

ESSAY: A PROPOSAL TO RESTRUCTURE THE CLEMENCY PROCESS—THE VICE PRESIDENT AS HEAD OF A WHITE HOUSE CLEMENCY OFFICE

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In the midst of the recent presidential campaign, the president's clemency power was a low priority issue. Neither candidate mentioned the subject during the debates or on the stump. The candidates' economic programs, foreign policy vision, and personal credibility outranked the importance of clemency by a country mile.

That is unfortunate for two reasons. Clemency is a prerogative that the president can exercise for any reason he or she deems appropriate without review, neither by Congress nor the courts.¹ How a president exercises that power therefore tells us a great deal about his or her view of the criminal justice system, as well as his or her character.² In addition, executive clemency, as the saying goes, "ain't what it used to be." With the exception of President Barack Obama, who granted a large number of commutations to drug offenders,³ over the past few

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1. See, e.g., *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1872); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

2. See, e.g., Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131 (2010).

3. President Barack Obama commuted the sentences of 1,175 offenders. OFF. OF PARDON ATT'Y, U.S. DEP'T OF JUSTICE, CLEMENCY INITIATIVE, <https://www.justice.gov/pardon/clemency-initiative> [<https://perma.cc/NZ8F-YOH31>] (last visited Mar. 14, 2017); Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 837 (2017); Devlin Barrett & Carol E. Lee, *President Obama Commutes Chelsea Manning's Sentence*, WALL. ST. J. (Jan. 17, 2017), <http://www.wsj.com/articles/president-obama-commutes-chelsea-mannings-sentence-1484688697>. The reason is that he believes the drug laws carry unduly severe punishments. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-

decades chief executives have granted clemency far less frequently than in years past. Various explanations have been offered for that decline: the increased accuracy of the trial process, the widespread use of plea-bargains, the institution of parole as an early release mechanism, the use of sentencing guidelines to prevent unduly harsh sentences, and fear by chief executives that an offender granted clemency will reoffend, causing them embarrassment and voter retribution.⁴ In addition, some chief executives have likely been reluctant to sign clemency warrants because some warrants signed by predecessors have poisoned the well by resting on political or other ignoble considerations.⁵ The bottom line is that clemency no longer plays the historic role that it did for most of our history and thus desperately needs to be fixed.

Two scholars—Professor and U.S. Sentencing Commissioner Rachel Barkow and Professor Mark Osler—have recently argued that the best solution is to create a formal clemency board along the lines of the Sentencing Commission, consisting of judges, former prosecutors, defense counsel, penologists, religious authorities, and the like.⁶ Aside from providing the president with a broad range of views, a bipartisan, diverse clemency board would give the president any “cover” he may need to reform the clemency process. Only such a board, the argument goes, can function as a political shield.

570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841 (2006)) (amended 2010), became law during a panic over the emergence of “crack” cocaine in the nation’s inner cities. The statute imposed a stiff mandatory minimum penalty on the distribution of crack, and the amount that triggered that penalty was 100 times less than the predicate amount of powdered cocaine. Congress reduced the 100:1 ratio to 18:1 in the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, but that statute does not apply retroactively. Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL’Y 241, 241–43 & n.3 (2014) [hereinafter Larkin, *Crack Cocaine*]. President Obama has decided to use his clemency power to reduce the sentences of offenders left stranded by the prospective-only 2010 law. Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL’Y, 886–87 (2016) [hereinafter Larkin, *Revitalizing Clemency*].

4. See, e.g., Larkin, *Revitalizing Clemency*, *supra* note 3, at 856–82.

5. See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 24 (2012) (“Presidential clemency is criticized as a perk for the rich and powerful, ranging from vice-presidential aide I. Lewis Libby to fugitive commodities trader Marc Rich.”).

6. See Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015).

That is a reasonable argument, although I find it ultimately unpersuasive because it would raise more problems than it solves. In my opinion, rather than create a formal clemency board the president should appoint one person to head a White House Clemency Office and serve as his principal clemency advisor. The vice president is the right person for that job.

I. THE PROBLEM: AN INSTITUTIONAL CONFLICT OF INTEREST

The willingness to mitigate punishment or forgive wrongdoing has been a revered feature of Western Civilization.⁷ In America, executive clemency was an accepted feature of colonial and early state criminal justice systems.⁸ It was written into the text of the Constitution as the Pardon Clause of Article II,⁹ and both the presidents and governors have granted clemency throughout our history.¹⁰ The extraordinary power to grant clemency allows a chief executive to play God on this side of the River Styx by forgiving an offender's sins or remitting his punishment.

Numerous commentators have recognized that the federal clemency process, however, is no longer fulfilling its noble purposes.¹¹ There is a consensus that the chief problem is the placement of the Office of the Pardon Attorney in the U.S. Department of Justice. That office came into being in the nineteenth century to assist the Attorney General in managing the clemency application process for the president, and it worked well for most of its history.¹² Recently, however, two factors

7. See, e.g., Larkin, *Revitalizing Clemency*, *supra* note 3, at 842–45; Leslie Sebba, *The Pardoning Power—A World Survey*, 68 J. CRIM. L. & CRIMINOLOGY 83 (1977).

8. See Paul J. Larkin, Jr., *The Demise of Capital Clemency*, 73 WASH. & LEE L. REV. 1295, 1300 & n.15 (2016) (collecting authorities) [hereinafter *Capital Clemency*].

9. U.S. CONST. art. II, § 2, cl. 1 (“The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”).

10. See, e.g., JEFFREY R. CROUCH, *THE PRESIDENTIAL PARDON POWER* (2009); CHRISTEN JENSEN, *THE PARDONING POWER IN THE AMERICAN STATES* (1922).

11. See, e.g., Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 573–74 (1991); Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447, 453–54 (2009); Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 46 (1998); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 594–95 (2012).

12. Beginning in 1789, the secretary of state was technically responsible for all pardon documents, but presidents generally relied on the attorneys general for

have effectively torpedoed the effectiveness of that office: (1) the decision by Attorney General Griffin Bell to have the Pardon Attorney report to him through the Deputy Attorney General and (2) the post-1980 politicization of federal criminal justice. The combination weakens the role of the Pardon Attorney and creates either an actual or apparent conflict of interest, because the Deputy Attorney General is the Justice Department official principally responsible for supervising criminal prosecutions. Few officials in that position, critics argue, would be willing to recommend that the president exonerate or grant leniency to someone whom a colleague has sent to prison.¹³

Critics of the process have suggested revisions of one kind or another.¹⁴ Some have argued that the Office of the Pardon Attorney should be transferred from the department that prosecuted a clemency applicant to a new position in the Executive Office of the President. Others have suggested that the president or Congress should create an independent agency, similar to the U.S. Sentencing Commission, to review every clemency petition and independently forward its recommendations to the White House. Everyone, however, recommends that the president or Congress end the door-keeping role that the Justice Department currently plays.

Yet, no one (myself included) has focused on the narrow question of *who* should head that office or chair that commission. That question is an important one for, at least, two reasons. In all likelihood, the person sitting in that chair will be responsible for setting the office's agenda, managing the flow of clemency petitions, choosing the supporting staff, and, in an ideal setting, meeting directly with the president to present his recommendations. Traditionally, the Office of the Pardon Attorney has been housed in the Department of Justice, and the

their advice regarding clemency. The State Department continued to process pardon applications until 1858, when Secretary of State Daniel Webster and Attorney General John Crittenden agreed that it should become the attorney general's responsibility. Seven years later, Congress authorized the hiring of a pardon clerk to assist the attorney general. See Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1172–82 & n.25 (2010) (citing Act of March 8, 1865, ch. 98, 38th Cong., 2d Sess. 516).

13. See, e.g., Margaret C. Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89 (2015).

14. See, e.g., Larkin, *Revitalizing Clemency*, *supra* note 3, at 899–900, 903, 914 (collecting alternatives).

Pardon Attorney has been a career lawyer, not a political appointee, certainly not someone subject to the “advice and consent” process contemplated by the Article II Appointments Clause.¹⁵ Perhaps someone the president appoints should hold that position. So, whom should the president select as pardon attorney? In my opinion, the best person would be the Vice President of the United States.

II. A SOLUTION: THE VICE PRESIDENT AS CLEMENCY ADVISOR

To say that the vice president occupies a humble position in the government is an understatement.¹⁶ Daniel Webster declined the office, saying that “I do not propose to be buried until I am really dead.”¹⁷ “The chief embarrassment in discussing the office,” wrote then-professor (and later President) Woodrow Wilson, “is that in explaining how little there is to be said about it one has evidently said all that there is to say.”¹⁸ John Adams, the nation’s first vice president, described it as “the most insignificant office that ever the invention of man contrived.”¹⁹

15. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power . . . [to] nominate, and by and with the Advice and Consent of the Senate, [to] appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .”).

16. See JODY C. BAUMGARTNER & THOMAS F. CRUMBLIN, *THE AMERICAN VICE-PRESIDENCY: FROM THE SHADOW TO THE SPOTLIGHT 2* (2015) (“[A] list of vice presidents and vice presidential candidates reads like a virtual *Who’s Who* of political mediocrities.”); *id.* at 4 (“[T]he office was in many respects an afterthought[.]”).

17. *Id.* at 33. Webster likely ate his words two years later when Milliard Fillmore became president upon the death of Zachary Taylor. JOEL K. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN 1* (2016).

18. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 241 (1901).

19. Letter from John Adams to Abigail Adams (Dec. 19, 1793) (quoted in BAUMGARTNER & CRUMBLIN, *supra* note 16, at 3). Contemporaries such as George Clinton, Elbridge Gerry, Richard Henry Lee, George Mason, James Monroe, Hugh Williamson, and Robert Yates shared his opinion or feared that the vice president would hamper the Senate by colluding with the president. See, e.g., *id.* at 29 (“As one vice presidential scholar put it, ‘nineteenth-century vice presidents make up a rogues’ gallery of personal and political failures.’” (footnote omitted)); Andrew N. Shindi, Note, *Concocting the Most Insignificant Office Ever Contrived: The Vice Presidency During the Early Republic*, 104 *GEO. L.J.* 1029, 1031–32 (2016). Vice-President John Nance Gardner is often reported as having said that the position “isn’t worth a pitcher of warm spit.” Daniel L. May, *We the People The Third Vice President of the United States of Earth*, 73 *A.B.A. J.* 76, 76 (1987). Rumor has it, though, that his real last word was a tad less genteel. See, e.g., BAUMGARTNER & CRUMBLIN, *supra* note

The Constitution hardly proves them wrong, assigning the vice president only limited functions. As President of the Senate, he casts a vote in the event of a tie. When a joint session of Congress counts the Electoral College votes, he presides over the proceedings and certifies the results, and as “president-in-waiting,” he succeeds the president upon the latter’s death, resignation, removal, or (now) temporary disability.²⁰ Otherwise, he performs whatever tasks the president (or sometimes Congress²¹) assigns him.²² Some assignments are substantial; others, far less so.²³ The last three vice presidents, Al Gore, Dick Cheney, and Joe Biden, have been valued advisors to the presidents

16, at 3; see also MICHAEL NELSON, *A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE-PRESIDENCY* 27 (1988).

20. See U.S. CONST. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”); *id.* art. II, § 1, cls. 1–2 (creating the vice presidency as an independently elected office and establishing the Electoral College); *id.* art. II, § 1, cl. 6 (declaring that “the Powers and Duties of the [President’s] Office . . . shall devolve on the Vice President” in the event of the president’s removal, death, resignation, or incapacity); *id.* amend. XII (providing for the separate election of president and vice president); *id.* amend. XX, §§ 1, 3–4 (providing for the succession of the vice president in the event of the death or removal of the president); *id.* amend. XXV, §§ 1–4 (same, disability of the president). Originally, there was a question whether the vice president would become president or merely act as president were the latter to leave office. John Tyler resolved the issue as a practical matter in 1841 by taking the presidential oath of office, see U.S. CONST. art. II, § 1, cl. 6, after the death of President William Henry Harrison. The Twenty-Fifth Amendment resolved the issue as a matter of law in 1967 by directing that the vice president becomes president in the event of the death, removal, resignation, or disability of the president. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 14–16.

21. By statute, the vice president is a member of the National Security Council and the board of Directors of the Smithsonian Institute. 50 U.S.C. § 402 (2012); 20 U.S.C. § 42 (2012); see also 3 U.S.C. § 15 (2012).

22. See U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); Glenn Harlan Reynolds, *Is Dick Cheney Unconstitutional?*, 102 NW. U.L. REV. COLLOQUY 1539, 1541 (2007) (“The Vesting Clause of Article II vests all the executive power in the President, with no residuum left over for anyone else. Constitutionally speaking, the Vice President is not a junior or co-President, but merely a President-in-waiting, notwithstanding recent political trends otherwise.” (footnote omitted)). The vice president had no separate budget until late in the 1960s when Spiro Agnew received one.

23. See, e.g., Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1717 (1988) (noting that FDR appointed VP Henry Wallace to head the Economic Defense Board on the eve of World War II); Reynolds, *supra* note 22, at 1541 (“Jimmy Carter gave Fritz Mondale an unusual degree of responsibility, a move replicated in subsequent administrations, particularly under Clinton/Gore and Bush/Cheney.” (footnotes omitted)); BAUMGARTNER & CRUMBLIN, *supra* note 16.

they served,²⁴ but historically speaking the vice president's principal responsibilities (asides from having a pulse) were to serve as the nation's representative at state funerals, to undertake diplomatic missions for the president, to handle troubleshooting assignments, and to work on behalf of their party.²⁵ Accordingly, it is not surprising that the scholarly publications discussing the achievements of the nation's vice presidents are about as numerous as the pages that sportswriters devote to the exploits of benchwarmers.²⁶

Yet, the vice president may be the perfect choice as the president's principal clemency advisor. To start with, the vice president has the desired impartiality. The vice president has no law enforcement responsibility; that belongs to the president, the attorney general, and officials such as the Director of the Federal Bureau of Investigation.²⁷ The vice president therefore lacks the institutional conflict-of-interest that plagues the federal clemency process today.

Aside from lacking a conflict of interest, several factors affirmatively militate in the vice president's favor. The vice president is a constitutional officer. He is elected to the same four-year term the president serves, he holds the second highest position in the executive branch, and he is removable only by im-

24. See BAUMGARTNER & CRUMBLIN, *supra* note 16, at 139–99.

25. See *id.* at 201–02 (“Gore, Cheney, and Biden . . . took the job seriously. This alone sets the modern era apart from previous times, when the vice presidency was seen as little more than a joke.”); *id.* at 119–29 (discussing the vice president's ceremonial, diplomatic, political, and advisory roles).

26. Most of the literature deals with specific vice presidents, the separate-state residency requirement of the Twelfth Amendment, or the accession provisions of the Twenty-Fifth Amendment. See, e.g., JON MEACHAM, *DESTINY AND POWER: THE AMERICAN ODYSSEY OF GEORGE HERBERT WALKER BUSH* (2015); Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505 (1995); Reynolds, *supra* note 22. The number of general treatments of the vice presidency has increased significantly of late, but it still is far closer to one than one hundred. In addition to the literature cited elsewhere in this essay, see, for example, PAUL C. LIGHT, *VICE-PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE* (1984); JULES WITCOVER, *THE AMERICAN VICE PRESIDENCY: FROM IRRELEVANCE TO POWER* (2014); Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811 (2005); Paul T. David, *The Vice Presidency: Its Institutional Evolution and Contemporary Status*, 29 J. POL. 721 (1967).

27. See, e.g., U.S. CONST. art. II, § 3 (“[The President] shall take care that the laws be faithfully executed”); 28 U.S.C. §§ 503, 506, 509 (2012) (authority of the Attorney General); *id.* §§ 532–33 (same, FBI Director); *id.* § 541 (same, U.S. Attorneys); *id.* §§ 561–69 (same, U.S. Marshals and Deputy U.S. Marshals).

peachment.²⁸ The vice president therefore has the political independence, stature, and authority to mediate among the often-competing views of the Justice Department and the applicant, along with any general entreaties from the American Bar Association, the defense bar, or other organizations with an interest in clemency. Lodging the advisory authority in one official also improves the efficiency of the process and perhaps enhances the accuracy of the recommendations the president receives.²⁹ Finally, the vice president gives the president some political cover by sharing in any potential blame should the president's decisions prove unpopular.

The next important factor is access. For most of our history, vice presidents did not have immediate access to the president. In fact, Walter Mondale was the first with a permanent office in the West Wing.³⁰ But every vice president since him has an office there, and every vice president since Nelson Rockefeller has had weekly meetings with the president.³¹ That access gives the vice president a leg up on every other potential clemency advisor because he can literally walk to the Oval Office from his nearby quarters in the same building.

Another factor is judgment. The president will need confidence in the wisdom of the vice president's counsel. Except for the rarest of cases, the president will not have the time to read a clemency applicant's file and must rely on the judgment of someone who has. The vice president will have the necessary time because his schedule is largely under the president's control, and a president who believes that clemency is important will not burden the vice president with duties that exhaust his days. Moreover, by having his own budget, the vice president can hire staff to focus exclusively on clemency.³² Given his regular access to the president, the vice president will be familiar with the president's correctional philosophy and privy to his reasons for granting and denying clemency requests, so the

28. See U.S. CONST. art. I, § 3, cls. 6–7; *id.* art. II, §§ 1, 4; *id.* amend. XII; *id.* amend. XX, §§ 1, 3; Friedman, *supra* note 23, at 1721.

29. See THE FEDERALIST No. 70, at 426 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[P]lurality in the executive . . . tends to conceal faults and destroy responsibility.”).

30. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 92.

31. *Id.* Vice President Cheney met with President George W. Bush several times each day. *Id.* at 127.

32. *Id.* at 92.

vice president should be able to anticipate the president's likely decisions far better than any other person or group.

Closely related to judgment is experience. Some presidents (for example, Jimmy Carter, Ronald Reagan, Bill Clinton, and George W. Bush) have been former governors, but not all (for example, Richard Nixon, Gerald Ford, and George H.W. Bush). If the vice president were a former governor, he would have had experience with making clemency decisions. The November 2016 election illustrates the value of that experience. Neither Donald Trump nor Hillary Clinton had any hands-on experience in making clemency judgments, but each vice presidential candidate did: Mike Pence was the governor of Indiana, and Tim Kaine, a senator, is a former governor of Virginia.³³ President Trump would benefit from the advice offered by someone who has made those decisions.³⁴

The last factor is trust. The president must have faith that the vice president will serve the president's interests rather than his own as a future presidential candidate. Nowadays, each presidential nominee selects his running mate, so, in theory, whoever the president chooses will be judicious, reliable, and trustworthy.³⁵ Of course, some presidential nominees may choose a defeated rival to unify the party.³⁶ Others may select someone who would benefit him politically either with powerful interest groups or in a part of the nation he does not call

33. See Associated Press, *Pence pardons three people*, WANE.COM, (Jan. 13, 2015), <http://wane.com/2015/01/13/pence-pardons-three-people/> [https://perma.cc/46AR-XSNF]; Sheryl Gay Stolberg & Thomas Kaplan, *On Death Penalty Cases, Tim Kaine Revealed Inner Conflict*, N.Y. TIMES, (July 23, 2016), <http://www.nytimes.com/2016/07/24/us/politics/tim-kaine-death-penalty.html> [https://perma.cc/B92E-KVQ9].

34. See Goldstein, *supra* note 26, at 547 ("Although compatibility must exist for the Vice President to have a chance to become the President's close working partner, this alone does not guarantee that the Vice President will achieve that status. Vice presidential influence has also been a function of competence. Presidents look for help to those who they believe have something to offer. They are unlikely to allot much time to someone with nothing to say or little to add. Vice Presidents have been most successful if they bring strength to the administration in an area where such strength is needed." (footnote omitted)).

35. That was not always the case, certainly not when, prior to the adoption of the Twelfth Amendment, vice presidents could be selected from the opposing party. There also was no guarantee of loyalty when senior party officials made the choice in the nineteenth century. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 32–36, 56–59, 88–91.

36. For example, President Reagan chose George H.W. Bush.

home.³⁷ In those instances, the president may pick a different consigliere. Attorney General Bobby Kennedy was the brother of President John Kennedy, so the latter had no doubts about the trustworthiness of the former. Griffin Bell, the nation's 72nd Attorney General, was a personal friend of President Jimmy Carter, while William French Smith and Edwin Meese were confidants of President Ronald Reagan before they became the 74th and 75th Attorneys General, respectively. In cases like those, the president may believe that, given a longstanding, prior personal relationship with the lawyers whom he appointed as his attorneys general, he has greater confidence in their sound judgment, honesty, impartiality, and loyalty than the vice president enjoys. But those are unusual cases. They explain why the president may decide to use someone other than the vice president in some cases, but they are not a reason to forego using the vice president as the president's principal clemency advisor everywhere else.

Common jokes about the position aside, the vice president occupies a powerful position in government. Former Vice President (and former President) George H.W. Bush and current Vice President Biden made that point, explaining that the vice president enjoys a position of strength when he enjoys the president's firm support.³⁸ Article II vests the "executive Power" in the president, but he can make it clear to his administration

37. For example, President Kennedy chose Texas Senator Lyndon Baines Johnson for geographic diversity and political support in the South. See BAUMGARTNER & CRUMBLIN, *supra* note 16, at 62–63; Friedman, *supra* note 23, at 1705–06 ("Often, perhaps most often, the vice-presidential candidate is chosen primarily not because she would be a good president but because she would help make a good ticket, balanced in ideology, geography, experience, and now, perhaps, sex and ethnicity as well." (footnote omitted)).

38. See BAUMGARTNER & CRUMBLIN, *supra* note 16, at 207–08 (quoting George H.W. Bush: "'Vice presidential power is still largely a function of the president's willingness to confer it.'" (footnote omitted)); THE LATE SHOW WITH STEPHEN COLBERT, *Vice President Joe Biden Interview, Part 2*, YOUTUBE (Sept. 11, 2015), <https://www.youtube.com/watch?v=XwmMPytjrK4> [<https://perma.cc/92W7-P2V8>] ("[S]ure, [they make jokes] . . . [and] they really should. There is no inherent power in the vice presidency But here's the deal. It is directly a reflection of your relationship with the president. If you have a relationship with the president, . . . and everyone knows if they do, if it's real, that you have his . . . back and you also have his confidence, then you can really do something worthwhile."). Of course, the vice president's position is powerful even when he is not the president's counselor. He is first in line to succeed the president, and more than one-third of all presidents between 1841 and 1975 died in office or quit. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 2.

that the vice president is a trusted advisor and that he has the power of the presidency behind him in whatever responsibilities he is assigned. President Carter did so by telling his staff, "If you get a request from Fritz [Walter Mondale's nickname], treat it as if from me."³⁹ Were the president to make the vice president his principal clemency advisor, there is no doubt that the vice president would have whatever authority he needs to accomplish that task.

The principal objection to making the vice president the principal clemency advisor is that the duties of that office would subtract from the time that he needs to remain conversant with all of the issues that would be on his plate were the president no longer able to remain in office. The national security issues alone are too complex for anyone to learn on the fly, the argument goes, so nothing should be assigned to the vice president that could in any way keep him from becoming a knowledgeable and competent replacement for the president at a moment's notice. Vice President Harry Truman was unaware of the existence of an atomic bomb when he succeeded to the presidency upon the death of Franklin Roosevelt in 1945.⁴⁰ That scenario is unthinkable today given that more than a half dozen foreign nations have nuclear weapons, and terrorists groups are trying to acquire them.

Moreover, there is a good reason why Henry Wallace was the first—and last—vice president to head a cabinet-level agency. Appointed to head the new Economic Defense Board in July 1941 (renamed the Board of Economic Warfare after Pearl Harbor), Wallace's responsibilities conflicted with the jurisdiction of other cabinet-level departments, notably State and Commerce, leading President Roosevelt to abolish the warfare board.⁴¹ Such "line assignments," as they are called, invariably place the vice president on the horns of a dilemma. Either they are important, which means that the vice president will butt heads with cabinet officials like the Attorney General or the Secretaries of State, Defense, or Treasury, or the assignments are trivial, which demeans the vice president and his office.⁴²

39. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 94 (footnote omitted).

40. JODY C. BAUMGARTNER, *THE AMERICAN VICE PRESIDENCY RECONSIDERED* 5 (2006).

41. NELSON, *supra* note 19, at 65.

42. *Id.* at 64–67.

For reasons such as those, commentators have recommended against tasking vice presidents with formal line assignments, and several vice presidents have recently spurned them.⁴³ Making the vice president head of a White House Clemency Office would dilute his ability to advise the president on the full range of his responsibilities.

Those concerns, however, are manageable. The president cannot add to the number of hours the vice president has each day, but he can reduce the number of hours that the vice president must spend on political assignments, such as making speeches and raising funds.⁴⁴ Of course, that would cut against the grain for some presidents, but the ones who take their clemency role seriously might find the tradeoff positive. Being head of the White House Clemency Office is also not the equivalent of being the secretary of a cabinet department. Evaluating clemency petitions is a relatively small-scale assignment. The number of petitions to review, the issues that they may raise, the number of people to be consulted and staff assistants to be managed—all of them are far smaller and more easily addressed than what the Secretaries of State, Defense, or the Treasury must handle. To be sure, the Vice President will be at odds with the Attorney General on occasion, but clemency occupies such a small amount of the Attorney General's jurisdiction that the number of conflicts should be bearable. The result is that the role will not mire the Vice President in "bureaucratic struggles" or "waste" his or others' time and resources.⁴⁵ Nor would clemency advisor be a "trivial assignment" that would undermine the Vice President's reputation.⁴⁶ A president who cared little about clemency could leave the status quo in place, so using the vice president as clemency advisor would signify its importance.

43. See, e.g., *id.* at 11; BAUMGARTNER & CRUMBLIN, *supra* note 16, at 65–70, 115–19, 141–43, 161–64, 181–82, 208. Vice President Walter Mondale began that trend after discussing the matter with former Vice Presidents Nelson Rockefeller and Hubert Humphrey. Mondale concluded that line assignments would be a waste of his time and avoided them, which freed him to play a general advisory role for President Carter. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 119.

44. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 122–25 (describing the political roles played by the vice president).

45. *Id.* at 208.

46. *Id.*

III. A POSSIBLE ALTERNATIVE: A CLEMENCY BOARD

Some commentators have argued that the president or Congress should formally establish a clemency board along the lines of the U.S. Sentencing Commission.⁴⁷ Of course, an *informal* clemency board could be combined with the recommendation presented in this Essay. The president or vice president can seek advice from whomever he chooses.⁴⁸ Gathering opinions from trusted parties would not keep the vice president from being the president's principal clemency advisor—the “last guy in the room after meetings,” as Vice President Biden once put it.⁴⁹ By contrast, a *formal* clemency board creates several serious problems.

A formal clemency board would be immediately labeled as a new-fangled version of a parole board. Congress repealed the statutes establishing parole in the Sentencing Reform Act of 1984 and substituted a mandatory sentencing guidelines system in their place.⁵⁰ Resurrecting parole would likely be attacked from several directions. As I have argued elsewhere, liberal and conservative criminal justice commentators “landed numerous, crippling blows to the original, romantic theory and practice of parole,”⁵¹ so returning it to a focal place in release

47. See, e.g., Barlow & Osler, *supra* note 6, at 1.

48. The president has the prerogative to seek advice on clemency from whom-ever he selects. See *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 482–89 (1989) (Kennedy, J., concurring in the judgment) (separation of powers principles prevent Congress from regulating the president's ability to obtain advice); *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (en banc) (“In making decisions on personnel and policy, and in formulating legislative proposals, the President must be free to seek confidential information from many sources, both inside the government and outside.”). The same policy arguments support recognizing that right in the vice president too.

49. BAUMGARTNER & CRUMBLIN, *supra* note 16, at 128, 190 (footnote omitted).

50. Sentencing Reform Act, Pub. L. No. 98-473, ch. 2, 98 Stat. 2031 (1984) (codified as amended at 18 U.S.C. § 3551 (2012) and 28 U.S.C. §§ 991–98 (2012)); *Mistretta v. United States*, 488 U.S. 361 (1989). Not everyone agrees that, like Generalissimo Francisco Franco, (“*Saturday Night Live*,” *Franco is still dead...but he's feeling better each day....*, YOUTUBE (Jun. 28, 2012), <https://www.youtube.com/watch?v=butZyxI-PRs> [<https://perma.cc/4P3M-P2ZS>]), parole is still dead. For the argument that the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which held unconstitutional mandatory sentencing guidelines, also effectively raised parole from the tomb like Lazarus, see Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303 (2013).

51. Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 36 (2013); *id.* (“Parole was

decisions would require members of Congress “to admit that they made a mistake in abandoning parole or to confess that they are rebirthing a policy previously thrown away.”⁵² Moreover, it is unclear why the president would want to take the heat for a disguised version of parole. One of the rationales for adoption of parole was to shift responsibility, and the potential blame, from the chief executive to a parole board. “Parole release decisions took the heat off the governor and dropped it into the parole board’s lap.”⁵³ A formal clemency board would transfer that heat back to the president.

Outsourcing clemency evaluations could also create more problems than it solves. Principal among these is the political brouhaha that would occur were members of such a committee to publicly assail the president’s clemency decisions and use the very platform that he created for them as the basis for their political legitimacy. That is not a hypothetical scenario. Criminal justice issues have become highly politicized. One of the most prominent debates today stems from the vast increase in federal imprisonment America has witnessed over the last thirty years due largely, the argument goes, to a focus on drug prosecutions and the stiff mandatory sentences of imprisonment demanded by a statute enacted two years after the Sentencing Reform Act: the Anti-Drug Abuse Act of 1986.⁵⁴ Various parties have been extremely critical of that law and the vast increase in federal imprisonment it has

too lenient for offenders and too discriminatory. Parole was ineffective at stemming crime and at rehabilitating prisoners. Parole placed trial judges and parole boards at odds, as each one tried to outguess the other regarding when a prisoner should be considered for release. Parole asked the impossible of correctional officials, because no one could satisfactorily predict when (if at all) an inmate had been rehabilitated, and of prisoners, because maintaining stable relationships in the community was an impossible task for someone hundreds (or more) miles from home. Parole was dishonest because it encouraged prisoners and parole boards to follow a script at release hearings and because it was used to ease prison overcrowding, not to further rehabilitation. And parole was illegitimate because it allowed only a narrow class of offenders—i.e., ones with community ties and good acting skills—to obtain release.”).

52. *Id.*

53. *Id.* at 35. To be sure, several penologists have recommended resurrecting parole. See, e.g., MICHAEL JACOBSON, *DOWNSIZING PRISONS* 158–72 (2005); Joan Petersilia, *Community Corrections*, in *CRIME: PUBLIC POLICIES FOR CRIME CONTROL* 483, 497–507 (James Q. Wilson & Joan Petersilia eds., 2002).

54. Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. § 841 (2012)) (amended 2010).

generated, with some critics attributing it to lingering racism.⁵⁵ It would be far easier for a clemency board to level criticisms against one person (the president) than against a collegial body (Congress) since each member of the latter can pawn off the blame on someone else. Incendiary criticisms of the president's clemency decisions would serve neither the president's, the applicant's, nor the public's interests.

A board created by statute would only aggravate the problem. As different interest groups jostled to establish their separate influence in the revised clemency process, the president would be under pressure to grant petitions based on irrelevant factors rather than by asking himself whether an applicant has reformed, whether his conduct was an aberration in an otherwise law-abiding life, and whether the legitimate purposes of the criminal law would be advanced or retarded by showing him leniency. By turning a penological or philosophical issue into a political one, the result would inject even more inappropriate political influence into clemency decisions than we see today.⁵⁶

No president who believes that clemency decisions are all cost and no benefit will want to get into a political catfight with an independent clemency agency and its powerful political allies. Instead, he will go along with the board's recommendations and save his political capital for use elsewhere.⁵⁷ That acquiescence, however, would besmirch clemency. What is worse, in the wrong hands that system would produce the equivalent of a "spoils system" as presidents used their pardon

55. See Larkin, *Crack Cocaine*, *supra* note 3, at 241–42, n.9 (collecting authorities). The racial disparity in imprisonment rates between blacks and white is undeniable, *id.* at 279, but the argument that it is due to racism is equally mistaken, *id.* at 249–78, as is the assumption that what may discriminate against the class of black offenders also discriminates against the class of blacks as a whole, *id.* at 278–94.

56. See Larkin, *Capital Clemency*, *supra* note 8, at 1296–97 & nn.2–4, 1308 & nn.53–55. Ironically, that result would also flip Alexis de Tocqueville's keen observation on its head. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 257 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835 & 1840) (noting that in America every political dispute ultimately becomes a legal one).

57. See Larkin, *Revitalizing Clemency*, *supra* note 3, at 905. Of course, there is no guarantee that a person who is just "a heartbeat away" from becoming president will not let his ambition cloud his judgment. High school chemistry teachers are not the only ones who sometimes break bad. But no one gets elected president without knowing how to protect himself against a potential fifth columnist or insider who goes rogue, even when he is the vice president.

power to repay old friends or make new ones. That outcome would delegitimize clemency.

Society wants the president to take his clemency power seriously and to make clemency decisions on a case-by-case basis according to the merits of each one. No society with that conviction wants to see clemency become a form of patronage. Relying on the informal recommendations of the vice president keeps the process “in house,” so to speak, and avoids those problems. Society is better off with that system than with the current one or the proposed alternative.⁵⁸

The U.S. Sentencing Commission did not succumb to this problem because it was under an external constraint, viz., the federal criminal code, that would not apply to a clemency board. All Sentencing Guidelines, commentary, and policy statements must comply with acts of Congress,⁵⁹ and a district court may not vary from those laws at sentencing.⁶⁰ By contrast, a clemency board would only serve in an advisory capacity, and the president is under no restraint when making clemency decisions; in fact, the Supreme Court has made it clear that Congress cannot hamper the president’s exercise of this prerogative.⁶¹ The upshot is that a clemency board is under no constraint as to how often, or for whom, it can recommend mercy. A board would have public relations power without criminal justice responsibility.

Finally, while the president could define and rearrange the membership and structure of any informal group of advisors that he chose, a board created by Congress would deny him

58. A formal clemency board would also add to the existing bureaucracy, which has already been criticized for moving at a sluggish pace. Slowing that process further makes little sense.

59. See 28 U.S.C. § 994(a)–(b) (2012) (Sentencing Guidelines must be consistent with acts of Congress); 28 U.S.C. § 994(k) (2012) (the U.S. Sentencing Commission may not consider rehabilitation when promulgating guidelines); *Mistretta v. United States*, 488 U.S. 361, 368 (1989) (“[E]ach [guidelines] sentence is to be within the limit provided by existing law.”) (citing 28 U.S.C. § 994(a), (b)(2) (2012)).

60. See 18 U.S.C. § 3582(a) (2012) (a district court may not consider the possibility of rehabilitation when deciding whether to imprison an offender or for how long to incarcerate him); *Tapia v. United States*, 564 U.S. 319 (2011) (applying 18 U.S.C. § 3582(a)); *Neal v. United States*, 516 U.S. 284 (1996) (ruling that the Sentencing Commission is bound by Supreme Court interpretations of a federal statute); see also *Mistretta*, 488 U.S. at 367.

61. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1872); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

that flexibility. There is no need for any such restriction, or for Congress to become involved in regulating the president's clemency decision-making process. Doing so even raises separation of powers issues. Clemency is a presidential prerogative. One consequence is that the president alone can and should decide how to make those decisions, which includes selecting the people from whom he seeks advice. A formal clemency board would interfere with the president's freedom to structure the clemency process as he sees fit. For example, if the president loses confidence in the vice president's judgment, he could select someone else as principal clemency advisor. A statute would deny the president that flexibility. He would be forced to disregard it or argue that it violated the Article II Pardon Clause. Either choice would provide considerable entertainment for the media, but neither one would help him make decisions. A statutory directive therefore cannot help the president; it can only hurt him. For that reason, just as Congress is entitled to decide whether to use a committee system to evaluate and recommend passage of legislation, so too the president should be entitled to decide whether to use one person or a select group of them for advice on clemency decisions.

IV. CONCLUSION

The need for reconsideration of the federal clemency process is a real one, and there is a consensus that the Justice Department should no longer play its traditional doorkeeper role. Using the vice president as a new clemency advisor offers the president several unique benefits that no other individual can supply without having enjoyed a prior close personal relationship with the chief executive. Donald Trump should seriously consider using Vice President Pence as his principal clemency advisor. Presidents, clemency applicants, and the public might just benefit from that new arrangement.