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DESIGNED TO FAIL: THE PRESIDENT'S DEFERENCE TO  
THE DEPARTMENT OF JUSTICE IN ADVANCING CRIMINAL  
JUSTICE REFORM

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## ABSTRACT

*One puzzle of President Obama's presidency is why his stated commitment to criminal justice reform was not matched by actual progress. We argue that the Obama Administration's failure to accomplish more substantial reform, even in those areas that did not require congressional action, was largely rooted in an unfortunate deference to the Department of Justice. In this Article, we document numerous examples (in sentencing, clemency, compassionate release,*

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*and forensic science) of the Department resisting common sense criminal justice reforms that would save taxpayer dollars, help reduce mass incarceration, and maintain public safety. These examples and basic institutional design theory all point in the same direction: real criminal justice reform requires putting the right institutions in charge of criminal justice policy making. This Article offers institutional changes that would help future Presidents make the system less punitive and reduce prison populations to achieve the broad transformation that Obama desired but did not attain. A critical move is to place criminal justice policy making in the hands of individuals who can advise the President independently of the institutional interests of prosecutors.*

## TABLE OF CONTENTS

INTRODUCTION . . . . .	390
I. THE DEPARTMENT OF JUSTICE AGENDA . . . . .	395
<i>A. The Prosecutorial Mindset . . . . .</i>	397
<i>B. Structural Factors Creating Bias Against Reform . . . . .</i>	400
II. THE DEPARTMENT OF JUSTICE RESPONSE TO REFORM	
PROPOSALS DURING THE OBAMA ADMINISTRATION . . . . .	404
<i>A. Department of Justice Resistance to Criminal Justice</i>	
<i>Reforms . . . . .</i>	405
1. <i>Sentencing Reform . . . . .</i>	406
2. <i>Clemency . . . . .</i>	425
3. <i>Compassionate Release . . . . .</i>	441
4. <i>Forensic Science . . . . .</i>	449
<i>B. The Department of Justice's More Aggressive Pursuit</i>	
<i>of State Reforms . . . . .</i>	454
III. REDESIGNING THE EXECUTIVE BRANCH AND USING THE	
APPOINTMENT POWER FOR INSTITUTIONAL REFORM . . . . .	456
<i>A. Presidential Criminal Justice Advisory Commission . . . . .</i>	459
<i>B. Presidential Clemency Board . . . . .</i>	461
<i>C. Applying Office of Information and Regulatory Affairs</i>	
<i>Review to Criminal Justice . . . . .</i>	463
<i>D. Appointments . . . . .</i>	466
1. <i>Department of Justice Appointments . . . . .</i>	467
2. <i>The Judicial Branch . . . . .</i>	471
CONCLUSION . . . . .	473

## INTRODUCTION

If you follow criminal justice policy in the United States, two themes dominate the discourse of the past several years. First, large portions of society have awakened to America's record-breaking levels of mass incarceration and criminalization. One out of every three adults possesses a criminal record,<sup>1</sup> and our levels of incarceration have no equal anywhere else in the world.<sup>2</sup> Second, and relatedly, there has been a bipartisan call to reform this state of affairs because it is not necessary for—and often undermines—public safety and because its costs outweigh its benefits.<sup>3</sup> News articles continually tout criminal justice reform as one of the few areas to bring together many Republicans and Democrats,<sup>4</sup> even in Congress where common ground is hard to find.<sup>5</sup>

If you move beyond the rhetoric and focus on the reality, however, not much has changed, even during the Obama Administration when the President had a stated commitment to getting smart on

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1. THE SENTENCING PROJECT, AMERICANS WITH CRIMINAL RECORDS (2015), <http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> [<https://perma.cc/H7L5-8MH7>].

2. See, e.g., Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816 (2017) (noting that the United States has 2.2 million incarcerated people, "more than any other country on Earth").

3. CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS, TRANSFORMING PRISONS, RESTORING LIVES ix (2016), <http://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf> [<https://perma.cc/NUW7-6JB2>] ("There is broad, bipartisan agreement that the costs of incarceration have far outweighed the benefits, and that our country has largely failed to meet the goals of a well-functioning justice system: to enhance public safety, to prevent future victimization, and to rehabilitate those who have engaged in criminal acts."); Obama, *supra* note 2, at 817 ("There is a growing consensus across the U.S. political spectrum that the extent of incarceration in the United States is not just unnecessary but also unsustainable. And it is not making our communities safer.").

4. See Lynn Adelman, *Criminal Justice Reform: The Present Moment*, 2015 WIS. L. REV. 181, 188-89.

5. See, e.g., Mark Holden, *Criminal Justice Reform Is Ripe for Bipartisan Achievement*, HILL (Jan. 3, 2017, 2:26 PM), <http://thehill.com/blogs/congress-blog/judicial/312492-criminal-justice-reform-is-ripe-for-bipartisan-achievement> [<https://perma.cc/8KCS-FK2X>] ("Criminal justice reform has been one of the few policy areas where Republicans and Democrats have forged bipartisan consensus."); Bill Keller, *Will 2017 Be the Year of Criminal Justice Reform?*, N.Y. TIMES (Dec. 16, 2016), [http://www.nytimes.com/2016/12/16/opinion/will-2017-be-the-year-of-criminal-justice-reform.html?\\_r=0](http://www.nytimes.com/2016/12/16/opinion/will-2017-be-the-year-of-criminal-justice-reform.html?_r=0) [<https://perma.cc/4LZ6-44WH>] (noting that criminal justice reform with bipartisan support is "[o]n the short list of things Congress could do to reassure voters that government is back in business").

crime and rolling back harsh punishments. Indeed, President Obama's support of reform was so strong that in the waning days of his time in office, he published a law review article entitled *The President's Role in Advancing Criminal Law Reform*, which highlighted his accomplishments and what he saw as "the tools Presidents can use to effect meaningful change throughout the system."<sup>6</sup> Yet his achievements in this area were modest at best.

Because criminal justice is "administered at all levels of government and shaped by a range of actors,"<sup>7</sup> the federal government can only do so much to tackle the broad tragedy of mass incarceration. But the federal system is one of the largest jurisdictions in terms of total imprisonment,<sup>8</sup> and it also often sets an example for states through its policies. Many commentators are quick to place most of the blame with Congress for stalled progress,<sup>9</sup> but significant criminal law reforms can occur with the use of executive power alone. Gains were modest under President Obama not because he lacked the power to do more, but because he followed an institutional model that was designed to fail.<sup>10</sup> Obama's failure to accomplish more substantial reform was largely rooted in the fact that his efforts were less about the *President's* role in advancing criminal law reform and more about the *Department of Justice's* role.<sup>11</sup> If

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6. Obama, *supra* note 2, at 815.

7. *Id.* at 814.

8. See DANIELLE KAEBLE ET AL., U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 7 fig.3 (2016), <https://www.bjs.gov/content/pub/pdf/cpus14.pdf> [<https://perma.cc/DG3Y-6Y6U>].

9. See, e.g., Obama, *supra* note 2, at 829 ("Although the reform bills appeared to have majority support in the Congress, including among many conservatives, Republican leaders have not yet allowed them to come to the floor for a vote."); Seung Min Kim, *Senators Plan to Revive Sentencing Reform Push*, POLITICO (Jan. 4, 2017, 5:13 AM), <http://www.politico.com/story/2017/01/senate-criminal-justice-sentencing-reform-233071> [<https://perma.cc/B9RQ-FJGN>] ("[D]espite support from President Barack Obama, powerful congressional Republicans, and a sprawling network of groups from the left and right, the legislation never made it to the floor ... [because of] the determined efforts of law-and-order conservatives to steamroll it."); Press Release, Office of the Press Sec'y, Press Briefing by Press Secretary Josh Earnest (Dec. 8, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/08/press-briefing-press-secretary-josh-earnest-12816> [<https://perma.cc/X3LE-RBFQ>] ("[T]he President would have preferred a more sweeping solution to [criminal justice reform] that only legislation could bring about, but that is not something that Congress was able to succeed in passing, despite [bipartisan support] ... [Reform is] another victim of Republican dysfunction in Congress.")

10. See *infra* Part I.B.

11. See *infra* notes 67-68 and accompanying text.

future Presidents who share President Obama's hope for reducing the sweep of criminal law and punishment follow the same model of deferring to the Department to lead the way on progressive reforms, they will achieve, at best, the same minimal successes because of the Department's hard-wired institutional resistance to reforms that make things more difficult for prosecutors.<sup>12</sup>

It makes sense for the President to turn to the Department for input on criminal justice issues given its collective expertise and experience in the area, but we believe the Obama Administration is a case study that shows why the Department is precisely the wrong entity to put in charge of reform efforts. The Department is the agency charged with prosecuting federal criminal laws, and its views on reform are inevitably colored by its prosecutorial functions and a bureaucratic preference for maintaining a status quo that favors the interests of prosecutors. In many areas, reform would require the Department to second-guess its own prior actions. It is a classic conflict of interest, and it defies everything we know about human nature as well as government incentives to expect prosecutors in the Department to perform that task objectively and without prioritizing prosecutorial interests above other valid interests.<sup>13</sup> This is not to fault them or cast aspersions. They dutifully carry out the mission of the Department. But that is precisely why they are the wrong actors to lead the way on criminal justice reform.

In this Article, we will document numerous examples of how this conflict drove the Department's largely successful efforts to weaken, rather than further, the President's criminal justice reform goals. Notably, the areas in which the Department acted most boldly were in contexts in which its prosecutorial interests dovetailed with reform efforts or in which the Department itself would be unaffected by reform proposals. Thus, the Administration was most active in its efforts to foster state and local reforms that do not affect federal

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12. A President who wants to move the Department in the opposite direction—to support tougher criminal laws and more powers for prosecutors—will likely find the Department to be a much more willing and cooperative partner.

13. Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 307-19 (2013) (explaining why, "given everything we know about agency design," the Department will prioritize its prosecutorial functions at the expense of other goals).

prosecution.<sup>14</sup> But in other areas involving the federal criminal justice system—areas in which reform would have made the Department’s job harder—the Department resisted more significant change.<sup>15</sup> The Department was particularly resistant when a reform effort would require it to revisit decisions it already made.<sup>16</sup> Whether the decision involved retroactive adjustments to sentences already handed down,<sup>17</sup> commutations or compassionate release for those currently serving out prison sentences,<sup>18</sup> or rethinking the use of forensic science that had already been employed to obtain convictions,<sup>19</sup> the Department resisted second looks of its prior judgments. Yet that kind of retrospective reassessment is critical to reducing the existing prison population. In all of these areas, the Department placed its own interests ahead of the broader goals stated by the President for criminal justice reform.

We provide this retrospective as an important cautionary tale for any future President who wishes to change criminal justice policies in the United States to make them less severe. Whether a President is working with Congress or changing executive policies on his or her own, the President should get assistance from individuals focused on presidential priorities, not just prosecutorial ones. And that means the Department is the wrong leader for most of these efforts. Asking the Department to do so is asking it to be a judge in its own cause—the very definition of conflict and bias.<sup>20</sup> Even when people act with the best of intentions—and we have no reason to doubt anyone acted otherwise—it is asking too much of anyone to judge situations that involve his or her own interests as if he or she would be unaffected. While law enforcement views must be seriously considered as part of any reform, the analysis of criminal justice reforms must be made by people that represent all the relevant interests. The final decision must be made by policymakers who take a broader view and consider all the relevant interests, not just those of prosecutors.

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14. *See infra* Part II.B.

15. *See infra* Part II.A.

16. *See infra* Part II.A.

17. *See infra* Part II.A.1.

18. *See infra* Parts II.A.2-3.

19. *See infra* Part II.A.4.

20. *See supra* note 13 and accompanying text.

Our analysis proceeds in three Parts. Part I begins by explaining why, as a matter of design, the Department is institutionally ill-suited to lead the way on criminal justice reforms because of the structure of the Department and its prosecutorial mindset.

Part II then shows how the Department's focus on its institutional self-interest has played out in practice. Section A documents numerous examples (sentencing, clemency, compassionate release, and forensic science) of the Department resisting common sense criminal justice reforms that would save taxpayer dollars, help reduce mass incarceration, and not undermine public safety. In other words, these are areas in which an objective decision maker with an open mind to reform would embrace changes (and indeed, often did, in opposition to the Department), but in which the Department opposed changes out of its institutional self-interest. Section B provides further support for the argument that self-interest largely underlies the Department's resistance to criminal justice reforms with numerous examples of the Department's eagerness to embrace bolder actions when its own interests were not at stake or when reforms would make its prosecutorial mission easier to achieve.

These examples and basic institutional design theory all point in the same direction: real criminal justice reform requires putting the right institutions in charge of criminal justice policy making. Part III thus offers institutional changes that would help future Presidents achieve the broader goal of reducing mass incarceration while maintaining public safety. The critical move is to place criminal justice policy making in the hands of individuals who balance prosecutorial interests against other costs and benefits and do not simply decide based on the institutional interests of prosecutors. We believe the President is best served by creating a commission within the Executive Office of the President to advise him or her on criminal justice policy matters.<sup>21</sup> An advisory body in the Executive Office of the President could also perform an oversight function over the Department by requiring it to explain why its policies stand up to cost-benefit analysis, promote public safety, and find support in scientific knowledge and data.<sup>22</sup> Part III also explains the importance of

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21. See *infra* Part III.A.

22. See *infra* Part III.C.

putting people with diverse experiences in criminal justice administration in key positions that affect criminal justice reform. This includes not only appointing people to leadership positions within the Department and agencies working on criminal justice issues, but also making sure the judicial branch represents diverse perspectives and not just those of prosecutors.

By favoring the view of prosecutors over others involved in criminal justice, the Executive Branch unavoidably favors punishment and a law enforcement model over rehabilitation; retribution and a focus on harm over culpability and redemption; and the status quo over innovation. While the voices of prosecutors must be part of any reform discussion, other voices must also be heard or the resulting policies will suffer from an imbalance.

#### I. THE DEPARTMENT OF JUSTICE AGENDA

Imagine a President who announced that he or she would take advice on criminal law matters only from the federal defenders' office. His or her primary advisor would be the Federal Public Defender for the District of Columbia, and experts within the defenders' offices would speak for the Administration before Congress and the Sentencing Commission. All pending legislation or proposed sentencing guideline amendments would be supported by the Administration only if the defenders bought into the proposal. In addition, suppose this President intended to put the defenders in charge of federal prisons, forensics, and the clemency process. The President's reasoning would be straightforward: the defenders understand criminal law at the ground level, offer a national breadth of understanding, and include experienced experts.<sup>23</sup> They offer experience equal to or better than anyone else within this specialized world, and are the group of practicing attorneys most responsible for safeguarding the crucial protections for criminal defendants embedded in the United States Constitution.

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23. The Federal Defenders National Sentencing Resource Council advises defenders, prepares appellate briefs, and offers expert testimony (among other functions). *See About, SENT'G RESOURCE COUNS. PROJECT FED. PUB. & COMMUNITY DEFENDERS*, <http://www.src-project.org/about/> [https://perma.cc/X3YC-EJ9Q].

That President would face a firestorm of dissent, despite the truth of the claims. Defenders, critics would cry, only represent one part of the justice system, and are biased given that all of their work is on behalf of defendants.

Yet, the mirror opposite<sup>24</sup>—a President whose principal advisor on criminal law is his or her chief prosecutor;<sup>25</sup> who sends prosecutors to speak for the Administration before Congress and the Sentencing Commission;<sup>26</sup> who vets proposals through the Department before determining a position; and who allows the Department to run the prisons, set our forensics policies, and control the clemency process<sup>27</sup>—is our current reality.

It matters—a lot—that the primary advisors to the President on criminal justice issues have professional interests to protect, regardless of administration.<sup>28</sup> These interests include maintaining the Department's size and budget, protecting and enlarging the power and discretion of its prosecutors, and expanding the menu of options those prosecutors have by constantly growing the size of the federal penal code and maintaining mandatory punishments.<sup>29</sup> It

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24. To be sure, the comparison is not entirely the same because defenders have a primary duty to their client while prosecutors should have a primary duty to justice. That said, for the reasons discussed, prosecutors often do operate in a culture that rewards convictions and long sentences. See also Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 206-07 (1988) (explaining that long sentences and convictions are ways prosecutorial competence is measured); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 967-69 (1997) (discussing prosecutorial incentives to maximize convictions).

25. The primary contact between the Department and the President, of course, is the Attorney General.

26. See, e.g., *Attorney General Eric Holder Testifies Before the U.S. Senate Committee on the Judiciary*, U.S. DEP'T JUSTICE (Mar. 6, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-testifies-us-senate-committee-judiciary-0> [<https://perma.cc/9WTL-GJA4>] ("I'm pleased to join the President, the Vice President, and countless Americans in calling on Congress to enact legislation addressing gun violence."); *Attorney General Loretta E. Lynch Testifies at the House Committee on the Judiciary Hearing*, U.S. DEP'T JUSTICE (Nov. 17, 2015), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-testifies-house-committee-judiciary-hearing> [<https://perma.cc/LC67-8YTK>] ("[T]he Justice Department is eager to see meaningful sentencing reform enacted during this Congress.").

27. See Barkow, *supra* note 13, at 278-306.

28. The Department also has great influence with Congress. William Stuntz sets out this powerful dynamic well, explaining that Congress gives great weight to prosecutors' views, even when those views advance the goals of the prosecutors rather than the public. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 544-46 (2001).

29. See *infra* notes 46, 52-53 and accompanying text.

should not surprise us that the size and power of the Department and the penal code have both exploded in recent years.<sup>30</sup> These things are not always good for the United States, but they are always good for the Department of Justice.

The Department is also especially likely to bristle at any reform that questions its prior actions, whether it be a retroactive adjustment to sentences, the early release of someone in federal prison, or a new look at forensic science that the Department commonly relies upon.<sup>31</sup> In areas such as these, reform may appear to the Department as the nullification of its work. Everything we know about the endowment effect tells us that the Department will be particularly resistant to efforts to take back or undo what it has achieved.

The role of the Department, including the bias it brings with it to discussions of policy, has been a hidden brake on reform efforts across a striking array of issues within the field of criminal law.<sup>32</sup> While prosecutors necessarily represent the Executive Branch in the federal courts in criminal matters, it is not necessary that they be the only significant input to the President on policy issues. A close examination reveals the damage done by giving this dual role of advisor and interested party to a federal agency that has used that unique power to expand its own power, even when under the leadership of self-proclaimed reformers like President Obama and Attorneys General Eric Holder and Loretta Lynch.

In this Part, we will first set out the nature of the Department's inherent bias on policy issues, and then specifically describe the way that this bias undermined the stated intentions of President Obama to reform the criminal justice system.

### A. *The Prosecutorial Mindset*

Prosecutors' chief self-conception is as defenders of the rule of law. They do not see their role as second-guessing legislative judgments about criminal law,<sup>33</sup> on the contrary, their job—their

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30. See Barkow, *supra* note 13, at 276-77.

31. See *id.* at 278-306 (explaining how the Department has reacted to these reform efforts).

32. See *infra* Part II.

33. See Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 859-60 (2015).

duty—is to enforce that law.<sup>34</sup> Prosecutors do, however, believe that it is their responsibility to exercise discretion in cases, to be the razor of morality in our society, to discern between the acceptable and unacceptable, and to decide what charges to bring. It should not surprise us that the people in that job often share a sense of moral certainty in what they do.<sup>35</sup> That certainty of purpose allows one to do the job (in fact, that trait is essential to doing the job well), but also makes it difficult to admit mistakes or to critique the power structure one resides within.<sup>36</sup>

Prosecutors are unique among lawyers in that they have no specific client and instead represent the people overall. Freed of the need to advocate for another person's interests, prosecutors instead rely upon their own consciences and the consciences of their supervisors to direct the use of their great power. The comments to the ethical rules tell prosecutors that they are “minister[s] of justice,” but that is left for each prosecutor to define.<sup>37</sup> That does not mean prosecutors do not have a side in the fight that ensues—the fact that they do is made clear by the oppositional construction of every case caption and courtroom. Rather, within that oppositional setting, prosecutors will tend to have a deep personal engagement with their work and their side stemming from the possession of such tremendous agency, a merging of work and identity.<sup>38</sup> It may be hard to morally separate oneself from a case pursuing a particular defendant when one has affirmatively chosen *that* case against *that* defendant.<sup>39</sup> When your job is taking away freedom, fortunes, and lives, the cost of second-guessing the laws that require it or being wrong in a given case is very high—perhaps too high to contemplate.<sup>40</sup>

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34. See U.S. CONST. art. II, § 3.

35. Mark Osler served as an Assistant United States Attorney in the Criminal Division in Detroit from 1995 through 2000.

36. See Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 59 (2016).

37. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2014).

38. See Jeanne Bishop & Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 J. CRIM. L. & CRIMINOLOGY 1031, 1034-37 (2015).

39. See *id.* at 1034-35.

40. To be clear, we are not discussing issues of prosecutorial misconduct here, but rather prosecutorial conduct in the normal course of business. See *id.*

The resulting tenacity of prosecutors and the tunnel vision it can create has been well documented.<sup>41</sup> Susan Bandes has described “the refusal of prosecutors to concede that the wrong person was convicted,”<sup>42</sup> even when DNA evidence has proven that person innocent.<sup>43</sup> That certainty, even after it is disproven, has striking results: Bandes points out that in about half the cases in which DNA exonerated an imprisoned individual, investigators did not even bother to submit the new evidence (showing the real offender) to the national DNA database, with a common reason being that they could not believe the wrong person was convicted.<sup>44</sup>

In a recent “Message from the Executive Director,” Scott Burns of the National District Attorneys Association concluded by saying, “The prosecutors I know are ethical, fair and solid members of their respective communities; the prosecutors I know don’t keep score, notch their belt or talk about conviction rates.... It is a noble calling and we should always be proud to say, ‘I’m a Prosecutor.’”<sup>45</sup>

This statement is consistent with the work of most prosecutors as they see it, and it is this celebration of prosecutors that lays bare the prosecutorial mindset more clearly than any critic’s barbs. Prosecutors, with some justification, see their calling as noble, and go forward with pride. Given that mindset, we should not be surprised to observe their resistance to those reforms that at least imply a failure of their present or past decisions, or ones that suggest they should have less discretion to exercise their best judgment. If you see your calling as a noble one, then you should be trusted to do the right thing in any given case because you are, after

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41. See, e.g., DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 22-25 (2012); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 883 (2009); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1611 (2006); Keith A. Findley, *Tunnel Vision*, in CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH 303, 316-17 (Brian L. Cutler ed., 2012); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 488 (2009).

42. Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 475 (2006).

43. *Id.* at 475-78.

44. *Id.* at 476.

45. Scott Burns, *Proud to Support America’s Prosecutors*, 46 PROSECUTOR 10 (2012).

all, pursuing the public interest. The prosecutor's beliefs and values thus merge with his or her idea of the public interest.

This explains why prosecutors resist efforts to make their jobs harder to do. As they see it, these efforts do nothing but impede noble pursuits. For example, mandatory minimums are valuable to prosecutors because they give prosecutors leverage to extract pleas and obtain cooperation. That is why federal prosecutors have consistently pressed Congress to enact or preserve mandatory minimums.<sup>46</sup> Eliminating mandatory minimums would transfer power currently held by prosecutors to judges, and prosecutors do not trust judges more than they trust themselves to reach the right outcomes. Indeed, prosecutors do not want any of their current powers vested in any other actor for the same reason. The result of this worldview is that any reform effort to eliminate tools that prosecutors find helpful or strip them of their authority is going to be met with resistance precisely because prosecutors see those tools and the exercise of their authority as furthering a noble cause. It is hard for them to see that they might not be the best actors to make these decisions.

### *B. Structural Factors Creating Bias Against Reform*

Beyond the mindset of individual prosecutors, there are structural features of the Department that inexorably push it towards expanding its own power, resisting reforms that would limit its power, and fighting to maintain the status quo when it already

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46. See, e.g., *Child Abduction Prevention Act and the Child Obscenity and Pornography Protection Act of 2003: Hearing on H.R. 1104 and H.R. 1161 Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 108th Cong. 15-17 (2003) (statement of Daniel P. Collins, Associate Deputy Att'y Gen. of the United States) (requesting legislation that would limit downward departures); *Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 107th Cong. 16-33 (2002) (statement of Roscoe C. Howard, U.S. Attorney for the District of Columbia) (arguing against a reduction in the penalties for crack cocaine, in part because it would reduce incentives for defendants to cooperate with prosecutors); Letter from Robert Gay Guthrie, President, Nat'l Ass'n of Assistant U.S. Attorneys, to Senator Patrick Leahy, Chairman, and Senator Charles Grassley, Ranking Member, Senate Judiciary Comm. (Jan. 31, 2014), <http://www.naaua.org/site/index.php/resources/letters/40-jan-2014-letter-opposing-mandatory-minimums-legislation/file> [<https://perma.cc/6GCG-NJU6>] (opposing the reductions in mandatory minimum sentences because they are an "indispensable tool" to "secure offender cooperation").

possesses authority in an area. One, perhaps the most important, is the fact that the Department is a large bureaucracy.<sup>47</sup> A second is that the Department is heavily influenced by career prosecutors.<sup>48</sup> A third is the coastal bias one finds in the Department, which may lead the Department's managers to believe that what happens in Washington, D.C., or the Southern District of New York is the norm, rather than what goes on in Waco or Memphis.<sup>49</sup>

With forty-one components and more than one hundred thousand employees,<sup>50</sup> the Department is, above all, an enormous bureaucracy. The nature of bureaucracies is to perpetuate themselves, and the Department is no different. It will naturally act to protect its power and stature by continuously seeking to expand its role. Max Weber, who shaped much of the way we see bureaucracy, worried about the "power position" of large bureaucracies and the danger that their organizational sophistication and control over the dispensation of resources could give them power greater than that of the sovereign.<sup>51</sup> The Department's preference to expand the penal code is a perfect example.<sup>52</sup> With each new federal crime, the role of the Department—in investigation, prosecution, and incarceration—grew further into what had traditionally been the realm of the states.<sup>53</sup>

A second powerful institutional force within the Department is a large cadre of career prosecutors, both at Main Justice and spread out among the offices of United States Attorneys. These career prosecutors fill the rank and file positions as well as leadership posts.

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47. See *infra* notes 50-53 and accompanying text.

48. See *infra* notes 54-60 and accompanying text.

49. See *infra* notes 61-62 and accompanying text.

50. U.S. DEP'T OF JUSTICE, FY 2016 AGENCY FINANCIAL REPORT, at I-3 (2016), <https://www.justice.gov/doj/page/file/910486/download> [<https://perma.cc/Z7BE-ZU7S>]; *DOJ Organizational Chart*, U.S. DEP'T JUSTICE (June 5, 2015), [https://www.justice.gov/sites/default/files/doj/pages/attachments/2015/04/27/doj\\_june\\_2015\\_2.pdf](https://www.justice.gov/sites/default/files/doj/pages/attachments/2015/04/27/doj_june_2015_2.pdf) [<https://perma.cc/W62X-9GQY>].

51. See MAX WEBER, *ECONOMY AND SOCIETY* 990-91 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 377-78 (1989).

52. See, e.g., Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 761-62 (2013) (noting the Department "has a strong institutional interest in having as much charging discretion as possible and as many charging options as Congress can provide"); Stuntz, *supra* note 28, at 510 ("[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes.").

53. See Stuntz, *supra* note 28, at 509.

Attorney General Holder spent most of his career with the Department,<sup>54</sup> as did his successor, Loretta Lynch, who started her career with the Department in 1990 and spent eighteen of the next twenty-six years there.<sup>55</sup> The Deputy Attorney General under Lynch was Sally Yates, a career Department employee who served for twenty-seven years, primarily as an Assistant United States Attorney.<sup>56</sup> Yates's Associate Deputy Attorney General, David Margolis, was a fixture at Main Justice for fifty years, primarily advising the upper echelons of the leadership.<sup>57</sup> It would defy everything we know about human cognition to expect individuals with that kind of institutional loyalty to be objective when assessing reforms. While there is value in placing people with experience in such posts, we should also expect that long-term employees are more likely to protect what is known and familiar rather than reverse course. It should not surprise us that bureaucracies in fields prizing innovation feature frequent mobility between employers—for example, the average tenure of employees at Google and Amazon is only about one year.<sup>58</sup>

The line prosecutors in the Department share those same tendencies—something that was especially noticeable in the open opposition to reform found among Assistant United States Attorneys in the field offices. The National Association of Assistant United States Attorneys resisted sentencing reform at every turn,<sup>59</sup> and when President Obama began using clemency more actively, they

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54. See *Eric H. Holder, Jr.*, COVINGTON, <https://www.cov.com/en/professionals/h/eric-holder> [<https://perma.cc/5L3X-PXYJ>]; *Attorney General: Eric H. Holder, Jr.*, U.S. DEP'T JUSTICE, <https://www.justice.gov/ag/bio/attorney-general-eric-h-holder-jr> [<https://perma.cc/2F7D-X29B>] (indicating that Attorney General Holder also clerked for the Criminal Division of the DOJ during law school).

55. *Attorney General: Loretta E. Lynch*, U.S. DEP'T JUSTICE, <http://www.justice.gov/ag/bio/attorney-general-loretta-e-lynch> [<https://perma.cc/WZ4Y-R4YC>].

56. Veronica Stracqualursi, *Everything You Need to Know About Former Acting Attorney General Sally Yates*, ABC NEWS (Mar. 29, 2017, 4:11 PM), <http://abcnews.go.com/Politics/acting-attorney-general-sally-yates/story?id=46444595> [<https://perma.cc/S7P8-DAWX>].

57. Eric Lichtblau, *David Margolis, a Justice Department Institution, Dies at 76*, N.Y. TIMES (July 15, 2016), [https://www.nytimes.com/2016/07/16/us/david-margolis-a-justice-department-institution-dies-at-76.html?\\_r=0](https://www.nytimes.com/2016/07/16/us/david-margolis-a-justice-department-institution-dies-at-76.html?_r=0) [<https://perma.cc/GH54-GZ9Y>].

58. *Full List of Most and Least Loyal Employees*, PAYSACLE, <http://www.payscale.com/data-packages/employee-loyalty/full-list> [<https://perma.cc/3H4V-GEL6>].

59. See *infra* Part II.A.1.

even held a rally in Washington, D.C., and protested that the federal system needed more imprisonment, not less.<sup>60</sup>

Finally, the leadership of the Department tends to come from just a few coastal districts, largely ignoring the middle of the nation. Of the last thirteen Attorneys General, only three (Jeff Sessions of Alabama, Alberto Gonzales of Texas, and John Ashcroft of Missouri) came from somewhere other than a coastal state.<sup>61</sup> The fact that Main Justice is located in Washington, D.C.—meaning that officials will live amidst the political elite—creates a strong nexus between the coasts and the management of the Department. This creates the potential for blindness to the practices in smaller offices across the middle of the country, where federal cases can be different than the

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60. Steven Nelson, *Prosecutors Rally Against Sentencing Reform, Say Build More Prisons*, U.S. NEWS & WORLD REP. (July 17, 2015, 3:36 PM), <http://www.usnews.com/news/articles/2015/07/17/prosecutors-rally-against-sentencing-reform-say-build-more-prisons> [https://perma.cc/7YH4-4LRR].

61. *Cf. Attorney General: Alberto R. Gonzales*, U.S. DEP'T JUSTICE, <https://www.justice.gov/ag/bio/gonzales-alberto-r> [https://perma.cc/V9VZ-CYU8] (indicating that Attorney General Gonzales was born in and practiced in Texas); *Attorney General: Benjamin Richard Civiletti*, U.S. DEP'T JUSTICE, <https://www.justice.gov/ag/bio/civiletti-benjamin-richard> [https://perma.cc/8HMJ-EQ2M] (indicating that Attorney General Civiletti was born in New York and practiced in Maryland); *Attorney General: Edwin Meese, III*, U.S. DEP'T JUSTICE, <https://www.justice.gov/ag/bio/meese-edwin-iii> [https://perma.cc/96DA-RCNS] (indicating that Attorney General Meese was born in and practiced in California); *Attorney General: Eric H. Holder, Jr.*, *supra* note 54 (indicating that Attorney General Holder was born in New York and practiced in D.C.); *Attorney General: Griffin Boyette Bell*, U.S. DEP'T JUSTICE, <https://www.justice.gov/ag/bio/bell-griffin-boyette> [https://perma.cc/BP3G-QXBX] (indicating that Attorney General Bell was born in and practiced in Georgia); *Attorney General: Janet Reno*, U.S. DEP'T JUSTICE, <https://www.justice.gov/ag/bio/reno-janet> [https://perma.cc/KL23-XFLE] (indicating that Attorney General Reno was born in and practiced in Florida); *Attorney General: John David Ashcroft*, U.S. DEP'T JUSTICE, <https://www.justice.gov/ag/bio/ashcroft-john-david> [https://perma.cc/UQE7-3G7B] (indicating that Attorney General Ashcroft was born in Chicago and practiced in Missouri); *Attorney General: Loretta E. Lynch*, *supra* note 55 (indicating that Attorney General Lynch was born in North Carolina and “considers [Brooklyn] her adopted home”); *Attorney General: Michael B. Mukasey*, U.S. DEP'T JUSTICE, <https://www.justice.gov/ag/bio/mukasey-michael-b> [https://perma.cc/4TF3-958X] (indicating that Attorney General Mukasey was born in and practiced in New York City); *Attorney General: Richard Lewis Thornburgh*, U.S. DEP'T JUSTICE, <https://www.justice.gov/ag/bio/thornburgh-richard-lewis> [https://perma.cc/DB35-BDTU] (indicating that Attorney General Thornburgh was born in and practiced in Pittsburgh and became Governor of Pennsylvania); *Attorney General: William French Smith*, U.S. DEP'T JUSTICE, <https://www.justice.gov/ag/bio/smith-william-french> [https://perma.cc/4J9R-CPEX] (indicating that Attorney General Smith was born in New Hampshire and practiced in California); *Attorney General: William Pelham Barr*, U.S. DEP'T JUSTICE, <https://www.justice.gov/ag/bio/barr-william-pelham> [https://perma.cc/SUV6-X2LP] (indicating that Attorney General Barr was born in New York City and practiced in D.C.).

norm in a large coastal city, and where prosecutors often pursue severe sentences for things that would be treated as minor on the coasts.<sup>62</sup>

For all these reasons, like a boulder being pushed on an even surface, the Department is a behemoth whose very mass creates momentum only in the same direction it was already moving. This means the Department rolls with reforms that increase its powers (more criminal laws or mandatory minimums that give it leverage to obtain pleas and cooperation) and is resistant to those reforms that will take some of its existing powers away or that question its prior decisions.<sup>63</sup>

## II. THE DEPARTMENT OF JUSTICE RESPONSE TO REFORM PROPOSALS DURING THE OBAMA ADMINISTRATION

So far, we have discussed why as a matter of theory, culture, and institutional design, one should expect the Department to favor law enforcement interests.<sup>64</sup> But we are told—often by individuals within the Department—that the Department represents justice itself and does not favor any particular view.<sup>65</sup> The law enforcement interest, in other words, is also the public's interest, so there is no conflict. We have no reason to doubt that the people working in the Department are doing their best to achieve justice and what they view as the right result, not only in individual cases, but as a matter of policy. But the fact remains that their perspective is necessarily influenced by the culture within which they work and the outlook

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62. This regional variation has been widely documented. Barkow, *supra* note 33, at 854-55 & nn.287-93 (citing sources documenting “large disparities among the ninety-four different U.S. Attorneys’ Offices in terms of what cases are prosecuted, what kinds of plea agreements are offered, and whether prosecutors move for departures under the Sentencing Guidelines”).

63. This is true across federal bureaucracies, of course, and in many instances, the stability of bureaucracies can be beneficial. One’s assessment of whether this inertia is good or bad will largely depend on what one thinks of the proposed change. If one’s goal is to push for criminal justice reforms that lessen the size of the punitive state, however, this bureaucratic inertia and resistance will act as an impediment to achieving that goal.

64. This has also been true historically. *See* Barkow, *supra* note 13, at 306-07.

65. Deputy Attorney General Sally Yates, for example, reportedly told aides to remember “that locking people up is not the department’s sole mission” because it is not “the Department of Prosecution” but “the Department of Justice.” Eric Lichtblau, *Obama Legacy of Freeing Prisoners May Come Under Trump Siege*, N.Y. TIMES (Jan. 15, 2017), <https://www.nytimes.com/2017/01/15/us/politics/obama-prisoners.html> [<https://perma.cc/5GQH-XG9K>].

it brings. This Part shows how this outlook manifests itself in practice. Section A explores those areas in which the Department resisted reforms that would undermine its own authority, while Section B analyzes the spaces where the Department was more willing to encourage change because the reforms either expanded the Department's authority or did not interfere with it.

### *A. Department of Justice Resistance to Criminal Justice Reforms*

There have been many instances—indeed, in the very areas President Obama highlighted as his primary achievements<sup>66</sup>—where the Department resisted reform efforts, but not because they failed the Obama Administration's stated goals of pursuing “evidence-based solutions” and bringing the “system more in line with the values that define us” such as “fairness, equality, and justice.”<sup>67</sup> Rather, the Department resisted because the reforms would make the Department's work more difficult, second-guess its prior decisions, or run counter to its judgment based on experience (as opposed to data). To be sure, some critical reforms came directly from within the Department, such as Attorney General Holder's amendments to charging practices.<sup>68</sup> We do not discuss charging reforms here, however, because we are focused on those areas of reform that are properly directed by the President and need not rest within the Department's judgment. We believe questions about how to enforce criminal laws in particular cases fall within the Department's appropriate sphere.<sup>69</sup> This Section thus addresses those areas of policy that need not rest with the Department but did so under President Obama. We catalog the most important of those—sentencing reform, clemency, compassionate release, and forensics.

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66. President Obama's list of federal criminal law achievements includes sentencing, clemency, prison policies, and forensics. Obama, *supra* note 2, at 824-38, 860-62.

67. *Id.* at 822, 824, 866.

68. Memorandum from Attorney Gen. Eric Holder, Jr., U.S. Dep't of Justice, to the U.S. Attorneys & Assistant Attorney Gen. for the Criminal Div. (Aug. 12, 2013) [hereinafter *Holder Memorandum*], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [<https://perma.cc/24C3-CA9G>].

69. *See infra* note 158. For areas that are squarely within the Department's authority, such as charging discretion, the key to reform will be through appointments. *See infra* Part III.D.1.

### 1. Sentencing Reform

The Obama Administration witnessed the greatest progress we have seen in rolling back the harshest policies of the 1980s and 1990s,<sup>70</sup> so it may seem nothing short of ungrateful to even ask if his Administration could have done more to support sentencing reform. In fact, however, the Department during President Obama's Administration often stood either as a prominent obstacle to getting more done or sided with maintaining the status quo. This Section recounts the Department's resistance across a range of issues and seeks to explain why it might have reached different conclusions than other reformers inside and outside of government.

Begin with the first major push for sentencing reform during President Obama's tenure—the effort to eliminate the disparity in sentencing between crack and powder cocaine. President Obama led the charge on this front even before he became President, vocally urging reform of crack cocaine sentences when he was a presidential candidate.<sup>71</sup> Previously, five grams of crack triggered a five-year mandatory minimum sentence, and fifty grams of crack triggered the ten-year mandatory minimum.<sup>72</sup> One would need five hundred and five thousand grams of powder cocaine, respectively, to hit those same triggers, which is what became known as the 100-to-1 ratio between the two drugs.<sup>73</sup> Congress rushed to create the initial 100-to-1 framework in a state of panic when crack came on the scene. As one representative candidly admitted at the time, “We didn't really have an evidentiary basis for it.”<sup>74</sup> Worse still, that differential treatment produced perniciously disparate outcomes based on race,

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70. See Obama, *supra* note 2, at 824-38, 860-62.

71. In 2007, then-Senator Obama told a Howard University audience that we should “not make the punishment for crack cocaine that much more severe than the punishment for powder cocaine when the real difference between the two is the skin color of the people using them.” Barack Obama, Remarks at the Howard University Convocation in Washington, D.C. (Sept. 28, 2007), <http://www.presidency.ucsb.edu/ws/?pid=77014> [<https://perma.cc/XQ74-PBCB>].

72. See NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 121 (2014).

73. See *id.*

74. *Id.* at 125.

with the harsher punishments for crack falling disproportionately on African Americans.<sup>75</sup>

President Obama kept his campaign promise and pushed hard for the passage of the Fair Sentencing Act (FSA) which raised the quantity triggers for the five-year and ten-year mandatory minimums to twenty-eight and two hundred eighty grams of crack, respectively.<sup>76</sup> While the ratio is still lopsided at eighteen-to-one—the result of a compromise in Congress that was necessary to pass the Act—it is a significant improvement from the prior regime that would not have likely been passed but for President Obama’s leadership and support, including the Department’s advocacy in favor of the law.<sup>77</sup>

Yet the Department has often failed to support efforts that would minimize the racially pernicious effects of the old regime. Consider the Department’s position before the Sentencing Commission on how to amend the Sentencing Guidelines in light of the passage of the FSA. In setting the initial Sentencing Guidelines for drug offenses, the Commission made the decision to use statutory quantities as benchmarks for the guidelines.<sup>78</sup> Thus, because Congress used five grams of crack as the trigger for a five-year sentence in the Anti-Drug Abuse Act of 1986,<sup>79</sup> the Commission’s initial guidelines

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75. In 2013, 83 percent of those charged with crack trafficking offenses were black and 5.8 percent were white. U.S. SENTENCING COMM’N, QUICK FACTS: CRACK COCAINE TRAFFICKING OFFENSES, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Crack\\_Cocaine.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Crack_Cocaine.pdf) [<https://perma.cc/5GFS-84V8>]. By contrast, blacks made up only 31.5 percent of powder cocaine trafficking offenders, while Hispanics made up 58 percent and whites made up 9.4 percent. U.S. SENTENCING COMM’N, QUICK FACTS: POWDER COCAINE TRAFFICKING OFFENSES, [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quickfacts/Quick\\_Facts\\_Powder\\_Cocaine.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quickfacts/Quick_Facts_Powder_Cocaine.pdf) [<https://perma.cc/97LK-BMMA>].

76. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.).

77. In 2009, the Department advocated for eliminating the disparity between crack and powder. *Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 2-3 (2009) [hereinafter Statement of Lanny A. Breuer] (statement of Lanny A. Breuer, Assistant Att’y Gen., Criminal Division, U.S. Department of Justice), <https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2009/05/21/2009-05-21-crm-breuer-crack-100-to-1.pdf> [<https://perma.cc/X29M-RK56>].

78. See U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY iv (2002), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205\\_Cocaine\\_and\\_Federal\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf) [<https://perma.cc/L8PK-FBX4>].

79. Pub. L. No. 99-570, § 1001, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 841(b)(1) (1986)).

opted to make five grams of crack trigger a guideline offense level of twenty-six, which yielded a sentencing range of sixty-three to seventy-eight months (slightly above the five-year mandatory minimum).<sup>80</sup> Similarly, fifty grams would trigger an offense level of thirty-two, or a range of 121 to 151 months.<sup>81</sup> The Commission then extrapolated upward and downward for other drug quantities above and below these statutory minimums using these levels as the anchors.<sup>82</sup>

Because the Commission's research showed that the 100-to-1 ratio was without basis and produced glaring racial disparities,<sup>83</sup> the Commission decided to take its own steps to limit the differential treatment between crack and powder in the guidelines even before the FSA. In 2007, the Commission reduced the guideline offense level for 5 grams to 24 (yielding a sentence of 51 to 63 months) and 50 grams to 30 (97 to 121 months).<sup>84</sup> In doing so, the Commission kept the ranges in accord with the statutory thresholds but somewhat reduced the severity of crack offenses.<sup>85</sup>

After the FSA passed, the Commission had to decide whether to continue to use the lower offense levels or whether it should go back to the original, higher offense levels under the theory that Congress had made its own determination of how to address the disparity.<sup>86</sup>

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80. U.S. SENTENCING GUIDELINES MANUAL § 5A5.2 (U.S. SENTENCING COMM'N 1987).

81. *Id.*

82. *See* U.S. SENTENCING COMM'N, *supra* note 78, at iv.

83. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 3, 8 (2007), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf) [<https://perma.cc/U5JJ-RS3P>]; U.S. SENTENCING COMM'N, *supra* note 78, at 91, 102-03; U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2, 8 (1997), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/19970429\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/19970429_RtC_Cocaine_Sentencing_Policy.pdf) [<https://perma.cc/A4MK-UVAF>]; U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 153-54 (1995), <https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/CHAP5-8.pdf> [<https://perma.cc/RVR6-JMCC>].

84. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 706 (U.S. SENTENCING COMM'N Supp. 2008).

85. The Commission decided that "the problems associated with the 100-to-1 drug quantity ratio are so urgent and compelling" that it needed to do what it could to limit the impact within the Guidelines. *Id.*

86. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 8, 124 Stat. 2374 (codified as amended at 28 U.S.C. § 994 (2012)) (vesting the Commission with emergency amendment authority to promulgate guideline changes consistent with the directives of the statute within

At the Department's urging,<sup>87</sup> the Commission decided to revert to the higher, pre-2007 offense levels.<sup>88</sup> The Department argued that the FSA's language was fairly read to mean that all drug types should be treated comparably.<sup>89</sup> It further argued that "a two-level reduction [for all drugs] is not warranted until further information is presented and can be considered."<sup>90</sup>

While the Department's reading was a fair one, it was neither dictated by the statute's language nor by its legislative history. There was room to take a different position. In fact, the Commission received comments from the lead sponsors of the law stating that they intended the Commission to retain the lower offense levels. Senator Dick Durbin wrote to the Commission to emphasize that Congress approved of the Commission's 2007 changes to the offense levels for crack and that, "[i]n debating and passing the Fair Sentencing Act, Congress did not intend for the base offense levels for crack cocaine to change," adding that "nothing in the text or

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ninety days of its passage).

87. See, e.g., *Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sentencing Comm'n* 16-17, 19 (2011) [hereinafter Statement of Laura E. Duffy] (statement of Laura E. Duffy, United States Attorney, Southern District of California), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110317/Testimony\\_DOJ\\_Duffy.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110317/Testimony_DOJ_Duffy.pdf) [<https://perma.cc/U8K8-KJ3M>] (stating the Department's position that the Commission should make permanent its temporary amendment to the Drug Quantity Table, which increased the offense levels back to twenty-six and thirty-two, respectively).

88. The Commission changed its guideline triggering quantities from 5 to 28 and 50 to 280, respectively, and those levels in turn triggered corresponding offense levels of twenty-six and thirty-two. 3 U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 748 (U.S. SENTENCING COMM'N 2011) (explaining this change as "ensur[ing] that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table"). Judge Castillo dissented because he did not believe Congress intended the Commission to change the offense levels when it passed the FSA. U.S. SENTENCING COMM'N, PUBLIC MEETING MINUTES 4 (Oct. 15, 2010), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20101015/20101015\\_Minutes.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20101015/20101015_Minutes.pdf) [<https://perma.cc/2T9X-PLXV>].

89. Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legislation, to the Honorable William K. Sessions III, Chair, U.S. Sentencing Comm'n 2 (Oct. 8, 2010) [hereinafter Wroblewski Letter], [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20101013/DOJ\\_Comment\\_100810.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20101013/DOJ_Comment_100810.pdf) [<https://perma.cc/4YUU-GVZM>] (arguing that the Act aimed to do a better job of differentiating among drug traffickers and that the language of the Act "strongly suggests" its approach should be "appl[ie]d in all drug trafficking offenses, across all drug types").

90. Statement of Laura E. Duffy, *supra* note 87, at 18-19.

legislative history [of the FSA] suggests otherwise.”<sup>91</sup> Senator Durbin reiterated this point in a subsequent letter he wrote with Senator Patrick Leahy, noting that his initial letter “was not contradicted by a single member of Congress” and was in fact buttressed by additional comments filed with the Commission by the then-Chairmen of the House Committee on the Judiciary and the then-Chairman of the House Subcommittee on Crime.<sup>92</sup> Although the Commission received a letter from a group of House legislators opposed to the FSA that urged the Commission not to maintain the 2007 offense levels,<sup>93</sup> Senator Durbin observed that “[u]nder traditional canons of statutory construction,” it is the views of sponsors, not opponents, that are entitled to greater weight.<sup>94</sup>

The Department may have disagreed because it feared that going too far in President Obama’s first term would impede the prospects of future legislation.<sup>95</sup> If so, it is worth asking whether the Department is the right entity to make the calculation of whether a reform at the moment is worth the risk of losing further gains later. The Commission sided with the Department’s more limited reading in 2010, so we will never know whether greater reform efforts then

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91. Letter from Senator Richard J. Durbin, U.S. Senate, to the Honorable William K. Sessions III, Chair, U.S. Sentencing Comm’n (Oct. 8, 2010), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20101013/SenDurbin\\_comment\\_100810.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20101013/SenDurbin_comment_100810.pdf) [<https://perma.cc/U6K7-FLUJ>].

92. Letter from Senators Richard J. Durbin & Patrick J. Leahy, U.S. Senate, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n 1 (Apr. 5, 2011) [hereinafter Leahy & Durbin Letter], [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110321/SenDurbin\\_Leahy\\_Comment.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110321/SenDurbin_Leahy_Comment.pdf) [<https://perma.cc/GS87-MGS3>] (citing Letter from Representatives John Conyers, Jr. & Robert C. Scott, U.S. House of Representatives, to the Honorable William K. Sessions III, Chair, U.S. Sentencing Comm’n (Oct. 8, 2010), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20101013/House\\_CrimeSubcomte\\_100810.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20101013/House_CrimeSubcomte_100810.pdf) [<https://perma.cc/NW53-Z9PL>]).

93. Letter from Representative Lamar Smith et al., U.S. House of Representatives, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n (Mar. 15, 2011), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110321/HR\\_JudiciarySubcomte\\_Comment.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110321/HR_JudiciarySubcomte_Comment.pdf) [<https://perma.cc/5ZQ5-6V6C>].

94. Leahy & Durbin Letter, *supra* note 92, at 1.

95. This theory is supported by a Department letter to the Commission urging it to “reinforce and support the bipartisanship that led to the passage of the Act and its important reforms by ensuring that the will of the nearly-unanimous Congress that passed the Act is achieved in its implementation.” Wroblewski Letter, *supra* note 89, at 2. Additionally, the Department supported a reduction of offense levels for all drugs in President Obama’s second term. *See infra* note 125 and accompanying text.

would have stymied future sentencing reform or bipartisan efforts.<sup>96</sup> But there are persuasive reasons for thinking that the Department's assessment of the costs and benefits of pushing additional reforms at any given time might be skewed by its institutional biases and interests. All else being equal, the Department might prefer to err on the side of caution and keep offense levels high, reasoning that its prosecutors can agree to lower sentences in cases in which they believe such reductions are merited. Thus, the Department may hold the view that it can police injustices instead of giving judges more room to do so, and not much is lost by doing so. In addition, the Department might not be as likely to see the problems with the prior regime because it prosecuted those cases under the old statutory triggers.<sup>97</sup> The Department may also be more inclined as an institution to focus on its law enforcement mission and less sensitive to the personal interests at stake on the other side of the balance. Whereas the Department highlighted in its 2010 comments to the Commission that it "has consistently advocated for federal sentencing laws that ... ensure public safety by being tough on drug crime,"<sup>98</sup> Senators Leahy and Durbin paid more attention to the fact that roughly two thousand additional people would benefit from sentencing reductions if the Commission kept the lower base offense levels and made its changes retroactive.<sup>99</sup>

The Department's resistance to crack sentencing reform did not stop there. When the Commission considered whether to make its amendments retroactive (such that any individual sentenced before 2010 who would receive a lower guideline range under the new FSA

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96. If a concern with future reform was what motivated the Department in its resistance, then the fact that the Commission lowered the offense levels for all drugs in 2014 without pushback from Congress does suggest that concern was likely misplaced. See Beth Schwartzapfel, *Federal Prisons Could Release 1,000 Times More Drug Offenders than Obama Did*, MARSHALL PROJECT (July 23, 2015), <https://www.themarshallproject.org/2015/07/23/federal-prisons-could-release-1-000-times-more-drug-offenders-than-obama-did#.hjZw4rGdq> [<https://perma.cc/8ANL-B3G7>].

97. Department leadership was often careful to point out that its endorsement of changes to the crack laws should not be seen as indictment of the Department's prosecutions under the old laws. See, e.g., Statement of Lanny A. Breuer, *supra* note 77, at 2 ("In committing ourselves to pursuing federal cocaine sentencing policy reform, we do not suggest in any way that our prosecutors or law enforcement agents have acted improperly or imprudently during the last 15 years.")

98. Wroblewski Letter, *supra* note 89, at 2.

99. Leahy & Durbin Letter, *supra* note 92, at 2.

guideline amendments than the range that applied to him or her could seek retroactive adjustment of his or her sentence),<sup>100</sup> the Department again took a narrow view. The Department argued that some people should be “categorically prohibit[ed]” from having a judge even consider whether a retroactive adjustment would be consistent with public safety.<sup>101</sup> Specifically, it argued that anyone who received a sentencing enhancement for using or possessing a weapon should be barred from having a judge reconsider his or her crack sentence under the old 100-to-1 ratio.<sup>102</sup> The Department also wanted to categorically bar those with more significant criminal histories from gaining the opportunity to appear before a judge.<sup>103</sup>

Importantly, no one automatically receives a sentence reduction even if the Commission makes a guideline change fully retroactive. Judges are required to “consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant’s term of imprisonment” before making a retroactive adjustment.<sup>104</sup> In each case, then, a judge must first determine that a retroactive reduction will not harm public safety before a defendant receives a lesser sentence.<sup>105</sup> The Department’s position that some people should be categorically banned from even

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100. Only the guideline changes could be made retroactive, not the statute because, there was no authorization in the FSA itself to apply retroactively, whereas the Commission has authority to make its guideline changes retroactive. So, anyone sentenced pursuant to a mandatory minimum under the old crack laws would not receive retroactive relief that gave him or her a sentence below the statutory minimum.

101. *Hearing on Retroactive Application of the Proposed Amendment to the Federal Sentencing Guidelines Implementing the Fair Sentencing Act of 2010 Before the U.S. Sentencing Comm’n* 2-3 (2011) [hereinafter Statement of Eric H. Holder, Jr.] (statement of Eric H. Holder, Jr., Att’y Gen. of the United States), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony\\_AG\\_Eric\\_Holder.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_AG_Eric_Holder.pdf) [<https://perma.cc/RM2Y-5MFY>] (discussing the role of congressional intent in applying retroactivity to violent offenders).

102. *Hearing on Retroactive Application of the Proposed Amendment to the Federal Sentencing Guidelines Implementing the Fair Sentencing Act of 2010 Before the U.S. Sentencing Comm’n* 8-9 (2011) [hereinafter Statement of Stephanie M. Rose] (statement of Stephanie M. Rose, United States Attorney, Northern District of Iowa), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony\\_Stephanie\\_Rose.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_Stephanie_Rose.pdf) [<https://perma.cc/SJ8R-DCXP>].

103. *Id.* (explaining that the Department would have barred anyone higher than criminal history category III from asking a judge to reconsider his or her crack sentence).

104. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10, cmt. n.1(B)(ii) (U.S. SENTENCING COMM’N 2015); see 18 U.S.C. § 3582(c)(2) (2012).

105. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.10, cmt. n.1(B)(ii).

going before a judge was presumably based on a distrust of judges making these determinations on a case-by-case basis and a willingness to accept that, as a result of its categorical bar, many deserving individuals would not receive relief. Most individuals convicted of drug offenses with higher criminal history categories pose little threat of violence.<sup>106</sup> Nor does receiving a weapons enhancement necessarily signify dangerousness. Defendants can receive the weapon enhancement even if they personally did not have a weapon as long as someone with them did—and this is true even if the defendant had no knowledge the other person had a weapon.<sup>107</sup> The Department was willing to sacrifice individuals in situations like these and restrict them from receiving less disparate crack sentences in order to prevent judges from making public safety determinations on an individualized basis.<sup>108</sup> It is hard to imagine anyone but a prosecutor deciding that trade-off makes sense, especially when it means individuals must continue to serve crack sentences universally recognized to be unjust and discriminatory.

Indeed, contrast the Department's preferred approach with the comments filed by a group of Democratic senators who argued that all eligible defendants should be able to petition a judge to determine if retroactive adjustments were appropriate.<sup>109</sup> The Senators had confidence "that all judges will consider public safety as a paramount concern when determining whether a sentence reduction is appropriate."<sup>110</sup> They argued that "[g]iven decades of inequity in crack sentencing, the ability of judges to discern on an individualized case-by-case basis who should benefit from a sentence reduction, and the requirement that public safety must be considered, we

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106. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 42 (2016), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607\\_RtC-Career-Offenders.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf) [<https://perma.cc/NR7L-BPD4>] (noting that, for repeat offenders whose criminal history includes only drug trafficking, the most common subsequent offense was drug trafficking).

107. *See, e.g.*, *United States v. Woods*, 604 F.3d 286, 290 (6th Cir. 2010) (holding that a defendant need not be aware a firearm is present but instead "the possession of a firearm by a coconspirator must (1) be connected to the conspiracy and (2) be reasonably foreseeable").

108. *See supra* note 103 and accompanying text.

109. *See* Letter from Senator Patrick J. Leahy et al., U.S. Senate, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n (June 1, 2011), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110602/Durbin\\_Leahy\\_Franken\\_Coons\\_Comment.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110602/Durbin_Leahy_Franken_Coons_Comment.pdf) [<https://perma.cc/UJX7-D66J>].

110. *Id.* at 3.

strongly believe that no particular category of defendant should be excluded from retroactive application.”<sup>111</sup>

Here again, we see the Department advocating for an approach that is at odds with broader criminal justice reform goals and with Democratic members of Congress who had been leaders for sentencing reform. Why the difference, especially when President Obama and Attorney General Holder spoke urgently about the need to reform the crack laws?<sup>112</sup> One can imagine that, unlike Attorney General Holder, the members of Congress did not have to deal with career staff who disagreed with the broader push for reform, so their resistance to retroactivity naturally followed suit. It is likely that Attorney General Holder faced substantial pushback within the Department. The Bush Administration’s Department of Justice opposed *any* retroactive application of the 2007 offense level reductions,<sup>113</sup> and many of those same line prosecutors were still at the Department when it was considering what position to take before the Commission in 2011. Indeed, the National Association of Assistant United States Attorneys, the professional organization that represents Assistant United States Attorneys (AUSAs), filed its own comments opposing any retroactive application of the crack sentencing guideline amendments.<sup>114</sup> One gets a sense of the kinds of arguments the Attorney General must have been facing within the Department from the AUSA association’s letter, which noted

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111. *Id.*

112. *E.g.*, Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> [<https://perma.cc/BMQ8-4TQ8>] (commenting on the successful “reduction of the *unjust* 100-to-1 sentencing disparity between crack and powder cocaine” (emphasis added)); Eric H. Holder, Jr., *Eric Holder: We Can Have Shorter Sentences and Less Crime*, N.Y. TIMES (Aug. 11, 2016), [https://www.nytimes.com/2016/08/14/opinion/sunday/eric-h-holder-mandatory-minimum-sentences-full-of-errors.html?\\_r=0](https://www.nytimes.com/2016/08/14/opinion/sunday/eric-h-holder-mandatory-minimum-sentences-full-of-errors.html?_r=0) [<https://perma.cc/U3GZ-N73P>] (“There is still a disparity in sentencing for offenses relating to crack and powder cocaine.... [T]his disparity must go.”).

113. *See, e.g.*, Letter from Alice Fisher, Assistant Attorney Gen., to the Honorable Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm’n 1 (Nov. 1, 2007), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20071100/PC200711\\_001.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20071100/PC200711_001.pdf) [<https://perma.cc/EHL7-X5JH>].

114. Letter from Steven H. Cook, Nat’l Ass’n of Assistant U.S. Attorneys, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n (June 2, 2011), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110602/NAAUSA\\_Comment.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110602/NAAUSA_Comment.pdf) [<https://perma.cc/63SY-V736>].

that early release of any individual currently serving a crack sentence “would be a slap in the face to the law enforcement officers who literally risked their lives in order to bring those criminals to justice.”<sup>115</sup> In the view of these line prosecutors, reducing crack sentences would be giving the affected individuals a “windfall,” not remedying an injustice.<sup>116</sup> They further emphasized the strain retroactive review would place on the system because roughly twelve thousand individuals could then be able to seek relief.<sup>117</sup>

The Department’s compromise approach becomes more understandable (at least as an institutional matter) in light of the internal pressures the Attorney General likely faced. Attorney General Holder personally appeared before the Commission at its hearing on retroactivity in 2011 instead of sending a representative from the Department—the more typical approach—and he spent most of his time speaking to the concerns of those who would oppose all retroactive relief.<sup>118</sup> He noted that the retroactive application of the 2007 amendments did not cause an increase in crime.<sup>119</sup> He also emphasized that it would be administratively feasible to process the cases.<sup>120</sup> What he did not do was spend time defending the Department’s view that judges should not be trusted to process all of these cases.<sup>121</sup> One can imagine that Attorney General Holder had been on the defensive in arguing for any retroactive relief at the Department, so he took the same posture before the Commission, explaining why the middle ground was not too bold instead of recognizing and defending why it was so narrow.<sup>122</sup>

Yet the Department’s view was far more limited than the view of the sentencing reformers in Congress and most other commenters before the Commission. As it turns out, it was also too limited for the bipartisan Commission, which unanimously applied its quantity-based reductions to the guidelines retroactively in all cases, without placing a limit based on the presence or use of a weapon or

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115. *Id.*

116. *Id.* at 3.

117. *Id.* at 2.

118. See Statement of Eric H. Holder, Jr., *supra* note 101, at 2-4.

119. *Id.* at 4.

120. *Id.*

121. See *id.* at 1-5 (failing to address if judges should be trusted with such cases).

122. *Id.* at 2-4.

criminal history, just as it had done in 2007 with its offense level reductions.<sup>123</sup> The fact that these more objective decision makers, without an institutional history of prosecuting these cases or a duty to deal with cases going forward, reached a different conclusion than the Department shows that the institution making the decision about reform matters. It also causes one to doubt the Department's ability to lead on sentencing reform.

The Department's subsequent positions on sentencing continued to follow the same basic pattern, even in President Obama's second term and even after the evidence mounted that the reductions in crack sentencing were not undermining public safety or the Department's ability to successfully prosecute cases.<sup>124</sup> When the Commission asked for comment in 2013 on whether it should reduce all of its drug sentencing guidelines by two offense levels (what came to be known as drugs minus two), the Department agreed with the reductions as a prospective matter.<sup>125</sup> But even in the relative political safety of a second term, with the President more outspoken about criminal justice reform, and in light of the successful implementation of crack retroactivity, the Department once again balked when it came time to deciding whether the drugs-minus-two amendment should apply retroactively.<sup>126</sup> The Department became

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123. See 3 U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 750 (U.S. SENTENCING COMM'N 2012).

124. See, e.g., U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 22-23 (Apr. 30, 2014), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430\\_RF\\_Amendments.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments.pdf) [<https://perma.cc/GA4K-UZWT>] (finding that the reduction in base offense levels for crack offenses had no deleterious effects on plea rates or cooperation); U.S. SENTENCING COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT 3 (2007), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527\\_Recidivism\\_2007\\_Crack\\_Cocaine\\_Amendment.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf) [<https://perma.cc/5R7K-W5DW>] (finding no statistically significant difference in recidivism rates of those offenders released earlier).

125. Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legislation, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 16 (Mar. 6, 2014), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf> [<https://perma.cc/R24L-NA74>].

126. See *Hearing on Retroactive Application of the Pending Drug Guideline Amendment to the Federal Sentencing Guidelines Before the U.S. Sentencing Comm'n* 7-8 (2014) [hereinafter Statement of Sally Quillian Yates] (statement of Sally Quillian Yates, United States Attorney, Northern District of Georgia), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony\\_DOJ.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony_DOJ.pdf) [<https://perma.cc/56J9-83LZ>].

even less generous in its view of retroactivity than it was in 2010.<sup>127</sup> Whereas it would have allowed individuals in criminal history category III to seek retroactive reductions in the FSA amendments, now it would only allow those in categories I and II.<sup>128</sup> And this time around, it also sought to ban anyone with an aggravating role adjustment or someone who received an enhancement for obstruction of justice<sup>129</sup>—something that can happen when a defendant testifies at trial but the judge decides the defendant is not being truthful.

The Department stated that its limited approach to retroactivity was driven by “public safety concerns that arise from the release of dangerous drug offenders and from the diversion of resources necessary to process over 50,000 inmates.”<sup>130</sup> The Department’s resource concerns had merit, of course, because such a large number of cases would be time-consuming to process.<sup>131</sup> But the assumption that full retroactivity would result in the “release of dangerous drug offenders” without the Department’s proposed categorical bars lacked support, especially in light of the Commission’s experience retroactively applying its previous crack guideline amendments without any categorical bars.

In the end, the bipartisan Commission once again unanimously rejected the Department’s categorical bars on retroactivity and made its amendments fully retroactive. It delayed implementation for one year to allow judges time to process the cases and to allow probation officers and the Bureau of Prisons to prepare people for reentry.<sup>132</sup> The delay, not ill-fitting substantive limits on eligibility, directly addressed the resource issue. Courts processed more than forty-six thousand motions, with more than thirty thousand people receiving retroactive sentencing reductions that lowered their sentences by 17 percent, or roughly two years, on average.<sup>133</sup> If the

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127. *See id.*

128. *Id.*

129. *Id.*

130. *Id.* at 4.

131. *See id.* at 4-6 (recognizing that prosecutors must devote additional time to growing caseloads).

132. U.S. SENTENCING COMM’N, AMENDMENT TO THE SENTENCING GUIDELINES 1-2 (2014), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718\\_RF\\_Amendment782.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf) [<https://perma.cc/E24D-NDYN>].

133. *See* U.S. SENTENCING COMM’N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT, tbls.1 & 7 (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and->

Department had its way, more than half of the people who received relief would have been ineligible.<sup>134</sup>

One is again left to wonder why a bipartisan Commission unanimously agreed that the Department was being too conservative on the topic of sentencing reform. And the answer again lies in the Department's institutional biases in favor of the status quo and avoiding any risk that someone released early might commit a dangerous offense. While those traits have their merits, they are ill-suited to the task of sentencing reform aimed at tackling mass incarceration. A one-dimensional focus on the risk that people released earlier might commit violent offenses can obscure attention to other risks, including those associated with *not* reducing sentences. The longer people serve in prison, the more difficult reentry becomes (increasing the risk of recidivism).<sup>135</sup> Furthermore, the use of limited law enforcement resources to house individuals who do not pose a risk means fewer resources to pursue other cases, help witnesses, and provide rehabilitation. The Commission compiled a substantial record after the retroactive reduction of crack sentences showing the feasibility of that approach without undermining public safety.<sup>136</sup> And of course, disproportionate sentences have palpable human costs. The Department's resistance thus owed less to its focus on the evidence and more to its institutional culture.

There are many other examples where the Department pushed for longer sentences even when the evidence did not support its claims.<sup>137</sup> One final example especially drives home this theme

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publications/retroactivity-analyses/drug-guidelines-amendment/20170510-Drug-Retro-Analysis.pdf [https://perma.cc/39HP-J5MU]. Most motions that were rejected were simply ineligible for relief (for example, a mandatory minimum applied or the sentence would expire before the effective date of the Commission's amendment), but judges denied more than three thousand on the merits, showing that public safety evaluations were taking place. *Id.* tbl.8.

134. Only 49.7 percent of the individuals fell within criminal history categories I and II, the Department's first cut-off for relief. *Id.* Additional people would be separately ineligible because of an enhancement for weapons possession, violence, aggravating role, or obstruction, but those numbers are unavailable.

135. EXECUTIVE OFFICE OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 39-40 (2016), <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf> [https://perma.cc/G6TP-ZC8E] (“[A] growing body of work has found that incarceration increases recidivism.”).

136. *See supra* note 124 and accompanying text.

137. For instance, when the Commission evaluated which offenses should be treated as

that the Department's interests are not well aligned with the goals of criminal justice reform. President Obama did not stop his efforts

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enumerated crimes of violence in its guidelines in the wake of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Department wanted burglary included in the list. See Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legislation, U.S. Dep't of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 2 (Oct. 30, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/DOJ.pdf> [<https://perma.cc/5YFN-JKXQ>]. But the empirical evidence showed that the overwhelming majority of burglaries, even those involving dwellings, involve no violence. U.S. SENTENCING COMM'N, AMENDMENT TO THE SENTENCING GUIDELINES 3 (2016), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121\\_RF.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf) [<https://perma.cc/LM2C-T6AQ>] (citing studies). The Commission thus rejected the Department's argument and left burglary off its list, noting that judges could instead give an upward departure in those relatively few cases of burglary where violence was involved. *Id.* at 4.

More recently, the Department pushed for an across-the-board increase in sentences for all alien smuggling cases based on its view that smuggling had become increasingly dangerous and tied to criminal organizations. Letter from Michelle Morales, Acting Dir., Office of Policy & Legislation, U.S. Dep't of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 3-13 (Mar. 14, 2016), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160316/20160316\\_DOJ.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160316/20160316_DOJ.pdf) [<https://perma.cc/4L48-6TMX>]. Again, the data did not back up the Department's request. The Department itself sought a sentence below the guidelines in 37.2 percent of smuggling cases as part of its fast-track disposition program, which undercuts the view that all the cases are as serious as the Department claimed. U.S. SENTENCING COMM'N, PUBLIC MEETING MINUTES 11 (Apr. 15, 2016) [hereinafter PUBLIC MEETING MINUTES], [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160415/meeting\\_minutes.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160415/meeting_minutes.pdf) [<https://perma.cc/ARA7-QU66>]. Commission data also showed that the majority of the defendants convicted of this offense serve low-level functions in the smuggling operation. *Id.* The Commission thus denied the Department's request for a blanket increase because the guidelines already accounted for the increased risk in certain cases by providing for enhancements when there is a risk of physical injury and other dangers. *Id.* at 11-12.

Then “[t]he Department opposed any inflationary adjustment to the guidelines’ monetary tables.” Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legislation, U.S. Dep't of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 12 (Mar. 9, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/DOJ.pdf> [<https://perma.cc/LUC8-5W89>]. The Department saw this as “an unwarranted reduction” in fraud sentences because, in “the Department’s experience and judgment, the harm from economic crimes is generally not being overstated.” *Id.* at 12, 14. But as the Commission noted, none of the monetary amounts in the Guidelines had been adjusted for inflation since adoption in 1987, and “[a]s a result, monetary losses in current offenses reflect, to some degree, a lower degree of harm and culpability than did equivalent amounts when the monetary tables were established or last substantively amended.” Sentencing Guidelines for United States Courts, 80 Fed. Reg. 25,782, 25,789 (submitted to Congress Apr. 30, 2015).

There are other examples like these, in which the Department asked for sentencing guideline increases without a basis in empirical facts, and contrary to the Obama Administration's overriding goal of being smart on crime and reducing incarceration. In the interest of space, we are not providing an exhaustive list, but these examples give the general flavor.

at legislative reform with the FSA. He continued to push for broader sentencing reform through legislation, specifically encouraging additional reforms to mandatory minimum drug sentencing laws.<sup>138</sup> The bill with the best chance of passage ultimately turned out to be the Sentencing Reform and Corrections Act of 2015.<sup>139</sup> That bill was the outgrowth of an earlier bipartisan proposal introduced by Senators Dick Durbin and Mike Lee, known as the Smarter Sentencing Act of 2014,<sup>140</sup> which would have reduced mandatory minimums for specified and defined nonviolent individuals from twenty years to ten years, ten years to five years, and five years to two years; along with entirely eliminating the mandatory sentence of life imprisonment in drug cases.<sup>141</sup> Additionally, the bill would have made the FSA retroactive and modestly expanded the safety valve to allow judges to sentence defendants outside of mandatory minimums in some cases.<sup>142</sup>

The Obama Administration backed those provisions of the Smarter Sentencing Act, but the Administration's support was not enough to get it through the Senate, so the bill was ultimately modified in various ways to make it less ambitious, including eliminating the reduction of the five-year mandatory minimum to two years.<sup>143</sup> "[E]ven though the bill was imperfect," President Obama supported it<sup>144</sup> and lamented that Republican leaders in Congress did not let the bill come up for a vote.<sup>145</sup>

While it is true that the legislation stalled because leaders in the Senate refused to bring it forward for a vote, one should not be left with the impression that the Senate bears sole responsibility for the fact that the bill turned out as watered down as it did, or that it failed to get a vote. Here again, it is important to observe the Department's role in advancing (or as the case may be, not advancing) sentencing reform legislation.

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138. Obama, *supra* note 2, at 827.

139. S. 2123, 114th Cong. (2015).

140. *See* Obama, *supra* note 2, at 827 (citing S. 1410, 113th Cong. § 4 (2014)).

141. *See id.*

142. *Id.*

143. *See id.* at 828.

144. *Id.*

145. *See id.* at 829.

The President is correct that the Department supported the Smarter Sentencing Act, but he neglects to mention that it was not the only bipartisan bill being considered by the Senate. Senators Patrick Leahy and Rand Paul proposed a more ambitious piece of legislation to address the problems with mandatory minimum sentences. The Justice Safety Valve Act of 2013 would have allowed judges to depart from mandatory minimums in individual cases based on the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of punishment.<sup>146</sup> The Justice Safety Valve Act would thus have effectively eliminated mandatory minimums as a constraint on judges.<sup>147</sup> There was some reason to believe President Obama would share Senators Leahy and Paul's interest in this legislation based on his statement in a speech at an NAACP Conference that “[f]or nonviolent drug crimes, we need to lower long mandatory minimum sentences *or get rid of them entirely*” and we should “[g]ive judges some discretion.”<sup>148</sup>

But the Justice Safety Valve Act was a nonstarter with the Department. The Department has repeatedly endorsed the need for mandatory minimums because of the leverage they give the Department to extract pleas and cooperation.<sup>149</sup> Indeed, one reason the reduction in the five-year mandatory minimum to two years disappeared is that unnamed federal prosecutors in New York told Senator Chuck Schumer that reducing the mandatory minimum would make it too difficult for prosecutors to obtain guilty pleas and cooperation in those cases.<sup>150</sup> To be sure, it was likely that the Justice Safety Valve Act lacked sufficient Senate support, so we are

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146. S. 619, 113th Cong. § 2 (2013).

147. *Id.*

148. Remarks at the NAACP Annual Convention in Philadelphia, PA, 2015 DAILY COMP. PRES. DOC. 5 (July 14, 2015) (emphasis added).

149. *See, e.g.*, Letter from Robert Gay Guthrie, President, Nat'l Ass'n of Assistant U.S. Attorneys, to Senator Patrick Leahy, Chairman, and Senator Charles Grassley, Ranking Member, Senate Judiciary Comm. 2 (Jan. 31, 2014), <http://www.naausa.org/site/index.php/resources/letters/40-jan-2014-letter-opposing-mandatory-minimums-legislation/file> [<https://perma.cc/6GCG-NJU6>].

150. *Executive Business Meeting* (Committee on the Judiciary Jan. 30, 2014) (statement of Sen. Chuck Schumer, Member, S. Comm. on the Judiciary), <https://www.judiciary.senate.gov/meetings/executive-business-meeting-2014-01-30> [<https://perma.cc/76CR-G4TQ>] (“[P]rosecutors across New York ... told [him] ... low-level [criminals] ... choose to cooperate rather than face the mandatory minimum and so if we reduce that lower-level minimum from five to two, many prosecutors are worried that they can no longer use this tool effectively.”).

not claiming that it failed to advance just because the Department did not endorse it. But the position of the Administration matters not only because it can help secure legislative victories, but also because it sends a message about what kind of system the President thinks we should have. By supporting the Justice Safety Valve Act, the President could have sent the same message that Senators Leahy and Paul wanted to send, which is that judicial discretion is critical to a well-functioning criminal justice system. Perhaps President Obama does not share that view. But if his only input about what position to take came from the Department, that option would have been off the table from the start.

The Department's resistance to reform legislation did not stop there. Even though the Department was willing to get behind the modest reductions in the mandatory minimums because those provisions did not undermine its ability to prosecute cases, it viewed things differently when a key trade-off that emerged for getting the legislation passed involved accepting so-called mens rea reform. Specifically, some key legislators refused to support mandatory minimum reform unless the legislation also included a provision stating that, if a federal statute did not require the government to prove that the defendant acted with a particular state of mind, the default state of mind the government should prove is "knowing."<sup>151</sup> Notably, the mens rea reform provision had its own bipartisan support in the House,<sup>152</sup> and most criminal law scholars and professional bar associations have lamented for years that strict liability laws have no place in the criminal sphere.<sup>153</sup> The Model Penal Code has its

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151. H.R. 4002, 114th Cong. § 11(1) (2015); see Matt Apuzzo & Eric Lipton, *Rare White House Accord with Koch Brothers on Sentencing Frays*, N.Y. TIMES (Nov. 24, 2015), <http://www.nytimes.com/2015/11/25/us/politics/rare-alliance-of-libertarians-and-white-house-on-sentencing-begins-to-fray.html> [<https://perma.cc/8S9L-EG9C>]; see also Jim Copland & Rafael A. Mangual, *Let's End Criminalization Without Representation*, NAT'L REV. (Jan. 14, 2017, 4:00 AM), <http://www.nationalreview.com/article/443856/criminal-justice-reform-over-criminalization-federal-agencies-congress-lawmaking> [<https://perma.cc/BNW4-WNE3>] (noting "[t]he lack of legislative progress" is due in part to the Administration's unwillingness to address mens rea reform).

152. See Apuzzo & Lipton, *supra* note 151; Copland & Mangual, *supra* note 151.

153. See, e.g., Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 402 (1993) ("[Strict liability] is a doctrine that contradicts the most basic principles of modern criminal law."); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 731 (1960) ("The proliferation of so-called 'strict liability' offenses in the criminal law has occasioned the vociferous, continued, and almost unanimous

own default mens rea requirement of recklessness, precisely because of the consensus view among those who study criminal law that it is inappropriate to punish people if they lack the requisite culpable state of mind.<sup>154</sup> Accepting mens rea reform would likely have led to passage of the mandatory minimum reforms as well.<sup>155</sup>

But whatever the views of Democrats in Congress or criminal law scholars, mens rea was a dealbreaker for the Department because it believed such a requirement would make it too difficult to prove its cases, particularly those involving environmental and regulatory offenses.<sup>156</sup> From the Department's perspective, its resistance made sense. It gained little as an institution from the mandatory minimum reductions, but it would lose a great deal in its ability to perform its tasks if mens rea requirements were added to its workload. It is, however, far from clear that a disinterested observer would make the same calculation. A trade-off that would give retroactive relief to the almost five thousand individuals serving crack sentences under the old 100-to-1 ratio and limit the damage caused by mandatory minimums in exchange for the adoption of a criminal law principle that has been a bedrock element of culpability does not seem so bad. Indeed, for many it is a win-win.

Not everyone agrees, of course, with how to balance the various interests at stake in a piece of criminal justice legislation, and reasonable people can disagree on the trade-off between mens rea requirements and a reduction in mandatory minimum sentences.<sup>157</sup> It may be that the White House itself, even without the Department's viewpoint, did not want to trade some mandatory minimum sentencing reductions for a greater burden in regulatory crime cases. As outsiders, we cannot know where the opposition arose.

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criticism of analysts and philosophers of the law.”).

154. See Levenson, *supra* note 153, at 452 (explaining how the Model Penal Code “requires proof of a culpable mental state” in order for something to be labeled a crime); Wasserstrom, *supra* note 153, at 731 (noting that the Model Penal Code provisions on culpability are considered a “frontal attack” on strict liability).

155. See Paul J. Larkin, Jr., “A Day Late and a Dollar Short”: President Obama’s Clemency Project 2014 at 11 (Mar. 8, 2017) (unpublished manuscript) (on file with authors).

156. See, e.g., Apuzzo & Lipton, *supra* note 151 (listing examples provided by the Department). President Obama seemed to agree with the Department’s views, noting that “mens rea reform ... could undermine public safety and harm progressive goals.” Obama, *supra* note 2, at 829 n.89.

157. See *id.*

What we do know is that, in making an informed decision, it is critical for the President to be guided by a diverse group of perspectives and not simply the Department, whose position will always favor law enforcement interests above all else.

It is particularly important for the President to be advised on legislative proposals from sources other than just the Department because the President cannot control the exercise of prosecutorial discretion directly. It is not the President's place to interfere in individual cases or tell the Department how to select which targets to pursue and which ones to leave alone.<sup>158</sup> But it is the President's duty to consider what criminal law legislation should be pursued, and that inquiry should take into account—among other things—how the legislation will interact with prosecutorial discretion. Prosecutors will rarely—if ever—see a problem with laws that expand their powers (either by imposing mandatory sentencing or reducing the elements that must be proven beyond a reasonable doubt) because they will always trust themselves to exercise discretion and will prefer to make those decisions without hindrance.<sup>159</sup> But if one is balancing and considering other interests—the protection of individual liberty, the risk of overcharging, the danger that sentencing enhancements will be used as leverage to extract pleas even when cases are weak or to punish those who exercise the right to trial, the threat of disproportionate sentences in particular cases—then the value of a judicial check becomes obvious. It is better for the jury to make the assessment about mens rea and to have judges play a role in determining the sentence in cases, and not just the prosecutor. But a careful analysis of these values will not take place if only prosecutors do the weighing because any discretion given to another actor takes away theirs.

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158. The Department's decisions about charging policies are thus one area that we believe appropriately falls within the Department's purview. The Department changed several of its charging policies as part of the Smart on Crime push. Obama, *supra* note 2, at 824-26.

159. *See supra* notes 45-46 and accompanying text.

## 2. Clemency

Perhaps none of President Obama's criminal law projects received as much attention as his clemency initiative, which resulted in more than 1700 commutations of sentence.<sup>160</sup> President Obama properly took credit for “[r]ein vigorating [c]lemency,”<sup>161</sup> and encouraging people in prison to apply for commutations,<sup>162</sup> while remembering his gracious meeting with five clemency recipients.<sup>163</sup> Other claims he has made—that his efforts were “unprecedented,” and resulted in more grants “than the previous eleven Presidents combined”<sup>164</sup>—selectively count previous presidential clemency efforts<sup>165</sup> and should be viewed in a broader context. While President Obama's grants were laudable, it is also important to note that he denied nearly twice as many petitions as at least the past five Presidents combined—a statistic that would likely be even more lopsided if data on denials alone were available before the Carter Administration.<sup>166</sup> More fundamentally than these historical comparisons,

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160. *Clemency Statistics*, U.S. DEP'T JUSTICE, <https://www.justice.gov/pardon/clemency-statistics> [<https://perma.cc/8AHG-DTAL>] (statistics through January 19, 2017).

161. Obama, *supra* note 2, at 835.

162. *Id.* at 836.

163. *Id.* at 837.

164. *Id.* at 836-37. Those claims grew larger as the number of grants increased. See Neil Eggleston, *The Reinvigoration of the Clemency Authority*, WHITE HOUSE: BLOG (Jan. 19, 2017, 2:25 PM), <https://obamawhitehouse.archives.gov/blog/2017/01/19/reinvigoration-clemency-authority> [<https://perma.cc/EEA4-VREP>] (“[T]he President has granted more commutations than any president in this nation's history and has surpassed the number of commutations granted by the past 13 presidents combined.”).

165. Specifically, these claims focus on commutations but ignore pardons, and thus, ignore the efforts of President Ford, who granted more than thirteen thousand pardons to draft evaders and army deserters. See Casey Tolan, *The Bold Step President Obama Could Take to Let Thousands of Federal Inmates Go Free*, FUSION (May 4, 2016, 3:44 PM), <http://fusion.net/story/298158/obama-clemency-board-gerald-ford/> [<https://perma.cc/4ESR-CYJK>].

166. U.S. DEP'T JUSTICE, *supra* note 160; *Current Fiscal Year Clemency Statistics*, U.S. DEP'T JUSTICE, <https://www.justice.gov/pardon/current-fiscal-year-clemency-statistics> [<https://perma.cc/U3PU-EL5Y>] (statistics through January 19, 2017). According to these statistics, President Obama denied 18,749 clemency petitions. U.S. DEP'T JUSTICE, *supra*. Presidents Carter through George W. Bush denied 11,305 combined. U.S. DEP'T JUSTICE, *supra* note 160. The Department of Justice keeps records differently before President Carter's Administration. For the earlier period, the Department consolidates denials with petitions that were closed without presidential action, so it is not possible to know what percentage of those were denials. *Id.* President Obama's denial rate is also comparable to previous Presidents. President Obama received 33,149 clemency petitions and denied 57 percent of them, whereas Presidents Carter through George W. Bush received a combined total of 17,150 petitions and

President Obama's efforts largely failed if the goal was to (as he put it) "address particularly unjust sentences in individual cases" because so many deserving people were denied or never received an answer.<sup>167</sup> A primary cause of this failure was again the central involvement of the Department.<sup>168</sup>

Obama failed to heed the advice of his first White House Counsel, Gregory Craig, who devised a plan to move clemency out of the Department and into the hands of an independent commission.<sup>169</sup> Consistent with his general deference to the Department, Obama chose to leave clemency primarily in its hands, despite the obvious conflict of interest inherent in allowing prosecutors to control the review of their own work.<sup>170</sup> Predictably, the pardon power languished, with only one sentence commuted in Obama's first term.<sup>171</sup> Indeed, "President Obama granted fewer clemency applications than any full-term President since George Washington" in his first term.<sup>172</sup>

Eventually, people began to notice that President Obama's clemency record did not match his rhetoric on criminal law. Beginning in 2011, ProPublica reporters Dafna Linzer and Cora Currier embarked on a series of articles outlining some of the failings of the Administration in using the pardon power.<sup>173</sup> The headline *Obama*

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denied 66 percent of them. *Id.*

167. Obama, *supra* note 2, at 836.

168. We follow in the footsteps of other experts who have urged moving clemency out of the Department. See Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1167-68 (2010); Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 231 (2003); Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89, 103-06 (2015); Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447, 456-60 (2009); Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse?*, 13 FED. SENT'G REP. 177, 178 (2001); Charles Shanor & Marc Miller, *Pardon Us: Systemic Presidential Pardons*, 13 FED. SENT'G REP. 139, 144 (2001).

169. Bill Keller, *The Bureaucracy of Mercy*, MARSHALL PROJECT (Dec. 14, 2015), <https://www.themarshallproject.org/2015/12/13/the-bureaucracy-of-mercy#.OWbVOK106> [<https://perma.cc/G4ED-3GKP>].

170. See Love, *supra* note 168, at 103, 105; Margaret Colgate Love, *Obama's Clemency Legacy: An Assessment*, 29 FED. SENT'G REP. 271, 272-73 (2017).

171. See U.S. DEP'T JUSTICE, *supra* note 160.

172. Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 855 (2016).

173. The complete series is available at the ProPublica web site: *Presidential Pardons*, PROPUBLICA, <https://www.propublica.org/series/presidential-pardons> [<https://perma.cc/2KXD->

*Has Granted Clemency More Rarely than Any Modern President*<sup>174</sup> is typical of their coverage. By late 2013, other writers had begun to follow ProPublica's lead. Perhaps stung by headlines like *Judging from His Clemency Record, Obama Likes Turkeys 10 Times as Much as People*,<sup>175</sup> and *Obama Neglects His Power to Pardon*,<sup>176</sup> there was finally some movement from the Administration on clemency in January 2014<sup>177</sup>—inexcusably, too late to make clemency a real mechanism of reform.

Unfortunately, the first tentative step came from the Department and signaled a fundamental misunderstanding of what had gone wrong with the clemency process. On January 30, Deputy Attorney General James Cole gave a speech at the New York State Bar Association Annual Meeting.<sup>178</sup> There he correctly noted that the federal prison population had grown by nearly 800 percent in thirty years, before moving onto issues of fairness, and then pivoting to clemency.<sup>179</sup> After describing the eight people who had received commutations the previous month from President Obama, Cole made a request of the bar association members, telling them, “This is where

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98HX]. Many of the pieces in the series were featured in the *Washington Post*. See, e.g., Dafna Linzer & Jennifer LaFleur, *ProPublica Review of Pardons in Past Decade Shows Process Heavily Favored Whites*, WASH. POST (Dec. 3, 2011), [https://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favoredwhites/2011/11/23/gIQAElvQO\\_story.html?utm\\_term=.36bc6ba03e3e](https://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favoredwhites/2011/11/23/gIQAElvQO_story.html?utm_term=.36bc6ba03e3e) [<https://perma.cc/8YAM-Z3HM>].

174. Dafna Linzer, *Obama Has Granted Clemency More Rarely than Any Modern President*, PROPUBLICA (Nov. 2, 2012, 9:00 AM), <https://www.propublica.org/article/obama-has-granted-clemency-more-rarely-than-any-modern-president> [<https://perma.cc/XNN6-NR5W>].

175. Jacob Sullum, *Judging from His Clemency Record, Obama Likes Turkeys 10 Times as Much as People*, FORBES (Nov. 27, 2013, 12:19 PM), <http://www.forbes.com/sites/jacobsullum/2013/11/27/judging-from-his-clemency-record-obama-likes-turkeys-10-times-as-much-as-people/> [<https://perma.cc/M3SG-MZ6J>] (noting that Obama had pardoned ten turkeys but commuted the sentence of only one drug offender).

176. Editorial Bd., *Obama Neglects His Power to Pardon*, WASH. POST (Dec. 1, 2013), [https://www.washingtonpost.com/opinions/obama-neglects-his-power-to-pardon/2013/12/01/283600c8-579c-11e3-8304-caf30787c0a9\\_story.html](https://www.washingtonpost.com/opinions/obama-neglects-his-power-to-pardon/2013/12/01/283600c8-579c-11e3-8304-caf30787c0a9_story.html) [<https://perma.cc/VUC4-V47Q>].

177. Kevin Johnson, *States Asked to Identify Prison Candidates for Clemency*, USA TODAY (Jan. 30, 2014, 5:12 PM), <http://www.usatoday.com/story/news/nation/2014/01/30/state-bar-offenders-clemency/5052847/> [<https://perma.cc/F83T-3EJU>].

178. James Cole, Deputy Attorney Gen., Remarks as Prepared for Delivery by Deputy Attorney General James Cole at the New York State Bar Association Annual Meeting (Jan. 30, 2014), <https://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-cole-new-york-state-bar> [<https://perma.cc/98DG-G8R7>].

179. *Id.*

you can help. We are looking to the New York State Bar Association and other bar associations to assist potential candidates for executive clemency.”<sup>180</sup>

Though the idea was—at that point—far from fleshed out, Deputy Attorney General Cole’s speech made three things clear: an expansion of clemency was worthwhile, the problems with clemency could be addressed in part through the representation of people in federal prison by pro bono attorneys, and the clemency process itself would remain embedded in the Department.<sup>181</sup> The first was true, the second was not, and the third was the mistake that would be the ultimate stumbling block for the project.

In April 2014, the rest of the plan became clearer. Disgraced Pardon Attorney Ronald Rogers was finally dispatched, a new pardon attorney came on board, and a broad project to solicit petitions and find representation for people in prison was announced.<sup>182</sup> However, even at this turning point—a point that could only have been reached with the approval of the President—it was settled that the Department was firmly in control. The initiative was not announced by the President himself, or even the Attorney General; that again was left to Deputy Attorney General Cole.<sup>183</sup> The visual image was striking: an initiative to undo harsh sentencing came literally from the very building from which that harsh sentencing had sprung, a stone edifice full of prosecutors who had put some of those same people in prison.<sup>184</sup>

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180. *Id.*

181. *See id.*

182. *See* Press Release, U.S. Dep’t of Justice, Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details New Criteria for Applicants (Apr. 23, 2014), <https://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new> [<https://perma.cc/JC9U-QMGJ>]; Sari Horwitz, *Justice Department Outlines Criteria for Clemency to Nonviolent Prison Inmates*, WASH. POST (Apr. 23, 2014), [https://www.washingtonpost.com/world/national-security/justice-department-outlines-criteria-for-clemency-to-nonviolent-prison-inmates/2014/04/23/1c5e9932-cad7-11e3-95f7-7ecdde72d2ea\\_story.html](https://www.washingtonpost.com/world/national-security/justice-department-outlines-criteria-for-clemency-to-nonviolent-prison-inmates/2014/04/23/1c5e9932-cad7-11e3-95f7-7ecdde72d2ea_story.html) [<https://perma.cc/H5RV-E95M>].

183. Deputy Attorney General Cole’s in-person announcement was accompanied by a video statement by Attorney General Eric Holder made earlier that week. Eric H. Holder, Jr., Attorney Gen., *Expanding Executive Clemency Criteria*, U.S. DEP’T JUSTICE (Apr. 21, 2014), <https://www.justice.gov/opa/video/expanding-executive-clemency-criteria> [<https://perma.cc/3B64-2GJD>].

184. Photos of the announcement show Deputy Attorney General Cole in the Department briefing room. *See* Dafna Linzer, *Justice Finally Comes to the Pardons Office and Perhaps to Many Inmates*, MSNBC (Apr. 23, 2014, 12:49 PM), <http://www.msnbc.com/msnbc/justice->

The plan Deputy Attorney General Cole announced focused on two things: encouraging people in prison to apply for clemency and establishing a system to assign them attorneys in the private sector.<sup>185</sup> At the same time, it concisely described the criteria for the project, which was intended to focus on people serving long sentences without a history of violence.<sup>186</sup> To match up people in prison with lawyers and vet the petitions, Deputy Attorney General Cole had assembled a group of prominent outside organizations—the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the American Bar Association, Families Against Mandatory Minimums, and the federal defenders—which collectively became known as “Clemency Project 2014” or CP14 for short.<sup>187</sup> By making some of the institutional critics of the Department its partners in the initiative, the Administration was able to ensure a relative absence of dissent within Washington criminal reform circles.<sup>188</sup>

The criteria Deputy Attorney General Cole announced<sup>189</sup> defined the project in confounding ways. Though the primary focus was

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finally-comes-the-pardons-office [https://perma.cc/XHH6-FFZW].

185. Press Release, U.S. Dep’t of Justice, *supra* note 182.

186. Deputy Attorney General Cole’s written press release announced that [u]nder the new initiative, the department will prioritize clemency applications from inmates who meet all of the following factors:

- They are currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense(s) today;
- They are non-violent, low-level offenders without significant ties to large scale criminal organizations, gangs or cartels;
- They have served at least 10 years of their prison sentence;
- They do not have a significant criminal history;
- They have demonstrated good conduct in prison; and
- They have no history of violence prior to or during their current term of imprisonment.

*Id.*

187. Lorelei Laird, *Massive Volunteer Effort Will Help with Obama Clemency Proposal*, ABAJ, (May 30, 2014, 8:45 PM), [http://www.abajournal.com/news/article/massive\\_volunteer\\_effort\\_will\\_help\\_with\\_obama\\_clemency\\_proposal/](http://www.abajournal.com/news/article/massive_volunteer_effort_will_help_with_obama_clemency_proposal/) [https://perma.cc/TFZ5-4BKW].

188. Alone among experts in the field, leaders of the Clemency Project 2014 consortium have heralded that Project as a noble success. *See, e.g.,* Norman L. Reimer, *The Commutation Legacy of President Barack Obama: Reflections on Clemency Project 2014—The Legal Profession’s Response to a Call for Help*, CHAMPION, Dec. 2016, at 16.

189. *See* Press Release, U.S. Dep’t of Justice, *supra* note 182.

clearly narcotics crimes,<sup>190</sup> the criteria failed to explicitly mention this. The result was that the Bureau of Prisons (BOP) solicited petitions from every person in federal prison,<sup>191</sup> including child pornography offenders, white collar criminals, and others who may have met the expressly stated criteria but would ultimately have little to no chance of getting clemency based on the de facto focus on those incarcerated for drug offenses. At the same time, the criteria tracked exactly some of the more miserly practices of the Department in other policies. For example, as with charging policies,<sup>192</sup> the Department broadly concerned itself with not allowing breaks for “gang members,” despite the difficulty of understanding and defining that term and the ease with which any group of people (especially younger people and people of color) might find themselves labeled a “gang.”<sup>193</sup>

Another criterion, perhaps the most important one, plainly reflected the defensive crouch of the Department as it managed clemency: the requirement that the petitioner “likely would have received a substantially lower sentence if convicted of the same offense(s) today.”<sup>194</sup> With this limitation, the Department effectively insulated itself from second-guessing the choices made by line assistants, because the project would now be principally targeted at changes in the law rather than the overzealousness of prosecutors.

While it created a scramble to determine what the new criteria meant, the clemency initiative did nothing to change the existing

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190. In his speech to the New York Bar, Deputy Attorney General Cole said, “We anticipate that the petitioners potentially eligible for consideration would include: non-violent, low-level drug offenders.” Cole, *supra* note 178. All of the clemency recipients were incarcerated for drug crimes. U.S. SENTENCING COMM’N, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE 9 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901\\_clemency.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf) [<https://perma.cc/Z2SZ-ZZ5H>] (“[A]ll the offenders who received commutations under the Initiative had committed a drug trafficking offense.”).

191. See Press Release, U.S. Dep’t of Justice, *supra* note 182.

192. In his August 2013 memorandum on charging, Attorney General Holder stipulated that mandatory minimums would continue to be enforced where a defendant has “significant ties” to a gang. *Holder Memorandum*, *supra* note 68, at 2.

193. Even experts acknowledge that “we still know little about the psychology of gang membership—street or prison” and “little about the links between street and prison gangs.” Jane L. Wood et al., *Predicting Involvement in Prison Gang Activity: Street Gang Membership, Social and Psychological Factors*, 38 LAW & HUM. BEHAV. 203, 205 (2014) (citation omitted).

194. See Press Release, U.S. Dep’t of Justice, *supra* note 182.

structure for evaluating clemency petitions. It was—and remains—a long vertical bureaucracy that winds through four federal buildings and no fewer than seven levels of review.<sup>195</sup> It begins with the petition landing on the desk of a staffer at the Office of the Pardon Attorney, the first of four Department employees who will perform an investigation, evaluate the case, and draft a memorandum with a recommended outcome.<sup>196</sup> This is reviewed by the Pardon Attorney, who is responsible for the recommendation that will then go up the chain.<sup>197</sup> The file then goes over to Main Justice, where staff assigned to the Deputy Attorney General review the case.<sup>198</sup> They make their recommendation to the Deputy Attorney General,<sup>199</sup> who again goes over the file.<sup>200</sup> At that point, the case is shuttled across town to the staff of the White House Counsel,<sup>201</sup> who review clemency cases amongst many other tasks.<sup>202</sup> Next up is the White House Counsel, who gives the case its penultimate review before (finally) sending it to the President.<sup>203</sup> The process often takes years.<sup>204</sup>

CP14 did nothing to change the stunningly inefficient Department bureaucracy described above. Instead, it just added more lay-

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195. See Mark Osler, *Clementia, Obama, and Deborah Leff*, 28 FED. SENT'G REP. 309, 309 (2016). The Pardon Attorney is housed at a satellite Department building in Washington, the Deputy Attorney General works at the “Main Justice” building at 950 Pennsylvania Avenue, the White House Counsel staff is located at the Eisenhower Executive Office Building, and the President, of course, is at the White House. *Id.*

196. See Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 36-38 (2005).

197. *Id.* at 39. Those at the levels above the Pardon Attorney—the Deputy Attorney General, White House Counsel, and their staffs, as well as the President—normally only see this recommendation, not the complete file. *See id.* at 40-41.

198. Osler, *supra* note 195, at 309.

199. 28 C.F.R. § 0.36 (2008).

200. *See id.* The Deputy Attorney General is the direct supervisor of the U.S. Attorneys and their Assistants. *Organization, Mission & Functions Manual: Attorney General, Deputy and Associate*, U.S. DEP'T JUSTICE, <https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general#dag> [<https://perma.cc/7VXQ-YVC8>]. The Department of Justice's organizational chart illustrates the remarkable breadth of the job. *See DOJ Organizational Chart*, *supra* note 50.

201. Sari Horwitz, *Struggling to Fix a “Broken” System*, WASH. POST (Dec. 5, 2015), <http://www.washingtonpost.com/sf/national/2015/12/05/holderobama/> [<https://perma.cc/CVB7-JN82>].

202. *Presidential Department Descriptions*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/participate/internships/departments> [<https://perma.cc/VFA5-DR8F>].

203. *See Osler, supra* note 195, at 309.

204. Kimberly Lawson, *How Significant Are Obama's 1,385 Commutations?*, BROADLY (Jan. 18, 2017, 7:29 PM), [https://broadly.vice.com/en\\_us/article/how-significant-are-obamas-1385-commutations](https://broadly.vice.com/en_us/article/how-significant-are-obamas-1385-commutations) [<https://perma.cc/S5NJ-RX3Q>].

ers. On top of the unwieldy process described above, CP14 created its own process, with redundant reviews and part-time experts.<sup>205</sup> Surveys from more than thirty-six thousand people in prison were sent to CP14 for an initial screen for basic disqualifiers.<sup>206</sup> From there, four more points of review were established (for a total of five, including the initial screen): a pro bono attorney assessed the case, then a “screening committee” reviewed a summary prepared by the attorney, followed by a similar, redundant review by a “steering committee.”<sup>207</sup> At this point, a petition would be drafted and reviewed by CP14,<sup>208</sup> before being submitted to the Pardon Attorney to then run the entire gauntlet within the Administration. In all, a clemency case traversing CP14 and then the Administration would face no less than a dozen sequential chokepoints with a varied array of personnel and filters, with no safeguards for consistency.

This model was not the only option. Indeed, in choosing this model, President Obama rejected the clearest precedent for a successful large-scale clemency project: Gerald Ford’s 1974-1975 bipartisan Presidential Clemency Board, which resulted in more than thirteen thousand pardons for draft evaders and deserters from the armed services during the Vietnam era.<sup>209</sup> President Ford managed to give each case individual consideration while maintaining a scale Obama could not, all while avoiding controversy. As writer Abby Rapoport noted, “Ford’s boards made it easier to give draft-dodgers more just sentences; they considered each application individually, but the sheer number of cases meant that the media and public didn’t—*couldn’t*—scrutinize each pardon individually.”<sup>210</sup> Critically, Ford did this by circumventing the normal process by taking it out of the Department.<sup>211</sup>

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205. See Keller, *supra* note 169.

206. *Clemency Project 2014*, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, <https://www.nacdl.org/cp2014/> [<https://perma.cc/MTG2-G26P>].

207. Keller, *supra* note 169.

208. *Id.*; Osler, *supra* note 195, at 309-10.

209. Tolan, *supra* note 165.

210. Abby Rapoport, *Why Obama Should Take a Cue from Gerald Ford on Crack Pardons*, AM. PROSPECT (Feb. 6, 2014), <http://prospect.org/article/why-obama-should-take-cue-gerald-ford-crack-pardons> [<https://perma.cc/NLK3-H4ZT>].

211. See *id.* The Ford model was not a mystery to the Obama administration; advocates presented the Ford Commission’s Report to several officials in the White House and the Department of Justice. See Tolan, *supra* note 165.

If CP14 was unsuccessful in altering the Department-centered process that had served prior Presidents poorly,<sup>212</sup> it was a resounding success at something else: creating new hope among people in federal prisons. Attorney General Holder publicly predicted that ten thousand people might be freed<sup>213</sup> and the BOP sent a notice about the project along with the criteria for eligibility to every person in federal prison.<sup>214</sup>

Over the next two years, it became clear that those hopes would not be realized, and that neither CP14 nor the Department were up to the task. The Marshall Project reported the grim statistics about twenty months after the announcement of CP14: more than thirty-three thousand applications had resulted in just 224 petitions submitted to the Pardon Attorney, and only four cases had been granted commutations after going through the CP14 gauntlet.<sup>215</sup> Clearly, the tactics of adding bureaucracy and keeping the Department at the center of the action was not working.

Outside observers were not alone in reporting these struggles. Deborah Leff, who became the Pardon Attorney in April of 2014,<sup>216</sup> resigned less than two years after being appointed.<sup>217</sup> A few months later, her resignation letter to Deputy Attorney General Sally Yates became public.<sup>218</sup> One sentence in that letter laid bare the problem

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212. See Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1195-1203 (2010). Within the Bush Administration, two White House Counsels (Harriet Miers and Fred Fielding) had complained that good cases were not reaching their desk. See Linzer & LaFleur, *supra* note 173.

213. Dara Lind, *President Obama Was Supposed to Shorten 10,000 Prison Sentences. What Happened?*, VOX (Mar. 29, 2016, 12:40 PM), <http://www.vox.com/2016/3/29/11325502/obama-pardon-clemency-leff> [<https://perma.cc/S6CG-SLVD>].

214. The text of that letter is available at Notice to Inmates: Initiative on Executive Clemency, Fed. Bureau of Prisons, U.S. Dep't Justice, [https://www.bop.gov/resources/news/pdfs/Notice\\_to\\_Inmates\\_Initiative\\_on\\_Executive\\_Clemency.pdf](https://www.bop.gov/resources/news/pdfs/Notice_to_Inmates_Initiative_on_Executive_Clemency.pdf) [<https://perma.cc/585P-A3GX>].

215. Keller, *supra* note 169. The final number of inmate applications later topped thirty-six thousand. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 206.

216. Linzer, *supra* note 184.

217. See Letter from Deborah Leff, Pardon Attorney, U.S. Dep't of Justice, to Sally Quilian Yates, Deputy Attorney Gen., U.S. Dep't of Justice (Jan. 15, 2016), *reprinted in* 28 FED. SENT'G REP. 312 (2016) [hereinafter Leff Letter]. Leff was not a career prosecutor, unlike her predecessor and successor. See Carrie Johnson, *New Pardon Chief in Obama Justice Department Inherits a Huge Backlog*, NPR (Feb. 3, 2016, 2:00 PM), <http://www.npr.org/2016/02/03/465429779/new-pardon-chief-in-obama-justice-department-inherits-host-of-problems> [<https://perma.cc/Z9DA-VA99>] (describing successor Robert Zauzmer's background); Linzer, *supra* note 184 (describing predecessor Ronald L. Rodgers's and Deborah Leff's backgrounds).

218. Gregory Korte, *Former Administration Pardon Attorney Suggests Broken System in*

with clemency's circuitous route through the Department of Justice: "In addition, as you know, I have been deeply troubled by the decision to deny the Pardon Attorney all access to the Office of White House Counsel, even to share the reasons for our determinations in the increasing number of cases where you have reversed our recommendations."<sup>219</sup> The sequential chain of decision-making had become so long and strained that one end could no longer communicate with the other, and the President never found out when the Pardon Attorney recommended a grant but was overruled by the Deputy Attorney General.<sup>220</sup>

Part of the problem was a lack of resources.<sup>221</sup> In announcing the initiative, Deputy Attorney General Cole promised that Department lawyers would be detailed to the Office of the Pardon Attorney to help deal with the predictable influx of cases.<sup>222</sup> As Leff's resignation letter made clear, that help never came, despite a dramatic increase in the office's caseload.<sup>223</sup>

As President Obama's second term came to an end and it was clear that his clemency project was unlikely to reach all the eligible candidates under his initiative, a group of experts and advocates wrote an open letter to the President, urging him to "determine that nonviolent offenders in certain extremely low-risk categories either deserve expedited review or should be granted clemency absent an individualized review."<sup>224</sup> The letter urged particular attention to those who were sentenced under the old 100-to-1 crack sentencing

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*Resignation Letter*, USA TODAY (Mar. 28, 2016, 5:37 PM), <http://www.usatoday.com/story/news/politics/2016/03/28/former-administration-pardon-attorney-suggests-broken-system-resignation-letter-obama/82168254/> [<https://perma.cc/Z4HZ-RRTT>].

219. Leff Letter, *supra* note 217.

220. When Leff's letter became public, the Department changed that policy. See Sari Horwitz, *Lack of Resources, Bureaucratic Tangles Have Bugged Down Obama's Clemency Efforts*, WASH. POST (May 6, 2016), [https://www.washingtonpost.com/politics/courts\\_law/lack-of-resources-bureaucratic-tangles-have-bugged-down-obamas-clemency-efforts/2016/05/06/9271a73a-1202-11e6-93ae-50921721165d\\_story.html](https://www.washingtonpost.com/politics/courts_law/lack-of-resources-bureaucratic-tangles-have-bugged-down-obamas-clemency-efforts/2016/05/06/9271a73a-1202-11e6-93ae-50921721165d_story.html) [<https://perma.cc/BPV9-GQR4>] (noting that the Department decided to allow Leff's replacement to have contact with the White House).

221. *Cf.* Leff Letter, *supra* note 217 (claiming she cannot fulfill her responsibilities as Pardon Attorney without the previously promised additional staff).

222. Press Release, U.S. Dep't of Justice, *supra* note 182.

223. Leff Letter, *supra* note 217.

224. Letter from Glenn E. Martin, President, JustLeadershipUSA, et al. to President Barack Obama (Nov. 29, 2016), [http://www.law.nyu.edu/sites/default/files/upload\\_documents/Expanded%20Clemency%20Letter%20to%20POTUS.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/Expanded%20Clemency%20Letter%20to%20POTUS.pdf) [<https://perma.cc/2CVV-4RVW>].

structure.<sup>225</sup> Despite the fact that by the last few months of the Obama presidency, it was clear that statutory reform was not going to happen and that no other avenues existed for thousands of easily identified people who would be free if sentenced under the current crack law, Attorney General Loretta Lynch told reporters that a categorical approach “would be hard to craft.”<sup>226</sup> That statement is hard to understand, because it was always an option for the Attorney General to ask the Sentencing Commission to provide him or her with lists of people who met the different criteria deemed important to the Department.<sup>227</sup> And of course the Department’s rejection of categories of people who merited sentencing relief stands in sharp contrast to its endorsement of using categorical bars to limit who could get retroactive adjustments under the Sentencing Guidelines.<sup>228</sup> In the latter context, the Department had no trouble crafting categories in barring people from accurate-length sentences.<sup>229</sup>

Certainly, many in the Obama Administration worked hard on clemency,<sup>230</sup> but in part that was because of the inefficiency of the process—you have to pedal hard to get a rusty bicycle to move. The Administration got off to a late start even thinking about clemency and then struggled to keep up with the number of petitions filed.<sup>231</sup>

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225. *See id.* President Obama could have given all the individuals serving sentences under the old crack laws the opportunity to petition a judge for resentencing, allowing them to make an argument for being sentenced under the Fair Sentencing Act of 2010 terms, while also allowing judges to check to be sure a public safety risk did not exist. *See* Larkin, *supra* note 155, at 11-12 (describing potential provisions a wide-scale commutation order could contain). Paul Larkin lays out how this process could have been constructed. *See id.*

226. Laura Jarrett, *AG Loretta Lynch Says Don’t Expect Blanket Pardons from Obama*, CNN (Dec. 15, 2016, 5:25 PM), <http://www.cnn.com/2016/12/15/politics/lynch-no-blanket-pardons/> [<https://perma.cc/KF3G-KVGC>].

227. *See* 28 U.S.C. § 994(w)(1), (4) (2012) (requiring the Commission to make data files regarding the reasons for imposing a sentence available to the Attorney General upon request).

228. *See supra* note 101 and accompanying text.

229. *See supra* note 102 and accompanying text.

230. White House Counsel Neil Eggleston alluded to this when he hyperbolically claimed that he told his staff, “No more eating, sleeping or drinking until we get all these commutations done.” Sarah Wheaton, *White House Promises to Speed up Clemency Program*, POLITICO (Apr. 1, 2016, 1:23 PM), <http://www.politico.com/blogs/under-the-radar/2016/04/white-house-clemency-speeding-up-221467> [<https://perma.cc/L4JW-HM7P>].

231. *See* Jacob Sullum, *Obama Issued More Commutations than Any Previous President but Neglected Pardons*, REASON: HIT & RUN (Jan. 20, 2017, 7:30 AM), <http://reason.com/blog/2017/01/20/obama-issued-more-commutations-than-any> [<https://perma.cc/NP3P-UVSM>] (claiming “the most striking aspect of Obama’s commutations” are their concentration at the end of his

A full 89 percent of the clemency grants took place in President Obama's last ten months in office, a stark contrast with most previous Presidents who granted clemency continuously from the beginning of their terms.<sup>232</sup> Thirty-one percent of these grants came in the final month.<sup>233</sup> Deputy Attorney General Sally Yates told the *Washington Post* that she reviewed "hundreds of petitions" over the 2016 holidays while working "24-7 over the Christmas break."<sup>234</sup> We applaud Yates's commitment, but a process where a key official is reviewing hundreds of petitions with lives at stake over a holiday is simply not part of a process that is well designed. It also might explain the large number of people who never got an answer from the Obama Administration on their clemency application, even though they filed their petitions by the Administration's stated deadline.<sup>235</sup>

Obama's process failed to reach all the people who met the Administration's stated criteria,<sup>236</sup> much less all the people who deserved clemency. The clearest measure of success is not the total number of clemencies granted (as the Administration touted throughout his presidency),<sup>237</sup> but the rate of grants against the

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Administration).

232. *See id.*

233. *See* U.S. DEP'T JUSTICE, *supra* note 160.

234. Sari Horwitz, *Obama to Commute Hundreds of Federal Drug Sentences in Final Grants of Clemency*, WASH. POST (Jan. 16, 2017), [https://www.washingtonpost.com/world/national-security/obama-to-commute-hundreds-of-federal-drug-sentences-in-final-grants-of-clemency/2017/01/16/c99b4ba6-da5e-11e6-b8b2-cb5164beba6b\\_story.html?hpid=hp\\_hp-banner-low\\_criminal-justice-240pm%3Ahomepage%2Fstory&utm\\_term=.75d5a3672387](https://www.washingtonpost.com/world/national-security/obama-to-commute-hundreds-of-federal-drug-sentences-in-final-grants-of-clemency/2017/01/16/c99b4ba6-da5e-11e6-b8b2-cb5164beba6b_story.html?hpid=hp_hp-banner-low_criminal-justice-240pm%3Ahomepage%2Fstory&utm_term=.75d5a3672387) [<https://perma.cc/6RQY-K4G3>]; *see also* U.S. DEP'T JUSTICE, *supra* note 160 (indicating that President Obama granted 539 commutations between December 19, 2016, and January 19, 2017).

235. *See* U.S. DEP'T JUSTICE, *supra* note 160 (indicating that at the end of the Obama Administration, 4250 clemency petitions were closed without presidential action, while 8880 were pending—neither acted upon nor administratively closed); Sean Nuttall, *Inside the Clemency Lottery*, MARSHALL PROJECT (Jan. 26, 2017, 10:00 PM), [https://www.themarshallproject.org/2017/01/26/inside-the-clemency-lottery?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20170127-681#.G7SOYsLCd](https://www.themarshallproject.org/2017/01/26/inside-the-clemency-lottery?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20170127-681#.G7SOYsLCd) [<https://perma.cc/BMD7-7XSB>] (noting that approximately 10 percent of the two hundred petitions filed by the Clemency Resource Center remained pending without an answer, despite being filed by the stated Department deadlines).

236. *See* Nuttall, *supra* note 235 (claiming "petitions that clearly appeared to meet the criteria" were ultimately denied, while others never received a decision at all).

237. *See supra* notes 160-65 and accompanying text.

total number of meritorious petitions submitted.<sup>238</sup> A report by the United States Sentencing Commission identified 2687 individuals convicted of drug trafficking offenses who met the 6 criteria, yet only 92 of them received clemency—just a little more than 3 percent.<sup>239</sup> And that is holding to the initial announced criteria. If one takes a broader view, there are many more left behind. The grants offer only the numerator; to understand what happened to the hope that President Obama and Attorney General Holder generated, we must consider the denominator as well, especially given the super-sized prison population. As Deputy Attorney General Cole acknowledged in his speech to the New York Bar, federal prison populations had gone up nearly 800 percent in the thirty years leading up to that moment. Those serving crack sentences under the 100-to-1 laws alone amounted to more than five thousand people.<sup>240</sup> Moreover, if one compares President Obama’s grant rate with other Presidents and not simply his total number of grants, the modesty of his clemency efforts becomes even clearer. His final grant rate relative to petitions received for both pardons and commutations was 5 percent.<sup>241</sup> By contrast, President Kennedy granted 36 percent of the petitions filed, President Johnson 31 percent, President Nixon 36 percent, President Ford 27 percent,<sup>242</sup> President Carter 21 percent, President Reagan 12 percent, President George H.W. Bush 5 percent, President Clinton 6 percent, and President George W. Bush 2 percent.<sup>243</sup> President Obama’s overall clemency grant rate was 5.3 percent, barely better than President Clinton and far behind

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238. Cf. *supra* notes 166-67 and accompanying text (claiming that despite the high number of grants, President Obama failed to meet his goal to address particularly unjust sentences).

239. U.S. SENT’G COMM’N, *supra* note 190, at 2.

240. See *Attorney General Confirmation Hearing Before the S. Comm. on the Judiciary, Day 1, Part 1*, CSPAN (Jan. 10, 2017), <http://cs.pn/2iaTFPr> [<https://perma.cc/BS42-4NXK>] (statement of Sen. Dick Durbin) (referring to the “almost five thousand still serving under this unfair 100-1 standard”).

241. U.S. DEP’T JUSTICE, *supra* note 166 (indicating that at the end of the Obama Administration, he had granted 212 pardons and 1715 commutations out of 36,544 total petitions received).

242. See Barkow, *supra* note 33, at 816-17. This figure does not include the over thirteen thousand pardons Ford issued outside of the regular clemency process to draft evaders and Army deserters. See *supra* note 165 and accompanying text. Presumably, the Pardon Attorney’s statistics only include cases that went through that office, and the Ford grants came through an alternative process.

243. Barkow, *supra* note 33, at 816-17.

Presidents Reagan, Carter, Ford, Nixon, and Johnson.<sup>244</sup> The numbers are even worse if one looks solely at pardons, in which President Obama's grant rate of 6 percent places him among the most frugal pardon-granters in history.<sup>245</sup> Moreover, shortly after President Donald Trump's inauguration, a pile of 11,374 clemency petitions were still pending; the Department and the White House never got to them.<sup>246</sup> Obama cranked the Department machine as hard as he could, but it was not capable of delivering on the promise of hope that he had made.

Beyond the failure reflected in the grant rates, deep tragedy occurred at a personal level. Some of those denied clemency were unworthy of it, of course. But others were prime candidates under the stated criteria and still did not receive relief.<sup>247</sup> Sean Nuttall<sup>248</sup> writes about his client, Tom, who at twenty-one years old became addicted to heroin.<sup>249</sup> Tom's girlfriend was also a drug user, and when she asked for heroin from Tom, he gave it to her, not realizing she had also taken a large quantity of cocaine.<sup>250</sup> Although Tom's girlfriend took only about one-twentieth the quantity needed for a lethal overdose of heroin, she died of an overdose because of the cocaine in her system.<sup>251</sup> Tom was charged with her death and with drug distribution.<sup>252</sup> The jury acquitted him of causing her death, but found him guilty of drug distribution.<sup>253</sup> The judge then sentenced Tom to eighty years in prison because he concluded—at odds

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244. U.S. DEP'T JUSTICE, *supra* note 160.

245. *See id.* (indicating that at the end of the Obama Administration, he had granted 212 pardons out of 3395 petitions received).

246. *See id.* Obama inherited 1943 commutation and pardon petitions, received another 36,544, and resolved only 27,144. *See id.*

247. *See Nuttall, supra* note 235 (claiming petitions that clearly met the clemency criteria were eventually denied).

248. Nuttall worked for the Clemency Resource Center, the organization we created to help get more clemency applicants legal help with their petitions. *See Clemency Resource Center, CTR. ON ADMIN. CRIMINAL L.*, <http://www.law.nyu.edu/centers/adminofcriminallaw/clemency> [<https://perma.cc/84D7-3SKF>]; *see also Nuttall, supra* note 235 (noting the author's work with the Clemency Resource Center).

249. *See Nuttall, supra* note 235 (claiming Tom became addicted to drugs after leaving home at age 16).

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

with the jury—that Tom had contributed to her death.<sup>254</sup> The judge wrote in support of Tom’s clemency petition before President Obama, explaining that the decision had haunted him ever since he made it.<sup>255</sup> Yet Nuttall writes that he had to give Tom “the same answer I had to give so many of our clients; [t]hat as deeply unsatisfactory as it must sound, the Obama administration’s clemency initiative was often a crapshoot.”<sup>256</sup> Indeed many of those denied seem indistinguishable from others who received their freedom.<sup>257</sup>

*USA Today* reporter Gregory Korte highlighted the puzzling case of Harold and DeWayne Damper, two brothers from Mississippi who “were indicted together, tried together, given the same sentence and, until recently, served their sentences at the same minimum-security prison.”<sup>258</sup> DeWayne had the more serious criminal record (two prior felony convictions as opposed to Harold’s one), yet it was DeWayne who got clemency and Harold who was denied.<sup>259</sup>

Deference to prosecutors had an additional dimension within the clemency initiative as well. Not only do prosecutors in Washington control the review process, but prosecutors in the office of conviction are also consulted regarding each petition viewed as promising.<sup>260</sup> Paul Larkin of the Heritage Foundation has written that in the waning days of the Obama initiative, the reliance on local prosecutors was even enhanced.<sup>261</sup>

Deference to those prosecutors—the local ones who put the defendant in prison for a long term in the first place—are written into the Pardon Attorney’s internal standards in language taken directly from the United States Attorney’s Manual, dictating that “[t]he views of the United States Attorney are given considerable

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254. *Id.*

255. *See id.* (noting the sentencing judge wrote a letter to the pardon attorney in support of Tom’s clemency petition).

256. *Id.*

257. Gregory Korte, *Two Brothers, Two Petitions for Clemency, Two Different Outcomes*, USA TODAY (Jan. 9, 2017, 6:47 PM), <http://www.usatoday.com/story/news/politics/2017/01/09/two-brothers-two-petitions-clemency-two-different-outcomes/96297020/> [<https://perma.cc/VZ36-AYXY>] (noting that the Damper brothers were given different commutation decisions despite the similarities of their cases).

258. *Id.*

259. *See id.*

260. *See* Morison, *supra* note 196, at 36-38.

261. *See* Paul J. Larkin, Jr., *Delegating Clemency*, 29 FED. SENT’G REP. 267, 267 (2017).

weight in determining what recommendations the Department should make to the President.”<sup>262</sup> Allowing local offices to have “considerable weight” in the reconsideration of sentences they sought will inevitably put a thumb on the scale for denying requests.<sup>263</sup> The mindset in favor of the status quo can be seen in a letter to the Pardon Attorney from a United States Attorney, recommending denial of clemency to a petitioner with a particularly sterling prison record:

[The] clemency application details what appears to be a remarkable turn-around during his time in custody. I cannot offer any insight into the representations about his progress. Nor can I be of much assistance in evaluating whether the changes, if true, warrant clemency. “Jailhouse conversions” are not uncommon, and I have no tools or experience with which to evaluate which ones are genuine or may endure beyond the confines of imprisonment.<sup>264</sup>

The petition was denied.<sup>265</sup> Within this one paragraph—and its remarkable skew against freedom—rests the problem with deference to prosecutors, particularly within the context of the Constitution’s specific grant of the clemency power to the President.

In failing to listen to his first White House Counsel or the advice of history to take clemency out of the hands of the Department,<sup>266</sup> the President neglected to reach thousands of worthwhile petitioners for clemency.<sup>267</sup> That failure cannot be blamed on Congress. President Obama had the clear authority to do more. But his decision to delegate this task to the Department sealed its fate, whether intended or not. While his clemency efforts resulted in more than a thousand grants, it left many thousands more behind, including those still serving 100-to-1 crack sentences.<sup>268</sup> Those denied relief

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262. *Standards for Consideration of Clemency Petitioners*, U.S. DEP’T JUSTICE § 1-2.111, <https://www.justice.gov/pardon/about-office-0> [<https://perma.cc/4G7R-VBVY>].

263. *Id.*

264. Letter from Richard L. Durbin, Jr., U.S. Attorney, to Deborah Leff, Pardon Attorney, Office of the Pardon Attorney, U.S. Dep’t of Justice (Aug. 30, 2015) (on file with authors).

265. See *Commutations Denied by President Barack Obama*, U.S. DEP’T JUSTICE, <https://www.justice.gov/pardon/obama-denials/commutations-denied-president-barack-obama> [<https://perma.cc/JZF7-Z9BZ>] (listing the names of persons whose petitions were denied).

266. See *supra* note 169 and accompanying text.

267. See *supra* note 247 and accompanying text.

268. See *supra* note 240 and accompanying text.

have suffered two grave injustices. First, they received a disproportionately long drug sentence. Second, they had their hopes legitimately raised to believe they would get relief if they met the Department's criteria, only to find that their cases were denied for some unexplained reason. In both cases, the decisions rested with prosecutors,<sup>269</sup> but the second one did not have to rest in prosecutorial hands, and it should not have been placed within an institution that is structurally biased against second-guessing its own decisions. For the thousands who remain in prison, this choice reflected a brutal timidity.

### 3. *Compassionate Release*

Clemency is not the only avenue for releasing people earlier than the date their federal prison sentence is set to expire. When it abolished parole in the federal system, Congress passed a law that gives the Director of the BOP, who sits within the Department, the authority to seek reductions in sentence for “extraordinary and compelling reasons,”<sup>270</sup> or what has more commonly been referred to as compassionate release. Congress then vested authority in the Sentencing Commission to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.”<sup>271</sup> The Commission's initial list included defendants with terminal illnesses and significant health problems.<sup>272</sup> These factors are unfortunately

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269. See Barkow, *supra* note 13, at 289-90 (describing how prosecutors have significant roles in the current clemency system).

270. 18 U.S.C. § 3582(c)(1)(A)(i) (2012). The law specifies two grounds for filing a motion: either “(i) extraordinary and compelling reasons warrant such a reduction” or (ii) the defendant is serving a life sentence because he or she has a previous violent felony and is now “at least 70 years of age, has served at least 30 years in prison, ... and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community.” *Id.* § 3582(c)(1)(A)(i)-(ii). In both cases, the statute requires that the reduction be “consistent with applicable policy statements issued by the Sentencing Commission.” *Id.* § 3582(c)(1)(A).

271. 28 U.S.C. § 994(t) (2012).

272. Until its recent amendments in 2016, the Commission's list included defendants suffering from a “terminal illness,” those “suffering from a permanent physical or medical condition, or ... experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement,” and situations involving “[t]he death or incapacitation of the

common occurrences for an increasingly aging federal prison population,<sup>273</sup> yet the BOP during President Obama's time in office rarely granted compassionate release. With a prison population averaging around two hundred thousand people, the BOP granted compassionate release to an average of only twenty-four people each year during his first term in office.<sup>274</sup> Even after critical reports of the BOP's practices from the Department's independent Inspector General (IG) prompted the Department to change some of its compassionate release policies,<sup>275</sup> the number of grants in the President's second term remained relatively slight compared to the overall population of elderly and sick individuals.<sup>276</sup>

This makes no sense if one were interested, as President Obama said he was, in "evidence-based solutions" to address "massive levels of incarceration [that] have not made us safer."<sup>277</sup> Elderly individuals and those with serious illnesses and health problems pose

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defendant's only family member capable of caring for the defendant's minor child or minor children." U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)(i)-(iii) (U.S. SENTENCING COMM'N 2015). The Commission also provided that the Bureau of Prisons could release individuals for other extraordinary and compelling reasons, making clear its list was not exhaustive. *See id.* § 1.B.1.13 cmt. n.1(A)(iv).

273. People aged fifty and over are the fastest growing segment of the federal prison population, increasing by 27 percent from 2009 to 2014. *See Public Hearing on Compassionate Release and Conditions of Supervision Before the U.S. Sentencing Comm'n* 63-65 (2016) [hereinafter U.S.S.C. Hearing], <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/Transcript.pdf> [https://perma.cc/S28B-49FA] (statement of Michael E. Horowitz, Inspector General, United States Department of Justice). Between 2009 to 2013, the number of incarcerated individuals age 65-69 increased by 41 percent and the number of individuals age 80 and older increased by 76 percent. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 2* (rev. ed. 2016), <https://oig.justice.gov/reports/2015/e1505.pdf> [https://perma.cc/9T6H-5GGN].

274. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, I-2013-006, *THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 1* (2013), <https://oig.justice.gov/reports/2013/e1306.pdf> [https://perma.cc/KQX2-R5GC].

275. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., *supra* note 273, at 42 (discussing the working group created to expand the use of compassionate release after the release of the 2013 compassionate release program report).

276. Between 2013 and 2015, 261 people received compassionate release. *See* Letter from Michelle Morales, Acting Dir., Office of Policy & Legislation, U.S. Dep't of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 17 (Feb. 12, 2016) [hereinafter Morales Letter], <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/DOJ.pdf> [https://perma.cc/Q6WX-MVP3]. The Bureau received more than 3,100 requests for compassionate release during this time. *Id.*

277. Obama, *supra* note 2, at 819, 822.

almost no public safety risk if they are released.<sup>278</sup> Moreover, releasing these individuals saves money that can be used for other public safety initiatives.<sup>279</sup> Elderly individuals and those with serious health ailments are the most expensive group of people to incarcerate because of their increased medical needs.<sup>280</sup> Costs for medical care have exploded at the federal level, with medical care expenses reaching \$1.1 billion in fiscal year 2014, a 30 percent increase from the costs five years earlier.<sup>281</sup> In fiscal year 2013, the BOP spent a full 19 percent of its budget on incarcerating aging individuals,<sup>282</sup> and 17 percent on medical expenses.<sup>283</sup>

These empirical facts are why the IG “concluded that an efficiently-run compassionate release program combined with modifications to the program’s eligibility criteria could expand the pool of eligible candidates, reduce overcrowding in the federal prison system, and result in cost savings for the BOP” without compromising public safety.<sup>284</sup> The IG issued two comprehensive reports on the Department’s use of compassionate release and found it wanting in both reviews.<sup>285</sup> The first report, released in 2013, found that BOP’s management and implementation of compassionate release “likely

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278. People released pursuant to the BOP compassionate release program during the five-year period from 2006 to 2011 had a recidivism rate of 3.5 percent. OFFICE OF THE INSPECTOR GEN., *supra* note 273, at 49-50. Indeed, if one looks at *all* prisoners released over the age of sixty, without even requiring an assessment of their physical health, the recidivism rate is only 16 percent. See U.S. SENTENCING COMM’N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 23 fig.11 (2016), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism\\_overview.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf) [<https://perma.cc/CC8G-4QHW>].

279. See TINA CHIU, VERA INST. OF JUSTICE, IT’S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 5 (2010), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release/legacy\\_downloads/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release/legacy_downloads/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf) [<https://perma.cc/E6N9-7T7H>] (discussing the expenses involved in caring for elderly inmates).

280. See *id.* (“[P]risoners spend about two to three times more to incarcerate geriatric individuals than younger inmates.”).

281. See U.S.S.C. Hearing, *supra* note 273, at 64-65.

282. OFFICE OF THE INSPECTOR GEN., *supra* note 273, at i.

283. *Id.* at 10.

284. *Hearing on Compassionate Release and Conditions of Supervision Before the U.S. Sentencing Comm’n* 3, 6 (2016), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/IG.pdf> [<https://perma.cc/F8C2-4K7J>] (statement of Michael E. Horowitz, Inspector General, United States Department of Justice).

285. See *generally* OFFICE OF THE INSPECTOR GEN., *supra* note 274 (discussing the BOP’s Compassionate Release Program); OFFICE OF THE INSPECTOR GEN., *supra* note 273 (discussing the effects of the aging inmate population on the BOP).

result[ed] in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided.”<sup>286</sup>

In the wake of the IG’s 2013 Report and as part of the Smart on Crime Initiative, the Department formed a working group to address ways compassionate release could be improved.<sup>287</sup> The group ultimately “concluded that aging inmates do not pose a significant public safety threat.”<sup>288</sup> It also concluded the Department could release individuals over the age of sixty-five “suffering from chronic or serious medical conditions related to the aging process” who are also “experiencing deteriorating mental or physical health that substantially diminishes their ability to function in a correctional facility,” and “for whom conventional treatment promises no substantial improvement to their mental or physical condition” if those individuals had served half their initial sentence.<sup>289</sup>

The IG studied these new criteria for compassionate release in 2015 in its second major report on the subject, but still found the Department falling short.<sup>290</sup> The IG concluded that the Department could lower the eligibility age from sixty-five to fifty for those suffering from chronic or severe health problems to save more money and without compromising public safety.<sup>291</sup> The IG also found fault with another category of elderly people recognized as eligible for compassionate release by the Department: people sixty-five and older who “have served the greater of 10 years or 75 percent of their

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286. OFFICE OF THE INSPECTOR GEN., *supra* note 274, at i.

287. OFFICE OF THE INSPECTOR GEN., *supra* note 273, at 42. The BOP’s complete list of criteria are laid out in Program Statement 5050.49. *See generally* FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, No. 5050.49, CN-1, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582(C)(1)(A) AND 4205(G) (2015), [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) [<https://perma.cc/ZM7M-SUDC>] (listing criteria for compassionate release eligibility). Its factors largely mirror the original criteria set out in § 1B1.13 of the Guidelines, though in addition to recognizing the death of a caregiver of a minor child to be an extraordinary circumstance, the BOP guidelines also “include the incapacitation of an inmate’s spouse or registered partner when the inmate would be the only available caregiver for the spouse or registered partner.” *Id.* at 7 (implementing Program Statement 5050.49).

288. OFFICE OF THE INSPECTOR GEN., *supra* note 273, at 47.

289. *Id.* at 43.

290. *See id.* at 46-50.

291. *Id.* at 48. The IG noted that its recommendation was consistent with the National Institute of Corrections, which also “recommend[s] that inmates be considered aging” starting at age fifty. U.S.S.C. Hearing, *supra* note 273, at 69.

sentence.”<sup>292</sup> The Bureau interpreted this latter provision to mean that individuals had to serve both a minimum of 75 percent of their sentence and at least ten years, thus rendering anyone with a sentence of less than ten years ineligible for consideration.<sup>293</sup> The IG argued that this interpretation seemed contrary to the Department’s concern with both overcrowding and public safety because it makes almost half the elderly population ineligible. The Department’s interpretation cut off those “likely to be the best candidates for early release [because] ineligible inmates who received a shorter sentence [of less than ten years] are more likely to have committed a less serious offense, and present less danger to the public.”<sup>294</sup> The IG further noted the limited effect the Department’s 2013 changes were having on grant rates. Of the 203 elderly people with medical conditions who applied—thirty-three of whom had their requests approved by the institution that housed them—none were ultimately approved for compassionate release by the BOP Director.<sup>295</sup> And only two of the ninety-three elderly individuals who applied without medical conditions received compassionate release.<sup>296</sup>

It is telling to compare the IG’s assessment of compassionate release with the way the Department sees it. Whereas the IG emphasized—based on empirical research—that a focus on elderly and sick people in prison who no longer pose a threat to society could ease prison overcrowding and save some of the BOP’s taxed resources, the Department refused to accept the premise that the release of elderly and seriously ill people should be seen as part of the effort “to reduce prison overcrowding or the prison population generally.”<sup>297</sup> In the Department’s view, “These objectives are addressed by the Department’s support for lowered guideline penalties for drug trafficking offenses, the Department’s Smart on Crime charging policy, by the Clemency Initiative, and by the Department’s support for legislation currently pending before the United States Congress.”<sup>298</sup> It is hard to understand why those other

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292. OFFICE OF THE INSPECTOR GEN., *supra* note 273, at 7.

293. *Id.* at 46.

294. *Id.* at 49.

295. *Id.* at 45 tbl.9.

296. *Id.*

297. Morales Letter, *supra* note 276, at 15.

298. *Id.*

initiatives—which we have already explained were pursued with less than full effort by the Department—would somehow obviate the need to have an additional program dealing with a growing segment of the prison population that poses the unique combination of high costs and a low risk to public safety. Moreover, none of the other initiatives highlighted by the Department address this population, so it is odd to see them as somehow replacing a more robust use of a mechanism that Congress put in place specifically to address changed circumstances of particular individuals.

The Department's narrow view is all the more difficult to understand in light of the fact that legislative history highlighted terminal illness as one of the examples of a changed circumstance that would be extraordinary and compelling.<sup>299</sup> Furthermore, the text of the statute itself provides, as one eligible category, elderly people serving life sentences because of a violent criminal record who no longer pose a threat.<sup>300</sup> This indicates that Congress expected age to be a key factor and provided for it as a grounds for early release, even in cases in which defendants had violence in their past.<sup>301</sup> If the statute and its history are not clear on this issue, they are at a minimum open to an interpretation that sees this provision more broadly than the Department does. With a prison population busting at the seams and a budget straining under high medical costs, one would think that broader interpretation would make ample sense to a Department working for a President committed "to highlight[ing] the compelling economic and policy arguments for justice reform as well as the human toll of a failing system."<sup>302</sup> Keeping people with failing health makes no sense as a matter of economics or public safety, and the human toll of not releasing them is considerable.

The Department did not just disagree with the IG's assessment; it also found itself at odds with the Sentencing Commission. Whereas the Department required individuals to demonstrate a prognosis of death within eighteen months or less to show a terminal illness,<sup>303</sup> the Commission agreed with the medical community's

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299. See S. REP. NO. 98-225, at 121 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3304.

300. 18 U.S.C. § 3582(c)(1)(A)(ii) (2012).

301. See *id.*

302. Obama, *supra* note 2, at 821-22.

303. See, e.g., OFFICE OF THE INSPECTOR GEN., *supra* note 274, at ii (stating the Depart-

assessment that because such predictions were not made by doctors, using that timeline impeded individuals' ability to get compassionate release.<sup>304</sup> Instead, the Commission defined a terminal illness consistent with the medical testimony that it should be "a serious and advanced illness with an end of life trajectory" and that "[a] specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required."<sup>305</sup> Additionally, while both the Department and the Commission agreed that individuals with serious health problems presented extraordinary and compelling circumstances, there were key differences. First, the Commission would allow anyone suffering from serious health problems to seek compassionate release,<sup>306</sup> whereas the Department made only those over sixty-five eligible.<sup>307</sup> Second, the Commission did not require individuals to serve a minimum prison term of any length.<sup>308</sup> In contrast, the Department's program statement concluded that people "should serve a minimum of 50 percent of the sentence to justify the resources that the Department spent to prosecute the inmate."<sup>309</sup> Finally, the Commission included those with "serious functional or cognitive impairment" among those who are eligible for medical reasons.<sup>310</sup>

The two agencies also differed in how they treated the elderly. The Sentencing Commission agreed with the IG that those sixty-five and older<sup>311</sup> should be eligible for release if they serve either ten years or 75 percent of their sentence, whichever is less, thus making those with sentences of less than ten years eligible.<sup>312</sup> Finally, the

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ment's intent to "expand the compassionate release program by making inmates with a life expectancy of up to 18 months eligible for consideration"); U.S. SENTENCING COMM'N, *supra* note 78, at 4 (emphasizing that the BOP only considers a terminal illness to be serious if the inmate's life expectancy is eighteen months or less).

304. *See* PUBLIC MEETING MINUTES, *supra* note 137, at 4.

305. U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)(i) (U.S. SENTENCING COMM'N 2016).

306. *See id.* cmt. n.1 ("Provided the defendant meets the requirements ... extraordinary and compelling reasons exist under any of the circumstances set forth below.").

307. OFFICE OF THE INSPECTOR GEN., *supra* note 273, at 43.

308. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.13.

309. OFFICE OF THE INSPECTOR GEN., *supra* note 273, at 43.

310. U.S. SENTENCING GUIDELINES § 1B1.13 cmt. n.1(A)(ii)(II).

311. One of the commissioners would have lowered this requirement to age sixty based on the testimony of medical experts and the Commission's recidivism data. PUBLIC MEETING MINUTES, *supra* note 137, at 5.

312. The Commission did not allow age alone to make someone eligible; the person addi-

Commission sought to “encourage[] the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances” and reminded the Bureau that “[t]he court is in a unique position to determine whether the circumstances warrant a reduction.”<sup>313</sup>

Why is the Department so much more reluctant than the IG or the Sentencing Commission when it comes to reductions in sentence for extraordinary and compelling circumstances, especially when its position is seemingly at odds with President Obama’s stated goals? The Department’s comments before the Sentencing Commission hold the answer. It told the Commission that it believed Congress intended to create “a system whose fundamental premise is that offenders should serve most of the sentences imposed by the courts.”<sup>314</sup> That view explains both the limited clemency initiative and the cramped view of compassionate release—even though both clemency and compassionate release are also part of the “system.”

The Department further noted that the Bureau should be “cautious” in granting compassionate release because individuals over fifty commit a range of offenses (listing among the notable offenses drug trafficking and fraud) and adding that 36.3 percent of them have a criminal history category of IV or higher.<sup>315</sup> It further added that “BOP data also suggests that older inmates convicted of drug offenses cannot always be described as low-level participants.”<sup>316</sup> The Department, in other words, does not care much about what extraordinary and compelling circumstances have developed in an individual’s life—whether it is a terminal illness or incurable and serious health problem; the Department cares about the initial offense. If that offense is serious enough—with seriousness assessed by the Department—it does not see a reason to revisit the sentence. This view flies in the face of the empirical evidence amassed by the IG about recidivism rates for the sick and the elderly and the broader goals of conserving limited prison resources.<sup>317</sup>

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tionally had to show he or she was experiencing a serious deterioration in his or her health because of his or her age. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.113 cmt. n.1(B).

313. *Id.* cmt. n.4.

314. U.S.S.C. Hearing, *supra* note 273, at 30 (statement of Jonathan Wroblewski, Principal Deputy Assistant Att’y Gen., United States Department of Justice).

315. Morales Letter, *supra* note 276, at 18.

316. *Id.* at 18-19.

317. See *supra* notes 278-83 and accompanying text (discussing the results of the IG’s 2013

But it is entirely consistent with how the Department approached just about every criminal justice reform issue involving federal offenders. The Department allowed for a limited category of relief for what it viewed as the lowest level offenders with the most minimal criminal history, but reaffirmed the status quo for everyone else—no matter how disproportionate their sentences, how extraordinary their life circumstances today, or even how much views on sentencing or drug policies have themselves changed over the years.<sup>318</sup>

#### 4. Forensic Science

Throughout his time in office, President Obama embraced the importance of science,<sup>319</sup> including “a wide range of research and policy initiatives to strengthen the forensic sciences.”<sup>320</sup> Yet when Obama reviewed this issue at the end of his time in office,<sup>321</sup> he neglected to mention that the Department rejected the findings and recommendations of a report he commissioned from his scientific advisors, and he did not demand that it take a different action based on the report.

The President had asked the President’s Council of Advisors on Science and Technology (PCAST) in 2015 to consider “whether there are additional steps” that could usefully be “taken on the scientific side” to strengthen the forensic science disciplines and “ensure the

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and 2015 reports on compassionate release).

318. Compassionate release was not the only area where the BOP seemed to ignore empirical evidence. The American Bar Association has complained that the BOP lags behind state systems in developing innovative programs, is haphazard in preparing people for release, and offers unduly limited drug treatment options for people in prison. See Letter from Bruce Green, Chair, ABA Criminal Justice Section, to Eric Holder, Attorney Gen., U.S. Dep’t of Justice (May 6, 2011) (on file with authors). The Obama Administration did not address these issues until November 2016, when it announced a plan to enhance educational opportunities in prisons and to improve the standards for halfway houses under contract to the BOP. See Obama, *supra* note 2, at 830-32. Because these initiatives were announced so late—after President Trump’s election—the Obama Administration never implemented them, and it remains to be seen whether they will survive.

319. See Gardiner Harris, *Obama to Leave the White House a Nerdier Place than He Found It*, N.Y. TIMES (July 31, 2016), [https://www.nytimes.com/2016/08/01/us/politics/obama-to-leave-the-white-house-a-nerdier-place-than-he-found-it.html?\\_r=0](https://www.nytimes.com/2016/08/01/us/politics/obama-to-leave-the-white-house-a-nerdier-place-than-he-found-it.html?_r=0) [<https://perma.cc/6RHM-B2TF>].

320. Obama, *supra* note 2, at 860.

321. See *id.* at 862.

validity of forensic evidence used in the Nation's legal system."<sup>322</sup> This request came on the heels of a 2009 report by the National Academy of Sciences (NAS) that found deficiencies in numerous forensic methods.<sup>323</sup> The NAS report concluded that aside from DNA analysis, "no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source."<sup>324</sup> The NAS then called for the creation of an independent federal agency that would oversee scientific research to establish the validity of various forensic methods, national testing standards, and the certification of forensic labs.<sup>325</sup> The NAS pushed for an independent agency because it believed any agency responsible for forensics needed "a culture that is strongly rooted in science" and not "principally beholden to law enforcement."<sup>326</sup> The NAS expressly cautioned that the FBI and National Institute of Justice were ill-suited to lead the way on reform because they were housed within the Department and thus "part of a prosecutorial department of the government," making them susceptible "to subtle contextual biases that should not be allowed to undercut the power of forensic science."<sup>327</sup> In the NAS's view, the Department could not be in control of forensic science because its "principal mission is to enforce the law" and "[t]he potential for conflicts of interest between the needs of law enforcement and the broader needs of forensic science are too great."<sup>328</sup>

The Department resisted the NAS findings and its calls for reform.<sup>329</sup> Instead of the creation of an independent entity, the

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322. PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXECUTIVE OFFICE OF THE PRESIDENT, REPORT TO THE PRESIDENT: FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS x (2016) [hereinafter PCAST], [https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast\\_forensic\\_science\\_report\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf) [<https://perma.cc/HWX6-EEDD>].

323. See NAT'L ACAD. OF SCIS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES 4-7 (2009) [hereinafter NAS].

324. *Id.* at 7.

325. Barkow, *supra* note 13, at 301.

326. NAS, *supra* note 323, at 17-18.

327. *Id.* at 16.

328. *Id.* at 17.

329. Barkow, *supra* note 13, at 303; Erin Murphy, *What "Strengthening Forensic Science" Today Means for Tomorrow: DNA Exceptionalism and the 2009 NAS Report*, 9 LAW, PROBABILITY & RISK 7, 14 n.50 (2010) (suggesting that the Department's research division "actively

Department partnered with a technology division within the Commerce Department to create a National Commission on Forensic Science in 2013.<sup>330</sup> In 2015, the Department took up recommendations by that Commission to require its labs to obtain accreditation and mandate that its prosecutors use only accredited labs within the next five years.<sup>331</sup>

The President's request to PCAST came as a follow-up to this effort, and PCAST found that much more still needed to be done. Its analysis was focused on "'feature-comparison' methods—that is, methods that attempt to determine whether an evidentiary sample (e.g., from a crime scene) is or is not associated with a potential 'source' sample (e.g., from a suspect), based on the presence of similar patterns, impressions, or other features in the sample and the source."<sup>332</sup> This kind of forensic methodology would include commonly used methods for analyzing DNA, fingerprints, ballistics, bitemarks, handwriting, shoeprints, tire tracks, and hair samples.<sup>333</sup> PCAST conducted a thorough review of a range of pattern matching disciplines and found many "lack[ed], any scientific support for their basic assumptions,"<sup>334</sup> while others rested on thin scientific foundation and were prone to gross exaggeration. PCAST thus urged scientific research to establish the validity of these methods—what it called foundational validity—where feasible; once that was established, it advocated for clear limits of validity as applied which would ensure the reliability of any testimony offered.<sup>335</sup> PCAST's concern here was with overclaiming, and it emphasized that "[s]tatements claiming or implying greater certainty than demonstrated by empirical evidence are scientifically invalid."<sup>336</sup> Radley Balko helpfully compares DNA sample interpretation with these other methods to show why the latter are lacking. Someone

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opposed congressional efforts to study forensic sciences through a research entity such as the National Academy of Sciences rather than a law enforcement entity such as itself").

330. Obama, *supra* note 2, at 860.

331. *Id.* As President Obama noted, the FBI also undertook a review of more than twenty-one thousand cases involving the use of microscopic hair analysis. *Id.* at 861.

332. PCAST, *supra* note 322, at 1.

333. *Id.*

334. Radley Balko, *When Obama Wouldn't Fight for Science*, WASH. POST (Jan. 4, 2017), [https://www.washingtonpost.com/news/the-watch/wp/2017/01/04/when-obama-wouldnt-fight-for-science/?utm\\_term=.65894f81a862](https://www.washingtonpost.com/news/the-watch/wp/2017/01/04/when-obama-wouldnt-fight-for-science/?utm_term=.65894f81a862) [<https://perma.cc/B8U2-GXLE>].

335. *See* PCAST, *supra* note 322, at 6.

336. *Id.*

analyzing a DNA sample “can give precise calculations of the odds of the suspect being the person whose DNA was left at the crime scene.”<sup>337</sup> In contrast, other feature comparison methods lack a standard methodology or reference set for interpretative purposes, and have much less scientifically established rates at which characteristics are distributed across a population. Thus, when an expert testifies, “we don’t know the rate at which those characteristics are distributed across the population,” this makes it hard to know how probative it is that there is a match between the defendant and the sample from the crime scene.<sup>338</sup> If thousands of people have the same kind of hair microscopy, then the presence of a match might not tell us very much. Anyone with even a passing familiarity with science—indeed, with common sense—would recognize this as a significant limitation to the use of this kind of evidence.

PCAST, unsurprisingly, could not have been clearer that the Department’s response to the 2009 NAS report was deficient because it failed to fill this gap in empirical knowledge. The PCAST report cautioned “that neither experience, nor judgment, nor good professional practices (such as certification programs and accreditation programs, standardized protocols, proficiency testing, and codes of ethics) can substitute for actual evidence of foundational validity and reliability.”<sup>339</sup> It noted that

an expert’s expression of *confidence* based on personal professional experience or expressions of *consensus* among practitioners about the accuracy of their field is no substitute for error rates estimated from relevant studies. For forensic feature-comparison methods, establishing foundational validity based on empirical evidence is thus a *sine qua non*. Nothing can substitute for it.<sup>340</sup>

Despite the fact that the PCAST report was authored by nineteen preeminent scientists, that its logic and grounding in scientific methods is irrefutable, that it was commissioned by the President, and that its results were touted in a press release by the White

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337. Balko, *supra* note 334.

338. *Id.*

339. PCAST, *supra* note 322, at 6.

340. *Id.*

House,<sup>341</sup> the Department simply refused to accept it. Attorney General Loretta Lynch curtly and quickly responded to PCAST's release that, although the Department "appreciate[s] their contribution to the field of scientific inquiry, the [D]epartment will not be adopting the recommendations related to the admissibility of forensic science evidence."<sup>342</sup> The Department's refusal to accept bedrock scientific analysis is troubling enough as applied to the federal system, but it is all the more disconcerting because forensic science is an area in which the federal government often takes on a leadership role that influences the states. So the message the Department sent was loud and clear: whatever the science says, we find this evidence valuable to our law enforcement agenda, so we will continue to use it.<sup>343</sup> The Department likely believed that doing so was the right thing because of its experience using this evidence in cases where its prosecutors believed defendants to be guilty, thus validating the value and utility of these methods for the Department, whatever the empirical evidence might say.<sup>344</sup>

Balko, who has written several probing articles on forensic science, sums up well the frustration with this outcome. He notes that President Obama "deserves credit for" calling attention to criminal justice reform.<sup>345</sup> But then he laments that "[all] too often those statements have been followed by policy changes that have been

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341. See Eric Lander et al., *PCAST Releases Report on Forensic Science in Criminal Courts*, WHITE HOUSE: BLOG (Sept. 20, 2016, 5:59 AM), <https://obamawhitehouse.archives.gov/blog/2016/09/20/pcast-releases-report-forensic-science-criminal-courts> [<https://perma.cc/GZ58-D75M>].

342. Jordan Smith, *FBI and DOJ Vow to Continue Using Junk Science Rejected by White House Report*, INTERCEPT (Sept. 23, 2016, 2:10 PM), <https://theintercept.com/2016/09/23/fbi-and-doj-vow-to-continue-using-junk-science-rejected-by-white-house-report/> [<https://perma.cc/JK2N-G8GB>]. The National District Attorneys Association and police organizations also dismissed the report. See Balko, *supra* note 334.

343. Even when the Department endorses best practices, as it recently did with eyewitness testimony, it is careful to add a caveat that if it fails to follow best practices, it should not suffer any consequences. See Memorandum from Sally Q. Yates, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Department Law Enforcement Components 2 (Jan. 6, 2017), <https://www.justice.gov/file/923201/download> [<https://perma.cc/4PZM-TNE3>] ("[N]othing in this memorandum implies that an identification not done in accordance with these procedures is unreliable or inadmissible in court.").

344. See Barkow, *supra* note 13, at 313 ("Prosecutors may therefore place greater faith in existing forensic science methods than empirical evidence would justify because they have used this information in cases where they believed the defendant to be guilty.").

345. Balko, *supra* note 334.

largely symbolic.”<sup>346</sup> Balko’s target was the response to forensic reform, but he could have been describing any of the previous issues discussed in this Part. While the Administration gave strong statements about various issues and did take some concrete steps to improve policies, the measures were limited and inadequate because the President did not back up his rhetoric by making sure things were appropriately implemented, and left it up to the Department to decide what should really happen. And all too often, nothing much did.

### *B. The Department of Justice’s More Aggressive Pursuit of State Reforms*

Tellingly, there were areas where the Department advocated for more robust reforms. Their common thread was that they did not interfere with the Department’s law enforcement mission, or, in fact, assisted it.

It is in the Department’s interest as a law enforcement agency charged with preventing police violence to do its part to remedy the underlying conditions that create this violence.<sup>347</sup> It is not surprising, then, that the Department would be vigilant in pursuing cases and reforms that help to deter future cases of excessive police violence. In the course of its investigation into the Ferguson Police Department after the death of Michael Brown, for example, the Department found “that revenue generation is stressed heavily within the police department” and that “[p]atrol assignments and schedules are geared toward aggressive enforcement of Ferguson’s municipal code, with insufficient thought given to whether enforcement strategies promote public safety or unnecessarily undermine community trust and cooperation.”<sup>348</sup> This caused the officers to see the citizens they policed “less as constituents to be protected than as potential offenders and sources of revenue,” which undermined

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346. *Id.*

347. See *Civil Rights Division, About the Division*, U.S. DEP’T JUSTICE, <https://www.justice.gov/crt/about-division> [https://perma.cc/ZL9C-8Q6M].

348. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [https://perma.cc/94HM-65NS].

police-community relations and in turn created a culture that breeds excessive force.<sup>349</sup>

The result is that the Department was at the forefront in addressing excessive fines and fees in state and local systems.<sup>350</sup> Doing so furthered the Civil Rights Division's mission and did nothing to threaten federal practice. Arguing against localities seeking to extract fines and fees from impoverished defendants posed no conflict with the Department's mission because unlike these municipalities, the Department has no need to use the criminal process to help keep its budget afloat.<sup>351</sup>

The same is true of the Department's efforts to spur states to enact sentencing reforms. The Department could urge states to expand parole eligibility or good time credits because it was not bound by the reforms it was advocating.<sup>352</sup> The Department can resist sentencing reductions and retroactive relief at the federal level while asking states to go bolder because one situation involves its own self interest and the other does not. In the latter context, the reform has no effect on the Department itself, but in the former, it does. Likewise, the President's Data-Driven Justice Initiative and Police Data Initiative could ask state and local jurisdictions to reduce jail stays and adopt other cost-effective solutions because none of those requests applied at the federal level.<sup>353</sup>

The Department can also support reforms that apply to other parts of the federal government as long as those changes do not require it to change its own practices. It took part in an Obama cabinet-level working group on reentry and endorsed reforms that made it easier for people with criminal records to get jobs, housing, and education.<sup>354</sup> Notably, while the Department helped other departments figure out how to change their policies, it did not do much

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349. *Id.*

350. Obama, *supra* note 2, at 843-44.

351. Similarly, no conflict occurred when the Obama Administration decided to stop selling certain military equipment to local police departments. Gregory Korte, *Obama Bans Some Military Equipment Sales to Police*, USA TODAY (May 18, 2015, 5:04 PM), <https://www.usatoday.com/story/news/politics/2015/05/18/obama-police-military-equipment-sales-new-jersey/27521793/> [<https://perma.cc/YY5R-TQPQ>].

352. *Cf.* Obama, *supra* note 2, at 846 (describing these efforts).

353. *Cf. id.* at 848-51 (discussing how these programs help the Department advance reform at the state and local levels).

354. *See id.* at 833-34, 853.

within its own Department on reentry issues. Although some U.S. Attorneys fostered innovative reentry practices within their districts, the Department itself did little to spearhead changes in prosecution practices that would aid reentry other than asking each office to put a reentry coordinator in place and trying out pilot programs to divert small numbers of people (typically fewer than a dozen in a given district) who presented the most sympathetic cases in which the initial charging decision was itself questionable. Even in those cases, it was typically federal judges pushing for the diversion efforts with prosecutors reluctantly agreeing to them.

### III. REDESIGNING THE EXECUTIVE BRANCH AND USING THE APPOINTMENT POWER FOR INSTITUTIONAL REFORM

President Obama's results in the realm of criminal law did not match his stated ambitions, even in areas completely under his control that did not require congressional cooperation. President Obama may have agreed with the Department that a more modest approach was preferable, despite his broader proclamations. But if a future President wants to achieve more, he or she needs to create new structures that allow decision-making and oversight to be more independent of the Department. Similar constructs have been created in the area of national security (in which the National Security Advisor floats as an independent advisor between the security agencies and the President),<sup>355</sup> foreign policy (in which the Secretary of State is just one of many advisors weighing in on crucial questions),<sup>356</sup> and trade (in which the U.S. Trade Representative operates independently of the Department of Commerce).<sup>357</sup> Examples exist, too, of Presidents creating important advisory bod-

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355. See ALAN G. WHITTAKER ET AL., *THE NATIONAL SECURITY POLICY PROCESS: THE NATIONAL SECURITY COUNCIL AND INTERAGENCY SYSTEM 7-10* (rev. ed. 2011), <http://www.landonrowland.com/NSC-Report-2007.pdf> [<https://perma.cc/CJ2N-CQSW>].

356. See *id.* (describing role of Secretary of State within the National Security Council).

357. See *Mission of the USTR*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/about-ustr> [<https://perma.cc/L3SU-H799>]. The White House Counsel does not serve this function; most of her tasks are not connected to criminal justice. Nor does the Domestic Policy Council, which is primarily focused on other issues, and thus naturally defers to the specialists at the Department. See *Domestic Policy Council*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/administration/eop/dpc> [<https://perma.cc/VZ2W-P5K3>]. Moreover, the White House Counsel and Domestic Policy Council, as generalists, are not well suited to the task of collecting and analyzing data about specific substantive areas.

ies by executive order, such as the “czars” for the environment and Ebola response.<sup>358</sup> There is even some precedent in criminal law, as noted, because President Ford created a body independent of the Department to advise him on clemency with respect to people who had dodged the draft.<sup>359</sup> In all these spaces, the White House recognized that it needed more independent assessments to counterbalance what it was hearing from agencies that might be biased by their primary mission and not see the bigger picture.

While the problem of institutional bias is not unique to the Department, there are additional features of the Department that make it particularly important for the President to hear from a more independent source on criminal justice policy. First, the Department, unique among federal agencies, serves as the President’s legal advisor, and the President turns to it to support the legality of his or her actions. The President may thus be particularly reluctant to second-guess its views on criminal justice issues because of a general deference to its legal judgments. Second, the White House might be hesitant to act contrary to the Department’s views if the Department’s objections to an alternative view are grounded in public safety arguments.<sup>360</sup> Without an independent analysis of the costs and benefits—including a risk assessment—the President may be even more likely to side with the Department than he or she would be to side with other agencies.

No one path can correct for this, and it is beyond the scope of this Article to provide all the options or all the details. Rather, our goal is to provide two main paths available to a President interested in getting less biased advice about criminal justice issues. Our focus is on those things the President can do without congressional help, so although it might be advisable to move the BOP and forensic re-

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358. See, e.g., Jack Healy et al., *Obama May Name “Czar” to Oversee Ebola Response*, N.Y. TIMES (Oct. 16, 2014), [https://www.nytimes.com/2014/10/17/us/obama-may-name-ebola-czar-after-amber-joy-vinson-flight-causes-concern.html?\\_r=0](https://www.nytimes.com/2014/10/17/us/obama-may-name-ebola-czar-after-amber-joy-vinson-flight-causes-concern.html?_r=0) [<https://perma.cc/U5UM-48LZ>].

359. See *supra* notes 209-11 and accompanying text.

360. See, e.g., *supra* note 156 and accompanying text (describing how President Obama deferred to the Department’s views on mens rea reform).

search outside of the Department entirely,<sup>361</sup> that would require statutory changes.<sup>362</sup>

One possible option is for the President to create a single Criminal Justice Advisory Commission (which would include Department representation but would be comprised of other viewpoints) within the Executive Office of the President that could advise the President on criminal justice issues. This is akin to the “czar” model the President has followed in other contexts<sup>363</sup> and would still give the President confidential advice, but with a commission structure so that the President could receive a diversity of viewpoints. This Commission could advise the President on all the policy issues discussed, thus providing a viewpoint separate from (but informed by) the Department. Once created, this body could also take over the task of reviewing clemency applications in light of the President’s policy preferences, thus replacing the function of the Pardon Attorney.<sup>364</sup>

A second path would be to create separate bodies, one that advises on policy questions and another that focuses on clemency decisions. Under this option, in addition to the Criminal Justice Advisory Commission, there would be something like a Presidential Clemency and Reentry Board that could replace the Pardon Attorney and the seven-level, Department-centered review currently employed.<sup>365</sup>

Under either of these models, a President could also create a process whereby the policy decisions endorsed by the Department get reviewed by either the Office of Information and Regulatory Affairs or the Criminal Justice Advisory Commission to make sure

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361. For such an argument, see Barkow, *supra* note 13, at 335-41. No state follows the federal model of housing its corrections agency within the prosecutor’s office; they all developed independent prison commissions or bureaus by 1929. See *Federal Penal and Reformatory Institutions: Hearing on H.R. Res. 233 Before the Spec. H. Comm. on Fed. Penal & Reformatory Insts.*, 70th Cong. 80-81 (1929) (statement of James Bennett, United States Bureau of Efficiency).

362. Barkow, *supra* note 13, at 280, 295 (describing the statutory framework placing these functions in the Department).

363. See *supra* note 358 and accompanying text.

364. If the body were to perform clemency review, then we believe it is in the President’s interest to make bipartisan appointments to it so that it provides the President with a degree of political cover for his decisions to reduce sentences and issue pardons. See Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 22 (2015).

365. See *supra* Part II.A.2.

the proposed decisions are justified under traditional cost-benefit analysis.

Finally, apart from these structural reforms, the President can also further criminal justice reform with the use of his or her appointment power, something President Obama did in practice but spent little time highlighting in his reflections on his own accomplishments.

#### *A. Presidential Criminal Justice Advisory Commission*

The problems inherent in the Department's dual role as a law enforcement agency and as advisor to the President, particularly for a reform-minded president, were made clear in the Obama years. One way to allow the President strong and broad advice on criminal law issues would be to form an advisory commission that would include Department representation, while remaining independent from the Department. This body should include individuals from academia who specialize in criminal justice and criminology, policy leaders on criminal justice reform, corrections officials and experts who study reentry and recidivism reduction, those who work in law enforcement, attorneys who work in criminal defense, and formerly incarcerated people who can speak to their experiences while incarcerated and during reentry.<sup>366</sup> Because federal programs often are directed at state and local criminal justice groups, representation from outside the federal system would be particularly helpful.

The Department would need to implement any of the President's policies, so it is important to give it a seat at the table to understand its concerns on any given policy. But whereas now those implementation concerns often drive the Department to reject suggestions outright, this new structure would allow the policies to be evaluated based on all their costs and benefits, and implementation issues would be but one of many issues under consideration. It is also important for any such advisory body to craft policies to facilitate Department compliance because the resistance to reform discussed in Part I would not disappear simply because policies change. Thus,

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366. For a discussion of the kinds of representation to include, see Rachel E. Barkow, *Administering Crime*, 52 UCLAL. REV. 715, 772, 778, 783 (2005); Barkow & Osler, *supra* note 364, at 21-22; and P.S. Ruckman, Jr., *The Obama Administration: Breaking Records in a Broken Clemency System*, 29 FED. SENT'G REP. 87, 90 (2017).

any such body should have a preference for clear rules instead of vague standards that can be more easily evaded, because prosecutors are likely to dutifully follow clear rules. For example, if the Commission were to offer a framework for the BOP to follow on compassionate release, it should set a clear timetable for the BOP to make decisions, set out clear eligibility criteria, and audit the BOP's decision-making for compliance.

The Criminal Justice Advisory Commission should also be set up to be data-driven in focus, with a mission to promote public safety in the least costly manner based on empirical evidence. This focus on data will allow the President to better assess any Department objections to a proposal based on the Department's views about how those reforms will affect public safety. The Commission will need a staff to help with this analysis, though some of this could be done in partnership with other agencies. The Sentencing Commission, for example, can provide the Administration with a great deal of information. Research institutions outside of government could also assist with specific tasks, as criminology departments and law schools already investigate many of the issues this body would consider.

One would assume that the problems with reforming forensic science<sup>367</sup> would have been handled much differently if such a commission were in place, acting as a buffer between the self-interested perspective of the Department and the consensus view of the scientific community that forensic methods require validation and more careful use in the courts.<sup>368</sup> The BOP's approach to compassionate release and the Department's position on sentencing policy may have also been different if it had first been analyzed by such a commission—just as the independent Sentencing Commission reached different conclusions than the Department after its analysis of the data and research on recidivism and costs.<sup>369</sup>

It is also possible that the President, in the end, may have sided with the Department on some of these issues even after hearing a wider set of views. But there is no question that, on net, decision-

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367. *See supra* Part II.A.4.

368. *See supra* notes 322-28 and accompanying text.

369. *See supra* Part II.A.1.

making on criminal justice will be improved overall if the President has full information before deciding which policies to endorse.

### *B. Presidential Clemency Board*

While the Criminal Justice Advisory Board could also be tasked with setting clemency standards and reviewing petitions, another model would be to separate this work and give it to a different body because it involves individual case processing. This entity would handle clemency issues but coordinate with the Criminal Justice Advisory Board on recidivism and reentry policy issues—as those are relevant to clemency—as well as on prosecution practices to help identify outlier sentences and practices in specific districts where clemency could provide a unifying corrective check.<sup>370</sup>

The board model for clemency has already proven effective in the states. It is not by accident that no state has embraced<sup>371</sup> the two key attributes of federal clemency: endless review and a central role for prosecutors.<sup>372</sup> Margaret Colgate Love has identified fourteen states that demonstrate well-functioning systems that provided “frequent and regular” pardon grants: Alabama, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Iowa, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, and South Dakota.<sup>373</sup> This mix of red and blue states shows that it is not politics that matters, it is process. And we know what kind of process works, too. Five out of the six states where pardon decisions are made by highly independent boards—Alabama, Georgia, Idaho, Connecticut, and South Carolina—are also among the fourteen members of the “frequent and regular” list.<sup>374</sup> Moreover, in each of the other states with high-functioning systems, a board plays a significant role in deci-

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370. See Barkow & Osler, *supra* note 364, at 22-25.

371. The Criminal Justice Policy Foundation maintains an online database for state clemency procedures. See *State Clemency Guide*, CRIM. JUST. POLY FOUND., <https://www.cjpf.org/state-clemency/> [<https://perma.cc/ME8G-GNHL>]. Margaret Colgate Love created a similar site for state pardon procedures in conjunction with the National Association of Criminal Defense Lawyers. See Margaret Colgate Love, *Restoration of Rights Project*, NAT'L ASS'N CRIM. DEF. LAW., <https://www.nacdl.org/rightsrestoration/> [<https://perma.cc/HY6N-LS79>].

372. See *supra* Part II.A.2.

373. Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730, 755-66 (2012).

374. *Id.* at 756-59, 766. The sixth such jurisdiction, Utah, largely misses the cut because the board in that state only gets three to five requests for pardons a year. *Id.* at 767.

sion-making.<sup>375</sup> There is a clear lesson from the states: use clemency boards, not redundant panels of prosecutors, if you want regular and rational clemency grants to be a part of your system of criminal law.

An example of this dynamic exists within the federal system, too: the Presidential Clemency Board used by President Ford to identify over thirteen thousand recipients of clemency in the wake of the Vietnam War.<sup>376</sup> Though the Ford Clemency Board was temporary (lasting just one year),<sup>377</sup> the structure he created could be replicated as a permanent institution. That board featured a bipartisan and diverse membership, which included representatives from academia, prominent members of the private bar, religious leaders,<sup>378</sup> and importantly—given its subject—representatives of the military.<sup>379</sup> Beyond its diversity, though, the Ford Clemency Board had a related advantage that is equally distinctive relative to the current federal clemency process: independence from the Department.<sup>380</sup> While a clemency review board should include a representative from the Department, it should be established outside of the Department and report directly to the President. This Board should include individuals with experience as federal defenders, judges, victims' representatives, probation officers, and police officers, among others, to get a range of perspectives aired and discussed.<sup>381</sup>

In addition to the thousands of clemencies, the Ford Clemency Board left behind a worthwhile legacy: a 400-page report on how it accomplished the task.<sup>382</sup> To be sure, the Ford Clemency Board had a more narrow task given that it had only a subset of all federal cases. But its methodology could apply more broadly. For example,

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375. *See id.* at 756-66.

376. *See supra* notes 209-11 and accompanying text.

377. *See* PRESIDENTIAL CLEMENCY BD., REPORT TO THE PRESIDENT 165, 178 (1975).

378. *See id.* app. A (providing the names and biographies of the Presidential Clemency Board members).

379. *Id.*

380. *See supra* notes 209-11 and accompanying text. Others have suggested alternative ways to achieve this independence. For example, Paul Larkin urges that the Pardon Attorney be relocated to the White House. Larkin, *supra* note 172, at 905-06. While that approach achieves the needed independence, we prefer a board model to give the President a broader range of viewpoints and to provide the President with more political cover—by allowing him or her to make bipartisan appointments—for broader reforms.

381. Barkow & Osler, *supra* note 364, at 21.

382. PRESIDENTIAL CLEMENCY BD., *supra* note 377.

to ensure uniformity, the Board paid NASA to engineer a computer program that reviewed case dispositions for consistency with Board precedent (something that even the Pardon Attorney does not seem to have in place, forty-two years later).<sup>383</sup> The White House has already created an office that specializes in using technology for better data analysis.<sup>384</sup> That office could put in place similar mechanisms for the Clemency Board based on key factors for consideration across cases, or it could have different templates for different categories of cases.<sup>385</sup>

There is one other opportunity that would come with the formation of a clemency board that is absent in our current system: the ability to accumulate and analyze data relative to clemency grants and denials, tracking things such as racial disparities, recidivism rates, and the success of reentry.<sup>386</sup> That data could then be used to guide subsequent clemency decisions as well as other policy positions.

### *C. Applying Office of Information and Regulatory Affairs Review to Criminal Justice*

Other executive agencies in government face oversight from the President through the Office of Information and Regulatory Affairs (OIRA), which is charged with making sure that the benefits of agency regulations outweigh the costs, and that less expensive alternatives have been considered.<sup>387</sup> Christopher DeMuth and Judge Douglas Ginsburg explained that this review process is necessary because a regulatory agency “will invariably wish to spend ‘too much’ on its goals. An agency succeeds by accomplishing the goals Congress set for it as thoroughly as possible—not by

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383. *See id.* at 327.

384. *See* U.S. DIGITAL SERV., EXEC. OFF. PRESIDENT, <https://www.usds.gov> [<https://perma.cc/WFH2-S7TU>].

385. It is also possible that the Clemency Board could subsume the staff and budget of the Pardon Attorney if authorized by Congress, which would make the move revenue-neutral, particularly if commutations increase and reduced prison costs are considered. But even if the President cannot get Congress to agree, he or she could potentially use some of the existing budget that is used for the Domestic Policy Council for this effort.

386. *See* Barkow & Osler, *supra* note 364, at 22-23.

387. *See* Exec. Order No. 12,866 § 6, 3 C.F.R. 638, 644-48 (1994), *reprinted in* 5 U.S.C. § 601 (2012); Exec. Order No. 13,563 § 1, 3 C.F.R. 215, 215-16 (2012), *reprinted in* 5 U.S.C. § 601 (2012).

balancing its goals against other, equally worthy goals.”<sup>388</sup> They therefore advocated for “some countervailing restraint” in the form of review “by an office that has no program responsibilities” to generate more balanced regulatory decisions.<sup>389</sup>

These same problems exist for prosecutors, who also will inevitably “wish to spend ‘too much’”<sup>390</sup> on their goals of criminal law enforcement. But no countervailing constraint was created for them and their policy decisions because OIRA review is currently set up for regulations, not general policy positions.<sup>391</sup> But with parole gone and clemency within the hands of prosecutors themselves, no other executive actor takes a second look at prosecutorial decision-making in individual cases, much less undertakes an analysis of the way in which the broader policies are operating and interacting.

Presidents do not have to accept this model. The OIRA review process was created by executive order, and another president could decide to institute reviews of Department policies, either by placing such review within OIRA or, if the President were to create a Criminal Justice Advisory Commission as described above, within that body. Specifically, the President could ask the Department to submit its policy determinations for review, to provide data to support its positions when available, and to explain why it rejected alternatives. Although this kind of oversight will not work for case-by-case applications of policies, it will allow for analysis of the policies themselves, which may in turn affect how the Department operates in specific cases. In an area like forensics, for example, the Department would have to explain why it rejected the PCAST findings, and the reviewing agency in the White House (either OIRA or something like it) could assess those determinations. If the White House disagreed, it could tell the Department to shift its policy decision. The same type of review could take place for BOP programming, or

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388. Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986).

389. *Id.*

390. *Id.*

391. President George W. Bush extended OIRA review for guidance documents, *see* Exec. Order No. 13,422, 3 C.F.R. 191 (2008), but President Obama reversed that policy, *see* Exec. Order No. 13,497, 3 C.F.R. 218 (2010), *reprinted in* 5 U.S.C. § 601 (2012). The Department’s policy positions may not meet the definition of a guidance document as Executive Order 13,422 defined it, but a President could define the scope of what should be submitted for review.

Department positions before agencies like the Sentencing Commission or its testimony before Congress. The idea would be to have the Department explain to another actor within the Executive Branch who brings a generalist perspective, and not strictly a law enforcement one, why its approach makes sense. This poses no problems to the Department's independence, because the White House would not be interfering with any individual determinations about whom to prosecute or investigate. It would be simply overseeing how the Department sets its policies overall and asking the Department to provide support. In the process of preparing such reports, the Department might find that some positions should be revised because they really do not have support in data.<sup>392</sup>

The President knows how to order specific policies when he or she wants to, so this would be a mechanism for him or her to find out when it is necessary to intervene. President Obama followed a model along these lines after his Task Force on 21st Century Policing released its report. He "directed [his] team to adopt the Task Force's federal recommendations."<sup>393</sup> He apparently did not wait to see how the FBI and other federal law enforcement agencies thought they should respond. The issue was important enough to him that he ordered the shift in practices immediately. The President took a similar approach with respect to solitary confinement, issuing a directive to the Department in 2016 to implement certain reforms.<sup>394</sup>

President Obama's more aggressive commands in those contexts—and the contrast with the other areas outlined here—suggests that part of the Department's unwillingness to go further may well have been because it was not receiving sufficiently strong signals from President Obama about how much political bandwidth he would spend on a given issue.<sup>395</sup> As outsiders, we cannot say if

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392. To be sure, some policies might be more difficult to quantify in terms of cost-benefit analysis for purposes of OIRA oversight. But that oversight need not be limited to purely quantitative review. *See* Exec. Order No. 13,563 § 1(c) ("Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.").

393. Obama, *supra* note 2, at 842.

394. *See id.* at 830.

395. This may also help explain why the Department took more aggressive steps in the second term than the first, when the President may have signaled he, too, was more willing to go out on a political limb for criminal justice. *See supra* note 125 and accompanying text.

President Obama privately urged the Department to do more. But we do know that any President will be ill-equipped to push for things if he does not know they are at issue. And this reviewing mechanism would allow a President and White House staff to stay apprised of key issues, should the President want to exercise political capital for a change.

Of course, it is possible that the Department resists the White House's requests for change, and the next decision point for the President would be what to do about it. At that point, the President would need to decide if the issue is important enough to ask for the resignation of the relevant political appointee, which in some cases could be the Attorney General. Radley Balko envisioned just this type of scenario with respect to the Department's rejection of the PCAST report.<sup>396</sup> He argued that the President should have discussed the report with Attorney General Lynch, and if she refused to implement the recommendations, asked for her resignation.<sup>397</sup> He made the same argument with respect to Director James Comey of the FBI.<sup>398</sup> This is obviously a politically risky move for any President, but one would expect that few disputes would come to this point. Instead, the OIRA-like review process should itself bring out the most rational path to follow, and one would expect the White House and Department to coalesce around that option, with few disagreements rising to the level of a standoff.

#### *D. Appointments*

When President Obama analyzed what Presidents can do to achieve criminal justice reform, he focused mainly on substantive policies without mentioning the critical role the appointment power plays in furthering reform. To be sure, he footnoted how important it was to have Attorneys General leading his efforts who supported

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And it may account as well, in part, for the bolder push by the Civil Rights Division, which also received higher-level backing from the White House in contrast to, say, clemency, where those announcements were left to the Deputy Attorney General and White House Counsel until the very end of President Obama's time in office when he started to make claims about clemency on his own. *See supra* notes 160-65 and accompanying text.

396. *See Balko, supra* note 334.

397. *See id.*

398. *See id.*

his stated reform agenda.<sup>399</sup> But the Attorney General is not the only position that matters for criminal justice reform; there are several other key appointments Presidents make that have a significant impact on the direction criminal justice reform takes. This Part highlights these other critical appointment decisions and how important it is to appoint people with the right backgrounds for these posts.

### *1. Department of Justice Appointments*

In addition to the Attorney General, other senior posts at the Department—especially the Deputy Attorney General and the Director of the BOP—are essential for the success of criminal justice reform. The Assistant Attorney General for the Criminal Division and head of the Office of Legal Policy also occupy crucial posts. If a President is concerned with reform, then he or she should make sure that individuals in those posts share his or her reform goals. In addition, a President interested in reform should encourage the Attorney General to dial-back the influence of United States Attorneys in setting policy within the Department. The Attorney General has an Advisory Committee composed of United States Attorneys that holds enormous sway in influencing Department policy.<sup>400</sup> A more balanced advisory committee—with defense lawyers, academics, and experts on criminal justice policy—would produce more balanced policy advice than a group made up of chief prosecutors.

We want to highlight two other key positions that may be less obvious here. The first is the Assistant Attorney General for the Civil Rights Division. The Civil Rights Division works on a range of critical issues including voting rights and discrimination cases

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399. Obama, *supra* note 2, at 824 n.53 (“[T]he most consequential actions I took [with respect to changing policies] were my decisions to entrust these dedicated public servants [Eric Holder and Loretta Lynch] (and other senior officials in the Department of Justice) with the authority to use their discretion wisely and to provide guidance and set an example for the thousands of federal prosecutors across the United States.”). Although we have outlined why even the most resolute leader of the Department will face obstacles in pushing the institution toward reform—and may in fact become captured by the viewpoints from within the Department—it is certainly true that getting someone interested in furthering the reform agenda highlighted by President Obama is a necessary, if not sufficient step.

400. See Press Release, U.S. Dep’t of Justice, Six New Members Appointed to Attorney General’s Advisory Committee (Apr. 30, 2015), <https://www.justice.gov/opa/pr/six-new-members-appointed-attorney-general-s-advisory-committee> [<https://perma.cc/Z3LD-EJSF>].

outside of criminal justice,<sup>401</sup> so Presidents may choose leaders of that Division based on how they prioritize different aspects of the Division's work. For a President that cares especially about criminal justice issues, it is helpful to choose someone with experience working on reform in that area. President Obama did a particularly good job selecting heads of the Civil Rights Division. The Division worked on police reform from the start of the Obama Administration under the leadership of Tom Perez,<sup>402</sup> who came to the position with a background in civil rights (including having previously worked as a prosecutor in the Civil Rights Division as well as advising Senator Kennedy on civil rights and criminal justice issues), consumer advocacy, and state politics.<sup>403</sup> The Division was even more active in criminal justice reform in President Obama's second term under the leadership of Vanita Gupta. Gupta's background was not as a Department prosecutor. Instead she came to the Department having previously worked as a civil rights lawyer, including serving as the Deputy Legal Director of the ACLU, where she was responsible for the ACLU's national effort to further criminal justice reform.<sup>404</sup> Under her leadership, the Civil Rights Division focused on how the pernicious effects of fines and fees both corroded the relationship between the police and the community, as well as undermined

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401. See U.S. DEP'T JUSTICE, *supra* note 347.

402. See, e.g., David Corn, *Why Picking Tom Perez for Attorney General Would Be a Smart Move for Obama*, MOTHER JONES (Nov. 3, 2014, 6:00 AM), <http://www.motherjones.com/politics/2014/10/tom-perez-attorney-general-obama> [<https://perma.cc/D557-VCRS>] ("Perez revitalized [the Civil Rights Division] by mounting voting rights cases and legal challenges to discrimination against gays and lesbians. During his tenure, the division opened a record-breaking number of investigations into police abuse and forged wide-ranging agreements to clean up various police forces accused of misconduct."); Justin Miller, *The Subtle Force of Tom Perez*, AM. PROSPECT (June 22, 2016), <http://prospect.org/article/subtle-force-tom-perez> [<https://perma.cc/3PG2-S2SM>] (noting Perez's work on police misconduct—including investigations into Seattle, Portland, Los Angeles, and Puerto Rico police forces and Arizona Sheriff Joe Arpaio—and stating that "[b]y 2011, the division was investigating 17 police and sheriff departments—the most in the DOJ's history").

403. See, e.g., *Meet the Assistant Attorney General*, U.S. DEP'T JUSTICE, <https://www.justice.gov/crt/meet-aag-banner> [<https://perma.cc/QCQ3-ENPU>] (discussing Perez's background enforcing consumer rights laws and workplace safety laws); Miller, *supra* note 402 (discussing the same and Perez's experience advising Senator Ted Kennedy on civil rights and criminal justice issues).

404. Gupta also worked for the NAACP Legal Defense and Educational Fund. See *Former Head of the Civil Rights Division Vanita Gupta*, U.S. DEP'T JUST. ARCHIVES, <https://www.justice.gov/archives/crt/staff-profile/former-head-civil-rights-division-vanita-gupta> [<https://perma.cc/WA9C-555F>].

efforts to reduce criminal behavior because of how those financial obligations burdened people already struggling to get by. This is the kind of insight one gets from having a range of experiences working on criminal justice issues, not just as a prosecutor, and it is a good blueprint for further appointees to head the Civil Rights Division if the goal is to advance criminal justice reform.

President Obama's pick for IG of the Department also proved to be critical to his reform efforts. While IGs are typically known for becoming captured by the very agencies they are charged with overseeing,<sup>405</sup> that did not hold true for Michael Horowitz, who was appointed IG in 2012. Horowitz came to the IG position with extensive Department experience, including eight years as a prosecutor in the Southern District of New York and three years at the Department in the Criminal Division as Chief of Staff and Deputy Assistant Attorney General.<sup>406</sup> He came to the job with the perspective of a prosecutor and the skill set of a first-rate investigator. His work as the Chief of Public Corruption in the United States Attorney's Office for the Southern District of New York likely made him sensitive to the misuse of government resources. He also served for six years as a Commissioner at the United States Sentencing Commission.<sup>407</sup> The Commission, as noted, grounds its decisions in data, and Horowitz took that same perspective as IG, amassing critical data in service of all his recommendations. Perhaps most importantly, IG Horowitz had a broader perspective of the IG's role than some of his predecessors, not simply looking for fraud and misconduct, but looking for ways to encourage the Department to more effectively and rationally spend and allocate its limited law enforcement resources.<sup>408</sup> He was not afraid to criticize the Department for falling short, and the result was that he influenced the Department's criminal justice agenda.

Perhaps most critical were Horowitz's calls for the Department to pay close attention to what he labeled as the "growing crisis in the

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405. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21-24 (2010).

406. *Meet the Inspector General*, U.S. DEP'T JUSTICE, <https://oig.justice.gov/about/meet-ig.htm> [<https://perma.cc/H78W-KY85>].

407. *Id.*

408. See Rachel E. Barkow, *Foreword: Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1178 (2016).

federal prison system” of both overcrowding and having BOP costs eat up a greater percentage of the Department’s budget, thus crowding out other law enforcement priorities.<sup>409</sup> His reports and testimony on the strain the BOP’s budget posed for other law enforcement needs provided the springboard for the Department’s Smart on Crime Initiative.

The IG’s analysis of the compassionate release practices of the BOP also catalyzed the Department to change its policies. Even though the Department did not go as far as the IG suggested, it is doubtful the Department would have done anything at all without the IG’s prompting. Similarly, the IG’s analysis of private prisons (showing that they posed greater security and safety risks) led the Department to announce it would reduce and ultimately end its use of private for-profit facilities.<sup>410</sup> Additional IG reports highlighted the need for the BOP to do a better job preparing individuals for reentry.<sup>411</sup> Ultimately, at the end of President Obama’s time in office, the Department focused more on the BOP’s programming.<sup>412</sup> The IG’s data-driven emphasis on how the Department was falling short in its law enforcement mission by spending too much money on failed policies provided the foundation for change. The fact these reports were publicly released also helped create some pressure

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409. Memorandum from Michael E. Horowitz, Inspector Gen., U.S. Dep’t of Justice, to the Attorney Gen. and the Deputy Attorney Gen. (Dec. 11, 2013, reissued Dec. 20, 2013), <https://oig.justice.gov/challenges/2013.htm> [<https://perma.cc/5YRW-Z9VH>]; see also *Oversight of the Department of Justice: Hearing on Appropriations for 2014 Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the H. Comm. on Appropriations*, 113th Cong. 131-32 (2013) (statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice).

410. See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS i-iii (2016), <https://oig.justice.gov/reports/2016/e1606.pdf> [<https://perma.cc/G3PV-NZ3V>]; see also Obama, *supra* note 2, at 831.

411. See generally OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS’ RELEASE PREPARATION PROGRAM i-iii (2016), <https://oig.justice.gov/reports/2016/e1607.pdf> [<https://perma.cc/ACJ7-52G7>].

412. See generally BOS. CONSULTING GRP., REDUCING RECIDIVISM THROUGH PROGRAMMING IN THE FEDERAL PRISON POPULATION: FINAL REPORT: BOP PROGRAMS ASSESSMENT (2016), <https://www.justice.gov/dag/page/file/914031/download> [<https://perma.cc/6D66-CC87>] (assessing BOP programming to determine its effects on reentry and recidivism); *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, U.S. DEP’T JUSTICE ARCHIVES, <https://www.justice.gov/prison-reform> [<https://perma.cc/D2AW-T54F>] (listing recent Federal Bureau of Prisons reforms to improve reentry).

within the Department to make those changes and help break its normal preference for the status quo.

As a result, Horowitz created a model for the Department's IG that could serve future Presidents well in their efforts to prompt change in the Department's practices. One of the key blocks to reform efforts is getting the Department to go along with those efforts—not only in principle, but also in implementation. Horowitz policed the Department closely to make sure both its policies and its implementation of those policies furthered the true mission of law enforcement—protecting the public while respecting individual rights—and used limited resources to achieve those goals most effectively. Future Presidents interested in criminal justice reform would do well to find IGs who share Horowitz's view that the scope of the IG's work includes both evaluating and implementing substantive policies to make sure they are the most effective use of the Department's limited resources.

## 2. *The Judicial Branch*

It is not just the President's executive branch appointments that matter for criminal justice reform. The judicial branch is a key partner in efforts to improve the system. The Sentencing Commission, an independent agency within the judicial branch, issued some of the most significant criminal justice reforms during President Obama's time in office by changing the sentencing guidelines on drug offenses and making those changes retroactive.<sup>413</sup> Appointments to the Commission are thus important for criminal justice reform efforts.<sup>414</sup>

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413. See *supra* Part II.A.1.

414. The Sentencing Commission is set up to be a bipartisan commission, so no more than four of its seven members can come from the same political party. See *Organization*, U.S. SENT'G COMMISSION, <http://www.ussc.gov/about/who-we-are/organization> [<https://perma.cc/N3UB-X6KP>]. In addition, at least three of the seven commissioners must be federal judges. *Id.* It is notable that President Obama appointed Ketanji Brown Jackson, an individual with a background as an assistant federal public defender, to the Commission in 2009 (he later appointed Jackson to the federal bench). See Del Quentin Wilber, *Ketanji Brown Jackson Nominated to Federal Bench*, WASH. POST (Sept. 20, 2012), [https://www.washingtonpost.com/local/ketanji-brown-jackson-nominated-to-federal-bench/2012/09/20/744848dc-037d-11e2-8102-ebee9c66e190\\_story.html?utm\\_term=.3b95cfb29160](https://www.washingtonpost.com/local/ketanji-brown-jackson-nominated-to-federal-bench/2012/09/20/744848dc-037d-11e2-8102-ebee9c66e190_story.html?utm_term=.3b95cfb29160) [<https://perma.cc/NMU2-39YJ>]. Previously, the Commission had largely been made up of individuals with prosecution experience, and few of its members have had experience as criminal defense lawyers, much less

Judges, too, are responsible for sentencing defendants and overseeing the government's law enforcement efforts to ensure that these efforts are consistent with the Constitution and any relevant statutes. In performing those tasks, it is critical to have a bench that represents a diversity of viewpoints on criminal law. The federal bench, however, is dominated by individuals with prosecution experience and has very few individuals with a public defense background. Specifically, a full 43 percent of active Article III judges have prosecutorial experience, compared with only 10.4 percent with public defense experience.<sup>415</sup>

To his credit, President Obama's judicial appointments outside of the Supreme Court were somewhat less tilted toward prosecutors. While 41 percent of his nominees had prosecution experience, 14 percent had public defense experience.<sup>416</sup> Notably, of the seven current Circuit Court judges with public defense backgrounds, five were appointed by President Obama.<sup>417</sup> But while President Obama

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experience as federal defenders. See Barkow, *supra* note 366, at 764-65. In 2013, President Obama appointed Rachel Barkow (one of the authors), a law professor whose scholarship is largely devoted to criminal justice reform. Appointments like these help provide the Commission with important perspectives that balance the prosecutorial perspective it tends to have. Because the majority of the Commission's members at any one time typically have prosecutorial backgrounds and because the Department sends a person to serve as an ex officio member of the Commission, the Department's views are always presented at every meeting, while the federal defenders lack any similar institutional presence on the Commission. See *id.* at 764.

415. Another 13.7 percent have private criminal defense experience, but that typically consists of white collar defense. While those experiences help practitioners see some areas common to all criminal defendants, they do not typically expose lawyers to the plight of the poorest criminal defendants who make up the bulk of the federal prison population. These figures were compiled by downloading a database of federal judges. See *History of the Federal Judiciary: Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., <http://www.fjc.gov/history/judges> [<https://perma.cc/YP2E-5ULY>]. This database was then limited to active, non-senior district court and circuit court judges and queried for career histories. All judges with private experience were reviewed manually to determine if they did defense work because it was not obvious from job title alone. These numbers were then cross-checked with information published in a study by the Alliance for Justice. See ALL. FOR JUSTICE, *BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS* (2016), <http://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf> [<https://perma.cc/3YB2-Z8BA>].

416. Twenty percent of his nominees had private defense experience. See ALL. FOR JUSTICE, *supra* note 415, at 8-9.

417. These judges are G. Steven Agee, Bernice Donald, Jane Kelly, Edward Prado, Luis Restrepo, Robert Wilkins, and James Wynn. See *Biographical Directory of Article III Federal Judges*, *supra* note 415.

did a better job than previous Presidents at appointing individuals with more varied criminal justice experience (including appointing people who had been public defenders) the overall numbers still skew heavily toward people who had been prosecutors.

People can change their perspectives and outlooks with new roles, so undoubtedly many people who take the bench after serving as prosecutors may actively question government positions. But again, it defies what we know about human nature and experience to think that someone's past experiences have no effect on his or her outlook. Because real criminal justice reform requires judges to check overreach by prosecutors and other law enforcement officials, it is critical that the bench reflect a range of professional backgrounds, and for any future President to put people with diverse backgrounds in positions responsible for criminal justice administration. This includes having individuals with defense or criminal justice reform backgrounds on the Supreme Court.

Lower courts matter as well, particularly as federal judges start to explore diversion programs and reentry courts to aid with criminal justice reform. In this regard, it is notable that perhaps the most successful reentry federal program was started by Judge Luis Restrepo, who before becoming a judge was a Philadelphia public defender and then later a federal defender.<sup>418</sup> Future Presidents should similarly pay attention to this factor if criminal justice reform remains a priority.

#### CONCLUSION

Barack Obama made strong statements about his commitment to criminal law reform, and yet his actual achievements were modest. The Department's control over criminal justice reform is a big part of the reason why, as we have seen in our examination of sentencing, clemency, compassionate release, and forensic science. A President who relies on the Department to roll back mass incarceration and lead the way on large-scale criminal justice reform is choosing an institutional model that is designed to fail, because such an effort will focus too much on the Department and not enough on justice. Obama's passion for reform was groundbreaking, authentic, and

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418. See ALL. FOR JUSTICE, *supra* note 415, at 8.

important. Our hope is that a successor will pair that passion with institutional models that allow for true and lasting success.