Commuted Sentences: Could You Ask for More?

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I. INTRODUCTION

The United States is home to approximately 330 million people.[1] Strikingly, 2.3 million of them are behind bars.[2] For every 100,000 people in the United States, nearly 700 are in prison, an incarceration rate unmatched by any other country.[3] And despite having only 4% of the world's population, the United States has an estimated one-third of the world's prisoners serving life sentences.[4]

The problems caused by mass incarceration are varied and significant. Annual spending on corrections at the state level alone totaled almost $57 billion in 2015.[5] And there appears to be little payoff either, as recidivism rates remain high; three quarters of those released from prison will be arrested within five years and over half will end up back in prison.[6] The lack of payoff is especially true for drug offenses, which account for nearly one-fifth of America's incarcerations.[7] A 2018 Pew Research analysis found "no statistically significant relationship between state drug imprisonment rates

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1. *U.S. and World Population Clock*, U.S. CENSUS BUREAU (Dec. 23, 2020), https://www.census.gov/popclock/ [https://perma.cc/332K-6LK7].

2. Press Release, Wendy Sawyer, Rsch. Dir., Prison Pol'y Initiative, & Peter Wagner, Exec. Dir., Prison Pol'y Initiative, Mass Incarceration: The Whole Pie 2020 (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/MT8A-GHKR].

3. Sintia Radu, *Countries with the Highest Incarceration Rates*, U.S. NEWS & WORLD REP. (May 13, 2019), https://www.usnews.com/news/best-countries/articles/2019-05-13/10-countries-with-the-highest-incarceration-rates [https://perma.cc/2J5R-9Z6F].

4. Campbell Robertson, *Crime Is Down, yet U.S. Incarceration Rates Are Still Among the Highest in the World*, N.Y. TIMES (Apr. 25, 2019), https://www.nytimes.com/2019/04/25/us/us-mass-incarceration-rate.html [https://perma.cc/9BYC-L2DS].

5. DANNY JASPERSON & KARIN RUEFF, MTC INST., AMERICA'S MASS INCARCERATION PROBLEM 6 (2017), https://www.mtctrains.com/wp-content/uploads/2017/11/Mass_Incarceration_Solutions.pdf [https://perma.cc/N6NF-GB6Q].

6. *Id.* at 5.

7. Press Release, Sawyer & Wagner, *supra* note 2.

and three indicators of state drug problems: self-reported drug use, drug overdose deaths, and drug arrests."[8]

The ineffectiveness of incarceration is not the only problem. Mass imprisonment has substantial social costs as well.[9] Around five million children have had a parent behind bars, "placing them at greater risk for emotional, behavioral, and academic problems."[10] Incarceration also affects communities of color disproportionately.[11] While blacks comprise only 12% of the total U.S. population, they represent 33% of the nation's prison population.[12]

The United States' mass incarceration problem cannot be attributed to any single policy or practice.[13] Instead, experts suggest it is the result of "punitive sentencing policies, an increase in prosecutions, and changes in criminal justice philosophy that deemphasized rehabilitation."[14] Criminal justice reform efforts have focused on reducing the prison population.[15] These efforts have had some success, especially within the last decade,[16] but much remains to be done.

Similar to the problem itself, the solutions to America's mass incarceration problem come from a variety of places. All three branches of government have a role, at both the state and federal level. One particularly interesting tool for criminal justice reform is executive clemency. Clemency allows a chief executive to unilaterally grant relief to convicted individuals.[17] The President's clemency power is broad and absolute, making it a uniquely effective tool for rolling back mass incarceration in the United States.[18]

Clemency is not, however, a perfect solution. As it currently stands, the clemency process is a maze of recommendations and multiple levels of

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8. THE PEW CHARITABLE TRS., MORE IMPRISONMENT DOES NOT REDUCE STATE DRUG PROBLEMS 1 (2018), https://www.pewtrusts.org/-/media/assets/2018/03/pspp_more_imprisonment_does_not_reduce_state_drug_problems.pdf [https://perma.cc/4P5F-BQLJ].

9. JASPERSON & RUEFF, *supra* note 5, at 6.

10. *Id.*

11. *Id.*

12. Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN, https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html [https://perma.cc/5H3Z-SK63] (Apr. 21, 2019, 3:50 PM).

13. JASPERSON & RUEFF, *supra* note 5, at 6.

14. *Id.*

15. Robertson, *supra* note 4.

16. *Id.*

17. *Clemency*, BLACK'S LAW DICTIONARY (2d ed. 1910).

18. German Lopez, *Amy Klobuchar Has a Plan To Reverse the War on Drugs—and Doesn't Need Congress To Do It*, VOX (Apr. 30, 2019, 8:00 AM), https://www.vox.com/future-perfect/2019/4/30/18484809/amy-klobuchar-clemency-pardon-criminal-justice-reform [https://perma.cc/M5DE-RYU5].

review.[19] Bureaucratic and political issues plague the process and can lead to inconsistent results.[20] Furthermore, there remain questions surrounding the scope of the clemency power, its susceptibility to judicial review, and its ultimate effect on an individual's sentence.[21] One such question is whether an executively commuted sentence remains under the control of the court.

This Comment argues that an executive commutation of an individual's sentence does not divest courts of their authority to further scrutinize that sentence.[22] Though this concept applies equally to sentences for all crimes, the question is analyzed where it has come up most recently: in the context of federal drug sentencing reform during the last decade, specifically as it relates to former President Barack Obama's 2014 Clemency Initiative.

Part II offers an overview of the President's pardon power, with a more in-depth look at the commutation power. This includes constitutional considerations such as the scope of the clemency power and whether the judiciary's power of review extends to a President's exercise of the power.

Part III looks at the 2010 Fair Sentencing Act, which addressed sentencing disparities in drug offenses, specifically those present in crack and powder cocaine offenses. It also covers President Obama's 2014 Clemency Initiative (the "Initiative"), an effort that resulted in the clemencies of 1,696 individuals. Each had been sentenced unfairly prior to the 2010 Fair Sentencing Act but were unable to benefit from the law's sentencing relief because it lacked retroactive effect. The Initiative's eventual reliance on "term" commutations ultimately led to the divestiture question at hand.

Part IV focuses on the individuals who saw their sentences commuted by President Obama but nonetheless sought further sentencing relief. Here, a circuit split exists concerning whether the President's commutation of a sentence divests courts of authority over that sentence. While most circuits say that the court's authority is not divested, the Fourth Circuit has held, and continues to maintain, that defendants cannot seek further sentence relief once they have received executive clemency. This Part examines the reasonings behind judicial decisions on either side of the split.

Part V argues that the stance taken by the Sixth Circuit in *Dennis v. Terris*, which allows courts authority over sentences even after executive commutation, is the correct approach for both constitutional and policy-based reasons. Looking forward, this Part then argues that executive clemency is a

19. *See infra* Part III.

20. *See infra* Part III.

21. *See infra* Part III.

22. The central issue of this Comment is whether a presidential grant of clemency divests courts of their authority to further scrutinize the sentence. This issue will sometimes be referred to as the "divestiture issue" or the "divestiture question."

powerful tool in addressing categorical issues, such as sentence reform, that may otherwise go unaddressed due to the nature of legislative and judicial processes.

II. BACKGROUND ON THE CLEMENCY POWER

The balance of executive and judicial power lies at the heart of the divestiture issue. This Part begins with a look at the President's clemency power, including its basis in the Constitution and how the power has been used historically. Next, this Part addresses how and when the courts may judicially review an executive's use of the clemency power.

A. The Power To Commute

"*The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.*"[23]

Clemency is the "president's power to pardon a person convicted of a criminal offense or to commute the related sentence."[24] Article II of the Constitution vests the President with the power to grant clemency.[25] This Section begins with a look at the purposes of, and limitations on, the pardon power. It then explores the numerous forms clemency can take. Finally, this Section details presidential use of the power in American history, specifically noting those uses that were broad and issue-based in nature.

1. Purposes and Limitations

The Constitution grants the President, as Chief Executive, a broad palette of powers.[26] Of these powers, the clemency power is perhaps the most unlimited. The Founders considered limitations, such as excluding crimes of

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23. U.S. CONST. art. II, § 2, cl. 1.

24. *Clemency*, *supra* note 17. While this Comment focuses primarily on the federal clemency power, all fifty states have provisions in their respective constitutions allowing for clemency at the state level. State clemency, however, is often subject to legislative override or other restrictions on its scope that do not exist at the federal level. For example, many states have implemented clemency boards that recommend certain individuals to the governor for clemency. In some states, the board itself exercises the pardon power. For a detailed comparison of state pardon policies and practices, see *50-State Comparison: Pardon Policy & Practice*, RESTORATION OF RTS. PROJECT, http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/ [https://perma.cc/Z4Q2-V2SZ] (May 2020).

25. U.S. CONST. art. II, § 2, cl. 1.

26. *See id.* art. II.

treason from the pardon's scope or requiring Senate approval of proposed pardons.[27] Ultimately, however, they settled on a pardon power "exclusive, broad, and virtually unrestricted by constitutional checks and balances."[28] The power is executive in nature; Congress cannot "withdraw, limit, or overturn presidential pardons," nor can the courts or prosecutors ignore them.[29] The Supreme Court has rarely used its power of judicial review over a grant of executive clemency, and when the Court has, it has interpreted the scope of the power very broadly.[30]

As to the power's broad and virtually unrestricted reach, the Constitution places only two obvious textual limitations: it can be used to pardon only crimes against the United States (i.e., federal crimes, not state crimes), and it cannot be used to pardon an individual during an impeachment proceeding.[31] In *Ex parte Garland*, the Court read a third limitation into the power that pertains to the timing of a grant of clemency.[32] A pardon "may be exercised at any time *after* [the] commission [of the offense], either before legal proceedings are taken or during their pendency, or after conviction and judgment."[33] It cannot, however, be exercised before the crime has been committed.[34] Beyond these limitations, though, the pardon power is plenary and absolute.[35] A President can grant clemency individually or to a class of persons and can grant it conditionally or absolutely.[36]

Some disagreement exists over whether the underlying principle of the pardon power is that of mercy, of justice, or some combination of the two.[37] When clemency is granted for purposes of mercy, "it is to minimize the undue harshness of an otherwise effective and fair system of laws."[38] In this way, clemency exists as a discretionary tool for an executive to help the accused or convicted, irrespective of what the law may dictate. A grant of clemency for reasons based in justice, on the other hand, "make[s] up for inadequacies

27. Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 77–78 (2019).

28. *Id.* at 79.

29. *Id.* at 83–84.

30. *Id.* at 85. Judicial review of the pardon power is addressed in detail in Part II.B.

31. U.S. CONST. art. II, § 2, cl. 1.

32. William F. Duker, *The President's Power To Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 526 (1977).

33. *Ex parte* Garland, 71 U.S. 333, 380 (1866) (emphasis added).

34. Duker, *supra* note 32, at 526.

35. *Ex parte Garland*, 71 U.S. at 380.

36. *Id.* at 351.

37. *See* Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43 (1998).

38. *Id.* at 78.

or failures within that system of laws."[39] Such failures can result from "a procedural rule [that] prevents the courts from reaching the merits of a 'good' claim" or from an established legal standard that lacks the flexibility to reach justice in a particular situation.[40]

2. Forms of Clemency

The Supreme Court has interpreted the constitutional text of the President's clemency power to include five distinct forms of clemency: pardons, commutations of sentences, reprieves, remissions of fines and penalties, and amnesties.[41] A pardon, the most far-reaching of the forms, relieves the offender of all legal consequences of her conviction and restores any civil rights that were forfeited because of the conviction.[42] A commutation, on the other hand, merely adjusts the punishment imposed but does not relieve the offender of punishment entirely.[43] Commutations generally take the form of sentence reductions or the replacement of a death sentence with life imprisonment.[44] A reprieve merely delays the execution of the punishment imposed by the court, while a remission of fines and penalties requires the government to return to an offender all or a portion of the fines and forfeitures that accrue from offenses against the government.[45] Finally, a grant of amnesty is essentially the same as a pardon, except it is granted to a class of offenders as opposed to an individual.[46]

Presidents are free to attach conditions to their clemency grants and have done so throughout American history in a variety of circumstances.[47] So long as these conditions do not "otherwise offend the Constitution," they are permissible.[48]

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39. *Id.*

40. *Id.*

41. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 810 (2015); Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 570 (2001); James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative To Escape Accountability*, 27 U. RICH. L. REV. 345, 348 (1993).

42. Barkow, *supra* note 41, at 811.

43. *Id.*

44. *See id.*

45. Hoffstadt, *supra* note 41, at 570 nn.40–41.

46. Barkow, *supra* note 41, at 811.

47. Schick v. Reed, 419 U.S. 256, 266 (1974). To provide a few examples, "presidents have offered clemency on the condition that offenders refrain from alcohol, provide support for family members, leave the country, join the [N]avy, drop claims against the United States, or restrict their travel or speech." Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1665 (2001).

48. *Schick*, 419 U.S. at 266.

3. Historical Use of the Clemency Power

Every President except two has utilized the clemency power.[49] Its usage declined significantly over time, especially during recent decades,[50] though the Initiative signaled a revival of the power's use. Presidents have also exercised the power in a variety of ways. The Initiative was not the first time a President has attempted to address large or controversial issues with the clemency power.

During the first half of the twentieth century, presidential usage of the clemency power was not uncommon. In fact, eight of the eleven Presidents between 1901 and 1969 used the clemency power in at least 1,000 instances during their respective terms in office.[51] Some used the power even more frequently. Presidents Woodrow Wilson and Franklin D. Roosevelt, for example, made 2,827 and 3,796 clemency grants, respectively.[52] With respect to the total number of requests received, these Presidents granted clemency, on average, in just over 30% of the cases before them.[53]

Beginning in the 1970s, however, Presidents began using the clemency power far more sparingly.[54] By the turn of the century, clemency grants became almost unheard of.[55] President George W. Bush granted just 2% of the requests he received, totaling only 200 clemency grants during his eight years in office.[56] Prior to the Initiative, President Obama was on pace for even fewer clemency grants, having made only sixty-two through his first six years in office.[57] Once President Obama set the Initiative in motion, however, clemency grants increased significantly. By the end of his term, President Obama had made 1,927 grants of clemency, nearly equaling the previous six Presidents combined.[58] This number doesn't show the entire picture,

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49. Eckstein & Colby, *supra* note 27, at 86.

50. *See* Barkow, *supra* note 41, at 813–18 ("Clemency grant rates have plummeted to such low levels that observers have noted that it has become 'hard to tell what distinguishes the handful of lucky winners from the thousands of disappointed suitors'; in the end, the process seems to 'operate[ ] like a lottery.'"); William M. Landes & Richard A. Posner, *The Economics of Presidential Pardons and Commutations*, 38 J. LEGAL STUD. 61, 72 (2009) ("The total number of clemency grants has ranged from zero in 6 years (including 5 years since 1992) to a high of 639 in 1920 (including 341 commutations).").

51. John Gramlich & Kristen Bialik, *Obama Used Clemency Power More Often than Any President Since Truman*, PEW RSCH. CTR. (Jan. 20, 2017), https://www.pewresearch.org/fact-tank/2017/01/20/obama-used-more-clemency-power/ [https://perma.cc/2LCW-3EKC].

52. *Id.*

53. *Id.*

54. *See id.*

55. *See id.*

56. *Id.*

57. *Clemency Statistics*, U.S. DEP'T. OF JUST., https://www.justice.gov/pardon/clemency-statistics [https://perma.cc/7K9R-PT3Z].

58. Gramlich & Bialik, *supra* note 51.

however, as the Initiative resulted in over 36,000 requests, far more than any other President had ever received.[59] President Obama granted just 5% of those requests, in line with other contemporary Presidents.[60] And if President Donald Trump's four years in office were any indication, the Initiative may turn out to be an aberration, as he made only 237 grants of clemency, out of over 11,000 requests.[61]

The dramatic decline in Presidents' use of the clemency power is largely attributable to a shift in American politics surrounding crime that began in the 1960s.[62] As crime rates rose across the country, Americans lost faith in the criminal justice system and began to demand tougher stances on crime from their elected officials.[63] Presidents and governors grew hesitant when it came to clemency, fearing that such actions would be perceived as being "soft on crime."[64] This sentiment has remained even after crime rates have dropped and attitudes toward criminal justice have changed across the nation.[65] As a result, clemency remains underutilized by executives.[66]

As mentioned above, clemency can be granted on an individual basis or to a class of persons. A number of Presidents have chosen the latter method with the intention of addressing large or particularly controversial issues. The Initiative was the latest example of such broad, issue-based use of clemency. There have been a number of other examples. President Thomas Jefferson pardoned soldiers who had deserted during the Revolutionary War.[67] Similarly, President James Madison pardoned deserters during the War of 1812, along with pirates and smugglers who had helped the British side.[68] President Andrew Johnson later pardoned soldiers who had fought for the Confederacy during the Civil War and "all persons engaged in the late rebellion."[69] One of the more controversial blanket pardons was President

59. *Id.*
60. *Id.*
61. *See* U.S. DEP'T. OF JUST., *supra* note 57.
62. Barkow, *supra* note 41, at 819.
63. *Id.*
64. *Id.* at 820.
65. *Id.*
66. *Id.* at 822.
67. Murray Illson, *At Least 12 Presidents Involved in Pardon or Amnesty Moves*, N.Y. TIMES (Jan. 22, 1977), https://www.nytimes.com/1977/01/22/archives/at-least-12-presidents-involved-in-pardon-or-amnesty-moves.html [https://perma.cc/54CB-Y98A].
68. *Id.*
69. *Id.*

Jimmy Carter's grant of unconditional pardons to hundreds of thousands of men who had evaded the draft during the Vietnam War.[70]

While many of these broad, issue-based clemency grants have been aimed at resolving issues following military conflicts, Presidents have also used this style of clemency grant to address issues with sentencing and criminal justice reform. Whereas President Obama sought to help those who had been sentenced harshly for crack cocaine convictions with the Initiative, President John F. Kennedy made a series of pardons and commutations aimed at helping first-time offenders who had received harsh mandatory minimum sentences under the 1956 Narcotics Control Act.[71]

B. Judicial Review of Executive Clemency

As noted, the President's power to pardon is largely without restriction. It has been interpreted as broad, plenary, and free from congressional limitation or judicial reversal.[72] The Supreme Court has even hinted that the separation of powers doctrine makes it unconstitutional for the judiciary to interfere with the power in any way.[73] However, despite its general hesitancy to do so, the Court has reviewed executive grants of clemency on a number of occasions.

In 1833, the Court held in *United States v. Wilson* that a pardon must be delivered to and accepted by its recipient to go into effect, that it may be rejected by the recipient, and that a court has no power to force the pardon upon him.[74] Nearly a century later, in *Ex parte Grossman*, the Court reviewed the validity of a presidential pardon that was granted to a man convicted of criminal contempt of court, ultimately holding the pardon constitutional.[75]

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70. Andrew Glass, *President Carter Pardons Draft Dodgers, Jan. 21, 1977*, POLITICO (Jan. 21, 2018, 6:30 AM), https://www.politico.com/story/2018/01/21/president-carter-pardons-draft-dodgers-jan-21-1977-346493 [https://perma.cc/3JUA-QCSC].

71. Interview by Robin Young with Samuel T. Morison, Former Staff Att'y, Off. of the Pardon Att'y (Feb. 3, 2014, 12:40 PM) https://www.npr.org/transcripts/271144928?storyId=271144928 [https://perma.cc/RP2N-Y55C]; Philip Bump, *Caroline Kennedy's Jury Service Echoes Her Father's Stance on Drug Crimes*, ATLANTIC (May 21, 2013) https://www.theatlantic.com/national/archive/2013/05/caroline-kennedys-jury-service-ends-her-father-might-have-hoped/315052/ [https://perma.cc/44K9-MNDV].

72. Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L.J. 698, 700 (2012).

73. *Id.* (citing United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) ("It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit.").

74. 32 U.S. (7 Pet.) 150, 161 (1833).

75. 267 U.S. 87, 122 (1925).

In 1915, the Court invalidated a pardon in *Burdick v. United States*[76] for the first and only time.[77] Burdick, a newspaper editor, was asked questions before a grand jury regarding a fraud that was under investigation.[78] Concerned that he might incriminate himself, Burdick invoked the Fifth Amendment and refused to provide the identity of the sources for his article.[79] President Woodrow Wilson granted Burdick a pardon in an effort to encourage him to speak, but Burdick rejected the pardon and maintained his silence.[80] The Court held that the pardon infringed on Burdick's Fifth Amendment rights and declared the pardon invalid.[81]

In 1974, the Supreme Court again reviewed a grant of clemency, this time upholding a conditional commutation as constitutional.[82] In *Schick v. Reed*, the Court reviewed the case of Maurice L. Schick, who had been sentenced to death in military court in 1954.[83] Six years later, President Eisenhower commuted Schick's sentence to life imprisonment, attaching the condition that he never be considered for parole at any point.[84] After the Supreme Court struck down the death penalty in 1972, Schick appealed his life sentence and argued that the no-parole condition attached to the commutation left him "in a worse position than he would have been in had he contested his death sentence—and remained alive—until the [death penalty was struck down] 18 years after that sentence was originally imposed."[85] Essentially, the Court noted, Schick argued that he "made a 'bad bargain'" by accepting the commutation in place of a death sentence, which would have converted to a life sentence *with* the opportunity for parole after the death penalty was abolished.[86] The Court upheld the commutation, noting the constitutionality of conditional clemency grants and the pardon power's inability to be "modified, abridged, or diminished" by congressional statute.[87]

The judiciary's power of review over clemency grants was explicitly addressed in Justice Sandra Day O'Connor's concurring opinion in *Ohio Adult Parole Authority v. Woodard*:

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76. 236 U.S. 79, 94 (1915).

77. Zachary J. Broughton, Note, *I Beg Your Pardon:* Ex Parte Garland *Overruled; The Presidential Pardon Is No Longer Unlimited*, 41 W. NEW ENG. L. REV. 183, 206 (2019).

78. *Burdick*, 236 U.S. at 85.

79. *Id.*

80. *Id.* at 86–87.

81. *Id.* at 94.

82. Schick v. Reed, 419 U.S. 256, 268 (1974).

83. *Id.* at 257.

84. *Id.* at 258.

85. *Id.* at 259.

86. *Id.*

87. *Id.* at 266–67.

> I do not, however, agree . . . that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards. . . . [A]lthough it is true that "pardon and commutation decisions have not traditionally been the business of courts," . . . some minimal procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.[88]

All told, it is clear that the pardon power has been subject to judicial review at various times throughout history, despite its otherwise unlimited nature. More specifically, scholars like Professor Daniel T. Kobil have proposed four types of challenges to a grant of clemency that provide a basis for judicial review: (i) clemency grants in cases of impeachment, (ii) clemency grants that undermine fundamental rights, (iii) clemency grants that deny equal protection of the law, and (iv) clemency grants that deny due process of law.[89]

III. PRESIDENT OBAMA'S CLEMENCY INITIATIVE

The question of whether a presidential commutation divests courts of authority over the sentence is one that was historically unaddressed by the courts. In recent years, however, the question has more frequently presented itself, primarily in the context of defendants who received commutations as a result of the Initiative.[90] An understanding of the Initiative and its impact on sentencing reform in the United States is thus helpful to fully understand the context in which the divestiture question has most commonly risen.

This Part first looks at the 2010 Fair Sentencing Act, the legislation that gave rise to the Initiative a few years later. After that, this Part addresses the Initiative, including its purpose and goals, its ultimate results, and some of its problems. Finally, this Part focuses on those defendants who saw their sentences commuted and still sought further, arguably deserved, relief.

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88. Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 288–89 (1998) (O'Connor, J., concurring in part) (citation omitted) (emphasis omitted).

89. For a more comprehensive look at these four types of challenges and at judicial review of executive clemency in general, see Kobil, *supra* note 72, at 711–12.

90. *See* Brianna Vollman, *Keeping Up with the Commutations: The Judiciary's Authority After an Exercise of Executive Clemency*, 88 U. CIN. L. REV. 1129, 1130 (2019).

A. The Fair Sentencing Act of 2010

On August 3, 2010, President Obama signed the Fair Sentencing Act ("FSA") into law.[91] The legislation was aimed at reforming harsh and unfair sentencing practices, specifically those for low-level crack cocaine offenses.[92] For nearly twenty-five years, beginning with the passage of the Anti-Drug Abuse Act of 1986, federal law had imposed stricter sentences on crack cocaine offenders than on powder cocaine offenders by a 100:1 ratio.[93] This meant that "one gram of crack cocaine was treated the same as one *hundred* grams of powder cocaine for sentencing purposes."[94] The 1986 Act also implemented a five-year mandatory minimum sentence for first-time offenders of simple possession of crack cocaine.[95] For comparison, "simple possession of any other controlled substance by a first-time offender—including powder cocaine—[was] a misdemeanor offense punishable by a *maximum* of one year in prison."[96] And that wasn't all, as prior convictions meant even harsher sentences for crack possession. An offender in possession of more than fifty grams of crack received a mandatory life sentence without parole if he had two prior drug convictions.[97]

The sentencing ratio between crack and powder cocaine was unpopular for two reasons. First, it proved to be largely without merit, as many of the

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91. THE SENT'G PROJECT, FEDERAL CRACK COCAINE SENTENCING 1 (2010), https://www.sentencingproject.org/wp-content/uploads/2016/01/Federal-Crack-Cocaine-Sentencing.pdf [https://perma.cc/ZP5T-RNDF].

92. *Id.*

93. Sarah Hyser, Comment, *Two Steps Forward, One Step Back: How Federal Courts Took the "Fair" Out of the Fair Sentencing Act of 2010*, 117 U. PA. L. REV. 503, 504 (2012).

94. Tyler B. Parks, Note, *The Unfairness of the Fair Sentencing Act of 2010*, 42 U. MEM. L. REV. 1105, 1107 (2012) (emphasis added).

95. Hyser, *supra* note 93, at 508–09. A brief explanation of how sentencing guidelines are affected by mandatory minimums is helpful. Following conviction, a federal judge receives a "presentence report" from the probation office. Parks, *supra* note 94, at 1109. The report suggests a guideline range for the defendant's sentence based on a combination of the individual's base offense level (which takes into account his role in the crime, whether there was a victim involved, whether he accepted responsibility, and whether he obstructed justice) and the individual's criminal history category (which takes into account the quantity and severity of any prior criminal convictions). *Id.* This creates a guideline range for the judge. *Id.* at 1110. "If the statute under which the defendant was convicted contains a mandatory minimum," the lower end of the guideline range is locked in place at the requisite minimum. *Id.* at 1111. Because the FSA both lowered the guideline range for crack convictions and eliminated the mandatory minimum, defendants sentenced for crack convictions after the law's enactment faced sentences much closer in severity to those facing powder convictions. *Id.* at 1112.

96. Hyser, *supra* note 93, at 509 (quoting U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at v (1995), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/EXECSUM.pdf [https://perma.cc/HRA4-XQMG]).

97. *Id.*

scientific and social rationales used by Congress to support the ratio's implementation in 1986 were later demonstrated to be false or exaggerated.[98] Second, it had an unduly harsh and disparate effect on the black community, which had statistically higher rates of conviction for crack cocaine offenses.[99] Convictions for powder cocaine, conversely, were more evenly spread across the population.[100]

In 1986, Congress pointed to five primary facts that underlined its heightened concern for crack in comparison with powder cocaine:

> (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent . . . ; (3) crack was more harmful to users than powder . . . ; (4) crack use was especially prevalent among teenagers; and (5) crack's potency and low cost were making it increasingly popular.[101]

In reality, studies showed that powder and crack cocaine had identical physiological and psychotropic effects, that crack cocaine never became a widespread epidemic among youth, and that crack cocaine did not cause as much violence as had been anticipated.[102] In essence, crack and powder cocaine were virtually identical in their chemical makeup, in their effects on users, and in their treatment and rehabilitation methods.[103] Furthermore, the ratio seemed to punish low-level drug dealers and users more harshly than it did the wholesale drug distributors who supplied them with the powder cocaine from which their crack cocaine was produced.[104] The sentencing ratio quickly became the target of sustained criticism.[105]

The racially discriminatory outcomes of the sentencing ratio's implementation were glaring. By the end of 2011, approximately 83% of the 30,000 federal prisoners serving crack cocaine sentences were black.[106] In 2010 alone, "92.7% of all crack cocaine defendants were non-white, and the majority of them (78.5%) were black."[107] In contrast, "[b]etween 1988 and 1995, federal prosecutors did not bring a single case against a white person 'under the crack provision in seventeen states, including major cities such as

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98. Parks, *supra* note 94, at 1114.
99. Hyser, *supra* note 93, at 504–05.
100. *Id.*
101. Parks, *supra* note 94, at 1114 (citing Kimbrough v. United States, 552 U.S. 85, 95–96 (2007)).
102. *Id.*
103. *See id.* at 1117.
104. *Id.* at 1115.
105. Hyser, *supra* note 93, at 510–11.
106. Andrew Cockroft, Comment, *Congress* Blewett *by Not Explicitly Making the Fair Sentencing Act of 2010 Retroactive*, 107 J. CRIM. L. & CRIMINOLOGY 325, 329 (2017).
107. *Id.*

Boston, Denver, Chicago, Miami, Dallas, and Los Angeles.'"[108] Instead, in white communities, powder cocaine convictions (and their comparatively lenient sentencing guidelines) were more common.[109]

It took until 2010 for Congress to finally ease the unfounded and racially discriminatory sentencing disparity. In passing the FSA, Congress reduced the crack-to-powder sentencing ratio from 100:1 to 18:1.[110] It also eliminated the five-year mandatory minimum for first-time possessors of crack cocaine.[111]

Though the FSA brought welcomed change, it wasn't perfect. Congress had settled on an 18:1 ratio as a compromise, as there were still members of Congress who believed that crack was more dangerous than powder cocaine.[112] There remains an effort to further reduce the ratio to 1:1 and do away with the sentencing disparity altogether.[113]

More contentious was the FSA's failure to contain an express retroactivity provision or any directive as to when federal judges were to implement the new mandatory minimums.[114] Courts were "immediately divided" on whether the FSA applied to defendants whose charged conduct occurred prior to the FSA's enactment.[115] The Supreme Court partially settled the debate in 2012, holding that the FSA's sentencing reductions applied only to those defendants who were *sentenced* after the FSA's enactment, even if their charged conduct occurred before the FSA went into effect.[116] But the Court left open the question of whether the FSA was *fully* retroactive, that is, whether it applied to all pre-Act offenders, specifically those who were sentenced before the law's enactment.[117] Circuit courts answered this question a number of times, however, with each circuit holding that the law

108. *Id.* (quoting United States v. Blewett, 719 F.3d 482, 487 (6th Cir. 2013)).

109. Carly Hudson, Note, *Between a Rock and a Hard Place: Ensuring that Defendants Incorrectly Sentenced Between the Fair Sentencing Act of 2010 and* United States v. Dorsey *Achieve Re-Sentencing*, 48 COLUM. J.L. & SOC. PROBS. 141, 142 (2014).

110. *Id.* at 142–43; *see* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (codified at 21 U.S.C. § 841(b)(1)(B)(iii)).

111. *See* Fair Sentencing Act § 3 (codified at 21 U.S.C. § 844(a)).

112. Hyser, *supra* note 93, at 512–13.

113. *Fair Sentencing Act*, ACLU, https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act [https://perma.cc/CH5E-3WAJ].

114. Hyser, *supra* note 93, at 514.

115. Nathaniel W. Reisinger, Note, *Redrawing the Line: Retroactive Sentence Reductions, Mass Incarceration, and the Battle Between Justice and Finality*, 54 HARV. C.R.-C.L. L. REV. 299, 300 (2019).

116. Dorsey v. United States, 567 U.S. 260, 273 (2012).

117. Cockroft, *supra* note 106, at 331.

was not written to have retroactive effect to the benefit of pre-Act offenders.[118]

The FSA eased some of the tension surrounding sentence disparities in cocaine convictions, which had proven unfair, unjustified, and racially discriminatory.[119] But though it was held partially retroactive, the law's failure to apply full retroactivity left thousands in prison serving sentences that were significantly longer than they would have received under the new sentencing guidelines.[120] It would take almost a decade for Congress to make the law fully retroactive, which it finally did with the enactment of the First Step Act in December 2018.[121] In the meantime, however, President Obama sought to help those serving sentences under the pre-FSA sentencing guidelines through the use of his clemency power.[122] The following sections explore the Initiative and introduce the curious question of divestiture that arose in a number of cases involving recipients of President Obama's clemency.

B. The Clemency Initiative

President Obama first indicated his desire to help those left behind by the FSA in December 2013, when he commuted the sentences of eight inmates who were each serving sentences ranging from twenty years to life.[123] The inmates had been sentenced for crack cocaine convictions prior to the enactment of the FSA and were thus unable to benefit from the law.[124] In commuting their sentences, President Obama noted that if they had been sentenced after the enactment of the FSA, "many of them would have already served their time and paid their debt to society."[125]

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118. *Id.*; *see, e.g.*, United States v. Augustine, 712 F.3d 1290, 1295 (9th Cir. 2013) (holding that "Congress, through its silence in the FSA on the question of retroactivity, has resolved the issue").

119. Cockroft, *supra* note 106, at 330.

120. *Id.* at 357.

121. *See* First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222; NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 9 (2019), https://fas.org/sgp/crs/misc/R45558.pdf [https://perma.cc/Q3SZ-FJB9] ("The First Step Act authorizes courts to apply retroactively the Fair Sentencing Act of 2010 . . . by resentencing qualified prisoners as if the Fair Sentencing Act had been in effect at the time of their offenses.").

122. Cockroft, *supra* note 106, at 357.

123. OFF. OF THE INSPECTOR GEN., U.S. DEP'T. OF JUST., REVIEW OF THE DEPARTMENT'S CLEMENCY INITIATIVE 4–5 (2018), https://oig.justice.gov/reports/2018/e1804.pdf [https://perma.cc/M4EP-8LK7].

124. *Id.*

125. *Id.* at 5.

These clemency grants foreshadowed the Initiative, which the Department of Justice ("DOJ") officially announced the following April.[126] The Initiative set out to grant clemency to "non-violent offenders who 'likely would have received substantially lower sentences if convicted for the same offenses' had they been sentenced under the law at the time the Initiative was announced."[127] The DOJ announced six criteria that it would consider when reviewing clemency petitions:

> 1. 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;
>
> 2. They are non-violent, low level offenders without significant ties to large scale criminal organizations, gangs or cartels;
>
> 3. They have served at least 10 years of their prison sentence;
>
> 4. They do not have a significant criminal history;
>
> 5. They have demonstrated good conduct in prison; and
>
> 6. They have no history of violence prior to or during their current term of imprisonment.[128]

Petitioners who met all six criteria were to have their applications prioritized.[129] Though the initial announcement did not say so, the Initiative's clemency reviews were at some point limited to drug-trafficking offenders; in the end, all the individuals whose petitions for clemency were granted had committed a drug-trafficking offense.[130]

Outside the DOJ, a group called the Clemency Project 2014 ("CP14") was formed by lawyers and advocates who aimed to identify candidates and

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126. *Id.* at 6.

127. U.S. SENT'G COMM'N, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE 6 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf [https://perma.cc/NX8M-EP3B].

128. OFF. OF THE INSPECTOR GEN., *supra* note 123, at 6.

129. *Id.*

130. COURTNEY M. OLIVA, THE CTR. ON THE ADMIN. OF CRIM. L., THE MERCY LOTTERY: A REVIEW OF THE OBAMA ADMINISTRATION'S CLEMENCY INITIATIVE 26 (2018), https://www.law.nyu.edu/sites/default/files/upload_documents/The%20Mercy%20Lottery.Report%20on%20Obama%20Clemency%20Initiative.2018.pdf [https://perma.cc/56QJ-ULV2] ("The majority of the drug offenses involved crack cocaine offenses (61 percent), followed by methamphetamine (17.4 percent), powder cocaine (15.4 percent), and marijuana trafficking (4.2 percent).").

facilitate their applications for clemency.[131] CP14 recruited and trained volunteer lawyers to help with their efforts.[132]

The Initiative process involved numerous steps of review for every petitioner's application. First, the Bureau of Prisons ("BOP") prepared a survey that was sent to every federal prisoner; the survey asked questions that generally overlapped with the six criteria.[133] The completed surveys were passed along to CP14.[134] CP14 would then identify survey respondents who appeared to meet the criteria and assign them volunteer attorneys to assist with their clemency petitions.[135] The petitions were next sent to the Office of the Pardon Attorney ("OPA") for review.[136] The OPA in turn made its own recommendations on each petition and sent those recommendations to the Deputy Attorney General, who could either accept or reject the OPA recommendation.[137] If accepted by the Deputy Attorney General, the OPA recommendation was passed to the White House Counsel's Office for yet another level of review before it was finally sent to the President for final approval.[138]

Perhaps unsurprisingly, this "bureaucratic maze" of reviews and recommendations proved to be inefficient and slow.[139] To make matters worse, the Initiative was burdened by an overwhelming number of applicants.[140] The BOP survey received 33,000 responses alone, and CP14 was left with the enormous task of sorting through them.[141] It took a CP14 attorney around thirty days to complete one applicant review, meaning thousands of applicants were left waiting months just to find out whether they would be assigned an attorney.[142] The Initiative was burdened by lack of resources and manpower,[143] limited access to applicants' records (such as their pre-sentencing reports), and inconsistencies surrounding the application of the six criteria.[144] The end of President Obama's term in office also

131. OFF. OF THE INSPECTOR GEN., *supra* note 123, at 6–7.
132. *Id.* at 7.
133. OLIVA, *supra* note 130, at 23.
134. *Id.*
135. *Id.* at 23–24.
136. *Id.* at 24.
137. *Id.*
138. *Id.*
139. *Id.* at 3.
140. *Id.* at 24.
141. *Id.*
142. *Id.*
143. *Id.* at 28. After hiring sixteen additional attorneys in April 2016, OPA had a total of twenty-six attorneys tasked with sorting through 10,621 applications. Thus, each attorney would have to review 408 petitions before the end of Obama's term, which was just nine months away. *Id.*
144. *Id.* at 24–25.

presented an ambitious deadline for the Initiative, adding further tension and urgency.[145]

In the end, President Obama granted clemency to 1,696 offenders under the Initiative.[146] This was far less than the original estimate that 10,000 offenders would qualify and only a fraction of the 24,000 offenders who actually submitted petitions.[147] The majority of the clemency grants (1,368) were made between August 2016 and January 2017, when President Obama's term concluded.[148] In fact, over 500 of the clemency grants were announced during the final four days of the Obama presidency.[149] Despite the last-minute rush, thousands of petitions were left pending.[150]

The majority of offenders saw their petitions denied altogether, and because the denials were not accompanied by any explanation nor subject to any appeal process, many of these offenders were left wondering why.[151] Adding to the frustration, evidence suggests many of those left behind were worthy of a second chance.[152]

C. "Term" Commutations Not Enough?

In the final months of the Initiative, President Obama changed the type of relief he granted offenders who had petitioned for clemency.[153] Up until August 2016, nearly all of the offenders who saw their sentences commuted were subsequently released from prison within four months.[154] This form of clemency, sometimes referred to as a "time served" commutation, allowed enough time for the BOP "to arrange for court-supervised monitoring and other re-entry programs" before the clemency grantee was released from federal custody.[155]

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145. *See id.* at 25 ("In April 2016, Deputy Attorney General Sally Yates sent an open letter to CP14 and announced that 'time was of the essence.'").

146. U.S. SENT'G COMM'N, *supra* note 127, at 32.

147. OLIVA, *supra* note 130, at 5.

148. U.S. SENT'G COMM'N, *supra* note 127, at 12 fig.2.

149. *Id.*

150. *Id.* at 32 ("As of January 19, 2017, . . . petitions from 7,881 offenders remained pending.").

151. OLIVA, *supra* note 130, at 22.

152. *Id.* at 3.

153. Gregory Korte, *For Obama, a Shift in Clemency Strategy*, USA TODAY (Sept. 15, 2016, 6:22 PM), https://www.usatoday.com/story/news/politics/2016/09/15/obama-shift-clemency-strategy/90255992/ [https://perma.cc/8GPZ-B45L].

154. *Id.*

155. *Id.*

Beginning in August 2016, however, President Obama's clemency grants more commonly took the form of "term" commutations.[156] Those who received this type of relief saw their sentences shortened, sometimes considerably.[157] But they were not subject to immediate release.[158] Instead, they were left with years, and sometimes decades, of time left to serve.[159] And because the vast majority of the Initiative's clemency grants came in those final five months of President Obama's presidency, most recipients ended up with this form of relief.[160]

To contextualize these term commutations, "the average sentence initially imposed on these Initiative recipients was 340 months (over 28 years) of imprisonment."[161] On average, Initiative recipients saw their sentences reduced by an average of 140 months (eleven years).[162]

Though there is some evidence that the change in strategy allowed President Obama to commute the sentences of more serious offenders, many clemency reform advocates urged that "if the Obama Administration was shifting its strategy to increasingly grant 'term' commutations . . . then the Administration should also make larger groups of people eligible for relief."[163] Instead the criteria for eligibility remained the same, and the final number of Initiative recipients wound up far below what many had hoped.[164]

Some also challenged the constitutionality of President Obama's liberal use of term commutations.[165] They allowed President Obama to effectively recalculate peoples' sentences using current federal sentencing guidelines, and not the harsher sentencing practices that were in effect in earlier time periods.[166] This, critics said, was the President "substituting his own judgment for that of Congress and the courts" and "going around lawmakers and acting alone."[167]

As noted above, however, the President's clemency power is one of the more unrestricted powers granted in the Constitution.[168] Moreover, it's not as though term commutations were completely unheard of during past

156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. U.S. SENT'G COMM'N, *supra* note 127, at 12 fig.2.
161. OLIVA, *supra* note 130, at 26.
162. *Id.* at 27.
163. *Id.* at 18.
164. *Id.* at 5.
165. Korte, *supra* note 153.
166. *Id.*
167. *Id.*
168. *See supra* Part II.

presidencies.[169] In the end, President Obama chose to utilize them to further his goal of helping those serving out lengthy sentences that had been widely recognized, even by Congress, as being harsh and unfair.[170]

But this was not the only constitutional question that emerged out of the abundance of term commutations granted during the Initiative. With most offenders receiving sentence reductions instead of immediate releases, it's understandable that the relief struck many of them as rather bittersweet. Sure, their sentence may have been reduced from a life sentence to a thirty-year term, but the reality of years still left to serve cut against the supposed relief they had received from their unjust sentence. Worse, for some, a thirty-year term was effectively still a life sentence due to their age or health.

For those who still had avenues for post-conviction relief at the time their sentence was commuted, the question arose: Could they still seek further relief from the courts? Or were they stuck with their executively commuted sentence? This question, which has not been answered definitively by the courts, is the central focus of Part IV.

IV. DOES A COMMUTATION DIVEST COURTS OF AUTHORITY?

The Initiative undoubtedly helped a substantial number of people. Hundreds saw their sentences slashed, sometimes by a significant amount. When the FSA was passed in 2010, the law's lack of retroactive effect had left these sentences locked in place.[171] With little hope for any congressional action (it would take until 2018 for Congress to address the issue, with its enactment of the First Step Act),[172] executive action was the most viable option.

However, the Initiative was not as successful as the Obama Administration had hoped. The Initiative left behind too many individuals equally deserving of sentence relief.[173] Even those who saw their sentences commuted were sometimes left with reasons to be disappointed.[174] These individuals are the focus of Part IV: Can they pursue further sentencing relief in court, even after their sentence has been commuted by the president? While most circuits have answered in the affirmative, the Fourth Circuit held in

169. *See supra* Part II.

170. *See supra* Part III.A–B.

171. *See supra* Part III.A.

172. *See supra note* 121 and accompanying text.

173. *See supra* Part III.

174. Ann E. Marimow, *All Agree His Sentence Was Too Harsh, but He May Still Stay Locked Up Forever*, WASH. POST (Mar. 22, 2016), https://www.washingtonpost.com/local/public-safety/all-agree-his-sentence-was-too-harsh-but-he-may-still-stay-locked-up-forever/2016/03/22/0d34aea2-ed3e-11e5-bc08-3e03a5b41910_story.html [https://perma.cc/7NNR-TT5E].

United States v. Surratt that a commutation moots any claims for further relief.[175] Section A details the *Surratt* approach. Section B explains the opposing approach taken by other circuits, specifically as it was applied in *Dennis v. Terris*.

A. The Surratt *Approach: Commutations Divest Courts of Their Authority*

In 2005, Raymond Roger Surratt "pled guilty to conspiracy to possess with intent to distribute more than 50 grams . . . of crack cocaine."[176] Surratt, who was thirty-one years old at the time, was a member of a large drug ring in western North Carolina.[177] He had a criminal history that included three prior drug-related convictions.[178] In deciding Surratt's sentence, the court determined that all three of his prior convictions constituted "felony drug offenses," and thus, in accordance with the mandatory minimums in place at the time, the judge sentenced Surratt to life imprisonment without release.[179]

Surratt's sentence struck many as unfair and undeserved, including the district court judge who sentenced him.[180] Nonetheless, Surratt's sentence was upheld in the face of his numerous attempts at appeal in the ensuing years.[181]

Two changes to the law in 2010 and 2011 gave Surratt renewed hope.[182] First, the FSA, enacted in 2010, reduced the disparity between sentences for powder and crack cocaine offenses, which had been notoriously disproportionate.[183] Then, in 2011, the Fourth Circuit changed its definition of what constituted a "felony drug offense" for purposes of sentence enhancement.[184] Had Surratt been sentenced after these changes, he would

175. 855 F.3d 218, 219 (4th Cir. 2017).

176. *Surratt*, 855 F.3d at 222 (Wynn, J., dissenting).

177. *See, e.g.*, Marimow, *supra* note 174.

178. *Surratt*, 855 F.3d at 222 (Wynn, J., dissenting).

179. *Id.*

180. *Id.*; *see also* Marimow, *supra* note 174 ("Even though sentencing guidelines recommended a maximum penalty of about [twenty] years, the judge said he had no choice but to impose a mandatory life sentence because of Surratt's earlier drug convictions. He called the penalty 'undeserved and unjust.'"). For a more detailed explanation of Surratt's sentencing, and why there is reason to believe it was a mistake, see Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255(e)*, 108 GEO. L.J. 287, 329–31 (2019).

181. Marimow, *supra* note 174.

182. *Surratt*, 855 F.3d at 222–23 (Wynn, J., dissenting).

183. *See supra* Part III.

184. *Surratt*, 855 F.3d at 223 (Wynn, J., dissenting).

have faced a mandatory minimum of 10-years' imprisonment and an advisory guidelines range of 120- to 137-months' imprisonment.[185]

In August 2012, Surratt "filed a successive habeas petition . . . seeking relief from his sentence."[186] Despite the government actually agreeing that Surratt was entitled to relief, the district court rejected the parties' arguments and upheld Surratt's life sentence, in part because neither the FSA nor the Fourth Circuit's decision to change the definition of "felony drug offense" applied to those individuals who were sentenced before the changes were enacted.[187]

Surratt appealed his case to the Fourth Circuit, which in turn affirmed the district court's ruling in July 2015.[188] The Fourth Circuit granted Surratt rehearing en banc and reheard his argument in March 2016.[189] By that point, Surratt and many others facing similar circumstances were beginning to receive national attention.[190] Despite its welcomed effects on sentencing disparities, the FSA was leaving many individuals with unfair sentences behind.[191]

The Initiative set out to help individuals like Surratt, but logistical obstacles prevented it from being as effective as the administration had originally hoped.[192] Nonetheless, in January 2017—almost ten months after the Fourth Circuit's rehearing en banc, and still without any en banc decision—President Obama commuted Surratt's life sentence to 200 months (approximately 16.5 years).[193] The commutation was conditional on Surratt enrolling in a drug abuse program and made no mention of Surratt's pending action before the Fourth Circuit.[194] Surratt accepted the commutation.[195]

To this point, the government had continued to maintain that Surratt was entitled to relief.[196] Following the commutation, however, the government argued that Surratt's action was moot because there was no longer any

185. *Id.*

186. *Id.* For a more detailed analysis of why Surratt's argument for habeas relief was well-founded, see Hasbrouck, *supra* note 180, at 329–31.

187. *Surratt*, 855 F.3d at 223–24 (Wynn, J., dissenting).

188. *Id.* at 224.

189. *Id.*

190. *See* Marimow, *supra* note 174; *see also* Linda Greenhouse, Opinion, *Crack Cocaine Limbo*, N.Y. TIMES (Jan. 5, 2014), https://www.nytimes.com/2014/01/06/opinion/greenhouse-crack-cocaine-limbo.html [https://perma.cc/BT7P-EMBZ].

191. *See supra* Part III.

192. *See supra* Part III.

193. *Surratt*, 855 F.3d at 224 (Wynn, J., dissenting).

194. *Id.* at 225.

195. *Id.*

196. *Id.*

fundamental defect in Surratt's sentence.[197] The government offered four reasons why Surratt's appeal was moot.[198] First, the government argued that "a federal court has no power to alter a sentence that results from an exercise of the President's pardon power."[199] Second, the government argued that the Supreme Court's decision in *Schick v. Reed* was controlling and required dismissal of Surratt's action.[200] The government also maintained that Surratt was "no longer serving the same sentence as that which is the subject of his habeas challenge."[201] Lastly, the government argued that Surratt had "waived . . . his right to collaterally attack his sentence" by accepting President Obama's commutation.[202]

Surratt, however, disagreed. Having already served 140 months of his sentence, Surratt still faced five more years in prison after the President's commutation.[203] If Surratt's now-commuted sentence was vacated and remanded for resentencing, he would likely be released immediately, as he had already served more than the applicable guideline range of 120 to 137 months.[204] Surratt argued this meant his action still presented a live issue and was not moot.[205]

The Fourth Circuit ultimately sided with the government, holding that Surratt's action for resentencing was moot.[206] While the Fourth Circuit's order was brief and without explanation, a concurring opinion explained the court's reasoning.

First, the concurrence reasoned that Surratt had "received the relief from life imprisonment he was seeking in this case and more."[207] The concurrence noted that Surratt willingly agreed to the commutation.[208] Thus, "[i]t would be a curious logic to allow a convicted person who petitions for mercy to retain the full benefit of a lesser punishment with conditions, yet escape burdens readily assumed in accepting the commutation which he sought."[209] In other words, it would not make sense to allow Surratt to escape the burden of serving out the last five years of a significantly shortened sentence that he was granted via a commutation, which he fought so hard to obtain in the first

197. *Id.*
198. *Id.* at 227.
199. *Id.*
200. *Id.* For an overview of Schick v. Reed, 419 U.S. 256 (1974), see *supra* Part II.B.
201. *Surratt*, 855 F.3d at 227.
202. *Id.*
203. *Id.* at 225.
204. *Id.* at 226.
205. *Id.* at 225–26.
206. *Id.* at 219.
207. *Id.* at 219 (Wilkinson, J., concurring).
208. *Id.* at 219–20.
209. *Id.* at 220 (citing Schick v. Reed, 419 U.S. 256, 267 (1974)).

place. He "cannot complain if the law executes the choice he has made" to accept a commuted sentence.[210]

Second, the concurrence noted that Surratt was "no longer serving a judicially imposed sentence, but a presidentially commuted one" and that a commutation "simply closes the judicial door."[211] Readjusting or rescinding the sentence would overstep the constitutionally mandated separation of powers between the judicial and executive branches.[212] The court was "simply without power to inject [itself] into the lawful act of a coordinate branch of government."[213] The concurrence explained that a presidential commutation could be subject to judicial review only if there existed "some constitutional infirmity" in the order.[214]

Finally, the concurrence emphasized the policy concern of finality in the criminal justice system.[215] Allowing Surratt to further argue his case would ignore the principle of finality and instead perpetuate the practice of defendants continually finding reasons for their cases "to go on and on and on."[216] The concurrence stated that "[t]o so freely revisit final judgments . . . is to embark on a course that is so vague and so open-ended as to render criminal judgments entirely provisional and good for one day only."[217] Surratt's original sentence was lawful at the time it was entered, the concurrence reasoned, regardless of the ensuing years of discussion and appeals surrounding its correctness.[218] The President "had every right" to take this into consideration in crafting his commutation offer.[219] Thus, his commutation brought a "merciful and firm" conclusion to the matter.[220]

B. The Dennis *Approach: Commutations Do Not Divest Courts of Their Authority*

In 1997, Quincy Dennis was convicted of three federal drug crimes related to possession and distribution of cocaine.[221] The multiple convictions, in conjunction with two prior drug offenses, resulted in a mandatory life

210. *Id.* (citing *Schick*, 419 U.S. at 265).
211. *Id.* at 219.
212. *Id.* at 219–220.
213. *Id.* at 219.
214. *Id.*
215. *Id.* at 220.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. Dennis v. Terris, 927 F.3d 955, 957 (6th Cir. 2019).

sentence and a concurrent thirty-year term.[222] Dennis failed on several attempts at collateral relief[223] until January 2017, when President Obama commuted his sentence to a thirty-year term.[224] The commutation was conditioned on Dennis "enroll[ing] in a residential drug abuse program and return[ing] a signed acceptance of the commutation," both of which Dennis did in accepting the commutation.[225]

Later that year, in December 2017, Dennis filed a habeas petition in an attempt to have his now-commuted sentence reconsidered.[226] Dennis maintained that one of his previous Ohio drug convictions did not count as a felony for purposes of sentencing enhancement.[227] Thus, Dennis argued, under the relevant mandatory minimum, he should have received a twenty-year sentence, not a life sentence.[228]

The district court dismissed Dennis's petition on the grounds that Dennis no longer served a "judicial" sentence but an executive one, and that the court lacked authority to alter a commuted sentence. [229] On appeal, the Sixth Circuit dismissed Dennis's petition on its merits.[230] Important here, however, is that in doing so, it first overturned the district court's mootness determination.[231]

The Sixth Circuit noted the constitutional powers in conflict: the President's largely unrestricted power to grant clemency and the judiciary's power to try and to sentence defendants, which is limited to live controversies where the court can give a remedy to the winner.[232] Inside this framework of constitutional considerations, the question then was whether a presidential commutation did away with the judicial sentence, leaving Dennis "bound only by an executive sentence," or whether the "commutation merely limit[ed] the execution of the *judicial* sentence."[233] The court concluded the latter, holding that a recipient of a commutation nonetheless remains "bound by a judicial sentence," as the commutation "changes only how the sentence

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222. *Id.*

223. *Id.*

224. *Id.*; Press Release, The White House Off. of the Press Sec'y, *President Obama Grants Commutations and Pardons* (Jan. 17, 2017), https://obamawhitehouse.archives.gov/the-press-office/2017/01/17/president-obama-grants-commutations-and-pardons [https://perma.cc/UF7K-ZGCP].

225. *Dennis*, 927 F.3d at 957.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* Note the similarity of the district court's reasoning to that of the Fourth Circuit's in *Surratt*, 855 F.3d 218, 219 (4th Cir. 2017); *see supra* Part IV.A.

230. *Dennis*, 927 F.3d at 961.

231. *Id.* at 958–60.

232. *Id.* at 957–58.

233. *Id.* at 958 (emphasis added).

is carried out by switching out a greater punishment for a lesser one."[234] When it comes to each branch's power over sentences, it is the judiciary's function to render judgment while it is the executive's function to carry the judgment into effect.[235]

The existence of conditional commutations further supported this position by allowing for the original judgment to "kick into full effect" in the event the recipient violates a term of the agreement.[236] Even more convincing is the existence of *unconditional* commutations, which do not require consent from the recipient.[237] Thus, the Sixth Circuit posited, if the commutation eliminates the judicial sentence in favor of a purely executive one, "a mischievous chief executive could interfere with an inmate's efforts to obtain deserved relief in court" by unconditionally commuting his sentence by only one day, thereby denying him judicial relief from what might be an unconstitutional sentence.[238]

Moreover, the Sixth Circuit held that Dennis's petition did in fact present a live controversy.[239] Dennis could be successful in his challenge and receive a sentence "less than his current [thirty]-year commuted sentence."[240] Simply put, Dennis had a concrete interest at stake.[241] This meant that his petition was not moot.[242]

The court did not stop its analysis there. It instead took on two other arguments the government had put forth: (1) that allowing the court continued authority over the sentence meant the judiciary was unconstitutionally stepping on the feet of the executive's commutation power; and (2) that Dennis lost his right to challenge the conditional commutation by accepting its conditions.[243]

First, the government had cited *Surratt* in arguing that "[a]bsent some constitutional infirmity in the commutation order, . . . [the court] may not readjust or rescind what the President, in the exercise of his pardon power, has done."[244] The Sixth Circuit partially agreed, conceding that a court could

234. *Id.* (citing Duehay v. Thompson, 223 F. 305, 307–08 (9th Cir. 1915) (stating that a commutation "is the change of a punishment to which a person has been condemned to a less severe one" and that it means "the executive has superimposed its mind upon the judgment of the court; but the sentence remains . . . the judgment of the court, and not of the executive")).

235. *Id.* (citing United States v. Benz, 282 U.S. 304, 311 (1931)).

236. *Id.*

237. *Id.*

238. *Id.* at 959.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 959–60.

244. *Id.* at 959 (citing United States v. Surratt, 855 F.3d 218, 219 (Wilkinson, J., concurring)).

not require a person to stay in prison longer than the commuted term nor could a court "disregard [any] conditions [a] President places on a commutation."[245] But the court may still judicially scrutinize the sentence "with respect to mistakes *the courts* may have made" because, as mentioned above, the original sentence remains in place and is judicial in nature.[246] Any such scrutiny would not be unconstitutionally changing or voiding what the President has done.[247]

As to the government's argument that Dennis could not undo or undermine a conditional commutation that he had already accepted, the court again agreed in part.[248] It is true that Dennis could not ask the court to change the commutation to a twenty-five-year sentence (instead of thirty years) or to alter the drug abuse program condition.[249] But Dennis, the court pointed out, was not challenging the commutation order.[250] Instead, he was challenging the underlying sentence.[251] The court held that this distinction allowed the court to entertain Dennis's petition.[252]

V. ANALYSIS

Due to its inconsistent and exceedingly rare usage by Presidents, the clemency power still provokes interesting questions when it is exercised. President Obama's use of term commutations during the Initiative was no exception. Two things are clear when evaluating those commutations. First, as discussed in Section A of this Part, a court should not lose its constitutional authority over a defendant's sentence upon an executive grant of clemency. Nor should a defendant lose his or her constitutional right to seek additional relief. Second, as discussed in Section B, the commutations granted during the Initiative were a commendable and effective use of the clemency power that should be considered by future Presidents. And given the current partisan divide in the American political landscape, which has slowed legislative and judicial efforts to reform the criminal justice system, there may be no better time than now for Presidents to wield the clemency power to address criminal justice issues.

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245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 960.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*

A. The Divestiture Question

The divestiture question at issue in *Surratt* and *Dennis* has not been addressed by the Supreme Court. While most circuits hold that courts have post-commutation authority over the sentence, the Fourth Circuit continues to follow its holding in *Surratt* that a presidential commutation divests courts of their authority over the underlying sentence.[253] This latter approach is incorrect, and *Surratt* should be rejected. Courts continue to have authority over commuted sentences for four primary reasons.

First, a commutation does not alter the reality that the prisoner is serving a *judicial* sentence. *Surratt* held just the opposite, that a commutation transforms a judicially imposed sentence into an executively commuted one.[254] This transformation shifts control of the sentence to the Executive branch and "closes the judicial door."[255]

The Supreme Court has addressed the distinction between judicial and executive power over sentences: the judiciary has power to render judgment while the executive branch has power to enforce and execute that judgment.[256] The Court made this distinction in *United States v. Benz*, a case that addressed the question of whether a court can reduce a prisoner's punishment even after the sentence is already being carried out.[257] The concern was that allowing the court to reduce a sentence after it was underway was functionally equivalent to a commutation.[258] It was argued that such action by the Court infringed on the Executive's power to pardon and commute sentences, a power accorded to the President and the President alone.[259] The Court rejected this and distinguished the pardon power from judicial reduction of sentences.[260] It held that an act of clemency "is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua judgment."[261] A reduction of the sentence by the court, however, "alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance."[262]

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253. *See, e.g.*, United States v. Baylor, No. 3:06CR340-1-HEH, 2018 WL 6991042, at *1 (E.D. Va. Aug. 15, 2018).

254. United States v. Surratt, 855 F.3d 218, 219 (4th Cir. 2017) (Wilkinson, J., concurring); *see infra* Part IV.A.

255. *Surratt*, 855 F.3d at 219; *see infra* Part IV.A.

256. United States v. Benz, 282 U.S. 304, 311 (1931).

257. *Id.* at 306.

258. *Id.*

259. *Id.*; U.S. CONST. art. II, § 2, cl. 1.

260. *Benz*, 282 U.S. at 307.

261. *Id.* at 311.

262. *Id.*

This idea applies to the divestiture question. During the Initiative, President Obama exercised his executive power by commuting the sentences of drug offenders.[263] These commutations merely abridged *the enforcement* of the judgments but did not alter the actual judgments themselves.[264] Thus, the judgments remained intact and open to further judicial scrutiny.[265] The sentence remains judicial in nature and does not become an "executive sentence."[266] Instead, the executive merely "superimpose[s] its mind upon the judgment of the court; but the sentence remains, nevertheless, the judgment of the court, and not of the executive."[267]

In *Dennis*, the Sixth Circuit made an illustrative argument to support the proposition that "[t]he judgment remains in place" and is not replaced with an executive sentence.[268] Suppose a prisoner is offered a *conditional* commutation that shortens his life sentence to twenty-five years. The commutation is conditioned on the prisoner maintaining good behavior. If the prisoner ever violates this condition, the life-sentence judgment "remains in place, ready to kick into full effect."[269] Likewise, the proposition also holds true if the prisoner was given an *unconditional* commutation. In this scenario, the prisoner's sentence is automatically commuted, even without his consent. As the *Dennis* court posited, this creates a world where a "mischievous" President could use the commutation power to unilaterally transform judicial sentences into executive sentences, thereby blocking prisoners from judicial relief.[270] In either case, it is clear that a sentence imposed by a court retains its judicial nature following a commutation rather than transferring into complete executive control.

Second, a presidential commutation, on its own, does not moot a prisoner's case because there may still be a live controversy with opportunity for relief. Article III of the Constitution establishes and empowers the judicial branch of the government and, in doing so, vests the judicial power in the courts.[271] The Constitution limits the jurisdiction of the courts to "Cases" and

263. *See supra* Part III.B.

264. *See* Dennis v. Terris, 927 F.3d 955, 958 (6th Cir. 2019) (quoting *Benz*, 282 U.S. at 311).

265. *Id.*

266. United States v. Surratt, 855 F.3d. 218, 221, 233 (4th Cir. 2017) (Wynn, J., dissenting).

267. Duehay v. Thompson, 223 F. 305, 307–308 (9th Cir. 1915); *see also* United States v. Buenrostro, 895 F.3d 1160, 1166 (9th Cir. 2018) (holding that a prisoner whose sentence was commuted from life to 360 months could still petition for sentence relief because President Obama's commutation "[did] not create a new judgment").

268. *Dennis*, 927 F.3d at 958.

269. *Id.*

270. *Id.* at 959.

271. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

"Controversies."[272] Accordingly, courts may hear only live disputes and are "without power to decide questions that cannot affect the rights of litigants in the case before them."[273]

The defendants in these cases were petitioning for sentence relief above and beyond President Obama's commutation.[274] President Obama commuted Quincy Dennis' life sentence to thirty years.[275] Dennis then argued that he should have been given a mandatory twenty-year sentence to begin with.[276] Raymond Surratt made a similar argument, contending that he should have been given a mandatory ten-year sentence, even after his life sentence was commuted to just under seventeen years by President Obama.[277] Thus, both *Dennis* and *Surratt* presented live cases to the court; despite their commutations, they still had concrete interests in their respective disputes and stood to benefit if they won. Even after a commutation, the court may in some cases have the power to decide questions that can affect the rights of the prisoner and, for that reason, these cases cannot be held as moot without any further consideration.

Other courts have agreed. The Seventh Circuit, for example, held that a prisoner whose death sentence was commuted to a life sentence by the Governor of Illinois could petition for further relief because his statutory minimum sentence was twenty years.[278] This meant it was possible for the prisoner to obtain relief, and his claims were not moot.[279] Outside the Fourth Circuit, all the courts that have considered this issue have concluded that if a petitioner is subject to resentencing less than the term imposed by the President, the "challenge is not moot, and he is entitled to seek resentencing."[280]

Third, the argument that the petitioner "waived"[281] his right to appeal his sentence by accepting a conditional commutation cannot stand because any such waiver would have to be explicit in the conditional commutation. Here, a few things are certain. First, it is true that it is entirely within the President's constitutional power to place conditions on a clemency grant so long as the

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272. *Id.* § 2, cl. 1.

273. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

274. *Dennis*, 927 F.3d 955 *passim*; United States v. Surratt, 855 F.3d 218 *passim* (4th Cir. 2017); s*ee also supra* Part IV.A–B.

275. *Dennis*, 927 F.3d at 957.

276. *Id.*; *see also supra* Part IV.B.

277. *Surratt*, 855 F.3d at 227; *see also supra* Part IV.A.

278. Simpson v. Battaglia, 458 F.3d 585, 595 (7th Cir. 2006).

279. *Id.*; *see also* Madej v. Briley, 371 F.3d 898, 899 (7th Cir. 2004) (holding that petitioner Madej's request for a new hearing was not vacated as moot following gubernatorial commutation).

280. *Surratt*, 855 F.3d at 227 (Wynn, J., dissenting).

281. *Id.*

conditions do not offend the constitution.[282] Further, it is also true that a condition to forego future appeals would actually be an entirely permissible condition.[283] And it is true that by accepting a conditional commutation, the recipient substitutes "a lesser punishment than the law has imposed upon him, and he cannot complain if the law executes the choice he has made."[284]

In assessing these commutation grants, however, it is clear that no such condition was attached.[285] While they were *conditional* commutations, their only explicit conditions were that the recipients enroll in drug abuse programs.[286]

Judge Wynn's dissenting opinion in *Surratt* addressed this argument, noting that a conditional commutation "is a private contract between the President and the individual."[287] In accepting such a contract, the recipient must be fully aware of the terms of the agreement. Judge Wynn noted that a defendant may waive his right to appeal a sentence or to attack it collaterally only when such waiver was "knowingly and voluntarily made."[288] Without a waiver condition explicitly stated in the grant of clemency and knowingly and voluntarily accepted by the commutation recipient, a prisoner with a commuted sentence does not waive his right to further attack that sentence.[289]

Fourth, allowing courts to retain authority over commuted sentences advances our judicial system's fundamental interest in fairness. It simply does not make sense to render moot a petitioner's efforts to obtain potentially significant and sometimes deserved sentence relief for the sole reason of her having had her sentence commuted. While finality is a legitimate interest in our judicial system, it is outweighed by the interest in fairness in this situation. In cases where an individual was unjustly sentenced, she should not be barred from pursuing any form of post-conviction relief necessary until her sentence is just. And if a presidential commutation gets her halfway to justice, the court should not hold up its hands and say it lacks the authority to finish the job.

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282. *See supra* Part II.A.2; Schick v. Reed, 419 U.S. 256, 265 (1974) ("[T]his Court has long read the Constitution as authorizing the President to deal with individual cases by granting conditional pardons.").

283. Adam M. Gershowitz, *Post-Trial Plea Bargaining in Capital Cases: Using Conditional Clemency To Remove Weak Cases from Death Row*, 73 WASH & LEE L. REV. 1359, 1380–86 (2016).

284. *Ex parte* Wells, 59 U.S. (18 How.) 307, 315 (1855).

285. *See supra* Part IV.B.

286. *See supra* Part IV.B.

287. United States v. Surratt, 855 F.3d 218, 231 (4th Cir. 2017) (Wynn, J., dissenting) (citing United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833)).

288. *Id.* at 232 (first citing United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992); and then citing United States v. Lemaster, 403 F.3d 216, 220 (4th Cir. 2005)).

289. *Lemaster*, 403 F.3d at 220.

B. Using Clemency for Criminal Justice Reform

Despite the Initiative's obvious shortfalls, its underlying motivation was justifiable and commendable. The sentencing guidelines for crack and powder cocaine in the United States were a glaring criminal justice problem for well over a decade, but Congress delayed the necessary changes for years.[290] Even after the FSA, countless men and women remained unfairly incarcerated because political realities and compromises meant that retroactivity was left off the table.[291] It took Congress an additional eight years to give the FSA retroactive effect.[292] Meanwhile, the absence of such legislation tied the courts' hands, preventing them from granting sentence relief.[293]

In such situations, the executive branch has the ability and power to make an immediate difference. President Obama's Initiative did just that in using the clemency power to grant relief to those left behind by the FSA. For this reason, the Initiative and President Obama should be commended.

Further, the use of the clemency power in such a broad, issue-based manner can and should be considered by future Presidents, especially in the arena of criminal justice reform, where the challenges posed often require the efforts of more than one actor and where legislative and judicial solutions sometimes fall short.[294] The use of clemency to solve criminal justice issues, like mass incarceration, as well as a reformation of the clemency process altogether, are among the proposals that appeared in many of the Democratic

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290. *See* DEBORAH J. VAGINS & JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 1–4 (2006) https://www.aclu.org/other/cracks-system-twenty-years-unjust-federal-crack-cocaine-law?redirect=criminal-law-reform/cracks-system-twenty-years-unjust-federal-crack-cocaine-law [https://perma.cc/TE23-MWVP].

291. *Frequently Asked Questions: 2011 Retroactive Crack Cocaine Guideline Amendment*, U.S. SENT'G COMM'N, https://www.ussc.gov/policymaking/amendments/frequently-asked-questions-2011-retroactive-crack-cocaine-guideline-amendment [https://perma.cc/6QDG-5297].

292. *See An Overview of the First Step Act*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/overview.jsp [https://perma.cc/4UUM-BJXL].

293. *Cf.* Sarah French Russell, *Second Looks at Sentences Under the First Step Act*, 32 FED. SENT'G REP. 76, 76 (2019).

294. *See* Barkow, *supra* note 41, at 807 (exploring "the fall of the clemency power and argu[ing] for its resurrection as a critical mechanism for the President to assert control over the executive branch in criminal cases"); Ridolfi, *supra* note 37, at 71 (looking at power of clemency and its ability to compensate for the judicial system's failure to deliver a just result, especially as avenues for post-conviction relief and habeas review have been increasingly restricted). For an exceptional look inside America's problem of mass incarceration and how it relates to its arguably overly harsh sentencing of drug crimes, see Mark Osler & Judge Mark W. Bennett, *A "Holocaust in Slow Motion?": America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. FOR SOC. JUST. 117 (2014).

policy platforms during the 2020 primary race.[295] Some candidates, such as Senators Bernie Sanders,[296] Amy Klobuchar,[297] and Cory Booker,[298] proposed the creation of independent clemency boards outside the DOJ and the simplification of the clemency review process. Klobuchar's and Booker's plans in particular called for an entirely new system of clemency.[299] They aimed to take the clemency process away from "the whims of the president and Justice Department officials" and to turn it into "an avenue for systemic, longer-lasting reform."[300]

President Joseph Biden did not make such sweeping proposals for the clemency system during the 2020 campaign.[301] Instead, President Biden campaigned with an intention to use the clemency power how it was used during President Obama's Initiative: that is, to reduce "unduly long sentences" for certain nonviolent and drug offenses.[302] This would keep the clemency system in the DOJ and would do little to fix its many inefficiencies and flaws.[303] When it comes to criminal justice reform, President Biden appears more focused on using Congress as a partner for legislative fixes and less focused on the use of the clemency power to remedy past injustices.[304] Rachel Barkow, a New York University law professor and clemency expert, called President Biden's campaign clemency plan "narrow and uninspiring"

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295. *See Vox's Guide to Where 2020 Democrats Stand on Policy*, VOX, https://www.vox.com/policy-and-politics/2019/4/23/18304657/vox-guide-2020-democratic-policy-primary [https://perma.cc/W296-VM6E].

296. German Lopez, *Bernie Sanders's Criminal Justice Reform Plan, Explained*, VOX (Aug. 19, 2019, 3:05 PM), https://www.vox.com/policy-and-politics/2019/8/19/20812138/bernie-sanders-criminal-justice-reform-plan-mass-incarceration [https://perma.cc/D7E5-8C5C].

297. Lopez, *supra* note 18.

298. German Lopez, *Cory Booker Has a Plan To Reform the Criminal Justice System—Without Congress*, VOX (June 20, 2019, 11:00 AM), https://www.vox.com/future-perfect/2019/6/20/18692038/cory-booker-criminal-justice-system-clemency-pardon [https://perma.cc/37XA-R4YD].

299. *Id.*

300. *Id.*

301. German Lopez, *Joe Biden's Criminal Justice Reform Plan, Explained*, VOX (Aug. 12, 2020, 6:15 PM), https://www.vox.com/policy-and-politics/2019/7/23/20706987/joe-biden-criminal-justice-reform-plan-mass-incarceration-war-on-drugs [https://perma.cc/N4SP-QWVV].

302. *The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN HARRIS, https://joebiden.com/justice/ [https://perma.cc/LJY2-V9T8] ("President Obama used his clemency power more than any of the 10 prior presidents. Biden will continue this tradition and broadly use his clemency power for certain non-violent and drug crimes.").

303. Rachel Barkow (@RachelBarkow), TWITTER (July 23, 2019, 4:50 AM), https://twitter.com/RachelBarkow/status/1153633603273875456 [https://perma.cc/SZT9-JJDA].

304. Rachel Barkow (@RachelBarkow), TWITTER (July 23, 2019, 4:48 AM), https://twitter.com/RachelBarkow/status/1153632949704757248 [https://perma.cc/JQ5P-DNQU].

and "modest at best."[305] She noted that President Biden would be largely dependent on Congress to realize any criminal justice reform if he decides to forgo clemency reform, one of the few areas where he has control.[306] Alternatively, President Biden may still opt to pursue substantive clemency reform, especially considering proposals to move the clemency process out of the DOJ and to create an independent board were included in the Democratic Party platform.[307]

As noted in Section A of Part II,[308] President Trump did not utilize the clemency power extensively. He made just 237 grants of clemency, including only ninety-four commutations.[309] President Trump didn't deny many petitions (in fact, he didn't deny any petitions at all during the final two years of his presidency)[310] but instead largely ignored them altogether[311] (nearly 15,000 petitions remained pending at the end of his term).[312] President Trump's advisors recommended to him an overhaul of the federal clemency system, including the creation of an independent clemency board, but he declined such changes and instead assembled "a small team of insiders to funnel cases to him."[313] On the issue of criminal justice reform, President Trump usually touted the passage of the First Step Act and a few clemency grants in particular.[314]

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305. Rachel Barkow (@RachelBarkow), TWITTER (July 23, 2019, 4:50 AM), https://twitter.com/RachelBarkow/status/1153633412713975810 [https://perma.cc/FMZ4-HNNR]; Rachel Barkow (@RachelBarkow), TWITTER (July 23, 2019, 4:52 AM), https://twitter.com/RachelBarkow/status/1153634007394979840 [https://perma.cc/B26P-BXXX].

306. Rachel Barkow (@RachelBarkow), TWITTER (July 23, 2019, 4:52 AM), https://twitter.com/RachelBarkow/status/1153633878478901248 [https://perma.cc/F6QP-EWCL].

307. Rachel E. Barkow & Mark Osler, Opinion, *Trump Abused the Clemency Power. Will Biden Reform It?*, WASH. POST (Nov. 16, 2020, 3:17 PM), https://www.washingtonpost.com/opinions/trump-abused-the-clemency-power-will-biden-reform-it/2020/11/16/6c9a58c2-2832-11eb-8fa2-06e7cbb145c0_story.html [https://perma.cc/T9PH-DZXW].

308. *See supra* Part II.A.

309. U.S. DEP'T. OF JUST., *supra* note 57.

310. *Id.*; Mark Osler, Opinion, *Trump's Failed Promise of Criminal Justice Reform Gives Biden an Opening*, WASH. POST (Aug. 27, 2020, 1:00 PM), https://www.washingtonpost.com/opinions/2020/08/27/trumps-failed-promise-criminal-justice-reform-gives-biden-an-opening/ [https://perma.cc/JQB6-RMPE].

311. Osler, *supra* note 310.

312. U.S. DEP'T. OF JUST., *supra* note 57.

313. Osler, *supra* note 310.

314. *Id.*; Arit John, *Trump Highlights Criminal Justice Reform with Pardon at GOP Convention*, L.A. TIMES (Aug. 25, 2020, 6:28 PM), https://www.latimes.com/politics/story/2020-08-25/rnc-trump-pardon-jon-ponder [https://perma.cc/2Q34-ZPK2].

Regardless of who occupies the Oval Office, the clemency power lies as a powerful tool in the drawer of the Resolute desk. And though Presidents, especially recent ones, have not always used it extensively, the clemency power has the potential to play a central role in criminal justice reform. Future Presidents would be wise to take note.

VI. CONCLUSION

While incarceration rates have dropped by 10% in the last decade, the United States remains the world's leader in incarceration by a wide margin.[315] Drug crimes underlie the vast majority of these incarcerations,[316] something both Congress and recent Presidents have sought to address through legislation and other initiatives aimed at criminal justice reforms. The 2010 FSA and President Obama's ensuing Initiative provide a couple of recent examples.

With these criminal justice issues and trends in mind, it does not make sense to add additional hurdles to sentence relief for those currently incarcerated for drug offenses. Unfortunately, the *Surratt* holding does just that in preventing prisoners with commuted sentences from seeking additional relief from the courts.

Instead, in the Fourth Circuit and in any courts that choose to follow its precedent, some incarcerated persons are effectively left with the impossible choice of fighting for the sentence they truly deserve or accepting a presidential commutation which, though it may offer more certain and immediate relief, may leave them with a sentence that is years or even decades longer than they deserve. Therefore, the *Dennis* holding answers this circuit split in the most reasonable and, more importantly, just and constitutional fashion. Accordingly, the answer to the divestiture question is that no presidential commutation should divest courts of their authority to further scrutinize a sentence.

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315. Robertson, *supra* note 4.

316. *Offenses*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [https://perma.cc/7X23-CM2N].