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Viewpoints

Clemency is Not the Answer (Updated)

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By Margaret Colgate Love

On Monday, President Obama announced in a video address (https://www.whitehouse.gov/blog/2015/07/13/president-obama-announces-46-commutations-video-address-america-nation-second-chance) that he had commuted the sentences of 46 people sentenced to long prison terms for drug offenses. His counsel, Neil Eggleston, stated that, "While I expect the President will issue additional commutations and pardons before the end of his term, it is important to recognize that clemency alone will not fix decades of overly punitive sentencing policies."

Mr. Eggleston added that "the President is committed to using all the tools at his disposal to remedy unfairness in our criminal justice system." However, judging from the Presiden's speech to the NAACP (https://www.whitehouse.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be) the next day, clemency is the only one of those tools that is calculated to result in any more prison releases.

The President has now issued 89 commutations, the most since Lyndon Johnson. But even if the President ends up granting triple that number or more, it will hardly make a dent in the number of those in prison potentially eligible for relief under the announced standards (http://www.justice.gov/pardon/new-clemency-initiative) of the Administration's clemency initiative. As Douglas Berman observed recently in his Sentencing Law and Policy blog (http://sentencing.typepad.com/sentencing_law_and_policy/2015/07/obama-plans-broader-use-of-clemency-to-free-nonviolent-drug.html), if the President one week were to commute as many as 80 federal drug prisoners, "this would still not be as substantively consequential for the federal prison population as the 400-plus drug defendants who will be sentenced to lengthy federal prison terms the very same week!"

Meanwhile, the system for administering the clemency initiative (http://www.justice.gov/pardon/new-clemency-initiative) is reportedly having difficulty gaining traction. On July 4, the *New York Times* reported in a front page story (http://www.nytimes.com/2015/07/04/us/obama-plans-broader-use-of-clemency-to-free-nonviolent-drug-offenders.html?ref=politics&_r=4) that more than 30,000 federal prisoners have filed applications for commutation of sentence with Clemency Project 2014, the consortium of private organizations formed last year to assist the Justice Department in identifying worthy cases, but that a "cumbersome review process" has allowed only "a small fraction" of them to reach the President's desk.

A press release issued by Clemency Project 2014 shortly after the grants were announced conceded that only four of the 46 cases had been submitted under its auspices, and a review of the recipients of clemency reveals that several did not satisfy the Justice Department's declared eligibility requirement (https://www.clemencyproject2014.org/)of ten years already spent in prison. Some prisoners have now expressed concern that perhaps the blessing of this Project was not the "fast track" to relief they had imagined.

There is a growing sense of urgency among those who are responsible for organizing the clemency effort, in the Department of Justice and in the private bar. In a recent training (http://www.usatoday.com/story/news/politics/2015/06/24/clemency-initiative-clock-is-running/29128091/) of volunteer counsel representing clemency applicants, Pardon Attorney Deborah Leff urged them not to delay in getting their clients' petitions filed.

"If there is one message I want you to take away today, it's this: Sooner is better," Leff said.

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Some federal public defender offices have been urged by Clemency Project 2014 to identify worthy applicants from among their client base and submit petitions for them prior to January 20, 2017, since it may take as much as a year for the Administration to review them.

But even with the extraordinary resources that have been devoted to identifying prisoners who meet the Justice Department's eligibility criteria, it seems unlikely that this task can be given more than a lick and a promise before the clock runs out on President Obama's term.

It is not clear if it was the Administration's original intention to try to reach all deserving cases through clemency, but that goal seems chimerical. It must now be conceded that a large percentage of the applications that have been filed, whether with Clemency Project 2014 or directly with the Pardon Attorney, will not have even been looked at by the end of this President's term.

Looking back on the 18 months since the clemency initiative was launched, what have we learned?

For starters, we've learned that the problem of unjust sentences is simply too large and too pervasive to deal with through the clemency mechanism. When Lyndon Johnson commuted 200 drug sentences in the 1960s, almost everyone then in prison who deserved relief got it, thanks to the staffing efforts of the Bureau of Prisons. Today, given the massive number of people prosecuted for federal drug crimes in the past 25 years and the fundamental rethinking of federal drug sentences now underway, potentially deserving prisoners are legion.

Between 1990 and 2007, nearly 10,000 people were sentenced to prison terms of 30 years or more for crimes involving drugs or firearms. Twice that number received sentences of at least 20 years. Trying to produce useful and reliable advice for the President about more than a token number of these individuals is too great a burden for the Justice Department's tiny pardon staff.

But the President cannot be expected to put his reputation on the line on the basis of anything less.

In addition to the practical problems raised by trying to force so many prisoner petitions through an administrative bottleneck onto a busy President's plate, there are institutional reasons why executive clemency is the wrong tool for dealing with systemic problems in the penal system. Even if a more efficient way of administering the pardon power could have been devised (say, the high-level clemency commission (http://ccresourcecenter.org/wp-content/uploads/2015/07/Chart3.4.26.15.pdf) that some states use), this would not have fully put to rest the perennial suspicion the public has about pardoning. As I wrote (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1570270) shortly after the final Clinton pardons, "as a practical matter [the pardon power] cannot be exercised except pursuant to a process that is perceived as accessible and fair."

As far as substantive fairness is concerned, that has never been expected of clemency. On the other hand, the diversity within the group of 46 grantees just in terms of length of time in prison has raised questions among prisoners and their lawyers about the fairness of the Justice Department's method of selection, and about why more of those proposed for relief by Clemency Project 2014 were not chosen.

Now that clemency has been harnessed to deal with a system-wide problem involving thousands of potentially eligible individuals, many expect greater attention to a justice-based model of fairness. The words "random" and "lottery" that had temporarily disappeared from conversations about clemency began to surface as soon as the grants were announced.

Other institutional concerns are raised by too great a reliance on clemency to deal with a systemic problem in the legal system: this disrespects both the key role played by courts in determining the quantum of punishment under federal sentencing policies, and the legitimate concerns of Congress (http://judiciary.house.gov/index.cfm/press-releases?ID=AB5B6665-FFC0-4C4F-9B95-3A573134CE25)for the rule of law.

Finally, there are philosophical as well as institutional and practical reasons why our justice system is built upon accountable judicial decision-making under statutory authority, and not upon the unstructured and unexplained discretion of a president exercising a plenary constitutional power. With all due respect to Alexander Hamilton's Federalist 74 (http://avalon.law.yale.edu/18th_century/fed74.asp), most scholars today subscribe to the vision of Enlightenment philosopher Cesare Beccaria (http://www.laits.utexas.edu/poltheory/beccaria/delitti/delitti.c46.html), who proposed in 1764 that "Clemency is a virtue which belongs to the legislator, and not to the executor of the laws; a virtue which ought to shine in the code, and not in private judgment."

(Hamilton might have agreed with Beccaria had he not had such a bad experience with the Continental Congress and such a good one with his mentor George Washington.)

Perhaps the most that can be hoped for from the Obama clemency initiative is that it will shine a light on excessive federal prison sentences as a pressing problem of justice, extend mercy to a few fortunate individuals, and signal the need for a more systematic approach.

In a word, if clemency is not the entire answer to the systemic problem of excessive sentences, it can still serve its time-honored function of pointing the way to a resolution through the legal system.

Looking ahead to the likely denouement of its clemency initiative with only a few hundred token grants, the Obama Administration ought to be exploring ways it can bring cases back to court for the relief so many deserve. Thankfully, this will not require new legislation or new funds, since there is already on the books a judicial sentence reduction authority that could easily be used.

Specifically, 18 U.S.C. § 3582(c)(1)(A)(i) provides that a court may at any time reduce a sentence upon motion of the Bureau of Prisons (BOP) for "extraordinary and compelling reasons." The Sentencing Commission is authorized under 28 U.S.C. § 994(t) to establish policy for courts considering BOP motions under § 3582(c)(1)(A)(i), which it has done under USSG ¶ 1B1.13.

Under this policy guideline, "extraordinary and compelling reasons" that may justify sentence reduction include illness, disability, old age, exigent family circumstances, and any other reason that the Justice Department may determine falls within that category.

It is noteworthy that several of the organizations currently participating in the clemency initiative, including the American Bar Association, are on record with the Sentencing Commission as favoring a more expansive menu of "extraordinary and compelling reasons" warranting sentence reduction, including one that now seems prescient: "The defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive."

Less than two years ago, BOP issued a new policy statement (http://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) with a list of circumstances in which it may seek a sentence reduction, a list that is evidently not intended to be exhaustive. Accordingly, there is no reason why BOP could not determine that "extraordinary and compelling reasons" exist in any case meeting the criteria set forth by Administration as warranting a grant of clemency.

The coincidence of the standards in the two contexts would be particularly fitting in light of the fact that the judicial sentence reduction authority in § 3582(c)(1)(A)(i) was originally enacted in 1976, at the Justice Department's instance, to expedite sentence reductions that previously had required a clemency application to be submitted to the President. All it would take to make this happen would be a resolve on the part of the Department to use this statute for the purpose it was originally intended.

Augmenting the Administration's clemency initiative through broader use of a judicial sentence reduction mechanism, which the Justice Department's own Inspector General has repeatedly criticized as underutilized (most recently for aging prisoners (https://oig.justice.gov/reports/2015/e1505.pdf)), would put sentence reduction on a sounder long-term footing that is more consistent with the principles of determinate sentencing, be more predictable and accountable as a practical matter, and respond to any concerns about the unaccountable use of executive power.

And, because a large scale sentence reduction program (http://www.ussc.gov/sites/default/files/pdf/amendment-process/materials-on-2014-drug-guidelines-amendment/20140724_FAQ.pdf) is already underway in the federal courts, economies of scale would be possible.

Many years ago, when I was serving as Pardon Attorney, then-Deputy Attorney General Philip Heymann asked me why we should ask the President to commute the sentence of an elderly prisoner when (he said) "we can do the job ourselves."

Now I would ask the current Deputy Attorney General the same question.

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