

Turning Hope-and-Change Talk Into Clemency Action for Nonviolent Drug Offenders

Douglas A. Berman*

In 2008, Barack Obama rode the themes of hope and change into the White House, capitalizing upon profound dissatisfaction with the outgoing Administration and broad concerns about the country's direction. In his acceptance speech on election night, then-President-Elect Obama stressed that "the true genius of America [is] that America can change."¹ In his Inaugural Address, President Obama described his election victory as evidence that the American people "have chosen hope over fear, unity of purpose over conflict and discord."²

These themes and words likely resonated with anyone interested in criminal justice reform, and especially with those eager for drug-sentencing reform. As I have argued in recent scholarship, America needs change to come to the structure and operation of its criminal justice systems.³ A massive increase in incarceration levels in recent decades, fueled in large part by the so-called "war on drugs," has made America the world's leader in imprisonment by a wide margin. Our incarceration rate is now roughly

*Douglas A. Berman is the William B. Saxbe Designated Professor of Law at the Ohio State University Moritz College of Law.

1. Barack Obama, This is Your Victory Speech at Grant Park in Chicago, Illinois (Nov. 4, 2008), available at <http://edition.cnn.com/2008/POLITICS/11/04/obama.transcript/>.

2. President Barack Hussein Obama, Inaugural Address delivered from Washington D.C. (Jan. 20, 2009), available at <http://www.whitehouse.gov/blog/inaugural-address/>.

3. See Douglas A. Berman, *Extreme Punishments*, in WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 163 (Charles Ogletree & Austin Sarat eds., 2008); see also Douglas A. Berman, *The Enduring (and Now Again Timely) Wisdom of the Original MPC Sentencing Provisions*, 61 FLA. L. REV. 709 (2009); Douglas A. Berman, *Exploring the Theory, Policy and Practice of Fixing Broken Sentencing Guidelines*, 21 FED. SENT'G REP. 182 (2009); Douglas A. Berman, *Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities*, 3 HARV. L. & POL'Y REV. (Online) (2008), http://www.hlpronline.com/Berman_HLPR_120808.pdf.

five to ten times the rate of most other Western industrialized nations.⁴ Mass incarceration in the United States has profound political, social, and economic costs — especially for minority communities and vulnerable populations such as juveniles and persons suffering from drug addiction and mental illness.⁵ These realities exist, in part, because modern policy-makers and practitioners have too often chosen fear over hope when responding to crime and administering punishments, especially in the arena of drug offenses.

Statements by Barack Obama suggest he appreciates the need for change in America's criminal justice system, especially with respect to nonviolent drug offenders.⁶ Encouragingly, President Obama's Administration has started taking a few small steps toward bringing the themes of hope and change to modern crime and punishment. However, in the historically important area of clemency⁷ — which just happens to be the only part of the criminal justice system in the President's exclusive control — President Obama has so far failed to make good on his campaign themes. This Article explains why it is important, and would be so valuable, for President Obama to start making active use of his clemency power, especially for nonviolent drug offenders. This Article also suggests how President Obama might start effectively turning hope-and-change talk into clemency action.

I. HOPE AND CHANGE FOR KEY PARTS OF THE CRIMINAL JUSTICE SYSTEM

Though President Obama has rarely emphasized crime issues when articulating his themes of hope and change, his own statements and early actions by his Administration reveal that he is not content with the criminal

4. See THE PEW CENTER ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 35 (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

5. See generally Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, available at http://www.hlpronline.com/Vol3_2-Dolovich_HLPR.pdf; IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (Mary Pattillo, David Weiman & Bruce Western eds., 2004); Tracey L. Meares, *Mass Incarceration: Who Pays the Price for Criminal Offending?*, 3 CRIMINOLOGY & PUB. POL'Y 295 (2004); INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002).

6. See *infra* text and accompanying notes 11-17.

7. Throughout this essay, unless otherwise specified, I use the terms "clemency" and "clemency power" as an umbrella term encompassing the authority of an executive official to grant pardons (which typically remove all consequences of criminal conviction) and commutations (which usually reduce a sentence), as well as reprieves and amnesties and other forms of executive grace that alter some of the standard components of a criminal conviction.

justice status quo in America.⁸ As detailed below, President Obama and his appointees have expressed particular concern with how the “war on drugs” has resulted in severe punishment for some nonviolent drug offenders.⁹

A. Recognizing the Need for a “New Dawn of Justice”¹⁰

Various statements by President Obama during his political career suggest he appreciates the need for hope and change to extend to modern criminal justice systems.¹¹ Well before he began seeking the presidency, Obama expressed opposition to mandatory minimum-sentencing provisions and suggested that the so-called “war on drugs” was not a winning strategy.¹² Throughout the 2008 presidential campaign, then-candidate Obama repeatedly reiterated his concerns about the ineffectiveness of mandatory minimum-sentencing statutes. He also assailed racial disparities and inequities in the enforcement of criminal laws and in the administration of punishments.¹³

President Obama’s views of, and concerns with, modern criminal justice realities found their most direct expression in a major policy speech he delivered at Howard University’s Convocation in September 2007.¹⁴ In his speech, Obama asserted that it was “time to seek a new dawn of justice in America.”¹⁵ Obama articulated his call for criminal justice change in this way:

When I’m President, we will no longer accept the false choice between being tough on crime and vigilant in our pursuit of justice We can have a crime policy that’s both tough and smart. If you’re convicted of a crime involving drugs, of course you should be punished. But let’s not make the punishment for crack cocaine that much more severe than the punishment for powder cocaine when the real difference between the two is the skin color of the people using them. Judges think that’s wrong. Republicans think that’s wrong. Democrats think that’s wrong,

8. See *infra* text and accompanying notes 11-18.

9. See *infra* text and accompanying notes 16-29.

10. See Senator Barack Obama, Remarks at Howard University Convocation (Sept. 28, 2007) [hereinafter Remarks at Howard University Convocation], available at http://www.barackobama.com/2007/09/28/remarks_of_senator_barack_obam_26.php (invoking the evocative phrase “new dawn of justice” roughly halfway through the speech).

11. See *infra* text and accompanying notes 11-17.

12. See On the Issues, Barack Obama on Drugs, http://www.ontheissues.org/domestic/Barack_Obama_Drugs.htm (last visited Oct. 19, 2009).

13. See NAACP, THE NAACP 2008 PRESIDENTIAL CANDIDATE CIVIL RIGHTS QUESTIONNAIRE 14, available at http://www.naacp.org/news/press/2008-02-01/RESPONSES.McCain_Obama.FINAL.pdf.

14. Remarks at Howard University Convocation, *supra* note 10.

15. *Id.*

and yet it's been approved by Republican and Democratic Presidents because no one has been willing to brave the politics and make it right. That will end when I am President.

I think it's time we also took a hard look at the wisdom of locking up some first-time, [nonviolent] drug users for decades. Someone once said that "long minimum sentences for first-time users may not be the best way to occupy jail space and/or heal people from their disease." That someone was George W. Bush—six years ago. I don't say this very often, but I agree with the President. The difference is, he hasn't done anything about it. When I'm President, I will. We will review these sentences to see where we can be smarter on crime and reduce the blind and counterproductive warehousing of [nonviolent] offenders. And we will give first-time, [nonviolent] drug[] offenders a chance to serve their sentence, where appropriate, in the type of drug rehabilitation programs that have proven to work better than a prison term in changing bad behavior. So let's reform this system. Let's do what's smart. Let's do what's just.¹⁶

This call for "a new dawn of justice in America" is notable for its exhortation that society "no longer accept the false choice between being tough on crime and vigilant in our pursuit of justice" and also for questioning "the wisdom of locking up some first-time, [nonviolent] drug users for decades."¹⁷ And it is especially notable for criticizing George W. Bush for failing to follow-up on talk of reform with tangible action as President. Through this speech, candidate Obama pledged that, as President of the United States, he would be willing "to brave the politics and make it right" in order to engineer needed reform of criminal justice policies and practices.¹⁸

B. Encouraging (Though Cautious) Early Reform Efforts

The Obama Administration has, in a few tangible ways, started to make good on the President's campaign pledge "to seek a new dawn of justice in America."¹⁹ Specifically, President Obama's appointees heading the Department of Justice and the Office of National Drug Control Policy — the two executive departments with the most direct involvement in crime and drug policy — have made various statements that echo Obama's call for our nation to "be smarter on crime and reduce the blind and counterproductive warehousing of [nonviolent] offenders."²⁰

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

For example, in a major interview upon assuming his new position, Obama's appointed Chief of the Office of National Drug Control Policy, Gil Kerlikowske, suggested that we should stop using war rhetoric when discussing the nation's drug problems. Kerlikowske told the *Wall Street Journal* that "regardless of how you try to explain to people it's a 'war on drugs' or a 'war on product,' people see war as a war on them[.] We're not at war with people in this country."²¹ In this interview, Kerlikowske stressed that it was time to place greater emphasis on treatment and less on incarceration in order to approach drug abuse more as a public health issue and less as a matter always requiring criminal justice intervention.²²

Similarly, Attorney General Eric Holder announced soon after he was confirmed that the Department of Justice would no longer prosecute distributors of medical marijuana who operate in accordance with state laws that have made some distribution of marijuana legal.²³ In addition, the Department of Justice has begun vocally advocating to Congress that the disparities in federal sentencing laws between the punishment for crack cocaine and the punishment for powder cocaine should be "completely eliminate[d]."²⁴

More broadly, the Department of Justice has embarked upon "a comprehensive, evidence-based review of federal sentencing and corrections policy."²⁵ As explained by Attorney General Holder in an important speech to the Vera Institute of Justice, a study group within the Department of Justice "is examining the federal sentencing guidelines, the Department's charging and sentencing advocacy practices, mandatory minimums, crack/powder cocaine sentencing disparities, and other racial

21. Gary Fields, *White House Czar Calls for End to 'War on Drugs,'* WALL ST. J., May 14, 2009, at A3.

22. *Id.*

23. See Alex Johnson, *DEA to Halt Medical Marijuana Raid.; Holder Confirms States to Have Final Say on Use of Drug for Pain Control*, Feb. 27, 2009, <http://www.msnbc.msn.com/id/29433708/>. In October 2009, Attorney General Holder announced the promulgation of formal guidelines for federal prosecutors in states that have enacted laws authorizing the use of marijuana for medical purposes; these guidelines made clear that the focus of federal resources should not be on individuals whose actions are in compliance with existing state laws. See Press Release, Department of Justice Office of Public Affairs, Attorney Gen. Announces Formal Med. Marijuana Guidelines (Oct. 19, 2009), available at <http://www.justice.gov/opa/pr/2009/October/09-ag-1119.html>.

24. *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs and the United States S. Comm. on the Judiciary*, 111th Cong. 10 (2009) (statement of Lanny A. Breuer, Assistant Att'y Gen., Criminal Division, United States Department of Justice).

25. Eric Holder, Att'y Gen. of the U.S., Remarks as Prepared for Delivery by Attorney General Eric Holder at the Vera Institute of Justice's Third Annual Justice Address (July 9, 2009), <http://www.usdoj.gov/ag/speeches/2009/ag-speech-090709.html>.

and ethnic disparities in sentencing [as well as] studying alternatives to incarceration and strategies that help reduce recidivism when former offenders reenter society.”²⁶ The intended goal is “to use the group’s findings as a springboard for recommending new legislation that will reform the structure of federal sentencing.”²⁷

In this speech to the Vera Institute, Attorney General Holder also focused on drug crimes and punishments, stressing his view that “we can do a much better job by looking beyond incarceration . . . in the way we deal with [nonviolent] drug offenses.”²⁸ Holder lamented that he has “seen far too many young people lose their claim to a future by committing [nonviolent] drug crimes,” and he suggested that an increase in the use of drug treatment courts provides a “promising, viable solution to the devastating effect of drugs on the criminal justice system and on American communities.”²⁹

These statements and early actions from members of the Obama Administration provide encouraging signs that President Obama remains committed to seeking “a new dawn of justice in America.” And yet, there is an important and disconcerting missing piece to this story. In the one part of the criminal justice system that is in the President’s exclusive control — the power to grant clemency in the form of pardons, commutations, and reprieves — President Obama has so far failed to make good on his campaign themes of “hope” and “change.”

II. THE NEED FOR HOPE AND CHANGE TO EXTEND TO CLEMENCY

The history of executive clemency power in America might be described as one filled with hope; but this power has been subject to troublesome changes in recent decades. Indeed, many individuals who are now eager for change in the clemency arena are essentially urging a change *back* to the traditions and practices that had come to define the President’s clemency power for the majority of American history.

26. *Id.*

27. *Id.* In subsequent speeches, Attorney General Holder has often mentioned having “established a Sentencing and Corrections Working Group to take a fresh look at federal sentencing practices.” Eric Holder, Att’y Gen. of the U.S., Remarks as Prepared for Delivery by Attorney General Eric Holder at the National Organization of Black Law Enforcement Executives (Feb. 12, 2010), <http://www.usdoj.gov/ag/speeches/2010/ag-speech-100212.html>.

28. *Id.*

29. *Id.* Attorney General Holder has reiterated his concern with overuse of incarceration in response to nonviolent drug offenses in a number of speeches. *See, e.g.*, Eric Holder, Att’y Gen. of the U.S., Remarks as Prepared for Delivery by Attorney General Eric Holder at the 2009 ABA Convention (Aug. 3, 2010), <http://www.usdoj.gov/ag/speeches/2009/ag-speech-090803.html>.

A. The Historic Tradition and Importance of the Clemency Power

Executive clemency power exercised by the President of the United States has a rich and distinguished history in America. The Framers robustly championed the executive clemency power that is provided by Article II of our Constitution.³⁰ At the time of founding, Alexander Hamilton stressed the importance of clemency in the *Federalist Papers*, emphasizing that “[t]he criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”³¹ Similarly, James Iredell of North Carolina championed the crucial nature of the executive clemency power, explaining that “there may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy.”³² As Iredell explained, because general criminal law cannot “foresee and provide for all possible cases that may arise . . . an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.”³³

Critically, the federal clemency power was not only praised in theory at America’s founding, but it was also honored in practice through America’s first two centuries. As former Pardon Attorney Margaret Colgate Love has explained:

[F]rom the early days of the republic the pardon power was pressed into regular service as an integral part of the day-to-day operation of the federal justice system. At a time when the laws were relatively harsh and inflexible, pardon was virtually the only way that federal offenders could have their convictions reviewed, prison sentences reduced, and rights of citizenship restored. Many pardons and sentence commutations were issued each year to ordinary people convicted of garden variety crimes, often upon the recommendation of the prosecutor or the sentencing judge. Far from being an “extraordinary” remedy, pardon was a very ordinary form of early release and restoration of citizenship rights.

....

30. See U.S. CONST. art. II, § 2, cl. 1 (providing that the President “shall have power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment”).

31. THE FEDERALIST NO. 74, at 473 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1966).

32. James Iredell, Address to the North Carolina Ratifying Convention, 4 ELLIOT 110, 110-14 (July 28, 1788), reprinted in 4 THE FOUNDERS CONSTITUTION 17 (Philip B. Kurland & Ralph Lerner eds., The University of Chicago Press 1987).

33. *Id.*

Until 1980, each president granted well over a hundred post-sentence pardons and sentence commutations almost every year, without fanfare or scandal. Grants were issued almost every month for much of this period, evidence that pardoning was considered part of the ordinary housekeeping work of the Presidency, not something reserved for holidays or departure from office. The percentage of clemency petitions acted on favorably remained high, approaching or exceeding 30% in every administration until [President] Jimmy Carter's.³⁴

Significantly, not only was the clemency power regularly used by most presidents, but it was often used swiftly. As scholar P.S. Ruckman has effectively documented, roughly half of all presidents granted some form of clemency *within their first two weeks* in the Oval Office;³⁵ until recently, nearly every president granted some clemencies during his first 100 days in office.³⁶ Even presidents serving during the most tumultuous periods in American history found the time and the opportunity to make early and regular use of their clemency power. For example, in their first years in the White House, Abraham Lincoln issued eighty pardons, Theodore Roosevelt issued 128 pardons or clemencies, Franklin Roosevelt issued 167 clemency grants, and Harry Truman issued 107 such grants.³⁷

In other words, until very recently, presidents recognized and acted in response to Hamilton's admonition that robust use of the executive clemency power was essential to help ensure that federal justice would not "wear a countenance too sanguinary and cruel."³⁸ Appreciating Iredell's insight that "there may be many instances [that] may entitle [an offender] to mercy,"³⁹ presidents regularly made extensive and judicious use of the clemency power to avoid being the "cause of very great injustice."⁴⁰

34. Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 FED. SENT'G REP. 5, 6-7 (2007) (footnotes omitted).

35. See Posting of P.S. Ruckman, Jr. to Pardon Power Blog, <http://pardonpower.com/2009/01/obama-presidents-first-pardon.html> (Jan. 28, 2009, 3:45 P.M.); see also Postings of P.S. Ruckman, Jr. to Pardon Power Blog, <http://pardonpower.com/charts/FirstPardon.mht> (Sept. 24, 2009, 2:10 P.M.).

36. See Posting of P.S. Ruckman, Jr. to Pardon Power Blog, <http://pardonpower.com/2009/01/obama-presidents-first-pardon.html> (Jan. 28, 2009, 3:45 P.M.); see also Postings of P.S. Ruckman, Jr. to Pardon Power Blog, <http://pardonpower.com/charts/FirstPardon.mht> (Sept. 24, 2009, 2:10 P.M.).

37. Margaret Colgate Love & John Stanish, Opinion, *Reinvigorate the Power*, 31 THE NAT'L L.J. at 22 (New York) Feb. 23, 2009.

38. THE FEDERALIST NO. 74, at 501 (Alexander Hamilton) (Jacob E. Cooke ed., 1983).

39. Iredell, *supra* note 32.

40. *Id.*

B. The Modern Decline of Clemency

In modern times, the executive clemency power has been failing to serve the ends of mercy and justice that the Framers emphasized and that many presidents previously effectuated. Once again, Margaret Colgate Love provides an effective summary of the modern decline of this historically important part of the criminal justice system:

In the past twenty-five years we have lost touch with the rich history of presidential pardoning. Four successive presidents have allowed the pardon power to atrophy, not because there was no more use for it — certainly this is not true since the advent of determinate sentencing — but because they both misunderstood and feared it. The Department of Justice, pardon's trusted official custodian for more than a century, marginalized and compromised the power.⁴¹

President Obama's three predecessors are uniquely responsible for clemency's functional demise. President George H.W. Bush granted a record low number of pardons and commutations, and Presidents Bill Clinton and George W. Bush continued a modern tendency to use the clemency power exceedingly sparingly.⁴² Perhaps even more troubling, the last two presidents largely declined to use their clemency power until the end of their terms. Neither Bill Clinton nor George W. Bush granted a single pardon or commuted a single prison sentence for the first two years of their presidencies.⁴³ And more than half of the clemency grants by President Clinton were issued during his very last days in office after eight years of a presidency marked largely by disregard for the clemency power.⁴⁴

The modern decline in the use of clemency at the federal level is not due to a lack of requests or a paucity of worthy cases; Presidents Bill Clinton and George W. Bush received a record number of pardon and commutation requests.⁴⁵ This fact is not surprising, given that in recent decades the federal criminal justice caseload has grown tremendously, the possibility of parole has been formally eliminated by statute, sentencing rules have become more rigid and severe through mandatory minimum-sentencing terms and increased guideline-sentencing ranges, and the collateral consequences of conviction have become more extensive and burdensome.

41. Love, *supra* note 34, at 5.

42. See U.S. DEPT. OF JUSTICE, *Office of the Pardon Attorney, Presidential Clemency Actions by Administration: 1945 to Present*, http://www.usdoj.gov/pardon/actions_administration.htm.

43. See *id.*

44. See *id.*

45. *Id.*

But, while many more persons are subject to the federal criminal justice system and many more offenders are serving longer prison terms and dealing with the ever-more-burdensome consequences of a criminal conviction, the constitutional clemency power continues to atrophy.

Many cultural and political forces have played a role in clemency's modern decline, which has occurred at the state level as well as in the federal system.⁴⁶ Extreme tough-on-crime political rhetoric and attitudes have become all too commonplace as criminal justice policy has become increasingly politicized. Thus, any exercise of the clemency power to show mercy is too often characterized as inherently suspect. Furthermore, since only troublesome grants of clemency tend to generate significant media attention or legislative hearings, presidents, governors, and their advisors can sensibly conclude that they will rarely face serious criticisms for failing to grant clemency, but will often face scrutiny for exercising clemency powers robustly.

At the federal level, structural changes have also contributed to clemency's modern decline. As Margaret Colgate Love has explained, at the end of the Carter Administration, "the Attorney General stopped making pardon recommendations and delegated authority to his second in command, who was responsible for carrying out the law enforcement programs of the Department of Justice. Pardon became subsumed to that agenda."⁴⁷ Moreover, in recent years, the Office of the Pardon Attorney has been underfunded and understaffed, which has also impeded the ability of the Department of Justice to give useful and effective information and guidance to the President.⁴⁸

Though relatively little media attention has been given to the modern decline of clemency, considerable media attention is often given to any grants of clemency that may appear to have been due to requests from political insiders or apparent cronies.⁴⁹ Recent high-profile clemency controversies — including President Clinton's pardon grants to his brother Roger Clinton and to fugitive financier Marc Rich on his last day in office and President George W. Bush's decision to commute the prison sentence of Lewis "Scooter" Libby, as well as President Bush's effort to grant and then retract a pardon to real estate developer Isaac Toussie just before

46. See generally Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153 (2009).

47. Marcia Coyle, *A Leading Legal Authority on Pardons Talks About the Need for Transparency — And How To Get To the Top of The List*, NAT'L L. J., Nov. 26, 2008, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426312881&slreturn=1&hbxlogin=1> (comments of Margaret Colgate Love).

48. See Maya Schenwar, *The Fall of the Presidential Pardon*, TRUTHOUT, April 2, 2009, <http://www.scoop.co.nz/stories/HL0904/S00037.htm>.

49. Schenwar, *supra* note 48.

leaving office — have further contributed to giving executive clemency power a bad name. Many, if not most, Americans now likely associate the clemency power with cronyism and scandal, and few have reason to understand the noble and sensible goals that the Framers sought to further by guaranteeing this power to the president in the Constitution.

Put simply, the historically important power of clemency is in a sad state of disrepair. Recognizing and troubled by these realities, Associate Supreme Court Justice Anthony Kennedy, in 2003, made an impassioned plea to “reinvigorate the pardon process at the state and federal levels.”⁵⁰ In a speech to the American Bar Association, Justice Kennedy made astute observations concerning the clemency power:

The pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent. A people confident in its laws and institutions should not be ashamed of mercy. The greatest of poets reminds us that mercy is “mightiest in the mightiest. It becomes the throned monarch better than his crown.” I hope more lawyers involved in the pardon process will say to Chief Executives, “Mr. President,” or “Your Excellency, the Governor, this young man has not served his full sentence, but he has served long enough. Give him what only you can give him. Give him another chance. Give him a priceless gift. Give him liberty.”

....

We must try . . . to bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach.⁵¹

Though speaking a full five years before Barack Obama was elected President, Justice Kennedy was essentially calling for hope and change in the exercise of the clemency power. Unfortunately, as detailed in the next Part, President Obama has yet to give these themes expression in the arena of clemency.

III. CHANGING CLEMENCY FOR NONVIOLENT DRUG OFFENDERS

President Barack Obama has wasted little time bringing his campaign themes of hope and change to many aspects of America’s laws and policies. In less than a year in office, President Obama has put forward

50. Anthony M. Kennedy, Assoc. Justice, Supreme Court of the U.S., An Address at the American Bar Association Annual Meeting (Aug. 9, 2003) [hereinafter Kennedy Speech], available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

51. *Id.*

profoundly important proposals seeking change on a broad array of major issues including the economy, the environment, health care, and education.⁵² On most issues, it would be hard to accuse President Obama of failing to try to help America change for the better.

However, President Obama can, and must, be accused of failing to give effect to his themes of hope and change in the context of the clemency power. As of this writing, a full fourteen months into his first term, President Obama has failed to grant a single clemency to a single human being.⁵³ Again, President Obama's failure to make use of the clemency power cannot be attributed to a lack of requests or a paucity of worthy cases as more than 3000 petitions for pardons and commutations are pending in the Office of the Pardon Attorney.⁵⁴ Moreover, there are likely thousands of additional persons still feeling the heavy brunt of the federal criminal justice system who can reasonably assert, in the words of Alexander Hamilton, that they have been subject to a form of justice that still wears "a countenance too sanguinary and cruel."⁵⁵ Notably, in November 2009, President Obama took time to celebrate Thanksgiving through the granting of a ceremonial "pardon" to a turkey at the White House,⁵⁶ but he still failed to give any human any reason to give thanks for his constitutional authority to grant clemencies.

A broad array of current federal prisoners and former offenders have sought clemency relief from, in the words of Alexander Hamilton in *The Federalist Papers*, a form of justice they claim is "too sanguinary and cruel." But it is especially notable and troublesome that President Obama has not yet acted on behalf of the nonviolent drug offenders whom he mentioned on the campaign trail, and whom members of his Administration have made the focal point of their own suggestions for criminal justice reform. When calling for "a new dawn of justice in America" on the campaign trail, Obama emphasized that as president he would be committed to giving "first-time, [nonviolent drug offenders] a chance to

52. See generally entries under "Featured Legislation" and "Presidential Actions" at whitehouse.gov.

53. See Molly M. Gill, *Turkeys 2, Humans 0*, WASH. POST, Nov. 27, 2009, available at <http://www.washingtonpost.com/wpdyn/content/article/2009/11/AR2009112606093.html>.

54. See U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATT'Y, PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION: 1945 TO PRESENT, http://www.usdoj.gov/pardon/actions_administration.htm (last visited Jan. 25, 2010).

55. THE FEDERALIST NO. 74, at 447-49 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

56. See video clip titled President Obama Pardons White House Turkey, Nov. 25, 2009, available at <http://www.whitehouse.gov/photos-and-video/video/president-obama-pardons-white-house-turkey>.

serve their sentence, where appropriate, in the type of drug rehabilitation programs that have proven to work better than a prison term in changing bad behavior.”⁵⁷ By some estimates, there may be tens of thousands of nonviolent drug offenders currently serving a federal prison term (not to mention possibly hundreds of thousands more such prisoners serving time in state and local prisons and jails).⁵⁸ Especially in light of his express criticism of George W. Bush for his failure to follow-up talk of reform with tangible action, President Obama can and should, at the very least, find one nonviolent federal drug-offender for whom a clemency grant would be justified. The rhetoric of hope and change seems empty in this setting because President Obama has not been moved by — or has lacked the personal interest and professional courage to try to find — a single case in the massive federal criminal justice system calling for some kind of clemency relief during his first fourteen months in the White House.

Of course, the systemic sentencing review being conducted by the Obama Administration’s Department of Justice can, and likely will, be much more critical to achieving “a new dawn of justice in America” than anything President Obama could achieve on his own through the exercise of executive clemency power. Nevertheless, even the grant of a single clemency would be of great symbolic importance and could have an important and needed transformative impact on the law, policies, and practices of criminal justice throughout the nation. Every action by President Obama garners media attention and generates public debate that goes far beyond the political and public reactions of anything said or done by his subordinates. Thus, through even just a single symbolic grant of some form of clemency to a single deserving nonviolent drug-offender, President Obama would be able to not only address the kind of sentencing injustices he has decried, but also highlight the seriousness of his commitment to reform in this arena and thereby showcase his law enforcement priorities to policy-makers and practitioners throughout the nation.⁵⁹ In other words, just a single symbolic clemency grant would

57. Senator Barack Obama, Remarks at Howard University Convocation (Sept. 28, 2007), http://www.barackobama.com/2007/09/28/remarks_of_senator_barack_obam_26.php.

58. See Marc Mauer & Ryan S. King, The Sentencing Project, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society*, at 2 (September 2007) (indicating that “[n]early a half-million (493,800) persons are in state or federal prison or local jail for a drug offense . . . [and that nearly] 6 in 10 persons in state prison for a drug offense have no history of violence or high-level drug selling activity”).

59. See Charles Shanor & Marc Miller, *Pardon Us: Systematic Pardons*, 13 FED. SENT’G REP. 139, 143 (2001) (cataloging historical instances in which the president has used his pardon power in a systematic way to spotlight the president's view on important public policy issues).

generate and enhance a public dialogue about the need for more hope and change throughout our criminal justice system. Just a single symbolic clemency grant could help achieve what Justice Anthony Kennedy urged more than six years ago — namely a “reinvigorat[ation of] the pardon process at the state and federal levels.”⁶⁰

Of course, extending hope and change to the clemency arena should not stop with the grant of just one or a few clemencies to nonviolent federal drug offenders. Though the need for clemency action is acute, broader structural reform of the entire presidential clemency process is also overdue. Especially in a modern era in which special commissions and czars are often created by an Administration to help focus energy and expertise on a specific problem, the historically important clemency power could benefit from the creation of a new executive branch institution dedicated to review and study of the past, present, and future of federal executive clemency. Specifically, President Obama ought to seriously consider creating some form of a “Clemency Commission” headed by a “clemency czar.” Notably, in his first year in office, President Obama has created through executive orders nearly a half-dozen new executive branch institutions ranging from the White House Office of Urban Affairs⁶¹ to the White House Council on Women and Girls⁶² to the White House Office of Health Reform⁶³ to the White House Council on Automotive Communities and Workers.⁶⁴ Though the issues and concerns to be examined by these offices and councils are surely important and worthy of attention, they all generally lack the constitutional pedigree of executive clemency and they do not suffer from the modern disregard and disrespect that now afflicts the clemency power.

Though a “Clemency Commission” headed by a “clemency czar” could be created and developed in any number of ways, my vision and goals here are meant to be fairly basic. The idea is for President Obama to create a special expert body, headed by a special designated official, who is primarily tasked with helping federal officials (and perhaps also state officials) improve the functioning, transparency, and public respect for executive clemency.⁶⁵ Though the structure, staffing, and mandates of a

60. See Kennedy Speech, *supra* note 50.

61. Exec. Order No. 13,503, 74 Fed Reg. 8,139 (Feb. 19, 2009).

62. Exec. Order No. 13,506, 74 Fed Reg. 11,271 (Mar. 11, 2009).

63. Exec. Order No. 13,509, 74 Fed Reg. 30,903 (June 23, 2009).

64. Exec. Order No. 13,507, 74 Fed Reg. 17,071 (Apr. 8, 2009).

65. In a recent article, Professor Jonathan Menitove has suggested a different model for reforming the federal clemency power, which involves a proposed Presidential Clemency Board designed to better handle the political problems that surround modern use of the clemency power. See Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447 (2009), available

Clemency Commission could take many forms, ideally it would include personnel with expertise about the nature of and reasons for occasional miscarriages of justice in the operation of modern criminal justice systems — persons who possess a deep understanding that, in the words of James Iredell, “an inflexible adherence to [severe criminal laws], in every instance, might frequently be the cause of very great injustice.”⁶⁶

The Clemency Commission could and should study the modern causes of wrongful conviction, “excessive” sentences, and overzealous prosecutions, and then make formal and public recommendations to the President and other branches about specific cases that might merit clemency relief or systemic reforms that could reduce the risk of miscarriages of justice. In addition, the Commission could be a clearing-house for historical and current data on the operation of executive clemency powers in state and federal systems. It could also serve as a valuable resource for offenders and their families and friends seeking information about who might be a good candidate for receiving clemency relief. Though the creation of a Clemency Commission would be an ambitious endeavor, the effort could pay long-term dividends for both the reality and the perception of justice and fairness in our nation’s criminal justice system.

IV. CONCLUSION

Statements by President Barack Obama when he was campaigning for the presidency and by his appointees in key criminal justice positions suggest his Administration appreciates the need for change to America’s criminal justice systems, especially with respect to nonviolent drug offenders. Encouragingly, President Obama’s Administration has taken a few tentative steps toward bringing the themes of hope and change to modern crime and punishment. However, in the historically important area of clemency — which is the only part of the criminal justice system in the President’s exclusive control — President Obama has so far failed to make good on his campaign themes of hope and change. As explained in this Article, it is now critical for President Obama to start making active use of his clemency power, especially for nonviolent drug offenders, and to start effectively turning hope-and-change talk into clemency action.

at http://www.hlpronline.com/Vol13-2_Menitove_HLPR.pdf (suggesting the creation of a partisan Presidential Clemency Board comprised of the President and four members of Congress).

66. Iredell, *supra* note 32.