

The Obama Administration: Breaking Records in a Broken Clemency System

Nietzsche once observed that, occasionally, when a man talks about himself, the aim is to conceal as much about himself as he wishes to reveal. That witty insight seemed wildly relevant in July of 2015, when White House Press Secretary Josh Earnest suggested President Obama's record on commutations of sentence had been "bold." Earnest offered, as evidence, the fact that the President had granted more of them than the previous four presidents combined.

Of course, Mr. Earnest was not reciting a doctoral dissertation on federal executive clemency, and only had so much time for PR work that day, but *really!* Bold? The first exercise of the pardon power in the Obama administration came 682 days into the term—the longest wait of any president in history save George W. Bush. When the first term ended, Obama had granted a single (1) commutation of sentence. No full presidential term had featured so few commutations since at least the administration of James Buchanan (1857–1861).¹

Was Earnest correct in saying the President had granted more commutations of sentence than the previous four presidents combined? He sure was. But those presidents (W. Bush, Clinton, H.W. Bush, and Reagan) were well known for freakish disregard for the pardon power and *especially* commutations of sentence. The comparison amounted to something like boasting one is more merciful than Torquemada.

There was more: the previous four presidents had granted a total of 88 commutations of sentence. By July of 2015, Obama had granted 89. That is to say, he had beaten them by a grand total of one (1). The previous four presidents had also received a total of 16,104 applications for commutations of sentence. Obama, however, had received over a thousand more applications (17,156) and yet granted only *one* more commutation.

The things Mr. Earnest did not say!

These kinds of clumsy comparisons continued throughout the Obama administration, without any useful reference to record numbers of incoming applications or—of equal, if not *greater* importance—the overall percentage of applications that had been granted (as opposed to being denied or closed without presidential action).² In March of 2016, the White House bragged that the President had granted more commutations than the previous 6 presidents combined.³ By August of 2016, the number was more than the previous ten presidents combined.⁴ By the end of the

term, Obama had granted more than the previous twelve presidents combined.⁵

Perhaps more significantly, President Obama broke Woodrow Wilson's record for the most commutations of sentence granted by a single president, a record that stood for almost a century. The new record, again, needs to be viewed in the context of both the total number of applications filed, and denials. It should also be considered in light of how President Wilson exercised clemency throughout two terms.

While setting his record mark for commutations (1,366), Wilson granted 1,087 presidential pardons, as well as 226 respites and 148 remissions of fines and forfeitures.⁶ President Obama, however, granted a mere 212 pardons—a higher number than George H.W. Bush and George W. Bush granted, but higher than no other president since James Buchanan (1857–1861).

Consequently, clemency, for President Obama, meant—for the most part—commutations of sentence, almost exclusively granted to federal prisoners who were convicted of a single class of offenses: those related to drugs. And these grants—for the most part—appeared very late in his second term. Indeed, almost by stealth, the second term featured the largest 4th-year clemency surge of any administration in history. Bill Clinton's last-minute pardon stunt pales in comparison.

Notice, President Wilson's terms (Figure 1) featured no particularly dramatic 4th-year clemency surges. Yet he still set the record for commutations, and granted almost 900 more pardons than President Obama. How is that possible? It's actually quite simple. Like most presidents before him—and most presidents throughout American history—Woodrow Wilson granted pardons and/or commutations of sentence *every single month* of his term.⁷ The White House made much of the fact that President Obama granted the largest number of commutations in a single day (214),⁸ a single month (325),⁹ and a single year (590).¹⁰ President Wilson was similarly generous, though certainly with much less fanfare. If he set any records, no one seemed to have noticed. In the 97 months covered in Figure 1, Wilson granted 50 or more commutations of sentence in only two months. Only 11 months featured more than 25 commutations of sentence. Wilson managed to make history without "making history."

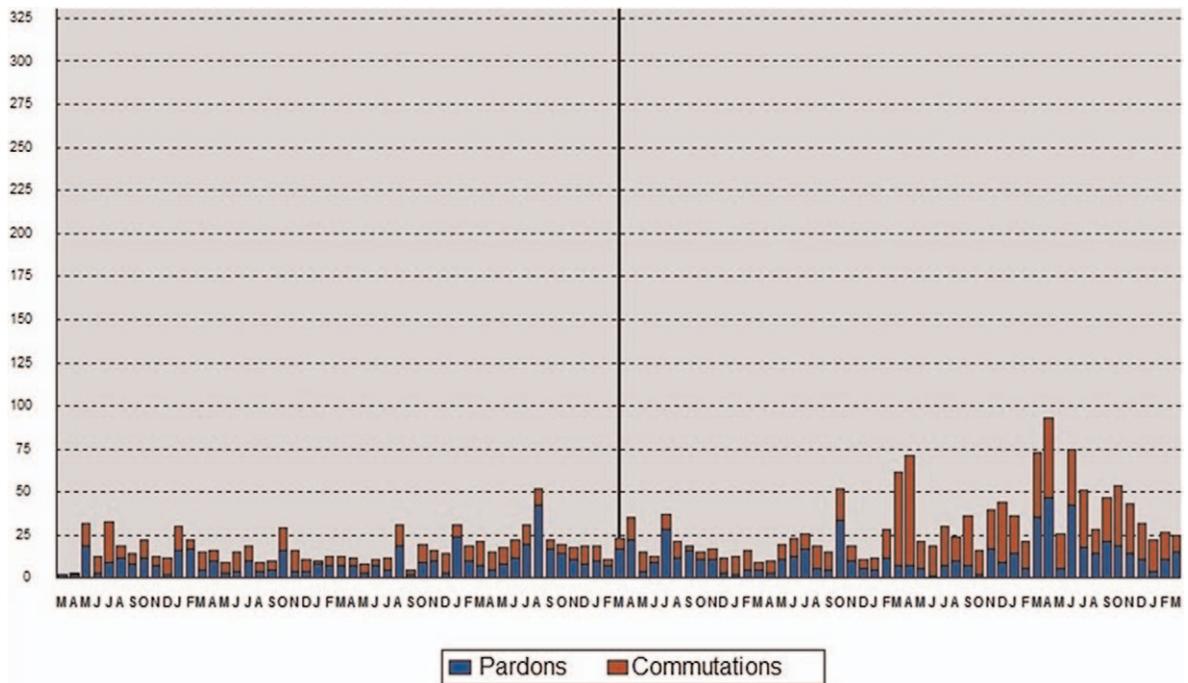


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Figure 1
Woodrow Wilson's Clemency Record (1913–1921)
Pardons (1,087) and Commutations of Sentence (1,366), First and Second Terms



Source: P.S. Ruckman, Jr., *Pardon Power Blog* (<http://www.pardonpower.com>)

Figure 1 makes it perfectly clear that, in the administration of Woodrow Wilson, clemency was not a last-minute stunt, a hurried afterthought, or a tidy bundle of gifts for distribution at Thanksgiving and Christmas. It was a regular feature of an executive actively functioning in a system of separation of powers and checks and balances—exactly what the Founders envisioned.

Wilson was, of course, a moderately busy president. Among other things, he dealt with the opening of the Panama Canal, the sinking of the *Lusitania*, World War I, the signing of the Federal Reserve Act, a re-election campaign, the Treaty of Versailles, and Prohibition. Notably, when the apparatus processing clemency applications is properly functioning, those kinds of things do not (or should not) matter much.¹¹ It isn't obvious, by looking at Figure 1, when any of these events took place. Nor should it be.

Recommendations should go to the White House regularly—because a bureaucracy (the Office of the Pardon Attorney, in the Department of Justice) has been created specifically for the purpose of processing and forwarding applications. Generally speaking, the president should be able to trust the decision making and advice that is the byproduct of that process. If he feels a serious need to review each application himself, in considerable detail, something is horribly wrong. That kind of approach may amount to working hard, but it isn't working smart.

When all is said and done—Alexander Hamilton's "easy access to mercy" (see *Federalist Papers*, No. 74) should always be at least moderately evident. Separation

of powers and checks and balances assume legislators and judges are not perfect. The tradition of mercy (inherited from common law) also recognizes that the executive has more flexibility in decision making and can consider factors which, many times, cannot even appear on the radar screens of legislators and judges (new evidence, aggravating and mitigating circumstances, changes in law, disparities in sentencing, rehabilitation, reincorporation into the community, humanitarian considerations, community service, charity work, etc.). The Framers meant for the executive branch to be a participant in government's approximation of criminal justice, not a mute, motionless bystander, deferring by default to the other branches.

Now compare what has been seen in the clemency record of Woodrow Wilson to that of President Obama, Figures 2 and 3. Everything one needs to know about the dire need for clemency reform can be seen in these two charts. The federal prison population has, of course, *boomed* since Wilson's day. Record numbers of clemency applications have been coming into the Office of the Pardon Attorney steadily, *for years*. On top of that, thousands of persons remain in prison who were sentenced under drug laws that have since been rejected by both parties in both chambers of Congress.

The merciless neglect of the current clemency system needs to be put to rest. Presidential terms should not feature 30 or 40 months without a single pardon or commutation of sentence.¹² The embarrassingly dysfunctional clemency

apparatus needs to be removed from career prosecutors in the basement of the DOJ who are unable (or unwilling) to process clemency applications in a timely fashion,¹³ with an eye toward mercy. This broken system has famously lacked transparency since 1932¹⁴ and, as it rushed through thousands of applications at the end of Obama's presidency,¹⁵ it even exempted itself from FOIA law.¹⁶

Clemency 2014 was an admirable initiative. But we are far past the time when the pressing need is for far-reaching, lasting institutional change, as opposed to temporary projects and fixes. It is time to create a permanent clemency board or commission (a device often used in the states) in the Executive Office of the President of the United States. Colleagues in my own discipline (political science), the American Civil Liberties Union, and an Attorney General of the United States were actually calling for the creation of such an institution in the early 1900s, and the force of their arguments has only grown stronger.¹⁷

The social background characteristics of those processing applications should be considerably diverse. The opinions of federal judges and prosecutors need to be joined by those with experience in public policy, social work, and criminal defense. A clemency board could also benefit from input by professors in law and the social sciences. Regardless, a demonstrated interest in clemency would be desirable in each and every member of a clemency board.

Clemency decision making should be transparent, open to regular empirical analysis and assessment. Grants should reflect a deliberate, systematic effort to achieve carefully articulated goals. Receiving a commutation of sentence, or a pardon, should not feel or appear so much like winning the lottery.

It is time for mercy to emerge, once again, as a *regular* feature of criminal justice—because prosecutions, sentences, and incarceration are regular features. It's not just about numbers, "making history" and "records." It is about restoring balance and a measure of fairness. It is about institutionalizing recognition of rehabilitation and restoration. It's about presidents using a power that was given to them . . . to *use* . . . not to abuse, or neglect until just before they leave office.

Notes

- ¹ Previous to Buchanan's administration, clemency warrants simply used the word "pardon" to the cover various forms of clemency that we distinguish today (pardon, commutation, respite, reprieve, remissions, etc.).
- ² The Obama administration denied 1,708 pardon applications and 18,749 applications for commutation of sentence. An additional 506 pardon applications and 4,250 commutation

applications have been closed without presidential action. See U.S. Dep't of Justice, Office of the Pardon Attorney, Total during Obama Administration (Jan. 20, 2009–Jan. 19, 2017), <https://www.justice.gov/pardon/current-fiscal-year-clemency-statistics>

- ³ A public statement by White House counsel Neil Eggleston referenced the "previous six administrations," while a simultaneously released graphic featured a comparison with the previous seven administrations. Neil Eggleston, *President Obama has now commuted the sentences of 348 individuals*, White House Blog (June 3, 2016, 3:30 PM), <https://www.whitehouse.gov/blog/2016/03/30/president-obama-has-now-commuted-sentences-348-individuals>.
- ⁴ Neil Eggleston, *President Obama grants 111 additional commutations, the most commutations granted in a single month*, White House Blog (Aug. 30, 2016), <https://www.whitehouse.gov/blog/2016/08/30/president-obama-grants-111-additional-commutations-most-commutations-granted-single>.
- ⁵ Neil Eggleston, *Obama has now granted more commutations than any president in this nation's history.*, White House Blog (Jan. 17, 2017), <https://obamawhitehouse.archives.gov/blog/2017/01/17/president-obama-has-now-granted-more-commutations-any-president-nations-history>.
- ⁶ Dep't of Justice, Office of the Pardon Attorney.
- ⁷ For most presidents previous to Eisenhower, the passage of one or two complete months without at least one grant of clemency was fairly rare.
- ⁸ Eggleston, *supra* note 4.
- ⁹ *Id.*
- ¹⁰ Neil Eggleston, *102 Second Chances*, White House Blog (Oct. 6, 2016), <https://www.whitehouse.gov/blog/2016/10/06/102-second-chances>.
- ¹¹ P.S. Ruckman, Jr., *Obama 2012: Too busy for pardons*, Pardon Power (Jan. 1, 2013), <http://www.pardonpower.com/2013/01/obama-2012-too-busy-for-pardons.html>.
- ¹² . . . a fairly common occurrence since the Eisenhower administration. See P.S. Ruckman, Jr., *Obama: More dubious pardon history-making*, Pardon Power (Jan. 24, 2013), <http://www.pardonpower.com/2013/01/obama-more-dubious-pardon-history-making.html>.
- ¹³ The Obama administration left 2,011 pardon applications and 8,880 commutations applications pending. See U.S. Dep't of Justice, *supra* note 2.
- ¹⁴ Previous to 1932, the *Annual Report* of the Attorney General provides extensive information on individual acts of clemency (including the reasoning behind grants). Afterward, only aggregate data arranged by fiscal year are presented.
- ¹⁵ See Sari Horwitz, *Obama to commute hundreds of federal drug sentences in final grants of clemency*, Wash. Post, Jan., 16, 2017, almost glamorizing DOJ officials' claims of being in "overdrive," working through vacations, and "killing themselves" to sift through the backlog of applications, just days before the administration ended.
- ¹⁶ P.S. Ruckman, Jr., *OPA: Forget about FOIA till Obama leaves office*, Pardon Power (Aug. 29, 2016), <http://www.pardonpower.com/2016/08/opa-forget-about-foia-till-obama-leaves.html>.
- ¹⁷ See P.S. Ruckman, Jr., *Preparing the Pardon Power for the 21st Century*, 12 U. St. Thomas L.J. 446 (2016).