



An Analysis of the Implementation of the 2014 Clemency Initiative

UNITED STATES SENTENCING COMMISSION



United States Sentencing Commission

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September 2017

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Introduction

On April 23, 2014, the Department of Justice announced an initiative to encourage qualified federal inmates to petition to have their sentences commuted by President Barack Obama. The stated intent of the initiative was to lower sentences for non-violent offenders who “likely would have received substantially lower sentences if convicted of the same offense” under the law then in effect. The Department of Justice (DOJ) announced six criteria that would entitle offenders to be prioritized for consideration for clemency. Over 24,000 offenders petitioned for clemency under the initiative, and the President commuted the sentences of 1,696 of those offenders.

This report analyzes the sentence commutations granted under the initiative. It provides data concerning the offenders who received a sentence commutation under the initiative and the offenses for which they were incarcerated. It examines the extent of the sentence reductions resulting from the commutations and the conditions that the President placed on his commutations. It also provides an analysis of the extent to which these offenders appear to have met the announced criteria for the initiative. Finally, it provides an analysis of the number of offenders incarcerated at the time the initiative was announced who appear to have met the eligibility criteria for the initiative and the number of those offenders who received a sentence commutation.

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Key Findings

The key findings of this report are:

- President Obama made 1,928 grants of clemency during his presidency. Of them, 1,716 were commutations of sentence, more commutations than any other President has granted.
- Of the 1,928 grants of clemency that President Obama made, 1,696 were sentence commutations under the 2014 Clemency Initiative.
- The commutations in sentence granted through the Clemency Initiative resulted in an average sentence reduction of 39.0 percent, or approximately 140 months.
- Of the 1,696 offenders who received a commuted sentence under the Clemency Initiative, 86 (5.1%) met all the announced Clemency Initiative factors for consideration.
- On April 24, 2014, there were 1,025 drug trafficking offenders incarcerated in the Federal Bureau of Prisons who appeared to meet all the announced Clemency Initiative factors. Of them, 54 (5.3%) received clemency from President Obama.
- By January 19, 2017, there were 2,687 drug trafficking offenders who had been incarcerated in the Federal Bureau of Prisons when the Clemency Initiative was announced and who appeared to meet all the announced Clemency Initiative factors. Of them, 92 (3.4%) received clemency from President Obama.

The President's Clemency Power

The Constitution gives the President the power to grant clemency to persons who have committed federal offenses. Article II of the U.S. Constitution provides:

The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.¹

Although the text of the President's clemency power uses only the words "reprieves" and "pardons," the power is generally understood to extend to five different forms of clemency: reprieves, pardons, amnesties, remissions, and commutations.² This report discusses President Obama's use of commutations under the Clemency Initiative; however, the other forms of clemency will be discussed briefly.

The Five Forms of Clemency

A reprieve is a temporary postponement of a punishment.³ It suspends the execution of the sentence of the court⁴ but has no effect on the crime or the punishment imposed for it.⁵ In contrast, a pardon relieves the offender of all punishment for the offense that has or may be imposed. The President can pardon someone before or after a formal conviction for a crime;⁶ however, in practice pardons are usually granted after a person has been convicted, served the punishment imposed, and demonstrated rehabilitation by leading an exemplary life upon release.⁷

Amnesties are, in essence, a type of pardon granted to a class of people for similar criminal acts.⁸ Most commonly, they are granted to a class of offenders who have not been prosecuted for the offense, often before any arrest for the crime has been made.⁹

The President may also order the remission of fines and forfeitures. This form of clemency requires the government to return to an offender all or a portion of the fine and forfeitures which a court ordered accrue to the government.¹⁰

Commutations of sentence are the form of clemency¹¹ used for the Clemency Initiative. A commutation does not relieve the offender of any legal consequence of the underlying offense, but only adjusts the punishment to be imposed.¹² The most common form of a commutation is the substitution of a lesser punishment of the same character for the punishment imposed by a court, such as the reduction in the length of a sentence of imprisonment.¹³ But commutations can also involve a change in the type of punishment itself, such as replacing a sentence of death with a sentence of life imprisonment.¹⁴

The Review of Clemency Petitions

Although the power to grant clemency belongs exclusively to the President, petitions for clemency have been processed by the Attorney General and his or her staff since 1852. In 1891, Congress established the Office of the Pardon Attorney in the Department of Justice, and the “clerk of pardons” (whom DOJ had renamed “the attorney in charge of pardons”) became the Pardon Attorney. For most of the time since, the Pardon Attorney reported directly to the Attorney General, who then presented the Pardon Attorney’s recommendations to the White House for decision. Before 1962, the Attorney General sent only those petitions that were recommended for clemency and all petitions which involved the death penalty.

Beginning in 1962, DOJ also began sending to the President those petitions which it recommended be denied. In 1978, the Attorney General delegated supervisory

authority over the Office of the Pardon Attorney to the Deputy Attorney General (DAG), who continues to supervise the office today. Under current practice, the DAG sends the DOJ recommendation to the White House through the Counsel to the President. In early 2016, DOJ appears to have revised its policy to also send to the President the Pardon Attorney's comments regarding petitions which the Pardon Attorney recommended be approved but the DAG recommended be denied.¹⁵

Conditioning Grants of Clemency

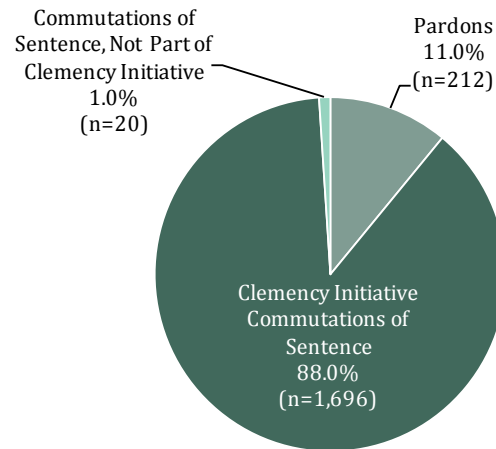
The President may attach conditions to a grant of clemency. In general, there are few, if any, legal limits on the conditions that the President may impose.¹⁶ The types of conditions imposed in the past have been wide-ranging, such as requiring the offender to swear allegiance to the country¹⁷ to performing acts of service benefitting the nation.¹⁸ While an offender cannot refuse a commutation outright,¹⁹ he or she can effectively refuse it by refusing to perform a condition attached to it.²⁰

Grants of Clemency Over Time by Different Presidents

In the modern era, President Franklin D. Roosevelt granted more clemencies than any other president. In his 12 years and one month in office, he granted 2,819 pardons, 488 commutations, 12 reprieves, and 477 remissions.²¹ President George H.W. Bush granted the fewest clemencies. During his four years in office, he granted 74 pardons and three sentence commutations.

President Barack Obama made 1,928 grants of clemency during his presidency.²² Of them, 1,716 were commutations of sentence, more commutations than any other president has granted.²³

Figure 1. Grants of Clemency by President Barack Obama 2009-2017



The 2014 Clemency Initiative

Announcement

On April 23, 2014, Deputy Attorney General James Cole held a press conference to announce a new Clemency Initiative. In the press release accompanying the event, DOJ stated that the Initiative was undertaken “at the behest of” President Obama and was intended to lower sentences for 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.²⁴

Mr. Cole stated at the press conference:

For our criminal justice system to be effective, it needs to not only be fair; but it also must be perceived as being fair. These older, stringent punishments that are out of line with sentences imposed under today’s laws erode people’s confidence in our criminal justice system. I

am confident that this initiative will go far to promote the most fundamental of American ideals—equal justice under law.²⁵

As discussed above, the announcement of the Initiative by the Deputy Attorney General was consistent with historical practice regarding the review of petitions for clemency, all of which are filed with the Department of Justice.

Criteria Entitling Offenders to Prioritized Consideration Under the Initiative

At the press conference on the Initiative, Mr. Cole announced six “criteria” that he said DOJ would consider when reviewing clemency petitions from federal inmates. In the press release issued after the event, DOJ stated that “Under the new initiative, the department will prioritize clemency applications from inmates who meet all of” the announced factors.²⁶ The six factors were:

- 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.²⁷

Effect of Announcing Factors

Announcing a set of criteria to be considered when reviewing petitions for clemency is not unprecedented. DOJ had previously promulgated what it calls “Rules Governing Petitions for Executive Clemency.”²⁸ However, these “rules” are mostly procedural in nature. In fact, in the rules themselves DOJ states that they are advisory and only for “the internal guidance of Department of Justice personnel.” The only provision that appears to limit an applicant’s eligibility to receive clemency²⁹ is the requirement that pardon petitions should not be filed until five years after the petitioner’s release from confinement for the offense for which the petitioner seeks the pardon.³⁰

In announcing the 2014 Clemency Initiative, DOJ provided six broad factors that it would consider in addition to those listed in the Code of Federal Regulations; however, the role that those factors were to play in the decision to grant clemency under the Initiative is unclear. For example, while the official DOJ announcement stated that offenders meeting these criteria would simply qualify for “prioritized consideration,” at other times DOJ referred to the factors as “eligibility criteria.”³¹ In Mr. Cole’s prepared remarks announcing the Clemency Initiative, which were posted on the DOJ website, he stated that “the initiative is open to candidates who meet six criteria.”³² He also noted that “[i]dentifying worthy candidates within our large prison system will be no easy feat” and that “a good number of inmates will not meet the six criteria.”³³ As recently as August 2017, the DOJ website provided a link to these same criteria with the words “Read more about who is qualified to apply for commutation under the new criteria.”³⁴

There are few limits on the President’s clemency power³⁵ and DOJ’s announcement of factors would not limit the President’s authority to exercise that power to only those

who met the stated criteria. The authors of this publication presume that, consistent with past practice, DOJ officials made individualized decisions regarding each petition for clemency. In so doing, DOJ may have recommended clemency for some offenders who did not meet all the announced factors, or may have interpreted the Initiative factors more broadly than the announced language might have suggested would have been the case.

Finally, the authors acknowledge that the President may have decided to grant clemency to offenders not meeting all the announced criteria but whom he determined were otherwise deserving. In an August 2016 press conference, President Obama stated that the focus of the Initiative was on offenders “who we think were overcharged and people who we do not believe have a propensity towards violence.”³⁶ He stated that “the main criteria” was whether “under today’s charges, their sentences would be substantially lower than the charges that they received”³⁷ Given this statement, he may have emphasized these two factors more than the other announced factors in determining whether to grant clemency.

Initiative Limited to Drug Trafficking Offenders

A review of the offenders granted clemency under the Initiative shows that at some point the Clemency Initiative was limited to drug trafficking offenders, as all the offenders who received commutations under the Initiative had committed a drug trafficking offense. This focus was not identified when the Initiative was announced and no formal public announcement was made later that the Initiative had been limited to drug trafficking offenders.

In August 2016, Deputy Attorney General Sally Yates, who had succeeded Mr. Cole, did announce that DOJ would “review and provide a recommendation to the White

House on every petition from a drug offender then in the Department's possession."³⁸ It appears that by that time, a decision had been made to limit the Initiative to drug trafficking offenders. Ms. Yates did not state whether DOJ would continue to act on petitions received from offenders who had committed other crimes, and DOJ ultimately did make recommendations to the President on over 4,400 petitions from offenders convicted of offenses other than drug trafficking.³⁹ Those petitions remained pending at the end of President Obama's term in office.

The DOJ website about the Initiative, written at the conclusion of President Obama's term, states that other offenses were ones "clearly not falling under the [I]nitiative" and that DOJ "took steps to ensure that petitions submitted under the Clemency Initiative would be identified, prioritized, and sent to the White House during President Obama's tenure."⁴⁰ As DOJ further explains on the website, to accomplish that goal, it "prioritized petitions from individuals convicted of drug trafficking offenses over the thousands of petitions involving other crimes for which sentencing law has not changed."⁴¹ The authors cannot determine whether DOJ continued to make recommendations to the President after August 2016 regarding petitions from offenders convicted of other offenses or whether DOJ officials chose to limit their review after August 2016 to petitions filed by drug offenders.

Response by the Bar

In a January 2014 speech to the New York State Bar Association, Mr. Cole called upon the members of that bar and attorneys across the nation to volunteer their time to assist inmates in seeking a sentence commutation under the Clemency Initiative, which had yet to be formally announced.⁴² Three months later when he announced the

Initiative, Mr. Cole referenced that speech, and noted that the bar had already responded by establishing “Clemency Project 2014,” whose members he said would be “working with inmates who appear to meet the six criteria and request the assistance of a lawyer.”⁴³

Ultimately, almost 4,000 volunteer lawyers worked as part of Clemency Project 2014.⁴⁴ They screened requests by more than 36,000 inmates for assistance from the group.⁴⁵ The project’s lawyers appear to have applied the Clemency Initiative criteria as announced⁴⁶ and determined that most of the inmates seeking assistance did not meet those criteria.⁴⁷ However, the project did submit approximately 2,600 clemency petitions to DOJ, presumably on behalf of those inmates who did meet all the Initiative criteria,⁴⁸ and the project states that its work supported 894 successful clemency petitions.⁴⁹

Recommendations by the Office of the Pardon Attorney

The Department of Justice reviewed and made recommendations to the White House on 6,195 petitions that had been filed by August 31, 2016.⁵⁰ Additionally, DOJ reviewed several hundred petitions filed after that date which were determined to be “particularly meritorious,” as well as all applications received from drug offenders who had been sentenced to life imprisonment, regardless of the filing date of the application.⁵¹ As of January 19, 2017, DOJ had reviewed and made a recommendation to the President on 16,776 petitions for clemency from drug offenders. However, as of January 19, 2017, petitions from 7,881 offenders remained pending. Of those pending petitions, 3,469 were submitted by drug offenders after August 31, 2016, and 4,412 were filed by offenders convicted of another type of crime.⁵²

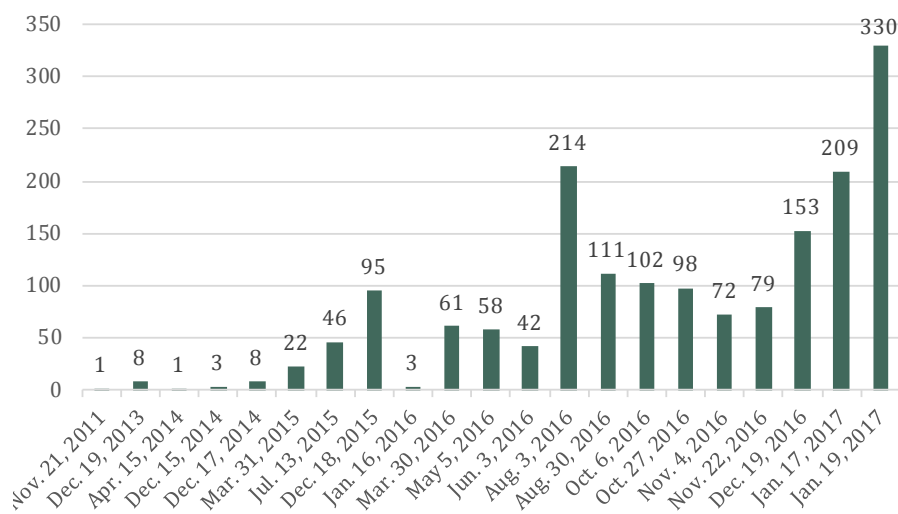
Data Analysis of the 2014 Clemency Initiative

Introduction

As discussed above, President Obama granted clemency to 1,928 offenders during his eight years in office (2009 to 2017). Of those, 1,716 involved a sentence commutation.⁵³ Ten of President Obama’s sentence commutations were granted before April 23, 2014, the date on which the Clemency Initiative was announced. Also, ten of the 1,706 commutations granted after that date do not appear to have been granted as part of the Initiative.⁵⁴ In total then, President Obama commuted the sentences of 1,696 offenders through the Clemency Initiative.

President Obama made 21 separate announcements granting sentence commutations. The first of these occurred on November 21, 2011, and the last was announced on January 19, 2017, one day before he left office.⁵⁵ The largest number of commutations granted on a single day occurred on January 19, 2017, when he commuted the sentences of 330 persons. Each set of commutations was announced through a press release, which specified a new, shorter sentence or provided a new release date for the offender.

Figure 2. Number of Commutations Granted by President Barack Obama 2009-2017

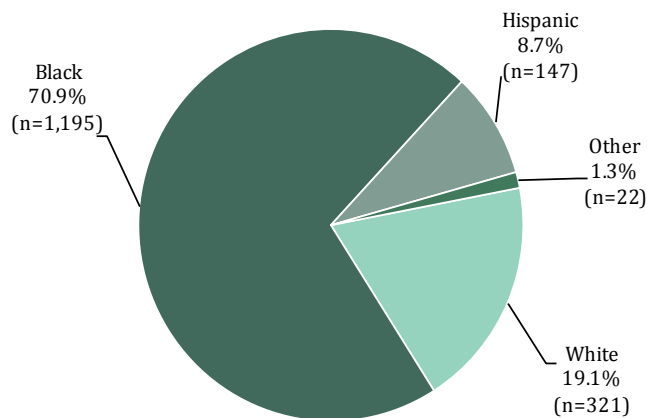


This section of the report will examine the 1,696 commutations and provide an analysis of the offenders who received a commuted sentence, the crimes for which they had been sentenced, and the extent to which these offenders met the announced criteria for the Initiative.⁵⁶ This section will conclude with an analysis of the number of offenders who were incarcerated on the date the Initiative was announced and who appeared to have met these criteria, and the number who eventually received clemency.

Demographics of Clemency Recipients

Of the 1,696 offenders whose sentences President Obama commuted through the Clemency Initiative, all but six were U.S. citizens. Men accounted for 94.0 percent of all clemency recipients. Most of the clemency recipients were Black (70.9%), followed by White (19.1%), Hispanic (8.7%), and Other race offenders (1.3%).

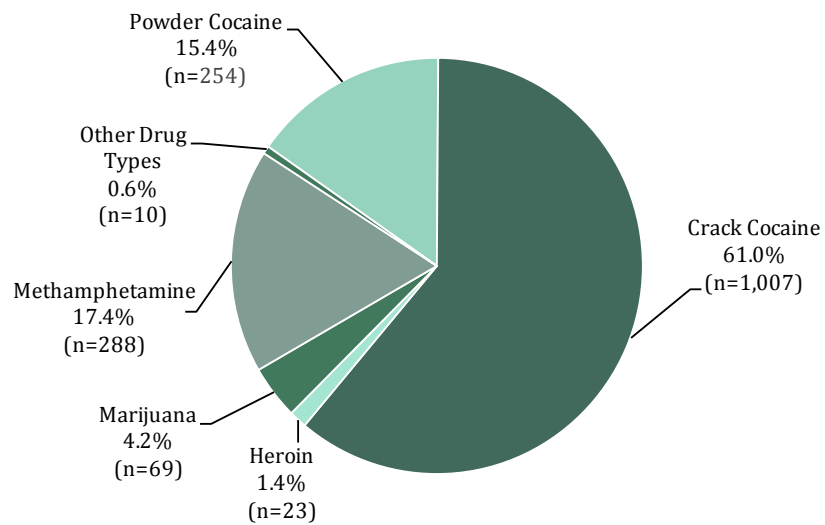
Figure 3. Race/Ethnicity of Offenders Receiving Clemency



Offense Characteristics

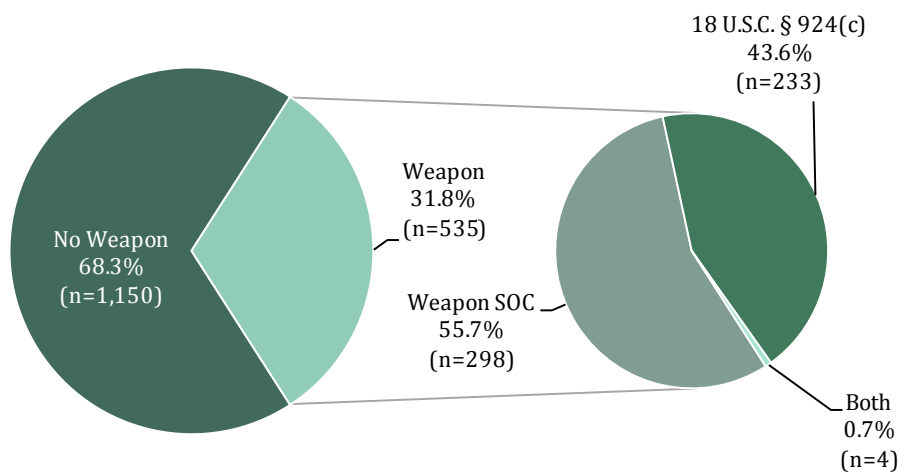
All the offenders who received a commutation under the Clemency Initiative had been sentenced for a drug trafficking offense.⁵⁷ Crack cocaine trafficking offenders accounted for 61.0 percent of all commutations, followed by methamphetamine (17.4%), powder cocaine (15.4%), and marijuana trafficking offenders (4.2%).

Figure 4. Drug Type for Offenders Receiving Clemency



Almost one-third (n=535, 31.8%) of the Clemency Initiative offenders had been found at sentencing to have had a weapon involved in their offense, typically a firearm.⁵⁸ Of those 535 offenders, 237 (14.1% of all clemency offenders) were also convicted of an offense involving the use or carrying of a firearm during and in relation to a crime of violence or a drug trafficking crime, or the possession of a firearm in furtherance of those crimes.⁵⁹

Figure 5. Weapon Involvement of Offenders Receiving Clemency

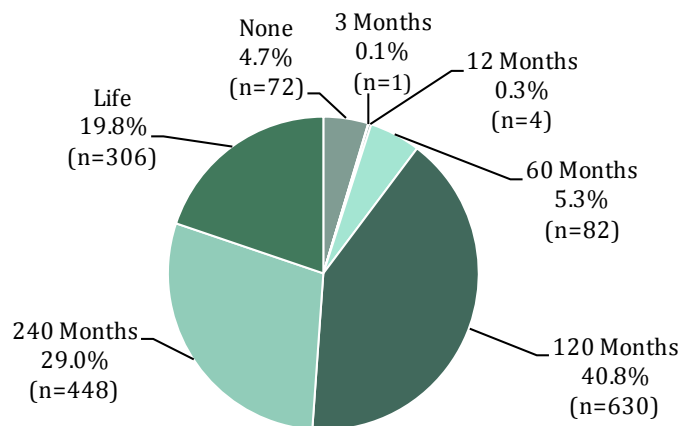


Most of the offenders receiving commutations did not have any leadership role in the offense for which they were sentenced. Only 18.0 percent (n=305) of those offenders were found to have been an organizer, leader, manager, or supervisor of a criminal activity.⁶⁰ However, most of the offenders also were found to not have been a minor or minimal participant in their offense.⁶¹ Only 26 offenders (1.5%) received an adjustment to their guideline level based on having played such a mitigating role in the offense.

Average Sentence Imposed

The average sentence originally imposed on the offenders who received a commutation was 340 months (over 28 years) of imprisonment. Almost all Clemency Initiative offenders (95.3%) had been convicted of an offense carrying a mandatory minimum penalty. Most (89.7%) were charged in such a way that the mandatory minimum penalty that applied in the case was ten years or longer. Indeed, most of the Clemency Initiative offenders (88.2%) received a sentence of 20 years or longer, or life imprisonment.

Figure 6. Clemency Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty



Most of the offenders convicted of an offense carrying a mandatory minimum penalty did not receive any form of relief from the mandatory penalty that applied in their case. Only seven offenders qualified for relief from the mandatory penalty pursuant to the statutory “safety valve” exception to such sentences, which requires courts to sentence the offender without regard to any otherwise applicable mandatory minimum punishment when certain conditions are met.⁶² And only 65 offenders received relief from

those penalties by providing substantial assistance to the government in investigating or prosecuting another person.⁶³

Sentence Impact of the Commutations

President Obama effectuated his commutations of sentence under the Clemency Initiative in one of two ways. For 1,228 offenders he set a new release date in his clemency order, which commuted the offender's sentence to that date. For 468 offenders he instead specified a new, shorter sentence to be served. Regardless of the method selected, most offenders were not immediately released by President Obama's commutation of their sentence. Less than one-third (n=493, or 29.1%) were released by January 20, 2017, the date President Obama left office.⁶⁴ Almost one-quarter of the offenders (23.0%) will not be released until after January 20, 2019.

President Obama imposed a condition on approximately one-third (32.6%) of the commutations that he granted under the Clemency Initiative. In each of those cases, the condition required the offender to enroll in residential drug treatment while in the Federal Bureau of Prisons system.⁶⁵ All the commutations imposing this condition were issued on or after August 3, 2016. At least one offender who received a sentence commutation refused to accept it by refusing to agree to the condition attached to it.⁶⁶

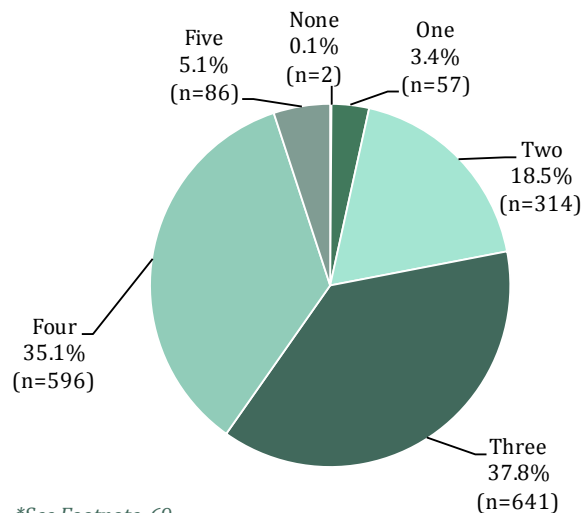
The sentence commutations granted through the Clemency Initiative made sizeable reductions in the sentences imposed on the recipients. The average reduction in sentence made by a Clemency Initiative commutation was 39.0 percent, representing a reduction in sentence of more than 11 years (140 months).

Offenders Receiving Clemency Who Met Each Initiative Factor

As discussed above, DOJ announced six factors that it planned to consider in reviewing the clemency applications from federal inmates. At the time, DOJ announced that it would “prioritize clemency applications” from inmates who met all the factors.⁶⁷ However, later it described these factors as eligibility criteria.⁶⁸

Of the 1,696 offenders who received a sentence commutation under the Clemency Initiative, 86 (5.1%) met all the announced factors.⁶⁹ All but two of the offenders met at least one of the factors and about three-quarters (78.0%) met three or more of the announced factors. This section of the report will examine each of the announced factors of the DOJ Clemency Initiative and assess the number of offenders receiving commutations who met each respective factor.

Figure 7. Number of Clemency Factors Met by Offenders Receiving Clemency*



The Department of Justice provided no additional information to the public regarding the Clemency Initiative factors after they were announced in April, 2014. In preparing this report, the authors have interpreted each of the announced factors in light of the plain meaning of the words used and also in light of another DOJ initiative announced at approximately the same time that used similar terms. The authors acknowledge that DOJ or the President may have interpreted the Initiative factors more broadly.

Factor 1: Lower sentence under current law

The first factor was that offenders be “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.” The language used in this factor did not state how a petitioner could demonstrate that his or her sentence would be lower today than at the time he or she was sentenced. The use of the phrase “by operation of law” suggests that the offender would have to identify some change in sentencing law that occurred after the date on which he was sentenced and that any court sentencing the offender today would likely impose a shorter sentence because of that change.

That interpretation of this factor is consistent with how DOJ explained its prioritized consideration of the thousands of petitions it received after the Clemency Initiative was announced. DOJ stated that it had “prioritized petitions from individuals convicted of drug trafficking offenses over the thousands of petitions involving other crimes *for which sentencing law has not changed* (emphasis added).”⁷⁰ Therefore, DOJ appears to have determined that the “sentencing law” for drug trafficking offenses had changed, but that “sentencing law” had not changed for other offenses.

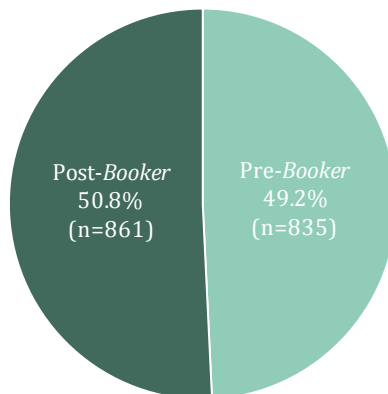
Examining this factor in light of that determination, there are three events that arguably rise to the level of a change in sentencing law such that they affected drug trafficking sentences “by operation of law.” Each is discussed below.

United States v. Booker

One of the most significant changes in federal sentencing law in the last several decades was brought about by the decision in *United States v. Booker*,⁷¹ in which the Supreme Court rendered the sentencing guidelines advisory. Prior to that decision, sentencing courts were required to impose a sentence within a range determined under the sentencing guidelines, unless the court identified extraordinary aggravating or mitigating circumstances. After the *Booker* decision, courts had greater discretion to impose a sentence outside the advisory sentencing range determined under the guidelines.⁷²

Of the 1,696 persons granted clemency under the Initiative, approximately half (49.2%) were sentenced before the date of the *Booker* decision.

Figure 8. Offenders Receiving Clemency Sentenced Before the Decision in U.S. v. Booker



For the 50.8 percent who were sentenced after *Booker*, that decision could not be the change in law that would lead a court today to impose a sentence substantially lower than the original sentence. Moreover, *Booker*'s holding was not limited to particular offenses, so it could not be said to be a change in sentencing law that distinguished drug trafficking offenses from "other crimes for which sentencing law has not changed."

Fair Sentencing Act of 2010

Another significant change in sentencing law occurred upon the passage of the Fair Sentencing Act of 2010 (FSA).⁷³ The FSA increased the quantity of crack cocaine that triggered the five- and ten-year mandatory minimum penalties in federal drug trafficking cases. Because of that change, cases involving the trafficking of five or more but less than 28 grams of crack do not trigger any mandatory minimum penalty, whereas a five-year penalty had applied before passage of the FSA. Similarly, in cases involving 28 or more but less than 280 grams of crack, a five-year minimum penalty applies after the FSA, whereas a ten-year penalty would have applied before the Act. Congress did not make the changes to the statutory mandatory minimum penalty thresholds retroactive.⁷⁴ As a result, there were offenders incarcerated as of 2014 who would have been subject to lower mandatory minimum penalties had the FSA been in effect when they were sentenced.

Although 97.9 percent of the clemency recipients under the Initiative were sentenced before passage of the FSA, that Act applied only to crack cocaine offenses. Only 61.0 percent of the Clemency Initiative offenders were convicted of trafficking crack cocaine. Therefore, the changes in law made by the FSA would have had no effect on the sentences of the remaining 39.0 percent of the offenders who received commutations under the Initiative. For those offenders, the

FSA could not be a change in law that would lead a court to impose a lower sentence.

Figure 9. Offenders Receiving Clemency Sentenced Before the Fair Sentencing Act of 2010 (FSA)

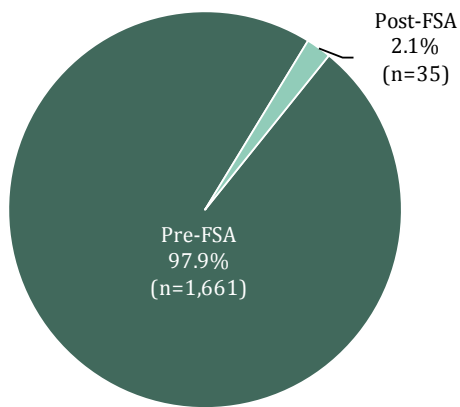
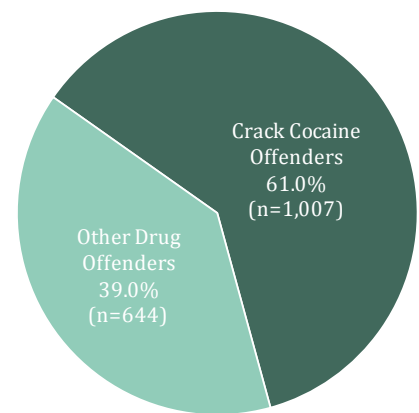


Figure 10. Drug Type for Offenders Receiving Clemency



The 2014 Drug Guidelines Amendment

A significant change in sentencing practice which affected federal drug trafficking offenders was Amendment 782 to the sentencing guidelines, promulgated by the Sentencing Commission in 2014. That amendment changed the way in which the base offense levels in the drug and chemical quantity tables in sections 2D1.1 and 2D1.11 of the *Guidelines Manual* incorporate the statutory mandatory minimum penalties for drug trafficking offenses. Specifically, the amendment reduced by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties. Most of the offense levels for quantities above and below the mandatory minimum threshold quantities also were adjusted downward by

two levels. The result of the amendment was to lower the sentencing ranges for most drug trafficking offenses. Amendment 782 became effective on November 1, 2014.⁷⁵

All the offenders receiving sentence commutations through the Initiative were sentenced before Amendment 782 was promulgated. However, the Commission had not promulgated Amendment 782 as of the date on which the Clemency Initiative was announced.⁷⁶ It would have been premature for DOJ to have concluded that Amendment 782 had changed the law regarding drug trafficking offenses. Also, given that the Supreme Court has made clear in *Booker* and later cases that the guidelines are advisory and that courts are not bound by them when imposing sentences, it is unlikely that Amendment 782 was the change in sentencing that “by operation of law” would cause drug trafficking offenders to receive a substantially lower sentence today than before Amendment 782 was promulgated.⁷⁷

If instead the words “by operation of law” and changes “in sentencing law” were construed to mean changes in sentencing *practices*, then Amendment 782 could well have been a change in sentencing practice that would lead to lower sentences today for most drug trafficking offenders sentenced before it went into effect. Also, if changes in sentencing practices were what was meant by this factor, then Attorney General Holder’s directive to prosecutors through the Smart on Crime Initiative⁷⁸ to charge drug cases in ways that triggered mandatory minimum penalties less often would also have led to lower sentences for drug trafficking offenders sentenced at the time President Obama was acting on petitions for clemency, as compared to those sentenced before that initiative was announced.⁷⁹ Under a “change in sentencing practice” interpretation of factor 1, therefore, most if not all of the offenders receiving clemency would have met this factor.

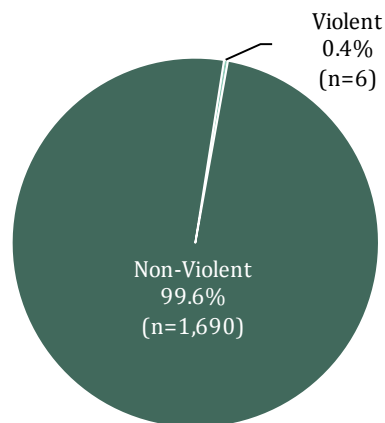
Factor 2: Non-violent, low-level offenders

The second factor stated that offenders seeking clemency had to be “non-violent, low-level offenders without significant ties to large scale criminal organizations, gangs or cartels” Most of the offenders receiving clemency under the Initiative appear to have satisfied this factor.

Exclusion of violent offenders

The Department of Justice did not define non-violent for the purpose of reviewing petitions filed under the Clemency Initiative. Notably, the terms “crime of violence” and “serious violent felony” appear in federal statutes.⁸⁰ Each term has a different meaning, but they each define crimes of violence to mean a felony offense that has as an element of the offense the use, threatened use, or attempted use of physical force against a person. Most drug trafficking offenses charged in federal court do not have the use or threat of force as an element of the offense.

Figure 11. Offenders Receiving Clemency Meeting Non-Violent Criterion



Even so, in some cases drug traffickers do use violence in connection with the offense. The sentencing guidelines account for this by providing for an enhanced sentence if violence is used in connection with a drug trafficking offense.⁸¹ Three of the offenders who received clemency under the Initiative were found to have used violence in connection with their drug trafficking offense.⁸² Three other offenders were convicted of a violent offense in addition to their drug trafficking crime.⁸³

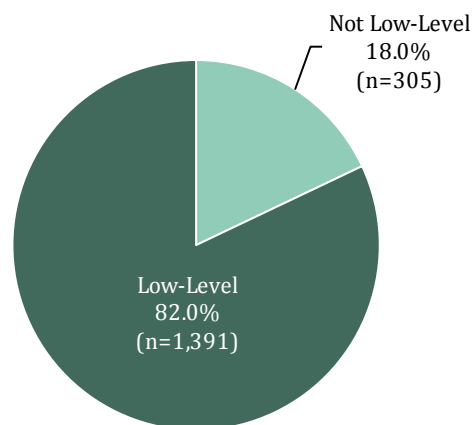
Exclusion of other than “low-level” offenders

The Department of Justice also provided no guidance on which offenders would be considered “low-level” at the time the Initiative was announced. However, on August 12, 2013, in a speech at the American Bar Association Annual Convention, Attorney General Eric Holder announced DOJ’s “Smart on Crime Initiative.” One of the stated goals of that initiative was “to ensure just punishment for low-level, non-violent convictions.”⁸⁴ In a memorandum to United States Attorneys about the Smart on Crime Initiative issued that same day, Mr. Holder gave directions regarding a change in the DOJ charging policy for “non-violent, low-level drug offenders.”⁸⁵ In that memorandum, Mr. Holder listed several criteria that were to guide prosecutors in determining whether to seek mandatory minimum penalties, stating that the criteria were “meant for low-level non-violent” offenders. Among those criteria was that the offender not be “an organizer, leader, manager or supervisor of others within a criminal organization”⁸⁶

Mr. Holder was the Attorney General when both the Smart on Crime Initiative, and the Clemency Initiative were announced and DOJ has described the Clemency Initiative as “an outgrowth” of the Smart on Crime Initiative.⁸⁷ Presumably then, the term “low-level” has the same meaning in both initiatives.

Using the definition of low-level drug offenders in the Smart on Crime Initiative, 82.0 percent of all Clemency Initiative recipients were low-level offenders. However, there were 305 offenders (18.0% of all offenders receiving a commutation) who were found by the sentencing court to have been an organizer, leader, manager, or supervisor of a criminal activity.⁸⁸

Figure 12. Offenders Receiving Clemency Meeting Low-Level Criterion

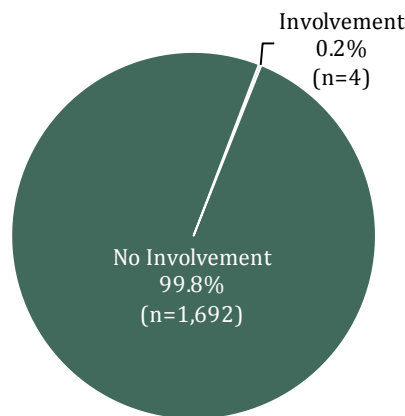


Exclusion for involvement with large-scale organizations, gangs, or cartels

The Commission does not regularly record whether an offender committed his or her crime while involved with an organization, gang, or cartel. In some cases, an offender's participation in these groups can serve as an element of the offense, such as in racketeering cases.⁸⁹ In other cases, gang participation can enhance the sentence under the guidelines.⁹⁰ However, these provisions would not likely apply in drug cases where the offender was involved with large-scale organizations other than gangs or was involved with cartels.

Two of the offenders granted a sentence commutation received an upward departure at sentencing through the gang involvement departure provision. Two other offenders were also convicted of a racketeering offense in addition to their drug trafficking crime. However, given the limitations of the data regarding this factor, this finding may underrepresent the actual number of offenders who were involved with large-scale organizations, gangs, or cartels.

Figure 13. Offenders Receiving Clemency Who Were Involved with Large-Scale Organizations, Gangs, or Cartels



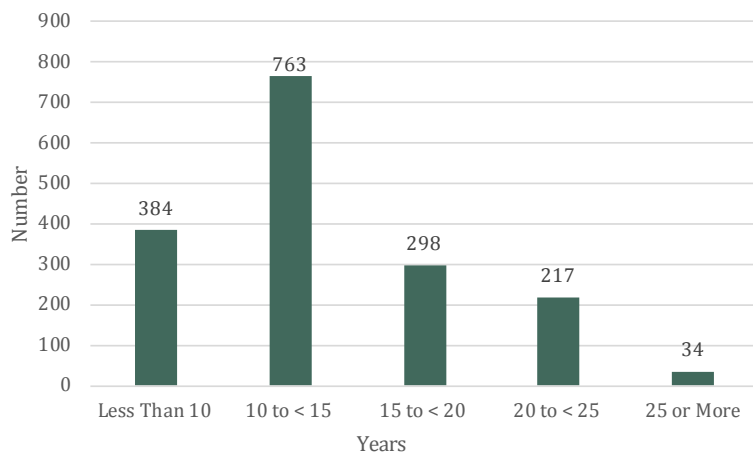
Factor 3: Ten-year imprisonment limitation

The third factor was that offenders seeking clemency must “have served at least 10 years of their prison sentence.” Although DOJ did not specify how the amount of time to be served was to be measured, one possible interpretation is that it would be measured as of the date on which the offender’s clemency was announced. Another interpretation is that the time served would be measured as of the date on which the offender was to be released.

Of the 1,696 persons granted clemency under the Initiative, 77.4 percent had served at least ten years in prison by the date their clemency was announced. Another

11.5 percent of these offenders had served at least nine years in prison. As discussed above, most clemency recipients were not released immediately by the President’s order; therefore, the number who will have served at least ten years of their sentence by the time they are released will increase. The Commission estimates that 93.5 percent of all Clemency Initiative offenders will have served at least ten years in prison by the time they are released under their commuted sentences.

Figure 14. Time Served by Offenders Receiving Clemency (as of date of announcement)

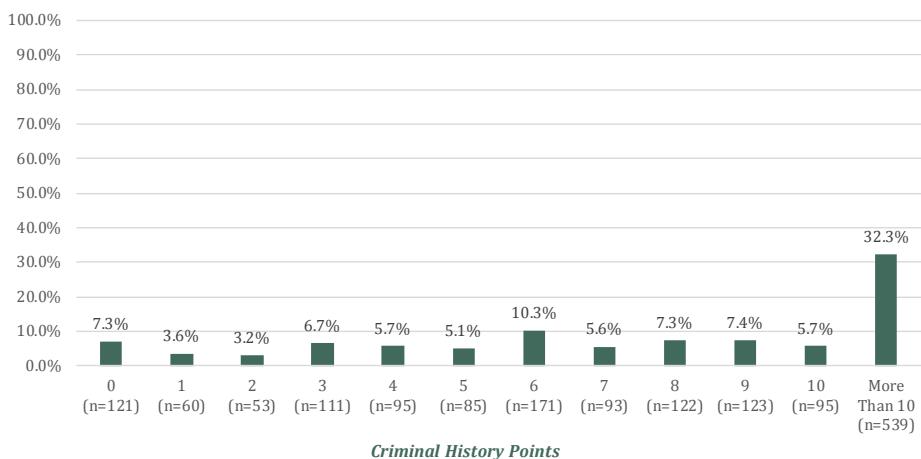


Factor 4: Exclusion for “significant criminal history”

The fourth factor required that offenders seeking clemency not have “a significant criminal history.” As with the other factors, no further definition of this factor was provided. However, in the Smart on Crime Initiative memorandum to prosecutors, Mr. Holder stated that low-level, non-violent offenders would not benefit from that policy if they had “a significant criminal history.”⁹¹ He went on to explain that, “[a] significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions.”⁹²

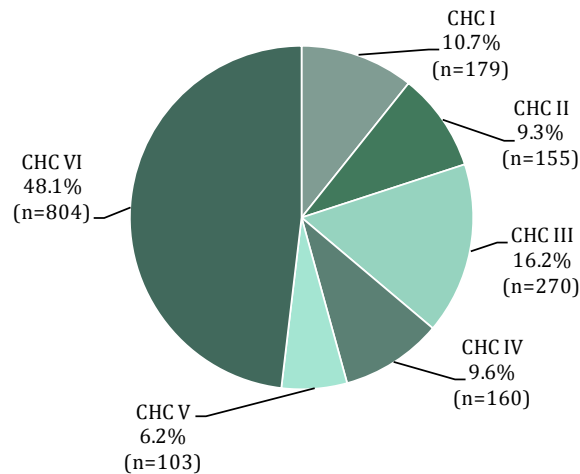
As discussed above, given that DOJ has described the Clemency Initiative as “an outgrowth” of the Smart on Crime Initiative, it is reasonable to read the term “significant criminal history” as having the same meaning in both initiatives. If so, then 86.0 percent of the Clemency Initiative recipients had a significant criminal history. That is, of the 1,696 offenders receiving a sentence commutation, 1,434 had a criminal history score of three or more criminal history points.

Figure 15. Criminal History Scores of Offenders Receiving Clemency



Under the sentencing guidelines, an offender’s prior criminal history is assessed points.⁹³ These points are then used to assign the offender to one of six “Criminal History Categories” (CHC). Offenders with three points are assigned to CHC II.⁹⁴ Of the offenders receiving a sentence commutation under the Initiative, 16.2 percent were assigned to CHC III, 9.6 percent were assigned to CHC IV, 6.2 percent were assigned to CHC V, and almost half (48.1%) were assigned to the highest Criminal History Category, CHC VI. In fact, of the 804 offenders in CHC VI, most (84.5%) had been found by the sentencing court to be “career offenders.”⁹⁵

Figure 16. Criminal History Category of Offenders Receiving Clemency



Factor 5: Good conduct in prison

The fifth factor required applicants to demonstrate good conduct in prison. Approximately 60 percent (59.7%) of the Clemency Initiative offenders had no serious misconduct while in prison.⁹⁶ However, about 40 percent (40.3%) of the Clemency Initiative offenders committed an act that the BOP classified as a “Greatest Severity Offense” or a “High Severity Offense.”⁹⁷ According to BOP policy, both such classes of misconduct ordinarily result in the loss of some good conduct credit.⁹⁸ Almost one-in-five (17.9%) of the Clemency Initiative offenders committed more than one of these acts of misconduct.

Figure 17. Offenders Receiving Clemency Who Committed Misconduct While in Prison

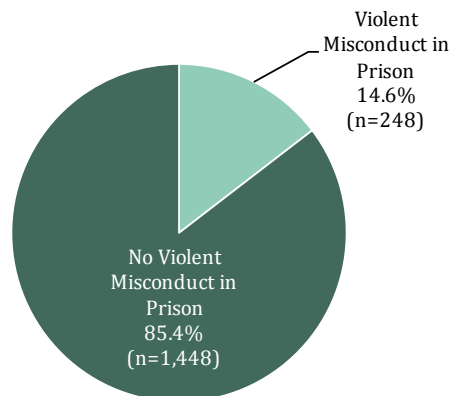


Factor 6: No violence prior to or during current term of imprisonment

The last of the announced factors was that offenders seeking clemency “have no history of violence prior to or during their current term of imprisonment.” The Commission does not regularly collect information about the nature of an offender’s past offenses (*i.e.*, the type of prior offenses); instead, it collects the number of criminal history points assessed for the conviction under the sentencing guidelines. Because of this, Commission data cannot determine with certainty whether the offenders who received commutations had any history of violence before they were incarcerated.

That said, generally speaking, some drug trafficking offenders do have violence in their criminal history. Based on a sample of offenders sentenced in fiscal year 2015 studied for another purpose, the Commission found that almost one-quarter (23.3%) of all drug trafficking offenders had been convicted previously of a violent offense. However, while it is likely that some of the offenders who petitioned for clemency had violence in their past, the authors cannot assess whether any of the offenders who received clemency had a violent criminal history.

Figure 18. Offenders Receiving Clemency Who Used Violence While in Prison



It is possible to determine whether any of the offenders receiving clemency committed a violent act while incarcerated. As discussed above, 40.3 percent of the Clemency Initiative offenders committed an act that the BOP classified as a “Greatest Severity Offense” or a “High Severity Offense” while they were incarcerated. Of these, 248 offenders (14.6% of all Clemency Initiative offenders) committed an act of misconduct that involved violence.⁹⁹

Number of Incarcerated Offenders Appearing to Meet All DOJ Factors at Time of Clemency Initiative

As discussed above, more than 24,000 offenders filed petitions seeking clemency after April 23, 2014, the date on which the Initiative was announced.¹⁰⁰ Eventually, eligibility for commutations under the Initiative was limited to only drug trafficking offenders. Ultimately, DOJ reviewed and made recommendations to the White House on 16,776 petitions received from drug traffickers,¹⁰¹ 1,696 of which were granted. As of January 19, 2017, however, petitions from 7,881 offenders remained pending.¹⁰² Of those petitions pending review, 3,469 petitions were submitted by drug trafficking offenders and the rest from offenders sentenced for other crimes.¹⁰³

On April 24, 2014, the day after the Clemency Initiative was announced, approximately 196,000 offenders were incarcerated in the BOP system serving sentences for federal crimes. Of them, slightly more than half (53.2%) were serving a sentence for drug trafficking. This section of the report analyses the number who met each of the Initiative criteria and the number who met all the criteria. As discussed above, in performing this analysis the authors have applied each of the criteria using the plain meaning of the words used and the meaning given to similar terms used in connection with DOJ’s Smart on Crime Initiative.

Of the approximately 104,000 drug trafficking offenders incarcerated on April 24, 2014, most (88.1%) were sentenced after the *Booker* decision. Just under half (45.6%) of those offenders were sentenced before the crack penalty changes made by the Fair Sentencing Act became effective, although only one-quarter (26.1%) of all drug trafficking offenders were crack offenders who would have been affected by that change in the law. However, all these drug trafficking offenders were sentenced before Amendment 782 to the sentencing guidelines became effective.

Of the approximately 104,000 drug trafficking offenders, most (98.1%) had not used violence in connection with their federal offense. Most (85.6%) also had not been found to have had an aggravating role in the offense, either as a manager, supervisor, organizer, or leader. Only 72 of the offenders received an upward departure in their sentence due to gang involvement in connection with their offense. About one-in-ten of these offenders (n=13,321, 12.8%) had served ten years or longer in prison by April 24, 2014, and one in five (n=26,311, 25.2%) had served ten years or longer by January 19, 2017.

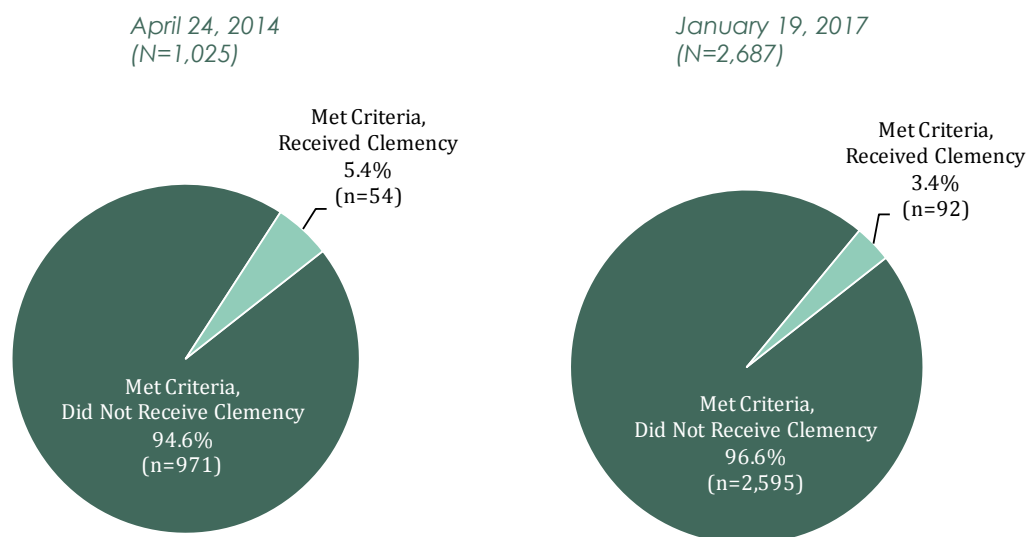
About one-third of the drug trafficking offenders (37.4%) had a criminal history score of less than three points. In contrast, almost one-in-four (23.0%) were assigned to the highest Criminal History Category and 16.1 percent were deemed to be career offenders. Seventy percent (70.5%) had no serious misconduct while in prison, and 87.3 percent had no violent misconduct while in prison.

Examining all the announced Clemency Initiative factors together, the Commission estimates that 1,025 of the approximately 104,000 drug trafficking offenders incarcerated on April 24, 2014 met all the Clemency Initiative criteria.¹⁰⁴ That is, these offenders had served “at least 10 years” in prison, did not have an aggravating role in

the offense, had no gang involvement, had a criminal history score of less than three, did not commit misconduct while in prison, and did not commit violence while incarcerated. Of these 1,025 offenders, only 54 received a sentence commutation through the Clemency Initiative. Therefore, 971 offenders who were incarcerated when the Clemency Initiative was announced appear to have met all the factors for clemency under the Initiative but did not obtain relief.

If instead the number of eligible incarcerated offenders was determined as of the last day on which President Obama granted commutations under the Initiative, January 19, 2017, then 2,687 of the approximately 104,000 drug trafficking offenders who were incarcerated when the Initiative was announced appear to have met all the Clemency Initiative criteria.¹⁰⁵ Of those offenders, 92 received clemency under the Initiative. Therefore, there were 2,595 offenders incarcerated when the Clemency Initiative was announced who appear to have met all the factors for clemency under the Initiative at the end of President Obama’s term in office but who did not obtain relief.

Figure 19. Incarcerated Offenders Appearing to Meet All DOJ Factors



The authors are unable to determine whether these offenders submitted petitions for clemency, which would have been required in order to be considered under the Initiative. It is also possible that petitions from many or all these offenders are among the approximately 3,500 petitions from drug trafficking offenders that remained pending at the end of President Obama's term in office.¹⁰⁶ Further, because the Commission's data do not contain information about violence in an offender's criminal history, the authors cannot assess the full extent to which any of these offenders satisfied that aspect of factor six. Due to these limitations, readers should interpret these findings with caution.

Conclusion

President Barack Obama granted clemency to 1,928 persons during his eight years in office. Most of these grants took the form of sentence commutations. Of the 1,716 sentence commutations he granted, 1,696 were made through the 2014 Clemency Initiative.

The stated intent of the Clemency Initiative was to lower sentences for non-violent offenders who "likely would have received substantially lower sentences if convicted of the same offense" under the law then in effect. At some point after it was announced, the scope of the Initiative was limited to drug trafficking offenders. The offenders who received commutations through the Initiative saw their sentences reduced by an average of 39.0 percent, or approximately 140 months.

Although DOJ announced factors that it stated would be considered when recommending petitions for clemency to the President, only 86 of the 1,696 offenders who received a commuted sentence under the Clemency Initiative appear to

have met all the announced factors. Many other offenders also appear to have met the announced factors yet were not offered clemency. By the end of President Obama's term in office there were almost 2,600 offenders who had been incarcerated when the Clemency Initiative was announced and who appeared to meet all the announced factors for consideration under the Initiative but who did not receive any form of clemency.

Because DOJ did not provide any public information as to what each factor meant, it is impossible to assess the extent to which the factors, as announced, contributed to the President's ultimate decision as to whom to grant clemency. As has been discussed, it is possible that all the offenders receiving sentence commutations under the Initiative met these factors, albeit with the factors interpreted more broadly than as discussed in this report. It may also have been that President Obama chose to emphasize some of the factors over others. The analyses in this report are presented to provide information about who received sentence commutations under the Initiative, the effect of those commutations on the sentences for those offenders, and the extent to which it appears that the announced factors were followed. The analysis of other offenders who may have met the announced criteria but did not receive clemency as of the end of President Obama's term in office is presented in order to provide some data regarding the overall reach of the 2014 Clemency Initiative.

Endnotes

- 1 U.S. CONST. art. II, § 2, cl. 1.
- 2 Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 811 (2015); Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 570 nn.37-42 (2001); Daniel, T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575 (1990-1991).
- 3 *See Ex Parte United States*, 242 U.S. 27, 43–44 (1916).
- 4 W.H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 26 (1941).
- 5 Reprieves are rarely given. According to the statistics published by the Office of the Pardon Attorney at the Department of Justice, the last president to grant a reprieve was Franklin D. Roosevelt in 1937. Office of the Pardon Attorney, U.S. Dep’t of Justice, *Clemency Statistics*, <https://www.justice.gov/pardon/clemency-statistics> [hereinafter DOJ Clemency Statistics].
- 6 *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866). At the Constitutional Convention one delegate proposed to limit the president’s power to grant a pardon until after conviction for the crime, however, the motion was withdrawn after some discussion. Humbert, *supra* note 4, at 16.
- 7 Barkow, *supra* note 2, at 811; Kobil, *supra* note 2, at 602. *See also* U.S. Dep’t of Justice, *Rules Governing Petitions for Executive Clemency* §1.2 (2017) (providing that pardon petitions should not be filed until “at least five years after the date of release of the petitioner from confinement” and further providing that petitions should not be filed while the offender is on probation, parole, or supervised release), <https://www.justice.gov/pardon/rules-governing-petitions-executive-clemency>.
- 8 Hoffstadt, *supra* note 2, at 570 n.42. *See also* *Knote v. United States*, 95 U.S. 149, 153 (1877) (noting that the Constitution does not use the word “amnesty” and that “the distinction between [pardon and amnesty] is one rather of philological interest than of legal importance.”). *But see* *Burdick v. United States*, 236 U.S. 79, 94–95 (1915) (“They are of different character and have different purposes. The one overlooks offense; the other remits punishment.”).

9 The use of the amnesty form of presidential clemency extends back to the very first president, who pardoned participants in the Whisky Rebellion in 1795. See JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* 55–56 (2009). There, citizens in Western Pennsylvania had organized protests of an excise tax on whiskey. The government sent 13,000 militia to end the protests and some of the leaders of the protest were tried for treason. Washington pardoned the two leaders who had been convicted of treason and granted amnesty to the rest of the participants. *Id.* See also Kobil, *supra* note 2, at 592 (citing Presidential Proclamation (July 10, 1795), reprinted in 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897* 173 (James D. Richardson ed. 1917). P.S. RUCKMAN, JR., *EXECUTIVE CLEMENCY IN THE UNITED STATES: ORIGINS, DEVELOPMENT AND ANALYSIS* 6 (1900–1993). Perhaps the most well-known examples of the presidential use of amnesty were the proclamations by Presidents Lincoln and Andrew Johnson to grant amnesty to persons who fought against the Union and by Presidents Ford and Carter to grant amnesty to Vietnam draft offenders and servicemembers who were absent without leave during the war. Kobil, *supra* note 2, at 593; Ruckman, *supra*, at 8. For a detailed discussion of the Civil War amnesties, see William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 *WILLIAM & MARY L. REV.* 475, 509–521 (1977). For a discussion of the Vietnam War amnesties see generally PRESIDENTIAL CLEMENCY BOARD, *REPORT TO THE PRESIDENT* (1975); Proclamation 4483, 3 *C.F.R.* § 4 (1978).

10 Kobil, *supra* note 2, at 577.

11 The Supreme Court has held that commutations are a form of clemency. *Ex Parte Wells*, 59 U.S. (18 How.) 307, 316, 15 L.Ed. 421 (1856); *Biddle v. Perovich*, 274 U.S. 480 (1927).

12 See Humbert, *supra* note 4, at 27 (noting that a commutation does not restore the privilege to vote or the competency to testify).

13 See Humbert, *supra* note 4, at 27.

14 *Scheck v. Reed*, 419 U.S. 256, 266 (1974) (“The plain purpose of the broad power conferred by [article II, §] 2, cl. 1, was to allow plenary authority in the President to ‘forgive’ the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable.”).

15 See Letter from Deborah Leff, Pardon Attorney, U.S. Dep’t of Justice, to Sally Quillian Yates, Deputy Attorney General, U.S. Dep’t of Justice (January 15, 2016) (on file with the author). See also Gregory Korte, *Former administration pardon attorney suggests broken system in resignation letter*, USA TODAY (March 28, 2016), <https://www.usatoday.com/story/news/politics/2016/03/28/former-administration-pardon-attorney-suggests-broken-system-resignation-letter-obama/82168254/>.

16 The Supreme Court has held simply that any condition or conditions imposed cannot “in themselves offend the Constitution.” *Schick v. Reed*, 419 U.S. 256, 264 (1974) (upholding commutation of death sentence to life imprisonment without the possibility of parole).

17 Kobil, *supra* note 2, at 593, Harold J. Krent, *Conditioning the President’s Conditional Pardon Power*, 89 CAL. L. REV. 1665, 1676 (2001).

18 *Id.*; PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT 15, 17–20 (1975).

19 *Biddle v. Perovich*, 274 U.S. 480, 487 (1927). In contrast, pardons usually must be accepted to be effective. Duker, *supra* note 9, at 521; Humbert, *supra* note 4, at 64–68.

20 Indeed, one offender who received a commutation of sentence under the Clemency Initiative refused to perform the condition attached to it, thereby refusing the commutation itself. Gregory Kote, *Obama grants clemency to inmate – but inmate refuses*, USA TODAY (October 14, 2016), <https://www.usatoday.com/story/news/politics/2016/10/14/obama-grants-clemency-inmate-refuses-arnold-ray-jones/92005682/>.

21 DOJ Clemency Statistics, *supra* note 5.

22 DOJ Clemency Statistics, *supra* note 5.

23 Woodrow Wilson granted the second highest number of commutations (1,366) during his eight years in office. DOJ Clemency Statistics, *supra* note 5.

24 Press Release, U.S. Dep’t of Justice, Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants (April 23, 2014) (on file with author, also available at <https://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new>) [hereinafter DOJ Clemency Initiative Press Release].

25 Office of the Pardon Attorney, U.S. Dep’t of Justice, Clemency Initiative Webpage, <https://www.justice.gov/pardon/clemency-initiative> [hereinafter DOJ Clemency Initiative Webpage].

26 DOJ Clemency Initiative Press Release, *supra* note 24. DOJ used the terms “criteria” and “factors” interchangeably when discussing the Initiative.

27 DOJ Clemency Initiative Press Release, *supra* note 24.

28 See U.S. Dep’t of Justice, Office of the Pardon Attorney webpage, <https://www.justice.gov/pardon>; 28 C.F.R. §§ 0.35, 0.36).

29 *Id.* However, the Office of the Pardon Attorney has a list of “standards” it considers in determining whether to recommend that a petition be granted. Included among them are post-conviction conduct, character and reputation; seriousness and relative recentness of the offense; acceptance of responsibility, remorse, and atonement; and official recommendations and reports (i.e., the prosecutor and judge in the case). U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 1-2.112 (2017) (Standards for Considering Pardon Petitions). In those standards DOJ notes that “Generally, commutation of sentence is an extraordinary remedy that is rarely granted.” *Id.* at § 1-2.113 (Standards for Considering Commutation Petitions).

30 At least one court held that DOJ regulations addressing the form or requirements for petitions for clemency are not binding, and do not limit the President’s “plenary power under the Constitution to grant pardons and reprieves” to any individual he deems fit, irrespective of whether an application has been filed. *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1243 (D.C. 1974).

31 DOJ Clemency Initiative Webpage, *supra* note 25.

32 See Remarks as Prepared for Delivery by Deputy Attorney General James M. Cole at the Press Conference Announcing the Clemency Initiative, Washington, DC, Wednesday, April 23, 2014 [hereinafter Cole April 2014 Prepared Remarks], <https://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-m-cole-press-conference>.

33 *Id.*

34 DOJ Clemency Initiative Webpage, *supra* note 25.

35 It is generally accepted that there are three broad limitations on the President's exercise of the clemency power. First, as the text of the pardon power itself makes clear, the President has no power over "Cases of Impeachment." *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866). Second, the President's power extends only to federal offenses. *Ex Parte Grossman*, 267 U.S. 87, 113 (1925). Third, the crime must precede the pardon; that is, the President may not pardon an act before it has occurred. Duker, *supra* note 9, at 525–26.

36 The President's News Conference at the Pentagon in Arlington, Virginia, 509 DAILY COMP. PRESS. DOC. 11 (Aug. 4, 2016), <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CP-D&browsePath=2016%2F08&isCollapsed=false&leafLevelBrowse=false&isDocumentResults=true&ycord=265> [hereinafter President's News Conference].

37 *Id.*

38 DOJ Clemency Initiative Webpage, *supra* note 25.

39 DOJ Clemency Initiative Webpage, *supra* note 25.

40 DOJ Clemency Initiative Webpage, *supra* note 25.

41 DOJ Clemency Initiative Webpage, *supra* note 25.

42 *See* Remarks as Prepared for Delivery by Deputy Attorney General James Cole at the New York State Bar Association Annual Meeting, New York, NY, Thursday (January 30, 2014), <https://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-cole-new-york-state-bar>.

43 Cole April 2014 Prepared Remarks, *supra* note 32.

44 *See* Clemency Project 2014 webpage, <https://www.nacdl.org/cp2014/> [hereinafter Clemency Project 2014 Initiative Webpage].

45 *Id.*

46 *See* Lawyers Committee for Civil Rights, Clemency 2014 webpage, <https://lawyerscommittee.org/special-initiatives/criminal-justice-initiative/clemency-project-2014/> ("Applicants must meet ALL

factors to be eligible under the Administration’s clemency initiative.”).

47 Clemency Project 2014 Webpage, *supra* note 44 (“The Project’s painstaking review of [requests for volunteer assistance from 36,000 federal offenders] revealed that the overwhelming majority of those requests were by applicants who did not meet the criteria put forward by the Department of Justice in April 2014.”).

48 Given that the Clemency Project 2014 noted that the “overwhelming majority” of the offenders seeking its assistance did not meet the announced criteria, the authors presume that the project’s lawyers only filed petitions on behalf of offenders who did meet the criteria. Also, when DOJ described the Clemency Project 2014 on its Clemency Initiative webpage, DOJ observed, “Inmates who appeared to meet the six criteria were offered the assistance of an experienced pro bono attorney through CP2014 in preparing his or her application for clemency.” DOJ Clemency Initiative Webpage, *supra* note 25.

49 Clemency Project 2014 Webpage, *supra* note 44.

50 DOJ later stated that the Office of the Pardon Attorney “applied a ‘grace period’ and considered all petitions received by mail by September 15, 2016, to assure that all petitions mailed in August were considered.” DOJ Clemency Initiative Webpage, *supra* note 25.

51 DOJ Clemency Initiative Webpage, *supra* note 25.

52 DOJ Clemency Initiative Webpage, *supra* note 25.

53 DOJ lists this number as 1,715. DOJ Clemency Initiative Webpage, *supra* note 25. However, DOJ does not appear to count one offender who was granted clemency but later refused to perform the condition attached to it. *See infra* note 66 and accompanying text. The Commission has included this offender in its analysis.

54 Three offenders received a sentence commutation in order to make them available as part of a prisoner transfer with Iran. Gregory Korte, *Obama grants clemency to 7 Iranians in prisoner swap*, USA TODAY (January 17, 2017), <http://www.usatoday.com/story/news/politics/2016/01/17/obama-grants-clemency-7-iranians-prisoner-swap/78923966/>. Three espionage offenders were granted commutations as part of a prisoner exchange with Cuba. Mimi Whitefield, *After a half century, a thaw in U.S.-Cuba ties*, MIAMI HERALD (December 17, 2014),

<http://www.miamiherald.com/news/nation-world/world/americas/cuba/article4591603.html>. A former member of the FALN terrorist group also received a sentence commutation. Charles Lane, *Commentary: The Obama pardon you should be mad about: Oscar Lopez Rivera*, CHI. TRIB. (January 19, 2017), <http://www.chicagotribune.com/news/opinion/commentary/>. Two offenders who had been convicted in a military court, one for murder and robbery and one for disclosing classified information, also received sentence commutations. Ellen Nakashima and Sari Horwitz, *Obama commutes sentence of Chelsea Manning, soldier convicted for leaking classified information*, WASH. POST (January 17, 2017), https://www.washingtonpost.com/world/national-security/obama-largely-commutes-sentence-of-chelsea-manning-us-soldier-convicted-for-leaking-classified-information/2017/01/17/f3205a1a-dcf8-11e6-ad42-f3375f271c9c_story.html?utm_term=.ca9e0852f203; One of the military offenders had been sentenced to death. His sentence was commuted to life imprisonment. Another offender convicted of murder in connection with drug trafficking also received a commutation to life imprisonment. Debra Cassens Weiss, *Obama's overlooked last-minute commutation lifts death sentence for disabled inmate*, ABA JOURNAL (January 18, 2017), http://www.abajournal.com/news/article/federal_death_row_inmate_is_among_those_winning_sentence_commutatoin/.

55 Eighteen of the 21 announcements came after the Clemency Initiative was announced in April, 2014.

56 The Commission matched its records with all these offenders. However, some cases were missing the information necessary for some of the analyses discussed in this report. Cases missing the information necessary for any specific analysis were excluded from that analysis only.

57 Some of the Clemency Initiative offenders were also convicted of a firearm, money laundering, racketeering, or robbery offense. Under the Commission's policy for classifying offenders based on the primary offense involved in the case, which is based on the highest applicable statutory maximum penalty that may be imposed and certain other factors, some Clemency Initiative offenders are deemed to be one of these other three types of offenders in the Commission's data.

58 In the cases involving 302 of these offenders, the court applied one of the specific offense characteristics (SOC) of the sentencing guidelines that serve to increase the guidelines sentencing range for the possession or use of a weapon in connection with the offense. *See, e.g.*, U.S. SENTENCING COMM'N, *Guidelines Manual*, §2D1.1(b)(1) (Nov. 2016)

[hereinafter USSG]. This enhancement applies if the weapon is present during a drug trafficking crime, unless it is clearly improbable that the weapon was connected to the offense. The government is not required to prove that the offender personally possessed the weapon.

59 *See* 18 U.S.C. § 924(c). Offenses under section 924(c) involve the use or carrying of a firearm during and in relation to a crime of violence or drug trafficking crime, or the possession of a firearm in furtherance of those crimes. The statute provides for a mandatory minimum penalty of 5, 7 or 10 years for a first offense, depending on the nature of the conduct involving the weapon. Second and subsequent convictions carry a 25-year minimum penalty. All penalties imposed under section 924(c) must be served consecutively to any punishment imposed for the underlying crime.

60 *See* USSG §3B1.1 (Aggravating Role) for further discussion of how the sentencing guidelines address an offender's aggravating role in the offense.

61 *See* USSG §3B1.1 (Mitigating Role) for further discussion of how the sentencing guidelines address an offender's mitigating role in the offense.

62 18 U.S.C. § 3553(f). This provision requires courts to impose a sentence on a non-violent offender with no or limited criminal background without regard to a statutory mandatory minimum punishment when certain other conditions are met.

63 Of these 65 offenders, 53 received relief from the mandatory minimum penalty at the time of original sentence by providing substantial assistance to the government prior to the date on which they were sentenced. *See* 18 U.S.C. § 3553(e). Thirteen offenders provided substantial assistance to the government after they were sentenced, and so were entitled to be resentenced below the minimum sentence established by statute. *See* Fed. R. Crim. P. 35(b). Of the 65 offenders, one received relief by providing both types of substantial assistance to the government.

64 Based on BOP data provided to the Commission identifying those offenders incarcerated on February 25, 2017. As of June 1, 2017, 811 of the Clemency Initiative offenders had been released. Three of those had been rearrested for a new crime. Statement of Jose Santana, Chief, Designation & Sentence Computation Center, Federal Bureau of

Prisons during a presentation at the USSC National Training Seminar, Baltimore Maryland, June 1, 2017.

65 For more information about the BOP's Residential Drug Abuse Treatment Program see https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp.

66 Gregory Korte, *Obama grants clemency to inmate -- but inmate refuses*, USA TODAY (October 14, 2016), <http://www.usatoday.com/story/news/politics/2016/10/14/obama-grants-clemency-inmate-refuses-arnold-ray-jones/92005682/>.

67 DOJ Clemency Initiative Press Release, *supra* note 25.

68 *See supra* notes 31–34 and accompanying text.

69 Consideration of the “operation of law” factor was omitted from this analysis due to the uncertainty as to the meaning of that factor, as discussed *infra* at notes 70–79 and accompanying text.

70 DOJ Clemency Initiative Webpage, *supra* note 25.

71 *United States v. Booker*, 543 U.S. 220 (2005).

72 However, both before and after the *Booker* decision, courts were required to comply with the sentencing requirements of 18 U.S.C. § 3553(a)(1) other than those involving the guidelines. *See also* *Gall v. United States*, 552 U.S. 38, 49 (2007) (courts are still required to begin all sentencing proceedings by correctly calculating the guideline sentencing range).

73 Fair Sentencing Act of 2010 (Pub. L. 111–220).

74 In response to the passage of the FSA, the Commission promulgated an amendment to the sentencing guidelines to incorporate the new mandatory minimum penalty thresholds into the guidelines. USSG App. C, amend. 750 (effective Nov. 1, 2010). The Commission made that change retroactive. USSG App. C, amend. 759 (effective Nov. 1, 2010). As of December 2014, 7,748 offenders had received a reduction in sentence as a result of that decision. *See* U.S. SENTENCING COMM'N, FINAL CRACK RETROACTIVITY DATA REPORT FAIR SENTENCING ACT 4 (2014).

75 *See* USSG App. C, amend. 782 (effective Nov. 1, 2014).

76 The Commission voted to promulgate Amendment 782 on April 10, 2014. See U.S. SENTENCING COMM'N, PUBLIC MEETING MINUTES APRIL 10, 2014 (2014), <http://www.ussc.gov/policymaking/meetings-hearings/public-meeting-april-10-2014>. The Commission formally transmitted this amendment to Congress on April 30, 2014. U.S. Sentencing Comm'n, Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2014; and request for comment, 79 Fed. Reg. 25996 (proposed May 6, 2014). Congress then had 180 days to vote to disapprove the amendment before it went into effect. 28 U.S.C. § 994(p).

77 The Commission voted to give retroactive effect to Amendment 782. As of June 30, 2017, over 30,000 offenders had been resentenced to a lower sentence under the amendment. The average reduction in sentence was 17.2%. U.S. SENTENCING COMMISSION, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT, Table 7 (July 2017). Of the 1,696 offenders who received a commutation under the Clemency Initiative, 85 had previously obtained a lowered sentence through the retroactive application of Amendment 782 by the sentencing court.

78 See *infra* footnote 85 and accompanying text.

79 The Smart on Crime Initiative was in effect through the end of President Obama's term, and therefore during the time in which all Clemency Initiative petitions were granted. See *infra* footnote 85 and accompanying text. The Smart on Crime Initiative was largely repealed by a directive by Attorney General Jeff Sessions to federal prosecutors in May 2017. See Memorandum to All Federal Prosecutors from Attorney General Jeff Sessions, Department Charging and Sentencing Policy (May 10, 2017).

80 See 18 U.S.C. § 16 (crime of violence); 18 U.S.C. § 924(c)(3) (crime of violence); 18 U.S.C. § 3559(c)(2)(F) (serious violent felony).

81 See USSG §2D1.1(b)(2), providing for a two-level increase in offense level if "the defendant used violence, made a credible threat to use violence, or directed the use of violence." However, this provision was not added until 2010. USSG App. C, amend. 750 (effective Nov. 1, 2010).

82 For this part of the analysis, an offender's possession of a weapon in connection with the offense was not considered to be violence. Had it been, another 533 offenders would not have met this factor.

83 Possession of a weapon in connection with a drug trafficking offense does not appear to have been considered a violent act. *See* President's News Conference, *supra* note 36.

84 U.S. DEP'T OF JUSTICE, SMART ON CRIME REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1 (2013).

85 Memorandum to United States Attorneys and Assistant Attorney General for the Criminal Division from Attorney General Eric Holder, *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (August 12, 2013) [hereinafter AG Smart on Crime Memo].

86 *Id.*

87 DOJ Clemency Initiative Press Release, *supra* note 25.

88 Offenders who a court finds have performed this role in the offense receive an upward adjustment in the offense level assigned to that offense under the sentencing guidelines. *See* USSG §3B1.1 (Aggravating Role).

89 *See* 18 U.S.C. § 1962 (illegal activity in connection with racketeer influenced and corrupt organizations).

90 *See, e.g.*, USSG §5K2.18 (providing for an upward departure in cases where the offender was subject to an enhanced sentence under 18 U.S.C. § 521 for participating in a criminal street gang).

91 *Id.*

92 AG Smart on Crime Memo, *supra* note 85.

93 *See generally* USSG, Ch. 4.

94 CHC II contains offenders with two or three criminal history points.

95 *See* USSG §4B1.1 for a discussion of career offender status.

96 Based on BOP data provided to the Commission at its request.

97 *See* Fed. Bureau of Prisons, U.S. Dep't of Justice, Program

Statement 5270.090 “Inmate Discipline Program” (July, 2011).

98 See 18 U.S.C. § 3624(b) (providing for credit towards the service of a sentence of imprisonment of more than one year if the inmate demonstrates “exemplary compliance with institutional disciplinary regulations”).

99 The most common violent acts that the Clemency Initiative offenders committed while incarcerated were fighting with another person (162 offenders) or assaulting another person without imposing serious bodily harm (55 offenders).

100 DOJ Clemency Initiative Webpage, *supra* note 25. Although DOJ does not report the total number of petitions, it does report that DOJ acted on 16,776 petitions from drug offenders, while 7,881 commutation petitions remained pending as of January 19, 2017.

101 DOJ Clemency Initiative Webpage, *supra* note 25.

102 DOJ Clemency Initiative Webpage, *supra* note 25.

103 DOJ Clemency Initiative Webpage, *supra* note 25.

104 Consideration of the “operation of law” factor was omitted from this analysis due to the uncertainty as to the meaning of that factor, as discussed *supra* at notes 70–79 and accompanying text.

105 Consideration of the “operation of law” factor was omitted from this analysis due to the uncertainty as to the meaning of that factor, as discussed *supra* at notes 70–79 and accompanying text.

106 As of August 2017, President Trump had made one grant of clemency. DOJ Clemency Statistics, *supra* note 5.

Appendix

The Commission collects data regarding every federal felony and Class A misdemeanor case sentenced during each fiscal year. Pursuant to 28 U.S.C. § 994(w)(1), the chief judge of each district is required to ensure that within 30 days of entry of judgment in a criminal case, the sentencing court submits a report of sentence to the Commission that includes: (1) the judgment and commitment order; (2) the written statement of reasons; (3) any plea agreement; (4) the indictment or other charging document; (5) the presentence report; and (6) any other information the Commission requests.

Data from these documents are extracted and coded for input into various databases. For each case in its Offender Dataset, the Commission routinely collects case identifiers, sentencing data, demographic variables, statutory information, the complete range of court guideline decisions, and departure and variance information. The analysis for this report began by identifying offenders in the Offender Datasets who received a commutation of sentence under the Clemency Initiative. The Commission obtained a complete list of commutations granted by President Barack Obama from DOJ at <https://www.justice.gov/pardon/obama-commutations>. Commutations granted prior to the announcement of the Clemency Initiative (April 23, 2014) as well as commutations granted to offenders other than federal drug trafficking offenders were excluded. Of the resulting 1,696 offenders, the Commission identified 1,670 offenders in the Offender Datasets based on name, sentencing date, and sentencing district. For an additional 26 offenders who were not in the Offender Datasets, information that the Commission typically collects was coded from case documents that were requested and received from the sentencing court.

The Commission augmented information from the Offender Datasets with records from BOP on inmates in custody as of January 25, 2014 and February 25, 2017. The BOP records were matched with those of the Commission based on sentencing date and at least one numeric identifier such as FBI number, U.S. Marshals Service number, Social Security number, or ICE number. All the 1,696 offenders who were either in the Offender Datasets or had information separately coded from case documents had a matching record in the BOP data. The BOP data contributed information relating to the amount of time the offender may have been detained before sentencing, the date the sentence computation began, the pre-clemency overall projected release date (for offenders not sentenced to a term of life), the post-clemency aggregated sentence, and the post-clemency overall projected release date. The Commission relied on the post-clemency overall projected release date for 468 offenders who were missing information on the date the offender's prison sentence expired as specified in the grant of clemency.

The Commission additionally undertook a brief coding project to collect details regarding any condition imposed as part of the grant of clemency. From the "terms of grant" information specified in the DOJ's Commutations Granted by President Barack Obama (2009-2017), staff recorded the date clemency was granted as well as the specifics of any condition of the grant of clemency, such as pre-release enrollment in the BOP's Residential Drug Abuse Program (RDAP).

This report examines the extent to which offenders who received a sentence commutation under the Clemency Initiative met the criteria for consideration and/or eligibility announced by the Department of Justice. For an explanation of how the Commission measured these criteria, see the following section titled "How DOJ Factors Are Measured in This Report."

The Commission also performed a separate analysis of offenders incarcerated in the BOP as of April 24, 2014 to determine which offenders met the DOJ criteria for the Clemency Initiative. For this part of the report, the Commission relied on a combined dataset of BOP records of inmates matched with the Commission's Offender Datasets for 1989 through 2016. Non-violent, low-level drug trafficking offenders who had served at least ten years of their prison sentence, and had no significant criminal history, no serious misconduct in prison, no history of violence prior to or during their current term of imprisonment, and no involvement with large-scale criminal organizations, gangs, or cartels were considered to have met the Clemency Initiative criteria (please refer to "How DOJ Factors Are Measured in This Report" below).

How DOJ Factors Are Measured in This Report

Drug Trafficking Offender

For the analysis of incarcerated offenders appearing to meet all DOJ factors, a drug trafficking offender is one whose primary offense (the offense of conviction with the highest statutory maximum penalty) was categorized as drug trafficking, manufacturing, or importing, or whose primary sentencing guideline was USSG §§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.8, 2D1.10, or 2D1.14.

Violent Offender

An offender was determined to be violent if any of the following guidelines were applied at sentencing: USSG §§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2A2.3, 2A2.4, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A3.5, 2A3.6, 2A4.1, 2A4.2, 2A5.1, 2A5.2, 2A5.3, 2A6.1, 2A6.2, 2B3.1, 2B3.2, 2D1.9, 2E1.1, 2E1.2, 2E1.3, 2E1.4, 2E1.5, 2G1.1, 2G1.2,

2G1.3, 2G2.1, 2G2.3, 2G2.4, 2G2.6, 2H4.1, 2M1.1, 2M2.1, 2M2.2, 2M2.3, 2M2.4, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.6, 2M3.7, 2M3.8, 2M3.9, 2M5.1, 2M5.2, 2M5.3, 2M6.1, 2M6.2, 2N1.1, 2P1.3, 2Q1.1, 2Q1.4, 2X6.1. Offenders whose offense levels were increased pursuant to USSG §§2D1.1(b)(2) were also considered to be violent offenders.

Low-Level Offender

An offender was determined not to be “an organizer, leader, manager or supervisor of others within a criminal organization” and, therefore, a low-level offender, if the Aggravating Role Adjustment at USSG §3B1.1 was not applied at sentencing.

Involvement with Large-Scale Organizations, Gangs, or Cartels

An offender’s involvement with large-scale organizations, gangs, or cartels was measured based on whether the court cited USSG §5K2.18 (Violent Street Gangs (Policy Statement)) as a reason for sentencing the offender above the guideline range, or if any of the Racketeering guidelines (USSG §§2E1.1, 2E1.2, 2E1.3, or 2E1.4) were applied at sentencing.

Length of Prison Sentence Served

For the analysis regarding offenders receiving clemency, the amount of time that an offender had served of his or her prison sentence was calculated as the difference between the offender’s sentencing date and the date on which the offender’s grant of clemency was announced, plus the amount of time the offender may have been detained before sentencing as determined by the court.

For the analysis regarding the number of clemency offenders who will have served at least ten years of their

sentence by the time they are released, the date of release was specified in the sentence commutation for some offenders. For other offenders, the sentence commutation specified a new sentence length. For this latter group the date of release was the adjusted release date as determined by the Bureau of Prisons after accounting for the new sentence length.

For the analysis of incarcerated offenders appearing to meet all Initiative factors, the amount of time that an offender had served of his or her prison sentence was calculated in two ways: first, as the difference between the offender's sentencing date and April 24, 2014, plus the amount of time the offender may have been detained before sentencing as determined by the court; and second, as the difference between the offender's sentencing date and January 19, 2017, plus the amount of time the offender may have been detained before sentencing as determined by the court.

Significant Criminal History

Following the definition used by Attorney General Eric Holder in connection with the Smart on Crime Initiative, offenders who received three or more total criminal history points under USSG §§4A1.1 and 4A1.2 were considered to have a significant criminal history.

Misconduct in Prison

An offender was determined to have serious misconduct in prison if, prior to April 24, 2014, he or she committed an act that the BOP classified as a "Greatest Severity Offense" or a "High Severity Offense," which, according to BOP policy, results in the loss of good conduct credit.

No Violence Prior to or During Current Term of Imprisonment

Commission data cannot determine with certainty whether the offenders who received sentence commutations had any history of violence before they were incarcerated. Because of this, no offenders were deemed to be excluded by that aspect of this factor.

An offender was determined to have committed an act of violence while in prison if, prior to April 24, 2014, he or she committed an act that the BOP classified as any of the following offenses: Killing, Assaulting With Serious Injury, Setting A Fire, Rioting, Encouraging Others To Riot, Taking Hostage(s), Sexual Assault By Threat/Force, Fighting With Another Person, Threatening Bodily Harm, Assaulting Without Serious Injury, Sexual Assault Without Force.

