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OPINION

Obama's Get-Out-of-Jail-Free Decree

By Paul H. Robinson

On Monday President Obama commuted the sentences of 46 drug offenders, bringing his commutation count to 89, more than the past four presidents combined. Meanwhile, the White House and Justice Department have signaled that this is only the beginning of an enormous clemency initiative by the administration.

Federal sentencing policy for nonviolent drug offenders is seriously misguided, leaving too many behind bars for far too long. But Mr. Obama's apparent decision to use his clemency power to override existing sentencing policy is also misguided.

There is a growing consensus that the sentences for such offenses are too long. A 2014 study by the Pew Research Center found that in the previous four years 40 state legislatures had taken action to ease their drug sentences. At the federal level, there is movement in Congress to reduce sentences, and the U.S. Sentencing Commission has revised its guidelines to retroactively reduce the sentences of more than 9,500 drug offenders. Three-quarters of those offenders are African-American or Hispanic.

The Obama clemency initiative is coupled with Clemency Project 2014—an outside consortium of professional and political organizations plus 50 law firms

and 20 law schools, totaling 1,500 lawyers—whose sole purpose is feeding clemency petitions to U.S. Pardon Attorney Deborah Leff. Some 30,000 offenders have already filed clemency requests with the project, and Ms. Leff says she wants to process all of these by January. Last month she told lawyers involved in these cases that they needed to file more petitions more quickly, writing shorter petitions if need be.

Compare this with the number of commutations granted by recent presidents. Ronald Reagan granted 13 in eight years, while George H.W. Bush granted only three in his four years in office. Bill Clinton granted 61 in eight years, while George W. Bush granted 11. Before Mr. Obama took office, LBJ held the modern record for the most commutations granted in one year, 80 in 1966.

Yet the problem with Mr. Obama's exercise of clemency is not the numbers; it is his conception of how the power can be legitimately used. Clemency serves as an important last-resort check on errors in the adjudication of individual cases. Has a prosecutor or a judge gone

off track and treated an offender unfairly? Under the Constitution, the president has the power to catch the error and fix it if appellate courts don't.

Many past presidents have seemed to abuse the power, especially in regard to pardons, exercising it in their own political self-interest to benefit rich contribu-

Using presidential clemency to override existing policy on criminal sentences sets a dangerous precedent.

tors or political friends. President Clinton's last-minute pardon of financier Marc Rich in January 2001 is perhaps the most obvious example. Even these abuses never crossed the red line between error-correction and policy-setting. They still treated clemency as focused on the unique facts of the case at hand, rather than as a device to overrule the existing sentencing policy set by the other

branches of government—the legislature, the judicial-branch U.S. Sentencing Commission, and individual sentencing judges. Mr. Obama, however, has substituted his judgment for that of the groups of officials constitutionally and statutorily authorized to make sentencing policy.

I was counsel for the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures when it created what became the Sentencing Reform Act of 1984, which created the U.S. Sentencing Commission. That law was to my mind a historic show of restraint by Congress. Lawmakers gave up some of their immediate political influence over sentencing policy by shifting it to an independent commission.

At the time, there was a consensus in Washington that sentencing legislation was falling victim to short-term political grandstanding, which was interfering with rational, coherent sentencing policy. It would be unfortunate if such congressional restraint was answered by a president's usurping that power to set sentencing policy. The president's clemency power was clearly never intended as a policy-setting device.

Using clemency to override existing policy on criminal sentences sets a dangerous precedent. Imagine a president who uses clemency to mitigate the sentences of nonviolent white-collar criminals like Bernie Madoff, or police officers who use deadly force in the line of duty, or for defendants in stand-your-ground cases, or for those who shoot abortion doctors as a claimed "act of conscience." Will each new president drop or revise the clemency criteria of his predecessor, and substitute his own? This would short-circuit the checks and balances of our constitutional separation of powers and give unrestricted lawmaking power to the president.

Instead of the arbitrary, autocratic commuting of sentences by the executive branch, Congress and the U.S. Sentencing Commission should make rule changes, even more retroactive changes. These new sentencing policies would have the legitimacy of the normal democratic process—and would subject all offenders to the same new rules.

Mr. Robinson, a law professor at the University of Pennsylvania, is the author, with Sarah Robinson, of "Pirates, Prisoners, and Lepers: Lessons from Life Outside the Law" (Potomac Books, 2015).