



ESSAY

The Pardon Power and Federal Sentence-Reduction Motions A Response to Yost and Flowers

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Introduction

There exists in our law a principled mechanism for imbuing the federal sentencing system with needed post-sentencing flexibility: 18 U.S.C. § 3582(c)(1)(A). This process is colloquially known as “compassionate release,” but “compassionate release” is a misnomer; compassion is not the standard, and release is not the most probable outcome. The statute instead “speaks of sentence reductions.”¹ Section 3582(c)(1)(A) allows courts to reduce a previously imposed sentence upon motion by the prisoner if: (a) the movant has identified “extraordinary and compelling” reasons for a sentence reduction; (b) a sentence-reduction comports with the Section 3553(a) sentencing factors; and (c) a reduction is consistent with applicable policy statements promulgated by the U.S. Sentencing Commission.² As Congress put it, Section 3582(c)(1)(A) is a “safety valve” that allows prisoners to obtain judicial review of a sentence in light of changed circumstances.³

The compassionate release misnomer is easy to understand: Perhaps the most salient group of beneficiaries is comprised of prisoners with terminal illnesses.⁴ Viewed abstractly, Section 3582(c)(1)(A) might look like a “mercy”

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1. *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020) (Calabresi, J.).

2. *See* 18 U.S.C. § 3582(c)(1)(A).

3. S. REP. NO. 98-225, at 121 (1983).

4. *See, e.g.*, U.S. SENT’G GUIDELINES MANUAL § 1B1.13(b)(1)(A) (U.S. SENT’G COMM’N 2023).

statute—and indeed, a sentence reduction is merciful in nature. But the sentence-reduction process is far more stringent and complex than a simple judicial exercise of compassion. Comprehending the analytical difference between the sentence-reduction statute and “compassionate release” is more than a mere academic exercise. The conflation of these two distinct concepts has inadvertently led to criticisms of Section 3582(c)(1)(A) that seem forceful on first glance but fail to withstand more searching review.

This piece addresses one of those misadventures. In a recent essay, Ohio Attorney General Dave Yost and former Ohio Solicitor General Benjamin Flowers argue that Section 3582(c)(1)(A) is constitutionally preempted by the President’s pardon power.⁵ In their view, the sentence-reduction statute violates two structural principles of the Constitution: the separation of powers and the unitary executive theory. As Yost and Flowers tell it, the statute “took from the President, and gave to the courts, the constitutionally assigned responsibility over issuing and denying commutations.”⁶ In so doing, the authors continue, Congress has arrogated to itself and the courts a freestanding compassion power reserved for the President alone.

Although appealing in its simplicity, the authors’ bottom line is dead wrong. This Essay responds with three principal objections. First, the sentence-reduction statute falls comfortably within Congress’s broad authority over federal criminal law—a discussion Yost and Flowers conspicuously sidestep in its entirety. Second, the commitment of the pardon power to the President does not constitutionally foreclose an otherwise valid exercise of Congress’s authority over the federal criminal system. And third, Yost and Flowers misapprehend the substance and scope of the sentence-reduction statute by treating it as a “mercy” power that is complete in itself. Properly understanding both the constitutional principles at play and the nature of the sentence-reduction statute leads to an inexorable conclusion: The pardon power does not constitutionally preempt Section 3582(c)(1)(A).

I. Congress and the Federal Criminal System

In an essay about Congress’s constitutional authority to permit ex-post sentence modifications, it would be wise to start with a discussion of the source and scope of Congress’s power to regulate federal criminal sentencing. It might be especially prudent to do so before declaring that Section 3582(c)(1)(A)

5. See generally Dave Yost & Benjamin M. Flowers, *The First Step Act and the Pardon Power*, HARV. J.L. & PUB. POL’Y PER CURIAM, Fall 2023, at 1.

6. *Id.* at 1.

“empower[s] the judiciary to exercise a power that the Constitution gives to the President alone.”⁷

Start with the text of Article I. The Constitution enumerates just three offenses that unambiguously fall within the purview of Congress’s criminal power. Congress may “provide for the Punishment of counterfeiting the Securities and current Coin of the United States”;⁸ “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”;⁹ and “declare the Punishment of Treason.”¹⁰ The Framers might have understood the enumerated offenses to constitute the whole of Congress’s power over criminal law.¹¹

Of course, that does not describe the trajectory of early American law. The view that eventually took hold “admitted the exclusivity of the three crimes enumerated in the Constitution, but denied that these were the sum total of Congress’s power to define crimes.”¹² Instead, the Necessary and Proper Clause formed, and still forms, the touchstone of Congress’s regulatory authority over the federal criminal system.¹³ As the Court put it in *M’Culloch v. Maryland*,¹⁴ “All admit, that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress.”¹⁵ This power is capacious. The Necessary and Proper Clause allows legislation that is “convenient, or useful” or “conducive to [the] beneficial exercise” of Congress’s legitimate aims.¹⁶ Congress has marshalled this authority to enact broad statutes that criminalize a wide range of behavior. At present, Congress has defined about 4,450 federal crimes, and federal incarceration rates have skyrocketed in recent years.¹⁷

Commensurate with the increasing federalization of crime, the Court has blessed Congress’s broad post-sentencing power. Congress may, for example,

7. *Id.* at 2.

8. U.S. CONST. art. I, § 8, cl. 6.

9. *Id.* art. I, § 8, cl. 10.

10. *Id.* art. III, § 3, cl. 2.

11. See Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 27-28 (1997).

12. *Id.* at 28-29.

13. See U.S. CONST. art. I, § 8, cl. 18; J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH. L. REV. 457, 470 (2012).

14. 17 U.S. (4 Wheat.) 316 (1819).

15. *Id.* at 416; accord *United States v. Comstock*, 560 U.S. 126, 135-36 (2010).

16. *M’Culloch*, 17 U.S. at 413, 418.

17. See J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH. L. REV. 457, 459-60 (2012).

administer “systems of parole and supervised release.”¹⁸ Or it may “provide prisoners with medical care and educational training.”¹⁹ Or it may “confine th[e] prisoner civilly after the expiration of his or her term of imprisonment.”²⁰ The law is replete with other examples of Congress allowing post-sentencing reductions in a person’s term of imprisonment. Federal Rule of Criminal Procedure 35(b), for instance, allows a “court [to] reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.”²¹ Federal habeas, too, authorizes relief when a prisoner “is in custody in violation of the Constitution or laws or treaties of the United States.”²²

Congress’s settled authority over the post-sentencing system is hardly surprising. Congress could have chosen not to criminalize conduct beyond counterfeiting, piracy, and treason.²³ It could have even declined to prescribe punishments for those three offenses.²⁴ What of the pardon power then? Yost and Flowers surely don’t think that a decision not to prescribe punishment for those three offenses—which would all but obviate the pardon power entirely—would have been unconstitutional. The point is that Congress has made a different policy decision but one that is no less constitutional.²⁵ It has chosen to enact overinclusive criminal laws but provide for back-end flexibility when appropriate. It could have chosen to enact underinclusive criminal laws without any back-end flexibility.²⁶ The Constitution does not mandate one system over another, and there is nothing unconstitutional about the choice Congress has made.

18. *United States v. Kebodeaux*, 570 U.S. 387, 394-95 (2013).

19. *Id.*

20. *Id.*

21. FED. R. CRIM. P. 35(b)(1); *see also* *United States v. Addonizio*, 442 U.S. 178, 189 (1979) (discussing Rule 35(b)).

22. 28 U.S.C. § 2241(c)(3). Judicial review of criminal convictions does not follow from the Suspension Clause. *See* Brief for Jonathan F. Mitchell and Adam K. Mortara as Amici Curiae in Support of Neither Party at 4, *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (No. 19-5807) (July 21, 2020) (“In a discussion about habeas corpus, nothing is more disqualifying than the belief that the Suspension Clause has anything to do with prisoners who have already been convicted by a court of competent jurisdiction.”).

23. *See* Bybee, *supra* note 11, at 31-32.

24. *See* Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 28 (1996) (“Had lower federal courts not been authorized, there would have been no need to debate what types of criminal cases should be tried in federal court. Consequently, the concept of federal criminal jurisdiction, exclusive or otherwise, would have been a nullity.”).

25. *See* Broughton, *supra* note 13, at 467-72 (describing both the growth of federal crimes and the Supreme Court’s permissive interpretation of Congress’s power over federal criminal law).

26. *See* Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 90-92 (2019).

The sentence-reduction statute is simply another instantiation of Congress's power to ensure the criminal system's responsible administration. Congress may have wanted to avoid the needless expenditure of resources on people for whom incarceration is no longer necessary. It may have wished to bolster respect for the legal system by allowing for post-sentencing review and flexibility. It may have recognized that unnecessarily lengthy periods of incarceration increase crime. Sentence reductions are one way in which Congress has chosen to tailor its criminal regime. That this tailoring occurs at the back end of the system rather than in advance of sentencing does not violate the Constitution. Invalidating the sentence-reduction statute would vitiate the "wisdom and humility"²⁷ of upholding Congress's determinations about the "necessities of government."²⁸

II. Pardons and the Separation of Powers

By now, it should be clear that there is at least a *prima facie* case for Congress's power to enact Section 3582(c)(1)(A). Yost and Flowers' response to the foregoing is a suggestion that the Constitution commits the pardon power to the President alone, so whatever the scope of the Necessary and Proper Clause, it cannot be used to exercise a power vested exclusively in another branch. In so doing, they commit two errors. First, they neglect to state the proper separation-of-powers standard, which tolerates some degree of overlapping responsibilities between branches. Second, they misunderstand the role that the pardon power plays in our constitutional structure. I address each in turn.

A. Separation of Powers

Although the separation of powers generally proscribes one branch from exercising the whole of a power vested exclusively in another, our Constitution tolerates some overlapping responsibility among the branches. James Madison famously framed the separation of powers as follows: "[W]here the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted"; but the separation of powers does "not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other."²⁹ The separation of powers therefore contemplates "the

27. *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).

28. *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

29. THE FEDERALIST NO. 47, at 302-03 (James Madison) (Clinton Rossiter ed., 1961); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 525
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constitutionality of a ‘twilight area’ in which the activities of the separate Branches merge,³⁰ and it eschews “a hermetic sealing off of the three branches of Government from one another.”³¹ As the Court affirmed in *Morrison v. Olson*,³² “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”³³

Today, the separation-of-powers inquiry no longer turns on whether one branch exercises a power that might be described as legislative, judicial, or executive in nature.³⁴ The Court instead considers two factors: first, whether one branch’s actions aggrandize its power at the expense of another branch, and second, whether one branch’s actions interfere with the constitutional duties of another.³⁵ If one branch’s actions “pose no danger of either aggrandizement or encroachment,”³⁶ they will be upheld unless the Constitution’s text expressly provides otherwise. In *Morrison v. Olson*,³⁷ for example, the Court rejected a separation-of-powers challenge to an independent counsel vested with the full investigative and prosecutorial power of the Department of Justice and Attorney General.³⁸ There was no doubt that

(Melville M. Bigelow ed., 5th ed. 1905) (repudiating the notion that separation of powers forecloses any degree of overlap in responsibility).

30. *Mistretta*, 488 U.S. at 386.

31. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

32. 487 U.S. 654 (1988).

33. *Id.* at 694 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

34. *See, e.g., Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199 (2020) (“Backing away from the reliance . . . on the concepts of ‘quasi-legislative’ and ‘quasi-judicial’ power, we view[] the ultimate question as whether [the action] is of ‘such a nature that [it] impede[s] the President’s ability to perform his constitutional duty.’” (quoting *Morrison*, 487 U.S. at 691)); *Mistretta*, 488 U.S. at 372 (“We also have recognized, however, that the separation-of-powers principle . . . do[es] not prevent Congress from obtaining the assistance of its coordinate Branches.”).

35. *See Mistretta*, 488 U.S. at 382 (“It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence”); *see also, Nixon v. Adm’r Gen. Servs.*, 433 U.S. 425, 443 (1977) (“[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.”); *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034-35 (2020) (holding that congressional subpoenas of presidential records unduly aggrandize the legislature’s power at the expense of the executive).

36. *Mistretta*, 488 U.S. at 382.

37. 487 U.S. 654 (1988).

38. *Id.* at 662, 696-97.

the independent counsel—which was not housed in any discrete branch of the government—exercised an important component of the executive power. But the “real question” for the Court’s separation-of-powers analysis was whether the for-cause removal restrictions at issue “impede[d] the President’s ability to perform his constitutional duty.”³⁹ The Court adopted a functional view of the separation of powers, explaining, “we simply do not see how the President’s need to control the exercise of [the independent counsel’s] discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.”⁴⁰

*Mistretta v. United States*⁴¹ applies these rules to circumstances directly analogous to the sentence-reduction scheme. That case involved a separation-of-powers challenge to the Sentencing Guidelines and the U.S. Sentencing Commission. The Commission is comprised of both judges and non-judges, but it is housed in the judicial branch.⁴² The Commission exercises certain rulemaking powers in the promulgation of the Sentencing Guidelines. The Court rejected the separation-of-powers challenge, reiterating that the separation-of-powers test turns on questions of “encroachment and aggrandizement.”⁴³ Even though Article III limits the judicial power to cases and controversies, the Court expressed that “Congress, in some circumstances, may confer rulemaking authority on the Judicial Branch.”⁴⁴

Consistent with this modern view of the separation of powers, the Court in *Mistretta* articulated a test that has particular force for our present purposes: “Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.”⁴⁵ Applying this test, the Court found no constitutional defect in the Commission’s promulgation of the Sentencing Guidelines. After all, “the sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch.”⁴⁶ The Court was therefore not concerned about improper aggrandizement of the judiciary; “[o]n the contrary, Congress placed the

39. *Id.* at 691.

40. *Id.* at 691-92.

41. 488 U.S. 361 (1989).

42. *See id.* at 368.

43. *Id.* at 382.

44. *Id.* at 387.

45. *Id.* at 388.

46. *Id.* at 390.

Commission in the Judicial Branch precisely because of the Judiciary’s special knowledge and expertise.”⁴⁷

There are doubtless limits on the authority of one branch to exercise the power committed to another, such as unambiguous constitutional text that forecloses overlapping responsibilities. The Court’s application of the Appointments Clause in *Buckley v. Valeo* illustrates this principle. At issue in *Buckley* was the composition of the Federal Election Commission, which consisted of six voting members—only two of whom were appointed by the President.⁴⁸ Applying the “plain language”⁴⁹ of the constitutional text, the Court concluded that this arrangement violated the Appointments Clause.⁵⁰ The Court began by noting that the commissioners were officers of the United States.⁵¹ It continued: “Unless their selection is elsewhere provided for, all Officers of the United States are to be appointed in accordance with the Clause.”⁵² Because the appointment of the commissioners was not “otherwise provided for” in the Constitution, the appointment needed to comport with the Appointments Clause.

In sum, the separation-of-powers doctrine turns primarily on whether one branch’s exercise of power unduly aggrandizes its own power or materially interferes with the constitutional duties of another branch. To suppose that the separation of powers requires rigid insularity is an invitation for the very judicial intrusion into the prerogatives of the coordinate branches that Yost and Flowers critique. We may now consider the scope of the pardon power.

B. The Pardon Power

The Constitution confers on the President the “Power to grant Reprieves and Pardons for Offenses against the United States.”⁵³ A president may, “either before attainder, sentence or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty.”⁵⁴ The power does not apply

47. *Id.* at 396.

48. *See* *Buckley v. Valeo*, 424 U.S. 1, 113 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

49. *Id.* at 127.

50. *Id.* at 125-26.

51. *See id.*

52. *Id.* at 132.

53. U.S. CONST. art. II, § 2, cl. 1.

54. *Ex parte Wells*, 59 U.S. (18 How.) 307, 311 (1855).

to state convictions nor to cases of impeachment.⁵⁵ Beyond those limitations, the President can pardon anyone “for any reason, or for no reason at all.”⁵⁶

To understand why Section 3582(c)(1)(A) does not impair the President’s pardon power, it is helpful to grasp precisely how that power fits within the Constitution’s system of checks and balances. The structural logic of vesting the pardon power in the President was to prevent joint abuses by Congress and the courts.⁵⁷ The Framers “understood the Pardon Power as an essential final check against miscarriages of justice and overly harsh applications of the letter of the law—and . . . as a device for national reconciliation after episodes of political unrest.”⁵⁸ As Alexander Hamilton saw it, “[h]umanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions . . . justice would wear a countenance too sanguinary and cruel.”⁵⁹ James Iredell similarly noted that “there may be instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. It is impossible for any general law to foresee and provide for all possible cases that may arise.”⁶⁰

The pardon power exists in our constitutional design to provide mitigation when the law admits none. The separation-of-powers doctrine in the pardon context thus operates as an anti-impairment principle. The other branches may not “limit the effect of [the President’s] pardon, nor exclude from its exercise any class of offenders.”⁶¹ Obviating the need to use the pardon power in certain instances—such as if Congress repealed all federal criminal laws—does not violate the Constitution. And for the reasons I explain in the following Part, the purported overlap between the pardon power and the sentence-reduction statute hardly approaches a usurpation of the President’s constitutional prerogatives.

55. See MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING* 264 (Bridget Flannery-McCoy & Alena Chekanov eds., 2020).

56. Yost & Flowers, *supra* note 5, at 4.

57. See Harold J. Krent, *Conditioning the President’s Conditional Pardon Power*, 89 CAL. L. REV. 1665, 1673 (2001) (“The Federalist Papers and other early writings suggest that the Framers intended the pardon power to function as a check on the coordinate branches.”).

58. MCCONNELL, *supra* note 55, at 171.

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

60. James Iredell, *Address at the North Carolina Ratifying Convention*, in 4 THE FOUNDERS’ CONSTITUTION 17 (Philip B. Kurland & Ralph Lerner eds., 1987); see Krent, *supra* note 57, at 1674 (“The Framers envisaged the pardon power as . . . a critical safeguard against legislative and judicially imposed punishment.”).

61. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

III. Sentence-Reduction Motions

Having established that the Constitution allows some degree of overlapping responsibilities between the branches, we may now consider whether the sentence-reduction statute is simply the pardon power by another name. This Part first addresses Yost and Flowers' fundamental misunderstanding of the federal sentence-reduction standard. Their imprecision is forgivable, given that their state-law offices do not fashion much occasion for familiarity with the federal sentence-reduction statute, but it is important to correct their conflation of Section 3582(c)(1)(A) with a true compassionate release statute. This Part then shows why Section 3582(c)(1)(A) does not unconstitutionally encroach on the pardon power. It concludes by responding to the authors' unitary executive theory.

A. The Sentence-Reduction Standard

The authors' thesis rests on a dubious premise. They suggest that the sentence-reduction statute "empowers courts to reduce an inmate's sentence as an act of mercy."⁶² Thus, they argue, the sentence-reduction statute is legislatively synonymous with the pardon power. Regrettably, Yost and Flowers conflate Section 3582(c)(1)(A) with a nonexistent "compassionate release" scheme.

But "mercy" will not do the trick; it is neither necessary nor sufficient for a sentence reduction under Section 3582(c)(1)(A). A prisoner must first establish "extraordinary and compelling" reasons for a sentence reduction.⁶³ True, those reasons might have emotional force (such as a terminal illness), but the statutory phrase has a specific meaning that excludes much of what might be considered merciful. For example, a person cannot seek a sentence reduction based solely on the fact that his or her sentence overstates the severity of the criminal offense.⁶⁴ Most importantly, though, even a person who satisfies the "extraordinary and compelling" circumstances prong is not entitled to a sentence reduction. The person must demonstrate that release is consistent with the Section 3553(a) sentencing factors.⁶⁵

62. Yost & Flowers, *supra* note 5, at 3.

63. 18 U.S.C. § 3582(c)(1)(A)(i).

64. *See* *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021) (rejecting a mandatory minimum sentence-reduction "on the basis that the prescribed sentence . . . rests on a misguided view of the purposes of sentencing"); U.S. SENT'G GUIDELINES MANUAL § 1B1.13(c) (U.S. SENT'G COMM'N 2023) (prohibiting sentence reductions based on sentence-related reasons except as specifically enumerated in Section 1B1.13(b)(6)).

65. *See* 18 U.S.C. § 3553(a).

The upshot is that there inevitably exist countless prisoners who have established extraordinary and compelling reasons for a sentence reduction, but for whom relief under Section 3582(c)(1)(A) is unavailable. The President faces no such limit in mercifully exercising the pardon power and indeed may fully pardon those individuals who have already obtained a sentence reduction.⁶⁶ Yost and Flowers are therefore deeply mistaken to suggest that a sentence reduction under Section 3582(c)(1)(A) “is a commutation by another name.”⁶⁷

B. Section 3582(c)(1)(A) and Separation of Powers

With the foregoing in mind, it is easy to understand the infirmity of Yost and Flowers’ separation-of-powers critique. I offer four reasons why Section 3582(c)(1)(A) does not violate structural constitutional principles. First, the sentence-reduction power is far narrower than the pardon power. Second, granting a sentence reduction does not impede the President’s ability to carry out constitutional responsibilities. Third, the sentence-reduction statute narrows, rather than expands, Congress’s power, and it is consistent with the tradition of judicial sentencing discretion dating back to the Founding. Finally, Yost and Flowers’ position cannot be squared with countless other statutes and rules that authorize back-end sentence reductions.

To start, beyond those explained in the preceding subsection, there are other reasons why the sentence-reduction statute does not permit courts to exercise the whole of the pardon power. For one, the pardon power can be exercised at any time—even before conviction or sentence.⁶⁸ Section 3582(c)(1)(A) applies only after a person has been sentenced. Some of the defined extraordinary and compelling reasons are even more temporally limited. If prisoners want to raise a change in the law as an extraordinary and compelling reason for relief, they must have “served at least 10 years of the term of imprisonment.”⁶⁹ Another difference between the pardon power and Section 3582(c)(1)(A) is the scope of possible relief. The pardon power allows the President not only to reduce a sentence, but to forgive the underlying conviction. Section 3582(c)(1)(A) authorizes a court only to reduce a term of imprisonment. Even a person whose sentence is reduced to time served may subsequently receive a pardon by the President. Yet another difference is the

66. See, e.g., *Schick v. Reed*, 419 U.S. 256, 268 (1974) (affirming President Eisenhower’s commutation of a death sentence to life in prison without parole, but noting that the prisoner may “apply to the present President or future Presidents for a complete pardon, commutation to time served, or relief from the no-parole condition”).

67. Yost & Flowers, *supra* note 5, at 3.

68. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (noting that the pardon power may be “granted before conviction”).

69. U.S. SENT’G GUIDELINES MANUAL § 1B1.13(b)(6) (U.S. SENT’G COMM’N 2023).

triggering mechanism by which an entity can grant relief. Section 3582(c)(1)(A) authorizes relief only “upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant.”⁷⁰ But the President can grant a pardon *sua sponte*.

Second, and following closely from my last point, Section 3582(c)(1)(A) does not “impede the President’s ability to perform his constitutional duty.”⁷¹ Even the most expansive view of the sentence-reduction statute leaves untouched the most fundamental components of the pardon power. Especially because the pardon power was intended primarily as a powerful check on the legislative and judicial branches, obviating the need to exercise a pardon hardly interferes with “discretion [that] is so central to the functioning of the Executive Branch as to require as a matter of constitutional law” that Section 3582(c)(1)(A) be invalidated.⁷² In this context, the greater power for Congress to eliminate all federal criminal law (and thereby extinguish the pardon power) includes the lesser power to grant post-sentencing relief from federal criminal laws (and thereby preserve the pardon power).

The President also retains control over the use of the sentence-reduction statute. The Sentencing Commission defines the scope of the “extraordinary and compelling” reasons standard,⁷³ and sentence reductions must be “consistent with applicable policy statements issued by the Sentencing Commission.”⁷⁴ Although the Sentencing Commission is housed in the judicial branch, “Congress has empowered the President to appoint and remove Commission members,” and as such, “the President’s relationship to the Commission is functionally no different from what it would have been had Congress not located the Commission in the Judicial Branch.”⁷⁵ Indeed, “the Executive Branch’s involvement in the Commission is greater than in other independent agencies.”⁷⁶ Were the President concerned about preserving the pardon power, he or she could exercise indirect authority over the Sentencing Commission to have it issue a policy statement precluding any sentence reductions whatsoever, or otherwise limiting their availability. The President could appoint, for example, commissioners who have expressed a desire to circumscribe the sentence-reduction system. The President could also tempt

70. 18 U.S.C. § 3582(c)(1)(A).

71. *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

72. *Id.* at 691-92.

73. *See* 28 U.S.C. § 994(t).

74. 18 U.S.C. § 3582(c)(1)(A).

75. *Mistretta v. United States*, 488 U.S. 361, 386 n.14 (1989).

76. *Id.*

commissioners away from the Commission by offering other high-status positions within the Executive Branch.⁷⁷

Third, Section 3582(c)(1)(A) does not unduly aggrandize the power of either Congress or the courts.⁷⁸ With respect to the former branch, Section 3582(c)(1)(A) is most properly understood as *limiting* Congress’s power by providing a safety valve from overbroad criminal statutes.⁷⁹ Nor is there a constitutional problem vesting the judiciary with this power. Recall that “Congress may delegate to the Judicial Branch nonadjudicatory functions that . . . are appropriate to the central mission of the Judiciary.”⁸⁰ As the Court found in *Mistretta*, delegating to the courts greater power over sentencing matters is squarely within “the Judiciary’s special knowledge and expertise.”⁸¹ In *Concepcion v. United States*,⁸² the Court emphasized that “[f]ederal courts historically have exercised . . . broad discretion . . . at an initial sentencing hearing.”⁸³ Importantly, “[t]hat discretion also carries forward to later proceedings that may modify an original sentence.”⁸⁴

Fourth, Yost and Flowers’ argument proves too much. There are countless other examples of criminal laws and rules that overlap modestly with the pardon power. I return now to the examples in Part I. The President has the power to pardon almost anyone for any reason—including that their custody violates the Constitution or laws of the United States. But the authors do not suggest that habeas is itself unconstitutional, despite the statute authorizing courts to grant relief on the same basis. Or take Rule 35(b), which allows a court to reduce a person’s sentence for providing substantial assistance in the investigation of another person. The President could surely reduce a person’s sentence—or forgive the underlying conviction altogether—for the same reason.

The authors attempt to marshal authority⁸⁵ for their position by citing *Affronti v. United States*,⁸⁶ but *Affronti* offers little support. In that case, the Court considered whether a district court could, under the relevant statute,

77. See *id.* at 409 (“[T]he President has the power to elevate federal judges from one level to another or to tempt judges away from the bench with Executive Branch positions.”).

78. See generally *id.* at 380-84 (applying the separation-of-powers doctrine and concluding that the Sentencing Commission does not interfere with the Judicial Branch).

79. See S. REP. NO. 98-225, at 121.

80. *Mistretta*, 488 U.S. at 388.

81. *Id.* at 396.

82. 142 S. Ct. 2389 (2022).

83. *Id.* at 2398.

84. *Id.*

85. Yost & Flowers, *supra* note 5, at 3-4.

86. 350 U.S. 79 (1955).

place a defendant on probation after he had begun serving the first in a series of consecutive sentences.⁸⁷ The Court’s “final analysis” was “governed by the meaning of the statute.”⁸⁸ Although the Court’s ultimate interpretation “avoid[ed] interference with the parole and clemency powers,”⁸⁹ the opinion is best understood as a semantic construction of the statute rather than a substantive application of the avoidance canon. The Court conducted no separation-of-powers analysis, nor did it cite any separation-of-powers cases.

In the end, the sentence-reduction statute furthers rather than violates the separation of powers. “The structural principles secured by the separation of powers protect the individual” by forestalling abuses of government.⁹⁰ When one branch exercises self-restraint, the separation-of-powers doctrine has succeeded without recourse to external checks and balances. The sentence-reduction statute averts many of the Congress-created abuses of the criminal legal system, obviating the *need* for the President to exercise the pardon power in those instances without obviating the power itself.

C. Unitary Executive

The authors’ unitary executive theory does not save their thesis. They contend that Section 3582(c)(1)(A) interferes with the political accountability that limits the President’s pardon power.⁹¹ They elaborate, “The unitary executive makes the pardon power work. . . . [P]olitical pressures, and the weight of the responsibility conferred by the pardon power, impose important limits where otherwise there are none.”⁹² Yost and Flowers’ argument fails on both constitutional and policy grounds.

Political accountability—or the supposed lack thereof—does not pose a constitutional problem for Section 3582(c)(1)(A). Yet again, their argument proves too much and runs headlong into precedent. The authors’ criticism indicts the entire federal sentencing regime we have had since the Founding. Judges have had wide latitude in sentencing defendants since the early days of the Republic—and for good reason.⁹³ Making decisions about sentence length by reference to political considerations would consistently and egregiously

87. *See id.* at 79-80, 82.

88. *Id.* at 83.

89. *Id.*

90. *Bond v. United States*, 564 U.S. 211, 222 (2011).

91. *See Yost & Flowers, supra* note 5, at 1, 4-6.

92. *Id.* at 5.

93. *See Concepcion v. United States*, 142 S. Ct. 2389, 2398-99 (2022) (quoting KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 9 (1998)) (noting that federal judges have always had wide sentencing discretion).

over-sentence criminal defendants.⁹⁴ Today, as at the Founding, judges properly consider mercy in the routine process of sentencing. For instance, the decision to sentence a defendant to the low end of a Guidelines range might be influenced by notions of mercy. So too, the factors that guide a judge's decision to grant a downward departure from the Guidelines range sound in the register of mercy.⁹⁵ If such politically unaccountable exercises of mercy are constitutionally unproblematic at sentencing, it is hard to conceive why *post-sentencing* exercises of mercy might be more constitutionally dubious simply because they are also politically insulated.

Perhaps aware of the shortcomings of their unitary executive argument, the authors finally turn to fearmongering. The supposed lack of political accountability will “result in more early releases,” they say, and “a[t] least some of these individuals will go on to assault, maim, rape, and murder law-abiding citizens.”⁹⁶ The authors say this without citing a single source for support. But data points to the contrary. Evidence shows that recidivism rates among First Step Act beneficiaries are far lower than recidivism rates among the general prison population.⁹⁷ This data makes sense, because the Section 3553(a) factors are a “major guardrail” on the capricious use of Section 3582(c)(1)(A).⁹⁸ All empirical evidence points to judges applying these factors faithfully and cautiously.⁹⁹

At bottom, the authors' unitary executive theory is window dressing for a policy argument, not a legal argument. The notion that mercy may be exercised only when consistent with the will of the majority of the electorate

94. John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 782 & n.415 (2020).

95. See, e.g., 18 U.S.C. § 3553(a)(1) (requiring courts to consider “the history and characteristics of the defendant” in fashioning a sentence); *id.* § 3553(a)(2)(D) (requiring courts to consider the ability of a sentence “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

96. Yost & Flowers, *supra* note 5, at 6.

97. See Ashley Nellis & Liz Komar, *The First Step Act: Ending Mass Incarceration in Federal Prisons*, SENT'G PROJECT (Aug. 22, 2023) (first citing OFF. OF THE ATT'Y GEN., U.S. DEP'T OF JUST., FIRST STEP ACT ANNUAL REPORT (2023); and then citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105139, FEDERAL PRISONS: BUREAU OF PRISONS SHOULD IMPROVE EFFORTS TO IMPLEMENT ITS RISK AND NEEDS ASSESSMENT SYSTEM (2023)), <https://perma.cc/2XQK-Q3PD>.

98. Erica Zunkel & Jaden M. Lessnick, *Putting the “Compassion” in Compassionate Release: The Need for a Policy Statement Codifying Judicial Discretion*, 35 FED. SENT'G REP. 164, 170 (2023).

99. See *id.* at 170-71 (collecting examples and data showing the frequency with which judges use the § 3553(a) factors to deny sentence-reduction motions, even when a defendant has established extraordinary circumstances for a sentence-reduction).

is foreign to our constitutional history.¹⁰⁰ Federal judges have been vested with wide sentencing discretion since the Founding precisely *because* they are politically insulated from the sort of impulsive and unsupported fearmongering propagated by Yost and Flowers. And whatever the merits of their policy argument, the Constitution “ha[s] nothing to do with it.”¹⁰¹

IV. Conclusion

Yost and Flowers implore their audience to consider the role of humility in our constitutional system.¹⁰² But there is nothing humble about seeking to invalidate Section 3582(c)(1)(A)—and a much wider swath of federal law—simply because a sentence reduction might resemble a pardon at the greatest level of abstraction. Our Constitution contemplates and depends on some diffused responsibilities. That was the rule at the Founding, and it remains the rule today. Only by twistification can one conclude that Section 3582(c)(1)(A) confers an unbounded mercy power upon federal judges. To be sure, sentence reductions are merciful in their nature. But no sound theory of constitutional interpretation confers upon the President a monopoly on compassion. Those who suppose otherwise offend the very humility and judicial restraint they purport to champion.

100. See *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (“[T]he longstanding ‘practice of the government’ can inform our determination of ‘what the law is.’” (first quoting *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); and then quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

101. *Obergefell v. Hodges*, 576 U.S. 644, 713 (2015) (Roberts, C.J., dissenting).

102. Yost & Flowers, *supra* note 5, at 1.