Written Statement

of

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"The Examination of Clemency at the Department of Justice"

Thank you for the invitation to appear. It is truly an honor to have another opportunity to testify before members of the House Judiciary Committee about clemency powers. I have spent more than three decades studying the operation of the federal criminal justice system as a law professor at The Ohio State University and as an editor of the *Federal Sentencing Reporter*. My research has led me to long advocate, in my academic writings and in testimony to the House Judiciary Committee sixteen years ago,[1] for more robust and more regularized use of executive clemency authority. I hope the non-partisan nature of my views on this topic is clear from the fact that I was previously invited to testify by Democratic members and today I have been invited by Republican members. More fundamentally, I hope this hearing can continue to advance and improve our collective understanding of clemency's foundational role in preserving our county's commitment to human liberty and in safeguarding our Constitution's checks-and-balances approach to constraining the government's awesome powers to punish.

Clemency has a rich and distinguished history that extends far before our nation's founding. Most critically, the Framers of our Constitution robustly championed executive clemency power. Alexander Hamilton stressed the importance of clemency in the Federalist Papers, emphasizing that "[t]he criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."[2] Similarly, James Iredell of North Carolina

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1 *See* Douglas A. Berman, *Turning Hope-and-Change Talk Into Clemency Action for Non-Violent Drug Offenders*, 36 NEW ENGLAND JOURNAL ON CRIMINAL AND CIVIL CONFINEMENT 59 (2010); Testimony of Douglas A. Berman submitted to House Judiciary Committee hearing on "The Use and Misuse of Presidential Clemency Power for Executive Branch Officials" (July 11, 2007).
2 THE FEDERALIST No. 74, pp. 447-49 (C. Rossiter ed. 1961).

advocated forcefully for the clemency power explaining that "there may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice."[3]

Of course, given that the framers of our Constitution fought a revolution to break free from the British monarchy, it might seem curious that, in Article II, Section 2, they granted the President a broad, king-like "Power to grant Reprieves and Pardons" for all federal offenses. But, in a beautiful article titled "Clemency as the Soul of the Constitution," legal scholar Mark Osler helps explain why the Framers meant for clemency power, in his words, "to be untamed":

> The fear in creating presidential powers was tyranny, but clemency is uniquely ill-suited to the purposes of a tyrant. After all, tyrants are enabled by imprisoning those they hate, not by letting people *out* of prison. To put it another way, mercy is at best an inefficient route to a greater evil.[4]

Reflecting on this point, it should be clear not only that clemency fundamentally serves as a check on government powers to enhance individual liberty, but also that any efforts to limit or undermine clemency authority can pose real risks to liberty. This is why Alexander Hamilton, in the Federalist Papers, spoke of the "*benign* prerogative of pardoning" while stressing that "[h]umanity and good policy conspire to dictate that [this power] should be as little as possible fettered or embarrassed."[5] The Framers understood not just that clemency is a benign power, but also that a greater evil can be enabled by fettering this power or by efforts to circumvent it.[6]

These realities – as well as my familiarity with "sanguinary and cruel" aspects of our criminal justice systems – account for why I find deeply troubling any Justice Department efforts to re-prosecute any clemency recipient for conduct related to a clemency grant. Though I am only somewhat familiar with the intricacies of the Esformes case, the transcendent structural and constitutional principles at issue make the particulars of one case largely beside the point. As the Framers surely understood, some government officials might always convince themselves (and maybe even others) that a particular clemency grant was for some reason undeserved or unjustified. But our Constitution's text, history and tradition makes plain that once a President decides to be merciful through an official clemency grant, that's to be the end of the story.

But the potentially harmful reverberations from just even one Justice Department decision to re-prosecute a clemency recipient could be endless. Even a single re-prosecution risks creating a life-altering chill for thousands of individuals who received pardons and commutations from past presidents; they can no longer feel secure in the repose that clemency is

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3 Address by James Iredell, North Carolina Ratifying Convention (July 28, 1788), *reprinted in* 4 THE FOUNDERS CONSTITUTION 17-18 (P. Kurland & R. Lerner ed. 1987).
4 Mark Olser, *Clemency as the Soul of the Constitution*, 34 JOURNAL OF LAW & POLITICS 131, 132 (2019).
5 THE FEDERALIST No. 74, pp. 447-49 (C. Rossiter ed. 1961).
6 The Framers rejected a proposal that the Senate would have consent authority to review the President's clemency decisions, *see* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 171–72 (Max Farrand ed., 1911), making plain their view that the President's check on the government's power to punish was to be conclusive.

supposed to provide. Zealous federal prosecutors almost always pursue multicount indictments, and many counts are often left formally unresolved in plea or trial processes. In a world that permits post-clemency re-prosecutions, any and every unresolved count becomes a tripwire for clemency recipients (and even would-be clemency applicants) which could echo through all aspects of the modern administration of criminal law. And, of course, the broader public is sure to lose faith in both the clemency process and the very meaning of executive clemency upon learning that the punitive whims of prosecutors can lead to the circumvention of clemency grants.

Though the Justice Department's eagerness to re-prosecute a clemency recipient is novel, it strikes me as similar to another example of constitutional checks-and-balances being undermined by prosecutorial zeal. I reference federal prosecutors often urging use of "acquitted conduct" to enhance sentences, an issue the Chair of this Subcommittee raised in his letter to the Attorney General regarding the Esformes case.[7] I surmise similar types of prosecutorial tunnel vision contributes to an eagerness to seek additional punishment while ignoring constitutional checks in the form of jury acquittals and presidential commutations. Notably, the Justice Department recently advocated against the U.S. Sentencing Commission revising the federal sentencing guidelines to limit the impact of acquitted conduct at sentencing.[8] The Department there, as when re-prosecuting in the Esformes case, seems eager to focus on legal technicalities to pursue ever more punishment rather than showing appropriate respect for our Constitution's checks-and-balances approach to limiting the most significant of all governmental powers.

Though troubled by Justice Department efforts to bully through constitutional checks, I have been heartened by the work of this Subcommittee and Committee to restore constitutional balances. Members of this Subcommittee did critically important work advancing a bill in the last Congress to restrict the use of acquitted conduct to enhance a sentence. That bill, the Prohibiting Punishment of Acquitted Conduct Act, ultimately received near unanimous support in the full House.[9] As part of a broader effort to honor and enhance respect for our Constitution's checks-and-balances, I would urge continued efforts to advance the Prohibiting Punishment of Acquitted Conduct Act to the President's desk.

Similarly, I am also heartened by the work of members of this Subcommittee on legislation designed to energize and improve the clemency process, in part by creating a body outside the Justice Department to help advise the President on these issues. In advocacy for the

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7 See Letter from Andy Biggs to Merrick Garland (Feb. 17, 2023), https://biggs.house.gov/sites/evo-subsites/biggs.house.gov/files/evo-media-document/esformes-letter-02.17.2023_0.pdf ("The Esformes case raises serious issues of double-jeopardy, vindictive prosecution and the fairness of using conduct for which a defendant has been acquitted by a jury in the sentencing phase of a criminal case.")

8 *See* Letter from Jonathan J. Wroblewski Director, Office of Policy and Legislation Criminal Division U.S. Department of Justice to The Honorable Carlton W. Reeves, Chair United States Sentencing Commission (Feb. 15, 2023), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ3.pdf.

9 *See* Prohibiting Punishment of Acquitted Conduct Act of 2021, H.R.1621 (passed/agreed to in House by a vote of 405–12 on March 28, 2022).

Fair and Independent Experts in Clemency (FIX Clemency) Act,[10] its sponsors have rightly noted that the placement of the Office of the Pardon Attorney within the Department of Justice ensures that law enforcement and prosecutorial interests unduly impact the work of that office. Creating an independent clemency board or commission, however it might be designed or structured, could help provide regular and reasoned advice to the President to assist clemency decision-making without the bureaucratic biases that have impacted the Justice Department's work in this area. Of course, an independent clemency board could not, nor should not, in any way constrain the exercise of the President's clemency power, but such a body could and should advance the sound functioning, overall transparency and public understanding of this historic power.

Though the structure and responsibilities of a clemency board could take many forms, its staffing could include personnel with expertise about the nature of, and reasons for, miscarriages of justice in the operation of modern criminal justice systems. The board could study the causes of wrongful convictions, excessive sentences, overzealous prosecutions and barriers to reentry in order make recommendations to the President about specific cases that might merit clemency and to Congress about systemic reforms that could reduce the risk of miscarriages of justice. In addition, a clemency board could be a valuable clearinghouse for historical and current data on the operation of executive clemency powers in both state and federal systems, and it could serve as a resource for offenders and their families seeking information about who might be a good candidate for receiving clemency relief.

Despite constitutional limits on altering the President's clemency powers, there are ways Congress could help improve the functioning, transparency and respect for this historic executive power. The creation of an independent clemency board could pay long-term dividends for both the reality and the perception of justice and fairness in our nation's criminal justice systems. More broadly, given the risks posed by the Justice Department's willingness to re-prosecute a clemency recipient, Congress should seriously explore what steps it might take to advance and support clemency's foundational role in preserving our county's commitment to human liberty and in safeguarding our Constitution's checks-and-balances approach to constraining the government's awesome powers to punish.

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Thank you again for this opportunity to share my perspective on these important issues. I would be happy and eager to answer any questions members of the Subcommittee may have.

10 *See* Fair and Independent Experts in Clemency Act, H.R.6234 (introduced December 19, 2021).