Before the House Committee on the Judiciary
Subcommittee on Crime and Fed. Government Surveillance
Hearing on "Examination of Clemency at the Department of Justice"
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Statement of Mark Osler
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Chair and Members of the Subcommittee,

I'm grateful to be before you again to discuss this important topic. I am a former federal prosecutor and currently work as a professor of law at the University of St. Thomas in Minneapolis. Beginning in August of this year, I will take a leave of absence to serve as the Deputy Hennepin County Attorney in my home state of Minnesota, overseeing the criminal division. Though I have a law enforcement background, my interest in clemency is not casual. I moved to Minnesota in 2010 from a tenured position at Baylor in part because St. Thomas would allow me to start a clinic focused on federal clemency. It is the first such clinic in the nation. My writing on clemency has appeared in The New York Times (2016 and 2021), the Washington Post (2014, 2018, 2019, 2020, 2021), the University of Chicago Law Review, the William and Mary Law Review, and many other places (often in collaboration with Rachel Barkow, a professor at NYU). I work in this field of measured mercy because it is one of the few areas where constitutional imperatives are so consistent with my own faith imperatives. I have worked on, reviewed, and supervised hundreds of clemency petitions.

My goal in this hearing is to describe how the core problem in the case of Philip Esformes—a clemency warrant that did not explicitly address the hung counts—is a product of a dysfunctional system for evaluating clemency petitions largely created and overseen by the Department of Justice. This Committee can do little that will directly impact the Esformes case, but Congress does have the power to address the underlying dynamic that created the issue in his case *and* generated an astonishing backlog of nearly 17,000 unresolved clemency petitions.

If President Donald Trump intended to prevent Philip Esformes from being retried on hung jury charges, he could have pardoned him on those charges at the same time he partially commuted Esformes' sentence for the charges of

conviction.[1] President Trump did not do so. His failure to explicitly deal with the hung counts was likely a casualty of the mad rush of clemency considerations at the end of his administration, which is one symptom of the broken clemency evaluation system that has brought disrepute to pardoning and undermines an Executive function the framers of the Constitution saw as essential to the justice system as a whole.

I. President Trump and the Philip Esformes Commutation

A. The Esformes Conviction and Commutation

Philip Esformes was charged by indictment with charges relating to health care fraud, money laundering and illegal kickbacks. During the investigation, the government seized business records which contained documents covered by attorney-client privilege. The government created a screening protocol in which a "taint team" was tasked with removing documents subject to privilege. That team failed in their task, and at least a hundred privileged documents were passed through to the prosecutors.

Based on this misconduct, Esformes moved to dismiss the indictment and to remove the prosecutors involved from the case. A Magistrate Judge initially issued a report and recommendation that concluded there was prosecutorial misconduct which was in bad faith, but recommended that Esformes be denied a dismissal or removal of the prosecutors because once the privileged materials were suppressed there would be no prejudice to Esformes. The District Court judge subsequently held that while there was misconduct, it was not in bad faith, and allowed the government lawyers to proceed with the case. This decision by the District Court and the subsequent conviction were later affirmed in an 11th Circuit opinion written by Judge William Pryor, the former Attorney General of Alabama and former Acting Chair of the United States Sentencing Commission.[2]

At trial, Esformes was convicted of 20 counts, and the jury deadlocked on the remaining six counts they considered.[3] In September of 2019, he was sentenced to 240 months of imprisonment, forfeiture of $38.7 million, about $5.5 million in restitution, and a three-year term of supervised release.

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[1] Modern clemency is nearly always expressed in one of two ways. Commutations of sentence mitigate punishment while leaving the conviction intact. Pardons affect the conviction (or charge) directly.
[2] United States v. Esformes, 60 F. 4th 621 (2023).
[3] It appears that an additional six counts were dismissed by the District Court prior to jury deliberation.

On December 22, 2023, President Donald Trump granted Esformes a partial commutation of his sentence. In a document titled "Executive Grant of Clemency," (often referred to as a "pardon warrant") President Trump commuted the remaining prison sentence while explicitly leaving "intact and in effect" the restitution order and the term of supervised release along with "all other components of the sentence". The pardon warrant was silent as to the hung charges. Subsequently, the Department of Justice signaled a desire to pursue a conviction on those hung charges.

There are four possibilities regarding those hung counts, given that President Trump easily could have dealt with them explicitly through a pardon:

- First, President Trump may not have been made aware of the hung counts at the time he issued the commutation—something his advisors should have told him about.
- Second, he may have not known that hung counts can be retried—something else a good advisor would have described.
- Third, he may have been aware of the hung counts and that they could be retried, but assumed they were covered by the commutation of sentence. If this is true, then the warrant is poorly drafted at best.
- Finally, he may have known about hung counts and assumed the warrant made clear they were unaffected by the commutation. In this scenario, there was never an intent to clear the hung counts, and the warrant is poorly drafted in not making that clear.

Importantly, under any of these scenarios, President Trump was failed by the system in place to advise him on clemency and by the process he elected to use, which often meant conducing little to no investigation into details of cases or asking DOJ to do that for him. A good system would have made him aware of the hung counts and the fact they could be retried and directed him to pardon the hung counts explicitly if that was his intent-- or expressly state he was letting them stand for retrial if that was what he wanted.

Whatever the failure, it was the product of a larger problem that should be rectified: a clemency review and evaluation process that is bureaucratic, inefficient, locked into a conflicted and biased Department of Justice, and the source of a remarkable and historic backlog of cases. One reason presidents opt to bypass the Department at the end of their terms in office is that DOJ is not capable of providing them with the kind of advice and efficiency they want. A better

system would avoid the rush at the end of a term and provide the kind of advice that would have made the debate over the Esformes grant unnecessary.

II. The Broken Clemency Process

Our clemency system has been broken for four decades. Before that, pardons and commutations were issued at regular intervals and in numbers we would find remarkable today.[4] Through most of the 20th Century, it was not unusual to see presidents grant clemency with great frequency: Theodore Roosevelt granted over a thousand, with a dramatically smaller number of federal convictions per year than we see today. Other 20th-century presidents showed the same kind of consistency: typical of the predominant trend, Coolidge granted nearly 1700 in his six years in office, Hoover approved almost 1200 over four years, Eisenhower granted over 1100 (with his fifth of eight years bearing the highest numbers), and Nixon approved over 900. President Ford created a special clemency commission that led to clemency for at least 6,000 Vietnam-era recipients.[5]

Then, something went wrong. President Reagan was a transitional figure—stingier than his predecessors, but not nearly as stingy as the men who followed him. President Reagan received 3,404 petitions for clemency during his two terms in office, and granted 406 of them—about 12%.[6] Reagan looks profligate compared to George H.W. Bush, who granted only 77 (5% of the petitions received), Bill Clinton's 459 out of 7,489 received (6%), and George W. Bush's 200 (2%). Even Barack Obama, who actively solicited petitions, had only a 5% grant rate, far behind that of Reagan. Donald Trump granted 238 petitions, for a 2% grant rate. What went wrong? As is so often true with government, process and bureaucracy.[7]

The current clemency review system developed haphazardly in the 1970s and 1980s. From a relatively simple system in which a petition was reviewed by the pardon attorney and then a recommendation conveyed from the Attorney General to the President, bureaucracy grew and metastasized until the process came to include seven distinct actors, each with their own interests and biases, acting sequentially. Today, a clemency petition will be considered in turn by the

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[4] U.S. Department of Justice, Clemency Statistics, available at https://www.justice.gov/pardon/clemency-statistics.
[5] Mark Osler, *Clemency as the Soul of the Constitution*, 34 Journal of Law & Politics 131, 135-137 (2019).
[6] Id.
[7] For a broader indictment of the DOJ's role in clemency and other areas needing reform, *see* Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Law Reform*, 59 William & Mary Law Review 387 (2017).

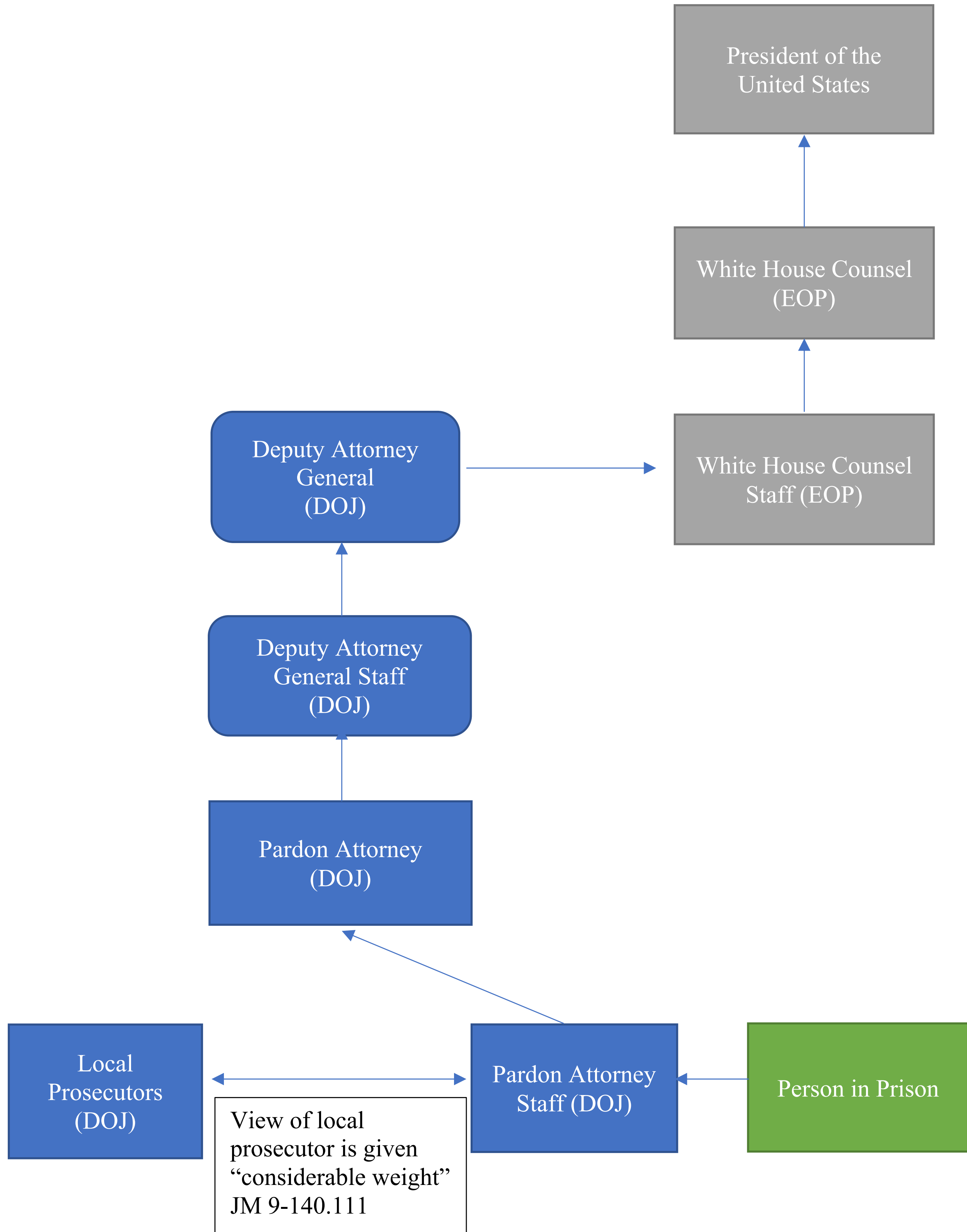
staff of the Pardon Attorney, the Pardon Attorney, the staff of the Deputy Attorney General, the Deputy Attorney General, the staff of the White House Counsel, the White House Counsel, and finally by the President.[8]

The chart on the next page (prepared for the 2022 hearing on this issue by this committee) depicts this awkward process. It could be, of course, that the Biden administration has added new levels of review to those already known because the backlog has not been addressed under his watch.

[8] Mark Osler, *Clementia, Obama, and Deborah Leff*, 28 FED. SENT. REP. 309, 309 (2016).

Path of evaluation for a federal commutation petition

Mark Osler, 2022



Any rational analyst would find that the system described above is dysfunctional. It has failed over and over, under different presidents, even in identifying the easiest cases for clemency such as marijuana cases from states where marijuana is now legal. The problem is not the pardon attorney, as such, but the system as a whole.

No one intentionally created this process in any kind of coherent way; rather, it developed organically over decades as officials delegated parts of the process (primarily, the Attorney General delegating evaluation to the Deputy Attorney General) and decision makers tasked staff members with independent substantive reviews. The problems with the haphazard result nearly leap off the page of the chart above, but I will summarize the major issues below.

First, the process is simply too long, too complex, and too opaque. No state has a system with nearly this many hands involved, and for good reason: It's just bad management. While a thorough review is necessary, these redundant reviews add nothing. You won't find a decision chart like this at a business—at least not at a good one.

Second, the reviews are sequential to one another. The absurd inefficiency of seven reviewers seeing a petition only after a predecessor is done—rather than simultaneously as part of a board—is striking. On top of that, baked into this system is negative decision bias; reviewers know they can get in trouble only for a bad "yes," which incentivizes "no's." It is seven valves, all spring-loaded shut, on the same pipe.

Third, the decision process is upside-down. The specialists with the most knowledge in this area are in the Office of the Pardon Attorney, but they are at the very bottom of the vertical line of decision. At the top we find generalists who usually will lack a depth of knowledge in this field—and they are asked not to generally provide guidance or oversight, but to individually review each petition.

Fourth, two of the key reviewers are generalists who have inherent conflicts. The Deputy Attorney General is the direct supervisor of the United States Attorneys, and essentially overturning the sentences they successfully argued for threatens that relationship. The White House Counsel, in turn, may seek to steer the President away from controversy, and that is achieved by avoiding the risks inherent in granting clemency. Both the DAG and the White House Counsel have other pressing and often episodic duties, and this means that clemency decisions can constantly be pushed to the back of the line of priorities.

Finally, and perhaps most importantly, the central role accorded to the Department of Justice—both in the four levels of review ensconced there and through the policy directive that the views of local prosecutors be solicited and "given considerable weight."[9] It's not hard to see the nature of this conflict of interest: the very people who sought an outcome are being asked to review it.

This flawed process has also led to a pattern of hasty clemency grants in the last days of an administration. Americans often assume that presidents waiting until the end of their final term to issue commutations and pardons is some kind of grand tradition with roots in the early Republic. In fact, this "tradition" began with Bill Clinton—and is likely a product of the rotten process we now employ. Ronald Reagan granted far more petitions in 1982 and 1983 than he did in 1988 and 1989, for example. Jimmy Carter's biggest year for grants was 1978, not 1980 or 1981, Nixon peaked in 1972, and Johnson in 1966—smack in the middle of their time in office.[10]

It's probably not a coincidence that the shift in timing for grants roughly correlates with the shift in the system of evaluation. Facing the prospect of leaving the pardon power unused because good candidates have not been advanced, it would be understandable that an Executive would want to do *something* with the power before leaving office. The story of Bill Clinton wandering through the press section of Air Force One asking "You got anybody you want to pardon?" as his administration wound down[11] may sum up the problem in a nutshell.

Just like Clinton and other immediate successors, Donald Trump's last-minute flurry of clemency decisions is fairly well documented. Philip Esformes was granted a commutation on December 22, 2020, just three days before Christmas, and in the last month of the Trump presidency. This was in the mad rush at the end of the term: Trump granted 16 commutations in the nearly four years before that last month, and 78 within those last 31 days.[12] Within that context, it is easy to understand how full advisement becomes almost impossible.

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[9] United States Department of Justice, Justice Manual, §9-140.111.
[10] U.S. Department of Justice, Clemency Statistics, available at https://www.justice.gov/pardon/clemency-statistics. Note that these statistics are by fiscal year.
[11] Weston Kosova, Backstage at the Finale, NEWSWEEK, Feb. 26, 2001, at 30.
[12] U.S. Department of Justice, Clemency Recipients, available at https://www.justice.gov/pardon/commutations-granted-president-donald-j-trump-2017-2021

III. A Better Plan for Philip Esformes—and 17,000 others

The dispute over the Esformes commutation would not exist if the warrant issued by Donald Trump had been clear and explicitly addressed the hung counts. That would have been much more likely if clemency was granted regularly and with proper advice and counsel, as was true for most of American history. Moreover, it would create hope and fairness for the nearly 17,000 people who have petitions pending, most of whom have waited for years.

I would urge all of you to consider the solution proposed in the H.R. 6234, the Fair and Independent Experts in Clemency Act" or "Fix Clemency Act," introduced last year as H.R. 6234. It would implement a coherent system for analyzing petitions and advising the president on clemency. This bill would create a presidentially-appointed board, working outside the Department of Justice, that would analyze clemency petitions and advise the president directly on outcomes. Specifically, the FIX Clemency Act would get rid of the bureaucratic bloat that has developed within the DOJ and allow for thorough and regular evaluations of clemency—getting rid of the last-minute rush which failed both Philip Esformes and President Trump.

As someone who pursues better clemency systems as a faith imperative, people often remind me of Micah 6:8:

> He has told you, O mortal, what is good,
>   and what does the LORD require of you
> but to do justice and to love kindness
>   and to walk humbly with your God?

Three values are required: justice, mercy, and humility. Each of these was embodied and expressed by the Founding Fathers. Justice was at the center of establishing ourselves as a new nation—to address the injustices of colonial rule. Mercy was placed in the Constitution itself in the form of the pardon power, and promoted by Alexander Hamilton as the Constitution was debated.[13] Humility—perhaps the hardest virtue—was displayed by George Washington, as he stepped away from power and resigned from his commission as Commander in Chief of the Continental Army after the Treaty of Paris was signed.

[13] Federalist 74.

The legal limbo Philip Esfortes finds himself in is the product of the same dysfunction that thousands of people with fewer resources are stymied by as they seek the Constitutionally-mandated pathway to mercy. We must now have the humility to step away from DOJ hegemony and create a functioning machine for mercy within our system of justice that both provides clear guidance to the President and hope to those who petition for freedom.