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TESTIMONY

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The Examination of Clemency at the Department of Justice

Testimony before the U.S. House of Representatives Subcommittee on Crime and Federal Government Surveillance of the Committee on the Judiciary

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STATEMENT OF BRETT TOLMAN

Thomas Jefferson wrote, "The most sacred of the duties of government is to do equal and impartial justice to all its citizens."

The Judiciary Act of 1789 tells us that the mandate of the Department of Justice (DOJ) is to ensure fair and impartial administration of justice for all Americans**.**

Philip Esformes deserves no less.

Yet, DOJ appears determined to deny Mr. Esformes that justice, which is supposed to be the bedrock of the American legal system. DOJ's unflinching decision to retry Mr. Esformes on the open counts betrays its prior representations to the court, nullifies a presidential Grant of Clemency, and what should concern us all, it is nakedly vindictive. That DOJ now relies on the take of a new Chief Executive to countenance who is undermining the acts of his predecessor further infects the whole proceedings with the taint of politics, compounding the danger it poses to the integrity of our federal criminal justice system. This complete disregard for our core Constitutional principles cannot and should not be tolerated.

Before we can fully capture the extent of the problems with DOJ's unreasonably dogged pursuit of Mr. Esformes, we must first acknowledge how rare and precious executive clemency has become at the federal level. In recent decades, presidents have typically granted some form of clemency to no more than a couple hundred individuals over the course of an entire presidential term. President Biden, for his part, outside of his dramatic but largely empty announcement on marijuana convictions, has granted a mere 120 petitions in his first two and a half years in office.

Small in absolute terms, these clemency actions are positively miniscule compared to the volume of petitions for clemency the executive branch receives. As of this month, for example, there are 16,933 pending clemency petitions. Yet, if President Biden continues at his own plodding rate, granting a single digit percentage of these petitions will simply place him alongside his fellow presidents from this century.

It's important to stress that time frame, however, because this atrophied clemency power is a decidedly recent phenomenon. For instance, famous rivals, President Kennedy and President Nixon, both granted 36% of clemency petitions. Other presidents of that era granted anywhere

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from 21% to 31% of clemency petitions. A hundred years ago, the story of a more aggressively asserted clemency power was much the same.

One look at the current clemency process, decades in the making and reinforced by President Biden, and it's not difficult to see why clemency has nearly disappeared. In short, our leaders have forgotten Alexander Hamilton's own observation that "[h]umanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed," and instead allowed clemency to be controlled in large part by DOJ. The very same DOJ so dismissive of clemency and eager to undercut it in Mr. Esformes' case.

Individuals seeking clemency must send their petitions first to DOJ, the same government agency responsible for their convictions and the need for clemency in the first place. It should come as no surprise that few petitions survive the many levels of review and other burdensome requirements that DOJ has put in place. It's a system with a strong structural bias against clemency that practically begs for conflicts of interest.

The result is that the American people are robbed of the meaningful exercise of a core constitutional power. Clemency can, and has, served many purposes. Appropriately used, it can remedy government abuses or overreach, correct legal mistakes, account for rehabilitation or changed circumstances, or even respond to the shift of legal or cultural mores. It is an awesome power and rightfully among the relatively few authorities explicitly enumerated in the U.S. Constitution.

One might think that in a system in which DOJ holds nearly all the cards, it might forgive the occasional hand that it does manage to lose. Perhaps looking with magnanimity upon those successful clemency petitions or at least adopting enough humility to recognize that any case capable of beating this system likely must be truly meritorious indeed. Unfortunately, the facts of Mr. Esformes' saga reveal the opposite: a DOJ that has lost sight of its founding mission and is willing to take any steps and push past legal and ethical boundaries to get what it wants.

In 2016, after being indicted, arrested, detained in jail, and having every asset he owned seized by the government, Philip Esformes was tried by a jury which found him guilty of 20 counts. Prior to the jury's verdict, the district court judge directed a verdict of acquittal on 6 other counts, ruling that the DOJ's evidence on those counts was insufficient as a matter of law. The jury did not reach a decision on an additional 6 counts, including the top count of the indictment—healthcare fraud conspiracy.

Then, at Mr. Esformes' 2019 sentencing, even though he was acquitted of the two counts of health care fraud, and the jury could not reach a verdict as the healthcare fraud conspiracy charge, the judge sentenced Mr. Esformes as if he had been convicted of healthcare fraud.

On the 20 counts of conviction as found by the jury, Mr. Esformes was facing 5 years in prison, but, at DOJ's insistence, the judge considered the acquitted conduct and the un-adjudicated healthcare fraud conspiracy charge and increased Mr. Esformes' sentence by 15 years, imposing

a 20-year sentence. The judge also ordered Mr. Esformes to forfeit in excess of $38,000,000 and pay $5.5 million in restitution.

Discussion of a possible retrial on the 6 undecided counts first occurred on November 21, 2019. After the DOJ suggested that a retrial of the 6 un-adjudicated counts was an option, the judge opined that such a retrial was pointless—precisely because the conduct charged in the undecided counts was the basis for Mr. Esformes' sentence. The judge said: "I think I announced at the time of sentencing that, in imposing that sentence, I [] consider[ed] [the healthcare fraud conspiracy conduct and other 5 undecided counts]…so I don't know what more [DOJ is] going to get out of the case if you try those additional counts."

In response to the judge's observation, the DOJ committed that if Mr. Esformes' convictions were affirmed, the DOJ would dismiss the 6 open counts.

Indeed, the lead DOJ prosecutor stated:

> "Certainly, Your Honor, if the case comes back on appeal, we would ask the [open] counts to run with the appeal so the whole thing could be retried.
>
> "We have entered into agreements to dismiss [open] counts [in other cases] if the defendant's appeal was dismissed, and we would agree to do so here."

Then, while Mr. Esformes' appeal was pending, former U.S. Attorneys General Edwin Meese and Michael B. Mukasey, former U.S. Deputy Attorney General Larry D. Thompson, and attorney Gary Apfel, with approval from the U.S. Attorney General William Barr, presented President Trump with a detailed Request for Clemency. The Request expressed the former officials' "deep concern for the injustice that ha[d] transpired in [Mr. Esformes'] case," noting prosecution misconduct that had occurred during the case. The Request stated that commutation of Mr. Esformes' sentence would be "the most humane and expedient resolution to remedy this injustice" and the "harmful error [that] infected every phase of [the] case." Significantly, the former DOJ officials also indicated that "Mr. Esformes has already served ample punishment [nearly five years] for what he actually did."

Thereafter, in an *amicus* brief filed in the United States Court of Appeals for the Eleventh Circuit, 9 former high-ranking DOJ Officials, including John D. Ashcroft, Louis J. Freeh, Alberto R. Gonzales, Edwin Meese III, Michael B. Mukasey, David W. Ogden, Kenneth W. Starr, Larry D. Thompson, and Seth P. Waxman, argued that Mr. Esformes' case should be dismissed in its entirety because "[t]he government eviscerated [Esformes'] attorney/client privilege and work-product protection" and "[t]hese pervasive privilege violations have irreparably tainted the government's case against the defendant." They concluded by declaring "dismissal is the only remedy that can fix these pervasive violations," and "restore[] [Mr. Esformes] to the circumstances that existed before the government's pervasive privilege violations."

Ultimately, on December 22, 2020, after spending almost 5 years behind bars, President Trump commuted Mr. Esformes' term of imprisonment and directed Mr. Esformes' immediate release from prison. The clemency warrant left in place Mr. Esformes obligation to serve three years of supervised release, forfeit $38 million, and pay $5.5 million in restitution.

The DOJ's response to the Presidential commutation was as swift as it was punitive. A few months after the clemency warrant was issued and after President Trump left office, DOJ announced its decision to retry Mr. Esformes on the open counts without even bothering to wait for the Eleventh Circuit's decision on Mr. Esformes' appeal.

During a court conference on April 26, 2021, the judge asked the prosecutors whether it was "the [DOJ]'s position that because of the commutation of [Mr. Esformes'] sentence, that if [Mr. Esformes] were convicted on [the open counts], that he c[ould] still get prison time because his sentence was commuted."

In responding, DOJ left no doubt of its new position: "[W]e do intend to proceed on those [6 open counts] and we see those as separate entirely from the counts that are subject to the appeal and the commutation," in fact, [we] "believe that if convicted on the [6 open counts], [Mr. Esformes] can be sentenced[] again." This position completely disregarded the language and intent of the clemency Warrant and violated DOJ's previous promise not to pursue a retrial if Mr. Esformes' conviction was affirmed, which ultimately was on January 6, 2023.

It is critically important to note that the clemency request was based, in large part, on the prosecutorial misconduct that had occurred. It also is notable that the DOJ affirmatively acknowledged that misconduct occurred. In response to questioning from the Chief Judge during oral argument in the Eleventh Circuit, the DOJ agreed that "reckless" was an apt description for the prosecution team's conduct. The DOJ further stated that "[we] take the mistakes that [were] made very seriously, and [do] not challenge the judge's descriptions [of their conduct as reckless]."

DOJ also admitted that, in response to the misconduct in this case, it "has adopted and implemented new protocols regarding filter searches[.]" In this regard, the DOJ completely overhauled its "taint" team search and review protocol because of the misconduct perpetrated against Mr. Esformes. In late 2018, the Criminal Division's Fraud Section Strategy, Policy, and Training ("STP") Unit began staffing a new "privilege team" dedicated to identifying privileged materials and overseeing negotiations with defense counsel regarding privilege designations. By May 2020, DOJ had created a Special Matters Unit to oversee DOJ "taint" teams review of privileged material.

The government is intent on retrying Mr. Esformes on counts based on conduct that formed the basis for his 20-year sentence, which was commuted by President Trump. There are multiple reasons why this would be contrary to law and would amount to a miscarriage of justice.

As we are all aware, the nature of clemency is inherently one of executive "grace" or "mercy." Executive clemency allows for discretion in a way that courtroom procedure cannot. It has been said that "when a President considers clemency, he acts as the distilled conscience of the citizenry."

Another fundamental and equally compelling concept of our criminal justice system is the Double Jeopardy Clause of the U.S. Constitution which provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

Any retrial of Philip Esformes is barred by the Presidential Commutation and the Double Jeopardy Clause. Mr. Esformes has already been put on trial and punished on the 6 open counts. Any argument to the contrary flies in the face of both the law and the facts. Indeed, any further prosecution of Mr. Esformes makes a mockery of the president's grant of clemency, and begs the question: what is the real reason for the threat of further prosecution?

Any further prosecution is also barred by the Fifth Amendment's prohibition on the vindictive prosecution of anyone. There is no dispute that the DOJ agreed to dismiss the 6 open counts if Mr. Esformes' appeal was denied. Then, President Trump commuted Mr. Esformes' sentence based on a clemency request that highlighted that the prosecution was tainted by misconduct and taking into account Mr. Esformes' ill health stemming from his confinement and his obvious rehabilitation.

After the commutation, DOJ reversed course. It now seeks to punish Mr. Esformes again for the same conduct on which his commuted sentence was based. Reflective of the abruptness of the DOJ's reversal of course, the prosecution team didn't even bother to wait for Mr. Esformes' appeal to be decided—despite its promise to not seek any further trial if Mr. Esformes appeal was denied—exposing their true motive. To exact revenge for a President disagreeing with DOJ's position.

I am aware of no case in which the DOJ has sought to retry a defendant on open counts premised on the same conduct that formed the basis of the defendant's sentence after a president ordered commutation of that sentence. Further, given the DOJ's prior commitment, the attempted retrial is plainly vindictive and a violation of due process—an act of retaliation for Mr. Esformes having successfully exercised his right to seek clemency.

It would be troubling enough if this treatment of Mr. Esformes was effectively the inevitable cost of going up against DOJ, which served as an equally unforgiving hurdle to all individuals attempting to piece their lives back together after involvement with the criminal justice system. Recent events, however, clearly show that for the right defendant—the son of the current president, for example—DOJ is willing to allow a person to move on with their lives. The legitimacy of the entire criminal justice system suffers in the face of such disparate treatment where a second chance appears granted based more on who a person is rather than what they have done.

This Committee is right to address the egregious missteps of DOJ and its disregard for executive clemency in Mr. Esformes' case. But it should not stop there. All too often, DOJ does not need to resort to such brazen steps to squelch clemency and harm deserving individuals and the public. It can simply end such hope and an individual's chance for a better future as a productive member of society by leveraging process as a cudgel out of the public eye. Less dramatic and resource intensive, it is an attack on clemency easily achieved at scale.

The pardon power is a presidential prerogative, and it may be too much to hope that this President will be the one to reinvigorate it. Yet, Congress can apply pressure in the defense of Mr. Esformes' rights and on behalf of the many others who find themselves unjustly in DOJ's crosshairs. Clemency can and should represent a last line of defense against such injustices. I commend this Committee for doing its part ensuring that it remains one.

ABOUT THE AUTHOR

Brett Tolman was a leading figure in the drafting and passage of the First Step Act, one of the most sweeping reforms of the federal criminal justice system in decades. Tolman continues to advise the White House and many members of Congress on such issues. He is an attorney and founder of the Tolman Group focusing on public policy and government reform. Previously, he was a shareholder at Ray Quinney and Nebeker and served as chair of the firm's White Collar, Corporate Compliance, and Government Investigations section. For the past 10 years, Tolman has defended corporations and executives in all manner of state and federal criminal and regulatory actions across the country.

Prior to entering private practice, Tolman was appointed by President George Bush in 2006 as the United States Attorney for the District of Utah and held that office for nearly 4 years from 2006-2009. As U.S. Attorney, he was responsible for cutting-edge cases addressing such issues as international adoption fraud, mortgage fraud, international marriage fraud, sex and human trafficking, terrorism, and breaches of national security. In 2009 he handled the prosecution of Brian David Mitchell, the kidnapper of Elizabeth Smart. From 2008-2009 he was selected by Attorney General Michael Mukasey to serve as special advisor to the attorney general on national and international policy issues affecting United States attorneys and the Department of Justice. Prior to his appointment as U.S. Attorney, Tolman served as chief counsel for crime and terrorism to the United States Senate Judiciary Committee.

During his career, Tolman has testified multiple times in the United States Congress and assisted in drafting and passing many pieces of legislation affecting state and federal criminal justice systems. These include the First Step Act of 2018, the Corrections Act, the Sentencing Reform Act, the Justice for All Act of 2004, Protection of Lawful Commerce in Arms Act (2005), the Violence Against Women and Department of Justice Reauthorization Act of 2005, the USA Patriot Improvement and Reauthorization Act of 2005, and the Adam Walsh Protection and Safety Act (2006). He is a frequent contributor on Fox News and *No Spin News with Bill O'Reilly*.

About Right On Crime

Right On Crime is a national initiative of the Texas Public Policy Foundation supporting conservative solutions for reducing crime, restoring victims, reforming offenders, and lowering taxpayer costs.