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Presidential Clemency and Opportunities for Reform
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Mr. Chairman and Members of the Subcommittee: Thank you for inviting me to testify about presidential clemency and opportunities for reform. It is an honor to appear before you.

In my remarks today, I would like to start by explaining why clemency is a critical safety valve in the federal system. I will then turn to the deficiencies with the way federal clemency currently is administered. The first set of problems revolve around having the Department of Justice play a gatekeeping role in the formal process for clemency review. The second set of issues are associated with the way in which presidents can bypass any formal process and use clemency as a means to reward political supporters and cronies. Finally, I will suggest possible reforms.

Some problems are easier to fix than others. The issues of DOJ bias, a backlog of cases, and chronically low grant rates are problems that can be solved through institutional design changes and legislative enactments that are within Congress's power and that do not violate the president's authority under the Constitution.

It is harder to address the problem of presidents giving grants to their political allies and benefactors. Congress cannot tell a president how to exercise the clemency power. At the end of the day, particular grants are questions of presidential judgment and discretion. The Framers assumed we would elect leaders with the wisdom and values to use this great power wisely and, if and when they did not, that we would hold them accountable for it at the ballot box and in the judgment of history.

I. Why Clemency is Important

The Pardon Clause of the Constitution vests the President with the "Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[1] The most common clemency grants given by presidents have been pardons and commutations.[2] A pardon removes the legal consequences of a conviction,

[1] U.S. CONST. art. II, § 2, cl. 1.

[2] *Clemency Statistic*s, U.S. DEP'T OF JUSTICE, https://www.justice.gov/pardon/clemency-statistics (last visited Mar. 1, 2020). In addition to pardons and commutations, presidents can grant reprieves (which delay the execution of a punishment), amnesties (which are essentially pardons granted to a class of

and it may be granted either before or after individuals begin their sentences. It can even be granted before an individual is convicted or even tried; it is permissible anytime after a crime has occurred. Typically, however, pardons have been granted some time after a sentence has been served in full and the individual has a demonstrable record of law-abiding behavior.[3] Pardons "restore[] those civil and political rights that were forfeited by reason of the conviction, most of which are a matter of state law, and remove[] statutory disabilities imposed by reason of having committed the offense."[4] A commutation, in contrast, does not erase all the consequences of a conviction and instead is a reduction in an individual's sentence.[5]

Commutations and pardons are both essential checks on federal government overreach and critical mechanisms to improve public safety and curb disproportionate punishments.

Commutations are critical because Congress abolished parole in 1984,[6] thus eliminating the major avenue that individuals previously pursued to seek reductions in their sentences. At the time it was abolished, several witnesses told Congress that clemency would need to play a renewed role in correcting excessive sentences.[7] That need has grown even more acute because of the many mandatory minimum sentences Congress has passed, which have created numerous cases of disproportionate sentences being imposed without any opportunity for a judicial check. Mandatory minimums have been particularly prevalent for drug offenses, where the trigger for the minimum is based on the drug's type and quantity. But quantity is a poor proxy for culpability because of the way conspiracy law operates; everyone in a conspiracy is held responsible for all the reasonably foreseeable quantities, whether they are the kingpin or a low-level courier. Congress set the quantities with the kingpins in mind, but most of the people actually sentenced under mandatory minimum laws are low-level participants. It is hardly surprising that numerous commutations granted by recent presidents have come in cases involving mandatory minimum sentences.[8]

Congress recently acknowledged that many of its mandatory minimums went too far in the First Step Act. But it failed to make most of its changes retroactive, thus leaving clemency as the only avenue of relief for the thousands of people still serving sentences under old mandatory minimums that would not be issued today.

Pardons are likewise essential because there is no other mechanism at the federal level for an individual to seek relief from collateral consequences of convictions or to signify their rehabilitation. In the absence of a pardon, individuals face many collateral

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offenders instead of individually), and the remission of fines and forfeitures. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 810-811 (2015).

[3] Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 576 (1991).

[4] Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 290 (2010).

[5] Biddle v. Perovich, 274 U.S. 480, 486–87 (1927).

[6] Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. § 3551).

[7] Barkow, *supra* note 2, at 816 n.81.

[8] *Id*. at 837 n.208 (listing examples of commutations in mandatory minimum cases by Presidents Clinton, George W. Bush, and Obama).

consequences of convictions, even long after they have completed their sentence and demonstrated law-abiding behavior. Federal convictions preclude individuals from a host of jobs and are grounds for denying or revoking occupational licenses.[9] Federal convictions also make individuals ineligible for public housing, welfare assistance, and food stamps, all of which are often critical transitional tools for individuals trying to reenter society after terms of incarceration.[10] A pardon can eliminate these barriers, and, in the process, promote public safety by easing the path to successful reentry. Pardons can also restore voting rights and the ability of an individual to serve on a jury or in the military or to possess firearms. There is no other mechanism available aside from a pardon to mitigate these collateral consequences of convictions.

II. Flaws in the Current Administration of Clemency

Although commutations and pardons are critically important mechanisms for ensuring proportionate sentences and easing the burdens of collateral consequences, they are exceedingly difficult to obtain under the current application process. The current formal clemency process involves seven stages of review, the first four of which are all in the Department of Justice – the same agency that brought the prosecution in the first instance. DOJ's main mission is law enforcement, so asking that agency to flip perspectives and think of sentence correction and redemption is no small request. Effectively, each clemency application becomes "a potential challenge to the law enforcement policies underlying the conviction."[11] It is all the more difficult when the agency is reviewing its own prior judgments and the review is overseen by prosecutors.

A person seeking a commutation or pardon files an application with the Office of the Pardon Attorney. A line attorney in that office seeks out the view of the prosecutor's office that charged the case and those views are given "considerable weight."[12] The odds are already stacked against a petitioner because most of those prosecutors are disinclined to see the case any differently than they did the first time around. If the line attorney in the Office of the Pardon Attorney thinks the petition should be denied, it is unlikely the petition will move any further. If the line attorney is inclined toward a grant, that just means the petition moves on to the Pardon Attorney.[13] If the application makes it through those first two stages, it moves on to the Office of the Deputy Attorney General (DAG).

The DAG's main line of work is supervising federal prosecutors, so the DAG is not exactly predisposed to positive recommendations for clemency. A lawyer within the DAG's office will first review the petition and then make a recommendation to the DAG. In addition to being professionally disinclined to support clemency because that effectively means second guessing the same prosecutors the DAG supervises, the DAG

[9] Barkow, *supra* note 2, at 866.
[10] *Id*. at 866-867.
[11] Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1194 (2010).
[12] *Standards for Consideration of Clemency Petitioners*, U.S. DEP'T OF JUSTICE § 9-140.111, https://www.justice.gov/pardon/about-office-0 (last visited Mar. 1, 2020).
[13] Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 431 (2017).

also has many other obligations, so clemency is unlikely to be a high priority. We know that the DAG frequently recommends deny even when the Pardon Attorney would grant a clemency petition.[14]

It is only after getting through the DOJ gauntlet that a petition would make its way to the White House, where it then faces two more layers of review. First, there is consideration by one of the lawyers in the White House Counsel's Office and then the White House Counsel himself. Only after all that would a petition make its way to the president's desk for the president's final decision. The entire process often takes years.[15]

This process is biased against grants not only because of its many possible veto points, but also because of DOJ's involvement and, particularly in the case of commutations, the substantive criteria it uses. DOJ regulations state that a commutation "is an extraordinary remedy that is rarely granted."[16] This standard might have made sense when it was first adopted, because it came about when parole was still an option for those seeking sentencing reductions. But DOJ never reconsidered this standard even after parole was abolished.[17]

DOJ's gatekeeping process – which effectively prevents almost all applications from ever reaching the president – is institutionally biased in favor of maintaining the judgments of prosecutors who originally pursued the cases it is reviewing. It is hard for anyone to second-guess their colleagues, particularly when those colleagues are pursuing the same institutional mission as you are.[18] It is harder still when you ask those very colleagues to weigh in on the merits, give those assessments deference, and apply a standard that views a grant as "extraordinary" and something that should be "rarely" given. Then you add in the fact that most Pardon Attorneys and their supervisors at DOJ have "overwhelmingly" been former prosecutors[19] and are thus part of a shared culture where they are desensitized to the long sentences federal prosecutors hand out on a daily basis.[20] This is not a review process well positioned to spot problems that may be commonplace or with the kind of objectivity needed to take a fresh look at sentences.

DOJ lawyers are also poorly placed to consider the ways in which people change over time and might be very different than when they initially committed their crimes. Prosecutors do not stay abreast of the progress people make while incarcerated or the efforts they make toward rehabilitation. Prosecutors thus have a poor perspective on

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[14] *See* Letter from Deborah Leff, Pardon Attorney, U.S. Dep't of Justice, to Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep't of Justice (Jan. 15, 2016), *reprinted in* 28 FED. SENT'G REP. 312 (2016).
[15] Barkow & Osler, *supra* note 13, at 431.
[16] *Standards for Consideration of Clemency Petitioners*, *supra* note 12, § 9-140.113.
[17] The pardon criteria are less biased against grants, though they do require waiting periods before an individual can be considered. Individuals must wait at least five years from their date of release to file. DOJ will consider an individual's post-conviction conduct, the seriousness of the offense and how recently it occurred, and the applicant's acceptance of responsibility and remorse. *Id.* § 9-140.112. A legal disability that results from the conviction "can provide persuasive grounds for recommending a pardon." *Id.*
[18] Barkow & Osler, *supra* note 13, at 398-400.
[19] Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1165 (2010); Love, *supra* note 11, at 1194 n.105.
[20] Barkow, *supra* note 2, at 825.

requests for pardons because they often cannot get past the facts of the original case. The view inside DOJ, according to a lawyer who worked in the Pardon Office for a decade, is that pardon attorneys should "defend the department's prosecutorial prerogatives" and that "the institution of a genuinely humane clemency policy would be considered an insult to the good work of line prosecutors."[21] In light of this view, there is a "strong presumption" at DOJ that "favorable recommendations should be kept to an absolute minimum."[22]

One need look no further than the output of DOJ's process to see the bias at play. The Pardon Attorney has received almost 1,197 pardon petitions during President Trump's time in office and only 18 have been granted. When you add the backlog of applications that existed when he took office, there are 2,445 petitions for pardons pending. The commutation statistics are even worse. There have been 6,551 petitions for commutations filed during the Trump Administration, and only 6 have been granted. There are a whopping 11,510 commutation petitions pending when you add the enormous number left over from the Obama Administration.[23] The story since President Trump took office is thus an enormous backlog of cases (almost 14,000) that has barely budged and very few grants of petitions received (an overall grant rate of 24 out of 7,748 petitions received, or .3%).

While these numbers are exceptionally low, recent previous presidents have also had low grant rates compared to most of the nation's history. President Obama granted 5% of the petitions he received, President George W. Bush granted 2%, President Clinton granted 6%, President George H.W. Bush granted 5%, and President Reagan granted 12%. During the administrations of Bill Clinton and George W. Bush, the Department received more than 14,000 petitions for commutations but recommended a mere 13 grants to the White House.[24] This contrasts with President Carter's grant rate of 21%, President Ford's rate of 27%, and President Nixon's rate of 36%.[25] These latter rates are more in accord with most of the historical practice. Between 1892 and 1930, 27% of the applications received some grant of clemency.[26]

Given the paucity of positive grant recommendations, it is not that surprising that some presidents might be tempted to look on their own for what they view as suitable cases for clemency. A former Pardon Attorney, Margaret Colgate Love, noted that "the Justice Department's reluctance to recommend cases favorably for clemency . . . was, at least in part, responsible for the extraordinary breakdown of the pardon process at the end of the Clinton administration."[27] George W. Bush also complained that he was not being

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[21] Samuel T. Morison, *A No-Pardon Justice Department*, L.A. TIMES (Nov. 6, 2010), https://www.latimes.com/archives/la-xpm-2010-nov-06-la-oew-morison-pardon-20101106-story.html.
[22] *Id.*
[23] All of these statistics are taken from the DOJ's website. *Clemency Statistics*, *supra* note 2.
[24] George Lardner, Jr., *No Country for Second Chances*, N.Y. TIMES A27 (Nov. 24, 2010) (quoting Samuel Morison), https://www.nytimes.com/2010/11/24/opinion/24lardner.html.
[25] Barkow, *supra* note 2, at 816-817.
[26] W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 97-99 (1941).
[27] *Presidential Pardon Power: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 25 (2001) (statement of Margaret Colgate Love).

provided grant recommendations when he sought them. His White House counsel noted "[i]t became very frustrating, because we repeatedly asked the [pardon] office for more favorable recommendations for the president to consider, [b]ut all we got were more recommendations for denials."[28] President Obama had to create a designated initiative with specific criteria to spark more positive recommendations from the Department, and even that fell short of his goals because it was administered by DOJ.[29] While it was laudable that President Obama commuted more than 1,700 sentences during his time in office, there were also thousands left behind. A report by the U.S. Sentencing Commission concluded that only 3.4% of the people who met President Obama's stated criteria received a clemency grant.[30]

The case of Alice Marie Johnson illustrates the flaws with keeping DOJ as a gatekeeper. Johnson was a first-time offender who received a life sentence for her role in a drug trafficking conspiracy. She was a model prisoner who helped others and accepted full responsibility for her role in the drug conspiracy. After serving nearly two decades, she asked the Obama Administration for clemency, but she was denied without the application ever reaching President Obama's desk because DOJ recommended that her petition be denied.[31] She came to President Trump's attention not because the DOJ had a change of heart, but because her case got the attention of Kim Kardashian, who then made a personal plea to the president.

A process that relies on cases that happen to catch a president's attention is likely to be one that results in grants disproportionately to the president's friends and supporters. That has certainly been the case during this administration, with President Trump granting clemency to the politically connected (e.g., Joe Arpaio, Dinesh D'Souza, Scooter Libby, Rod Blagojevich, Bernard Kerik), high-profile individuals who have gone out of their way to sing his praises (e.g., Conrad Black, author of Donald J. Trump: A President Like No Other; Angela Stanton); and cases profiled on Fox (e.g., Kristian Saucier, Eddie Galagher). The Trump process has been described as "an ad hoc scramble that bypassed the formal procedures used by past presidents and was driven instead by friendship, fame, personal empathy and a shared sense of persecution."[32]

While the proportion of clemency grants given to those with connections is particularly lopsided in the Trump administration, the pardon process has always tilted toward those with influence. A 2011 study by ProPublica found that a person seeking a

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[28] Dafna Linzer & Jennifer LaFleur, *ProPublica Review of Pardons in Past Decade Shows Process Heavily Favored Whites*, WASH. POST (Dec. 3, 2011), https://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElnVQO_story.html.

[29] Barkow & Osler, *supra* note 13, at 425-430.

[30] U.S. SENTENCING COMM'N, *An Analysis of the Implementation of the 2014 Clemency Initiative* 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf.

[31] Jeremy Diamond & Kaitlan Collins, *Trump Commutes Sentence of Alice Marie Johnson*, CNN (June 6, 2018), https://www.cnn.com/2018/06/06/politics/alice-marie-johnson-commuted-sentence/index.html.

[32] Peter Baker et al., *The 11 Criminals Granted Clemency by President Trump Had One Thing in Common: Connections*, N.Y. TIMES (Feb. 19, 2020), https://www.nytimes.com/2020/02/19/us/politics/trump-pardons.html.

pardon who had the backing of a member of Congress was three times as likely to get one as someone without that support.[33]

These, then, are the two major flaws with how clemency is administered today: (1) the Department of Justice cannot objectively vet the applications for clemency because it is overwhelmingly biased in favor of recommending deny, and the result is that too many cases never get relief; and (2) some presidents, including and especially the current one, have decided to use an ad hoc process (if there is any process at all) to identify their own cases of interest, thus using clemency to favor cronies and allies.

III. Possible Reforms

In the words of the Supreme Court, "[t]o the executive alone is intrusted [sic] the power of pardon; and it is granted without limit."[34] The Supreme Court has made clear that "[t]his power of the President is not subject to legislative control."[35] "[T]he President may exercise his discretion under the Reprieves and Pardons Clause for whatever reason he deems appropriate."[36] The power can be used on any federal criminal offense.[37]

Although Congress cannot directly regulate the clemency power of the president, it does possess the authority to create substitute mechanisms that perform as well or better than clemency when it comes to checking excessive sentences and eliminating the negative consequences of convictions that hinder reentry.

A. Legislative Alternatives to Clemency

The most significant problem with clemency is that it is not being used enough given the need. Thankfully, there are other options for correcting the problems of excessive sentences and the negative consequences and stigma of convictions aside from commutations and pardons if Congress were to provide for them. I will first discuss those measures that Congress can enact to address the dearth of commutations, and then I will turn to the options available to correct for the low level of pardons.

1. Reducing the Need for Commutations

Parole and commutations serve the same function of providing a mechanism to reduce someone's sentence. The two have, in fact, served as substitutes for each other. Presidents granted commutations relatively frequently for most of the country's history until parole came on the scene in the early twentieth century and "essentially replaced

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[33] Linzer & LaFleur, *supra* note 28.
[34] United States v. Klein, 80 U.S. 128, 147 (1871).
[35] *See Ex parte* Garland, 71 U.S. 333, 380 (1866)
[36] Hoffa v. Saxbe, 378 F. Supp. 1221, 1225 (D.D.C. 1974).
[37] *Garland*, 71 U.S. at 380. This includes charges of contempt of court. *Ex parte* Grossman, 267 U.S. 87, 115 (1925). The president can also attach conditions on a clemency grant as long as they do not "otherwise offend the Constitution." Schick v. Reed, 419 U.S. 256, 266 (1974). *See generally* Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665 (2001).

clemency as the primary mechanism for reducing sentences."[38] Thousands of people were released from federal prison each year through parole. But no one sentenced after November 1, 1987, is eligible for parole, which leaves commutations to fill the gap.[39] The thousands of petitions waiting in the backlog at DOJ are a sign that commutations are not up to the task.

One solution is thus for Congress to bring back parole and or create other second look mechanism for sentences. People and circumstances change over time – particularly over the long periods of incarceration that are so often handed down in the federal system. Having a second look allows a decision maker to account for the ways in which people change, particularly as they age out of criminal behaviors. It also provides a mechanism for reflecting changes in attitudes to particular kinds of crime. For example, marijuana is now legal in many states, yet individuals continue to serve decades in federal prison for selling marijuana. Parole eligibility or the opportunity to appear before a judge for resentencing after a certain length of time can help fill the vacuum created by the lack of presidential commutations.

Another means to address excessive sentences is to make sure they do not occur in the first place. Giving judges discretion to tailor sentences to the facts before them is a critical safety valve against prosecutorial overreach. Mandatory minimums tie judges' hands and create the bulk of the excessive sentences we see in the federal system. Eliminating mandatory minimums would go a long way in addressing the huge need for commutations in the federal system.

Additionally, when Congress does recognize that its sentencing laws have gone too far, it is crucial that it provide for retroactive relief to those still living under the prior regime. Congress has been reluctant to make its sentencing changes retroactive, but the experience of retroactive sentencing adjustments shows this can be done effectively and without a hit to public safety. Congress gave the Sentencing Commission the authority to determine when its changes to the Sentencing Guidelines should be retroactive. The Commission made reductions in crack sentences eligible for retroactive adjustment in 2007 and 2011, and when it studied what happened to those who served their full sentences and those who received retroactive reductions, it found they did not have different recidivism rates.[40] Congress should similarly provide for retroactive adjustments when statutes lower sentences. Judges have shown they are able to make these decisions consistent with public safety, and having this mechanism in place would ease some of the burden on commutations.

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[38] Barkow, *supra* note 2, at 814.

[39] *Id*. at 816 and n.81 (quoting witnesses who warned Congress of the need for commutations to fill the gap if parole were abolished).

[40] U.S. SENTENCING COMM'N, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf; U.S. SENTENCING COMM'N, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf.

2. Reducing the Need for Pardons

Pardons are particularly important at the federal level because, unlike many states, Congress has not provided for alternative mechanisms to expunge or seal criminal records or to allow people to obtain some kind of certificate of good standing that could remove collateral consequences of conviction and make it easier to obtain employment. Congress could thus address the shamefully low rate of pardons, particularly for individuals who need it most, by providing substitute channels to get the same relief. There should be federal legislation that allows individuals to expunge federal convictions and restore their rights without having to seek a presidential pardon. Providing an alternative avenue could also help address the glaring racial disparities in the dispensing of pardons. A 2011 study found that white applicants seeking a pardon were more than four times as likely to get it granted than people of color.[41]

As with the need for commutations, the other major solution to this issue is to reduce the need for such relief in the first place. Some of the collateral consequences stem from state law, and the only way to address those sanctions is to remove the federal conviction from an individual's record. But many of the most significant collateral sanctions are federal, and it is long past time for Congress to take another look at some of these laws.[42] Restrictions on access to public housing and federal assistance benefits for those with felony convictions undermine the goal of public safety because of how difficult it is for people to transition from incarceration to lawful employment. These are often crucial bridge services and benefits that allow people to make that leap. Similarly, reducing states' highway funds if they do not suspend drivers' licenses for people with drug offenses ends up hampering people's ability to drive to jobs, again in opposition to public safety goals. Eliminating these collateral consequences would not only stem the need for many pardons, but it would improve public safety more generally by allowing more people to successfully transition to law-abiding lives after serving their sentences.

B. Congressional Support of Presidential Clemency

All of the mechanisms I have suggested would greatly improve federal sentencing and punishment. But even if they were adopted, there would still be cases that call out for mercy. Laws will always be imperfect, and clemency is an important safety valve for when the law falls short. Moreover, to the extent the options I am suggesting are not adopted – and it is always difficult to get criminal justice reform through Congress – clemency will remain the only mechanism available to correct excessively long sentences and to pave the way for someone to clear a record and reenter society without the burdens and collateral consequences of a conviction. Finally, clemency will remain part of the

[41] Linzer & LaFleur, *supra* note 28.
[42] RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 88-97 (2019).

Framers' vision of the separation of powers[43] and a means by which the president exercises oversight over enforcement decisions that go too far.[44]

Thus, even if Congress passes other needed changes, Congress should still provide the necessary resources to enable the president to use the clemency power most effectively.

While Congress cannot dictate how a president should exercise the constitutional power of clemency, it can provide funding for needed institutional changes. For example, after the Civil War, as federal criminal law expanded and more clemency petitions were filed, Congress approved funding for a pardon clerk to assist the Attorney General, which eventually became the Office of the Pardon Attorney.[45] Giving authority to the AG to review clemency applications was unremarkable initially, because the AG was largely removed from supervising U.S. Attorneys for the first 100 years.[46] But we are a far cry from that model today, and leaving the clemency authority in the Department puts prosecutors in charge of reviewing their own decisions.

Several recent presidents have expressed frustration with running clemency out of the Department of Justice, and many of the current candidates running for president have noted that they want to switch to a model that relies on a presidential advisory board that exists outside of DOJ.[47] President Trump appears to be transitioning to this model as well.[48]

Congress can and should provide funding to support this needed institutional change so that this advisory board model has an operating budget that allows it to do its job most effectively.[49] By providing funding to pay an advisory board and staff to process petitions, Congress can help address the huge backlog of cases waiting to be reviewed. In the absence of funding, presidents must rely on volunteers or shift funds from elsewhere in the Executive Office of the White House budget. A designated funding stream for a clemency board would signal the broad support this idea has and help make

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[43] Barkow, *supra* note 2, at 831-832.
[44] *Id.* at 840; *Ex parte* Grossman, 267 U.S. 87, 120 (1925) ("Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.").
[45] Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful,* 27 FORDHAM URB. L.J. 1483, 1489 n.26 (2000).
[46] Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 287 (2013)
[47] The Marshall Project, *How Would You Use Your Clemency Powers as President?*, https://www.themarshallproject.org/2019/10/10/2020-the-democrats-on-criminal-justice#primer-clemency (last accessed Mar. 1, 2020).
[48] Toluse Olorunnipa et al., *White House Assembles Team of Advisors To Guide Clemency Process as Trump Considers More Pardons*, WASH. POST (Feb. 19, 2020), https://www.washingtonpost.com/politics/white-house-assembles-team-of-advisers-to-guide-clemency-process-as-trump-considers-more-pardons/2020/02/19/752d04d2-532e-11ea-929a-64efa7482a77_story.html.
[49] For more details on this model, see Barkow & Osler, *supra* note 13, at 461-463; *see also* Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 19-25 (2015).

this model successful by attracting individuals who can devote the necessary time to process these applications carefully. To be sure, Congress cannot require a president to use such a board. But by creating a budget for it, it makes it more likely that it will be consulted.

While Congress can provide institutional support to increase the likelihood that a president can get the advice and information necessary to make good decisions, it cannot control what those decisions ultimately are. Presidential judgment is not something that Congress can control or influence. If a president exercises the clemency power to favor political allies and cronies, Congress lacks the constitutional power to stop the president unless the abuse rises to the level of impeachment.[50] "[A] president's use of clemency is shaped by the deepest values of that president," as Mark Osler reminds us.[51] The main mechanism for checking a president who gives questionable grants or exercises discretion in disturbing ways is to elect a new president with better judgment and values.

IV. Conclusion

Thank you for allowing me to testify and share my thoughts on clemency. I would be happy to answer any questions that you might have.

[50] *See Ex parte* Grossman, 267 U.S. 87, 121 (1925) (noting that if the President were to abuse his clemency powers, the remedy would be impeachment).
[51] Mark Osler, *Clemency as the Soul of the Constitution*, 34 J. L. & POL. 131, 131 (2019).