



*Hearing of the Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties*

Presidential Clemency and Opportunities for Reform

**Written Statement of the Justice Division of the
American Civil Liberties Union
National Political Advocacy Department
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With more than three million members, activists, and supporters, the ACLU is a nonpartisan public interest organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, DC to protect the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws.

The ACLU is advancing a smart justice strategy that seeks to reduce the number of people and racial disparities reflected in the criminal legal system. Our agenda includes supporting the release, through clemency and other means such as the Second Chance Act, of people serving long sentences under draconian sentencing law and policy. Therefore, we strongly call for the establishment of an independent, robust, fair and transparent clemency process.

Chairperson Cohen; Ranking Member Johnson; Members of the Subcommittee:

Thank you for the opportunity to appear before you today. I am Cynthia Wilcox Roseberry, previously the project Manager of Clemency Project 2014, which was a response by the American Bar Association, American Civil Liberties Union, Families Against Mandatory Minimums, Federal Public and Community Defenders and the National Association of Criminal Defense Lawyers to the Clemency Initiative of the Obama Administration. I have worked more than two decades as a criminal defense lawyer, including teaching federal and state criminal law and as the Federal Defender for the Middle District of Georgia. I was appointed as a member of the Colson Task Force on Federal Corrections and I am the first and only African American woman past president of the Georgia Association of Criminal Defense Lawyers. I am currently Deputy Director for Policy in the Justice Division of the National Political Advocacy Department at the American Civil Liberties Union, where we work to reform our criminal legal system. My testimony is informed by my experience from many points in America's criminal legal system.

America leads the world in incarceration with 2.3 million people in prison and jail. Since 1970, there has been a 700% increase in incarceration. Imprisonment is a brutal and costly response to violations or possible violations that traumatize incarcerated people, and hurts families and communities. At the end of 2014, the imprisonment rate among Black men was nearly six times that of white men and the incarceration rate of Black women was double that of white women. The United States spends over \$80 billion on incarceration each year. (See <https://www.aclu.org/issues/smart-justice>)

More people now understand that mass incarceration is not the answer to public safety, and recognize the need for meaningful criminal justice reform. This understanding has led to the beginning of change with much more necessary to heal the harm inflicted by the failed war on drugs which was specifically aimed at communities of color.

With the abolition of parole in the federal system and the failure to retroactively apply the modest sentencing reform provisions of the First Step Act, many languish in federal prison subject to draconian and unjust sentences.¹ Today, people are spending longer time in prison than ever before. Long after they have served substantial time in prison, been rehabilitated and are ready to

¹ Passing the Second Chance Act would create a method for release not dependent upon the clemency process.

return to their communities, tens of thousands of people remain incarcerated because of the system's failure to release them. Although it should not be the lone response to overincarceration, the Article II Clemency Power is a useful and powerful tool to begin to immediately correct the horror of unnecessarily long sentences.

The Article II discretionary power belongs to the executive who has broad discretion in the exercise of this power. It is precisely because this power is vested in the executive thusly, that there is a heightened need for the appearance and substance of fairness and justice. This is the foundation of our faith in our democracy. This power must not be exercised with incarcerated persons in the same manner as it is used for turkeys in November, sparingly, and reserved for a lucky few who are called to the attention of the executive because of connection, financial status or celebrity. Thousands more should be considered. The average person should be assured that their petition for clemency will not require more than evidence of the need for mercy under the circumstances.

Without this assurance, the least among us, and specifically those against whom the war on drugs and over policing are aimed, suffer under a caste system from which they can never emerge given the myriad collateral consequences of conviction. They are required to watch from the cages in which they have been placed, as others who have been incarcerated for the same acts.

During Clemency Project 2014, there were more than 36,000 applicants for clemency. Thousands of their family members called, emailed, sent facsimile messages and mail and personally appeared in our office in hopes that their loved ones would be lucky enough to be granted clemency. One mother called me every week to pray with me for the release of those suffering under long sentences. I was also contacted by judges, probation officers, defense lawyers, law professors and some prosecutors who sought to bring to our attention, someone languishing in prison with hope for their release. The process was saturated with desperation reminiscent of France in 1815 and Jean Valjean, but this was 21st century America! Sadly, some of the petitions were denied while many remain unanswered, leaving the petitioners and the many interested parties without answers, wondering where is the justice, where is the fairness in the secret deliberations on the applications for liberty.

How can we be assured of this fairness and justice? The clemency process must be completely independent of the system employed to incarcerate millions of people. An independent commission, created by the executive and resourced by Congress, with representation from all stages of the criminal justice system, including those who are formerly incarcerated, prosecutors, defense lawyers, corrections experts and members of the public with appropriate resources to review the inevitable deluge of petitions from the masses is a first step. Independence would ensure that one actor could not put a thumb of the scales of justice as is the case in our current system where the same officers in the Department of Justice who prosecuted the cases have this power.

This commission would promulgate clear and equitable criteria for release. Applicants would have notice of the evidence necessary to successfully support a petition for clemency. Newly incarcerated persons would have an incentive to immediately work to achieve necessary rehabilitation. The general public would understand and believe that the system is just and broadly

available and not reserved for a privileged few under a secret process. Further, members of society would have faith that those who return have been rehabilitated, are prepared to safely reenter society and society would be prepared to welcome them.

Paramount among the criteria would be the consideration of anyone affected by the failure to retroactively apply sentencing reform. If we, the people, determine that we are no longer willing to seek incarceration for certain acts, then those who were previously incarcerated for those acts must go free in order for equal justice under the law to have meaning. Categorical clemency could be granted, for example to those who were subject to enhanced sentences where the penalty is no longer applicable. Additionally, a categorical approach would be just for those serving long sentences because of the trial penalty that results when one exercises their Constitutional right to trial, as well as those aged political prisoners from the shameful COINTELPRO prosecutions. Although there is a mechanism for compassionate release, it is underutilized and when employed, release is often denied. The clemency commission could be used to clear this backlog of all elderly or infirm who deserve to be released.

Additionally, a reentry system to assist those who have been isolated from the progress society has made during their incarceration is an essential, commensurate step. For the more than 1700 people released during Clemency Project 2014, reentry included the challenge of reintegrating into a world that seemed alien. With a criterion of serving 10 years before consideration for release, advances in technology alone presented a gauntlet for the person reentering. In the ten years between 2004 and 2014, Facebook, Firefox, the iPod, Bluetooth technology, HDTV, DVR, Skype, satellite radio, smart phones and blogging were introduced. These technological advances were unavailable to those imprisoned yet, necessary for everyday life after release. Imagine being required to get a job when the system of simply applying is absolutely foreign to you. If we take the step of removing a person from society, we have the responsibility to return them to society prepared to be a fully functioning member of society after they have paid their debt. We must stamp their receipt paid in full and they must be unencumbered from the burden of challenges such as an inability to interface with modern technology. Although it is not a panacea, ensuring funding for the First Step Act could assist in this effort.

The vast majority of those incarcerated in America are in state prisons. Through the example of transparent, broad and comprehensive use of federal clemency, states can find instruction in how to achieve equal justice for those languishing in state prisons. The ACLU has outlined in its Blueprint for Smart Justice (See <https://50stateblueprint.aclu.org>), a plan for every state to decrease the number of people languishing in prisons in our country. In many states the driver of mass incarceration is the failure to release those who have paid their debt to society and have been rehabilitated. A federal Second Chance Act, which would allow those in prison to petition for release after serving 10 years, could serve as an inspiration to states to increase release efforts and remove the dubious distinction of incarcerating 25% of the world's prison population despite comprising a mere 5% of the global population. (See <https://50stateblueprint.aclu.org>)

It is my hope that you remove the scourge of mass incarceration from our justice system. The scourge that informs 1 in 3 Black boys born today that they can expect to be incarcerated. The scourge that prevents \$80 billion from being spent on their education because it is being spent to

incarcerate them. When historians look back on what we did during our watch, let them record that we were enlightened; May they extol the virtue of our quest for equal justice for all and may they marvel at the expediency with which it was achieved. I am personally grateful to you for taking an interest in the nation's most urgent issue for there is nothing more urgent than freedom.