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**Before the House Committee on the Judiciary**  
**Subcommittee on Crime, Terrorism, and Homeland Security**  
**Oversight Hearing on Clemency and the Office of the Pardon Attorney**  
**May 19, 2022**

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 the current clemency petition backlog requires urgent attention and then turn to possible solutions. While Congress has within its power the ability to address many of the same injustices that clemency is designed to remedy, Congress’s primary ability to do so is through legislation providing direct relief to incarcerated and formerly incarcerated people. It is far less efficient and more constitutionally suspect for Congress to try to fix the shortcomings with clemency by telling the President what to do. The Constitution vests the clemency power with the president, and the Framers assumed we would have leaders who would take this power seriously. Unfortunately, recent history has proved otherwise, and thus far President Biden has fallen well short of his constitutional duties in exercising this key constitutional obligation. Nevertheless, Congress can provide funding and incentives for needed institutional changes.

## **I. Why Clemency Requires Urgent Reform**

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.”<sup>1</sup> The most common clemency grants given by presidents have been pardons and commutations.<sup>2</sup> A pardon removes the legal consequences of a conviction, 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 any time after a crime has occurred. Typically, however, pardons have been granted only after the passage of considerable time after a sentence has been served in full and the individual has a demonstrable record of law-abiding behavior.<sup>3</sup> Pardons “restore[] those civil and political rights that were forfeited by reason of the conviction, most of which are a matter of state

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<sup>1</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>2</sup> *Clemency Statistics*, 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 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).

<sup>3</sup> Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 576 (1991).

law, and remove[] statutory disabilities imposed by reason of having committed the offense.”<sup>4</sup> A commutation, in contrast, does not erase all the consequences of a conviction and instead is a reduction in an individual’s sentence.<sup>5</sup>

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,<sup>6</sup> 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.<sup>7</sup> The Supreme Court has also relied on the existence of clemency to uphold limits on habeas review, noting that clemency is the “historic mechanism” for actual innocence claims and, the “‘fail safe’ in our criminal justice system.”<sup>8</sup>

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.<sup>9</sup> 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.

It is no answer to rely on a second look mechanism in the courts, such as compassionate release, to fix long sentences. We have seen wide disparities in how courts view the scope of this authority, with some districts granting 79.2% of the petitions before them, and others granting only 1.8%.<sup>10</sup> Moreover, there is a circuit split in the Court of Appeals on whether to view this authority narrowly and grant petitions only in cases involving issues like terminal illnesses or extraordinary family emergencies or whether it can be used more broadly to address nonretroactive changes in sentencing laws and other disproportionately long sentences.<sup>11</sup> This mechanism thus falls short in

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

<sup>5</sup> *Biddle v. Perovich*, 274 U.S. 480, 486–87 (1927).

<sup>6</sup> Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. § 3551).

<sup>7</sup> Barkow, *supra* note 2, at 816 n.81.

<sup>8</sup> *Herrera v. Collins*, 506 U.S. 390, 412, 415 (1993) (internal citations omitted).

<sup>9</sup> Barkow, *supra* note 2, at 837 n.208 (listing examples of commutations in mandatory minimum cases by Presidents Clinton, George W. Bush, and Obama).

<sup>10</sup> United States Sentencing Commission, *Compassionate Release Data Report*, tbl. 2 (May 2022), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20220509-Compassionate-Release.pdf>. The variation is reflected in circuit rates as well, with a high of 30.4% petitions granted in the First Circuit, compared to a low of 9.3% in the Fifth Circuit. *Id.* at tbl. 3.

<sup>11</sup> *Id.* at 63-64, n.17.

many jurisdictions around the country at offering corrections for excessively long sentences, and it never provides the relief a pardon does by removing the collateral consequences of convictions.

Pardons are 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 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.<sup>12</sup> 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.<sup>13</sup> 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.

Despite the urgent need and importance of clemency, considering these applications appears to be a low priority for the current administration. It inherited a backlog of 14,000 petitions, and instead of urgently addressing it, the backlog has only grown. There are now more than 18,000 people waiting for a response to their petitions, many of whom have been waiting for years. It is hard to overstate the level of mismanagement responsible for this unconscionable backlog. These people deserve answers to their petitions, yet the administration has done nothing to suggest it has any grasp of the urgency of the situation. Despite promises to remove this process from the Department of Justice because of the inherent conflict of interest of putting prosecutors in charge of clemency review,<sup>14</sup> nothing has been done to take the decision making out of DOJ.

Nor has the Administration done anything to improve the process in DOJ itself. It only recently appointed a full-time head of the Office of the Pardon Attorney in April of 2022 – more than a year into the Administration – and the office remains woefully understaffed. There are 9 attorney advisors in that office, in addition to the Pardon Attorney and Deputy Pardon Attorney.<sup>15</sup> That means every attorney would have to get through more than 1,600 petitions each to tackle the backlog. But even then, the process is not over. Every petition positively referred by the Office of the Pardon Attorney must still make its way through the Deputy Attorney General’s Office and the White House Counsel’s Office before a grant is given, and both of those offices have other priorities that they typically rank much higher than clemency.

Given the Administration’s lack of effort to correct any aspect of the clemency process – either by removing it from DOJ, creating a task force or commission to deal with the backlog, or

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<sup>12</sup> Barkow, *supra* note 2, at 866.

<sup>13</sup> *Id.* at 866-867.

<sup>14</sup> Biden-Sanders Unity Task Force Recommendations 10, <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf> (“we support the continued use of the President’s clemency powers to secure the release of those serving unduly long sentences” and “also support establishing an independent clemency board to ensure an appropriate, effective process for using clemency, especially to address systemic racism and other priorities”).

<sup>15</sup> Office of the Pardon Attorney, Organization Chart, <https://www.justice.gov/pardon/office-pardon-attorney-organization-chart/chart>.

buttressing the resources of the Office of the Pardon Attorney and prioritizing case processing in the Office of the Deputy Attorney General or the White House Counsel – it is not surprising that its record of clemency grants is woefully inadequate to the urgency of the need. President Biden has granted only 78 clemency petitions so far, 3 pardons and 75 commutations.

It is not just the number but the nature of the grants that show just how narrowly the Administration is viewing this power. Most of the grantees were already released by Attorney General William Barr to home confinement under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The political risk was thus already made by the previous Administration, and all the Biden grants did was ensure that those people, who were already leading law-abiding lives outside of prison, would not have return to prison when the pandemic is declared over. But it hard to see why only a few dozen people released under the CARES Act merited such relief when thousands have been released to home confinement.<sup>16</sup> These are people who have demonstrated their ability to safely live in their communities and who met the rigid criteria established under Attorney General Barr for their initial release.<sup>17</sup> There is no reason to grant a tiny percentage of their clemency petitions. The Administration has already indicated these cases are a priority,<sup>18</sup> yet even in this context it appears ill-equipped to process these cases. There is no reason not to give a categorical grant to all of them, and the individualized review is grinding the process to a standstill.

The Administration also noted that its recent grants included individuals who would be sentenced differently today under new drug laws that shortened sentences.<sup>19</sup> But, here, too, the Administration granted only a handful of these cases out of the thousands just like them. President Obama used this as one of the criteria in his clemency initiative, and he left behind almost 2,600 people who met all of his stated criteria.<sup>20</sup> Despite its good intentions and the relief it provided for many deserving people, clemency under the Obama Initiative operated more like a lottery than the equitable and efficient processing of applications that one should expect from the government.<sup>21</sup>

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<sup>16</sup> Federal Bureau of Prisons, Frequently Asked Questions Regarding Potential Inmate Home Confinement in Response to the COVID-19 Pandemic, <https://www.bop.gov/coronavirus/faq.jsp> (last visited March 6, 2022).

<sup>17</sup> Memorandum from the Attorney General to the Director of Bureau of Prisons, Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic, March 26, 2020, [https://www.bop.gov/coronavirus/docs/bop\\_memo\\_home\\_confinement.pdf](https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf) (giving priority to those already in low and minimum security facilities, disallowing anyone with a sex offense from receiving relief, and deprioritizing anyone with any BOP infraction in the past year). See also Memorandum from the Attorney General to the Director of Prisons, Increasing Use of Home Confinement at Institutions Most Affected by COVID-19, April 3, 2020, [https://www.bop.gov/coronavirus/docs/bop\\_memo\\_home\\_confinement\\_april3.pdf](https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf) (prioritizing release from specific institutions with high rates of infection but continuing to require detailed reentry plans before releasing individuals).

<sup>18</sup> Sam Stein, Biden Starts Clemency Process for Inmates Released Due to Covid Conditions, Politico, Sept. 13, 2021, <https://www.politico.com/news/2021/09/13/biden-clemency-covid-inmates-511658>.

<sup>19</sup> Carrie Johnson, Biden Takes First Actions on Clemency with 3 Pardons and 75 Commutations, NPR, April 26, 2022, <https://www.npr.org/2022/04/26/1094755907/reentry-recidivism-biden-formerly-incarcerated-jobs-housing-healthcare-loans>.

<sup>20</sup> United States Sentencing Commission, An Analysis of the Implementation of the 2014 Clemency Initiative 34, September 2017, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901\\_clemency.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf) (“[T]here were 2,595 offenders incarcerated when the Clemency Initiative was announced who appear to have met all the factors for clemency under the Initiative at the end of President Obama’s term in office but who did not obtain relief.”).

<sup>21</sup> Center on the Administration of Criminal Law, NYU School of Law, The Mercy Lottery: A Review of the Obama Administration’s Clemency Initiative (2017),

Many of the people left behind by that initiative who met its criteria along with thousands of others are waiting in that backlog of 18,000 plus petitions.

If this were in any other area of government responsibility, there would be alarm bells ringing about the ineptitude and gross negligence of those in charge. Sadly, because clemency often fails to get the attention it deserves from the press or public officials, those calls have not come as loudly as they should. But make no mistake. The failure to take drastic measures to address the current backlog of clemency petitions is presidential malpractice. The Framers placed the pardon power in Article II next to the Commander in Chief powers for a reason. It is a critically important check on executive overreach and injustice, and yet we have a president who has yet to take this responsibility seriously despite the obvious signs the process has been broken for years and the now unconscionable backlog of petitions – each one representing a human being whose liberty is at stake.

## II. Solutions

Because this a congressional hearing, I am going to discuss solutions to the failings with the clemency process that are within Congress's control. I have separately urged those in the Biden Administration – as I have previously done in the Trump and Obama Administrations – about the need to take executive action to reform clemency.<sup>22</sup> I will continue to encourage President Biden to take action on this issue that the Framers squarely placed within the president's responsibility. But in the absence of executive leadership on this issue, what can Congress do?

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. I will first discuss those options before turning to the incentives Congress can put in place to encourage improvements to the clemency process itself.

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[https://www.law.nyu.edu/sites/default/files/upload\\_documents/The%20Mercy%20Lottery.Report%20on%20Obama%20Clemency%20Initiative.2018.pdf](https://www.law.nyu.edu/sites/default/files/upload_documents/The%20Mercy%20Lottery.Report%20on%20Obama%20Clemency%20Initiative.2018.pdf).

<sup>22</sup> Rachel E. Barkow & Mark Osler, *Biden Can't Let Trump's DOJ Legacy Stifle Reform*, The Hill, Nov. 17, 2021, <https://thehill.com/opinion/criminal-justice/581795-biden-cant-let-trumps-doj-legacy-stifle-reform/>; Rachel Barkow & Mark Osler, *Where Reform Goes to Die*, Inquest, July 26, 2021, [https://inquest.org/doj-where-reform-goes-to-die/Rachel E. Barkow & Mark Osler, \*We Know How to Fix the Clemency Process. So Why Don't We?\*, N.Y. Times, July 13, 2021, <https://www.nytimes.com/2021/07/13/opinion/biden-clemency-justice-dept.html>; Rachel Barkow & Mark Osler, \*14 Steps Biden's DOJ Can Take Now to Reform America's Criminal Legal System\*, The Appeal, March 15, 2021, <https://theappeal.org/the-lab/white-paper/14-steps-bidens-doj-can-take-now-to-reform-americas-criminal-legal-system/>; Rachel E. Barkow & Mark Osler, \*Trump Abused the Clemency Power. Will Biden Reform It?\*, Wash Post, November 16, 2020; Rachel Barkow, Mark Holden, & Mark Osler, \*The Clemency Process Is Broken. Trump Can Fix It\*, The Atlantic, Jan. 15, 2019, <https://www.theatlantic.com/ideas/archive/2019/01/the-first-step-act-isnt-enough-we-need-clemency-reform/580300/>; 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 \(2017\); 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 \(2015\); Rachel E. Barkow & Mark Osler, \*The President's Idle Executive Power: Pardoning\*, Wash. Post, Nov. 26, 2014, \[https://www.washingtonpost.com/opinions/the-presidents-idle-executive-power-pardoning/2014/11/26/3934ab1c-71aa-11e4-8808-afaale3a33ef\\\_story.html\]\(https://www.washingtonpost.com/opinions/the-presidents-idle-executive-power-pardoning/2014/11/26/3934ab1c-71aa-11e4-8808-afaale3a33ef\_story.html\).](https://inquest.org/doj-where-reform-goes-to-die/Rachel%20E.%20Barkow%20&%20Mark%20Osler,%20We%20Know%20How%20to%20Fix%20the%20Clemency%20Process.%20So%20Why%20Don't%20We?)

## 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 clemency as the primary mechanism for reducing sentences."<sup>23</sup> 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.<sup>24</sup> 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. While clemency will still be needed even with these second look mechanisms, if they are appropriately broad, it should make such a need far less pronounced.

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

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<sup>23</sup> Barkow, *supra* note 2, at 814.

<sup>24</sup> *Id.* at 816 and n.81 (quoting witnesses who warned Congress of the need for commutations to fill the gap if parole were abolished).

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.<sup>25</sup> 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.

## 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.<sup>26</sup>

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.<sup>27</sup> 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.

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<sup>25</sup> 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](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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf).

<sup>26</sup> 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/gIQAElNVOO\\_story.html](https://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElNVOO_story.html).

<sup>27</sup> RACHEL BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 88-97 (2019).

## B. Legislative Correctives to the Clemency Process Itself

The mechanisms suggested above would greatly improve federal sentencing and punishment, and I urge Congress to prioritize them. 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 Framers’ vision of the separation of powers<sup>28</sup> and a means by which the president exercises oversight over enforcement decisions that go too far.<sup>29</sup>

That raises the question of what Congress can do to reform the clemency process itself. 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.”<sup>30</sup> The Supreme Court has made clear that “[t]his power of the President is not subject to legislative control.”<sup>31</sup> “[T]he President may exercise his discretion under the Reprieves and Pardons Clause for whatever reason he deems appropriate.”<sup>32</sup> The power can be used on any federal criminal offense.<sup>33</sup> This broad authority limits opportunities for the legislature to dictate how the clemency authority is exercised. At the end of the day, decisions whether to grant or deny clemency are left to the president and the president alone. Congress cannot tell the president which cases to grant, deny, or prioritize, nor can Congress dictate to the president the process he must follow in deciding cases or whom he must consult in making decisions.

While Congress cannot dictate how a president should exercise the constitutional power of clemency, it can provide funding to create incentives for needed institutional changes. The president is currently using a process that relies on the Office of the Pardon Attorney, which is funded by Congress. If Congress wants to help the president address the record-setting backlog of petitions, it could increase dedicated funding for that office. Until Fiscal Year 2014, the Office of the Pardon Attorney had 11 authorized and funded staff positions.<sup>34</sup> That number was set in the middle of the 1990s and based on the receipt of an average of about 600 clemency petitions in total each year.<sup>35</sup> The Office of the Pardon Attorney received more than 45,000 petitions in the ten year period between fiscal year 2010 and 2020 for an average of 4,500 petitions per year, 7.5 times the rate of petitions when the staffing was set at 11 positions.<sup>36</sup> While the Office received

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<sup>28</sup> Barkow, *supra* note 2, at 831-832.

<sup>29</sup> *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.”).

<sup>30</sup> *United States v. Klein*, 80 U.S. 128, 147 (1871).

<sup>31</sup> *See Ex parte* Garland, 71 U.S. 333, 380 (1866).

<sup>32</sup> *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1225 (D.D.C. 1974).

<sup>33</sup> *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).

<sup>34</sup> Office of the Pardon Attorney, FY 2023 President’s Budget Submission 4, <https://www.justice.gov/file/1492246/download>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 3-4.

authorization to increase staffing to 20 positions in FY2015, and then 80 in FY2022, the continuing resolution means none of the funding for those positions has been received by the Office. Providing this Office with a dedicated funding stream or funded positions, at least to address the backlog, could help address the urgent crisis it faces.

To be sure, that will not address all the veto points responsible for the backlog. A big reason for the backlog is the failure of the Office of the Deputy Attorney General and the White House Counsel's Office to act. For example, at the beginning of FY2020, there were 13,625 pending petitions, but only 5,004 of them, or 37%, were in the Office of the Pardon Attorney.<sup>37</sup> The other 63% were awaiting decisions by the White House Counsel or Office of the Deputy Attorney General. One reason for the current backlog is the Administration is following a policy of sending all of those cases left unresolved by the Trump administration back to the Office of the Pardon Attorney to rework, which meant 8,000 cases started from scratch in the Office of the Pardon Attorney because the Trump Administration failed to act on the recommendations that already existed from the Office of the Pardon Attorney and the Biden Administration refused to consider those petitions based on the existing write-up of the Pardon Attorney. One is left to wonder why the Administration could not have at least acted on the recommendations for a grant from the Office of the Pardon Attorney given that the same substantive standards have remained in place across Administrations. Nevertheless, the policy has been to start over completely, so some of the cases in the backlog have been reworked multiple times in the Pardon Attorney's Office because of this policy.<sup>38</sup> This duplication of effort all stems from the failure of the Deputy Attorney General or the White House Counsel's Office to act expeditiously on the recommendations. This suggests that increased funding for the Office of the Pardon Attorney would hardly be sufficient.

A better approach would be to fund a separate advisory board to process the backlog. 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.<sup>39</sup> Congress could instead provide funding for an advisory board that exists outside the Department of Justice to provide advice to the President on clemency.<sup>40</sup> 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 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 the proposal does not have to mirror the one in the Fair and Independent Experts in Clemency Act (FIX Clemency Act), that is one option for making this change. Again, the president may still wish to funnel these recommendations through the Department of Justice or the White House Counsel's Office. But he would not have to, and having

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<sup>37</sup> *Id.* at 7.

<sup>38</sup> *Id.* at 7-8 (noting cases have been reworked 1-5 times).

<sup>39</sup> 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).

<sup>40</sup> For more details on this model, see Barkow & Osler, *supra* note 13, at 461-463; *see also* Barkow & Osler, *Restructuring Clemency*, *supra* note 20, at 19-25.

this separate process staffed and functioning could create an incentive for him to give this new model a try – particularly when he agreed as part of the Biden-Sanders Unity Task Force to do just that.

Taking clemency out of the Department of Justice would address the bureaucratic duplication that is responsible for much of the holdup in petition processing. It would also address a fundamental conflict of interest in having the same agency that prosecuted all these cases review them for clemency. 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.”<sup>41</sup> 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.”<sup>42</sup> 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.<sup>43</sup> 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 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.<sup>44</sup>

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.<sup>45</sup>

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<sup>41</sup> Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1194 (2010).

<sup>42</sup> *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 May 9, 2022).

<sup>43</sup> Barkow & Osler, *Designed to Fail*, *supra* note 20, at 431.

<sup>44</sup> 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).

<sup>45</sup> Barkow & Osler, *Designed to Fail*, *supra* note 20, at 431.

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."<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> 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<sup>49</sup> and are thus part of a shared culture where they are desensitized to the long sentences federal prosecutors hand out on a daily basis.<sup>50</sup> 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 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."<sup>51</sup> In light of this view, there is a "strong presumption" at DOJ that "favorable recommendations should be kept to an absolute minimum."<sup>52</sup>

One need look no further than the output of DOJ's process to see the bias at play. The grant rate for commutations and pardons across presidencies, whether during a Republican and Democratic administration, has been shockingly low in recent years and compared to the rates for most of the nation's history. President Trump granted 2% of the petitions he received, President Obama granted 5%, President George W. Bush granted 2%, President Clinton granted 6%,

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<sup>46</sup> *Standards for Consideration of Clemency Petitioners*, *supra* note 12, § 9-140.113.

<sup>47</sup> 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.*

<sup>48</sup> Barkow & Osler, *Designed to Fail*, *supra* note 20, at 398-400.

<sup>49</sup> Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1165 (2010); Love, *supra* note 39, at 1194 n.105.

<sup>50</sup> Barkow, *supra* note 2, at 825.

<sup>51</sup> 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-oev-morison-pardon-20101106-story.html>.

<sup>52</sup> *Id.*

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.<sup>53</sup> This contrasts with President Carter's grant rate of 21%, President Ford's rate of 27%, and President Nixon's rate of 36%.<sup>54</sup> 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.<sup>55</sup>

A clemency advisory board could help to overcome the conflict of interest and bureaucratic logjam of keeping clemency within the Department of Justice, while also avoiding a process that bypasses DOJ and favors cronies and the politically connected, as was evident in the Trump Administration. Setting up a permanent board is the preferred option, but a second-best solution would be to create a temporary board to at least deal with the current historic backlog of cases. President Ford made good use of such a temporary board to address the large number of cases associated with evasion of the Vietnam Draft, and that is a good model to address the current crisis.<sup>56</sup>

Short of its power of the purse, there is little else that Congress can do to oversee clemency. It can and should hold hearings like the one today, and it should demand that the Department explain why there has been no progress on the backlog and where the petitions currently are in the process. It should insist that the Administration articulate how it plans to tackle the backlog. While the Administration could refuse to answer, there will hopefully be politically costs to its unwillingness to live up to the promises it made on reforming clemency and making criminal justice reform a top priority.

### **III. 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.

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<sup>53</sup> 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>.

<sup>54</sup> Barkow, *supra* note 2, at 816-817.

<sup>55</sup> W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 97-99 (1941).

<sup>56</sup> Mark Osler, Memo to the President: Two Steps to Fix the Clemency Crisis, 16 U. St. Thomas L.J. 329, 340-342 (2020).