

Statement of D. Michael Hurst, Jr.

Partner, Phelps Dunbar LLP

Former United States Attorney, Southern District of Mississippi

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

Madame Chairwoman, Ranking Member and members of the Committee, my name is Mike Hurst and I am a partner in the Jackson, Mississippi office of the law firm Phelps Dunbar, LLP. I appreciate the invitations to be here today to testify about the clemency process and the U.S. Department of Justice's Office of the Pardon Attorney.

Before joining Phelps in January 2021, I served as the United States Attorney for the Southern District of Mississippi, having been appointed by President Donald J. Trump and confirmed by the Senate in October 2017. Before that, among other things, I worked as a non-profit lawyer, ran for elected office, served as an Assistant U.S. Attorney, worked as a regulatory lawyer and litigator at a law firm here in Washington, DC, was a staffer to a congressman, and finally was Counsel to the Constitution Subcommittee of the House Judiciary Committee.

I am here today to give my perspective on these issues as a former Chief Federal Law Enforcement Officer, a former line federal prosecutor, and now as a criminal defense attorney. The views I am expressing today are my own, and do not represent those of my firm, my clients, or anyone else.

I. Brief Overview of Historical Precedent

I will dispense with the historical background of the President's authority to grant clemency, as you have had august academics and impressive law school professors who have thoroughly briefed this subcommittee on those historical precedents. Suffice it to say that the President of the United States clearly has some of the strongest authority in this arena, emanating directly from Article II, Sec. 2 of the Constitution itself, and that authority has been further solidified by various U.S. Supreme Court opinions over the years.

II. My Experience Working in DOJ

During my tenure as United States Attorney, I received requests from the Office of the Pardon Attorney to respond to petitions for clemency of defendants who had been prosecuted in my office. From a policy standpoint, I believe that is an appropriate request. In most cases, our prosecutors know these defendants, the circumstances that led to their arrest, the details of the prosecutions and the convictions, and the intricacies of the cases better than anyone else.

As U.S. Attorney, I recommended approval of some petitions and disapproval of others, similar to my previous job as an AUSA, where I decided which cases had sufficient evidence to prove beyond a reasonable doubt to prosecute and which ones did not. In both instances, my goal was not to lock someone up or keep someone locked up. Rather, our role as federal prosecutors was to ensure that justice was done.

As Justice Sutherland wrote in his majority opinion in *Burger v. United States*:

“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”¹

DOJ’s policies with regard to review of clemency petitions are correct – clemency should only be granted in extraordinary circumstances and exercised rarely. Over the last few years, some have attempted to demonize law enforcement and prosecutors, arguing that too many people are being prosecuted for too many crimes. However, the impetus to change that issue begins here, in Congress, in this branch of government. Congress passed the criminal laws. If a majority no longer likes those laws,

¹ 295 U.S. 78 (1935).

repeal them. Despite what those whom have never prosecuted a case will argue, AUSAs are not in the business of prosecuting and convicting innocent people. In our judicial system, the Federal Government has an immense burden of proof, as it rightly should – beyond a reasonable doubt. AUSAs have to convince 12 common, ordinary people from their communities that someone has broken the criminal laws that Congress passed without a reasonable doubt in their mind. The reason the conviction rate is so high in the federal criminal justice system is because of the professionalism and dedication of our federal law enforcement, and the unsung heroism and work done by our state and local partners on the ground. While crime is surging around our country, the discussion we should be having is not how to release more criminals, but how to increase prosecutions, arrest more violent offenders, and other efforts to make the public safer.

III. Responses to Criticisms of the Clemency Process

a. Office of the Pardon Attorney is Not Biased

My experience over the years with the Office of the Pardon Attorney was always professionalism, fairness, methodical, and deliberative – exactly what we all should want and expect of those reviewing a petition of someone who wants out of prison. Never in all of my experience did I ever get the sense that the Office of the Pardon Attorney was biased, one-sided, or otherwise pushing either a grant or denial of clemency.

Some commentators have criticized the Office of the Pardon Attorney by saying that, because they are housed within DOJ, and maybe some are former prosecutors themselves, that they cannot divorce themselves from the pressure exerted by DOJ's law enforcement mission. However, I would say those commentators have never worked within the Department of Justice. DOJ is an incredibly diverse, multi-faceted agency, who's main job is not law enforcement, but rather to do justice. In fact, the Department of Justice is the only federal cabinet agency that is named after a virtue, with that virtue

driving DOJ criminologists within the National Institute of Justice or DOJ community organizers within the Community Relations Service or DOJ statisticians within the Bureau of Justice Statistics. The Department of Justice does not consist solely or exclusively of just federal prosecutors. There is a wide array of backgrounds, skillsets, positions, and jobs within and throughout the Department, other than prosecutors, such that it cannot be reasonably argued that the Office of the Pardon Attorney is bullied or pressured into doing (or not doing) anything.

One of the arguments used by some to show bias at the Office of the Pardon Attorney is the perceived “low output” of actual pardons and commutations issued by the President. But this is a red herring. At the end of the day, the President decides who to pardon. Conversely, if all 151,283 individuals incarcerated in federal prisons applied for clemency, those clemency numbers and percentages would be even more miniscule. It is disingenuous to argue bias within the Office of the Pardon Attorney when the percentages of pardons and commutations are driven by factors outside the Pardon Attorney’s control (Presidential prerogative, number of petitions, qualities of candidate, etc.).

b. Multi-Level Reviews of Clemency Petitions are Necessary

Some commentators also argue that the clemency process is biased against granting relief because there are too many possible veto points through the gauntlet. On the other hand, I see those checks and balances in the evaluation process as a positive, as these multiple points of review are re-evaluating someone who has been thoroughly investigated by professional law enforcement agents, their cases analyzed by federal prosecutors, who voluntarily pled guilty, or were found guilty beyond a reasonable doubt by their peers in their community, and ultimately sentenced by a federal judge with all the resources of a U.S. Probation Office and the sentencing guidelines to help provide uniformity. Our system of justice is not perfect, by any means. But as long as human beings are involved, there never will be a perfect justice system. I would venture to say, however, that despite its flaws, we still have the

best, fairest system of justice in the world, so much that we send our federal prosecutors all around the world to train others on the rule of law, justice and judicial process, and others want to emulate us.

c. Criteria Should be High for Release of Those Convicted of Federal Crimes

Some commentators criticize DOJ's regulations which characterize commutations as "extraordinary" remedies which should only be "rarely granted." However, considering the release of inmates back into society is something extraordinary, and, if the review is done correctly, such requests for release should properly only be rarely granted.

IV. Potential Solutions (in Search of a Problem)

a. More Government Is Not the Answer

Some have advocated for creating a new, independent federal governmental agency to address these perceived issues. But I believe President Ronald Reagan had it right when he said, "The closest thing to eternal life on earth is a Government Program." The last thing we need is another government program or agency, for a few reasons. First, as a general matter, we should go back to President Trump's idea in his executive order regarding regulations, but apply it to agencies: for every new agency created, we need to repeal two additional government agencies. Second, if the current reviewing agency is facing 17,000+ petitions, but Congress has only allocated them 20 staffers – and you want them to do more – it stands to reason that Congress should give them more resources (again, I disagree with this, specifically Congress expanding government). The problem with simply growing government is that it is never enough, and it is hardly ever repealed or scaled back. Finally, even if Congress were successful in establishing this new "U.S. Clemency Board," there is no authority requiring the President to use, rely upon or defer to this new agency. Every President has relied upon DOJ's Office of Pardon Attorney to handle the review of clemency petitions for him, even Presidents who desired to expedite

and speed up the process in order to grant more clemency requests. It is because the Office of Pardon attorney works.

b. Real Oversight of Executive Agencies

I noticed that today's hearing is entitled "Oversight Hearing on Clemency and the Office of the Pardon Attorney," yet the new Pardon Attorney for DOJ, Elizabeth G. Oyer, who was appointed just a few weeks ago, was not called today to testify. That seems odd. If one is serious about conducting real oversight of an executive agency, might I suggest calling said agency to appear before the subcommittee and testify? Ms. Oyer's background includes a decade in the Federal Public Defender's Office, which presumably shows the initiative by this Administration in attempting to revamp and rev up clemency petitions and should help to dispel any perceived bias on the part of the Office of the Pardon Attorney in favor of prosecutors at DOJ. However, this Subcommittee cannot know the answers to these thorny questions if it doesn't call the executive agency to appear before the subcommittee for its oversight hearing regarding that specific agency.

In my opinion, a more concerning and insidious threat facing the clemency process is the political abuse or wholesale avoidance of the system in place, via corruption and/or cronyism, which does not necessarily discriminate among political parties. In my humble opinion, that is a more noble goal of this subcommittee in conducting oversight of the Office of Pardon Attorney, rather than using your oversight authority as a Trojan Horse to effect political change of decarcerating federal prisons.

c. It's the President Prerogative, Not Congress's

Presidents can prioritize or de-prioritize the issue of clemency during their administrations. For instance, President Barak Obama directed the U.S. Department of Justice to institute a Clemency Initiative in 2014, which encouraged federal inmates who would not pose a threat to public safety to petition to have their sentences commuted by the President. At the end of the day, the President can

make it happen if he wants it to happen. But, even for some, in the case of President Obama and his initiative, this was not enough.

d. Want to Limit the President, Then Amend the Constitution

If none of these solutions are sufficient, then change the Constitution. I know that is not an easy lift, but with the President's clemency authority emanating directly from the Constitution, and such authority almost unlimited, there is little else substantively Congress can do than revise the actual language in Article II, Section 2, in order to restrict and/or limit the President's authority.

e. Want Fewer Prisoners, Then Change or Repeal Criminal Laws

Many commentators who argue that the clemency process is broken or that the Office of the Pardon Attorney is biased are only using these arguments as a pretext for the argument against mass incarceration and overcriminalization in America. To these commentators I would say – just be true to yourselves. Instead of arguing for more clemency, lobby Congress to repeal criminal laws, lower sentences for crimes, or continue to make the argument to defund the police. Unfortunately, I think those arguments and efforts have contributed to the dramatic increase our country has experienced in crime over the last two years. At the end of the day, Congress passes the laws that law enforcement and prosecutors enforce, so the buck stops here with Congress. If you want fewer people locked up, change your laws. I strongly disagree with your sentiment, as I perceive increased crime needing increases in cops and prosecutors and the increased enforcement of our laws.

V. Conclusion

The clemency process is not perfect, but it works relatively well, considering the resources the Office of the Pardon Attorney has and the professionalism that it exhibits. Clemency should only be granted in rare and extraordinary circumstances, and it is a positive attribute that there are so many

levels of review before it reaches the President's desk. But, if a President wanted to expedite the process, he has more than enough authority to do so. At the end of the day, this is a power of the President, just as making appropriations is an exclusive power of Congress. If this subcommittee's real goal is to decrease the incarceration of Americans, then it needs to role up its sleeves and get to work repealing all of the federal criminal laws that it has previously passed. Unfortunately, such actions will only leave increase crime and make Americans less safe and more at risk. Thank you.