

**Written Testimony of Andrea James,
Executive Director
The National Council for Incarcerated and
Formerly Incarcerated Women and Girls
to
United States House Committee on the Judiciary**

May 19, 2022

I. Introduction

The National Council for Incarcerated & Formerly Incarcerated Women and Girls is the only national advocacy organization founded and led by incarcerated and formerly incarcerated women and girls. Organizing began in a federal prison yard with a group of women, including myself, who wanted policy makers instituting criminal justice reform to hear the voices of formerly incarcerated people – those who understand the harm the current system inflicts and have the expertise to create an alternative system that recognizes each person’s humanity.

While still incarcerated, we founded “Families for Justice as Healing,” which is now doing profound criminal justice reform work in the Boston area. In 2015, I received a Soros Justice Fellowship and used the 18 months of support to launch The National Council – a platform of connectivity, networking, and support of advocacy organizations led by incarcerated and formerly incarcerated women and girls across the country. Our mission is simple: to end the incarceration of women and girls. In its short history, the National Council has already had a significant impact, including acting as the voice of the incarcerated women who helped draft the Dignity Act.¹ We’ve also passed Primary Caretaker legislation in several states, mandating that judges consider alternate sanctions for primary caretakers of children – generally women – and provide a written justification if they order incarceration.² We are proud, also, to support the Fix Act.

The National Council is committed to abolishing incarceration for women and girls. As formerly incarcerated women, we believe a prison will never be the place to address the economic and psychological reasons women end up in prison. Prison most often causes further social and economic harm and does not increase public safety. The prison experience increases trauma in women and, if they are mothers, to the children they are separated from. It deepens poverty in the individual lives of incarcerated people and the overall economic stability of their communities.

Although our long-term goal is to end the incarceration of women and girls, we are also working to address conditions of confinement for those still living inside prisons. We support women seeking compassionate release and work to raise awareness of the horrific conditions in our prisons and jails. Through our “Reimagining Communities” project,³ a national

¹ <https://justiceroundtable.org/dignity-act-for-incarcerated-women/>

² Human Impact Partners, Keeping Kids and Parents Together: A Healthier Approach to Sentencing in MA, TN, LA, <https://humanimpact.org/hipprojects/primary-caretakers/> (last visited May 7, 2019).

³ <https://www.nationalcouncil.us/reimagining-communities/>

infrastructure for supporting community-based initiatives led by incarcerated, formerly incarcerated, and directly-affected women and girls, we are supporting community organizing, economic development, basic income guarantee, and participatory budgeting to expand opportunities for those in marginalized communities to keep people out of the criminal legal system.

II. A Note on Terminology

Language matters. We will not be able to end mass incarceration until we use terms that prioritizes the person before the transgression, describing what a person has done rather than asserting what a person is. We have a different mental image of “a person who sells drugs” than we do of a “drug dealer.” A person is not a crime; a bad choice, no matter how deplorable, is never the defining characteristic of an individual, but just one aspect of who they are. Dehumanizing someone makes it too easy to justify locking that person away for years – or decades – under inhumane conditions. Long sentences harm the people who are locked up, their families, and costs the taxpayers billions of dollars. To open the door to thinking about solutions rather than punishment, policy must be framed in a way that that acknowledges the human being first, rather than their transgression or incarceration, particularly after decades of incarceration. As James Baldwin put it, “I am what time, circumstance, history, have made of me, certainly, but I am also much more than that. So are we all.”

Therefore, my testimony will refer to “incarcerated women” or simply “women.” I ask you to avoid using terms like “inmate,” “felon,” “thief,” or “murderer.” This is not “cancel culture” but simply a request to acknowledge the humanity of everyone, even those who have transgressed society’s laws and norms.

III. Understanding Clemency

In the past several decades, clemency has become politicized, creating some misconceptions that have turned clemency from an age-old accepted power of the sovereign to something almost distasteful.⁴ We must start with dispelling some myths:

a. The notion that clemency is a “gift” is wrong.

Clemency is an executive power that is enshrined in the Constitution. Justice Rehnquist called it the “fail safe” of our legal system. It has been the foundation of justice since ancient times. The Founding Fathers recognized this, which is why they put clemency in the Constitution. Alexander Hamilton wrote that “Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”⁵

Of course, clemency has been misinterpreted by Presidents from both parties. But if a judge makes a bad decision, we do not stop using the courts. If a legislature passes a bad law, we do not opt for anarchy. Therefore, a few cynical uses of clemency to benefit friends or big

⁴ Catherine Sevchenko, Fixing the Support of Justice, 34 *Federal Sentencing Reporter*, 239–244 (Apr. 2022).

⁵ Federalist Paper No. 74.

donors does not justify abandoning clemency as the tool to use to correct an injustice. But that is what we have done.

b. The idea that granting clemency is being “soft on crime” is wrong.

The United States Code mandates that prison sentences should be no longer than necessary to effectuate the purposes of sentencing, which include protection of the public and rehabilitation of the person who committed the transgression.⁶ Clemency is based on an analysis of who the person is today not what they did years or decades ago. People who have educated themselves, aged out of crime, are ill, or elderly do not need to be in prison. Their incarceration is not punitive; it is vindictive.

c. Clemency is the embodiment of Empathy

The reasons that women land on a prison bunk are as varied and complex as the women themselves. Faced with difficult situations, fear, poverty, lack of self-confidence and education, lead people to make bad decisions and do things they regret. Recently many groups have tried to increase awareness of the cruelty of mass incarceration by promoting “empathy” for those in prison by telling their stories. Uplifting the humanity of those who have committed legal transgressions is a foundation upon which policy change can be built. Standing alone, it is merely feel-good chatter.

Clemency is empathy in action. Merriam Webster defines empathy “as being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another.” Anyone who claims to emphasize with incarcerated people must support clemency for those who made bad decisions in difficult times and have grown and left their mistakes behind. Average Americans understand this. Sixty-two percent of voters recognize that reducing prison populations would strengthen communities by reuniting families and saving taxpayer dollars that can be reinvested into the community.⁷

IV. Clemency allows the President to strengthen communities with the stroke of a pen

Giving people second chances creates benefits that ripple through entire communities. We, The National Council for Incarcerated and Formerly Incarcerated Women are on the frontlines in the neighborhoods most directly affected by mass incarceration and we see the direct affect that when a president, present or past, grants clemency, especially to the women most directly affected, It has a profound effect on how these communities think about the administration currently leading clemency efforts. Women who have received clemency have made invaluable contributions on the national, state, and local levels.

a. Women who receive clemency do amazing things:

Kemba Smith Pradia is a wife, mother, public speaker, advocate, consultant, and author of *Poster Child*. She has worked with senior officials at The White House, The United

⁶ 18 U.S.C. § 3553 (“The court shall impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection.”) (emphasis added).

⁷ ACLU Smart Justice, *Embracing Clemency* at 4 (June 23, 2021), <https://www.aclu.org/report/aclus-redemption-campaign-embracing-clemency-report>

Nations, Members of Congress, and has led trainings for Federal and State Probation organizations across the country. Corporations such as Verizon, Traveler's Foundation, Proctor and Gamble, Bank of America and Gulfstream have sponsored her speaking to women and youth nationwide. In 2019, Kemba was appointed to the Virginia Parole Board by Governor Ralph Northam and on January 14, 2022, she involuntarily separated from the State due to the transition of a new administration. Prior to her appointment, she served on the Virginia Criminal Sentencing Commission and held the position of State Advocacy Campaigns Director with the ACLU of Virginia. Currently, she continues to serve on the Board of Directors for Virginia CARES, Drug Policy Alliance. She is founder of The Kemba Smith Foundation and is also a member of Delta Sigma Theta Sorority, Inc. and the NAACP.

Cindy Shank, was featured in a documentary called *The Sentence* that has won multiple awards, including the Exceptional Merit in Documentary Filmmaking at the 2019 Emmy Awards. 28 days after her release she was hired by Shaheen Chevrolet and has been promoted 7 times. She is currently working as the head of their Ecommerce Department. She was able to purchase a house for her and her three daughters in early 2020. In July of 2019 she testified before this Subcommittee. She was selected to take part in the Women Transcending and Collective Leadership Institute course at Columbia University to develop leadership skills, get media training, and deepen her understanding of policy reform. She has continued to use her voice to advocate for those left behind.

Amy Ralston Povah is an accomplished filmmaker, writer, speaker, and activist. Her efforts have focused primarily on issues related to executive clemency, criminal justice reform, conspiracy laws, women in prison, and the drug war. After being granted clemency in 2000,

Amy started the CAN-DO Foundation to educate the public about conspiracy laws and advocate for clemency applicants seeking "justice through clemency." Over 140 people featured on the CAN-DO website have been set free. Amy has spoken on panels at Yale University, Pepperdine University, Vanderbilt University, Washington State University, New York University, Columbus School of Law, University of St. Thomas, on Capitol Hill and The George Washington University school of law. Amy has authored Op Eds for news sources including the *New York Times*, *Fusion*, *HuffPost*, *San Francisco Chronicle*, *The Hill*, *Business Insider* and has been interviewed and/or quoted by almost every major media source. In 2010, Amy formed a film production company and became President of Harm Reduction Productions. She produced the award-winning film *420 – The Documentary*.

Ramona Brant, who worked for the human resources department for the city of Charlotte North Carolina to help newly released prisoners find work before her untimely death two years after her clemency was granted. To commemorate her extraordinary efforts to help people return home after incarceration, the mayor of Charlotte declared February 25 to be Ramona Brant Day.

Danielle Metz is the Director of Clemency for The National Council. Dani was sentenced to three life sentences plus fifty years. Dani was the other of two small babies when she went to prison with a triple life sentence. After 23 years in a federal prison prior to receiving clemency, the only thing saving her from a life sentence, Dani received clemency from

President Obama, who has continued to provide words of encouragement since he granted her clemency. Dani is not sitting in a federal prison anymore, wasting her brilliance and human potential. Danielle Metz is sitting with me here, in this judiciary committee hearing. She is our director of clemency at The National Council. She is a student at the Southern University of New Orleans, and a community health worker for the Formerly Incarcerated Transition Clinic.

These women have caught the spotlight, but their contributions are replicated every day in the achievements of those who are quietly rebuilding their lives after incarceration.

Josie Ledezma who writes that she has “been given a chance to live to truly be free. I am working paying my taxes. I am teaching Bible study in different levels. I also go and speak to groups of women that have either been incarcerated or were addicted to drugs and are struggling to have a new change of life. It’s called U Turn for Christ. . . . I’ve spoken to teenagers and young adults as a preventative means for them.”

Felicia Smith graduated from Southern University of Shreveport after she got home, majoring in Human Service, concentrating in Counseling. She is currently on maternity leave after the birth to a second daughter and will be returning to work within the next month.

Crystal Rhiannon, who has spent the last two years helping her husband the family screen printing business, which they successfully kept it open despite the economic hardship caused by Covid 19. Her return home meant that her husband did not have to struggle as a single-parent of two teenaged daughters during the pandemic.

b. Clemency rebuilds families, fixing the harm caused by ASFA

Clemency is an overlooked tool to bring the crime rate *down*. Higher rates of crime happen in impoverished communities where jobs and decent educational opportunities are scarce.⁸ The National Council’s reimagining communities campaign is designed to revitalize local neighborhoods by creating jobs, better schools, and rebuilding the community ties that can contain and defuse tension between neighbors. But if the residents are locked up, no one will be available to do the work. Incarcerated parents cannot be active in the PTA. Children from unsupported households must concentrate on survival, not dreams of going to college.

Giving clemency to parents sentenced under the draconian conspiracy laws of the 1980s and 1990s will bring them back where they belong: working, raising their children, and using their second chance to make the world a better place. Two-thirds (63%) of people in BOP custody have minor children.⁹ That means 65,600 mothers are in federal prison unable to

⁸ Press Release, Bureau of Justice Statistics, *Persons at or Below the Federal Poverty Level Had Highest Rates Of Violent Victimization For The Period 2008–12* (Nov. 18, 2014) <https://www.bjs.gov/content/pub/press/hpnyv0812pr.cfm>; Corina Graif, Andrew S. Gladfelter, Stephen A. Matthews, *Urban Poverty and Neighborhood Effects on Crime: Incorporating Spatial and Network Perspectives*, 8 *Sociol Compass* 1140–1155 (Sept. 2014), <https://onlinelibrary.wiley.com/doi/abs/10.1111/soc4.12199>

⁹ Lauren E. Glaze & Laura M. Maruschak, *Bureau of Justice Statistics, Dep’t of Justice, Special Report: Parents In Prison And Their Minor Children*, at 1-2 (2008), <http://bjs.ojp.usdoj.gov/content1/pub/pdf/pptmc.pdf>

raise their children.¹⁰ Put another way, that is 1.7 million children¹¹ whose absent mothers cannot read them a bedtime story or tuck them in at night, or work with them toward a better future. The situation is, however, even more heart-breaking than that. Every tenth mother will *never* see their children again, even after they are released from prison.

Approximately 11% of incarcerated women cannot leave their children with family members and thus they end up in the foster care system.¹² The Adoption and Safe Families Act (ASFA) of 1997¹³ limits the amount of time a child may remain in foster care. Although creating a stable environment for children is desirable, ASFA requires states to terminate parental rights and place children in an adoptive family if the parents have been gone for 15 of the previous 22 months.¹⁴ After parental rights are terminated, parents cannot have any contact with their children nor receive news about them through third parties. Thus just over a year in a federal prison can destroy the family of an incarcerated mother who could not place her children with a spouse or family member.

c. Clemency rebuilds families, fixing the harm caused by conspiracy laws

Clemency presents the easiest solution to resolving the massive injustice caused by this country's conspiracy laws, which are the engine of mass incarceration. Under conspiracy laws, anyone who is even tangentially involved in a group that is engaged in illegal activity can be held responsible for the most serious act of any other participant.¹⁵ Conspiracy prosecutions are a major weapon of the war on drugs that disproportionately harm minor players, mainly women and people of color.¹⁶

The U.S. Code contains dozens of conspiracy laws, giving prosecutors broad leeway to file conspiracy charges, which only require proof of an agreement between two or more people to commit an illegal act.¹⁷ Federal drug conspiracy laws require mandatory minimum sentences tied to the amount of drugs involved.¹⁸ While the leaders of the enterprise have valuable information that they can trade for immunity or light sentences, others caught up in the system have nothing to offer. Women are disproportionately affected by this system.¹⁹ They are told to betray loved ones and when they cannot, or will not, prosecutors then use the draconian punishments mandated by conspiracy laws to extort unwarranted guilty pleas. Women who try to resist are told that they will be separated from their children for decades and if they do get out, their kids will be strangers to them. For those few who try to withstand the pressure, prosecutors make good on their threats, using conspiracy laws to implicate

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (1997).

¹⁴ 42 U.S.C. § 675(5)(E).

¹⁵ 21 U.S.C. § 846.

¹⁶ ACLU, *Caught in the Net: The Impact of the Drug Policies on Women and Families* (2011), https://www.aclu.org/files/images/asset_upload_file431_23513.pdf

¹⁷ *Id.* at 31-32; Charles Doyle, Cong. Research. Serv., R41223, *Federal Conspiracy Law: A Brief Overview*, 4-5 (2016).

¹⁸ See 21 U.S.C. §§ 846, 963.

¹⁹ *Id.* at 35-36.

women in drug operations of which they knew nothing, obtaining decades-long sentences for something as trivial as passing on a phone message or renting a car.²⁰

The horror caused by conspiracy laws can be best illustrated by the tragedy of Michelle West who is currently serving a 2 LIFE plus 50-year sentences for a murder she did not commit while the person, her then-boyfriend, who admitted pulling the trigger did not serve a day in prison for that crime. Michelle had no criminal record. The person who committed the murder cooperated with authorities, but Michelle went to trial. Under the conspiracy laws and mandatory sentences at the time, she was given a de facto death sentence for dating the wrong man. Just one year after imposing Michelle's life sentence, District Judge Newblatt wrote Michelle a letter stating, "Your sentences were required by the Sentencing Guidelines, and I was not permitted to exercise judgment."²¹

The National Council has been advocating for clemency for Michelle West since we were founded on the Danbury prison yard in 2011. So have numerous others. People have made documentaries, put Michelle or her daughter Miquelle on magazine covers. The National Council put advertisements for Michelle's clemency at bus stops throughout Washington DC. Michelle met with members of Congress who recently toured FCI Dublin due to the sexual assaults and mismanagement. A year ago, Forbes magazine ran a story by Walter Pavlo titled "*Will Any U.S. President Help Michelle West Achieve Freedom*"²²

If our system cannot give Michelle West clemency, then it needs to be scrapped and replaced with a process that can. Clemency is tailor-made for situations like Michelle's when every person from the judge on down agrees that the law mandated an unfair sentence.

The only way to fix this injustice is to reform conspiracy laws to bring them into compliance with basic principles of due process. Prosecutors should no longer be able to obtain a conviction without any solid evidence of actual participation in a drug conspiracy or solely on the word of an informer. Sentences should be given based on the person's actual participation (including prohibiting incarceration for otherwise innocent acts such as passing a message) not on the most heinous act committed by anyone in the group. It violates every fundamental principle of justice to punish someone for the act of another, yet thousands of people are serving decades-long sentences for actions they knew nothing about. Conspiracy laws are a toxic remnant from the failed war on drugs and must be reformed. Therefore, we are very grateful to Representative Karen Bass (D-CA), Representative Jackie Speier (D-CA), and Representative Nancy Mace (R-SC) for introducing the Women in Criminal Justice Reform Act, which, among other things, would limit application of conspiracy laws to substantive involvement not the incidental contact such as taking a phone message or picking up lunch for the conspirators. This legislation amends the Controlled Substances Act and the Controlled Substances Import Act to solve the "girlfriend problem," i.e. would end the all too

²⁰ *Braverman v. United States*, 317 U.S. 49, 53 (1942); *United States v. Kozeny*, 667 F.3d 122, 132 (2d Cir. 2011); *United States v. Lukens*, 114 F.3d 1220, 1222 (D.C. Cir. 1997).

²¹ Letter from Judge Newblatt to Michelle West (Jan. 31, 1995), <https://www.candoclemency.com/wp-content/uploads/2015/03/Letter-from-Judge.pdf>

²² Walter Pavlo, Will Any U.S. President Help Michelle West Achieve Freedom. *Forbes* (Apr. 18, 2021), <https://www.forbes.com/sites/walterpavlo/2021/04/18/will-any-us-president-help-michelle-west-achieve-freedom/?sh=7857028f5306>

common situation in which girlfriends or wives of individuals involved in drug trafficking have no knowledge of the operation and thus have no information to trade in exchange for a more lenient sentence. Many women face stiffer penalties on conspiracy charges than the person convicted of the trafficking.

In the meantime, Michelle West and every other woman in the BOP are suffering under inhuman conditions. As she writes:

[T]he unit I am housed in has been without hot water in the rooms, showers, since March 30th. There is a very small hot water tank installed for the handicap shower. . . . The boiler has to be replaced for the unit in order for us to have hot water. The CMS plumber working on the project can't work on most days during the week, because he is being augmented to work as an officer or on some other post or project. . . . We have two units on exposure quarantine for COVID. I am wondering what happens if this unit gets locked down for COVID. Hot water in this unit does not appear to be a priority. There was a portable shower outside the unit . . . I walk by and I can smell the stench coming from it smelling like raw sewage. On a lot of days, I have taken a bucket in the shower with the cold water to bathe. I call them bucket baths.

V. Conditions of Confinement

In the last few years, a politicians and the public have paid a great deal of attention to issues such as inadequate provision of feminine hygiene products to incarcerated women. Not only has this not been resolved – we received word earlier this month from the women at FCI Marianna that they have not had access to sanitary napkins for the past two weeks – it is merely the tip of the iceberg. The conditions of confinement throughout the system are appalling. I would like to focus on one example – Federal Medical Center Carswell, which is a medical facility for women as well as a minimum security camp.

a. Carswell

Carswell houses the most vulnerable segment of the prison population: women who require hospitalization and/or constant physical or mental health care. But the reports of conditions there belong in a Charles Dickens novel. I included the DC report mentioned describing food at FMC Carswell, the only medical center for women in the BOP system, in my testimony three years ago. It is still true today. Here are a few examples:

- **From the DC Corrections Information Council report dated July 6, 2018:** “Inmates are provided with one serving of the main entrée, one serving of starches, one serving of dessert (when served), and one piece of fruit (when served). . . . DC inmates reported that meals are not healthy enough One DC inmate noted, The quantity of food (such as one small hotdog for dinner) is very insufficient for one’s diet

and causes inmates to buy huge amounts of commissary food that is very unhealthy. It also causes indigent people to go hungry and sell their pills in exchange for food.”²³

- **An email sent to a National Council staff member on February 14, 2022:** “[The] food [here] is undercooked or cold and with portions that can’t or won’t sustain a small child”²⁴

These emails show medical care at FMC Carswell verges on non-existent.

- “[COVID-19] Testing is sporadic and random, and recovery comes without even having a retest. If an inmate test positive for the virus they are moved out of the unit for 10 days then they are placed back into that same unit with inmates that are still negative.”²⁵
- “The burn on my stomach is now 9 days old and it is infected. Other ladies (not medical staff) are trying to help me keep it clean, but it hurts really bad. It makes me nauseous, so I sleep most of my day and night. Medical has not given me antibiotics for the infection and med surge refuse to see me even though the officer called them telling them it is infected.”

Only after The National Council intervened with the BOP Central Office did the burn victim get any medical treatment. Nor is FMC Carswell the only women’s prison to provide inadequate food, implement dangerous COVID-19 protocols, and withhold medical treatment. Reports from FCI Dublin, which is the target of an on-going investigation for sexual abuse and corruption, include the following:

- “I also kept wrappers of food we got on Friday and today. Best by date: 1/31/21!!! [the previous year]. Bologna, cheese, bread etc. I am having people sign it and date it.”²⁶
- “[T]hey are moving us to an infected unit with sick people...I’m not happy about it.”²⁷
- “Just after the town hall I spoke to one of the women [from BOP Central] about not having had my teeth cleaned because we haven’t had a dental hygienist in over two years and only one dentist. I showed her my teeth and told her that I came here with

²³ District of Columbia Corrections Information Council, *FMC Carswell Federal Medical Facility Inspection Report* (July 6, 2018),

<https://cic.dc.gov/sites/default/files/dc/sites/cic/publication/attachments/FMC%20Carswel%20Inspection%20Report%20and%20BOP%20Response%207.6.18.pdf>.

²⁴ Email to The National Council Intake Coordinator Phyllis Hardy (Feb. 22, 2022) (on file with The National Council).

²⁵ Email to The National Council Intake Coordinator Phyllis Hardy (Feb. 14, 2022) (on file with The National Council).

²⁶ Email to The National Council Intake Coordinator Phyllis Hardy (Jan. 23, 2022) (on file with The National Council).

²⁷ Email to The National Council Intake Coordinator Phyllis Hardy (Jan. 21, 2022) (on file with The National Council).

Class A teeth. I am concerned because if you have an issue, by the time the dentist sees you, his first suggestion is to pull it because that is all he has time for.”²⁸

This abuse occurs throughout the system:

- **FCI Aliceville:** “[O]n Thursday evening on the menu was chef salad. Usually, it is topped with turkey meat, chopped rather fine.... that time however there was RAW turkey on the salad!! literally slimy, pink, raw meat!! this lady had a huge piece of it took it to the [lieutenant] on duty...all she said was she had no idea because she does not work in food service!! [S]o the girl went to one of the staffers and was told that the meat was “cold cuts” well, technically he wasn't lying...it was cut cold... but come on now, RAW meat!! do they not know how sick one can get from eating raw meat??? especially poultry”²⁹
- **FPC Alderson:** A few new recreation classes were offered to supplement our "fresh air time" which is 4 hours per week. Then after attending one class, we were informed that the class was changed to one of the 4 hour per week designated times. This is due to staff shortages. To add insult to injury a bulletin was posted about the health dangers of sitting prolonged periods. The dangers including heart attacks, certain cancers, obesity, etc.”³⁰
- **FPC Greenville:** [T]hese days is in worse conditions with no hot water. Many of us are showering in cold water. Some ladies running to the gym where there’s 1 quarantine shower and it’s just a mess here. Everyone is pretty much not wearing mask anymore. Everything is up and running like there’s no COVID.”³¹

VI. FIX ACT

As of May 13, 2022, 17,324 people had pending clemency applications with the Pardon Attorney at the U.S. Department of Justice.³² Some people have been waiting for years for a decision. The bureaucracy involved in processing pardons is cumbersome, even by the standards of Washington bureaucracy. Worse, as an application goes from the Pardon Office to the Deputy Attorney General to the White House Counsel’s Office, any government worker

²⁸ Email to The National Council Intake Coordinator Phyllis Hardy (Mar. 15, 2022) (on file with The National Council).

²⁹ Email to The National Council Intake Coordinator Phyllis Hardy (Apr. 30, 2022) (on file with The National Council).

³⁰ Email to The National Council Intake Coordinator Phyllis Hardy (Feb. 17, 2022) (on file with The National Council).

³¹ Email to The National Council Intake Coordinator Phyllis Hardy (Feb. 27, 2022) (on file with The National Council).

³² Office of the Pardon Attorney, US Department of Justice, <https://www.justice.gov/pardon> (last visited May 13, 2022).

can decide without any accountability to the public or the petitioner not to send the petition to the President, resulting in a denial.

The Fair and Independent Experts in Clemency Act, or FIX Clemency Act, establishes an independent commission with a civil service staff and commissioners appointed by the president. The board will be composed of a range of people, including someone who was formerly incarcerated. The Act promotes transparency in reviewing petitions and ensures that multiple perspectives will be involved in the decision-making, eliminating the conflict of interest in which the Justice Department reviews the decisions of its own prosecutors and, not surprisingly, rarely finds them wanting. The FIX Clemency Act will reduce the political fallout for modern presidents who think they must appear tough and so are averse to granting clemency. It will end the practice of cramming serious consideration of clemency into a short period at the end of the president's time in office. A commission with a dedicated staff of civil servants will normalize review of petitions. The Act requires recommendations within eighteen months, so that consideration of clemency will be driven by an established timetable, not political considerations. Because the Constitution vests the clemency power solely in the president, the commission cannot force the president to act, but there will be accountability for any backlog: either the commission is not functioning properly, or the president is stalling. People seeking clemency and their families, friends, and advocates will know exactly where the problem is.

An independent commission will also create a buffer to political pressure. Presidents are more apt to grant clemency to someone with high social status and powerful friends who can donate money to political campaigns. Cornelius Vanderbilt lobbied for Jefferson Davis to be pardoned. Jimmy Carter pardoned Patricia Hearst, heiress to a publishing fortune. Gerald Ford pardoned Richard Nixon. Bill Clinton pardoned Marc Rich, who donated a total of \$500,000 to the Clinton Presidential Library and Hillary Clinton's Senate campaign. Although the commission cannot prevent the president from granting clemency to the rich and powerful, allowing the privileged to jump the clemency review line will draw attention to an act that the president has every reason to want to keep private. The Fix Clemency Act would bring transparency and fairness into the clemency process.

I testified before this very committee three years ago – almost to the day. On that occasion, I expressed concern that no one was monitoring implementation of the First Step Act and that women were not getting the benefits Congress intended. Then I worried that the BOP was dragging its feet on recalculating Good Time credits; three years later, that has still not been done.

Again, I ask that this Committee ensure the recalculation of good time credits for those currently incarcerated, one of the major reforms that supporters of the First Step Act celebrated. One of my own staff, currently on home confinement under the CARES Act, is due to end her sentence in August of this year – by her calculation according to BOP policy. The BOP just gave her credit for her programming but did not include her good time credit, giving her an out date of August 27, 2023. We are halfway through May and the BOP still

has given her a valid outdate.³³ The BOP's delays are potentially causing people to be imprisoned longer than the law requires, a violation of the principle on which this country was founded: a promise of life, liberty, and the pursuit of happiness.

I end with the First Step Act because it is emblematic of criminal justice reform to date: a tweak here and there without the political will to implement it effectively. The FIX Act is different. It restructures a system which is literally unconstitutional because it prevents the President from granting clemency as envisioned in that sacred document. We need a functioning clemency system to fix the myriad problems endemic in the federal prison system.

³³ Luke Barr, *DOJ finds Bureau of Prisons failed to apply earned time credits to 60,000 inmates*, ABCNews (Nov. 17, 2021).