Statement of Mark Osler
Robert & Marion Short Professor of Law, Univ. of St. Thomas (MN)

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

Chair and Members of the Subcommittee,

Thank you for allowing me to be heard on this important subject. There is a crisis in clemency with approximately 18,000 petitions pending and no plan in place to deal with this historic backlog. My goal here is to describe the current process of advising the president on clemency (including the role of the Pardon Attorney), outline the problems created by this process, advocate for the FIX Clemency Act as a way Congress can address these problems, and establish the continuing importance of clemency in criminal justice and its reform.

I. The Contemporary Process for Evaluating Clemency Petitions and Advising the President

Our clemency system has been broken for four decades. Before that, pardons and commutations were issued at regular intervals and in numbers we would find remarkable today.[1]

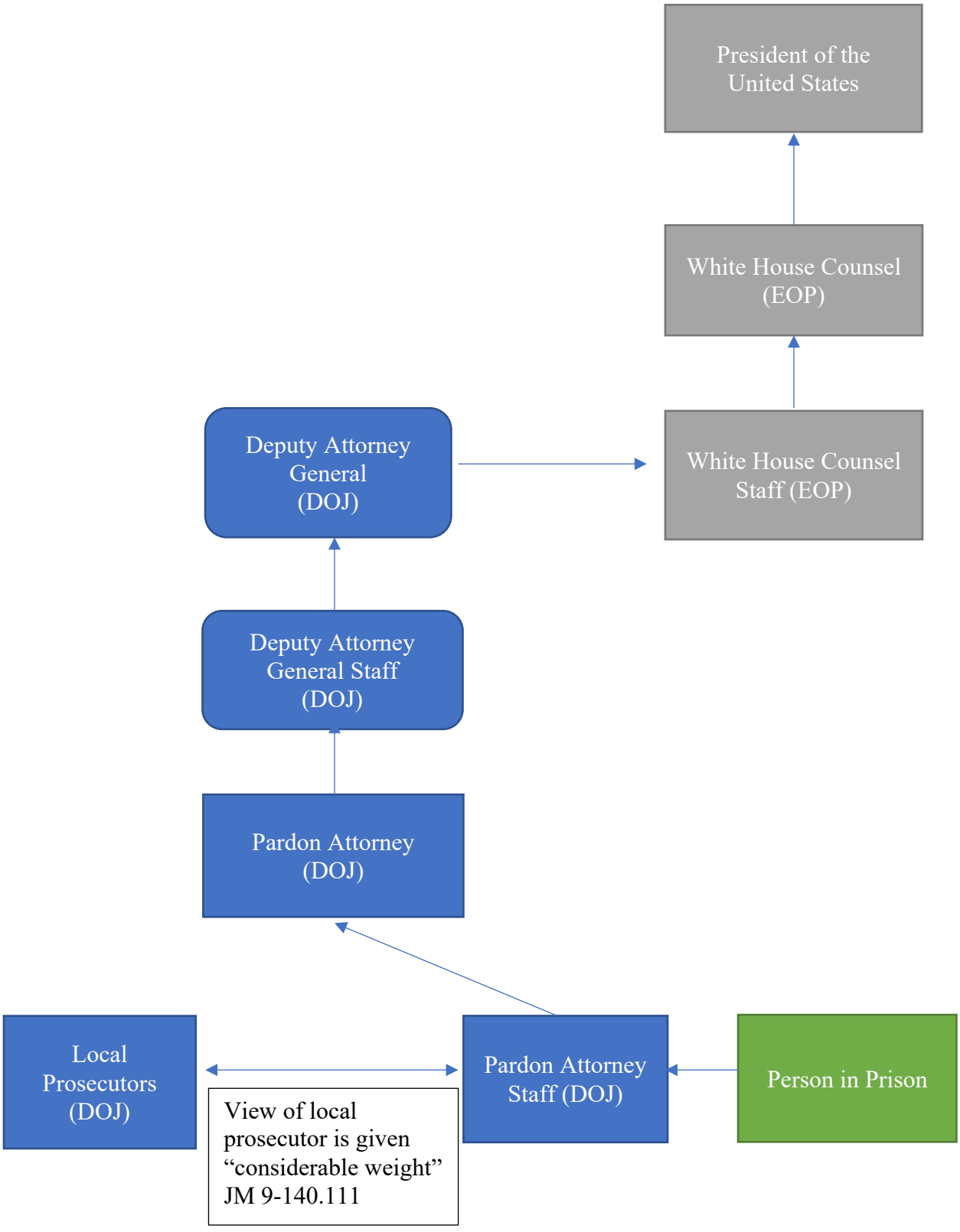
The current clemency review system developed haphazardly in the 1970s and 1980s. From a relatively simple system in which a petition was reviewed by the pardon attorney and then a recommendation conveyed from the Attorney General to the President, bureaucracy grew and metastasized until the process came to include seven distinct actors, each with their own interests and biases, acting sequentially. Today, a clemency petition will be considered in turn by the staff of the Pardon Attorney, the Pardon Attorney, the staff of the Deputy Attorney General, the Deputy Attorney General, the staff of the White House Counsel, the White House Counsel, and finally by the President.[2]

The chart below depicts this awkward process.

[1] U.S. Department of Justice, Clemency Statistics, available at https://www.justice.gov/pardon/clemency-statistics.
[2] Mark Osler, *Clementia, Obama, and Deborah Leff*, 28 FED. SENT. REP. 309, 309 (2016).

Path of evaluation for a federal commutation petition

Mark Osler, 2022



II. Key Problems with the Contemporary Process

Any rational analyst would find that the system described above is dysfunctional. It has failed over and over, under different presidents, even in identifying the easiest cases for clemency such as marijuana cases from states where marijuana is now legal. The problem is not the pardon attorney, as such, but the system as a whole.

No one intentionally created this process in any kind of coherent way; rather, it developed organically over decades as officials delegated parts of the process (primarily, the Attorney General delegating evaluation to the Deputy Attorney General) and decision makers tasked staff members with independent substantive reviews. The problems with the haphazard result nearly leap off the page of the chart above, but I will summarize the major issues below.

First, the process is simply too long, too complex, and too opaque. No state has a system with nearly this many hands involved, and for good reason: It's just bad management. While a thorough review is necessary, these redundant reviews add nothing. You won't find a decision chart like this at a business—at least not at a good one.

Second, the reviews are sequential to one another. The absurd inefficiency of seven reviewers seeing a petition only after a predecessor is done—rather than simultaneously as part of a board—is striking. On top of that, baked into this system is negative decision bias; reviewers know they can get in trouble only for a bad "yes," which incentivizes "no's." It is seven valves, all spring-loaded shut, on the same pipe.

Third, the decision process is upside-down. The specialists with the most knowledge in this area are in the Office of the Pardon Attorney, but they are at the very bottom of the vertical line of decision. At the top we find generalists who usually will lack a depth of knowledge in this field—and they are asked not to generally provide guidance or oversight, but to individually review each petition.

Fourth, two of the key reviewers are generalists who have inherent conflicts. The Deputy Attorney General is the direct supervisor of the United States Attorneys, and essentially overturning the sentences they successfully argued for threatens that relationship. The White House Counsel, in turn, may seek to steer the President away from controversy, and that is achieved by avoiding the risks inherent in granting clemency. Both the DAG and the White House Counsel have

other pressing and often episodic duties (such as shepherding Supreme Court nominees, for the White House Counsel), and this means that clemency decisions can constantly be pushed to the back of the line of priorities.

Finally, and perhaps most importantly, the central role accorded to the Department of Justice—both in the four levels of review ensconced there and through the policy directive that the views of local prosecutors be solicited and "given considerable weight."[3] It's not hard to see the nature of this conflict of interest: the very people who sought an outcome are being asked to review it.

A key lesson should be learned from the Obama administration's clemency initiative, which attempted to use clemency broadly without replacing the flawed process. While thousands of lawyers volunteered time and the president was pushing for results, only 1715 sentences were commuted because that administration created a system that not only left the broken evaluation system in place but added bureaucracy to it.[4] A review by the DOJ's Inspector General revealed a wealth of problems with the Obama program's implementation,[5] many of which could have been avoided if the underlying process had been restructured. In the end, Obama *denied* as many clemency petitions as his five predecessors combined.[6]

Congress does not have the role of restricting or directing the exercise of clemency by the President. It does, however, have an oversight responsibility relating to the performance of the process it funds, and the ability to construct a better process through legislation which would await signing by the same presidential pen that grants freedom through pardon warrants.

III. The FIX Clemency Act and a Better Process

H.R. 6234, the Fair and Independent Experts in Clemency Act" or "Fix Clemency Act," would implement a coherent system for analyzing petitions and advising the president on clemency, and address comprehensively the problems set out above.

---

[3] United States Department of Justice, Justice Manual, §9-140.111.
[4] Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 Vermont Law Review 465, 487-489 (2017).
[5] Office of the Inspector General, U.S. Department of Justice, Review of the Department's Clemency Initiative (Aug. 2018), available at https://oig.justice.gov/reports/2018/e1804.pdf.
[6] Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 William & Mary Law Review 387,425 (2017).

In short, this bill would create a presidentially-appointed board, working outside the Department of Justice, that would analyze clemency petitions and advise the president directly on outcomes. Specifically, the FIX Clemency Act would do the following:

- *Move from complexity to simplicity*. The Fix Clemency Act would essentially shrink the process, by sending petitions directly from the newly-created U.S. Clemency Board to the White House.
- *Allow for faster analysis to clear the backlog*. Because the Clemency Board would work in teams of three and have analysis from a dedicated staff, it could potentially work faster that the Pardon Attorney and her staff. Moreover, it offers an efficiency that cannot be gained by simply beefing up the pardon attorney's office, by removing the levels of review currently in place between the Pardon Attorney and the President. In other words, if we triple the Pardon Attorney's staff and keep the current system, that will do little to fix the problem, because the capacity of the reviewers above will remain the same. That would be like installing a bigger pump without putting in a larger outflow pipe—things can't move out, no matter how hard the pump is working.
- *Take the process out of the DOJ.* By taking the process of evaluating clemency out of the Department of Justice, the Act would finally remove the inherent conflict posed by prosecutors reviewing their own work. It also would mean that criteria would no longer be determined solely by the Department of Justice, and there would be no required deference to the opinion of local prosecutors.
- *Create more timely results*. Right now, petitions languish for years. The new structure created by the FIX Clemency Act would be more efficient—and at any rate, the legislation would establish an 18-month time limit for opining on a petition.
- *Impose greater transparency and provide data*. Under the FIX Clemency Act, the staff of the Board is directed to produce regular data reports on the work of the Board and related events.
- *Allow for the priorities of the president to be respected*. The Act specifically directs the Board to seek out priorities from the president, which would allow the president to both shape the system and have the final word on who actually receives a grant of clemency (as the Constitution requires).

IV. The Crucial and Continuing Importance of Clemency Within Criminal Justice and its Reform

We need clemency to work the way it is intended, with regular grants to people who have changed their lives either during their term of incarceration or after and for those that our society no longer condemns (such as marijuana sellers), among others. Many tools were used to create our too-large prison population, and many tools will be needed to disassemble it. One of those many tools is and must be a functioning and principled system of clemency.

Certainly, clemency is not the only tool for mindfully reducing prison populations, or even the primary one. Because clemency is purely retroactive, we need prospective tools that will create more realistic sentences in the future: legislation that sweeps away mandatory minimums, for example, and a serious revamp of the sentencing guidelines. Nor should clemency be the only retrospective tool in play. We need broader use of compassionate release, for example, and a more active employment of parole where it still applies. But amid all of this there is still a critical role for clemency to play.

Others will, and should, urge Congress to create second-chance sentencing mechanisms that will send cases back to sentencing judges after a significant portion of a sentence has been served. While those mechanisms can be worthwhile, they cannot stand alone, because they generate too many disparities between judges and districts. We know this from the studies already available of the second-chance mechanism for compassionate release that was contained in the First Step Act, which allows those in prison to take their petition to a district court after an administrative denial. According to a report by the United States Sentencing Commission released just ten days ago, covering compassionate release decisions made after October 1, 2020, there are stark disparities between judicial districts in grant rates. For example, in the Middle District of Georgia, judges granted just 4 out of 217 compassionate release petitions- a rate of just 1.8%. Yet in the adjacent Northern District of Georgia, 76 out of 170 petitions were granted, a rate of 44.7%. Effectively, compassionate release existed in one district, but not in the district next door. Clemency is a mechanism which can reach those worthwhile cases shunted aside in the Middle District of Georgia, as well as those that may present a good case for release outside the criteria for compassionate release.

A functioning clemency system is essential, too, if we care about pardons. Clemency takes two forms: commutations, which shorten or otherwise amend a

sentence and pardons, which serve to eliminate some of the effects of the underlying conviction rather than merely the sentence. Pardons can be granted to those who have not completed a term of imprisonment, but more often are given to those who have been convicted, done their time, and proven themselves in the community upon re-entry or completion of a term of probation. Second-chance sentencing measures like compassionate release can act like a commutation, but do nothing for those who seek the most common form of pardon. In some states, expungement serves this purpose, but the federal system lacks an expungement statute authorizing relief from the effects of conviction.

That means that for those who have done their federal time and want a fresh start, pardons are the only game in town. They matter, too, in that pardons allow people to vote, to own a gun, to serve on a jury and remove collateral consequences like housing and federal benefits restrictions—the things that make us full-fledged citizens. Perhaps just as importantly to some, it marks an actual forgiveness by the society that exacted punishment. In many states, the vast majority of clemency grants are pardons rather than commutations, and they are taken seriously. A man who presents himself for a pardon thirty years after his offense because he wants to hunt with his grandchildren is asking for a return of his human dignity. When we tear down or make inoperable the machinery of clemency, we choke off this nuanced and moral action.

Finally, clemency is singular in reflecting the widely-held values of Americans. At the core of clemency are mercy and a belief in second chances, values which reside deep within our identity. To Christians like me, the ethic of mercy is deeply engrained. However, the value of mercy is found not only at the center of the Christian faith but embraced uniformly by other faiths and by belief systems unrelated to faith. Americans want there to be a path to mercy, and (in the words of Alexander Hamilton), "the benign prerogative of pardoning should be as little as possible fettered or embarrassed."[7] Our current dysfunctional process for evaluating clemency petitions is an unreasonable fetter on a lever to freedom.

[7] Alexander Hamilton, Federalist 74.