

TESTIMONY OF

NKECHI TAIFA, ESQ

President

The Taifa Group, LLC

&

Convener Emeritus

Justice Roundtable

**OVERSIGHT HEARING on
CLEMENCY AND THE OFFICE OF THE PARDON ATTORNEY**

before the

HOUSE JUDICIARY COMMITTEE

Subcommittee on Crime, Terrorism, and Homeland Security

Congresswoman Sheila Jackson Lee, Chair

May 19, 2022

Good morning, Judiciary Committee Chair Jerrold Nadler, Crime Subcommittee Chair Sheila Jackson Lee, Vice Chair Cori Bush, and other Members who are part of this auspicious body. Thank you for convening this important oversight hearing on Clemency and the Office of the Pardon Attorney.

My name is Nkechi Taifa, President and CEO of The Taifa Group, Convener Emeritus of the Justice Roundtable, Senior Fellow at the Center for Justice at Columbia University, civil/human rights attorney, and a long-time advocate for justice system reform and transformation. I am honored to testify at this important hearing to generally share my insights, particularly with respect to the need to consider the grant of clemency to categories of people in general, and to shine a spotlight on a specific one – that of “old law” elderly prisoners, and I will conclude touching on the issue of posthumous pardons.

PRECEDENTS FOR USE OF CLEMENCY TO RECTIFY INJUSTICES AND HEAL SOCIETY

Presidents have always had the power to correct mistakes and show mercy through clemency – a catch-all term for several related procedures – including shortening sentences through commutations, restoring civil rights through pardons, and more recently, the granting of posthumous pardons.

There is sound precedent for the use of the clemency power to rectify and close painful chapters in our national history. For example, President Kennedy sought to relieve the impact of lengthy mandatory minimum narcotics laws from the 1950s through sentence commutations, impacting, in today’s numbers, about 2,000 prisoners.

In 1974 President Ford addressed the issue of the convictions of Vietnam-era draft-dodgers by establishing a review board to vet appropriate cases for possible commutation, which resulted in the possibility of conditional clemency for about 14,000 draft evaders and military deserters in less than a year.

President Carter used the clemency power to offer draft-evaders amnesty as a way to heal the wounds from the controversial Vietnam War.

Pursuant to the Civil Liberties Act of 1988, which granted reparations to Japanese Americans unjustly incarcerated during World War II, President Reagan received authority to pardon political prisoners who were convicted of resisting detention camp internment.

In 2014 President Obama established a Clemency Initiative, inviting petitions from people convicted of nonviolent offenses who would have received substantially lower sentences if convicted of the same offenses today, resulting in the release of over 1,700 people.

COVID 19 AND OVER-INCARCERATION HAVE ESCALATED THE NEED TO COMMUTE SENTENCES

Use of the clemency power represents an exceptional opportunity for presidents to show mercy, correct miscarriages of justice, and right historical wrongs. There are currently over two million people in prison or jail in the U.S., a 500% increase over the last 40 years, much of it as result of flawed policies emanating from the 1994 Crime Bill and its legislative precedents in 1984, 1986 and 1988. If there is a serious interest in making a dent in over- incarceration and rectify abuses from the past, the Executive must demonstrate a clear commitment to the robust and consistent use of clemency and make regular use of this unique power.

The public health crisis presented by COVID-19 in carceral settings has intensified the urgent need to decarcerate. Public health experts have advised government officials to release people who pose no threat to public safety. If mass incarceration is ever to be abated, whether because of its inherent importance or whether pursuant to the need to adhere to social distancing guidelines, it is critical that intentional steps be implemented that expand the number of people eligible for relief. Individual commutations, however, are not enough to tackle the enormity of this challenge.

CATEGORICAL CLEMENCIES MUST BE SERIOUSLY CONSIDERED

Thus, in addition to clemency petitions considered on a case-by-case basis, a categorical approach to releasing groups of deserving candidates for clemency must be seriously considered as well. The administration just recently tiptoed into this process by commuting 77 sentences in the class of people who had been released from prison to home confinement. This is an important start. The harms, however, that mass incarceration has wrought on families and communities have been massive; correcting these harms must be massive as well.

The time is now ripe to follow precedents from past administrations and grant clemency for certain categories of people. In November 2020 the Justice Roundtable, which I convened at the time, issued a Report, [Transformative Justice: Recommendations for the New Administration and the 117th Congress](#). We advocated that the President and Administration should extend the concept of clemency from case- by-case grants of individual mercy into a systemic response using targeted categories of people to correct decades of racist, punitive, and degrading incarceration.

We recommended that categories for commutation could include, but not be limited to, those who have unsuccessfully petitioned for compassionate release, older or elderly prisoners, including those whose sentences predated the U.S. Sentencing Guidelines, and those who have a debilitating, chronic, or terminal medical condition. Individuals serving sentences that have since been deemed unjust but not made retroactive should also be prime candidates. I

In addition, the report stressed that those serving excessively lengthy prison sentences as a result of exercising their constitutional right to go to trial, euphemistically known as the “trial penalty,” should likewise be considered. [Michelle West](#), serving a life without parole sentence since 1993 for a first offense, is a prime example of this category. Veterans as a group could be considered, we opined, as well as women and parents of minor children. We stressed that the sentences of people convicted of marijuana offenses must be commuted. Indeed, there is a robust campaign led by Weldon Angelos to that effect, inclusive of a comprehensive September 14, 2021 [letter](#) of prestigious influencers delivered to President Biden requesting clemency for all persons subject to federal criminal and civil enforcement on the basis on nonviolent marijuana offenses.

The Justice Roundtable’s report also noted that individuals who have been labeled as career offenders who have only narcotics as a triggering offense, as well as those who have received double mandatory minimum sentences where the individual has only drug convictions should also be considered. And the category of individuals sentenced for drug- related offenses – many of whom were sentenced pursuant to policies in the 1994 Crime Bill that have now been denounced as unjustly contributing to mass incarceration – should be granted clemency. It is critical that those who are [COINTELPRO](#)-era political prisoners who remain federally incarcerated

should also be granted clemency, such as [Dr. Mutulu Shakur](#), [Veronza Bowers](#) and [Leonard Peltier](#).

The above represent just some possible recommendations for categorical clemency relief. And, not to be forgotten, our report stressed that regardless of whether an individual fits into any of the categories suggested above, it is critical that the focus be on who the person is today and any postconviction achievements they have attained, as opposed to their conviction of record.

Our report suggested that Congress can play a critical role as well. Governors have a responsibility to slash the incarcerated population within their states. We stated that Congress can premise the awarding of justice-focused grants to states on a governor's commitment to reduce state prison populations through categorical commutations that correct past systemic abuses of the past.

Finally, I support the [Fair and Independent Experts in Clemency Act](#) (FIX Clemency), introduced by Congresswoman Ayanna Pressley and colleagues, which aims to address the country's mass incarceration crisis by establishing an independent clemency board to review petitions and send recommendations directly to the President. Indeed, since 2010, myself, along with Professor Mark Osler and others, initiated a public campaign to recommend the creation of an expert clemency commission within the executive branch that would eliminate the current system's redundant bureaucracy and reduce the irony that structured the processing of clemencies within the very agency whose job it was to prosecute. In supporting this bill, I hope that it will create a rebuttable presumption of release for specific categories of incarcerated people.

CORRECTIVE CLEMENCY FOR OLD LAW FEDERAL PRISONERS

The category I wish to highlight for clemency at this time is that of “old law” federal prisoners who were sentenced for offenses committed prior to November 1, 1987, when federal parole was abolished, and the U.S. Sentencing Guidelines went into effect. Grouped together, these people are referred to as “old law” prisoners – those sentenced to indeterminate sentences, most dependent on the U.S. Parole Commission to grant their release. However, those who are parole-eligible have been denied multiple times based on the nature of their original conviction, without serious consideration of personal change or accomplishments and behavior inside prison. And these people have been excluded from petitioning the courts for compassionate release, although the majority are over 65, and many have significant medical problems because of decades in prison.

This category of people is among the very oldest and longest incarcerated in the federal system. Many are in their late 60s, 70s, even 80s; the youngest would be in their 50’s. Their health has deteriorated with advancing age, and many have underlying health conditions like heart and lung disease, diabetes, and advanced cancer. Numerous clinical studies, including one published by the American Journal of Public Health, have found that a prisoner’s physiological age averages 10-15 years older than his or her chronological age, due in part to the combination of stresses associated with incarceration. Due to increased healthcare and caretaking services, the cost to incarcerate these elderly individuals is three to five times higher than those who are younger.

These “old law” federal prisoners are uniquely vulnerable to infection from COVID-19 and other communicable diseases. Presidential clemency is their only recourse and their last resort.

The U.S. Parole Commission, which was officially abolished in 1987 but reauthorized multiple times, is dysfunctional, resulting in inadequate procedures, cursory review, and routine parole denials. Because of exclusion from the First Step Act, no one sentenced under the “old law” is eligible to turn to the courts for compassionate release, unlike every other federal prisoner.

Release of these elderly “old law” prisoners will not endanger public safety. The U.S. Sentencing Commission recognizes that people over 50 are extremely unlikely to commit new crimes. This significant decline in recidivism has been established by multiple studies.

The nature of an original conviction is now widely acknowledged to be inaccurate as a predictor of current risk to public safety upon release for older prisoners. Many of these “old law” federal prisoners were convicted of serious offenses but those original convictions reflect neither their current behavior nor their rehabilitation of many decades. There should be a presumption that they be released due to their advanced age, medical conditions, and number of years served in prison.

Creating a rebuttable presumption for release for this category of incarcerated people would correct both the inaction of the U.S. Parole Commission, as well as Congressional oversight in omitting old law prisoners from First Step Act reforms. And granting clemency to those whose offenses occurred before the Sentencing Guidelines took effect would correct the egregious sentencing disparities suffered by these old law prisoners, many languishing in prison because laws impacting them were not made retroactive.

There is widespread public support for fairness and consistency in sentencing, and corrective clemency that benefits many identifiable classes of people can be readily accomplished. With respect to not only the old law prisoners but also all those currently serving

a sentence where the law has changed but not made retroactive, people will continue to serve sentences that Congress and the Supreme Court have already determined are unfair and disproportionately punitive to African Americans. The result is unjust, unnecessary, and inconsistent with evolving standards of decency.

A CASE FOR POSTHUMOUS PARDON – MARCUS GARVEY

In addition to restoring civil liberties, the presidential pardon power may also be used to correct injustice and restore the reputations of those who have been wrongly convicted posthumously (i.e., after their death). The quest for a posthumous pardon for early 20th century civil rights leader Marcus Garvey has been a multi-decade effort spanning several administrations to right a wrong committed by the U.S. government nearly 90 years ago and has the support of millions throughout the African diaspora.

Marcus Mosiah Garvey was one of the most prominent leaders of the civil rights movement in the first half of the 20th century. In 1923, Mr. Garvey was wrongfully convicted in U.S. federal court on a bogus charge of using the mails in furtherance of a scheme to defraud, and sentenced to five years in prison. The facts, however, demonstrate that Marcus Garvey was targeted because of his race and political beliefs, that he received an unfair trial, that he nonetheless made extraordinary contributions to the community and the civil rights movement, and that a full pardon is warranted to remedy this significant miscarriage of justice.

Multiple government agencies – including the Bureau of Investigation, predecessor to today's FBI – feared Garvey's power in unifying Black people and sought to neutralize his massive influence by aggressively targeting him. A young Bureau agent, J. Edgar Hoover, was a chief

strategist, using tactics he would later perfect as part of his infamous and now discredited counterintelligence “COINTELPRO” program rampant during the 1960s.

Recognizing the wide-spread abuses in Mr. Garvey’s case, and with the support of most of the jurors who had voted to convict, his sentence was commuted by President Calvin Coolidge in 1927, whereupon he was promptly deported to his native Jamaica. Considering the politically motivated biases and prosecutorial misconduct at the root of his trial, a posthumous pardon for Marcus Garvey is warranted to rectify a gross miscarriage of justice that has persisted for far too long.

Marcus Garvey was not just a wrongfully-convicted person—his unjust conviction involved racial and political motivations intended to stifle a growing movement among Black people that even today requires rectification and redress.

Despite the commutation of his sentence, Garvey’s name is still tarnished by the stigma of his conviction, and the Garvey family, led by his remaining living son, Dr. Julius Garvey, seeks to amend the historical record to reflect the honorific nature of their ancestor’s contributions to the U.S. and global community. Considering the weight of local, congressional, and international efforts to clear his name over the decades, Garvey’s case presents a truly exceptional set of circumstances not easily replicated, that merit a presidential pardon.

As reflected in a February 2022 letter to Judiciary Chair Nadler, authored by Anthony Pierce of Akin Gump, counsel to Dr. Julius Garvey, Mr. Garvey’s influence on numerous social justice leaders, such as Dr. Martin Luther King, Jr., and Nelson Mandela, is well documented. As a charismatic orator, Mr. Garvey used his organization, the Universal Negro Improvement Association and African Communities’ League (UNIA), to assemble over 2,500 delegates from all

over the world to develop the first-ever International Convention of the Negro Peoples of the World, during which a document was drafted and adopted which provided a foundation used by other civil and human rights leaders to further racial justice initiatives. Mr. Garvey also used the UNIA to launch the Black Star Line Shipping Company, the Liberia Project and the Negro Factories Corporation, which established thriving businesses in Black communities, employing over 1,000 people in Harlem, New York alone.

Mr. Garvey's vision of racial justice and anti-colonialism has been honored by governments around the world. The 32 member nations of the Organization of American States unanimously passed a resolution naming its hall of culture in his honor in 2008. Moreover, his native country, Jamaica, has designated him as its first "national hero," and his likeness appears on the nation's currency.

The modern organized effort to exonerate and restore Mr. Garvey's reputation has lasted for over thirty years. Dr. Garvey and his late brother, Marcus Jr., testified before the House Judiciary Committee in 1987 alongside several historians and luminaries. The Honorable Charles B. Rangel, then- Chairman of the House Ways and Means Committee, annually co-sponsored house resolutions for Mr. Garvey's exoneration.

While there is no question that pardons are most beneficial for those who are living, there are times when the granting of exceptional posthumous petitions are valuable and necessary to show that discredited values of the past are no longer the values of the present. Such is the case with Marcus Garvey. Although most of the posthumous pardons have been issued by governors on the state level -- (e.g. Virginia Governor Ralph Northam granted posthumous pardons in August 2021 to the Martinsville Seven, young Black men electrocuted 70 years ago for the

purported rape of a white woman) -- there is precedent across party lines for posthumous pardons granted by the president.

In 1975 President Ford granted a posthumous pardon to Confederate General Robert E. Lee, restoring full citizenship rights removed because of his military leadership of the Southern succession. In 2008 President Bush issued a posthumous pardon to Charles Winters, who served 18 months for smuggling B-17 bombers to the state of Israel in violation of the Neutrality Act of 1939.

In 1999, Lieutenant Henry O. Flipper received a posthumous pardon from President Clinton, 117 years after his dishonorable discharge from the military on specious charges. Flipper was the first African American graduate of West Point, and the first African American commissioned officer in the regular U.S. army. Although found not guilty during his court-martial for embezzlement of funds, he was nevertheless dishonorably discharged. Lieutenant Flipper's posthumous pardon gave a semblance of closure to the family, restored his good name and reputation, and removed yet another appalling stain from this country's system of justice.

For more than 100 years, Jack Johnson's legend as the first Black heavyweight boxing champion has been undisputed, but his legacy had been tarnished by a 1913 racially tainted criminal conviction – for transporting a white woman across state lines, in contravention to the Mann Act. Since his death in 1946 there had been advocacy for a posthumous pardon, which was successfully granted by President Trump.

Posthumous pardons, though symbolic, serve to affirm this country's commitment to righting wrongs and ending injustice, regardless of when it occurred.

CONCLUSION

From the kangaroo courts and lynching laws of yesterday to the mass incarceration crisis confronting society today, miscarriages of justice have been an ever-present feature of the U.S. criminal punishment system. However, presidents have always had the absolute power and have used it, to correct mistakes and show mercy through clemency, whether shortening sentences through individual commutations, the use of blanket amnesties and categorical clemencies, restoring civil rights through pardon, as well as through application of the posthumous pardon. All these tools should be used today. If this Committee feels any specific area or category needs additional examination, please prioritize the convening of targeted hearings for further scrutiny.

Thank you for this opportunity to testify on this important subject and I stand ready to provide any further technical assistance needed.

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