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Subcommittee on the Constitution, Civil Rights, and Civil Liberties
"Presidential Clemency and Opportunities for Reform"
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Mr. Chairman and Members of the Subcommittee,

Thank you for allowing me to be heard on this important subject, which involves nothing less than the nature of a central constitutional power of the president.

Calls to restrict the pardon power have cropped up periodically over the past two centuries, and have been consistently rejected—most recently, in the wake of President Bill Clinton's pardons of Marc Rich and Pincus Green in 2001.[1] Though many are upset with some of President Donald Trump's grants of clemency, those impulses should be resisted again. The institution of clemency is ancient and gives voice to the core American values of mercy and second chances.

At the same time, the flawed process by which clemency petitions are processed requires reform by the executive. All would be better served if clemency evaluation was taken out of the Department of Justice and given to a bipartisan board. To encourage these reforms, Congress should promote and fund this better structure for the evaluation of clemency cases.

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[1] PBS Newshour, Pardon Probe, Feb. 8, 2001, available at https://www.pbs.org/newshour/show/pardon-probe-marc-rich.

I. Clemency reflects America's love of mercy and second chances

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.[2] The framers of the Constitution saw the value of mercy in history, in religion, and in the plays of William Shakespeare, which were wildly popular at that time— George Washington even took in a performance of *The Tempest* (with its themes of mercy) during the Constitutional convention itself.[3]

Just as Shakespeare's plays presented mercy as a virtue to the framers of the Constitution, so our own popular culture continues to do so now. To take one example,[4] the *Batman* movies directed by Christopher Nolan repeatedly emphasize themes of mercy as an ultimate virtue. In the climax of *The Dark Knight*, the evil Joker has hijacked two ferries rigged with explosives; one is full of prison inmates, the other jammed with civilians. The Joker gives each group a detonator for the other ferry and tells each they will be spared if they activate the detonator and kill those on the other ferry. All prove merciful, however, and both groups decline to activate the detonator. Batman then captures the Joker and, in another act of mercy, spares his life.[5]

The moral touchstone of a generation, the Harry Potter books and movies, also return again and again to themes of mercy and redemption. One of the most memorable scenes in the series depicts Harry's mentor, Dumbledore, at the hands of Harry's arch-nemesis, Draco Malfoy, who has come to kill Dumbledore.[6] Harry has been immobilized, and watches as Draco, terrified, prepares to cast a killing spell on the calm, feeble Dumbledore. As he steels himself for the attempted kill,

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[2] For example, the non-theistic Society for Ethical Culture embraces the value of mercy. Dr. Joseph Churman, "Doing Justice, Loving Mercy, and the Struggle to Make Life Whole," Sept. 19, 2010, available at http://www.nysec.org/testing/sundayvideo-9-19-2010.

[3] The influence of Shakespeare on the Framers was the subject of an entire exhibition at the Folger Shakespeare Museum in Washington D.C. Shakespeare & Beyond, America's Shakespeare: Connections Between the Bard and the Founding Fathers, June 28, 2016, available at https://shakespeareandbeyond.folger.edu/2016/06/28/americas-shakespeare-founding-fathers/.

[4] It is impossible to list all of the modern films with themes of mercy, but some of the better ones include Traffic (IEG 2000), Chocolat (Miramax 2000), and Schindler's List (Universal 1993).

[5] THE DARK KNIGHT (Warner Bros. 2008). A 2016 movie not involving Nolan and featuring a notably less merciful Batman, Superman v. Batman: Dawn of Justice, was a flop.

[6] The scene is essentially the same in the book and the movie. J.K. Rowling, HARRY POTTER AND THE HALF-BLOOD PRINCE (2005); HARRY POTTER AND THE HALF-BLOOD PRINCE (Warner Bros. 2009).

Draco snarls "You're in my power... I'm the one with the wand... You are at my mercy." Unflinching and unflappable, Dumbledore replies "No, Draco. It is my mercy, not yours, that matters now."[7] Power, Dumbledore is telling Draco, goes with mercy.

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."[8]

II. The present problem with clemency is the process

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. For example, even much-maligned Herbert Hoover granted nearly 1,200 clemencies in his one term in office.[9] The supposed "tradition" of holding off on clemency grants until the end of a second term is a myth—that unfortunate practice began with Bill Clinton.[10]

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. A contemporary 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.[11] No hearing for the petitioner or victims is required or provided for at any point.[12]

There are four primary problems with this structure.

First, the process is simply too long. 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, three redundant reviews (at the Pardon Attorney, Deputy Attorney General, and White House Counsel) add nothing.

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[7] Id.
[8] Alexander Hamilton, Federalist 74.
[9] U.S. Department of Justice, Clemency Statistics, available at https://www.justice.gov/pardon/clemency-statistics.
[10] Id.
[11] Mark Osler, *Clementia, Obama, and Deborah Leff*, 28 FED. SENT. REP. 309, 309 (2016).
[12] 28 C.F.R. §§1.1-1.11 (2016).

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."

Third, 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 clemency. Both the D.A.G. 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."[13] 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. 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 system in place but added bureaucracy to it.[14] The fact that good cases were left on the table is revealed not only by the repeated rejection of Alice Marie Johnson, but the thousands who have been released under the First Step Act, which targeted the same group of non-violent narcotics offenders. A review by the DOJ's Inspector General revealed a wealth of problems with the Obama program's implementation,[15] many of which could have been avoided if the underlying process had been restructured. In the

[13] United States Department of Justice, Justice Manual, §9-140.111.
[14] Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 Vermont Law Review 465, 487-489 (2017).
[15] 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.

end, Obama *denied* as many clemency petitions as his five predecessors combined.[16]

A better structure is easy to envision. The most productive and efficient state systems (and the example of President Gerald Ford's conditional pardons of Vietnam era offenders) utilize a board through which multiple people conduct a simultaneous review of pending petitions and make recommendations to the president.[17]

III. Congress should fund a better process rather than attempt to unconstitutionally limit the pardon power

Individualism is perhaps the defining characteristic of the American identity. The soul of our constitution can be found in those sections that vibrate with the frequency of that identity: the apportionment of individual rights, the establishment of democracy, and the ability of a single person to give mercy on behalf of the society through the pardon power. It is the last of these that can be most controversial. Through all of the scandals and triumphs wrought by clemency, it has stood alone as an unchecked power of the president. Even now, it should remain so. To alter its character and restrict its scope would be to turn our back on one of our deepest values, the intent of the framers, and the hopes of the least among us.[18]

Clemency, after all, is not suited to be a tool of tyranny: Tyrants gain power by putting people in prison, not by letting them out. Hamilton was perhaps getting to that in referring to clemency as a "benign prerogative."[19] We may object to particular grants—I certainly have—but restrictions would be consistent with neither the constitutional scheme or the intent of the framers.

Presidents, from the first, have used the pardon power in keeping with what was most important in their own hearts: Washington acted out of the confidence and purpose of a military commander called to unify his troops; Lincoln was moved by authentic human stories; Truman saved the man who tried to assassinate him because he sympathized with his cause (Puerto Rican nationalism); Ford pardoned his predecessor and draft evaders because he was at core a reconciler

[16] 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).
[17] Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 Vermont Law Review 465, 491-502 (2017).
[18] Mark Osler, *Clemency as the Soul of the Constitution*, 34 Journal of Law & Politics 131 (2019).
[19] Alexander Hamilton, Federalist 74.

who believed in national healing; Obama deeply emphasized with the hurt and broken people he found in prison; and Donald Trump moves in response to his trust in those he pulls close.[20] Those facts beg an answer to a central question: Is that deeply personal use of clemency what the framers of the constitution intended?

It seems clear that they did intend exactly that. Moving within a social and legal culture that saw clemency as a virtue flowing from an individual, they considered other models,[21] looked clearly at the potential problems with such a broad grant of power, and chose to include the pardon power at the heart of the constitution as the sole prerogative of the person holding the office of president.

Instead of attempting to restrict clemency, the better course is to encourage the development of an advisory system that will provide consistency, principle, and regularity to the process. The outline of such a process isn't complicated: create an advisory commission that would evaluate petitions and make recommendations to the president on a regular schedule.[22]

In short time, an advisory clemency board would probably be revenue-positive, as even a handful of commutations can save significant tax dollars from being spent on needless imprisonment. Signaling a willingness to fund such a board—and engaging the executive collaboratively on its creation—would spur movement towards this better structure. This is a rare area of potential bipartisan cooperation, and collaboration will bear more fruit than conflict.

The project is worthy of attention. By reviving the principled use of clemency, we can restore the proper role of mercy and the soul of the Constitution.

[20] Mark Osler, *Clemency as the Soul of the Constitution*, 34 Journal of Law & Politics 131, 137-147 (2019).
[21] Id. at 151-155,
[22] Rachel E. Barkow and Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal,* 82 University of Chicago Law Review 1, 18-25 (2015).