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PRESIDENTIAL CLEMENCY AND OPPORTUNITIES FOR REFORM

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

MARCH 5, 2020

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PRESIDENTIAL CLEMENCY AND OPPORTUNITIES FOR REFORM

THURSDAY, MARCH 5, 2020

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

Washington, DC.

The subcommittee met, pursuant to call, at 9:06 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Cohen [chairman of the subcommittee] presiding.

Present: Representatives Cohen, Nadler, Raskin, Scanlon, Dean, Garcia, Jackson Lee, Johnson, Jordan, Collins, Reschenthaler, Cline, and Armstrong.

Staff Present: David Greengrass, Senior Counsel; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Anthony Valdez, Staff Assistant; John Williams, Parliamentarian; James Park, Chief Counsel; Will Emmons, Professional Staff Member; Matt Morgan, Counsel; Paul Taylor, Minority Counsel; and Andrea Woodard, Minority Professional Staff Member.

MR. COHEN. The subcommittee of the full committee, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. Without objection, I am the chair, and I am authorized to declare a recess of the subcommittee at any time. I welcome everyone to today's hearing on presidential clemency and opportunities for reform. I will recognize myself for an opening statement.

Not far from here, almost 57 years ago, Dr. Martin Luther King spoke movingly to remind America of the fierce urgency of now, because now is the time to make justice a reality for all of God's children.

We hold this hearing today to remind America that today there are few things more fiercely urgent than the need to grant clemency to the thousands who suffer from the burdens of excessive and unjust imprisonment, or the collateral consequences stemming from their criminal convictions.

Perhaps not coincidentally, these burdens are disproportionately borne by people of color.

The Constitution provides the President with broad authority to grant clemency because the Framers understood that the criminal justice needed a safety valve that would guard against excessive or

unjust punishments. Article II, Section 2 gives the President the power to, quote, "grant reprieves and pardons for offenses against the United States except in cases of impeachment," unquote. Until fairly recently, most Presidents were relatively generous in granting clemency. According to a statistical analysis by one of our witnesses, Professor Rachel Barkow, between 1892 and 1930, 27 percent of clemency applications resulted in some form of clemency.

As recently as the 1970s, President Carter granted 21 percent of the petitions he received; President Ford granted 27 percent; and President Nixon, who was famously known as a law and order President, nonetheless, he granted 36 percent of clemency petitions.

It was only the beginning of the 1980s that clemency grants began to decline sharply. I have long been concerned with the stinginess with which modern Presidents have granted clemency. And between 2013 and 2014, I wrote four different letters to my favorite President, President Obama, and then Attorney General Holder, urging the President to grant more clemency petitions, and authored two opinion pieces on the subject. And I would ask unanimous consent to insert these letters and opinions pieces into the record. Without objection, so done. Thank you.

[The information follows:]

MR. COHEN FOR THE OFFICIAL RECORD

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HIGHWAYS AND TRANSIT
WATER RESOURCES AND ENVIRONMENT

June 18, 2013

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

I enjoyed our recent discussion regarding criminal justice issues and the President's use of his pardon power. As a follow-up to our conversation, please find a copy of a letter I sent to President Obama urging him to make greater use of his powers of executive clemency to provide justice to those individuals who are serving unnecessarily long sentences.

In addition, my letter describes my proposal for the Department of Justice to create a special Compassionate Release Review Board, which would conduct a systematic review of the sentences of all current prisoners and recommend worthy candidates for pardon or commutation. As part of this review, a CRRB would also consider broad classes of offenders serving unjust sentences that no longer align with our national values and policies.

I hope you will consider my proposal and that we can continue our useful discussion of this very important issue soon. Thank you for your service as Attorney General and I look forward to our continued partnership on this and many other matters.

As always, I remain,

Most sincerely,

Steve

Steve Cohen
Member of Congress

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WATER RESOURCES AND ENVIRONMENT

June 18, 2013

The Honorable Barack Obama
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Obama:

You have, at times, made bold use of your executive power to help the powerless, from granting deferred action to DREAM Act beneficiaries to providing some relief from crushing student loan burdens. But you have been surprisingly reluctant to use your pardon power, a very important power granted to you under the Constitution. However, you still have the opportunity to help those who need it most and leave an important legacy of justice.

Criminal sentences reflect a society's values but as our values change, many of those sentences unfortunately remain on the books and people still serving them suffer needlessly. In his "Letter from a Birmingham Jail," Dr. Martin Luther King, Jr. argued that "one has a moral responsibility to disobey unjust laws." I hope you will use your legal authority under the Constitution, and your moral responsibility in the spirit of Dr. King, to "disobey" unjust sentences and make them right through your pardon power.

To date, you have pardoned only 39 people and commuted one sentence, far fewer than most of your recent predecessors. Meanwhile, our prisons are packed with non-violent offenders serving excessive sentences, particularly for drugs, simply because Congress wanted to look tough on crime. But the public is awakening to the fact that this policy is taking us in the wrong direction. 40 years of the drug war has proven to be a failure and not only are we throwing away the lives of millions of people who pose no risk to society, but we are also wasting precious resources through our vast prison industrial complex.

We can do better and you have the opportunity to lead the way. Unfortunately, the Pardon Office at the Department of Justice (DOJ) is currently headed by a holdover from the Bush Administration who has been admonished by the DOJ's Inspector General for withholding and misrepresenting information. He should be immediately replaced by a highly respected figure in

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the legal field, someone who would see the job as an opportunity to restore liberty to those who have long since paid their debt to society, not one who sees denying justice as his mission.

This new leader of the Pardon Office ought to create a special Compassionate Release Review Board (CRRB) to conduct a systematic review of the sentences of all current prisoners and recommend worthy candidates for pardon or commutation. As part of this review, a CRRB would also consider broad classes of offenders serving unjust sentences that no longer align with our national values and policies.

For example, in the 1980s, tough new sentences were imposed on crack cocaine, leading to a 100:1 disparity compared to powder cocaine. Thanks to your leadership, Congress recognized the injustice of this law, including the racial disparities in sentencing it created, and passed important legislation that you signed in 2010, the Fair Sentencing Act, which greatly reduced the disparity. Yet because the law was not made retroactive, thousands of individuals who were sentenced prior to 2010 remain in prison, serving sentences that have now been repudiated by Congress and your Administration.

Similarly, the American people have changed their attitudes towards marijuana, and a majority now supports legalization, but the laws on our books have yet to catch up, leaving too many people in prison waiting for Congress to act. In addition, your Administration has continued to prosecute individuals and businesses for violating federal marijuana laws despite their being in full compliance with their state laws regulating the medical use of marijuana. You should use your commutation authority to correct these injustices.

This is not only a matter of fairness. Considering the historic fiscal constraints we face, releasing prisoners who pose no risk to society and who have served the bulk of their sentences would help save precious resources. This is an issue that should bring liberals and conservatives together.

In your recent inspiring speech at Morehouse College, you urged the graduating class to defend the powerless. You also spoke of the special obligation you felt to "help those who need it most, people who didn't have the opportunities that I had — because there but for the grace of God, go I — I might have been in their shoes. I might have been in prison. I might have been unemployed. I might not have been able to support a family. And that motivates me."

You can channel this motivation into a historic opportunity to give a second chance to people who have paid their rightful debt to society. In one bold stroke, you can create a CRRB to evaluate existing sentences in light of our shifting policies and values and recommend release where justice no longer calls for an offender's confinement. The Constitution grants you unlimited, unfettered authority to grant pardons and commutations and this power cannot be thwarted by Congress, like so much of your agenda. You can use this power to reduce unjust sentences and right some of the wrongs of our criminal justice system. I urge you to use it fully, compassionately, and without delay for justice delayed is most certainly justice denied.

Thank you for your leadership on criminal justice issues and I look forward to working with you on this very important matter.

As always, I remain,

Most sincerely,

Steve Cohen
Member of Congress

cc: Attorney General Eric H. Holder, Jr.

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COMMISSION ON SECURITY AND COOPERATION IN EUROPE
(U.S. HELSINKI COMMISSION)

January 7, 2014

The Honorable Barack Obama
President of the United States of America
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Obama:

I was pleased to see that on December 19, 2013 you commuted the sentences of 8 people who were victims of this nation's misguided sentencing laws. However, the justice you delivered to these 8 individuals only highlighted the injustice resulting from the continued incarceration of thousands of other people serving similarly unjust sentences. I urge you to make much broader use of your commutation power and release all those whose confinement does not serve the cause of justice.

As we discussed in the East Room of the White House not long ago, our hearts are in the same place when it comes to this issue but only you have the power to take direct action to free those who are unjustly incarcerated. Under your leadership, this nation has recently seen critical reforms to the criminal justice system for which you and your Administration should be applauded. In particular, Attorney General Holder's "Smart on Crime" initiative, released in August of 2013, contained vital changes to prosecution and sentencing policy that will dramatically improve our justice system. I was also pleased with Deputy Attorney General Cole's August 29, 2013 memo announcing that your Administration will respect the determination of those states that have legalized marijuana for medical or personal use. These actions demonstrate your commitment to reform and pursuing a more compassionate and effective strategy with respect to law enforcement and prosecution.

However, I am concerned that you have been mis-served by some in your Administration, who have not carried out the policies and priorities that you set forth. I am especially disappointed by your Pardon Attorney, who has recommended pardons and commutations at a historically low rate and has even been found by the Department of Justice Inspector General to have engaged in

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"conduct that fell substantially short of the high standards expected of Department of Justice employees and the duty he owed the President of the United States." Rather than seeking worthy candidates for clemency, he appears to seek avenues to deny clemency as broadly as possible. It is time to take a sharp break from this approach.

As I have previously written to you, your Pardon Attorney should be removed from his position immediately and replaced by a highly respected member of the legal community with a mission to release all those serving unjust sentences. He or she should appoint a panel of distinguished lawyers to systematically review the sentences of all current federal prisoners and recommend candidates whose incarceration serves no public purpose. Rather than freeing a few symbolic individuals, this office should be charged with recommending the release of thousands of people whose sentences no longer align with national policies and values. This would truly advance the cause of justice.

For example, the 8 people whose sentences you commuted on December 19th were sentenced for crack cocaine offenses prior to passage of the Fair Sentencing Act of 2010, which reduced the unfair and racially discriminatory sentencing disparity between crack and powder cocaine. Although I have no way of knowing, I suspect you believe as I do that the Fair Sentencing Act should have eliminated the disparity entirely rather than merely reducing it to 18 to 1. However, it was vitally important legislation and you should be proud to have signed it into law. As you recognized, many of the individuals whose sentences you commuted would have already completed their terms had they been sentenced under the new law. But because the law was not made retroactive, they were still serving sentences that Congress has now declared void against public policy. Rarely, if ever, in American history has Congress spoken so clearly to repudiate its own policy by significantly lowering sentences. Although the law failed to provide for the release of those who paid the price for the misguided policies of the past, it is your duty as Executive to use the power granted to you under the Constitution to rectify this injustice. You should act immediately to commute the sentences of the thousands of people who would be free today had the Fair Sentencing Act been in effect when they were sentenced.

It is inconceivable that in the entire federal prison system there were only 8 individuals deserving of commutation. Without a committed effort to reviewing each individual sentence and the circumstances surrounding their convictions, thousands of people will continue to sit in prison, away from their families and unable to serve as productive members of their communities. Continuing to confine these individuals wastes resources our nation cannot afford and that could be much better spent investing in economic growth and the health of our citizens.

As you, yourself, noted in your December 19th statement, "Commuting the sentences of these eight Americans is an important step toward restoring fundamental ideals of justice and fairness. But it must not be the last." You were elected to bring change to this country but your use of the

pardon power has been business as usual, if not a step back from that of your predecessors. I know that you share my concern for all those who are unjustly deprived of their liberty. I urge you to make executive clemency a priority for your Administration and deliver justice to all those who need it. As Dr. Martin Luther King, Jr. reminded us, we are confronted by the "fierce urgency of now" and for those individuals serving unjust sentences there is no time to waste. Justice delayed is justice denied.

As always, I remain,

Most sincerely,

Steve

Steve Cohen
Member of Congress

Happy New Year - Aloha! From Memphis

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COMMISSION ON SECURITY AND
COOPERATION IN EUROPE
(U.S. HELSINKI COMMISSION)

December 4, 2014

The Honorable Barack Obama
President of the United States of America
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Obama:

I have urged you on numerous occasions to make greater use of your executive clemency power. With the passage of time since our last discussion, the need for you to issue a significant number of commutations has only increased. For individuals currently serving unjust sentences, each passing day that they remain confined is another day that they unfairly pay the price for the mistaken policies of the past. I encourage you to be mindful of Dr. King, who spoke so movingly more than 50 years ago to "remind America of the fierce urgency of now" because "Now is the time to make justice a reality for all of God's children." I respectfully suggest that nothing is more fiercely urgent now than restoring the liberty of all those unjustly imprisoned.

I applaud the steps your Administration has already taken to expand the use of clemency, including the appointment of Deborah Leff as Pardon Attorney, who seems genuinely dedicated to the cause of justice. I also appreciate the clemency initiative announced by the Department of Justice (DOJ) and hope that it will bring significant results. However, I am concerned that its guidelines are needlessly restrictive and that many deserving offenders will not qualify under its rigid standards. Despite the progress your Administration has made, these measures remain too limited to fully confront the scope of the problem as many thousands of individuals deserving of your compassion remain deprived of their liberty with no hope in sight.

In particular, justice demands that anyone sentenced prior to passage of the Fair Sentencing Act of 2010 who would be free by now if they had been sentenced under the current law should be released. There is no justification for the continued confinement of individuals serving sentences that have now been found void against public policy.

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Going forward, I also hope that you will consider needed reforms to the clemency process to take the burden and decision-making power away from the DOJ. As I suggested in my letter to you of June 18, 2013 a new commission should be established to review the sentences of all current prisoners and recommend worthy candidates for release, including broad classes of offenders whose sentences no longer align with national policies or values. I commend your attention to the attached op-ed piece recently published in the Washington Post by Rachel E. Barkow and Mark Osler, which calls on you to create an independent commission to evaluate clemency applications. According to press reports, your first White House Counsel, Greg Craig, made a similar proposal when he was in your Administration.

The current clemency process is far too cumbersome and suffers from an inherent conflict of interest since the same Justice Department that prosecutes offenders is also responsible for recommending their release. A much better solution would be to create an independent clemency commission. By requiring a balanced membership composed of experts in the field, you could ensure that you receive only the best and unbiased advice when making such an important decision.

Too many presidents have waited until the closing days of their Administration to use their power of executive clemency, and even then only a relatively limited number of deserving people have been granted a reprieve. With the holiday season upon us, there is no better time to deliver justice to all those who deserve your compassion. After taking this immediate action, I also urge you to reform the clemency process by creating an independent clemency commission to better serve you and future presidents as you consider candidates for pardon and commutation. I am including my previous correspondence with you on the need to significantly increase the number of commutations and some opinion pieces I have published, which more fully describe the issues at stake. I would be happy to discuss this further at your convenience and stand ready to assist you in any way that I can.

As always, I remain,

Most sincerely,

Steve Cohen
Member of Congress

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COMMISSION ON SECURITY AND COOPERATION IN EUROPE (U.S. HELSINKI COMMISSION)

June 26, 2019

President Donald J. Trump
The White House
Washington, D.C. 20500

Dear President Trump:

Last year, you commuted the life prison sentence of my constituent, Alice Marie Johnson, for a non-violent drug offense. It was the right thing to do and I'm pleased Ms. Johnson has returned to society in a responsible way. I am writing to recommend that you similarly commute the sentences of another roughly 16,000 non-violent drug offenders who deserve the same relief.

President Obama set up a special program to expedite the release of non-violent drug offenders late in his presidency, ultimately commuting a total of 1,715.

The thousands serving time for non-violent drug offenses don't have Kim Kardashian to plead their cases for clemency but are just as deserving of the relief. Beyond the question of righting an injustice, commutation would relieve taxpayers of the cost of unnecessary incarceration. These non-violent drug offenders should be released based on their records, not on celebrity endorsements.

Justice delayed is justice denied. Please do the right thing.

Sincerely,

Steve Cohen

Steve Cohen
Member of Congress

THE Nation.

Published on *The Nation* (http://www.thenation.com)

Reducing Racial Inequality in Our Justice System

Rep. Steve Cohen (Dem., TN) | August 22, 2013
0

Attorney General Eric Holder (AP Photo/J. Scott Applewhite)

At the March on Washington fifty years ago, Dr. Martin Luther King inspired a generation of Americans "to make justice ring out for all of God's children." That day in 1963, Dr. King told us he had come to our capital "to remind America of the fierce urgency of now." At the time, America heeded his words: within two years, President Johnson signed both the Civil Rights Act and the Voting Rights Act into law.

Sadly, over five decades, that fierce urgency appears to have faded. Justice seems further away for

too many, particularly for the thousands—disproportionately low-income people of color—whose liberty has been taken from them through unequally applied sentences for low-level drug offenses. President Obama should do more to deliver them justice, and he can by commuting their sentences.

This month, Attorney General Eric Holder took an important step by announcing federal prosecutors would overhaul draconian prosecution policies that result in excessively long mandatory minimum sentences for nonviolent drug offenders and seek smarter, more just approaches that reduce the racial disparities of our current system. America's views on drug policy are rapidly changing, but countless prisoners remain locked up, serving sentences that no longer align with our national values. In 2010, President Obama signed the Fair Sentencing Act into law and ensured that those arrested with crack—mostly young, African-American men—are no longer subject to a 100-to-1 sentencing disparity compared to those arrested with essentially the same drug in powder form, who are more likely to be Caucasian.

The Fair Sentencing Act was a rare time in history when Congress reduced sentences, thereby enunciating a sharp turn in public policy, yet those sentenced prior to 2010 remain in prison, serving sentences that have now been repudiated by Congress. And so, as important as Attorney General Holder's recently announced new policies were, they did nothing to help those who are currently serving unjust, lengthy sentences.

If, as Dr. King wrote, "justice too long delayed is justice denied," then every day they continue to sit in prison serving sentences that policymakers—and the American people—believe no longer fit their crime is another day that justice is denied. I continue to call on President Obama to use his commutation power to correct these injustices today.

And there is more he can do. According to a recent poll, 52 percent of Americans now support legalization of marijuana. And a recent ACLU report revealed that despite using marijuana at the same rate as Caucasians, African-Americans were arrested for marijuana at a rate four times higher than whites. With opposition to the failed policies of criminalization and prohibition growing every day, Congress should immediately act to catch up with the American people. In the interim, the president should not let anyone suffer one more day for the mistakes of outdated policy. He should be guided by the fierce urgency of now.

But this is not merely a matter of justice. Reducing prison overcrowding by commuting excessively long sentences is the fiscally prudent path, especially in the face of sequestration. It costs an estimated $30,000 per year to house an inmate in federal prison. Keeping Americans locked up when they would not be under current law is, put simply, a foolish waste of money.

That $30,000 per prisoner could undoubtedly be better spent. The National Institutes of Health, our nation's true Department of Defense, faces cuts of $1.6 billion that will stop research into potentially life-saving cures. Meanwhile, 57,000 fewer children will be enrolled in Head Start programs this year, reducing their chances of success.

But today, our increasingly limited resources are spent incarcerating people—in some cases now elderly and incapacitated people—who no longer pose a danger to society and have already served long sentences. That's both unjust and unwise—and the fierce urgency of now is most relevant.

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Commutation of nonviolent offenders is a significant step the president can take immediately, but he has so far used this power—one of the few he has that cannot be obstructed by the Tea Party—far less than his predecessors.

Drug policy reform has not always been politically popular. At many points in past decades, I have found it a lonely pursuit, but today it is an issue that unites the left and the right.

Americans of all political persuasions now recognize how our policies prop up injustice and waste our dwindling resources. It's time for the president to take the next step and right these wrongs. He should use his commutation power to the fullest extent and complete the important work that Attorney General Holder began earlier this month.

The people serving unjust sentences know all too well the fierce urgency of now. I hope the president will heed Dr. King's reminder and act on their behalf as soon as possible—right now.

Why do Americans misremember the 'I Have a Dream' speech [2]?

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The Hill

Commutations help restore justice

By Rep. Steve Cohen (D-Tenn.) - 11/25/14

As Americans gather at their Thanksgiving table this month and join in the annual Black Friday sales, there are thousands of people who will be left out of this holiday cheer. They are far away from their families, serving lengthy sentences for non-violent, and often minor, offenses. Even though they pose no danger to the public, and taxpayers spend as much as $30,000 a year to incarcerate them, they remain in prison because of an antiquated sentencing system, with little hope of release anytime soon. That is, unless the President commutes their sentences. When President Obama faces the wrenching decision of which turkey to pardon this year, I hope he will also consider the thousands of people who deserve his mercy as well.

Unfortunately, compared to his predecessors the president has issued pardons and commutations at a historically low rate. Although the Justice Department announced a new clemency initiative, it has yet to yield any results. And while the Obama Administration has taken some bold steps to reform the criminal justice system he has been far too timid when it comes to using his commutation power to free those individuals whose continued confinement serves no public purpose.

Pause to consider one group of people serving particularly unjust sentences. Prior to passage of the Fair Sentencing Act of 2010, there existed a 100 to 1 sentencing disparity between crack, which is used predominantly by African-Americans, vs. powder cocaine, which is used predominantly by whites. Recognizing this manifest injustice and the racial disparities that biased enforcement has perpetuated, Congress changed the law to significantly reduce the unfairness. But because the law was not made retroactive, thousands of people remain incarcerated, serving sentences that Congress has now determined to be void against public policy. By using the power of commutation, the President can and should bring these sentences in line with the policy Congress and the President have now set forth.

There are countless other people who also deserve the President's mercy but whose cases have not been brought to his attention. Today prisoners, many of whom have little education, are expected to apply for commutation, often without legal assistance. Their applications are then evaluated by the same Justice Department that put them in prison in the first place. I commend President Obama for naming a new Pardon Attorney who seems genuinely committed to justice,

but we need a better system. The President ought to appoint a respected member of the legal field to lead an independent panel that would systematically review the sentences of all people in federal prison to recommend worthy candidates for pardon or commutation.

At times, the Obama administration has justifiably boasted of its strong enforcement efforts. For example, the Department of Justice Antitrust Division successfully prosecuted several white-collar criminals for serious market manipulation that hurt a wide swath of consumers and caused vast economic damage. As punishment, these criminals were sentenced to an average of 2 years each. Had those same defendants been caught possessing a small amount of methamphetamine, with 2 prior convictions for selling personal amounts of marijuana, they might have been sentenced to life without parole. This is just one example of a system that's unfair and unjust.

A bipartisan consensus has developed that our criminal justice system must be fixed. Congress has before it a number of important proposals to reform harsh and racially biased sentencing laws and I hope we will act on those bills quickly. But we need a broad program of presidential commutations to assist the people currently in prison paying the price for the mistaken policies of the past. That's why Obama should use the power granted to him by the Constitution and commute the sentences of those people who are unjustly incarcerated. As Dr. Martin Luther King, Jr. reminded us, we are confronted with the "fierce urgency of now" and for those individuals serving unjust sentences there is no time to waste.

The annual presidential pardon of a Thanksgiving turkey makes for a fun tradition we can all enjoy. But it's no laughing matter for the thousands of prisoners and their families who suffer as a result of unnecessary and unfair sentencing policies. They are calling out for similar relief from their President. As we begin the holiday season, the President can chart a better course. By using his commutation power to free all those who are serving unjust sentences he can act with mercy and compassion on behalf of those who need it most. I can think of no better representation of the holiday spirit.

Cohen has represented Tennessee's 9th Congressional District since 2007. He sits on the Judiciary and the Transportation and Infrastructure committees.

Mr. COHEN. With President Trump, I am afraid that we have received a new low when it comes to the clemency power in terms of the number of petitions he has granted, his seemingly self-interested motivations for his clemency decisions, his unwillingness to use a systematic, transparent objective process for considering clemency petitions.

In President Obama's situation, he was a little slower, or a lot slower than I thought he should be, and I exorcised him every time I saw him. Every opportunity I had with him, I told him we need to get clemencies done and get it started.

He was a very thorough President. He set up a board. They did issue, I think it was, give or take, 2,500 commutations or pardons toward the end. They were all done objectively through a process. I thought he should be done closer to 10,000 or more, because there were so many people languishing. But he did some, and he got it started.

With Trump, we have seen it change, though. There have been very few pardons issued, commutations issued, and most of them have been based on President Trump's whims, his noting who supported the commutation or pardon request shows that they were not done in an objective basis, but a subjective basis, not what the law decided on an objective, look at your record and your sentencing, and your reformation, but who wanted you to be pardoned, and that is not the way we are supposed to do it.

Presidents have customarily relied upon the recommendations of the pardon attorney who is within the Department of Justice in making decisions about clemency. Well, that process is subject to legitimate criticism because Justice is often not interested in granting clemencies that are involved with prosecutions that underlings in Justice might have secured. They are still involved in the clemency process and have been. That process is the one we have, but President Trump, in contrast, has completely circumvented even that process, the Department of Justice has, in making clemency decisions, not asking them to look at cases and give him advice, but treating clemency like it is solely his personal gift to bestow upon individuals, like the king, from which this power kind of came overseas and into our Constitution.

And according to The New York Times, most of his clemency grants were the results of these inside connections. Sylvester Stallone for the posthumous clemency of Jack Johnson, Kardashian woman for the other famous pardon of Alice Marie Johnson, and a few of her friends or people that she met while incarcerated. And then there has been others, similar with Milken and others, Eddie DeBartolo.

So those were inside connections who were even boasted of or publicized by President Trump, and sometimes it was the promotion of Fox News, but not the clemency office in the Department of Justice.

So, according to a review conducted by The Washington Post, all but five of the 24 people who have received clemency from Trump had a line into the White House, or currency with his political base, meaning that that is not a blind process. Just last month, President Trump issued seven pardons, four commutations, including a pardon for the 1980s, quote, junk bond king, Michael Milken,

the very personification in culture and life of Wall Street greed and excess, who was convicted and served prison time for securities fraud and conspiracy.

According to The New York Times, Mr. Milken's pardon was a result of lobbying by many individuals with close ties to President Trump, including his personal lawyer, Rudy Giuliani, who, I think, earlier, might have been his personal prosecutor, and his largest donor, Sheldon Adelson. Treasury Secretary Steve Mnuchin, Jared Kushner, and Ivanka Trump also advocated for that pardon.

The Milken pardon shines a harsh light on the fact under President Trump, pardons are mainly for the rich, the famous, and the well-connected. And that was in spite the fact that Mr. Milken, when he was convicted, was told not to make any deals. And then he got a $50 million fee for doing the deal between Time Warner and Comcast. That merger—was it Comcast? I think it was. CNN. Time Warner. Whoever it was, it was a Ted Turner deal. He got $50 million and wasn't supposed to do it.

Even when President Trump grants clemency in a deserving case, he does so seemingly for the wrong reasons, and through the wrong means.

In June 2018, he commuted the sentence of a lady who was one of my constituents at the time, now an Arizonan, Alice Marie Johnson, a 63-year-old woman serving a life sentence for a non-violent drug offense, but only after reality TV star Kim Kardashian lobbied on her behalf. While I strongly supported the commutation of Ms. Johnson, as I have other constituents of mine, President Trump appears to have considered the merits of her application only because she attracted the attention of a celebrity patron. Most of my constituents, or all of my constituents, do not have that luck. Similarly, President Trump posthumously pardoned boxer Jack Johnson, whose case was brought by Sylvester Stallone.

Justice is supposed to be blind. The thousands serving time for nonviolent drug offenses did not have Kim Kardashian or Sylvester Stallone to plead their cases for clemency, but they are just as deserving of relief, or maybe more so. These nonviolent individuals should be released based on their records and not celebrity endorsements, or arbitrary whims of the President.

I have written President Trump and suggested setting up the panel like President Obama had, and grant the clemency. Even better than the bill that I think Congressman Collins might have been a sponsor of, or the prime sponsor, the Second Chance Act, which I proudly supported, even when Democrats were resistant because it was a step in the right direction and a good thing to do. But Second Step is not as good as, or can cover as many people as clemency can. And so I urged President Trump to use clemency, but did not hear back from him.

Clemency should be expanded to become a routine part of the criminal justice system. The decisions as to when clemency should be granted must be made on objective, transparent, and systematic processes. This is right and just. This is the rule of law. President Trump has granted clemency in 24 cases, but there have been more than 7,700 petitions filed during his President thus far. So it is not hard to figure. That is less than 1 percent, way less than 1 percent.

.3 percent, by the way, and nowhere near the 36 percent of Richard Nixon.

Our Nation's prison population is larger than ever, and many remain in prison because of mandatory minimums and sentencing disparities that Congress repealed without making the repeal retroactive. In other words, many remain in prison based on public policy of Congress, avoiding leaving many unjustly in prison. And while my concern is for justice and for those without their families, and wallowing in our prison system, everybody pays for this. The prison system is extremely expensive, and taxpayers are paying for this lack of action.

We will hear from our witnesses' proposals for reform of the clemency process, and ways to address the need for clemency. In 2013, I proposed the creation of a compassionate release review board that would review sentences of current prisoners and make clemency recommendations. I also introduced H.J. Res. 8, a constitutional amendment that would ensure that no President could abuse the clemency power to escape accountability for his or her own crimes. I hope we consider these and other ideas.

I thank our witnesses for being here. I am looking forward to a fulsome discussion on the subject, and I would now recognize the ranking member of the subcommittee, the gentleman from Louisiana, Mr. Johnson, for his opening statement.

Mr. JOHNSON. Thank you, Mr. Chairman, and welcome to the House Constitution Subcommittee. I am glad to see students in the audience. We are talking about important constitutional matters here, so I hope you find it interesting.

This is an interesting hearing. It is on the presidential clemency power. We get that power out of the Constitution. I have to say at the beginning, I always disagree with the guy sitting next to me, because we are in different parties, and I, of course, disagree with his characterization of President Trump's clemency decision process. And I am not so sure The New York Times is the best source to evaluate the objectivity of President Trump.

But that aside, Article II, Section 2 of the Constitution is where we find the clemency power, and it gives the President the authority, as the Constitution says, quote, "to grant reprieves and pardons for offenses against the United States except in cases of impeachment," unquote.

Chief Justice John Marshall described the exercise of the pardon power in 1833, and he said it this way: He said, quote, "It is an act of grace preceding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed, from the punishment the law inflicts for a crime he has committed," unquote.

Pardons have both a public and a private meaning, and to some people, it even has a spiritual component. You think about what the Apostle Paul explained to the church in Corinth in the New Testament Book of Second Corinthians. He said it this way: Now, if anyone has caused pain, he has caused it not to me but in some measure to all of you. For such a one, this punishment by the majority is enough. So you should rather turn to forgive and comfort him, or he may be overwhelmed by excessive sorrow. So I beg you to reaffirm your love for him.

I mean, that is what the Bible says. So the commission of a crime, of course, does harm everyone, and that is why crimes must be punished by government. That is kind of the role of government is to maintain the rule of law. But not forgiving also harms everyone, not only by denying individuals themselves forgiveness when warranted, but by denying society as a whole, the catharsis that comes with forgiveness, along with the ability to move on as a people.

And, so, our Constitution grants the chief executive not just the power to punish, but also the power to, in a legal sense, forgive. That is a powerful thing. Of course, along with any public power in democracy comes politics, and the larger significance of any presidential pardon regarding any particular person can too often be obscured today by partisan political rhetoric. It happens all the time. You heard a little bit of it already this morning. But as Alexander Hamilton wrote of the pardon power in Federalist Paper No. 74, quote, "Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as impossible, fettered or embarrassed. The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too cruel," unquote.

See, our Founding Fathers sought to create a system in which lines of accountability were clear so that people could make reasonable decisions regarding whom was responsible for what when they cast their votes for candidates. Too much bureaucracy foils that plan of our Founders today. As one of the witnesses here today, Professor Mark Osler, says in his written testimony, quote, "The Obama administration created a system that not only left the broken system in place, but added bureaucracy to it. The fact that good cases were left on the table is revealed not only by the repeated rejection of Alice Marie Johnson," who we heard about this morning, "but the thousands who have been released under the First Step Act. A review by the DOJ's Inspector General revealed a wealth of problems with the Obama program's implementation, many of which could have been avoided if the underlying process had been restructured," unquote.

Whatever its flawed implementation in any given circumstance, the constitutional clemency power should not be amended to limit presidential discretion. As Professor Osler also states, quote, "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 and referring to clemency as a benign prerogative. We may object to particular grants, but restrictions would be consistent with neither the constitutional scheme or the intent of the Framers," unquote.

I hope our hearing today will both recognize the need to protect Americans from dangerous criminals which, we all respect but also, allow some breathing space for the universal soul of the pardon process, namely, forgiveness. The pursuit of law and order, the encouragement of redemption are not mutually exclusive pursuits. These are quintessential American values.

I will make one more Bible quote, since we are talking about forgiveness. Micah 6:8 is in the Old Testament. It says, He has shown

the old man what is good and what the Lord requires if you are to act justly, love mercy, and walk humbly with your God. It must be possible to do all three because the creator who has endowed us with all of these inalienable rights and freedoms requires it of us. I hope we can do that.

I look forward to hearing from all of our witnesses here today, and thank you again for being with us. I yield back.

Mr. COHEN. Before I recognize the chairman for his statement, I want to address the school children who are here. You heard some remarks by my colleague suggesting I had injected politics into this and been partisan. I hope you were here when I let you know that I have criticized President Obama, too, for what I thought was a late process and not issuing enough commutations; I wrote letters that I have entered into the record about President Obama; and I supported President Trump's Second Chance Act; and that I supported Alice Marie Johnson's pardon, or commutation, excuse me.

But the fact is that is not partisan. And to say The New York Times can't be objective, nobody can be in favor of giving a pardon or a commutation to a junk bond king worth billions of dollars who objects to and overrules the court's orders, and flagrantly does.

I recognize Mr. Nadler.

Mr. JOHNSON of Louisiana. Touche, and I actually love the guy. I really do.

Chairman NADLER. Thank you, Mr. Chairman. Before I begin my prepared remarks, I would like to start by commenting on some of the remarks we have just heard in the last few minutes. The gentleman from Louisiana, I think it is, said that tyranny—and quoted, I think, Alexander Hamilton. Tyranny can result from putting people in jail, not from letting people out of jail. I would point out it can result either way.

If you have a President or any executive who puts people in jail when he shouldn't, who violates the rule of law, who violates due process, obviously you are on the road to tyranny. If you have a President who uses the pardon power to pardon his own confederates in crimes, to pardon all of his friends, to pardon anybody who may have committed a crime in his behalf so that he can evade the rule of law, then that can lead to tyranny, too.

And I would quote, the debates at the Constitutional Convention, when they were debating the pardon power, and James Iredell from Pennsylvania asked, or maybe the pardon power that we are designing here is too broad, and what if a President committed—what if a President engaged in criminal conspiracy and pardoned his co-conspirators? And James Madison answered, Well, that could never happen because a President would immediately—any such President would be impeached. I would submit the history of the last few months shows that Madison was wrong, and that any such President would not necessarily immediately be impeached, unfortunately, so we do not have an effective guarantee against tyranny by a President, or by anybody else or by a tyrant or would be tyrant who would use the pardon power or threaten to use, as the current President has, to pardon his own co-conspirators.

Article II, Section 2 of the Constitution provides the President with the power, quote, "to grant reprieves and pardons for offenses

against the United States except in cases of impeachment." The fundamental purpose of the clemency power is to ensure that justice is tempered with mercy. Although presidential clemency is commonly viewed as an occasional act of mercy, the Framers also understood that clemency is also necessary to the fair administration of justice.

As Alexander Hamilton noted in Federalist 74 regarding the clemency power, and I think this has already been quoted this morning, without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As such, presidential clemency should be a routine part of the Federal criminal justice system. Unfortunately, over the past several decades, under both Republican and Democratic administrations, the executive branch has failed to fully employ the clemency power to help remedy injustice as the Framers intended.

For example, after decades of mandatory sentencing policies in the so-called war on drugs, far too many non-violent Federal offenders, disproportionately people of color, sit in prison unnecessarily, serving unduly harsh sentences. And many others continue to face hardships after serving their time and seeking full entry, reentry into their communities because of the collateral consequences caused by their Federal convictions. Yet, thousands of petitions for clemency remain pending with the Department of Justice's Office of Pardon Attorney, to which the executive branch has customarily delegated the responsibility of processing candidates for clemency.

Presidential administrations of both parties have been rightly criticized for deficiencies in the Department of Justice's clemency process. In fact, our witnesses today all agree that the current process housed at the Justice Department, must be reformed in order to increase the rate and diversity of clemency grants. Some critics of the current process even believe that it should be taken out of the Department of Justice altogether.

I am pleased that this hearing will allow us to examine various proposals for reforming the clemency process. While the current DOJ process may be in real need of reform, at least it is a process. Legitimate questions have been raised about President Trump's seemingly arbitrary approach to clemency, which seems to have completely bypassed the Department of Justice.

To be clear, concerns that special access to the presidency plays a role in the granting of clemency are not unique to President Trump. This exercise of the clemency power over the past 3 years, however, as pointedly demonstrated that special access to the President is not just a factor in some clemency grants, but in this administration, it may well be the only factor.

Just last month, President Trump granted clemency to 11 individuals. The New York Times reported that these recent clemency grants came about through, quote, "An ad hoc scramble to bypass formal procedures used by past Presidents," and were, quote, "driven by friendship, fame, personal empathy, and a shared sense of persecution."

The Times also noted that every single one of their recipients had an inside connection or were promoted on Fox News. This is not to say that every recipient of the clemency grant by President

Trump is undeserving of mercy and forgiveness, but we must put his clemency decisions in context.

To the point of this hearing, while President Trump has made publicizing clemency grants a hallmark of his administration, he has issued very few of them. According to one witness's data analysis, he has granted only 24 out of 7,748 petitions received during his administration, or .3 percent of petitions. These numbers are exceptionally low even when compared to the historically low grant of President Trump's recent predecessors.

While Congress has little authority over the President's exercise of the clemency power, Congress does have the power to enact criminal justice reform measures. I commend the President for joining with Congress to enact the First Step Act into law 2 years ago. That said, paving the way for more clemency grants does not lay in a process that depends almost entirely on special access to the White House. It is within President Trump's power today to create a process that ensures clemency petitions are treated fairly as a routine aspect of the Federal criminal justice system. To the extent that Congress can assist with this process, we should examine all options available to us.

With that, I would like to thank the witnesses for appearing, and I look forward to hearing their testimony today.

Mr. COHEN. Thank you, Mr. Chair. I now recognize the ranking member of the committee and the prime sponsor of the First Step Act, Mr. Collins of Georgia.

Mr. COLLINS. Thank you, Mr. Chairman.

I came here this morning on a day in which we are flying out, hoping that we would talk about a positive thing that we are working for, and instead, they can't help themselves.

The chairman of the subcommittee, the chairman of the committee can't help themselves but to politicize. They just don't like the President. Let's put a sign in this committee room. As long the Democrats are—we can put up there we don't like the President. We know it, so let's get over it, okay.

Yes. I mean, if we want to go back, and we will talk about President Obama on the last day commuting 300, including Chelsea Manning? I mean, if we want to talk about these, let's do that, but why don't we talk about the positive? We don't want to, because we failed in impeachment, and we can't forget it. I just—it is just stunning to me. This committee, which can do so much to help those that are incarcerated, those that are facing the criminal justice system, those that are going through it, has frankly just been AWOL the last year and a half.

But we did something in the last term, and in fact, this what makes this so much sadder. At last Congress, I did partner with a number of my colleagues across the aisle, dear friends, Hakeem Jeffries and others, to get the First Step Act to President Trump's desk for a signature. Yes. President Trump's desk for a signature, after 8 years under the previous administration, which we talked about it a lot. I was supportive of those measures. It never happened. Never happened. So the first meaningful stuff that actually happened is from President Trump.

As many of you know, that bill was near and dear to my heart. It was something we put a lot of time and effort into. And my col-

leagues on the other side of the aisle, Hakeem in particular, who did yeoman's work on his side and our friends in the Senate who added things to it, but also worked yeoman's work, made something different for the American people.

When Matthew Charles walked into the room just beside me in that library and hugged me, and as he had done with Hakeem and others, saying I am now out of prison because of the First Step Act, thank you, and now his life has changed and is different. Those are the positive stories we need to talk about. Those are the things that clemency can bring, that pardons can bring. Just simply griping at a President you don't like because the way that it has been handled, and because you can go back on both sides and talk about how Presidents have not done it over the past 25 years is not the way to start this.

Since the First Step Act was signed into law, we have seen communities restored, hope renewed, and families reunited. That legislation is the measure of mercy that should serve as a guide towards potential future reforms. The First Step Act ensures dangerous violent criminals serve their time behind bars. It excludes the Nation's most dangerous offenders from applying any time credit for their sentences, and no prisoner that has a recidivism risk level higher than low is eligible for prerelease into custody under the First Step Act. And the warden, who ultimately knows the prisoner best, makes the final decision. There is a lot of lies going on about this act. This is what it actually does.

And it all goes back to what I used to say about this building, monies and morals. It is how we spend our money for people that we do incarcerate, that our morals are how we feel about them, that we give them a chance when they get out to make something of their life. Ninety-five percent of all individuals who go to jail get out. They don't go there to die. They get out. What are we doing as a Federal system, and how are we encouraging State and locals to look at them as human beings that they are, many who made mistakes, many of them made tragic mistakes, many of them with mental health, with addictions and other things, we have got to provide a better way.

For those 5 to 10 percent who need to stay in forever, they have got plenty of jail space for them. If you want to live outside the law, and you want to do something so heinous, you are going to stay in there, and nobody has said you can get out. But for those who deserve a chance, that is what this bill does.

The First Step Act embodies the mercy and forgiveness that must accompany any law enforcement regime governing human affairs. I stood by the President when he made his remarks last year at the Prison Reform Summit and the First Step Act celebration, when he stated this landmark legislation will give countless current and former prisoners a second chance at life, and a new opportunity to contribute to their communities, their States, and their Nations.

As President, I pledge to work with both parties for the good of the whole Nation. The more I spoke and met with those individuals, those involved in our criminal justice system, the more clear it became, that unfair sentencing rules were contributing to the cycle of poverty and crime like nothing else before. It was time to

fix this broken system and to improve the lives of so many nonviolent prisoners who will have opportunity to participate in vocational training, education, drug treatment programs.

When they get out of prison, they will be ready to get a job, instead of turning back to a life of crime. As we consider executive clemency process, I would hope the same sentiments will help guide us today, even with the start of this hearing.

The constitutional authority to the President to pardon offenders under the Constitution is very broad, and not up for changing by law in this committee. That is a constitutional guarantee.

You want to have a constitutional amendment, maybe so, but not any other way. Congress doesn't have the constitutional authority to restrict the President's pardon authority in any significant way. And the Constitution gives the President vast ways to decide who may receive a pardon and when it be issued.

But there is also precedent for Congress to provide a variety of ways in which we can, with the Department of Justice and other entities, assist the President in evaluating applications. The result of any such evaluation is simply advisory, and they cannot bind the President's Article II authority to pardon.

The President also can't be required to consult with any person or entity before considering a pardon. But the President can consider standards for reviewing pardon petitions, and the Department of Justice has offered just that in the past and continues to do so today.

Factors taken into consideration include post conviction conduct, character, and reputation, seriousness and relative offense, acceptance of responsibility, remorse, atonement, and the need for relief, and official recommendations and reports. Of course, beyond such official guidance, the President can always consult with his beliefs and faith understandings.

In my experience, and from my background, I have been moved again by the words of the Psalmist who said, You, Lord, are forgiving and good, abounding in love all who call to You. Stated in the New Testament in Corinthians, he says that we are committed to a message of reconciliation. That is faith. But the best many times comes from just the simple instructions that we find in Ephesians, that says, Be kind and compassionate, one to another, forgiving each other just as Christ forgave you.

The fundamental message of Scripture which drives many, including myself, speaks of promise, hope, and redemption always following human cruelty. It is with that spirit that I would hope from here on out we approach this subject today, because at the end of the day, it is not about what goes on on this stage right here. It is about those who right now who are behind bars, it is behind those who are getting ready to enter the criminal justice system, who are going through the struggles that this committee can help and can be a part of. And if we focus on them, then lives can be changed.

Instead of making it harder, we ought to be reaching out with a hand to lift up, because they are the least among us. With that, I yield back.

Mr. COHEN. Thank you. Now that we have had our spiritual hour, I would remind the witnesses and the committee that this

hearing is entitled, and is, Presidential Clemency and Opportunities for Reform, not what I have done in the past and why you should elect me Senator from Georgia. I will now introduce each of the witnesses, and after each introduction, will recognize that witness for his or her oral testimony. Please note that your written statement will be entered into the record. I ask you to summarize your testimony to 5 minutes. To help you stay within the time, there is lights in front of you. The green light means go. The yellow means you have got a minute left, and red means you should be finished at that time.

Each witness is under a legal obligation to provide truthful testimony in answers to the subcommittee and that any false statement you make today may be subject to prosecution under Section 1001 of Title 18 of the United States Code. Sometimes people have been sworn in by committees, sometimes not. It is not a requirement, and there is nothing in law to say that you should be sworn. That would mean that you would take an oath under God as a witness to do so. That is what I call the Mitt Romney oath, that God requires you to do what is right. But we have only seen that happen once recently, so I won't do that here.

Our first witness is Kemba Smith Pradia. In 1994, Mrs. Pradia, who had no prior criminal record, was sentenced to 24-1/2 years in prison for conspiracy in her boyfriend's illegal drug-related activities, a nonviolent, first-time offense. Due to Federal sentencing guidelines in place, the court could not account for the substantial mitigating factors in her case, including that she participated in her boyfriend's criminal activities out of fear for her life. In 2000, President Clinton commuted her sentence to time served. In December 2014, she was appointed to the Virginia Criminal Sentencing Commission. In 2019, she was appointed to the Virginia Parole Board, the first former inmate to serve on the parole board. She is also the author of Poster Child, a book about her experiences with the criminal justice system, and works as an advocate for criminal justice reform.

After her release, Mrs. Pradia earned a Bachelor's degree in social work from Virginia Union University and a law degree from Howard University School of Law. Thank you, and you are recognized. Was there a mistake there? You are shaking your head, but you are recognized for 5 minutes. Did we make a mistake in your intro?

Ms. PRADIA. No law degree.

Mr. COHEN. Okay. You are recognized.

STATEMENTS OF KEMBA SMITH PRADIA, FOUNDER, KEMBA SMITH FOUNDATION; CYNTHIA ROSEBERRY, DEPUTY DIRECTOR, NATIONAL POLICY ADVOCACY DEPARTMENT, AMERICAN CIVIL LIBERTIES UNION; MARK OSLER, PROFESSOR AND ROBERT AND MARION SHORT DISTINGUISHED CHAIR IN LAW, UNIVERSITY OF ST. THOMAS SCHOOL OF LAW; AND RACHEL BARKOW, VICE DEAN AND SEGAL FAMILY PROFESSOR OF REGULATORY LAW AND POLICY AND FACULTY DIRECTOR, CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

STATEMENT OF KEMBA SMITH PRADIA

Ms. PRADIA. Good morning, committee members. I am humbled to have this opportunity to testify before you today. Despite me being already committed to speak at North Carolina Central University later this evening, it was important for me to be here. My prayer today is that our testimonies will go beyond these walls, and move the hearts of Congress and our President.

Almost 20 years ago, President Clinton changed my life forever by freeing me from an excessive prison sentence. It was a U.S. President that had the power to change my fate. It was an act of mercy. In 1994, I was sentenced to 24-1/2 years in Federal prison, even though I had no prior record. The prosecutor said I didn't handle, use, or sell the drugs that were involved, and I didn't commit a violent crime.

Ultimately, I was a college student and girlfriend of a drug dealer who was abusive. I turned myself in to the authorities 7 months pregnant with my first child and was denied bond.

But in the 1990s, there was no room to see me as a human being. I was seen as a statistic, another single young black mother who was involved with drugs. I was seen as a disposable, like my life had no value. The judge sentenced me to 24 years and 6 months. At 23 years old, I was sentenced to more time than I had been living on this earth, and I wasn't supposed to be released until my son was a grown man.

There were several factors that led to me receiving executive clemency: First, the media. In particular, black media took interest in reporting my story. There was a magazine called Emerge Magazine that did an extensive article about my story which led to the NAACP Legal Defense Fund, LDF, taking on my case pro bono. I had two parents who were deeply dedicated and sacrificed a great deal to support me, not only by caring for my son, making sure I had money on my books, and prison visits, but my dad is actually here in the room. They traveled across the country advocating for my freedom, and educating the public about drug policy and sentencing.

There were individuals in national organizations who organized rallies and writing campaigns because they thought what happened to me was unjust. In the 1990s, black women were one of the fastest-growing populations going to prison, so Elaine Jones, Director of LDF, enlisted black women's organizations in which she was a member to invest in advocating for my release, organizations such as Delta Sigma Theta Sorority, Incorporated, Links, Incorporated, and the National Council of Negro Women. It became bigger than

just advocating for me. They were hoping to set a precedent for others to receive their freedom.

There were even congressional Members who were on this very committee such as my dad told me how he met with Congressman John Conyers, who was chair at the time, but there were Congressman Bobby Scott and Maxine Waters who were champions in advocating for my release.

The criminal justice reform movement wasn't what it is today. And after serving 6½ years, it was a modern day miracle for President Clinton to grant me executive clemency in December 2000. It was said that he was trying to do a redemptive act during the 25th hour of his presidency to write the wrongs of him signing the crime bill that caused the big prison boom. I, like Alice Johnson, came out singing praises to the President, even though there was some people in the community who felt it extremely different than me.

A few days after my release, my mother saw me tearing up, and she asked me what was wrong. And I told her that I was having a hard time dealing with the fact that I left so many men and women behind bars that deserve to be home too. One of those women was Michelle West, who is still serving a double life sentence, and has been incarcerated for 27 years. On the day that I was released, I spent all day in the visitation room with my attorneys from LDF. As hours passed by, and no prison staff told us anything, I had begun to think it, my commutation, wasn't going to happen. After my visit, and going through the squat and cough, Michelle was the first person waiting for me outside the door as I walked back on the yard to tell me, Kemba, you are going home. They said your name on CNN. I remember vividly to this day how the prison was on lockdown, and the women were yelling me well wishes as I walked out of my unit to exit the prison yard.

Even though that was a surreal moment for me, the only thing I can remember is the overwhelming feeling of heartache that took over me. That heartache and survivors guilt motivated me to speak about my experience, and I became a national and international public speaker. My lived experience has led my role as a domestic violence survivor, national advocate, and consultant in the criminal justice arena for over 20 years, working with women and youth, national organizations, universities, and corporations and the media. I held the position of State Advocacy Campaign Director with the ACLU of Virginia, worked with senior White House and the United Nations in Geneva, Switzerland, members of Congress, and I have led trainings for Federal and State probation organizations across the country. In 2019, I was appointed as a member of the Virginia Parole Board by Governor Ralph Northam.

Today, I am not here just representing myself, I am representing the formerly and currently incarcerated community. There are some of us that have been in this movement for years. In 2016, President Obama invited a group of us that had received executive clemency from Presidents to the White House. We had the opportunity to discuss our reentry back into society and our lives now. It was said that it was an historic day because that had never been done before.

President Obama commuted more sentences than any President on record, which was over 1,700. Of those, were 568 incarcerated

individuals with life sentences who applied. We are grateful for what President Obama did, but we were also disappointed that he wasn't able to do more, because there were over 36,000 petitions submitted. We were disappointed that Alice Johnson, Michelle West, and William Underwood and other sentences had not been commuted as well.

When President Trump came into office, we assumed that there would be no progress with criminal justice reform as it related to drug policy and sentencing, especially with Jeff Sessions being Attorney General. We were wrong.

To my surprise, I was invited to the White House to hear President Trump introduce the First Step Act, and it evolved to include language in which Congress was able to enact, and there have been many beneficiaries of this legislation who are singing praises to this administration.

We are all supportive and happy for those that are being released. My criticism, ever since President Trump has been in office, is what about the clemency initiative, and the thousands of people that are still waiting on a response. President Trump has only commuted 10 individual sentences since being in office. I was an advocate for Alice Johnson. I am grateful that she has a champion like Kim Kardashian who has access to the President to advocate for her release. But there are others who are deserving of this act of mercy, and the President is their last resort.

There are shortcomings of the Federal clemency process. Even with my own situation, I became the poster child for sentencing, drug sentencing gone wrong, but I know I received relief because I had the privilege of my background, of being a college student with two middle class parents who were advocating for my release who had support from organizations that typically in the past had conservative views when it came to criminal justice. Not everyone has this exposure and access that I had, but they were just as deserving of this presidential act of mercy.

Mr. COHEN. You have to wrap up.

Ms. PRADIA. Just real—I will wrap up. Last year, I was invited to the White House for a criminal justice reform strategy session, discussing next steps of clemency. As I sat at the table, I noticed that there was not a representative from any of the national organizations that have typically been involved in having these conversations. I participated, even though I must admit I was uncomfortable. I leaned into knowing that Van Jones and Topeka Sam sat at these tables before me in order to generate movement on our issues. Needless to say, after my participation, I heard nothing further.

As this administration moves forward with the new clemency initiative, and putting the White House more directly in control of the process than the Justice Department, I would strongly suggest you include organizations that have been working on the issues for decades, and have a diverse group of individuals from attorneys, researchers, social workers, people who are in the media who have received commutations.

Most importantly, I challenge this administration to break President Obama's record with commutations. Some are critical of how this power is being used to release President Trump's allies. If I

am brutally honest, I don't care about them as long as you are releasing my people out of prison who deserve the same opportunity that I have been given, who are no threat to public safety, which could even mean few violent offenders.

To this judicial committee and Congress, I urge you to be advocates like Virginia Congressman Bobby Scott, Maxine Waters. I am sure you hear from plenty of family members who live in your district. Please bring these compelling stories of individuals who deserve second chances to this administration's attention. Thank you.

[The statement of Ms. Pradia follows:]

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
"Presidential Clemency and Opportunities for Reform"
Testimony by: Kemba Smith Pradia
March 4, 2020

Good morning Committee Members, I am humbled to have this opportunity to testify before you today. Despite me being already committed to speak at North Carolina Central University later this evening, it was important for me be here. My prayer today is that our testimonies will go beyond these walls and move the hearts of Congress and our President.

Almost 20 years ago, President Clinton changed my life forever by freeing me from an excessive prison sentence. It was a U.S. President that had the power to change my fate. It was an act of mercy

In 1994, I was sentenced to 24.5 years in Federal Prison even though I had no prior record and I didn't commit a violent crime. Ultimately, I was a college student and girlfriend of a drug dealer who was abusive. I turned myself into the authorities seven months pregnant with my first child and was denied bond. But in the 1990's there was no room to see me as a human being. I was seen as a statistic; another single, young, Black mother who was involved with drugs. I was seen as a disposable, like my life had no value. The judge sentenced me to 24 years and six months. At 23 years old, I was sentenced to more time than I had been living on this earth and I wasn't supposed to be released until my son was a gown man.

There were several factors that lead to me receiving executive clemency.

- First, the media, in particular, black media, took interest in reporting my story. There was a magazine called Emerge Magazine that did an extensive article about my story which led to the NAACP Legal Defense Fund (LDF) taking on my case pro-bono.
- I had two parents who were deeply dedicated and sacrificed a great deal to support me, not only by caring for my son, making sure I had money on my books and prison visits, but they traveled across the country advocating for my freedom and educating the public about drug policy and sentencing.
- There were individuals and national organizations who organized rallies and writing campaigns because they thought what happen to me was unjust. In the 90's, black women were one of the fastest growing populations going to prison, so Elaine Jones, Director of LDF enlisted prominent

black women's organizations in which she was a member of to invest in advocating for my release. Organizations such as Delta Sigma Theta Sorority, Inc., Links, Incorporated and the National Council of Negro Women. It became bigger than just advocating for me they were hoping to set a precedent for others to receive their freedom.

- There were even Congressional Members who were on this very committee such as Congressman Bobby Scott and Congresswoman Maxine Waters who were champions in advocating for my release.

The Criminal Justice Reform Movement wasn't what it is today, and after serving 6.5 years, it was a modern-day miracle for President Clinton to grant me executive clemency in December 2000. It was said that he was trying to do a redemptive act during the 25th hour of his presidency to right the wrongs of him signing The Crime Bill that caused the big prison boom. I like Alice Johnson came out singing praises to President Clinton, even though there were some people in the community who felt extremely different than me.

A few days after my release my mother saw me tearing up and she asked me what was wrong. And I told her that I was having a hard time dealing with the fact that I left so many men and women behind bars that deserved to be home, too. One of those women was Michelle West, who is still serving a double life sentence and has been incarcerated for 27 years.

On the day that I was released, I spent all day in the visitation room with my attorneys from LDF. As hours passed by and no prison staff told us anything, I had begun to think, "it" – my commutation, wasn't going to happen. After my visit and going through the squat and cough, Michelle was the first person waiting for me outside the door as I walked back on the yard to tell me "Kemba, you are going home. They said your name on CNN".

I remember vividly to this day how the prison was on lockdown and the women were yelling me well wishes as I walked out of my unit to exit the prison yard. Even though that was a surreal moment for me, the only thing I can remember is the overwhelming feeling of heartache that took over me.

That heartache and survivors guilt motivated me to speak out about my experience and I became a national and international public speaker. My lived experience has led my role as a domestic violence survivor, national advocate and consultant in the criminal justice arena for over 20 years working with women and youth, national organizations, universities, corporations and the media. I held the position of State Advocacy Campaigns Director with the ACLU of Virginia, worked with senior officials at The

White House, the United Nations in Geneva, Switzerland, Members of Congress, and I have led trainings for Federal and State Probation organizations across the country. In 2019, I was appointed as a member of the Virginia Parole Board by Governor Ralph Northern.

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President Obama commuted more sentences than any President on record, which were over 1,700. Of those there were 568 incarcerated individuals with life sentences who applied. We are grateful for what President Obama did, but we were also disappointed that he wasn't able to do more because there were over 36,000 petitions submitted. We were disappointed that Alice Johnson, Michelle West, William Underwood and other sentences had not been commuted as well.

When President Trump came into office, we assumed that there would be no progress with Criminal Justice reform as it related to drug policy and sentencing especially with Jeff Sessions being the Attorney General. We were wrong. To my surprise, I was invited to the White House to hear President Trump introduce the First Step Act and it evolved to include language in which Congress was able to enact and there have been many beneficiaries of this legislation who are singing praises to this administration. We are all supportive and happy for those that are being released.

My criticism ever since President Trump has been in office is what about The Clemency Initiative and the thousands of people that are still waiting on a response. President Trump has only commuted 10 individuals' sentences since being in office. I was an advocate for Alice Johnson. I am grateful that she has a champion like Kim Kardashian who had access to the President to advocate for her release, but there are others who are deserving of this act of mercy and the President is their last resort. There are shortcomings of the federal clemency process. Even with my own situation, I became the poster child for drug sentencing gone wrong, but I know I received relief because I had the privilege of my background of being a college student, with two middle class parents who were advocating for my release who had support from organizations that typically in past had conservative views when it came to criminal justice. Not everyone has this exposure and access that I had, but they are just as deserving of this presidential act of mercy.

Last year, I was invited to the White House for a Criminal Justice Reform Strategy Session discussing the Next Steps with Clemency. As I sat at the table, I noticed that there was not a representative from any of the national organizations that I have typically been involved with in having these conversations. I participated, even though I must admit I was uncomfortable. I leaned into knowing that Van Jones and Topeka Sam sat at these tables before me in order to generate movement on our issues. Needless to say, after my participation, I heard nothing further.

As this administration moves forward with the New Clemency Initiative and putting the White House more directly in control of the process than the Justice Department. I would strongly suggest that you include organizations that have been working on this issue for decades, and have a diverse group of individuals from attorneys, researchers, social workers, people who are in the media and people who have received commutations. Most importantly, I challenge this administration to break President Obama's record with commutations. Some are critical of how this power is being used to release President Trump's allies, if I am brutally honest, I don't care about them, as long as you are releasing my people out of prison who deserve the same opportunity that I have been given, who are no threat to public safety, which could even mean few "violent offenders."

To this Judicial Committee and Congress, I urge you to be advocates like Virginia Congressman Bobby Scott and Congresswoman Maxine Waters. I am sure you hear from plenty of family members who live in your district. Please bring those compelling stories of individuals who deserve second chances to this administration's attention.

In closing, recently there was a Virginia Supreme Court Judge that told me, the government should not be concerned with being right, instead it should be concerned with making sure "justice" has been served. I thank God that President Clinton didn't adhere to the Department of Justice opinion that I needed to serve my full sentence. There was a President that felt as if Justice had been served. There are many others like me who are waiting on their opportunity to live lives that would overshadow who they use to be if given the opportunity. Like Alice Johnson and I, they would be an asset to our great nation.

Thank you.

Mr. COHEN. Thank you. And I appreciate your history and your testimony, but you were 5 minutes over. And the yellow light means you have got one left minute, and the red light means your time is up. We have got to go have votes soon, and we want everybody to have a chance.

Our next witness is Cynthia Roseberry. Ms. Roseberry is Deputy Director of National Policy Advocacy for the ACLU. Prior to joining that organization, she was a member of the Charles Colson Task Force, a bipartisan task force charged with examining overincarceration and making recommendations to the President, Congress, and the Attorney General on reducing prison populations.

In 2014, she served as manager of the Clemency Project, a national pro bono effort to provide assistance to clemency applicants. She has worked as a Federal defender in the Middle District of Georgia. She has a J. D. From Georgia State University, a B.S. From Wilberforce University. You are recognized.

STATEMENT OF CYNTHIA ROSEBERRY

Ms. ROSEBERRY. Mr. Chairman, Ranking Member Johnson, and members of the committee, thank you for the opportunity to appear before you today.

Thousands of people languish in Federal prison, subject to draconian and unjust sentences because of the abolition of parole and failure to retroactively apply reforms, like the sentencing provision of the First Step Act. Long after they have served substantial time in prison, been rehabilitated, and are ready to return to their communities, tens of thousands of people remain incarcerated because of the system's failure to release them. And although it should not be the lone response to overincarceration, the Article II clemency power is a useful tool to begin to immediately correct the horror of unnecessarily long sentences.

Clemency power belongs to the executive who has the broad discretion to use it, but it is precisely because this power is invested in this way that there is a heightened need for the appearance and substance of fairness and justice.

This is the foundation of our faith and our democracy. This power must not be exercised with people in the same manner as it is used for turkeys in November, sparingly and reserved for a lucky few who are called to the attention of the executive because of connection, financial status, or celebrity.

Thousands should have access to clemency. The average person should be assured that their petition for clemency will not require more than evidence of the need for mercy under the circumstances. Without this assurance, the least I among us, and specifically those against whom the war on drugs and overpolicing are aimed, suffer under a caste system. They are required to watch from the cages in which they have been placed as others, who have been incarcerated for the same acts, are released.

During Clemency Project 2014, more than 36,000 applicants for clemency appeared. Additionally, thousands of family members called, emailed, sent postal mail, and personally appeared in our office in hopes that their loved ones would be lucky enough to be granted clemency. One mother called me every week to pray for the release of those suffering under long sentences. I was contacted by

judges, probation officers, defense lawyers, law professors, and some prosecutors who sought to bring our attention to someone languishing in prison with the hope for their release. The process was saturated with desperation. Sadly, many of the petitions were denied while many more remain unanswered, leaving thousands of petitioners and interested parties wondering where is the justice? Where is the fairness in the secretive deliberations on applications for liberty?

How can we be assured of fairness and justice? The clemency process must be completely independent of the system employed to incarcerate the millions of people. An independent commission should be established with representatives from all stages of the criminal legal system, including those who were formerly incarcerated, prosecutors, defense lawyers, corrections experts, and members of the public.

Independence would ensure that one actor could not put a thumb on the scales of justice, as is the case in our current system where the very same officers in the Department of Justice who prosecuted the case have the power. The commission should have the necessary resources to review the inevitable deluge of petitions from the masses. The commission would promulgate clear and equitable criteria for release. Applicants would have notice of the evidence necessary to successfully submit a petition. Newly incarcerated persons would have an incentive to immediately work to achieve rehabilitation, and the general public would understand and believe that the system is just and broadly available, and not reserved for privileged few under a secret process.

Further, members of society would have faith that those who return have been rehabilitated and are prepared to safely reenter society, and society would be prepared to welcome them.

Paramount among the criteria would be the consideration of anyone affected by the failure to retroactively apply sentencing reform. If we, the people, determine that we are no longer willing to incarcerate certain acts, then those who commit those acts and are incarcerated should go free in order for equal justice under the law to have meaning.

Categorical clemency could be granted, for example, to those serving sentences subject to enhancements that no longer apply. Additionally, those serving long sentences suffering under a trial penalty, for exercising their constitutional right to trial, and those political prisoners for the shameful COINTELCO prosecutions. Also, there is a mechanism for compassionate release, but it is underutilized. Clemency could be used to clear this backlog.

It is my hope that you remove the scourge of mass incarceration from our justice system—I would ask for just 2 more seconds. The scourge that informs one in three black boys born today that they can expect to be incarcerated, the scourge that prevents $80 billion from being spent on their education, because it is being spent to incarcerate them.

When historians look back on us, and what we did during our watch, let them record that we were enlightened. May they extol the virtual of our quest for equal justice for all, and may they marvel at the expediency with which it was achieved through an independent, transparent, fair, and just process. I am personally grate-

ful to you for taking an interest in the Nation's most urgent issues, for there is nothing more urgent than freedom. Thank you.

[The statement of Ms. Roseberry follows:]

Hearing of the Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Presidential Clemency and Opportunities for Reform

Written Statement of the Justice Division of the

American Civil Liberties Union

National Political Advocacy Department

Thursday, March 5, 2020

Cynthia W. Roseberry

Deputy Director, Justice Division, National Political Advocacy Department

American Civil Liberties Union

With more than three million members, activists, and supporters, the ACLU is a nonpartisan public interest organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, DC to protect the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws.

The ACLU is advancing a smart justice strategy that seeks to reduce the number of people and racial disparities reflected in the criminal legal system. Our agenda includes supporting the release, through clemency and other means such as the Second Chance Act, of people serving long sentences under draconian sentencing law and policy. Therefore, we strongly call for the establishment of an independent, robust, fair and transparent clemency process.

Chairperson Cohen; Ranking Member Johnson; Members of the Subcommittee:

Thank you for the opportunity to appear before you today. I am Cynthia Wilcox Roseberry, previously the project Manager of Clemency Project 2014, which was a response by the American Bar Association, American Civil Liberties Union, Families Against Mandatory Minimums, Federal Public and Community Defenders and the National Association of Criminal Defense Lawyers to the Clemency Initiative of the Obama Administration. I have worked more than two decades as a criminal defense lawyer, including teaching federal and state criminal law and as the Federal Defender for the Middle District of Georgia. I was appointed as a member of the Colson Task Force on Federal Corrections and I am the first and only African American woman past president of the Georgia Association of Criminal Defense Lawyers. I am currently Deputy Director for Policy in the Justice Division of the National Political Advocacy Department at the American Civil Liberties Union, where we work to reform our criminal legal system. My testimony is informed by my experience from many points in America's criminal legal system.

America leads the world in incarceration with 2.3 million people in prison and jail. Since 1970, there has been a 700% increase in incarceration. Imprisonment is a brutal and costly response to violations or possible violations that traumatize incarcerated people, and hurts families and communities. At the end of 2014, the imprisonment rate among Black men was nearly six times that of white men and the incarceration rate of Black women was double that of white women. The United States spends over $80 billion on incarceration each year. (See https://www.aclu.org/issues/smart-justice)

More people now understand that mass incarceration is not the answer to public safety, and recognize the need for meaningful criminal justice reform. This understanding has led to the beginning of change with much more necessary to heal the harm inflicted by the failed war on drugs which was specifically aimed at communities of color.

With the abolition of parole in the federal system and the failure to retroactively apply the modest sentencing reform provisions of the First Step Act, many languish in federal prison subject to draconian and unjust sentences.[1] Today, people are spending longer time in prison than ever before. Long after they have served substantial time in prison, been rehabilitated and are ready to

[1] Passing the Second Chance Act would create a method for release not dependent upon the clemency process.

return to their communities, tens of thousands of people remain incarcerated because of the system's failure to release them. Although it should not be the lone response to overincarceration, the Article II Clemency Power is a useful and powerful tool to begin to immediately correct the horror of unnecessarily long sentences.

The Article II discretionary power belongs to the executive who has broad discretion in the exercise of this power. It is precisely because this power is vested in the executive thusly, that there is a heightened need for the appearance and substance of fairness and justice. This is the foundation of our faith in our democracy. This power must not be exercised with incarcerated persons in the same manner as it is used for turkeys in November, sparingly, and reserved for a lucky few who are called to the attention of the executive because of connection, financial status or celebrity. Thousands more should be considered. The average person should be assured that their petition for clemency will not require more than evidence of the need for mercy under the circumstances.

Without this assurance, the least among us, and specifically those against whom the war on drugs and over policing are aimed, suffer under a caste system from which they can never emerge given the myriad collateral consequences of conviction. They are required to watch from the cages in which they have been placed, as others who have been incarcerated for the same acts.

During Clemency Project 2014, there were more than 36,000 applicants for clemency. Thousands of their family members called, emailed, sent facsimile messages and mail and personally appeared in our office in hopes that their loved ones would be lucky enough to be granted clemency. One mother called me every week to pray with me for the release of those suffering under long sentences. I was also contacted by judges, probation officers, defense lawyers, law professors and some prosecutors who sought to bring to our attention, someone languishing in prison with hope for their release. The process was saturated with desperation reminiscent of France in 1815 and Jean Valjean, but this was 21st century America! Sadly, some of the petitions were denied while many remain unanswered, leaving the petitioners and the many interested parties without answers, wondering where is the justice, where is the fairness in the secret deliberations on the applications for liberty.

How can we be assured of this fairness and justice? The clemency process must be completely independent of the system employed to incarcerate millions of people. An independent commission, created by the executive and resourced by Congress, with representation from all stages of the criminal justice system, including those who are formerly incarcerated, prosecutors, defense lawyers, corrections experts and members of the public with appropriate resources to review the inevitable deluge of petitions from the masses is a first step. Independence would ensure that one actor could not put a thumb of the scales of justice as is the case in our current system where the same officers in the Department of Justice who prosecuted the cases have this power.

This commission would promulgate clear and equitable criteria for release. Applicants would have notice of the evidence necessary to successfully support a petition for clemency. Newly incarcerated persons would have an incentive to immediately work to achieve necessary rehabilitation. The general public would understand and believe that the system is just and broadly

available and not reserved for a privileged few under a secret process. Further, members of society would have faith that those who return have been rehabilitated, are prepared to safely reenter society and society would be prepared to welcome them.

Paramount among the criteria would be the consideration of anyone affected by the failure to retroactively apply sentencing reform. If we, the people, determine that we are no longer willing to seek incarceration for certain acts, then those who were previously incarcerated for those acts must go free in order for equal justice under the law to have meaning. Categorical clemency could be granted, for example to those who were subject to enhanced sentences where the penalty is no longer applicable. Additionally, a categorical approach would be just for those serving long sentences because of the trial penalty that results when one exercises their Constitutional right to trial, as well as those aged political prisoners from the shameful COINTELPRO prosecutions. Although there is a mechanism for compassionate release, it is underutilized and when employed, release is often denied. The clemency commission could be used to clear this backlog of all elderly or infirm who deserve to be released.

Additionally, a reentry system to assist those who have been isolated from the progress society has made during their incarceration is an essential, commensurate step. For the more than 1700 people released during Clemency Project 2014, reentry included the challenge of reintegrating into a world that seemed alien. With a criterion of serving 10 years before consideration for release, advances in technology alone presented a gauntlet for the person reentering. In the ten years between 2004 and 2014, Facebook, Firefox, the iPod, Bluetooth technology, HDTV, DVR, Skype, satellite radio, smart phones and blogging were introduced. These technological advances were unavailable to those imprisoned yet, necessary for everyday life after release. Imagine being required to get a job when the system of simply applying is absolutely foreign to you. If we take the step of removing a person from society, we have the responsibility to return them to society prepared to be a fully functioning member of society after they have paid their debt. We must stamp their receipt paid in full and they must be unencumbered from the burden of challenges such as an inability to interface with modern technology. Although it is not a panacea, ensuring funding for the First Step Act could assist in this effort.

The vast majority of those incarcerated in America are in state prisons. Through the example of transparent, broad and comprehensive use of federal clemency, states can find instruction in how to achieve equal justice for those languishing in state prisons. The ACLU has outlined in its Blueprint for Smart Justice (See https://50stateblueprint.aclu.org), a plan for every state to decrease the number of people languishing in prisons in our country. In many states the driver of mass incarceration is the failure to release those who have paid their debt to society and have been rehabilitated. A federal Second Chance Act, which would allow those in prison to petition for release after serving 10 years, could serve as an inspiration to states to increase release efforts and remove the dubious distinction of incarcerating 25% of the world's prison population despite comprising a mere 5% of the global population. (See https://50stateblueprint.aclu.org)

It is my hope that you remove the scourge of mass incarceration from our justice system. The scourge that informs 1 in 3 Black boys born today that they can expect to be incarcerated. The scourge that prevents $80 billion from being spent on their education because it is being spent to

incarcerate them. When historians look back on what we did during our watch, let them record that we were enlightened; May they extol the virtue of our quest for equal justice for all and may they marvel at the expediency with which it was achieved. I am personally grateful to you for taking an interest in the nation's most urgent issue for there is nothing more urgent than freedom.

Mr. COHEN. Thank you, Ms. Roseberry.

We are joined by one of the most distinguished members of our committee, Mr. Ben Cline, an outstanding Congressman and a good family man, I presume.

I now recognize the next witness as Mr. Mark Osler. Mr. Osler is a Professor and Robert and Marion Short Distinguished Chair in Law at the University of St. Thomas School of Law, advocates for sentencing in clemency policies rooted in the principle of human dignity, a former Federal prosecutor that argued the case of Spear versus United States before the Supreme Court, which held in that case that judges could categorically reject the 100-to-1 mandatory ratio in crack and powder cocaine sentences for Federal sentencing guidelines. In 2015, he co-founded with our fellow witness, Rachel Barkow, The Clemency Resource Center, a 1-year, pop-up law firm that prepared clemency petitions. Thank you for that, sir. He received his J. D. From Yale and his B. A. From William and Mary. minutes. Professor Osler, you are recognized for 5 minutes

STATEMENT OF MARK OSLER

Mr. OSLER. Mr. Chairman, members of the committee, thank you for this opportunity to be heard.

In the course of doing the work that you just mentioned, Mr. Chairman, one of our clients was a man named Robert Shipp, and you were kind enough to write a letter of support, twice, in fact, on his behalf. One of the things you recognized in that letter was the unfairness of Mr. Shipp's story, that he was someone who turned to dealing drugs after the murder of his brother. The murderer of his brother served a 10-year sentence. Mr. Shipp was doing life for the nonviolent narcotics crime. Unfortunately, he was denied clemency. But we know these stories as all of us on this panel have gotten to do. We care about the institution of clemency, and I want to spend a little time talking about how that institution is framed right now.

The process to evaluate and make recommendations on petitions to the President, I think of it as a pipe. Water goes through the pipe, and there is seven valves, and each one of those valves is spring-loaded to be shut. And somebody has to turn each valve open as the water goes through. And those seven valves are first, it is the staff of the pardon attorney, second, it is the pardon attorney, staff at the Deputy Attorney General, then the Deputy Attorney General, then the staff at the White House Counsel, then the White House Counsel, and then the President, and that is sequential.

It is a terrible system. No one in business would create a decision mechanism like that. It grew up organically. It wasn't intentional. No one thought about it very hard. It seems just people wanted to review the cases that were coming through and took that on.

What we saw was pretty telling under the Obama administration. There, the President was deeply committed to making clemency work. And there were people, Ms. Roseberry to my right, who played a huge role in that program and worked very hard, and what happened, much of it was due to her efforts, and also to the efforts of advocates like Nkechi Taifa who is here today, who advocated for clients, learned their stories.

But in the end, even though Eric Holder, the Attorney General, said we would get 10,000 people out, ended up with 1,700. 1,715. Don't get me wrong. It is a wonderful thing for those people, but it is a tragedy about the people like Robert Shipp, who did not receive clemency.

And one thing, too, about that, that is telling about this process is that when things started to flow through that pipe, when President Obama was able to get it to work at the end, the Inspector General report on that project tells us that what they did was skip the Deputy Attorney General. They bypassed that valve, basically, for the noes which allowed the Deputy Attorney General to focus on the yeses, and that was part of what made it work.

I would like to return briefly to Robert Shipp. As I said, he was denied clemency under President Obama, and I was floored by that decision. He was imprisoned at Sandstone Prison in Minnesota, about an hour north of where I live and teach, and I felt compelled to drive up and tell him in person, and talk to him about his denial, and I did that. And I sat in the cell, the visiting attorney area. And that was a hard day. And on the drive back, I determined that we had to come up with a system that works, one that doesn't have that many valves that are spring-loaded shut.

Mr. Johnson, you quoted Micah 6:8. As a pastor, that is very meaningful to me. When I taught at Baylor Law School, I walked into the school every day under those words. And you know, the thing about that, as I think about it, and I have for a long time, is that justice and mercy are intention if "justice" means we treat everyone the same, and "mercy" means that we give some people a break, that part of our project is to resolve those two poles. And I think the answer, in part, is the third part of that passage. It is humility, that we have to humble ourselves to know those stories, to care about them, to agree that mercy is good. We need the humility to see the change in others, to know the limits of our judgments, and to see the human dignity in all people, including those who are incarcerated. Thank you.

[The statement of Mr. Osler follows:]

Statement of Mark Osler
Robert & Marion Short Professor of Law, Univ. of St. Thomas (MN);
Ruthie Mattox Chair of Preaching, 1st Covenant Church-Minneapolis

Before the House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
"Presidential Clemency and Opportunities for Reform"
March 5, 2020

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

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[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.

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[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).

Mr. COHEN. Thank you, Professor. Our next witness is Rachel Barkow, Vice Dean and Segal Family Professor of Regulatory Law and Policy and Faculty Director, Center on the Administration of Criminal Law at NYU. She has taught at NYU since 2002, where she teaches courses in criminal law, common law, and administrative law.

From June 2013 to 2019 of January, she served as a member of the U.S. Sentencing Commission. Among her various areas of scholarly focus the role of mercy and criminal in the criminal justice system. In 2015, she co-authored, together with Mr. Osler, Professor Osler, a University of Chicago Law Review article arguing for the independent clemency commission outside the Department of Justice. She received her J.D. From Harvard, magna cum laude. She served as editor of the Harvard Law Review, B.A. with honors from Northwestern, served as law clerk for the Honorable Lawrence Silverman of the U.S. Court of Appeals for the D.C. circuit, and for the Honorable Anton Scalia, Associate Justice of the Supreme Court of the United States. Professor, you are recognized for 5 minutes.

STATEMENT OF RACHEL E. BARKOW

Ms. BARKOW. Thank you very much, Mr. Chairman, Ranking Member Johnson, and members of the subcommittee, thank you for inviting me today to testify. There were two problems with Federal clemency today. The first, and, by far, the biggest concern, is that it is not being used enough. The second is that of the few grants that are being given, a large proportion have gone to presidential supporters and those with connections to him. So, the good news is that Congress has the power to address the more pressing concern of inadequate numbers of clemency grants, and I urge you to do so.

Clemency, as you have heard many of us talk about, is a critical avenue for achieving justice and proportional sentencing in the Federal system because Congress abolished parole in 1984, and that was previously the major avenue for getting sentence reductions.

Pardons are also essential, because there is no other mechanism at the Federal level for an individual to seek relief from the collateral consequences of convictions. And now, unfortunately, it is difficult to get either commutations or pardons under the current application process, because the Department of Justice, the same agency that brought the prosecution in the first place, plays a gatekeeping role and it is institutionally biased against clemency, because it is reviewing its own prior decisions. So I don't think you need to look any further than the output of DOJ'S process to see this bias at play.

According to DOJ's own clemency statistics, there have been more than 7,700 petitions filed since President Trump took office, and only 24 grants. So that is a rate of 0.3 percent. And this is part of a pattern of low grant rates in recent decades, because of DOJ resistance to clemency.

During the administrations of Bill Clinton and George W. Bush, the Department received more than 14,000 petitions for

commutations, but the Department only recommended that 13 of them should be granted.

Now, President Obama had to create a designated initiative with specific criteria to try to spark more positive recommendations from the Department. And even with that effort, he fell short of his goals precisely because it was administered by DOJ. Only 3.4 percent of the people who met President Obama's stated criteria received clemency, and thousands were left behind.

And I do think the case of Alice Marie Johnson illustrates the flaws with keeping DOJ as a gatekeeper. Johnson was a first-time offender who got a life sentence for her role in a drug trafficking conspiracy. She was a model prisoner, helped others, accepted full responsibility for what she had done. And after serving almost two decades, she asked President Obama for clemency. But she was rejected without her application ever reaching President Obama's desk. And that is because DOJ thought her petition should be denied.

Now, she came to President Trump's attention not because DOJ had a change of heart, but because her case got the attention of Kim Kardashian, who then made a personal plea to the President.

There are thousands of cases like Alice Marie Johnson out there, but they are waiting in a line of 14,000 petitions, where the end result is most likely going to be the Department of Justice recommending no. So Congress can't force the President to grant those petitions through clemency, but you can create mechanisms of release that do a good job.

Congress can create second-look mechanisms such as parole or an opportunity for resentencing by a judge, and that can serve the same function as commutations. Congress can also help prevent excessive sentencing from occurring in the first place, by eliminating mandatory minimums and giving judges more flexibility to have the facts fit the actual case before him or her.

Additionally, Congress, when it recognizes that its sentencing laws have gone too far, as it did with the First Step Act, can, and I believe should, provide retroactive relief for the people who were still serving sentences under the old laws that Congress has recognized should be overturned. Congress can also address the low rate of pardons by enacting legislation that allows individuals to expunge Federal convictions and restore their rights. And, again, reduce the need for such relief in the first place by removing some of those oppressive collateral consequences.

But, in addition to passing legislation along these lines that could serve as a substitute for clemency, Congress can also improve the operation of clemency itself, by providing the necessary resources to enable the President to use the power more effectively.

Several recent Presidents of both parties have indicated frustration with clemency being run out of the Department of Justice, as have some of the candidates who are currently running for President, and they want to switch to a model that relies on an advisory board that exists outside of DOJ. And President Trump appears to be transitioning to such a model as well. Congress can and should provide funding to support this change so that this board has the resources it needs to do the job effectively.

The one thing that Congress can't do is tell the President how to exercise the clemency power, which is why solving the second problem of grants given to supporters, or cronies, isn't subject to a legislative fix. The main mechanism for checking a President who does that, who gives grants and/or exercises the discretion in ways that people might find disserving, is to elect a new President with better judgment and better values.

So thank you, again, for allowing me to testify and share my thoughts on clemency. And I would be happy to answer any questions that you have.

[The statement of Ms. Barkow follows:]

Statement of Rachel E. Barkow
Vice Dean and Segal Family Professor of Regulatory Law and Policy
Faculty Director, Center on the Administration of Criminal Law
New York University School of Law

Before the House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Presidential Clemency and Opportunities for Reform
March 5, 2020

Mr. Chairman and Members of the Subcommittee: Thank you for inviting me to testify about presidential clemency and opportunities for reform. It is an honor to appear before you.

In my remarks today, I would like to start by explaining why clemency is a critical safety valve in the federal system. I will then turn to the deficiencies with the way federal clemency currently is administered. The first set of problems revolve around having the Department of Justice play a gatekeeping role in the formal process for clemency review. The second set of issues are associated with the way in which presidents can bypass any formal process and use clemency as a means to reward political supporters and cronies. Finally, I will suggest possible reforms.

Some problems are easier to fix than others. The issues of DOJ bias, a backlog of cases, and chronically low grant rates are problems that can be solved through institutional design changes and legislative enactments that are within Congress's power and that do not violate the president's authority under the Constitution.

It is harder to address the problem of presidents giving grants to their political allies and benefactors. Congress cannot tell a president how to exercise the clemency power. At the end of the day, particular grants are questions of presidential judgment and discretion. The Framers assumed we would elect leaders with the wisdom and values to use this great power wisely and, if and when they did not, that we would hold them accountable for it at the ballot box and in the judgment of history.

I. Why Clemency is Important

The Pardon Clause of the Constitution vests the President with the "Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[1] The most common clemency grants given by presidents have been pardons and commutations.[2] A pardon removes the legal consequences of a conviction,

[1] U.S. CONST. art. II, § 2, cl. 1.
[2] *Clemency Statistics*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/pardon/clemency-statistics (last visited Mar. 1, 2020). In addition to pardons and commutations, presidents can grant reprieves (which delay the execution of a punishment), amnesties (which are essentially pardons granted to a class of

and it may be granted either before or after individuals begin their sentences. It can even be granted before an individual is convicted or even tried; it is permissible anytime after a crime has occurred. Typically, however, pardons have been granted some time after a sentence has been served in full and the individual has a demonstrable record of law-abiding behavior.[3] Pardons "restore[] those civil and political rights that were forfeited by reason of the conviction, most of which are a matter of state law, and remove[] statutory disabilities imposed by reason of having committed the offense."[4] A commutation, in contrast, does not erase all the consequences of a conviction and instead is a reduction in an individual's sentence.[5]

Commutations and pardons are both essential checks on federal government overreach and critical mechanisms to improve public safety and curb disproportionate punishments.

Commutations are critical because Congress abolished parole in 1984,[6] thus eliminating the major avenue that individuals previously pursued to seek reductions in their sentences. At the time it was abolished, several witnesses told Congress that clemency would need to play a renewed role in correcting excessive sentences.[7] That need has grown even more acute because of the many mandatory minimum sentences Congress has passed, which have created numerous cases of disproportionate sentences being imposed without any opportunity for a judicial check. Mandatory minimums have been particularly prevalent for drug offenses, where the trigger for the minimum is based on the drug's type and quantity. But quantity is a poor proxy for culpability because of the way conspiracy law operates; everyone in a conspiracy is held responsible for all the reasonably foreseeable quantities, whether they are the kingpin or a low-level courier. Congress set the quantities with the kingpins in mind, but most of the people actually sentenced under mandatory minimum laws are low-level participants. It is hardly surprising that numerous commutations granted by recent presidents have come in cases involving mandatory minimum sentences.[8]

Congress recently acknowledged that many of its mandatory minimums went too far in the First Step Act. But it failed to make most of its changes retroactive, thus leaving clemency as the only avenue of relief for the thousands of people still serving sentences under old mandatory minimums that would not be issued today.

Pardons are likewise essential because there is no other mechanism at the federal level for an individual to seek relief from collateral consequences of convictions or to signify their rehabilitation. In the absence of a pardon, individuals face many collateral

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offenders instead of individually), and the remission of fines and forfeitures. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 810-811 (2015).

[3] Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 576 (1991).

[4] Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 290 (2010).

[5] Biddle v. Perovich, 274 U.S. 480, 486–87 (1927).

[6] Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. § 3551).

[7] Barkow, *supra* note 2, at 816 n.81.

[8] *Id.* at 837 n.208 (listing examples of commutations in mandatory minimum cases by Presidents Clinton, George W. Bush, and Obama).

consequences of convictions, even long after they have completed their sentence and demonstrated law-abiding behavior. Federal convictions preclude individuals from a host of jobs and are grounds for denying or revoking occupational licenses.[9] Federal convictions also make individuals ineligible for public housing, welfare assistance, and food stamps, all of which are often critical transitional tools for individuals trying to reenter society after terms of incarceration.[10] A pardon can eliminate these barriers, and, in the process, promote public safety by easing the path to successful reentry. Pardons can also restore voting rights and the ability of an individual to serve on a jury or in the military or to possess firearms. There is no other mechanism available aside from a pardon to mitigate these collateral consequences of convictions.

II. Flaws in the Current Administration of Clemency

Although commutations and pardons are critically important mechanisms for ensuring proportionate sentences and easing the burdens of collateral consequences, they are exceedingly difficult to obtain under the current application process. The current formal clemency process involves seven stages of review, the first four of which are all in the Department of Justice – the same agency that brought the prosecution in the first instance. DOJ's main mission is law enforcement, so asking that agency to flip perspectives and think of sentence correction and redemption is no small request. Effectively, each clemency application becomes "a potential challenge to the law enforcement policies underlying the conviction."[11] It is all the more difficult when the agency is reviewing its own prior judgments and the review is overseen by prosecutors.

A person seeking a commutation or pardon files an application with the Office of the Pardon Attorney. A line attorney in that office seeks out the view of the prosecutor's office that charged the case and those views are given "considerable weight."[12] The odds are already stacked against a petitioner because most of those prosecutors are disinclined to see the case any differently than they did the first time around. If the line attorney in the Office of the Pardon Attorney thinks the petition should be denied, it is unlikely the petition will move any further. If the line attorney is inclined toward a grant, that just means the petition moves on to the Pardon Attorney.[13] If the application makes it through those first two stages, it moves on to the Office of the Deputy Attorney General (DAG).

The DAG's main line of work is supervising federal prosecutors, so the DAG is not exactly predisposed to positive recommendations for clemency. A lawyer within the DAG's office will first review the petition and then make a recommendation to the DAG. In addition to being professionally disinclined to support clemency because that effectively means second guessing the same prosecutors the DAG supervises, the DAG

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[9] Barkow, *supra* note 2, at 866.
[10] *Id.* at 866-867.
[11] Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1194 (2010).
[12] *Standards for Consideration of Clemency Petitioners*, U.S. DEP'T OF JUSTICE § 9-140.111, https://www.justice.gov/pardon/about-office-0 (last visited Mar. 1, 2020).
[13] Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 431 (2017).

also has many other obligations, so clemency is unlikely to be a high priority. We know that the DAG frequently recommends deny even when the Pardon Attorney would grant a clemency petition.[14]

It is only after getting through the DOJ gauntlet that a petition would make its way to the White House, where it then faces two more layers of review. First, there is consideration by one of the lawyers in the White House Counsel's Office and then the White House Counsel himself. Only after all that would a petition make its way to the president's desk for the president's final decision. The entire process often takes years.[15]

This process is biased against grants not only because of its many possible veto points, but also because of DOJ's involvement and, particularly in the case of commutations, the substantive criteria it uses. DOJ regulations state that a commutation "is an extraordinary remedy that is rarely granted."[16] This standard might have made sense when it was first adopted, because it came about when parole was still an option for those seeking sentencing reductions. But DOJ never reconsidered this standard even after parole was abolished.[17]

DOJ's gatekeeping process – which effectively prevents almost all applications from ever reaching the president – is institutionally biased in favor of maintaining the judgments of prosecutors who originally pursued the cases it is reviewing. It is hard for anyone to second-guess their colleagues, particularly when those colleagues are pursuing the same institutional mission as you are.[18] It is harder still when you ask those very colleagues to weigh in on the merits, give those assessments deference, and apply a standard that views a grant as "extraordinary" and something that should be "rarely" given. Then you add in the fact that most Pardon Attorneys and their supervisors at DOJ have "overwhelmingly" been former prosecutors[19] and are thus part of a shared culture where they are desensitized to the long sentences federal prosecutors hand out on a daily basis.[20] This is not a review process well positioned to spot problems that may be commonplace or with the kind of objectivity needed to take a fresh look at sentences.

DOJ lawyers are also poorly placed to consider the ways in which people change over time and might be very different than when they initially committed their crimes. Prosecutors do not stay abreast of the progress people make while incarcerated or the efforts they make toward rehabilitation. Prosecutors thus have a poor perspective on

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[14] *See* Letter from Deborah Leff, Pardon Attorney, U.S. Dep't of Justice, to Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep't of Justice (Jan. 15, 2016), *reprinted in* 28 FED. SENT'G REP. 312 (2016).
[15] Barkow & Osler, *supra* note 13, at 431.
[16] *Standards for Consideration of Clemency Petitioners*, *supra* note 12, § 9-140.113.
[17] The pardon criteria are less biased against grants, though they do require waiting periods before an individual can be considered. Individuals must wait at least five years from their date of release to file. DOJ will consider an individual's post-conviction conduct, the seriousness of the offense and how recently it occurred, and the applicant's acceptance of responsibility and remorse. *Id.* § 9-140.112. A legal disability that results from the conviction "can provide persuasive grounds for recommending a pardon." *Id.*
[18] Barkow & Osler, *supra* note 13, at 398-400.
[19] Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1165 (2010); Love, *supra* note 11, at 1194 n.105.
[20] Barkow, *supra* note 2, at 825.

requests for pardons because they often cannot get past the facts of the original case. The view inside DOJ, according to a lawyer who worked in the Pardon Office for a decade, is that pardon attorneys should "defend the department's prosecutorial prerogatives" and that "the institution of a genuinely humane clemency policy would be considered an insult to the good work of line prosecutors."[21] In light of this view, there is a "strong presumption" at DOJ that "favorable recommendations should be kept to an absolute minimum."[22]

One need look no further than the output of DOJ's process to see the bias at play. The Pardon Attorney has received almost 1,197 pardon petitions during President Trump's time in office and only 18 have been granted. When you add the backlog of applications that existed when he took office, there are 2,445 petitions for pardons pending. The commutation statistics are even worse. There have been 6,551 petitions for commutations filed during the Trump Administration, and only 6 have been granted. There are a whopping 11,510 commutation petitions pending when you add the enormous number left over from the Obama Administration.[23] The story since President Trump took office is thus an enormous backlog of cases (almost 14,000) that has barely budged and very few grants of petitions received (an overall grant rate of 24 out of 7,748 petitions received, or .3%).

While these numbers are exceptionally low, recent previous presidents have also had low grant rates compared to most of the nation's history. President Obama granted 5% of the petitions he received, President George W. Bush granted 2%, President Clinton granted 6%, President George H.W. Bush granted 5%, and President Reagan granted 12%. During the administrations of Bill Clinton and George W. Bush, the Department received more than 14,000 petitions for commutations but recommended a mere 13 grants to the White House.[24] This contrasts with President Carter's grant rate of 21%, President Ford's rate of 27%, and President Nixon's rate of 36%.[25] These latter rates are more in accord with most of the historical practice. Between 1892 and 1930, 27% of the applications received some grant of clemency.[26]

Given the paucity of positive grant recommendations, it is not that surprising that some presidents might be tempted to look on their own for what they view as suitable cases for clemency. A former Pardon Attorney, Margaret Colgate Love, noted that "the Justice Department's reluctance to recommend cases favorably for clemency . . . was, at least in part, responsible for the extraordinary breakdown of the pardon process at the end of the Clinton administration."[27] George W. Bush also complained that he was not being

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[21] Samuel T. Morison, *A No-Pardon Justice Department*, L.A. TIMES (Nov. 6, 2010), https://www.latimes.com/archives/la-xpm-2010-nov-06-la-oew-morison-pardon-20101106-story.html.
[22] *Id.*
[23] All of these statistics are taken from the DOJ's website. *Clemency Statistics*, *supra* note 2.
[24] George Lardner, Jr., *No Country for Second Chances*, N.Y. TIMES A27 (Nov. 24, 2010) (quoting Samuel Morison), https://www.nytimes.com/2010/11/24/opinion/24lardner.html.
[25] Barkow, *supra* note 2, at 816-817.
[26] W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 97-99 (1941).
[27] *Presidential Pardon Power: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 25 (2001) (statement of Margaret Colgate Love).

provided grant recommendations when he sought them. His White House counsel noted "[i]t became very frustrating, because we repeatedly asked the [pardon] office for more favorable recommendations for the president to consider, [b]ut all we got were more recommendations for denials."[28] President Obama had to create a designated initiative with specific criteria to spark more positive recommendations from the Department, and even that fell short of his goals because it was administered by DOJ.[29] While it was laudable that President Obama commuted more than 1,700 sentences during his time in office, there were also thousands left behind. A report by the U.S. Sentencing Commission concluded that only 3.4% of the people who met President Obama's stated criteria received a clemency grant.[30]

The case of Alice Marie Johnson illustrates the flaws with keeping DOJ as a gatekeeper. Johnson was a first-time offender who received a life sentence for her role in a drug trafficking conspiracy. She was a model prisoner who helped others and accepted full responsibility for her role in the drug conspiracy. After serving nearly two decades, she asked the Obama Administration for clemency, but she was denied without the application ever reaching President Obama's desk because DOJ recommended that her petition be denied.[31] She came to President Trump's attention not because the DOJ had a change of heart, but because her case got the attention of Kim Kardashian, who then made a personal plea to the president.

A process that relies on cases that happen to catch a president's attention is likely to be one that results in grants disproportionately to the president's friends and supporters. That has certainly been the case during this administration, with President Trump granting clemency to the politically connected (e.g., Joe Arpaio, Dinesh D'Souza, Scooter Libby, Rod Blagojevich, Bernard Kerik), high-profile individuals who have gone out of their way to sing his praises (e.g., Conrad Black, author of Donald J. Trump: A President Like No Other; Angela Stanton); and cases profiled on Fox (e.g., Kristian Saucier, Eddie Galagher). The Trump process has been described as "an ad hoc scramble that bypassed the formal procedures used by past presidents and was driven instead by friendship, fame, personal empathy and a shared sense of persecution."[32]

While the proportion of clemency grants given to those with connections is particularly lopsided in the Trump administration, the pardon process has always tilted toward those with influence. A 2011 study by ProPublica found that a person seeking a

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[28] Dafna Linzer & Jennifer LaFleur, *ProPublica Review of Pardons in Past Decade Shows Process Heavily Favored Whites*, WASH. POST (Dec. 3, 2011), https://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElnVQO_story.html.
[29] Barkow & Osler, *supra* note 13, at 425-430.
[30] U.S. SENTENCING COMM'N, *An Analysis of the Implementation of the 2014 Clemency Initiative* 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf.
[31] Jeremy Diamond & Kaitlan Collins, *Trump Commutes Sentence of Alice Marie Johnson*, CNN (June 6, 2018), https://www.cnn.com/2018/06/06/politics/alice-marie-johnson-commuted-sentence/index.html.
[32] Peter Baker et al., *The 11 Criminals Granted Clemency by President Trump Had One Thing in Common: Connections*, N.Y. TIMES (Feb. 19, 2020), https://www.nytimes.com/2020/02/19/us/politics/trump-pardons.html.

pardon who had the backing of a member of Congress was three times as likely to get one as someone without that support.[33]

These, then, are the two major flaws with how clemency is administered today: (1) the Department of Justice cannot objectively vet the applications for clemency because it is overwhelmingly biased in favor of recommending deny, and the result is that too many cases never get relief; and (2) some presidents, including and especially the current one, have decided to use an ad hoc process (if there is any process at all) to identify their own cases of interest, thus using clemency to favor cronies and allies.

III. Possible Reforms

In the words of the Supreme Court, "[t]o the executive alone is intrusted [sic] the power of pardon; and it is granted without limit."[34] The Supreme Court has made clear that "[t]his power of the President is not subject to legislative control."[35] "[T]he President may exercise his discretion under the Reprieves and Pardons Clause for whatever reason he deems appropriate."[36] The power can be used on any federal criminal offense.[37]

Although Congress cannot directly regulate the clemency power of the president, it does possess the authority to create substitute mechanisms that perform as well or better than clemency when it comes to checking excessive sentences and eliminating the negative consequences of convictions that hinder reentry.

A. Legislative Alternatives to Clemency

The most significant problem with clemency is that it is not being used enough given the need. Thankfully, there are other options for correcting the problems of excessive sentences and the negative consequences and stigma of convictions aside from commutations and pardons if Congress were to provide for them. I will first discuss those measures that Congress can enact to address the dearth of commutations, and then I will turn to the options available to correct for the low level of pardons.

1. Reducing the Need for Commutations

Parole and commutations serve the same function of providing a mechanism to reduce someone's sentence. The two have, in fact, served as substitutes for each other. Presidents granted commutations relatively frequently for most of the country's history until parole came on the scene in the early twentieth century and "essentially replaced

[33] Linzer & LaFleur, *supra* note 28.
[34] United States v. Klein, 80 U.S. 128, 147 (1871).
[35] *See Ex parte* Garland, 71 U.S. 333, 380 (1866)
[36] Hoffa v. Saxbe, 378 F. Supp. 1221, 1225 (D.D.C. 1974).
[37] *Garland*, 71 U.S. at 380. This includes charges of contempt of court. *Ex parte* Grossman, 267 U.S. 87, 115 (1925). The president can also attach conditions on a clemency grant as long as they do not "otherwise offend the Constitution." Schick v. Reed, 419 U.S. 256, 266 (1974). *See generally* Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665 (2001).

clemency as the primary mechanism for reducing sentences."[38] Thousands of people were released from federal prison each year through parole. But no one sentenced after November 1, 1987, is eligible for parole, which leaves commutations to fill the gap.[39] The thousands of petitions waiting in the backlog at DOJ are a sign that commutations are not up to the task.

One solution is thus for Congress to bring back parole and or create other second look mechanism for sentences. People and circumstances change over time – particularly over the long periods of incarceration that are so often handed down in the federal system. Having a second look allows a decision maker to account for the ways in which people change, particularly as they age out of criminal behaviors. It also provides a mechanism for reflecting changes in attitudes to particular kinds of crime. For example, marijuana is now legal in many states, yet individuals continue to serve decades in federal prison for selling marijuana. Parole eligibility or the opportunity to appear before a judge for resentencing after a certain length of time can help fill the vacuum created by the lack of presidential commutations.

Another means to address excessive sentences is to make sure they do not occur in the first place. Giving judges discretion to tailor sentences to the facts before them is a critical safety valve against prosecutorial overreach. Mandatory minimums tie judges' hands and create the bulk of the excessive sentences we see in the federal system. Eliminating mandatory minimums would go a long way in addressing the huge need for commutations in the federal system.

Additionally, when Congress does recognize that its sentencing laws have gone too far, it is crucial that it provide for retroactive relief to those still living under the prior regime. Congress has been reluctant to make its sentencing changes retroactive, but the experience of retroactive sentencing adjustments shows this can be done effectively and without a hit to public safety. Congress gave the Sentencing Commission the authority to determine when its changes to the Sentencing Guidelines should be retroactive. The Commission made reductions in crack sentences eligible for retroactive adjustment in 2007 and 2011, and when it studied what happened to those who served their full sentences and those who received retroactive reductions, it found they did not have different recidivism rates.[40] Congress should similarly provide for retroactive adjustments when statutes lower sentences. Judges have shown they are able to make these decisions consistent with public safety, and having this mechanism in place would ease some of the burden on commutations.

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[38] Barkow, *supra* note 2, at 814.

[39] *Id*. at 816 and n.81 (quoting witnesses who warned Congress of the need for commutations to fill the gap if parole were abolished).

[40] U.S. SENTENCING COMM'N, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf; U.S. SENTENCING COMM'N, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf.

2. Reducing the Need for Pardons

Pardons are particularly important at the federal level because, unlike many states, Congress has not provided for alternative mechanisms to expunge or seal criminal records or to allow people to obtain some kind of certificate of good standing that could remove collateral consequences of conviction and make it easier to obtain employment. Congress could thus address the shamefully low rate of pardons, particularly for individuals who need it most, by providing substitute channels to get the same relief. There should be federal legislation that allows individuals to expunge federal convictions and restore their rights without having to seek a presidential pardon. Providing an alternative avenue could also help address the glaring racial disparities in the dispensing of pardons. A 2011 study found that white applicants seeking a pardon were more than four times as likely to get it granted than people of color.[41]

As with the need for commutations, the other major solution to this issue is to reduce the need for such relief in the first place. Some of the collateral consequences stem from state law, and the only way to address those sanctions is to remove the federal conviction from an individual's record. But many of the most significant collateral sanctions are federal, and it is long past time for Congress to take another look at some of these laws.[42] Restrictions on access to public housing and federal assistance benefits for those with felony convictions undermine the goal of public safety because of how difficult it is for people to transition from incarceration to lawful employment. These are often crucial bridge services and benefits that allow people to make that leap. Similarly, reducing states' highway funds if they do not suspend drivers' licenses for people with drug offenses ends up hampering people's ability to drive to jobs, again in opposition to public safety goals. Eliminating these collateral consequences would not only stem the need for many pardons, but it would improve public safety more generally by allowing more people to successfully transition to law-abiding lives after serving their sentences.

B. Congressional Support of Presidential Clemency

All of the mechanisms I have suggested would greatly improve federal sentencing and punishment. But even if they were adopted, there would still be cases that call out for mercy. Laws will always be imperfect, and clemency is an important safety valve for when the law falls short. Moreover, to the extent the options I am suggesting are not adopted – and it is always difficult to get criminal justice reform through Congress – clemency will remain the only mechanism available to correct excessively long sentences and to pave the way for someone to clear a record and reenter society without the burdens and collateral consequences of a conviction. Finally, clemency will remain part of the

[41] Linzer & LaFleur, *supra* note 28.
[42] RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 88-97 (2019).

Framers' vision of the separation of powers[43] and a means by which the president exercises oversight over enforcement decisions that go too far.[44]

Thus, even if Congress passes other needed changes, Congress should still provide the necessary resources to enable the president to use the clemency power most effectively.

While Congress cannot dictate how a president should exercise the constitutional power of clemency, it can provide funding for needed institutional changes. For example, after the Civil War, as federal criminal law expanded and more clemency petitions were filed, Congress approved funding for a pardon clerk to assist the Attorney General, which eventually became the Office of the Pardon Attorney.[45] Giving authority to the AG to review clemency applications was unremarkable initially, because the AG was largely removed from supervising U.S. Attorneys for the first 100 years.[46] But we are a far cry from that model today, and leaving the clemency authority in the Department puts prosecutors in charge of reviewing their own decisions.

Several recent presidents have expressed frustration with running clemency out of the Department of Justice, and many of the current candidates running for president have noted that they want to switch to a model that relies on a presidential advisory board that exists outside of DOJ.[47] President Trump appears to be transitioning to this model as well.[48]

Congress can and should provide funding to support this needed institutional change so that this advisory board model has an operating budget that allows it to do its job most effectively.[49] By providing funding to pay an advisory board and staff to process petitions, Congress can help address the huge backlog of cases waiting to be reviewed. In the absence of funding, presidents must rely on volunteers or shift funds from elsewhere in the Executive Office of the White House budget. A designated funding stream for a clemency board would signal the broad support this idea has and help make

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[43] Barkow, *supra* note 2, at 831-832.
[44] *Id.* at 840; *Ex parte* Grossman, 267 U.S. 87, 120 (1925) ("Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.").
[45] Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful,* 27 FORDHAM URB. L.J. 1483, 1489 n.26 (2000).
[46] Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 287 (2013)
[47] The Marshall Project, *How Would You Use Your Clemency Powers as President?*, https://www.themarshallproject.org/2019/10/10/2020-the-democrats-on-criminal-justice#primer-clemency (last accessed Mar. 1, 2020).
[48] Toluse Olorunnipa et al., *White House Assembles Team of Advisors To Guide Clemency Process as Trump Considers More Pardons*, WASH. POST (Feb. 19, 2020), https://www.washingtonpost.com/politics/white-house-assembles-team-of-advisers-to-guide-clemency-process-as-trump-considers-more-pardons/2020/02/19/752d04d2-532e-11ea-929a-64efa7482a77_story.html.
[49] For more details on this model, see Barkow & Osler, *supra* note 13, at 461-463; *see also* Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 19-25 (2015).

this model successful by attracting individuals who can devote the necessary time to process these applications carefully. To be sure, Congress cannot require a president to use such a board. But by creating a budget for it, it makes it more likely that it will be consulted.

While Congress can provide institutional support to increase the likelihood that a president can get the advice and information necessary to make good decisions, it cannot control what those decisions ultimately are. Presidential judgment is not something that Congress can control or influence. If a president exercises the clemency power to favor political allies and cronies, Congress lacks the constitutional power to stop the president unless the abuse rises to the level of impeachment.[50] "[A] president's use of clemency is shaped by the deepest values of that president," as Mark Osler reminds us.[51] The main mechanism for checking a president who gives questionable grants or exercises discretion in disturbing ways is to elect a new president with better judgment and values.

IV. Conclusion

Thank you for allowing me to testify and share my thoughts on clemency. I would be happy to answer any questions that you might have.

[50] *See Ex parte* Grossman, 267 U.S. 87, 121 (1925) (noting that if the President were to abuse his clemency powers, the remedy would be impeachment).
[51] Mark Osler, *Clemency as the Soul of the Constitution*, 34 J. L. & POL. 131, 131 (2019).

Mr. COHEN. Thank you very much. We are now in the period where we ask questions of 5 minutes of each. And I will start with my 5-minute period.

And, first, I want you to reiterate, Professor Barkow, the suggestions you had. Because the reality is, we can do oversight. And that is part of what this hearing is about is oversight. But we can't stop or change the President's pardon power, unless he tries to pardon himself, and that would go to court. What were your suggestions of legislation that could serve the same purposes?

Ms. BARKOW. Thank you for the opportunity to talk about them further. So, I think on the—so commutations reduce sentences that are excessive. That is the Presidential power. So you could create other mechanisms that do the same thing, just not with the President.

So we used to have parole in our system, and that was the main mechanism by which people got sentencing reductions. If you look at the charts on when clemency starts to fall initially, it is when we have the advent of parole. So bringing some form of parole back, or a second look by a judge that allow you——

Mr. COHEN. When was parole eliminated?

Ms. BARKOW. 1984's legislation eliminated it. So anyone sentenced after November 1st, 1987, in the Federal system cannot get parole.

Chairman NADLER. Excuse me, chairman, may I have moment?

Mr. COHEN. Yes.

Chairman NADLER. When you are referring to the parole elimination, you are referring to the institution of determinative sentencing, right?

Ms. BARKOW. Correct. It was part of the Sentencing Reform Act package of eliminating parole and creating a sentencing commission. And people testified before Congress at that time saying, now that you have eliminated parole, it is going to put a lot of weight on clemency. Because we need to have an avenue for commutations. And that turned out to be particularly true because there were so many new mandatory minimums that came into play at the same time, and then continued to come.

So you have this, lots of disproportionate sentences that were mandatory, that the judge had no power to do otherwise, and no back-end mechanism to correct them. So reinstituting some form of parole or a second look by a judge after a period of time could do the same thing as a commutation. It would just be giving it to a different actor in the system.

Mr. COHEN. Do you know if that was discussed as part of the First Step Act?

Ms. BARKOW. I do know there is legislation that is being considered that others may know more about—the second look, which would allow for more back-end review. And I also know that the part of the First Step Act that allows people to earn credits as opposed to good-time credits, participate in programming and be eligible for some reductions, you know, that is one other way that was supposed to expand the opportunity. And then also, removing the requirement that DOJ had to file your petition for compassionate release. You know, that also opened up one other opportunity. But that is for people who have terminal illnesses and the like. For

your kind of core group of folks who have excessively long sentences, I do think there needs to be more opportunities for them. And I do think having a second look in the system would do it. And it would take some of the pressure off the President.

Mr. COHEN. Are there limits to the Compassionate Release Act, as far as number of years somebody would have had to have served?

Ms. BARKOW. No, you can—a person can file their petition now directly with a judge. You know, can ask obviously to go through the Bureau of Prisons process, but does have the ability now to file with a judge and explain why they merit compassionate release.

So, for example, if they have a terminal illness, if they are a caregiver for a child, they are the only caregiver that is left that could take care of a family member, because you know someone has passed away and the like. I do know that people are filing petitions for extraordinary sentencing relief under that provision, arguing that they can do it in the case——

Mr. COHEN. Do you have any recommendations of changes in the compassionate release to make it more effective?

Ms. BARKOW. I do think it should be explicitly made available to people who are serving excessively long sentences and can demonstrate good behavior while they have been incarcerated. I think that is something that could be more explicitly made clear, because right now, the folks who are trying to do that, you know, it will remain a question whether judges will accept those petitions.

Mr. COHEN. How do you know that? Are you suggesting putting out a public paper to the prisoners?

Ms. BARKOW. Well, I think that—so there could be legislative changes that may clear who is eligible and who Congress has in mind should be asking for sentencing relief. I do think—and I will let some of the other advocates who work there more directly with people who are currently incarcerated—I do think word gets around about what opportunities are available in terms of opportunities, but not everybody has access to counsel to help them and the resources they need to——

Mr. COHEN. Ms. Roseberry, do you have any suggestions on things we can do legislatively to improve people's opportunities to get their freedom?

Ms. ROSEBERRY. Yes, sir. Thank you for that question. I agree that the Second Chance Act, passing the Second Chance Act will be helpful to give folks a second look. We recommended that on the Culson task force. Of course, getting rid of mandatory minimums stops the process on the first end. Fully funding the First Step Act so that people can avail themselves of that. I think as of July of 2019, only about 3,000 people have been able to be released through that Act. There needs to be programming so that people can come out.

I would just also add that if we are concerned about safety, that we they about the fact that if prisons are overcrowded, then the folks who work in corrections are unsafe as well. That is one of the things that we found in the Culson task force. So there is a need for mercy for them as well to have folks come out.

Mr. COHEN. Thank you. I recognize Mr. Johnson for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman. And thank you all for your thoughtful comments and contributions. And there is a lot of competing events going on in the Hill right now. You know how this works. The record of this is very important. And your writings are important.

What you said just a moment ago is exactly right. We hear from those who work within the prisons about the underfunding crisis, really, that they have. So they have jeopardized the safety of those who are in charge in these facilities. Because that is a whole other issue.

Professor Osler, I really appreciated your frank discussion and our mutual reference to Micah 6:8, in how there is this tension between acting justly and love and mercy, and how it is resolved really with that third phrase of humility. And that is a lot to unpack, and something we ought to consider.

But can you describe, just real quickly, why you think clemency grants can be consistent with public safety? Because I think there is a lot of misconception out there about that.

Mr. OSLER. Yes, thank you. Thank you for that question. And yes, absolutely. One thing that clemency allows for is the capacity for people to change. That someone who at 18, 19, 20, was committing a felony, even a violent felony, is going to be very different later in their life. And clemency gives us the opportunity to hold them accountable, to monitor that change, and to recognize it, and to free them what they are ready to be a productive member of society. And that is something that clemency is especially well-suited for is considering those individual circumstances.

One thing that doesn't work so well right now is that mostly we reach back for advice to the people who are involved at the time of the criminality—back to the prosecutor, back to the sentencing judge. It is always appropriate to go back to the victim and include them. Although in Federal crimes, very often, there is not a victim.

But I think we need, as well, to reach out to those who currently know that person as they are incarcerated. Too often, we think of people who are incarcerated as their life ended when the prison door closed. But they do have a life going forward, as many of us on that panel know very well. And the people who. know them in the prison who work with them are able to give us a good view of what they are now.

Mr. JOHNSON. So you are talking about people—the employees within the prison. I mean those who are charged with guarding the inmates, so to speak?

Mr. OSLER. It will be corrections officers; it will be wardens; but it will also be people who provide educational opportunities, who do ministry within the prison as well.

Mr. JOHNSON. So one of the concerns, of course, is about the risk associated with early release. There is always exceptions: Someone gets out who shouldn't. Mistakes are made.

How do you—how can we reduce those risks?

Mr. OSLER. I think one thing that we can do to reduce those risks is to do a better job of tracking the success of the commutations that have already been granted. That is one problem with the system that we have, is that there is no one who is in charge of data collection and analysis. That is something that Pro-

fessor Barkow has done a lot of work on. That if we had a clemency board, one that was able to perform these other functions, and also be able to track recidivism by people who had received commutations and be able to give us a better idea of who is successful and who is not.

Mr. JOHNSON. We heard a lot this morning, several references to Alice Marie Johnson's case—and I am not an expert in the background of it. But can you summarize why it took so long for her to receive clemency? Are there lessons to be learned there?

Mr. OSLER. There are certainly lessons to be learned, and one of them is about transparency. That is the thing about Alice Marie Johnson being denied those three times is that we don't really know why. That we don't have a sense of that process. Which for those of us that are lawyers, it is very frustrating. Where you used to be able to have a back and forth, and that is not a part of this process.

And so, I think one of the takeaways is that we don't know, and that is wrong. Because that way we don't know how to advocate for people going forward. We don't know what to avoid, what kind of cases are—shouldn't be taken forward. The other thing is that although we don't know this, I think many people believe that there was resistance from the DOJ in granting her petition. And, again, that goes back to the problems that many of us have already talked about in reference to clemency as it works today.

Mr. JOHNSON. And that would have been the DOJ under perhaps several previous administrations, right?

Mr. OSLER. Yeah, that is correct. And this is something that, again, Professor Barkow and I wrote an article about this, about the role of the DOJ. And the one thing that is remarkable is it is pretty consistent across administration's resistance to reform and correcting problems that we find from that department.

Mr. JOHNSON. Because no one wants to be perceived as soft on crime, right?

Mr. OSLER. That is correct. And also the people who make the decisions and work on policy—for example, the deputy attorney general, in this circumstance, that is who the U.S. attorneys report directly to. And they have to maintain a good relationship with those people, and they avoid making decisions that would imperil that relationship.

Mr. JOHNSON. Thank you. I yield back.

Mr. COHEN. Thank you, Mr. Johnson. Mr. Nadler.

Chairman NADLER. Thank you, Mr. Chairman. The witnesses have referred to a number of things that we have dealt with in the last few years, mistakes that were made by Congress back in 1986, instituting determinative sentencing. The war on drugs was a terrible mistake. I don't know if you have referred to it, but the Crime Bill of 1994, which is a terrible mistake, all of which led to mass incarceration. We have tried—I should tell you, because someone raised this—that we tried to get interactive application, new sentencing guidelines into the First Step Act last year, or 2 years ago. So these are issues that we have been dealing with.

My problem, and I—before all of this stuff, I was successful in getting someone a pardon the same day that you had, the last day of the Clinton administration. A 22-year-old woman who had been

sentenced to 68 years in jail and served, at that point, 19 or 20 years, and it was—it was a terrible miscarriage of justice. But it would not have been solved if I, as a Congressman, did not happen to hear about it. And I was able to work for 3 or 4 years and got it done.

Now, undoubtedly, you know of Ms. Smith Pradia's case, we know about the Marie Johnson case, there are undoubtedly thousands of cases we don't know about. And, yes, the advisory committee that was set up to advise the President is probably prejudiced because it has got the Department of Justice in it. We should take the Department of Justice out of it and set it up more independently. But how do you guarantee, how could we institutionally improve the likelihood that a President, any President, President Smith who gets elected next year, is going to exercise better judgment, going to grant more pardons, more commutations? What can we, as an institution, do to—aside from hope that the next President is a good guy and has good judgment and so forth, what can we do as an institution to maximize the odds that the pardon power would be used decently?

Mr. OSLER. I have a couple of thoughts on that, though, I will put forward quickly. And one is that encouraging a process that creates regularity of consideration is something where right now, Presidents for the, you know, past two decades, three decades, clemency comes up when it comes up. There is no regular meeting with someone who is making those advisory decisions.

The second thing is that we don't talk about it during elections. That we don't—the answer to clemency problems is politics. And yet, we are in the middle of a Presidential election season, and during the Democratic primaries, nobody talks about clemency. I think Amy Klobuchar did once. Where does Joe Biden, for example, stand on clemency? I don't know. But we need to ask that question when we can, when it matters.

Chairman NADLER. And the odds are he doesn't know because he probably hasn't thought about it like anybody else.

Mr. OSLER. Right. And we need to make him think about it. And you all have a platform to do that. And I hope that you will use that political platform to press our political leaders, be they Democratic or Republican, to articulate, before they take office what it is that they would do with clemency.

Ms. PRADIA. And I would like to add that with my particular situation, the Department of Justice did not want me to be released. And the attorneys from LDF didn't want me to even speak publicly, because they knew that the Department of Justice was upset, I was on probation for 5 years, they were worried about my probation officer violating me.

But I do want to highlight that I do believe the Department of Justice needs to be eliminated from the process. And recently there was a Virginia Supreme Court judge that told me, the government should not be concerned with being right. Instead, it should be concerned with making sure justice has been served.

And, you know, this was part of my statement. I thank God that President Clinton didn't adhere to the Department of Justice's opinion that I needed to serve my full sentence. There was a President that felt as if justice had been served. There are many others

like me who are waiting on their opportunity to live life that would overshadow who they used to be if given the opportunity. Like Alice Johnson and I, they would be an asset to our great Nation. And I apologize for going over earlier as well. Thank you.

Chairman NADLER. I yield back.

Mr. COHEN. We are going to recognize Mr. Armstrong for 5 minutes. And then, I think, we should probably break for votes, and then we will come—then we will come back.

Mr. ARMSTRONG. Could you do Mr. Reschenthaler first?

Mr. COHEN. I am just taking instructions from the Republicans, whoever you all want to yield.

All right. Mr. Reschenthaler, you are on.

Mr. RESCHENTHALER. Thank you, Mr. Chairman. And I yield my good friend from North Dakota.

Mr. ARMSTRONG. Thank you. One thing we can do—let's be honest. The biggest problem with clemency isn't that it is an inefficient system, because it has been an inefficient system regardless of who the government is. The biggest problem with clemency is that we have too many people that need it. This started a long time ago. And you can go to Richard Nixon and the war on drugs. You can go to the sentencing guidelines and the enhancement for crack cocaine, which absolutely, disproportionately, affected African Americans in cities. You can go to States like mine who end up in Federal court off of Native American reservations in an incredibly period of time. So what do we do? We try to retroactively apply sentencing guideline reform again. That is how you do it. Because you diffuse it between 535 Members of Congress instead of one person sitting in the executive branch. Because nobody has ever lost an election being tough on crime.

And instead of having hearings where we are taking pot shots at the ranking member of the committee and instead of taking pot shots at the ranking member of the full committee, we should have hearings like this every single day of the week. We should be talking about it. And the reason I know this is because I have done it.

You didn't have to worry about minimum mandatory sentences. You blew so far past the minimum mandatory sentence because you had a boyfriend who was dealing drugs. And I assuming somewhere, somewhere along the line in that conspiracy, somebody had a gun, so they made it violent. Which comes back when you look at this. One of the first things we can do—and I know U.S. attorneys are great people. I supported the last Democratic U.S. appointee in North Dakota, and I supported the last two Republican ones. But I don't think anybody ever intended prosecutors to be able to determine sentences, and that is what happened, because how they charge something, how we draconianly enhance drug weights in historical methamphetamine or drug conspiracies without ever having a drug in the courtroom, how we put those drugs on a low-level member of that conspiracy, because they are using minors amounts of drugs to feed their addiction, and we treat them just like the leader of a drug cartel, that is how we end up in this situation.

We did sentencing—Federal sentencing guideline reform. Have we checked to see what States that have mirrored their sentencing guidelines are starting to reform theirs as well?

Minnesota is a neighboring state. I used to practice law in Minnesota. If anybody thinks Minnesota is a liberal State, you get convicted of a crime there.

After the first step back, their state sentencing guidelines are worse than the Federal ones. Do we know if they are—do they know if they are taking it forward? And there are States that are doing this. Texas has done criminal justice reform. North Dakota has done criminal justice reform. How are we providing services? Why aren't we not utilizing—the one thing the Federal Government does really, really well is a pretrial release program. It is actually one of the greatest ironies in anything. It is nonconfrontational.

They get you into life choices. They get you into addiction treatment. They do all of those things. Then you show up at court and you get a 10-year minimum mandatory sentence. I don't know how good your pretrial release program is. If you are going to prison for 8.5 years, you are not really going to remember anything about it.

So instead of pointing fingers at the executive branch when we are doing this, how do we solve it? This is hard, hard, hard work. And the reason it is hard work is if you make 1,000 right decisions and one wrong decision and that happens to be in your district, you are going to penalized politically for it, every one of us. We run every 2 years.

So, you have to stand up and be counted, and you have to do it. And you have to do it in a way that actually effectuates change. Are there ways to do it. One, you go back and you concentrate on nonviolent crimes. But you define nonviolent crimes not in how they were prosecuted in 1998, you look at them. If there was a gun associated in a drug conspiracy, but it was associated 17 levels, 17 levels removed from that particular sentence, that is not a violent crime. It is simply not.

And so, instead of sitting here and blaming people and doing those—and I am supporting clemency. I am on the letters for clemency. I will advocate for people all the time. But let's recognize the fundamental problem. The fundamental problem is we started down this path 48 to 50 years ago, and have allowed it to snowball ever since.

And let's also recognize that regardless of how anybody feels about anybody, the single biggest piece of criminal justice reform that has ever come out of Washington, D.C. was the First Step Act. But that is only the first step. And then we should also recognize the fact that the vast 95 percent of this happens at the local and state level. County jails are full of people serving pretrial.

So let's utilize technology. Let's invest in those things. Let's do GPS tracking. Let's do SCRAM bracelets. Let's work at those things. Because the vast majority of people, whoever get sentenced in the Federal court system, it ain't their first trip to the rodeo. They have been in misdemeanor cases. They have been in county jail. They have been in State jail. They have been through all of these things. So let's utilize the resources to attack this before they get it.

Then, finally, we need to start addressing the fact that we are felonizing nonviolent drug offenders from the age of 18 to 22. Because you talk about collateral consequences, but here is what I can tell you: If you have one felony, the chances of you having another one go up exponentially, because we have created perverse incentives for every government program we have to avoid felons like the plague. So if we want to deal with this, we can deal with it. But I don't think throwing political pot shots at each other is the right way. And with that, I yield back.

Mr. COHEN. Thank you. With the exception of the suggestions of political pot shots, Mr. Armstrong did a splendid job. We will now recess until after the votes.

[Recess.]

Mr. COHEN. We are back, and Mr. Raskin will be first to ask questions. It is 5 minutes, and he is recognized.

Mr. RASKIN. Thank you very much, Mr. Chairman. Let's see, I see Ms. Smith is not with us. Is she coming back?

Mr. COHEN. No, she has left the building.

Mr. RASKIN. Oh, okay. All right. So Ms. Roseberry, let me start with you. Thank you very much for your excellent testimony.

Do we need some kind of structural change in the way that pardons are being issued? And let me ask you this specifically, is there a problem in the pardon attorney's office, or is it just that the President is disregarding the pardon attorney's office?

Ms. ROSEBERRY. Sir, you are asking—thank you for your question. You are, of course, asking a lifelong criminal defense lawyer. There is a problem in the pardon attorney's office. The culture there, of course, is one of prosecution. And so, when you have a system that looks back to the same system that created the problem to solve the problem without interjecting anything independent, you have the same problem.

Mr. RASKIN. So the President is the one under Article II is given the power to render pardons. And so, certainly in this administration, probably in any administration, they are going to view it as an executive function. Do you think that we should set up an advisory congressional panel on pardons that is bipartisan in nature that operates like the Joint Economic Committee or the House Ethics Committee?

Ms. ROSEBERRY. Absolutely. You have that oversight power. And to be guided by independent and transparent objectives would be much better than having it lie in the agency that did it. And in Maryland, when Governor Ehrlich pardoned so many people between 2003 and 2009——

Mr. RASKIN. Yeah.

Ms. ROSEBERRY [continuing]. It was a seamless process that pulled on many experts in the field. And that is what I would suggest for our Federal system.

Mr. RASKIN. Professor Barkow, let me ask you: Do you agree it would make sense for us to set up some kind of independent advisory congressional commission that would look at big cases and bring them to the attention of the President?

Ms. BARKOW. I don't think that is actually the solution that this problem needs. I think that creating a review by another political body, I think, is going to face some of those same political pres-

sures about being risk averse to recommending grants for cases. It think it would be hard for a body set up in Congress to do that.

There is actually some—there is a need to have people who really understand our prison systems, who really understand programming in prisons, people who have themselves been incarcerated, people like that on an advisory body, I think, can do a lot more helpful and productive good. So I think it would be—a better alternative, in my view, would be for Congress to fund an advisory board that is bipartisan, but is not made up of congressional representatives, but it is actually made up of people in the field that really would understand what they are reviewing when they review commutations and pardons. So people who understand the difficulties with reentry, people who would understand sentencing.

And, so, I think it would be a question of Congress providing funding for something like that. But I do think it has to be cooperative with the President. Because the President doesn't need to take advice from any outside body. And to keep it constitutional, I do think it would have to be something that the President wants to do that Congress funds.

Just as an example of that, I would say when President Obama wanted to use the office of the pardon attorney for his initiative and wanted kind of additional funding for his process, my understanding is that funding was denied by Congress, and it was one of the setbacks in getting more grants. And so I think more productive type thing for Congress to do is to make sure that the President has funding when, you know, he or she wants to really up the ante.

Mr. RASKIN. Professor Osler, do you agree with that, and do you think that this is something we should do before the end of this Congress?

Mr. OSLER. I agree with Professor Barkow. I think that it is for the executive to form, that an advisory body, that certainly, there would be input from Congress informing that in terms of the dialogue that you have regularly on a number of executive decisions. The way that we are going to fix this process is going to be collaborative, and it is going to have to be.

Now, that said, one thing that Professor Barkow mentioned that I think is really important is about the funding, that one of the reasons we didn't get an administrative body under the Obama administration is because they didn't believe they could get the funding for that, much less fund the pardon of office appropriately.

Mr. RASKIN. And do you think there is anything that can be done with this President? I mean, he is definitely drawn to luminaries and celebrities in cases like that. I almost thought we should have a TV show called, You Are Pardoned, where people can get up and make their case. Is there some way to enlarge his pool of applicants that are coming to him to get beyond just Kim Kardashian? Or should she be the pardon attorney?

Mr. OSLER. Well, I would say that I think there is encouraging signs that the President is moving in that direction to broadening the pool. And we have to encourage that. I think that, again, this is something where the control on the pardon is politics. And in terms of being critical of particular pardons, that is something that

is going to happen, and it should happen going both ways. Having that dialogue—and that kind of a TV show, I would watch it.

Mr. RASKIN. All right. I would yield back, Mr. Chairman. Thank you.

Mr. COHEN. Ms. Scanlon.

Ms. SCANLON. Thank you very much. First, I would like to ask unanimous consent to introduce the U.S. Department of Justice statistics on clemency and pardons, going all the way back to William McKinley. So we have a factual basis to talk about how many petitions have been submitted, and how they have been dealt with.

Thank you. So in looking at those, I noted that under the Obama administration, over 36,000 clemency and pardon petitions were submitted, which is more than four times any prior administration. And, in fact, more pardons—more clemency petitions were granted than under prior administrations. And I am familiar with that because I have worked with that project, the Clemency 2014 Project, in my last job.

As I understand it, that program was started largely in the face of congressional inaction to address mass incarceration, and the inhumane and expensive results of the mandatory sentencing laws that this body passed. So Clemency 2014 invited clemency petitions from Federal prisoners who had served substantial sentences for low-level nonviolent crimes. And my former law firm worked with Ms. Roseberry and, indeed, I think just about everyone at this table, to recruit and train volunteer attorneys to screen applicants for clemency, and then represent them for free. Because there were no resources available to screen these applicants or to represent them.

So, I came away with a few takes on this whole process. The first was the toll of excessive sentencing. The human toll of excessive sentencing. We heard from Ms. Smith before, I think, about the impact on her life. I would also suggest that people look at the documentary movie, The Sentence, which tells the story of one of my firm's clients and what happened to her and her family as a result of really unnecessary sentencing.

The second thing I came away with was the need for resources to assist the people who are in jail. Because, in addition to the 29 people for whom we were able to receive Presidential clemency, we also found a number of clients who were entitled to relief, but had been unable to get it because they lacked legal representation. So, you know, the ongoing issue of making sure that people have actual access to justice.

And then the third piece is, okay, where are we now? What can we do to try to get out of the situation? Obviously not imposing a lot of new mandatory sentences that, you know, don't really move the ball forward in terms of criminal justice reform.

I was interested in hearing a little bit more about the Second Look Act, and if you can tell me kind of how that would work? I am not sure who is most familiar.

Ms. BARKOW. I am happy to start, and then Cynthia can jump in. There is proposed legislation that would allow people, after a certain length of time, to go back in for a resentencing. And I can't recall if it is 10 or 15 years. But the idea is you would have a second chance to go back before a judge for a resentencing at that

point. And certainly, there are other models that are like that, that the American Law Institute had suggested that jurisdictions have that kind of lookback after a certain period of time that would allow judges to do it.

And I will just say that you are absolutely right in terms of clemency was trying to fill a need that was actually just an inadequacy in other spaces. And First Step Act retroactivity, for example, really helped to address some of those petitions, allowing there to be retroactivity for people with the crack powder reduction. But it really should just be the general rule that when Congress makes any legislative changes to sentences that are lower, it should automatically be eligible for retroactive relief. I would really encourage that as a mechanism to deal with this backlog. That would probably be one of the best things that you could do. All it would mean, it would give people an opportunity to petition for that retroactive relief.

And judges do a very good job at that. I will just tell you, if you are worried about public safety, the sentencing commission has the authority to make its guidelines retroactive, and had done so in 2007 for crack reductions, and was able to follow the people that got the reductions 5 years later. And the people that got the early release did not recidivate any higher than the people served their full sentence.

And so, I think you can be quite confident that retroactive adjustments will be exercised wisely. And it is really one of the best things I think that you could do to deal with the backlog.

Mr. OSLER. I agree. I support Second Look. One thing to be conscious of, though, is that that can't represent place clemency, and it can't supplant it. And one of the reasons that we have seen this with First Step is that if there is a judge out there who gives a harsh sentence, rescinding that same case back to the same judge and saying, now review it, and that then—and of course there are more likely to deny the second look. Whereas the judge that is easier on the sentence is also easier on the second look. And that enhances disparities. We have to be very careful about that. And that is one reason that we are always going to need clemency as a backup to these things because those disparities are going to persist.

Ms. ROSEBERRY. And I would like to add we are soon to schedule a briefing on the second look that would be able to members who would like to learn more about it as well.

Ms. SCANLON. Thank you. And I see my time has expired. Thank you all.

Mr. COHEN. Thank you. You are recognized for 5 minutes.

Ms. DEAN. I am Madeleine Dean from Pennsylvania, and I, in anticipating this hearing, I was thinking over and over in my head of words that I used to teach. I was a professor at La Salle University for 10 years, a professor of writing. And we would look at the question of justice and mercy. And one of my favorite all-time speeches on the question of mercy, of course, is the woman attorney, Portia, from the Merchant of Venice.

And so while we got the Bible in here, I wanted to make sure we got a little Shakespeare in here to frame this picture. Because we are talking not just justice, but mercy, and as some of you said,

grace. As Portia argued, the quality of mercy is not strained. It droppeth as the gentle rain upon the place beneath. It is twice blest. It blesseth him that gives and him that takes. It is mightiest in the mightiest. It becomes the throne a monarch better than his crown. And earthly power doth then show likest God's when mercy seasons justice.

I love that thought—when mercy seasons justice. I am not so interested in the monarch or throned crown, but it is a warning to us all. That when we remember to look beyond just justice, to look to that next higher level, and season whatever we do.

And so, as I approached this hearing, I thought of that. And I thought of women I visited Muncy Prison in Pennsylvania, an all-women's prison. Many women that I met with are lifers.

And so, the issue of pardon of clemency is on my mind. And you have given us many suggestions. Obviously, within the constitutional pardon power, it is so broad. We don't know or how we can influence directly this President or any others in the future. How can I make a difference for folks who are sitting in State prisons, like the women at Muncy, in terms of pushing toward greater clemency?

Ms. ROSEBERRY. Thank you for that question. And I have seen the lady lifers. I know they sing. I wept when I saw them sing. I think what you did is the first thing that we must do, and that is to get proximate to the people who are suffering under these sentences. As long as we can continue to quote numbers around them and about them, we don't know who they are.

Kemba made a lasting impression on us all. So once we get proximate to them, we can lift their stories and their voices up to support categorical approaches like the lady lifers. I know one was recently pardoned in Pennsylvania. That is a category of people who don't need to be in prison. And we can go back to our States and say we want to look at our system to save money to give grace.

I, often, when I tried a case, would say to a judge, it is really easy to give mercy to someone you like. The more difficult way to do it is someone who has done something you don't like, or with which you don't agree. The statistics show that people who commit violent acts have a lower probability of recidivism.

So I would also like to include not just the people we like and who make us weep from sympathy, but those who have been rehabilitated because of a severely long sentence.

Mr. OSLER. And Ms. Dean, if I could, the quote from Shakespeare isn't irrelevant. It is striking that the Framers of the Constitution lived at a time that Shakespeare was revered. During the Constitutional Convention, George Washington went to see The Tempest, which has similar themes. Jefferson saw the Merchant of Venice twice. Jefferson and Adams, together, as rivals went to Stratford-Upon-Avon. So this is part of what influenced them, directly, as they chose to put the pardon power in the Constitution.

Ms. DEAN. Thank you for telling me that. Thank you. My next thought is, and you have given us some indication of it.

And I was thinking, Professor Barkow, in your written testimony, you highlighted the differences, sort of general differences that struck me from H. W. Bush administration, and to the Obama administration, and petitions that were granted at least in the sin-

gle digits. Yet, from the Nixon to Carter administrations, the grant was in the double digits, varying from 36 to 21 percent. In fact, you wrote that the grant rate between 1892 and 1930 was 27 percent.

So for those who think pardon is so rare, and it happens only when you get a Kim Kardashian, or you get on Fox News, and that is just the way the system works historically, it wasn't that way. Can you identify some of the differences and how we could go back to higher pardon rates?

Ms. BARKOW. Yeah, I think we should think of it as a normal part of our operation of justice, because mistakes were a system that fails. And we need to also recognize that people change over time, and circumstances change over time. And clemency is there to correct for those failings, and also recognize the change in people. And we used to do that, and we used to do it regularly. And I think the switch was really the kind of Willie Horton-style politics that scared politicians away from using the courage to show people mercy.

And I do think another part of that problem was giving more authority to within the Department of Justice, the Office of the Deputy Attorney General, really kind of taking over the clemency process and being more inclined to say no.

So I think we can make an institutional change, but a big part of it is also just rethinking the politics surrounding these issues, and to vocally support giving people clemency. I think it is somewhat of the things you do for the people who are incarcerated with life sentences. The more politicians who speak out on these issues, I think the better.

Ms. DEAN. Thank you, Mr. Chairman, I yield back.

Mr. COHEN. Thank you, Ms. Dean.

Mr. Armstrong, I presume you are here to engage in some discussion.

Mr. ARMSTRONG. I am, Mr. Chairman. Thank you.

Mr. COHEN. You are recognized for 5 minutes of cogent and interesting and pithy analysis.

Mr. ARMSTRONG. Perfect. I think we have people at the table that understand a lot of this stuff really well. So I will end my rant and come back to asking some questions. And I think the first one I would start with is when we talk about dealing with clemency and things we can do—I think too often we make binary choices. We talked earlier about retroactive application of those types of things. But are there ways where if we pass something like sentencing guideline reform, that we can work that into a presumption of existing cases? Because they are moving forward and looking back. And if we get into an all-or-nothing situation, we always run into a situation where we may get nothing.

Just to get some structure, as an example, anybody who had a nonviolent drug crime with a sentencing guideline above X and we change that law, I mean, in order to put it into the system with a presumption towards it? Does that make sense?

Ms. BARKOW. I think if you are asking, if I am understanding correctly, Congress has given directives to the sentencing commission in the past. But almost every directive Congress has ever given the sentencing commission is to increase sentences. But you have the power to give directives to lower sentences. So if the ques-

tion is, could, should it be appropriate to give directives to lower sentences, I would say absolutely. And I think that, and also fixing mandatory minimums. Because you see both of those as kind of inputs that creates these problems are the mandatory minimums. And then, you could have excessive guideline cases.

Mr. ARMSTRONG. Well, I appreciate that, because I think one of the things you see on minimum mandatory sentences is where they fall under the guidelines. One of the things the First Step Act did that, I think, is hopefully going to show a lot of long-term results, is how we allowed for the safety valve. And, I mean, getting a Class B misdemeanor deferred imposition of sentence when you were 18 years old for having a joint used to be where you wouldn't qualify for the safety valve anymore and how we are dealing with those issues.

I mean—and then so I am going to just switch a little bit. When we are dealing with this moving forward, and not so much in the clemency area, what are some things we can do to work towards either, A—because it is usually the minor people in these cases. And there are just so many perverse incentives for somebody with a decent case to not go to trial—whether it is a 5Kl substantial cooperation or qualifying for a safety valve. Are there ways we can appropriate those things so they can actually be utilized, and also work towards people's ability to go to trial?

Mr. OSLER. I am sure Professor Barkow will have comments on that. But just briefly, I would say that a couple things to look at relating to that would be the conspiracy law, and the way that conspiracy built on top of the way we used the weight of narcotics is the proxy for culpability. It leads to the problems with a lot of the cases that I as a Federal prosecutor and you as a Federal prosecutor saw.

Mr. ARMSTRONG. Well, I was a defense attorney. I was on the side of righteousness and goodness.

Mr. OSLER. But you saw the same thing, though.

Mr. ARMSTRONG. We did.

Mr. OSLER. But that is one thing. Also, you know, insofar as there are other laws that we have in the Federal system, the bootstrap accomplished liability into sentencing. We need to review those, and that is something that would really use the attention of this body.

Mr. ARMSTRONG. And before I—go ahead, ma'am.

Ms. ROSEBERRY. I would also add, looking at the trial penalty that is often put on a person who exercises their constitutional right to a trial and doesn't accept the plea agreement, we need more transparency around plea agreements, and how and whether they are offered and to whom so that we will know how people are choosing and/or being coerced into taking pleas.

Mr. ARMSTRONG. I have seen that just on the ground. It is not that necessarily sometimes don't want to take responsibility for their actions. They just don't think their actions quite correlate with 375 pounds of methamphetamine, because of what you were talking about, about the total weight of the process.

So, again, that is not always binary. Yes. Am I guilty of something? No. Should I be going to prison for 37 years? I mean, so having the ability to do some of that post sentencing, which would

back to my point of, you know, we—we have done an okay job of making guidelines discretionary instead of mandatory. But I still stand by the—if we are appointing Federal judges for life, we need to give them a little more control over their courtrooms. And that could work into a clemency scenario as well.

Ms. BARKOW. Could I just add that if you wanted to address the plea-bargaining issue, one of the directives, for example, you could have is that you would allow defendants to challenge relevant conduct and it would not count against acceptance of responsibility. It is a kind of precise way to deal with the problem that you are talking about. Because right now, the Department frequently tells people that you cannot get acceptance of responsibility if you are going to challenge relevant conduct on appeal. That makes a big difference, and it creates all kinds of issues with whether or not people can challenge things later.

So do I think that—I mean, that is the kind of more micromanaging things that happen over at the commission. But Congress has done that a lot over the years, but always in the direction of severity. And so I do think it wouldn't be inappropriate to do it in the other direction, and also to emphasize you want more role adjustments.

Mr. ARMSTRONG. Thank you. And thank you all for being here.

Mr. COHEN. Thank you, Mr. Armstrong.

Mr. COHEN. Does anybody have anything else in the short and cogent, pithy manner they would like to voice.

Ms. ROSEBERRY. I do, your Honor.

Mr. COHEN. Go ahead.

Ms. ROSEBERRY. Mr. Chair, I think looking at these issues in a vacuum is what has kept us in a system of mass incarceration. I think we have to look beyond the scope of nearly our criminal legal system to policing, and how communities, or particularly communities of colors and poor communities are policed, so that there is more interaction with the criminal legal system, and there is more difficulty getting out of the criminal legal system.

And I also lift up the idea of reentry. I know that we are not here for reentry, but clemency affects that. When people come home, they need to be able to fully integrate, not just having a job, but understanding the technology that works or has come into existence since they have been away, understanding how the world works.

Yesterday, I had a briefing with the Justice Round Table where I saw that Washington State is working to reintegrate parents with children earlier. You heard about Mr. Underwood who is prison here, who has been away from his children forever. We need to think about families, and reintegrating those families with each other as we bring people home as well. And that means preparing people while they are in prison, for a short period of time, preparing them to come home so that the community can be assured that they are coming home rehabilitated and that the environment is safe.

Mr. COHEN. Thank you, Ms. Roseberry. We have a Subcommittee on Crime, and the chairwoman, Karen Bass, had a hearing on that subject. It might have been this week, but it was recently. If not

this week, it was last week, and we went into several of those issues, but that is important, reentry.

Professor.

Mr. OSLER. Yes. I would just like to follow up on something Mr. Armstrong said about—you mentioned the 100-to-1 ratio between crack and powder and the influence that had. That is what pulled me into this whole thing. I was a Federal prosecutor in Detroit in the 1990s. I prosecuted those cases. I sought those sentences, and I received them, but I stopped believing in it. And it was coming to the other side, and eventually, we did win in the Supreme Court, and we did win at least in the Fair Sentencing Act through the work of Ms. Taifa and others, you know, changed prospectively. But clemency was what allowed us to look retrospectively.

Now, that brings me to my final point, which is, too often, we talk about criminal justice reforms as this or this. It needs to be this and this. And so, when we talk about other reforms, and I think Professor Barkow did a great job of outlining some of those other reforms that are necessary. That is not at the exclusion of fixing clemency. It has to be fixing clemency and creating those reforms to prevent the tragedies that you described. Thank you.

Ms. BARKOW. Just quickly, I would just say that mercy and reducing sentences aren't inconsistent with safety. This is a really good opportunity. You can do both. And actually, lowering sentences can help improve safety. It makes reentry easier for people when they serve shorter sentences. Longer sentences are not—I think people make an assumption that we want to keep sentences as long as possible, and we don't want retroactive relief because that is good for safety, but we have mounds of data that shows that is not true.

Mr. COHEN. Let me ask a question of the panel. You all have mentioned 1,700 people who were commuted, had sentence commutations under President Obama. Were there maybe 7- or 800 pardons as well?

Ms. BARKOW. No. The pardon process—there were almost no pardons because all the effort was brought into commutations.

Mr. OSLER. It was in the 200s, I believe, the number of pardons. And this is described in the Inspector General's report as well, that as they were working on the commutations, they intentionally set aside pardons and said to the pardon office, don't worry about pardons. Just focus on commutations. Eventually towards the end of the process, they changed their mind. They dedicated one person to the pardon office to work on just pardons, and that's how we got that relatively small number.

Mr. COHEN. And it is referred to as the 2014 plan. When did they start issuing clemencies?

Mr. OSLER. I believe that the first eight came——

Ms. ROSEBERRY. In 2015.

Mr. OSLER. 2015.

Ms. ROSEBERRY. It was calendar year 2015.

Mr. COHEN. Was it light in 2015.

Ms. ROSEBERRY. It was. Yes, it was. It took a while to get up and get going. We had to receive data from the Bureau of Prisons in order to identify people. And I should also say that the 36,000 were people who came to the project looking for a petition to be filed. Ul-

timately, under the discrete criteria that were announced, many of them were not passed on through petition because it was found that they appeared not to qualify.

Mr. COHEN. Thank you. Thank you.

Kelly. Do you have anything else, Representative Armstrong?

Mr. ARMSTRONG. I don't. I just want to say, again, thank you all for being here.

Mr. COHEN. Nobody else. No.

All right. That concludes today's hearing. I want to thank all of our witnesses and Ms. Smith Pradia, who had to catch a plane to get to Carolina to speak. I thank everybody for appearing. Without objection, all members have 5 legislative days to submit additional written questions for the witnesses and additional materials for the record.

This hearing is adjourned.

[Whereupon, at 12:07 p.m., the subcommittee was adjourned.]

APPENDIX

An official website of the United States government Here's how you know

CLEMENCY STATISTICS

William McKinley | Theodore Roosevelt | William H. Taft | Woodrow Wilson | Warren Harding | Calvin Coolidge | Herbert Hoover | Franklin D. Roosevelt | Harry S. Truman | Dwight D. Eisenhower | John F. Kennedy | Lyndon B. Johnson | Richard M. Nixon | Gerald R. Ford | Jimmy Carter | Ronald Reagan | George H.W. Bush | William J. Clinton | George W. Bush | Barack Obama | Donald J. Trump

WILLIAM MCKINLEY

Fiscal Year	Petitions Pending	Petitions Received	Petitions Granted				Petitions Denied	Closed Without Presidential Action
			Pardon	Commutation	Respite	Remission		
1900	68	677	129	73	4	14	131	332
1901	45	796	162	50	2	12	117	448

THEODORE ROOSEVELT

Fiscal Year	Petitions Pending	Petitions Received	Petitions Granted				Petitions Denied	Closed Without Presidential Action
			Pardon	Commutation	Respite	Remission		
1902	50	738	92	36	0	6	181	366
1903	107	543	70	57	0	7	131	316
1904	69	585	87	62	2	11	122	278
1905	90	574	109	52	0	4	119	278
1906	76	627	96	52	1	5	124	363

1907	81	523	71	30	4	10	116	272
1908	49	460	53	22	1	8	56	235
1909	134	463	90	52	1	8	79	220

WILLIAM H. TAFT

Fiscal Year	Petitions Pending	Petitions Received	Petitions Granted				Petitions Denied	Closed Without Presidential Action
			Pardon	Commutation	Respite	Remission		
1910	147	645	111	119	1	24	139	290
1911	108	393	82	64	2	14	84	163
1912	92	412	108	78	2	18	55	173
1913	70	661	82	100	10	16	75	324

WOODROW WILSON

Fiscal Year	Petitions Pending	Petitions Received	Petitions Granted				Petitions Denied	Closed Without Presidential Action
			Pardon	Commutation	Respite	Remission		
1914	124	664	104	116	1	28	102	345
1915	92	662	78	86	12	10	101	309
1916	158	889	116	107	30	16	109	436
1917	233	938	182	96	43	7	31	510
1918	302	934	119	94	29	14	140	640
1919	200	1,115	116	262	19	18	50	576

1920	274	1,028	198	341	57	43	25	440
1921	198	1,224	174	264	35	12	156	578

WARREN HARDING

Fiscal Year	Petitions Pending	Petitions Received	Petitions Granted				Petitions Denied	Closed Without Presidential Action
			Pardon	Commutation	Respite	Remission		
1922	208	1,144	162	187	28	13	182	536
1923	244	1,317	138	199	20	26	306	758

CALVIN COOLIDGE

Fiscal Year	Petitions Pending	Petitions Received	Petitions Granted				Petitions Denied	Closed Without Presidential Action
			Pardon	Commutation	Respite	Remission		
1924	114	1,515	105	120	11	11	264	897
1925	221	1,568	182	96	0	11	266	1,017
1926	227	1,209	127	96	2	19	241	755
1927	196	949	89	110	2	20	161	633
1928	130	1,261	110	172	4	36	119	706
1929	244	1,544	160	179	0	29	148	1,082

HERBERT HOOVER

Fiscal Year	Petitions Pending	Petitions Received	Petitions Granted				Petitions Denied	Closed Without

			Pardon	Commutation	Respite	Remission		Presidential Action
1930	190	1,141	121	85	1	14	129	783
1931	198	1,195	163	114	0	31	113	785
1932	187	1,203	189	137	0	39	115	699
1933	211	1,235	199	69	0	36	60	686

FRANKLIN D. ROOSEVELT

Fiscal Year	Petitions Pending	Petitions Received	Petitions Granted				Petitions Denied	Closed Without Presidential Action
			Pardon	Commutation	Respite	Remission		
1934	397	1,061	114	53	2	35	192	662
1935	400	1,407	211	36	3	61	184	757
1936	555	944	154	183	4	49	325	455
1937	329	1,080	192	37	3	59	137	653
1938	328	1,287	219	28	0	92	160	797
1939	319	1,215	172	32	0	40	139	729
1940	422	1,293	242	31	0	40	104	791
1941	510	1,367	178	15	0	18	74	910
1942	682	1,272	305	21	0	51	55	599
1943	923	1,019	332	17	0	10	55	748
1944	780	781	424	10	0	10	60	586
1945	471	815	276	25	0	12	29	506

HARRY S. TRUMAN

Fiscal Year	Petitions Pending	Petitions Received	Petitions Granted			Petitions Denied or Closed Without Presidential Action
			Pardon	Commutation	Remission	
1945 (2.5 mos)	479	201	98	9	2	133
1946	438	977	279	28	3	570
1947	535	779	308	13	2	483
1948	508	657	178	15	0	411
1949	561	638	178	17	1	313
1950	690	504	400	14	3	338
1951	439	467	189	10	1	228
1952	478	477	192	6	0	214
1953 (6.5 mos)	543	330	91	6	1	197
Total *(93 mos.)*		**5,030**	**1,913**	**118**	**13**	**2,887**

DWIGHT D. EISENHOWER

Fiscal Year	Petitions Pending	Petitions Received	Petitions Granted			Petitions Denied or Closed Without Presidential Action
			Pardon	Commutation	Remission	
1953 (5.5 mos.)	578	269	6	1	0	159
1954	681	461	55	7	0	348
1955	732	662	59	4	0	684
1956	647	585	192	9	0	568
1957	463	585	232	4	0	443
1958	369	406	98	6	0	302
1959	369	434	117	2	0	286
1960	398	437	149	5	0	244

1961 (6.5 mos.)	437	261	202	9	0	145
Total *(96 mos.)*		**4,100**	**1,110**	**47**	**0**	**3,179**

JOHN F. KENNEDY

Fiscal Year	Petitions Pending	Petitions Received	Petitions Granted			Petitions Denied or Closed Without Presidential Action
			Pardon	Commutation	Remission	
1961 (5.5 mos.)	342	220	24	9	0	121
1962	408	595	166	16	0	315
1963	506	592	133	43	2	233
1964 (4.5 mos.)	687	342	149	32	1	162
Total *(34 mos.)*		**1,749**	**472**	**100**	**3**	**831**

LYNDON B. JOHNSON

Fiscal Year	Petitions Pending		Petitions Received		Petitions Granted			Petitions Denied or Closed Without Presidential Action	
	P	C	P	C	P	C	R	P	C
1964 (7.5 mos.)	685		579		166	40	0	275	
1965	783		1,008		195	80	0	569	
1966	947		865		364	80	1	726	
1967	532	109	419	444	222	23	0	147	373
1968	582	157	409	340	13	3	0	106	309
1969 (6.5 mos.)	872	185	278	195	0	0	0	129	196
Total *(62 mos.)*			**4,537**		**960**	**226**	**1**	**2,830**	

RICHARD M. NIXON

Fiscal Year	Petitions Pending		Petitions Received		Petitions Granted			Petitions Denied or Closed Without Presidential Action	
	P	C	P	C	P	C	R	P	C
1969 *(5.5 mos.)*	1,021	184	136	115	0	0	0	123	57
1970	1,034	242	337	122	82	14	0	432	266
1971	857	84	266	188	157	16	0	436	212
1972	530	44	346	170	235	18	2	252	158
1973	389	36	323	162	202	4	1	198	143
1974	312	50	291	135	187	8	0	209	128
1975 *(1.5 mos.)*	207	49	-	-	0	0	0	0	0
Total *(67 mos.)*			**1,699**	**892**	**863**	**60**	**3**	**1,650**	**964**

GERALD R. FORD

Fiscal Year	Petitions Pending		Petitions Received		Petitions Granted			Petitions Denied or Closed Without Presidential Action	
	P	C	P	C	P	C	R	P	C
1975 (10.5 mos.)	207	49	351	259	147	5	4	166	159
1976 (15 mos.)	245	140	502	240	106	11	0	199	243
1977 (3.5 mos.)	442	126	125	50	129	6	1	70	63
Total *(29 mos.)*			**978**	**549**	**382**	**22**	**5**	**435**	**465**

JIMMY CARTER

Fiscal Year	Petitions Pending		Petitions Received		Petitions Granted			Petitions Denied		Petitions Closed Without Presidential Action	
	P	C	P	C	P	C	R	P	C	P	C
1977 (8.5 mos.)	368	106	292	271	0	1	0	1	0	118	49
1978	541	327	379	262	162	3	0	307	409	74	46
1979	377	131	436	274	143	10	0	138	123	55	132
1980	477	140	355	168	155	8	3	150	106	161	81
1981 (3.5 mos.)	366	108	119	71	74	7	0	42	35	11	18
Total *(48 mos.)*			**1,581**	**1,046**	**534**	**29**	**3**	**638**	**673**	**419**	**326**

RONALD REAGAN

Fiscal Year	Petitions Pending		Petitions Received		Petitions Granted			Petitions Denied		Petitions Closed Without Presidential Action	
	P	C	P	C	P	C	R	P	C	P	C
1981 (8.5 mos.)	358	119	220	137	2	0	0	0	0	66	87
1982	510	169	283	179	83	3	0	258	123	81	85
1983	371	137	298	149	91	2	0	74	33	96	103
1984	409	147	289	158	37	5	0	99	31	95	101
1985	467	168	256	151	32	3	0	86	18	66	109
1986	540	188	222	140	55	0	0	94	28	65	103
1987	548	197	227	183	23	0	0	115	34	52	110
1988	588	236	236	148	38	0	0	205	43	68	181

1989 (3.5 mos.)	513	160	68	60	32	0	0	38	8	23	26
Total *(96 mos.)*			**2,099**	**1,305**	**393**	**13**	**0**	**969**	**318**	**612**	**905**

GEORGE H.W. BUSH

Fiscal Year	**Petitions Pending**		**Petitions Received**		**Petitions Granted**			**Petitions Denied**		**Petitions Closed Without Presidential Action**	
	P	**C**	**P**	**C**	**P**	**C**	**R**	**P**	**C**	**P**	**C**
1989 (8.5 mos.)	488	186	115	130	9	1	0	122	22	41	112
1990	432	184	206	148	0	0	0	94	22	59	114
1991	485	196	172	146	29	0	0	390	198	62	31
1992	180	109	174	205	0	0	0	45	76	40	31
1993 (3.5 mos.)	269	207	64	106	36	2	0	25	111	18	8
Total *(48 mos.)*			**731**	**735**	**74**	**3**	**0**	**676**	**429**	**220**	**296**

WILLIAM J. CLINTON

Fiscal Year	**Petitions Pending**		**Petitions Received**		**Petitions Granted**			**Petitions Denied**		**Petitions Closed Without Presidential Action**	
	P	**C**	**P**	**C**	**P**	**C**	**R**	**P**	**C**	**P**	**C**
1993 (8.5 mos.)	260	192	172	526	0	0	0	1	2	33	53
1994	392	656	228	580	0	0	0	175	400	74	136
1995	371	700	209	403	53	3	0	158	258	39	133
1996	330	709	204	308	0	0	0	72	139	23	137
1997	438	736	209	476	0	0	0	69	325	38	123

1998	540	764	201	407	21	0	0	54	126	37	161
1999	628	884	261	748	34	12	2	126	231	36	208
2000	693	1,179	336	1,052	70	6	0	0	790	61	176
2001 (3.5 mos.)	894	1,259	181	988	218	40	0	0	116	12	32
Total *(96 mos.)*			**2,001**	**5,488**	**396**	**61**	**2**	**655**	**2,387**	**353**	**1,159**

GEORGE W. BUSH

Fiscal Year	**Petitions Pending**		**Petitions Received**		**Petitions Granted**			**Petitions Denied**		**Petitions Closed Without Presidential Action**	
	P	**C**	**P**	**C**	**P**	**C**	**R**	**P**	**C**	**P**	**C**
2001 *(8.5 mos.)*	923	2,063	110	548	0	0	0	0	1	45	277
2002	988	2,332	152	1,096	0	0	0	519	1,466	53	240
2003	565	1,715	172	851	7	0	0	51	819	21	159
2004	659	1,588	235	951	12	2	0	108	632	42	178
2005	733	1,728	252	807	39	0	0	89	411	35	296
2006	822	1,829	254	759	39	0	0	255	779	53	315
2007	729	1,495	334	925	16	2	0	0	0	75	336
2008	972	2,083	555	1,770	44	2	0	513	2,182	107	360
2009 *(3.5 mos.)*	864	1,309	434	869	32	5	0	194	1,208	33	62
Total *(96 mos.)*			**2,498**	**8,576**	**189**	**11**	**0**	**1,729**	**7,498**	**464**	**2,223**

BARACK OBAMA

Fiscal Year	**Petitions Pending (Static)**	**Petitions Received**	**Petitions Granted**	**Petitions Denied**	**Petitions Closed Without**

										Presidential Action	
	P	C	P	C	P	C	R	P	C	P	C
2009 *(8.5 mos.)*	1,040	903	232	1,086	0	0	0	0	0	132	120
2010	1,140	1,869	262	1,902	0	0	0	0	0	116	340
2011	1,285	3,431	331	1,585	17	0	0	872	3,104	84	389
2012	643	1,523	383	1,547	5	1	0	147	689	48	148
2013	826	2,232	303	2,370	17	0	0	314	1,577	44	240
2014	754	2,785	273	6,561	13	9	0	154	1,226	36	222
2015	824	7,889	294	2,999	12	79	0	142	782	6	915
2016	958	9,115	997	11,028	6	583	0	0	6,507	34	1,701
2017 (*3.5 mos.*)	**1,920**	**11,355**	320	4,071	142	1043	0	79	4,864	8	177
Total (*96 mos.*)			**3,395**	**33,149**	**212**	**1,715**	**0**	**1,708**	**18,749**	**508**	**4,252**

DONALD J. TRUMP

Fiscal Year	Petitions Pending*		Petitions Pending End of Reporting Month		Petitions Received		Petitions Granted			Petitions Denied		Petitions Closed Without Presidential Action	
	P	C	P	C	P	C	P	C	R	P	C	P	C
2017 (8.5 mos)	2,009	9,360	2,270	8,931	421	1,709	1	0	0	0	0	160	2,138
2018	2,270	8,931	2,207	9,751	340	1,853	6	4	0	82	98	320	933
2019	2,207	9,751	2,445	11,510	330	2,460	8	2	0	0	0	88	701
2020 (4 mos)	2,445	11,510	2,548	10,408	106	529	3	0	0	0	0	3	1,631
Total (36.5 mos)					**1,197**	**6,551**	**18**	**6**	**0**	**82**	**98**	**571**	**5,403**

***LEGEND:** The statistics for petitions granted are taken from a count of clemency warrants maintained by the Office of the Pardon Attorney. Cases in which multiple forms of relief were granted are counted in only one category, unless multiple presidential warrants were signed to effectuate the President's decision for the same individual. Cases in which clemency was granted to a person who did not file under the Department of Justice regulations, through the Office of the Pardon Attorney, are counted as “Petitions Granted” but have not been counted as “Petitions Pending” or “Petitions Received” since at least FY 1990. The figures for commutations exclude one reprieve granted in FY 2000 and one granted in FY 2001. Also excluded from this chart are individual members of a class of persons granted pardons by proclamation, such as President Carter’s proclamation granting clemency to certain Vietnam era offenders, and persons granted clemency after action by President Ford’s Presidential Clemency Board because those petitions were not processed through the Office of the Pardon Attorney. The Office of the Pardon Attorney does not maintain statistics on those categories of grants and has no documentation to support them. “Fiscal year” was originally defined as July 1 to June 30, but in 1976 became October 1 to September 30. "Petitions Pending" means pending at the beginning of the fiscal year, or in the case of a change of administration, the number of cases pending at the time of the new President’s inauguration; that number may not correspond with the number computed from case-processing figures reported for the previous year due to the fact that minor subsequent corrections in case closure for a previous fiscal year(s) have and will continue to be made.

Updated February 7, 2020

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Yes No