OVERSIGHT HEARING ON CLEMENCY AND THE OFFICE OF THE PARDON ATTORNEY

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
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C O N T E N T S

THURSDAY, MAY 19, 2022

OVERSIGHT HEARING ON CLEMENCY AND THE OFFICE OF THE PARDON ATTORNEY

Thursday, May 19, 2022

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

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. Sheila Jackson Lee [Chair of the Subcommittee] presiding.

Members present: Representatives Nadler, Jackson Lee, Scanlon, Bush, Cicilline, Lieu, Correa, Biggs, Gohmert, Tiffany, Massie, and Owens.

Staff present: Aaron Hiller, Chief Counsel and Deputy Staff Director; John Doty, Senior Advisor and Deputy Staff Director; David Greengrass, Senior Counsel; Moh Sharma, Director of Member Services and Outreach & Policy Advisor; Brady Young, Parliamentarian; Cierra Fontenot, Chief Clerk; Merrick Nelson, Digital Director; Mauri Gray, Deputy Chief Counsel for Crime; Nicole Banister, Counsel for Crime; Veronica Eligan, Professional Staff Member/ Legislative Aide for Crime; Jason Cervenak, Minority Chief Counsel for Crime; Michael Koren, Minority Professional Staff Member; Andrea Woodard, Minority Professional Staff Member; and Kiley Bidelman, Minority Clerk.

Ms. JACKSON LEE. [Presiding.] The Subcommittee will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Good morning and welcome to today's oversight hearing on "Clemency and the Office of the Pardon Attorney."

I would like to remind Members that we have established an email address and distribution list to circulate exhibits, motions, or other written materials that Members might want to offer as part of our hearing today. If you would like to submit materials, please send them to the email address that has previously been distributed to your offices, and we will circulate the materials to Members and staff as quickly as we can.

I would also ask for all Members, both those in person and those attending remotely, to please mute your microphones when you are not speaking. This will help prevent feedback and other technical issues. You may unmute yourself anytime if you seek recognition.

Due to the size of our panels today, I will strictly enforce the five-minute rule.

I now recognize myself for an opening statement.

During today's hearing, the Subcommittee will examine Executive Clemency and explore solutions to improve the process of evaluating clemency petitions and making recommendations to the President.

Although the authority to grant clemency vests solely with the President, the Office of the Pardon Attorney, a unit within the Department of Justice that is congressionally created and funded, aids the President in the exercise of the clemency power through an administrative process established by regulations that developed somewhat haphazardly.

The rules, which were first promulgated by President McKinley in 1898, provide that clemency petitions are to be directed to DOJ and require the Attorney General to make a recommendation to the President on the merits of those requests.

The relatively simple process for evaluating petitions and making recommendations evolved during the 1970s and 1980s, and now, include seven levels of review, the first four of which reside within the DOJ. The Office of the Pardon Attorney, under the direction of the Deputy Attorney General, is responsible for processing petitions for Executive Clemency, reviewing case materials, vetting petitioners, and providing recommendations to the President. It is where the clemency process begins and ends for some petitions.

Understanding the central importance of the Office of Pardon Attorney to a discussion about clemency and our Committee's oversight over both the Department of Justice and the Office of the Pardon Attorney, I thought it best to have the Pardon Attorney participate in our conversation today. It is unfortunate that we were unable to reach an agreement with the Department of Justice to have the Pardon Attorney here to discuss how we can efficiency and account for and reduce bias in the clemency process because, as the Supreme Court has noted, Executive Clemency serves a vital role in the criminal justice system.

We know so many families that are struggling with loved ones who deserve to have that consideration. So, I expect to have the Pardon Attorney here in the very near future, singly in a hearing or at a briefing before this Committee. It is imperative that all elements of this process come before this Committee for our appropriate oversight.

The Framers of the Constitution understood that the criminal justice system needed a check that would guard against unjust or excessive punishments. Clemency can be a useful tool to right the wrongs of the failed war on many aspects of the criminal justice system and overcome misguided policies that led to mass incarceration by unburdening those who languish in prison or who suffer from the collateral consequences of their convictions. Certainly, some of those were in the times of the excessive penalties for those who had basic possession in terms of drug cases, minimal drug cases with decades of sentencing and incarceration.

If that is to be the case, Congress should encourage the President to use Executive Clemency and power routinely by fixing an appar-

ently broken system and providing the President with the support he needs. That was done just a few weeks ago by President Biden.

Clemency decisions should be made objectively, systematically, and with transparency. Yet, we know that the modern clemency process cycles between periods of inaction and controversy, but there have been a few instances in the exercise of Executive Clemency that varied from what we have become accustomed and from what we must learn.

In 1974, President Ford establishes a temporary Presidential Clemency Board and identified more than 13,000 clemency recipients following the Vietnam War. Presidents Ford and Carter granted clemency to hundreds of thousands of men who evaded the draft.

Then, in 2014, DOJ, at the behest of former President Barack Obama, announced the Clemency Initiative which focused on nonviolent drug offenders, so many that were incarcerated for decades. Despite initial problems in planning, implementation, and management, through the initiative, DOJ substantially increased the number of recommendations to the White House, resulting in 1,696 individuals receiving clemency, appropriately so.

Significant changes, which we would make note of, were made in the final year of the initiative that enabled DOJ to meet its goal of making recommendations to the White House on over 13,000 petitions. For example, DOJ temporarily increased staffing at the Office of the Pardon Attorney to meet the demands of the initiative. The Office of the Pardon Attorney prioritized the review of petitions from individuals who were strong candidates for clemency, and DOJ streamlined the review process.

Taking lessons from Obama's Clemency Initiative, we should consider whether there are incentives or measures Congress can implement to permanently streamline and shorten the timing of the review process to avoid the dilemma President Biden currently faces. I would have liked to ask the Pardon Attorney how she plans to tackle the backlog of 15,000 clemency petitions President Biden inherited upon taking office in an efficient and just manner or how Congress can help.

We must also consider the longstanding criticism that there is a merit conflict in the review process when it begins with DOJ if the President is to make better use of the clemency power.

Since the Pardon Attorney is not here, I hope our Witnesses can offer sensible solutions and proposals for reform of the clemency process, as well as ways in which clemency can be used as the Framers of the Constitution expected.

I thank each of our Witnesses for their participation. I look forward to a robust discussion.

Without objection, I will submit into the record the following documents:

A *New York Times* guest essay written by Rachel E. Barkow and Mark Osler entitled, "We Know How to Fix the Clemency Process. So Why Don't We?" dated July 13, 2021.

An entry from the Federal Sentencing Reporter, Volume 32, by Mark Osler entitled, "The Role of the Clemency in Criminal Justice Reform."

[The information follows:]

MS. JACKSON LEE FOR THE RECORD

OPINION

GUEST ESSAY

We Know How to Fix the Clemency Process. So Why Don't We?

July 13, 2021

By Rachel E. Barkow and Mark Osler

Ms. Barkow is a professor at the New York University School of Law and the author of "Prisoners of Politics: Breaking the Cycle of Mass Incarceration." Mr. Osler, a former federal prosecutor, is a professor at the University of St. Thomas School of Law in Minneapolis.

Many things have divided progressive and centrist Democrats, but they are united in the view that prosecutors at the Department of Justice should not be in charge of clemency.
Credit...Tom Brenner for The New York Times

During the Democratic primaries, Amy Klobuchar, Kamala Harris, Pete Buttigieg, Cory Booker, Elizabeth Warren and Bernie Sanders all endorsed a good and simple idea: Take the clemency process out of the Department of Justice and put it in the hands of a bipartisan board to advise the president, ending decades of dysfunction.

After Joe Biden won the nomination, this reform was endorsed as part of the Biden-Sanders Unity Plan and the Democratic platform. Under this plan, clemency could be used frequently, impartially, and with principle.

Inexplicably, however, the Biden administration seems poised to reject this consensus and wants to leave clemency under the control of the Justice Department. Doing so will undermine the administration's stated hope of achieving criminal justice reform and reducing racial bias in the federal system.

The fundamental problem with having the Justice Department run clemency is that prosecutors aren't good at it. Under the department's regulations, the Office of the Pardon Attorney must give

"considerable weight" to the opinions of local prosecutors — the very people who sought the sentence in the first place.

These prosecutors typically don't keep up with the people they prosecuted to learn what they've been doing while incarcerated or what their post-prison re-entry plans look like. Their data point is the conviction itself, so their analysis of the case is frozen in time. No matter the intent from on high, it is hard to get around this obstacle.

Vice President Harris, a former prosecutor herself, has warned of "inherent conflicts of interest" in the current process. Justice Department lawyers, she argued during her campaign, should not determine whether people convicted by colleagues in the legal system should have their sentences shortened or commuted.

The Biden administration is ignoring this fundamental truth because it wants a reprise of President Barack Obama's approach to clemency. It is worth remembering that model yielded only one commutation of a sentence and a handful of pardons during his first term because it relied on the lethargic, biased process embedded within the Justice Department. The Biden administration seems to be focused only on President Obama's clemency efforts in his final two years in office, but even those efforts had limited success.

Yes, President Obama granted more than 1,900 clemency petitions; 11 percent resulted in pardons and the rest in commutations. Almost all the commutations were for drug offenses. But more telling is that his administration rejected and ignored thousands more that were meritorious. It was effectively a lottery. This was a lost opportunity that granted relief to some but ignored too many.

It is particularly odd to follow this plan considering the different circumstances faced by the new administration. While Mr. Biden faces a giant pile of over 15,000 pending clemency petitions (many from the Obama administration), Mr. Obama inherited only a little over 2,000.

The Biden team seems to think the right "criteria" might produce a different outcome. But focusing on "criteria" rather than process reflects a failure to learn from the Obama-era experience.

Mr. Obama's clemency initiative, which started in 2014, began with a strict focus on criteria including "no history of violence" or ties to gangs. It didn't work. A year into the initiative, President Obama had a miserly 0.3 percent grant rate for commutations. By 2016, the number of commutations had grown significantly, but because the administration ignored those criteria. A study by the United States Sentencing Commission later found that only 5.1 percent of the people who received commuted sentences actually met all of the criteria. In other words, the Obama project succeeded, even in a limited way, only once the kind of criteria Mr. Biden wants to embrace were effectively jettisoned.

Even worse is the administration's stated timetable. In conversations with activists, the administration has, at most, expressed some desire to use the pardon power before the 2022 midterm elections. That tells us two things, both dispiriting: that this is a low priority for the president, and that the administration does not yet have a handle on how this all could work. That's far too long for reforms that don't need congressional approval and when there is a backlog of petitioners who have waited too long for justice.

The faulty architecture of clemency has been apparent for decades, with shamefully low grant rates from presidents of both parties. If the administration put in place a competent advisory board to process petitions instead of relying on the Justice Department's flawed and biased process, it could address the backlog, just as a board addressed the huge backlog of petitions for clemency from draft evaders in the wake of the Vietnam War.

The board should include experts in rehabilitation, re-entry and prison records, including a person who has been incarcerated. It would be able to consult with the Justice Department, but the department would no longer be responsible for the decision itself. This will allow the board to make objective recommendations; then it will be up to the president whether to accept them.

The Biden administration understands the value of expertise and process. Justice is the last place where an exception should be made.

Rachel E. Barkow is a professor at the New York University School of Law and the author of "Prisoners of Politics: Breaking the Cycle of Mass Incarceration." Mark Osler, a former federal prosecutor, is a professor at the University of St. Thomas School of Law in Minneapolis.

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The Role of Clemency in Criminal Justice Reform, 2022

MARK OSLER*

Professor and Robert and Marion Short Distinguished Chair in Law, University of St. Thomas School of Law

I. Introduction

It's hard to undo a big pile of mess. That's what we have found as reformers trying to address an overly retributive criminal justice system that too often, and without justification, robs Americans of our freedom, money, and integrity. In the federal system, this mess was driven by a number of independent but related measures largely created in the 1980s, including the elimination of parole, the implementation of mandatory sentencing guidelines, the imposition of mandatory minimum sentences, and the bizarre creation of a presumption for pretrial detention in even the most mundane drug cases.[1] Many tools were used to create this machine of overincarceration, and many tools will be needed to disassemble it. One of those many tools is clemency.

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

There is reason, of course, to be discouraged by the recent history of clemency. President Clinton used the pardon power repugnantly, for his brother and "fugitive financier" Marc Rich;[2] President Obama used it vigorously but inefficiently;[3] President Trump treated it like a reality show;[4] and President Biden ignored it completely his entire first year in office, neither granting nor denying a single petition by presidential action.[5] That sadly echoes our herky-jerky progress in other areas as statutory reform has stalled, compassionate release petitions have too often been defeated by the Department of Justice (DOJ) and inconsistent judges, and efforts to truly consider parole even for the few people still eligible have failed.

We need clemency to work the way it was intended, with regular grants to people who have changed their lives either during their term of incarceration or after. As Alexander Hamilton predicted in arguing for the inclusion of the pardon clause in the Constitution, justice in our day too often wears "a countenance too sanguinary and cruel," and so the "benign prerogative of pardoning should be as little as possible fettered or embarrassed,"[6] even as other second-chance sentencing devices emerge.

What is it, then, that pardons and commutations can uniquely accomplish if allowed to function properly? First, clemency offers a breadth of possibility that no other mechanism can match. It gives one person remarkable abilities—if that person can be convinced to use them. Second, commutations can cover the gaps created by glaring disparities among judges when other second-chance methods send cases back to courts for review. Third, pardons granted to those who have completed prison terms—historically, a large percentage of all clemencies granted—have a unique ability to confer forgiveness on those who have served their time. Fourth, clemency can play a role in national reconciliation and signal to the nation the values of an administration, something that is especially important when values are changing. Fifth, just as clemency can transcend judicial disparities, they can also surmount the opposition of overinvested prosecutors, who are often given too large a voice, too far down the road from their involvement in the case. Sixth, the very act of considering clemency (and the moving stories included in many petitions) can consistently remind the president of the overbearing and needless harshness embedded in too much of our criminal process. Finally, clemency is a historical and constitutional duty of the president, and to cast it aside removes a thread from the fabric the Founders wove.

II. Breadth and Potential

No other possible mechanism in criminal law can be as far-reaching as clemency. The fact that a president can change the sentences for tens of thousands, or for none, is unmatched by the prerogatives of any other actor in the federal system. At times—for example, when Presidents Ford[7] and Carter[8] granted clemency for thousands in the wake of the Vietnam War—that potential has been realized, simultaneously offering freedom and signaling a shift in values within the country in a way that only the pardon power could accomplish. In baseball terms, clemency is the batter that can give you batches of singles and the occasional grand slam.

III. The Problem of Disparities

The Constitution's pardon power draws from the deep history of civilization, going back to the ancients. Most directly, it draws from the sometimes disputed placement of clemency in the hand of the monarch throughout British history, up to the time of American independence.[9] While such consolidation of any power can be seen as

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problematic, even when placed there by democratic processes, one thing it does not do is create disparities among decision-makers, a problem that has plagued other second-chance methods.

For example, the First Step Act of 2018 created a process allowing those in prison to take their case for compassionate release to a district court judge even if the Bureau of Prisons opposes the motion. This was an important and positive development that has resulted in the release of thousands of people from federal prison. The problem has been staggering inconsistency between judicial districts and individual judges. In short, a person's chances of getting compassionate release are largely determined by where they were sentenced in the first place. A study by the U.S. Sentencing Commission in September 2021 revealed the remarkable outcome disparities among districts. It showed that in the Southern District of Georgia only 4 out of 230 compassionate release motions were granted (1.7%), while in the District of Oregon 82 out of 127 were granted (64.6%). And those weren't extreme outliers: overall, 30 jurisdictions had grant rates under 10%, and 22 had rates over 30%.[10] That's not justice; it's a lottery in which the odds are based on where you are sentenced. Clemency, with one decider, can at least clean up the discrepancies by identifying the mean and granting clemency to those who were denied on the basis of mere geography.

Judge-based second-chance reviews like compassionate release are worthwhile, but they need a backstop if they are to issue anything close to fairness.

IV. Pardons

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

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

V. Value Signaling and National Reconciliation

Since ancient times, clemency has been used as a way to signal the virtue of mercy within retributive systems of justice and to repair broken social bonds. The first significant use of the pardon power, in fact, was intended to do just that, when President Washington pardoned some of the leaders of the Whiskey Rebellion—a revolt that threatened to fracture the nation at the Appalachians. In defending his pardons of rebels who had been sentenced to die, Washington noted that clemency allowed him to "mingle in the operations of government every degree of moderation and tenderness which the national justice, dignity, and safety may permit."[11] By the same instinct, presidents from Lincoln through Carter tried to mend the divisions of war through the judicious use of clemency, and President Ford's intent in granting a pardon to his predecessor, Richard Nixon (before he was even charged with a crime), was to allow the nation to heal after the tumult of Watergate.[12]

The national division now at hand derives from a different kind of conflict: the war on drugs. President Obama declared that war over,[13] and he showed a unique understanding of its costs. Among other things, he visited a prison, met with people convicted of narcotics crimes, and initiated a clemency program aimed largely at those incarcerated for narcotics.[14] These actions not only reflected his values, but sought to heal the nation. There is much left to do to unwind the war on drugs and heal its divisions, and clemency can and should be part of the process.

VI. Getting Past the Opposition of the DOJ and Its Employees

Second-chance sentencing methods that return a case to the courts also bring back the parties, including the DOJ, that too often and too predictably oppose a sentencing change reflexively.[15] Clemency—if a rational evaluation process is adopted—would allow a way around this block in the road.

Right now, sadly, the clemency evaluation is literally embedded within the DOJ and suffers terribly from the inherent conflict of interest this presents: the same bureaucracy that sought an outcome is being asked to review it. It doesn't have to be that way, of course. While court-based processes can't get around or limit the role of the DOJ (which is a party, after all), a reformed clemency system with a reduced role for the DOJ certainly could.[16] Notably, the FIX Clemency Act, described elsewhere in this Issue, is an excellent template for such a reform.

VII. The Review of Clemency Can Humanize the Criminal Justice System for the President and Other Actors

When President Obama wrote a reflection on his clemency initiative, it wasn't surprising that he described in detail

a few life stories of clemency recipients that had touched him deeply.[17] How could they not?

No matter what evaluation process underlies his or her decision, in the end the president must make the call on most clemency petitions. This means that (at least sometimes), the president will be exposed to the occasional and casual brutality of our sentencing, those excesses that rob freedom unnecessarily and do nothing to promote public safety. Even as a thumbnail sketch or a quick skim, clemency petitions are deeply human. It is inevitable that a decision-maker exposed to those narratives will be subtly pushed to view criminal justice in a more honest and human light; exposure to the complicated reality of sentencing outcomes evaporates the easy answers of long sentences and ever-expanding criminal codes.

VIII. Clemency Is a Principled Constitutional Duty of the President

As drafted, the U.S. Constitution contained both the wrenchingly awful (the three-fifths compromise) and the wonderfully elegant (the webs of control that create checks and balances). Few powers in the Constitution, however, match the pardon power's rootedness in a deep and commonly held principle that transcends faiths, cultures, and backgrounds. There are few belief systems that don't embrace the virtue of mercy, that refuse a chance at redemption, or that describe people as rigidly fixed and unchanging. If there is such a thing as natural law that is "written on their hearts,"[18] this thing, mercy, is it.[19]

Statutory reform, court-based second-look mechanisms, and other tools are essential to addressing overincarceration in the United States. But it would be a mistake to exclude from this mix the tool that was placed in the president's hand by those who wrote the Constitution. They did so with a sense that this inflection of mercy, when done well, resounds in our common soul.

Notes

* Thanks to Rachel E. Barkow and Jeanne Bishop for their helpful comments on the manuscript.

1 Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 New Engl. L. Rev. 161, 164 (2020).

2 Ruth Marcus, *No President Has Ever Misused the Pardon Power as Thoroughly as Trump Has*, Wash. Post (Dec. 23, 2020), https://www.washingtonpost.com/opinions/2020/12/23/no-president-has-ever-misused-pardon-power-thoroughly-trump-has/.

3 Center on the Administration of Criminal Law at NYU, The Mercy Lottery: A Review of the Obama Administration's Clemency Initiative (2018).

4 Sarah Bahr et al., *Here Are Some of the People Trump Pardoned*, N.Y. Times, https://www.nytimes.com/article/who-did-trump-pardon.html.

5 U.S. Dep't of Justice, Clemency Statistics, https://www.justice.gov/pardon/clemency-statistics.

6 The Federalist No. 74 (Hamilton).

7 Marjorie Hunter, *A Re-Entry Plan*, N.Y. Times (Sept. 17, 1974), https://www.nytimes.com/1974/09/17/archives/a-reentry-plan-goodell-named-head-of-clemency-unithesburgh-included.html.

8 Lee Lescase, *President Pardons Viet Draft Evaders*, Wash. Post (Jan. 22, 1977).

9 Paul J. Larkin Jr., *Revitalizing the Clemency Process*, 39 Harv. J.L. & Pub. Pol'y 833, 843 (2016).

10 U.S. Sent'g Commission, Compassionate Release Report (Sept. 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf.

11 President George Washington, Seventh Annual Address to Congress (Dec. 8, 1795).

12 Graham C. Dodds, Mass Pardons in America 173–75, 194–99 (2020).

13 Gil Kaufman, *President Obama Says It Is Time to End the War on Drugs and Start the War on Addiction*, MTV News (Oct. 21, 2015), https://www.mtv.com/news/2356281/president-obama-addiction-prescription-pills-heroin/.

14 Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 813 & 837 (2017).

15 Keri Blakinger & Joseph Neff, The Marshall Project, "31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36 (June 11, 2021), https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36.

16 Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 Univ. Chi. L. Rev. 1 (2015).

17 Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 837 (2017).

18 Romans 2:15 (New Standard Revised Version).

19 Mark Osler, *Seeking Justice Below the Guidelines: Sentencing as an Expression of Natural Law*, 8 Georgetown J. L. & Pub. Pol'y 167 (2010).

Ms. JACKSON LEE. Let me also thank my colleague and Vice Chair, Congresswoman Cori Bush, for her interest in this hearing and her invaluable help as we proceeded to have this hearing, and as we proceed further to secure the Pardon Attorney.

Might I also mention with deepest sympathy to the families of those lost in Buffalo, New York, and those lost to guns and hatred.

As we proceed in this hearing, I hope that we will find as many facts as necessary to improve this process and to improve the criminal justice system.

I now recognize the gentleman from Arizona, Mr. Biggs, for his opening statement.

Mr. Biggs, you are recognized.

Mr. BIGGS. Thank you, Madam Chair, and I appreciate you holding this hearing today.

Today's hearing is entitled, "Oversight Hearing on Clemency and the Office of the Pardon Attorney." It is interesting and I appreciate you reporting that you attempted to bring the new Pardon Attorney to our hearing today. The new Pardon Attorney is Elizabeth G. Oyer. She served 10 years as a Federal public defender, and I look forward to hearing her in the future about the Pardon Attorney's position and her thoughts on the proposals that we are going to hear today.

This hearing is actually just another in a series of hearings that furthers the agenda of my friends on the other side of the aisle with their intention of totally reforming the justice system, and with some of their initiatives actually putting the public safety at risk.

The first in this series was a hearing on "Controlled Substances, Federal Policies, and Enforcement." In that hearing, while arguing for drastic reform of our drug laws, one of the majority's Witnesses likened our nation's drug laws to Jim Crow laws.

When the Subcommittee held a hearing entitled, "From Miranda to Gideon," they called for pretrial reform. My colleagues on this Subcommittee have some interesting—actually dangerous—ideas about pretrial criminal justice reform. One of them introduced the No Money Bail Act of 2021. This bill would eliminate bail in the Federal system and withhold Federal grant money from States that don't eliminate their bail.

We have seen time and time again all over this country the disastrous and deadly consequences of eliminating bail. At that hearing, we heard from a grieving mother who lost her son because the State of New Jersey implemented bail reform that allowed a convicted felon back out onto the street.

Next, we had another hearing on "Undoing the Damage of the War on Drugs: A Renewed Call for Sentencing Reform." This was another hearing where the majority's Witnesses called for decriminalizing drug possession for all drugs, and no matter how much drugs that they had in their possession.

That brings us to today's hearing on clemency. My reading of article II, section 2, is that the President has broad, broad authority to grant reprieves and pardons for offenses. The President, ultimately, makes the decision on how to reprieve or provide clemency, and thus, the President actually has the opportunity—and, quite frankly, I think has the obligation—to create the rubric for grant-

ing clemency and the standards that the President is going to look at before granting reprieves, pardons, commutations, or clemency.

So, with that in mind, I don't think anybody in the room doubts the President has constitutional authority in this area, nor do we think that the President's authority to commute sentencing of drug offenders is outside of the scope of the President's authority. So, because the Constitution seems to vest that authority with the President, the rubric seems to also lie with the President.

Just because the President may commute such sentences does not necessarily mean that the President should take action at all. While such commutations do not raise constitutional concerns, they certainly can raise public safety concerns.

During the last two years, the United States has seen a spike in violent crime. In 2020, the United States tallied more than 20,000 murders, the highest total since 1995 and 4,000 more than in 2019. FBI data, preliminarily, for 2020 points to a 25 percent surge in murders. This would be the largest single year increase since the agency began publishing uniform data in 1960.

Last year, in America, there were more than 105,000 drug overdoses. That follows a record in 2020 with more than 91,000 overdose deaths. Now, may not be the time, despite what the Biden Administration and any of my colleagues believe, to release drug traffickers and dealers back into our communities and neighborhoods.

Just last month, the Biden Administration commuted the sentences of 75 drug traffickers and dealers. President Obama, similarly, commuted the sentence of 1,715 drug offenders, and some of those granted clemency by President Obama went on to reoffend not longer after they were released—many back to selling and trafficking drugs.

At a time when overdose deaths and violent crimes is surging, this Subcommittee should probably not look to ways to let more drug dealers and traffickers out of prison early. More importantly in some respects is the philosophy of this, and that is that it is the President's prerogative—that means it is the President who either designs, accepts the current rubric, or implements a new rubric in determining early releases, commutations, pardons, and reprieves.

We can comment on it, it is my position, but I don't think we can legislatively, at least in a constitutional manner, impose upon the President our will on how the President determines to grant reprieves and pardons. That is plenary power exclusively reserved to the President of the United States.

Madam Chair, with that, I will yield back.

Ms. JACKSON LEE. Thank you.

The Chair now recognizes the Chair of the Full Committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chair NADLER. Good morning.

Thank you. I thank Chair Jackson Lee for holding this important oversight hearing on "Executive Clemency and the Office of the Pardon Attorney."

I hope that today's discussion provides us with proposals that will enable President Biden and his successors to apply the power of Executive Clemency as the Framers intended—as a tool nec-

essary to the fair Administration of justice that tempers justice with mercy.

Over the past several decades, Republicans and Democrats have failed to employ this power, which rests solely in the President, to help remedy injustice, as the Framers first conceived. After decades of Draconian mandatory sentencing policies, far too many nonviolent Federal offenders, disproportionately, people of color, remain in prison serving what we know now are unnecessarily harsh sentences. Some of these prisoners are elderly and suffering from chronic illnesses and have served their debt to society many times over. Many others face hardships when seeking reentry into their communities after completing their sentences because of the collateral consequences of their convictions.

Clemency is the only remaining relief for many of these people. Yet, thousands of clemency petitions are currently pending due to the more than 15,000 petitions left by the previous Administration for President Biden to consider.

The tremendous responsibility of reviewing these petitions and making recommendations to the President has been customarily delegated to the Office of the Pardon Attorney, an agency within the Department of Justice.

This Subcommittee has both the authority and the obligation to evaluate the efficacy of this office and to improve upon its ability to support a vital authority of the Executive. I know that many of our Witnesses today agree that the current clemency process requires immediate reform. Some may even argue that the process should be removed from the Department of Justice altogether because of the inherent conflict of interest posed by placing the authority to review petitions for clemency within the same department that prosecuted each prisoner.

In recent years, much of this Committee's consideration of clemency presented around abuse of the pardon power by Presidents of both parties in individual cases. I appreciate the opportunity today, instead, to focus on clear-minded systemic reforms that will increase the rate and diversity of clemency grants, paying special attention to the plight of incarcerated women and minorities who have borne the brunt of the so-called War on Drugs.

I commend President Biden for doing what many previous Presidents have not; that is, issuing grants of clemency earlier in his term and not just before his presidency ends. Last month, he used criteria similar to those used by President Obama to issue more than 1,700 grants of clemency, primarily to nonviolent drug offenders who would have received a lower sentence if they were charged with the same offense today.

Recalling our recent discussion surrounding the exercise of compassionate release and the limitation of the First Step Act, we know that there are thousands more remaining in prison who are now released in home confinement with similar stories.

I hope that our Witnesses today will discuss how Congress can help the Office of the Pardon Attorney and the President reach more of these individuals and provide relief that will allow them the ability to return to their communities and home confinement without risking return to prison.

Although Congress has little authority over the President's exercise of the clemency power, we can enact measures that will pave the way for more clemency grants. We can also assist in reforming the processes we do have control over to ensure that petitions are treated fairly and timely, and as a routine mechanism of the criminal justice system.

I would like to thank the Witnesses for appearing today. I look forward to hearing their testimony, and I yield back the balance of my time.

Ms. JACKSON LEE. I thank the gentleman.

[Audio malfunction.]

Mr. BIGGS. Madam Chair, you are frozen. We have got a technical issue going on, Madam Chair.

Ms. JACKSON LEE. Am I back?

Chair NADLER. Yes.

Ms. JACKSON LEE. Am I back?

Chair NADLER. Yes, you are.

Ms. JACKSON LEE. All right. Is Mr. Jordan present? Is Mr. Jordan present?

Mr. BIGGS. No, he is not present, Madam Chair.

Ms. JACKSON LEE. Thank you.

When he comes, Ranking Member Jordan will be recognized—

[Audio malfunction.]

It is now my pleasure to introduce the Witnesses for the first panel.

The Honorable Ayanna Pressley was elected to represent—can you hear me?

Chair NADLER. Yes.

Ms. JACKSON LEE. Can you hear me?

Chair NADLER. Yes.

Ms. JACKSON LEE. The next Witness, the Honorable Ayanna Pressley, was elected to represent Massachusetts' 7th Congressional District in the House of Representatives on November 6, 2018. She was also the first woman of color to serve in the 100-year history of the Boston City Council. She is an advocate and a fighter for informed and robust policies and an advocate for positive change for the most vulnerable, and an important legislator.

We are delighted to have her here, and we welcome you as our distinguished Witness. Thank you for your participation.

Please summarize your testimony in five minutes. To help you stay within the timeframe, there is a timing light on your table and on your screen. When the light switches from green to yellow, you have one minute to conclude your testimony. When the light turns red, it signals that your five minutes has expired.

STATEMENT OF HON. AYANNA PRESSLEY

Ms. PRESSLEY. Should I go? All right.

Good morning.

Ms. JACKSON LEE. Yes, yes.

Ms. PRESSLEY. All right. Thank you.

Good morning, Chair Jackson Lee—

Ms. JACKSON LEE. Good morning.

Ms. PRESSLEY. —Ranking Member Biggs, and Chair Nadler, and Members of the Subcommittee on Crime, Terrorism, and Homeland

Security. Thank you for the invitation to testify on my legislation, the Fair and Independent Experts in Clemency Act, also known as the FIX Clemency Act.

In the United States, there are approximately two million people incarcerated in the criminal legal system and over 200,000 in Federal custody—disproportionately, Black, Latino, indigenous, disabled, and LGBTQ+. Our nation has the highest incarceration rate of any country in the world. This should ring alarm bells for every lawmaker because it impacts mass incarceration in each and every one of our districts, and it should stoke the moral outrage of everyone who calls this nation home, as this is a shameful legacy.

The people locked in cages throughout this nation are real people. Their families and friends are serving their sentences alongside them. I know this all too well, growing up with an incarcerated parent. I can only imagine how different my own childhood would have been if my father was able to get the medical help and treatment he desperately needed and deserved. Instead, his opioid addiction, which today would be treated as a public health issue, was criminalized and his addiction robbed me of his physical presence during my most formative years.

Today, my father, Martin Terrell, like millions of Black men and women, is a survivor of mass incarceration. He has obtained multiple degrees, gone on to be a college professor and published author. Nonetheless, my having been robbed of his presence during my formative years, it has been an ongoing healing process for myself and our family.

My story is hardly an anomaly. Across the country, more than five million children have experienced the incarceration of a parent. As policymakers, we must reject this unjust status quo and disrupt the cycle and legacy in this country of treating trauma with more trauma. We need to end the crisis of mass incarceration and fixing our clemency process is a central part of the solution.

That is why I am proud to have introduced The FIX Clemency Act with two distinguished Members of the Judiciary Committee, Representatives Cori Bush and Hakeem Jeffries. My legislation would transform how clemency works by replacing the redundant and biased Department of Justice process with a new and independent U.S. Clemency Board. The Board would be composed of experts in fields like behavioral health and rehabilitation, appointed by the President. There would also be a seat at the table for a person who was formerly incarcerated because I believe the people closest to the pain should be the closest to the power driving and informing the policymaking.

Currently, applications for clemency are under the full control of staff in the Department of Justice and must undergo repeated scrutiny with duplicative layers of bureaucratic review. Experts have warned that this structure creates a prosecutorial bias against each applicant, and at any point in this process one lone staffer can unilaterally prevent an application from moving forward.

The FIX Clemency Act makes clear that prosecutors and people who run prisons should not have outsized influence when it comes to evaluating clemency applicants. With my bill, the newly created Board would be transparent and independent. All recommendations

by the Board would be transmitted directly to the President and included in an annual report to Congress.

With more than 17,000 clemency applications pending for years before the DOJ, we must pass the FIX Clemency Act. That is over 17,000 people, and their lives hang in the balance.

I am proud that my bill was drafted in close partnership with lawyers, constitutional scholars, advocates from across the political spectrum, and those who understand clemency best, people who were formerly incarcerated, people like Danielle Metz, who is a recipient of clemency herself.

She was punished with three consecutive life sentences and an additional 20 years in Federal prison for nonviolent drug offenses. Danielle Metz served more than two decades in prison away from family and her children before her sentence was finally commuted. I am grateful for her partnership in this legislation.

Congress has the power to legislate a just and equitable clemency process by passing my legislation to create an independent Board.

I applaud President Biden for granting 78 commutations and pardons last month. It establishes a historic precedent and will help set the individuals, their families, and communities on a pathway to healing. We must continue this historic momentum.

To truly confront the backlog of over 17,000 applications and prevent it from ever occurring again, there must be structural change. More than 150 years ago, Congress created the current clemency process. Now, it is time for Congress to fix it.

Thank you.

[The statement of Ms. Pressley follows:]

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CONGRESSWOMAN AYANNA PRESSLEY
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COMMITTEE ON THE JUDICIARY
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"OVERSIGHT HEARING ON CLEMENCY AND THE PARDON ATTORNEY"
OFFICIAL TESTIMONY

MAY 16, 2022

Good morning Chairwoman Jackson Lee, Ranking Member Biggs, and Members of the Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. Thank you for convening today's "Oversight Hearing on Clemency and the Pardon Attorney" and inviting me to testify on my legislation, H.R. 6234, the Fair and Independent Experts in Clemency Act, also known as the FIX Clemency Act.[1]

In the United States, there are approximately 2 million people incarcerated in the criminal legal system, including more than two hundred thousand people in federal custody.[2] We have the highest incarceration rate of any country in the world.[3] This statistic should ring alarm bells for every Member of Congress because it impacts each and every one of our districts.

Mass incarceration is a policy failure and a moral failure, exacting hurt and harm on our constituents and disproportionately targeting those who are most marginalized: our Black, Latinx, Indigenous, disabled, and LGBTQ+ neighbors.[4] The disparities are well-documented and irrefutable, but more important than any statistic is the impact of incarceration on people's lives.

To paraphrase the philosopher, Angela Y. Davis: prisons do not disappear problems, they disappear human beings. Locked in cages throughout this nation are real people, and their families, friends, and loved ones are serving their sentences with them.

I know this all too well. Growing up with an incarcerated parent, I can only imagine how different my own childhood would have been if my father was able to get the help he desperately needed. Instead, the system criminalized his addiction and robbed me of his physical presence during my most formative years. As a child, I was forced to carry the burden of incarceration.

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[1] https://pressley.house.gov/media/press-releases/pressley-bush-jeffries-advocates-unveil-historic-bill-transform-broken-clemency.
[2] https://www.prisonpolicy.org/reports/pie2022.html.
[3] https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/.
[4] https://www.bop.gov/about/statistics/statistics_inmate_race.jsp; https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp; https://www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf; https://cdn.americanprogress.org/wp-content/uploads/2016/07/15103130/CriminalJusticeDisability-report.pdf.

My story is hardly an anomaly. According to the Bureau of Justice Statistics, nearly half of the people in federal prisons were the parent or guardian of a minor child.[5] The cruelty of our carceral system produces harm, not healing.

So let me be clear: mass incarceration is not justice, far from it. It is born from policies rooted in slavery and white supremacy. And for far too long this crisis has destabilized our communities and our families..

As policymakers, we have an opportunity and an obligation to reject this unjust status quo and to take every measure available to end this cycle of responding to trauma and pain with more trauma and more pain.

We need to end the crisis of mass incarceration, and fixing our clemency process must be a part of the solution.

That is why I am proud to have introduced the FIX Clemency Act along with two Members of the Judiciary Committee: Representative Cori Bush and Representative Hakeem Jeffries.

My legislation would transform how clemency works by replacing the redundant and biased Department of Justice (DOJ) process with a new and independent United States Clemency Board. The Board would be composed of experts in fields like behavioral health, rehabilitation, and reentry and appointed by the President. There would also be a representative from the DOJ on the Board and a reserved seat for a person who is formerly incarcerated – because the people closest to the pain should be closest to the power, driving and informing the policymaking.

Currently, applications for clemency are under the full control of staff in the Department of Justice and must undergo repeated scrutiny with duplicative layers of bureaucratic review. This creates a prosecutorial bias against each and every applicant regardless of their type of conviction or evidence of rehabilitation. Furthermore, at any point in the current process, one staffer can unilaterally prevent an application from moving forward without providing the applicant any information.

The FIX Clemency Act makes clear that prosecutors and people who run prisons should not have outweighed influence when it comes to evaluating clemency applicants. With my legislation, the newly created board would be directly responsible for reviewing applications requesting a pardon, commutation, or relief from collateral consequences like access to occupational licensing and government resources. All recommendations by the Board would be transmitted directly to the President and included in an annual report to Congress. My bill makes the clemency process transparent and independent, and would streamline the process making it easier for the President to use their clemency authority.

With more than 17 thousand people trapped in the clemency backlog waiting years for a response from the Department of Justice[6], we must pass the FIX Clemency Act. People's lives hang in the balance.

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[5] https://bjs.ojp.gov/library/publications/federal-prisoner-statistics-collected-under-first-step-act-2020.
[6] https://www.justice.gov/pardon.

My legislation has been endorsed by lawyers, constitutional scholars, and criminal justice reform advocates from across the political spectrum. Presidential pardon power is specifically enumerated in the U.S. Constitution, and the President is entitled to a process that does not encumber their ability to exercise their clemency power. More than 150 years ago, Congress created the current process, and it now time for Congress to fix it.

I am proud to say that the FIX Clemency Act was drafted in close partnership with those who understand clemency best: people who are formerly incarcerated. Throughout every step of the drafting process, they provided keen insight and expert knowledge based on their lived experience. People like Danielle Metz, who serves as Director of Clemency for the National Council for Incarcerated and Formerly Incarcerated Women and Girls, and is a recipient of clemency herself. Danielle was sentenced to three consecutive life sentences and an additional twenty years in federal prison for non-violent drug offenses due to participation in her abusive husband's illegal activities.[7] She served more than two decades in prison away from family and her children before her sentence was finally commuted. I am grateful for her advocacy and partnership on this legislation, and I know there are thousands of people like her waiting to be reunited with their loved ones.

Congress has the power to legislate a just and equitable clemency process by passing my legislation to create an independent board. I applaud President Biden for granting 78 commutations and pardons last month. It sets a historic precedent and will help set those individuals, their families, and their communities on a pathway to healing. However, in order to fully confront the massive backlog of more than 17 thousand applications and prevent it from ever occurring again, there must be structural change in the clemency process.

Thank you Chairwoman Jackson Lee and Members of the Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security for taking this issue seriously and inviting me to offer testimony on my legislation, HR 6234, the Fair and Independent Experts in Clemency Act. I stand ready to partner with you to fix clemency.

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[7] https://www.essence.com/awards-events/2019-essence-festival/danielle-metz-clemency-obama-honor-roll/.

Ms. JACKSON LEE. Let me thank you for very insightful testimony. We were very pleased to have you before our Committee and very pleased that you accepted. So, thank you very much.

At this time, we will move to the second panel.

This concludes the first panel of today's hearing. I would like to thank Representative Pressley for participating in this hearing.

We will now take a short recess to set up our second panel of Witnesses. We will recess for five minutes.

[Recess.]

Ms. JACKSON LEE. The Subcommittee will reconvene to hear the testimony of our second panel. I will now introduce our second panel of Witnesses.

Professor Mark Osler is a Robert and Marion Short Professor of Law at the University of St. Thomas School of Law. He is a former Federal prosecutor and author whose writings on clemency, sentencing, and narcotics policy have appeared in *The New York Times, The Washington Post, The Atlantic,* and many law journals, including at Harvard, Stanford, the University of Chicago, and Georgetown. Professor Osler is a graduate of the College of William and Mary and Yale Law School.

Mr. D. Michael Hurst, Jr., is a partner with Phelps Dunbar LLP. He was a U.S. Attorney for the Southern District of Mississippi from 2017–2021, and previously served as Legislative Director and Counsel to Congressman Chip Pickering and as counsel for the Constitution Subcommittee of the House Judiciary Committee. That was Congressman Chip Pickering. He graduated from Millsaps College and the George Washington University Law School.

Professor Rachel Barkow is Vice Dean and Charles Seligson Professor of Law at NYU School of Law. She serves as a faculty director of the Zimroth Center on the Administration of Criminal Law at NYU. From 2013–2019, she served as a member of the United States Sentencing Commission. Professor Barkow graduated from Northwestern University and Harvard Law School. She served as a law clerk to Judge Laurence H. Silberman on the D.C. Circuit and Justice Antonin Scalia on the U.S. Supreme Court.

The Honorable Morris Murray has been the prosecuting attorney for Defiance County, Ohio, since his election in 2009. He also serves as legal counsel for the Board of County Commissioners, County Officials, and several other public boards and agencies. Attorney Murray is a graduate of the University of Dayton and the University of Dayton School of Law.

Nkechi Taifa is President and CEO of The Taifa Group LLC; founder and convener of the Justice Roundtable and serves as senior fellow for the Columbia University Center for Justice.

She served as advocacy director for criminal justice at the Open Society Foundation. She has also served as legislative and policy counsel for the ACLU, the Women's Legal Defense Fund; Director of Howard University's School of Law's Equal Justice Program, and staff attorney for the National Prison Project. She graduated from Howard University and George Washington University Law School.

Ms. Andrea James is the founder and Executive Director of the National Council for Incarcerated and Formerly Incarcerated Women and Girls and the founder of Families for Justice as Heal-

ing. She is a former criminal defense attorney, formerly incarcerated woman, and author. Ms. James is a 2015 Soros Justice Fellow and a recipient of the 2016 Robert F. Kennedy Human Rights Award.

Mr. Jason Hernandez was granted clemency by President Barack Obama on December 19, 2013. Upon his release, he earned his high school diploma and founded several nonprofit organizations, including at Last, which empowers Latino students to become leaders in their schools and communities and helps them pursue careers where Latinos are underrepresented. Mr. Hernandez received fellowships from the Open Society Foundation, Open Philanthropy, and the Latino Justice, and serves as a consultant to the ACLU's Redemption Campaign, Embracing Clemency.

Mr. William R. Underwood received compassionate release after 33 years of incarceration. Mr. Underwood is currently a senior fellow at the Sentencing Project's Campaign to End Life Imprisonment. He is also a consultant, public speaker, advisor, and advocate at the Underwood Legacy Fund, where he advocates for the rights of songwriters, producers, composers, lyricists, and music publishers.

We welcome all our distinguished Witnesses. We thank them for their participation.

I will begin by swearing in our Witnesses. I ask our Witnesses testifying in person to rise and ask our Witnesses testifying remotely to turn on your audio and make sure that I can see your face and your raised hand while I administer the oath.

Witnesses are unmuted.

Do you swear or affirm, under penalty of perjury, that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Let the record show the Witnesses answered in the affirmative.

Thank you, and please be seated.

Please note that your written testimony will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in five minutes.

To help you stay within that timeframe, there is a timing light on your table and on your screen. When the light switches from green to yellow, you have one minute to conclude your testimony. When the light turns red, it signals that your time is up.

You are now welcomed.

Mr. Osler, you may give your statement.

STATEMENT OF MARK OSLER

Mr. OSLER. Thank you, Madam Chair, Mr. Ranking Member. Thank you for this opportunity to be heard this morning on this important subject.

I am going to use my time to describe the broken system that we used to evaluate clemency petitions. The Pardon Attorney is a part of this broken process, but only a part, and probably not the most important part.

I have prepared a chart of the current process. It is also included in my written testimony as well. If you look at the chart that is here to my left, you will see that there is a green box at the bottom lefthand corner. What that represents is—this is a commutation

petition—someone in prison usually preparing the petition themselves. They are going to fill out the form. They are going to send it in to the Pardon Attorney staff that is going to do an analysis of it and come up with an opinion.

Now, they are going to reach out to the local U.S. Attorney's Office and get their opinion, which will be given considerable weight going up the chain. Once the Pardon Attorney staff has their report, it goes to the Pardon Attorney, who is going to make an independent evaluation.

Now, from there, it doesn't go to the President. Instead, it goes to a staff member at the Deputy Attorney General's Office. That is the middle blue box in the rank of three there. That staff member is going to make a recommendation, and then, that goes to the Deputy Attorney General.

From there, it goes to a staff member at the White House Counsel's Office. After that, it goes to the White House Counsel. Only after that, after seven sequential steps, does it go to the President.

This is a terrible process. Whether you think a lot of clemency should be granted or only just a few, this is a bad process for getting to the right ones.

Mr. Ranking Member, I would note that, in terms of the President having input and having the rubric that would be controlling, having so much separation of bureaucracy between the President and the people who are doing the evaluation doesn't help that at all. It is undisputed that no business, at least no decent business, no successful business, would make decisions in a process like this.

Now, this process was not designed in any coherent way. It grew up organically over time. For example, the Attorney General originally met with the President to advise him directly about these petitions. Then, that was delegated to the Deputy Attorney General, who then had a staff member intercede in between the Pardon Attorney and the DAG. Then, the White House Counsel got involved. So, over time, as bureaucracy does, it grew up and it just doesn't work.

A couple of the problems here. One is the sequential nature of the decisions. This combines with another problem, which is negative decision bias. No one gets in trouble for saying no. All the risk is in saying yes.

So, if we think about this as a pipe with seven valves, and they all have to be opened for any petition, even the best petition, to get to the end, and they are spring-loaded shut. No wonder this process doesn't work.

Another problem is that you have two key positions here that are people who are generalists who are really busy. One of them is the Deputy Attorney General, who has operating control of much of the Department of Justice. What has happened with this process isn't just that the Deputy Attorney General oversees the process, but personally vets each petition. When you have 17,000–18,000 petitions, that is just not going to work, and frankly, it hasn't. The White House Counsel, as well, of course, has many jobs to do, and this is just one of them.

So, what to do? Well, we just heard about the well-named FIX Clemency Act. That would eliminate much of this bureaucracy and,

yes, bring the process closer to the President, so that the President's will about clemency can be respected in a more direct way.

I want to close by telling you why I care so much about this. This has become my life's work. In part, it is because I hate bureaucracy. It is also a matter of faith. My work has integrity because a core value of my Christian faith—mercy—is also found in the constitutional pardon power. It is rare to find a faith imperative that so clearly is also a constitutional imperative. Even though in my own perspective, just as a Christian, I know that mercy is a core value of Judaism, of Islam, and nearly every moral system that is either religious or secular.

Americans love freedom and we believe in mercy. We just need to build a machine that reliably can provide us with just that.

Thank you.

[The statement of Mr. Osler follows:]

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

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

Chair and Members of the Subcommittee,

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

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

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

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

The chart below depicts this awkward process.

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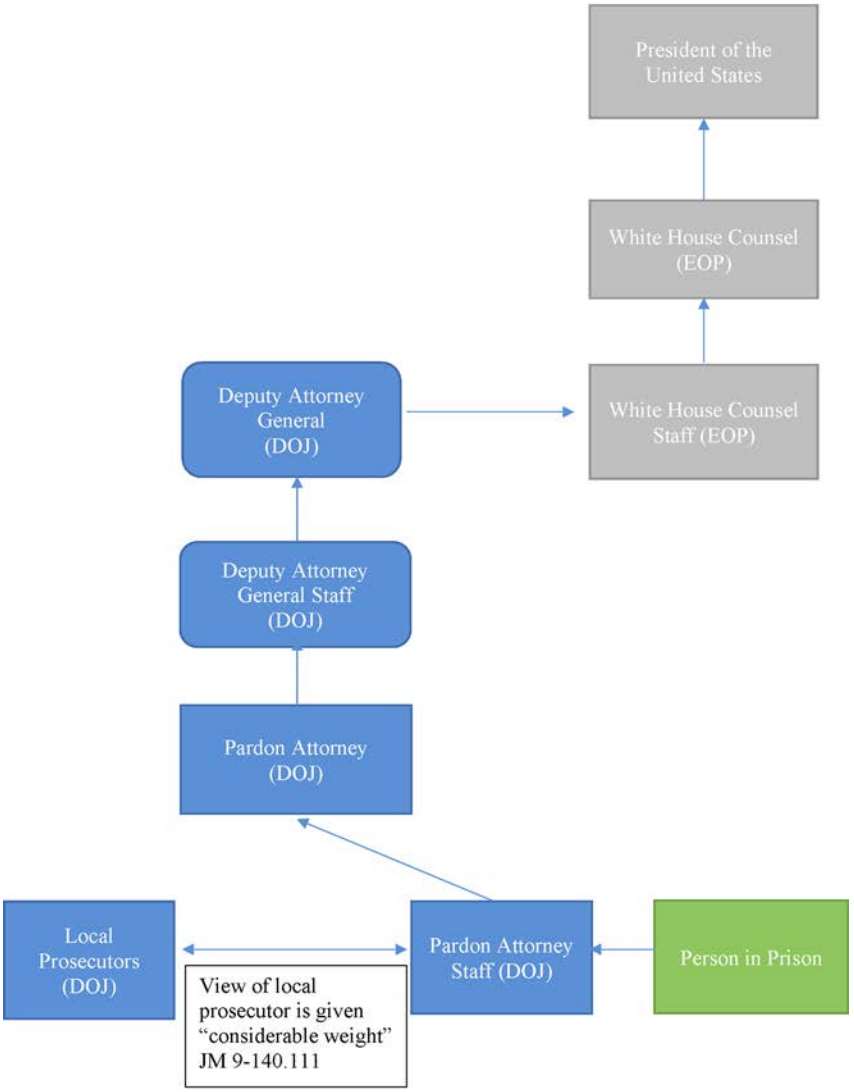
[1] U.S. Department of Justice, Clemency Statistics, available at https://www.justice.gov/pardon/clemency-statistics.
[2] Mark Osler, *Clementia, Obama, and Deborah Leff*, 28 FED. SENT. REP. 309, 309 (2016).

Path of evaluation for a federal commutation petition
Mark Osler, 2022



II. Key Problems with the Contemporary Process

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

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

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

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

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

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

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

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

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

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

III. The FIX Clemency Act and a Better Process

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

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

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

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

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

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

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

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

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

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

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

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

[7] Alexander Hamilton, Federalist 74.

Ms. JACKSON LEE. Thank you very much, Professor Osler, for your testimony. Thank you again.

Mr. Hurst, you are now recognized for five minutes.

STATEMENT OF D. MICHAEL HURST, JR.

Mr. HURST. Thank you, Madam Chair, Ranking Member, and Members of the Subcommittee.

My name is D. Mike Hurst. I am a partner in the Jackson, Mississippi office of Phelps Dunbar, and before that, I served as United States Attorney for the Southern District of Mississippi.

I appreciate the invitation to be here today to testify about the clemency process and the DOJ's Office of the Pardon Attorney.

Before joining Phelps in January of 2021, not only did I serve as United States Attorney, but I also had stints as an Assistant United States Attorney, a nonprofit lawyer, a private practitioner here in Washington, DC, a congressional staffer, and as the Madam Chair said, counsel to the Constitution Subcommittee, which Mr. Nadler was the Ranking Member at the time.

I am here today, though, to give my perspective on clemency and the Office of the Pardon Attorney; specifically, in my experience as a former chief Federal law enforcement officer and a former Federal prosecutor on the front lines, and also now, as a criminal defense attorney.

Let me just be clear. The views I am expressing today are my own. They do not represent my firm, my clients, or anyone else.

First, during my tenure as United States Attorney, I was asked by the Office of the Pardon Attorney on several occasions to give my thoughts on petitions for clemency of defendants who had been prosecuted in our office. I believe, as a policy matter, that asking the prosecutor's opinion of a petition is not only appropriate, but it is vitally important, as no one knows these defendants and the circumstances surrounding their criminal cases better than the prosecutor.

As U.S. Attorney, and before that, as an Assistant U.S. Attorney, my role was not to lock someone up or to keep someone locked up. Rather, our role as Federal prosecutors was to ensure that just was done.

For brevity's sake, I will summarize or paraphrase Justice Sutherland's 1935 language in *Berger* v. *United States* which says,

> The United States Attorney's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense a servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Thus, in my role as U.S. Attorney, I recommended approval of some petitions and disapproval for others—always with a mindset towards ensuring that justice was done. DOJ's policies that clemency petitions should only be granted in extraordinary circumstances, and clemency should be exercised rarely, are the correct judicious approaches to this issue. These approaches ensure that justice is done.

Second, the process for clemency entrusted to the Pardon Attorney is, and has been, working and does not need revising or whole-

sale revamping. The attorneys in the Office of the Pardon Attorney, in my experience, have always been professional, fair, methodical, and deliberate—exactly what we all should want and expect of those reviewing petitions of people who want out of prison.

I have never experienced any type of bias or skewed judgment from the Pardon Attorney, either for or against petitions, nor did I ever hear or witness any type of pressure on the Pardon Attorney from prosecutors or others within the Department of Justice.

The multiple possible veto points throughout the process is not a flaw, but, rather, a positive part of the system, as those checks and balances, these multiple points of review, are reevaluating someone who has been investigated, prosecuted, and convicted for violating our criminal laws, and we should make damn sure that they are not a threat to society, and run all the traps necessary to ensure that before releasing them back to the public.

Finally, there are some advocating for creating a new, independent Federal government agency to address these perceived issues, but believe President Ronald Reagan had it right when he said, "The closest thing to internal life on Earth is a government program." The last thing we need is another government agency or program.

Even if Congress were successful in establishing this new U.S. Clemency Board, as the Ranking Member has pointed out, the President has almost unlimited authority to grant clemency. So, there would be no authority requiring the President to use, rely upon, or defer to this new government agency.

In conclusion, the clemency process today is not perfect, but it works relatively well, considering the resources of the Office of the Pardon Attorney and the professionalism that the office exhibits. Clemency should be granted only in rare, extraordinary circumstances, and petitions for clemency should continue to have many levels of review before they reach the President's desk.

If a President wants to expedite the process, he has more than enough authority to do so.

Ms. JACKSON LEE. The gentleman's time has expired. You can finish.

Mr. HURST. Yes, Madam.

Those who want to simply release more criminals, defund our police, and not enforce our criminal laws will only further increase already rising crime throughout America and make America less safe.

Thank you.

[The statement of Mr. Hurst follows:]

Statement of D. Michael Hurst, Jr.

Partner, Phelps Dunbar LLP

Former United States Attorney, Southern District of Mississippi

Before the House Committee on the Judiciary

Subcommittee on Crime, Terrorism, and Homeland Security

Oversight Hearing on Clemency and the Office of the Pardon Attorney

May 19, 2022

Madame Chairwoman, Ranking Member and members of the Committee, my name is Mike Hurst and I am a partner in the Jackson, Mississippi office of the law firm Phelps Dunbar, LLP. I appreciate the invitations to be here today to testify about the clemency process and the U.S. Department of Justice's Office of the Pardon Attorney.

Before joining Phelps in January 2021, I served as the United States Attorney for the Southern District of Mississippi, having been appointed by President Donald J. Trump and confirmed by the Senate in October 2017. Before that, among other things, I worked as a non-profit lawyer, ran for elected office, served as an Assistant U.S. Attorney, worked as a regulatory lawyer and litigator at a law firm here in Washington, DC, was a staffer to a congressman, and finally was Counsel to the Constitution Subcommittee of the House Judiciary Committee.

I am here today to give my perspective on these issues as a former Chief Federal Law Enforcement Officer, a former line federal prosecutor, and now as a criminal defense attorney. The views I am expressing today are my own, and do not represent those of my firm, my clients, or anyone else.

I. Brief Overview of Historical Precedent

I will dispense with the historical background of the President's authority to grant clemency, as you have had august academics and impressive law school professors who have thoroughly briefed this subcommittee on those historical precedents. Suffice it to say that the President of the United States clearly has some of the strongest authority in this arena, emanating directly from Article II, Sec. 2 of the Constitution itself, and that authority has been further solidified by various U.S. Supreme Court opinions over the years.

II. My Experience Working in DOJ

During my tenure as United States Attorney, I received requests from the Office of the Pardon Attorney to respond to petitions for clemency of defendants who had been prosecuted in my office. From a policy standpoint, I believe that is an appropriate request. In most cases, our prosecutors know these defendants, the circumstances that led to their arrest, the details of the prosecutions and the convictions, and the intricacies of the cases better than anyone else.

As U.S. Attorney, I recommended approval of some petitions and disapproval of others, similar to my previous job as an AUSA, where I decided which cases had sufficient evidence to prove beyond a reasonable doubt to prosecute and which ones did not. In both instances, my goal was not to lock someone up or keep someone locked up. Rather, our role as federal prosecutors was to ensure that justice was done.

As Justice Sutherland wrote in his majority opinion in *Burger v. United States*:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[1]

DOJ's policies with regard to review of clemency petitions are correct – clemency should only be granted in extraordinary circumstances and exercised rarely. Over the last few years, some have attempted to demonize law enforcement and prosecutors, arguing that too many people are being prosecuted for too many crimes. However, the impetus to change that issue begins here, in Congress, in this branch of government. Congress passed the criminal laws. If a majority no longer likes those laws,

[1] 295 U.S. 78 (1935).

repeal them. Despite what those whom have never prosecuted a case will argue, AUSAs are not in the business of prosecuting and convicting innocent people. In our judicial system, the Federal Government has an immense burden of proof, as it rightly should – beyond a reasonable doubt. AUSAs have to convince 12 common, ordinary people from their communities that someone has broken the criminal laws that Congress passed without a reasonable doubt in their mind. The reason the conviction rate is so high in the federal criminal justice system is because of the professionalism and dedication of our federal law enforcement, and the unsung heroism and work done by our state and local partners on the ground. While crime is surging around our country, the discussion we should be having is not how to release more criminals, but how to increase prosecutions, arrest more violent offenders, and other efforts to make the public safer.

III. Responses to Criticisms of the Clemency Process

a. Office of the Pardon Attorney is Not Biased

My experience over the years with the Office of the Pardon Attorney was always professionalism, fairness, methodical, and deliberative – exactly what we all should want and expect of those reviewing a petition of someone who wants out of prison. Never in all of my experience did I ever get the sense that the Office of the Pardon Attorney was biased, one-sided, or otherwise pushing either a grant or denial of clemency.

Some commentators have criticized the Office of the Pardon Attorney by saying that, because they are housed within DOJ, and maybe some are former prosecutors themselves, that they cannot divorce themselves from the pressure exerted by DOJ's law enforcement mission. However, I would say those commentators have never worked within the Department of Justice. DOJ is an incredibly diverse, multi-faceted agency, who's main job is not law enforcement, but rather to do justice. In fact, the Department of Justice is the only federal cabinet agency that is named after a virtue, with that virtue

driving DOJ criminologists within the National Institute of Justice or DOJ community organizers within the Community Relations Service or DOJ statisticians within the Bureau of Justice Statistics. The Department of Justice does not consistent solely or exclusively of just federal prosecutors. There is a wide arrange of backgrounds, skillsets, positions, and jobs within and throughout the Department, other than prosecutors, such that it cannot be reasonably argued that the Office of the Pardon Attorney is bullied or pressured into doing (or not doing) anything.

One of the arguments used by some to show bias at the Office of the Pardon Attorney is the perceived "low output" of actual pardons and commutations issued by the President. But this is a red herring. At the end of the day, the President decides who to pardon. Conversely, if all 151,283 individuals incarcerated in federal prisons applied for clemency, those clemency numbers and percentages would be even more miniscule. It is a disingenuous to argue bias within the Office of the Pardon Attorney when the percentages of pardons and commutations are driven by factors outside the Pardon Attorney's control (Presidential prerogative, number of petitions, qualities of candidate, etc.).

b. Multi-Level Reviews of Clemency Petitions are Necessary

Some commentators also argue that the clemency process is biased against granting relief because there are too many possible veto points through the gauntlet. On the other hand, I see those checks and balances in the evaluation process as a positive, as these multiple points of review are re-evaluating someone who has been thoroughly investigated by professional law enforcement agents, their cases analyzed by federal prosecutors, who voluntarily pled guilty, or were found guilty beyond a reasonable doubt by their peers in their community, and ultimately sentenced by a federal judge with all the resources of a U.S. Probation Office and the sentencing guidelines to help provide uniformity. Our system of justice is not perfect, by any means. But as long as human being are involved, there never will be a perfect justice system. I would venture to say, however, that despite its flaws, we still have the

best, fairest system of justice in the world, so much that we send our federal prosecutors all around the world to train others on the rule of law, justice and judicial process, and others want to emulate us.

c. Criteria Should be High for Release of Those Convicted of Federal Crimes

Some commentators criticize DOJ's regulations which characterize commutations as "extraordinary" remedies which should only be "rarely granted." However, considering the release of inmates back into society is something extraordinary, and, if the review is done correctly, such requests for release should properly only be rarely granted.

IV. Potential Solutions (in Search of a Problem)

a. More Government Is Not the Answer

Some have advocated for creating a new, independent federal governmental agency to address these perceived issues. But I believe President Ronal Reagan had it right when he said, "The closest thing to eternal life on earth is a Government Program." The last thing we need is another government program or agency, for a few reasons. First, as a general matter, we should go back to President Trump's idea in his executive order regarding regulations, but apply it to agencies: for every new agency created, we need to repeal two additional government agencies. Second, if the current reviewing agency is facing 17,000+ petitions, but Congress has only allocated them 20 staffers – and you want them to do more – it stands to reason that Congress should give them more resources (again, I disagree with this, specifically Congress expanding government). The problem with simply growing government is that it is never enough, and it is hardly ever repealed or scaled back. Finally, even if Congress were successful in establishing this new "U.S. Clemency Board," there is no authority requiring the President to use, rely upon or defer to this new agency. Every President has relied upon DOJ's Office of Pardon Attorney to handle the review of clemency petitions for him, even Presidents who desired to expedite

and speed up the process in order to grant more clemency requests. It is because the Office of Pardon attorney works.

b. Real Oversight of Executive Agencies

I noticed that today's hearing is entitled "Oversight Hearing on Clemency and the Office of the Pardon Attorney," yet the new Pardon Attorney for DOJ, Elizabeth G. Oyer, who was appointed just a few weeks ago, was not called today to testify. That seems odd. If one is serious about conducting real oversight of an executive agency, might I suggest calling said agency to appear before the subcommittee and testify? Ms. Oyer's background includes a decade in the Federal Public Defender's Office, which presumably shows the initiative by this Administration in attempting to revamp and rev up clemency petitions and should help to dispel any perceived bias on the part of the Office of the Pardon Attorney in favor of prosecutors at DOJ. However, this Subcommittee cannot know the answers to these thorny questions if it doesn't call the executive agency to appear before the subcommittee for its oversight hearing regarding that specific agency.

In my opinion, a more concerning and insidious threat facing the clemency process is the political abuse or wholesale avoidance of the system in place, via corruption and/or cronyism, which does not necessarily discriminate among political parties. In my humble opinion, that is a more noble goal of this subcommittee in conducting oversight of the Office of Pardon Attorney, rather than using your oversight authority as a Trojan Horse to effect political change of decarcerating federal prisons.

c. It's the President Prerogative, Not Congress's

Presidents can prioritize or de-prioritize the issue of clemency during their administrations. For instance, President Barak Obama directed the U.S. Department of Justice to institute a Clemency Initiative in 2014, which encouraged federal inmates who would not pose a threat to public safety to petition to have their sentences commuted by the President. At the end of the day, the President can

make it happen if he wants it to happen. But, even for some, in the case of President Obama and his initiative, this was not enough.

d. Want to Limit the President, Then Amend the Constitution

If none of these solutions are sufficient, then change the Constitution. I know that is not an easy lift, but with the President's clemency authority emanating directly from the Constitution, and such authority almost unlimited, there is little else substantively Congress can do than revise the actual language in Article II, Section 2, in order to restrict and/or limit the President's authority.

e. Want Fewer Prisoners, Then Change or Repeal Criminal Laws

Many commentators who argue that the clemency process is broken or that the Office of the Pardon Attorney is biased are only using these arguments as a pretext for the argument against mass incarceration and overcriminalization in America. To these commentators I would say – just be true to yourselves. Instead of arguing for more clemency, lobby Congress to repeal criminal laws, lower sentences for crimes, or continue to make the argument to defund the police. Unfortunately, I think those arguments and efforts have contributed to the dramatic increase our country has experienced in crime over the last two years. At the end of the day, Congress passes the laws that law enforcement and prosecutors enforce, so the buck stops here with Congress. If you want fewer people locked up, change your laws. I strongly disagree with your sentiment, as I perceive increased crime needing increases in cops and prosecutors and the increased enforcement of our laws.

V. Conclusion

The clemency process is not perfect, but it works relatively well, considering the resources the Office of the Pardon Attorney has and the professionalism that it exhibits. Clemency should only be granted in rare and extraordinary circumstances, and it is a positive attribute that there are so many

levels of review before it reaches the President's desk. But, if a President wanted to expedite the process, he has more than enough authority to do so. At the end of the day, this is a power of the President, just as making appropriations is an exclusive power of Congress. If this subcommittee's real goal is to decrease the incarceration of Americans, then it needs to role up its sleeves and get to work repealing all of the federal criminal laws that it has previously passed. Unfortunately, such actions will only leave increase crime and make Americans less safe and more at risk. Thank you.

Ms. JACKSON LEE. The gentleman's time has expired.

Let me, for the record, make sure that Mr. Hurst's full name is complete. It is D. Michael Hurst who is the Witness that we just heard.

Thank you so very much for your testimony, Mr. Hurst.

I now wish to recognize Professor Barkow for five minutes.

STATEMENT OF RACHEL E. BARKOW

Ms. BARKOW. Thank you, Madam Chair, Mr. Ranking Member, Members of the Subcommittee. I am honored to testify before you today.

So, as you have heard, there are currently approximately 18,000 clemency petitions awaiting answers from President Biden. Almost 15,000 of those are commutation petitions seeking relief from excessive sentences being served right now, and another 3,000 petitions are requesting pardons.

Unfortunately, clemency appears to be a low priority for the current Administration. It inherited a backlog of 14,000 petitions, and instead of urgently addressing it, the backlog has grown by more than 28 percent.

It is hard to overstate the level of mismanagement responsible for this unconscionable backlog. These people, many of whom have been waiting for years, deserve answers to their petitions. Yet, the Administration has done nothing to suggest it has any grasp of the exigency of the situation. It hasn't changed any aspect of the clemency process that created this backlog.

President Biden granted just 78 clemency petitions so far: Three pardons, 75 commutations, leaving 99.6 percent of the rest of the petitions in their holding pattern. It is not just the paltry number, but the nature of the grants that shows just how narrowly the Administration is viewing this power.

Most of the grantees were already released to home confinement under the CARES Act, but it is hard to see why only a few dozen people released under the CARES Act merited such relief, instead of all of them as a categorical matter.

The Administration also noted that its recent grants included individuals who would be sentenced differently today under laws like the First Step Act that shorten sentences. Here, too, the Administration granted only a handful of these cases out of thousands just like them. If this were in any other area of government responsibility, there would be alarm bells ringing about the ineptitude of those in charge.

Sadly, because clemency often fails to get the attention it deserves from the press and public officials, those calls haven't come as loudly as they should. Make no mistake, the failure to take drastic action to address the current backlog of clemency is presidential malpractice.

So, the question is what to do about it. In my written testimony and my prior testimony to you, I have urged Congress to use its legislative authority to create other second-look mechanisms, prevent excessive sentences from occurring in the first place, and create an expungement option.

Congress can also use its authority to improve the clemency process itself. Congress can't dictate how a President should exercise

the constitutional power of clemency, but it can provide funding and incentives for needed institutional changes.

The President currently relies on a process in the Office of the Pardon Attorney, as you have heard, and that is funded by Congress. Congress could, instead, fund a separate advisory board that exists outside the Department of Justice to provide advice to the President on clemency. Taking clemency out of the Department of Justice would address the bureaucratic duplication that Professor Osler described and that is responsible for much of the holdup in petition processing.

It would also address the fundamental conflict of interest in having the same agency that prosecuted all those cases reviewing them for clemency, a structure that has resulted in egregiously low clemency grants in all recent presidential Administrations.

Congress can't require a President to use that board, but a designated funding stream for a clemency board would signal the broad support this idea has, and it would be more likely that it would be consulted, especially when a President like President Biden has already indicated his desire to do this as part of the Biden-Sanders Unity Task Force.

While the proposal doesn't have to mirror the one in the FIX Clemency Act, that is one option for making this change. Setting up a permanent board is, in my view, the preferred option, but a second-best scenario would be to create at least a temporary board to deal with the clemency petition backlog. President Ford used a temporary board to address a large number of cases associated with evasion of the Vietnam draft, and that could be a model for this approach.

A less effective strategy, but better than nothing, would be for Congress to increase dedicated funding for positions in the Office of the Pardon Attorney. Eighty of these have been approved, but they have not been funded because of the continuing resolution.

The reason this approach is less desirable is that it would address only delays from initial review in the Pardon Attorney's Office, when a big reason for the backlog is the failure of the Deputy Attorney General and White House Counsel's Office to act.

For example, we know that, in fiscal year 2020, 63 percent of the pending petitions were awaiting decisions by the DAG or White House Counsel. They had already been processed through the Pardon Attorney's Office.

So, a board that is outside of DOJ would definitely be the preferred approach, in my view, and I urge Congress to do that or take other measures to create replacement mechanisms for clemency.

Thank you for allowing me to testify and share my thoughts. I am happy to answer any questions you might have.

[The statement of Ms. Barkow follows:]

Statement of Rachel E. Barkow
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Before the House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
Oversight Hearing on Clemency and the Office of the Pardon Attorney
May 19, 2022

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 the current clemency petition backlog requires urgent attention and then turn to possible solutions. While Congress has within its power the ability to address many of the same injustices that clemency is designed to remedy, Congress's primary ability to do so is through legislation providing direct relief to incarcerated and formerly incarcerated people. It is far less efficient and more constitutionally suspect for Congress to try to fix the shortcomings with clemency by telling the President what to do. The Constitution vests the clemency power with the president, and the Framers assumed we would have leaders who would take this power seriously. Unfortunately, recent history has proved otherwise, and thus far President Biden has fallen well short of his constitutional duties in exercising this key constitutional obligation. Nevertheless, Congress can provide funding and incentives for needed institutional changes.

I. Why Clemency Requires Urgent Reform

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, 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 any time after a crime has occurred. Typically, however, pardons have been granted only after the passage of considerable 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

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[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 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).

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] The Supreme Court has also relied on the existence of clemency to uphold limits on habeas review, noting that clemency is the "historic mechanism" for actual innocence claims and, the "'fail safe' in our criminal justice system."[8]

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.[9] 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.

It is no answer to rely on a second look mechanism in the courts, such as compassionate release, to fix long sentences. We have seen wide disparities in how courts view the scope of this authority, with some districts granting 79.2% of the petitions before them, and others granting only 1.8%.[10] Moreover, there is a circuit split in the Court of Appeals on whether to view this authority narrowly and grant petitions only in cases involving issues like terminal illnesses or extraordinary family emergencies or whether it can be used more broadly to address nonretroactive changes in sentencing laws and other disproportionately long sentences.[11] This mechanism thus falls short in

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[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] Herrera v. Collins, 506 U.S. 390, 412, 415 (1993) (internal citations omitted).
[9] Barkow, *supra* note 2, at 837 n.208 (listing examples of commutations in mandatory minimum cases by Presidents Clinton, George W. Bush, and Obama).
[10] United States Sentencing Commission, Compassionate Release Data Report, tbl. 2 (May 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20220509-Compassionate-Release.pdf. The variation is reflected in circuit rates as well, with a high of 30.4% petitions granted in the First Circuit, compared to a low of 9.3% in the Fifth Circuit. Id. at tbl. 3.
[11] *Id.* at 63-64, n.17.

many jurisdictions around the country at offering corrections for excessively long sentences, and it never provides the relief a pardon does by removing the collateral consequences of convictions.

Pardons are 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 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.[12] 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.[13] 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.

Despite the urgent need and importance of clemency, considering these applications appears to be a low priority for the current administration. It inherited a backlog of 14,000 petitions, and instead of urgently addressing it, the backlog has only grown. There are now more than 18,000 people waiting for a response to their petitions, many of whom have been waiting for years. It is hard to overstate the level of mismanagement responsible for this unconscionable backlog. These people deserve answers to their petitions, yet the administration has done nothing to suggest it has any grasp of the urgency of the situation. Despite promises to remove this process from the Department of Justice because of the inherent conflict of interest of putting prosecutors in charge of clemency review,[14] nothing has been done to take the decision making out of DOJ.

Nor has the Administration done anything to improve the process in DOJ itself. It only recently appointed a full-time head of the Office of the Pardon Attorney in April of 2022 – more than a year into the Administration – and the office remains woefully understaffed. There are 9 attorney advisors in that office, in addition to the Pardon Attorney and Deputy Pardon Attorney.[15] That means every attorney would have to get through more than 1,600 petitions each to tackle the backlog. But even then, the process is not over. Every petition positively referred by the Office of the Pardon Attorney must still make its way through the Deputy Attorney General's Office and the White House Counsel's Office before a grant is given, and both of those offices have other priorities that they typically rank much higher than clemency.

Given the Administration's lack of effort to correct any aspect of the clemency process – either by removing it from DOJ, creating a task force or commission to deal with the backlog, or

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[12] Barkow, *supra* note 2, at 866.
[13] *Id.* at 866-867.
[14] Biden-Sanders Unity Task Force Recommendations 10, https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf ("we support the continued use of the President's clemency powers to secure the release of those serving unduly long sentences" and "also support establishing an independent clemency board to ensure an appropriate, effective process for using clemency, especially to address systemic racism and other priorities").
[15] Office of the Pardon Attorney, Organization Chart, https://www.justice.gov/pardon/office-pardon-attorney-organization-chart/chart.

buttressing the resources of the Office of the Pardon Attorney and prioritizing case processing in the Office of the Deputy Attorney General or the White House Counsel – it is not surprising that its record of clemency grants is woefully inadequate to the urgency of the need. President Biden has granted only 78 clemency petitions so far, 3 pardons and 75 commutations.

It is not just the number but the nature of the grants that show just how narrowly the Administration is viewing this power. Most of the grantees were already released by Attorney General William Barr to home confinement under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The political risk was thus already made by the previous Administration, and all the Biden grants did was ensure that those people, who were already leading law-abiding lives outside of prison, would not have return to prison when the pandemic is declared over. But it hard to see why only a few dozen people released under the CARES Act merited such relief when thousands have been released to home confinement.[16] These are people who have demonstrated their ability to safely live in their communities and who met the rigid criteria established under Attorney General Barr for their initial release.[17] There is no reason to grant a tiny percentage of their clemency petitions. The Administration has already indicated these cases are a priority,[18] yet even in this context it appears ill-equipped to process these cases. There is no reason not to give a categorical grant to all of them, and the individualized review is grinding the process to a standstill.

The Administration also noted that its recent grants included individuals who would be sentenced differently today under new drug laws that shortened sentences.[19] But, here, too, the Administration granted only a handful of these cases out of the thousands just like them. President Obama used this as one of the criteria in his clemency initiative, and he left behind almost 2,600 people who met all of his stated criteria.[20] Despite its good intentions and the relief it provided for many deserving people, clemency under the Obama Initiative operated more like a lottery than the equitable and efficient processing of applications that one should expect from the government.[21]

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[16] Federal Bureau of Prisons, Frequently Asked Questions Regarding Potential Inmate Home Confinement in Response to the COVID-19 Pandemic, https://www.bop.gov/coronavirus/faq.jsp (last visited March 6, 2022).
[17] Memorandum from the Attorney General to the Director of Bureau of Prisons, Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic, March 26, 2020, https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf (giving priority to those already in low and minimum security facilities, disallowing anyone with a sex offense from receiving relief, and depriortizing anyone with any BOP infraction in the past year). See also Memorandum from the Attorney General to the Director of Prisons, Increasing Use of Home Confinement at Institutions Most Affected by COVID-19, April 3, 2020, https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf (prioritizing release from specific institutions with high rates of infection but continuing to require detailed reentry plans before releasing individuals).
[18] Sam Stein, Biden Starts Clemency Process for Inmates Released Due to Covid Conditions, Politico, Sept. 13, 2021, https://www.politico.com/news/2021/09/13/biden-clemency-covid-inmates-511658.
[19] Carrie Johnson, Biden Takes First Actions on Clemency with 3 Pardons and 75 Commutations, NPR, April 26, 2002, https://www.npr.org/2022/04/26/1094755907/reentry-recidivism-biden-formerly-incarcerated-jobs-housing-healthcare-loans.
[20] United States Sentencing Commission, An Analysis of the Implementation of the 2014 Clemency Initiative 34, September 2017, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf ("[T]here were 2,595 offenders incarcerated when the Clemency Initiative was announced who appear to have met all the factors for clemency under the Initiative at the end of President Obama's term in office but who did not obtain relief.").
[21] Center on the Administration of Criminal Law, NYU School of Law, The Mercy Lottery: A Review of the Obama Administration's Clemency Initiative (2017),

Many of the people left behind by that initiative who met its criteria along with thousands of others are waiting in that backlog of 18,000 plus petitions.

If this were in any other area of government responsibility, there would be alarm bells ringing about the ineptitude and gross negligence of those in charge. Sadly, because clemency often fails to get the attention it deserves from the press or public officials, those calls have not come as loudly as they should. But make no mistake. The failure to take drastic measures to address the current backlog of clemency petitions is presidential malpractice. The Framers placed the pardon power in Article II next to the Commander in Chief powers for a reason. It is a critically important check on executive overreach and injustice, and yet we have a president who has yet to take this responsibility seriously despite the obvious signs the process has been broken for years and the now unconscionable backlog of petitions – each one representing a human being whose liberty is at stake.

II. Solutions

Because this a congressional hearing, I am going to discuss solutions to the failings with the clemency process that are within Congress's control. I have separately urged those in the Biden Administration – as I have previously done in the Trump and Obama Administrations – about the need to take executive action to reform clemency.[22] I will continue to encourage President Biden to take action on this issue that the Framers squarely placed within the president's responsibility. But in the absence of executive leadership on this issue, what can Congress do?

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. I will first discuss those options before turning to the incentives Congress can put in place to encourage improvements to the clemency process itself.

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https://www.law.nyu.edu/sites/default/files/upload_documents/The%20Mercy%20Lottery.Report%20on%20Obama%20Clemency%20Initiative.2018.pdf.

[22] Rachel E. Barkow & Mark Osler, *Biden Can't Let Trump's DOJ Legacy Stifle Reform*, The Hill, Nov. 17, 2021, https://thehill.com/opinion/criminal-justice/581795-biden-cant-let-trumps-doj-legacy-stifle-reform/; Rachel Barkow & Mark Osler, *Where Reform Goes to Die*, Inquest, July 26, 2021, https://inquest.org/doj-where-reform-goes-to-die/Rachel E. Barkow & Mark Osler, *We Know How to Fix the Clemency Process. So Why Don't We?*, N.Y. Times, July 13, 2021, https://www.nytimes.com/2021/07/13/opinion/biden-clemency-justice-dept.html; Rachel Barkow & Mark Osler, *14 Steps Biden's DOJ Can Take Now to Reform America's Criminal Legal System*, The Appeal, March 15, 2021, https://theappeal.org/the-lab/white-paper/14-steps-bidens-doj-can-take-now-to-reform-americas-criminal-legal-system/; Rachel E. Barkow & Mark Osler, *Trump Abused the Clemency Power. Will Biden Reform It?*, Wash Post, November 16, 2020; Rachel Barkow, Mark Holden, & Mark Osler, *The Clemency Process Is Broken. Trump Can Fix It*, The Atlantic, Jan. 15, 2019, https://www.theatlantic.com/ideas/archive/2019/01/the-first-step-act-isnt-enoughwe-need-clemency-reform/580300/; 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); 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); Rachel E. Barkow & Mark Osler, The President's Idle Executive Power: Pardoning, Wash. Post, Nov. 26, 2014, https://www.washingtonpost.com/opinions/the-presidents-idle-executive-power-pardoning/2014/11/26/3934ab1c-71aa-11e4-8808-afaa1e3a33ef_story.html.

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 clemency as the primary mechanism for reducing sentences."[23] 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.[24] 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. While clemency will still be needed even with these second look mechanisms, if they are appropriately broad, it should make such a need far less pronounced.

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

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[23] Barkow, *supra* note 2, at 814.
[24] *Id.* at 816 and n.81 (quoting witnesses who warned Congress of the need for commutations to fill the gap if parole were abolished).

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.[25] 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.

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.[26]

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.[27] 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.

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[25] 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.

[26] 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.

[27] RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 88-97 (2019).

B. Legislative Correctives to the Clemency Process Itself

The mechanisms suggested above would greatly improve federal sentencing and punishment, and I urge Congress to prioritize them. 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 Framers' vision of the separation of powers[28] and a means by which the president exercises oversight over enforcement decisions that go too far.[29]

That raises the question of what Congress can do to reform the clemency process itself. 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."[30] The Supreme Court has made clear that "[t]his power of the President is not subject to legislative control."[31] "[T]he President may exercise his discretion under the Reprieves and Pardons Clause for whatever reason he deems appropriate."[32] The power can be used on any federal criminal offense.[33] This broad authority limits opportunities for the legislature to dictate how the clemency authority is exercised. At the end of the day, decisions whether to grant or deny clemency are left to the president and the president alone. Congress cannot tell the president which cases to grant, deny, or prioritize, nor can Congress dictate to the president the process he must follow in deciding cases or whom he must consult in making decisions.

While Congress cannot dictate how a president should exercise the constitutional power of clemency, it can provide funding to create incentives for needed institutional changes. The president is currently using a process that relies on the Office of the Pardon Attorney, which is funded by Congress. If Congress wants to help the president address the record-setting backlog of petitions, it could increase dedicated funding for that office. Until Fiscal Year 2014, the Office of the Pardon Attorney had 11 authorized and funded staff positions.[34] That number was set in the middle of the 1990s and based on the receipt of an average of about 600 clemency petitions in total each year.[35] The Office of the Pardon Attorney received more than 45,000 petitions in the ten year period between fiscal year 2010 and 2020 for an average of 4,500 petitions per year, 7.5 times the rate of petitions when the staffing was set at 11 positions.[36] While the Office received

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[28] Barkow, *supra* note 2, at 831-832.
[29] *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.").
[30] United States v. Klein, 80 U.S. 128, 147 (1871).
[31] *See Ex parte* Garland, 71 U.S. 333, 380 (1866)
[32] Hoffa v. Saxbe, 378 F. Supp. 1221, 1225 (D.D.C. 1974).
[33] *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).
[34] Office of the Pardon Attorney, FY 2023 President's Budget Submission 4, https://www.justice.gov/file/1492246/download.
[35] *Id.*
[36] *Id.* at 3-4.

authorization to increase staffing to 20 positions in FY2015, and then 80 in FY2022, the continuing resolution means none of the funding for those positions has been received by the Office. Providing this Office with a dedicated funding stream or funded positions, at least to address the backlog, could help address the urgent crisis it faces.

To be sure, that will not address all the veto points responsible for the backlog. A big reason for the backlog is the failure of the Office of the Deputy Attorney General and the White House Counsel's Office to act. For example, at the beginning of FY2020, there were 13,625 pending petitions, but only 5,004 of them, or 37%, were in the Office of the Pardon Attorney.[37] The other 63% were awaiting decisions by the White House Counsel or Office of the Deputy Attorney General. One reason for the current backlog is the Administration is following a policy of sending all of those cases left unresolved by the Trump administration back to the Office of the Pardon Attorney to rework, which meant 8,000 cases started from scratch in the Office of the Pardon Attorney because the Trump Administration failed to act on the recommendations that already existed from the Office of the Pardon Attorney and the Biden Administration refused to consider those petitions based on the existing write-up of the Pardon Attorney. One is left to wonder why the Administration could not have at least acted on the recommendations for a grant from the Office of the Pardon Attorney given that the same substantive standards have remained in place across Administrations. Nevertheless, the policy has been to start over completely, so some of the cases in the backlog have been reworked multiple times in the Pardon Attorney's Office because of this policy.[38] This duplication of effort all stems from the failure of the Deputy Attorney General or the White House Counsel's Office to act expeditiously on the recommendations. This suggests that increased funding for the Office of the Pardon Attorney would hardly be sufficient.

A better approach would be to fund a separate advisory board to process the backlog. 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.[39] Congress could instead provide funding for an advisory board that exists outside the Department of Justice to provide advice to the President on clemency.[40] 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 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 the proposal does not have to mirror the one in the Fair and Independent Experts in Clemency Act (FIX Clemency Act), that is one option for making this change. Again, the president may still wish to funnel these recommendations through the Department of Justice or the White House Counsel's Office. But he would not have to, and having

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[37] *Id.* at 7.
[38] *Id.* at 7-8 (noting cases have been reworked 1-5 times).
[39] 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).
[40] For more details on this model, see Barkow & Osler, *supra* note 13, at 461-463; *see also* Barkow & Osler, *Restructuring Clemency*, *supra* note 20, at 19-25.

this separate process staffed and functioning could create an incentive for him to give this new model a try – particularly when he agreed as part of the Biden-Sanders Unity Task Force to do just that.

Taking clemency out of the Department of Justice would address the bureaucratic duplication that is responsible for much of the holdup in petition processing. It would also address a fundamental conflict of interest in having the same agency that prosecuted all these cases review them for clemency. 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."[41] 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."[42] 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.[43] 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 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.[44]

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.[45]

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[41] Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1194 (2010).
[42] *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 May 9, 2022).
[43] Barkow & Osler, *Designed to Fail*, *supra* note 20, at 431.
[44] *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).
[45] Barkow & Osler, *Designed to Fail*, *supra* note 20, at 431.

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."[46] 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.[47]

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.[48] 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[49] and are thus part of a shared culture where they are desensitized to the long sentences federal prosecutors hand out on a daily basis.[50] 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 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."[51] In light of this view, there is a "strong presumption" at DOJ that "favorable recommendations should be kept to an absolute minimum."[52]

One need look no further than the output of DOJ's process to see the bias at play. The grant rate for commutations and pardons across presidencies, whether during a Republican and Democratic administration, has been shockingly low in recent years and compared to the rates for most of the nation's history. President Trump granted 2% of the petitions he received, President Obama granted 5%, President George W. Bush granted 2%, President Clinton granted 6%,

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[46] *Standards for Consideration of Clemency Petitioners*, *supra* note 12, § 9-140.113.
[47] 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.*
[48] Barkow & Osler, *Designed to Fail*, *supra* note 20, at 398-400.
[49] Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1165 (2010); Love, *supra* note 39, at 1194 n.105.
[50] Barkow, *supra* note 2, at 825.
[51] 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.
[52] *Id.*

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.[53] This contrasts with President Carter's grant rate of 21%, President Ford's rate of 27%, and President Nixon's rate of 36%.[54] 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.[55]

A clemency advisory board could help to overcome the conflict of interest and bureaucratic logjam of keeping clemency within the Department of Justice, while also avoiding a process that bypasses DOJ and favors cronies and the politically connected, as was evident in the Trump Administration. Setting up a permanent board is the preferred option, but a second-best solution would be to create a temporary board to at least deal with the current historic backlog of cases. President Ford made good use of such a temporary board to address the large number of cases associated with evasion of the Vietnam Draft, and that is a good model to address the current crisis.[56]

Short of its power of the purse, there is little else that Congress can do to oversee clemency. It can and should hold hearings like the one today, and it should demand that the Department explain why there has been no progress on the backlog and where the petitions currently are in the process. It should insist that the Administration articulate how it plans to tackle the backlog. While the Administration could refuse to answer, there will hopefully be politically costs to its unwillingness to live up to the promises it made on reforming clemency and making criminal justice reform a top priority.

III. 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.

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[53] 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.
[54] Barkow, *supra* note 2, at 816-817.
[55] W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 97-99 (1941).
[56] Mark Osler, Memo to the President: Two Steps to Fix the Clemency Crisis, 16 U. St. Thomas L.J. 329, 340-342 (2020).

Ms. JACKSON LEE. I thank the gentlelady for her testimony.

Now, I recognize Prosecuting Attorney Murray, who is recognized for five minutes.

STATEMENT OF THE HON. MORRIS MURRAY

Mr. MURRAY. Thank you.

Good morning, Chair Jackson Lee, Ranking Member Biggs, and Members of the Judiciary Committee.

My focus today is really I want to take a pause, or I hope this Committee will take a pause, and think about public safety and the impact on local communities.

My name is Morris Murray. I am the elected Prosecuting Attorney for Defiance County, Ohio. I, first, served as an Assistant Prosecutor back in 1985 before being elected to my current position in 2009. I am past member of the National District Attorneys Association Board, and I am also a past President of the Ohio Prosecuting Attorneys Association.

I am also proud to add that, prior to beginning my law career, I served as police officer for several years. I think that it is important that I compelled to note that today's testimony is being on the heels of National Police Week, a time to recognize and salute our entire law enforcement community.

I would like to echo and support the comments of my colleague, former Prosecutor Hurst. During my career—and I am coming from the perspective of a local front-line prosecutor—I prosecuted over 5,000 felony matters, all levels of severity. I worked extensively for 30 years with a multi-jurisdictional narcotics task force. We are situated here in northwest Ohio, and although our community is relatively small, we are in a situation where we often are the crossroads for drug trafficking and other serious offenses coming through and around our community from larger metropolitan areas.

This is a dangerous—and I am sorry to use the old cliche—but this is a slippery slope. To the extent we allow this slope to continue in this direction, we are going to be compromising public safety.

As this Committee exercises its oversight role with respect to clemency and the Pardon Attorney, I am compelled to express grave concern regarding the likelihood that increasing the number of offenders being released, or anticipated to be released, we really need to take a serious and really nonpolitical, apolitical look at the impact on public safety, on State and local law enforcement, and the available resources.

Many of the offenders being released have committed very serious crimes. I certainly wouldn't dispute that there are some wonderful success stories that have been referred to in some of the earlier testimony, and anecdotally, those are there. That is wonderful.

The reality is there are already and likely to be substantially many, many more stories that are more tragic. The reality is that offenders involved in this level of serious drug offenses have been connected to the drug culture for a long time. While we can talk about elderly prisoners or ill prisoners, the reality is we are going to see many, many 20-, 30-, 40-year-olds that are more likely to be granted clemency if we loosen up this process.

This policy is coming at a time when we are seeing a major spike in serious crimes, violent crimes, increasing and staggering numbers of drug-related deaths, coupled with an effort by some to redirect law enforcement resources away from what our first priority should be, and that is public safety.

There is a common misconception that offenders convicted of Federal drug laws, or any drug laws, for that matter, are nonviolent offenders. The reality is this culture lends itself to violence. The business model itself is full of violence. Use of violence and intimidation is part of the business.

We have a widespread distribution system throughout this country that is putting large amounts of drugs on the streets of all kinds—dangerous and deadly drugs. Even though small amounts may show up in communities like mine, they are coming through this distribution process.

Offenders released that have been involved, deeply involved, in this process, commonsense would suggest they are very likely to get back involved. Money drives this. Lots of cultural issues come into play.

You are shifting the burden to local law enforcement and State authorities. Crimes will be enforced; drug laws will be enforced at the State level. If you shift what the Federal enforcement system can do in the holding of serious offenders accountable, you are going to shift that burden to local communities.

I appreciate the opportunity to speak today. I come from a perspective of a front-line prosecutor and public safety is our number one priority.

Ms. JACKSON LEE. The gentleman's time has expired.

Mr. MURRAY. Thank you.

[The statement of Mr. Murray follows:]

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Good morning, Chairwoman Jackson Lee, Ranking Member Biggs, and Members of the Judiciary Committee:

My name is Morris Murray, and I am the Elected Prosecuting Attorney for Defiance County, Ohio. I first served as an Assistant Prosecutor beginning in 1985 before being elected to my current position which I have held now since 2009. I am a past member of the National District Attorneys Association (NDAA) Board and a past President of the Ohio Prosecuting Attorneys Association. I am also proud to add, that prior to beginning my Law Career, I served as a Police Officer for several years and I am compelled to note that my testimony today is being submitted on the heels of National Police Week. A time to recognize and salute our entire Law Enforcement Community.

During my career, I have prosecuted over 5000 felony matters at all levels of severity. Although my Jurisdiction is small, we are situated in Northwest Ohio centrally positioned within less than two hours from several larger metropolitan areas, including Detroit, Toledo and Ft Wayne. I mention this because we commonly find ourselves as a crossroad for serious criminal activity, particularly illegal drug trafficking.

As this Committee exercises its oversight role with respect to Clemency and the Pardon Attorney, I am compelled to express grave concern regarding the increasing number of serious offenders being released or anticipated to be released. We must take a serious and apolitical look at the impact on public safety, state and local law enforcement and available resources. Many of the offenders being released have committed very serious drug crimes. And the likelihood, if this policy continues, is that dangerous individuals will be put on the streets of our local communities. This policy is coming at a time when we are seeing a major spike in serious crimes, increasing and staggering numbers of drug related deaths, coupled with an effort by some to redirect law enforcement resources away from our safety-first commitment.

There is a common misconception that offenders convicted of federal drug crimes or any drug crimes for that matter, should be considered "non-violent" offenders; that they are just being imprisoned based on possession of controlled substances. But that belies reality about the vast majority of offenders convicted of drug crimes involving large quantities of substance, such as

hundreds of grams of methamphetamine, kilos of heroin or cocaine and large amounts of fentanyl. Yes, these are the types of offenders being released. Records would support and common sense indicates that many of these folks came from a deep involvement and history in the drug trafficking culture cultivated by criminal organizations. Offenders in this category do not have access to these large quantities without being very involved or very connected to the industry. Please realize that the trafficking culture I'm referring to is one where the business model commonly relies on violence and intimidation within its own ranks and compromises the safety of everyone involved. Common sense also leads to a reasonable inference, that many of these offenders will return to that culture and add to the growing emergency that has resulted from these dangerous drugs being distributed on the streets in our cities and towns, both big and small. Prosecutors understand that many returning citizens can also take actionable steps to end the cycle of crime and violence, but any clemency process should transparently lay out how each individual plans to accomplish this goal.

You would perhaps be shocked to see the volume, even in small jurisdictions like mine, of drug related matters being dealt with by Law Enforcement and Prosecutors every day. While many of these cases involve smaller amounts of drugs, like meth, heroin or fentanyl, we cannot forget where these small amounts are coming from every day. The truth is, as you surely know, there is a wide sweeping distribution process all over the country. Releasing large numbers of serious federal drug offenders will undoubtedly add to this enterprise.

It concerns me that prosecutors have little or no meaningful input on decisions allowing release. Basing a prisoner's substantial early release simply on the name of the crime or his or her participation in prison programming, overlooks reality and common sense. There is value in the certainty of punishment and the current policy and direction of this new version "clemency initiative" disregards the importance of that certainty. Even more troublesome is that by taking a less aggressive approach at the Federal level, you will be shifting the burden to state and local criminal justice authorities. That outcome is simply inevitable.

My comments are based on personal observations and experience. Many of the thousands of local DA's and prosecutors across the country are similarly situated. We work where the rubber meets the road. Not in classrooms, research offices or think tanks. We see the devastating impact the illegal drug trade is having on our local communities and on individual victims. Releasing thousands of serious offenders, particularly in the midst of violent crime trends and overdose deaths, is perhaps well meaning but clearly misguided policy.

Ms. JACKSON LEE. The gentleman's time has expired. Thank you. I recognize Ms. Taifa for five minutes.

STATEMENT OF NKECHI TAIFA

Ms. TAIFA. Thank you very much, Congresswoman Sheila Jackson Lee, Chair Nadler, and Members of this Committee.

Thank you for convening this important hearing. You have my comprehensive written testimony. So, I will spend my five minutes focusing on two issues.

First, the need to consider clemency for categories of people in general, shining the spotlight on that of, quote, "old law elderly prisoners," unquote, and second, the issue of posthumous pardons.

If mass incarceration is ever to be abated, it is critical that intentional steps be implemented that expand the number of people eligible for relief. Individual commutations are not enough to tackle the enormity of this challenge.

Thus, in addition to clemency petitions considered on a case-by-case basis, a categorical approach to releasing groups of these deserving candidates for clemency must be seriously considered.

At the beginning of this Administration, the Justice Roundtable issued a report, "Transformative Justice," and in it, we outlined some categories that commutation could include such as those who had unsuccessfully petitioned for compassionate release; elderly prisoners, those serving sentences that have since been deemed unjust, but not made retroactive; those serving excessively lengthy prison sentences as a result of exercising their constitutional right to go to trial, euphemistically known as the "trial penalty."

We stress that the sentences of people convicted of marijuana offenses must be commuted. Indeed, there is a robust campaign, led by Weldon Angelos, to that effect.

We added that those who are COINTELPRO era political prisoners who remain federally incarcerated should also be granted clemency, such as Dr. Mutulu Shakur, Veronza Bowers, and Leonard Peltier.

The report stress that, regardless of whether an individual fits into any of the categories suggested above, it is critical that the emphasis be on who the person is today and any post-conviction achievements they have attained, as opposed to their conviction of record.

The category I wish to highlight for clemency at this time is that of old law Federal prisoners who were sentenced for offenses committed prior to November 1987, when Federal parole was abolished in the U.S. before the Sentencing Guidelines went into effect. Grouped together, these people are referred to as "old law prisoners," and they are among the very oldest and longest incarcerated in the Federal system. Many are in their late sixties, seventies, and even eighties. Many have underlying medical conditions. They pose no threat to public safety. Presidential clemency is their only recourse and their last resort.

The U.S. Parole Commission engages in routine parole denials, and because of exclusion from the First Step Act, no one sentenced under the old law is eligible to turn to courts for compassionate release, unlike every other Federal prisoner.

Creating a rebuttable presumption for release for this category of incarcerated people will correct both the inaction of the U.S. Parole Commission, as well as congressional oversight, in omitting old law prisoners from First Step reforms.

The second issue I would like to briefly highlight is that of the posthumous pardon. While there is no question that pardons are most beneficial to those who are living, there are times when the granting of exceptional posthumous petitions are important and necessary to show the discredited values of the past are no longer the values of the present.

There is precedent across parties line for posthumous pardons granted by the President. The Ford, Bush, Clinton, and Trump Administrations have each issued posthumous pardons, which I outlined in my written testimony.

The request for a posthumous pardon for early 20th century civil rights leader Marcus Garvey has been a multi-decade effort to right a wrong committed by the U.S. Government nearly 100 years ago, and it has the support of millions. President Calvin Coolidge recognized the widespread abuses in this case in 1927, and he commuted his sentence. Despite this commutation, his name is still tarnished by the stigma of his conviction.

His son, Dr. Garvey testified before this Judiciary Committee in 1987. Congressman Rangel, Congresswoman Rebecca Clarke, and others, have issued resolutions highlighting Garvey's accomplishments as a human rights leader and calling for his exoneration.

So, in conclusion, the President should use all the tools in the toolbox with respect to clemency.

We thank this Committee for examining all these issues.

[The statement of Ms. Taifa follows:]

TESTIMONY OF

NKECHI TAIFA, ESQ
President
The Taifa Group, LLC
&
Convener Emeritus
Justice Roundtable

OVERSIGHT HEARING on

CLEMENCY AND THE OFFICE OF THE PARDON ATTORNEY

before the

HOUSE JUDICIARY COMMITTEE

Subcommittee on Crime, Terrorism, and Homeland Security
Congresswoman Sheila Jackson Lee, Chair

May 19, 2022

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

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

PRECEDENTS FOR USE OF CLEMENCY TO RECTIFY INJUSTICES AND HEAL SOCIETY

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

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

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

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

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

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

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

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

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

CATEGORICAL CLEMENCIES MUST BE SERIOUSLY CONSIDERED

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

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

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

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

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

should also be granted clemency, such as Dr. Mutulu Shakur, Veronza Bowers and Leonard Peltier.

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

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

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

CORRECTIVE CLEMENCY FOR OLD LAW FEDERAL PRISONERS

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

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

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

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

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

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

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

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

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

A CASE FOR POSTHUMOUS PARDON – MARCUS GARVEY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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Ms. JACKSON LEE. I thank you.

Now, Ms. James, you are recognized for five minutes.

STATEMENT OF ANDREA JAMES

Ms. JAMES. Good morning, and thank you, Madam Chair, and Mr. Ranking Member. The National Council for Incarcerated and Formerly Incarcerated Women and Girls is the only national advocacy organization founded and led by incarcerated and formerly incarcerated women and girls.

Organizing begin in a Federal prison yard with a group of women, including myself, who wanted policymakers instituting criminal justice reform to hear the voices of formerly incarcerated people, those who understand the harm the current system inflicts and have the expertise to create an alternative system that recognizes each person's humanity.

As formerly incarcerated women, we believe a prison will never be the place to address the economic and psychological reasons women end up in prison. Prison most often causes further social and economic harm and does not increase public safety.

The prison experience increases trauma in women and, if they are mothers, to the children they are separated from. It deepens poverty in the individual lives of incarcerated people and the overall economic stability of their communities.

Although our long-term goal is to end the incarceration of women and girls, we also working to address conditions of confinement for those living inside of prisons. We support women seeking compassionate release and work to raise awareness of the horrific conditions in our prisons and jails.

We support women seeking clemency. In the past several decades, clemency has become politicized. It is the notion that clemency is a gift is wrong. Clemency is an executive power that is enshrined in the Constitution. Justice Rehnquist called it the fail-safe of our legal system. It has been the foundation of justice since ancient times.

The idea that granting clemency is being soft on crime is wrong. Clemency is based on an analysis of who the person is today, not what they did years or decades ago. People who have educated themselves, aged out of crime, are ill or elderly do not need to be in prison. Their incarceration is not punitive, it is vindictive.

Clemency is empathy in action. Anyone who claims to empathize with incarcerated people must support clemency for those who made decisions in difficult times and have grown and left their mistakes behind.

Average Americans understand this. Sixty-two percent of voters recognize that reducing prison populations would strengthen communities by reuniting families and saving taxpayer dollars that could be reinvested in communities.

Clemency rebuilds families, fixing the harm caused by the Adoption and Safe Families Act. Two-thirds of people in BOP custody have minor children. That means 65,600 mothers are in Federal prison unable to raise their children. Put another way, that is 1.7 million children whose mothers are absent due to incarceration.

The situation is, however, even more heartbreaking than that. Every tenth mother will never see their children again, even after

they are released from prison. Approximately 11 percent of incarcerated women cannot leave their children with family members, and thus end up in the foster care system.

The Adoption and Safe Families Act of 1997 limits the amount of time any child may remain in foster care. Although creating a stable environment for children is desirable, ASFA requires no States to terminate—requires States to terminate parental rights and place children in an adopted family. This destroys the family of an incarcerated mother who could not place her children with a spouse or family member.

Clemency also rebuilds families, fixing the harm caused by conspiracy laws. Conspiracy prosecutions are a major weapon of the war on drugs that disproportionately harm minor players, mainly women and people of color.

The horror caused by conspiracy laws can be best illustrated by the tragedy of Michelle West, who is currently serving a two life plus 50-year sentence for a murder.

My time is short. I do want to say that conspiracy laws are a toxic remnant of the failed war on drugs and must be reformed. The only way to fix this injustice is to reform conspiracy laws to bring them in compliance with basic principles of due process.

Lastly, I do want to point out that there are several women who have come home who were granted clemency who have done a remarkable contribution to their communities. One of them is here with us today, Danielle Metz, who is our Director of Clemency at the National Council.

Dani was sentenced to serve three life sentences plus 20 years in the Federal system. Her sentence was commuted, and she is a remarkable contribution and example of what happens when we grant women clemency.

Thank you.

[The statement of Ms. James follows:]

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

May 19, 2022

I. Introduction

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

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

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

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

[1] https://justiceroundtable.org/dignity-act-for-incarcerated-women/
[2] Human Impact Partners, Keeping Kids and Parents Together: A Healthier Approach to Sentencing in MA, TN, LA, https://humanimpact.org/hipprojects/primary-caretakers/ (last visited May 7, 2019).
[3] https://www.nationalcouncil.us/reimagining-communities/

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

II. A Note on Terminology

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

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

III. Understanding Clemency

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

a. The notion that clemency is a "gift" is wrong.

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

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

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[4] Catherine Sevcenko, Fixing the Support of Justice, 34 *Federal Sentencing Reporter*, 239–244 (Apr. 2022).
[5] Federalist Paper No. 74.

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

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

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

c. Clemency is the embodiment of Empathy

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

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

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

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

a. Women who receive clemency do amazing things:

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

[6] 18 U.S.C. § 3553 ("The court shall impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection.") (emphasis added).
[7] ACLU Smart Justice, Embracing Clemency at 4 (June 23, 2021), https://www.aclu.org/report/aclus-redemption-campaign-embracing-clemency-report

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[8] Press Release, Bureau of Justice Statistics, *Persons at or Below the Federal Poverty Level Had Highest Rates Of Violent Victimization For The Period 2008–12* (Nov. 18, 2014) https://www.bjs.gov/content/pub/press/hpnvv0812pr.cfm; Corina Graif, Andrew S. Gladfelter, Stephen A. Matthews, *Urban Poverty and Neighborhood Effects on Crime: Incorporating Spatial and Network Perspectives*, 8 Sociol Compass 1140–1155 (Sept. 2014), https://onlinelibrary.wiley.com/doi/abs/10.1111/soc4.12199

[9] Lauren E. Glaze & Laura M. Maruschak, *Bureau of Justice Statistics, Dep't of Justice, Special Report: Parents In Prison And Their Minor Children*, at 1-2 (2008), http://bjs.ojp.usdoj.gov/conten1/pub/pdfpptmc.pdf

raise their children.[10] Put another way, that is 1.7 million children[11] whose absent mothers cannot read them a bedtime story or tuck them in at night, or work with them toward a better future. The situation is, however, even more heart-breaking than that. Every tenth mother will *never* see their children again, even after they are released from prison.

Approximately 11% of incarcerated women cannot leave their children with family members and thus they end up in the foster care system.[12] The Adoption and Safe Families Act (ASFA) of 1997[13] limits the amount of time a child may remain in foster care. Although creating a stable environment for children is desirable, ASFA requires states to terminate parental rights and place children in an adoptive family if the parents have been gone for 15 of the previous 22 months.[14] After parental rights are terminated, parents cannot have any contact with their children nor receive news about them through third parties. Thus just over a year in a federal prison can destroy the family of an incarcerated mother who could not place her children with a spouse or family member.

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

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

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

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (1997).
[14] 42 U.S.C. § 675(5)(E).
[15] 21 U.S.C. § 846.
[16] ACLU, *Caught in the Net: The Impact of the Drug Policies on Women and Families* (2011), https://www.aclu.org/files/images/asset_upload_file431_23513.pdf
[17] *Id.* at 31-32; Charles Doyle, Cong. Research. Serv., R41223, *Federal Conspiracy Law: A Brief Overview*, 4-5 (2016).
[18] *See* 21 U.S.C. §§ 846, 963.
[19] *Id.* at 35-36.

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

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

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

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

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

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

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

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

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

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

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

V. Conditions of Confinement

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

a. Carswell

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

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

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

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

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

- "[COVID-19] Testing is sporadic and random, and recovery comes without even having a retest. If an inmate test positive for the virus they are moved out of the unit for 10 days then they are placed back into that same unit with inmates that are still negative."[25]

- "The burn on my stomach is now 9 days old and it is infected. Other ladies (not medical staff) are trying to help me keep it clean, but it hurts really bad. It makes me nauseous, so I sleep most of my day and night. Medical has not given me antibiotics for the infection and med surge refuse to see me even though the officer called them telling them it is infected."

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

- "I also kept wrappers of food we got on Friday and today. Best by date: 1/31/21!!! [the previous year]. Bologna, cheese, bread etc. I am having people sign it and date it."[26]

- "[T]hey are moving us to an infected unit with sick people...I'm not happy about it."[27]

- "Just after the town hall I spoke to one of the women [from BOP Central] about not having had my teeth cleaned because we haven't had a dental hygienist in over two years and only one dentist. I showed her my teeth and told her that I came here with

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[23] District of Columbia Corrections Information Council, *FMC Carswell Federal Medical Facility Inspection Report* (July 6, 2018), https://cic.dc.gov/sites/default/files/dc/sites/cic/publication/attachments/FMC%20Carswel%20Inspection%20Report%20and%20BOP%20Response%207.6.18.pdf.

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

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

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

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

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

This abuse occurs throughout the system:

- **FCI Aliceville**: "[O]n Thursday evening on the menu was chef salad. Usually, it is topped with turkey meat, chopped rather fine.... that time however there was RAW turkey on the salad!! literally slimy, pink, raw meat!! this lady had a huge piece of it took it to the [lieutenant] on duty...all she said was she had no idea because she does not work in food service!! [S]o the girl went to one of the staffers and was told that the meat was "cold cuts" .... well, technically he wasn't lying...it was cut cold... but come on now, RAW meat!! do they not know how sick one can get from eating raw meat??? especially poultry"[29]

- **FPC Alderson**: A few new recreation classes were offered to supplement our "fresh air time" which is 4 hours per week. Then after attending one class, we were informed that the class was changed to one of the 4 hour per week designated times. This is due to staff shortages. To add insult to injury a bulletin was posted about the health dangers of sitting prolonged periods. The dangers including heart attacks, certain cancers, obesity, etc."[30]

- **FPC Greenville**: [T]hese days is in worse conditions with no hot water. Many of us are showering in cold water. Some ladies running to the gym where there's 1 quarantine shower and it's just a mess here. Everyone is pretty much not wearing mask anymore. Everything is up and running like there's no COVID."[31]

VI. FIX ACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms. JACKSON LEE. The gentlelady's time has expired. I now recognize Mr. Hernandez for five minutes. Mr. Hernandez.

STATEMENT OF JASON HERNANDEZ

Mr. HERNANDEZ. Good morning. Members of the Congressional Subcommittee, I'm very deeply sorry I cannot be present today at this very important legislation addressing clemency reform. Thank you for allowing me this opportunity to speak on my behalf and those that are incarcerated.

My name is Jason Hernandez, and I would like to briefly tell you who I was. I was a drug dealer, which I became at the age of 15. I was a defendant when at the age of 21, I was indicted by the Federal government for distributing crack cocaine and sentenced to life without parole plus an additional term of 320 years.

I was a prisoner. In prison, I was a jailhouse attorney. Thirteen years into my sentence, I would write the most important letter and petition of my life. This letter and petition I sent to President Barack Obama on September 21, 2011, asking him to commute my sentence of life without parole.

On December 19, 2013, President Obama answered my prayers by commuting my sentence to 20 years. I would find out in 2018 from a *New York Times* reporter that President Obama received my letter and he read it. President Obama would go on to give clemency to 1,715 people, five of the 500 were serving life without parole.

President Obama's show of good grace, mercy, and willingness to exercise his power to pardon so abundantly has been done by other Presidents of the United States, typically in relationship to a war. President Abraham Lincoln would issue 64 pardons to Confederate soldiers for war-related offenses.

President Andrew Johnson issued sweeping pardons to thousands of former Confederate officials and soldiers after the Civil War. President Jimmy Carter granted unconditional pardons to hundreds of thousands of men who evaded the draft during the Vietnam War.

In 1971, the United States began a war which was called the war on drugs. Since the commencement of the war on drugs, millions of people have been arrested, charged, indicted, and sent to prison, a majority of which were Latinos or African Americans.

I have stated above how the Presidents of the United States have exercised the power to pardon people and in some committed an Act related to war initiated by the United States. Some of these wars were deemed controversial, some deemed necessary. The war on drugs: Controversial, necessary? Could be arguments to support both sides.

What we do know is that it was a war that was not thought out, misguided, ill-advised, racially biased, and has hurt Black and Brown communities more than it has helped them. At a time when our communities needed sidewalks, roads, and better schools, we got more prisons. At a time when we needed mentors and teachers, we got more police.

In acknowledging the war on drugs is a failure and should come to an end, one of the olive branches that should be extended is clemency. Former Supreme Court Justice Anthony Kennedy stated

to the American Bar Association on 2003, a people confident in its laws and institutions should not be ashamed of mercy.

I hope more lawyers involved in the pardon process will say, Mr. President, this young man has served—hasn't served his full sentence, but he has served long enough. Give him what only you can give him, give him another chance. Give him a priceless gift. Give him liberty. For still, the prisoner is a person, still he or she is part of the family of humankind.

Earlier I stated who I was. Now, since my release from prison in 2015, let me tell you who I am. I am a criminal justice reformer and the founder of Crack Open the Door and Get Clemency Now. I have contributed to nearly a dozen individuals being released early from prison, nine of which were serving life without parole.

I am an author who has written a book called Clemency Now, Get Clemency Now, which teaches people incarcerated and their families who to put together powerful clemency petitions. I am the 2017 Black Chamber of Commerce Trailblazer and Community Civic Leader of the Year.

I am the 2018 McKinney Volunteer of the Year. I am the 2021 Leadership McKinney Alumnus of the Year. I'm also the 2022 NACDL's Champion of Justice of the Year.

I am also the founder and Executive Director of At Last, which is a leadership program for Latino high school students which teaches them how to become leaders in their school and in their community.

I was once Inmate No. 07031078, and now through clemency and only clemency, I am once again Jason Hernandez. I hope and pray Congresswoman Ayanna Pressley's historic legislation to transform our nation's broken clemency system and address the growing problems of mass incarceration continues with the necessary steps so that it becomes law.

There are more prisoners like me in there. There are more Kemba Smith Pradias in there, there are more Bill Underwoods, and there are more Sharanda Joneses in there. With this legislation, we can free them all.

Thank you for this time, and God bless you all, and God bless this great country.

[The statement of Mr. Hernandez follows:]

Members of the Congressional Subcommittee. I'm deeply sorry I cannot be present today on this very important topic of legislation addressing clemency reform. I thank you for allowing me this opportunity.

My name is Jason Hernandez and I would like to briefly tell you who I was.

I was born and raised in Mckinney Texas, a city outside of Dallas, Texas. I got involved in drug dealing at a very young age of 15. I was a drug dealer. At the age of 21, I was indicted by the federal government for distributing crack cocaine and sentenced to life without parole plus 20 years, 20 years, 20 years, 20 years, 40 years, 40 years, 40 years, 40 years, and 80 years. My supplier was also charged and sentenced for giving me the powder cocaine I converted to crack cocaine. He received 12 years imprisonment.

I was a prisoner. In prison I was a jailhouse attorney. Which i would like to think i was good at but not good enough to gain my release. Nevertheless, it would help me create the most important letter and petition of my life: A letter and Petition I sent to President Barack Obama on September 21, 2011, asking him to reduce my life without parole sentence

On December 19, 2013, President Obama answered my prayers by commuting my sentence to 20 years. Along with me there were 7 other individuals who also received clemency: All african american. All crack cocaine offenders. 5 who were serving life without parole and 2 sentenced to 30 years. I would find out in 2018 from a New York Times reporter that President Obama received and read the letter I sent to him.

President Obama would go on to give clemency to 1,715 people. 500 who were serving life without parole. An action which would be extraordinary on so many levels. Not only for those who received it but also their families and communities.

President Obama's show of good grace and willingness to exercise his power to pardon so abundantly has also been done by other Presidents of the United States. Typically in relation to war.

President John Adams pardoned soldiers who had deserted during the Revolutionary War.

President Abraham Lincoln would issue 64 pardons to confederate soldiers for war-related offenses. They were part of his Proclamation of Amnesty and Reconstruction which was his blueprint for the reintegration of the South into Union.

President Andrew Johnson issued sweeping pardons to thousands of former Confederate officials and soldiers after the Civil War.

President Jimmy Carter granted an unconditional pardon to hundreds of thousands of men who evaded the draft during the Vietnam War.

In 1971 The Unites United States began another war: It was called a War On Drugs.; In any war there is an enemy, and in this instance the enemy was American Citizens. Since the commencement of the War On Drugs, millions of people have been arrested, charged, indicted, and sent to prison. A majority of which were Latinos or African-Americans who make up one-third of the United States population but two-thirds of those imprisoned.

It took over 40 years for members of congress and the population to admit this war on drugs has done more harm than good to our citizens and to our nation, most of which were African-American and Latino communities.

One of the Founding Fathers of America, Alexander Hamilton, saw the value of investing in the president the ability to grant reprieves and pardons to groups during periods of national crisis. He stated *"In seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or*

rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall."

I have stated above how Presidents of The United State have exercised the power to pardon people who in some way committed an act related to a War initiated by the United States. Some of these wars were deemed controversial, some deemed necessary--all were periods of a national crisis.

The War On Drugs: Controversial? Necessary? Could be arguments to support both sides. What we do know is that it was a war that was not thought out, misguided, ill-advised, racially biased, and has hurt black and brown communities more than it has helped them. So much so that what the War on Drugs has done to those communities had it done the same to other communities of non color across the United States, it would be deemed a national crisis.

At a time when our communities needed sidewalks, roads, and better schools we got more prisons. At a time when we needed more mentors and teachers, we got more police instead.

Recent Presidents seem to have acknowledged this reality of the War On Drugs and have used clemency not only as an act of mercy but also as an act of correcting a wrong committed on behalf of our nation.

One method of reducing mass incarceration is by implementing mass clemency: which can be achieved by a stroke of the President's pen. It was the stroke of a pen that created mass incarceration, and it is by the stroke of the President's pen which can undue mass incarceration

In acknowledging the War On Drugs was a failure and should come to an end, one of the olive branches that can be extended to heal those communities that were mostly impacted can and should be clemency.

Former Supreme Court Justice Kennedy, in a 2003 speech to the American Bar Association, illustrated the pardon power as one of being extraordinary unique, and a necessity in ensuring justice is administered and adjusted over time;

A people confident in its laws and institutions should not be ashamed of mercy." I hope more lawyers involved in the pardon process will say to Chief Executives, ***"Mr. President,"*** *or "Your Excellency, the Governor, this young man has not served his full sentence, but he has served long enough.* ***Give him what only you can give him. Give him another chance. Give him a priceless gift. Give him Liberty."***

If the President of The United States, the most powerful man in the world, were to implement mass clemency it would send a message to others incarcerated as well as to those who are free that people can change and when they do mercy and forgiveness should be bestowed upon them. **For *"still, the prisoner is a person; still he or she is part of the family of humankind."*** Quoting Justice Kennedy, ABA Speech 2003.

Early I stated who I was. Now Let me tell you who I am.

After nearly 18 years imprisonment I was released on August 11th, 2015 at the age of 39.

I am a criminal justice reformer and the founder of Crack Open The Door and Get Clemency now. I have been deemed an expert on clemency who has taught this subject at colleges and I have contributed to nearly a dozen individuals obtaining their freedom--9 of which were serving life without parole.

I am an Author who has written a book called Get Clemency Now: which teaches people incarcerated and their families how to put together powerful clemency petitions without the help of an attorney. Which is viewable and downloadable for free at gtetclemencynow.org.

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I am the 2018 Mckinney's Kim Hoffman Volunteer of the Year:

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I am the 2022 N.A.C.D.L Champion of Justice of the Year.

I am also the founder and Executive Director of ATLAST: which is a leadership program for latino high school kids which teaches them to become leaders in their school and community while helping seek careers where latino are underrepresented. Such as Attorneys, elected officials, judges, prosecutors. So we are not in the system but now work in the system.

I was once inmate number 07031-078. And now through clemency and only clemency I am once again and now Jason Hernandez.

I hope and pray Congresswoman Ayanna Pressley's, Congresswoman Cori Bush, and Congressman Hakeem Jeffries, historic legislation to transform our nation's broken clemency system and addresses the growing problem of mass incarceration, continues with the necessary steps so that it will become law.

I thank you for your time and may God continue to bless you and this great nation.

Ms. JACKSON LEE. Thank you very much, Mr. Hernandez.
Mr. Underwood, you are recognized for five minutes.

STATEMENT OF WILLIAM UNDERWOOD

Mr. UNDERWOOD. First, I want to thank Chair Jackson Lee and Chair Nadler, Ranking Member Biggs, and the Members of the Subcommittee for holding this hearing today and for sharing this space to hear stories about the importance of second chances for people like me and families like mine.

My name is William Underwood. I'm a 68-year-old Senior Fellow with the Sentencing Projects Campaign to End Life Imprisonment. Over 50 years ago, I was teenage father in Harlem. I needed to provide for my family, and there was one way to make fast money. I became involved in the drug trade to ensure that my son didn't know the hunger and pain I did.

I previously testified to this Committee about the impact of the war on drugs on me and my community and the racial injustice at its heart. I was ultimately sentenced to life without the possibility of parole and a concurrent 20-year sentence for leading a violent drug operation during the 1970s and early 1980s.

During my incarceration, I committed myself to growth and had no infractions in 33 years. I parented my children from behind bars, and they became steadfast advocates for my release. In the fall of 2014, President Obama announced the clemency initiative for people sentenced under mandatory sentencing laws.

My clemency petition received support from entertainers, musicians, faith leaders, reformers, conservatives, sports figures, civil rights leaders, scholars, industry leaders, people I mentored in prison, and most of all my children. President Obama ultimately commuted the sentences of 1,715 people convicted of Federal drug crimes. I was not one of them.

Instead, following the passage of the First Step Act, I was granted compassionate release in January 2021, at 67 years old. Judge Sidney H. Stein's release order cited letters from the men I mentored while in prison who said that I created a culture of responsibility among the men around me. Since my release, I've worked to create second chances for others.

I was not an outlier in prison. There are many more people like me in Federal prisons. Many are older—many who are older and sicker, who have been denied compassionate release. Clemency is valuable. It should be available to all people to safely return to the community regardless of the crime or sentence. Clemency should also be granted far more frequently. Clemency should never be someone's only hope of freedom.

There are three important ways that Congress could create more second chances today. First, Congress should pass the First Step Implementation Act and COVID–19 Safer Detention Act of 2021. The First Step Act reduced mandatory minimum sentences for drug offenses but was not retroactive.

The First Step Implementation Act would fix that inequity. Among other provisions, it would allow courts to give a second chance to individuals who have served at least 20 years for crimes they committed as minors.

The COVID–19 Safer Detention Act pf 2021 would also help to reduce excessively lengthy sentences by expanding release opportunities for elderly or terminally ill individuals. It would give compassionate release eligibility to people sentenced before November 1, 1987.

The bill also includes urgent provisions to protect the lives of elderly individuals by adding COVID–19 vulnerability as the basis for compassionate release and shorten the judicial review process for early release during the pandemic.

Second, Congress should transfer jurisdiction of older individuals to Federal courts so that they can receive a meaningful opportunity at parole. People sentenced in Federal courts before 1987 are entitled to parole hearings every two years.

People age of out of crime, and old law individuals are elderly and have a low risk of recidivism. Few people receive parole.

In 2021, the U.S. Parole Commission granted parole to less than 20 percent of old law individuals who received hearings, despite the health emergency in Federal prisons. We believe Federal courts are better equipped to fairly judge whether these individuals deserve parole.

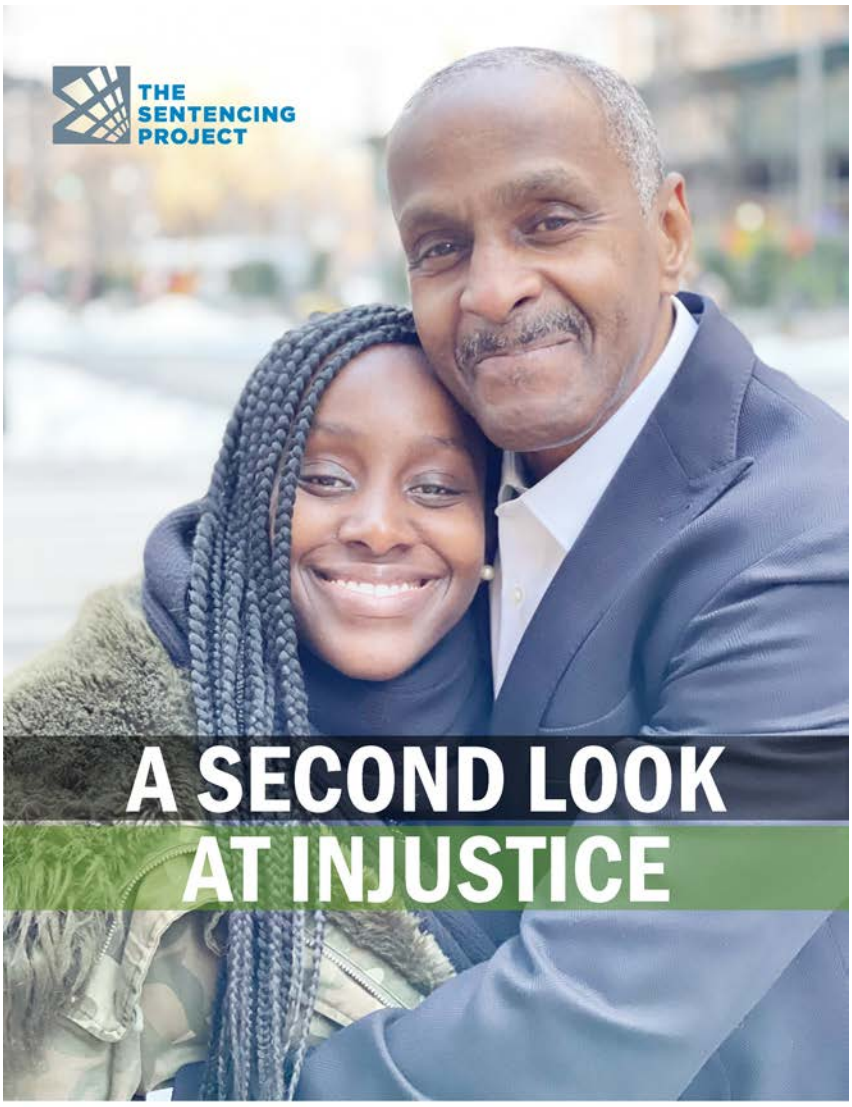
Finally, Congress should pass legislation to allow everyone's sentence to be reassessed after ten years. Ten years is long enough to see how someone has grown and changed and to reevaluate whether they should go home.

That's why in 2019 Senator Booker and Representative Bass introduced The Second Look Act, which would give all people in the Federal prison system a chance to have their sentence reviewed after ten years.

Receiving a second chance shouldn't be an extraordinary event. If we believe in redemption and the rule of law and acknowledge that our criminal justice system has been biased or too harsh, it should be routine. My story should not be rare.

I urge you to consider all the men and women like me. Please remember their dignity, their worth, their loved ones, and their vulnerability as they grow old behind bars, and give them a path home. Thank you.

[The statement of Mr. Underwood follows:]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The Sentencing Project promotes effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice.

The Sentencing Project gratefully acknowledges Arnold Ventures for their generous support of our research on extreme sentences in the United States.

Cover photo: William Underwood, criminal justice reform advocate and survivor of 33 years in prison, with his daughter Ebony Underwood, founder of We Got Us Now and a member of The Sentencing Project's Board of Directors. Photography provided by Underwood Legacy Fund.

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EXECUTIVE SUMMARY

Lawmakers and prosecutors have begun pursuing criminal justice reforms that reflect a key fact: ending mass incarceration and tackling its racial disparities require taking a second look at long sentences.

Over 200,000 people in U.S. prisons were serving life sentences in 2020—more people than were in prison with any sentence in 1970.[1] Nearly half of the life-sentenced population is African American. Nearly one-third is age 55 or older.

"There comes a point," Senator Cory Booker has explained, "where you really have to ask yourself if we have achieved the societal end in keeping these people in prison for so long."[2] He and Representative Karen Bass introduced the Second Look Act in 2019 to enable people who have spent at least 10 years in federal prison to petition a court for resentencing.

Legislators in 25 states, including Minnesota, Vermont, West Virginia, and Florida, have recently introduced second look bills. A federal bill allowing resentencing for youth crimes has bipartisan support.[3] And, over 60 elected prosecutors and law enforcement leaders have called for second look legislation,[4] with several prosecutors' offices having launched sentence review units.

This report begins by examining the evidence supporting these reforms. Specifically:

- Legal experts recommend taking a second look at prison sentences after people have served 10 to 15 years, to ensure that sentences reflect society's evolving norms and knowledge. The Model Penal Code recommends a judicial review after 15 years of imprisonment for adult crimes, and after 10 years for youth crimes. National parole experts Edward Rhine, the late Joan Petersilia, and Kevin Reitz have recommended a second look for all after 10 years of imprisonment—a timeframe that corresponds with what criminological research has found to be the duration of most "criminal careers."
- Criminological research has established that long prison sentences are counterproductive to public safety. Many people serving long sentences, including for a violent crime, no longer pose a public safety risk when they have aged out of crime. Long sentences are of limited deterrent value and are costly, because of the higher cost of imprisoning the elderly. These sentences also put upward pressure on the entire sentencing structure, diverting resources from better investments to promote public safety.
- Crime survivors are not of one mind and many have unmet needs that go beyond perpetual punishment. Ultimately, a survivor's desire for punishment must be balanced with societal goals of advancing safety, achieving justice, and protecting human dignity.

The report presents in-depth accounts of three reform efforts that can be models for the nation:

1. **California's 2018 law (Assembly Bill 2942) allows district attorneys to initiate resentencings.**

   Elected prosecutors across the state have begun using the law to undo excessively long sentences. Los Angeles County District Attorney George Gascón announced a sentence review unit for all who have served over 15 years. Lawmakers have also advanced legislation to enable all who have served at least 15 years to directly petition for resentencing. California's experience demonstrates the potential of reaching a bipartisan consensus among prosecutors on the principle that some are serving unjust prison sentences. California also underscores the need for dedicating resources and educating the courts to achieve broad application of sentence modifications.

2. **Washington, DC's Second Look Amendment Act (2020) allows those who committed crimes as emerging adults—under age 25—to petition for resentencing after 15 years of imprisonment.**

   Supported by a coalition of advocates and local leaders, the law builds on an earlier reform for youth crimes and makes up to 29% of people imprisoned with DC convictions eventually eligible for resentencing. Local media coverage of the success of those resentenced for youth crimes helped generate broad public support to overcome opposition from the U.S. Attorney's Office. DC Attorney General Karl Racine, Council Judiciary Chair Charles Allen, and Corrections Director Quincy Booth have recommended expanding the reform to all who have served over 10 years in prison.

3. **New York State's Elder Parole bill would allow people aged 55 and older who have served 15 or more years in prison to receive a parole hearing.**

   This ongoing campaign, led by Release Aging People in Prison and allies, became especially urgent amidst the state's reluctance to use medical parole or commutations to release people at risk of COVID-19. Brooklyn District Attorney Eric Gonzalez supports the bill, explaining: "If someone has gone through the process of changing themselves ... there should be a mechanism for them to then appear before a parole board that will fully vet them."[5]

To end mass incarceration and invest more effectively in public safety, The Sentencing Project recommends limiting maximum prison terms to 20 years, except in unusual circumstances.[6] Achieving this goal requires abolishing mandatory minimum sentences and applying reforms retroactively. To implement a second look policy that can effectively correct sentencing excesses of the past, The Sentencing Project recommends instituting an automatic sentence review process within a maximum of 10 years of imprisonment, with a rebuttable presumption of resentencing, and intentionally addressing anticipated racial disparities.

INTRODUCTION

"Regrets, I've had a few"

During the 2020 presidential campaign, Joe Biden acknowledged that aspects of the 1994 Crime Bill, which he had strongly supported, were a mistake. "Things have changed drastically," he explained, expressing greater understanding and remorse about the law's harmful disparate impact on African Americans.[7] President Biden is not alone in expressing regrets about his role in the buildup of mass incarceration, though he is uniquely positioned to undo its damage.

Former Princeton University Professor John Dilulio Jr. regrets that his "superpredator" theory contributed to the mass incarceration of youth of color beginning in the 1990s and encouraged the Supreme Court to limit life imprisonment for youth crimes.[8] Former Maryland Governor Parris Glendening regrets having set a precedent of denying parole to eligible people serving life sentences and has encouraged his successors to support legislation giving parole boards the final say.[9] Former California Governor Jerry Brown regrets approving laws that contributed to California's prison boom, and worked to undo their impact during his second run as governor.[10]

TAKING A SECOND LOOK AT INJUSTICE

In recent years, lawmakers and criminal justice practitioners have begun taking a second look at sentences imposed during the buildup of mass incarceration. With support from Attorney General Karl Racine, the DC Council passed legislation allowing people who have served over 15 years in prison for crimes committed under age 25 to petition the courts for resentencing. Los Angeles District Attorney George Gascón joined a group of prosecutors in his state and around the country in creating a sentence review unit, instructing his office to identify cases for resentencing among those who have served over 15 years in prison. When describing her office's sentence review unit—for people medically vulnerable to COVID-19 who are either over age 60 and have served over 25 years or who have served over 25 years for a youth crime—Baltimore City State's Attorney Marilyn Mosby explained that prosecutors should repair the harm caused by their past support for "the epidemic of mass incarceration and racial inequality."[11] She, like her counterpart Larry Krasner in Philadelphia, has endorsed statewide second look legislation.[12] Over 60 other elected prosecutors and law enforcement leaders have also called for second look legislation.[13] At the federal level, Senator Cory Booker and Representative Karen Bass introduced legislation allowing people who have spent over 10 years in federal prison to petition a court for resentencing and Senators Dick Durbin and Chuck Grassley have introduced a bill allowing resentencing for youth crimes. Legislators in 25 states, including Minnesota, Vermont, West Virginia, and Florida, have recently proposed second look bills.

THE NEED FOR SECOND LOOK REFORMS

Because of the dramatic increase in long prison terms in the United States, especially for African Americans, ending mass incarceration and tackling its racial disparities require a second look at long sentences. Currently, over 200,000 people are serving life sentences in U.S. prisons, more people than were in prison with any sentence in 1970.[14] One in five imprisoned Black men is serving a life sentence. The remarkably low recidivism rates that follow long sentences, and the notable accomplishments of some amidst the constraints of incarceration, have increased momentum for revisiting long sentences imposed in an era when some saw these individuals as less than human.[15]

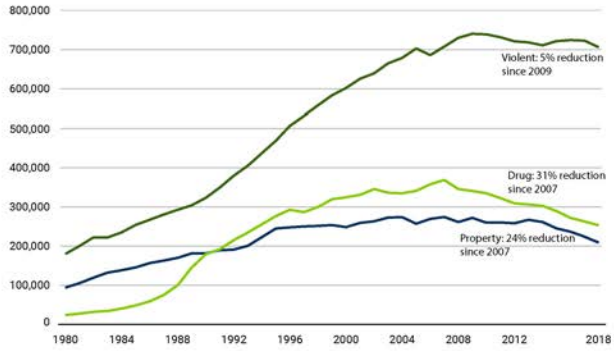
U.S. crime rates increased dramatically beginning in the 1960s, but between 1991 and 2019 crime rates fell by about half, just as they did in many other countries around the world.[16] The United States was exceptional in dramatically increasing its prison population during the crime wave—from under 200,000 imprisoned people in 1972 to nearly 800,000 in 1991—and in continuing to imprison more people when crime rates were falling,

Momolu Stewart (center) was released after 22 years of incarceration in 2019 under DC's Incarceration Reduction Amendment Act (IRAA). IRAA recipients Kareem McCraney (left) and Halim Flowers (right) advocated for his resentencing, as did Kim Kardashian West. Stewart was sentenced to life at age 16. Courtesy Kareem McCraney, 2019.

reaching a peak of nearly 1.6 million imprisoned people in 2009, with an additional 767,000 people held in jails.[17] This growth was the product of growing prison admissions, driven in part by the War on Drugs, and of longer prison terms imposed for all crimes.[18] Policymakers lengthened prison terms through mandatory sentencing laws on the front end, and by reducing discretionary release mechanisms on the back end. As Margaret Colgate Love, former U.S. pardon attorney, and Cecelia Klingele, law professor at University of Wisconsin, have observed: "The severity of American prison sentences is magnified by the atrophy of back-end release mechanisms like parole and clemency."[19]

The prison population has been modestly downsized since reaching its peak level in 2009, achieving an 11% reduction before the COVID-19 pandemic led many political leaders and criminal justice practitioners to further, though insufficiently, depopulate prisons.[20] But most of the prison downsizing thus far has been among people with nonviolent—particularly drug—convictions. Among the half of the prison population that is serving time for a violent offense, there was only a 5% reduction in imprisonment levels between peak year 2009 and 2018, despite the dramatic crime drop.

U.S. Prison Population by Conviction Offense, 1980-2018



Note: Reductions are from years when the prison population for that offense category reached its peak. Based on sentenced prison populations in state and federal systems. Chart omits public order and other/unspecified offenses, for which an additional 244,604 people were imprisoned in 2018, a peak historical level.
Source: Bureau of Justice Statistics Prisoners Series (1994-2019)

Legal and criminological experts have supported second look reforms to scale back extreme sentences. According to the American Law Institute, a nonpartisan group of leading legal practitioners and scholars who strive to clarify and modernize U.S. laws:

> The prospect of evolving norms, which might render a proportionate prison sentence of one time period disproportionate in the next, is a small worry for prison terms of two, three, or five years, but is of great concern when much longer confinement sentences are at issue.... [I]t is unsound to freeze criminal punishments of extraordinary duration into the knowledge base of the past.[21]

In one of its flagship documents, the Model Penal Code, the American Law Institute recommends that legislatures authorize judicial review of sentences after 15 years of imprisonment for adult crimes, and after 10 years for youth crimes.[22] National parole experts Edward Rhine, the late Joan Petersilia, and Kevin Reitz have added: "We would have no argument with a shorter period such as 10 years"—a timeframe that corresponds with criminological research showing that most "criminal careers" typically last fewer than 10 years.[23]

Survivors of violent crime are not of one mind regarding extreme punishment, and some have supported second look efforts. Becky Feldman, who lost her brother to homicide in Baltimore City in 2000, heads Baltimore's sentence review unit. She has stated:

> I deeply appreciate the importance of closure and holding people accountable. But it was my time at the Public Defender's office representing inmates that brought me healing and purpose. There is so much humanity, talent, and kindness behind prison walls, and we cannot give up on them.[24]

Victim advocacy and service organizations in DC and New York have supported second look reforms in their jurisdictions.

This report examines the rationale behind second look reforms and presents three efforts around the country to implement these reforms. "Second look" reforms considered here include post-sentencing relief such as second look legislation, sentence review units established by prosecutors, and the establishment of new parole eligibility or granting of more meaningful parole consideration. "Life imprisonment is not the solution to problems, but a problem to be solved," Pope Francis has said.[25] Second look reform efforts are a part of the solution.

WHY A SECOND LOOK?

The evidence that long prison terms are not just inhumane and ineffective, but are in fact *counterproductive* to public safety, led The Sentencing Project in 2018 to launch a campaign to end life imprisonment and limit prison sentences to 20 years, except in unusual circumstances.[26]

Second look reforms are a key tool for curbing excessive imprisonment. In recent years, leading criminological and legal experts have recommended second look reforms, and some faith groups and victim advocacy organizations have supported scaling back extreme sentences. For example:

- **Policymakers should "reexamine policies regarding mandatory prison sentences and long sentences," advised a 2014 National Academy of Science report** edited by Jeremy Travis, Bruce Western, and Steve Redburn, currently executive vice president of Criminal Justice at Arnold Ventures, professor of sociology at Columbia University, and professorial lecturer at George Washington University, respectively.[27] "There is strong evidence that increasing long sentences has promoted neither deterrence nor incapacitation," explained the panel of scholars and practitioners.[28]

- **Members of the American Law Institute voted in 2017 to approve an updated Model Penal Code including a "second look" post-sentencing modification process.** The Model Penal Code recommends that youth who commit crime under age 18 should be eligible for sentence modification within 10 years of imprisonment, and that their maximum sentence be limited to 20-25 years.[29] For everyone 18 and older they recommend:

  > The legislature shall authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of any sentence of imprisonment.[30]

  University of Minnesota Law School Professor Kevin Reitz, who led the Model Penal Code revisions as Reporter, explained: "Where there was disagreement over the 15-year provision, it came from proponents of significantly shorter periods, such as 10 or even 5 years."[31] With national parole experts Edward Rhine and the late Joan Petersilia, Reitz has endorsed initiating resentencing reviews after 10 years of imprisonment.[32]

- **The Charles Colson Task Force on Federal Corrections and a task force of the Council on Criminal Justice have echoed the Model Penal Code's second look recommendation for people in federal prisons.**[33]

- **Pope Francis's criticism of life imprisonment is echoed by other faith groups.** "A just and necessary punishment must never exclude the dimension of hope and the goal of rehabilitation," the pope told a joint session of Congress in 2015, reiterating his call for the global abolition of the death penalty.[34] Pope Francis condemns capital punishment because it violates the sanctity of life and the dignity of convicted individuals, and because it fosters a sense of vengeance, rather than justice, among crime survivors.[35] He is similarly opposed to life-without-parole sentences, calling them "a hidden death penalty" in his recent encyclical *Fratelli Tutti*.[36] The United Methodist Church also opposes life-without-parole sentences and it is joined by the Jewish Council on Urban Affairs, the Muslim Public Affairs Council, and other faith-based organizations in signing the Campaign for the Fair Sentencing of Youth's Statement of Principles, which opposes sentencing youth to life without the possibility of parole.[37]

This section presents the criminological evidence, racial equity lens, survivor perspective, and legal expertise undergirding a vision of a more effective, racially equitable, and humane sentencing policy.

1. CRIMINOLOGICAL EVIDENCE: EXTREME SENTENCES ARE COUNTERPRODUCTIVE FOR PUBLIC SAFETY

People age out of crime and recidivism declines with age

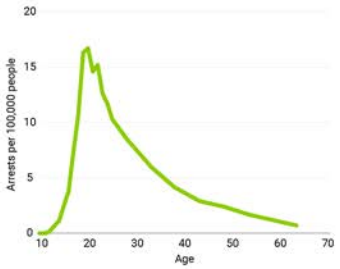
The "age-crime curve" is a longstanding and well-tested concept in criminology, depicting the proportion of individuals in each age group that is engaged in criminal activity.[38] For a range of offenses, crime rates peak around the late teenage years and begin a gradual decline in the early 20s. Criminal sentencing laws and practices, however, generally do not reflect evidence of the limited life cycle of criminal activity, though this has begun to change. "Criminal careers are of a short duration (typically under 10 years)," write University of Texas Criminologist Alex Piquero and colleagues, "which calls into question many of the long-term sentences that have characterized American penal policy."[39]

The age-based rise and decline in criminal activity reflects the changing lives and minds of youth and young adults. As children grow, the combination of greater individual freedom and incomplete psychological maturation elevates risk of criminal offending.[40] During adolescence and into early adulthood, young people gain cognitive capability before they learn to self-regulate by controlling their impulses, considering the impact of their actions on others, delaying gratification, and resisting the influence of peers.[41] Criminal careers wane in adulthood not only because of greater maturity, but also because adults acquire other forms of social control that promote desistance from crime, such as family and work responsibilities.

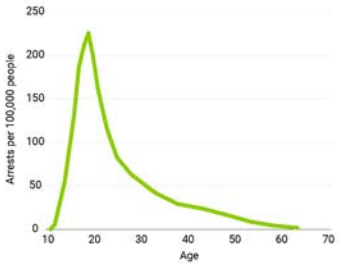
Aging out of crime is a key reason why people who have been imprisoned for violent crimes—who generally serve longer sentences—are the least likely to recidivate when released from prison. When the Bureau of Justice Statistics examined individuals released from state prisons in 2005, it found that those with violent convictions were less likely to be arrested than those with drug or property convictions.[42] Specifically, in either the first or ninth year after release, "the percentage of prisoners released for a violent offense who were arrested following release was about three-quarters of the percentage for those released for a property offense."[43] The violent crime category used in this Bureau of Justice Statistics study is driven by the most common violent offenses, assault and robbery.[44] As described next, recidivism rates are lowest among those convicted of the most serious violent crimes for which people generally serve the longest sentences, sexual offenses and homicide.

People released after decades of imprisonment for the most serious crimes have extremely low recidivism rates. This fact indicates that they have been imprisoned long past the point at which they pose an above-average public safety risk. Specifically:

Murder Age-Arrest Curve, 2010



Robbery Age-Arrest Curve, 2010



Source: Snyder, H. N. (2012). *Arrest in the United States*, 1990-2010. Bureau of Justice Statistics. https://www.bjs.gov/content/pub/pdf/aus9010.pdf

- Reincarceration rates among people previously imprisoned for murder or nonnegligent manslaughter in New York and California were less than half that of the general population released from prison (4% versus 10%, respectively), according to a study of new-crime reimprisonment within three years of release by University of Michigan Law School's J.J. Prescott, Benjamin Pyle, and Sonja Starr.[45] Among those with homicide convictions who were aged 55 and older and released during the study period, between 1991 and 2014, only 0.2% were re-imprisoned for the same offense. These findings echo past research revealing that life-sentenced individuals paroled in California with murder convictions have a "minuscule" recidivism rate for new crimes.[46]
- People paroled in Michigan between 2007 and 2010 with convictions for second-degree murder, manslaughter, or a sex offense were about two-thirds less likely to be reimprisoned for a new crime within three years as the total paroled population, according to a 2014 study by the Citizens Alliance on Prisons and Public Spending.[47] Over 99% of these individuals were not re-imprisoned for a similar offense within three years.
- Among 188 life-sentenced individuals released from prison due to the 2012 *Unger v. State* decision by the Maryland Court of Appeals, which found that a jury instruction used by Maryland courts until 1981 had denied defendants due process rights, only five had returned to prison after five years of release for either a violation of parole or for a new crime, well below the state's overall recidivism rate.[48]

While these studies demonstrate the minimal public safety risk people pose after lengthy prison sentences for serious crimes—echoing research in other states and other western countries[49]—some of these individuals do far more than avoid recidivism. Thomas Farrell, who leads the Pennsylvania Supreme Court's Office of Disciplinary Counsel, notes that the men he met at the Elsinore Bennu ThinkTank for Restorative Justice at Duquesne University, who were released after serving decades on life sentences, now work as paralegals, community activists, and volunteers with local charities. "There is so much more they could have contributed had they been released decades sooner," writes Farrell.[50] Prolonged incarceration prevents many others from making similar contributions to society.

Long sentences have a limited deterrent effect

In addition to incapacitating people who pose limited criminal threat, long sentences also fail to effectively deter others from criminal activity. As Daniel Nagin,

"The Ungers" are a group of nearly 200 Maryland lifers who gained their freedom through the courts. Their extremely low recidivism rate underscores the need for the state to eliminate roadblocks to parole. Courtesy Michael Millemann, 2017.

professor of public policy and statistics at Carnegie Mellon University and a leading national expert on deterrence has written: "Increases in already long prison sentences, say from 20 years to life, do not have material deterrent effects on crime."[51] Researchers have found that long sentences are limited in deterring future crimes because most people do not expect to be apprehended for a crime, are not familiar with relevant legal penalties, or commit crime with their judgment compromised by substance use or mental health problems.[52]

The expectation of getting away with crime is not unreasonable, given FBI data showing that police "clear" fewer than two-thirds of murders (arresting a suspect), with the clearance rate for reported rapes falling to one-third.[53] These low clearance rates are a key reason that criminologists emphasize that the *certainty* of punishment is a more effective deterrent than its *severity*.[54] Nagin's survey of research on this issue with University of Chicago Professor Steven Durlauf concludes: "For the general incarceration of aged criminals to be socially efficient, it must have a deterrent effect on younger criminals ... Simply no reliable evidence is available that such an effect is sufficiently large to justify the costs of long prison sentences."[55]

Long sentences divert resources from effective investment in public safety

Since extreme sentences offer modest public safety gains and come at a high financial cost, they should be evaluated alongside more effective investments in public safety. Some organizations advocating on behalf of crime survivors have pointed to investments that should be made outside of the criminal legal system to prevent future victimization. For example, the Network for Victim Recovery of DC (NVRDC) has stated:

> NVRDC believes that in order to fully support communities who have experienced violence, we must evaluate all the root causes of crime that affect crime victims and defendants alike—poverty, lack of access to education, lack of safe housing, institutional racism, and other systemic biases.[56]

But during the era of mass incarceration, the United States has underinvested in key policies and programs to tackle the root causes of crime. One example is access to effective and affordable treatment for substance use disorder. The Bureau of Justice Statistics reports that 58% of people in state prisons and 63% of those serving jail sentences between 2007 and 2009 reported having a drug use disorder in the year prior to their admission.[57] But only about one-quarter of incarcerated people who had a drug use disorder reported participating in any drug treatment program while serving a sentence in prison or jail.[58] People with limited economic resources also struggle to get timely treatment for substance use problems in their communities. The gap between capacity and the need for treatment persists today—though it has been narrowed by the Affordable Care Act.[59] Reducing spending on excessive incarceration would free up resources to eliminate this gap. Other important investments to tackle the root causes of crime include: increasing access to high-quality early education, reducing residential segregation, and reducing the prevalence of firearms.[60]

By lowering the "anchor point" affecting all sentence lengths, second look reforms can help to achieve broad reductions in imprisonment.

Counterintuitively, ending an individual's imprisonment will not immediately translate to prison cost savings that can be better invested. This is because many of the fixed costs of running prisons, especially staffing costs, will not change until prison population reductions are enough to close down a prison wing, or an entire prison. At that point the savings would be substantial. In some communities, the cost savings from a prison closure have occurred alongside repurposing of the prison facility, helping to bring jobs and revenues to the affected communities.[61] Second look reforms can help to achieve broad reductions in imprisonment levels, and prison closures, by lowering what the Model Penal Code calls the "anchor point" that puts upward pressure on the entire sentencing structure.[62] Eliminating excessive prison terms for serious crimes can promote a broader evaluation of prison terms—even prison admissions—for other crimes.

2. A SECOND LOOK AT THE RACIAL BIAS EMBEDDED IN EXTREME SENTENCES

"I'm not a predator. I was a kid who made a terrible decision," explains Derrick Hardaway.[63] Hardaway served 20 years in prison, having been convicted as an adult at age 14 for helping his teenage brother kill Robert Sandifer in Chicago in 1994, who at age 11 was wanted for the murder of a young girl. All three Black boys in this case received national media scrutiny amidst what Carroll Bogert, President of the *Marshall Project*, has called the "sensational media myth" of the superpredator, begun by Princeton University Professor John Dilulio Jr.[64] Dilulio later expressed regret and worked to undo his theory's contribution to the mass incarceration of youth of color.[65] But his early work and its amplification in the media contributed to, as Bogert puts it, "branding a generation of young men of color as animals."[66] The legacy of this era can be found in the individuals who remain imprisoned for past crimes, and in the persistence of excessively punitive sentences for new crimes, particularly for people of color.

Dilulio had framed his support of increased punitiveness as advancing racial justice, claiming that the population he sought to protect were "crime-plagued [B]lack inner-city Americans and their children."[67] As Yale Law School Professor James Forman Jr. has argued, many Black mayors, judges, and police chiefs supported tough-on-crime measures, out of fear that gains of the civil rights movement were being undermined by crime.[68] However, Forman notes, these Black officials also wanted a war on poverty, on racial injustice, and on joblessness, and these proposals gained far less traction.

Black Americans' views on how to improve public safety is particularly important because they are most likely to be victims of serious violent crime.[69] Blacks and Latinxs have been far more likely than whites to be crime victims, and to be more fearful of becoming crime victims, and yet they have been less supportive of punitive criminal justice practices while being more likely to support investments in rehabilitation and crime prevention.[70] But the fact that Black Americans have also been more likely than whites to commit violent crimes, and to be associated with crime at exaggerated levels by white Americans, contributes to the greater support among whites of punitive policies. This pattern has been underscored by the greater willingness among the public and policymakers to apply a public health framework, albeit amidst punitive policies, to the opioid crisis, in contrast to past drug crises. Not only does the association of this drug crisis with whites help to promote treatment and prevention as policy responses, so too does the greater proximity of white Americans to the policymaking process.[71]

John Dilulio Jr.

Dilulio coined the term "superpredator" in a fearful 1995 cover story in the conservative political opinion publication *The Weekly Standard,* which was later reprinted in the *Chicago Tribune*. He warned of an imminent crime wave resulting from a growing youth population that suffers from the "moral poverty ... of growing up surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings."[72] Dilulio's term was picked up by presidential candidate Bob Dole, First Lady Hillary Clinton, and referenced in a federal crime bill, and his theory contributed to a wave of punitive policies for youth and young adults.[73] Steve Drizin, a Chicago attorney, said the term "had a profound effect on the way in which judges and prosecutors viewed my clients."[74] Dilulio's faulty analysis and exaggerated claims came under fire from leading scholars, including his mentor, conservative criminologist James Q. Wilson.[75] His prediction of a tidal wave of youth crime never materialized, with youth crime rates in fact falling.

3. A SECOND LOOK AT CRIME SURVIVORS' NEEDS

One argument raised against sentence modifications is that they violate societal expectations of finality, and in particular, the expectations of violent crime survivors. But as Douglas Berman, Law Professor at Ohio State University, has acknowledged, "Victim interests may not always run toward treating sentences as ... final."[76] For some crime survivors like Jeanne Bishop, who lost three family members to murders committed by a teenager, "An alternative type of 'finality' exists.... It happens when the work of punishment, penitence, remorse and rehabilitation is complete, and a young offender can re-enter society."[77]

Crime survivors sometimes describe a transformation in their views, as can be seen among high-profile survivors who once advocated for severe penalties but are now working to undo their impact. This includes Samantha Broun, who now advocates in favor of second chances for people with life sentences. Broun testified for stronger restrictions on release from prison in 1995, after her mother was the victim of a violent crime perpetrated by a man whose murder sentence had been commuted only months earlier. Broun has since expressed concern for people who may still be behind bars because of policy changes made in the wake of her mother's victimization.[78] Another such advocate is Patty Wetterling, who lobbied for sex-offender registries after her son's abduction in 1989, but has since become a vocal critic of registries. Wetterling told *American Public Media* in 2016, "Locking them up forever, labeling them, and not allowing them community support doesn't work. I've turned 180 (degrees) from where I was."[79] Delivering the keynote speech at the Mitchell Hamline School of Law's symposium on residency restrictions and sex-offender registries, she voiced concern over the effectiveness and harms caused by a policy for which she once advocated.

Because harmed individuals begin and move towards different views regarding just punishment for their suffering, victim support and advocacy organizations, including Crime Victims Treatment Center in New York and Network for Victim Recovery of DC emphasize the diversity of views among their constituents regarding appropriate punishment. This complexity of survivor preferences can also be found within the conflicting views of family members in some high-profile cases.[80]

A non-partial assessment of violent crime survivors' needs must grapple with the fact that many survivors have unmet needs that go beyond punishment. "Punishment alone does very little to heal the gaping wound a crime can leave on victims and their families," writes Linda Mills, professor of social work at New York University, noting also that the criminal legal system overlooks victims' needs beyond a desire for punishment.[81] Mills advocates for incorporating restorative justice elements to the current practices of criminal courts to better assist victims and their family with healing from trauma, particularly by giving them a more active role in their recovery beyond testifying and submitting impact statements. As Danielle Sered, executive director of Common Justice, has noted, "The services and support to help victims come through their pain are often scarce—and they frequently leave out a significant portion of survivors"—those who do not cooperate with law enforcement.[82] Common Justice works with New York prosecutors in Brooklyn and the Bronx to offer alternatives to incarceration and victim services for violent crimes, based in restorative justice principles to "recognize the harm done, honor the needs and interests of those harmed, and develop appropriate responses to hold the responsible party accountable."[83]

Ultimately, some people impacted by violent crime will object to resentencing even if resentencing does not pose a public safety risk. Often, survivors' limited contact with the individual who caused them harm leaves them ill-prepared to assess risk of future violence, especially in cases resulting in long sentences.[84] Other times, the desire for additional punishment may be independent from public safety concerns, but it runs counter to the principles that the criminal legal system should seek to uphold. In these instances, it is worth noting, as Sered has observed:

> A survivor-centered system is not a survivor-ruled system. Valuing people does not mean giving them sole and unmitigated control. The criminal justice system maintains a responsibility to safety, justice, and human dignity that it should uphold even when those interests run contrary to survivors' desires.[85]

As Sered explains, in these situations the criminal legal system remains obliged to listen to survivors, to be transparent about the decision making process, and to connect them with support.

"A survivor-centered system is not a survivor-ruled system. Valuing people does not mean giving them sole and unmitigated control. The criminal justice system maintains a responsibility to safety, justice, and human dignity that it should uphold even when those interests run contrary to survivors' desires."

— Danielle Sered, Common Justice

Punishment imposed by the criminal legal system is intended, in part, to displace personal acts of retaliation by survivors. But governments undertake this retribution within a scaffolding of rights and norms that is intended to ensure fairness and justice. This includes procedures to ensure that the person being punished is guilty, and laws restraining excessive punishment for their offense, such as the death penalty. After reinstating the death penalty in 1976, the Supreme Court has narrowed the crimes and people for whom death could be sought in a series of cases responding to the "evolving standards of decency."[86] This includes prohibiting capital punishment for crimes other than homicide (*Kennedy v. Louisiana*, 2008) and for individuals who are intellectually disabled (*Atkins v. Virginia*, 2002) or who were under the age of 18 at the time of their crime (*Roper v. Simmons*, 2005). While society owes a great debt to those who experience loss or trauma from the terrible crimes where the death penalty is prohibited, it rejects any preference they may have for an execution. Similarly, when society seeks to curb excessive terms of imprisonment that are counterproductive to public safety and are infused, to some degree, with racial bias, this can result in a sentence modification that conflicts with the wishes of survivors. Ultimately, as Berman suggests, reconsidering initial sentences "may foster respect for a criminal justice system willing to reconsider and recalibrate the punishment harms that it imposes upon its citizens."[87]

4. PRACTICAL LEGAL CONCERNS

Since 1923, the American Law Institute has brought together leading legal practitioners and scholars to clarify and modernize U.S. laws. In 2008, when Justice Ruth Bader Ginsburg spoke at the organization's annual meeting, she credited the Institute's projects with providing "enlightenment and guidance," echoing Justice William Rehnquist's praise from over a decade earlier.[88] One of these projects has been the Model Penal Code, which since its inception in 1962 has influenced criminal codes and court decisions.[89]

The American Law Institute recommends the creation of a judicial post-sentence modification mechanism because long sentences have contributed to making the United States the world leader in its incarceration rate, even amidst plummeting crime rates, and to ensure that government decisions to deprive people of liberty for "a substantial portion of their adult lives remain intelligible and justifiable at a point in time far distant from their original imposition."[90] The Institute began exploring second look post-sentencing modifications—beyond commutations, good-conduct sentence reductions, age-infirmity release, and retroactive application of sentencing reductions—for people serving very long prison sentences in 2008, to accompany its recommendation to eliminate indeterminate sentencing.[91] Its experts disfavored hinging prison release decisions on parole boards,

explains Reitz, because "states with the highest standing incarceration rates in the early 21st century are nearly all indeterminate-sentencing jurisdictions."[92]

The Model Penal Code's recommendation that jurisdictions retroactively apply second-look provisions to existing sentences raises practical concerns about courts' administrative capacity to handle resentencing petitions. Its authors note that while the number of people already imprisoned who would seek resentencing under the reform "should not be overwhelming," it would be greater in the initial phase than later years.[93] Cecelia Klingele, University of Wisconsin Law professor and Associate Reporter of the Model Penal Code, notes that while new second look legislation is likely to create a "temporary surge in filings, it seems unlikely that such motions would clog dockets or otherwise impede the orderly administration of justice in the trial courts."[94] Klingele explains this reform would transform some of the existing correspondence between incarcerated individuals and the courts and that jurisdictions with existing sentencing modification practices have not been overburdened. Some recent examples of large-scale resentencings include the federal courts' re-evaluation of 50,000 sentences as result of a sentencing guideline change by the U.S. Sentencing Commission and California's modification of nearly 3,000 sentences as a result of that state's retroactive three-strikes law reform.[95]

NATIONWIDE REFORM EFFORTS

1. SECOND LOOK FOR ALL

Federal Second Look Bill

"There comes a point where you really have to ask yourself if we have achieved the societal end in keeping these people in prison for so long," Senator Cory Booker told *Vox* in 2016. He continued: "Is the societal cost and expenditure worth it to keep somebody who's older—higher medical costs and the like—in prison? This is a conversation this country really needs to have."[96] Three years later, he and Representative Karen Bass introduced the Second Look Act, which would allow people who have spent at least 10 years in federal prison to petition a court to take a "second look" at their sentence, enabling judges to determine whether they are eligible for a sentence reduction or release.[97] The bill has inspired model state legislation proposed by the National Association of Criminal Defense Lawyers.[98]

William Underwood

Booker and Bass's Second Look Act was inspired by the experiences and insights of individuals including William Underwood. Booker met Underwood during a 2016 visit to the Fairton Federal Correctional Institution in New Jersey. Underwood was arrested in 1988, on drug and conspiracy charges, and sentenced to a concurrent 20-year sentence and life without parole. "The man that stood before me was an intelligent, capable, a dedicated father and an atoned man. He has accepted responsibility for his crime," said Booker after meeting Underwood. "America is the land of second chances. It's time we lived up to that and show mercy to a man who has served almost three decades in prison."[99]

During his 33 years in prison, Underwood took advantage of every educational and service opportunity available to him. He served as a mentor for younger incarcerated men and received zero infractions during his entire incarceration.[100] Booker said not even the correctional officers believed Underwood should still be imprisoned.[101]

After several failed attempts at post-conviction relief, including seeking a commutation from the President of the United States and a sentence reduction under the First Step Act, Underwood was finally granted compassionate release on January 15, 2021 at age 67. His release was granted ten days after he tested positive for COVID-19. In the order for his release, U.S. District Court Judge Sidney Stein wrote:

> In light of Underwood's exemplary record over [the] last three decades; his consequential mentorship of young men and contribution to a 'culture of responsibility' in federal prison; and his commendable efforts in raising and supporting his children and grandchildren from behind bars, the Court finds that '[b]y any measure, [Underwood's] good deeds exceed the bounds of what we consider "rehabilitation"' and amount to extraordinary and compelling reasons meriting a sentence reduction.[102]

Since his release, Underwood and his four children have started the Underwood Legacy Fund to advocate for criminal justice reform and mentor young entrepreneurs.[103] By sharing his experience, Underwood aims to fight for a second look for the men he left behind. "With all the youngsters that I've talked to [in prison], with all the ones that consider me their mentor, [with] the conditions of my probation I can't talk to them for at least another one or two years," said Underwood in his first interview post-release. "It's kind of like prisoner's remorse … a lot of good men I left with life sentences."[104]

Rep. Bass has explained that the Second Look Act sought to ensure that "we aren't forgetting those who did fall victim to the War on Drugs and are sitting in prison due to draconian sentencing practices for crimes that don't fit the punishment."[105] Former federal judge Kevin Sharp has supported the bill, noting that he "resigned, in large part, because he could no longer stand to impose the excessive and unjust prison terms Congress mandates in so many cases."[106] Although Congress has yet to advance the Second Look Act, the bill has inspired other jurisdictions to move forward with similar reforms.

As illustrated below with California and DC's reforms and New York's ongoing campaign, jurisdictions differ in the period of imprisonment that they require before initiating a second look, and which populations they make eligible—often based on current age or age at the time of offense. In addition to the specific eligibility details provided below, The Sentencing Project's preliminary analysis of the life-sentenced population in a group of 14 states in 2020 shows:

- 73% had already served at least 10 years in prison and 55% had served at least 15 years
- 27% committed their crime under age 25
- 45% were over age 50 and 32% were over age 55.[107]

These figures indicate the varying impacts that second look reforms may have based on their eligibility criteria.

Featured Reform: "A Complete Paradigm Shift" for California Prosecutors

Over 26,000 people in California's prisons have already served over fifteen years—27% of the state's prison population.[108] Three quarters of this group are people of color. Although for decades California judges could revise sentences seen to no longer advance the interest of justice based on recommendations from the California Department of Corrections and Rehabilitation (CDCR) or the Board of Parole Hearings, resentencing requests were rarely made or granted.[109]

Hillary Blout, a former San Francisco prosecutor, led the effort to pass Assembly Bill 2942 in 2018, enabling district attorneys to request resentencing.[110] By 2020, Los Angeles' District Attorney, George Gascón, announced a sentence review unit for all who have served over 15 years. Legislators are also seeking to enable all who have served at least 15 years in prison to directly petition the courts for resentencing. California's experience demonstrates the possibility of reaching a bipartisan consensus among prosecutors on the principle that some are serving unjust prison sentences. California also underscores the need for dedicating resources and educating the courts to achieve broad application of sentence modifications.

Assemblymember Phil Ting introduced AB 2942 in 2018, noting that California has the country's highest proportion of people in prison serving long-term sentences. "It's time we acknowledge that individuals convicted of more serious offenses can also turn their lives around and deserve a second chance," Ting explained.[111] Bill sponsor Jeff Rosen, Santa Clara County's District Attorney who launched the state's first conviction review unit, has said: "Every prosecutor wants justice, and we want to right wrongs. And if we've done something that's wrong, we want to fix it."[112] Blout approached Ting with the idea for AB 2942 in 2018. "We talk a lot about all of the people that were ensnared because of the system and what we did to people back in the 90s and early 2000s and the 80s," she has said, adding: "My mission is to go back and find those people and bring them home."[113] District Attorneys including Nancy O'Malley (Alameda County) and George Gascón (then DA of San Francisco) submitted support letters for the bill, as did the ACLU. Other prosecutors verbally supported the reform and law enforcement remained neutral.

AB 2942 instructs the courts to consider:

> postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice.[114]

Victims are also included in the evaluation under Marsy's Law, which gives crime survivors "a right to notice, the right to appear at a sentencing hearing, and the right to have their safety considered before any release."[115] Survivors may also receive a remorse letter from the person who harmed them, and in some cases, District Attorneys have offered restorative justice services.

For the People, the non-profit organization that Blout leads, partners with prosecutors' offices from across the political spectrum to "ensure that *all* prosecutors are actively reviewing cases."[116] The organization also works with system leaders, community members, and incarcerated individuals to help implement the law. Silicon Valley DeBug has been organizing community-based meetings in several counties to develop "social biographies" of potential applicants, with support letters and photos of the homes that await them. The Ella Baker Center has published a resentencing toolkit.[117] In many communities, public defender offices have also been working with DAs to make the case for a resentencing.

After the law took effect in January 2019, All of Us or None's San Diego chapter successfully advocated for the first release under this law, Kent Williams. Williams is now home with his wife in San Diego after serving 16 years for property crimes. He was sentenced to 50-years-to-life in prison under the Three Strikes law for burglarizing two homes and stealing a car in 2003, crimes fueled by his substance use disorder. Williams said: "The Lord heard my cry.... I'm just so grateful for another chance."[118] San Diego County DA Summer Stephan recommended Williams for resentencing, noting that if sentenced now, he would receive less time. Williams' sentencing judge, Albert Harutunian, resentenced him to time served in 2019. Without this reform, Williams would not have been eligible for parole consideration for another three decades.

Hillary Blout

When Kamala Harris asked Hillary Blout why she wanted to become a district attorney, Blout said she wasn't sure that she did. At the time, Harris was District Attorney of San Francisco and Blout was interning at her office. Blout, a Black woman, began the internship "to better understand how the system operated" but assumed she wasn't DA material.[119] "I feel bad for the defendants and I'm probably going to know a lot of them ... I'm not sure I'm the kind of person you want here," Blout told Harris.[120] Blout remembers Harris explaining that she fit perfectly with Harris's vision of the office—to recruit prosecutors with lived experiences, people who share backgrounds of those being prosecuted, people who felt compassion for defendants. Blout took the job believing that increasing the office's representation of people of color from communities directly impacted by mass incarceration would help to produce more equitable outcomes.

As a prosecutor, Blout kept noting racial disparities in drug sentencing and the cycling through of Black and Brown people as defendants. She took a step back to work on Proposition 47, the ballot initiative that reduced penalties for drug possession and certain property crimes, which she saw as helping to bring some of the reforms already in place in San Francisco to other parts of the state. Immersed in community organizations, advocacy groups, and in academic research on criminal justice, Blout wanted this conversation to reach prosecutors—across political parties and across the state. She believed that prosecutors would universally agree on two points: "prosecutors are here to do justice" and "people are in prison that are serving unjust sentences."[121] Several prosecutors agreed with her that it was their job to correct sentences that would now be considered unjust, or that remained imposed on people who had already rehabilitated. But, she noted, "I didn't realize that there was nothing on the books that would allow prosecutors ... to reconsider [the sentences that they had asked for].... It was shocking to me with all the power they have, that they didn't have the power to bring people home."[122] This prompted Blout to lead the effort to pass AB 2942. The ultimate goal, she explains, is "to make bringing someone home a win as much as getting a conviction" for prosecutors.[123]

Blout's organization has worked with 12 prosecutor's offices who have begun reviewing over 300 cases, with many prioritizing burglary or robbery convictions for which people have served at least 10 years.[124] About 50 people have been released so far in California, she says. Blout explains that increasing this number requires increasing dedicated funding for this effort—for district attorneys and public defender offices to make the case for resentencing, and for CDCR to provide necessary information.[125] "The bottleneck now," she explains, "is about getting these cases reviewed and getting them ready for court."[126]

California courts have resentenced an additional 64 people based on their exceptional conduct as a result of 155 referrals from CDCR between 2010 and 2019.[127] Increasing this resentencing rate, suggests Superior Court Judge Richard Couzens, requires educating judges about evidence-based sentencing principles in the post-sentencing context.[128] Prosecutors also need to be educated, says Sam Lewis of the Anti-Recidivism Coalition, to not oppose resentencing referrals from CDCR. Lewis adds: "Correctional officers see you Monday through Sunday, twenty-four hours a day, it's documented what you do, when you have a good day, when you have a bad day.... Why would you oppose the correctional system that's supposed to hold people inside that's telling you this person's ready to go?"[129]

Andrew Aradoz

In 2020, Yolo County District Attorney Jeff Reisig successfully facilitated the resentencing and release of Andrew Aradoz after 16 years of imprisonment for an attempted-murder conviction. Prosecuted as an adult for a crime committed at age 14, Aradoz was sentenced to 24 years to life in prison.[130] Had Aradoz been sentenced after the passage of Senate Bill 1391 in 2018,[131] which excludes anyone under age 16 from being charged as if they were an adult, he would have received a much shorter original sentence.

Aradoz faced a number of struggles from a young age before becoming involved with gangs as a teenager. After becoming incarcerated, he began to transform his life. He says that fellow incarcerated people who acted as his mentors along with an accountability and healing program in prison were crucial in turning his life around. Now the recipient of a second chance, Aradoz is working, on track to pursue a college degree, and has committed his life to supporting his family. Speaking about his future goals, he says, "I just want to be here with my family ... not just be here with them, I want to be able to help them. I'm doing better and now I want them to do better too."[132] He believes second look reforms should be expanded so that more people like him can come home. "I'm one of those people, I can't be the only one," he says.[133]

Aradoz's case was recommended by a legal clinic which Reisig created with For the People at University of California, Davis. Aradoz's victim did not oppose his resentencing.[134] Reisig has characterized second look as "a complete paradigm shift" for prosecutors,[135] explaining:

Andrew Aradoz, resentenced under California's AB 2942, with his nephew. Courtesy Andrew Aradoz, 2021.

> Our job as public servants, as protectors of the people is to make sure that not only that justice is done and people are accountable and victims are cared for, but that the community believes in the system. And looking at the entirety of a case to make sure that it's done right I think is part of our obligation.[136]

Since the passage of California's second look law, Blout's organization has worked with lawmakers and advocates in states including Minnesota and Oregon to help launch and implement resentencing policies. Washington State's second look law, SB 6164, was modeled after California's. In Minnesota, Attorney General Keith Ellison has supported legislation allowing prosecutors to file motions for a reduced sentence if a person is deemed safe and their sentence is deemed excessive.[137] Meanwhile, in California, Los Angeles's District Attorney has developed a sentence review unit that can serve as a national model and state experts have recommended broadening the current second look law.

Expanding Second Look in Los Angeles County and in California

The most far-reaching application of California's second look law has come from Los Angeles County District Attorney George Gascón. During his campaign to become District Attorney, Gascón committed to not seeking the death penalty, following his practice as San Francisco's District Attorney. He also told *The Appeal*:

> If you look at other countries around the world, you will see that often maximum sentences are usually around 20 years—and I'm talking for ... very serious offenses—and then after 20 years, it's a year-by-year evaluation of psychological and dangerousness assessment. I think that we need to start moving in that direction.[138]

In a policy memo issued on his first day in office in December 2020, Gascón instructed his staff to curb their reliance on sentencing enhancements and announced a new resentencing policy. Citing the American Law Institute and national parole experts, Gascón announced that his office would "reevaluate and consider for resentencing people who have already served 15 years in prison."[139] The Amity Foundation, in partnership with the Returning Home Well initiative, has pledged assistance to those resentenced in Los Angeles.[140]

Two months after Gascón's policy memo, the Committee on Revision of the Penal Code announced 10 policies unanimously approved by its members. Among these recommendations was expanding the second look process to allow all individuals who have served over 15 years in prison to request a reconsideration of their sentence. The Committee also recommended creating a presumption of resentencing if the petitioner has the support of law enforcement for certain specified reasons, requiring appointment of counsel for cases initiated by law enforcement, and requiring written reasons for court decisions.[141] Assemblymembers Ting and Ken Cooley have introduced legislation to implement the Committee's recommendations on resentencing.[142]

Related Reforms

Legislative Reforms

- New York's Domestic Violence Survivors Justice Act (2019) allows resentencing for people serving at least 8 years for a crime in which their experience as a domestic violence survivor was a significant contributing factor. The law's exclusions include those convicted of first degree murder and people who are required to be on the state's sex offender registry.[143] Few people have been resentenced under the law thus far.
- Illinois passed a Domestic Violence Amendment in 2015.[144] The law directs judges to consider the effects of abuse during sentencing and allows currently incarcerated people to petition for resentencing if evidence of abuse was not presented during their original sentencing. Few are thought to have benefitted from the law thus far.[145]
- Washington State passed SB 6164 in 2020, enabling elected prosecutors to petition a court for resentencing of felony convictions.[146] The Department of Corrections has supported allowing people who have served over 15 to petition for early release.[147]
- In Ohio, Civil Rule 60(b)(5) allows judges to issue relief if it is found in the interest of justice "for any reason." The rule has been used by the Ohio Justice and Policy Center's Beyond Guilt project to advocate for the release of people who have served long sentences and demonstrated rehabilitation.[148]

Prosecutorial Reforms

- San Francisco District Attorney Chesa Boudin launched a Post-Conviction review unit in 2020. The unit reviews sentences that may be excessive or otherwise questionable by taking into account factors including conduct in prison and reentry plans.[149]

- In Prince George's County, MD, State's Attorney Aisha Braveboy launched a Conviction and Sentencing Integrity Unit. The unit has moved at least one person sentenced to life for a youth crime to reentry court.
- Washington State's King County Prosecuting Attorney's office announced a new Sentencing Review Unit in 2020. The unit will build on the office's prior review practices, which focused on people sentenced to life without parole under the state's "three strikes" law whose third crime was 2nd degree robbery, which is no longer a strike.[150]
- Wisconsin courts have the power to change or modify sentences on the grounds that they are "unduly harsh or unconscionable," or upon the emergence of "new factors" in the case. At any time, a defendant may file a motion to have a sentence modified under the statute and District Attorneys have supported some motions.[151]
- Orleans Parish District Attorney Jason Williams's office will no longer oppose parole or pardon applications, even for violent convictions. Williams contends that these decisions should be made by corrections professionals.[152]

2. SECOND LOOK FOR CRIMES BY EMERGING ADULTS

Rationale and Broader Context

Vincent Schiraldi, the former head of juvenile corrections in Washington, DC, and Bruce Western, a leading criminal justice scholar, proposed "raising the family court's age to 21 or 25" in a 2015 *Washington Post* Op-Ed.[153] They explained that family courts, pioneered over a century ago to prioritize rehabilitation over punishment for youth crimes, arbitrarily restricted their jurisdiction to those under age 18.

Research in recent decades in neurobiology and developmental psychology has established that adolescent brain development continues until the mid-20s. During this stage of life, young people are still learning to self-regulate by controlling their impulses, considering the impact of their actions on others, delaying gratification, and resisting peer pressure.[154] Recent socioeconomic changes have also delayed several of the hallmarks of independent adulthood—including marriage, parenting, and living independently—while post-secondary education has become "more economically necessary but also more difficult to attain for many young adults than in past decades."[155] These factors make emerging adults especially likely to engage in crime, but also especially responsive to rehabilitative interventions. For these reasons, leading criminologists Rolf Loeber and David Farrington have recommended that legislatures "raise the minimum age for referral of young people to the adult court to age 21 or 24 so that fewer young offenders are dealt with in the adult criminal justice system."[156]

Jeffrey Jensen Arnett

The term "emerging adulthood" was coined by developmental psychologist Jeffrey Jensen Arnett in 2000. It refers to a distinct period of life occurring between the late-teens and mid-twenties, usually defined as ages 18 to 25. The period is developmentally distinct from both adolescence and established adulthood, and is significantly structured by emerging adults' identity exploration in the workplace and in their personal lives. In addition, emerging adults are more likely to engage in certain risky behaviors than those in other age groups due to identity exploration, brain development, and a tendency to pursue "novel and intense experiences."[157] Risk-taking behaviors peak during emerging adulthood before making a steep decline as an individual reaches their late-twenties.

Several other social domains treat late adolescence, or emerging adulthood, as distinct from adulthood. As Schiraldi and Western note: "You can't serve in the House of Representatives until age 25, it costs more to rent a car as a young adult, and you can stay on your parents' health insurance until 26."[158] In addition, a majority of states extend foster care or offer transition supports, such as transitional living services, housing, and

educational assistance, beyond age 18—often until age 21 as incentivized by a 2008 federal law.[159] The Juvenile Law Center explains that in addition to child welfare agencies, "mental health providers, workforce development programs, school systems, [and] housing authorities" all offer models for treating emerging adults distinctly from adults.[160]

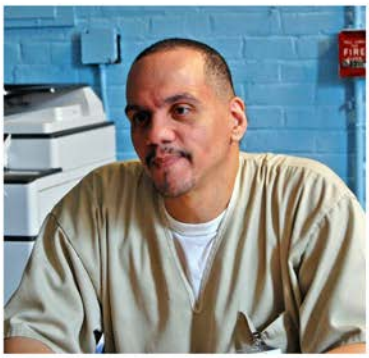
In the criminal legal system, recent Supreme Court decisions limiting life-without-parole sentences for youth have affirmed this scientific evidence for those up to age 18[161] and a growing number of states are implementing reforms reflecting evidence that people are not mature adults until after reaching their mid-twenties. These reforms echo the established policies of several European countries.[162] Domestically, these reforms include:

- In 2016, Vermont became the first state in the country to begin handling criminal cases involving those between ages 18 and 21 in its juvenile rather than adult courts, excluding the most serious offenses.[163] Elected officials in states including Massachusetts, Connecticut, Illinois, California, and Colorado have sought to implement similar reforms.[164] The Massachusetts proposal to raise the age of juvenile courts to 20 has the support of Suffolk County District Attorney Rachael Rollins.[165] Rollins has said that the overrepresentation of youth of color in the justice system may be preventing policymakers from treating young people with compassion.[166]
- Some states allow specialized sentencing for "youthful offenders." In Washington, DC, the Youth Rehabilitation Act (2018) allows courts to sentence youth aged 24 or younger to a community-based program in lieu of prison, or to receive a reduced prison sentence in cases where a mandatory minimums apply, except for some violent or sexual crimes.[167] The law also allows the court to seal a conviction from public view after the completion of a sentence. Michigan has a similar law and legislation proposed in New York's 2019-2020 session would have strengthened that state's modest version of this reform.[168]
- The Washington state Supreme Court overturned the automatic life-without-parole sentences given to two individuals for murders committed at ages 19 and 20, expanding on the U.S. Supreme Court ruling in *Montgomery v. Louisiana*.[169]
- Several community-based strategies seek to prevent emerging adults' contact with the justice system, notes an Urban Institute report.[170] Successful programs provide targeted assistance in areas such as mentorship, mental and physical health services, and housing and financial stability.
- A number of states have begun incarcerating emerging adults separately from adults. As Youth Represent and Children's Defense Fund-New York, explain, "By avoiding or delaying transfer from juvenile facilities to adult prisons at 18, young people are protected from the risks of physical and sexual violence that they face in adult prisons, and benefit from age-appropriate services, programming and re-entry supports that are typically more robust in juvenile justice systems."[171] Oregon, California and Washington State have enabled some individuals under age 25 to be held in juvenile rather than adult correctional facilities. New York City has created a separate jail facility for people between the ages of 18 and 21. The facility provides targeted programming and re-entry support, and does not allow the use of solitary confinement.[172]

Eriberto DeLeon

Since 2017, Connecticut prisons have been operating emerging-adult units to focus on the rehabilitative potential of a group of 18-to-25 year olds.[173] Based on a youth prison in Germany, the program focuses on the dignity of people in prison and includes daily check-ins and conversations meant to foster emotional growth, as well as expanded privileges during visitation hours. The select group of individuals in these units are paired with older imprisoned adults who serve as mentors.

Eriberto (Eddie) DeLeon is one of these mentors. DeLeon has been incarcerated since age 19, sentenced to 60 years for his involvement in a 1991 burglary that resulted in the killing of a bar owner at his home. "It took me 15 years to be sick and tired of being sick and tired," DeLeon explains, reflecting on his path from gang involvement and trouble behind bars to becoming a mentor who develops programs that expedite others' rehabilitation.[174] He helps imprisoned emerging adults manage their emotional responses to stress, handle conflict, and gain practical life skills. "I want to give back. For the rest of my life I want to prove myself," DeLeon says.[175] His cousin, Thea Montañez, says: "It's great that we've found a role for these men to play, but now what?"[176] Montañez sees reconsideration of extreme sentences from the 1990s as the next step in the evolution of criminal justice reform. While she is "very proud that Connecticut has done a great deal to apply what we know today to begin fixing the mistakes of the past," she sees her cousin as a reminder of the work that remains. Michael Lawlor, who served as undersecretary for criminal justice policy and planning for former Governor Dannel Malloy, has recommended one such remedy: a second look at sentences for emerging adults, similar to the one passed in Washington, DC.[177] Connecticut legislators recently proposed such a bill.[178] DeLeon described the bill as "a little light at the end of the tunnel."[179]



Eriberto (Eddie) DeLeon, an incarcerated mentor for emerging-adults in Connecticut prisons. Courtesy Andrius Banevicius, Connecticut Department of Corrections, 2018.

Featured Reform: Washington, DC's Second Look at Sentences for Emerging Adults

In December 2020, the DC Council overwhelmingly approved the Second Look Amendment Act ("Second Look Act") as part of a broad package of reforms, allowing people who committed crimes under age 25 to petition the courts for resentencing after 15 years of imprisonment.[180] Melody Brown was a key supporter of the reform.[181] In 1995, Brown's husband, Jerome McDaniel, was killed by 16-year-old Bennie Floyd. For years, Brown wanted Floyd to "rot in hell" for turning her anniversaries into visits to the cemetery. But she was moved by a letter from Floyd demonstrating remorse and maturity, and by the example that her daughters set in forgiving him. "I'm rooting for him," she now says of Floyd. She supported his release under DC's original second look reform, the Incarceration Reduction Amendment Act (IRAA) of 2016, which allowed resentencing for crimes committed under age 18.[182] She then successfully advocated for extending the reform to crimes committed by emerging adults.

A broad coalition supporting this legislation overcame opposition from the U.S. Attorney's Office, with support from trusted criminal justice leaders and with informed

news coverage of the successes of those resentenced for youth crimes. DC's second look reforms make up to 29% of people imprisoned with DC convictions eventually eligible for resentencing.[183] Criminal justice leaders who championed this reform have recommended expanding it further.

Support from Crime Survivors

Brown was part of a broad array of DC violent crime survivors who supported the Second Look Act. When a local leader argued that reducing sentences for sexual violence disrespected victims,[184] April Goggans, an organizer with Black Lives Matter DC, wrote in the *Washington Post*:

> As a [B]lack woman and mother who has survived sexual assault and intra-community violence, I will not tolerate being spoken for. I support the Second Look Amendment Act without any reservations. Keeping people in jail does not make us safer.[185]

Network for Victim Recovery of DC, a victim services and advocacy organization, also supported the reform, hoping that it would create "new definitions of justice that account for the spectrum of crime survivors' experiences."[186] Another local leader and sexual violence survivor, Erin Palmer, guided her Advisory Neighborhood Commission (ANC)—among 40 elected commissions that advise the DC Council—to unanimously pass a resolution in support of the bill, and several other ANCs followed suit.[187] Before examining the broader coalition that coalesced behind this reform, it is helpful to understand the emerging adult law's predecessor.

Second Look for Youth Crimes

Crystal Carpenter was one of the driving forces behind DC's original second look reform, IRAA, which focused exclusively on youth whose offenses occurred prior to their 18th birthday. When Carpenter was 15 years old, her brother James Carpenter received a 57-years-to-life sentence for a crime he committed at age 17. "When people would spend their summers in college focused on summer breaks and spring breaks, I used to come back up to DC and sit in courtrooms and watch court cases," Carpenter remembers.[188] Seeing no avenues to bring her brother home within a reasonable timeframe, she contacted numerous advocacy organizations for support, and the Campaign for the Fair Sentencing of Youth worked with her to develop a second look bill for

Melody Brown with her daughters Jerria Brown-McDaniel Houdhan (left) and Jerrika Brown-McDaniel (right). Courtesy Melody Brown, 2017.

juveniles modelled after that of West Virginia, proposing that resentencing be allowed after 15 years. Ultimately, DC's law allowed resentencing after 20 years of imprisonment for youth crimes, and it applied retroactively. Councilmember Kenyan McDuffie championed the 2016 reform and the Council took it up as a response to the Supreme Court's 2012 *Miller v. Alabama* ruling, which required states to consider the unique circumstance of youth to arrive at individualized life-without-parole sentences for homicide. Carpenter credits the advocacy of Eddie Ellis, who became an inspiring community leader upon being paroled in 2006 after serving 15 years for a crime he committed at age 16, for giving the Council the "confidence needed for a bill such as this."[189] Carpenter and Ellis later joined the staff of the Campaign for the Fair Sentencing of Youth and supported the expansion of the original legislation.

In 2018, the DC Council expanded the 2016 law to allow people who committed their crimes under age 18 to petition the DC Superior Court for resentencing after 15 years of imprisonment, instead of 20.[190] In this second iteration of IRAA, the Council also sought to uphold the original reform's intent to focus on rehabilitation by removing "the nature and circumstances of the offense" from a list of factors that judges must consider in deciding whether to award relief. The offense itself was

still implicitly included within several of the 11 remaining factors, including the individual's rehabilitation, statement from the U.S. Attorney's Office, statement from the victim, the defendant's role in the offense, and the catch-all factor of "any other information the court deems relevant to its decision."[191] This reform made an additional 150 people eligible for resentencing, while the third iteration of the reform, the Second Look Act, made approximately 500 additional individuals immediately eligible for resentencing.[192]

Overcoming Opposition to Expand Second Look to Emerging Adults

Three key factors contributed to the successful expansion of DC's second look reform. First, a broad and strong coalition including advocates, individuals resentenced for youth crimes, attorneys, and researchers—known as the Thrive Under 25 Coalition—raised support for the bill.[193] Several thousand DC residents signed a petition circulated by the coalition in support of the reform.[194] In March 2019, over 50 people testified in person in support of the proposed legislation, and many more did so in writing.[195] The mayor's office also testified in support of the bill, explaining that "We know from both lived experiences and research that, at a certain point, there is not a compelling public safety reason to keep someone incarcerated any longer."[196] The Mayor later hedged her position on the bill in response to victim concerns, before ultimately signing it.[197]

Second, trusted criminal justice leaders championed the reform. Judiciary Chair Charles Allen and DC Attorney General Karl Racine defended the bill against criticism from the *Washington Post* editorial board and the U.S. Attorney's Office, writing, "We should not be dissuaded by the same echoes of fear that gave us mass incarceration."[198] In a span of five months in 2019, the *Post* published three editorials against the bill. The editorial board's discussions with advocates and individuals resentenced for youth crimes may have encouraged their support of a second look after 20 years of imprisonment for juvenile sentences in Virginia and Maryland.[199] But they characterized DC's proposed reform for emerging adults as "deceiving the public and fooling victims."[200]

The U.S. Attorney's Office of DC, which prosecutes most local felonies and was then led by Trump-appointed Jessie Liu, strongly opposed the bill.[201] In September 2019, that office organized a convening to mobilize local ANCs against the bill. At this event, federal prosecutors falsely claimed that DC had one of the country's lowest incarceration rates compared to states, later acknowledging the error via Twitter, and framed the maintenance of severe sentences as a racial justice issue for victims of color.[202] Peter Newsham, then-chief of the Metropolitan Police Department, presented slides highlighting crimes in which the accused or convicted would eventually qualify for resentencing under the reform. Outside of the meeting, organizers led by Black Lives Matter DC and Black Youth Project 100 held a public education "speak back"—handing out flyers explaining that this was an opportunity for a sentence review, not automatic release from incarceration. Also outside were Shannon Battle and Wendell Craig Watson—resentenced for youth crimes—who distributed T-shirts in support of the Second Look Act.[203] Members of the Thrive Coalition later attended ANC meetings across the city clarifying the purpose and intent of the bill.

The third key factor supporting the expansion of second look was informed local and national news coverage that profiled IRAA recipients, some of whom had already achieved incredible professional success and were giving back to the community.[204] These men (no women qualified for sentencing until the passage of the Second Look Act) included Tyrone Walker, who mentored dozens of young men and completed college coursework while incarcerated, and became a leader in criminal justice reform at the Justice Policy Institute upon his release; Halim Flowers, who self-published 11 books and completed college coursework while incarcerated and has since won two competitive fellowships and is elevating the stories of those impacted by the criminal justice system; and Kareem McCraney, who earned an associate degree in paralegal studies while in prison and since his release has served as a youth mentor in Southeast DC, participated in a paralegal fellowship program at Georgetown University, and is a program analyst for the DC Corrections Information Council. Many others are working to prevent youth violence as violence interrupters, credible messengers, and youth mentors. None of those released had been convicted of new crimes.

The Law's Enactment and Implementation

DC's 2020 elections brought in three new council members who supported the reform and the defeat of

the lone member who later voted against it. During the final vote, council members also overwhelmingly rejected two amendments that were expected to discourage resentencing.[205] The pandemic summer's protests against violence by the police, including the killing of George Floyd and Breonna Taylor, and additional local revelations of bias in policing and prosecution, heightened public expectations for legislation to advance racial justice.[206] When the bill unanimously passed its first vote, Councilmember McDuffie explained: "This is about a system that's so disproportionately unfair to people of color, particularly about Black people.... The way we support victims is to address the root causes that compel young people to pick up guns to resolve disputes."[207]

Sixty people have been released so far under DC's first two second look laws and nine applicants have been denied, with the U.S. Attorney's Office opposing resentencing in all but a handful of cases.[208] The legal work behind these petitions was shared by the Public Defender Service (PDS) for the District of Columbia, court-appointed private attorneys, and pro-bono law firms and law school clinics, who will also work together to coordinate implementation of the Second Look Act. The DC Council has also dedicated funding for restorative justice services to support survivors and reentry funding to support resentenced individuals.

Beyond the Second Look Act

DC advocates and leaders continue to build on the Second Look Act. In 2021, the District Task Force on Jails and Justice, an independent body whose members include Attorney General Racine, Councilmember Allen, and Director of the DC Department of Corrections Quincy Booth, recommended amending DC's second look law to:

> allow any person who has served at least ten (10) years in prison to petition for resentencing and require D.C. Superior Court to review sentences of any person who has served at least 20 years.[209]

In May 2020, Carpenter's brother was released from prison as a result of the second look reform for youth, having spent 24 years incarcerated. Having him back is "beyond anything I could imagine," Carpenter explains, who now works to support people as they return home from long prison terms and advocates for similar reforms in other states.[210] As Michael Serota, law professor at Arizona State University, has written, "the District is by no means an outlier" in imposing extreme sentences that should receive a second look.[211]

Related Reforms

Legislative Reforms

- In 2018, the California legislature began directing many individuals who committed crimes under age 26 to Youth Offender Parole Hearings, to give weight to the diminished culpability of youth and young adults serving lengthy sentences and to emphasize their potential for growth and maturity. The original Youth Offender parole law passed in 2013 applied to crimes committed under age 18, an age limit that was raised in 2015 and 2017. The law has notable exclusions, including people convicted of sexual offenses or sentenced to life without parole past age 18.[212] Newt Gingrich described the reform extending these hearings to crimes committed under age 23 as "compassionate, fair, and backed up by the latest scientific understanding of brain development."[213]
- Illinois passed legislation in 2018 allowing early parole review for people who committed their crime before age 21, with certain exclusions. To be eligible, a person must serve 10 years in prison, or 20 years if they were convicted of aggravated criminal sexual assault or first degree murder. The change only applies prospectively.[214]

Prosecutorial Reforms

- Brooklyn, NY's District Attorney Eric Gonzalez now consents to parole at the first hearing for people who entered into plea agreements, which constitutes the vast majority of cases in the district, "absent extraordinary circumstances and subject to their conduct during incarceration."[215] Gonzalez's office has also instituted special review for people serving indeterminate life sentences for crimes committed under age 24, "so that there can be a meaningful inquiry into whether they have matured into appropriate candidates for release."[216]
- In Massachusetts, Suffolk District Attorney Rachael Rollins has supported evidentiary hearings at the state's Supreme Judicial Court to consider whether to extend the state's ban on life-without-parole sentences for youth to emerging adults.[217]

Joel Castón

Joel Castón is a Washingtonian and incarcerated mentor, writer, and activist. After being convicted of murder at age 18, Castón underwent a remarkable transformation, driven by mentorship, faith, and education. He is one of the founding mentors in the Young Men Emerging Unit at the DC Jail, a program that provides recently incarcerated people between the ages of 18 to 25 with mentorship, job training, and educational programming. Passionate about finance, Castón has several self-published books and hopes to eventually become an investment advisor and professional trader, with a YouTube channel for demystifying the markets. He's felt ready to return home since at least his 18th year of incarceration, when he'd been imprisoned for the same number of years that he'd been free. He's now been incarcerated for 27 years and notes:

> I am a middle-aged guy. I'm a dad, I'm a grandfather—I have two grandchildren. I have gray hair at my temples, I don't think like that 18-year-old guy that once had a mindset that I completely reject. I have changed. I am deeply remorseful.... I have a proven track record of rehabilitation and demonstrated remorse. Individuals like myself, they deserve an opportunity to present a colorful argument of why they deserve their freedom.[218]

Castón was raised in a family and community that faced major obstacles. His father and sister struggled with substance use problems, and he recalls many in his community treating their trauma with drugs. Raised by a single mother and later by his sister, Castón and his cousin became active in the drug market by 6th grade, despite its harms on his family and community. His experiences have convinced him of the need to invest in "no entry" programs and services to prevent imprisonment, rather than just "re-entry" to prevent re-imprisonment. For him, this would have included wraparound services for his family. He also points to the counseling services that victims need, and that he himself needed to cope, at age 18, with a sentence of 30 years to life with the possibility of parole. "Faith gave hope to my despair," Castón has written.[219]

Castón was delighted by the news of the Incarceration Reduction Amendment Act (IRAA), even though it did not apply to him since he committed his crime 33 days after turning 18. The expansion of the law to those who committed their crime under age 25 would allow him to petition for resentencing—but before the law went into effect Castón became one of the lucky few to be granted parole.[220] Referencing his experience as a DC resident who is eligible for a second look and who has spent time in federal facilities around the country, Castón says:

Joel Castón, co-founder of the Young Men Emerging Unit at the DC Jail, wearing an "I Voted / Yo Voté" sticker. Courtesy Joel Castón, 2021.

> I'm grateful that we have it in DC but what about the guys from New York? What about the people from North Carolina? What about the people from Puerto Rico? What about the people from Minnesota? What about the guys in California? What about the guys in Louisiana? What about all these places I've been at and they don't have nothing in place? But I've been with these guys, I can't forget my brothers and sisters still trapped behind prison doors.[221]

With his longtime friend Tyrone Walker—an IRAA beneficiary who is now with the Justice Policy Institute—Castón continues to call for curbing excessive sentences, noting that they disproportionately affect Black men like themselves. With Michael Woody, another founding mentor of the Young Men Emerging Unit, they've written a report about how the DC program, inspired by Connecticut's, can serve as a model for the country.[222] In the *Washington Post*, Castón and Walker have written:

> We are proud that we've helped create this program, and we hope the approach will also move beyond the walls of the DC jails and into the community.[223]

Castón once asked his own mentor why he did so much for others and was told that he was paying his dues. It's a philosophy that Castón now shares.

3. SECOND LOOK FOR OLDER PEOPLE IN PRISON

Rationale and Broader Context

Fiscal and Moral Costs of Imprisoning Older Individuals

In recent years, the imprisonment rate of people in older age groups has grown while the rate among the youngest age groups has declined. In fact, the Bureau of Justice Statistics observes that people aged 55 or older accounted for most of the growth of the state prison population between 2003 and 2013.[224] Among imprisoned people aged 65 and above, half have served over 10 years. Two factors have driven the "graying" of the prison population: 1) People serving longer sentences, and 2) Older people being more likely to be imprisoned upon a conviction due to their greater likelihood of having a criminal history in the era of mass incarceration.[225] The results are problematic both from public safety and humanitarian perspectives.

As noted earlier, older people are less likely than their younger counterparts to pose a public safety risk, making their incarceration an ineffective tool for promoting public safety. What's more, older people are more costly to incarcerate, largely due to their health care needs. Incarcerated people in the United States tend to be less healthy than the overall population, and the experience of incarceration leaves many in poorer health.[226] These facts result from the criminal legal system's over-selection of low-income people of color, combined with the stresses of incarceration and the often low quality of health care delivered in carceral settings—with prisons generally lacking systems to "monitor chronic problems or to implement preventative measures."[227] The provision of medical care for elderly incarcerated individuals becomes particularly costly when they must be transported off-site, with security, for medical care. Although nationwide estimates have proven elusive because of a lack of uniformity and detail in data reporting across correctional institutions,[228] several studies have documented far higher costs of imprisoning older individuals compared to younger ones.[229]

There are also humanitarian concerns with imprisoning older people who do not pose an unreasonable public safety risk. Given the chronic health problems and other issues that elderly people in prison face, it is almost certain that they are exposed to needless and prolonged suffering due to the overcrowding, violence, and limited medical care in prisons. As Berkeley Law Professor Jonathan Simon argues, "given the record levels of physical and sexual violence prevalent in our prisons today, it is deceitful to argue that the custody provided prisoners is 'safe.'"[230] These problems are compounded in the case of elderly people in prisons, who are more likely to face declining health and abuse,[231] making their continued incarceration a violation of basic human dignity. As Justice Anthony Kennedy wrote in the Supreme Court's review of the landmark California prison overcrowding case, *Brown v. Plata*, "A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."[232] A second look at the continued imprisonment of older people in prison is an important step in reforming the criminal legal system to take account of human rights.

The Inadequacy of Medical / Compassionate Release

The National Conference of State Legislatures reports that while nearly all states have a medical or compassionate parole policy (extending parole consideration to people with certain serious medical conditions) and 17 states have geriatric parole laws (allowing parole review for imprisoned people who are past a certain age) few people are released from prison through these mechanisms.[233] This is due both to the politicization of this decision making process and to the narrow eligibility criteria of these remedies. The Vera Institute of Justice notes that compassionate release policies often exclude people with the most serious convictions, have narrow medical criteria, and require medical professionals to make challenging timed prognoses—generally requiring the assessment of a terminal illness or permanent incapacitation and being within six months to two years of death.[234] In addition, these policies often impose a burdensome application process, elevate the objections of law enforcement and victims in decision making, and require a level of post-release care in which states have not invested.[235]

The COVID-19 pandemic has underscored the limitation of existing statutes and practices. Incarcerated elderly individuals and those who have serious medical conditions often found that despite their heightened risk of serious illness or death from the coronavirus, they do not qualify for relief under existing laws.[236] For those close to death, as Dr. Rachael Bedard, director of health

care for the elderly in the New York City jail system, explains, "We can make someone's experience of leaving this world less sorrowful when we do our utmost to honor their dignity, and the complexity of their identity and life experience. To do that, it is imperative to open the cage."[237] For the over 2,500 people who have died in U.S. prisons of coronavirus-related causes, the experience of dying was not made less sorrowful.[238]

The Atrophy of Executive Clemency

The use of executive clemency, particularly of commutations to shorten sentences, has also declined significantly since the mid-twentieth century. Between 1897 and 1945, presidents commuted an average of 355 sentences per term; since then each president has commuted an average of just 132 sentences per term even as the U.S. prison population grew by over 900% between 1945 and 2019.[239] In 2009, former U.S. Pardon Attorney Margaret Colgate Love suggested that commutations were available only to the politically connected, writing that, "what had once been a routine presidential housekeeping function subject to justice-based norms began to seem more like a perk of office available primarily to those with direct access to the White House."[240] The power was used more frequently by President Barack Obama, who granted over 1,700 commutations during his time in office, many as part of his Clemency Initiative.[241] But the U.S. Sentencing Commission found in 2017 that 2,595 incarcerated individuals appeared "to have met all the factors for clemency under the Initiative at the end of President Obama's term in office but … did not obtain relief."[242] Presidential commutations dropped again during President Donald Trump's term to only 94. Even as COVID-19 spread in prisons during his tenure, Trump made little use of clemency other than in the cases with political connections.[243]

Commutations have also dwindled at the state level. In Oklahoma, commutations declined during the COVID-19 crisis, even as the number of applications rose dramatically.[244] In New York, Governor Andrew Cuomo approved just two of the more than 120 petitions filed by lawyers from the NACDL/FAMM State Clemency Project between 2017 and 2020.[245] Historically, governors used commutations to address conditions in prisons and to reduce sentences for people who pose little threat to public safety. In 1975, for instance, Maryland Governor Marvin Mandel issued "Christmas commutations" to nearly 200 people in prison whose sentences were set to expire within 180 days, in an attempt to address overcrowding and inhumane conditions.[246] Declines in the traditional exercise of executive mercy are common across the country. In Massachusetts, 83 people were granted commutations during the 1970s, while only a single person had their sentence commuted between 1997 and 2019.[247] Since the 1980s, presidents and governors have largely refrained from using commutations as a tool of mercy, likely due to fear of political pushback, even as prison populations have grown exponentially.[248]

Featured Campaign: New York's Elder Parole Bill

"I felt alive for the first time in three decades,"[256] Dino Caroselli wrote, describing the moment that he learned about New York's Elder Parole bill (S.15A/A.3475A). The reform would allow people aged 55 and older who have served 15 or more years in prison to receive parole consideration, regardless of original crime of conviction or original sentence. Caroselli, 64 years old, has served nearly 30 years on a 65-year-to-life sentence for attempted robbery, attempted aggravated assault, and a subsequent prison fight. "I was a slow learner," he explains, "but like so many others I've turned my life around" and he has the record of programming, work, and mentorship to prove it.

Without the passage of the Elder Parole bill, Caroselli will most likely die in prison. He is not eligible for parole until 2057, when he would be 100 years old.[257] The Elder Parole bill would similarly give David Gilbert, the 76-year old father of San Francisco District Attorney Chesa Boudin, who has been incarcerated for 40 years, a parole hearing in his lifetime.[258] Other paths out of prison, such as medical parole and executive clemency, have resulted in very few releases, even during the COVID-19 pandemic.[259] Some of the most upstanding individuals in New York prisons, like Benjamin Smalls, have had their accomplishments chronicled in *New York Times* obituaries after being overlooked for executive clemency and medical parole.[260] The Elder Parole bill would make over 1,100 people in New York prisons immediately eligible for parole consideration.[261] Although New York has reduced its prison population serving life with the possibility of parole between 2010 and 2016, the state still has the country's fourth highest number of people serving these sentences.[262]

When Does Old Age Begin in Prison?

For the broader population in the United States, 65 has become a common age cutoff to be considered elderly, as reflected in the eligibility age of Medicare. While some people, including many of our current political leaders, remain professionally active in their 70s and 80s, many institutions and organizations rely on a lower-than-65 senior age cutoff to better reflect research on lived experiences, and many are encouraged to move in that direction.[249] Thus AARP membership can begin at age 50, chain restaurants like Denny's and IHOP offer a 55-plus menu for seniors, and President Biden has proposed lowering the Medicare eligibility age from 65 to 60.

When it comes to the U.S. incarcerated population, researchers and government agencies have generally relied on either age 50 or 55 as the cutoff for being considered elderly. The *Marshall Project* explains:

> In the early 1990s, a few officials suggested to the sociologist Ronald Aday that 'the typical inmate in his fifties has a physical appearance of at least 10 years older.' That comment was cited widely by journalists and researchers, and a handful of mysteriously specific claims have floated around, saying prisoners over 50 have a health profile of people 11.5 years older.[250]

Some studies have begun to document accelerated aging among the incarcerated.[251] In a 2004 report, the National Institute of Corrections suggested that 50 may be an appropriate cutoff for being considered elderly in the corrections system since aging in prison is accelerated by the stresses of staying safe behind bars, financial troubles, drug or alcohol withdrawal, and inadequate health care prior to incarceration.[252] A 2008 national survey found that among 27 departments of correction, over half, 15, relied on 50 as the cutoff, 5 on 55, and the remaining 7 on ages 60 and above.[253]

At the federal level, while the Bureau of Prisons does not specify an age at which the people in its prisons are considered "aging," a 2016 report by the Department of Justice's Office of the Inspector General classified those age 50 and older as part of this category.[254] In reports examining the aging of state prison populations, the Bureau of Justice Statistics focuses on those aged 55 or older.[255]

The Elder Parole bill, championed by the Release Aging People in Prison (RAPP) Campaign, has gained momentum every year since its introduction in 2018. In 2019, it passed through committees in both legislative houses, facing opposition from Republican legislators, police unions, and some District Attorneys. "Outrageous and idiotic," is how Staten Island District Attorney Michael McMahon described the bill in a 2019 *New York Post* article reminding readers that those who committed some of the city's most heinous crimes would become eligible for parole.[263] In January 2020, Erie County District Attorney John Flynn said that while he would support revisiting sentences for youth crimes after many decades in prison, he was "not open to look at a 40-year-old man, a 40-year-old woman, an adult, who commits murder and 15 years later wants to get out because [they're] 55."[264] But Brooklyn District Attorney Eric Gonzalez, who handles one of the state's—and country's—largest caseloads, has supported the bill. "If someone has gone through the process of changing themselves … there should be a mechanism for them to then appear before a parole board that will fully vet them," Gonzalez explained.[265]

In January 2020, hundreds of New Yorkers went to the State Capitol to support the bill, sponsored by Assemblymember Carmen De La Rosa and State Senator Brad Hoylman. Noting that most people serving life sentences are people of color, De La Rosa has written, "I refuse to have my five year-old daughter grow up in a state that condemns people who look like her to die in cages, regardless of their change and transformation over years and decades."[266] Some victim service and advocacy groups support the reform, including the Crime Victims Treatment Center, whose executive director, Christopher Bromson, has said: "We recognize that many individuals enter the criminal justice system with histories of trauma, and that more may experience devastating

sexual victimization during their incarceration. And yet we also believe that healing and change are possible."[267] Other groups advocating on behalf of crime survivors, including the New York State Coalition Against Sexual Assault and the Downstate Coalition for Crime Victims, have also supported the bill.[268]

In January 2021, the People's Campaign for Parole Justice ("People's Campaign"), a coalition including criminal justice reform advocates, current and formerly incarcerated people, academics, and victim advocacy groups, organized hundreds of people to attend a virtual rally in support of the bill, which by then had the support of 25 lawmakers.[269] Testimony at this event and at legislative hearings from imprisoned individuals including Caroselli, Stanley Bellamy, and Robert Ehrenberg has given lawmakers an opportunity to get to know the people who would be impacted by this reform.[270] The state's reluctance during the pandemic to use medical parole or commutations to significantly reduce the elderly and medically vulnerable populations in prison, combined with its decision to not prioritize COVID-19 vaccine access to imprisoned people until ordered to do so by the courts, has underscored the need for the Elder Parole bill, as well as its challenging political prospects.[271]

Advocates highlight one aspect of New York's Elder Parole bill that distinguishes it from similar existing laws: it does not exclude people based on their sentence or crime of conviction. A 2019 letter signed by over 130 organizations in support of the bill states:

> Exclusions based solely on the nature of a person's crime only promote notions of punishment and revenge, and offer no benefit to public safety. In fact, they hinder it. Returning elders are mentors and leaders in our communities and help us build the safe and nurturing world we want.[272]

José Saldaña, Director of the RAPP campaign who had served 38 years in prison until his release in 2018, has said, "We believe every human that's incarcerated is redeemable."[273] Saldaña has written:

José Saldaña speaking to supporters of the Elder Parole bill in Albany, New York. Courtesy Michelle Lewin, 2020.

> African, Latinx, Asian, Indigenous People, and other People of Color have historically been denied human rights and civic rights. From generation to generation People of Color fought and died for every right we have today. Parole Justice is Racial Justice. Exclusions are not a part of our history of liberation.[274]

The Elder Parole bill, Saldaña argues, "is a step toward redemption and away from a racist culture of perpetual punishment and revenge rooted in the politics of mass incarceration."[275]

Meanwhile, the list of people who have died awaiting sentencing and parole reform in New York continues to grow. This list includes Valerie Gaiter, who at age 61 had served nearly 40 years in prison on a 50-year-to-life sentence, longer than any other woman then incarcerated in New York State. Gaiter had a long list of accomplishments during her incarceration. "Just about every formerly incarcerated woman I have met attributes at least part of their transformation to Gaiter," Saldaña observed.[276] Gaiter died in prison from cancer in 2019, 10 years before she would have been eligible for parole.[277]

Supporters of the Elder Parole bill recognize that creating a meaningful parole opportunity for the elderly imprisoned population also requires mending a parole process that a former commissioner has described as "broken, terribly broken."[278] While RAPP's and other groups' advocacy has improved parole practices, procedures, and outcomes in recent years, the parole board held fewer parole hearings in 2020 than in 2019 and sustained a significant racial gap in parole grants.[279] Another proposed bill supported by the People's Campaign, The Fair and Timely Parole Act (S.1415/A.4231), would continue the effort to reorient the parole board's decisions towards an assessment of current public safety risk rather than the historical crime.

Related Reforms

Legislative Reforms

- The First Step Act (2018) provides an avenue for compassionate release for people incarcerated in the federal system, allowing incarcerated individuals to directly petition courts for release after meeting certain criteria. The act also reauthorizes and expands the BOP's early release pilot program, which allows certain people age 65 and above with non-violent conviction histories to be placed in home confinement.[280]
- California passed an Elderly Parole reform bill in 2020 (AB-3234), which lowers the requisite age of eligibility for elderly parole review to 50 years and time served to 20 years. The law instructs the parole board to consider whether age, time served, or physical health affect chances of reoffending. The law excludes people convicted of first degree murder if the victim was a peace officer.[281]
- Washington, DC passed a compassionate release law in 2020 that allows anyone age 60 and above who has served at least 25 years in prison, or who meets other criteria, to petition a judge for early release.[282]

Prosecutorial Reforms

- During the coronavirus pandemic Marilyn Mosby, State's Attorney for Baltimore, MD, launched a Sentencing Review Unit focusing in part on medically vulnerable people over age 60 who have been incarcerated over 25 years.[283] Mosby's office will connect impacted individuals with restorative justice and reentry services. Describing the effort, Mosby wrote alongside Los Angeles District Attorney George Gascón that, "The United States spends millions of dollars to incarcerate elderly people who no longer present a public safety threat.... People over 60 comprise 3 percent of violent crime arrests."[284]

RECOMMENDATIONS

To end mass incarceration and better invest in public safety, The Sentencing Project and over 200 organizations recommend limiting maximum prison terms to 20 years, except in unusual circumstances.[285] Achieving this goal requires reforming front-end sentencing laws and practices, such as by abolishing mandatory minimum sentencing laws as recommended at the federal level by President Biden and Attorney General Merrick Garland, and more broadly by the American Bar Association and the NAACP Legal Defense and Educational Fund.[286] These reforms should be applied retroactively to those already sentenced.

Changing prosecutorial practices is also key to achieving front-end sentencing reform. Over 60 elected prosecutors and law enforcement leaders have recommended that prosecutors' offices develop policies to ensure that lengthy sentences, such as those beyond 15 or 20 years, "be reserved for the unusual and extraordinary case."[287]

Second look reforms, in addition to executive clemency, are important tools for correcting sentencing excesses of the past. For lawmakers and prosecutors, several lessons can be drawn from the successful and ongoing second look reform efforts presented in this report. Recommended components of an effective second look policy include:

1. Instituting an automatic sentence review process within a maximum of 10 years of imprisonment, with a rebuttable presumption of resentencing. Subsequent hearings should occur within a maximum of two years.[288]
2. Anticipating and intentionally monitoring and addressing racial and other disparities in resentencing.[289] Discretionary resentencing decisions may be impacted by the race and other characteristics—such as educational level, mental health status, and gender—of the incarcerated individual or their victim. For example, disparities in both sentencing and in-prison discipline driven by racial bias will impact eligibility for resentencing and must therefore be accounted for in any resentencing policy, practice, or law.
3. Appointing legal counsel to represent individuals through the resentencing process.
4. Placing decision-making authority within an entity willing to make an evidence-based assessment of whether an individual's release would pose an unreasonable public safety risk. In some jurisdictions, judges or judicial panels, rather than parole boards, may be better insulated from political aversions to resentencing.
5. Establishing assessment criteria and training, and requiring written explanations for resentencing denials. Ensure that resentencing decisions balance the desire for punishment from some crime survivors with societal goals of advancing safety, achieving justice, and protecting human dignity.
6. Enabling crime survivors to provide input and ensuring that the resentencing process is transparent to them. Invest in restorative justice services to support crime survivors and in rehabilitative programming in prisons and reentry programming outside of prisons to promote success for those who are resentenced.

CONCLUSION

Rehabilitation and redemption are relevant goals not only for imprisoned people being held accountable for their crimes, but also for the policymakers, practitioners, and members of the public who demand excessive prison terms that are counterproductive to public safety. During his campaign, President Biden committed to cutting the prison population by half, saying that he would even "go further than that."[290] Ending mass incarceration in our lifetime will require reducing prison admissions and moderating prison terms for all crimes, including for violent crimes for which half of the U.S. prison population is imprisoned. Necessary reforms will take a better *first look* at criminal legal penalties going forward, and a *second look* at sentences already imposed for past crimes.

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A Second Look at Injustice

Nazgol Ghandnoosh, Ph.D.

May 2021

THE SENTENCING PROJECT
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The Sentencing Project works for a fair and effective U.S. justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration.

Ms. JACKSON LEE. Thank you very much, Mr. Underwood, for your testimony. Thank you for all your statements, for your opening statements, and for your contribution to this hearing.

We will now proceed under the five-minute rule with questions. I will begin by recognizing myself for five minutes.

It is important to realize how many people we have incarcerated and the desire for them to start anew or to contribute to society.

Mr. Osler, help us understand the impact of soliciting the local prosecutors and giving that considerable weight for someone who's been incarcerated and has a whole new attitude and change of life. Can you explain that conflict of interest and how other clemency process models would prevent that conflict?

Mr. OSLER. Yes, thank you for that important question. One thing I want to make clear is that I don't think anyone is talking about cutting DOJ completely out of the process where they would not have a voice. It is important that DOJ has a voice and people who know what the core imperatives are there.

However, I will say this about going back to the local prosecutors, that I was an Assistant United States Attorney, and there's something that prosecutors know, and that is that there's a deep moral commitment to work.

That is a good thing, because when I'm asking for a sentence for someone like Mr. Hernandez, I'm standing 20 feet away from someone and saying that I want that person to miss their child's wedding and not be—

Ms. JACKSON LEE. Mr. Osler, my time is short, I have other questions—

Mr. OSLER. Well, I will say—sorry. Okay, just that there is a deep that person has, and it's tied to the moment of the crime, and it doesn't take into account how people change over time. These petitions often are 20, 30, 40 years later, and that deep commitment is tied to a different point in time.

It doesn't account for the change in the person's life, including some of the changes that we heard about from some of the other Witnesses here.

Ms. JACKSON LEE. Thank you. Professor Barkow, tell me why you support the creation of a task force of Border Commission very briefly. I do have other Witnesses that I want to question, thank you.

Ms. BARKOW. I'm in favor of the creation of an advisory body that exists outside the Department of Justice:

(1) It will help alleviate that duplication of effort and get rid of some of the bureaucracy.
(2) It won't have the same conflict of interest and the people appointed by the President could have relevant expertise in the kinds of questions that come up with clemency in evaluating how that person is today.
(3) I think when you have a specialist body like that, it can be more efficient and get petitions processed more quickly, and it can be a good resource for the President.

I should say I don't think any of this replaces the President's authority. I agree that it is 100 percent within the President's prerogative to grant or deny. It would provide the President with better sources of information and an efficient process, as opposed to what the President is getting now, which is effectively nothing, which is a backlog of 18,000 people.

They're not getting a yes, they're not getting a no, they're not even getting a maybe. They are just sitting in some kind of purgatory. Creating an advisory board would help cut that red tape, get rid of the conflict, and give the President better advice.

Ms. JACKSON LEE. Thank you so very much. Ms. James, I think we started out by hearing thoughts that all we might be doing is adding to the criminal element, and that we might be creating danger. I do want to pay tribute to our law enforcement during Police Week. We all want to be safe.

You made a very important point that I know, as I have been working with incarcerated women. Many of them are there for conspiracy charges that impact women who are grabbed into the system and given enormous pain. Of course, that completely implodes in many cases, as do fathers, the family.

Would you comment on that, and that releasing these women will be a contribution to society, not a detriment. Ms. James.

Ms. JAMES. Thank you, thank you. I would like to comment on that. I am a former criminal defense attorney. I stood in countless courtrooms defending women, men, and children. I'm also a formerly incarcerated woman that served a sentence inside of a Federal prison.

Madam Chair, but for clemency—but for conspiracy in the Federal prison system, the majority of the women who are currently incarcerated in our Federal prisons would not, could not justify the prosecution, indictment, and sentencing at the lengthy sentences that these women received.

Conspiracy is something that we must take a very deep look at. We have been doing a years' long research study with incarcerated women in the Federal system. It causes egregious harm, disparately impacts women, particularly women with children, separating them for unconscionable periods of time for sentences that otherwise could not be justified.

Ms. JACKSON LEE. The gentlelady's time has expired, and my time has expired. Thank you very much.

Now, my privilege to yield to the Ranking Member, Mr. Biggs, for five minutes.

Mr. BIGGS. Thank you, Madam Chair, and again, thanks to the Witnesses for being here for some very enlightening and informative testimony.

I want to go back to my opening comments and try to address them with how I see this—how I see it now. Professor Osler, I appreciate the diagram that you put up there. Professor Barkow, I read your statement, and I find it very interesting as well.

I want to, we have a real short amount of time, so I'm going to keep you on a short leash. I do want your responses to this. Because when you talked about this, both of you, and I wrote down next to yours—Ms. Barkow, I wrote, "creating a system outside the system."

I get it, this is the system as it currently sits. This is the system—it grew organically. The President controls the system is my point, and I think we all agree to that.

My question is, if you create a system outside the system, which is kind of what we're talking about, are you not just sticking an-

other box on that board? That would be my concern if you really want to streamline this. I'll go to you first, Ms. Barkow.

Ms. BARKOW. There is no guarantee that's not the case. I can see that, because you can't force the President to use it if you create an additional body.

Though, that it wouldn't work out that way, because, one, this President has claimed that he wants to create a body outside of the Department of Justice, he just hasn't done it.

I think Congress creating something like this gives it an imprimatur that Congress thinks it's a good idea. The idea would be having that agency set up. I would think of it more like an advisory board that would kind of sell itself because the President would find it to be useful.

There's no guarantee, and you could find that the President decides "I don't want to use that, I want to stick with this. Or I'm going to take that and finally"—

Mr. BIGGS. I hate to cut you, but go to Professor Osler real quick.

Mr. OSLER. Yeah, we would hope that the President would not make that bad choice. I'd point something out, too, that the President doesn't pick everybody in this chart. That certainly picks the DAG and sometimes is happy with that choice and sometimes not. The staff—

Mr. BIGGS. Rubric—

Mr. OSLER. Well, in essence—

Mr. BIGGS. He could change that rubric today. He's approved only 78 clemencies. We've seen—after President Obama left, he had 13,000 in the pipeline, you had 14,000 after Trump, you've got 18,000 today.

Any President, and I'm saying either party or the other, they're the ones that actually could change the systemic—because, Mr. Osler, you're describing what I would say is maybe a potentially systemic problem here.

If it's a systemic problem, there's really—the Constitution gives one individual the authority to actually clean up that process. We may send a signal from the Congress, we may not, and I would suggest that those signals have probably sent for multiple Administrations.

How do you avoid just putting another box on there? I'm going to give you about ten seconds because I got to get some other questions answered.

Mr. OSLER. Yeah, well, I just want to note that when the President sets a rubric and says I want these people out, this system had done terribly. For example, most recently, we had President Biden saying I want people from the CARES Act—We got a handful.

Mr. BIGGS. I get it, yeah. As probably everybody sitting at this table and throughout the room to say the rubric doesn't—might have some real issues, okay. So, I thank you for that.

I want to get to you, Mr. Murray. What role do the actual victims of violent crime, because we have about eight percent of everybody that's in Federal prison is requesting clemency. So, what role does a victim of violent crime have in this current rubric or should have in clemency decisions?

Mr. MURRAY. Is that question addressed to me? I'm sorry, I couldn't hear—

Mr. BIGGS. Yes, yes.

Mr. MURRAY. Part here. My perception is that's a very minimal role. The other difficulty there is how you define victim. Talk to a mother whose 20-year-old son just died of an overdose drug that was trafficked to that 20-year-old, that mother's a victim. There's a lot of variety on that question.

I don't believe there's significant input. I keep hearing the term bias from the side of the prosecutors, but a number of the panelists and a number of the people involved in the process come from the defense side, from the offender's side. Where do we balance potential bias—

Mr. BIGGS. Okay, I hate to cut you off, because I appreciate it. I wanted to get to Mr. Hurst.

You've experienced this on both sides, defending and prosecuting. Where does the victim fit in this process?

Mr. HURST. The victims should fit in with this process. This is the whole point of law enforcement, to keep us safe and to prevent people from becoming victims. So, yes, victims should have a role in this process, just as they have a role when we prosecute Federal crimes.

We have a victim Witness coordinator in every U.S. Attorney's office in the nation, and we consult with the victims when we prosecute cases.

Mr. BIGGS. Thank you, my time has expired.

Thank you, Madam Chair.

Ms. JACKSON LEE. Thank you, I now recognize the Chair of the Full Committee, Mr. Nadler, for five minutes.

Chair NADLER. Thank you, Madam Chair.

Professor Osler, because the Federal system lacks expungement opportunities for individuals, the only relief they can get from the collateral consequences of conviction is through the clemency process.

Can you explain how the lack of access to clemency, along with the burden of a criminal conviction, prevents successful reentry and reintegration?

Mr. OSLER. Yes, I can. Part of the reason is I run a clinic at my school where we represent people for pardons. We know what it means to them. Every case is going to be different, of course, but for example, it may seem mundane, but there are pardon petitions from people where what they want to do is go hunting with their grandchild.

They can't because they can't possess a gun. That may be a little thing to some people, but it's a big thing to that grandfather. There are people who can't get a license to do the job that they want to do.

Perhaps most importantly, many people just want to feel whole again. They want to feel that they have moved past their—that it is recognized that they are no longer the person that committed that crime, and that's what pardons can do.

Unfortunately, this system serves commutations poorly. It serves pardons even worse. Thank you.

Chair NADLER. Why do you say that it serves pardons even worse?

Mr. OSLER. Well, for the last—during the Obama presidency, during the Biden presidency, there's been an emphasis on commutations. Because the bandwidth is so thin from the pardon attorney on up, when they're focusing on commutations, pardons get shunted aside.

Chair NADLER. Thank you. Professor Barkow. In your testimony, you discuss the possibility of removing the clemency process entirely from the Department of Justice. Can you explain how that would help address the bureaucrat barriers and increase relief for individuals seeking clemency?

Ms. BARKOW. Sure. It would effectively get rid of that chart. So, you would have a body that replaces it, provides all the information to the President, and then the President still makes the ultimate decision. The President could tell that advisory body how he wants to run.

He could say that these are the cases I want to prioritize, this is the way I want you to look at petitions. I want you to favor this category or that category, or this kind of person. What you would effectively have is a dedicated board that is supposed to just do clemency.

What you have in that chart is you have one office that does that, which is the Office of the Pardon Attorney, which is woefully understaffed. Then it has to go through these other two places in the chart where the White House Counsel and the Deputy Attorney General, they just are prioritizing other things, and not unreasonably so.

So, placing an advisory board that is just designed for clemency gives you the benefit of specialization and efficiency. It takes away any kind of bias that exists from having the same agency that brought the case make the final decision.

You still get input from the Department of Justice; you still ask about facts of the case from prosecutors. You have it evaluated by an objective party that doesn't tilt on one side or the other, it's just trying to think what is the best outcome and advice to give the President.

Chair NADLER. Thank you. Ms. Taifa, in your testimony you discussed the need for clemency to fix past wrongs that led to mass incarceration, such as mandatory minimums and other harsh sentencing. How can improving the clemency process address the ongoing racial disparities in the criminal justice system to make the system more equitable and fairer?

Ms. TAIFA. In my testimony, it was through instance categorical clemencies, looking at groups of people. Because mass incarceration has been so massive, the solution to it needs to be massive as well.

There is precedent for it. We have talked about the Ford clemencies for Vietnam-era draft resistors, that happened also with respect to Carter. It was very effectual. There was no danger to public safety or anything along those lines.

It sought to correct issues and help to bring—heal the nation, because that was a very controversial time. Mass incarceration is controversial, and—

Chair NADLER. Excuse me, but that was a categorical clemency to an entire class of people. You're not talking about that.

Ms. TAIFA. Well, actually, I am. I'm talking about various classes of people. One of which I spoke of was the class of old law prisoners who were sentenced before 1987, before the sentencing guidelines went into effect.

They don't have any recourse, and clemency is basically their only avenue that they have for release. They're no benefit from the First Step Act compassionate release processes, and the parole board has been basically ineffectual.

Chair NADLER. Thank you very much, my time has expired. I yield back.

Ms. JACKSON LEE. I thank the Chair. I now recognize Mr. Gohmert for five minutes.

Mr. GOHMERT. Thank you, Madam Chair, appreciate all the Witnesses' input today.

I heard Dan Lungren, a Member of Congress, shortly after I got here when the discussion in this Committee was about the gross unfairness of having so much more severe sentences for crack cocaine as compared to powder cocaine. We were told that was racist to even have that.

Dan Lungren had been here when that was passed. He pointed out, and I went back and pulled some articles and found out that he was right, that when the extraordinarily higher punishment for crack cocaine was passed through this Committee in the House, there were Members of the Congressional Black Caucus, including Charlie Rangel, that said if you vote against this, then you're in favor of destroying the Black community. That this crack cocaine is just a poison to the community, and we have got to have these more severe sentences.

So, it was passed. You had a Committee, you had all kinds of research. For those of us that have been sentencing judges for felonies, most of us didn't see any reason for that kind of big disparity in sentencing.

So, a new Committee, a better researched Committee doesn't necessarily mean that we're going to have a solution to the problem. One of the concerns I have about blanket across-the-board decisions on sentencing after the fact is that most of the judges I know—I was a State felony judge—but Federal judges as well have these massive presentence reports. Some of us spend a tremendous amount of time agonizing over all the details in that presentence report and trying to come to the right conclusion. Then to have somebody, some Committee, somebody come in and say we don't know anything about this case, but we're going to come in and adjust that sentence. Well, they may not know what the judge knows from the presentence report, that actually there was a gun involved. In order to get someone to testify against a bigger guy, there was an agreement we won't include the gun charge so you'll get a lighter sentence.

I mean, there are things that are considered at the trial court that don't get considered when this body comes in and says we're going to have a blanket adjustment to sentencing.

There's been a good deal of criticism of President Trump for granting pardons in the military system. I would encourage others

on this Committee, please join with me in helping reform the military justice system.

Because when you have the same commanding general that signs an order saying I want this person prosecuted and even without saying it, it's clear to every commander, everybody below the commanding general, that he wants him convicted or he wouldn't have signed the charge.

Then the general gets to pick the people that will be on the jury, and the jury doesn't even have to be unanimous. It's a problem, and we have had a lot of unfairnesses in the military system.

I know that's not what anybody here is about, but when we're taking a look at unfairness and justice, that is a grave unfairness. Actually, President Trump didn't get to everybody that should have gotten pardoned.

One of the finest hires I've ever made was somebody that was treated that way in the military justice system. He now works for me. He didn't get a pardon, but he's a brilliant guy, and he's going to help us make these changes.

I just point those things out from somebody that has agonized over sentencing and tried to do the right thing in sentencing. It's not fair to have somebody come in that doesn't know the case you did and change the sentence. We have got to work toward more fairness. Appreciate—

Ms. JACKSON LEE. The gentleman's time has expired.

Mr. GOHMERT. All right, I appreciate it. Yield back.

Ms. JACKSON LEE. The gentleman's time has expired. I now recognize the gentlelady from Pennsylvania, Ms. Scanlon, for five minutes.

Ms. SCANLON. Thank you, Chair Jackson Lee, for holding this hearing today and to all our Witnesses for being here.

Executive Clemency can be an important tool in our justice system. However, as so many have attested today, the current process could use some work.

I had the privilege of participating in the Clemency Project 2014, an effort led jointly by the then White House, the Department of Justice, and a host of groups across the ideological spectrum to grant relief to nonviolent offenders who've been subjected to mandatory minimum sentences, which we've since moved away from.

In that project, we trained hundreds of private bar lawyers across the country and joined them in screening thousands of case files and filing hundreds of clemency petitions on behalf of individuals who met a rigorous criterion for consideration.

I was really pleased that the team at my law firm obtained clemency for 29 individuals. I think their stories can help inform this conversation and dispel some of the rhetoric and fears about releasing dangerous individuals into the community.

One of them was Michelle Miles, who was jointly represented by my former law firm and NYU students under the supervision of Professor Barkow. Another was Cindy Shank, whose story was the basis for an award-winning 2018 documentary, The Sentence, which provides an in-depth look on the incredible impact that clemency can have.

I also know that thousands of clemency applications were left unaddressed when President Obama left office, with his successor

choosing to prioritize clemency and pardons for his personal associates and individuals recommended by social media influencers using no discernable objective criteria, other than political expediency.

I understand that our current process can be burdensome, inefficient, and both underutilized and subject to abuse. So, it sounds like there are ways we can improve the clemency process and ensure that the President can effectively implement this important tool.

Professor Barkow, yesterday I joined Congresswoman Pressley and two of our Republican colleagues, Representatives Joyce and Armstrong, in a letter to the Pardon Attorney requesting disaggregated demographic data on the clemency application backlog so that we can better understand its impact on communities.

We know there currently are over 17,000 pending clemency petitions stuck in that backlog. Can you give us a sense of who the applicants caught in the backlog are? Do many of them meet the criteria for clemency established by the last couple Administrations?

Ms. BARKOW. I'll answer that to the best that I can, but it's not a very transparent process, which is one of the problems. We don't really know because the Pardon Attorney doesn't give very much information about what the petitions look like.

What I can tell you is there are thousands of people who would not be serving the sentences they're serving today because the law itself has changed, and Congress did not make the changes retroactive, for example in the First Step Act. Other than making crack cocaine changes retroactive, all the other changes to mandatory minimums were just forward-looking only.

There's a lot of people who are serving sentences that wouldn't get the sentences they have today. Similarly, they wouldn't have gotten the sentences they have today because they were sentenced under mandatory guidelines, and they didn't get covered by the Obama initiative.

We know there are thousands. I can't give you a precise amount. I can tell you the Sentencing Commission did a report after the Obama initiative and found who there were thousands of people who met his criteria who just kind of escaped review under that process.

The other thing we know is there are thousands, we don't —again, I don't know the precise number, I've tried to get it from BOP, this Committee could get it, who have been released under the CARES Act.

So, they're already released under home confinement. Attorney General Bill Barr released them. They will go back to prison if the pandemic is declared over—if the emergency is over—unless they get clemency relief.

They were a big chunk of the people who got the grants from President Biden in those 75. So, that's another large group of people who are in there.

Then we have a lot of people who are serving sentences under mandatory minimums. To go back to Representative Gohmert's point, those judges had no authority to give that sentence, their hands were tied.

Many of those judges would very much like to see those people get clemency because they actually weren't the product of a judge looking at individual circumstances and facts. They were mandatory minimums that the prosecutor brought, and they were triggered by the conviction or the plea. That's it, the judge couldn't do anything about it.

So, those are some of the people that are in that pool. They have families, they have loved ones, they've served their time. They have reformed. Many of them like Mr. Underwood have, unblemished records that are very hard to have while someone is incarcerated. They're just looking for a second chance and show that they're no threat to public safety.

Ms. SCANLON. Well, I share your concerns that the White House and DOJ lack the resources to tackle the backlog and be more efficient moving forward, and that there's a potential for conflict of interest within the DOJ. Can you just speak very briefly about how the pardon advisory board could assist with that?

Ms. JACKSON LEE. The gentlelady's time has expired.

Ms. SCANLON. Okay, Madam Chair, I just would request unanimous consent to enter into the record an article from National of Second Chances detailing the experience of Michelle Miles, who received clemency from President Obama in 2016.

Ms. JACKSON LEE. Without objection, so ordered. The gentlelady witness can provide the answer in writing. Thank you for your courtesy.

[The information follows:]

MS. SCANLON FOR THE RECORD

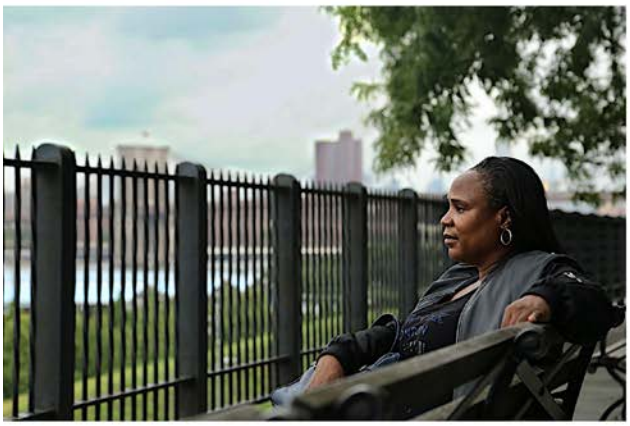
https://www.nationofsecondchances.org/michelle-miles/#content

I grew up in the Marcy Housing Projects in Brooklyn, New York.

My mom worked hard as a single parent to raise 6 children and barely made ends meet. I was the middle child and watching her struggle was hard on me. I hated to see her trying to figure out how she would keep food on the table and clothes on our back. She did what she could and I love her for that.

I was doing well in school and promised that I would graduate and get a good job so I could help pay the bills. At the time I was the only child getting an education, my other siblings dropped out of school early. So I felt like I was the backbone of the family and needed to step up to help my mom.

Then, when I was 18 years old I met an older man—old enough that I really didn't take interest in him. He was a well known drug dealer in the Marcy Projects. The money and flashy things he showed me just left me slack jaw. I had never seen anything like it.



I probably should have ran for my life, but instead I listened to his promises of helping me. He knew the situation my family was in and used that to get me involved in his business. When I look back, it was clear he was baiting me but I didn't see it that way then. He promised to pay me $1100.00 a week to cook and package drugs for him.

Thinking that fast money would help me and my family, I agreed. Soon, I decided to drop out and dedicate all my time to him. I never thought about the consequences of my actions.

I was arrested by the FBI at age 25.

They immediately started saying things like "*We don't want you, we want him. Just give us the information we want and we'll let you go.*" I wouldn't do that so they arrested me. I was booked at 25th Federal Plaza and the next day I saw a judge who told me I was being charged with conspiracy. It happened so quick.

I never did any of the cooking or packaging alone—it was either with him or his partner. I was just the girlfriend doing whatever he asked. I never distributed or sold any drugs. But when his partner got arrested he started bringing my name into this and saying I was a distributor so he could get less time. They gave me a leadership role.

I was offered a cooperation agreement which meant that I had to give up names. They told me that if I didn't cooperate with them, I'd get more time. I wanted to take my case to trial because the things they were accusing me of, I knew I hadn't done and I wasn't going to plead guilty to things I didn't do.

I had a public defender at first but he was a jerk. When he first met me he immediately told me I was stupid for wanting to fight the charges and that I should just plead guilty and give up as many names as I could. Really he wanted me to just be a rat and I had to fight to get him off of my case.

The trial lasted a little over two weeks.

I was completely unprepared for the amount of time I received. At first I was told that my charges would likely get dropped altogether and my lawyer told me the worst I would get is 10 years.

Then the judge started reading out the sentence and it felt like he was talking about somebody else, like a murderer. He told me he was departing from my sentence, lowering it two levels, to avoid having to give me a life sentence because he felt I was beholden to my boyfriend. That was the first time I'd ever heard life was possible for my charges. He told me he was bound by the guidelines to sentence me to 360 months.

For a second it didn't hit me and then I started calculating... 30 years.

The first prison I went to was in Tallahassee, FL. It was a nightmare. I was so many miles away from home and my family. It felt like I was losing myself. The hardest thing was being away from my family. I grew up with my sisters and brothers and they shipped me so far from them that the only way we could keep in touch was with expensive phone calls. I spent a lot of money on phone calls.

There were some friendships formed in prison but I mostly tried to keep to myself. I wanted to stay out of trouble as much as possible. The whole experience had left me feeling like a loose cannon and I was afraid that someone might tick me off and I'd get myself in more trouble. I stayed employed my entire 19 years in prison. I never stopped working. One of the longest jobs I held was at the start of the Iraq war building harnesses, devices, and clothing for the military.

In 2009 I met a judge who was from my district and came into the prison with students to learn from prisoners. My case manager asked me to sit down with them and tell my story. It was about 20 students with the judge and afterward he told me that he was moved by my story. So I wrote him a letter to see if he'd help with my case at all.

By October, I received a letter from the New York University School of Law, letting me know they were reviewing my case. By March, I got a letter from Ballard Spahr, Stillman & Friedman saying they were teaming up with New York University School of Law and would be taking my case pro-bono.

That was just a wow moment for me—to have that kind of support. Then in 2013, the Clemency Project 2014 was announced. Initially, my team didn't think they would be going for clemency, but a few months later told me it was best that we at least applied to have my name in the database. They put together the whole clemency packet for me but I had to look over and approve everything. We submitted in April of 2015 and wouldn't hear anything back for over a year.

During that time, my younger sister had a massive heart attack on Thanksgiving. She never fully recovered and passed away on March 10, 2016 at the age of 39. Only a couple of months later, I'd hear the news that would change my life once again.

President Obama commuted my sentence on May 5, 2016.

I was called to speak to the camp administrator and assumed it was because I had done something wrong. They handed me the phone and when the voice on the other line said "*this is Charles Stillman*," my heart just dropped. I knew if one of the law firm partners was calling, it had to mean clemency. All he said was, "*Ms. Miles, it is my pleasure...*" and I just started screaming. Nobody starts a sentence like that if isn't good news. I knew then that President Obama had commuted my sentence. It was a moment I will never forget.

You'd never thing that accepting freedom would be difficult but after so long in prison, I actually got sick to my stomach the day I left. But when I started walking out those doors and realized that nobody was escorting me, that I was really about to be free, I just felt amazing. I can't even put it into words.

One of the first things I did was go to Times Square and it was so overwhelming I just cried.

After so many years without all the lights, and noises, and business, it was just too much for me. There's still times I feel like that. I'm very focused on my mom because I was gone for so long, I feel like in a lot of ways I think she leans on my even more. She was always there for me so I need to always be there for here.

I have a good job, a good salary, it's up to me if I want to be successful and do the best that I can and grow within this organization. I'm working for the Fortune Society, who help formerly incarcerated people with re-entry and finding employment. I initially found out about them because I needed their help and I was asked if I would like to intern as a receptionist. They said my warm smile would help greet people and because I had done so much time, people could relate to me.

I interned two months and they hired me as a Career Advisor, which I've been doing for six months. It's helped me so much professionally and financially, and I absolutely love it. Sometimes there's difficult clients because it's people going through tough times, but I just try to kill them with kindness because I remember that's where I came from.

I hope President Obama knows how much this opportunity means to me and I thank him from the bottom of my heart.

Photos by Wes Bruer
Story edited by Jon Perri

Michelle Miles

SHARE THIS STORY

Ms. SCANLON. Thank you.

Ms. JACKSON LEE. Thank you. I recognize now Mr. Tiffany for five minutes.

Mr. TIFFANY. Thank you, Madam Chair, and it's good to have all you here. Mr. Underwood, it's good to see you here before this body once again.

You cited President Ford, I believe, Ms. Barkow, and that he set up this panel. I mean, isn't it the case that the President can do this if he wants to?

Ms. BARKOW. Yes, I have urged him to do this, and he has not yet.

Mr. TIFFANY. Isn't it the case that he could just reprioritize, you hear about this backlog, can't he reprioritize this within his Department of Justice and say we want to see more of these reviewed and the decisions expedited?

Ms. BARKOW. He can. That's a little bit trickier, to be honest. President Obama effectively tried to do that. He told the Department of Justice what he was interested in doing.

It's very hard to get through that machinery to crank out what the President wants, because you can see it's a bit of a bureaucratic mess. It's hard to oversee that in a way that gets exactly what you want out of it. Yes, the President can do it.

I would say the best thing he could do is to give the Department of Justice very clear categories, as Ms. Taifa pointed out, and that's the most effective way to get this organizational chart.

Mr. TIFFANY. I'm so glad that you bring up the bureaucracy, because we're going to comment on that later. It's one of the great concerns I have, having served in State government, are we setting up a parallel bureaucracy that ends up just being a problem.

I hope I say your name correctly, Ms. Taifa. You were talking about a categorical clemency or commutation or whatever. So, do you believe we should have a broad class of people that should simply be given clemency or?

Ms. TAIFA. Well, actually, what I'm talking about is a rebuttable presumption of release for specific, targeted categories of persons. I gave examples of a number of different categories.

It's not just a broad, get-out-of-jail-free type of situation. It's a rebuttable presumption, meaning there will be a presumption, say, if someone has served a certain amount of time, has complied with all the things they're supposed to comply with in prison, that they should be able to be granted at least a presumption of that.

That could be rebutted by the prosecutor or whatever, but there should be some type of process that can be expedited, and that's one way of going about that.

Mr. TIFFANY. Thank you for your answer in regard to that. I think we also have to really be mindful of victims in regard to this.

I think about in the State of Wisconsin, our Governor Evers, who named his parole commission, just recently was going to parole someone who had a heinous record of a brutal murder. The family was outraged at the parole commission that was named by Governor Evers, that they were going to let this person loose. So, I think we have to be very mindful of the victims also.

Mr. Hurst, how often in, let's say the last decade, does someone go to prison for a simple marijuana possession charge?

Mr. HURST. Oh, I have no idea. I don't have that in front of me.

Mr. TIFFANY. Mr. Murray, can you answer that question, how often does somebody go to prison for a simple marijuana charge? Simple possession.

Mr. MURRAY. Sure, almost never at this point in time. Only large, large quantities. Obviously, with the trend across the country as it relates to cannabis, there's less and less emphasis.

Resources aren't available, we're inundated with meth and other more serious drugs. The attitude is that we don't have the time or the resource to deal with marijuana.

Mr. TIFFANY. So, what you're saying—

Mr. MURRAY. Very rare, very rare.

Mr. TIFFANY. What you're saying, Mr. Murray, is it's pretty rare to see that, it's rare to see that happen.

Mr. HURST. Mr. Tiffany, I can tell you in 15 years as a Federal prosecutor, zero have been prosecuted in the Southern District of Mississippi for simply marijuana possession.

Mr. TIFFANY. Yeah, okay. Just a follow up, Mr. Hurst. What are the unintended consequences of—you've got 20 seconds to answer this—what are the unintended consequences of making this change?

Mr. HURST. Well, I think the unintended consequences is what Professor Barkow said, which is the President can just ignore it. The problem is we're just creating more bureaucracy.

If you look at the FIX Clemency Act, we're putting more people on the Federal dole, we're funding more retirements, we're funding more salaries. We're basically sending the taxpayers' dollars out for no apparent reason.

Mr. TIFFANY. So, thank you for that. I'm just going to close with this: I am so glad you brought this up in regards to the bureaucracy, because we see it everywhere in the Federal government. It happens everywhere.

When you hear us talking about natural resources, you hear us talking about any issues where there are huge impediments in the way, you see charts like that you could double the number of people that are in the way. That happens all over our Federal government.

We need to fix it, and I'm so glad you bring it up, and I'm glad you bring up the negative decision bias that goes on in our Federal government.

Ms. JACKSON LEE. The gentleman's time has expired.

Mr. TIFFANY. I yield back.

Ms. JACKSON LEE. The gentleman's time has expired. I'm now pleased to yield to the gentlelady from Missouri, Congresswoman Bush, our Vice Chair, for five minutes.

Ms. BUSH. St. Louis and I thank you, Chair Lee, for convening today's crucial hearing. Thank you for your partnership and collaboration on such an urgent issue as clemency, which has been a top priority for me since I was sworn into office.

Three weeks ago, after months of urging from myself and our fellow colleagues, President Biden granted clemency to 78 people, including 75 commutations and three pardons. I was absolutely proud to see two of those residents—two of those people were residents of St. Louis.

In exercising this extraordinary executive authority, the President cited redemption and rehabilitation as core values of our nation. I couldn't agree more, and I commend him for taking this necessary step.

During the previous Administration, the President largely used his clemency power for cronies, for family Members, political allies, and friends. Rather than a tool of redemption and decarceration, he wielded this authority for nepotism and corruption. Clemency became an extension of the privilege afforded to the rich and the powerful.

In the context of our punitive carceral system, clemency provides President Biden with the authority to put humanity over greed, justice over violence, and righteousness over corruption.

Ms. James, in your testimony that 65,600 mothers are in Federal prison unable to raise their children, leaving 1.7 million children behind, and that every tenth mother will never see their children again, even after they are released from prison, how would mass commutations and clemencies impact Black and Brown communities, particularly women?

Ms. JAMES. Thank you and thank you for your support for our efforts around clemency for women in the Federal system, Congresswoman.

Clemency allows the President to strengthen communities with a stroke of a pen. We have thousands of women currently incarcerated who have lots of years inside already where their children were infants and now may be 10–12 years old. That is typical throughout the Federal system.

We have women like Danielle Metz, who's here with me, Congresswoman, who you have met and personally had conversations with. Dani's story is unfortunately not an anomaly. It is so common in the Federal system. Dani is here with us today, thank goodness, after 23 years in a Federal prison where her children grew up without her.

The Adoptions Safe Families Act, which we have to desperately work on, is something that destroys families. Because it requires that the State remove custody of parents, and it did not take into consideration the fact that many of these people were going to be incarcerated women.

Eighty-five percent of currently incarcerated women are mothers, and they were the primary caretakers of their children prior to their incarceration. We must do something to recognize the further harm and trauma that happens when you separate mothers from children, and that you remove these women from our communities.

Clemency is gender justice. It is an opportunity for us to correct some of the things that all the people on this panel, including conspiracy and other things that have led to significant convictions in unreasonable amounts of time that are affecting the women in the Federal system.

Women just like Danielle Metz, just like Virginia Douglas, just like Kemba Smith. Women just like Amy Povah.

Women just like Michelle West, going on her 29th year of incarceration, never an infraction during incarceration, whose daughter Miquelle has come before this Committee and the White House countless times to beg for a second chance for her mother.

So, this does mean something to us. Clemency would provide a huge tool to help us to move these women and help to reunite and heal families.

Ms. BUSH. Thank you.

Ms. JAMES. Thank you.

Ms. BUSH. Ms. Taifa, you talked powerfully about Marcus Garvey's conviction being unjust but outright wrong. Why is it so important to exonerate Garvey and other leaders of racial justice who have been victims of prosecution?

Ms. TAIFA. Thank you, Congresswoman. It is so very important because there have been so many instances of injustice in this country, not just what's happening now, but what has happened historically. Marcus Garvey served to unite Black people, not only in this country, but across the world as well.

He was targeted by this government, he was targeted by the predecessor to the Federal Bureau of Investigation, the Bureau of Investigation under a young J. Edgar Hoover.

The trial was a mix of issues dealing with race and dealing with politics. Even the President at that time, Calvin Coolidge, agreed, and a result commuted that sentence.

That commutation did not remove the stigma of his name. His living son, Dr. Julius Garvey, has been seeking to restore the honor of his father. His image, Marcus Garvey's image, in on the currency of the nation of Jamaica. All over the world, people have been honoring him. Dr. Martin Luther King, Nelson Mandela, others, many leaders around the world.

Ms. JACKSON LEE. The gentlelady's time—

Ms. TAIFA. Have learned from his teaching. Thank you.

Ms. BUSH. Thank you, I yield back.

Ms. JACKSON LEE. Thank you. Gentlelady's time has expired, thank you very much. Let me acknowledge if there are any other Members that are in the room.

Mr. BIGGS. Madam Chair, Mr. Massie is in the room and would like to speak.

Ms. JACKSON LEE. I'm delighted to yield five minutes to Mr. Massie.

Mr. MASSIE. Thank you, Madam Chair.

There's no doubt in mind that we have thousands of people in this country who are incarcerated unfairly or over-incarcerated. They've served their time, they've been punished enough, and that they should be released to leave—lead productive lives.

With that said, clemency is a tool of the Executive Branch, not of Congress. I think we need to take this opportunity to think about what we could do in Congress to fix these problems, or to prevent these problems.

I don't think mass clemency is the answer any more than mandatory minimums are the answer to crime, because it's a one-size-fits-all. I do think there should be more clemency and more considerations given on an individual basis.

Ms. James, you mentioned conspiracy and how so many people are charged with conspiracy. Just to summarize for those people who are watching this, this is a way to prosecute somebody who has not committed a crime. What we have to do is have the resolve in Congress not to pass more conspiracy laws.

We're doing it every year. It's not easy to vote against some of these bills that have the conspiracy stuff stuck in them. The anti-lynching bill had a conspiracy charge or clause in there. So, that you could convict somebody who had never been involved in lynching somebody merely for talking about it.

So, it takes resolve on the part of my colleagues to vote against these things where we create new conspiracies.

Also, mandatory minimums. These are one of the most dangerous things that we've created here in Congress. They're a creation of Congress, not the Executive Branch. We don't let the judges have the discretion that they should have to determine what the actual punishment is to fix the actual crime.

When you've got a bill, and it's a bill to prevent sex trafficking, and there's a mandatory minimum in there, it's hard politically, it's hard for my colleagues to vote against a sex trafficking bill that would cut back on sex trafficking, even if it's got a mandatory minimum in there.

They're not considering the fact that mandatory minimum could be used to prosecute a receptionist at an internet hosting company merely because that internet site was used for sex trafficking.

The single mom who's the receptionist there, maybe she knows something's up and everything at this company's not on the up and up, but she's got to feed her kids and she's working there as a receptionist. Why does she deserve ten years in prison when the person who's actually committing the crime may get exactly the same sentence?

This just takes a lot of resolve. We got to start reading the bills, read the bills, look for these things in there, and offer amendments that take out the conspiracy charges and to take out the mandatory minimums that are in there that tie the judges' hands and then create this problem on the back end where you need to use clemency.

I'd just like to use my remaining time to talk about one case, the case of Ross Ulbricht. He was a young, peaceful, first-time offender serving a double life prison plus 40 years. The guy has been condemned to rot in prison for setting up a website called Silk Road. There were people selling drugs on there, and he probably knew that was happening.

The people who were selling drugs on there who got convicted are already out of prison, and the guy who set up the website when he was 26 years old is now ten years later, this fall, it will be the tenth anniversary of his time in prison.

He was an Eagle Scout. He doesn't claim that he was innocent, he knows now that it was a crime. He's asking for clemency; he's asking for his sentence to be commuted. He's got a college degree; he could be a productive member of society. So, I would like hopefully the Executive Branch to look at this case.

Madam Chair, I would like to submit for the record a summary of Ross Ulbricht's case from *freeross.org*, and remind people that Ross was never prosecuted for causing harm or bodily injury, and no victim was named at his trial. I ask unanimous consent to submit these two pages from that site.

Ms. JACKSON LEE. Without objection, so ordered.

[The information follow:]

MR. MASSIE FOR THE RECORD

Free Ross Ulbricht

Ross Ulbricht Case Overview

Ross Ulbricht, a young, peaceful first-time offender, is serving a double life sentence plus 40 years, without parole, for all non-violent charges associated with creating the Silk Road website. An Eagle Scout and scholarship student, he was a 26-year-old idealistic libertarian—passionate about free markets and privacy—when he made the site. Ross was never prosecuted for causing harm or bodily injury and no victim was named at trial. This is a sentence that shocks the conscience.

Accepts Responsibility

Ross has expressed heartfelt remorse for creating Silk Road and accepts responsibility for the mistake he made. Although he never intended harm, he has learned how even well-meaning and idealistic actions can have unintended consequences. Now much wiser and more mature, Ross has vowed that, should he be released, he would never come close to breaking the law again.

Silk Road was an online marketplace similar to eBay, that emphasized privacy and used Bitcoin as the means of exchange. Based on the non-aggression principle, it allowed people to voluntarily buy and sell what they chose, as long as no third party was harmed. Consequently, the site prohibited child pornography, violent services, stolen property, and generally anything used to "harm or defraud" others. Items exchanged included books, art, clothing, and electronics. However, other vendors realized that the site's anonymity made it an attractive platform for selling illegal drugs (most commonly small amounts of marijuana, as shown by a Carnegie Mellon University study).

Ross was not accused of selling drugs or illegal items himself, nor did he launder money or hack computers, but was held responsible for what others listed on the site.

> *"Silk Road turned out to be a very naive and costly idea that I deeply regret…It was supposed to be about giving people the freedom to make their own choices, to pursue their own happiness however they individually saw fit…I do not, and never have, advocated the abuse of drugs…I understand what a terrible mistake I made."*
> – Ross in letter to the Court [PDF]

Corruption, Misconduct, and Violations

The entire case that led to Ross's egregious sentence—from the investigation to the trial to the sentencing—was riddled with corruption, prosecutorial misconduct, and constitutional violations. In the course of arriving at the conviction and sentence, Ross's rights were violated numerous times.

Both the prosecution and much of the media smeared Ross with unprosecuted, false allegations of planning violence that never occurred, were never proven, never ruled on by a jury, and were ultimately dismissed with prejudice. His case was tainted by corrupt agents (later sent to prison), warrantless spying and lies under oath by the FBI and AUSA, proven evidence tampering, preclusion of exculpatory evidence, and much more.

Ross's cruel and unusual punishment is an extreme example of sentencing disparity and the kind of abuse that reformers are now fighting to change. Compared to others sentenced for similar, or worse, conduct, Ross's sentence is grossly excessive and disproportionate. All the other Silk Road defendants received sentences of no more than 10 years, including the actual drug sellers and the men behind Silk Road 2.0, a bigger replica.

Ross and his legal team at Williams & Connolly LLP, supported by 21 organizations, petitioned the Supreme Court, challenging important Fourth and Sixth Amendment violations in the case, but the Court declined to hear it.

There is a strong, bipartisan consensus that Ross is the victim of a miscarriage of justice and his sentence must be commuted. In addition to steadfast support from family and friends, his clemency has widespread support, including from the legal, criminal justice reform, technology, and liberty communities.

Over 250 organizations and eminent individuals from across the political spectrum have voiced their support. Ross's clemency petition is steadily growing with nearly 1/2 million signatures and is the largest clemency petition to the President on Change.org.

Exemplary Behavior

October 1, 2022 will mark the beginning of Ross's **10th** year in prison. While enduring the harshness of prison, he has been a model inmate—leading classes, tutoring, mentoring fellow inmates and being a good influence. He has also completed several educational programs. He has never received a disciplinary sanction and is universally liked by the prison staff. Based solely on his life sentence, and despite his non-violent history and low security score, he is being held at a maximum-security facility.

Throughout his ordeal, Ross has remained a fundamentally positive and compassionate human being. He clings to the hope of a second chance and dreams of a future where he can start a family, contribute to society with his education and skills, and inspire change as an advocate for criminal justice reform.

Ross and others serving life sentences for non-violent drug offenses

Read/watch: **Railroaded: The Real Story of Silk Road.**
Based on over 400 references. Never-before-seen information.

Mr. MASSIE. Thank you, and I yield back the balance of my time.

Ms. JACKSON LEE. The gentleman yields back. Mr. Biggs, do you have—I do have some concluding remarks. Mr. Biggs, do you have concluding remarks? I yield to you at this time.

Mr. BIGGS. Madam Chair, thank you. I'm going to forego my concluding remarks because of the vote. Thank you, Madam Chair. Thanks to the Witnesses.

Ms. JACKSON LEE. Thank you as well to the Witnesses. Let me again, I do have some concluding remarks.

Let me thank Congresswoman Pressley; Mark Osler, Professor Osler; Professor Barkow; Professor at one time but a CEO and founder of the Taifa Group, Nkechi Taifa; Andrea James; Michael Hurst; and the Honorable Morris Murray.

In concluding, let me say that the genesis of this hearing was absolute necessity, and the thousands that languish in prison in our Federal system that really warrant this response of a clemency or a pardon. I think what the Witnesses have generated today is that there is a bipartisan support for a response and for an answer.

As I conclude, I just want to briefly submit into the record the story of Anthony Todd Robinson, who was an Army officer who was arrested on mistaken identify for sexual assault and spent 27 years in the State system in Texas.

He received from then-Governor Bush clemency, and he is also now a board-certified law graduate and attorney helping those who are particularly in need. That is Mr. Robinson.

Ms. JACKSON LEE. In addition, Michelle Miles, Pedro Torres, Waylon Wilson, are all individuals released under this system. They have not contributed to crime; they've contributed to society's best. They have made an economic contribution to our engine of our economy.

[The information follow:]

MS. JACKSON LEE FOR THE RECORD

ANTHONY ROBINSON

Other Texas Cases With Mistaken Witness Identifications

Anthony Robinson (Photo/Innocence Project)

In 1987, Anthony Robinson was picking up a car for a friend at the University of Houston when university police blocked the parking lot, pulled him out of the car, and arrested him. The police said that Robinson matched the description that a rape victim had given of her attacker: a black man wearing a plaid shirt. The victim also claimed that her attacker had a mustache, which Robinson did not. Robinson was not a student at the University, which he believes encouraged the police to link him to the crime.

At trial, the prosecution relied heavily on the victim's identification of Robinson from a lineup. At the time of Robinson's conviction in 1987, DNA testing was not yet admitted as evidence in Harris County (TX) courts. Robinson had told police he was innocent and had offered to provide the police with a blood sample to prove his innocence.Serology testing was conducted, and an analyst testified that the victim and Robinson had similar blood group markers, which were consistent with evidence from the crime scene. The analyst testified incorrectly that 60% of possible perpetrators could be excluded. When the evidence being tested is a mixed stain of semen from the perpetrator and vaginal secretions from the victim – and testing does not detect blood group substance or enzymes foreign to the victim – no potential semen donor can be excluded because the victim's blood group markers could be "masking" the perpetrator's. Under such circumstances, the failure to inform the jury that 100% of the male population could be included and that none can be excluded is highly misleading.

Robinson was sentenced to twenty-seven years and he was paroled in 1997. Once paroled, Robinson was able to raise his own funds to pay for the DNA test by working as an order clerk at a local oilfield supply company. Robinson hired Randy Schaffer to clear his record. The DNA testing proved his innocence, which then led the state to conduct its own test, confirming the

exculpatory results. On November 7, 2000, the Texas Board of Pardons and Paroles voted unanimously to recommend Robinson's pardon. Robinson was awarded $245,000 in state compensation and an annuity of $4,700.

Summary courtesy of the Innocence Project, http://www.innocenceproject.org/. Reproduced with permission.

Report an error or add more information about this case.
Posting Date: Before June 2012
Last Updated: 11/26/2016

https://www.nationofsecondchances.org/michelle-miles/#content

I grew up in the Marcy Housing Projects in Brooklyn, New York.

My mom worked hard as a single parent to raise 6 children and barely made ends meet. I was the middle child and watching her struggle was hard on me. I hated to see her trying to figure out how she would keep food on the table and clothes on our back. She did what she could and I love her for that.

I was doing well in school and promised that I would graduate and get a good job so I could help pay the bills. At the time I was the only child getting an education, my other siblings dropped out of school early. So I felt like I was the backbone of the family and needed to step up to help my mom.

Then, when I was 18 years old I met an older man—old enough that I really didn't take interest in him. He was a well known drug dealer in the Marcy Projects. The money and flashy things he showed me just left me slack jaw. I had never seen anything like it.

I probably should have ran for my life, but instead I listened to his promises of helping me. He knew the situation my family was in and used that to get me involved in his business. When I look back, it was clear he was baiting me but I didn't see it that way then. He promised to pay me $1100.00 a week to cook and package drugs for him.

Thinking that fast money would help me and my family, I agreed. Soon, I decided to drop out and dedicate all my time to him. I never thought about the consequences of my actions.

I was arrested by the FBI at age 25.

They immediately started saying things like "*We don't want you, we want him. Just give us the information we want and we'll let you go.*" I wouldn't do that so they arrested me. I was booked at 25th Federal Plaza and the next day I saw a judge who told me I was being charged with conspiracy. It happened so quick.

I never did any of the cooking or packaging alone—it was either with him or his partner. I was just the girlfriend doing whatever he asked. I never distributed or sold any drugs. But when his partner got arrested he started bringing my name into this and saying I was a distributor so he could get less time. They gave me a leadership role.

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In 2009 I met a judge who was from my district and came into the prison with students to learn from prisoners. My case manager asked me to sit down with them and tell my story. It was about 20 students with the judge and afterward he told me that he was moved by my story. So I wrote him a letter to see if he'd help with my case at all.

By October, I received a letter from the New York University School of Law, letting me know they were reviewing my case. By March, I got a letter from Ballard Spahr, Stillman & Friedman saying they were teaming up with New York University School of Law and would be taking my case pro-bono.

That was just a wow moment for me—to have that kind of support. Then in 2013, the Clemency Project 2014 was announced. Initially, my team didn't think they would be going for clemency, but a few months later told me it was best that we at least applied to have my name in the database. They put together the whole clemency packet for me but I had to look over and approve everything. We submitted in April of 2015 and wouldn't hear anything back for over a year.

During that time, my younger sister had a massive heart attack on Thanksgiving. She never fully recovered and passed away on March 10, 2016 at the age of 39. Only a couple of months later, I'd hear the news that would change my life once again.

President Obama commuted my sentence on May 5, 2016.

I was called to speak to the camp administrator and assumed it was because I had done something wrong. They handed me the phone and when the voice on the other line said "*this is Charles Stillman*," my heart just dropped. I knew if one of the law firm partners was calling, it had to mean clemency. All he said was, "*Ms. Miles, it is my pleasure...*" and I just started screaming. Nobody starts a sentence like that if isn't good news. I knew then that President Obama had commuted my sentence. It was a moment I will never forget.

You'd never thing that accepting freedom would be difficult but after so long in prison, I actually got sick to my stomach the day I left. But when I started walking out those doors and realized that nobody was escorting me, that I was really about to be free, I just felt amazing. I can't even put it into words.

One of the first things I did was go to Times Square and it was so overwhelming I just cried.

After so many years without all the lights, and noises, and business, it was just too much for me. There's still times I feel like that. I'm very focused on my mom because I was gone for so long, I feel like in a lot of ways I think she leans on my even more. She was always there for me so I need to always be there for here.

I have a good job, a good salary, it's up to me if I want to be successful and do the best that I can and grow within this organization. I'm working for the Fortune Society, who help formerly incarcerated people with re-entry and finding employment. I initially found out about them because I needed their help and I was asked if I would like to intern as a receptionist. They said my warm smile would help greet people and because I had done so much time, people could relate to me.

I interned two months and they hired me as a Career Advisor, which I've been doing for six months. It's helped me so much professionally and financially, and I absolutely love it. Sometimes there's difficult clients because it's people going through tough times, but I just try to kill them with kindness because I remember that's where I came from.

I hope President Obama knows how much this opportunity means to me and I thank him from the bottom of my heart.

Photos by Wes Bruer
Story edited by Jon Perri

Michelle Miles

SHARE THIS STORY

PEDRO TORRES

37-year-old Pedro Torres was an immigrant from Mexico who was living illegally in the U.S. and working in Dallas as a laborer at an ironworks. On the morning of April 17, 1983, while Torres was at work in Dallas, 18-year-old Manuel Ortega was stabbed to death more than 250 miles away in Houston. The witnesses to the murder said that the man who killed Ortega was named Pedro Torres.

Nearly five months later, Dallas police picked up Pedro Torres for drinking a beer in a convenience store. The officers did a routine check in which they entered Torres's name into the Texas Department of Public Safety computer, and the computer records showed that a "Pedro Torres" was wanted for Manuel Ortega's murder in Harris County. Three witnesses then positively identified Torres as Ortega's killer. Torres was convicted of the murder in a jury trial and sentenced to seventy-five years in prison.

However, Judge Michael McSpadden had his reservations about the case from the start. About a month after Torres's conviction, Judge McSpadden requested that Torres's defense attorney, Carlos Garcia, provide him with Torres's work records. Garcia had not presented the work records at trial, and, upon examining them, it became clear to Judge McSpadden that an error had been made and the wrong "Pedro Torres" had been convicted. These records showed that Torres was at work in Dallas on April 17, 1983 when the murder was committed in Houston. Coupled with Torres's work records was a new witness: the roommate of the "Pedro Torres" who had actually committed the murder. Judge McSpadden stated that he could understand why the jury had originally ruled against Torres based on the evidence that was presented. On April 26, 1985, Judge McSpadden reversed Torres's conviction and ordered his immediate release from prison. The other Pedro Torres was sought by police but had not been located as of April 1985.

Judge McSpadden gave Torres a document that declared him innocent of the murder of Ortega to avoid any future confusion or accusation. It is not known whether Immigration and Naturalization Service ever deported Torres.

— *Researched by Kenneth Avila*

NATION OF SECOND CHANCES

Wayland Wilson

Wayland Wilson was a first time nonviolent offender when he received a mandatory minimum sentence of 37 years for conspiracy to distribute crack cocaine and marijuana. He served 23 years before being granted clemency by President Obama on May 5, 2016.

My brother and I co-owned a car dealership in Dallas, Texas.

One Saturday morning I went to the car lot to open up and about 20 minutes later cops stormed in with guns drawn. I found out later that they had been investigating my brother. I knew he was

selling cocaine and crack-cocaine but I was only involved in selling marijuana. But it was easy for them to tie me into things because they could prove phone calls were coming to and from my lot, they could say that I was involved. That's all they needed.

Conspiracy laws allow prosecutors to charge lots of people and hold them all accountable regardless of how small their role might be. What they do is they round up all these folks, the small fish, and get them to turn on one another with promises of reduced sentences. I was a small fish but they threw lots of charges at me to try and make one stick. Just me having knowledge of illegal activity made me part of a conspiracy and because we dealt with cash at the dealership it was easy for them to accuse me of money laundering. It started out a cocaine conspiracy, then they changed it to crack-cocaine, then to marijuana, then they just lumped all of them together.

If I had plead guilty, I would have only done 11 years.

That was the plea deal they offered me, but they wanted me to say I had done things that I hadn't. It was just crazy what the

prosecutors were claiming. They wanted me to admit to laundering a million dollars. That never happened and I just couldn't plead guilty to something I didn't do, so I decided to go to trial. I had never even had a parking ticket so I thought I would be okay.

When I turned down their deal and decided to go to trial, they kind of saw it as a slap in the face. Now they wanted to get me the longest sentence possible. They really stacked the deck against me and painted it out to be this big drug ring where I was making millions of dollars.

At trial the jury was mostly white and convicted me on every charge. The judge explained to me that the law required him to give me such a severe punishment, that his hands were tied in sending a first time offender to prison for 37 years. My brother and my cousin were also convicted. I'd never even been to jail before and they sent me right to a high security prison.

Their goal is to break up your family.

The whole thing was devastating for everyone in my family. I left behind my wife and two children. Nobody could believe that I got this amount of time. I couldn't believe it. How do you give a first time offender 37 years?

My son was 11-years-old and my daughter was 9. I missed out on raising them. I'd talk with them on the phone and keep a relationship but it was hard because like I said, when you go to

trial, they punish you. After my conviction they sent me as far away from my family as they could.

Everything had to be readjusted. I was the breadwinner of the house so things were in disarray when I left. They seized all of my assets so I no longer owned anything that I could sell for money to help my family with food, clothes, housing, school supplies. It was just devastating. My wife had to learn how to raise a family by herself and she did the best with what she had.

It's hard getting used to being away from your family.

You only have 300 minutes a month to talk to them and you can only talk 15 minutes a time. You need to have money on your books to make phone calls or use the commissary and you can only go to the commissary on a certain date depending on what your number is. It takes a great deal of adjustment to cope with losing freedom this way.

I wasn't around violence before prison.

The first prison they sent me to was the USP in Leavenworth, Kansas which was maximum security. The higher security level of a prison, the more dangerous it is. I was a first time offender, I wasn't around violence before prison. But in there you never knew what would happen. There was always somebody getting stabbed and fights between gangs. They could call lockdown and it might last a few hours or a few weeks.

I worked as a mailroom orderly, delivering the mail to the medium security and the camp and I also worked in the garden. For the most part I worked as an orderly in the units cleaning. When I wasn't working, most of my time was spent at the law library.

One of the first things I did when I went to Leavenworth was take every law course available. Studying law everyday was like my workout. I was determined to get out of prison and understanding law seemed like the best way to do that. I learned how to write motions and do my own filing, everything.

Over the years I went from knowing nothing to helping other inmates get their sentences reduced and a lot of them even went home. They were thankful for my help and that felt good.

Prison is full of constant challenges.

I had mostly good conduct. They get you for little things and some officers taunt you, do things to get on your nerves. You live everyday based on what kind of mood they might be in. They'll look at you and say "Inmate, get over here and stand still." And

they'd just make you stand perfectly still for as long as they want and if you moved a tiny bit, they'll write you up for an infraction.

You see movies and they're mostly nothing like real prison. There's so much stuff that goes on, so many rules. And I can tell you that they have everything in prison that they have on the streets—drugs, alcohol, everything... and you need to work hard to avoid that.

In 2014 I was contacted by a lawyer named Brittany Byrd. She grew up with my cousin Deanne and agreed to help with our case by putting together our clemency petitions as part of the Clemency Project 2014. I had been working for years on my own appeals and Brittany asked me to stop appealing and trust her. That was hard because after being let down by lawyers in the past I felt like I had to do everything myself — but I'm so glad I listened to her.

I always believed that I'd get clemency. I'd tell guys "Man, I'm getting out. I'm getting clemency." And they just say, "That guy is crazy. He's been locked up too long. He's institutionalized." But for me all I could think about was going home.

President Obama granted me clemency on May 5, 2016.

One day they called me from work to go to the counselor's office and when I got there my counselor was waiting along with the Assistant Warden. They told me they had received a phone call and that I needed to sit down and wait for my lawyer to call back. They didn't know what it was about but I knew it must be clemency. Finally the phone rang and they gave it to me and it was Brittany on the line. She said "Wayland, congratulations you've been granted clemency."

Chills came over me. I was overjoyed and thankful. Very, very, thankful. God was really in the plan and I just felt so blessed. My other co-defendant, Donel Clark, he got clemency too and my brother Michael got out on the two-point reduction.

My family picked me up from the prison and we were able to stop and eat dinner together for the first time in 23 years. They dropped me off at a halfway house and once I finished my time there, the first thing I did at home was eat my mom's pot roast and lemon cake. I missed that for so many years. They'd let us have some of it on the holidays but now I had all of it sitting on one table, my family's table. It was an incredible feeling.

Now I'm an independent contractor trailer truck driver hauling all sort of loads like freight, RV, cars, whatever. They call it "hot-shotting" and I'm in the process of expanding but right now. I mostly haul the RV trailers. It's been good to me and I really enjoy it. It can be long hours but for the most part you get used to it and it doesn't seem like work because you're relaxing and taking the trailer from point A to point B without any damage.

It really touches you to have the commander-in-chief reach down and correct what was wrong.

You have the President of the United States giving people a second chance when some people still don't want to see that it was a mistake to lock people up and throw away the key for a nonviolent crime. It really touches you to have the commander-in-chief reach down and correct what was wrong.

I want President Obama to know that I will always and forever be grateful for his service to our country and to us first time

offenders. I believe that God was looking over both of us and that he laid us on President Obama's heart. I just want to tell him thank you and that I appreciate him and Eric Holder and the clemency project for writing these wrongs. People just didn't deserve to serve this kind of time and we all have so more to offer society and our families outside of prison.

There's a lot of people left behind that should be out. A lot of really good people in prison. Some of the best, most trustworthy friends that you could have are right there. They deserve a second chance too.

Photos by Brenton Gieser
Story edited by Jon Perri

Wayland Wilson

We must recognize that there are different times when people were incarcerated and arrested, convicted, and from the time that they come and seek clemency.

Very quickly, Mr. Hernandez, you tell a powerful story. Can you just quickly say why you are seeking a pardon?

Mr. HERNANDEZ. The reason I'm seeking a pardon is to make me whole again, to give me a chance to be back, as you could say, my civil rights. Whether that's to hold public office or to rent an apartment or to get a certification or a license—

Ms. JACKSON LEE. You are a different person today than you were before, is that correct?

Mr. HERNANDEZ. Excuse me, ma'am, what was that?

Ms. JACKSON LEE. You're a different person today than you were at the time of your criminal activity.

Mr. HERNANDEZ. Oh, yes, even when I wrote President Obama, I told him I wasn't in a position to tell him I deserved life or freedom. What I could tell him was that I was a changed person. That I wasn't that 18-year-old kid that sold drugs over 15 years ago.

Ms. JACKSON LEE. All right, thank you. Let me quickly go to Mr. Underwood. Can you explain how clemency can be used to right the wrongs of a tough-on-crime era that was an era of really lack of options, no one thought creatively.

Yes, drugs were horrible, and I defend those people who at that time felt that was the way to go. There was no options. Then it lasted forever.

Mr. UNDERWOOD. Yes, ma'am. Well, one thing they could do since is look at resentencing. Could look at a person and see that they're not the person they were. They can determine and look at resentencing. It's not a get-out-of-jail-free card. A look at resentencing is for a District Court Judge after a thorough vetting of the individual and look at them and see that they're not who they were when they came in many years ago, that they're a reformed person and that they can contribute to society as an American citizen.

Ms. JACKSON LEE. Thank you. Ms. Taifa, on the issue of Marcus Garvey, let me just add to the point very quickly, the time is running. That many people fighting social ills were caught up in the criminal justice system. Marcus Garvey, that happened to him, and he deserves the respect of a response of the pardon.

Is that your view? Ms. Taifa?

Ms. TAIFA. I said absolutely, yes, he definitely deserves a pardon. We need closure to that era in history.

Ms. JACKSON LEE. Thank you so very much. Again, I want to thank all the Witnesses. The guiding post is that we must do something to reform the clemency and pardon process. This oversight hearing was not a first step. I believe it should be a comprehensive step.

We do need to meet with the Pardon Attorney, we'll insist that we do so. As well, we need to begin to reform this process immediately, for there are too many mothers and fathers and people who are seeking to do better in this nation.

Again, my appreciation to all the Members who participated. This concludes today's hearing. Thank you to our distinguished Witnesses for attending.

Without objection, all Members will have five legislative days to submit additional written for the witnesses or additional materials for the record. Now, this hearing is adjourned.

Thank you to the Witnesses.

[Whereupon, at 11:14 a.m., the Subcommittee was adjourned.]

QUESTIONS AND ANSWERS FOR THE RECORD

Greetings, Veronica! Pursuant to the August 2 letter from Chairman Nadler to me regarding my participation in the Oversight Hearing on Clemency and the Office of the Pardon Attorney, please see below my response to the question raised, as well as corrections to my oral testimony delivered at the hearing:

Question from Representative L. Luis Correa for the record:
President Biden took a critical first step through recent clemency announcements in April. As we normalize cannabis markets across the country, how important is it for those convicted of cannabis offenses to have their records expunged?

Nkechi Taifa response:

It is imperative that those convicted of cannabis offenses have their records expunged as the country normalizes cannabis markets. States must vacate the convictions of people, especially those of Black men and women, for marijuana possession and sale charges due to recent drug reform policies. No one should have to languish in prison or have opportunities squandered once they reenter society for a substance that is largely no longer criminalized. Those with records for misdemeanors and other low-level violations of federal marijuana law face heavy consequences that overshadow any official punishment. Depending on the jurisdiction, misdemeanor marijuana convictions have restricted educational aid, housing assistance, occupational licenses, driver's licenses, and even foster parenting. In most jurisdictions, employers can deny job offers or promotions based on marijuana misdemeanor convictions, even old ones—and in some places, employment can be denied based on a misdemeanor marijuana arrest without an ensuing conviction. Expungement must come hand in hand with justice measures that provide opportunities for employment and revenue in general, and particularly in the growing and regulated cannabis industry. Without expungement, fields of opportunity will remain uneven, and disparities will continue to be baked in systems with no chance for equity.

New York University
A private university in the public service

Rachel Barkow
Vice Dean and Charles Seligson Professor of Law
Faculty Director, Zimroth Center on the Administration of Criminal Law

August 4, 2022

Representative Correa asked the following:

Many states are enacting automatic expungement laws that allow people with past convictions to clear eligible criminal records. As you know, an overwhelming majority of cannabis-related charges are handled by state and local law enforcement. Therefore, millions of Americans with past marijuana convictions would benefit from automatic record-clearing measures. Record clearance would not only provide people of color the opportunity to participate in the cannabis industry but can also reduce barriers to employment, education, and housing opportunities. Is there a role for Congress in expanding the availability of automatic record clearance at the state level?

I believe there is a role for Congress to expand the availability of automatic record clearance. First, I think Congress should pass legislation that would allow federal records to be automatically expunged, because a federal conviction is the impediment for some people.

Second, Congress can help expand the availability of automatic record clearance at the state level by providing funding for it. Setting up an automatic process takes resources, and many states struggle to find the funds for such a process. Congress could incentivize states to create automatic record clearance by providing the funding to establish these programs. Ultimately, that funding would result in cost savings because it would, as Representative Correa notes, aid in reentry and therefore reduce recidivism.

Questions for Panel 2

Chairwoman Jackson Lee, thank you for holding this most important hearing this morning, and thank you to our witnesses for being here today.

Question 1 - *To Panel Two witnesses Bill Underwood or Nkechi Taifa*

President Biden took a critical first step through recent clemency announcements in April. As we normalize cannabis markets across the country, how important is it for those convicted of cannabis offenses to have their records expunged?

Answer 1 - The importance of an expunged record for a cannabis offense cannot be overstated. As we normalize cannabis markets across the country, it is imperative that those most harmed by the war on drugs be allowed to benefit from the economic opportunity that cannabis markets present, especially for its returning citizenry.

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