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PRIVILEGED AND CONFIDENTIAL:
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Mariano-Florentino Cuéllar
Special Assistant to the President for
Justice and Regulatory Policy
White House Domestic Policy Council
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. Cuéllar:

Having served as a staff attorney in the Office of the Pardon Attorney (OPA) for 12 years, I was encouraged by Eric Holder's recent remarks on the occasion of Black History Month, in which he called upon all Americans to foster a meaningful dialogue concerning "the racial matters that continue to divide us." This is a daunting task, to be sure, given the weight of our shared historical experience, which as Mr. Holder noted makes the prospect of confronting these unresolved issues in a constructive way "both awkward and painful." Yet, the need to "confront racial issues freely and without fear" is especially urgent for those of us privileged to work at the Justice Department, because we are charged with the special responsibility of making the Constitution's promise of equal liberty a living reality.

In the spirit of those remarks, I must bring to your attention the near total collapse of the clemency advisory process, the burden of which falls especially hard on minorities who make up a disproportionate share of the prison population. By longstanding practice, the President has followed the Department's advice in the vast majority of clemency matters. This is the norm because acting against such advice is usually a politically risky maneuver, whereas acting in accord with it provides the President with substantial political cover. Realistically, no President can be expected to grant clemency on a regular basis against the contrary advice of his own Justice Department. Thus, while the reluctance of recent Presidents to exercise the clemency power more generously perhaps can be criticized, a large measure of the blame falls squarely on the bureaucratic managers of the Department's clemency program, who have taken firm control of the advisory process in furtherance of their own institutional agenda. Simply put, President Obama will ***not*** be in a position to grant clemency as he wishes a year from now, or two years from now, if nothing is done to change this dynamic.[1]

[1] In the last two administrations, the Counsel's Office specifically requested the Department to increase the supply of favorable clemency recommendations toward the end of the President's term in office. In both cases, OPA professed that it lacked adequate resources to comply with the President's wishes and refused to relax the standard of review, knowing that it could run out the clock, as it were. President Clinton reacted to the Department's recalcitrance by granting a rash of irregular cases that had not been properly vetted, whereas President Bush essentially shut the process down. In neither case did the Department serve the best interests of the President.

The statistics are striking. In the last administration, OPA received approximately 11,000 clemency petitions. President Bush granted 189 pardons and 11 commutations, which is fewer clemency grants than any two-term president since Thomas Jefferson. President Bush also denied a record number of cases, about 7,500 commutation and 1,700 pardon requests. In all of these cases, both grants and denials, President Bush did exactly as the Department advised ***99.8%*** of the time, which vividly illustrates the paucity of favorable recommendations.

Remarkably, during the entire Bush administration, the Department submitted a favorable letter of advice in a grand total of ***five*** commutation cases, only ***three*** of which advocated a meaningful reduction of sentence. With a burgeoning federal prison population of over 200,000 persons and the receipt of about 8,500 commutation requests in eight years, this advisory record amounts to the assertion that the system is essentially perfect – injustices never occur, sentences are never excessive, circumstances never change, and mercy is never appropriate. No reasonable person really believes that.[2]

The disintegration of the clemency advisory system is not simply a matter of applying an unduly strict standard of review but, rather, the abandonment of the review process altogether in many cases. Since June 2008, the current Pardon Attorney has transmitted more than ***2,200*** clemency cases to the Deputy Attorney General's Office without conducting a meaningful review of a single one of these petitions. Instead, he has support staff prepare lists of names with basic sentencing information and attaches them to a cover memorandum, which asserts in boilerplate language that "a review of the contents of each petition establishes that none has merit." On this basis, he asserts that "there is no reason to conduct a further investigation by this office, such as a review of the presentence report . . . or the preparation of a more detailed summary denial report."

While this reporting format has been used in the past in limited circumstances, it has never been thought appropriate to indiscriminately clear out a backlog of pending cases in this fashion. Given the sheer volume of cases involved, it is not physically possible that each petition was reviewed by OPA's small professional staff. In fact, none of these cases was even assigned to an attorney. Accordingly, there is little basis for asserting that each one is necessarily without merit. Moreover, even on the assumption that all of these cases would have ended up being denied anyway, in my view, this sort of superficial treatment invariably undermines the integrity of the advisory process. If OPA can't be bothered to maintain the intellectual discipline of writing a report in each case saying why denial is justified, it becomes far too easy to deny cases as a matter of course without any real consideration. While the President's decision to grant clemency in any particular case is a matter entirely within his discretion, it does not follow that the Department's advice should be arbitrary. Yet, for these petitioners, the process was a

[2] The current "strategy" within the Department is to modestly increase these numbers, at least initially, precisely in order to blunt this criticism. Hence, there are currently five or six favorable commutations being prepared for the President's consideration, although none have yet been forwarded to the Counsel's Office. Even so, this is not a change in policy and the numbers will remain so vanishingly small that it will make no practical difference.

meaningless exercise. Small wonder, then, that the clemency advisory system is now widely perceived to be chronically dysfunctional.[3]

Worse yet, the advisory process has been tainted by overt racial discrimination. In January 2008, the former Pardon Attorney, Roger Adams, was forced to resign after an investigation by the Department's Office of Inspector General (OIG) concluded that he had been improperly using invidious racial generalizations in his evaluation of clemency applications. In particular, Adams made racially derogatory remarks about Chibueze Okorie, an ordained Presbyterian minister from Brooklyn who is seeking a pardon to avert deportation, which would separate him from his young American-born son.[4] While recommending denial of Rev. Okorie's petition on the ground that he was not sufficiently trustworthy, Adams asserted, "This might sound racist, but Okorie is about as honest as you could expect for a Nigerian. Unfortunately for him, that's not very honest." When he was confronted by OIG investigators, Adams actually defended his remarks, claiming that it was "a legitimate comment to make in the course of [his] work" and that an applicant's "ethnic background" is "an important consideration" in deciding a clemency case. The OIG concluded, reasonably enough, that "Adams' belief that an applicant's 'ethnic background' was something that should be an 'important consideration' in a pardon decision" was extremely troubling and perhaps even unconstitutional.[5]

The episode should have prompted some serious soul-searching. Instead, the managers of the Department's clemency program have steadfastly refused to admit that Adams did anything wrong and attempted to suppress information about the matter in order to avoid further public scrutiny. Indeed, they had no intention of revisiting Adams' tainted advice to the President until I insisted that they had no ethical alternative. However, in April 2008, Associate Deputy Attorney General David Margolis personally reaffirmed Adams' recommendation, in spite of the OIG's findings of misconduct. Several months later, in reliance on Mr. Margolis' advice, President Bush denied the petition.

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[3] *See* Charlie Savage, *On Clemency Fast Track, via the Oval Office*, New York Times, Jan. 1, 2009; Ariane de Vogue, *Is Pardon Reversal a Sign of a Broken System?*, ABC News, Dec. 30, 2008; Scott Michels, *Record Numbers Seeking Bush Pardons*, ABC News, Nov. 14, 2008; Charlie Savage, *Felons Seeking Bush Pardon Near a Record*, New York Times, July 19, 2008; Carrie Johnson, *Awaiting New Pardon Attorney: Backlog and a Chance to Make a Mark*, Washington Post, May 27, 2008; Richard B. Schmitt, *Record Backlog of Clemency Cases Takes Toll on Federal Prisoners*, Los Angeles Times, Nov. 24, 2007.

[4] As you know, an important point of President Obama's immigration policy is the preservation of family unity. The Okorie case illustrates the role that the pardon power can play in highlighting the importance of that policy initiative.

[5] *See* Dafna Linzer, *Brooklyn Minister, Target of Racist Comments by Former Pardon Attorney, Waits For a Second Hearing*, ProPublica, Jan. 16, 2009; Alison Gendar, *Chibueze Okorie asks President Bush to Look at Good Works and Grant Pardon*, New York Daily News, Dec. 14, 2008; Alison Gendar, *Feds Order Brooklyn Minister Deported Despite Slur by Bush's Aide*, New York Daily News, Oct. 17, 2008; Alison Gendar, *Furor Over Bush Lawyer's Racism in Deportation Case of Nigerian Minister*, New York Daily News, July 14, 2008; Lara Lakes Jordan, *Pardon Attorney Moved After Racism Claim*, Associated Press, Feb. 5, 2008; George Lardner, Jr., *Begging Bush's Pardon*, New York Times, Feb. 4, 2008.

The Department's refusal to correct the injustice done to Rev. Okorie – evidently influenced by Mr. Margolis' sense of personal loyalty to Adams, his longtime friend and colleague – is a continuing stain on the reputation of the clemency program. Given the overwhelming appearance of impropriety resulting from the Department's handling of the case, I would urge the President to revisit the matter.[6] If the Department expects to credibly promote the cause of equal justice and racial reconciliation, it must first put its own house in order.

The Attorney General has also spoken about the need to revitalize the mission of the Civil Rights Division. While that is a laudable goal, to be sure, much the same could be said about OPA. Under the Department's tutelage, the administrative clemency program no longer fulfills its traditional ancillary role in advancing the President's overall criminal justice agenda. I appreciate that executive clemency is never going to be high on President Obama's list of priorities, given the myriad pressing issues that compete for his attention. But, at some point in his presidency, he certainly will want to exercise the pardon power, which is committed by the explicit text of the Constitution to his personal discretion. If he expects to receive fair and impartial advice, consistent with his own policy views, the process must be reformed, beginning with the appointment of a politically accountable Pardon Attorney, rather than an insulated career prosecutor whose ideological commitments lie elsewhere.[7]

Sincerely,

Samuel T. Morison
Attorney-Advisor
Office of the Pardon Attorney

[6] Aside from Adams' disturbing views about race, 28 U.S.C. § 528 requires Department officials to recuse themselves "from participation in a particular investigation . . . if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof." There is no reason to believe that clemency proceedings are exempt from these constraints. The implementing regulations provide that "no employee shall participate" in a matter "if he has a personal or political relationship with . . . [a]ny person . . . [who] has a specific and substantial interest that would be directly affected by the outcome of the investigation." 28 C.F.R. § 45.2(a)(2). A "personal relationship" is defined as "a close and substantial connection of the type normally viewed as likely to induce partiality." *Id*. at § 45.2(c)(2). Mr. Margolis clearly had such a "personal relationship" with Adams at the time he reaffirmed the denial of Rev. Okorie's pardon application. Moreover, Adams had a "specific and substantial interest that [was] directly affected by the outcome of the investigation," because a reversal of his advice would have been a personal rebuke. Given Adams' reputational interest in the outcome, Mr. Margolis arguably should not have handled the reconsideration of the case.

[7] The last Pardon Attorney who was a political appointee was John Stanish, who served in this capacity during the Carter administration. It is no coincidence that the marked decline in the efficacy of the clemency program dates from the beginning of the Reagan administration, when the advisory function was placed squarely in the hands of the career prosecutors.