

**A TIME
TO HEAL**

**FEDERAL CANNABIS
CLEMENCY**

LAST
PRISONER
PROJECT

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CAMPAIGN STRATEGY

BACKGROUND & OPPORTUNITY

CANNABIS CLEMENCY

"[A pardon] is not a private act of grace, it is the determination of the ultimate authority that the public welfare will be better served."

— Justice Oliver Wendell Holmes

Article II of the U.S Constitution gives our country's presidents the unilateral authority to grant clemency, or "reprieves and pardons for offenses against the United States".

The Framers conceived of this power as a mechanism for addressing injustices and systemic shortcomings in our country's criminal justice system. The "check" of the clemency power allows the President to dispense "the mercy of government" in cases where the legal system fails to deliver a morally or politically tenable result.

Perhaps nowhere are these injustices more obvious — and the systemic shortcomings more palpable— than the plight of the estimated 40,000 people still languishing behind bars for cannabis-related offenses.

We're calling on President Biden to utilize his executive authority to issue clemency grants (pardons and/or commutations) to the thousands of individuals with federal marijuana-related convictions.

In doing so, President Biden would provide desperately-needed relief to the thousands still suffering behind bars because of our nation's unjust and needless policy of marijuana prohibition. Not only does an end to the incarceration of "cannabis offenders" enjoy broad support from the vast majority of the American public, it's an issue that President Biden has also repeatedly vowed to work to address.

This effort would also help the Biden Administration advance its racial equity-focused agenda with policymakers *and* the American people. Perhaps most importantly, in helping to provoke and shape a national conversation around the country's current approach to policing and law, "cannabis clemency" would bolster the Administration's stated desire to work towards a more just, equitable, and effective approach to law enforcement, drug policy, and criminal justice.

CAMPAIGN STRATEGY

CANNABIS CLEMENCY

THE GOAL

The vast majority of Americans, on both sides of the aisle, believe that people should not be in prison for most marijuana-related activity. To that end, the Biden Administration should provide legal relief for those currently and formerly incarcerated due to federal marijuana-related criminal convictions.

This federal "cannabis clemency" effort would secure the freedom of the thousands of individuals currently incarcerated due to federal cannabis-related convictions. It would also provide legal relief to those still suffering the burden of attendant cannabis-related collateral consequences.

This approach, which draws from historical precedent, would first see President Biden issue an Executive Order authorizing the convocation of a Presidential Cannabis Clemency Board.

Once impaneled, the independent Board would be tasked exclusively with evaluating the clemency petitions of federal "cannabis offenders". The Board, which would be staffed with individuals with lived and/or professional expertise and operate independently from the Department of Justice, would then provide individualized grant recommendations to President Biden.

Not only would this effort provide desperately-needed relief to thousands, but it would also provide data, insights, and learnings that could be used to expand this clemency grant evaluation model to other offense types.

This effort would also serve as a template and example for government authorities like state governors, who can use their clemency power to grant retroactive relief to exponentially more individuals suffering due to state-level cannabis-related convictions.

Furthermore, this "pop-up" approach would provide the data and insights necessary for broader applications of more challenging and/or expansive class-wide clemency efforts.

Perhaps most importantly, this effort would dovetail with the Biden Administration's stated desire to "heal the nation" by "rooting systemic racism from our laws, our policies, our institutions, and our hearts."

THE PRECEDENT

In the mid-1970s, President Ford impaneled a civilian "Presidential Clemency Board", which hired staff to review tens of thousands of petitions from individuals charged and convicted of violations of the Selective Service Act.

During the year it was in session, the eighteen-member board (made up of attorneys, clergy-members, legislators, and other civilians) reviewed approximately 21,500 petitions, eventually submitting a total of 14,514 recommendations to President Ford. The Board's recommendations ranged from an immediate pardon to twenty-four months of community service.

IMPLEMENTATION RECOMMENDATION

President Biden should create a *Presidential Cannabis Clemency Board* tasked, for the time being, with expediting the review and processing of clemency petitions from individuals currently or formerly under federal custody due to cannabis and cannabis-related convictions.

President Ford's *Presidential Clemency Board* is a helpful precedent for this approach. The Ford Board, which was impaneled following an executive order, operated between 1974-1975. During the Board's year-long tenure, its eighteen members were able to review over 21,000 cases — ultimately delivering over 14,000 recommendations for clemency to President Ford's desk.

The creation of an independent Board tasked with considering the legal merits of each petitioner's case has many benefits. These include, but are not limited to, the following.

- Currently, the federal clemency process operates as what some scholars have called a “redundant bureaucracy” in which the Office of the Pardon Attorney, the Deputy Attorney General, and White House Counsel are each tasked with reviewing the same file. The independence and relative logistical ease of a “board approach” would allow for a transparent, consistent, and fair process by which the president would fairly exercise an enumerated constitutional power. This would help to rehabilitate the concept of executive clemency amongst policymakers and the American public.
- Because the Board operates outside of the purview of the Department of Justice, it would naturally limit the influence — as well as conserve the bandwidth — of federal prosecutors. Limited DOJ resources, as well as the natural biases of federal prosecutors, would otherwise undermine the stated goal of this nationwide clemency operation: the bipartisan desire to extricate
- By creating a separate pathway for cannabis clemency, the administration can signal their willingness to take concrete action on their stated desire to limit the influence of America's five-decade-long drug war. This initiative will have an immediate, clear impact (and leave a lasting legacy), while also giving the Biden Administration some distance from broader, potentially more controversial, legislative efforts around drug policy reform.
- The Board approach also allows the decoupling of large-scale clemency programs from the DOJ / Office of the Pardon Attorney without necessitating an expensive and time-consuming overhaul of the federal clemency process. That said, while the impaneling of the “Presidential Cannabis Clemency Board” will be an important and necessary step towards reimagining the federal criminal justice system, it should not preclude consideration of additional, ostensibly more expansive reforms. If anything, the Board approach can serve as a template for a clemency apparatus that would be able to be deployed more regularly and extensively in the future.

HISTORY & PRECEDENT

THE CLEMENCY POWER

Article II of the U.S. Constitution gives our country's presidents the unilateral authority to grant clemency, or "reprieves and pardons for offenses against the United States." Clemency, an absolute power of the Executive, is an umbrella term encompassing pardons, commutations, and amnesties.

The Framers conceived of the clemency power as a mechanism for correcting "systemic shortcomings/miscarriages of justice" in our country's criminal justice system. They wanted to give Presidents the ability to dispense "the mercy of government" in those cases where the legal system failed to deliver a morally or politically tenable result.

Justice William H. Rehnquist, the former Supreme Court Chief Justice, put it best when he characterized the power as a "fail-safe" against the "unalterable fact that our judicial system, like the human beings who administer it, is fallible."

While the Framers didn't conceive of the power as an opportunity for high-level gift-giving, they of course imagined it ran the risk of being occasionally wielded in pursuit of personal or political gain. Still, they felt it was a risk worth taking, as it was believed to be a necessary part of the country's carefully-calibrated system of checks and balances.

For most of history, U.S Presidents conceptualized the power thusly, and so exercised it in a considered and meaningful fashion. In fact, until around 1980, clemency grants were understood to be a routine part of an American President's day-to-day responsibilities.

Unfortunately, contemporary use of the executive clemency power often falls afoul of the framer's original vision. In recent years, thanks in large part to recent high-profile controversies surrounding grants, presidents have allowed the pardon power to fall into disuse.

Yet, even as pardons appear increasingly outmoded, anachronistic, and/or corrupt, the staggering growth of the prison population over the past few decades — especially when coupled with the elimination of federal parole and the exponential growth of the collateral consequences imposed on justice-impacted individuals — demands greater employment of the power.

DRAFT

EXECUTIVE ORDER

ON ESTABLISHING A CLEMENCY BOARD TO REVIEW CERTAIN CONVICTIONS OF PERSONS UNDER 21 USC § 881, CERTAIN CONVICTIONS FOR VIOLATIONS OF 21 USC §§ 821, 841, 842 (A)(1), 842(B), 844, 846, 850, 952, 953, AND 963 AND TO MAKE RECOMMENDATIONS FOR EXECUTIVE CLEMENCY WITH RESPECT THERETO

By virtue of the authority vested in me as President of the United States by Section 2 of Article II of the Constitution of the United States, and in the interest of the internal management of the Government, it is ordered as follows:

§1. POLICY.

It is the policy of my Administration to weigh in on the important domestic discussion around drug policy, policing, and criminal justice reform by using the tool the Framers put at my most immediate disposal: executive clemency. We expect that this effort — which seeks to redress the harms of a policy that has proven to be unwise, inequitable, and unjust — will provide the relief qualified recipients need as they work to rebuild their lives and achieve the full promise of this nation.

While a true reimagining of our nation's approach to these issues will demand further action in Congress, we believe this order represents another step forward in our nation's long-awaited reckoning around race, equity, and justice. It is my sincere hope that this action will compel other local, state, tribal, and federal authorities to deploy their clemency power in a similar manner, at the same time they continue to work towards a more just, equitable, and effective approach to law enforcement and criminal justice.

Almost exactly fifty years ago, America formally entered a 'War on Drugs', a costly crusade that has failed to achieve its stated public health goals. As Americans, we believe in the importance of liberty, opportunity, and equal justice under the law. The evidence shows that our current federal approach to cannabis hasn't just failed to live up to these values, it's actively undermined them. Criminalizing people who use marijuana needlessly entangles millions of people in the criminal legal system each year at a tremendous societal cost. And the burden of these misguided policies disproportionately falls on the most vulnerable segments of our society.

As a matter of fairness, equality, and sound public health policy, we must ensure justice is at the foundation of America's approach to drug policy. To that end, this order seeks to use my executive authority to further these aims by: establishing a cannabis offense-focused executive clemency board; implementing a focused clemency strategy; reviewing certain convictions of persons convicted under or related to the Controlled Substances Act; working to reduce the number of people with cannabis-related convictions in federal custody; working to encourage the reform of outdated and unjust practices and ensuring clarity of messaging about cannabis on the federal level.

§2. Executive Cannabis Clemency Board.

(a) Establishment and Membership. There is hereby established in the Executive Office of the President a Board of ___ members, chaired by _____, which shall be known as the Presidential Cannabis Clemency Board. The members of the Board shall be appointed by the Chairperson, with the advice and approval of the President.

(b) Mission and Functions. To support the implementation and oversight of the policy laid out in section 1 of this order, the Board, under such regulations as it may prescribe, shall examine the cases of persons who have been convicted of or who are currently under a criminal justice sentence for a Federal cannabis-related offense, including individuals who:

(i) have been convicted of violating 21 USC §§ 821, 841, 842 (a)(1), 842(b), 844, 846, 860, 952, 953, and 963 of the Controlled Substances Act, or of any rule or regulation promulgated pursuant to that section, for unlawful cannabis-related acts committed after May 1, 1971, or

(ii) have received criminal sanctions and/or punitive or undesirable discharges related to the possession, use, cultivation, or distribution of cannabis as a consequence of violations of 21 USC §§ 821, 841, 842 (a)(1), 842(b), 844, 846, 860, 952, 953, and 963 that occurred after May 1, 1971, and/or are serving sentences of confinement for these, as well as other, cannabis-related violations.

If the case of any person convicted of or currently under a criminal justice sentence for a Federal cannabis-related offense is not reviewed by the Board such person may petition the Board for special consideration.

The board shall promulgate the initial regulations to perform the functions outlined in this section not later than _____.

(c) Scope. The Board is tasked with the evaluation of the cases of "cannabis violators"—including, but not limited to—individuals who were convicted of cannabis-related violations of the Controlled Substances Act and related penalties and enhancements. These statutes include, but are not limited to unlawfully:

- (i) Possessing marijuana,
- (ii) Distributing marijuana,
- (iii) Cultivating marijuana,
- (iv) Money laundering under 18 USCS § 1956 with a connection to marijuana, or
- (v) Conspiring to or intent of committing any of the above acts.

(d) Purview. The Chair of the Executive Clemency Board shall coordinate with the Federal Bureau of Investigations, the Federal Bureau of Prisons, and other relevant agencies or their designees, as necessary, to ensure that this Clemency Board's work is executed in an effective and equitable manner.

§3. PRIORITIZATION.

The Board shall give priority consideration to those applicants who have been convicted of an offense set forth in §2 of this order and are presently confined or on supervised release. The Board should also give priority consideration to petitioners of advanced age.

§4. REPORTING

The Board shall report to the President its findings and recommendations as to whether executive clemency should be granted or denied in any case. If clemency is recommended, the Board shall also recommend the form that such clemency should take, including full or conditional pardon, commutation, and/or remission of fines and fees.

§5. COMPENSATION

Each member of the Board, except any member who then receives other compensation from the United States, may receive compensation for each day the member is engaged upon the work of the Board at not to exceed the daily rate now or hereafter prescribed by law for persons and positions in GS-18, as authorized by law (5 U.S.C. 3109), and may also receive travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 5703) for persons in the government service employed intermittently.

§6. FUNDING

Necessary expenses of the Board may be paid from the Unanticipated Personnel Needs Fund of the President or from such other funds as may be available.

§7. ADMINISTRATIVE SERVICES

Necessary administrative services and support may be provided to the Board by the General Services Administration on a reimbursable basis.

§8. ADMINISTRATIVE SUPPORT

All departments and agencies in the Executive branch are authorized and directed to cooperate with the Board in its work, and to furnish the Board all appropriate information and assistance, to the extent permitted by law.

§9. TIMEFRAME AND DEADLINE

The Board shall submit its final recommendations to the President not later than _____, at which time it shall cease to exist.

§10. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:(i) the authority granted agencies, or entities, its officers, employees, or agents, or any other person by law to an executive department or agency, or the head thereof; or(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.
THE WHITE HOUSE

ADDENDUM

IMPLEMENTATION ALTERNATIVES

We evaluated the various grant modalities (pardon, amnesty, commutation, remissions of fines and forfeitures, and reprieves) and implementation processes (see below) that fall under the federal clemency authority before settling on our Board recommendation.

1

INDEPENDENT CLEMENCY BOARD OR AGENCY

Prominent academics have proposed the creation of an independent agency or independent review board as a solution to the inefficiencies and insufficiency of mass clemency efforts. This approach would entail the creation of a new independent administrative agency that considers every clemency application and sends to the President its recommendation. The President could select the panel/board members or Congress could establish, within limits, a formal agency to assist the President. The members of the panel could be drawn from the ranks of senior or retired federal judges, members of the public, clergy, etc. And while the Justice Department may be able to offer an opinion on clemency petitions, it would not have the veto power that it currently enjoys.

2

'KENNEDY METHOD'

In contrast to the very large numbers of draft evaders President Ford addressed, President Kennedy faced a different sort of challenge. The 1956 Narcotics Control Act had set strict mandatory minimum sentences for a number of drug-related offenses, a situation that produced lengthy terms for some defendants who were perceived to be of low culpability. President Kennedy's method kept review of the petitions within the DOJ, using the cloak of secrecy available there. The BOP was directed to have wardens identify cases for possible commutation. But because it was carried out by existing staff, Kennedy's program addressed only a tiny fragment of the number of cases that Ford's Clemency Board considered.

3

OBAMA CLEMENCY INITIATIVE

President Obama believed that the prospective-only nature of the Fair Sentencing Act of 2010 rendered it inadequate to address the historical implications of the crack-to-powder sentencing disparity. Accordingly, he set in motion an initiative to tackle the cases of the approximately 30,000 cases "left behind" through the exercise of his pardon power. In 2014, the Obama Administration established what is known as "Clemency Project 2014," — a DOJ initiative that encouraged qualified individuals in federal custody to petition to have their sentences commuted, or reduced, by the President of the United States. The DOJ prioritized petitions from those who met most, if not all, six factors. At the end of Obama's second term, the DOJ had made 16,776 grant recommendations — and the President granted commutations of sentences to approximately 7,715 individuals. As of January 20, 2017, approximately 7,881 commutation petitions remained pending in the Office of the Pardon Attorney.

4

TRANSFER OAP TO THE WHITE HOUSE

Academic scholars have also proposed the (re)creation of a pardon reviewing authority either outside of the Department of Justice, as part of the Executive Office of the President, or as a direct function of the Attorney General as the President's personal representative. In addition, this new reviewing authority would be staffed with a broad variety of personnel including prosecutors, sociologists, psychologists, historians, and even defense attorneys.

CAMPAIGN DETAILS

CANNABIS CLEMENCY

NOTES

As federal authorities currently have little authority to expunge, seal, and/or set aside federal cannabis-related convictions, clemency grants represent the only way to ensure relief for individuals currently or formerly incarcerated for those offenses.

But while this use of the clemency power will alleviate some of the legal disabilities imposed on his particular population, it will not bring about all of the necessary relief for individuals burdened by these “meritorious” cannabis-related cases.

As such, classwide clemency should not be considered a substitute for more robust legislative action. Congress must also proactively seek to alleviate the burden of federal collateral consequences through legislative action.

ACCOMPANYING LEGISLATION

Even after the receipt of a clemency grant, the collateral consequences of a federal cannabis-related conviction all-too-often prevent individuals from being able to access public housing, public assistance, and employment opportunities. They also leave recipients subject to deportation, disenfranchisement, and other issues that work to prevent a successful reentry.

Evidence shows that these deficiencies not only have a deleterious impact on the lives of system-impacted individuals, but that they work against the safety, health, and prosperity of the broader American public.

To that end, here are some additional criminal justice reforms Congress should prioritize.

- Securing additional record-related protections by enacting a federal expungement and/or judicial sealing statute.
- Ensure that released individuals are expeditiously re-enfranchised, and other legal and civic rights subsequently restored.
- Promulgate fair chance hiring regulations.
- End the felony drug ban for income and nutrition assistance, as well as housing assistance.
- Raise the standard for stops above “reasonable suspicion of criminal activity”.
- Recalibrate the apparatus for distributing federal funds to local and state law enforcement agencies by ensuring cannabis-arrest numbers no longer factor into grant calculations.
- Disincentivize the use of civil asset forfeiture by local, state, and federal authorities.

CLEMENCY BOARD SUGGESTED GUIDELINES

ELIGIBILITY GUIDELINES

Operationally, Ford's board first reviewed tens of thousands of petitions for an initial baseline reduction determination. They then further assessed the applications based on a list of mitigating or aggravating factors. The Presidential Cannabis Clemency Board should consider a similar approach. They should also use some of the guidelines developed during President Obama's 2014 Clemency Initiative to assess cases.

While we understand that a commutation is traditionally "granted upon conditions similar to those imposed pursuant to parole or supervised release", the Board should take pains to scale back the scope and punitiveness of those conditions.

And as the Board would decline to recommend clemency for individuals who "pose a serious threat to public safety or national security," we would ask that relevant authorities be barred from reflexively honoring ICE detainers and/or immediately deporting non-citizens granted "cannabis clemency" through this initiative.

THE SCOPE

Without direct cooperation with the Federal Bureau of Prisons, it's difficult to ascertain the exact number of individuals convicted of cannabis-related offenses since May 1, 1971 (the effective date of The Federal Comprehensive Drug Abuse Prevention and Control Act of 1970).

Given historical trends, we imagine that the total number of impacted individuals is in the low hundreds of thousands (3,000 - 5,000 of whom we estimate are currently in BOP custody). However, as cannabis law enforcement has ebbed and flowed over the past five decades, the total number of potential grant recipients is somewhat difficult to estimate.

For reference, we've included recent statistics from the U.S. Sentencing Commission on federal marijuana-related convictions and incarceration.

150,000+

TOTAL NUMBER OF INDIVIDUALS CONVICTED OF FEDERAL MARIJUANA-RELATED OFFENSES, 1992 - 2019

OFFENSE*	DESCRIPTION	CASES
USSG §2D1.1	Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy	1,665 (2019)
USSG §2D1.2	Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy	4 (2019)
USSG §2D1.6	Use of Communication Facility in Committing Drug Offense; Attempt or Conspiracy	6 (2019)

*Effective November 1, 1987. Amended effective November 1, 2007 (amendment 711).