

Written Testimony in Support of HF 2788
Mark Osler
Robert & Marion Short Distinguished Professor of Law
University of St. Thomas

I write in support of HF2788, which would reform the clemency process in Minnesota. My interest in clemency is not casual. I moved to Minnesota in 2010 from a tenured position at Baylor in part because St. Thomas would allow me to start a clinic focused on federal clemency. It is the first such clinic in the nation. My writing on clemency has appeared in The New York Times (2016 and 2021), the Washington Post (2014, 2018, 2019, 2020, 2021), the Star Tribune, the University of Chicago Law Review, the William and Mary Law Review, and many other places (often in collaboration with Rachel Barkow, a professor at NYU). I work in this field of measured mercy because it is one of the few areas where constitutional imperatives are so consistent with my own faith imperatives.

Because of my interest in clemency, I began attending the clemency hearings in Minnesota six years ago and have been to most of them since that first visit. They fascinate me because of the inherent drama provided by people petitioning directly to the powerful, but frustrate me with their inefficiency, intimidating nature, lack of productivity, and the sense that many more people should be going through the process and receiving the clemency that they deserve.

From that experience, I have tried to discern the problems with the current system. Some are obvious: the three members of the Pardon Board (the governor, the attorney general and the chief justice) are busy with other tasks, and the fact that they personally hear every case means that the pipeline of the process has an obvious bottleneck. I was also struck by how few people receive clemency. From my contact with other scholars, I knew that many other states typically grant far more pardons, including conservative states like South Carolina, Arkansas and our neighbor South Dakota. The system also seemed needlessly confusing, as there is a “pardon extraordinary” that is more ordinary than a simple pardon.

In Minnesota, clemency does not mean (and would not mean if this bill is passed) releasing masses of people from prison. The vast majority of those who seek and receive clemency here are citizens who have completed their sentence, re-established themselves in their community, and seek a pardon so they can further their career or engage in activities with their family, such as hunting with a grandchild. The clemency hearings this past December featured many nurses who

have served as the backbone of our healthcare system through the pandemic, and now seek new responsibilities from which they were barred because of a felony conviction.

This bill offers simple, commonsense solutions to our clemency issues. To relieve the bottleneck created by hearings attended by three of the most important state officials, the bill establishes a part-time clemency commission that would oversee the system, conduct the hearings, and make recommendations to the pardon board. The power of no one member of the pardon board would be diluted, as each of them would get to pick three members of the commission. This will establish welcome consistency while relieving the department of corrections, the governor, the attorney general, and the chief justice of responsibilities that drain their time. To be clear, the board would still be able to hear from applicants and victims when that would be helpful to them as they make their decisions, but they would not need to hear from each and every applicant.

The bill also would shift the voting requirement on the board of pardons from 3-0 to grant a petition to a vote with the governor and one other member of the board voting in favor if the full board is present. The unanimity requirement is a creature of statute rather than the Minnesota Constitution. The Minnesota Constitution establishes the members of the pardon board and provides that pardoning is to be done by the governor “in conjunction with” the attorney general and the chief justice. In 2022, in *Shefa v. Ellison*, the Minnesota Supreme Court upheld the current system, but also said “under the interpretation we have adopted, the Legislature could have provided, consistent with the Minnesota Constitution, that a majority vote of the Board of Pardons was sufficient to grant a pardon, as long as the governor was one of the affirmative votes.” This bill simply creates a structure that the Court has already said is allowable, by requiring that a clemency petition can be granted only if the governor or a majority of the board oppose it.

The bill makes other important changes: It eliminates the distinction between a pardon and “pardon extraordinary”—a distinction adds little value but creates much confusion. It also ensures that the commission and the board provide translation and interpretation services. Critically, the bill further requires that service and support be provided to crime victims throughout the process. This is important because the process can be confusing and frustrating for some victims, and some of the most powerful clemency applications are those supported by the victims themselves.

Clemency was embraced by the founding fathers because it embodies a virtue that nearly all societies honor. In my own faith tradition, people often cite to Micah 6:8, which says this: “He has shown you, O mortal, what is good. And what does the Lord require of you? To act justly and to love mercy and to walk humbly with your God. My hope is that through this new law, the state I love will move humbly towards an embrace of both justice and mercy.

Mark Osler
University of St. Thomas
1000 LaSalle Ave., MSL 400
Minneapolis MN 55403
Mark.Osler@StThomas.edu