

The Biden Clemency Crisis

UNDERSTANDING DRUG SENTENCING SYMPOSIUM

Thursday, October 7, 2021 | 2:15 – 3:30 p.m. EDT | Zoom

Panelists:

Rachel Barkow, Faculty Director, Center on the Administration of Criminal Law, Vice Dean and Charles Seligson Professor of Law, New York University School of Law

Premal Dharia, Executive Director, Institute to End Mass Incarceration, Harvard Law School

Jason Hernandez, Founder, Crack Open the Door

Moderator:

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

TRANSCRIPT

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00:00:06.029 --> 00:00:14.130

Holly Griffin: Thank you for attending the Biden clemency crisis, part of the Understanding Drug Sentencing Symposium. Before we begin, we have just a few notes we'd like to share with you.

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Holly Griffin: Note that Q and A and auto generated transcription have been enabled for this event. Additionally, this event is being recorded. The recording will be made available as soon as possible after the event. Thank you again for joining us. Mark?

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00:00:29.760 --> 00:00:30.090

Mark Osler: All right.

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00:00:30.300 --> 00:00:31.230

Mark Osler: Thank you so much.

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00:00:31.590 --> 00:00:43.560

Mark Osler: My name is Mark Osler. I am Professor of Law here at the University of St Thomas in Minneapolis. We are going to be talking about clemency in the Biden Administration and how we got to the point where we are now.

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Mark Osler: You know the, we came through the Obama Administration, where at the end there was real action on clemency into the Trump Administration that was like driving in Minneapolis and that there's long periods of nothing happening, then brief periods of chaos.

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Mark Osler: And now

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Mark Osler: entering the Biden Administration, some people had great hope and there was advocacy for thousands of grants in the first hundred days, for example.

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00:01:12.210 --> 00:01:30.870

Mark Osler: All which is gone unrealized and as we currently have a backlog of cases that has risen over 16,000 petitions. We have a great panel to talk about this today and I'll introduce them in the order that they'll be speaking. Rachel Barkow is the

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00:01:32.160 --> 00:01:41.970

Mark Osler: Vice Dean and Charles Seligson Professor of Law at NYU. She is one of America's leading experts in these issues and perhaps,

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00:01:43.530 --> 00:01:53.100

Mark Osler: America's most effective advocate from the academy in these this field. Her book, Prisoners of Politics, has gotten great reviews.

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00:01:53.910 --> 00:01:58.530

Mark Osler: It and it's had an impact on on the discussion generally. It for example,

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Mark Osler: Professor Barkow is one of the an early and fierce advocate for diversifying the federal bench to include people with a defense background, instead of just

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Mark Osler: former Federal prosecutors. An idea that even as a former federal prosecutor, I think is a good one. And we've seen that happening within the Biden Administration.

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Mark Osler: After Rachel will be hearing from Jason Hernandez and Jason is a

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Mark Osler: person who was convicted of a nonviolent drug offense. He was a first time offender, he received a life sentence.

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00:02:32.430 --> 00:02:44.010

Mark Osler: And he served 17 years of his sentence before he was released in 2013 by President Obama by commutation. And one of the things is remarkable, about Jason

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00:02:45.000 --> 00:03:04.230

Mark Osler: is that he wrote himself out. That he wrote his own petition. And after he was successful in that he has made it one of his missions to help other people do the same thing. Jason has written a great book called, Get Clemency Now, that's directed at people who are seeking clemency.

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00:03:05.580 --> 00:03:15.480

Mark Osler: And it's a practical guide to what to do and what not to do and it's really been remarkable I've I've given it to a lot of people so far. Jason also

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00:03:16.290 --> 00:03:27.510

Mark Osler: since this release has been incredibly active in his community McKinney in Texas. Just the the list of things that he's done within that home community

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00:03:28.590 --> 00:03:44.220

Mark Osler: is is truly remarkable. And we also are going to be hearing from Premal Dharia, who is the Executive Director of the Institute to End Mass Incarceration at Harvard law school. And she has a long

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Mark Osler: career of experience in this field. She was a public defender in three different places, including

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Mark Osler: in Guantanamo. And in the Institute that she's she's heading up now is really off to a great start. They have a publication called Inquest that's a number of fascinating pieces already and they're embarking on what can be really a central project in the broader

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00:04:17.640 --> 00:04:22.770

Mark Osler: ecosystem of people who are working on these issues. But we're going to start with Professor Barkow

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Rachel Barkow: Thanks mark and thanks to everyone for allowing me to be part of this. Before I give you kind of an overview of where we're at in terms of clemency today, I just wanted to give a few pieces of background information.

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Rachel Barkow: So I wanted to just start by explaining why clemency is so important, particularly at the federal level.

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Rachel Barkow: So I think probably most of the people who are listening are aware that we have a mass incarceration problem in the United States.

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Rachel Barkow: With you know more than 2.2 million people incarcerated. And the Federal prison system is among the largest. You know we currently have

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00:05:02.850 --> 00:05:14.130

Rachel Barkow: almost 156,000 people who are currently incarcerated in federal prisons. More than half of them are there for drug crimes and they're serving really long sentences.

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Rachel Barkow: Life sentences sentences, sentences like the one that Jason received are just not uncommon.

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Rachel Barkow: And in the federal system there's really no way to correct those excessively long sentences other than through clemency. Parole was abolished in 1987 so that is not a viable option.

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00:05:33.450 --> 00:05:45.150

Rachel Barkow: There is a mechanism for getting compassionate release up until very recently that was completely foreclosed unless the Bureau of Prisons filed a motion on your behalf. And even now,

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Rachel Barkow: with people having some ability to file their motions directly with courts,

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Rachel Barkow: we're seeing really mixed reactions to petitions or the claim is that compassionate release should be based on the fact that a sentence is excessively long.

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Rachel Barkow: We have some courts in the country are in circuits that have said, you cannot make that claim there's no grounds for it and even in geographical locations where you can make it,

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Rachel Barkow: really mixed reactions by judges. So clemency remains the only national mechanism for correcting these excessively long sentences for this enormous federal prison population.

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Rachel Barkow: The other reason that clemency is so important at the federal level are for people who are seeking pardons. So this is for the group of people who are out but they want to get their record cleared.

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Rachel Barkow: And they often want to get their record cleared for very significant reasons, like, for example, they're facing deportation and unless they can get the pardon

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Rachel Barkow: they're going to be removed from the country. So the stakes are very high there's no other mechanism for those folks either we don't have a federal expungement or way to get

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Rachel Barkow: those collateral consequences removed. So clemency you know, for better for worse when we're talking about federal options, is actually critically important.

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Rachel Barkow: And for most of the nation's history we had presidents who seem to understand

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Rachel Barkow: that this was something they needed to do as part of their their function, so I wanted to just give you a sense historically.

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Rachel Barkow: of what those rates look like. So you can see, we had presidents as recently as Presidents Carter and Ford, Nixon, Johnson, Kennedy,

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Rachel Barkow: granting you know, between a third, and a fifth of the petitions that they received. So pretty high grant rates.

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Rachel Barkow: And we start to just see the decline occur with the presidency of Ronald Reagan. And what's particularly

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Rachel Barkow: interesting, and I would say tragic about the fact that that's when that the decline comes, is that's really when the numbers should have gotten larger not smaller.

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Rachel Barkow: Because parole was abolished in 1987 which means before President Reagan these other Presidents knew there was functioning parole and they still had

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Rachel Barkow: fairly high clemency grant rates, even with functioning parole as another option for people seeking relief of their sentences.

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Rachel Barkow: So, if anything, we would have expected or hoped to have seen an increase in grant rates when parole is abolished because that would have meant commutations would take on even added importance at that point.

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Rachel Barkow: But unfortunately, it's just the opposite. Now I I want to highlight another aspect of this which is for those of you who follow clemency you might have been aware of the fact that

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Rachel Barkow: President Obama had a much touted clemency program sometimes known as CP14 which was named after the year it started in 2014. A clemency project that began then.

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Rachel Barkow: And he had very much stated his concerned with criminal justice issues. He wrote a law review article about how committed, he was to various aspects of criminal law reform and clemency was part of that.

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Rachel Barkow: Now, despite the fact that he did show renewed interest in this. So first off it's going to remind everybody his overall grant rate ends up being pretty close to what President Clinton did.

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Rachel Barkow: Just a little bit better than President Clinton's grant rate, but his commutation rate is certainly better than the most recent presidents who came before him.

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Rachel Barkow: You know starts to look a little bit more like Nixon's which, again, you can decide for yourself how impressed, you are, but the fact that he he rose to the level of of Nixon.

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Rachel Barkow: But I want to highlight what we might have expected from a President who said he was very interested in granting clemency. So by making the announcement that he was very interested in this you could probably imagine the Department of Justice

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Rachel Barkow: because the President was interested in this sent a message to everybody who was incarcerated and the result was a lot of people who are incarcerated very interested. So

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Rachel Barkow: they received over 33,000 petitions, and this is going to be important because it's going to get us to that backlog that Mark had mentioned.

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Rachel Barkow: The Department of Justice was just not equipped to handle the deluge of petitions that came in. The Obama Administration quickly looked to outsiders to help.

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Rachel Barkow: They had hoped the federal defenders could kind of be the frontline actors to help with all of this, but unfortunately

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Rachel Barkow: there were legal limits to the federal defenders ability to do that. And so instead it was a group of essentially NGOs, nongovernmental organizations,

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Rachel Barkow: who helped screen the petitions that's the group that came to be known as CP14. And they they did their best you know there were about 4000 volunteers.

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00:10:55.740 --> 00:10:59.820

Rachel Barkow: Unfortunately, most of them did not have any experience with federal sentencing,

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Rachel Barkow: with federal clemency, and one of the criteria that President Obama had indicated was of concern to him as he was interested in giving clemency to people who wouldn't have gotten that same sentence today.

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Rachel Barkow: So being able to do federal sentencing calculations and explain why it wouldn't have been given today was actually really important, as well as other things that make a good clemency petition. I don't think

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Rachel Barkow: Jason's book was out yet at the time that they were filing this because they really could have used it. They were in over their head that I guess is what I'm going to say.

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00:11:30.240 --> 00:11:40.920

Rachel Barkow: After one year of being in operation CP14 managed to submit only 50 petitions up at that up until that point. By the end, they did get in more than 1000.

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00:11:41.370 --> 00:11:52.800

Rachel Barkow: But that's actually a pretty low rate when we're talking about a volunteer force 4000 and just to give you a basis of comparison; Mark and I set up a little clemency shop

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Rachel Barkow: where we got some some foundation funds to be able to pay some lawyers to do this full time And so we had seven I believe full time attorneys doing this.

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Rachel Barkow: And the seven of them submitted more than 200 petitions

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Rachel Barkow: and got 96 of them granted. So I mentioned that just so we keep in our mind that this is something that is good to have people who specialize it's good to have people who know what they're doing.

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00:12:18.150 --> 00:12:31.350

Rachel Barkow: And you can't kind of just do this on the fly and hope it's going to turn out to be okay. For the Obama end results, so of these 33,000 that they received they were only able to review

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Rachel Barkow: about half of those. They still had thousands that had no answer and they ultimately granted 1716 not all of the 1716 were part of CP14, though.

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00:12:48.570 --> 00:12:54.060

Rachel Barkow: There were 10 that were granted before the initiative was ever announced so they're likely not part of that. They had some

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Rachel Barkow: prisoner trade clemencies that I don't think are included in this, some military court folks like we had Chelsea Manning. So there were a few that aren't but it's ballpark about 1700

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00:13:05.700 --> 00:13:16.050

Rachel Barkow: through this initiative. And you know, to his credit, the kinds of people who were receiving these grants were much more racially diverse than we've seen in clemencies statistics in the past.

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00:13:16.920 --> 00:13:34.320

Rachel Barkow: 70% of the people who received clemency were black, 9% Hispanic. So the numbers looked more like what the federal prison population itself looks like and so, for that, I think you know, there should be some credit given to the fact that it wasn't what we'd seen previously.

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Rachel Barkow: On the other hand, the folks that got the grant didn't seem to meet all of the things that the Obama Administration said they were looking for.

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00:13:44.640 --> 00:13:48.390

Rachel Barkow: They had said they were looking for people that didn't have significant criminal history.

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Rachel Barkow: And they they had a variety of criteria like no violence in their background and when you looked at some of the grants it didn't seem like they really were with him the heartland of what those requirements were, although I think they were all deserving.

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Rachel Barkow: I think the requirements themselves were too limiting. But even more disturbing is that a lot of people who did meet the requirements never got a grant they they were left in limbo, a few were denied.

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00:14:14.610 --> 00:14:22.590

Rachel Barkow: And it's the denials, that I think you really need to focus on here because, although I know the Obama Administration wanted to focus us on

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Rachel Barkow: the number of grants, that is a record high level of denials, and I do not think that it's proportionate to the merits. There were people denied who should not have been denied.

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00:14:36.390 --> 00:14:42.240

Rachel Barkow: So I want to highlight a couple flaws with this process because I think it's the kind of key lessons learned that I'm hoping

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Rachel Barkow: someday we'll have a president will really take to heart the lessons learned. So the first one is

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Rachel Barkow: just the layers of bureaucracy in the Department of Justice how cumbersome the process is, how ill equipped it is to handle large numbers of petitions.

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Rachel Barkow: All right, that's important because we have a current backlog of 16,000 so if you want to be able to get through that backlog,

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00:15:07.650 --> 00:15:19.440

Rachel Barkow: you need a different process in place than this one because we have now seen through successive administration's, this does not process that many applications; you cannot get it done, you couldn't even get it done with outside help.

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00:15:19.890 --> 00:15:30.690

Rachel Barkow: It is just not feasible, it is not possible. So we have a process failure of really epic proportions. The second is that these denials that you see here

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Rachel Barkow: with this kind of a of a process, why so many denials? Why so few grants? I can tell you from having familiarity with the petitions that were filed by that group of lawyers that we worked with,

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Rachel Barkow: there were lots more meritorious petitions in there, lots more. I would say, thousands of grants that should have been given that weren't.

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00:15:53.490 --> 00:16:01.320

Rachel Barkow: And that's another problem that I just want to flag, which is that I think having prosecutors in control of this whole process

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00:16:01.590 --> 00:16:09.000

Rachel Barkow: is the reason you see the number of denials that you do, including of people who seem to meet the president's own stated criteria.

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Rachel Barkow: The problem is this process starts with the Department of Justice going to the prosecutor's office that brought the case initially

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Rachel Barkow: and saying, "hey, what do you think about this case?" And it's pretty unsurprising that the same people who brought it

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Rachel Barkow: and fought for it say, "well, we think we did a good job, why do you want to take another look at that?" And so they say, "no", and that's the end of the matter for way too many of these petitions.

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00:16:33.120 --> 00:16:47.340

Rachel Barkow: So I think what you see here is the result of an epic process failure and a huge conflict of interest in having the very same people who brought these cases in the first place, asked to take a second look at what they did.

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00:16:47.880 --> 00:16:52.590

Rachel Barkow: You're just going to get that kind of denial and you're also going to get cases that are just never processed in the first place.

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00:16:53.520 --> 00:17:01.260

Rachel Barkow: And you're going to be left with this was the current total as of at least yesterday when I made my slide the number of pending petitions that we have.

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00:17:02.130 --> 00:17:13.230

Rachel Barkow: Now, I think this is a national embarrassment. There are human beings behind every single one of these petitions, I know some of those people I'm sure you do too.

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00:17:13.830 --> 00:17:20.220

Rachel Barkow: They have been waiting, some of them since 2016, since 2015. That they have been waiting for years

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00:17:20.730 --> 00:17:27.120

Rachel Barkow: with no indication about what's happening, they are waiting they're worried they're worried they're going to be deported if they're waiting for a pardon.

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00:17:27.600 --> 00:17:35.790

Rachel Barkow: They're serving excessively long sentences and wondering if they're ever going to get out. These are real human beings behind these numbers and yet,

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00:17:36.660 --> 00:17:46.050

Rachel Barkow: the Biden Administration has shown no indication of doing something to meet this crisis it's its business as usual, as far as they're concerned.

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00:17:46.980 --> 00:17:55.020

Rachel Barkow: And and I can't understand that I really can't. So if I leave you with one thought today it's that that is unacceptable.

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00:17:55.830 --> 00:18:05.640

Rachel Barkow: You can't leave 16,000 people waiting in an endless queue, who deserve their opportunity to be heard, who have real viable claims.

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00:18:06.480 --> 00:18:15.090

Rachel Barkow: I think the answer to this is that you need a different structure in place to address these. I think it's the too many layers of bureaucracy and a bureaucracy that's in charge.

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00:18:15.810 --> 00:18:20.640

Rachel Barkow: It's prosecutors who are in charge of it and there's an inherent conflict of interest asking them to do that.

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00:18:21.270 --> 00:18:28.440

Rachel Barkow: And so I know we'll have a little time later to talk more specifically about the kinds of things we would put in its place but if I leave you with one thought,

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00:18:28.890 --> 00:18:39.360

Rachel Barkow: it's that we are a clemency system in absolute crisis. And you know nine some months into this Administration, there was no sign that they understand the magnitude of the problem.

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00:18:40.830 --> 00:18:44.940

Mark Osler: Excellent. Thank you, and that is a very efficient PowerPoint.

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00:18:46.170 --> 00:18:56.940

Mark Osler: Now, one thing I want to note, too, is for those people who have questions you'll see at the bottom of your screen there's a Q and A button and you can you can hit that and write your question in and we'll be looking those over.

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00:18:58.260 --> 00:19:04.050

Mark Osler: Now, Professor Barkow mentioned that there were 10 or so people who received clemency before this

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00:19:05.310 --> 00:19:13.320

Mark Osler: big initiative really kicked off under President Obama. One of those people was Jason Hernandez who will hear from next. Jason?

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00:19:15.330 --> 00:19:15.900

Jason Hernandez: Hello Mark.

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00:19:16.950 --> 00:19:25.830

Jason Hernandez: Just I think first, it's an honor to be on the panel with with two individuals Rachel Barkow and Mark Osler, people that I used to read

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00:19:26.460 --> 00:19:40.590

Jason Hernandez: a court decisions from that the judge would actually call some of the materials that childhood right and to actually come out of prison to meet y'all that to be on the panel with y'all this is really, really cool amazing, surreal feeling.

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00:19:41.700 --> 00:19:43.890

Jason Hernandez: But so after now done

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00:19:46.260 --> 00:19:47.040

Jason Hernandez: highlighting y'all,

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00:19:49.170 --> 00:19:53.880

Jason Hernandez: I'm gonna talk a little bit about myself and my experience with clemency inside and

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Jason Hernandez: outside of prison. So first you know first off my name is Jason Hernandez. I'm one of the first individuals to receive clemency in 2013 from President Barack Obama.

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00:20:03.450 --> 00:20:08.940

Jason Hernandez: On that date, President Obama commuted the sentences of eight people, seven we're black, one was Latino,

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00:20:09.270 --> 00:20:17.490

Jason Hernandez: myself. Six were men and two two were ladies. All of us were crack cocaine offenders. Six were serving life without parole and one was serving a 30 year sentence.

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00:20:18.210 --> 00:20:28.710

Jason Hernandez: This, even though we were the first group known as the Obama eight, this was an act of mercy that was fortelling of what obama's clemency initiative initiative is about to come and what it was going to focus on.

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00:20:30.180 --> 00:20:37.110

Jason Hernandez: But even after I received my comutation of sentence in 2013, I ended up staying incarcerated for an additional 18 months.

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00:20:37.710 --> 00:20:50.550

Jason Hernandez: My life without parole sentence plus 320 years was knocked down to 20 years and I had to do, nearly 17 I think I had to do 17 years eight months on that so only had 16 years at the time that I received clemency.

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00:20:51.720 --> 00:21:01.920

Jason Hernandez: During that time, when I was incarcerated is when President Obama announced his clemency initiative and during that and that's when I

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00:21:04.020 --> 00:21:12.510

Jason Hernandez: that's when when when I was in there. So I was able to kind of get this what you could say this inside depth about what was going on in there.

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00:21:12.780 --> 00:21:17.130

Jason Hernandez: And from what prison officials were telling us based on information and records they have,

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00:21:17.520 --> 00:21:24.780

Jason Hernandez: they were estimating around 10,000 prisoners would be released. That was what the word was when we were incarcerated with the staff was telling us.

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00:21:25.260 --> 00:21:35.970

Jason Hernandez: You know, ultimately Obama's clemency initiative when it was all said and done, resulted in over 1700 people being granted released. All of them were were all drug offenders.

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00:21:36.840 --> 00:21:45.540

Jason Hernandez: Now as Rachel mentioned earlier, this is monumental on several accounts, but none more so than the fact that over 500 lifetimes received clemency.

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Jason Hernandez: Prior to that, if I'm not mistaken, there was only there's there's only been one prisoner who has received clemency that was serving life without parole in the United States, and that was in the

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00:21:56.580 --> 00:22:02.430

Jason Hernandez: Bush Administration, Bush two Administration. Where a person who serves serving life without parole for a methamphetamine.

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00:22:02.820 --> 00:22:18.930

Jason Hernandez: offense. And what was also extraordinary and impressive was 80% who received clemency as Rachel noted, as well, were minorities over 80%. Prior to this, black and Latinos who make up a majority of the federal prison system were least likely to receive clemency.

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00:22:20.100 --> 00:22:22.110

Jason Hernandez: Nevertheless, despite how extraordinary

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00:22:23.730 --> 00:22:39.390

Jason Hernandez: and monumental Obama's clemency initiative was, the nearly 1700 prisoners who received clemency, me being one of them, was a far cry from the nearly estimated 10,000 people who were expected to receive clemency based on the Bureau of Prisons information what they were telling us.

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00:22:40.410 --> 00:22:48.840

Jason Hernandez: Now, there were previous administrations with exercises extraordinary executive power to grant to grant clemency, almost I guess you could say on a large scale.

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00:22:49.890 --> 00:22:58.620

Jason Hernandez: President Lincoln and President Andrew use mass pardons for related offenses committed by federal confederate soldiers. In 1921,

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00:22:59.160 --> 00:23:13.710

Jason Hernandez: President Harding issued blanket pardons to anyone convicted under the Espionage Act. And to help the end the Vietnam War, President Jimmy Carter offered offered blanket pardons to any American who who had dodged the draft during during that war.

141

00:23:15.030 --> 00:23:23.910

Jason Hernandez: As, as noted, as noted as with all of these prior clemency initiatives, most of these clemencies given by these Presidents were in relationship to a war.

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00:23:24.780 --> 00:23:32.040

Jason Hernandez: Which is also relevant today with drug offenders in federal prison and why a large number of these prisoners should receive clemencies.

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00:23:32.850 --> 00:23:47.550

Jason Hernandez: Since the 1960s, the United States is at a war against drugs award has resulted in communities being disrupted and some even destroyed. And when I say destroyed there's no exaggeration to that statement, you know, to give an example,

144

00:23:48.870 --> 00:23:57.600

Jason Hernandez: and Mark can, and this was when I went to go visit Mark Osler one time, that certain parts of Detroit look like an actual atomic bomb was dropped on.

145

00:23:58.170 --> 00:24:04.200

Jason Hernandez: And other neighborhoods that were decimated were then ultimately that look like this across the United States of

146

00:24:04.980 --> 00:24:16.410

Jason Hernandez: theirs they don't look like that no more, because now they're they've been completely flatten. And now they have high rises, dog parks, and cafes which is known as gentrification. A majority of all these communities

147

00:24:17.490 --> 00:24:19.350

Jason Hernandez: at one time at one time, which were

148

00:24:20.370 --> 00:24:25.020

Jason Hernandez: minority driven or there's no minorities there if there's there's a small amount of them.

149

00:24:26.280 --> 00:24:33.930

Jason Hernandez: And I know that when I talk, you know labels are extremely important, and I know that there's a lot of focus on words and humanization of people that are incarcerated.

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00:24:34.320 --> 00:24:41.940

Jason Hernandez: And you know, we should not refer to them as convicts, or prisoners, but I believe to refer these individuals anything other than prisoners

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00:24:42.390 --> 00:24:53.220

Jason Hernandez: would not be reality and would be down downplaying the circumstances that these individuals are in. What I mean by that is that anytime a person is kept in prison for an excessive amount of time.

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00:24:53.850 --> 00:25:05.430

Jason Hernandez: that is not justified by their conduct or their crime is in true context, a prisoner and his or her sentence becomes something more than a punishment, and I think it becomes something more to

153

00:25:06.870 --> 00:25:12.870

Jason Hernandez: torture, to an extent. To keep a person in prison for a period of time that they know that they shouldn't be there.

154

00:25:14.580 --> 00:25:21.240

Jason Hernandez: So when we think about clemency, we think about redemption and relationship to the prisoners like somebody like myself, was incarcerated.

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00:25:21.810 --> 00:25:29.940

Jason Hernandez: But because of the war, because of the way the war on drugs was implemented and the way it wasn't forced which, I would say, resulted in the medicine

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00:25:30.420 --> 00:25:39.660

Jason Hernandez: being worse than the disease is actual than the actual disease. Clemency is a first step, and one of the many steps for the United States to acknowledge that they made a mistake.

157

00:25:40.710 --> 00:25:47.190

Jason Hernandez: That they didn't know better, and through time and experience have learned that what might seem right when

158

00:25:48.510 --> 00:25:55.890

Jason Hernandez: these laws were passed that through time and experience have learned you know what might have seemed right, then, is not is not right now.

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00:25:56.730 --> 00:26:08.940

Jason Hernandez: And through clemency is not only a way for a prisoner to be redeemed but in a manner in which the United States, I believe can ask for forgiveness for mercy and to redeem themselves.

160

00:26:11.640 --> 00:26:16.920

Jason Hernandez: And I think you know for those 10,000 prisoners who were left behind serving excessive sentences.

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00:26:17.340 --> 00:26:34.470

Jason Hernandez: You know, be given freedom, so that they are no longer held captive no longer a prisoner and become part of the fabric of our society and become whole again and regain their humanity. Now the important of clemency right now at this moment, it's so important that

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00:26:35.850 --> 00:26:41.130

Jason Hernandez: I mean, I would I would be in prison right now have if President Obama not gave me have not given me clemency.

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00:26:43.290 --> 00:26:50.700

Jason Hernandez: And what we seen was that after me and the next administration, it took something something to the extent to where you'd have to know somebody who knew somebody.

164

00:26:51.300 --> 00:27:00.240

Jason Hernandez: If you didn't know Kim kardashian or somebody you just weren't going to get out. So even though I got out in 2015 and here we are 2021 and Mark was able to talk about these things that I've done

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00:27:00.840 --> 00:27:12.450

Jason Hernandez: would not have been able to do them if President Obama had not took those steps to give up individuals like me clemency. So the power of clemency what I want to show you about the power of clemency and what it means to somebody behind bars

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00:27:12.900 --> 00:27:21.270

Jason Hernandez: is I I can't tell you what it felt like to get my life back to get that second birth certificate, you could say to be brought back from the dead.

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00:27:22.350 --> 00:27:30.420

Jason Hernandez: But there was an instance when I came out that they were doing a video on me and they asked me to read my Executive Order that the President gave me.

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00:27:31.140 --> 00:27:39.690

Jason Hernandez: And I hadn't read it, and I hadn't read it in a while, and I was like okay sure I'll go I'll get it and I'll read it, so what I'm gonna do I'm gonna share my screen with you.

169

00:27:41.370 --> 00:27:44.580

Jason Hernandez: And I'm going to show you the video of me where

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00:27:45.690 --> 00:27:48.870

Jason Hernandez: should be able to show it if not might need some help.

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00:27:50.640 --> 00:27:51.540

Jason Hernandez: Thought that I had it.

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00:27:53.880 --> 00:27:57.810

Jason Hernandez: I don't see it there, Holly can you share can you share it for me.

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00:28:03.780 --> 00:28:04.380

Mark Osler: There we go.

174

00:28:05.280 --> 00:28:06.000

Jason Hernandez: Okay well.

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00:28:08.040 --> 00:28:12.690

Jason Hernandez: This is it, this is me well I wasn't on the wasn't on the

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00:28:13.890 --> 00:28:20.580

Jason Hernandez: on the show, but here is john Oliver talking about me receiving clemency and showing the video of me reading my order.

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00:28:22.560 --> 00:28:25.560

Holly Griffin: Here, let me know if you're not able to hear it, and I can I can start again.

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00:28:26.430 --> 00:28:27.390

Jason Hernandez: Yeah I wasn't able to hear.

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00:28:37.140 --> 00:28:38.400

Holly Griffin: Just one moment, let me try that again for you.

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00:28:48.120 --> 00:28:58.110

Jason Hernandez who was sentenced to life in prison for dealing drugs, including crack. Watch him read his commutation from the President, be it known that I Barack Obama,

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00:28:59.130 --> 00:29:01.080

President of the United States of America.

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00:29:02.430 --> 00:29:03.600

in consideration of

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00:29:10.140 --> 00:29:12.870

the premises, divers other good

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00:29:17.400 --> 00:29:20.250

and sufficient reasons me thereunto moving,

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00:29:22.050 --> 00:29:23.700

do hereby grant this application.

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00:29:30.510 --> 00:29:35.640

Let me tell you just how moving that is I'm moved by it and I'm British.

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00:29:41.490 --> 00:29:42.480

Jason Hernandez: Am I back on Holly?

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00:29:44.850 --> 00:29:50.310

Jason Hernandez: Okay thank you so much for sharing that video and

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00:29:51.840 --> 00:30:04.620

Jason Hernandez: I mean wow, I mean just to see that again every time I see it right and not just to mention when I received clemency just two days ago I had my my supervise release, eight years supervised release that I served six and a half years on

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00:30:07.050 --> 00:30:18.960

Jason Hernandez: terminated by my federal judge. So now just to kind of almost say, the next step to freedom, but I am also going to go to apply for pardon from the Biden Administration. So the urgency of now, I knew

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00:30:20.190 --> 00:30:24.120

Jason Hernandez: I knew that this time would come again and I do believe that the Biden Administration will

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00:30:25.500 --> 00:30:34.170

Jason Hernandez: do something similar to what President Obama did, if not greater. And knowing that that would come but then knowing all the problems that were happening inside prison

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00:30:34.530 --> 00:30:43.590

Jason Hernandez: and outside of prison, I created a guidebook for this specific instance right here. So that those people that are incarcerated wouldn't have to rely on some type of

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00:30:44.190 --> 00:30:55.440

Jason Hernandez: superstar or some type of organization to come help them; that they can do it themselves because last time when they waited for everybody else, waited for the Obama Administration to

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00:30:56.730 --> 00:31:07.650

Jason Hernandez: to help them, that resulted in 10,000 people who are close there to the state of prison and that are still in there right now. People who had 20 years have 30 years have been in there 30 years now,

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00:31:07.950 --> 00:31:11.130

Jason Hernandez: those who have been there 30 years, been in there forty years now. So

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00:31:11.790 --> 00:31:19.680

Jason Hernandez: I know what I mean I know what that feels like when nobody wants to help you out. I remember when I was reaching out to people and nobody wants to nobody wants to lend a hand to me.

198

00:31:20.010 --> 00:31:33.990

Jason Hernandez: And I said I'm going to do everything I possibly can to empower those people that are incarcerated, to empower their families to make to not let nobody tell them that they don't deserve a chance, to show people that they deserve a second chance. So

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00:31:34.560 --> 00:31:42.660

Jason Hernandez: I think we can't sit back right now and wait for the Biden Administration and come out with the criteria to come up with what, whatever their initiative is going to be.

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00:31:43.440 --> 00:31:57.960

Jason Hernandez: That we need to set the initiative. We're the experts, we need to tell them what they need to do, and I feel that if we don't do that that there's going to those same 10,000 prisoners or there close to, are going to be unfortunately left behind again.

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00:31:59.940 --> 00:32:00.480

Jason Hernandez: Just

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00:32:01.530 --> 00:32:04.710

Jason Hernandez: that's what Mark, that's what I have to say about everything that's going on right no.

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00:32:05.070 --> 00:32:15.660

Mark Osler: Okay that's that's great Jason and just real quickly, could you tell people how to get your book about Get Clemency Now. I'm sure there's some people who are listening to this would like to download it or or order it.

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00:32:16.950 --> 00:32:19.620

Jason Hernandez: Yes so you can actually go to the website,

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00:32:20.070 --> 00:32:22.170

Jason Hernandez: Getclemencynow.org.

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00:32:22.500 --> 00:32:23.970

Jason Hernandez: You can do it for free.

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00:32:24.180 --> 00:32:30.300

Jason Hernandez: You can download it for free, and you can print it for free, that was the whole intent and and designed for this book to be

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00:32:30.390 --> 00:32:44.610

Jason Hernandez: not only for people that are incarcerated and their families, but to law students, attorneys, everybody so that they can be prepared for this time that when it comes so that there are no excuses. You can buy it as well on Amazon but there's really no need to.

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00:32:45.690 --> 00:32:51.720

Mark Osler: Okay, thanks so much and thanks for that that incredible resource that it was very moving to watch that video.

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00:32:52.050 --> 00:32:59.820

Mark Osler: I can tell you I've been to the homes of the number of people who've received clemency from President Obama and invariably they have that letter framed on the wall.

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00:33:00.390 --> 00:33:08.640

Mark Osler: And it chokes me up whenever I see it because part of what President Obama said in that letter is I'm counting on you now.

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00:33:09.120 --> 00:33:23.010

Mark Osler: That you know for the legitimacy of this project, you know I'm counting on you to do well in freedom, as you have Jason. That you know that that ask that he made of you, you fulfilled.

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00:33:24.330 --> 00:33:30.090

Mark Osler: And it's a remarkable thing from the most powerful person in the world to reach out to you and ask for that.

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00:33:31.200 --> 00:33:34.560

Mark Osler: Alright, so next we're going to turn things over to Premal Dharia.

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00:33:36.450 --> 00:33:51.570

Premal Dharia: Thank you, thank you everyone, and thanks for having me here today. I'm really thrilled to be in conversation with such esteemed co panelists and I found all of your remarks so powerful and Jason I would just echo that about the video I was choking up over here, thank you for sharing that.

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00:33:52.830 --> 00:34:01.740

Premal Dharia: So let's just zoom out a little bit and address some of the kind of broader policy considerations that are important here, and about what makes clemency so important in context.

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00:34:02.730 --> 00:34:08.040

Premal Dharia: So first kind of looking broadly at the Biden Administration thus far, when it comes to

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00:34:08.460 --> 00:34:19.350

Premal Dharia: addressing the dire need to decarcerate our country and to change policy to address the structures that have created mass incarceration; which by the way, President Biden, you know, has told us that

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00:34:19.890 --> 00:34:24.750

Premal Dharia: matters to him and told us he cares about this issue about about addressing that the harms of mass incarceration.

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00:34:25.170 --> 00:34:34.020

Premal Dharia: And you know as Rachel noted the Administration's action on clemency thus far has been disheartening it's worrisome to slide with the fire all around and

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00:34:34.410 --> 00:34:41.340

Premal Dharia: everything is fine sort of captures it perfectly. And, hopefully, there will be a shift to listening to experts, like the three

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00:34:41.850 --> 00:34:53.820

Premal Dharia: other people on the screen, who have concrete proposals and ideas to change the game. As Jason said, you know these are the experts, this is who should be calling the shots on what happens next.

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00:34:54.750 --> 00:35:07.680

Premal Dharia: I guess campaign promises the Administration thus far has done very little to engender hope in meaningful criminal legal reform sort of more broadly. The federal prison population has been rising.

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00:35:08.640 --> 00:35:15.510

Premal Dharia: And that's happening in a pandemic. Over 43,000 people incarcerated and federal prisons have tested positive for COVID.

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00:35:17.880 --> 00:35:25.170

Premal Dharia: The recent recommendation also to make permanent the class wide scheduling of fentanyl analogs is probably like and it flies in the face of science and public health.

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00:35:25.500 --> 00:35:34.530

Premal Dharia: These are some of the examples of sort of ongoing disappointments that that matter in context here, right when we're talking about clemency and why it's so important.

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00:35:36.240 --> 00:35:42.600

Premal Dharia: And so, while I do want to express gratitude, some of the some of the things that the Administration, thus far has done well, for example,

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00:35:43.110 --> 00:35:50.490

Premal Dharia: the meaningful increase in the number former public defenders and civil rights lawyers being nominated the federal bench which is we can't understate the importance of that.

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00:35:50.760 --> 00:35:59.850

Premal Dharia: It's important for us as a Community, and pushing for accountability for the promises of the President made to us into our communities because we deserve to see them happen.

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00:36:00.510 --> 00:36:07.110

Premal Dharia: And there's tremendous power in the President's actions, because real people's lives are implicated, of course, and real policies are implicated.

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00:36:07.380 --> 00:36:18.810

Premal Dharia: But also because he sets the tone for the DOJ in his Administration right and the DOJ is home to all of the federal prosecutors in that country, and so his words his choices his actions

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00:36:19.230 --> 00:36:26.280

Premal Dharia: matter. They matter on a very, very fundamental levels in courthouses across the country, not just in the White House.

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00:36:27.270 --> 00:36:35.220

Premal Dharia: So when it comes to clemency I also want to highlight one thing that Rachel mentions that I'm not sure it's always apparent to those who aren't in the weeds to federal prison practices.

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00:36:35.640 --> 00:36:41.220

Premal Dharia: There are very few if zero ways to get out of prison early once you're in there.

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00:36:41.850 --> 00:36:49.860

Premal Dharia: Or at all if you have a long sentence. It's not as if there are 100 mechanisms for much to pick and oh clemency is one possible paths, among the many available.

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00:36:50.580 --> 00:37:01.980

Premal Dharia: That's not how our system is built, it's nearly impossible to get any official of any kind to consider a request for reduced sentence for an early release, no matter the circumstances and no matter how you got that sentence to begin with.

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00:37:02.580 --> 00:37:12.390

Premal Dharia: For those interested in the system as a mass incarceration and mass criminalization that we've built, this is really important as background for the conversation on why clemency matters so much.

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00:37:12.900 --> 00:37:24.630

Premal Dharia: The decades of harsh and lengthy sentences being handed out left and right have left us with prisons full of people who have no release in site. Many of them are aging and whose underlying conduct is years in the rearview mirror.

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00:37:25.980 --> 00:37:35.850

Premal Dharia: People serving long sentences are, in some ways, actually, what makes us the world leader in incarcerating people. In federal prisons, 53% of people are serving sentences of 10 years or more.

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00:37:36.210 --> 00:37:50.070

Premal Dharia: 30% are serving sentences of 15 years or more. And while it's important to think about ways to stop the flow of people into prisons, which many people do, and certainly many people in the audience I'm sure do; it's imperative that we also focus on getting people out of them.

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00:37:51.390 --> 00:38:03.540

Premal Dharia: There are some useful statistics from the Sentencing Project that I think are helpful to mention here. More people are sentenced to life in prison in America, then there were people in prison serving any sentence in 1970.

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00:38:04.620 --> 00:38:15.390

Premal Dharia: Nearly five times the number of people are now serving life sentences in the United States as we're in 1984. A rate of growth that has outpaced even the sharp expansion of the overall prison population during that period.

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00:38:15.960 --> 00:38:19.740

Premal Dharia: More than two thirds of those serving life sentences are people of color.

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00:38:21.210 --> 00:38:27.510

Premal Dharia: One out of every seven people in prison is serving a life sentence, one in five black men in prison is serving a life sentence.

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00:38:28.080 --> 00:38:34.680

Premal Dharia: And, unlike in state systems, this is, this is a critical sort of distinction between a state systems and the federal system, unlike in state systems,

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00:38:34.950 --> 00:38:44.040

Premal Dharia: almost half of the people in federal prison are there for drug offenses. Which is an area that President Biden promised to make a priority, recognizing decades of harmful approaches to drug

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00:38:44.520 --> 00:38:51.960

Premal Dharia: policy and utilizing the tools that are available to him to actually make a change. And federal clemency could not be more central to that promise.

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00:38:53.190 --> 00:38:58.290

Premal Dharia: Imagine the releases the other ways that people in federal prison have to seek early release.

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00:38:58.560 --> 00:39:09.780

Premal Dharia: Rachel touched on this earlier as well, but compassionate release requires a showing of extraordinary and compelling reasons. And well that should, of course, also be an avenue for release, it's limited and it faces significant backlog of its own.

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00:39:11.730 --> 00:39:17.910

Premal Dharia: Rachel described the faulty architecture of the current clemency process in her remarks and I hope you there's time for

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00:39:18.180 --> 00:39:27.060

Premal Dharia: her and or Mark to dig in a little bit more on that because they have really excellent proposals for paths forward and some of the reasons why the current system doesn't make any sense.

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00:39:27.930 --> 00:39:33.210

Premal Dharia: But I want to also highlight another reason those ideas and clemency itself is so important.

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00:39:33.540 --> 00:39:45.630

Premal Dharia: The incarceration of the 150,000 plus people in federal prisons today is itself, based on the structural injustice in our criminal legal system right. These issues when taken piecemeal

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00:39:46.530 --> 00:39:54.990

Premal Dharia: can result in widespread agreement. I mean, in fact, you know, President Biden campaigned on a number of these piecemeal issues that undergird how these people ended up in prison to begin with.

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00:39:55.410 --> 00:40:03.360

Premal Dharia: We have racially disparate and unjust policing and sentencing policies right, not a controversial statement people agree about this, people want to do something about this.

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00:40:03.930 --> 00:40:16.920

Premal Dharia: Pretrial detention is harmful, and can be coercive. Again, not controversial. Mandatory minimums are unfair and should be undone. President Biden talked about this in his campaign and on his website. This is again a commonly understood truth.

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00:40:17.940 --> 00:40:28.050

Premal Dharia: Prosecutors hide evidence at times and sometimes use coercive tactics to ensure guilty pleas. Again, this is widely understood by especially people who practice in courts, as I did as a public defender.

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00:40:29.550 --> 00:40:36.750

Premal Dharia: Another is that we set people up for reincarceration through our own system of so called supervision and surveillance right. That is often the case as well.

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00:40:37.620 --> 00:40:43.530

Premal Dharia: So people agree on many of these piecemeal underlying factors, the harms of our current criminal legal system.

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00:40:44.460 --> 00:40:52.620

Premal Dharia: But doing something about these issues means tackling the system from various directions right, it means taking a multifaceted, multipronged approach to addressing them.

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00:40:52.860 --> 00:41:00.690

Premal Dharia: It means acknowledging that the structural and policy problems must be considered when we're talking about the importance of release mechanisms like clemency.

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00:41:01.260 --> 00:41:10.590

Premal Dharia: They are the reasons that our prisons are full of human beings. In addition to making front end policy changes, we need to be finding ways to bring people home.

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00:41:11.790 --> 00:41:18.270

Premal Dharia: And we have one really clear way, I'm gonna say we need President Biden, to make it meaningful and to use it.

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00:41:19.470 --> 00:41:19.890

Premal Dharia: Thank you.

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00:41:21.840 --> 00:41:26.490

Mark Osler: Thank you so much, and yeah very worthwhile to get that that

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00:41:27.570 --> 00:41:29.520

Mark Osler: bigger frame of what we're talking about.

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00:41:30.840 --> 00:41:44.340

Mark Osler: Again, if anyone has questions who's tuning in you can go to the bottom of your screen there's a Q and A button and type in your question for us. I do want to follow up with Professor Barkow on something, and that is

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00:41:45.750 --> 00:41:50.160

Mark Osler: you know there's people certainly who say, Professor that President Biden

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00:41:51.300 --> 00:42:03.000

Mark Osler: doesn't really have to act because on the one hand there's things like compassionate release that can let people out or he should wait until legislation cleans it up. What do you say to those people?

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00:42:04.020 --> 00:42:04.830

Rachel Barkow: Are fools.

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00:42:06.180 --> 00:42:18.810

Rachel Barkow: So here's what I would say is that was what President Obama thought you know if, for those of us who are working in the trenches on clemency during the Obama Administration, you know now is when we're getting our ptsd because

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00:42:19.680 --> 00:42:23.040

Rachel Barkow: every time you would urge them to do something bigger and bolder,

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00:42:23.280 --> 00:42:32.220

Rachel Barkow: they were worried that that wasn't appropriate because really this was something that required a big legislative fix. They they weren't sure that was the right appropriate role for clemency.

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00:42:32.460 --> 00:42:40.410

Rachel Barkow: And they were worried that that might undercut the momentum to get legislative change so they were kind of walking this tightrope.

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00:42:41.010 --> 00:42:47.190

Rachel Barkow: And I guess, I want to point out two lessons that I hope are learned from that experience. So one is,

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00:42:47.490 --> 00:42:54.840

Rachel Barkow: you know the Obama people were holding out hope for this legislative fix and, ultimately, what came about through legislation

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00:42:55.020 --> 00:43:06.960

Rachel Barkow: was the First Step Act. And I think the critical thing to note about, that is, it had no retroactive sentencing relief for anyone other than people who are serving crack sentences under that old

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00:43:07.320 --> 00:43:17.340

Rachel Barkow: 100 to one ratio. So you know about 4000 people finally got the ability to get retroactive sentencing relief for crack after more than three decades, I will just say. So

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00:43:17.520 --> 00:43:24.990

Rachel Barkow: if the legislative fix model you have in mind is a three decade lag time to fix a problem that had been obvious for that long,

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00:43:25.200 --> 00:43:31.980

Rachel Barkow: you're not going to get a legislative fix for the people who are currently incarcerated right now. Congress seems to have no appetite

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00:43:32.250 --> 00:43:36.210

Rachel Barkow: for retroactive sentencing adjustments. So so kind of the first issue

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00:43:36.510 --> 00:43:42.630

Rachel Barkow: I would say is even if you could get Congress to act we've seen no indication they're going to act in that way. And so

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00:43:42.810 --> 00:43:55.560

Rachel Barkow: clemency is the urgent mechanism for dealing with that precise problem. Similarly, there is no indication that there's legislative appetite to deal with the pardon function, either, for any kind of expungement.

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00:43:55.950 --> 00:44:06.330

Rachel Barkow: And for eliminating, for example, collateral consequences that people face in terms of benefits reductions the you know threat of deportation all those things. So I don't see any of that on the horizon.

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00:44:06.900 --> 00:44:23.280

Rachel Barkow: And the other kind of less than I guess, I would say is you know the Obama Administration also kind of thought, well, we just kind of need to get the ball rolling, and then our successor will kind of take over. Now, I think they thought the successor was going to be a different person

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00:44:24.630 --> 00:44:27.690

Rachel Barkow: than the than the one that they got. But that's a lesson too.

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00:44:28.470 --> 00:44:36.240

Rachel Barkow: You can't rely on people and the discretion of individuals to fixing this as a structural and a process problem. And so

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00:44:36.420 --> 00:44:49.740

Rachel Barkow: if you care about these issues, you need to fix the structure and the process and it's not enough to kind of rely on who's coming down to follow you next and it's not enough to rely on legislation. If there's there's no sign that that's happening.

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00:44:50.400 --> 00:45:03.060

Rachel Barkow: And it's the president's constitutional responsibility to engage in just that kind of error correction on individual sentences and you know could do it on a categorical basis. You know the President could certainly say

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00:45:03.360 --> 00:45:06.570

Rachel Barkow: all of those changes should have been retroactive because they should have.

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00:45:07.020 --> 00:45:17.820

Rachel Barkow: And I'll add a lot of the mandatory minimum changes that have been made in the First Step Act, reducing some of the mandatory minimums were adjusting mandatory minimums that Joe Biden personally

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00:45:18.390 --> 00:45:28.770

Rachel Barkow: had pushed for in his time in the Senate. And so there's another twist to the story that I do think is worth mentioning, I don't know that we'll ever have another president so uniquely responsible for the the

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00:45:29.250 --> 00:45:32.280

Rachel Barkow: specific people who are seeking relief.

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00:45:32.760 --> 00:45:41.070

Rachel Barkow: And so you know I had sort of held out hope that this was going to be a redemption story, not just for the people who filed petitions, but you know for President Biden himself.

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00:45:41.340 --> 00:45:47.640

Rachel Barkow: You know what an amazing opportunity to write some wrongs and show that he had learned some lessons which he had told us all he had learned.

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00:45:48.360 --> 00:45:55.890

Rachel Barkow: As promote pointed out on the campaign trail. You know he had said wow I really get this now, I see things totally differently. Well you know all you gotta do is.

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00:45:56.400 --> 00:46:04.650

Rachel Barkow: As President Obama famously said I got a pen and and he could use that pen and he could write those those wrongs that he himself was part of.

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00:46:06.030 --> 00:46:12.570

Mark Osler: Thank you and Jason I want to circle back to you and I know that people reach out to you who are in prison

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00:46:13.110 --> 00:46:24.060

Mark Osler: and who are seeking clemency, what's your sense of a you know there's there's times that people are optimistic, times that they're less optimistic, is there a sense of disappointment, right now, or what are you sensing?

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00:46:26.910 --> 00:46:27.810

Mark Osler: I think you're on mute.

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00:46:31.110 --> 00:46:39.990

Jason Hernandez: I wouldn't say disappointed, there is again when I was incarcerated when President Obama was electedm

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00:46:41.010 --> 00:46:50.100

Jason Hernandez: I mean when he was elected, it was like the Dallas Cowboys won the Superbowl. Like people were banging on walls and windows and chairs, I mean it was this big roar because we felt

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00:46:50.610 --> 00:47:04.920

Jason Hernandez: that something's going to happenl even though nothing happened the next four years he was there until the fifth year he was in office. I do feel the increase of emails that I'm getting from people that are incarcerated has you know tripled.

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00:47:06.000 --> 00:47:11.730

Jason Hernandez: I get way more emails that I do now than I do, do the Trump Administration, when he was in office.

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00:47:12.300 --> 00:47:18.360

Jason Hernandez: So they are asking what's what's happening what's going on, what are you hearing, what's going to be eligible for it?

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00:47:19.290 --> 00:47:25.290

Jason Hernandez: So, again, I think that there's that they're optimistic that something is going to be put into place here soon.

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00:47:26.220 --> 00:47:31.080

Jason Hernandez: You know I think one of the main things that's been asked is are they going to what about

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00:47:32.040 --> 00:47:42.660

Jason Hernandez: crimes outside of outside of drug drug crimes? Because I think I'm mistaken, President Obama granted clemency only to all drug offenders. There wasn't one person outside of that category that received

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00:47:43.230 --> 00:47:52.890

Jason Hernandez: clemency people that committed fraud. But then also those that committed violent crimes as well, you have those individuals who have are incarcerated have been in there 20-30 years that are saying,

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00:47:53.310 --> 00:48:00.690

Jason Hernandez: you know I committed my crime, when I was in my teens where, when I was in their 20s and if they're not that boy, no more that they're now an old man.

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00:48:01.170 --> 00:48:18.810

Jason Hernandez: And that they would like to have a chance as well not to just be categorically denied. Right like to consider all the petitions, not just certain ones, and I think that's that's not something a hard ask. It's not a hard question to ask. I think that as as Rachel said the pen.

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00:48:19.830 --> 00:48:24.900

Jason Hernandez: The power of I know the power of the pen because I wrote President Obama letter asked him to release me but,

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00:48:25.560 --> 00:48:32.490

Jason Hernandez: I think mass clemency, how you end mass incarceration you do it through mass clemency. And what does that involve?

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00:48:32.790 --> 00:48:44.250

Jason Hernandez: The signature right, it was a signature by the President that put us in there and a signature by the President that could get us out of there. So you know the pen right, theres nothing more powerful than the sword the sword that's what I say.

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00:48:46.950 --> 00:48:58.350

Mark Osler: Yeah excellent so Premal I want to return to you for a second um you mentioned that there's been some things that the Biden Administration has done that's been encouraging so far, but there's others that have been disappointing.

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00:48:59.130 --> 00:49:07.500

Mark Osler: Given that we saw an Administration that brought in some people who had been activists within the this this realm,

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00:49:08.640 --> 00:49:10.320

Mark Osler: why do you think there's been

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00:49:12.090 --> 00:49:16.500

Mark Osler: such a slow walk at the start of this Administration on some of these important things?

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00:49:21.780 --> 00:49:22.590

Premal Dharia: Great question.

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00:49:24.000 --> 00:49:30.960

Premal Dharia: I hope I'm not sure I have an answer. I mean you know, I think that you know Rachel's book answers a lot of that for us right. We're stuck

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00:49:31.980 --> 00:49:42.150

Premal Dharia: in politics and media narratives and sort of historical narratives that get reinforced about what our criminal legal system is meant to do and what it actually does.

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00:49:43.050 --> 00:49:54.450

Premal Dharia: The the sort of farce that it's connected to public safety. And so I think that's part of it. I you know, I think that like I said before, to its credit, the Administration has

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00:49:55.830 --> 00:50:06.60

Premal Dharia: focused heartily on federal judicial nominations and I think that's really important. And you know I'm I'm heartened to see the changes already coming on the federal bench.

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00:50:07.590 --> 00:50:12.210

Premal Dharia: And so I think a lot of attention is done to that, but I think that, I mean it's it's inexcusable frankly.

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00:50:13.050 --> 00:50:17.340

Premal Dharia: As Rachel said earlier, and as Jason has mentioned, these are real human beings.

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00:50:17.820 --> 00:50:26.580

Premal Dharia: You know, in addition to the people who are currently incarcerated and we now have this threat of reincarceration hanging over numerous people's heads who were released under the Cares Act. I mean it's

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00:50:26.850 --> 00:50:43.080

Premal Dharia: it's cruel what we're what we're doing to people. And and the fact that there is an opportunity to address that cruelty right away quickly and with clarity and and that it's not being utilized is completely unfathomable, to be honest.

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00:50:43.380 --> 00:50:51.480

Rachel Barkow: Hey Mark, can I jump in on some one of the you know so so I agree we don't know for sure why we're not seeing more but

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00:50:52.050 --> 00:50:59.850

Rachel Barkow: you know reading some tea leaves I think one thing that's happening now, perversely is because, during the Trump Administration

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00:51:00.180 --> 00:51:09.540

Rachel Barkow: there was such an abuse of the President's relationship with the Department of Justice so much interference with things, the President should have been interfering with.

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00:51:10.290 --> 00:51:18.420

Rachel Barkow: Such a disregard for the department's traditional role, such politicisation and cronyism and the granting of clemency.

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00:51:18.810 --> 00:51:21.540

Rachel Barkow: I fear that part of what we're seeing now

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00:51:21.810 --> 00:51:34.890

Rachel Barkow: is a reaction specifically to Trump without going back on a further timeline and also stopping to ask you know not just fixing what Trump did but also thinking about fixing some of the problems during the Obama Administration and

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00:51:35.130 --> 00:51:37.050

Rachel Barkow: and I think they may have overcorrected

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00:51:37.500 --> 00:51:47.280

Rachel Barkow: to the point of saying, "wow we're just we love the Department of Justice, you know, unlike Trump you know the Department of Justice, we are we're going to let them do what they do and

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00:51:47.520 --> 00:52:00.960

Rachel Barkow: and we don't want to even remotely look like we're interfering with them." And and I think there may be a concern that you know somehow changing the operation of clemency would look too much like what Trump was doing. Now, I think

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00:52:01.560 --> 00:52:12.510

Rachel Barkow: that is such a crazy takeaway from the Trump Administration, right, to not be Trump you just don't give clemency ad hoc to your criminal co-conspirators.

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00:52:13.230 --> 00:52:24.780

Rachel Barkow: You know it's a pretty low bar and it doesn't mean that what you can't do is fixed structural problems with the dispensation of clemency itself. And you know anyone that I have ever had a conversation with

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00:52:25.050 --> 00:52:31.710

Rachel Barkow: about the way federal clemency works, as soon as I say "yes, the prosecutors who brought the case are in charge."

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00:52:32.790 --> 00:52:40.080

Rachel Barkow: You know people pretty much get the fox guarding the henhouse problem there right off the bat. And then you know the follow up question is usually,

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00:52:40.290 --> 00:52:47.220

Rachel Barkow: "is that typical? is that, like a thing?" And then I say, "no, no state does that. That no other jurisdiction does that." So

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00:52:47.400 --> 00:53:00.060

Rachel Barkow: we have this really odd historical accident that put federal prosecutors in charge, that's been crying out to be fixed. That almost every Democratic presidential candidate for President said, "I will fix that when I get there."

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00:53:00.870 --> 00:53:05.370

Rachel Barkow: That, then, President Biden did not say that when he was a candidate, but he did adopt.

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00:53:05.970 --> 00:53:14.430

Rachel Barkow: In the Biden's Senator Sanders Unity Task Force documents that oh, you know, when I look at the things that Senator Sanders said he was going to do, and they tried to kind of reach agreement,

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00:53:15.090 --> 00:53:21.120

Rachel Barkow: that was one of them. So this idea of fixing clemency taking it out of the Department of Justice, making sure it was functioning

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00:53:21.300 --> 00:53:29.640

Rachel Barkow: was something that was just a consensus idea that had been adopted. And I think somehow it has gotten entangled with this broader narrative about

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00:53:29.820 --> 00:53:41.130

Rachel Barkow: somehow not getting on DOJ's turf that I'm I worry about that that might be part of it. In addition to all the other things that premise was saying, I think we're also true, but I think there may be a little side story here that worries me.

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00:53:41.880 --> 00:53:52.800

Mark Osler: Yeah and I note that Rachel and I've written about the problems with DOJ pretty extensively, I think, in the last year or so in the Washington Post, New York Times, and most recently an Inquest, we did a piece there.

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00:53:54.120 --> 00:54:06.450

Mark Osler: So we have a question from a particular informed viewer here, asking their indications that President Biden will be granting commutations to individuals who are least pursuant to the Cares Act,

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00:54:07.290 --> 00:54:17.490

Mark Osler: that is home confinement. Who, faced the prospect of return to prison after the pandemic, how do you think that will figure into President Biden's overall clemency approach?

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00:54:21.150 --> 00:54:22.680

Mark Osler: Rachel do you want to go first on that one.

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00:54:23.010 --> 00:54:37.410

Rachel Barkow: Sure, so um my understanding is that the Administration has indicated that it is considering clemency for a subset of the people who are currently out on home confinement; and, in particular, that subset is

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00:54:38.130 --> 00:54:47.730

Rachel Barkow: a group of people who I believe have more than 18 months left to serve on their sentence and fall into a category of nonviolent

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00:54:48.060 --> 00:55:01.440

Rachel Barkow: drug offenders. So it's a, it's a, I don't know what the exact number would be of the people there's about 4000 people I think on home confinement right now. And that subset would probably be more in the neighborhood of like 1000 of those people.

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00:55:02.010 --> 00:55:10.590

Rachel Barkow: So you know all off the bat we're talking about three quarters of them have not been contacted or told that they're in the ballpark of having been considered for this.

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00:55:11.400 --> 00:55:22.050

Rachel Barkow: And then of the ones who are, they're supposed to file a clemency petition like you know, everybody else, so I presumably think somehow their petition

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00:55:22.320 --> 00:55:28.380

Rachel Barkow: is not going to get in line behind the other 16,000 that are already there and they're going to do something to keep track of them.

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00:55:29.010 --> 00:55:35.100

Rachel Barkow: But they still have to go through the normal Department of Justice, my understanding is the normal Department of Justice process.

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00:55:35.520 --> 00:55:38.100

Rachel Barkow: So you know just to flag a few things that are wrong with that.

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00:55:38.550 --> 00:55:45.150

Rachel Barkow: If you can't grant categorical clemency to a group of people who have already been prescreened

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00:55:45.420 --> 00:55:53.910

Rachel Barkow: by Attorney General Bill Barr as not presenting a risk to their community, who have been out and living productive safe lives.

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00:55:54.210 --> 00:56:01.710

Rachel Barkow: And you can't, with the stroke of your pen, give all of those people clemency right off the bat, that's your first giant red flag.

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00:56:01.980 --> 00:56:10.980

Rachel Barkow: That we have a serious problem with the Administration. I think they are the easiest group to categorically you keep them out we're in the middle of the pandemic. It's just insane to me

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00:56:11.250 --> 00:56:18.450

Rachel Barkow: that you need anything more from those folks. So the fact they're carving out just a subset of them that they're thinking about maybe giving clemency to

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00:56:19.020 --> 00:56:24.450

Rachel Barkow: I think it's it's inexplicable. I do think that

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00:56:24.870 --> 00:56:37.050

Rachel Barkow: you know, a concern I've heard some people raise, and I do not know that this is the Administration's concern this is just conjecture on the part of some is, I think the group of people that were released for the Cares Act.

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00:56:37.890 --> 00:56:38.790

Rachel Barkow: Home confinement.

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00:56:39.090 --> 00:56:51.720

Rachel Barkow: Is as a disproportionately whiter group of people than what looks like the overall prison population, so there may be a concern that you know if you kind of target that group you're not addressing some of the core racial justice issues. But

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00:56:51.930 --> 00:56:58.980

Rachel Barkow: of course, the solution to that is to make sure you release all the people of color who should have been released under the Cares Act.

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00:56:59.340 --> 00:57:10.530

Rachel Barkow: And you you expand the pool, you don't arbitrarily send other people back. But that that's my understanding of where things currently are and I'll just add on that my great fear is that somehow

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00:57:10.980 --> 00:57:18.720

Rachel Barkow: they give clemency to this quarter of the Cares Act people, and then they you know put out their White House press release that says,

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00:57:18.960 --> 00:57:31.710

Rachel Barkow: "President Biden historically grants clemency to 1000 people in his first term. Never before have we seen a president give you know this kind of clemency." And they try to kind of rah rah, this is a big deal.

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00:57:32.190 --> 00:57:41.970

Rachel Barkow: When you know that's like a rah rah big deal like I woke up this morning and went to work, right, like I did but it was supposed to do that. It was kind of the bare minimum.

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00:57:42.600 --> 00:57:53.940

Rachel Barkow: So I don't think that would be something that should be applauded. It should be, frankly, all of them should get it, and we should be releasing far more people under the Cares Act, who are still in there or inexplicably denied as well.

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00:57:55.980 --> 00:57:59.490

Mark Osler: Um Jason or Premal, do you have anything on that that the Cares Act?

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00:58:01.020 --> 00:58:02.970

Premal Dharia: That was just gonna I'm sorry Jason go ahead.

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00:58:04.380 --> 00:58:11.670

Premal Dharia: I was just going to sort of like pile on to the last point that Rachel may what was my biggest fear, which is that this like tiny carve out

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00:58:12.300 --> 00:58:18.270

Premal Dharia: which in itself it's harmful right, like carving out some subset of a group of people who all deserve it

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00:58:18.870 --> 00:58:27.150

Premal Dharia: and saying, some are deserving and some are undeserving reinforces bigger a structural problems that we're going to have to contend with for years to come in all parts of criminal legal reform.

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00:58:27.600 --> 00:58:38.010

Premal Dharia: So it's it's you know creating new harm to do that kind of carve out and and on top of that, my biggest fear is that it creates political cover for not doing anything else

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00:58:38.820 --> 00:58:47.610

Premal Dharia: in the in the months to come when big structural changes needed and far more release is needed and so so that's that's really my biggest fear.

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00:58:48.900 --> 00:58:50.130

Jason Hernandez: I would just say that.

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00:58:52.350 --> 00:58:53.160

Jason Hernandez: We know who.

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00:58:54.480 --> 00:59:03.630

Jason Hernandez: Petitions have been filed back since 2011 and even now with those who meet this criteria for the Obama Administration which

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00:59:04.350 --> 00:59:10.440

Jason Hernandez: Biden had to work hand in hand with it because they're like brothers right. They're going to do everything together, and that is not hard.

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00:59:11.010 --> 00:59:22.920

Jason Hernandez: I don't see what the problem is, as far as these individuals under the Cares Act that why can't you release them? Through administration through the Trump Administration, which basically has released them as well.

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00:59:24.090 --> 00:59:29.670

Jason Hernandez: Again I just don't I don't know I don't get it, I don't understand what what the holdup is there should be something in place already.

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00:59:30.420 --> 00:59:38.490

Mark Osler: Yeah so we got a question here that I'll answer a little bit and then throw it over to the others and it's from Queen Karen Garrison.

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00:59:39.510 --> 00:59:45.630

Mark Osler: Who in this Administration is most educated and effectively active when it comes to clemency and commutation at the time?

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00:59:46.350 --> 00:59:54.420

Mark Osler: Which of you are working with them? And that's a great question, because one thing that I think we've learned over the past couple administrations it makes a huge difference if there's a

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00:59:54.840 --> 01:00:03.330

Mark Osler: top advisor who's really motivated in that. I think the sense was that in the Obama Administration, the President himself was motivated but also Valerie Jarrett.

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01:00:03.720 --> 01:00:13.020

Mark Osler: Somebody that they look to for advice, who who pushed for change. Within the Trump Administration we did get the First Step Act and it was Jared Kushner who was the advocate

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01:00:13.380 --> 01:00:21.210

Mark Osler: within the Trump Administration for that kind of change. What hasn't emerged from what I've seen in this Administration is that person.

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01:00:21.840 --> 01:00:37.890

Mark Osler: That person who has access to the President, who has the presence here who's going to be able to keep this something like the reforms we're talking about on the agenda and up at the top. Certainly the White House Council plays a role. The

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01:00:39.000 --> 01:00:48.690

Mark Osler: the Domestic Policy Council plays a role. And there's a group of people within the White House counsel's office who have made a point of reaching out to people were involved and on

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01:00:49.350 --> 01:00:59.670

Mark Osler: on this, these issues and have heard you know a lot of what we're saying today. What's not clear is is who it might be that's really going to

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01:01:00.900 --> 01:01:07.860

Mark Osler: you know, in those informal moments say to the President, "this matters, this needs to change." So do others have thoughts on that?

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01:01:12.930 --> 01:01:17.790

Mark Osler: No okay, well, I do want to throw out another question, and that is

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01:01:19.890 --> 01:01:25.050

Mark Osler: the you know what's, the most important thing that President Biden could do right now

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01:01:26.130 --> 01:01:36.090

Mark Osler: in this area? What is it that that you know if he's if he's going to make a move what what should that move be? And I'll start with you Premal.

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01:01:41.280 --> 01:01:50.310

Premal Dharia: Thanks yeah I was just looking at the questions I think, which I'll sort of go to like what next, right, like what can we do? And I think I mean there's so many mechanisms that you and Rachel really have put forth

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01:01:50.580 --> 01:01:54.660

Premal Dharia: a number of proposals in various pieces of writing as you mentioned, you know. And I think

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01:01:55.260 --> 01:02:00.930

Premal Dharia: first and foremost, is this big structural change that needs to happen, which is getting this process out of the Department of Justice,

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01:02:01.650 --> 01:02:12.210

Premal Dharia: right. And so I mean, I think that that's that that leads to all of the other changes that could happen. I don't think we can get to other legislative fixes or you know other sort of

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01:02:12.720 --> 01:02:20.520

Premal Dharia: potential opening up new mechanisms which I think it's also important right. I can look at legislature there's there's all kinds of things that could be added to the mix.

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01:02:20.790 --> 01:02:31.410

Premal Dharia: But I don't think we're going to see success in any of them until we take this initial fundamental step of removing prosecutors from the decision making, you know component of this process.

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01:02:32.250 --> 01:02:37.770

Mark Osler: Yeah and I think certainly understand that you know, as a former prosecutor

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01:02:38.130 --> 01:02:47.190

Mark Osler: the commitment you have to be in right is huge. You've you've been a few feet away from someone is you're arguing for years of their life, sometimes their entire life to be taken away from them.

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01:02:48.030 --> 01:02:59.040

Mark Osler: The moral costs of being wrong or having that change are huge and I think that, of course, you're going to run into problems and that's the line of decision. Jason do you have any thoughts on that?

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01:03:00.150 --> 01:03:00.630

Mark Osler: On.

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01:03:01.980 --> 01:03:03.330

Jason Hernandez: What Biden should do, the most important thing.

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01:03:06.240 --> 01:03:13.800

Jason Hernandez: Set a policy initiative a clemency policy initiative and set it quick. Those are the exact same words

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01:03:14.310 --> 01:03:21.690

Jason Hernandez: President, President Bush Bush total President Obama in his last two or three hours of his presidency.

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01:03:22.230 --> 01:03:29.010

Jason Hernandez: They talked about 1,000 things, but one of the things which I wish I could have been in the been in the limousine at that time.

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01:03:29.850 --> 01:03:41.040

Jason Hernandez: To think about that that the last days of President Bush was thinking about to advise President Obama was that he should focus on clemency on pardons, clemency and set a policy and set it quick.

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01:03:41.460 --> 01:03:46.830

Jason Hernandez: Out of all this out of all the wrong things that were going on in the United States at that time, President Obama Obama didn't do it.

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01:03:48.270 --> 01:03:53.370

Jason Hernandez: So we know that Biden knows this, right, he knows that this is important, this extraordinary,

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01:03:54.510 --> 01:03:55.860

Jason Hernandez: this godlike power.

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01:03:57.030 --> 01:04:10.110

Jason Hernandez: To bring people back from this is an extraordinary power that the President has right and even even in the Schindler's list, for example in schindler's list right, I think it was Schindler when he told Amon the

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01:04:11.370 --> 01:04:24.720

Jason Hernandez: true power is not letting somebody brought in prison right or sending somebody to prison. The true power is showing mercy, forgiveness, that that is what power is and not everybody can do that so here President Biden has an opportunity to.

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01:04:25.980 --> 01:04:29.700

Jason Hernandez: Again, to to show people what true power is and what it should be.

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01:04:30.390 --> 01:04:30.750

yeah.

423

01:04:31.770 --> 01:04:36.060

Mark Osler: Exactly. Rachel, what do you think the most important thing Biden should do?

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01:04:36.750 --> 01:04:46.200

Rachel Barkow: Well, I agree with what both Premal and Jason have said already. And I guess just add a little more detail to it, so you know I think the policy should be

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01:04:46.410 --> 01:04:57.900

Rachel Barkow: there's an emergency 16,000 petition backlog and I need to sign an Executive Order tomorrow, creating an emergency Commission that's going to help me churn through the backlog. You don't even have to remove things from DOJ permanently.

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01:04:58.140 --> 01:05:05.280

Rachel Barkow: But at a minimum, you should do what President Ford with his big backlog of people who were the Vietnam draft evaders.

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01:05:05.910 --> 01:05:13.920

Rachel Barkow: Is is you recognize special circumstances call sometimes for special presidential action. So the first thing I would tell them to do is deal with this emergency first.

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01:05:14.640 --> 01:05:17.970

Rachel Barkow: Have a special commission setup that helps you turn through your backlog.

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01:05:18.420 --> 01:05:27.240

Rachel Barkow: I probably set up either the same Commission or two and have another one that does the Cares Act folks. Now the Cares Act folks honestly, I don't think you need a commission, I think you need

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01:05:27.510 --> 01:05:30.870

Rachel Barkow: the pen and you just give them all, you give them all clemency.

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01:05:31.380 --> 01:05:37.320

Rachel Barkow: Because if they had done anything wrong, you would know about it, because they would have already been sent set back. So you know, really, what I think

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01:05:37.620 --> 01:05:48.000

Rachel Barkow: should happen is that and then that's after he does, that the second thing is, you need to start using your bully pulpit to talk about these issues. There's a deafening silence out of the White House on pretty much everything related

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01:05:48.300 --> 01:05:58.080

Rachel Barkow: to criminal law and justice. Have you heard them talk about any of the major pieces of legislation that you know people are fighting to get through in Congress, because I haven't. You know I haven't heard a big push

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01:05:58.680 --> 01:06:07.470

Rachel Barkow: to deal with some of the things that we're seeing in terms of equalizing, for example, crack and powder cocaine, so the ratios are exactly the same now, which should be an absolute no brainer.

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01:06:08.430 --> 01:06:16.170

Rachel Barkow: Seeing them push forward other legislative changes to the kind of the second step kind of things that come after the First Step Act.

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01:06:16.950 --> 01:06:28.530

Rachel Barkow: They're not even trying to move stuff through Congress they're just weirdly quiet on the criminal justice front. And I fear it's it's what Premal was talking about before, I fear there's a little bit of

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01:06:29.340 --> 01:06:41.460

Rachel Barkow: a concern that they're going to get tied up in an unpopular abolish the police kind of movement or frame and they don't want to kind of come anywhere near that. Which I view is just complete and total political cowardice because

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01:06:42.270 --> 01:06:49.830

Rachel Barkow: you can get in front of these issues. It's your obligation as as the President to explain some of these things to people, to explain what real public safety looks like.

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01:06:50.460 --> 01:07:01.530

Rachel Barkow: And you can be leading on all of it. So So for me it would be you deal with the emergency backlog, you get clemency put into an advisory body that you, the President hear from directly and help you deal with that.

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01:07:01.710 --> 01:07:07.920

Rachel Barkow: When you give them a directive of who you're interested in. Jason's point about you know you pick your policy, you get people in there and help you do it.

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01:07:08.520 --> 01:07:19.500

Rachel Barkow: But you also show leadership on these issues and and you find yourself out there being heard on it. And I know there's a million things, it's a pandemic, we have everything going on in Afghanistan, like it's it's a lot.

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01:07:20.100 --> 01:07:30.510

Rachel Barkow: But, but this is a lot, too, and this is a really important issue. And this is a person who was elected and and gave a pledge and a promise that he would not turn his back on racial justice issues.

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01:07:30.870 --> 01:07:38.160

Rachel Barkow: It was a big part of what got him into office, it was a big part of what he pledged right away in his his very first speech when he

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01:07:38.730 --> 01:07:41.850

Rachel Barkow: accepted the presidency that he was not going to turn his back on these issues.

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01:07:42.150 --> 01:07:53.160

Rachel Barkow: And if you care about racial justice, you cannot ignore what we're talking about with with the criminal legal punishment bureaucracy that he is overseeing. This this should be priority one.

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01:07:53.550 --> 01:07:58.170

Rachel Barkow: And it's the easiest one for him to address when it comes to clemency because he doesn't need anybody else's help.

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01:07:58.860 --> 01:08:10.470

Mark Osler: Yeah absolutely so stay off mute for a second Rachel because we got a question from Professor Mona Lynch that to Professor Barkow's point on prosecutors guarding the henhouse,

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01:08:10.920 --> 01:08:24.510

Mark Osler: the worst most aggressive prosecutors who produced the worst injustices are least likely to support clemency. Can you foresee some kind of proactive internal DOJ program to more closely examine cases from those districts where sentences are the most draconian?

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01:08:25.710 --> 01:08:33.270

Rachel Barkow: That's a great point and I wish I could say that I was optimistic that DOJ could kind of clean its own house that way.

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01:08:34.320 --> 01:08:41.790

Rachel Barkow: That was not my experience, for example, when I was on the Sentencing Commission, we would have representatives from DOJ come in and complain

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01:08:42.060 --> 01:08:51.330

Rachel Barkow: about all the judicial disparity that they had seen. How can you have a judge, and you know in one district do X and another district do Y. And I can't tell you how many times

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01:08:51.570 --> 01:08:56.580

Rachel Barkow: my colleagues and I would say, you know we're noticing similar patterns among your prosecutors.

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01:08:57.120 --> 01:09:10.890

Rachel Barkow: That you know there's really big disparities and how you're filing for example 851 enhancements, people getting double mandatory minimums. That is huge variation by district so U.S. attorney's taking wildly different approaches.

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01:09:12.120 --> 01:09:21.360

Rachel Barkow: And there was no effort by the department to do anything to kind of equalize or address that. You know they have some vague centralized memos that go out.

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01:09:22.260 --> 01:09:31.080

Rachel Barkow: And there's it's not called the U.S. attorney's manual anymore, what is it the Justice Manual? They have some new name for it, that I can't quite remember what it is, but you know that what was formerly known as,

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01:09:31.320 --> 01:09:40.860

Rachel Barkow: The U.S. Attorney's manual. They have that plus the memos that are supposed to be the kind of equalizing documents, but they are woefully inadequate to the task. And so you do actually have,

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01:09:41.670 --> 01:09:49.020

Rachel Barkow: and I know actually, no one knows this more than Mona so so I'm definitely saying something that no one has studied more effectively and well than her.

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01:09:49.620 --> 01:10:00.090

Rachel Barkow: you have these wide disparities. I don't think that the department is really positioned well to address them in-house. I think they kind of let the different districts do their thing.

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01:10:00.900 --> 01:10:10.320

Rachel Barkow: And other than the few things that you have to get preclearance from DOJ, for you know certain kind of wiretaps, death penalty kind of stuff, they sort of let those other chips fall where they may.

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01:10:10.830 --> 01:10:18.360

Rachel Barkow: That is actually why I think it's really critical to have functioning clemency because I think it's the president's obligation to even some of that out.

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01:10:18.990 --> 01:10:25.830

Rachel Barkow: And, and I wrote a you know I'm sure much too long law review article that I think that was actually part of the constitutional design. Like I think if you're a

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01:10:26.100 --> 01:10:34.020

Rachel Barkow: unitary executive type or just a strong executive type, that's exactly what the President should use the clemency authority for is to kind of make sure

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01:10:34.380 --> 01:10:39.480

Rachel Barkow: all the little districts are doing what the President wants. And so, when you have the outliers that are overcharging,

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01:10:39.690 --> 01:10:50.580

Rachel Barkow: you use clemency precisely to fix that but I don't think that will happen unless you have a body outside of DOJ taking a look and doing it. But it would be very easy for a body like that to do you know. For example,

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01:10:50.850 --> 01:11:01.830

Rachel Barkow: that, for me, that would be one of the things I would urge the President to do is start, for example with 851 enhancements. You know there's a really great Sentencing Commission report on this, you can immediately look at the districts that have gone over the top

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01:11:02.070 --> 01:11:09.180

Rachel Barkow: in seeking double mandatory minimums, they're outliers. You know you could correct those right off the bat. So there's a lot you could do with data

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01:11:09.720 --> 01:11:19.200

Rachel Barkow: and disparities that are based by on districts, that would be great for a president to prioritize. But in order to implement that effectively, I think you have to take it out of the department.

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01:11:19.890 --> 01:11:28.500

Mark Osler: Yeah so we've got a great question from Professor Doug Berman, about what can Congress do to help but

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01:11:29.460 --> 01:11:35.640

Mark Osler: even though he's the organize organizer of the whole symposium I do think, I want to end with Jason. Jason,

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01:11:36.240 --> 01:11:43.500

Mark Osler: there's a lot of us who are in a situation right now, where we've advocated through the Trump Administration into the Biden Administration where

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01:11:44.310 --> 01:11:56.970

Mark Osler: there doesn't seem to be a lot of hope maybe. And of you're the expert on hope somehow doing a life sentence you kept working and you envisioned your freedom, how did you maintain hope through that period?

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01:11:59.790 --> 01:12:07.890

Jason Hernandez: Well, unfortunately it took my brother who was murdered in prison serving 30 years for four grams of crack cocaine for me to change my life.

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01:12:10.110 --> 01:12:21.630

Jason Hernandez: But with that right what I spoke about earlier, I had, I had hoped right a lot of hope. Faith that I was going to get out, had no doubt in my mind that I was, I lived every day like I was going to get out because I knew it was going to happen.

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01:12:24.150 --> 01:12:30.120

Jason Hernandez: But one of my main reasons for coming out when I talked about earlier about neighborhoods looking like atomic bombs had been dropped on.

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01:12:33.210 --> 01:12:37.170

Jason Hernandez: My neighborhood where I grew up and looks like that to a certain person.

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01:12:38.790 --> 01:12:42.780

Jason Hernandez: I contributed to that by the stuff that I did. I was selling drugs in my community.

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01:12:44.190 --> 01:12:47.580

Jason Hernandez: And I have to live with that, even now, to this day right.

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01:12:48.750 --> 01:12:52.980

Jason Hernandez: That bothers me, right, it hurts. I gotta go to my neighborhood and I see stuff that I did

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01:12:54.000 --> 01:13:09.600

Jason Hernandez: back in when I was a kid at 18, 19, 20 years old that still has an impact on the community. That there's still people incarcerated buyers, stuff that, the acts that I did, and I wanted to

get out. That's what made that's what kept that hope that I wanted to come back to this community and make a difference.

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01:13:11.640 --> 01:13:22.410

Jason Hernandez: And I have right, I and I'm never going to stop. I owe a debt to this community. But you know what, I ain't the only one who created what happened here and what happened across

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01:13:23.220 --> 01:13:31.260

Jason Hernandez: thousands of black and brown communities across this United States. But it just wasn't the drug dealers right, as I mentioned earlier, that the cure was worse than the poison.

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01:13:32.100 --> 01:13:45.150

Jason Hernandez: And those individuals that were up on top, who didn't give us in our communities what we needed better schools; simple things like sidewalks, lamppost so we can see at night. The small things that we needed that we didn't get.

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01:13:46.440 --> 01:14:02.820

Jason Hernandez: We got more officers right. We didn't get treatment there was no such thing as rehabilitation. That those individuals up there now contributed to that and ones the most powerful man in the world right now. That he has that ability to make up for all the wrong that was committed back then.

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01:14:04.020 --> 01:14:19.440

Jason Hernandez: And I know it's hard for me to sleep at night, for what I did, and I don't see how anybody else can, but if you're a position to make change, how they say, "too much is given, much is expected." Right. That this is how America can make right, mass clemency.

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01:14:20.940 --> 01:14:32.400

Mark Osler: I think that's a pretty good place to end. I really like to thank the panelists and thank everybody who tuned in for this discussion. I hope you found this worthwhile, as I did. Thank you.