



## A Post-Clemency Prosecution Shines a Light on a Broken System

A month before he left office, then-President Donald Trump freed Philip Esformes, a Florida nursing home operator who had served nearly five years of a 20-year sentence for bilking Medicare and Medicaid. Despite that commutation, the Justice Department plans to retry Esformes for the same conduct that sent him to prison in the first place.

Critics of that unprecedented move say it undermines the pardon power and violates the Fifth Amendment's ban on double jeopardy. As witnesses at a recent congressional hearing emphasized, the case also illustrates the sorry state of the federal clemency system, which in recent decades has become increasingly stingy, inefficient and haphazard.



Jacob Sullum

Esformes was arrested in 2016 and charged with numerous crimes related to a scheme that prosecutors said involved bribes, kickbacks and medically unnecessary treatments, all of which helped fund a "lavish lifestyle." After an eight-week trial in 2019, U.S. District Judge Robert N. Scola Jr. directed the jury to acquit Esformes of six charges, including two counts of health care fraud, deeming the evidence underlying them insufficient as a matter of law.

The jury convicted Esformes of 20 other charges, including conspiracy to defraud the United States, money laundering, payment and receipt of kickbacks, and obstruction of justice. But it failed to reach verdicts on six counts, including the central charge of conspiring to commit health care fraud.

Based on the 20 convictions, Right on Crime Executive Director Brett Tolman noted in his congressional testimony, "Mr. Esformes was facing 5 years in prison." But federal prosecutors successfully urged Scola to sentence Esformes as if he had been convicted of health care fraud, which "increased Mr. Esformes' sentence by 15 years."

Although it defies conventional notions of justice, federal judges are allowed to punish defendants for crimes that have not been proven beyond a reasonable doubt. In this case, Scola explicitly said he considered the six undecided counts in determining Esformes' sentence.

The Justice Department nevertheless wants to take another stab at convicting Esformes of those crimes. It argues that the commutation Esformes received does not preclude another prosecution, because it says nothing about the unresolved counts.

Trump explicitly left in place three years of post-release supervision, plus restitution and forfeiture totaling about \$44 million. But it is hard to believe he thought he was leaving the door open to a trial that could send Esformes back to prison. That prospect instead seems to be the result of a mistake that



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could have been avoided if Trump had been better advised.

“A good system would have made him aware of the hung counts and the fact they could be retried,” University of St. Thomas law professor Mark Osler notes. Then Trump could have pardoned those counts, which would have prevented a retrial.

As Osler sees it, that oversight is emblematic of a broken clemency process that is highly bureaucratic, needlessly complicated, painfully slow and maddeningly opaque. The current system involves seven sequential layers of review and effectively empowers prosecutors to block mercy for defendants they put away.

Presidents frustrated by that process often have been tempted to take shortcuts, Osler notes, resulting in “hasty clemency grants in the last days of an administration.” Trump, for example, granted 78 of his 94 commutations during his last 31 days in office.

Although Americans might assume that pattern is traditional, it did not emerge until the Clinton administration. And as acts of clemency became increasingly concentrated toward the end of a president’s time in office, they also became much rarer: Trump granted 2% of petitions, for instance, down from 12% under Ronald Reagan and 36% under Richard Nixon.

It seems unlikely that Joe Biden, who currently has a backlog of nearly 17,000 petitions, will make a substantially bigger dent in them than his recent predecessors did. Meanwhile, his administration’s vindictive pursuit of Esformes casts doubt on the finality of clemency, sending exactly the wrong signal about an important but woefully underused remedy for injustice.

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