

# CONSTITUTIONAL MEANS TO PREVENT ABUSE OF THE CLEMENCY POWER

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## HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES OF THE COMMITTEE ON THE JUDICIARY U.S. HOUSE OF REPRESENTATIVES ONE HUNDRED SEVENTEENTH CONGRESS FIRST SESSION

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## CONSTITUTIONAL MEANS TO PREVENT ABUSE OF THE CLEMENCY POWER

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**Tuesday, February 9, 2021**

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,  
AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

*Washington, DC*

The Subcommittee met, pursuant to call, at 9:12 a.m. via Webex, Hon. Steve Cohen [chair of the subcommittee] presiding.

*Present:* Representatives Cohen, Ross, Johnson of Georgia, Garcia, Bush, Jackson Lee, Johnson of Louisiana, Jordan, McClintock, Roy, Fischbach, and Owens.

*Staff Present:* David Greengrass, Senior Counsel; John Doty, Senior Advisor; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Jordan Dashow, Professional Staff Member; John Williams, Parliamentarian; James Park, Chief Counsel, Constitution, Civil Rights, and Civil Liberties; Will Emmons, Professional Staff Member, Constitution, Civil Rights, and Civil Liberties; Matt Morgan, Counsel, Constitution, Civil Rights, and Civil Liberties; Katy Rother, Minority Deputy General Counsel and Parliamentarian; Caroline Nabity, Minority Counsel; James Lesinski, Minority Counsel; Sarah Trentman, Minority Senior Professional Staff Member; and Kiley Bidelman, Minority Clerk.

Mr. COHEN. The Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

Without objection, the chair is authorized to declare a recess of this Subcommittee at any time.

Before we go into our committee, I would like to express the chair, and I am sure all of the Members of the Committee and the Congress' sadness at the passing of Representative Wright. He served for a short period of time, but he was a gentleman, and we will miss him, and we mourn his loss. And I would like for us to have a moment of silence in his honor. Without objection.

Thank you. Thank you.

At this point, Mr. Johnson, if you would like to lead us in prayer regarding the passing of our colleague, you would be recognized.

Mr. JOHNSON of Louisiana. Thank you for that, Mr. Chair. Very much appreciated.

Our colleague, Chip Roy, who has joined us this morning, was on an interview this morning and knew Representative Wright as well as any others, and said so well, he was a good man, a good family man, and truly dedicated public servant to his constituents and to the country. So, thank you for that. I will lead us in prayer. Thank you.

I will just pray, Heavenly Father, thank you for this day, for the work that you have put before us, and for all our colleagues. We are reminded this morning of the preciousness of life and how fleeting it is.

I pray that Representative Wright's example would be one that shines for all of us. He was truly committed to you and to his family and to his country and to all those he served. So, let that be a shining example for us. Let us be reminded to value one another and that life is short, and we make the most of it.

So, we pray for the Wright family, all those involved, his constituents, everyone affected, all of our colleagues as well, and that you bless and continue to bless him and them and the work of our hands.

All this I pray in Jesus' name. Amen.

Thank you, Mr. Chair. Yield back.

Mr. COHEN. Okay. Well done. Thank you.

Now, we will go back to the Committee and welcome everyone to today's hearing on "Constitutional Means to Prevent Abuse of the Clemency Power."

Before we begin, I would like to remind Members, new and returning, that we have established an email address and distribution list dedicated to circulating exhibits, motions, and other written materials that Members might want to offer as part of our hearing today.

If you would like to submit materials, please send them to judiciary docs—that is *judiciarydocs@mail.house.gov*, and we will distribute them to Members and staff as quickly as possible.

I will now recognize myself for an opening statement.

I am pleased to convene the first hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties for the 117th Congress. I look forward to once again working with the gentleman from Louisiana, Ranking Member Mike Johnson, and other Members of our Subcommittee on the many challenging and pressing issues that will be addressing us in the months and years to come.

While we will no doubt have sharp disagreements from time to time, it is my hope that we will always be able to disagree in the guardrails of mutual respect as colleagues. Each of us was sent here to represent our constituents faithfully and to the best of our abilities.

We begin this Congress by picking up on a topic that we devoted two hearings to in the previous Congress, which is the proper scope and use of the President's constitutional power to grant clemency.

The clemency power is outlined in article II, section 2 of the Constitution, and is rightly broad. The clemency power's purpose is to Act as a safety valve for our criminal justice system, to correct system injustices, and to ensure that mercy tempers excessively harsh punishments.

There are few things that are more fiercely urgent than the need to grant clemency to the thousands who suffer from the burdens of excessive and unjust imprisonment or the collateral consequences stemming from their criminal convictions. Perhaps not coincidentally, these burdens are disproportionately borne by people of color.

I have long been concerned with the stinginess with which modern Presidents have granted clemency, beginning in the 1980s with the so-called war on drugs, which really goes back to the 1970s. Between 2013 and 2014, I wrote four letters to then President Obama and then Attorney General Holder urging the President and the Attorney General to become more involved, to grant more clemency petitions, and I authored two opinion pieces on the subject calling for more clemency grants.

In fact, I had written the President early in his second term and told him I had three C's I wanted him to work on: Cuba, cannabis, and commutations. It was alliterative, it may be somewhat effective, but he was a little shy on clemency.

I also wrote to President Trump to commend him for commuting the sentence of Alice Marie Johnson and to encourage him to do more than his predecessor, who did issue a great number of clemencies, probably the most of anybody in recent time, but far from the amount of people that deserved them. I asked him if he would do more in granting clemency to many cases like that of Ms. Johnson.

It is my hope that President Biden will be a leading example of how clemency power could be more effectively used, especially among those who may be more deserving but whose pleas have not been heard.

The Subcommittee will commit itself to pushing for more expansive use of the clemency power, an effort that I hope will be bipartisan, because we are talking about freedom, and we know both caucuses appreciate freedom.

When considering what is the proper scope and use of the clemency power, however, there is another matter to consider, which is whether there are or should be limits on the power when a President grants clemency for self-serving or corrupt purposes, rather than as an Act of mercy. Presidents of both parties have issued controversial pardons that raise these kinds of questions, which is why they have been longstanding interests of this subcommittee. Such pardons are often not in keeping with the purpose of the clemency power.

In 2019, the Subcommittee considered the question of whether a President could issue a self-pardon, and the consensus among all the witnesses at that hearing, including the one requested by the minority, was that, on balance, the Constitution likely would prohibit self-pardons. Indeed, during the Nixon Administration, the Department of Justice's Office of Legal Counsel concluded self-pardons would be unconstitutional because of the basic principle that no one should be a judge of his or her own case.

Questions about the proper scope of the clemency power took on greater urgency during the recent Presidency. No President is permitted to abuse the power of his office to obstruct a law enforcement investigation, yet the manner in which President Trump used the clemency power throughout his Presidency raised the concern

that he may have been willing to do just that to protect himself and his political allies.

For example, during the investigation of the special counsel, Robert Mueller, into possible Russian interference in the 2016 Presidential election, President Trump on multiple occasions dangled the possibility of pardons for witnesses who refused to cooperate—specifically, Paul Manafort, his former campaign chair, Michael Flynn, his National Security Advisor, Roger Stone, his senior campaign adviser.

Ultimately, he would pardon all three of these individuals after their convictions for various criminal offenses stemming from the Mueller investigation during his final weeks in office.

In addition, to matters related to the Mueller investigation, President Trump used the clemency power in other potentially self-serving ways as most of those who received clemency had some kind of special access or other political or personal connection to him. That seemed to be the thread rather than the crime and the sentence.

This included clemency for four former Republican Members of Congress, one of whom I was personally close to. Nevertheless, they had been convicted of various criminal offenses, ranging from bribery and insider trading to misuse of campaign donations.

Charles Kushner, his son-in-law's father, and his former chief political strategist, Steve Bannon, who was awaiting trial on fraud charges relating to a scheme to fund a wall on the U.S.-Mexican border, were also pardoned.

President Trump also reportedly discussed pardoning himself and his children during his final days in office. We presume he didn't do that, but we don't know that for a fact, because there is such a thing as a secret pardon, which is something we should address today.

In light of the foregoing, I introduced H.J. Res. 4, a proposed constitutional amendment that would expressly prohibit Presidents from granting clemency to themselves, prohibit clemency grants to certain classes of people, like the President's family Members to the third degree, Administration officials, paid campaign staff, or any person or entity who committed an offense directed by the President. It also has a catchall provision making any pardon invalid which was issued for a corrupt purpose. I had introduced similar resolutions in the previous two Congresses.

While this proposed amendment precludes clemency for certain potential recipients, I would also like to talk about ways to improve the clemency process, transparency, and the timing of pardons and commutations.

Specifically, I would like to hear the witnesses' views about requiring public notice of pardons, to get around the issue of a possible secret pardon, or commutations that might be issued before election day. I think Mr. Naftali had suggested some type of prohibition before election day, or after the election, but it would have to have some time period and the requirement of notice. There it was a secret pardon, it wouldn't be known. That would have to be addressed.

The public notice of pardons or commutations, maybe a time before election day so that voters have notice, that only, obviously, in

a Presidential election year and probably only in the first term; requiring more transparency to avoid secret pardons; and revising the system by which clemency decisions are made, including removing or curtailing or otherwise amending the role of the Department of Justice with respect to the clemency process.

This will not be our last look at the clemency power in this Congress as the Subcommittee will continue to engage on this issue, including from a criminal justice reform perspective.

I thank our witnesses for being here, and I look forward to a lively discussion.

Now, I would like to recognize the gentleman from Louisiana, our Ranking Member, Mr. Johnson, for his opening statement.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair. I appreciate that very much.

Article II, section 2 of the Constitution includes very clear language, and of course it says, in relevant part, quote, “The President shall have the power to grant reprieves and pardons for offenses against the United States except in cases of impeachment,” unquote.

Some Presidents, of course, have used this power more than others. They do this based upon their own conceptualization of justice, their own respective judgments, and most of the country has always respected that.

For instance, President Trump issued 237 total pardons and commutations during his term of office in 4 years—237. By comparison, President Obama issued 1,927 pardons and commutations, President Bush issued 200, and President Clinton issued 457. So, the numbers vary.

President Obama issued pardons or commutations, many of which were very controversial. He, for example, included Chelsea Manning, who endangered national security by leaking classified information; Oscar Rivera Lopez, a top FALN leader and terrorist; and his Joint Chiefs of Staff Vice Chair, James Cartwright, who lied to Federal investigators.

President Bush commuted the sentence of Lewis “Scooter” Libby, which was controversial in some circles.

President Clinton issued pardons or commutations to his own brother for drug-related offenses, to fugitive political donor Marc Rich, to his CIA Director, his Housing Secretary, and several individuals who were convicted for their actions during the scandals of his own Administration.

Most recently, President Trump pardoned Roger Stone and Michael Flynn.

All these Presidents exercised their judgment and issued pardons that were controversial with the opposing party and with many segments of the public. But despite the broad use of the pardon power that has varied from President to President throughout our entire history, the majority introduced the Abuse of Power Prevention Act last Congress.

Republicans explained that the bill was unconstitutional at a Committee markup last July. Nevertheless, the Committee favorably reported the bill on a party-line vote.

Additionally, Chair recently introduced the proposed constitutional amendment that he just mentioned to narrow the pardon power.

I have several significant concerns with this proposed amendment. Many of us do. Among other issues, it vaguely declares that, quote, "Pardons issued for a corrupt purpose shall be invalid." The problem there is that it is pretty vague and overbroad language. There is not any framework or workable standard to determine what exactly amounts to a corrupt purpose.

I am sure that the majority would argue that certain pardons issued by President Trump were issued for a corrupt purpose, while most Republicans would argue they served the interests of justice by ending politically motivated prosecutions.

This very issue of partisan passions affecting the judgment of Congress is precisely why the Founders structured the Pardon Clause exactly as they did. Alexander Hamilton argued against legislative involvement in the pardon power, because he said, quote, "When the offense has proceeded from causes which had inflamed the resentments of the major party, they may often be found obstinate and inexorable, when policy demanded a conduct of forbearance and clemency," unquote.

James Madison similarly argued that legislative involvement in the pardon power would be improper because, quote, "Numerous bodies actuated more or less by passion and might, in the moment of vengeance, forget humanity," unquote.

Similarly, a narrower pardon power was proposed during the Constitutional Convention for precisely the same reasons that the majority advances today. For good reason, that proposal was soundly defeated.

The pardon power is best vested in the President, as it was designed in the Constitution, for a President to exercise as they see fit based upon their personal judgment and notion of justice.

I thank our witnesses for appearing before the Subcommittee this morning. I look forward to your testimony, and I hope we can have a productive conversation.

Mr. Chair, with that, I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

Unanimous consent is requested for submission of the full Committee Chair Mr. Nadler's opening statement for the record, and I would ask for unanimous consent for that. Without objection, his statement will be entered into the record.

[The information follows:]

**MR. COHEN FOR THE RECORD**

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**Statement of Chairman Jerrold Nadler for the Hearing on the  
“Constitutional Means to Prevent Abuse of the Clemency Power”  
Before the Subcommittee on the Constitution, Civil Rights, and Civil  
Liberties  
Tuesday, February 9, at 9:00 a.m.  
Virtual Hearing via Cisco Webex Events**

Today’s hearing is an important opportunity for us to consider how to address abusive exercises of the pardon power.

This Committee—under both Democratic and Republican majorities—has, on multiple occasions in the past, considered potential responses to controversial presidential clemency grants that created the appearance of impropriety, a corrupt bargain, or otherwise undermined the American public’s faith in the integrity of their government.



Indeed, in one of the few examples in American history of a sitting president testifying before Congress, President Gerald Ford appeared before the House Judiciary Committee to explain his decision to pardon former President Nixon in the wake of the Watergate scandal.

Unfortunately, Congress finds itself again in a period of national reflection where we must consider what, if any, reforms we should undertake in the wake of former President Trump's frequent abuse of the clemency power. No other modern president has ever exercised this important power in a manner so contrary to the Framers' intent that the president use it to provide mercy and to remedy miscarriages of justice.

In contrast, President Trump abused the clemency power in self-serving ways that undermined the cause of justice and impugned the integrity of the federal criminal justice system.

For example, Special Counsel Robert Mueller's Report described multiple instances in which President Trump dangled the possibility of a pardon for witnesses who refused to cooperate with the Mueller investigation.

President Trump also used his bully pulpit to launch attacks on the Mueller investigation, and praised individuals like Roger Stone who refused to cooperate with federal investigators. Eventually Stone was convicted on charges related to lying to Congress. But even before Stone served a day in prison, President Trump commuted Stone's sentence. Then in the waning days of his presidency, President Trump pardoned not only Roger Stone, but also several other individuals with convictions stemming from Special Counsel Mueller's investigation—including close associates Michael Flynn and Paul Manafort.

President Trump appears to have granted pardons to his cronies out of a mixed desire to reward them for their personal loyalty, and to execute one final public attack on the integrity of the Special Counsel's investigation before leaving office. Indeed, perhaps tellingly, one of the few people convicted during the Special Counsel's probe who did not receive a pardon was Rick Gates, who had cooperated significantly with the investigation.

While issuing these self-serving pardons, President Trump granted relatively few pardons or commutations for individuals whose continued confinement offended basic notions of justice. For example, only a handful of his clemency grants went to individuals with convictions for crimes like drug possession, or other offenses linked to failed criminal justice policies like the so-called "War on Drugs", which disproportionately harm communities of color.

Most of his clemency grants also completely bypassed the traditional process for independent review established within the Justice Department, relying instead on people with personal connections. According to a recent *Washington Post* article, lobbyists with connections to the Trump White House created a veritable cottage industry, accepting hundreds of thousands of dollars in fees to get their clients' clemency petitions in front of the president before the clock ran out on his term, many of which were of questionable merit. Meanwhile, nearly 14,000 clemency petitions filed with the Department of Justice went unaddressed during the Trump Administration.

Despite President Trump's apparent affection for the clemency power, he granted very few clemency petitions relative to his predecessors. President Trump granted 237 acts of clemency during his term in office.

According to a Pew Research Center analysis, only two other presidents since 1900—George W. Bush and George H.W. Bush—granted fewer acts of mercy, ranking President Trump near the very bottom compared to his peers.

In short, President Trump issued fewer clemency grants than most of his predecessors, and a significant number of the grants he made went to the wealthy or the well-connected. As if that was not bad enough, he used the pardon power to take a final parting shot at the rule of law, granting pardons to individuals convicted in the course of an investigation that included an examination of the president's own conduct.

Former President Trump's extreme behavior has once again exposed and exacerbated longstanding concerns regarding the exercise of the clemency power: Presidents are making too few clemency grants, while special access to the White House—which has always been a factor—has become an increasingly deciding factor in whether to grant clemency.

Indeed, President Trump was an extreme example of a recent trend among presidential administrations. Presidents of both parties appear to grant clemency at a much lower rate compared to their predecessors. That same Pew Research Center study found that presidents from McKinley to Carter granted clemency for roughly 20 percent of petitioners, while presidents since George H. W. Bush have clemency grant rates in the single digits.

The thousands of clemency petitions filed with DOJ's Office of the Pardon Attorney—left in limbo as part of a deeply flawed system—nonetheless demonstrate the need for a more streamlined presidential clemency process that advocates on behalf of clemency petitioners.

I share Chairman Cohen's hope that we can continue in a bipartisan manner to explore ways in which Congress can encourage presidential administrations to treat clemency as a routine feature of the federal criminal justice system. The purpose of today's hearing, however, is to determine what potential legislative tools are at Congress's disposal to identify abusive pardons issued for corrupt or self-serving purposes, and to make explicit constitutional guardrails to discourage presidents from exercising the clemency power contrary to the Framers' intentions.

I thank Chairman Cohen for holding this hearing and I look forward to the testimony from today's witnesses on this important subject.



Mr. COHEN. The Ranking Member, Mr. Jordan, is present, and, if he chooses to make a statement, he is recognized at this point.

Mr. JORDAN. Mr. Chair, I am fine. Thank you.

Mr. COHEN. All right, Mr. Jordan. Thank you, and welcome.

Now we will go to witness introductions. We welcome our witnesses and thank them for participating in today's hearing. I will now introduce each witness and after that introduction will recognize the witnesses for his or her oral testimony.

Please note that your written statement will be entered into the record in its entirety. Accordingly, I ask you summarize your testimony in 5 minutes. In the absence of the proverbial timing lights, the green, the yellow, and the red, I will note orally when 5 minutes have elapsed and bang my gavel, otherwise known as a Louisville Slugger miniature bat.

There will also be a timer on your screen, so please be mindful.

Before proceeding with testimony, I would like to remind all of our witnesses that you have a legal obligation to provide truthful testimony and answers to the subcommittee. Any false statement you may make today may subject you to prosecution under section 1001 of title 18 of the United States Code.

Our first witness is Caroline Fredrickson. Ms. Fredrickson is a distinguished visitor from practice at Georgetown University Law Center and a senior fellow with the Brennan Center for Justice at New York University School of Law. She teaches courses on the legislative process, constitutional law, and democracy.

She was previously the President of the American Constitution Society for Law and Policy. She has also had an extensive career serving the government as special assistant to the President for legislative affairs during the Clinton Administration, as chief of staff to Senator Maria Cantwell, and as deputy chief of staff and counsel for Senator Tom Daschle. She also served as a law clerk for the Honorable James L. Oakes of the U.S. Court of Appeals for the Second Circuit.

Ms. Fredrickson received her J.D. from Columbia University School of Law, where she was a Harlan Fiske Stone scholar and served as editor of the Columbia Law Review. She received her B.A. summa cum laude from Yale University.

Ms. Fredrickson, you are now recognized for 5 minutes.

#### **STATEMENT OF CAROLINE FREDRICKSON**

Ms. FREDRICKSON. Thank you so much, Mr. Chair. I am really pleased to have the opportunity to appear before you today on this important topic.

As has been said, the pardon power gives the President the power to address injustices and show mercy. However, the breadth of this power has made it susceptible to misuse.

Just before leaving office in 1992, President George H.W. Bush pardoned former Secretary of Defense Caspar Weinberger and five others convicted in the Iran-Contra scandal.

And President Bill Clinton's pardon to Marc Rich, a fugitive felon who had been indicted for fraud and tax evasion and was the ex-husband of a major donor to both the Clinton Foundation and Hillary Clinton's Senate campaign, was rightly criticized.

Former President Trump has gone even further in granting questionable pardons. On his final day, Trump pardoned 74 people and commuted the sentences of 70 others, including Salomon Melgen, who was convicted of defrauding Medicare to the tune of \$75 million.

The pardon power was intended to be a benevolent power, but there are several well-recognized limits on its exercise. It only extends to Federal crimes, it may not be used to obstruct justice, and a self-pardon is constitutionally suspect.

Congress could of course reform the pardon power by constitutional amendment. As Chair's proposal would do, it would limit the President's pardon power to grant such a pardon to himself, his family, his Administration officials or campaign advisers, and would prevent pardons for conduct undertaken for a direct and significant personal benefit of the President, his family, officials, or for crimes committed in cooperation with the President.

The Chair rightly states that the power often operates like a get-out-of-jail-free card more than as a grant of mercy to those who have been clear victims of injustice.

Congress could also reform the pardon power by creating statutory limits. There is a bill introduced by Representative Adam Schiff which would propose two important reforms. In cases of covered offenses, his bill would require that DOJ and the President provide congressional committees with materials relating to the prosecution as well as the pardon, and it would strengthen the bribery statute by clarifying its application to the President and Vice President that it is an official Act to grant a pardon or commutation and that such a grant is a thing of value.

Thus, the amendment would ensure that—or the bill would ensure that any offer of a pardon or a pardon itself would be a criminal Act if part of a corrupt exchange, and it would also declare Presidential self-pardons invalid.

There is strong reason to believe this legislation would withstand constitutional challenges. It is widely accepted that Congress may impose criminal penalties on a Presidential pardon intended to bribe a recipient. Since the legislation does not attempt to circumscribe the actual grant of a pardon, it does not tread near the President's article II powers.

DOJ has issued two opinions that are consistent with this understanding. In October 1995, there was an opinion that stated the "application of the bribery statute raises no separation of powers question, let alone a serious one."

According to OLC, the Constitution confers no power in the President to receive bribes as it specifically forbids any increase in the President's compensation for his service while he is in office, which is what a bribe would function to do, and because the Constitution expressly authorizes Congress to impeach the President for bribery.

With respect to a President's pardon of him or herself, as is well-known, in 1974 there was another OLC opinion that stated that such a pardon is illegitimate.

There is another bill meriting consideration, authored by Representative Krishnamoorthi, which would require the President to publish the issue date, recipient, and full text of each pardon or re-

prieve granted. Even if not limiting to whom or for what reason a pardon could be granted, such legislation would bring public attention to ill-considered grants.

Another area where Congress can help police the pardon power is its oversight function. After President Clinton pardoned Marc Rich, Congress engaged in a thorough and bipartisan investigation. Although no criminal charges were issued, Congress did uncover some highly questionable behavior, including efforts by President Clinton's half-brother and brother-in-law to lobby for pardons in exchange for pay.

As has been noted, the President's power is an awesome power, a power for good. It is often used, however—or it is not often enough used for good, and it is sometimes used in a way that is abusive, and Congress is right to take up the task of restoring the pardon to its status as a benevolent power.

Thank you.

[The statement of Ms. Fredrickson follows:]

## TESTIMONY OF CAROLINE FREDRICKSON

## BEFORE THE COMMITTEE ON THE JUDICIARY

## SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

## HOUSE OF REPRESENTATIVES

February 9, 2021

Thank you very much for the opportunity to appear before you in these hearings on the President's pardon power. My name is Caroline Fredrickson. I am a Visiting Professor from Practice at Georgetown Law and a Senior Fellow at the Brennan Center for Justice. Prior to joining the Law School, I was President of the American Constitution Society where I oversaw our lawyer and law student chapters throughout the country. In all these positions, I have written and spoken on many legal and constitutional issues, including on the pardon power. For example, I co-wrote a May 2018 report entitled "Why President Trump Can't Pardon His Way Out of the Special Counsel and Cohen Investigations."<sup>1</sup> Prior to joining ACS, I served as the Director of the ACLU's Washington Legislative Office. I've also served as the Chief of Staff to Senator Maria Cantwell of Washington, Deputy Chief of Staff to then-Senate Democratic Leader Tom Daschle of South Dakota, and Special Assistant to the President for Legislative Affairs.

Today we are here to discuss whether and how Congress can rein in abuse of the pardon power.

Article II Section 2 of the United States Constitution states that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."<sup>2</sup> Applicable only to convictions under federal criminal law, the pardon power has been used since the country's founding to grant pardons, clemencies, and amnesties to individuals who have been charged or convicted of federal crimes.

The pardon power is intended to grant the President broad power to address injustices and show mercy. However, the breadth of this power has also made it susceptible to misuse. Today the possibility of the pardon power being used for corrupt purposes is not merely an academic exercise. A few examples from history suffice to show that this problem has been with us for some time. Just before leaving office in 1992, President George H.W. Bush granted a pardon to former Secretary of Defense, Caspar Weinberger and five others who had been convicted for their role in the Iran-Contra scandal. And President Bill Clinton was roundly condemned for his last day pardons including that for Marc Rich, a fugitive felon, who had been indicted for fraud and tax evasion. Bad enough that he was a felon, but Rich was also the former husband of Denise Rich, a major donor to Clinton's foundation and to Hillary Clinton's Senate campaign. Such was the bipartisan outcry that Congress initiated investigations as did the United States Attorney in Manhattan.

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<sup>1</sup> See Noah Bookbinder, Norman Eisen, Caroline Frederickson, & Conor Shaw, Am. Const. Soc'y & Citizens for Resp. & Ethics in Wash., WHY PRESIDENT TRUMP CAN'T PARDON HIS WAY OUT OF THE SPECIAL COUNSEL AND COHEN INVESTIGATIONS (2018), <https://www.acslaw.org/wp-content/uploads/2018/07/ACS-CREW-Pardon-paper.pdf>.

<sup>2</sup> U.S. CONST. art. 2, § 2.

But upon departure from office, former President Trump went even farther in granting ethically and morally questionable pardons. While it is customary for an outgoing President to wield the pardon power more liberally at the end of a presidency, nearly all of Trump's pardons and commutations were issued in the final months before he left office. On his final day, Trump pardoned 74 people and commuted the sentences of 70 others. This list included a rogues' gallery of criminals, including Salomon Melgen who was convicted of defrauding Medicare to the tune of approximately \$75 million<sup>3</sup> as well as Steve Bannon, his former consigliere who had been indicted for fraud in connection with a non-profit he set up to raise money for the border wall.<sup>4</sup> In addition, Trump issued a final pardon to Albert J. Pirro, Jr., the ex-husband of Trump cheerleader and Fox News host Jeanine Pirro,<sup>5</sup> as well as clemency to several former Members of Congress convicted for corruption, obstruction of justice, and other crimes.<sup>6</sup> These pardons followed those granted to allies caught up in the Russia investigation such as Michael Flynn and George Papadopoulos, other disgraced former Members of Congress, and Jared Kushner's father.<sup>7</sup> While Trump did not attempt a "self-pardon" as many feared nor pardon direct family members, his final actions did bring a harsh spotlight to the problematic nature of the exercise of the pardon power. Other Presidents have been criticized for certain pardons, but the sheer number of questionable grants by Trump has renewed calls for congressional regulation.

I. The pardon power was intended to be a "benevolent power".

The Constitution vests the President with the power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."<sup>8</sup> As Alexander Hamilton explained in Federalist No. 74, this "benevolent power" is intended to mitigate the harshness of criminal prosecution.<sup>9</sup> Hamilton noted that "the criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."<sup>10</sup> Building on Hamilton's words, Supreme Court Justice Oliver Wendell Holmes described the pardon as "a part of the constitutional scheme" that should be granted when the "public welfare will be better served by inflicting less than what the judgment fixed."<sup>11</sup>

The first grants of pardons provide evidence of the framers' vision of its benevolent purpose – as a way to heal the fabric of society. On November 2, 1795, George Washington used the pardon to end the earliest major instance of civic violence since the Constitution's establishment six years earlier.<sup>12</sup> Dubbed "the Whiskey Rebellion," this uprising of farmers and distillers angry over the federal government's whiskey tax threatened the survival of the nascent country, causing President Washington to send troops, arrest the instigators, and charge them with treason. President Washington's subsequent use of his benevolent

<sup>3</sup> *Here are Some of the People Trump Pardoned*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/article/who-did-trump-pardon.html> [hereinafter *People Trump Pardoned*].

<sup>4</sup> Zolan Kanno-Youngs, Eric Lipton, Stephanie Saul and Scott Shane, *How Bannon and His Indicted Business Partners Cashed In on Trump*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/us/politics/bannon-we-build-the-wall.html>.

<sup>5</sup> Benjamin Din, *Trump Issues Last-Minute Pardon to Albert Pirro, Ex-Husband of Jeanine Pirro*, POLITICO (Jan. 20, 2021, 12:15 PM), <https://www.politico.com/news/2021/01/20/trump-last-minute-pardon-albert-pirro-460764>.

<sup>6</sup> *People Trump Pardoned*, *supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> U.S. CONST. art. 2, § 2.

<sup>9</sup> THE FEDERALIST No. 74 (Alexander Hamilton).

<sup>10</sup> *Id.*

<sup>11</sup> *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

<sup>12</sup> Carrie Hagen, *The First Presidential Pardon Pitted Alexander Hamilton Against George Washington*, SMITHSONIAN.COM (Aug. 29, 2017), <https://www.smithsonianmag.com/history/first-presidential-pardon-pitted-hamilton-against-george-washington-180964659/>.

power—which successfully subdued the rebellion—was seen as a success for the young country. His response afterwards—wherein he forgave two Pennsylvania men who were sentenced to hang for treason—further cemented the understanding of the pardon power’s important role.

Since President Washington’s first pardon in 1795, the federal government has systematized its process for issuing pardons, but the intended goals of ensuring fairness and healing the fabric of society have not changed.<sup>13</sup> After the Civil War, the Department of Justice took charge of the pardon process. The Office of the Pardon Attorney receives and reviews each pardon application to determine if it meets specified criteria and, in the process, solicits feedback from various government stakeholders. The application, along with the Pardon Attorney’s recommendation and intergovernmental feedback, is sent to the White House Counsel’s Office for review before landing on the President’s desk for a final decision.

This process allows for informed feedback from all branches of government and ensures that pardon applications are not prioritized based on political patronage or celebrity.<sup>14</sup> A review of recent pardons and commutations by President Obama proves this point. Over the course of his two terms, President Obama issued 1,715 commutations and 212 pardons.<sup>15</sup> Although some of these pardons were high profile—perhaps most notably the commutation of Chelsea Manning—most of them were given to nonviolent drug convicts serving long sentences.

Not only did President Trump issue fewer pardons than his predecessors since the beginning of the 20<sup>th</sup> century,<sup>16</sup> he degraded the pardon process. Trump used a ‘theatrical pardoning’ style where most pardons were not deserved, the recipient had not reformed or repented, and the pardon did not further justice.<sup>17</sup> Rather than working through the administrative apparatus governing the pardon power, President Trump granted pardons on the basis of celebrity and without intergovernmental consultation, including to individuals like Joe Arpaio, Dinesh D’Souza, and Lewis “Scooter” Libby. Most pardons issued by President Trump went to “to well-connected offenders who had not filed petitions with the [DOJ] pardon office or did not meet its requirements.”<sup>18</sup> Rather, “money and access have proved to be far more valuable under Trump.”<sup>19</sup> Even individuals serving long sentences for nonviolent drug convictions who might have

<sup>13</sup> There are clearly notable exceptions throughout American history where a pardon has been granted in circumstances that were less than honorable. In addition to those of Presidents Clinton and Bush mentioned above, the pardon of former President Nixon immediately comes to mind. However, generally speaking, Presidents have honored the extraordinary power of pardons and limited it to appropriate circumstances.

<sup>14</sup> It is important to emphasize that this process is not without its flaws. Many legal scholars and practitioners have recognized that the Justice Department has its own biases based on its role in federal prosecutions, making it resistant to clemency and not a strong advocate towards the White House. Indeed, this subcommittee held a hearing in March 2020 focused on clemency from a criminal justice reform perspective, and many members voiced this criticism. This could be an area for further examination.

<sup>15</sup> Kenneth T. Walsh, *A History of Presidential Pardons*, U.S. NEWS & WORLD REP. (June 8, 2018, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2018-06-08/the-most-prominent-presidential-pardons-in-history>.

<sup>16</sup> John Gramlich, *Trump Used his Clemency Power Sparingly Despite a Raft of Late Pardons and Commutations*, PEW RESEARCH CENTER (Jan. 22, 2021), <https://www.pewresearch.org/fact-tank/2021/01/22/trump-used-his-clemency-power-sparingly-despite-a-raft-of-late-pardons-and-commutations/>.

<sup>17</sup> See Bernadette Meyler, *Trump’s Theater of Pardoning*, 72 STANFORD L. REV. ONLINE 92, 93-95 (2020).

<sup>18</sup> *Holding Presidents Accountable*, CITIZENS FOR RESP. & ETHICS IN WASH. (Dec. 2, 2020), <https://www.citizensforethics.org/reports-investigations/crew-reports/holding-presidents-accountable/#issue11> (quoting Beth Reinhard and Anne Gearan, *Most Trump Clemency Grants Bypass Justice Dept and Go to Well-Connected Offenders*, WASH. POST (Feb. 3, 2020, 6:15 PM), [https://www.washingtonpost.com/investigations/most-clemency-grants-bypass-doj-and-go-to-well-connected-offenders/2020/02/03/4e8f3eb2-21ce-11ea-9c2b-060477c13959\\_story.html](https://www.washingtonpost.com/investigations/most-clemency-grants-bypass-doj-and-go-to-well-connected-offenders/2020/02/03/4e8f3eb2-21ce-11ea-9c2b-060477c13959_story.html)).

<sup>19</sup> *Id.* (quoting Beth Reinhard and Anne Gearan, *Most Trump Clemency Grants Bypass Justice Dept and Go to Well-Connected Offenders*, WASH. POST (Feb. 3, 2020, 6:15 PM), <https://www.washingtonpost.com/investigations/most->

deserved a pardon, like Alice Marie Johnson, seemed only to receive one if they had a celebrity benefactor like Kim Kardashian West who lobbied the President on their behalf.<sup>20</sup> Surely the founders did not anticipate the “benevolent power” of the pardon to be corrupted in this way by political patronage and celebrity support.

II. The pardon power is not absolute.

Even without congressional reform of the pardon power, there are several limits on the exercise of this “benevolent power” that already are well-recognized: 1) a President’s pardon power only extends to federal crimes; 2) the pardon power may not be used to obstruct justice; and 3) a self-pardon is constitutionally suspect.

A. Double jeopardy laws cannot be relied upon to preclude state criminal prosecution or federal civil actions.

The Fifth Amendment of the U.S. Constitution states that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.”<sup>21</sup> Applicable to the states under the Fourteenth Amendment, the Supreme Court has held that the Double Jeopardy Clause only applies within a sovereign entity.<sup>22</sup> Since the U.S. Constitution creates a federal form of government wherein, as James Madison explained in Federalist No. 46, the states and national government are “different agents and trustees of the people, constituted with different power[s],” the federal government and state governments are separate sovereigns under our government.<sup>23</sup>

Referred to as the “separate sovereigns” doctrine, the Supreme Court has repeatedly confirmed this understanding of the Double Jeopardy Clause.<sup>24</sup> As such, the Fifth Amendment’s protection against double jeopardy nonetheless permits state investigators to pursue state offenses even if the individual being prosecuted has already received a presidential pardon for federal offenses that criminalize the same conduct, and it also permits state and federal officials to coordinate in such prosecutions without implicating the Double Jeopardy Clause.

The absence of protection under the U.S. Constitution against successive prosecutions is not the end of the matter though, because some states have enacted their own prohibitions against double jeopardy. Some states impose double jeopardy protections that mirror the Supreme Court’s parameters on federal constitutional double jeopardy. Other states have established more expansive protections against double jeopardy. For example, New York, Virginia, and Delaware impose various statutory limits on state

[clemency-grants-bypass-doj-and-go-to-well-connected-offenders/2020/02/03/4e8f3eb2-21ce-11ea-9c2b-060477c13959\\_story.html](https://www.nytimes.com/2020/02/03/4e8f3eb2-21ce-11ea-9c2b-060477c13959_story.html)).

<sup>20</sup> Peter Baker, *Alice Marie Johnson Is Granted Clemency by Trump After Push by Kim Kardashian West*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/trump-alice-johnson-sentence-commuted-kim-kardashian-west.html>.

<sup>21</sup> U.S. CONST. amend. V.

<sup>22</sup> *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (“[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment.”).

<sup>23</sup> THE FEDERALIST NO. 46 (James Madison).

<sup>24</sup> *Bartkus v. Illinois*, 359 U.S. 121 (1959); *see also* *United States v. Lanza*, 260 U.S. 377, 382 (1922) (“The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy.”); *Abbate v. United States*, 359 U.S. 187, 194 (1959) (declining to overrule *Lanza* and referencing cases relying on it as establishing “the general principle that a federal prosecution is not barred by a prior state prosecution of the same person for the same acts”). The case, *Gamble v. United States*, 587 U.S. \_\_\_\_ (2019) reaffirmed this longstanding interpretation.

prosecutions of conduct previously prosecuted at the federal level. New York’s criminal procedure statute prohibits prosecutions for “two offenses based on the same act or criminal transaction,”<sup>25</sup> whether federal or state offenses. Finally, some states with double jeopardy statutes have codified exceptions to the rule barring successive federal and state prosecutions. A broad and common exception allows successive prosecution when there is a substantial difference between the offense to which a defendant has already been in jeopardy and the one for which he is being prosecuted.<sup>26</sup>

A final important limitation on the Double Jeopardy Clause is the question of when double jeopardy protections attach. The Constitution’s protection against double jeopardy does not attach when an indictment is filed. Instead, double jeopardy only attaches in one of two circumstances. The first is when an individual is convicted or enters a guilty plea.<sup>27</sup> Double jeopardy also attaches when a case proceeds to trial and a jury has been impaneled and sworn in, or, in the case of a bench trial, a witness is sworn.<sup>28</sup> Charges that are dropped prior to trial or excluded from a plea agreement are not subject to the Constitution’s double jeopardy limitations.<sup>29</sup> It is quite common for federal prosecutors, particular those who have been working in coordination with state authorities, to exclude certain charges from a plea agreement or drop them before trial to preserve the ability of the state to pursue charges when the federal prosecution has concluded. Moreover, if a defendant pleads guilty in a federal case, that admission of guilt – even if he or she later receives a presidential pardon – can be introduced as an admission of guilt, which could expedite a finding of wrongdoing in a collateral proceeding.<sup>30</sup>

The President’s pardon power also does not extend to civil matters—including lawsuits for damages between private parties, civil actions brought by the United States, or collateral consequences such as professional restrictions.<sup>31</sup> As a starting matter, presidential pardons cannot protect property and other

<sup>25</sup> N.Y. CRIM. PROC. LAW § 40.10(2); N.Y. CRIM. PROC. LAW § 40.20. New York’s former Attorney General Eric Schneiderman proposed that the legislature amend the state’s double jeopardy law to ensure that a state prosecution is not barred in cases where a federal prosecution has been annulled by a presidential pardon. Jed Shugerman, *No Pardon for You, Michael Cohen*, SLATE (Apr. 17, 2018, 12:24 PM), <https://slate.com/news-and-politics/2018/04/new-york-should-amend-its-double-jeopardy-law-to-make-sure-trump-cant-bail-out-michael-cohen.html>.

<sup>26</sup> See, e.g., DEL. CODE ANN. tit. 11, § 208; N.J. STAT. ANN. § 2C:1-11; 18 PA. STAT. AND CONS. STAT. ANN. § 111.

<sup>27</sup> N.Y. CRIM. PROC. LAW. § 40.30; *Peterson v. Commonwealth*, 5 Va. App. 389, 395 (1987) (“Where there is no trial at all, but rather a plea of guilty, as in the case at bar, jeopardy attaches when the court accepts the defendant’s plea.”); DEL. CODE ANN. tit. 11, § 207; *Rawlins v. Kelley*, 322 So. 2d 10, 12-13 (Fla. 1975).

<sup>28</sup> N.Y. CRIM. PROC. LAW § 40.30; *Martin v. Commonwealth*, 242 Va. 1, 8, (1991) (“[J]eopardy attaches only after a jury is empaneled and sworn in a jury trial or the first witness is sworn in a bench trial.”); *Tarr v. State*, 486 A.2d 672, 674 (Del. 1984); *State v. Korotki*, 418 A.2d 1008, 1012 (Del. Super. Ct. 1980); *Rawlins v. Kelley*, 322 So. 2d 10, 12-13 (Fla. 1975).

<sup>29</sup> See *State v. Carter*, 452 So. 2d 1137, 1139 (Fla. Dist. Ct. App. 1984) (double jeopardy does not bar refile of charges dismissed pre-trial). *C.f.* *United States v. Lewis*, 844 F.3d 1007, 1010 (8th Cir. 2017) (“The four counts in the 2010 indictment were dismissed before a jury was empaneled. Jeopardy did not attach during any of the pretrial proceedings.”); *Midgett v. McClelland*, 547 F.2d 1194, 1196 (4th Cir. 1977) (“Putting him to trial on the assault charge after he had been put to trial on that charge once, the prosecution dropping the charge only after the testimony was in, was clearly a violation of Midgett’s right not to be put in jeopardy twice.”). See *Ohio v. Johnson*, 467 U.S. 493, 494 (1984) (holding that a defendant who pled guilty to two of four charges in an indictment could still be prosecuted on the remaining two offenses, without violating the Double Jeopardy Clause). See also *United States v. Abboud*, 273 F.3d 763, 766 (8th Cir. 2001) (rejecting a double jeopardy defense where conspiracy charges were brought after having been dropped in a previous prosecution as part of a plea agreement).

<sup>30</sup> FED. R. EVID. 410.

<sup>31</sup> See, e.g., *United States v. McMichael*, 358 F. Supp. 2d 644, 647 (E.D. Mich. 2005) (“Put differently, a pardon does not erase the guilt of the underlying conviction. For example, a pardoned murderer could still be subject to civil prosecution for wrongful death.”).



assets owned by those pardoned from civil asset forfeiture. Individuals who have received a presidential pardon may also be subject to collateral civil consequences, including restrictions on their ability to participate in certain professions. Courts have held that a pardon does not remove all sanctions that might attach to an individual's conduct.<sup>32</sup> For instance, the D.C. Court of Appeals held that a presidential pardon did not preclude a bar association from suspending one of the attorneys implicated in the Iran-Contra Affair, despite the fact that he received a presidential pardon for his convictions.<sup>33</sup> In so ruling, the court relied on a distinction between consequences from the conviction itself and those contingent on the conduct underlying the offense—regardless of whether the case was prosecuted.<sup>34</sup> Because the attorney's dishonesty before Congress violated the D.C. Bar's code of professional responsibility, the suspension was valid even though the attorney had been pardoned.<sup>35</sup>

B. The pardon power cannot be used to obstruct justice or as bribery.

The President's pardon power is nearly absolute and certainly bars successive federal prosecution of the offenses covered by the pardon. When it comes to questions of obstructive pardons, however, this is the start of the inquiry, not the end, because, while a president can issue an obstructive pardon, its issuance might create more legal jeopardy for him or her, not less.

If the President issues an obstructive pardon it could constitute an impeachable abuse of power for which there is clear precedent in the articles of impeachment drafted by the House Judiciary Committee against President Nixon.<sup>36</sup> The first count in the articles of impeachment against President Nixon charged him with "using the powers of his high office, engaged personally and through his close subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such illegal entry [into the Watergate hotel]."<sup>37</sup> The specific allegation in support of this article of impeachment was that Nixon intended to "interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the office of Watergate Special Prosecution Force, and Congressional Committees" and endeavored "to cause prospective defendants, and individuals duly tried and convicted, to expect favored treatment and consideration in return for their

<sup>32</sup> *In re Elliott Abrams*, 689 A.2d 6 (D.C. 1997) (en banc), *cert. denied*, 117 S. Ct. 2515 (1997); *see also*, *Hirschberg v. Commodity Futures Trading Comm'n*, 414 F.3d 679, 684 (7th Cir. 2005) ("[D]enial of floor broker registration based on fraudulent conduct underlying a pardoned criminal conviction does not constitute a violation of the pardon clause.").

<sup>33</sup> *In re Elliott Abrams*, 689 A.2d at 6.

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Id. Accord Hirschberg*, 414 F.3d at 682–83 ("Government licensing agencies may consider conduct underlying a pardoned conviction — without improperly 'punishing' the pardoned individual — so long as that conduct is relevant to an individual's qualifications for the licensed position."); *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975) ("The pardon removes all legal punishment for the offense. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.").

<sup>36</sup> *Articles of Impeachment Adopted by the House of Representatives Committee on the Judiciary*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/articles-impeachment-adopted-the-house-representatives-committee-the-judiciary> (last visited Mar. 18, 2019). This precedent draws on the views of the founders at the time the Constitution was drafted. Records from the Virginia Ratifying Convention show that George Mason was deeply worried that one day a President who lacked George Washington's sound character would use the pardon power to stop unsavory inquiries and perhaps even attempt to obstruct justice. D. W. Buffa, *The Pardon Power and Original Intent*, BROOKINGS (July 25, 2018), <https://www.brookings.edu/blog/fixgov/2018/07/25/the-pardon-power-and-original-intent/>.

<sup>37</sup> AM. PRESIDENCY PROJECT, *supra* note 36.

silence or false testimony, or rewarding individuals for their silence or false testimony.”<sup>38</sup> Indeed, President Nixon repeatedly discussed clemency for one of the officials who was indicted for his role in the conspiracy.<sup>39</sup> This is unquestionable precedent that an obstructive pardon is an impeachable offense.

In addition to impeachment, an obstructive pardon could also expose a president to criminal liability for obstruction of justice, witness tampering, and possibly even bribery for which he or she could be indicted after leaving office (and possibly even before). A specific provision of federal law, 18 U.S.C. § 201(b)(4), explains the criminal interaction between bribery and witness tampering. Section 201(b)(4) prohibits corruptly offering or promising anything of value to a witness with the intent to influence or prevent that witness’s testimony or sharing of evidence. A companion provision prohibits a potential witness from demanding, seeking, receiving, accepting, or agreeing to accept anything of value in return for shaping the testimony or for not testifying at all.<sup>40</sup> Although charges under the witness provisions of the federal bribery statute for a corruptly-motivated pardon would be novel, it nonetheless closely maps on to the statute: the pardon would amount to a thing of value that the president might be “giving” to a witness in exchange for influence over that witness or witness’s silence. Indeed, in the case of the pardon granted by President Clinton to Marc Rich, the Department of Justice opened a criminal inquiry in 2001 and then-Senator and subsequent Attorney General Jeff Sessions said that the investigation was warranted: “From what I’ve seen, based on the law of bribery in the United States, if a person takes a thing of value for himself or for another person that influences their decision in a matter of their official capacity, then that could be a criminal offense.”<sup>41</sup> Courts have been quite clear in analogous contexts that the term “anything of value” should be interpreted broadly and can include intangible considerations, such as a pardon.<sup>42</sup> Nonetheless, new legislation should clarify that a pardon is a thing of value under the bribery laws to put to rest any lingering questions.

### C. A self-pardon is constitutionally suspect.

Our pardon power traces its origins to the royal prerogative of mercy exercised by a British monarch, whereby he or she would sit as a “super-judge,” evaluating someone else’s conduct to see if it deserved clemency. Scholars who have studied the history of the royal pardon have been unable to find any precedent for a sovereign pardoning him- or herself. Nonetheless past presidents, most notably President Nixon, have asked if they could use the pardon power to save themselves. Indeed, in the waning hours of his presidency President Nixon’s Department of Justice issued a memorandum addressing the propriety and constitutionality of a self-pardon.<sup>43</sup>

The Nixon Department of Justice Office of Legal Counsel memo evaluated the pardon power through a rule of law framework. Recognizing the “fundamental rule that no one may be a judge in his own case,” the memo unequivocally concludes that “the President cannot pardon himself.”<sup>44</sup> This conclusion was

<sup>38</sup> *Id.*

<sup>39</sup> Bob Woodward & Carl Bernstein, *Nixon Debated Paying Blackmail, Clemency*, WASH. POST (May 1, 1974), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/050174-2.htm>.

<sup>40</sup> 18 U.S.C. § 201(b)(4) (1994).

<sup>41</sup> David Johnson, *U.S. Is Beginning Criminal Inquiry in Pardon of Rich*, N.Y. TIMES (Feb. 15, 2001),

<https://www.nytimes.com/2001/02/15/us/us-is-beginning-criminal-inquiry-in-pardon-of-rich.html>.

<sup>42</sup> *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986) (“In order to put the underlying policy of the statute into effect, the term ‘thing of value’ must be broadly construed. Accordingly, the focus of the above term is to be placed on the value which the defendant subjectively attached to the items received.”); *United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992) (holding that a “thing of value” covers intangible considerations).

<sup>43</sup> Memorandum from Acting Assistant Att’y Gen. Mary C. Lawton on Presidential or Legislative Pardon of the President (Aug. 5, 1974), <https://www.justice.gov/file/20856/download> [hereinafter Lawton Memorandum].

<sup>44</sup> *Id.*

seemingly accepted by President Nixon and perhaps may have played a role in President Ford's decision to pardon Nixon after he left office. There is no reason to think the Department Justice's 1974 opinion on the pardon power was incorrect. To the contrary, there is every reason to think it was and remains the correct reading of our Constitution. Nonetheless, here too, it would be useful for Congress to settle any remaining question over the correctness of this understanding.

### III. How can the pardon power be reformed constitutionally?

#### A. Congress could reform the pardon power by constitutional amendment.

Obviously, the most significant reform to the pardon power would be through a constitutional amendment. The proposal introduced by Chairman Cohen would, according to the Chairman, "limit the President's pardon power to grant a pardon or clemency to himself, his family, his administration officials, or his campaign advisors. It would also prevent pardons for conduct undertaken for a direct and significant personal benefit of the President, the President's family, or Administration officials, and for crimes committed in cooperation with the President. Finally, it ensures that pardons issued for a corrupt purpose are invalid. Donald Trump has demonstrated that the broad nature of the pardon power makes it ripe for abuse. Passing this joint resolution would remove that threat, now and in the future."<sup>45</sup>

The Chairman rightly states that Americans need to address what the outer limits of the pardon power should be. Currently, it often operates like a get-out-of-jail free card for campaign donors and political allies or even family members, rather than as a grant of mercy to those who have been "clear victims of injustice, like those convicted of marijuana offenses, or whose actions seem excusable after calm reflection, like Jimmy Carter's pardon of Vietnam-era draft resisters or Lincoln's grants of clemency that prevented some young soldiers from execution."<sup>46</sup>

Amending the Constitution is a significant challenge, but in light of the abuses that have taken place, the pardon power might certainly be considered as an appropriate focus for constitutional change.

#### B. Congress could reform the pardon power by creating statutory limits.

Short of amending the Constitution, Congress could limit the use of the pardon power legislatively. One bill, introduced by Representative Adam Schiff, focuses on two important reforms.<sup>47</sup> In cases of "covered offenses," Abuse of the Pardon Prevention Act would require DOJ and the president to provide congressional committees documents and other materials that pertain to the pardoned individual's prosecution as well as to the pardon. The bill defines covered offenses as those arising "from an investigation in which the President, or a relative of the President, is a target, subject, or witness";<sup>48</sup> offenses related to refusals of a witness to testify or produce papers to Congress;<sup>49</sup> and offenses under 18

<sup>45</sup> Press Release, Congressman Cohen Introduces Constitutional Amendment to Reform Presidential Pardon Power (Jan. 3, 2021), <https://cohen.house.gov/media-center/press-releases/congressman-cohen-introduces-constitutional-amendment-reform>.

<sup>46</sup> Rep. Steve Cohen, *Stopping the Abuse of the Pardon Power*, THE HILL (Dec. 23, 2020, 4:00 PM), <https://thehill.com/blogs/congress-blog/politics/531513-stopping-the-abuse-of-the-pardon-power>. See also *This Day in History: President Carter Pardons Draft Dodgers*, HISTORY.COM (last visited Feb. 5, 2021), <https://www.history.com/this-day-in-history/president-carter-pardons-draft-dodgers>.

<sup>47</sup> Abuse of the Pardon Prevention Act of 2019, H.R. 1627 (2019).

<sup>48</sup> *Id.*

<sup>49</sup> See 2 U.S.C. § 192 (1938).

U.S.C. § 1001 (false statements), § 1505 (obstruction), § 1512 (witness tampering) or § 1621 (perjury), if the offense related to a congressional proceeding or investigation.<sup>50</sup>

The second major focus of the Schiff bill is to strengthen the use of the bribery statute to get at the use of bribery connected to the grant of a pardon. Amending the criminal statute on bribery, 18 U.S.C. § 201, the bill would clarify its application to the president and vice president as well as that it is an “official act” under the statute to grant a pardon or commutation and that such a grant is “anything of value.”<sup>51</sup> Thus, the amendment would ensure that any offer of a pardon or a pardon would be a criminal act if part of a corrupt exchange.

Another provision of this legislation, derived from legislation authored by a member of this subcommittee, Representative Jamie Raskin, would “declare presidential self-pardons invalid.”<sup>52</sup> According to its language, “The President’s grant of a pardon to himself or herself is void and of no effect, and shall not deprive the courts of jurisdiction, or operate to confer on the President any legal immunity from investigation or prosecution.”<sup>53</sup>

There is strong reason to believe this legislation would withstand constitutional challenges and impose important reforms on the pardon power. With respect to the bribery provisions, it is widely accepted that Congress may impose criminal penalties on a presidential pardon issued to bribe a recipient. As Bob Bauer and Jack Goldsmith, one a Democrat and the other a Republican who served in high-level legal positions in several administrations, have explained: “A pardon or commutation may be ‘absolute’ for the beneficiary. But it would not in any way afford the president, as the grantor, immunity from commission of a crime in connection with granting a pardon, nor would it cover any such separate crime committed by the grantee. Congress could, for example, make it a crime for the president and the grantee to engage in a bribery scheme in which the grantee makes a personal payment or campaign contribution as part of an explicit quid pro quo arrangement. The president’s subsequent pardon or commutation would remain fully in effect for the offense pardoned, in accordance with the Pardon Clause. But the law would apply to the independent criminal acts committed by the president and the grantee in the course of reaching an illegal agreement about the terms on which a pardon would be granted. Congress can similarly criminalize the use of the pardon to undermine a judicial proceeding, which the president might do by offering it as a means of inducing false testimony.”<sup>54</sup>

Since the legislation does not attempt to circumscribe the actual grant of a pardon, it does not tread anywhere near a limit on the president’s Article II powers. It would, however, ensure that a pardon designed to function as a bribe – even if it allowed the grantee to escape any repercussions for the crime to which the pardon was directed – would in itself form the basis for a separate crime with penalties for both the president and the pardon recipient.

Moreover, the Department of Justice has issued two opinions consistent with this understanding. An October 1995 opinion stated: “Application of [the bribery statute, 18 U.S.C. § 201, to the president] raises

<sup>50</sup> See 18 U.S.C. § 1001 (2006); 18 U.S.C. § 1505 (2004); 18 U.S.C. § 1512 (2008); 18 U.S.C. § 1621 (1994).

<sup>51</sup> See 18 U.S.C. § 201 (1994).

<sup>52</sup> See Kyle Cheney, *House Dems Push Legislation to Criminalize Quid-Pro-Quo Pardons*, POLITICO (July 22, 2020, 11:46 AM), <https://www.politico.com/news/2020/07/22/democrats-legislation-criminalize-quid-pro-quo-pardons-378037>.

<sup>53</sup> *Id.*

<sup>54</sup> Bob Bauer & Jack Goldsmith, *How to Reform the Pardon Power*, LAWFARE (Feb. 26, 2020, 8:00 AM), <https://www.lawfareblog.com/how-reform-pardon-power>.

no separation of powers question, let alone a serious one.”<sup>55</sup> According to the Office of Legal Counsel, the “Constitution confers no power in the President to receive bribes,” as it “specifically forbids any increase in the President’s compensation for his service while he is in office, which is what a bribe would function to do,” and because “the Constitution expressly authorizes Congress to impeach the President for, *inter alia*, bribery.”<sup>56</sup>

As to the provision banning self-pardons, this section would serve an important purpose in regulating an out-of-control power. There is no language or precedent regarding a president’s pardon of him or herself—although there has been much discussion. As mentioned above, however, in 1974, the Office of Legal Counsel issued an opinion that such a pardon was illegitimate.<sup>57</sup> Since that opinion has never been tested, we cannot know exactly how a court might approach the question, although it certainly has the merit of falling on the side of commonsense, the normal usage of the word “to grant,” and the historical understanding that the use of the pardon was a matter of grace by the executive. Nonetheless, legislation is worth pursuing because it expresses an important viewpoint of congressional opinion on this matter that courts would take into account. And, since it may not be tested for a long time, if ever, such a law could help shape how future administrations design their policies with respect to pardons.

Another bill meriting consideration, H.R. 1348 authored by Representative Krishnamoorthi, would require certain information about presidential pardons and reprieves to be made public.<sup>58</sup> Specifically, the President would be required to publish the issue date, recipient, and full text of each pardon or reprieve granted.<sup>59</sup> Even if not limiting to whom or for what reason a pardon could be granted, such legislation would bring public attention and potential condemnation for ill-considered grants. To minimize any burden on the president, the reporting requirement should apply only in cases where the individual seeking a pardon has a close personal, professional, or financial relationship to the president. As a corollary, in courts, a similar relationship typically warrants recusal by a judge.<sup>60</sup>

Congress could also pass a resolution expressly and categorially condemning self-pardons.<sup>61</sup> There is precedent for this type of congressional resolution. At least 22 “sense of” Congress resolutions have been introduced in Congress to disapprove, censure, or condemn a president’s actions, with a 1912 resolution condemning President Taft being the latest that was adopted.

### C. Oversight and prosecutions

Another area where Congress can help police the pardon power is simply through its oversight and investigative powers. After President Clinton pardoned Marc Rich and others, Congress engaged in a thoroughgoing and bipartisan investigation. Although no criminal charges were issued, Congress’s work did uncover some highly questionable behavior, including efforts by President Clinton’s half-

<sup>55</sup> Cited in Bauer & Goldsmith, *supra* note 54. See also 18 U.S.C. § 201 (1994).

<sup>56</sup> Cited in Bauer & Goldsmith, *supra* note 54.

<sup>57</sup> Lawton Memorandum, *supra* note 43.

<sup>58</sup> See Presidential Pardon Transparency Act of 2019, H.R. 1348 (2019).

<sup>59</sup> *Id.*

<sup>60</sup> See Preet Bharara, Christine Todd Whitman, Mike Castle, Christopher Edley, Jr., Chuck Hagel, David Iglesias, Amy Comstock Rick, & Donald B. Verrilli, Jr., Brennan Center for Justice, NATIONAL TASK FORCE ON RULE OF LAW & DEMOCRACY: PROPOSALS FOR REFORM 22 (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_TaskForceReport\\_2018\\_09.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_TaskForceReport_2018_09.pdf).

<sup>61</sup> See *Id.* at 23; *Holding Presidents Accountable*, *supra* note 18.

brother and brother-in-law to lobby for pardons in exchange for pay.<sup>62</sup> Certainly, the exposure of this sordid episode lingered for the Clintons even without criminal prosecutions and may indeed deter others from so acting.

Hearings focused on Trump's most egregious pardons would similarly raise public awareness of his misdeeds, even if not criminal, and provide strength to deterrence in the future. Congress could ensure the public has a better understanding that pardons are not to be used as gifts for corrupt political donors and supporters but are meant to assist those who have suffered a miscarriage or excess of justice. In the same light, Congress should examine reports that during the Mueller investigation Trump contemplated pardoning Michael Cohen and Paul Manafort as a way to obstruct justice and avoid any legal liability.<sup>63</sup> Moreover, while prosecutions generally take place out of the public eye, hearings are an important forum for public education about significant public policy and constitutional issues, not to mention a mechanism to underscore the message that we are a nation of laws, and not of men and women.

Prosecutions are an important complement to the public process led by Congress. Essential to demonstrating that no one is above the law, a prosecution could focus on the potential illegalities of pardons issued by Trump, even without the changes recommended by the above bills. For example, his pardon for Michael Flynn, after two guilty pleas of lying to the FBI, should face further examination, especially in light of reporting of conversations about pardons between Trump's lawyers and those of Flynn and Paul Manafort.<sup>64</sup> The Flynn pardon may implicate obstruction, bribery or other criminal laws. In addition, prosecutors could also examine whether Trump's commutation of the sentence of political ally Roger Stone was provided in exchange for Stone's lying to Congress. The Department of Justice has apparently already begun to dig into potential claims of pardon bribery,<sup>65</sup> which can serve as the basis for further examination as more evidence comes to light.

#### V. Conclusion

The president's pardon power is an awesome power. When used as intended, it is a powerful tool for justice. However, it can also be a tool of greed, oppression, and perversion if used inappropriately and contrary to its purpose. The founders recognized that the pardon power could fall into the hands of someone with questionable character and motives. In fact, in 1788 at the Virginia Ratifying Convention George Mason raised this possibility when he said the president "ought not to have the power of pardoning, because he may frequently pardon crimes which were advised by himself. It may happen, at some future day, that he will establish a monarchy, and destroy the republic. If he has the power of

<sup>62</sup> See Alison Leigh Cowan, *Roger Clinton's Dogged Effort for Drug Trafficker*, N.Y. TIMES (Aug. 26, 2001), <https://www.nytimes.com/2001/08/26/us/roger-clinton-s-dogged-effort-for-drug-trafficker.html>; *Hillary's Brother Was Paid for Pardon Work*, ABC NEWS (Jan. 6, 2006, 6:12 PM), <https://abcnews.go.com/Politics/story?id=121771&page=1>.

<sup>63</sup> See Paul Rosenzweig and Justin Florence, *Opinion: Trump Cannot Use a Pardon to Stop Manafort's Cooperation*, WASH. POST (Sept. 14, 2018, 12:26 PM), [https://www.washingtonpost.com/opinions/trump-cannot-use-a-pardon-to-stop-manafort-s-cooperation/2018/09/14/c8338d96-b770-11e8-a2c5-3187f427e253\\_story.html](https://www.washingtonpost.com/opinions/trump-cannot-use-a-pardon-to-stop-manafort-s-cooperation/2018/09/14/c8338d96-b770-11e8-a2c5-3187f427e253_story.html).

<sup>64</sup> See Michael S. Schmidt, Jo Becker, Mark Mazzetti, Maggie Haberman, & Adam Goldman, *Trump's Lawyer Raised Prospect of Pardons for Flynn and Manafort*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/us/politics/trump-pardon-michael-flynn-paul-manafort-john-dowd.html>.

<sup>65</sup> Katelyn Polantz, *Justice Department Investigating Potential President Bribery Scheme, Court Records Reveal*, CNN (Dec. 2, 2020, 6:01 AM), <https://www.cnn.com/2020/12/01/politics/presidential-pardon-justice-department/index.html>.

granting pardons before indictment, or conviction, may he not stop inquiry and prevent detection? The case of treason ought, at least, to be excepted. This is a weighty objection with me.”<sup>66</sup>

James Madison, immediately understanding the force of Mason’s objections, replied that he too recognized that there was danger to giving the president the pardon power. But, if the pardon power were to be used improperly and fall into unscrupulous hands the Constitution had a remedy – impeachment. Over the course of several decades, unfortunately, we have come to learn that impeachment may not be enough of a check, especially because many pardons come at the end and not early in a presidency, making it impossible to condemn pardons that are immoral or indefensible in a way that can protect rule of law. Congress is right to take up the task of restoring the pardon to its status as a “benevolent power.”

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<sup>66</sup> D.W. Buffa, *The Pardon Power and Original Intent*, BROOKINGS (July 25, 2018), <https://www.brookings.edu/blog/fixgov/2018/07/25/the-pardon-power-and-original-intent/>.

Mr. COHEN. Thank you, Ms. Fredrickson. You have obviously been here before, because you know how to do 5 minutes on the nose.

Our next witness is Karen HOBERT FLYNN. Ms. Hobert Flynn is the President of Common Cause, a position she has held since 2016. Common Cause is a nonpartisan grassroots organization dedicated to upholding the core values of American democracy, working to create open, honest, and accountable government and promote equal rights and opportunity for all and empower people's voices in the political process.

Ms. Hobert Flynn has been with Common Cause for the last 28 years in various capacities. In that time, she has worked to expand Common Cause's efforts with respect to election Administration reform, curbing the outsized influence of big money in politics, and ethics and accountability reforms.

She has written and spoken frequently on democracy issues, including about influence of money in politics, voting rights and ethics, and conflict of interest reform for elected officials.

Ms. Hobert Flynn, you are recognized for 5 minutes.

#### **STATEMENT OF KAREN HOBERT FLYNN**

Ms. HOBERT FLYNN. Thank you, Chair Cohen, for inviting me to testify at this important hearing.

Mr. Chair, Ranking Member Johnson, and Members of the subcommittee, I am pleased to be here as President of Common Cause, a national, nonpartisan organization with more than 1.5 million supporters working for an open and accountable democracy.

The pardon power is a potent tool to advance justice. Unfortunately, it can also be misused to obstruct justice. This warrants congressional action, and I hope my testimony today will help you with your task.

First, I must say that no discussion about executive clemency is complete without first acknowledging the broader problems of our criminal justice system. Systems of mass incarceration continue to ravage communities, often violently wrenching Black and Brown people out of their homes and dumping them in steel cages at alarming rates. Racist public policies continue to have disparate, inequitable impacts on Black and Brown people and communities.

Until Congress passes sweeping criminal justice reform that roots out racism, classism, and xenophobic policies and practices in all levels of the justice system, we must encourage the President to use clemency as a tool to chip away at injustice, as President Obama did during his term and I discuss further in my written testimony.

Elections have consequences, including those who are seeking clemency. Many of President Trump's pardons rewarded his White, wealthy friends, including war criminals, former aides, corrupt insiders, and others who obstructed justice by lying to Congress and law enforcement. This is a challenge we have seen with some other Presidents.

More importantly, we believe that President Trump abused the pardon power to send a message that he and his associates viewed themselves as above the law. In his words and deeds, President



Trump signaled his intent to reward obstruction and subvert accountability to further his own political power.

His efforts were open and notorious. Special Counsel Mueller detailed this in his report, noting that, quote, “Many of the President’s acts directed at witnesses, including discouragement of cooperation with the government and suggestions of possible future pardons, took place in public view,” end quote.

Among those pardoned, Michael Flynn, who twice pleaded guilty to lying to the FBI; his former campaign Chair, Paul Manafort, who encouraged witnesses to lie on his behalf; Roger Stone, convicted of obstructing Congress’ investigation into foreign election interference, lying under oath, and witness tampering.

There are also very serious questions about how the pardon power could be used for illegal bribery or pardon schemes, as public reporting late last year indicated the Department of Justice was investigating.

There are steps Congress must explore to rein in the abuse of the pardon power. First, some reforms would require a constitutional amendment. H.J. Resolution 4 by Chair Cohen puts forward a number of strong proposals to curb self-dealing and evasion of accountability, including invalidating pardons issued for corrupt purposes.

Even without a constitutional amendment, Congress has the power to otherwise check the abuse of the pardon. The Abuse of the Pardon Power Prevention Act in the 116th Congress, which was included in the Protecting Our Democracy Act, provides important oversight, transparency, and antibribery and self-dealing protections. We urge its reintroduction and passage this Congress.

In the meantime, Congress should also investigate whether President Trump’s pardons to his associates and others were otherwise corruptly granted and share what it learns with the American people.

Congress should also explore the idea of independent clemency boards to review clemency petitions and advise the President. This could eliminate biases and conflicts of interest inherent in the current system, which often relies on prosecutors at the Department of Justice to serve as a check on their own prosecutions. Members of such a clemency board should reflect our country’s diversity and be representative of stakeholders inside and outside the criminal justice system.

Mr. Chair, I believe that democracy is resilient, but it takes work to ensure that it lives up to its promise. It will continue to be stress tested. I urge the Committee to take the steps that are necessary to advance justice for all, protect the Rule of law, and end the racial inequities in our legal system. The pardon power is one important part of what must be a comprehensive approach.

Thank you, Mr. Chair, and I look forward to the committee’s questions.

[The statement of Ms. Hobert Flynn follows:]



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**Testimony of  
 Karen Hobert Flynn  
 President, Common Cause and Common Cause Education Fund  
 Hearing on "Constitutional Means to Prevent Abuse of the Clemency Power"  
 The Committee on the Judiciary, U.S. House of Representatives  
 Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
 February 9, 2021**

Thank you, Chairman Cohen, for inviting me to testify, and thank you to Chairman Cohen, Ranking Member Johnson, and members of the Subcommittee for holding this important hearing examining reforms to the pardon power. My name is Karen Hobert Flynn, and I am the President of Common Cause, a national nonpartisan organization with more than 1.5 million supporters and 30 state chapters working for an open and accountable democracy. For more than 50 years, Common Cause has been holding power accountable through lobbying, litigation, and grassroots organizing. Common Cause works to reduce the role of big money in politics, enhance voting rights for all Americans, stop gerrymandering, foster an open, free, and accountable media, and strengthen ethics laws.

Common Cause supports this Committee's efforts to prevent abuse of the clemency power. We appreciate the opportunity to submit this testimony addressing executive clemency, its recent use and abuse by President Donald J. Trump, and reforms to the clemency process that would make its usage more equitable and consistent with notions of justice to which our nation should aspire.

One of the core values of our democracy that we must uphold and protect is the rule of law. In the wake of one of the most corrupt and chaotic administrations in American history, we must survey the scope of the damage and take steps to bolster our institutions to prevent further assault.

As I will discuss in this testimony, President Trump tested the fundamental constitutional principle that no person should be above the law, not even the president of the United States. He also trampled on another important principle our nation aspires toward: equal justice for all.

The clemency power is a potent tool that can advance justice, but it can also be misused to obstruct justice. This warrants Congressional examination and action, and I hope my testimony today will help with your task.

**I. Executive Clemency as a Tool for Racial Justice**

It is important to understand that no conversation about executive clemency would be complete without first acknowledging the broader problems of our criminal justice system.

democracy is **OUR** common cause

Systems of mass incarceration are ravaging our communities, often violently wrenching Black and Brown people out of their homes and dumping them in steel cages at alarming rates. Until Congress passes sweeping criminal justice reform that roots out racism, classism and xenophobic policies and practices in all levels of the justice system, we must encourage the president to use clemency as a tool to chip away at injustice.

The chief executive has a unique ability to address a variety of systemic and individual injustices that are embedded in criminal prosecutions, such as wrongful convictions, overly harsh charging and sentencing determinations, and prison terms that serve merely as punishment for having the wrong color skin, living with mental illness or living in poverty. Executive clemency is an essential tool that can be used to deliver fairness in the criminal legal system at the federal level.

Racist public policies, including those rooted in the misguided and ineffective “war on drugs” and, before that, in Jim Crow laws intended to maintain the subjugation of Black Americans after the institution of slavery was formally ended, continue to have disparate and devastating impacts on Black and Brown individuals and communities.<sup>1</sup>

As detailed in a 2018 report by The Sentencing Project to the United Nations, “African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences.”<sup>2</sup> The Sentencing Project reports that by year-end 2015, more than 6.7 million individuals were under some form of correctional control in the United States.<sup>3</sup> African-American adults are nearly six times as likely to be incarcerated than whites, while Hispanics are more than three times as likely.<sup>4</sup> Such racial disparities exist in nearly every facet of the criminal justice system and at every level of government.

Although the president’s clemency power applies only to the 152,000 individuals presently incarcerated in federal prisons and others convicted of federal crimes, executive clemency can be used as a tool for racial justice, as President Barack Obama acknowledged.

In a 2017 article published by the *Harvard Law Review*, President Obama detailed how he had “pushed for reforms that make the criminal justice system smarter, fairer, and more effective at keeping our communities safe” and further explained:

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<sup>1</sup> See, e.g., Michelle Alexander, *THE NEW JIM CROW*, <https://newjimcrow.com/>.

<sup>2</sup> *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance; Regarding Racial Disparities in the United States Criminal Justice System*, March 2018, available at <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Through considering grants of clemency to individuals in the federal system, the President gains a unique vantage point into the fairness of federal sentences. While not a substitute for the lasting change that can be achieved by passage of legislation, the clemency power represents an important and underutilized tool for advancing reform.<sup>5</sup>

By the time President Obama took office in 2009, the number of clemency petitions granted annually had been in decline for decades, coinciding with the tough-on-crime rhetoric of the “war on drugs” and concurrent dramatic rise in federal criminal prosecutions.<sup>6</sup> President Obama asked his team to “look more systematically at how clemency could be used to address particularly unjust sentences in individual cases” and to “encourage individuals who have demonstrated good behavior in the federal system to seek clemency if they were sentenced under outdated laws that have since been changed and are no longer appropriate to accomplish the legitimate goals of sentencing.”<sup>7</sup> By the time President Obama left office in 2017, he had commuted the sentences of 1,715 individuals—the most grants of commutation issued by any president in this nation’s history—and had granted a total of 212 pardons.<sup>8</sup>

President Obama intended to demonstrate the “way clemency can be used to correct injustices in the system” and “worked to reinvigorate the clemency power and to set a precedent that will make it easier for future Presidents, governors, and other public officials to use it for good.”<sup>9</sup> Clemency will not solve the many injustices of the criminal legal system, but executives can use that power to chip away at systemic injustice.

## II. Donald J. Trump’s Abuse of the Pardon Power

Elections have consequences, including for those seeking clemency. Whereas President Obama used executive clemency to correct injustices, President Trump abused the pardon power to send a clear message that he and his associates viewed themselves as above the law. President Trump, in his words and deeds, showed that he would use the pardon power to reward obstruction and subvert democratic norms of accountability to further his own political power. It is a study in contrasts.

President Trump used the pardon power primarily to protect his own interests—dangling and granting pardons to his most loyal supporters as rewards for lying and otherwise obstructing lawful Congressional and Justice Department investigations into Trump, his campaign, and his

<sup>5</sup> Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, HARVARD LAW REVIEW, Jan. 5, 2017, <https://harvardlawreview.org/2017/01/the-presidents-role-in-advancing-criminal-justice-reform/>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Department of Justice, Clemency Statistics, <https://www.justice.gov/pardon/clemency-statistics>.

<sup>9</sup> Barack Obama, *supra* note 5.

administration. President Trump's abuse of executive clemency to obstruct justice makes clear the urgent need for reform.

Consider his public statements about a self-pardon. On July 22, 2017, barely six months after taking office, Trump tweeted: "While all agree the U.S. President has the complete power to pardon, why think of that when only crime so far is LEAKS against us. FAKE NEWS[.]"<sup>10</sup> President Trump is believed to have meant that his "complete power" to pardon includes the power to pardon himself. Days before Trump's Tweet, the *Washington Post* had broken the story that the president's lawyers were "exploring ways to limit or undercut special counsel Robert S. Mueller III's Russia investigation" and that the president had "asked his advisers about his power to pardon aides, family members and even himself in connection with the probe."<sup>11, 12</sup>

Then in June 2018, as the Mueller investigation proceeded, he tweeted: "As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong? In the meantime, the never ending Witch Hunt, led by 13 very Angry and Conflicted Democrats (& others) continues into the mid-terms!"<sup>13</sup> This was an obvious ploy to pressure Special Counsel Mueller, hide the truth, obstruct justice, and evade accountability.

Even in his waning days in office, President Trump was considering a self-pardon.<sup>14</sup> It is notable that he was exploring this option in the immediate aftermath of inciting an insurrection to overturn the election—a high crime for which this House impeached him. His trial starts this very day.

A self-pardon would violate a bedrock constitutional value, as articulated in a 1974 Department of Justice (DOJ) opinion. Specifically, "under the fundamental rule that no one may be a judge in his own

<sup>10</sup> See <https://twitter.com/realDonaldTrump/status/888724194820857857> (account suspended).

<sup>11</sup> Carol D. Leonnig et al., *Trump team seeks to control, block Mueller's Russia investigation*, WASHINGTON POST, July 21, 2017, available at: [https://www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5\\_story.html?hpid=hp\\_rhp-top-table-main\\_trumplegal-925pm%3Ahomepage%2Fstory&utm\\_term=.31157f98fc68](https://www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5_story.html?hpid=hp_rhp-top-table-main_trumplegal-925pm%3Ahomepage%2Fstory&utm_term=.31157f98fc68).

<sup>12</sup> This was not the first time a president had contemplated pardoning himself. In August 1974 President Richard Nixon discussed with his aides the possibility of pardoning himself and then resigning, but later decided against attempting a self-pardon and left his pardoning to President Ford. See Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996-97), available at <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1233&context=facpubs>.

<sup>13</sup> Caroline Kenny, *Trump: I Have the Absolute Right to Pardon Myself*, CNN, June 4, 2018, <https://www.cnn.com/2018/06/04/politics/donald-trump-pardon-tweet/index.html>.

<sup>14</sup> Michael S. Schmidt and Maggie Haberman, *Trump Is Said to Have Discussed Pardoning Himself*, N.Y. TIMES, Jan. 20, 2021, <https://www.nytimes.com/2021/01/07/us/politics/trump-self-pardon.html>.

case, the President cannot pardon himself.”<sup>15</sup> In the United States, no one—not even the president—should be above the law.

Beyond his dangerous opining on self-pardons, he used the pardon power to reward supporters that backed his personal political agenda. This created the appearance and reality of a two-track justice system—one for the president’s associates, and another for everyone else.

President Trump issued his first pardon to former Maricopa County Sheriff Joe Arpaio, a vocal supporter of Trump during his 2016 campaign. Arpaio was convicted of criminal contempt for refusing to comply with a court order to stop racially profiling and detaining people based solely on suspicion of their immigration status, without articulable suspicion that they had committed a crime under state law. Throughout 24 years as sheriff of Maricopa County, Arpaio built a national reputation for the inhumane, harsh conditions of his jail and for his illegal treatment of immigrants, which mirrored Trump’s own policies and practices toward immigrants.<sup>16</sup> Pardoning Arpaio was the antithesis of using executive clemency as a tool for racial justice.

And he pardoned others to obstruct justice. As Special Counsel Robert Mueller’s investigation of Russian interference in the 2016 election ramped up, President Trump began dangling pardons in front of former campaign officials and allies under investigation—an obvious effort by Trump to obstruct justice and a clear abuse of the clemency power. Special Counsel Mueller noted that “many of the President’s acts directed at witnesses, including discouragement of cooperation with the government and suggestions of possible future pardons, took place in public view.”<sup>17</sup>

As recounted in Special Counsel Mueller’s report, President Trump sharply criticized witness cooperation with the Mueller team, referring to cooperation as “flipping” and stating that flipping was “not fair” and “almost ought to be outlawed.”<sup>18</sup> President Trump commented that it was “very brave” that his former campaign Chairman Paul Manafort did not “flip” and in response to a question about a potential pardon for Manafort, Trump said, “It was never discussed, but I wouldn’t take it off the table. Why would I take it off the table?”<sup>19</sup> Meanwhile, President Trump’s lawyer Rudolph Giuliani raised the possibility of a pardon for Manafort in interviews with the press, telling the *New York Daily News*, for example, that “[w]hen the whole thing is over, things might get cleaned up with some presidential

<sup>15</sup> Presidential or Legislative Pardon of the President, 1 Op. O.L.C. Supp. 370, 370 (1974).

<sup>16</sup> Julie Hirschfeld Davis and Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES, Aug. 25, 2017, <https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html>.

<sup>17</sup> Special Counsel Robert S. Mueller, III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, Vol. II, p. 7, <https://www.justice.gov/storage/report.pdf>.

<sup>18</sup> *Id.* at 127.

<sup>19</sup> *Id.* at 128.

pardons.”<sup>20</sup> And Manafort reportedly told another witness who was cooperating with Mueller’s team, former Trump deputy campaign chairman Rick Gates, that Manafort had talked to the president’s personal counsel and that he and Gates should “sit tight” because Trump was “going to take care of us.”<sup>21</sup>

Similarly, days after Trump’s former national security advisor Michael Flynn pleaded guilty to making false statements as part of a cooperation agreement with Mueller’s team, Trump responded to a question from the press about whether he was considering a pardon for Flynn by saying, “I don’t want to talk about pardons for Michael Flynn yet. We’ll see what happens. Let’s see.”<sup>22</sup>

In the end, although Special Counsel Mueller accepted the DOJ Office of Legal Counsel opinion that a sitting president cannot be indicted for obstruction of justice or other crimes,<sup>23</sup> he concluded:

[I]f we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, however, we are unable to reach that judgment. The evidence we obtained about the President’s actions and intent presents difficult issues that prevent us from conclusively determining that no criminal conduct occurred. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.”<sup>24</sup>

President Trump went on to pardon many political allies who had justly been convicted of serious federal crimes. Trump pardoned his former national security advisor Michael Flynn, who had twice pleaded guilty to lying to the F.B.I. during the Trump-Russia investigation, about conversations with a Russian diplomat.<sup>25</sup>

Weeks before leaving office, Trump issued pardons to dozens of individuals, “many wealthy and well-connected convicts with ties to his innermost circles, including former campaign chairman Paul

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<sup>20</sup> *Id.* at 124.

<sup>21</sup> *Id.* at 123.

<sup>22</sup> *Id.* at 122.

<sup>23</sup> *Id.* at 1.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> Charlie Savage, *Trump Pardons Michael Flynn, Ending Case His Justice Dept. Sought to Shut Down*, N.Y. TIMES, Nov. 25, 2020 (updated Dec. 8, 2020), <https://www.nytimes.com/2020/11/25/us/politics/michael-flynn-pardon.html>.



Manafort, Republican operative Roger Stone and Charles Kushner, the father-in-law of Ivanka Trump.”<sup>26</sup>

Manafort was convicted of illegally lobbying in Ukraine, encouraging witnesses to lie on his behalf, and committing tax and bank fraud. A federal judge also ruled that Manafort lied to prosecutors on Special Counsel Mueller’s team about his interactions and communications with Russian nationals—matters at the heart of the investigation into Russian interference in the 2016 election.<sup>27</sup>

Roger Stone, longtime friend and former campaign advisor to Trump, was convicted of seven felonies for obstructing Congress’ investigation of Russian interference in the 2016 election, lying under oath to investigators, and attempting to block the testimony of a witness who would have exposed his lies.<sup>28</sup> Prior to pardoning Stone, Trump had commuted his sentence.<sup>29</sup>

Trump also pardoned his former campaign adviser George Papadopoulos, who pleaded guilty to lying to F.B.I. agents during the Russian election interference investigation about his contacts with people who claimed to have ties to top Russian officials.<sup>30</sup> Alex van der Zwaan likewise pleaded guilty to lying to Special Counsel Mueller’s investigators about contacts with Trump’s 2016 campaign and a Russian military intelligence official—and received a pardon.<sup>31</sup>

Andrew Weissmann, a lead prosecutor on Special Counsel Mueller’s team, described Trump’s pardons of Flynn, Stone, Manafort, Papadopoulos and van der Zwaan as an abuse of the “power that was conferred on him by the framers of the Constitution.”<sup>32</sup> Weissmann was asked whether he believed

<sup>26</sup> Amita Kelly, Ryan Lucas, Vanessa Romo, *Trump Pardons Roger Stone, Paul Manafort And Charles Kushner*, NPR, Dec. 23, 2020, <https://www.npr.org/2020/12/23/949820820/trump-pardons-roger-stone-paul-manafort-and-charles-kushner>.

<sup>27</sup> Spencer S. Hsu, *Federal judge finds Paul Manafort lied to Mueller probe about contacts with Russian aide*, WASHINGTON POST, Feb. 13, 2019, [https://www.washingtonpost.com/local/legal-issues/us-judge-finds-paul-manafort-lied-to-mueller-probe-about-contacts-with-russian-aide/2019/02/13/c5209f7a-2f2c-11e9-86ab-5d02109aeb01\\_story.html](https://www.washingtonpost.com/local/legal-issues/us-judge-finds-paul-manafort-lied-to-mueller-probe-about-contacts-with-russian-aide/2019/02/13/c5209f7a-2f2c-11e9-86ab-5d02109aeb01_story.html).

<sup>28</sup> Sharon LaFraniere and Zach Montague, *Roger Stone Is Convicted of Impeding Investigators in a Bid to Protect Trump*, N.Y. TIMES, Nov. 15, 2019, <https://www.nytimes.com/2019/11/15/us/politics/roger-stone-trial-guilty.html>.

<sup>29</sup> Peter Baker, Maggie Haberman and Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES, July 10, 2020, <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html>.

<sup>30</sup> Steve Holland, *Trump grants full pardon to Russia probe figure George Papadopoulos*, REUTERS, Dec. 22, 2020, <https://www.reuters.com/article/us-usa-trump-pardons/trump-grants-full-pardon-to-russia-probe-figure-george-papadopoulos-idUSKBN28XQOB>.

<sup>31</sup> *Id.*

<sup>32</sup> *Mueller Investigation’s Lead Prosecutor On Trump’s Pardons*, NPR, Dec. 24, 2020, <https://www.npr.org/2020/12/24/950101975/mueller-investigations-lead-prosecutor-on-trumps-pardons>.



Manafort violated his cooperation agreement by lying to prosecutors in anticipation of receiving a pardon. Weissmann responded:

Absolutely. I mean, we have the dangling of pardons to Stone and Manafort. And one thing about this president is he's not very subtle. I mean, he came out and publicly praised Manafort while he was saying that Michael Cohen was, you know, loathsome because he, quote, "was a rat," again, using the terms of a mob boss. And what you saw with Roger Stone and with Manafort is that he made good on the dangling of the pardon by actually conferring it.<sup>33</sup>

Rewarding those who shielded him from accountability in the Russia probe was not the only priority for President Trump in using the power of clemency. He also pardoned a large handful of politicians and politically connected individuals convicted of campaign finance crimes and other fraud and corruption charges, including:

- Charles Kushner, father of Trump's son-in-law Jared Kushner, convicted of illegal campaign contributions and other crimes.
- Elliot Broidy, a top GOP donor and former top finance official at the Republican National Committee, convicted of violating foreign lobbying laws.
- Stephen K. Bannon, who had been charged but not yet convicted of defrauding Trump supporters who donated to support private construction of a border wall.
- Seven Republican former Congressmen, convicted of a variety of campaign finance, corruption, fraud and other crimes: Chris Collins, Duncan Hunter, Steve Stockman, Rick Renzi, Robin Hayes, Mark Siljander and Randall "Duke" Cunningham.
- Two Democratic former public officials convicted on corruption charges, Kwame Kilpatrick and Rod Blagojevich.<sup>34</sup>

Disturbingly, there is very little transparency into how some of these pardons were contemplated or brought to the president's attention. Given President Trump's penchant for corruption and self-dealing, advocates were alarmed by public reporting in December 2020 that the DOJ was investigating a bribery scheme that involved a pardon and funneling money to the White House or a political committee.<sup>35</sup> This raises very serious questions about how the pardon power could be used for illegal bribery schemes.

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<sup>33</sup> *Id.*

<sup>34</sup> Aaron Blake, *Trump's swampiest pardons, ranked*, WASHINGTON POST, Jan. 20, 2021, <https://www.washingtonpost.com/politics/2021/01/20/trumps-swampiest-pardons-ranked/>.

<sup>35</sup> Katelyn Polantz, *Trump Pardon: DOJ Investigating Potential Presidential Pardon Bribery Scheme, Court Records Reveal*, CNN, Dec. 2, 2020, <https://www.cnn.com/2020/12/01/politics/presidential-pardon-justice-department/index.html>.

Many of his pardons were used to reward white, wealthy friends—including war criminals, corrupt insiders, and those who obstructed justice by lying to law enforcement about investigations into foreign interference in our elections. All of these actions advance a cynical, corrupt separate system of justice by which President Trump acted with impunity. By the time President Trump left office, he had issued a total of 143 pardons and had commuted the sentences of 94 individuals—far fewer than the 212 pardons and 1,715 sentences commuted by President Obama—with little transparency or evidence Trump used executive clemency as a tool for racial justice or mercy.<sup>36</sup>

### III. Reforming the Clemency Process

In the wake of President Trump’s abuse of the pardon power to obstruct investigations into Russia’s interference in U.S. elections and other abuses of the clemency power, Congress must investigate his pardons and commutations for potential violations of obstruction, bribery and other laws and take steps to bolster our democracy’s resilience to ensure that such abuses of executive clemency do not happen again. Today’s hearing is an excellent step in the right direction.

The president’s clemency power derives from Article II, Section 2 of the Constitution, which provides that the president “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” Some desirable reforms of the clemency power would require amendment of the Constitution. House Joint Resolution 4,<sup>37</sup> for example, proposes strong provisions prohibiting the president from granting pardons and reprieves to:

- himself or herself;
- any family member, up to a third degree relation, of the president, or a spouse thereof;
- any current or former member of the president’s administration;
- any person who worked on the president’s presidential campaign as a paid employee;
- any person or entity for an offense that was motivated by a direct and significant personal or pecuniary interest of any of the foregoing persons; or
- any person or entity for an offense that was at the direction of, or in coordination with, the president.

Additionally, H.J. Res. 4 proposes amending the Constitution to provide that any pardon issued for a corrupt purpose is invalid. The constitutional amendment proposed by H.J. Res. 4 would prevent future presidents from abusing the pardon power in the way President Trump did—to obstruct investigations into illegal activities by the president, administration officials, campaign staff and other political allies.

<sup>36</sup> Department of Justice, Office of the Pardon Attorney, *Clemency Statistics*, <https://www.justice.gov/pardon/clemency-statistics>.

<sup>37</sup> H.J. Res. 4, 117th Cong. (2021), <https://www.congress.gov/bills/117th-congress/house-joint-resolution/4/text>.

Yet even without a constitutional amendment, Congress has the power to—and must—check a president’s abuse of the clemency power. Special Counsel Mueller explained:

[E]ven when a power is exclusive, “Congress’ powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow” the President’s act. [*Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015)]. For example, although the President’s power to grant pardons is exclusive and not subject to congressional regulation, see *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147–148 (1872), Congress has the authority to prohibit the corrupt use of “anything of value” to influence the testimony of another person in a judicial, congressional, or agency proceeding, 18 U.S.C. § 201(b)(3)—which would include the offer or promise of a pardon to induce a person to testify falsely or not to testify at all. The offer of a pardon would precede the act of pardoning and thus be within Congress’s power to regulate even if the pardon itself is not. Just as the Speech or Debate Clause, U.S. CONST. ART. I, § 6, cl.1, absolutely protects legislative acts, but not a legislator’s “taking or agreeing to take money for a promise to act in a certain way . . . for it is taking the bribe, not performance of the illicit compact, that is a criminal act,” *United States v. Brewster*, 408 U.S. 501, 526 (1972) (emphasis omitted), the promise of a pardon to corruptly influence testimony would not be a constitutionally immunized act. The application of obstruction statutes to such promises therefore would raise no serious separation-of-powers issue.<sup>38</sup>

Just as Congress had the authority to enact the anti-bribery statute at 18 U.S.C. § 201(b)(3), prohibiting the corrupt use of “anything of value” to influence the testimony of another person in a judicial, congressional, or agency proceeding—and for a court to apply this statute to a president’s dangling of pardons to obstruct justice—so too can Congress take further legislative steps to prevent abuse of the clemency power.

The 116<sup>th</sup> Congress considered doing so with the Abuse of the Pardon Power Prevention Act, which was Title I of the Protecting our Democracy Act (H.R. 8363).<sup>39</sup> The bill is a comprehensive package of reforms that would prevent future abuses of power and provide additional transparency and accountability provisions for the Executive Branch. It would ensure greater integrity in future presidents’ use of the pardon power by requiring, within 30 days of the president issuing a pardon, that the president and attorney general submit to the House and Senate Judiciary Committees materials obtained or produced by the Executive Office of the President and DOJ relating to the pardon. The Act also echoes Special Counsel Mueller’s report, making clear that the anti-bribery

<sup>38</sup> Special Counsel Robert S. Mueller, III, *supra* n. 17, at 173.

<sup>39</sup> Protecting Our Democracy Act, H.R. 8363, 116th Cong. (2020).

statute, 18 U.S.C. § 201, applies to presidential pardons. Finally, the Act would establish that a president's self-pardon "is void and of no effect." Common Cause urges Congress to hold hearings on, and pass, this bill to stop future presidents from abusing their executive power.

Congress should also explore legislation to create an independent clemency board to review petitions for pardons and commutations and advise the president, removing the process from the DOJ. Doing so will eliminate the biases and conflicts of interest inherent in the current process, which relies on prosecutors to serve as a check on their own prosecutions and the sentences they sought. Because of these conflicts of interests and unneeded layers of DOJ bureaucracy under the current system, clemency petitions have limited chances of making it to the president's desk. Members of such a clemency board should reflect our country's diversity in terms of race, ethnicity, gender, political ideology and all other respects, and be representative of all key stakeholders inside and outside the criminal justice system.<sup>40</sup>

A recent Congressional Research Service report on the organization of executive branch agencies asks: "[W]ho decides how to organize agencies and departments within the executive branch? The ultimate answer to this question is Congress."<sup>41</sup> The report notes that the Constitution's Necessary and Proper Clause empowers Congress to enact legislation to aid the "President in carrying out his own constitutional duties (e.g., the establishment of the Office of the Pardon Attorney in the Department of Justice to assist the President in carrying out the pardon power)."<sup>42</sup> The DOJ website cites numerous statutes delegating pardon administration to various officials within the DOJ.<sup>43</sup>

In the absence of Congressional action, President Biden can likewise move the administration of the clemency process from the DOJ to the White House, relocating the pardon attorney in the White

<sup>40</sup> For a more thorough examination of this reform proposal, see Mark Osler, *Memo to the President: Two Steps to Fix the Clemency Crisis*, UNIV. OF ST. THOMAS LAW JOURNAL, March 2020, <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1469&context=ustlj>.

<sup>41</sup> Jared P. Cole, *Organizing Executive Branch Agencies: Who Makes the Call?*, Congressional Research Service, June 27, 2018, <https://fas.org/sgp/crs/misc/LSB10158.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> A DOJ website FAQ regarding pardons reads:

Pardon responsibilities were delegated to the Office of the Clerk of Pardons, established in the Office of the Attorney General by an act of March 3, 1865 (13 Stat. 516). The Office of the Clerk of Pardons became a component of the newly created Department of Justice, pursuant to its enabling act, June 22, 1870 (16 Stat. 162). It was superseded by the Office of the Attorney in Charge of Pardons, established in the Department of Justice by an act of March 3, 1891 (26 Stat. 946), and re-designated the Office of the Pardon Attorney in 1894. SEE 204.1.

See Department of Justice, Office of the Pardon Attorney, Frequently Asked Questions, <https://www.justice.gov/pardon/frequently-asked-questions>.

House counsel's office or assigning the pardon attorney to serve as staff to a clemency board created by executive order or under the Federal Advisory Committee Act.<sup>44</sup>

Finally, regarding the use of executive clemency as a tool for racial justice, I noted earlier in my testimony that such use is only part of a remedy for the many inequities of our criminal justice system. As Margaret Colgate Love, pardon attorney during the George H.W. Bush and Bill Clinton administrations, explained in a recent *Lawfare* article, we should be asking the basic question of “what (if any) role pardon should play in the ordinary operation of the federal justice system.”<sup>45</sup> She explains further that the “core problem that has led to pardon’s abuse is that the legal system asks too much of it” and it is “folly to expect to harness unruly pardon—whose operation is by definition arbitrary—to compensate for failures in the legal system[.]”<sup>46</sup>

Ms. Colgate Love recommends that Congress build on the 2018 First Step Act (H.R. 5682), which gave federal courts authority to consider petitions filed by federal prisoners to reduce their sentences in cases involving “extraordinary and compelling reasons,” by also giving courts “authority to issue certificates of restoration of rights that would have the same legal effect as a presidential pardon.”<sup>47</sup>

During the 116<sup>th</sup> Congress, Rep. Hakeem Jeffries (D-NY) introduced the Kenneth P. Thompson Begin Again Act (H.R. 8560),<sup>48</sup> which would amend a Reagan-era statute to eliminate an age cap and make more people eligible for expungement of a conviction for a first-time simple drug possession offense. Legislation of this sort could dramatically reduce the number of people with conviction records in the first place.

These and other legislative reforms to provide second chances to individuals with criminal convictions would both alleviate some of the racial inequities in the legal system and reduce the need for those with criminal convictions to rely on a lottery-like presidential clemency process for justice.

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Common Cause appreciates the opportunity to submit this testimony addressing the presidential clemency power, its recent abuse by President Trump to obstruct justice, and reforms that would make the clemency process more equitable and consistent with notions of justice our nation should aspire toward.

<sup>44</sup> Federal Advisory Committee Act, Pub. L. 92-463, § 2, 86 Stat. 770 (1972).

<sup>45</sup> Margaret Colgate Love, *Are Trump’s Pardons a Blessing in Disguise?*, *LAWFARE*, Dec. 29, 2020, <https://www.lawfareblog.com/are-trumps-pardons-blessing-disguise>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Kenneth P. Thompson Begin Again Act, H.R. 8560, 116th Cong. (2020).

A bedrock principle of our U.S. Constitution is that no person should be above the law, not even the president of the United States. Another bedrock principle, which our nation has to date failed to deliver, is equal justice for all. Congress must do everything in its power to hold President Trump accountable for his actions, reform the clemency process to prevent similar future abuses of power, and transform the criminal justice system to end systemic racism.

Thank you for your attention and time this morning, and I look forward to your questions.

Mr. COHEN. Thank you very much, Ms. HOBERT FLYNN. I appreciate your testimony and your service with Common Cause.

Our next witness is Mr. Josh Blackman. He is a professor at law at the South Texas College of Law in Houston, Texas, where he specializes in constitutional law, law and technology, and the study of the United States Supreme Court. He is the author of 59 published articles, three books, and numerous amicus briefs, and is the editor of a case book on constitutional law.

He received his J.D. magna cum laude from George Mason University School of Law, where he served as articles editor of the George Mason Law Review. He received his B.S. magna cum laude from Penn State University—The Pennsylvania State University. He was a law clerk for the Honorable Danny J. Boggs of the U.S. Court of Appeals for the Sixth Circuit and for the Honorable Kim Gibson of the U.S. District Court for the Western District of Pennsylvania.

Professor Blackman, you are recognized for 5 minutes.

#### STATEMENT OF JOSH BLACKMAN

Mr. BLACKMAN. Thank you.

Chair Cohen, Ranking Member Johnson, thank you for inviting me to testify. My name is Josh Blackman, and I am a constitutional law professor at the South Texas College of Law Houston.

People often think that the courts have a monopoly on interpreting the Constitution. They don't. As we speak, the House managers are trying President Trump for violating the Constitution, and here we will discuss the constitutional means to prevent abuse of the clemency power.

In my brief opening remarks, I would like to make three primary points. First, I will discuss an important purpose of the pardon power. Second, I will consider proposed statutory regulations of the pardon power. Third, I will talk about H.R. 4, a proposed constitutional amendment that would limit Presidential clemency.

Today, people often view the pardon power as a form of error correction. For example, the courts made an error by imposing an unjust sentence or prosecutors pursued an unjust charge. As originally understood, clemency could serve a greater purpose.

In Federalist No. 74, Alexander Hamilton identified the, quote, "principal argument" for the pardon power," quote, "restoring the tranquility of the commonwealth."

Pardons do not merely help individuals. Presidents can issue pardons to advance broader public policies. Some of the most famous pardons in American history served this purpose. President Washington pardoned participants in the Whiskey Rebellion. President Jefferson pardoned those convicted under the Sedition Act. After the Civil War, President Johnson pardoned former Confederates.

Each of these decisions was unpopular in some quarters. In each case, the President used his pardon power to pursue the common good as he saw it.

This issue brings me to my second point. Last summer, this Committee marked up the Abuse of Pardon Prevention Act. I criticized this bill in a post I coauthored for Lawfare with my colleague Seth Barrett Tillman, who is a lecturer at the Maynooth University De-

partment of Law in Ireland, and I will submit that post for the record.

In short, this proposed bill would alter the Presidency such that he would now second-guess his official actions for fear of prosecution. Congress should not empower Federal prosecutors through the power of the criminal process to dictate what is the public interest.

Third, this Committee is considering H.R. 4, a proposed constitutional amendment that would limit whom the President can pardon. I oppose this amendment. It attempts to constitutionalize a single conception of the public interest, what is and is not a proper pardon.

The public interest is always contestable, because no one has the institutional knowledge to declare a monopoly on what is in the common good.

The President should be able to make important decisions with vigor, independence, and dispatch. The President shall have the greatest latitude to issue pardons, precisely because the President should have the greatest latitude to pursue what he sees as the common good.

Limiting the President's power to issue pardons will limit the President's power to promote what Hamilton referred to as "the tranquility of the commonwealth." This amendment should not be adopted.

Thank you for your time, and I will be happy to answer any of your questions.

[The statement of Mr. Blackman follows:]



**U.S. House of Representatives  
Committee on the Judiciary  
Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
February 9, 2021**

**“Constitutional Means to Prevent Abuse of the Clemency Power”**

**Statement of Professor Josh Blackman  
South Texas College of Law Houston**

**Written Statement of Professor Josh Blackman**

Chairman Cohen, Ranking Member Johnson, thank you for inviting me to testify. I am a constitutional law professor at the South Texas College of Law Houston.

People often think that the courts have a monopoly on interpreting the Constitution. They don't. As we speak, the House Managers are trying President Trump for violating the Constitution. And here, we will discuss the "constitutional means to prevent abuse of the clemency power."

In my brief opening remarks, I'd like to make three primary points. First, I will discuss an important purpose of the pardon power. Second, I will consider proposed statutory regulations of the pardon power. And third, I will talk about H.R. 4, a proposed constitutional amendment that would limit presidential clemency.

Today, people often think of the pardon power as a form of error correction. For example, the courts made an error by imposing an unjust sentence. Or prosecutors pursued an unjust charge. But as originally understood, clemency could serve a greater purpose. In Federalist No. 74, Alexander Hamilton identified the "principal argument" for the pardon power: "restor[ing] the tranquillity of the commonwealth." Pardons do not merely help individuals. Presidents can issue pardons to advance broader public policies. Some of the most famous pardons in American history served this purpose. President Washington pardoned participants in the Whiskey Rebellion. President Jefferson pardoned those convicted under the Sedition Act. After the Civil War, President Andrew Johnson pardoned former Confederates. And President Ford pardoned people who evaded the draft. Each of these decisions was unpopular in some quarters. But, in each case, the President used his pardon power to pursue the common good, as he saw it.

This history brings me to my **second** point. Last summer, this Committee marked up the *Abuse of Pardon Prevention Act*. I criticized this bill in a post I co-authored for *Lawfare* with my colleague, Seth Barrett Tillman, Lecturer at the Maynooth University Department of Law in Ireland.<sup>1</sup> I will submit that post for the record. In short, this proposed bill would alter the presidency such that he would now second-guess his official actions for fear of prosecution. Congress should not empower Federal prosecutors, through the power of the criminal process, to dictate what the public interest is.

**Third**, this committee is considering H.R. 4, a proposed constitutional amendment that would limit whom the President can pardon. I oppose this amendment. It attempts to constitutionalize a single conception of the public interest: what is, and is not a proper pardon. The public interest is always contestable because no one has the institutional knowledge to declare a monopoly on what is in the common good. The President should be able to make important decisions with vigor, independence, and dispatch. The President should have the greatest latitude to issue pardons, precisely because the President should have the greatest latitude to pursue what he sees as the common good. Limiting the President's power to issue pardons will limit the President's power to promote what Hamilton referred to as "the tranquility of the commonwealth." This amendment should not be adopted.

Thank you for your time, and I would be happy to answer any of your questions.

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<sup>1</sup> Josh Blackman & Seth Barrett Tillman, The Abuse of the Pardon Prevention Act Would Criminalize Politics, *Lawfare* (Aug. 20, 2020), <https://perma.cc/GE4N-A3GD>.

Mr. COHEN. Thank you, Professor. I appreciate your testimony.

We now would like to recognize our next witness—and I am going to have to ask you to help with the pronunciation of your name. Is it Naftali? Professor Naftali, is that correct? I am going to presume it is correct.

So, our next witness is Timothy Naftali, and I have seen him on television a thousand times—well, dozens of times—and I never get his name quite right. He is a clinical associate professor of public service, clinical associate professor of history, and director of the undergraduate public policy major at New York University.

He focuses on national security and intelligence policy, international history, and Presidential history. He served as a consultant to the 9/11 Commission and recently coauthored a book called “Impeachment: An American History.” He is also the author of a December 2020 article in *The Atlantic* magazine titled “Trump’s Pardons Made the Unimaginable Real.”

Prior to NYU, he served as the founding director of the Richard Nixon Presidential Library and Museum in Yorba Linda, California, and I kind of guess that he is considered the top expert on President Nixon.

Professor Naftali received his Ph.D. and M.A. in history from Harvard, an M.A. with distinction from Johns Hopkins School of Advanced International Studies, and an B.A. magna cum laude with a distinction in history from Yale University.

Professor Naftali, you are recognized for 5 minutes.

#### STATEMENT OF TIMOTHY NAFTALI

Mr. NAFTALI. I wish to thank the chair, Mr. Cohen, the Ranking Member, Mr. Johnson, and Members of the House Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Civil Liberties for the privilege of testifying to you today.

Concerns about the breadth of the President’s clemency power and the desire to in some way reform it are not new to this moment in our history. It is not solely a product of these deeply partisan times. It is not an unprecedented knee-jerk reaction to the conduct of our 45th President.

According to Fordham University Law School’s Democracy and the Constitution Clinic, on 41 separate occasions since 1974 Members of Congress from both parties have introduced legislative proposals designed in one way or the other to modify the President’s use of executive clemency. Over half of these initiatives were introduced before the year 2001.

Indeed, 20 years ago, almost to the day, this Subcommittee held a similar hearing on the Presidential pardon. The catalyst then was concern and disappointment on both sides of the aisle in how and to whom President Clinton had issued 140 pardons and 36 commutations on his final day in the White House—most notoriously, one to Marc Rich, a fugitive facing criminal prosecution for tax evasion, whose former wife was a donor to the Clinton Library.

All the panelists two decades ago cautioned this Subcommittee not to amend the Constitution, reflecting confidence that the Clinton pardons would be an aberration because of the criticism they had inspired. Quote, “I very much doubt that future Presidents will

need to be restrained in their use of pardon power,” one panelist argued, “given the in terrorem example of the final Clinton grants.”

I quote our distinguished predecessors with humility. Who knows how well today’s testimony will age in 20 years, let alone the rest of us? I think I can say as a historian that history can only act as a deterrent to bad behavior if we all know it.

The last few months, let alone the last 20 years, suggest, at least to this scholar, that we were far too optimistic about Presidential pardon behavior 20 years ago. The Clinton pardons should have led to concrete Federal corrective action.

Today, I will leave most of the discussion of legal precedents to my fellow panelists who are lawyers. Perhaps my value to you is in using this statement to share some history indicating the perils of an unreformed Presidential clemency power and how a few Presidents, one of whom later became Chief Justice of the Supreme Court, looked at the matter.

The only President to have joined the Supreme Court after leaving office, of course, was William Howard Taft, and therefore he is a unique witness, if you will, on looking at the pardon from both the perspective of 1600 Pennsylvania Avenue and that of the Supreme Court.

In a book that he wrote as a law professor before he came back to Federal service when he was appointed to the Court, he wrote, “The duty involved in the pardoning power is a most difficult one to perform because it is completely within the discretion of the executive and is lacking so in rules or limitations of its exercise. The only Rule he can follow is he shall not exercise it against the public interest.”

When he became Chief Justice, he had to look at a case that involved contempt of court. The question that was raised was, can the pardon be used in a way to protect those whose actions threatened our very system of justice?

He concluded, yes, the pardon power is unfettered. But, he added, there is always the possibility of impeachment as a corrective action, as a deterrent.

My belief in the need for corrective action is founded on what I learned about our Nation’s 37th President, Richard Nixon, from publicly available materials at the Nixon Library when I was director.

In my prepared statement and in our questions perhaps, I will detail or discuss the cynicism and the lawlessness that attached to President Nixon’s approach to the pardon power. Although he did not issue the pardons that he dangled, his dangling of pardons not only became part of article I that was passed by your Committee in a bipartisan manner in 1974, but no doubt led to perjury.

Therefore, even regardless of our 46th President, the Nixon precedent alone is an argument for not allowing this power to be unrestrained, particularly in a partisan age where the tool of impeachment, I would argue, is no longer as much of a deterrent on bad pardons as our Founders, who lived in a prepartisan age, assumed it would be.

Thank you for your time. I welcome your questions.

[The statement of Mr. Naftali follows:]

Prepared Statement of Timothy Naftali  
Clinical Associate Professor of History &  
Clinical Associate Professor of Public Service  
New York University  
February 8, 2021

I wish to thank the Chair and Ranking Member and the Members of the House Judiciary Committee Subcommittee on the Constitution, Civil Rights and Civil Liberties for the privilege of testifying to you today.

I am Tim Naftali, a clinical associate professor with a joint appointment at NYU. I am also currently serving as the director of NYU's undergraduate public policy major. Trained as a professional historian, my research, teaching and publications have reflected a broad set of interests. At the University of Virginia's Miller Center of Public Affairs, where I served as the inaugural director of the Presidential Recordings Program, I began to focus more on the past and practice of the presidency. This led to my appointment as the first federal director of the Richard Nixon Presidential Library and Museum when the National Archives and Records Administration assumed responsibility for what had been the private Richard Nixon Library and Birthplace in July 2007.

Concerns about the breadth of the President's clemency power and the desire to, in some way, reform it are not new to this moment in our history. It is not solely a product of these deeply partisan times. It is not an unprecedented kneejerk reaction to the conduct of our 45<sup>th</sup> President. According to Fordham University Law School's Democracy and the Constitution Clinic, on 41 separate occasions since 1974 members of Congress have introduced legislative proposals designed in one way or the other to modify the president's use of executive clemency. And over half of these initiatives were introduced before the year 2001. See Milana Bretgoltz, Albert Ford, & Alicia Serrani, "An Absolute Power, or a Power Absolutely in need of Reform? Proposals to Reform the Presidential Pardon Power," Appendix B: Proposed Presidential Power Pardon Legislation, Fordham University, January 2021, [https://www.fordham.edu/download/downloads/id/15277/an\\_absolute\\_power\\_or\\_a\\_power\\_absolutely\\_in\\_need\\_of\\_reform.pdf](https://www.fordham.edu/download/downloads/id/15277/an_absolute_power_or_a_power_absolutely_in_need_of_reform.pdf)

Indeed twenty years ago, almost to the day, this subcommittee held a similar hearing on the presidential pardon. The catalyst then was concern and

disappointment, on both sides of the aisle, in how and to whom President Clinton had issued 140 pardons and 36 commutations on his final day in the White House, most notoriously one to Marc Rich, a fugitive facing criminal prosecution for tax evasion whose wife was a donor to the Clinton library. *See Douglas Martin, Marc Rich, "Financier and Famous Fugitive Dies at 78," The New York Times, June 26, 2013*  
<https://www.nytimes.com/2013/06/27/business/marc-rich-pardoned-financier-dies-at-78>.

All of the panelists two decades ago cautioned this subcommittee not to amend the Constitution, reflecting confidence that the Clinton pardons would be an aberration because of the criticism they had inspired. "I very much doubt that future Presidents will need to be restrained in their use of pardon power," one panelist argued, "given the *in terrorem* example of the final Clinton grants." *See Margaret Colgate Love, Pardon Attorney, US Department of Justice, 1990-1997, Presidential Pardon Power: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, One Hundred Seventh Congress, First Session, February 28, 2001, p. 26*

I quote our distinguished predecessors with humility. Who knows how well today's testimony will age in 20 years. But I think I can say, as an historian, that history can only act as a deterrent to bad behavior if we know it. The events of the last four years suggest, at least to this scholar, that we were far too optimistic about future presidential pardon behavior twenty years ago. The Clinton pardons should have led to concrete federal corrective action.

Today I will leave most of the discussion of legal precedents to my fellow panelists who are lawyers. Perhaps my value to you is in using this statement to share some history indicating the perils of an unreformed presidential clemency power and how a few presidents, one of whom later became Chief Justice of the Supreme Court, looked at the matter.

*William Howard Taft's Assumption*

Let's start with William Howard Taft, the only individual thus far in our history who has ever served as Chief Executive and Chief Justice. After leaving the White House in 1909, in a book on presidential power, he reflected on the sweeping power of the pardon. *See William Howard Taft,*

*The President and His Powers*, NY: Columbia University Press, 1916, p. 121.

“The duty involved in the pardoning power is a most difficult one to perform, because it is so completely within the discretion of the Executive and is lacking so in rules or limitations of its exercise. The only rule he can follow is that he shall not exercise it against the public interest.”

Recognizing the possibility of abuse, he offered this caution:

“The question which the President has to decide is whether under peculiar circumstances of hardship he can exercise clemency without destroying the useful effect of punishment in deterring others from committing crimes.”

About a decade later, as Chief Justice of the Supreme Court, Taft answered his own question in a case involving President Calvin Coolidge’s pardon to a saloonkeeper who was found guilty of contempt of court. In *Ex Parte Grossman*, Taft wrote for a unanimous Court:

“If it be said that the President by successive pardons of constantly recurring contempts in particular litigation might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument.”

Taft assumed that fellow members of the President’s club could be trusted: “Our Constitution confers this discretion on the highest officer in the Nation in confidence that he will not abuse it.” And in those rare instances where the President used the pardon against the public interest, Taft explained the remedy was the Congressional power of impeachment: “Exceptional cases like this if to be imagined at all would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.” See *Ex Parte Grossman* 267 U.S. 87 (1925).

The question before us today is “has the history of presidential pardons confirmed Taft’s confidence that the moral character of the individuals we elect to the White House as reinforced by the threat of impeachment is enough to ensure the use of the presidential pardon in the public interest as understood by our Founders?” And, if not, is there anything that this co-equal branch, Congress, can or should do to limit the President’s ability to use a pardon in ways that contravene the public interest?



*The Nixon Precedent*

My strong belief in the need for corrective action is founded in what I learned about our Nation's 37<sup>th</sup> President, Richard Nixon, from publicly available materials at the Nixon Library. As one can now hear online on his White House recordings, President Nixon saw the pardon as a way to strengthen the cover up of his administration's involvement in a series of criminal actions, including but not limited to the second break-in at the Democratic National Committee headquarters, which led to the arrest of seven individuals linked to his re-election committee.

President Nixon believed there were no constitutional limits on his use of the pardon, a view consistent with the legal advice that his lawyers received. A year before the Watergate scandal, in July 1971, during a routine review of the administration's pardon system, the counsel to the president, J. Fred Buzhardt, and the White House Counsel John Dean read about Chief Justice Taft's broad view of the pardon. "The power of the President to pardon is so unfettered," argued a report from an outside consultant, "that the Supreme Court has even said, through the pen of Mr. Chief Justice Taft, in *Ex Parte Grossman* 267 U.S. 87 (1925), that even should the Chief Executive pardon contempt convictions to the extent of destroying the judicial system of the nation, the proper recourse for correction would be through impeachment 'rather than to a narrow and strained construction of the general powers of the President.'" See *Memo, Arthur Fergenson to John Dean, cc. Fred Fielding, July 8, 1971, "The Presidential Power of Pardon," SMOF: J. Fred Buzhardt Files, 1969-1976, Box 37, Folder: Pardon Petitions Correspondence,* Richard Nixon Library.

Within weeks of the June 1972 arrest of the Watergate, Nixon decided to test the proposition that he could use a pardon to protect his presidency even if it undermined the American judicial system. The President came up with the idea of linking clemency for the five Watergate burglars and their two supervisors to a pardon for a group of anti-war activists belonging to Vietnam Veterans Against the War who had just been indicted in Florida for planning to disrupt the 1972 Republican Convention. *Listen to EOB Tape*

348-10, July 19, 1972, time code 11:34, <https://www.nixonlibrary.gov/white-house-tapes/348>.

A month later, with the White House contemplating the need to pay the burglars hush money, Nixon reminded White House Chief of Staff H. R. “Bob” Haldeman of the amnesty idea. He said he wanted the anti-war dissenters “kept under indictment, or—whatever it is—they are charged until after the election, on the other side, you know what I mean. That veterans’ group down there in Florida ... the strategy [is] ... you’ve got to pardon everybody.” *Listen to Oval Office Tape 758-11, August 1, 1972; time codes 16:07-16:58.* <https://www.nixonlibrary.gov/white-house-tapes/758>

During this discussion caught on tape, Haldeman suggested that for maximum effectiveness they might need to indict more anti-war dissenters. Since initially only six anti-war dissenters had been arrested in Florida, and there were seven Watergate figures in jail, Haldeman told the president “what we’re trying to do is get some more ... where they *appear* to be doing something.” Nixon didn’t push back on the tape. *Listen to Oval Office Tape 758-11, Aug. 1, 1972; time codes 16:07-16:58.*

<https://www.nixonlibrary.gov/white-house-tapes/758> The plan was to announce the simultaneous release of the Watergate burglars and the anti-war activists, calling it an “amnesty,” after the November 1972 election.

The determination and ease with which the President and his lieutenants discussed the use of executive clemency to advance a criminal cover-up is chilling. Hearing these conversations leaves no doubt in my mind of the black hole that for this one president, at least, the pardon power could provide in not only our system of justice but in presidential accountability. It is still breathtaking to me that Nixon and Haldeman discussed arresting people just so they could be pardoned as a part of a scheme to ensure the Watergate burglars kept silent.

In the end, Nixon didn’t proceed with his cynical amnesty plan. He didn’t seem to need it. The Watergate cover-up held through the end of 1972. However, when the cover-up began to weaken in early 1973, largely because District Court Judge John Sirica imposed heavy sentences on the Watergate seven, Nixon began to dangle pardons. In January, he used his aide Charles Colson to promise a pardon to E. Howard Hunt, one of the supervisors of the campaign’s illegal espionage team. *Listen to EOB Tape 394-3 Jan. 5, 1973, time code 20:35, https://www.nixonlibrary.gov/white-house-tapes/394* In the late spring, as White House Chief of Staff H. R. “Bob” Haldeman and his

chief domestic advisor John Ehrlichman faced expanding law enforcement and congressional probes, Nixon told them “I don’t give a shit what comes out on you or John or even that poor, damn dumb [former Attorney General] John Mitchell, there is going to be a total pardon.” *Listen to EOB Tape 437-19 May 18, 1973, time code: 3:25*  
<https://www.nixonlibrary.gov/white-house-tapes/437>

The Nixon case is not emphasized in histories of the pardon because Nixon did not act on any of the dangled Watergate pardons—including the self-pardon that was discussed in the White House in the August 1974. [The Nixon pardon that is typically emphasized is Gerald Ford’s pardon of Nixon] As Taft had expected, the threat of impeachment may well be the reason. In 1972 and early 1973, when Nixon was talking about pardons in the White House, impeachment, which hadn’t been attempted by a Congress for over one hundred years, seemed a very distant threat. But after October 1973, when Nixon fired the Watergate Special Prosecutor in the Saturday Night Massacre, the wheels of impeachment began to turn and the threat became serious.

Did the Nixon case confirm Taft’s confidence that our Constitutional system of checks and balances would restrain the misuse of a pardon even by those with corrupt intent? Not really. The dangling of the pardons was a corruption of the power and those presidential actions mattered. Bob Haldeman and John Mitchell were both found guilty of committing perjury and making false statements to the FBI and to a Grand Jury. John Ehrlichman was found guilty of making a false statement to agents of the FBI and on two counts of making false statements to a Grand Jury. *See Watergate Special Prosecution Force Report, Appendix A: Status Report of Cases* In July 1974, a bipartisan majority of this committee agreed that even unexecuted pardons would represent interference in with our system of justice. In its first article of Impeachment, which it approved 27-11 on July 27, 1974, the House Judiciary Committee cited hints and promises of clemency as one of nine ways that Nixon had obstructed justice. *See Timothy Naftali, “Richard Nixon,” in Jeffrey A. Engel, et al, Impeachment: An American History, New York: Modern Library, 2018, p. 149 and “Impeachment Article I,” The New York Times, July 28, 1974.*  
<https://www.nytimes.com/1974/07/28/archives/impeachment-article-i-article-i.html>

*Was Nixon an Outlier?*

Leaving Nixon and Clinton aside, would Taft, arguably, have been disappointed with how many other presidents used the pardon power?

Among modern presidents, there are examples of pardons that do not fit within the broad categories of mercy or an ability to correct an error by the federal judiciary. In 1962 John F. Kennedy pardoned Matthew Connelly, appointments secretary to President Harry Truman who was found guilty of taking a bribe in office to help a St. Louis man implicated in an IRS investigation. See C. Vann Woodward, ed., *Responses of the Presidents to Charges of Misconduct*, NY: Delacourt Press, 1974, pp. 336-337 Connelly had served less than a year in jail and there wasn't any widespread sense that he had been mistreated. But one very powerful person felt that way: former President Truman. As John F. Kennedy explained to Truman it was as much because Truman wanted his loyal lieutenant pardoned as a sense of a miscarriage of justice that led the 35<sup>th</sup> President to pardon a convicted felon. See Letter, JFK to Harry S Truman, December 5, 1962, *President's Office Files, Truman, Harry S, 1962, JFKL*, Note President Kennedy misspelled Connelly's name as Connolly. <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/033/JFKPOF-033-015> There is no evidence that Kennedy had a corrupt purpose; but the pardon certainly had a political benefit to him.

More recently, George H. W. Bush used his clemency power at the eleventh-hour of his presidency to pardon Reagan administration officials involved in the Iran-Contra scandal, which had occurred when he was Vice President. In the words of the Independent Prosecutor Lawrence E. Walsh, "President Bush's pardon of Caspar Weinberger and other Iran-contra defendants undermines the principle that no man is above the law. It demonstrates that powerful people with powerful allies can commit serious crimes in high office -- deliberately abusing the public trust without consequence." See David Johnston, December 25, 1992, "Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover-Up'" *The New York Times*, <https://archive.nytimes.com/www.nytimes.com/books/97/06/29/reviews/iran-pardon.html#1>

And this brings us to our 46<sup>th</sup> President, Donald J. Trump. Some of his pardons evoked elements of the most harmful pardons of his predecessors. Like Nixon he dangled pardons before those indicted for schemes that seemed to implicate his presidential campaign. Unlike Nixon, he actually pardoned them. Like Bill Clinton, he reserved his most questionable pardons until the threat of impeachment seemed to be over. Like George H. W. Bush, he pardoned allies caught up in a criminal investigation that he considered unjust. Unlike George H. W. Bush, the criminal investigation—the Mueller investigation—arguably undermined by these pardons occurred because of a political scandal that occurred during of his presidency.

Donald Trump, the catalyst for the current re-examination of the pardon power, certainly wasn't the first president to issue a pardon that contravened the spirit of Taft's philosophy of the pardon. But, unlike his predecessors but one, he systematized the inversion of the Founder's expectations about the future use of the pardon. In a sense he took Nixon's most cynical applications of executive clemency and turned them into a Constitutional imperative.

*Where do we go from here?*

The Constitution is as a brilliant, flexible, often prescient document, which, by definition, shouldn't be trifled with. But one can hold that conviction deeply and also believe that there are moments when this founding charter needs to be updated to reflect changes in not only who we are but lessons learned over the course of over two centuries of the United States.

Although I have stressed individual presidential conduct in arguing for corrective action, another reason for reforming the presidential pardon power is structural. The pardon power, like the very first electoral system in our Constitution, was the product of a pre-partisan era. As you all know the Founders didn't predict that a presidential candidate and a vice presidential candidate would run as a ticket. But Thomas Jefferson and Aaron Burr did and both got the same number of votes for President in 1800, prompting the need for a XIIth Amendment. The Founders also didn't anticipate our party system. When they gave the impeachment power to Congress, they didn't anticipate there ever being a President's party in Congress that would view

impeachment in partisan terms, thus watering down the Constitutional deterrent against the misuse of any power, especially the pardon.

How powerful a deterrent is impeachment to the misuse of the pardon anymore? As we examine the past four years, we should ask ourselves whether the Nixon or Clinton cases acted in any way as a deterrent to President Trump's preferred use of the pardoning power. And once he had been acquitted in his first trial and last November's election had happened, what kind of a deterrent was left to his using the pardon to undo federal prosecutions of particular political interest to himself?

Although I am not here as a proponent of any particular fix, the history of controversial presidential pardons suggests to me that we must make it more difficult to use or dangle a pardon to cover up a crime by the president or his friends or associates, that we should remove the temptation to reward political allies, especially at the end of a term when public sanctions are at their weakest, and that we must also eliminate the temptation of the self-pardon. Our history contains too many instances of the misuse of the presidential pardon to assume anymore that the human and institutional checks and balances relied on by the Founders in this regard still work.

I wish to thank you for your attention and welcome your questions.

Mr. COHEN. Thank you, Professor. Appreciate your being with us and your life's work.

We will start with questioning now, and I will take the first round of questions. We will have, again, the 5-minute rule, and I will recognize myself for 5 minutes.

First, I would like to ask Ms. Hobert Flynn, according to your testimony, President Trump's clemency grants overall, quote, "created the appearance and reality of a two-track justice system, one for the President's associates and another one for everyone else."

Why is even the appearance of impropriety in the granting of a Presidential clemency so dangerous to our democratic order and the Rule of law generally?

Ms. HOBERT FLYNN. Thank you for the question.

One of the challenges is that we see the actions of our President can have real impact, and it can undermine people's view of government.

One of the things that I think distinguishes President Trump's pardons from those of his predecessors, including pardons that are granted to the wealthy and well-connected—we saw other Presidents do this—was the challenge around many things that happened during his term.

He dangled pardons as a way to signal that he would excuse anyone who refused to cooperate with the Mueller investigation and reward anyone willing to lie to them. He did just that when he pardoned Mike Flynn, Paul Manafort, and Roger Stone.

As recounted in Special Counsel Mueller's report, Trump criticized witness cooperation with the Mueller team, referring to cooperation as flipping, and stating that flipping was not fair and almost ought to be outlawed. That is a quote.

President Trump commented that it was very brave that his former campaign Chair, Paul Manafort, did not flip. In a response to a question about a potential pardon for Manafort, Trump said, "It was never discussed, but I wouldn't take it off the table. Why would I take it off the table?" end quote.

Meanwhile, President Trump's lawyer, Rudolph Giuliani, raised the possibility of a pardon for Manafort in interviews with the press, telling the New York Daily News, for example, "When the whole thing is over, things might get cleaned up with some Presidential pardons," end quote.

These kinds of actions raise the specter that the President is above the law and can use something like a tool, the Presidential pardon, in ways to help himself. That is not what the Founders thought of when they were talking about the pardon.

The power of the pardon is extensive, but it needs to be viewed in the context of other provisions of the Constitution. It requires the President to uphold the law and the Constitution. So, this is not a tool to put his own worries about how he could be judged in the Mueller investigation in terms of Russian interference.

Mr. COHEN. Ms. Hobert Flynn—

Ms. HOBERT FLYNN. His activity is undermining to people's view of their government.

Mr. COHEN. In fact, let me go to Ms. Fredrickson, although you will be just as good a witness for this.

The appearance of a conflict of interest is important. Professor Blackman said certain changes should not be constitutionalized in granting clemency because of a single conception of the public interest.

Well, aren't there certain classes of people, Ms. Fredrickson, that would have an inherent conflict, such as family Members or possible close associates, that it would destroy the public's belief in the integrity of the Presidency and of the clemency process and of justice for all, equal justice for all?

Ms. FREDRICKSON. Well, I think that is absolutely true, Mr. Chair, that there are certain classes of people for whom the grant of a pardon raises immediate questions about conflicts of interest, self-interestedness, and lack of public interest.

As Chief Justice Marshall said in 1833, the pardon power is supposed to be an Act of mercy. That is the historical origins of it. That is what the Framers of the Constitution believed it was designed to do. It was a benevolent power. It wasn't a power to grant one's self and one's family a get-out-of-jail-free card or the ability to solicit funds for campaign donations in exchange for a pardon.

Mr. COHEN. Let me ask you this, Ms. Fredrickson. My 5 minutes are about up. You mentioned in your testimony about somebody that committed like \$25 million worth of fraud, and there was something, I think, a pardon of a man in Florida who had done Medicaid fraud and a man in another State that had done different fraud. There were a bunch of frauds in the tens and tens of millions of dollars.

Could that in any way be seen as just as one of the statements about just the difference of opinion of the political parties and how they view justice?

Ms. FREDRICKSON. Well, that is starting to get into the gray area. I think the Committee and the legislation that we are considering is most appropriately focused on quid pro quo pardons, which are certainly out of bounds.

I think the constitutional amendment would clearly—could clearly get at a more circumscribed view of the public interest. I don't understand how it could be in the public interest to pardon somebody who has ripped off the government and Medicare for \$75 million worth of funds by encouraging ill senior citizens to have more treatments than they needed. It is hard to contemplate how that could possibly be in the public interest.

Mr. COHEN. Thank you, Ms. Fredrickson.

My time is over, and I would like to recognize the Ranking Member, Mr. Johnson, at this point.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair.

I have got a few questions for Professor Blackman. I just wanted to start first and clarify something. Isn't it true that the Supreme Court has long affirmed that the President's pardon power is not subject to any legislative control at all?

Mr. BLACKMAN. Absolutely. Going back almost 160 years, there is a case called *Ex parte Garland*. In that case the Supreme Court held that there is basically no limitations in the pardon power. This really hasn't been challenged by the Supreme Court. They have reaffirmed in other cases since. So, I think your reading of the case law is correct, Representative.



Mr. JOHNSON of Louisiana. So, thank you for clarifying that. I think it is important for the full context of all this.

As you noted, you publicly opposed House Joint Resolution 4. Among other things, it would invalidate any pardon issued for a corrupt purpose. That is the quote, the language taken right out of the resolution.

What is your understanding of that phrase, and why is that so problematic?

Mr. BLACKMAN. I think it is really important we focus on the word corrupt. The Chair mentioned this word corrupt. My good friend, Caroline Fredrickson, mentioned the word corrupt. This is a word on which people disagree.

Federal prosecutors often have a lot of difficulty proving what is a corrupt intent. The classic example, I give a politician a suitcase full of cash in exchange for some sort of public service. Okay. I am okay with it. That is corrupt.

When we are talking about something a little bit more blurry—for example, when someone says there is some sort of unjust prosecution, and he determines that, in order to end this unjust prosecution we need to issue a pardon—under the proposed statute, that could be a thing of value, right? You are giving a thing of value to perhaps end an investigation. That is certainly a public Act and one which the President has.

I would be very hesitant to push the boundaries of what is and is not a bribe in a constitutional amendment or the proposed statute.

Mr. JOHNSON of Louisiana. Thank you for that.

House Joint Resolution 4 is not the first time, of course, that our Democratic colleagues have used legislation about pardons to target President Trump. Last Congress, Representative Adam Schiff introduced H.R. 7694, the Abuse of the Pardon Prevention Act. This Committee reviewed that legislation last summer.

Professor, you authored an article concluding that the bill would have criminalized politics. Can you elaborate on that a little bit, explain what the problem is there?

Mr. BLACKMAN. Sure. I think the statute suffers from a similar problem that the amendment does. It uses this word corrupt and allows Federal prosecutors to decide when the President is acting in the public interest and when he is not. Basically, corrupt is going to be the opposite of whatever the prosecutor thinks is in the public interest, and I think it is dangerous.

The pardon is a political act, it is a public act. I actually agree with Chair that the secret pardons are problematic, and I am going to go with him on that one. To the extent that these pardons are public, the President takes the political flak for it. If there is an abuse of power, impeachment is the remedy. James Madison said so 200 years ago.

I don't think that legislation or even an amendment is the right way to ex-ante, in advance, try to limit this authority.

Mr. JOHNSON of Louisiana. Very good.

This may be my last question. We are running out of time. I was intrigued by what Professor Naftali just testified to and his premise that there are some pardons that are so egregious that it really does require amending the Constitution or some other correc-

tive action, as he said. He noted President Clinton, who is probably the most notorious abuser of the pardon power, at least in the modern era, for all the things he did.

I wonder what your reaction is to your colleague there. Although there are some very egregious examples, does that mean now that we should change the Constitution wholesale?

Mr. BLACKMAN. I think—and I am grateful for my friend, Professor Naftali's remarks—I think the remedy should be after the fact, not before the fact. Today, we are seeing that they can impeach a former President. Apparently, that is the new rule. So, if a President decides to engage in sort of misconduct in the last month or two of his term, there are political remedies.

I think trying to legislate in advance is problematic, because now whenever the President considers, "Do I issue a pardon, do I not?" he is always thinking, "Man, if I issue this pardon, I am going to get in trouble," or, "Some Federal prosecutor, the next Robert Mueller, will try to indict me because I issued this pardon." That is a chilling effect I think is problematic. I think that this body, Congress, needs oversight after the fact rather than chilling beforehand.

Mr. JOHNSON of Louisiana. I have got 30 seconds left. Let me just ask you a mechanical question, because there is a lot of confusion about it. What is the role of the Department of Justice's pardon attorney in all this, the recommendations they make?

Mr. BLACKMAN. The DOJ is purely advisory. The Attorney General and his subordinates make a recommendation, but ultimately it is for the President and the President alone who decides whether to check yes or no in that pardon box.

Mr. JOHNSON of Louisiana. Very good.

With 7 seconds left, I will yield back, Mr. Chair.

Thanks to all the witnesses.

Mr. COHEN. Thank you. Thank you, Mr. Johnson.

Next for questioning is Ms. Ross, a new member from North Carolina.

You are welcomed, and you are recognized.

Ms. ROSS. Thank you so much, Mr. Chair.

Thank you to all the witnesses. This has been a fascinating morning. Thank you for your perspectives and for your scholarship.

I have a couple questions for Ms. Fredrickson, just to narrow down when there could ever be an abuse of the pardon power. The first question is, can the President's exercise of the pardon power, clemency, ever violate our current criminal laws prohibiting obstruction of justice or bribery?

Ms. FREDRICKSON. Thank you very much for that question. I did have to—I was neglectful in not saying to my colleagues from academia and from advocacy what a pleasure it is to be here. Josh and I go way, way back. I have to say I first met Josh when he was a young law clerk. Anyway, so we are good friends, and it is good to be here.

Your question is a very important one, and I appreciate it. As I stated in my written testimony, there is actually already wide consensus that certain kinds of pardons could be considered criminal acts. That is, in the example that Professor Blackman used, I think the bag of cash, or the suitcase of cash, I like bag of cash better,

it has more—a better visual. So, the bag of cash in exchange for a pardon.

Most scholars, most constitutional experts believe that is already a criminal action. Efforts to obstruct a judiciary proceeding would also, to suborn testimony of a witness, for example.

However, one of the things that this, the legislation, would do is to clarify it, clarify the statute, to make it even more clear that the bribery statute applies to the President and Vice President and that a pardon is a thing of value. So that is why, although the law is well understood already to cover that type of behavior, it would be prudent to make it more explicit.

Ms. ROSS. Okay. Well, you have done a great job, because you have already answered my second question in answering my first question. So, thank you for that.

Then my next question really goes to the issue of, so, if the President does violate this criminal law, the bribery statute, or obstruction of justice, either in its current form or if it is amended, the Department of Justice has said that a sitting President cannot be criminally prosecuted.

Do you agree with that? Or do you believe that it would have to wait until after the President completed his or her term?

Ms. FREDRICKSON. Well, I don't tend to agree with it as a legal matter. As a prudential matter, it makes a certain amount of sense to postpone such an activity until after, and it really depends on what the criminal Act was.

However, it certainly is generally expected that, in the case of the abuse of a pardon, it would happen after a Presidency, because most pardons, especially ones that are highly controversial, like the Marc Rich or Steve Bannon pardons, are issued often even on the fading last moments of a Presidency.

So, unless there is some—I think Professor Blackman, who seems to concede that one can impeach a President who has left office for questionable pardons, but one could also certainly criminally prosecute.

Ms. ROSS. Okay. So, I just want to be very clear with this last minute.

You see, after the President has left office, two avenues to pursue a Presidential violation of the law for obstruction of justice or bribery. Of course, the Congress could impeach, that, itself, is in the Constitution, after the grant of the pardon power, but there also could be a criminal prosecution brought by the Department of Justice or a Federal prosecutor. Is that what you are saying?

Ms. FREDRICKSON. Yes. I would actually want to quote then Senator and future Attorney General Jeff Sessions, who, in speaking about the Marc Rich pardon, said it qualified, absolutely. He couldn't find a better example of quid pro quo bribery and it was a criminal act. There are certainly many conservative scholars who share that perspective.

Ms. ROSS. Thank you very much.

Mr. Chair, I yield back.

Mr. COHEN. Thank you. Thank you, Ms. Ross.

If I am incorrect in my order, Mr. Johnson, you can correct me. It is your team. I think Mr. Jordan would be next or Mr. McClint-

tock. Mr. Johnson, who wants to seek recognition next, Mr. Jordan or Mr. McClintock?

Mr. JOHNSON of Louisiana. We will probably go to Mr. Jordan if he is ready.

He may not be. That is okay. Let's go to Mr. McClintock. Thank you.

Mr. COHEN. You are welcome.

Mr. MCCLINTOCK. Oh, great. Thank you, Mr. Chair.

Perhaps the most egregious recent example of politicized prosecutions came with the Mueller proceedings, the prosecution of Michael Flynn. Mueller's prosecutors falsified documents to the FISA Court. They withheld material evidence from the court. They held interviews under false pretenses. They operated in an entirely partisan manner, where Republicans were singled out while the actions of Democrats in initiating the entire Russia collusion hoax went ignored.

Just because the targets of this politicized process were associates of the President doesn't make these actions any less egregious or the injustice any less offensive or the remedy any less necessary.

There were a number of pardons issued by President Trump and his predecessors that I have cringed at, and I am sure I will be outraged at pardons this President will make. I think the importance of the pardon power in rendering justice in matters like the Mueller investigation argue against any limitations on it.

I can't believe the Founders didn't give great consideration to the frailties of human nature in assigning this power to the President.

Professor Blackman, could you discuss in greater detail the reasons the Founders offered in writing this provision of the Constitution as they did and how they might reply to some of the objections you have heard today?

Mr. BLACKMAN. Thank you so much, Representative. The Framers modeled the pardon power after their prerogative of the king, which is basically an almost absolute power. There are two limits: Only pardon for Federal offenses, and you can't pardon impeachment. Beyond that, there is really no discretion.

During the constitutional convention, there were debates about whether the Congress should have a role in the pardon power. For example, whether the Congress must approve of a pardon. Those proposals were voted down.

I think the history tells us that the Framers viewed this power to be residing in a single person, the President. I see over your shoulder George Washington, our first President, he very famously issued pardons for those who were in Whiskey Rebellion. This was basically an uprising, insurrection, perhaps not too dissimilar to what people think happened a few weeks ago at the Capitol. Washington pardoned the people in the Whiskey Rebellion to make peace, to bring tranquility to the Nation. It was controversial in some quarters, but I think he did a lot of very important work. I think it is why one person, the President, should have discretion to decide how to pursue the common good.

Mr. MCCLINTOCK. Well, I am sure they must have foreseen, just human nature being what it is, that there would be a President who would issue pardons for partisan reasons, for personal reasons. I can't believe they didn't take that into consideration when they

wrote this provision. What would they be saying about some of the arguments we have heard from the other side?

Mr. BLACKMAN. Well, there were debates in the Philadelphia Convention as well as the Virginia Ratifying Convention about the abuse of pardon power.

George Mason, who was invoked earlier, was very much worried about the President basically using the pardon to cover up his own crimes. James Madison said the remedy in that case is impeachment. I think that is probably the right answer.

The pardon itself will remain valid, and the President could be convicted, removed from office. Apparently now under the prevailing wisdom, he can be convicted even after he leaves office. So, there is still some teeth in Congress for you to punish him. Again, these are public acts. Right? I don't like the secret pardons. That is not how this is supposed to work. The public act, we know what it is, and the President can be judged politically for his actions.

Mr. MCCLINTOCK. Thank you.

Mr. BLACKMAN. Thank you.

Mr. MCCLINTOCK. I will yield back.

Mr. COHEN. Thank you, Mr. McClintock.

Next is the distinguished gentleman from the great State of Georgia, the Peach State, and the home of the Atlanta Airport, and one of my favorite chicken restaurants, Mr. Hank Johnson. Is Mr. Johnson there?

Mr. JOHNSON of Georgia. Just trying to get unmuted, Mr. Cohen. I want to thank you, Mr. Chair, for holding this very important hearing. I am looking forward to serving on this Subcommittee and to participating in the important work of repairing our Constitution.

Like so many parts of our Constitution, the pardon power has been repeatedly abused over the past 4 years. In the cases of Roger Stone, Paul Manafort, Michael Flynn, Steve Bannon, and so many others, Donald Trump used the pardon power to shield himself and thus obstruct justice, and to help cronies rather than using that unbridled power to correct injustice and excess in the criminal justice system. His abuse of the pardon power was egregious and unprecedented and shocks the conscience.

Ms. Fredrickson, why didn't the Framers include limits on the use of the pardon power in the Constitution? Do you believe that there should be limits on the use of the pardon power?

Ms. FREDRICKSON. Well, thank you very much for that question. I have to say I unfortunately don't know the restaurant that Chair was referring to, but I would like to find it next time I am in your district.

So, I think it is hard to know from the discussions exactly the scope of their thoughts around the pardon power. But, historically it had not been considered for use outside of this idea of being used as a benevolent power or as an Act of grace.

So, although George Mason did raise his concerns and his worries were assuaged by James Madison, as was mentioned, this was sort of novel territory, in many ways because the King himself would have not been subject, for example, to prosecution in the normal court system. So the idea of a self-pardon, for example, and things like that were just not things that had been contemplated.

Then, of course, as Professor Blackman said, that impeachment was seen as a possible approach to that kind of abuse of pardon. Again, I emphasizing why it is a legally correct position to be able to prosecute—or to impeach a President after leaving office because otherwise you can never, in the theory of—that pardons can't be prosecuted, you could never actually get after that kind of an action. I think that there was not really a contemplation of the kind of criminal actions that might take place that a pardon might be used for, which does not mean that the Founders thought that everything possible that a President could do was exempt under his article II of section 2 powers to pardon.

Mr. JOHNSON of Georgia. Well, let me ask you this, during the Trump Administration, we watched time and time again as President Trump shamelessly dangled the promise of a pardon to keep potential witnesses against him silent. To your knowledge, has any other President in the history of this country ever so abused the pardon power?

Ms. FREDRICKSON. Well, as Professor Blackman has noted, there has been this possibility of secret pardons. So, to some extent, we may not know. But certainly this past 4 years has raised significant, significant concerns about the pardon being used as an obstructive device, as a way of obstructing justice, as a way of obstructing actual proceedings in court, which I think there, as I said earlier, it is a very widely-held position. That those kinds of actions are actually crimes in and of themselves. So, therefore, even if the President could pardon somebody, for an initial act, the Act of exchanging a pardon for suborning testimony would be a crime separate from the one that was pardoned by the President and could be subject to prosecution.

Mr. JOHNSON of Georgia. Well, let me ask—thank you, ma'am.

Let me ask Ms. Hobert Flynn, did President Trump's abuse and perversion of the pardon power do damage to our democracy? If so, how?

Ms. HOBERT FLYNN. I think it has done damage to our democracy because it sends a message, which President Trump talked about frequently, that he somehow is above the law. He talked about shooting someone in the street and nobody doing anything about it. Pardoning people who could testify against him shows an abuse of the pardon power, and it is one where Americans want to see guardrails put on again, and commonsense solutions to be tackling some of these issues.

Mr. JOHNSON of Georgia. Thank you.

Mr. Naftali, after President Trump's excesses, how should Congress Act to curtail the abuse of the pardon power?

Mr. NAFTALI. Well, I thought I would repeat that I am not a lawyer. So, I am going to speak as someone who studies power as a historian.

I believe that, as Chief Justice Taft wrote in *ex parte Grossman*, that there is in a sense, there are checks and balances on the pardon. That we should see the pardon within the framework—I am going beyond what Chief Justice said—within the framework of our constitutional checks and balances.

If we find evidence that a President has either ignored the restraints that our Founders hoped would be on him, or someday her,

or we find that those restraints were not sufficient, we have to ask ourselves whether Congress, as part of its role and responsibility in maintaining the system of checks and balances, ought to take corrective action.

I argued in my testimony, not talking about Donald Trump but talking about Richard Nixon, that you have body of remarkable evidence of corrupt intent that is available to everybody in this country. What Richard Nixon understood was that no one could stop him. He came up with a series of corrupt ideas for using the pardon. He was going to have an amnesty, he was going to pervert the concept of amnesty, which had been used previously in our history, Professor Blackman talked about the amnesty for Whiskey Rebellion. Those for the Whiskey Rebellion. There were amnesties after the Civil War. There was an amnesty that President Carter signed regarding the Vietnam War.

President Nixon perverted that idea to find a way to cover releasing the Watergate burglars. So he looked for Democrats, in this case, anti-war dissenters, Members of Vietnam Veterans Against the War who had been indicted—and ultimately, by the way were cleared of this—had been indicted for planning to disrupt the 1972 Republican Convention. He said: Please keep them under indictment, hold them under indictment. This is on tape. He said: I need—we need them under indictment so that, after the election, we can let them go; I will pardon them, and I will pardon the Watergate burglars. That way there will be pardons on both sides. Then his chief of staff, White House Chief of Staff Bob Hartmann, said: You know, we don't have enough of these dissenters in jail. There are only six of them, the implication, and there are seven Watergate burglars. He said: We can find reason to arrest more veterans, Vietnam veterans, who are dissenters or put them in jail so that we have a balance.

Now, that is absolutely the most corrupt way of thinking of the pardon, but they thought this way. Now, the question we need, as Americans, to think about is whether the Nixon team were an aberration? Were they the only corrupt people ever to be in the White House? Were the only people—was President Nixon the only American President who saw this pardon as a get-out-of-jail-free card, as a way for manipulating our judicial system for political personal gain? I don't think.

Regardless of what you think about Donald Trump—and I am making this point here that there is enough evidence for corrective action without even talking about the 46th President.

Now, my view of the 46th President is public. I have written about my concerns about his use of the pardon, about other elements of his Administration, but I am not making an argument for corrective action on the basis of Donald J. Trump. I say there is enough historical data that the system wasn't working before him. Now the outrage of those worried about the Trump era should combine with the continuing outrage of people worried about the Clinton era. You should work together.

My preferred approach would be a constitutional amendment. I am not a lawyer. My sense here is that the Founders, God bless them, right—the Founders made a few mistakes. In fact, that generation admitted it. They didn't think there would be parties. So,

they put together an electoral system that resulted in a tie vote because they never imagined that a President or Vice President would run on the same ticket.

Mr. JOHNSON of Georgia. Well, we are still cleaning up wreckage after two Republican Presidents. I think your testimony is quite elucidating, and I thank you for it.

With that, I will yield back.

Mr. COHEN. Thank you, Mr. Johnson.

Thank you, professor. Thank you for gauging it in terms, which is what this Committee has intended to do is a bipartisan approach to correcting a problem that has been bipartisan misused on occasion.

Mr. Roy, you are recognized next.

Mr. ROY. I thank Chair. I first want to just say thank you for recognizing our colleague, Ron Wright at the outset of this hearing.

Mr. Chair, it means a lot. He was a good friend, a fellow Texan. We are all praying for his family, his wife, Susan. I will look forward to celebrating his life later this week.

Secondly, I would like to just, you know, raise one issue that I think I heard from one of the witnesses, Ms. Flynn, about the extent to which pardons were used to reward White, wealthy friends, including war criminals, corrupt insiders, all of these actions remains a cynical, corrupt separate system of justice under President Trump.

The pardon power has been used at the very beginning for political purposes. We can go back to Jefferson. We can go back to every President has done something. I would say, I guess, that Mr. Naftali was basically trying to say that this is a systemic problem, that it cuts across both lines.

That kind of a partisan attack on President Trump, I just wanted to say that I think that there are some people that might take issue with it. Like Alice Mary Johnson, like a host of people, the criminal justice reform activist for advocating that President Trump helped, and that the President did in fact help. So that broad, broad stroke characterization, I think it is wrong and unfortunate and shouldn't characterize this hearing. The Chair is trying to put together an objective hearing here to try to figure out what we might want to do on the pardon power. So, I think that is an important part of this.

I would also note there has been a number of controversial pardons, I know that we have talked about every single one of them cutting across both lanes. Indeed Chair of the Judiciary Committee, Chair Nadler, was instrumental in pushing for pardon of the Rosenbergs, that were a part of the bombing of the United States Senate in 1983.

It is not the first time the Capitol has been attacked. This kind of thing has happened. I hope that some of the people involved this year end up in jail like the Rosenbergs. The Chair of this Committee asked Bill Clinton to pardon these individuals who literally blew a bomb off of the United States Senate, targeting Members of the body in the Capitol. So, this is obviously nothing new, and something that I think we ought to be thinking through.

The one question I would have—Mr. Blackman, I would like your opinion, as we talk about reforms, one of the primary concerns I



have about the draft amendment to the Constitution—the Texas Constitution—and look, far be it for me to ever say anything negative about the great State of Texas—but the Texas Constitution is, I don't know, 400 pages. I don't know. It is long. It is a lot of basically statutory-type language in that constitution. Mr. Blackman, Professor Blackman, you probably know that. I believe it is critically important that the United States Constitution is not that, but it sets out high-level principles, structures of government, Bill of Rights, things that we order as in the balance of power between Washington and the States.

My concern about this measure is that it starts getting in the weeds. When we start getting into the weeds in the Constitution, I think that is a problem. I agree it requires amendment and then amendment and an amendment every time you change your views.

If we are going to do anything, why wouldn't there be something here that would say, look, one of the problems we have is these pardons tend to occur on January 19th or 20th? They tend to occur right at the tail end when you are in the lame duck. Maybe you say that you could, maybe if you are going to do a structural limitation that might cut across on a bipartisan basis, maybe say pardons have to be finished prior to elections of the President's term or something along lines.

I guess what I am saying is, if you are going to have a reform, wouldn't it be better to have a structural reform like that something than something that gets in statutory bases with respect to family Members? Are we going to say that John Kennedy couldn't have pardoned Bobby Kennedy if there was something that he felt was important to pardon just because his brother happened to be the Attorney General? I don't think that is a good path to go down, in my view.

Professor Blackman, do you have any thoughts on that?

Mr. BLACKMAN. I actually did some research, and there were many proposed amendments. Representative Barney Frank of Massachusetts proposed an amendment in 2001 that did exactly what you suggested. It would ban pardons from October through January 21st of an election year. So, basically before the election until after the inauguration, no pardons could be issued. As far as I know, no action was taken on that amendment, but that is almost exactly as you said, sir.

Mr. ROY. Well, I appreciate that. I don't even know that is right solution. I was literally kind of just mulling that as we were sitting here talking. Because I don't think the right path is to go down in the specifics—in the direction that has been laid out here before the committee.

I appreciate that answer, and I will yield back my time here in a second. I just think, let's keep this objective as we can and recognize a significant amount of work done by the Trump Administration to help people in criminal justice reform, cutting across color, faith, et cetera, and that every President has issued some pardons that every single one of us would think was somewhat questionable.

I yield back, Mr. Chair. I appreciate it.

Mr. COHEN. You're welcome, Mr. Roy. I appreciate your questions. I am not wedded to any principle. I look at ideas, and we will move from there.

Next, we will recognize another Houston, Texas—another Texan and another Houstonian, Ms. Sylvia Garcia.

Ms. GARCIA. Thank you, Mr. Chair.

Please know that we have got some great chicken in Texas. I know we are known for barbecue and Tex-Mex, but we also have chicken. I actually subscribe to a fried chicken blog. So, if the interest is fried chicken, I have got the list of the best fried chicken places in Texas.

So, with that, I want to get to Ms. Fredrickson and ask her a couple of questions. You mentioned, as Mr. Blackman and even Chair, a secret pardon. So, is there such a thing? Have secret pardons been revealed at a later time? Have there been any? I am just really intrigued by the whole notion.

Ms. FREDRICKSON. Well, I am not aware of any secret pardons being revealed after the fact, but there is certainly a question, a legal gray area of whether pardons can be issued in secret. Now, the thing that is clear is that if somebody actually is being prosecuted and they want to prevent that, they have to come forward and say they have been pardoned. So, in a way, that is how we would have learned if a secret pardon had been issued.

I would like to, if you don't mind, just speak to Congressman's Roy's point about bipartisan potential of this issue and Chair and to say that certainly I think adding to or—to consideration, structural reforms, such as the timing issues, but also transparency issues. I think Professor Blackman and I are very much on the same wavelength that a pardon absolutely must be under the public eye.

Other things that I think would be really important would be to structure the pardon attorney in such a way that there would be deep involvement, which would also be transparent, just proposed by legislation, the transparency of the pardon power, but to structure the pardon attorney role so that there would actually be a more benevolent aspect to it because I think one of the rightful criticisms has been that even in the Pardon Attorney's Office, prosecutors are often very reluctant to move forward, very worthwhile legitimate requests for commutation and pardon, and having a more active presence of those who are seeking justice for those who have been over—for overincarceration, or for oversentencing for the injustice of the criminal justice system.

Ms. GARCIA. Well, you have actually anticipated my line of questioning because exactly what I was going to ask you next was about the role of DOJ and the pardoning attorney or the section, I am not sure if it is a section or division. But one of the things—reports that were out there is if the former President just ignored any recommendations and pretty much closed their role and they were not involved in many of the pardons that he did issue. Do you think that was part of the problem with a lot of the criticism that he got in some of his pardons? Would it be a fix that we can make to make sure that it is structured so that there is always a role for DOJ and the pardon attorney?

Ms. FREDRICKSON. Well, I think it is a rightful criticism. One of the aspects of President Trump's pardoning was the very limited role of the pardon attorney, which does serve as advisory capacity now. Even those very deserving people who were pardoned from the criminal justice system often only received a pardon because of the intervention of a celebrity, like Kim Kardashian, and that is unfortunate.

Again, as I said, I think that there have been criticisms in all Administrations of the pardon attorney not being attentive enough to the failures of our criminal justice system and having a broader understanding of which types of individuals to move forward.

It was mentioned about how many pardons and commutations President Obama issued, about 1,700. There were almost 8,000 petitions that were left unaddressed, maybe rightfully so. Again, I think that is because the Pardon Attorney's Office is—may have some inappropriate—needs to be more affirmatively directed towards recognizing the injustice of our criminal justice system.

Ms. GARCIA. Well, thank you.

Mr. Chair, with only 8 seconds left, I will go ahead and yield back.

Mr. COHEN. Thank you. Thank you, Congresswoman Garcia.

I wasn't really thinking of fried chicken. Pascal's in Atlanta is what I was thinking, and they have got the best boiled chicken. That is just for Ms. Fredrickson's information.

Representative Fischbach, you are recognized next.

Mrs. FISCHBACH. Well, thank you very, very much. I appreciate that, and I am coming to you from the beautiful State of Minnesota, where we are below zero here, but I am warm inside so I appreciate the opportunity to take a couple of minutes.

Mr. Johnson and Mr. McClintock really covered some of the things that I wanted to ask. I thought that I may just take the opportunity to offer Professor Blackman a few minutes, just to stand on that issue of legislative involvement in the Presidential pardon issue. It is something that I am interested in, and if you could have additional comments.

Mr. BLACKMAN. Sure, sure. Well, thank you so much Representative, I appreciate the chance. I am hearing some interference in the background. It is a little hard to speak. I think it is another—someone is not on mute.

I think the role of Congress here is important. I think the role, though, should occur after the fact, in terms of oversight. In the event that the President issues, perhaps, a pardon that Congress deems unjust or inappropriate, that is something Congress can investigate.

What I would hesitate is to put limitations on whom the President can issue a pardon to and how that pardon can be issued. I will just use H.R. 4 as an example. I will read from it. It says, "A pardon issued for a corrupt purpose shall be invalid." The amendment does not define what is a corrupt purpose. It leaves it hanging. A lot of us here are attorneys, not all of us are.

When Congress doesn't define a statute, that lets someone else to define it. It can let Federal prosecutors define the statute, and it can let courts define the statute. Great? It lets courts find this language. I think if Congress wants to actually prohibit some spe-

cific act, they need to do something more than to say “corrupt purpose” because that’s not something that is self-evident. That is not a term that everyone understands. If you think of any term that we have argued about in the courts, emolument, right? People argue about these things.

So, if this body wants to put an amendment to prohibit certain kinds of actions, they should spell them. What does that mean to be corrupt? I think bribery is already prohibited. The Constitution says you can impeach for bribery or impeach a bribe, and OLC has said you can prosecute a President for bribery.

There is a difference between bribery and corruption, right? Corruption is one of these catch-all provisions. Chair Cohen said a catch-all provision that can sweep in a lot of conduct. That is perhaps unpopular, but I don’t think it fits within the traditional conception of an illegal offense.

Mrs. FISCHBACH. Thank you very much. I will yield back the remainder of my time.

Mr. BLACKMAN. Thank you.

Mr. COHEN. Thank you, Representative Fischbach, and stay warm.

Mrs. FISCHBACH. We are trying. We are trying.

Mr. COHEN. Okay. I am sure. Our next Congressman has 5 minutes is our—another freshman from up the river, Representative Bush.

Ms. BUSH. Thank you. St. Louis and I thank you, also, Chair, for convening today’s crucial hearing.

It is without question that Donald Trump did away with all Presidential norms. Donald Trump’s use of the pardon power will forever be associated with nepotism and corruption. It made clear that, under Donald Trump, an Act of mercy is given to wealthy donors, well-connected friends, his cronies, and his White supremacist allies. Under Trump, the pardon power became an extension of the privilege afforded to the rich and powerful.

Meanwhile, 14,000 clemency applications are languishing in the bureaucracy of the Department of Justice. Thousands of people with no connections to the upper echelons of power and access are left with limited resources, caged and behind bars as the devastating uncertainty of COVID-19 runs rampant.

The pardon power is not the problem. The problem is that it has not been used enough to correct for systemic injustices. Take, for example, Byron Miller. Byron was born and raised in Missouri’s First District right here in St. Louis. He was convicted on Federal drug charges at 28 years old. He is now 53, living with hypertension and asthma, fearing for his life as COVID-19 makes its way through our prison.

Byron’s mother is now 80, his father has cancer, and his daughter was only 6 years old when Byron was sentenced. His absence is deeply felt in his family and in his community.

These are the kinds of people our Presidents are leaving behind, people like Byron who are aging behind bars, and others, who had they been sentenced today, would be serving much less time, if any at all.

The pardon power was created as a virtually unchecked power of the Presidency. This extraordinary power can be a powerful tool of

freedom. In the context of our punitive carceral system, the pardon power allows Presidents to put humanity over greed, justice over violence, and righteousness over power.

Our country is in the midst of a national reckoning on racial justice. For far too long, we have oppressed, exploited, policed, and criminalized Black and Brown communities. We are in need of national healing. This moment requires transformational change. It's the kind of change that can be done with the stroke of a pen.

Ms. Hobert Flynn, you talk about the use of the clemency power as a tool to address racial discrimination. What role can it play in addressing racial disparities in the criminal legal system?

Ms. HOBERT FLYNN. You are right that so many people who did not have access to a process, someone that knew Trump—and this has happened with other Presidents to be clear, Clinton and others—if they don't have someone to help them, that can be a real challenge.

Congress can explore legislation to create an independent clemency board to review petitions for pardons and commutations and advise the President, removing the process from the DOJ because there is a conflict when DOJ prosecutors reject some of the prosecutions that they have had.

This could be a check and a new vehicle for this to go directly to the President. I think the President also can look to create and streamline the process for clemency, taking it out of the DOJ. I would encourage looking at Deborah Leff, who was the pardon—she was in the Office of Pardon Attorney during the Obama Administration. As Caroline said, they wanted to move 10,000 commutations. There were a couple of problems she faced. One is, as they opened up the stream for people to get applications in, focused on racial justice and excessive sentencing, they didn't have the resources to add staff because Congress was blocking efforts to provide more resources. So, Congress can play a role here. Second, she didn't have access to the White House counsel. So doing—setting up a board where you have independent people making recommendations, people inside and outside of the criminal justice system, I think that could be a real tool to move it for others.

Ms. BUSH. Okay. Let me ask you this one quick question. We only have a few seconds. In your testimony, you note that racist policies like the war on drugs have disproportionately devastated communities of color and that you believe that the Presidential Administration should use the clemency power to remedy these injustices. Why do you feel that Presidents have been really reluctant in this way? Because it also is worth noting that—well no, go ahead.

Ms. HOBERT FLYNN. No, we have deep problems in our criminal justice system that must be addressed. Clemency is only one tool for racial justice. We have to be looking at all levels—sentencing guidelines. Actually, I don't even think clemency should be limited to something that the President can do. It should be able to be done in courts, in Federal courts across the country. So, what we have so look at is top-to-bottom reform.

Ms. BUSH. Thank you. I yield my time.

Mr. COHEN. Thank you, Ms. Bush.

Our next Congressman to be recognized is someone who played in the NFL so long ago that he never played against Tom Brady, Representative Burgess Owens.

Mr. OWENS. That is putting things in perspective. Thank you so much for that. Well, first, good morning, everyone, and my colleagues, Subcommittee chair, and Ranking Member, this is indeed truly an honor to be with you.

What I am hoping to do is bring to this Committee my long passion for criminal justice reform. I have had a mission for decades. I started Second Chance Youth working with at-risk kids coming out of the juvenile system and giving them a second chance.

I am always pleased when Americans are given that second chance. Alice Johnson is a great example of that. A grandmother given a life sentence for her first offense. It took 22 years before someone heard her voice, and that was President Trump. Of course, President Obama for 8 years did not.

I want to say something that CNN had said about the pardons. CNN: The vast majority of pardons and commutations on Trump's list were doled out to individuals whose cases have been championed by criminal justice reform advocate, including people serving lengthy sentences for low-level offenses.

I think we need to bring on the wisdom of our forefathers, and they put a very high bar when this comes down to amendments. It needs to pass by two-thirds of the House and Senate, and then go to the States. Three-quarters of the State legislators have to also pass. There is a reason for why it has been done this way. It is purposely put in place not to be changed by passions of politics every 4 to 8 years, but by reason and time. That's the difference between democracy—Democrat—democracy and republic. Our republic has lived for 200 years because of this reason over time. What has been the result of that? There have been over 10,000 attempts to change or amend our Constitution. It has only happened 27 times.

So, we, the people, are the ones that will make this happen. It is not done by a stroke of a pen; it will not be done by legislators every 4 to 8 years. It is done by, we, the people.

Even though this is very educational, I think these kinds of conversations we need to have so that we can understand this process and understand our Constitution. I can predict that this amendment will not be the 28th.

So, that being said, I do have a couple of questions. Professor Blackman, what are the explicit limits in the Constitution that the Founders placed on the pardon power?

Mr. BLACKMAN. Thank you, Representative. Only two. The first is that the President can only pardon Federal offenses; he can't pardon State offenses. Second, the President can't pardon impeachments.

Mr. OWENS. Okay. During the conventional—Constitution Convention, did the Founders consider and object to legislative involvement in the President's power—or pardon power? I want to clarify that one.

Mr. BLACKMAN. Yes. There were proposals of having actually the Congress involved, that the Congress would have to approve of pardons, and those were rejected. Madison and others said that we really should put the power of the pardon in a single individual to

ensure that there is speed and efficiency, and you can consider justice.

As you know, we have a lot of people in the Congress making decisions; they don't always agree on things. In this case, a unitary executive does make some sense.

Mr. OWENS. Okay. As I mentioned, this is something we go through every 4 to 8 years because it has been somewhat political. But can you characterize President's Obama pardon of Chelsea Manning for something that I remember being a big deal for a while? How does that compare with the majority of President Trump's pardons?

Mr. BLACKMAN. Well, I think the Manning pardoning was quite controversial precisely because WikiLeaks was involved, and there were national security implications. I think I'd make a bigger point; I think perhaps people on the one side of the aisle have a certain conception of public good, and the people on the other side of the aisle have a different conception of public good. I don't think there is a single shared conception. That is why there is elections. I think President Biden will probably look at different people to pardon than President Trump did. That is what happens every 4 to 8 years.

I think your point is well-taken that different people think different pardons are controversial for very different reasons.

Mr. OWENS. Okay. Thank you very much. I am going to give back my time. Thank you so much. I appreciate it.

Mr. BLACKMAN. Thank you, sir.

Mr. COHEN. We only have about 10 or 12 more minutes of Mr. Naftali. I am going to have a beginning of a second round after Ms. JACKSON LEE. I would like to use knows 5 minutes, Ms. JACKSON LEE. You if you will take your 5 minutes, and if you have anything to direct to Mr. Naftali on the history of pardons, it would be great.

Ms. JACKSON LEE. Let me thank you, Mr. Chair, and the ranking Chair for holding this Committee hearing on this very important issue.

It has been stated that the pardon power of the President is not, in fact, unlimited, though governed by the Constitution. I offer these thoughts as I present my issues in the backdrop of January 6th. The unforgivable attack on democracy incited by the 46th President, where his loyalists laid siege to the Capitol Building, parading the obscenity of the symbol of the Confederate battle flag, while seeking to disrupt the joint meeting of Congress to count and announce the winner of the majority of votes cast by Presidential electors, all the while championing, "Hang Mike Pence," culminated a reign of corruption, abuse of power, criminal conduct, unethical behavior, and malfeasance unseen in America, and that weakened our country and made it poor and left it more divided than ever.

As a senior member of this committee, I chose to be on this constitutional committee, even as a sit in this last seat because I believe it is important for us to coddle, protect, nurture, and build the Constitution.

I am delighted with the witnesses that are here. I want to acknowledge my hometown constituent, Josh Blackman, professor of law, South Texas College of Law, and as well all of the other wit-

nesses, Karen Hobert Flynn, Professor Naftali, and, of course, the witness of Professor Frederickson.

Let me raise this question to Professor Naftali as it relates to the history of dealing with the importance of the clemency power. I might add to the fact that not only are people languishing, I, over the years, offered legislation before we had criminal justice reform and sentencing reduction to try to address the tens upon tens and hundreds upon hundreds of elderly African-American or minority incarcerated persons in the Federal system based upon the drug siege of the 70s and 80s.

So, Professor, would you give us just a historical comment, if you would, on whether or not the President—past President authority would even reach to the point if he had reached to attempting to give pardon to those who perpetrated criminal acts under January 6th? Then would you, as a historian, see any parallels between the post-Trump era and the post-Nixon era, during which Congress instituted several good government reforms aimed at reining in potential abuses? Thank you so much for your leadership and scholarship as well.

Mr. NAFTALI. Thank you, Congresswoman Jackson Lee. After he was acquitted, President acquitted in his then trial, President Johnson used the pardon power to pardon Jefferson Davis. It was the Christmas pardon of 1868. It is very hard for me to—I get emotional talking about Reconstruction in the United States because I think we, as a people, and especially people of color, but we, as a people, bear a heavy burden because our country did not face the truth of the Civil War and then swept it under the carpet. I believe the amnesty for Jefferson Davis create—helped to create that burden. That was a pardon by a President at the end of his term.

I worried, I have to tell you, in January, that we might see some pardons of the insurrectionists.

I spent today talking about Nixon because—not just because I know—think I know Nixon—but we have evidence that is—we have a shared body of data. All of you could—I know you are busy people, and you should be—but we can actually all listen. It is there. We don't yet have, but I want us to have it, a shared body of data about the Trump era. We have a lot of public information, but there is a lot more to learn.

I have a feeling that the second impeachment, Ms. Jackson Lee, may have actually deterred President Trump from perhaps, perhaps pardoning some insurrectionists. I don't have evidence, and I don't want to make the claim that he would have, but it is a question I will be asking as a historian.

So, yes, Presidents have had the power to pardon insurrectionists. Indeed, as Professor Blackman would certainly know—I am mentioning him because he talked about the issue of amnesty—the Founders did talk about, perhaps, at times using the pardon to calm our political environment by issuing amnesties.

One element of our history that I think really needs to be stressed is that our Founders did not think of a partisan era; they did not think of in terms of political parties. That is one of the reasons we have the 12th amendment because they had to correct the electoral system, at least, because they hadn't imagined parties. Some of how they conceived of limits on the pardon, I think, are



less powerful because they didn't assume there would be a President's party in Congress. Because they hadn't thought in those terms.

So, that is why I am suggesting structural forums that because the pardon is too powerful a tool now for a President in a way that the Founders, I don't think, anticipated because of the change in the balance of power brought about in a partisan age.

One more thing I would mention. This is a little outside of my lane, but since you have asked the question about the reforms or two, I believe that when—that the issue of a pardon is not just the issue for the White House, that that power resides in the President as our Head of State. Therefore, Congress does have a role, perhaps, in expanding knowledge of the pardon to those that could benefit from petitions. The issue is not simply that the petitions get read by the people in the Justice Department and then fed to the White House through some system. It is also that that the people in the country who are incarcerated, who are deserving of mercy, know how to communicate their story to Washington.

In the case of Donald Trump's era, at the very least, Kim Kardashian was able to provide some of those stories to the man with the pen. That is a very idiosyncratic way for people who have suffered from unfair incarceration to get their stories before our Chief Executive.

So, as we think about limits on the President's misuse of the pardon, we should think of ways to broaden the public's access to that executive clemency.

Mr. COHEN. Thank you, Ms. Jackson Lee, for asking the professor. I would like to follow up with the professor.

In your study of the history of impeachment and/or pardons, are you familiar with any secret pardons ever being revealed?

Mr. NAFTALI. No. I am not. In fact, when that issue arose during the last weeks of the Trump Administration, I was learning something.

I want to make one other thing clear. I am worried about the nature of the climate of power. This is not, not an artificial concept.

Professor Blackman, with whom I agree on a number of points—but Professor Blackman talked about dealing with the problem of the power after the fact. I am not sure that the history of the misuse of the pardon suggests that that is enough because part of the problem is if the President and his, and someday her, inner circle believe they can get away with it, that has an effect on our judicial and congressional system at that time. If people know that they will be protected, they might not be truthful with Congress, they might not be truthful with the FBI, or with the grand jury because of this notion that the climate is permissive.

I think we have had that permissive climate in a number of Presidencies. I have documented—and you can learn yourselves about Nixon—and we are now having a debate over the extent to which it was a permissive climate in the Trump Administration. There was certainly at least a permissive climate in the Clinton Administration the last day of his second term. That permissive climate is a threat to our constitutional system and to the balance of power that the Founders believed in.

I really encourage Congress to be robust in defending its prerogative, in defending the importance of checks and balances. I think the pardon power has gotten out of whack.

Mr. COHEN. Let me ask you this, President Obama, who issued either 1,700 or 1,900, I think it was 1,700-something pardons, he had a system set up at Justice that was rather stringent. I think you had to serve at least 10 years of your sentence, which why 9 years of your sentence should not have made some drug, non-violent, victimless drug crime one that shouldn't be pardoned because you had served 9 and not 10 years. Has any other President that you are aware of set up a system like that of hoops to go through, a criterion, and done it in a totally objective manner where they didn't know the person?

Mr. NAFTALI. I really don't know the nuts and bolts history of the approach to the pardon attorney. I know that, for many Presidencies, I know in the case of Nixon, ironically, a year before Watergate, the White House was trying to create a better system for pardons. Not every Nixon pardon, by the way, was suspect. But the permissive climate is problematic in that it undermined, I believe, our judicial and congressional systems.

Presidents have tried to routinize this approach. Let's keep in mind that the Office of the Pardon Attorney, we have had, as a people, for a long time. It was, I believed, created in the late 19th century.

So, yes, I think the issue, Mr. Chair, is when Presidents go outside of the system—and it is, how often do they do that? When they stay within the system, when they let the experts at DOJ, the civil servants provide them with data and recommendations—and the Attorney General, of course, plays the role—that is one thing. When they go outside the system—and we have examples of Presidents doing that—I would argue, the evidence seems clear now at least—that President Trump went outside of the system more than his predecessors. Whenever they go outside the system, usually, not always, but usually it produces a controversial pardon. That was the case with President Clinton, with President Nixon's contemplated pardons, his dangling of the pardons, with President George H.W. Bush.

So, how do you keep the President within the system? That is really the President's prerogative. There are ways I think to complicate the creation of a permissive environment for bad pardons.

Mr. COHEN. Your Atlantic article, which I thought was brilliant, had several suggestions, one of which was the timing and not doing a pardon before the end of the election. Did you consider a President in his first term as different from his second term, did you consider having to give notice before, say if election day is a limitation, say maybe 10 days before election day, and having notice to make sure it is not a secret pardon? What are the other reforms you suggested in your article that we should consider?

Mr. NAFTALI. Mr. Cohen, well, thank you, for asking me. I really believe in deterrence because I think we are all imperfect beings. Okay? Even the best of us faces temptation.

So, I think that one of the great deterrents is public sanction. In other words, the public responding to what you have done. That is

why, by the way, a secret pardon concerns me because then the public, by definition, doesn't know about it.

That is why I want Presidents not to fear—I like Presidents to know that the public has a chance to give a verdict on their pardons. So, that is why I very much like former Congressman Frank's idea that you set a structural sort of deadline for the use of the pardon, and you do it before an election. So, they can't do it after the public has a chance to respond. The reason you would do it in October is the public has to know about these things. Now, if you can figure out a way to require disclosure, you could do it in late October other than October 1st. I think that is a good idea.

The second thing is, although, the self-pardon, there are lots of good arguments why it shouldn't be constitutional. I would leave it to the lawyers. In the Nixon period, they looked at this, and they decided that, A, it probably wasn't, and, B, it had to do with what the Supreme Court would do. The Supreme Court sent a message in *U.S. v. Nixon* that even the appointees of the President can vote against the President.

So, I really believe that sanction should be included, that you should not have self-pardons.

Finally, I worry about the President's ability, under partisan temptation, to pardon those who are political associates. I think that should be looked at hard—a prohibition should be looked at hard as well regarding that.

Mr. COHEN. Thank you, Professor. I know you have a hard cut. I just have one last question, and I am going to finish my overtime. That is to Ms. Fredrickson and/or to Ms. HOBERT FLYNN.

First, Ms. Fredrickson. The proposals Mr. Schiff has in his bill, Congressman Owens is right. The likelihood of my statute, my amendment to the Constitution, it is the degree of difficulty is great, a statute is not.

Are there any problems you have with the proposals that Mr. Schiff has in his bill? Are there things you think that should be in there that could pass constitutional muster and put limits, such as Professor Naftali and others have discussed?

Ms. FREDRICKSON. Well, thank you very much. To Professor Naftali, I really have enjoyed hearing you speak. I am always a fan of historians, being a daughter of a historian. It is a very important part of this conversation.

I think that Congressman Schiff's bill puts out some very important reforms, as I had mentioned, which have to do with transparency in showing that there is broader dissemination of information about the pardons, as well as the prosecution that would be pardoned.

Also, again, the clarification of the bribery statute, which, I think, it is widely held that would already apply to the President, but just to ensure that there is no question about that. Beyond that, I think certainly Congress should be considering some of these reforms. They may impose greater challenges in terms of getting closer to the confines of the article II authority that the President has as circumscribing the grant of pardons in a way that doesn't constitute a prosecution for a criminal offense, which has already seen to be allowable. Actually, telling the President when she cannot pardon somebody, it is worth considering. It maybe a

little bit more challenging in terms of the constitutional limitations.

Mr. COHEN. So, on the idea of the secret pardon and trying to prohibit them by requiring some notice to be given, some public disclosure, do you think that could be statutorily, or is the power in the Constitution so broad that it couldn't be done?

Ms. FREDRICKSON. Well, again, there it is a gray area. It would certainly be worthwhile for Congress to move forward on the transparency issues, the transparency provisions that are included in Congressman Schiff's bill and then Mr. Krishnamoorthi's bill, but also to look at the timing issues. It certainly sets out a very important point of Congress' role in understanding the Constitution, which Professor Blackman rightly says Congress plays a very important role in the interpretive process and sends a strong message.

So, there is a possible constitutional challenge; I wouldn't endorse, but I certainly would be—as something that would occur. It would still merit going forward in pursuing such reforms because I think they might certainly stimulate an Administration to try and adhere to them. If an Administration did not, it would provoke its own political backlash.

Mr. COHEN. Thank you, Ms. Fredrickson. I have gone over time and taken that opportunity to ask each of you and Mr. Naftali questions.

Does Mr. Johnson or anybody else on the Committee desire any additional time, or should we close this hearing up?

Mr. JOHNSON of Louisiana. I will take it if it is offered, Mr. Chair. Just another 5 minutes or less.

Mr. COHEN. Or less, thank you.

Mr. JOHNSON of Louisiana. Just quickly, there has been a lot said. I actually think it was a productive discussion today, and I appreciate that and the tone that everybody brought to the discussion. It is important.

As we have acknowledged, there have been people politically aggrieved on either side of this depending on who the President's been.

I do want to just point out some things have been said about President Trump this morning. He has been accused of not only, in one sense, going outside the system, as it was said a few moments ago to egregious violations of the pardon power.

I just wanted to ask Professor Blackman just to kind of put a bow on all of this: I mentioned in my opening that President Trump granted nearly 240 pardons in commutations. We have heard a lot this morning about how he abused the pardon power, but according to the Pew Research Center, President Trump used, quote "power less frequently than nearly every other President since the turn of the 20th century."

Professor Blackman, I just wanted to ask you, would you agree that the grants of clemency and pardon and all that that President Trump used was done by him, at least from his subjective viewpoint, in a way to rectify unfair sentences and prosecutions?

Mr. BLACKMAN. I think so. Maybe I will focus on one in particular, Jack Jackson, who was a very famous boxer from the early 20th century, an African-American boxer. He was charged with vio-

lating the Mann Act. Which if you don't know what the Mann Act is, it is basically this very nebulous law that prohibited transporting a woman across State lines for immoral purposes. He had a mistress who happened to be White, and he was charged with basically having a relationship with a White woman. He was sentenced to time in prison. This was almost a hundred years ago, and this was a pardon that probably should have come some time ago. I think it was one of the more commendable pardons that President Trump issued. I think it has worked well—

Mr. JOHNSON of Louisiana. Thanks for mentioning that. I point out that he was—my son is named Jack Jackson. We take a lot of pride in this.

Mr. BLACKMAN. Wow.

Mr. JOHNSON of Louisiana. Jack Johnson, the boxer, was convicted by an all-White jury for that crime, that you said. Of course, civil rights groups and advocates petitioned past Presidents many times to officially recognize that his prosecution and conviction embodied racial hostility and intolerance. It took until the time of President Trump to correct that historical injustice.

So, it was mentioned Alice Johnson, another for a drug-related offense.

The point is that, I guess, what I want to conclude here at the end, Mr. Chair, is to make the point, for history, for the historians, the lawyers, and all of us who are involved in this, that there have been controversial pardons by almost every President, but there also have been some very noble things that have been done before. President Trump certainly did the latter. I wanted to note that for the record.

So, I know we are over our time, and I will yield back, Mr. Chair. I appreciate again the tone and the content of the discussion this morning.

Ms. JACKSON LEE. Mr. Chair, I would like to comment. I think I had my hand up.

Mr. COHEN. Sure, Ms. JACKSON LEE. You are recognized.

Ms. JACKSON LEE. Well, thank you so very much, Mr. Chair. Very important hearing, and I will be brief on my comments.

Professor Naftali, thank you for giving us not only food for thought but a structural roadmap along with the legislation that we are now looking to assess.

I gave those opening remarks specifically because, as you well know, that was the height of the discussion and intense discussion as to whether the President would in actuality pardon those domestic terrorists or insurrectionists, and it was a frightening possibility.

I also want to say that I have lived for a long time on this Committee with the teeming numbers of individuals in the Federal prison system who are predominantly African American or people of color, visited some of them, had people and families petition and beg for some relief. It is a painful experience to see your neighbors incarcerated under these mandatory minimums and could not be released or access to.

So, you gave an interesting point about structuring—the structure of it and the potential of Congress and also information. Thank you for that.

I wanted to conclude my remarks by saying that this is an important agenda, and reform is important. The Constitution is prescient. It is a prescient document. Thank you for your historical perspective.

I think that we should continue to recognize that this document has lasted for a period of time that pushes us to protect it prospectively and to be serious about protecting it. So, I look forward to, Mr. Chair, on this.

Finally, let me offer my deepest sympathy to my late colleague, Congressman Wright, Congressman from Texas, for obviously this tragic loss, his tragic loss, and to say that I know that he was dedicated to the service of this Nation, and I know that his constituents and the Nation is grateful for his dedication.

Thank you, Mr. Chair, and I yield back.

Mr. COHEN. Thank you, Ms. JACKSON LEE.

I believe Mr. Hank Johnson has asked for a few minutes. He is the only person who has. With the permission of the Committee and indulgence, we will recognize Mr. Johnson for a last round of questioning.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair.

Professor Blackman, it would be fair to say that President Trump was rather stingy in his use of the pardon power compared to President Obama. Is that correct?

Mr. BLACKMAN. I think he issued few of them. Absolutely.

Mr. JOHNSON of Georgia. Yes. In fact, Trump pardoned 143 and commuted 94 sentences. Obama, in his 8 years, pardoned 212 and commuted 1,715 sentences.

Would it be fair to say that President Trump (sic) commuting sentences showed more mercy than President Trump, who just simply let a bunch of folks off the hook? Particularly in the wee hours of the morning on the night of January 19th, he issued—of his 237 total pardons and commutations, Trump commuted or pardoned more than 140 people in the wee hours of the morning, just 10 hours before his term ended, including Steve Bannon, a potential witness against him who was under indictment for defrauding Trump supporters in a Build the Wall scheme.

Professor Blackman, would it be fair to say that it is best for Presidents to depend on the Office of the Pardon Attorney rather than simply dispensing pardons and commutations out of their back pocket like President Trump did?

Mr. BLACKMAN. Well, I thank you for the question, Representative.

The Constitution gives the President this power. The pardon attorney can make recommendations. I actually agree with Ms. Fredrickson. It may make sense to have people who aren't in the DOJ making these recommendations because very often DOJ is supporting the prosecutions. I think having somebody—

Mr. JOHNSON of Georgia. Well, how many times did President Trump rely upon the Office of Pardon Attorney before making any of his 237 commutations?

Mr. BLACKMAN. I don't know, but I guess the number is pretty small.

Mr. JOHNSON of Georgia. How many did President Obama do under the Office of the Pardon Attorney?

Mr. BLACKMAN. I don't know the number. I am guessing it is a bigger number.

Mr. JOHNSON of Georgia. Yeah. I think it was a total of 1,927, and he relied on the Office of the Pardon Attorney.

Professor Fredrickson, what is the better practice in terms of use of the pardon power, and how can we best protect our democracy from being undermined by the illicit use of the pardon power as we saw happen under the Trump Administration?

Ms. FREDRICKSON. Well, I would like to first thank you for that question. It is a very important one. I would like to associate myself with the remarks of my colleague, Karen Hobert Flynn, who talked about the need really to have a wholesale reform of our criminal justice system and its disparate impact, particularly on Black and Brown people.

The pardon power is one element of that, but it is not sufficient, clearly, in the commutation. Having a system inside the Justice Department, or I think a better practice, as Ms. Hobert Flynn also suggested, is perhaps a kind of a board that was made up of people who weren't all prosecutors who would be considering the real injustice that has been done and whose sentences can be commuted or who can be pardoned through the President's pardon power.

That, I think, is very insufficient because there are so many people who are prosecuted for low-level drug offenses, who are already in prison for excess of time that we—unlikely to address all those people through the pardon attorney process or through any kind of a commutation and pardon board.

Nonetheless, though, I think it is very important to have a system that does allow the most significant cases to move forward and be put in front of such a board or in front of the pardon attorney for expedited process.

Mr. JOHNSON of Georgia. Thank you.

Thank you, Mr. Chair. I yield back.

Mr. COHEN. You are welcome, Mr. Johnson.

I have been told by staff that Ms. Bush might have a question. Is that correct? Representative Bush? Representative Bush, going once, going twice.

This adjourns—this concludes our hearing. I want to thank all our witnesses for appearing today.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witness or additional materials to the record.

I would like to specifically ask the witnesses, if you have thoughts about legislation, either the amendment to the Constitution, or as Representative Owens has cautioned, more likely statutory changes and suggest them in your comments to the chair because we are going to try to draft something that is feasible, passable, and improving things.

So, if you have suggestions that we can do for amendments to Mr. Schiff's statutory, that would be appreciated greatly. With that being said, I am done.

In memory of Representative Wright, Congressman Wright, this hearing is adjourned.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair.

[Whereupon, at 11:20 a.m., the Subcommittee was adjourned.]





## **APPENDIX**

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<p><b>SHEILA JACKSON LEE</b> 18TH DISTRICT, TEXAS</p> <p>WASHINGTON OFFICE: 2160 Rayburn House Office Building Washington, DC 20515 (202) 225-3816</p> <p>DISTRICT OFFICE: 1919 SMITH STREET, SUITE 1180 THE GEORGE "MICKEY" LELAND FEDERAL BUILDING HOUSTON, TX 77002 (713) 555-0050</p> <p>ACRES HOME OFFICE: 6719 West MONTGOMERY, SUITE 204 HOUSTON, TX 77019 (713) 691-4882</p> <p>HEIGHTS OFFICE: 420 WEST 19TH STREET HOUSTON, TX 77008 (713) 961-4070</p> <p>FIFTH WARD OFFICE: 4300 LYONS AVENUE, SUITE 200 HOUSTON, TX 77020 (713) 227-7740</p>	<p><b>Congress of the United States</b> <b>House of Representatives</b> Washington, DC 20515</p>	<p>COMMITTEES: JUDICIARY</p> <p>SUBCOMMITTEES: COURTS, INTELLECTUAL PROPERTY AND THE INTERNET IMMIGRATION AND BORDER SECURITY</p> <p><b>HOMELAND SECURITY</b> SUBCOMMITTEES: RANKING MEMBER BORDER AND MARITIME SECURITY TRANSPORTATION SECURITY</p> <p>SENATOR NAMI DEMOCRATIC CAUCUS</p>
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**CONGRESSWOMAN SHEILA JACKSON LEE OF TEXAS**

**COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL  
RIGHTS, AND CIVIL LIBERTIES**

**VIRTUAL HEARING ON:  
“CONSTITUTIONAL MEANS TO PREVENT  
ABUSE OF THE CLEMENCY POWER”**

**TUESDAY, FEBRUARY 9, 2021  
9:00 A.M. (EST)  
CISCO WEBEX**



- Thank you, Chairman Cohen and Ranking Member Johnson, for convening this hearing on “Constitutional Means to Prevent Abuse of the Clemency Power.”
- Let me welcome our witness:
  1. Caroline Frederickson, Distinguished Visitor from Practice, Georgetown University Law Center;

2. Karen Hobert Flynn, President of Common Cause;
3. Timothy Naftali, Clinical Associate Professor of History, New York University; and
4. *Josh Blackmon, Professor of Law, South Texas College of Law Houston (Minority Witness)*

- Thank you for your participation and I look forward to discussing with you how to prevent the misuse and abuse of the important Pardon Power conveyed to the President by Article II, section of the Constitution, and to increase the exercise, where appropriate, of the Pardon Power, which the Framers regarded as an act of sovereign grace.
- Mr. Chairman, this hearing takes place at a sobering moment for on this very day, February 9, 2021, trial is to begin on the second impeachment of the 45<sup>th</sup> President of the United States for inciting insurrection against the United States in what has been described by Congresswoman Lynn Cheney of Wyoming, the Chair of the House Republican Conference, as the greatest violation of his oath and duty by a President in the history of our country.
- That unforgivable attack on democracy incited by the 45<sup>th</sup> President – where his loyalists laid siege to the Capitol Building, parading the obscenity of the Confederate battle flag while seeking to disrupt the Joint Meeting of Congress to count and announce the winner of the majority of votes cast by presidential electors all the while chanting “Hang Mike Pence” – culminated a reign of corruption, abuse of power, criminal conduct, unethical behavior, and malfeasance unseen in America and that weakened our country, made it poorer, and left it more divided than ever.
- Perhaps the only things to rival the domestic terrorist attack fomented by the 45<sup>th</sup> President was his active involvement in trying to extort a foreign nation to interfere to his benefit in the 2020 presidential election and his beseeching of the Russian government to aid his election campaign in the 2016 election, which in turn led to the investigation conducted by Special Counsel Robert Mueller which resulted in dozens

of indictments, and the arrests, and convictions or guilty pleas of persons acting for or on behalf of the 45<sup>th</sup> President.

- It is regrettable that events and the conduct of the 45<sup>th</sup> occupant of the White House has compelled us to assemble here today to discuss and make explicit what has long been implicitly understood and internalized by both citizens, and holders of offices of public trust, and that is **as President Roosevelt so eloquently stated on December 7, 1903:**

***“No man is above the law and no man is below it: nor do we ask any man’s permission when we ask him to obey it.”***

- That is why in the 116<sup>th</sup> Congress, I was an original cosponsor of H.R. 2678, the *No President Above The Law Act*, introduced by Chairman Nadler to amend 18 U.S.C. §3282 to provide for the tolling of the statute of limitations with regard to certain offenses committed by the President of the United States during or prior to tenure in office.
- This sensible legislation makes clear that a president is estopped from relying on the statute of limitations to escape from prosecution for criminal acts that under current DOJ Office of Legal Counsel policy cannot be instituted during a president’s continuance in office.
- I also cosponsored in the last Congress H.R. 7694, the *Abuse of the Pardon Prevention Act*, which was incorporated in H.R. 8383, the *“Protecting Our Democracy Act,”* that was reported favorably by this Committee and is designed to deter abuses of the pardon power and is made necessary by recent actions of the 45<sup>th</sup> President, who on his way out the door pardoned convicted felon Roger Stone, who was found guilty by a jury of his peers of obstruction of Congress, witness tampering, and five counts of lying to Congress.
- In fact, as the judge in his case described during sentencing, Roger Stone was “prosecuted for covering up for the President” and lied repeatedly to the House Permanent Select Committee on Intelligence about his extensive communications with the Trump Campaign regarding WikiLeaks, in which he repeatedly held himself out as having contacts

with WikiLeaks and advance knowledge of WikiLeaks's planned releases of stolen emails.

- And Roger Stone further obstructed justice by making a number of disturbing attempts to intimidate a witness from cooperating in the investigation against him.
- There is ample evidence in the public domain that strongly suggests that the President held out the possibility of a pardon for Stone to encourage Stone's silence on matters that could have caused the President great embarrassment or even criminal liability.
- Mr. Chairman, the "*Abuse of the Pardon Prevention Act*," requires transparency in circumstances where the President uses that power for potentially self-serving purposes or in a manner that could undermine the functions of Congress.
- The legislation would require that if the President issues a pardon for someone in connection with an investigation in which the President or one of his family members is a target, subject, or witness, the Department of Justice (DOJ) must disclose to Congress its investigative files pertaining to that person; it further requires DOJ and the White House to disclose all materials relating to their consideration of the pardon at issue.
- Additionally, it requires these disclosure obligations if the President issues a pardon for a crime that compromises the integrity of Congressional proceedings, such as for offenses involving obstruction of Congress.
- Second, "*Abuse of the Pardon Prevention Act*," would amend the federal bribery statute to make explicit that offering or granting a pardon or commutation may serve as the basis for finding criminal culpability under the statute and includes the President and Vice-President among the persons covered by the statute.

- Third, the legislation makes explicit the self-evident and widely held view of constitutional scholars that a president cannot pardon himself and that any attempt to do would be void and without effect.
- This existing understanding is shared by the Department of Justice, constitutional scholars, and even the Republican-invited witness at a hearing on this issue held in the 116<sup>th</sup> Congress by this Subcommittee.
- The pardon granted to Roger Stone was one of the latest but far from the only instance of his abuses of the pardon power in the short span the 45<sup>th</sup> President occupied the White House.
- Special Counsel Robert Mueller’s Report on the Investigation Into Russian Interference in the 2016 Presidential Election describes multiple instances in which the 45<sup>th</sup> President dangled the possibility of a pardon for witnesses who refused to cooperate with investigators.
- For example, during the prosecution of former Trump Campaign Chairman Paul Manafort “and while the jury was deliberating, the 45<sup>th</sup> President repeatedly stated that Manafort was being treated unfairly and made it known that Manafort could receive a pardon.”
- The 45<sup>th</sup> President also suggested he was considering a pardon (which he subsequently granted) for former national security advisor Michael Flynn; and the President’s former personal attorney, Michael Cohen, testified that he had discussed a potential pardon with the 45<sup>th</sup> President’s personal counsel before Cohen began cooperating with investigators.
- Moreover, the 45<sup>th</sup> President used his pardon powers in other potentially self-serving, abusive, and arbitrary ways; a June 2020 review of the 36 instances in which the 45<sup>th</sup> President granted pardons or commuted sentences indicates that “[a]lmost all of the beneficiaries of Trump’s pardons and commutations have had a personal or political connection to the president.”
- And in 21 of those instances, the pardon or commutation served the President’s political agenda—such as when he pardoned Sheriff Joe

Arpaio after he was convicted for defying court orders relating to his unlawful detention of immigrants or former Illinois Governor Rod Blagojevich, convicted in June 2011 of corruption charges in connection with attempting to sell the appointment to the Senate seat vacated by President-elect Barack Obama.

- Mr. Chairman, on January 20, 2017, with his right hand placed on the historic Lincoln Bible, Donald Trump uttered one of the most important statements in the life of this nation.
- He declared to the nation and the watching world that “I do solemnly swear that I will faithfully execute the office of President of the United States and will to the best of my ability, preserve, protect and defend the Constitution of the United States.”
- Mr. Chairman, these 35 words have immense meaning.
- Not only are they mandated by Article II, Section I of the U.S. Constitution but they bind the taker, as Lincoln said in 1861, “to an oath registered in Heaven.”
- These 35 words cover the two fundamental duties of the President: to “take care that the laws be faithfully executed” and to preserve, protect and defend the Constitution.
- Before January 20, 2017, Donald Trump had never been elected to public office, nor served in the military, nor held a position in the government, nor been admitted to practice law before the bar.
- This is noteworthy because it means that in his 70 years of living, Donald Trump had never taken a public oath to uphold the Constitution before January 20, 2017.
- With his assumption of the office, however, it soon became obvious that the 45<sup>th</sup> President’s previous stints as a real estate mogul, television personality, and owner of the Miss Universe beauty pageant left him wholly unequipped to grasp the full weight, scope, meaning of—and the obligations he assumed in taking the Presidential Oath of Office.

- As a senior member of Congress and the House Committees on Judiciary and Homeland Security, I am ever mindful of my responsibility to preserve and protect the pillars of our democracy.
- I answer to my constituents directly and indirectly to all Americans, and my public actions are constrained by my fidelity to the rule of law.
- The 45<sup>th</sup> President, unfortunately, never was able to grasp this fact or accept these democratic constraints.
- The 45<sup>th</sup> President repeatedly acted out his selfish desire to discredit or eliminate an official investigation into Russian meddling in the 2016 Presidential election and to avoid accountability for his conduct.
- As one who cherishes the Constitution and the system of separated powers and checks and balances, I had long been alarmed by the 45<sup>th</sup> President's attempts to undermine the rule of law and abuse the pardon power.
- That is why on June 25, 2017, I introduced a resolution, H. Res. 474, joined by our colleagues Mr. Cohen, Ms. Bass, Mr. Lieu, Mr. Raskin, and others condemning any action by the 45th President to remove Special Counsel Mueller, impede his investigation, or pardon any person for offenses against the United States arising out of Russia's meddling in the 2016 Presidential Election.
- Mr. Chairman, on January 20, 2017, the 45<sup>th</sup> President took an oath—the first of his life—to preserve and protect the Constitution and to take care that our nation's laws are faithfully executed.
- He treated his oath as a mere non-binding suggestion and now it falls to us to do all we can to ensure that no future president will ever feel so emboldened to make a mockery of his office and the democracy we hold dear.
- Thank you, Mr. Chairman, I yield back my time.