

**Testimony of  
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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  
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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.

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

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<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

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<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

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<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

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<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-idUSKBN28X0OR>.

<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 swamiest pardons, ranked*, WASHINGTON POST, Jan. 20, 2021, <https://www.washingtonpost.com/politics/2021/01/20/trumps-swamiest-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.

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<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/bill/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

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<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

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<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.

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<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.