

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 45th 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*

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 37th 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 any 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 35th 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 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 46th 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.