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ARTICLE

THE CORRUPTION OF THE PARDON POWER

ALBERT W. ALSCHULER*

ABSTRACT

This Article shows how the pardon power has been corrupted over the past forty years. It begins with a brief history of federal clemency. Throughout this history, presidents gave weight to the views of prosecutors and judges and afforded politicians considerable influence. Nevertheless, until well into the twentieth century, presidents liberally granted clemency to both prisoners and ex-offenders who, after completing their sentences, sought to erase their convictions.

In the early 1930s, as parole became a common means of releasing prisoners, the use of clemency to release prisoners declined. The abolition of parole in the 1980s, however, brought no revival of clemency. To the contrary, sentence commutations continued to fall and came close to the vanishing point. For the first time in its history, the United States had no functioning mechanism for releasing prisoners prior to the expiration of their sentences, and the federal prison population burgeoned. The last two years of the Obama administration did see a brief departure from this pattern.

As the front door to clemency closed, a back door opened. Presidents who emphasized how little sympathy they had for criminals took a different view when the criminals were people they knew. This Article describes troubling pardons granted by Presidents Reagan, George H. W. Bush, Clinton, and George W. Bush. The Article focuses primarily, however, on the clemency granted by President Trump. While thousands of clemency applications remained unresolved, Trump granted clemency to potential witnesses against him, political supporters, personal friends, people with political constituencies, rap stars, abusive law enforcement officers, war criminals, and people whose applications were championed by movie stars, professional athletes, and Fox News commentators. The Article describes many of Trump's pardons and commutations. It concludes by asking

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whether the Framers erred by granting a nearly unfettered power to the president.

I. GUARDING AGAINST CORRUPTION

The Framers of the Constitution were obsessed with corruption.¹ One of them, Charles Pinckney, boasted, “Corruption was more effectually guarded against, in the manner this government was constituted, than in any other that had ever been formed.”² In allocating the pardon power, however, the Framers cast aside the anti-corruption structures they had devised. Although the federal government is said to be one of checks and balances, the pardon power is essentially unfettered.³ Article II, Section 2, Clause 1 of the Constitution provides, “[The President] shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”⁴

When Roger Sherman urged the Constitutional Convention to allow the president to pardon only with the Senate’s concurrence, only his own state, Connecticut, voted in favor.⁵ “[W]ithout an easy access to exceptions in favor of unfortunate guilt,” Hamilton wrote in *Federalist 74*, “justice would wear a countenance too sanguinary and cruel.”⁶ He added, “[A] single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of punishment, than any numerous body whatever.”⁷ More than two centuries later, White House officials noted that pardons were President Trump’s “favorite thing” because he could approve them without the restraints that hampered his other initiatives.⁸

1. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 348 (2009); *Citizens United v. FEC*, 558 U.S. 310, 452 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting Teachout, *supra*).

2. DEBATES WHICH AROSE IN THE HOUSE OF REPRESENTATIVES OF SOUTH-CAROLINA ON THE CONSTITUTION FRAMED FOR THE UNITED STATES BY A CONVENTION OF DELEGATES ASSEMBLED AT PHILADELPHIA 44 (Charleston 1831).

3. I describe some limits on this power in Albert W. Alschuler, *The Limits of the Pardon Power*, 63 ARIZ. L. REV. 546 (2021).

4. U.S. CONST. art. II, § 2, cl. 1.

5. *Madison Debates August 25*, YALE L. SCH. GOLDMAN L. LIBR. https://avalon.law.yale.edu/18th_century/debates_825.asp (last visited Sept. 9, 2021).

6. THE FEDERALIST No. 74, 446 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003).

7. *Id.* at 447.

8. See Robert Costa, Josh Dawsey & Ashley Parker, *Trump fixates on pardons, could soon give reprieve to 63-year-old woman after meeting with Kim Kardashian*, WASH. POST (June 5, 2018), https://www.washingtonpost.com/politics/trump-fixates-on-pardons-could-soon-give-reprieve-to-63-year-old-woman-after-meeting-with-kim-kardashian/2018/06/05/37ac6cb6-683d-11e8-bbc5-dc9f3634fa0a_story.html.

Most early state constitutions did not give governors the same unchecked power the U.S. Constitution gave the president.⁹ One state, Georgia, assigned the pardon power principally to the legislature.¹⁰ Today, in twenty-three states, governors have a pardon power like the president's; in twenty-one other states, governors may pardon only with the advice or concurrence of other officials (usually the majority of a state clemency board); and in six states, governors appoint clemency boards and have no further role in the process themselves.¹¹ Among history's many proposals for reforming federal clemency was one Senator (later Vice President) Walter Mondale offered shortly after President Ford pardoned President Nixon—a constitutional amendment to allow Congress to disapprove clemency grants by a two-thirds vote of both houses.¹²

Today the pardon power is corrupted. I use the word *corruption* in the same way Aristotle and the Framers did: A thing is corrupted when it becomes impure or perverted. In particular, the use of public power to advance private ends is corrupt.¹³

II. A BRIEF HISTORY OF FEDERAL CLEMENCY

For most of American history, presidents personally reviewed tall stacks of pardon applications, and they saw the job as mandatory. They focused particularly on whether a trial judge or prosecutor supported an application,¹⁴ and political support mattered too. Many of the 331 clemency warrants Abraham Lincoln issued to people convicted in civilian courts

9. See CAROLYN STRANGE, *DISCRETIONARY JUSTICE: PARDON AND PAROLE IN NEW YORK FROM THE REVOLUTION TO THE DEPRESSION* 23 (2016); W. H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 14 (1941).

10. CONST. OF GEORGIA, art. XIX (1777), https://avalon.law.yale.edu/18th_century/ga02.asp.

11. Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730, 743–44 (2012).

12. Walter F. Mondale, *Harnessing the President's Pardon Power*, 61 ABA J. 107, 108 (1975).

13. See ARISTOTLE, *POLITICS* 114 (Benjamin Jowett, trans. Oxford Univ. Press rev. ed. 1967) (c. 350 BCE); ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED* 38–55 (2014).

14. President Jefferson wrote, "No pardon is granted in any case but on the recommendation of the judges who sat on the trial & who best know & estimate the degree of the crime, & character & deportment of the criminal." George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT'G REP. 212, 213 n.21 (2004). The first "Rules Relating to Application for Pardon," approved by President McKinley in 1898, required the Attorney General to seek an evaluation of every application by the office of the United States Attorney that had prosecuted the applicant's case and also "to obtain, if possible, the views of the trial judge." Except in capital cases and cases in which the president asked to see an application, an application without the support of either the prosecutor or the trial judge was denied automatically. U.S. Dep't of Justice, *Rules Relating to Applications for Pardon* (Feb. 4, 1898) (on file with the author). In 1907, the rules permitted the Attorney General to forward an application to the president even when neither the prosecutor nor the judge supported it. In 1913, they declared that a favorable recommendation by a prosecutor, trial judge, law enforcement agency, or prison official would automatically send an application to the president's desk.

mentioned the endorsement of judges (seventy-three warrants), prosecutors (seventy-eight warrants), prison officials (forty-four warrants), U.S. Senators (fifteen warrants), Members of the House of Representatives (fourteen warrants), and governors (twelve warrants).¹⁵ Warrants also noted the support of former public officials, state legislators, mayors, aldermen, generals, the vice president, and many ordinary citizens. The clemency warrant of one offender recited the endorsement of a “large majority” of the Pennsylvania legislature and “several thousand citizens.”¹⁶

A president’s personal favor could matter. Lincoln’s acquaintance with Henry Luckett, for example, might have saved Luckett’s life.¹⁷ Luckett had been convicted of attempting to transport quinine and percussion caps to the Confederate army. An Indiana member of Congress and both of Indiana’s senators accompanied Luckett’s daughter, Mrs. Bullitt, and her husband as they pleaded with Lincoln for a remission of Luckett’s death sentence. Mrs. Bullitt argued that her father had been entrapped and that his mental ability was impaired.

As Mrs. Bullitt spoke,

Mr. Lincoln, turning to Senator Lane, exclaimed:

“Lane, what did you say this man’s name was?”

“Luckett,” answered the senator.

“Not Henry M. Luckett?” quickly queried the president.

“Yes,” interposed Mrs. Bullitt; “my father’s name is Henry M. Luckett.”

“Why, he preached in Springfield years ago, didn’t he?” said Mr. Lincoln.

“Yes, my father used to preach in Springfield,” replied the daughter.

Someone familiar with the mindset of modern prosecutors might imagine that prosecutors’ approval of pardon applications has always been rare. In the years 1885 through 1931, however, there were 10,548 grants of clemency. Presumably almost every grant had the support of a prosecutor or judge, but presidents mentioned this support only 4,296 times. 2,623 grants noted the support of both prosecutor and judge; 1,346 mentioned only the prosecutor’s support; and 334 mentioned only the judge’s. Recommendations by prosecutors alone outnumbered those by judges alone by a ratio of four-to-one. See HUMBERT, *supra* note 9, at 97–99 (part of Table I).

15. See P.S. Ruckman, Jr. & David Kincaid, *Inside Lincoln’s Clemency Decision Making*, 29 PRES. STUD. Q. 84, 93–94 (1999). Although P. S. Ruckman Jr. murdered his sons and then ended his life in 2018, I do not hesitate to cite his extensive and useful scholarship on the history of pardons. See Jim Hagerty, *Renowned College Professor P.S. Ruckman Kills Children, Self, Say Police*, INQUISITR (Mar. 4, 2018), <https://www.inquisitr.com/4813078/renowned-college-professor-p-s-ruckman-kills-children-self>.

16. Ruckman & Kincaid, *supra* note 15, at 93–94.

17. See Daniel W. Voorhees, “No Hanging in this Case”—*The President’s Clemency*, in REMINISCENCES OF ABRAHAM LINCOLN BY DISTINGUISHED MEN OF HIS TIME, 351, 359–60 (Allen Thorndike Rice ed., 1886).

“Well, this is wonderful!” Mr. Lincoln remarked; . . . “I knew this man well; I have heard him preach; he was a tall, angular man like I am, and I have been mistaken for him on the streets. Did you say he was to be shot day after to-morrow? No, no! There will be no shooting or hanging in this case. Henry M. Lockett!”¹⁸

Although the path to clemency was political, this path was accessible to a large portion of U.S. society. Someone without prior political connections, an electoral constituency of his own, a history of campaign contributions, or a high-priced advocate could generate support for a pardon and gain fair consideration. Between 1860 and 1900, presidents granted 49 percent of all the applications for clemency they received,¹⁹ and as recently as 1961 to 1980, they granted 28 percent.²⁰ In the years 1885 through 1931, chief executives approved 10,548 clemency grants.²¹ They reviewed all 10,548 files personally, and they or their Attorneys General provided brief explanations of the reasons for their decisions.²²

Until 1890, a large majority of clemency grants were pardons. Presidents then began to grant sentence commutations in significant numbers. By 1910, the usual (but not invariable) means of ordering an immediate release from confinement was a commutation of sentence “to expire at once.”²³ Using a commutation rather than a pardon to free a prisoner left his conviction intact.

Since 1962, the Justice Department’s rules have forbidden federal prisoners from applying for pardons.²⁴ Pardons are available only after former offenders have been free for at least five years.²⁵ Despite the Justice Department’s rules, presidents sometimes exercise their constitutional power to grant pardons to prisoners. Except when a president bypasses the rules, however, the only sort of clemency that currently gets someone out of prison is a commutation.

18. *Id.*

19. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 53 (1989).

20. See *Clemency Statistics*, U.S. DEP’T OF JUST. (Aug. 24, 2021), <https://www.justice.gov/pardon/clemency-statistics>. From fiscal 1961 through fiscal 1980, inclusive, presidents granted 3,603 petitions; 9,270 were either denied by the president or closed without presidential action. A total of 12,873 petitions were considered.

21. See HUMBERT, *supra* note 9, at 97–99 (part of Table I). The average number of grants per year was 224.

22. Every *Attorney General’s Annual Report* during these years included a list of grants and the reasons given for them. The reports are included in the HeinOnline database.

23. See HUMBERT, *supra* note 9, at 96–98 (part of Table I); compare 1904 ATT’Y GEN. ANN. REP. 53, with 1905 ATT’Y GEN. ANN. REP. 52.

24. 28 C.F.R. Part 1 (1963); 27 Fed. Reg. 11002 (Nov. 10, 1962).

25. 28 C.F.R. § 1.2 (2020) (“No petition for pardon should be filed until the expiration of a waiting period of at least five years after the date of the release of the petitioner from confinement or, in case no prison sentence was imposed, until the expiration of a period of at least five years after the date of the conviction of the petitioner.”).

The following chart shows the number of commutations per decade since 1910.²⁶ It reveals a sharp decline in the 1930s, the near disappearance of commutations in the 1980s, 1990s, and 2000s, and an apparent resurgence of commutations in the 2010s. Explanations of these changes will follow. Of course, the changes should be viewed against the background of a changing federal prison population. In the 1910s, when presidents granted more than 1,100 commutations, the number of federal prisoners was about 2,600.²⁷ In the first decade of the twenty-first century, when presidents granted only fifty-seven commutations, the number was about 180,000.²⁸ While the prison population multiplied about seventy times, sentence commutations fell to one-twentieth their earlier number.

COMMUTATIONS BY DECADE²⁹

1910s	1122
1920s	1764
1930s	774
1940s	201
1950s	69
1960s	340 ³⁰
1970s	96
1980s	29
1990s	17
2000s	57 ³¹
2010s	1726 ³²

26. Again, the decade 1910 to 1920 is the first in which commutations can reasonably be regarded as the “get out of prison” kind of clemency.

27. U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., *HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984*, 145 tbl. 6-1 (1986), <https://www.bjs.gov/content/pub/pdf/hcsus5084.pdf>. This daily population figure for 1915 includes federal inmates housed in state prisons as well as those housed in federal penitentiaries.

28. U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., *PRISONERS IN 2005* 1 (2007), <https://www.bjs.gov/content/pub/pdf/p05.pdf>.

29. U.S. DEP’T OF JUST., *supra* note 20.

30. The bulge in the number of commutations in the 1960s was attributable to the commutation of more than 300 mandatory minimum drug sentences by Presidents Kennedy and Johnson. When Robert Kennedy became Attorney General in 1961, he encouraged the Pardon Attorney and the Director of the Bureau of Prisons to locate prisoners serving mandatory minimum sentences who merited clemency. According to Pardon Attorney Reed Cozart, “When the wardens told [Kennedy] how tremendous [sic] this boosted prison morale, he ordered the whole process speeded up.” See Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 *FED. SENT’G REP.* 139, 145–46 n.23 (2001) (quoting *Executive Clemency Cases Growing Each Year*, *THE SUNDAY STAR*, Jan. 14, 1968). The commutations approved by Presidents Kennedy and Johnson were the last awarded in sizeable numbers until President Obama’s Clemency Project 2014.

31. Almost two-thirds of the fifty-seven commutations issued during the first decade of the twenty-first century (thirty-six commutations) came on one day—the last day of the Clinton ad-

The decline in commutations in the 1930s and the further decline in the 1940s was attributable to the use of a mechanism other than clemency to release prisoners. In 1910, Congress established a parole board in each of the three federal penitentiaries,³³ and in 1930, a single United States Board of Parole replaced the three boards.³⁴ Initially, the number of parole releases was not sufficient to slow commutations, and indeed the number of commutations increased. But in 1932, the Attorney General noted that the number of parole releases had burgeoned:

Since 1910 when the Federal parole act became effective, the number of prisoners released annually on parole from the Federal institutions has grown from 133 in 1910-11 to 5,207 in 1931-32. The increase has been especially rapid during the past few years Thus the number paroled in 1931-32 was more than five times as large as the number paroled three years previously, and more than twice as large as the number paroled two years previously. The number of parole releases has also increased more rapidly than the prison population Parole releases in 1910-11 numbered only 6.4 per 100 of the prison population . . . while parole releases in 1931-32 numbered 38 per 100 of the prison population³⁵

In the 1930s and 1940s, parole greatly reduced the number of commutations. Then, a half-century later, Congress ended parole. The Sentencing

ministration. See U.S. DEP'T OF JUST., COMMUTATIONS, REMISSIONS, AND REPRIEVES GRANTED BY PRESIDENT WILLIAM J. CLINTON (1993-2001), <https://www.justice.gov/pardon/clinton-commutations>. Another 21 percent (twelve commutations) also came during Clinton's final year in office. Moreover, President Clinton granted *all* of the commutations approved during the preceding decade (seventeen commutations). All but three of those commutations came on a single day and freed long-imprisoned members of FALN, a Puerto Rican terrorist group responsible for 120 bombings. See *id.*; Charles Babington, *Puerto Rican Nationalists Freed From Prison*, WASH. POST (Sept. 11, 1999), <https://www.washingtonpost.com/wp-srv/politics/campaigns/keyraces2000/stories/faln091199.htm>. Congress passed resolutions condemning the FALN commutations by votes of 95-to-2 in the Senate and 311-to-41 in the House. See *Bill Clinton Pardons Controversy*, WIKIPEDIA, https://en.wikipedia.org/wiki/Bill_Clinton_pardon_controversy (last visited Aug. 17, 2020).

32. Including commutations granted during the first nine months of fiscal 2020.

33. Act of June 25, 1910, 36 Stat. 819 (1910).

34. See U.S. DEP'T OF JUST., U.S. PAROLE COMM'N, HISTORY OF THE FEDERAL PAROLE SYSTEM 1, 7 (2003). The rhetoric of parole differed from the rhetoric of pardon. Pardon was about justice and mercy, but parole was about treatment. Pardon was seen as ending punishment, but parole was seen as continuing treatment in the community. See Sanford Bates, *What May Be Done to Forward the Judicious Application of the Principle of Individualization of Punishment by the Judge Who Assigns the Penalty to Be Inflicted on the Offender?*, 16 J. CRIM. L. & CRIMINOLOGY 477, 485 (1926) ("[P]unishment depends not upon [the offender's] crime but upon his particular type of personality; the length of punishment depends on his reaction to treatment; and the place and character of his punishment likewise depend upon his needs and his reaction to correctional treatment."); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1-6 (2003).

35. ATT'Y GEN. ANN. REP. 127 (1932). Parole did not reduce the need for pardons to restore the civil rights of ex-offenders, and, after 1930, the number of pardons grew while the number of commutations declined. U.S. DEP'T OF JUST., *supra* note 20.

Reform Act of 1984 (SRA) replaced parole release with a regime of determinate sentencing based on mandatory guidelines.³⁶ A hopeful scholar speculated that the abolition of parole could lead to “an expanded and crucial role for pardons,”³⁷ but it did not happen. Instead, the number of commutations fell further and approached the vanishing point.

With two exceptions—Presidents Obama and Biden—all presidents elected since 1980—Reagan, George H. W. Bush, Clinton, George W. Bush, and Trump—emphasized their support of tough-on-crime measures.³⁸ Most of these presidents evidently saw considerable political risk in releasing prisoners.³⁹ In most years since 1980, the president did not find even one federal prisoner worthy of early release.⁴⁰

In his eight years in the White House, Ronald Reagan commuted thirteen sentences (one percent of the applications his administration received); in his four years, George H. W. Bush commuted three (one-half of one percent of the applications received); in his eight years, Bill Clinton com-

36. See 18 U.S.C. §§ 3551–3625. In 2005, a constitutional ruling of the Supreme Court made the guidelines discretionary. *United States v. Booker*, 543 U.S. 220 (2005).

37. See MOORE, *supra* note 19, at 86. Moore also wrote, “It is reasonable to expect that the role of pardons will expand in the next decade because of changes now taking place in the criminal law Under the new rules, judicial discretion will be sharply curtailed by sentencing guidelines, and parole will gradually be eliminated. Pardon may end up as the only means of individualizing sentences.” *Id.* at 7. At hearings on a precursor to the SRA, a Member of Congress observed, “[W]e always have executive clemency if we do not have parole.” Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary, 97th Cong. 204 (1981) (comment of Rep. Bill McCollum). A representative of the Justice Department declared, “[I]f you eliminate the parole system, you will eliminate a safety valve [but] there is always the executive clemency mechanism as well.” *Id.* at 64 (statement of Assistant Attorney General Jonathan Rose).

38. See Howell Raines, *Reagan Proposes Revision of Laws to Combat Crime*, N.Y. TIMES (Sept. 29, 1981), <https://www.nytimes.com/1981/09/29/us/reagan-proposes-revision-of-laws-to-combat-crime.html>; *Text of President’s Speech on Drive Against Crime*, N.Y. TIMES (Oct. 15, 1982), <https://www.nytimes.com/1982/10/15/us/text-of-president-s-speech-on-drive-against-crime.html>; JACK W. GERMOND & JULES WITCOVER, *WHOSE BROAD STRIPES AND BRIGHT STARS: THE TRIVIAL PURSUIT OF THE PRESIDENCY 157–69* (1989); SIDNEY BLUMENTHAL, *PLEDGING ALLEGIANCE: THE LAST CAMPAIGN OF THE COLD WAR 295–96* (1990); *Willie Horton*, WIKIPEDIA, https://en.wikipedia.org/wiki/Willie_Horton (last visited Jan. 28, 2020); Editorial, *When the Murderer is a Woman*, N.Y. TIMES (Jan. 31, 1998), <https://www.nytimes.com/1998/01/31/opinion/when-the-murderer-is-a-woman.html>; *Ricky Ray Rector*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ricky_Ray_Rector (last visited Jan. 28, 2020); MOLLY IVINS, *SHRUB: THE SHORT BUT HAPPY POLITICAL LIFE OF GEORGE W. BUSH 49* (2000); JAMES MOORE & WAYNE SLATER, *BUSH’S BRAIN: HOW KARL ROVE MADE GEORGE W. BUSH PRESIDENTIAL 205* (2003); Fox Butterfield, *On the Record: Governor Bush on Crime: Bush’s Law and Order Adds Up to Tough and Popular*, N.Y. TIMES (Aug. 18, 1999), <https://www.nytimes.com/1999/08/18/us/record-governor-bush-crime-bush-s-law-order-adds-up-tough-popular.html>; German Lopez, *Donald Trump Wants to Bring Back the “Tough on Crime” Policies that Helped Cause Mass Incarceration*, VOX (Sept. 21, 2016, 3:25 PM), <https://www.vox.com/2016/5/25/11737264/donald-trump-criminal-justice-republican-president>.

39. Few political nightmares could be worse than the one that befell former Arkansas Governor Mike Huckabee when a prisoner whose sentence he commuted murdered four police officers nine years later. See Ross Douthat, *Prisons of Our Own Making*, N.Y. TIMES (Dec. 13, 2009), <https://www.nytimes.com/2009/12/14/opinion/14douthat.html>.

40. U.S. DEP’T OF JUST., *supra* note 20.

mutated sixty-one (one percent of the applications received); in his eight years, George W. Bush commuted eleven (one-tenth of one percent of the applications received); and in his four years, Donald Trump commuted eighty-nine (one percent of the applications received).⁴¹

For a time, Barack Obama seemed no different. He commuted no sentences in fiscal 2009, 2010, 2011, and 2013; he commuted one in 2012 and nine in 2014.⁴² In 2014, however, the Justice Department announced Clemency Initiative 2014, which “prioritized” applications from prisoners who would have received lower sentences under the law then in effect, who already had served at least ten years, and who had no gang or organized crime connections or history of violence.⁴³ By the time Obama left the White House, he had commuted 1,715 sentences (five percent of the petitions his administration received).⁴⁴

All but nineteen of Obama’s commutations were attributable to the Clemency Initiative,⁴⁵ and all of the sentences commuted pursuant to this initiative were for drug trafficking.⁴⁶ When Deborah Leff, the pardon attorney from 2014 to 2016, declared that she was “unable to carry out [her] job effectively” and resigned, she noted that she had been “instructed to set aside thousands of petitions for pardon and traditional commutation.”⁴⁷ Although the average sentence reduction granted under the Clemency Initiative exceeded eleven years, most commutations left their recipients with time to serve. Fewer than one-third of the recipients were released before the end of Obama’s presidency.⁴⁸

41. *Id.* Department of Justice statistics include all applications received by the department. They also include all clemency granted by the president even when it has gone to people who did not apply to the department (as President Trump’s clemency did frequently). *See infra* text accompanying note 76. It is accurate to say both that the number of commutations granted by President Trump equaled 1 percent of all applications received and that Trump granted considerably fewer than one 1 percent of all applications.

42. *Id.*

43. *See Obama Administration Clemency Initiative*, U.S. DEP’T OF JUST. ARCHIVES, <https://www.justice.gov/archives/pardon/obama-administration-clemency-initiative>.

44. U.S. DEP’T OF JUST., *supra* note 20.

45. U.S. SENT’G COMM’N, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE 1, 20 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf.

46. *Id.* at 9.

47. Letter from Deborah Leff, Pardon Att’y, U.S. Dep’t of Just., to Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Just. (Jan. 15, 2016), <https://www.documentcloud.org/documents/2777898-Deborah-Leff-resignation-letter.html>.

48. U.S. SENT’G COMM’N, *supra* note 45, at 17.

Despite the flaws of the Clemency Initiative,⁴⁹ the number of Obama's commutations was astounding. They were ten times greater than the total granted by *all* other presidents between 1980 and 2021.⁵⁰

In the years since the SRA, with the last two years of the Obama administration excepted, the United States, for the first time in its history, had no functioning mechanism for releasing prisoners prior to the expiration of their sentences. Partly as a result, the federal prison population is now 4.25 times what it was at the time of the SRA,⁵¹ and the average time served by federal prisoners has more than doubled.⁵²

Presidents since 1980 also granted pardons (the clemency normally granted only after offenders have completed their sentences) less frequently than their predecessors. The average number of pardons per year for all presidents since 1980 (including Obama) was thirty-five.⁵³ The average number during the administrations of Presidents Wilson, Harding, and Coolidge (when the prison population was less than one-thirtieth its current size) was 135.⁵⁴

III. SOME TROUBLESOME PARDONS BEFORE TRUMP

With the exception of President Obama, presidents since 1980 emphasized how little sympathy they had for criminals, and they reduced clemency for people in prison to a trickle. Things looked different to these presidents, however, when the criminals were people they knew or when the presidents' supporters might cheer clemency because they didn't mind the crimes. Then, resolve melted into compassion. Recent presidents have been tough on crime, but not all crime. As the front door to clemency closed, a back door opened.

President Reagan's pardons of Mark Felt and Edward Miller, the highest-ranking FBI agents ever convicted of a crime, looked much like President Trump's pardon of Sheriff Joe Arpaio.⁵⁵ During the Nixon

49. See CTR. ON THE ADMIN. OF CRIM. L. AT NYU L. SCH., *THE MERCY LOTTERY: A REVIEW OF THE OBAMA ADMINISTRATION'S CLEMENCY INITIATIVE* (2018), http://www.law.nyu.edu/sites/default/files/upload_documents/The%20Mercy%20Lottery.Report%20on%20Obama%20Clemency%20Initiative.2018.pdf.

50. U.S. DEP'T OF JUST., *supra* note 20.

51. See U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 2003* 488 tbl.6.13 (Ann L. Pastore et al. eds., 2005) (reporting that there were 35,781 federal prisoners in 1985); *Statistics*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Feb. 3, 2021) (reporting that there were 152,071 federal prisoners on Jan. 28, 2021).

52. PEW CHARITABLE TR., *PRISON TIME SURGES FOR FEDERAL INMATES: AVERAGE PERIOD OF CONFINEMENT DOUBLES, COSTING TAXPAYERS \$2.7 BILLION A YEAR* (2015), [https://www.pewtrusts.org/~media/. . /prison_time_surges_for_federal_inmates.pdf](https://www.pewtrusts.org/~/media/. . /prison_time_surges_for_federal_inmates.pdf).

53. U.S. DEP'T OF JUST., *supra* note 20.

54. See *id.*; U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS, *HISTORICAL CORRECTIONS STATISTICS*, *supra* note 27, at 145 tbl.6-1 (prison population figure for 1920).

55. For a description of the Arpaio pardon, see *infra* text accompanying notes 78–82.

administration, Felt and Miller authorized nine warrantless, admittedly “extra-legal,” and, as things turned out, fruitless break-ins at the homes of friends and relatives of members of the Weather Underground.⁵⁶ President Reagan described Felt and Miller as “two men who acted on high principle to bring an end to the terrorism that was threatening our nation.”⁵⁷ On learning of Felt and Miller’s pardons, former President Nixon sent them bottles of champagne.⁵⁸ Felt might have taken special pleasure in the gift because he had a secret. He revealed a quarter century later that he was “Deep Throat,” the person who, perhaps more than any other, had brought Nixon’s presidency to an end.⁵⁹

On Christmas Eve, 1992, following his electoral defeat by Bill Clinton, President George H. W. Bush pardoned four officials who had been convicted of criminal conduct in the Iran-Contra affair. He also pardoned two defendants awaiting trial, including former Secretary of Defense Caspar Weinberger.⁶⁰ The Special Counsel for Iran-Contra Affairs declared, “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.”⁶¹ The special counsel added in an interview that President Bush remained a subject of his investigation.⁶²

The most publicized and most criticized of President Clinton’s grants of clemency was the pardon he granted Marc Rich at the urging of Rich’s former wife, Denise Rich. Marc Rich had fled the United States as he was

56. See Robert Pear, *President Reagan Pardons 2 Ex-FBI Officials in 1970s Break-Ins*, N.Y. TIMES (Apr. 16, 1981), <https://www.nytimes.com/1981/04/16/us/president-reagan-pardons-2-ex-fbi-officials-in-1970-s-break-ins.html>; Tim Weiner, *W. Mark Felt, F.B.I. Official who Became ‘Deep Throat,’ is Dead at 95*, N.Y. TIMES (Dec. 19, 2008), <https://www.nytimes.com/2008/12/19/washington/19felt.html>; *W. Mark Felt*, WIKIPEDIA, https://en.wikipedia.org/wiki/Mark_Felt (last visited Feb. 1, 2020).

57. *Reagan Statement About the Pardons*, N.Y. TIMES (Apr. 16, 1981), <https://www.nytimes.com/1981/04/16/us/reagan-statement-about-the-pardons.html>. President Trump similarly described Joe Arpaio as an “American patriot.” Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 25, 2017, 10:00 PM), <https://twitter.com/realDonaldTrump/status/901263061511794688>.

58. Laurie Johnston & Robert McG. Thomas, *Notes on People: Congratulations and Champagne from Nixon*, N.Y. TIMES (Apr. 30, 1981), <https://www.nytimes.com/1981/04/30/nyregion/notes-on-people-congratulations-and-champagne-from-nixon.html>.

59. See Weiner, *supra* note 56.

60. See David Johnston, *Bush Pardons 6 in Iran Affair, Averting a Weinberger Trial; Prosecutor Assails ‘Cover-Up’*, N.Y. TIMES (Dec. 25, 1992), <https://www.nytimes.com/1992/12/25/us/pardons-bush-pardons-6-iran-affair-aborting-weinberger-trial-prosecutor-assails.html>.

61. *The Pardons; Independent Counsel’s Statement on the Pardons*, N.Y. TIMES (Dec. 25, 1992), <https://www.nytimes.com/1992/12/25/us/the-pardons-independent-counsel-s-statement-on-the-pardons.html>.

62. Johnston, *supra* note 60. For further discussion of the Weinberger pardon, see Alschuler, *supra* note 3 at 573 n.122; Albert W. Alschuler, *Unequal Justice for Girtha Gulley*, CHI. TRIB. (Jan. 13, 1993), <https://www.chicagotribune.com/news/ct-xpm-1993-01-13-9303161543-story.html>.

about to be charged with tax evasion and conspiring to purchase more than six million barrels of oil from Iran while that country was holding fifty-two U.S. hostages. Denise Rich had contributed more than \$1 million to the Democratic Party and its candidates, \$450,000 to Clinton's library fund, \$100,000 to a fund supporting Hillary Clinton's Senate campaign, \$10,000 to the president's legal defense fund, and \$7,375 worth of furniture to the Clintons. She also had presented a gold-plated saxophone to the president at a charity ball.⁶³

Clinton's pardon of Rich and his business partner Pincus Green came on the president's last day in office, only hours before the inauguration of George W. Bush. On the same day, Clinton granted clemency to two former members of his cabinet (John Deutch and Henry Cisneros), one cabinet member's son (Richard Riley, Jr.), a former cabinet member's chief of staff (Ron Blackley), a former Member of Congress (Mel Reynolds), a former governor who had been a college friend (J. Fife Symington III), a lawyer who had managed Clinton's Georgetown campaign for student body president (Paul Prospero), one of the president's partners in the Whitewater real estate venture (Susan McDougal), Clinton's half-brother (Roger Clinton), and two applicants who, apparently without Clinton's knowledge, had paid a brother of Hillary Clinton more than \$200,000 apiece to support their applications.⁶⁴

In his memoirs, President George W. Bush acknowledged and decried the corruption of the pardon power: "I came to see massive injustice in the system. If you had connections to the president, you could insert your case into the last-minute frenzy."⁶⁵ As he rode up Pennsylvania Avenue to his successor's inauguration, Bush offered this advice: "Announce a pardon policy early on, and stick to it."⁶⁶ President Obama did not follow Bush's counsel.⁶⁷

In 2007, Bush himself remitted the 30-month prison sentence of Lewis "Scooter" Libby, Vice President Dick Cheney's chief of staff.⁶⁸ Libby had been convicted of perjury, obstruction of justice, and false statements for lying during an investigation of the leak of a CIA agent's identity. Bush called Libby's sentence excessive,⁶⁹ but it was in fact comparable to those

63. Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1137-38 (2010).

64. *See id.* at 1137-60.

65. GEORGE W. BUSH, DECISION POINTS 104 (2010).

66. *Id.* at 105.

67. *See supra* text accompanying note 42.

68. *See* Peter Baker, *Trump Pardons Scooter Libby in a Case that Mirrors His Own*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/us/politics/trump-pardon-scooter-libby.html>.

69. *Bush Statement on Commuting Libby Sentence*, NPR (July 2, 2007, 6:02 PM), <https://www.npr.org/templates/story/story.php?storyId=11667128>.

imposed on similar offenders under the Federal Sentencing Guidelines.⁷⁰ Following his remission of Libby's sentence, the House Judiciary Committee held hearings on "The Use and Misuse of Presidential Clemency Power for Executive Branch Officials."⁷¹ According to Bush's memoirs, his refusal to grant Libby a full pardon led Vice President Cheney to "stare[] at me with an intense look" and say, "I can't believe you're going to leave a soldier on the battlefield."⁷²

IV. THE COMPASSION OF DONALD TRUMP

At the time of President Trump's inauguration, 11,369 unresolved petitions for clemency were before the Justice Department, and during Trump's presidency the Department received 11,611 more. During his presidency, Trump approved 237 grants of clemency.⁷³ Only two presidents since 1900 had approved fewer grants; both were named Bush.⁷⁴ Eighty-one percent of Trump's grants (193) followed his defeat in the presidential election of 2020, and 60 percent (143) came on his last day as president.⁷⁵

Many of Trump's grants did not go to people who had petitioned the Department. Many in fact went to people whom the Department's rules declared ineligible to apply. One estimate is that only about twenty-five resulted from Justice Department recommendations; the rest resulted from

70. Eleven days before Bush remitted Libby's sentence, the Supreme Court affirmed a guidelines sentence of thirty-three months for perjury in a case with facts very similar to Libby's. *Rita v. United States*, 551 U.S. 338 (2007). On the day Bush remitted Libby's sentence, the defendant in the Supreme Court case began serving his. *Use and Misuse of Presidential Clemency Power for Executive Branch Officials: Hearing Before the Committee on the Judiciary*, 110th Cong. (2007).

71. *Use and Misuse of Presidential Clemency Power for Executive Branch Officials: Hearing Before the Committee on the Judiciary*, 110th Cong. (2007).

72. BUSH, *supra* note 65, at 105. President Trump later granted a full pardon to Libby. *See infra* text accompanying notes 110–12.

73. U.S. DEP'T OF JUST., *supra* note 20. Trump also denied 180 petitions, and the Justice Department closed 8,013 petitions because its rules made applicants ineligible for clemency or because applicants had died, completed their sentences, or failed to respond to repeated requests for information. The number of pending petitions at the end of the period had grown to 14,753. *Id.*

74. *Id.*

75. *See Statement from the Press Secretary Regarding Executive Grants of Clemency*, THE WHITE HOUSE (Jan. 20, 2021), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-012021/> [hereinafter *Jan. 20 Statement*]; *Statement from the Press Secretary Regarding Executive Grants of Clemency*, THE WHITE HOUSE (Dec. 23, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-122320/> [hereinafter *Dec. 23 Statement*]; *Statement from the Press Secretary Regarding Executive Grants of Clemency*, THE WHITE HOUSE (Dec. 22, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-122220/> [hereinafter *Dec. 22 Statement*]; *Statement from the Press Secretary Regarding Executive Grant of Clemency for General Michael T. Flynn*, THE WHITE HOUSE (Nov. 25, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grant-clemency-general-michael-t-flynn/> [hereinafter *Nov. 25 Statement*].

personal or political connections.⁷⁶ The Department's Office of the Pardon Attorney has an annual budget of \$4.5 million and employs about nineteen people, including eleven attorneys.⁷⁷ Perhaps the staff of this office feel like hamsters on an exercise wheel.

V. A PARADE OF PARDONS

President Trump's grants commonly cheered his supporters and appalled his detractors. Even the recipients who seemed most clearly to deserve clemency often appeared to have received it because they had celebrity champions or because the president could immediately use their grants for political gain.

Trump's grants included:

* A pardon for Joe Arpaio, the former sheriff of Maricopa County, Arizona, who had been convicted of criminal contempt for violating a judicial order to end ethnic profiling.⁷⁸ Arpaio was known for his harsh treatment of jail inmates as well as his efforts to stop unlawful immigration.⁷⁹ He had been a prominent supporter of Trump's presidential candidacy and had spoken on Trump's behalf at the 2016 Republican National Convention.⁸⁰ Three days before pardoning Arpaio, Trump cheered a crowd by asking whether the former sheriff had been "convicted for doing his job."⁸¹ The president declared, "I'll make a prediction. I think he's going to be just fine, OK."⁸²

76. Kenneth P. Vogel, *The Road to Clemency from Trump Was Closed to Most Who Sought It*, N.Y. TIMES (Jan. 26, 2021, 5:00 AM), <https://www.nytimes.com/2021/01/26/us/politics/trump-pardons.html>; see Jack Goldsmith & Matt Gluck, *Trump's Circumvention of the Justice Department Clemency Process*, LAWFARE (Dec. 29, 2020, 1:49 PM), <https://www.lawfareblog.com/trumps-circumvention-justice-department-clemency-process> (estimating that only seven of Trump's first ninety-four clemency grants were made on the recommendation of the Justice Department). The White House statement concerning Trump's 143 grants of clemency on his last day in office noted that eighteen were "supported by Acting Attorney General Jeffrey Rosen and the Office of the Pardon Attorney." *Jan. 20 Statement*, *supra* note 75.

77. Beth Reinhard & 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.

78. *Pardon of Joe Arpaio*, WIKIPEDIA, https://en.wikipedia.org/wiki/Pardon_of_Joe_Arpaio (last visited Apr. 19, 2018).

79. *Joe Arpaio*, WIKIPEDIA, https://en.wikipedia.org/wiki/Joe_Arpaio (last visited Apr. 19, 2018).

80. Michael Edison Hayden, *Sheriff Joe Arpaio Stumps for Trump at the Republican National Convention*, ABC NEWS (July 21, 2016, 7:22 PM), <http://abcnews.go.com/Politics/sheriff-joe-arpaio-stumps-trump-republican-national-convention/story?id=40780727>.

81. Kevin Liptak, Daniella Diaz & Sophie Tatum, *Trump Pardons Former Sheriff Joe Arpaio*, CNN POLITICS (Aug. 27, 2017, 2:32 AM), <https://www.cnn.com/2017/08/25/politics/sheriff-joe-arpaio-donald-trump-pardon/index.html>. For further discussion of the Arpaio pardon, see Alschuler, *supra* note 3, at 577–80.

82. Liptak, Diaz & Tatum, *supra* note 81; Alschuler, *supra* note 3, at 577–80.

* A pardon for former Navy Petty Officer First Class Kristian Saucier, who had been convicted in a civilian court after unlawfully taking photographs in classified areas of a nuclear submarine. Fox News commentators and Saucier himself had argued for a pardon on Fox News. Their principal argument was that Saucier's crime posed no greater risk to national security than one supposedly committed by Hillary Clinton.⁸³

* A pardon for conservative writer Dinesh D'Souza, who had pleaded guilty to making illegal campaign contributions. D'Souza maintained on *Fox and Friends* that his prosecution had been prompted by President Obama's "anger over [a] movie that I made about him."⁸⁴

* A pardon for former newspaper publisher Lord Conrad M. Black of Crossharbour, who had served a prison sentence for mail fraud. Black had been a business associate and neighbor of the President, and he recently had published a book titled *Donald J. Trump: A President Like No Other*.⁸⁵

* A pardon for David Safavian, a former Republican lobbyist and office holder who served a prison term for lying about his relationship with lobbyist Jack Abramoff. Safavian accepted a golf trip to London and Scotland from Abramoff while Safavian was chief of staff of the General Services Administration and Abramoff was negotiating with that agency for the purchase or development of government buildings. After Safavian's release, he became a champion of criminal justice reform.⁸⁶

* A pardon for Michael Milken, a once prominent financier, who served a prison term for securities and tax violations. After his release, Milken devoted much of his wealth and energy to medical philanthropy. He

83. Ryan Lucas, *Trump Pardons Ex-Navy Sailor Sentenced for Photos of Submarine*, NPR (Mar. 9, 2018, 5:10 PM), <https://www.npr.org/2018/03/09/592440282/trump-pardons-ex-navy-sailor-sentenced-for-photos-of-submarine>. An Internet search for "Kristian Saucier on Fox News" reveals more than twenty Fox News segments concerning his case. See Cleve R. Wootson, Jr., *A Felon Pleaded His Case on 'Fox & Friends.' Days Later, Trump Pardoned Him*, WASH. POST (Mar. 10, 2018, 2:15 PM), <https://www.washingtonpost.com/news/the-fix/wp/2018/03/10/a-felon-pleaded-his-case-on-fox-friends-days-later-trump-pardoned-him/>. After Saucier's pardon, he announced plans to sue former President Obama and others for denying him equal protection by prosecuting him and not Clinton. Elizabeth Llorente, *Ex-Navy Sailor Pardoned by Trump Says He's Suing Comey and Obama*, FOX NEWS (June 7, 2018), <https://www.foxnews.com/politics/ex-navy-sailor-pardoned-by-trump-says-hes-suing-comey-and-obama>.

84. Peter Baker, *Dinesh D'Souza, Pardoned by Trump, Claims Victory Over Obama Administration*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/us/politics/trump-pardon-dsouza.html>.

85. See Eli Watkins & Allie Malloy, *Trump Issues Pair of Pardons to Conservative Advocate, Former Publisher*, CNN POLITICS (May 16, 2019, 5:14 AM), <https://www.cnn.com/2019/05/15/politics/trump-pardons-conrad-black-patrick-nolan/index.html>; Graham Slaughter, *Conrad Black Says Full Pardon from Trump is "Very Gratifying"*, CTV NEWS (May 16, 2019, 7:57 AM), <https://www.ctvnews.ca/canada/conrad-black-says-full-pardon-from-trump-is-very-gratifying-1.4424348>.

86. See Tom Shoop, *President Pardons Ex-GSA, OMB Official*, GOVEXEC DAILY (Feb. 18, 2020), <https://www.govexec.com/oversight/2020/02/president-pardons-ex-gsa-omb-official/163178/>; Nick Wakeman, *Former GSA Official Among Trump's Pardons*, FCW (Feb. 19, 2020), <https://fcw.com/articles/2020/02/19/safavian-trump-pardon-wakeman.aspx>.

also paid \$47 million to settle a Securities and Exchange Commission complaint that he violated a lifetime ban on securities work.⁸⁷ A White House press release noted thirty-three supporters of Milken's pardon.⁸⁸ Not all were wealthy and not all were Republicans, but a description of the list as a "‘murderers’ row of Republican donors and billionaires" was not far from the mark.⁸⁹ Included were Sheldon and Miriam Adelson (who, over the prior decade, had given \$308 million to promote the election of Republicans⁹⁰), Tom Barrack (the chair of Trump's inaugural committee, a creditor who had rescued Trump's son-in-law, Jared Kushner, from bankruptcy,⁹¹ and a powerbroker who later was indicted for lobbying the Trump administration illegally on behalf of the United Arab Emirates⁹²), Rupert Murdoch (the founder of Fox News⁹³), Robert Kraft (the owner of the New England Patriots and a personal friend of the president⁹⁴), Maria Bartiromo (a Fox Business anchor⁹⁵), Representative Kevin McCarthy (the House Minority

87. See James B. Stewart, *Pardon Closes the Book on Michael Milken's Case but Can't Rewrite It*, N.Y. TIMES (Feb. 21, 2020), <https://www.nytimes.com/2020/02/18/business/michael-milken-case-lessons.html>.

88. *Statement from the Press Secretary Regarding Executive Grants of Clemency*, THE WHITE HOUSE (Feb. 18, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/state-ment-press-secretary-regarding-executive-grants-clemency-2> [hereinafter *Feb. 18 Statement*].

89. See John K. Carroll, *I Was a Prosecutor in the Michael Milken Case. I'm Outraged at the Pardon Process*, WASH. POST (Feb. 19, 2020, 8:05 PM), <https://www.washingtonpost.com/opinions/2020/02/19/i-was-prosecutor-michael-milken-case-im-outraged-pardon-process/>; Erik Larson, *Milken Pardon Backed by Billionaires from Funds, Real Estate*, BLOOMBERG (Feb. 18, 2020, 5:11 PM), <https://www.bloomberg.com/news/articles/2020-02-18/milken-pardon-backed-by-billionaires-from-funds-real-estate>; James B. Stewart & Jesse Drucker, *Milken Had Key Allies in Pardon Bid: Trump's Inner Circle*, N.Y. TIMES (Mar. 1, 2020), <https://www.nytimes.com/2020/03/01/business/michael-milken-trump-pardon.html>.

90. See Robert Frank, *Billionaires Are Spending More on Political Contributions, Here Are the Three Biggest Spenders*, CNBC (July 1, 2020, 10:32 AM), <https://www.cnbc.com/2020/07/01/sheldon-and-miriam-adelson-top-list-of-billionaire-political-contributors.html>; Albert W. Alschuler, *Limiting Political Contributions After McCutcheon, Citizens United, and SpeechNow*, 67 FLA. L. REV. 389 app. at 493–97 (2015).

91. See *Thomas J. Barrack Jr.*, WIKIPEDIA, https://en.wikipedia.org/wiki/Tom_Barrack (last visited Aug. 22, 2020).

92. See Sharon LaFraniere & William K. Rashbaum, *Thomas Barrack, Trump Fund-Raiser, Indicted on Lobbying Charge*, N.Y. TIMES (July 20, 2021), <https://www.nytimes.com/2021/07/20/us/thomas-barrack-trump-indicted.html>.

93. See *History of Fox News*, WIKIPEDIA, https://en.wikipedia.org/wiki/History_of_Fox_News (last visited Aug. 22, 2020). Murdoch was a friend and business associate of Milken. See, e.g., David A. Vise, *Once Again, Milken Goes Looking for Megadeals*, WASH. POST (June 8, 1994), <https://www.washingtonpost.com/archive/business/1994/06/08/once-again-milken-goes-looking-for-megadeals/36743c3f-4ddf-47fa-a98b-ea4f1947a2c5/>; *A Presidential Pardon for the 'Junk Bond King'*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/business/dealbook/milken-trump-pardon.html>.

94. See Gary Myers, *Patriots Owner Robert Kraft Opens Up About Deflategate, Roger Goodell and President Donald Trump*, N.Y. DAILY NEWS (Jan. 29, 2017, 10:37 PM), <https://www.nydailynews.com/sports/football/robert-kraft-opens-goodell-deflategate-donald-trump-article-1.2958959>.

95. See Sarah Ellison, *What Happened to Maria Bartiromo?*, WASH. POST (Dec. 23, 2020, 5:00 AM), https://www.washingtonpost.com/lifestyle/media/maria-bartiromo-fox-news-trump/2020/12/22/35520a90-3fb1-11eb-8db8-395dedaaa036_story.html.

Leader⁹⁶), Elaine Chao (a member of Trump's cabinet⁹⁷), and Rudolph Giuliani (Trump's lawyer⁹⁸—and the former U.S. Attorney who, thirty years earlier, had relentlessly prosecuted Milken⁹⁹). Only two people on the list appeared to have no financial or personal ties to either Trump or Milken.¹⁰⁰

* A pardon for Bernard Kerik, who served a prison term for obstruction, false statements, and tax offenses. Kerik was Rudolph Giuliani's bodyguard and driver during Giuliani's 1993 campaign for Mayor of New York. After the election, he joined the city's Department of Corrections. In 1998, Giuliani appointed him Corrections Commissioner and, in 2000, Police Commissioner. In 2004, President Bush nominated Kerik to be Secretary of Homeland Security, but Kerik soon withdrew his name. The federal crimes to which he pleaded guilty stemmed partly from his acceptance of renovations to his apartment worth \$250,000 from a firm said to have organized crime connections and from his falsehoods to the White House during his screening for the cabinet position.¹⁰¹ A White House press release noted thirteen supporters of Kerik's pardon¹⁰² including Giuliani, Andrew Napolitano (a Fox News analyst¹⁰³), Geraldo Rivera (a Fox News reporter and commentator¹⁰⁴), Charlie Daniels (a member of the Country Music Hall of Fame¹⁰⁵), Peter King (a member of Congress¹⁰⁶), Eddie Gallagher (a Navy Seal whose demotion Trump reversed after Gallagher was acquitted of murdering a teenage captive but convicted of wrongfully posing for a photo with the victim's corpse¹⁰⁷), and Sidney Powell (a lawyer known for her

96. See *About*, KEVIN MCCARTHY: REPRESENTING CALIFORNIA'S 23RD DISTRICT, <https://kevinmccarthy.house.gov/about> (last visited Sept. 10, 2021).

97. See *Secretary Elaine L. Chao*, <https://www.elainechao.com> (last visited Sept. 10, 2021).

98. See Shayna Jacobs, Rosalind S. Helderman & Devlin Barrett, *Giuliani's N.Y. Law License Suspended in Connection with Efforts to Overturn 2020 Election*, WASH. POST (June 24, 2021, 4:37 PM), https://www.washingtonpost.com/national-security/rudy-giuliani-law-license-suspended/2021/06/24/037f3f4c-d502-11eb-a53a-3b5450fdca7a_story.html.

99. See generally DANIEL R. FISCHER, *PAYBACK: THE CONSPIRACY TO DESTROY MICHAEL MILKEN AND HIS FINANCIAL REVOLUTION* (1995).

100. Stewart & Drucker, *supra* note 89.

101. See *Bernard Kerik*, WIKIPEDIA, https://en.wikipedia.org/wiki/Bernard_Kerik (last visited Aug. 25, 2020); Press Release, Michael J. Garcia, U.S. Attorney for S.D.N.Y., Ex-New York City Police Commissioner Bernard Kerik Charged by U.S. in Conspiracy, Tax, and False Statements Case (Nov. 9, 2007), <https://www.justice.gov/archive/usao/nys/pressreleases/November07/kerikindictmentpr.pdf>.

102. *Feb. 18 Statement*, *supra* note 88.

103. See Lydia O'Connor, *Fox News' Andrew Napolitano Faces Another Sexual Assault Lawsuit*, HUFFPOST (Sept. 28, 2020, 2:34 PM), https://www.huffpost.com/entry/fox-news-judge-andrew-napolitano-sexual-assault_n_5f72172fc5b6117cd10284cc.

104. See *Geraldo Rivera*, FOX NEWS, <https://www.foxnews.com/person/r/geraldo-rivera> (last visited Sept. 10, 2021).

105. See Bill Friskics-Warren, *Charlie Daniels, Fiddling Force in Country and Rock, Dies at 83*, N.Y. TIMES (July 7, 2020), <https://www.nytimes.com/2020/07/06/arts/music/charlie-daniels-dead.html>.

106. See *Peter King*, BALLOTEDIA, https://ballotpedia.org/Peter_King (last visited Sept. 10, 2021).

107. See *infra* note 185.

appearances on Fox News and for representing Trump's former national security advisor Michael Flynn¹⁰⁸).

* Sentence commutations and pardons for Dwight Hammond and Steven Hammond, Oregon ranchers serving prison sentences for arson on federal land. The Hammonds' convictions led some of their supporters to occupy the Malheur Wildlife Refuge. One of their advocates was Indiana businessman Forrest Lucas, a friend of Vice President Mike Pence. Lucas had contributed more than \$100,000 to Pence campaigns, and the released prisoners returned home on his private jet.¹⁰⁹

* A pardon for Lewis "Scooter" Libby, who had been Vice President Dick Cheney's chief of staff.¹¹⁰ Libby had been convicted of obstruction of justice, perjury, and false statements for lying during the investigation of a leak to the press that Valerie Plame was a CIA agent. President George W. Bush remitted Libby's prison sentence soon after it was imposed, but he left other sanctions and Libby's conviction in place.¹¹¹ Some speculated that Libby's full pardon was intended to send a message to Trump associates that crime can be forgiven when criminals remain loyal to a president.¹¹²

* A sentence commutation for Alice Marie Johnson, who had served twenty-one years of a mandatory life sentence for a nonviolent cocaine trafficking offense. A powerful internet video about Johnson¹¹³ came to the attention of reality television star Kim Kardashian West, and she supported a commutation of Johnson's sentence in a well-publicized meeting with Trump in the Oval Office.¹¹⁴ Trump introduced Johnson during his 2019 State of the Union address, and his campaign paid several million dollars to broadcast an advertisement during the 2020 Super Bowl that showed her tearfully thanking the president.¹¹⁵ Johnson spoke at the 2020 Republican

108. See Jeremy W. Peters & Alan Feuer, *What We Know About Sidney Powell, the Lawyer Behind Wild Voting Conspiracy Theories*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/article/who-is-sidney-powell.html>.

109. See Eileen Sullivan & Julie Turkewitz, *Trump Pardons Oregon Ranchers Whose Case Inspired Wildlife Refuge Takeover*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/10/us/politics/trump-pardon-hammond-oregon.html>; Julie Turkewitz, *How a Tycoon and Pence Friend Helped 2 Ranchers Get Pardons*, N.Y. TIMES (July 12, 2018), <https://www.nytimes.com/2018/07/12/us/forrest-lucas-mike-pence-hammond-pardons.html>.

110. See Baker, *supra* note 68.

111. See *supra* text accompanying notes 68–72.

112. See Marcy Wheeler, *Trump Pardoned Libby to Protect Himself from Mueller*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/opinion/trump-scooter-libby-pardon.html>.

113. Mic, *Miss Alice is Serving Life for a Nonviolent Offense*, FACEBOOK (May 2, 2018), <https://www.facebook.com/MicMedia/videos/1904448656244582>.

114. See 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>.

115. See Annie Karni & Maggie Haberman, *Trump and Kushner Saw Super Bowl Ad as Way of Making Inroads with Black Voters*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/04/us/politics/trump-super-bowl-ad.html>; Frank Miles, *Trump Campaign Prison Reform Super*

National Convention,¹¹⁶ and the president granted her a full pardon the next day.¹¹⁷ He flew Johnson from Washington to Cleveland on Air Force One to attend the first debate of the 2020 campaign.¹¹⁸ Contrary to plan, however, Trump failed to ask Democratic candidate Joe Biden to apologize to Johnson for his role in enacting a 1994 crime bill.¹¹⁹

* A pardon for Jon Ponder, who became a friend of the FBI agent who arrested him and who, after completing his prison sentence for bank robbery, founded Hope for Prisoners, a nonprofit organization providing job training, counseling, and other assistance to former inmates. Trump pardoned Ponder during the 2020 Republican National Convention. The convention showed a seven-minute video in which the president signed the pardon and he, Ponder, and the FBI agent spoke.¹²⁰ A Fox News commentator observed that the video was the “most powerful moment” of the day’s program.¹²¹

* A pardon for Edward DeBartolo, Jr., a former owner of the San Francisco 49ers and a member of the Pro Football Hall of Fame. DeBartolo had delivered a briefcase containing \$400,000 in cash to Louisiana Governor Edwin Edwards and obtained a riverboat gambling license the next day. He avoided prison by testifying against Edwards, paying a \$1 million fine, and pleading guilty to misprision of a felony (failing to disclose a felony). NFL greats Jerry Rice, Jim Brown, Ronnie Lott, and Charles Haley were present when the White House announced DeBartolo’s pardon.¹²²

Bowl Ad Features Alice Marie Johnson, FOX NEWS (Feb. 2, 2020), <https://www.foxnews.com/us/trump-campaign-prison-reform-super-bowl-ad-alice-johnson>.

116. Brooke Singman, *Alice Johnson, at Republican National Convention, Praises Trump for Giving Her ‘a Second Chance’*, FOX NEWS (Aug. 27, 2020), <https://www.foxnews.com/politics/alice-johnson-praises-trump-for-giving-her-a-second-chance>.

117. President Donald Trump, The White House, Remarks by President Trump Granting a Full Pardon to Alice Johnson (Aug. 28, 2020, 2:10 PM), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-granting-full-pardon-alice-johnson>.

118. Katherine Burgess, *Memphian Alice Marie Johnson on Air Force One as Trump Heads to Debate*, MEMPHIS COM. APPEAL (Sept. 29, 2020, 3:24 PM), <https://www.commercialappeal.com/story/news/2020/09/29/trump-biden-debate-alice-marie-johnson-air-force-one/3577237001>.

119. Shannon Pettypiece, Leigh Ann Caldwell & Carol E. Lee, *Trumpworld ‘Worried’ Amid Debate Performance Fallout*, NBC NEWS (Oct. 1, 2020, 9:08 PM), <https://www.nbcnews.com/politics/2020-election/trumpworld-worried-amid-debate-performance-fallout-n1241596>.

120. See Pranshu Verma & Stephanie Saul, *Trump Pardons a Convicted Bank Robber*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/08/25/us/politics/trump-jon-ponder-pardon.html>.

121. Charles Creitz, *Brit Hume Calls Trump Pardon of Jon Ponder ‘Most Powerful Moment’ of RNC’s Second Night*, FOX NEWS (Aug. 26, 2020), <https://www.foxnews.com/politics/brit-hume-trump-pardon-jon-ponder-nc>. The president said, “I will continue to give all Americans, including former inmates, the best chance to build a new life and achieve their own American dream, and a great American dream it is.” Verma & Saul, *supra* note 120. In 2016, Trump’s remarks had a different tone. He said, “Obama is even releasing violent criminals from the jails, including drug dealers, and those with gun crimes. And they’re being let go by the thousands. By the thousands.” Lopez, *supra* note 38.

122. See Tyler Bridges, *Trump Pardons Edward DeBartolo Jr., Who Paid \$400K Cash to Edwin Edwards for Gambling License*, ADVOCATE (Feb. 18, 2020, 6:06 PM), <https://www.the>

* A posthumous pardon for heavyweight boxing champion Jack Johnson, who had been convicted in 1913 of traveling with his white girlfriend across a state line. Film star Sylvester Stallone brought Johnson's case to Trump's attention, and he and a number of boxers surrounded Trump in the Oval Office as he signed Johnson's pardon.¹²³

* A posthumous pardon for women's rights champion Susan B. Anthony, which Trump announced in an Oval Office ceremony on the centennial of the Nineteenth Amendment. Anthony was convicted in 1872 of unlawful voting. Historians said she would have refused a pardon if one had been offered during her lifetime.¹²⁴

* A pardon for Chris Collins, a former Republican member of Congress convicted in 2019 of insider trading. A member of the board of directors of a drug company, he telephoned his son from the White House lawn with instructions to sell shares in the company after he learned that one of its drugs had failed a trial. Collins had been the first member of Congress to endorse Trump's campaign for president. He was serving a twenty-six-month prison sentence at the time of his pardon.¹²⁵

* A pardon for Duncan D. Hunter, a former Republican member of Congress who pleaded guilty in 2019 to a campaign-finance violation. Hunter and his wife allegedly used \$250,000 in campaign funds for expenses that included vacations, video games, theatre tickets, and oral sur-

advocate.com/baton_rouge/news/politics/article_c96a8aca-5274-11ea-8731-dfd4499e944f.html; *President Trump Pardons Former 49ers Owner Edward DeBartolo Jr.*, ESPN (Feb. 18, 2020), https://www.espn.com/nfl/story/_/id/28729223/president-trump-pardons-former-49ers-owner-edward-debartolo-jr.

123. See John Eligon & Michael D. Shear, *Trump Pardons Jack Johnson, Heavyweight Boxing Champion*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/sports/jack-johnson-pardon-trump.html>.

124. See Scott Martelle, *Opinion: Trump Doesn't Understand Susan B. Anthony's Fight, Which is Why He Pardoned Her*, L.A. TIMES (Aug. 18, 2020, 12:23 PM), <https://www.latimes.com/opinion/story/2020-08-18/susan-b-anthony-pardon-vote-trump>.

Before President Clinton granted the United States' first posthumous pardon in 1999, the Justice Department's pardon attorney maintained that a president could not approve a posthumous pardon because no one could deliver it and the recipient could not accept it. Darryl W. Jackson, Jeffrey H. Smith & Edward H. Sisson, *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251, 1265–67 (1999); see *United States v. Wilson*, 32 U.S. 150, 161 (1833) ("A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete, without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."); but see *Biddle v. Perovich*, 274 U.S. 480, 486–87 (1927) (holding that a convict may not refuse to accept a president's commutation of his death sentence and calling into question the ability of anyone to decline to accept a pardon).

125. Nicole Hong, *With One Crime, an Ex-Congressman Damaged 2 Families*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/01/24/nyregion/chris-collins-son-insider-trading.html>; Michael Kranish, *Trump Vowed to Drain the Swamp. Then He Granted Clemency to Three Former Congressmen Convicted of Federal Crimes*, WASH. POST (Dec. 23, 2020, 8:33 PM), https://www.washingtonpost.com/politics/trump-pardon-hunter-collins-stockman/2020/12/23/dc2ff8e0-4538-11eb-975c-d17b8815a66d_story.html.

gery.¹²⁶ Hunter also allegedly spent campaign funds to conduct five extramarital affairs.¹²⁷ Like Collins, Hunter was an early supporter of Trump's 2016 campaign.¹²⁸ He received his pardon shortly before he was to report to prison to serve an eleven-month sentence.¹²⁹ Trump also pardoned his estranged wife.¹³⁰

* A sentence commutation for Steve Stockman, a former Republican member of Congress who had completed two years of a ten-year sentence for using \$1.25 million in donations intended for charity, for such personal expenses as hot air balloon rides.¹³¹

* A pardon for Rick Renzi, a former Republican member of Congress who was convicted in 2013 of extortion, insurance fraud, and other crimes and who completed a three-year sentence.¹³²

* A pardon for Robin Hayes, a former Republican member of Congress, who, after being charged with participating in a \$2 million bribery scheme in 2019, pleaded guilty to making a false statement, agreed to cooperate with prosecutors,¹³³ and was sentenced to a term of probation and a fine.¹³⁴

* A pardon for Mark Siljander, a former Republican member of Congress who pleaded guilty in 2010 to obstructing justice and failing to register as a foreign agent. Siljander served a one-year prison term.¹³⁵

126. Indictment, *United States v. Hunter*, No. 18CR3677W (S.D. Cal., Aug. 21, 2018), <https://www.justice.gov/usao-sdca/press-release/file/1089516/download###>.

127. Tim Arango, *Duncan Hunter Used Campaign Money for Multiple Affairs, Prosecutors Say*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/duncan-hunter-affair-wife.html>.

128. Nick Gass, *Trump Lands His First Congressional Endorsements*, POLITICO (Feb. 24, 2016, 10:59 AM), <https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/02/duncan-hunter-endorses-donald-trump-219725>.

129. *Duncan Hunter's Swampy Pardon*, PRESS-ENTERPRISE (Dec. 29, 2020, 11:17 AM), <https://www.pe.com/2020/12/29/duncan-hunters-swampy-pardon>.

130. Morgan Cook, *Margaret Hunter to Get Full Pardon, White House Says*, SAN DIEGO UNION-TRIB. (Dec. 23, 2020, 4:55 PM), <https://www.sandiegouniontribune.com/news/watchdog/story/2020-12-23/margaret-hunter-to-get-full-pardon>.

131. Shannon Najmabadi, *Trump Commutes Remaining Prison Term of Former Texas GOP Congressman Steve Stockman, Who Was Convicted of Misusing Charitable Funds*, TEX. TRIB. (Dec. 22, 2020, 7:00 PM), <https://www.texastribune.org/2020/12/22/donald-trump-commute-prison-steve-stockman-texas-congressman>; Press Release, U.S. Dep't of Just. Office of Public Affairs, Former U.S. Congressman Sentenced to 10 Years in Prison for Extensive Fraud, Tax, and Election Crime Scheme (Nov. 7, 2018), <https://www.justice.gov/opa/pr/former-us-congressman-sentenced-10-years-prison-extensive-fraud-tax-and-election-crimes>.

132. *Pardons Granted by President Donald J. Trump*, U.S. DEP'T OF JUST. (Apr. 28, 2021), <https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021>.

133. Hannah Knowles, *Former North Carolina GOP State Party Chairman Pleads Guilty to Making False Statement to FBI*, WASH. POST (Oct. 2, 2019), <https://www.washingtonpost.com/politics/2019/10/02/former-north-carolina-state-political-party-chairman-pleads-guilty-making-false-statement-fbi>.

134. U.S. DEP'T OF JUST., *supra* note 132.

135. *Id.*

* A pardon for Randall “Duke” Cunningham, a former Republican member of Congress who spent eight years in prison after pleading guilty to accepting \$2.4 million in bribes from defense contractors.¹³⁶

* A sentence commutation for Kwame Kilpatrick, Detroit’s Democratic mayor from 2002 until his resignation in 2008. Kilpatrick’s resignation came after he lied under oath during a suit against the city and then approved a \$8.4 million settlement to conceal this deception. His time as mayor was marred by several other scandals.¹³⁷ After leaving office, Kilpatrick was jailed for obstructing justice and other state crimes. In 2013, he was convicted in a federal court of a multi-million-dollar corruption scheme.¹³⁸ Kilpatrick began a letter to Trump from prison by declaring, “I first want to congratulate you for the overwhelming and stunning victories of your Presidential campaign, and also the unprecedented success of your first two-years in office. You have shaken up the entire world . . . and that is a great thing to behold.”¹³⁹ Kilpatrick then wrote that an “Obama appointed team viciously and maliciously pursued” his prosecution and partnered “with the media in planting stories, riddled with blatant lies, malicious rumors, and evil intent. #fake news.”¹⁴⁰ By the time of Trump’s clemency, Kilpatrick had served seven years of a twenty-eight-year sentence. A co-defendant sentenced to twenty-one years remained in prison with ten years to serve when Kilpatrick went home.¹⁴¹

* A sentence commutation for former Illinois Governor Rod Blagojevich, a Democrat, who had been convicted of attempted extortion

136. See Tony Perry, *Rep. Cunningham Pleads Guilty to Bribery, Resigns*, L.A. TIMES (Nov. 29, 2005, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2005-nov-29-me-duke29-story.html>; Greg Moran, *Trump’s 11th Hour Pardon of Duke Cunningham Called ‘Total Disgrace’*, SAN DIEGO UNION-TRIB. (Jan. 20, 2021, 1:18 PM), <https://www.sandiegouniontribune.com/news/courts/story/2021-01-20/trumps-11th-hour-pardon-of-duke-cunningham-called-total-disgrace>; see generally MARCUS STERN, JERRY KAMMER, DEAN CALBREATH & GEORGE E. CONDON, *THE WRONG STUFF: THE EXTRAORDINARY SAGA OF RANDY “DUKE” CUNNINGHAM, THE MOST CORRUPT CONGRESSMAN EVER CAUGHT* (2007). Cunningham’s pardon was conditioned on his payment of court-ordered restitution and forfeiture.

137. Karen Drew, *‘The Kwame Kilpatrick Rollercoaster Ride’—The Rise and Fall of Former Detroit Mayor*, CLICK-ON DETROIT (Jan. 20, 2021, 2:13 PM), <https://www.clickondetroit.com/features/2021/01/20/the-kwame-kilpatrick-rollercoaster-ride-the-rise-and-fall-of-former-detroit-mayor/>; Kwame Kilpatrick, WIKIPEDIA, https://en.wikipedia.org/wiki/Kwame_Kilpatrick (last visited Feb. 3, 2021).

138. Steven Yaccino, *Kwame M. Kilpatrick, Former Detroit Mayor, Sentenced to 28 Years in Corruption Case*, N.Y. TIMES (Oct. 10, 2013), <https://www.nytimes.com/2013/10/11/us/former-detroit-mayor-kwame-kilpatrick-sentencing.html>.

139. Alan Lengel, *2019 Recap: Ex-Detroit Mayor Kilpatrick Pleads for Trump’s Help in Gushing Letter*, DEADLINE DETROIT (Dec. 27, 2019, 7:45 AM), https://www.deadlinedetroit.com/articles/22494/ex-detroit-mayor-kilpatrick-pleads-for-trump_s_help_in_gushing_letter_praising_his_unprecedented_success (reprinting the letter in full).

140. *Id.*

141. Tresa Baldas, *Kwame Kilpatrick Vowed a Comeback. Trump Made it Happen*, DETROIT FREE PRESS (Jan. 20, 2021, 8:44 PM), <https://www.freep.com/story/news/local/michigan/detroit/2021/01/20/kwame-kilpatrick-pardoned-donald-trump-detroit-mayor/4217253001>. Trump’s commutation left intact Kilpatrick’s obligation to pay \$4,779,826 in restitution.

and other crimes after demanding campaign contributions and other favors in exchange for government benefits. The governor famously said of the Senate seat Barack Obama vacated upon being elected president, “I’ve got this thing, and it’s fucking golden. I’m just not giving it up for fucking nothing.”¹⁴² At the time of his commutation, Blagojevich had served eight years of a fourteen-year sentence. While awaiting trial, he had appeared on a season of a Trump-hosted television show, *The Celebrity Apprentice*. During his imprisonment, his wife frequently urged clemency on Fox News.¹⁴³

* A sentence commutation for Dr. Salomon Melgen, an ophthalmologist who was reputed to be the richest practicing physician in America.¹⁴⁴ In 2018, Melgen was sentenced to seventeen years in prison for defrauding Medicare and also was ordered to pay \$53 million in restitution. The evidence at his trial showed that he diagnosed patients with macular degeneration (MD) at an exceptionally high rate and then concluded that 75 percent of these patients suffered from the “wet” form of the disease. (Normally only 10 to 15 percent of MD patients are found to have the “wet” variety.) Melgen diagnosed nearly all of his Black patients with “wet” MD although this variety is found almost exclusively in whites. Melgen’s diagnoses enabled him to prescribe injections of Lucentis, which cost \$2,000 per vial. Although each vial is intended to provide a single dose, Melgen drew multiple doses from each vial and received from Medicare as much as three times the reimbursement he would have received if he had administered the drug according to its label. The evidence showed other fraud, including billing Medicare ninety-six times for treating a patient’s prosthetic eye.¹⁴⁵ In 2017, Melgen, a major donor to Democratic candidates,¹⁴⁶ stood trial with Senator Robert Menendez for bribery, but the jury failed to reach a

142. Matthew Choi, *Illinois Republicans Urge Trump to Keep Blagojevich in Prison*, POLITICO (Aug. 8, 2019, 8:43 PM), <https://www.politico.com/story/2019/08/08/illinois-republicans-bлагоjevich-trump-1453566>.

143. Monica Davey & Mitch Smith, *Who is Rod Blagojevich? Why Did President Trump Commute His Sentence?*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/18/us/rod-bлагоjevich-sentence.html>; Stacy St. Clair, *How Patti Blagojevich Helped Earn Her Husband’s Release*, CHI. TRIB. (Feb. 18, 2020, 7:43 PM), <https://www.chicagotribune.com/news/breaking/ct-patti-bлагоjevich-ex-illinois-governor-helped-earn-bлаго-release-20200218-dw7r7rbbhwbaldnwy3m4vm5mvy-story.html>.

144. Owen Dyer, *Medicare’s Top Billing Doctor is Convicted of Medical Fraud*, THE BMJ (May 4, 2017), <https://www.bmj.com/content/357/bmj.j2188.short>; see *Medicare Millionaires: Florida Eye Doc Got \$21 Million from Medicare in 2012*, N.Y. DAILY NEWS (Apr. 9, 2014, 2:15 PM), <https://www.nydailynews.com/life-style/health/medicare-millionaires-florida-eye-doc-21-million-medicare-2012-article-1.1750771>.

145. *United States v. Melgen*, 967 F.3d 1250, 1255–56 (11th Cir. 2020).

146. Russ Choma, *FBI Raids Home of Big Donor to Menendez and Others*, OPENSECRETS.ORG (Jan. 30, 2013, 5:07 PM), <https://www.opensecrets.org/news/2013/01/fbi-raids-home-of-menendez-donor>.

verdict.¹⁴⁷ The White House noted that Senator Menendez favored clemency for Melgen.¹⁴⁸

* A sentence commutation for William Walters, a professional gambler described as “a major political contributor and a deal maker.”¹⁴⁹ In 2017, Walters was convicted of insider trading, fined \$10 million, and sentenced to five years in prison.¹⁵⁰ He retained President Trump’s former lawyer John Dowd to make his case for clemency. According to the *New York Times*, Dowd “marketed himself to convicted felons as someone who could secure pardons because of his close relationship with the president,” and he “told Mr. Walters and others that he would soon obtain a pardon for his client using his access to the White House and because Mr. Walters had been investigated by prosecutors in Manhattan and the F.B.I.”¹⁵¹ Dowd told the *Times* he had never boasted about his ability to obtain pardons, and he refused to answer questions.¹⁵²

* A sentence commutation for Jonathan Braun, who was sentenced to ten years for operating a drug ring that allegedly imported and sold \$1.72 billion worth of marijuana. Although the White House declared that Braun had served five years of this sentence, the *New York Times* reported he had served only one. During an eight-year delay between Braun’s guilty plea and his sentencing, he may have cooperated with law enforcement, but, according to New York Attorney General Letitia James, he also helped operate a money-lending business and threatened borrowers who failed to pay with violence, kidnapping, and death. The White House may not have known that at the time of his commutation that Braun was under criminal investigation and was a defendant in civil lawsuits brought by New York State and the Federal Trade Commission alleging criminal conduct. It also may have been unaware of Braun’s history of violence, which included throwing someone from a second-floor balcony in 2018. Why the president granted Braun’s commutation is unclear, though one of the lawyers retained by Braun’s family, Alan Dershowitz, had represented Trump in his im-

147. Nick Corasaniti & Nate Schweber, *Corruption Case Against Senator Menendez Ends in Mistrial*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/nyregion/senator-robert-menendez-corruption.html>.

148. *Jan. 20 Statement*, *supra* note 75.

149. Joe Schoenmann, *John L. Smith on the Commutation of Billy Walters Sentence*, NEV. PUB. RADIO (Jan. 27, 2021), <https://knpr.org/knpr/2021-01/john-l-smith-commutation-billy-walters-sentence>.

150. Karl Ritter, *Insider Trading Sentence of Vegas Gambler Walters Commuted by Trump*, LAS VEGAS SUN (Jan. 20, 2021, 10:35 PM), <https://lasvegassun.com/news/2021/jan/20/insider-trading-sentence-of-vegas-gambler-walters>.

151. Michael S. Schmidt & Kenneth P. Vogel, *Prospect of Pardons in Final Days Fuels Market to Buy Access to Trump*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/17/us/politics/trump-pardons.html>.

152. *Id.*

peachment trial.¹⁵³ The *Times* reported that Dershowitz had a role in at least twelve of Trump's clemency grants.¹⁵⁴

* A pardon for Eliyahu Weinstein, who served seven years of a twenty-four-year sentence for stealing more than \$200 million through real estate scams. The White House noted the support of Alan Dershowitz and others and also said that "numerous victims" had written to endorse clemency for Weinstein.¹⁵⁵ One victim who did not write was Ruth Brandt, who lost \$1 million. She reported that a Weinstein supporter, Yitz Grossman, had offered her \$100,000 for a favorable letter. A victim who did write, Harvey Wolinetz, lost \$70 million. Two people briefed on the conversation said that Grossman told Wolinetz his support could lead to a six-figure restitution. Grossman denied offering money in exchange for letters but acknowledged, "I certainly told people that you have no shot [at restitution] if a person is sitting in the system."¹⁵⁶

* A pardon for Dwayne Michael Carter, Jr., better known as Lil Wayne, a rapper who has sold more than 120 million records¹⁵⁷ and who has had more Billboard Hot 100 hits than Elvis Presley.¹⁵⁸ On December 23, 2019, officers found cocaine, ecstasy, oxycodone, and a loaded .45 caliber revolver in Lil Wayne's luggage when he arrived in Miami on a private flight from California.¹⁵⁹ The rapper had not been charged with any crime, however, when he met with President Trump six days before the 2020 presidential election. After a "great" meeting, Lil Wayne tweeted a photo that showed him and the President with broad smiles and the President making a thumbs-up gesture. The press reprinted the photo widely. Lil Wayne also

153. Michael S. Schmidt, Maggie Haberman & William K. Rashbaum, *Trump's Last-Minute Pardon Frees Man Still Facing Accusations of Violence*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/trump-pardons-jonathan-braun.html>. I have known Dershowitz for fifty-five years and can vouch for his integrity. He told the *Times* that he donated the fees he received from Braun's family to charity upon learning of Braun's violent history. See Kenneth P. Vogel & Nicholas Confessore, *Using Connections to Trump, Dershowitz Became Force in Clemency Grants*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/2021/02/08/us/politics/dershowitz-trump-pardons-clemency.html>. If any of Braun's champions misled White House officials, however (for example, by misstating the amount of time he had served in prison), the Justice Department could appropriately file a declaratory judgment action seeking the invalidation of Braun's commutation. See Alschuler, *supra* note 3, at 587–90.

154. Vogel & Confessore, *supra* note 153.

155. *Jan. 20 Statement*, *supra* note 75.

156. Kenneth P. Vogel & Nicholas Confessore, *Access, Influence and Pardons: How a Set of Allies Shaped Trump's Choices*, N.Y. TIMES (Mar. 21, 2021), <https://www.nytimes.com/2021/03/21/us/politics/trump-pardons.html>.

157. *Lil Wayne, Tyga to Hit the Stage at Diriyah Season Concert*, ARAB NEWS (Nov. 20, 2019), https://www.arabnews.jp/en/arts-culture/article_5211.

158. *Rapper Lil Wayne Breaks Elvis Presley's Billboard Record*, REUTERS (Sept. 27, 2012, 6:15 PM), <https://www.reuters.com/article/entertainment-us-lilwayne-billboard/rapper-lil-wayne-breaks-elvis-presleys-billboard-record-idUSBRE88Q1XP20120927>.

159. *Lil Wayne Pleads Guilty in Miami to Federal Gun Charge*, U.S. ATT'Y FOR THE S. DIST. OF FLA. (Dec. 11, 2020), <https://www.justice.gov/usao-sdfl/pr/lil-wayne-pleads-guilty-miami-federal-gun-charge>.

praised Trump's Platinum Plan for Black Americans and his work on criminal justice reform.¹⁶⁰ Soon after the election, Lil Wayne was charged with possession by a felon of a firearm—the gold-plated Remington found in his luggage in 2019.¹⁶¹ (Lil Wayne could not lawfully possess a firearm because, in 2009, he had pleaded guilty to felony gun possession in New York and served eight months in prison.¹⁶²) On December 11, 2020, Lil Wayne pleaded guilty to the felon-in-possession charge.¹⁶³ He faced as much as ten years in prison.¹⁶⁴ Eight days before his scheduled sentencing hearing, on Trump's last day in office, the President gave him a full pardon.¹⁶⁵

* A commutation for Bill K. Kapri, known as Kodak Black, a rapper whose 2017 and 2018 albums peaked at number three and number one on the Billboard 200.¹⁶⁶ At the time Trump set him free, Kodak Black had served almost half of his forty-six-month sentence for lying on federal forms when he purchased multiple firearms, two of which later were found at crime scenes. Prosecutors said that one of these weapons—found with Kodak Black's fingerprints and a live round in the chamber—had been used to fire at another rap performer.¹⁶⁷ (Calling Kodak Black a danger to the community, a judge had ordered him held without bond, and prosecutors had increased their sentence recommendation after he participated in a jail fight in which a guard was injured.¹⁶⁸) The White House statement concerning the rapper's commutation noted his charitable contributions but did not mention his long, unremitting criminal record.¹⁶⁹ It also failed to mention

160. Sarah Polus, *Lil Wayne Meets with President Trump, Praises his 'Platinum Plan' for Black Americans*, HILL (Oct. 29, 2020, 8:53 PM), <https://thehill.com/blogs/in-the-know/in-the-know/523512-lil-wayne-meets-with-president-trump-praises-his-platinum-plan>.

161. Elie Levine, *Lil Wayne Faces Federal Charge for Gun Possession*, NPR (Nov. 17, 2020, 4:01 PM), <https://www.npr.org/2020/11/17/935879260/lil-wayne-faces-federal-charge-for-gun-possession>.

162. Jem Aswad, *Timeline: The Criminal History of Lil Wayne*, ROLLING STONE (Nov. 5, 2010, 3:10 PM), <https://www.rollingstone.com/music/music-news/timeline-the-criminal-history-of-lil-wayne-100927>.

163. *Lil Wayne Pleads Guilty in Miami to Federal Gun Charge*, *supra* note 159.

164. Levine, *supra* note 161.

165. Joe Coscarelli, *Lil Wayne and Kodak Black Among 4 Hip-Hop Figures Trump Pardoned*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/arts/music/trump-pardons-lil-wayne-kodak-black.html>.

166. *Chart History Kodak Black*, BILLBOARD, <https://www.billboard.com/music/kodak-black/chart-history/TLP> (last visited Sept. 4, 2021).

167. Joe Coscarelli, *Kodak Black Sentenced to Nearly 4 Years in Prison*, N.Y. TIMES (Nov. 13, 2019, 12:21 PM), <https://www.nytimes.com/2019/11/13/arts/music/kodak-black-jail-sentencing.html>.

168. *Kodak Black Gets 46 Months Behind Bars in Federal Gun Case*, TMZ (Nov. 13, 2019, 9:12 AM), <https://www.tz.com/2019/11/13/kodak-black-sentenced-46-months-prison-federal-gun-case>.

169. *Jan. 20 Statement*, *supra* note 75. For descriptions of Kodak Black's criminal history, see *Kodak Black*, WIKIPEDIA, https://en.wikipedia.org/wiki/Kodak_Black (last visited Sept. 4, 2021); Jessica McKinney, *Kodak Black's Sexual Assault Case and Plea Deal, Explained*, COMPLEX (Apr. 28, 2021), <https://www.complex.com/music/kodak-black-sexual-assault-case-what-you-need-to-know>.

the occasion when an Instagram feed showed him and others using marijuana near an infant and holding a handgun,¹⁷⁰ another occasion when his Instagram feed showed him and several other men receiving oral sex from a woman in a hotel room,¹⁷¹ and still another when he was expelled from an anger-management class after burping repeatedly to disrupt the class and then assaulting the instructor when she threatened to call 911.¹⁷² At the time of his commutation, Kodak Black faced first-degree sexual assault charges in South Carolina. A high school student said she accompanied him to a hotel room where he tore her clothes, bit her repeatedly, and raped her as she screamed for help.¹⁷³ Although this recipient of Trump's clemency could have been imprisoned for as long as thirty years if convicted of this crime, he pleaded guilty following his release from prison to a reduced charge and was sentenced to an eighteen-month term of probation. His attorney told the court, "He had romantic ideas on his mind. She did not. So, he ended up trying to have a romantic encounter with her and bit her as part of that and injured her."¹⁷⁴ The rapper accepted this description of his crime.¹⁷⁵ In a tweet from prison shortly before the 2020 election, Kodak Black endorsed Trump's Platinum Plan.¹⁷⁶

* A pardon for Stephanie Mohr, a police officer who served ten years in prison after unleashing her K-9 to attack an unresisting homeless man. Before the attack, another Prince Georges County officer asked a supervisor, "Hey Sarge, we got a new dog. Mind if it gets a bite?"¹⁷⁷ Witnesses testified that Mohr also released her dog to attack a sleeping teenager and threatened a fugitive's family that the dog would attack their "black ass" if they failed to reveal the fugitive's location.¹⁷⁸ The Fraternal Order of Police supported Mohr's application for clemency.¹⁷⁹

170. *Rapper Kodak Black Arrested in Florida on Multiple Charges*, AP (Jan. 19, 2018), <https://apnews.com/article/69bfc8600c4f403ea45b07137966b47f>.

171. *Kodak Black Posts Sex Session on Instagram Live, Twitter Reacts Accordingly*, BET (Jan. 27, 2017, 11:38 AM), <https://www.bet.com/music/2017/01/27/kodak-black-sex-instagram-live.html>.

172. Rafael Olmeda, *Rapper Kodak Black Burped Excessively in Anger Management Class, Hearing Told*, S. FLA. SUN SENTINEL (Apr. 21, 2017, 3:40 PM), <https://www.sun-sentinel.com/local/broward/fl-reg-kodak-black-final-violation-probation-continues-20170420-story.html>.

173. McKinney, *supra* note 169.

174. McKinney, *supra* note 169.

175. McKinney, *supra* note 169.

176. Kodak Black (@KodakBlack1k), TWITTER (Oct. 26, 2020, 5:30 PM), <https://twitter.com/KodakBlack1k/status/1320855346278223876>.

177. Alex Busansky, *Opinion: Trump's Worst Pardon is One You Don't Know About*, WASH. POST (Dec. 29, 2020, 3:29 PM), <https://www.washingtonpost.com/opinions/2020/12/29/trump-pardons-stephanie-mohr-prince-georges>.

178. *Id.*; *United States v. Mohr*, 318 F.3d 613, 620 (4th Cir. 2003); *but see* Eric Mack, *Stephanie Mohr to Newsmax TV: Pardon Me, President Trump*, NEWSMAX (Dec. 7, 2020, 4:30 PM), <https://www.newsmax.com/newsmax-tv/canine-police-officer-pardon/2020/12/07/id/1000439> (television interview in which Mohr asserted her innocence and requested clemency).

179. *Dec. 23 Statement*, *supra* note 75.

* Pardons for Ignacio Ramos and Jose Compean, former U.S. Border Patrol Agents convicted of shooting a fleeing drug suspect and covering up the incident. President George W. Bush previously had commuted Ramos and Compean's eleven- and ten-year prison sentences.¹⁸⁰

* A pardon for Gary Brugman, a former Border Patrol Agent who served over two years in prison after kicking and beating two arrestees.¹⁸¹

* A pardon for Michael Behenna, a former Army First Lieutenant convicted of unpremeditated murder for killing an Iraqi man in his custody.¹⁸²

A pardon for Clint Lorange, a former Army Lieutenant serving a nineteen-year sentence for murdering two unarmed Afghans. After ordering soldiers to fire on these men, Lorange called in false reports of the encounter. His men turned him in.¹⁸³

* A pardon for Major Mathew L. Golsteyn, an Army Special Forces officer awaiting trial for murdering an Afghan suspected of being a bomb maker. Secretary of Defense Mark Esper and Army Secretary Ryan McCarthy opposed clemency for Golsteyn and Lorange,¹⁸⁴ but, before conferring with these officials, the president tweeted that Golsteyn was a "U.S. Military hero."¹⁸⁵ Former military officers protested what they saw as a signal

180. Lauren Villagran, *Trump Pardons El Paso Border Agents Convicted of Shooting Mexican Drug Smuggler*, EL PASO TIMES (Dec. 23, 2020, 11:05 AM), <https://www.elpasotimes.com/story/news/2020/12/23/trump-pardons-two-former-border-patrol-agents-convicted-shooting-el-paso/4025071001>; see Pamela Colloff, *Badges of Dishonor*, TEX. MONTHLY (Sept. 2007), <https://www.texasmonthly.com/articles/badges-of-dishonor> (describing the agents' conduct and the efforts of Lou Dobbs, Ann Coulter, and other broadcasters to portray them as heroes).

181. Alex Samuels, *Donald Trump Pardons Former Border Patrol Agent Gary Brugman, Who Was Convicted of Violating a Man's Civil Rights*, GOV'T EXEC. (Dec. 28, 2020), <https://www.govexec.com/management/2020/12/donald-trump-pardons-former-border-patrol-agent-gary-brugman-who-was-convicted-violating-mans-civil-rights/171047>.

182. See Mihir Zaveri, *Trump Pardons Ex-Army Soldier Convicted of Killing Iraqi Man*, N.Y. TIMES (May 6, 2019, 10:15 PM), <https://www.nytimes.com/2019/05/06/us/trump-pardon-michael-behenna.html>.

183. See Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES (Nov. 22, 2019, 5:48 PM), <https://www.nytimes.com/2019/11/15/us/trump-pardons.html>.

184. *Id.*; Ellen Ioanes, *Military Leaders Are Worried That Trump Pardoning Troops Accused of War Crimes Will Impair the Justice System and Undermine Overseas Bases*, INSIDER (Nov. 15, 2019, 4:09 PM), <https://www.businessinsider.com/military-leaders-worry-that-trump-pardons-will-impair-justice-system-2019-11>.

185. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 16, 2018, 10:03 AM), <https://twitter.com/realdonaldtrump/status/1074319076766433280?lang=EN>. On the day President Trump pardoned Golsteyn and Lorange, he reversed the demotion of Chief Petty Officer Edward Gallagher, a Navy SEAL who had been acquitted of murder but convicted of wrongfully posing for a photo with the murder victim's corpse. Secretary of the Navy Richard Spencer said in a letter of resignation that he could not have carried out in good conscience an order to restore Gallagher's rank. See William Cummings, *'Rule of Law Is What Sets Us Apart'; Richard Spencer's Scathing Final Letter as Navy Secretary*, USA TODAY, (Nov. 26, 2019, 9:58 AM), <https://www.usatoday.com/story/news/politics/2019/11/25/richard-spencers-last-letter-navy-chief-after-seal-gallagher-case/4295123002>.

that America does not take war crimes seriously.¹⁸⁶ Trump, however, invited Golsteyn and Lorance to appear with him on the stage of a Republican fundraiser.¹⁸⁷

* Pardons for Nicholas Slatten, Paul Slough, Evan Liberty, and Dustin Heard. In 2007, while employed as security guards by the private military contractor Blackwater, Slatten, Slough, Liberty, and Heard killed fourteen civilians (including two children) and wounded seventeen others at a square in Baghdad. Witnesses at their trial testified they opened fire with machine guns and grenade launchers indiscriminately and without provocation.¹⁸⁸ The agent who led the FBI's investigation called the event "a massacre along the lines of My Lai in Vietnam."¹⁸⁹ Slatten was sentenced to life for murder and the others to twelve years or more for voluntary manslaughter.¹⁹⁰ A United Nations panel called their pardons an affront to justice and a violation of international law.¹⁹¹

* A pardon for George Papadopoulos, a foreign policy advisor to Trump's 2016 campaign. In April 2016, Papadopoulos told an Australian diplomat that Russia had damaging information about Hillary Clinton. After WikiLeaks released hacked Democratic National Committee emails in July, the diplomat's government told American officials about Papadopoulos's statement. In the investigation that followed, Papadopoulos lied to the FBI about when and how he heard that Russia had "dirt" about Clinton in the form of "thousands of emails."¹⁹² He claimed to have received this information before joining the Trump campaign, although, in fact, someone who might have been a Russian agent provided it after learning of his role in the

186. See Thomas B. Edsall, *The Savage Injustice of Trump's Military Pardons*, N.Y. TIMES (Dec. 4, 2019, 5:00 AM), <https://www.nytimes.com/2019/12/04/opinion/trump-military-pardons.html> (collecting quotations).

187. See Maggie Haberman, *Trump Brings 2 Officers He Cleared of War Crimes Onstage at Fund-Raiser*, N.Y. TIMES (Dec. 8, 2019, 6:23 PM), <https://www.nytimes.com/2019/12/08/us/politics/trump-war-crimes-pardons.html>.

188. Laurel Wamsley, *Shock and Dismay After Trump Pardons Blackwater Guards Who Killed 14 Iraqi Civilians*, NPR (Dec. 23, 2020, 5:44 PM), <https://www.npr.org/2020/12/23/949679837/shock-and-dismay-after-trump-pardons-blackwater-guards-who-killed-14-iraqi-civil>; Michael Safi, *Trump Pardons Blackwater Contractors Jailed for Massacre of Iraq Civilians*, THE GUARDIAN (Dec. 23, 2020, 4:32 PM), <https://www.theguardian.com/world/2020/dec/23/trump-pardons-blackwater-contractors-jailed-for-massacre-of-iraqi-civilians>.

189. John M. Partarini, *Horrified by Blackwater Pardons*, N.Y. TIMES (Jan. 1, 2021), <https://www.nytimes.com/2021/01/01/opinion/letters/blackwater-pardons.html>.

190. *Pardons Granted by President Donald J. Trump (2017-2021)*, U.S. DEP'T OF JUST., <https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021>.

191. John Bowden, *UN Says Trump Blackwater Pardons Violate International Law*, HILL (Dec. 30, 2020, 9:51 AM), <https://thehill.com/homenews/administration/532065-un-says-trump-blackwater-pardons-violate-international-law>.

192. Carrie Johnson, *Ex-Trump Aide Papadopoulos, 1st Charged in Russia Probe, Sentenced to 14 Days*, NPR (Sept. 7, 2018, 5:02 PM), <https://www.npr.org/2018/09/07/645539743/ex-trump-aide-papadopoulos-1st-charged-in-russia-probe-sentenced-to-14-days>.

campaign.¹⁹³ Papadopoulos pleaded guilty to making false statements and, as part of his sentence, spent twelve days in prison. On his release, he tweeted, “I NEVER flipped against the president.”¹⁹⁴

* A pardon for Alex van der Zwaan, a lawyer in the London office of Skadden, Arps, Slate, Meagher and Flom who pleaded guilty to lying to prosecutors concerning his communications with Paul Manafort, Rick Gates, and an associate later determined to be a Russian intelligence agent. Van der Zwaan’s deception concerned conduct by Manafort and Gates that might have been criminal but apparently was unrelated to Trump’s campaign.¹⁹⁵

* A sentence commutation and later a full pardon for Roger Stone. The commutation came four days before Stone was to begin serving a forty-month sentence for obstruction, witness tampering, and making false statements.¹⁹⁶ Stone had been a business associate, political associate, and friend of the president for more than thirty years,¹⁹⁷ and the judge who sentenced him noted that he committed his crimes to “cover[] up for the president.”¹⁹⁸ Trump had praised Stone’s “guts” for announcing he would not testify against Trump,¹⁹⁹ and Stone had told an interviewer he expected clemency because he did not “turn on” Trump.²⁰⁰ Stone’s truthful testimony might have shown that Trump committed perjury in sworn responses to inquiries from the office of Special Counsel Robert Mueller.²⁰¹

193. *Id.*; Statement of the Offense at 2, *United States v. Papadopoulos*, 2017 WL 4873375 (D.D.C. Oct. 5, 2017) (No. 1:17CR0018 (RDM)).

194. Tal Axelrod, *George Papadopoulos Leaves Federal Prison After Serving 12 Days*, THE HILL (Dec. 7, 2018, 11:42 AM), <https://thehill.com/homenews/news/420260-george-papadopoulos-leaves-federal-prison-after-serving-12-days>.

195. See David Voreacos, Erik Larson, Andrew M. Harris & Steven T. Dennis, *Mueller Gets Plea, No Cooperation, as Skadden Lawyer Admits Lies*, BLOOMBERG (Feb. 20, 2018, 7:23 PM), <https://www.bloomberg.com/news/articles/2018-02-21/mueller-gets-plea-no-cooperation-as-skadden-lawyer-admits-lies>; Statement of the Offense at 2–3, *United States v. Van der Zwaan*, (D.D.C., Feb. 20, 2018) (No. 1:18-CR-00031-ABJ).

196. Maggie Haberman & Michael S. Schmidt, *Trump Gives Clemency to More Allies, Including Manafort, Stone, and Charles Kushner*, N.Y. TIMES (Dec. 23, 2020), <https://www.nytimes.com/2020/12/23/us/politics/trump-pardon-manafort-stone.html>.

197. Olivia Paschal & Madeleine Carlisle, *A Brief History of Roger Stone*, ATLANTIC (Nov. 15, 2019), <https://www.theatlantic.com/politics/archive/2019/11/roger-stones-long-history-in-trump-world/581293>.

198. Rachel Weiner, Matt Zapotosky, Tom Jackman & Devlin Barrett, *Roger Stone Sentenced to Three Years and Four Months in Prison, as Trump Predicts “Exoneration” for his Friend*, WASH. POST (Feb. 20, 2020, 6:18 PM), https://www.washingtonpost.com/local/public-safety/roger-stone-sentence-due-thursday-in-federal-court/2020/02/19/2e01bfc8-4c38-11ea-9b5c-eac5b16dafaa_story.html.

199. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 3, 2018, 10:48 AM), <https://twitter.com/realdonaldtrump/status/1069619316319035392?lang=en>.

200. Howard Fineman, *Roger Stone is Saved*, WASH. POST (July 12, 2020, 10:39 PM), <https://www.washingtonpost.com/opinions/2020/07/10/roger-stone-is-saved>.

201. See Alschuler, *supra* note 3, at 595–99.

* A pardon for Paul Manafort, who for two months had been the manager of Trump's 2016 presidential campaign.²⁰² In 2018, a jury convicted Manafort of bank fraud, tax, and registration offenses. He later pleaded guilty to other offenses, including money laundering and witness tampering.²⁰³ Although Manafort's plea agreement required him to cooperate with prosecutors, he lied to them repeatedly,²⁰⁴ and his lawyers apparently briefed the President's lawyers about his conversations.²⁰⁵ In 2019, a judge sentenced Manafort to seventy-three months in prison.²⁰⁶ Both before he promised to cooperate and after he broke his agreement, Trump praised Manafort's courage for refusing to "flip."²⁰⁷ The President added that flipping "almost ought to be outlawed" and at the same time indicated he was considering a pardon.²⁰⁸ Like Stone, Manafort might have been able to incriminate Trump. During the 2016 campaign, he shared internal polling data with a long-time Russian-Ukrainian associate, whom the Senate Intelligence Committee later determined was a Russian intelligence officer. Manafort also discussed with this associate a plan for Russia's takeover of the eastern half of Ukraine.²⁰⁹ The intelligence officer "provided the Russian Intelligence Services with sensitive information on polling and campaign strategy,"²¹⁰ but prosecutors were unable to determine what use the Russian Intelligence Services or their proxies made of this information,

202. See Matt Zapposky, Josh Dawsey, Colby Itkowitz & Jonathan O'Connell, *Trump Pardons Charles Kushner, Paul Manafort, Roger Stone in Latest Wave of Clemency Grants*, WASH. POST (Dec. 23, 2020, 8:57 PM), https://www.washingtonpost.com/national-security/charles-kushner-paul-manafort-roger-stone-trump-pardons/2020/12/23/05cf013a-456d-11eb-975c-d17b8815a66d_story.html.

203. Government's Sentencing Memorandum, *United States v. Manafort*, 2019 WL 1292656 (D.D.C. Feb. 23, 2019) (No. 1:17-CR-201-1-ABJ).

204. See Byron Tau & Aruna Viswanatha, *Judge Rules Paul Manafort Lied in Violation of Plea Deal*, WALL ST. J. (Feb. 13, 2019, 9:38 PM), <https://www.wsj.com/articles/judge-rules-paul-manafort-made-false-statements-in-violation-of-plea-agreement-11550101738>; Government's Submission in Support of Its Breach Determination, *United States v. Manafort*, 2018 WL 6433151 (D.D.C. Dec. 7, 2018) (No. 1:17CR-201-1-ABJ).

205. Michael S. Schmidt, Sharon LaFraniere & Maggie Haberman, *Manafort's Lawyer Said to Brief Trump Attorneys on What He Told Mueller*, N.Y. TIMES (Nov. 27, 2018), <https://www.nytimes.com/2018/11/27/us/politics/manafort-lawyer-trump-cooperation.html>.

206. Spencer S. Hsu, Rachel Weiner & Ann E. Marimow, *Paul Manafort Sentenced to a Total of 7.5 Years in Prison for Conspiracy and Fraud, and Charged with Mortgage Fraud in N.Y.*, WASH. POST (Mar. 13, 2019, 4:27 PM), https://www.washingtonpost.com/local/legal-issues/paul-manafort-faces-sentencing-in-washington-in-mueller-special-counsel-case/2019/03/12/d4d55dd4-44d0-11e9-aaf8-4512a6fe3439_story.html.

207. ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 127–28 (2019).

208. *Id.*

209. REPORT OF THE SELECT COMMITTEE ON INTELLIGENCE, U.S. SENATE, ON RUSSIAN ACTIVE MEASURES CAMPAIGN AND INTERFERENCE IN THE 2016 U.S. ELECTION, COUNTERINTELLIGENCE THREATS AND VULNERABILITIES at v, vii, 75–84 (2020).

210. Press Release, U.S. Dep't of the Treasury, Treasury Escalates Sanctions Against the Russian Government's Attempts to Influence U.S. Elections (Apr. 15, 2021), <https://home.treasury.gov/news/press-releases/jy0126>.

what they might have wanted in return for any campaign help they provided, and whether Manafort shared the officer's plotting with Trump.²¹¹

* A pardon for Steve Bannon. Bannon became chief executive officer of Trump's presidential campaign at about the time Manafort departed. (Manafort resigned after a government agency in Ukraine released a handwritten ledger indicating he had received \$12.7 million in illegal, off-the-books cash payments from a Ukrainian political party.²¹²) For the first eight months of Trump's presidency, Bannon was his chief strategist and senior counselor. After Trump fired him,²¹³ Bannon made disparaging comments about Trump and his family that estranged him further from the President.²¹⁴ In August 2020, Bannon and three others were charged with raising more than \$25 million by promising to use these funds to build a border wall and by falsely promising to take no compensation for themselves. The defendants allegedly diverted hundreds of thousands of dollars for their personal use.²¹⁵ After Bannon was indicted, he reconciled with Trump, supported Trump's claims of fraud in the 2020 presidential election, and (perhaps facetiously) advocated beheading Dr. Anthony Fauci and FBI Director Christopher Wray.²¹⁶ The White House statement concerning Bannon's pardon read, "Prosecutors pursued Mr. Bannon with charges related to fraud stemming from his involvement in a political project. Mr. Bannon has been an important leader in the conservative movement and is known for his political acumen."²¹⁷ Trump did not pardon Bannon's co-defendants,

211. See Alschuler, *supra* note 3.

212. Andrew E. Kramer, Mike McIntire & Barry Meier, *Secret Ledger in Ukraine Lists Cash for Donald Trump's Campaign Chief*, N.Y. TIMES (Aug. 14, 2016), <https://www.nytimes.com/2016/08/15/us/politics/what-is-the-black-ledger.html>; Maggie Haberman & Jonathan Martin, *Paul Manafort Quits Donald Trump's Campaign After a Tumultuous Run*, N.Y. TIMES (Aug. 19, 2016), <https://www.nytimes.com/2016/08/20/us/politics/paul-manafort-resigns-donald-trump.html>.

213. Ashley Parker, Philip Rucker, Robert Costa & Damian Paletta, *Trump Gets Rid of Stephen Bannon, a Top Proponent of His Nationalist Agenda*, WASH. POST (Aug. 18, 2017), [https://www.washingtonpost.com/politics/trump-decides-to-get-rid-of-white-house-chief-strategist-stephen-bannon/2017/08/18/98cd5c40-8430-11e7-902a-2a9f2d808496_story.html?](https://www.washingtonpost.com/politics/trump-decides-to-get-rid-of-white-house-chief-strategist-stephen-bannon/2017/08/18/98cd5c40-8430-11e7-902a-2a9f2d808496_story.html?hpid=hp_hp-top-table-main-trump%3Astephen-bannon%3Ahomepage%2Fstory&hpid=hp_hp-top-table-main-trump%3Astephen-bannon%3Ahomepage%2Fstory)

214. See David A. Graham, *Why Trump Turned on Steve Bannon*, ATLANTIC (Jan. 3, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-president-vs-steve-bannon/549617>. Bannon was reported to have called Trump "just another scumbag" and "a crooked business guy." Edward Helmore, *Bannon Described Trump Organization as 'Criminal Enterprise'*, MICHAEL WOLFF BOOK CLAIMS, GUARDIAN (May 29, 2019, 2:00 AM), <https://www.theguardian.com/us-news/2019/may/28/bannon-trump-organization-criminal-enterprise-comments-michael-woff-book>. Trump said of Bannon, "When he was fired, he not only lost his job, he lost his mind." Graham, *supra*.

215. Indictment, United States v. Kolfage, 2020 WL 4873659 (S.D.N.Y. Aug. 20, 2020) (No. 20-CR-412).

216. Jennifer Jacobs, *Trump Reconciles with Ex-Staffer Steve Bannon in Talks on Election*, BLOOMBERG (Jan. 14, 2021, 4:28 PM), <https://www.bloomberg.com/news/articles/2021-01-14/trump-reconciles-with-ex-strategist-bannon-in-talks-on-election>; Peter Beaumont, *Steve Bannon Banned by Twitter for Calling for Fauci Beheading*, GUARDIAN (Nov. 6, 2020, 4:21 PM), <https://www.theguardian.com/us-news/2020/nov/06/steve-bannon-banned-by-twitter-for-calling-for-fauci-beheading>.

217. Jan. 20 Statement, *supra* note 75.

apparently because they were neither important leaders in the conservative movement nor known for their political acumen.²¹⁸

* A pardon for retired Lieutenant General Michael Flynn, who had been Trump's national security advisor for twenty-two days. Flynn was an advisor to Trump's 2016 campaign. During a speech to the Republican National Convention, he encouraged a chant about Trump's Democratic opponent by shouting, "Lock her up! Lock her up! Damn right!"²¹⁹ Flynn lost his position as Trump's national security advisor because he lied to Vice President Elect Mike Pence and others about his conversations with Russia's ambassador to the United States. After FBI Director James Comey rejected Trump's request to end the agency's investigation of Flynn, Flynn pleaded guilty to making false statements about his conversations with the ambassador.²²⁰ He initially agreed to cooperate with prosecutors but later retained new counsel (Sidney Powell), asserted his innocence, alleged prosecutorial misconduct, and sought to withdraw his guilty plea. Trump applauded Flynn's turnaround,²²¹ and the Justice Department moved to dismiss Flynn's prosecution. When litigation concerning the motion to dismiss seemed likely to extend beyond Trump's presidency, Trump pardoned Flynn.²²²

* A pardon for Elliott Broidy, a prominent Republican donor who had been finance chairman and vice chairman of the Republican National Committee. Broidy also had been vice chairman of the Trump Victory Committee and vice chairman of Trump's Presidential Inaugural Commit-

218. One of the unpardoned co-defendants was an Air Force veteran who had lost both legs and a hand in Iraq. See Joseph Tanfani & Julia Harte, *Decorated Veteran at Center of U.S. Fraud Charges on Border-Wall Fundraising*, REUTERS (Aug. 21, 2020, 11:16 AM), <https://www.reuters.com/article/us-usa-indictment-war-hero-insight/decorated-veteran-at-center-of-u-s-fraud-charges-on-border-wall-fundraising-idUSKBN25H27G>.

219. James Kittfield, *How Mike Flynn Became America's Angriest General*, POLITICO (Oct. 16, 2016), <https://www.politico.com/magazine/story/2016/10/how-mike-flynn-became-americas-angriest-general-214362>.

220. For a description of Flynn's conduct and the harm it threatened, see Marty Lederman, *Understanding the Michael Flynn Case: Separating the Wheat from the Chaff, and the Proper from the Improper*, JUST SEC. (May 29, 2020), <https://www.justsecurity.org/70431/understanding-the-michael-flynn-case-separating-the-wheat-from-the-chaff-and-the-proper-from-the-improper>.

221. Caitlin Oprysko, *Trump Applauds Flynn's Hiring of FBI Critic as New Lawyer*, POLITICO (June 13, 2019, 8:03 AM), <https://www.politico.com/story/2019/06/13/trump-michael-flynn-lawyer-1363094>.

222. Charlie Savage, *Trump Pardons Michael Flynn, Ending Case His Justice Dept. Sought to Shut Down*, N.Y. TIMES (Nov. 25, 2020), <https://www.nytimes.com/2020/11/25/us/politics/michael-flynn-pardon.html>. Within two weeks of his pardon, Flynn and lawyer Sidney Powell were in the Oval Office advising Trump. Flynn had said that he favored a declaration of martial law and a new presidential election conducted by the military in key states. Kevin Liptak & Pamela Brown, *Heated Oval Office Meeting Included Talk of Special Counsel, Martial Law as Trump Advisers Clash*, CNN (Dec. 20, 2020, 9:15 PM), <https://www.cnn.com/2020/12/19/politics/trump-oval-office-meeting-special-counsel-martial-law/index.html>; Sonam Sheth, *Trump's Former National Security Advisor Says the President Should Impose Martial Law to Force New Elections in Battleground States*, INSIDER (Dec. 18, 2020, 9:18 AM), <https://www.businessinsider.com/michael-flynn-trump-military-martial-law-overturn-election-2020-12>.

tee. His first criminal conviction came in 2002 when he pleaded guilty to attempting to provide improper gratuities to the New York State Controller. The New York State Retirement Fund had invested \$250 million in his equity firm, and he had provided \$1 million in illegal gifts to pension officials. In 2018, Broidy resigned as vice chairman of the Republican National Committee after the press reported that Trump's lawyer Michael Cohen had negotiated a nondisclosure agreement in which Broidy paid a *Playboy* playmate \$1.6 million not to reveal their affair. In October 2020, Broidy admitted receiving millions of dollars to covertly influence the administration on behalf of Chinese and Malaysian interests.²²³ He pleaded guilty to violating a lobbying law and agreed to forfeit \$6.6 million. Before Broidy was sentenced, Trump pardoned him.²²⁴

* A pardon for Paul Pogue, who served a prison term for tax offenses. Pogue's son and daughter-in-law contributed \$238,000 to Trump Victory during the six months before his pardon.²²⁵

* A pardon for Albert Pirro, who served a prison term for tax offenses. Pirro, a lawyer, real estate developer, and major Republican fundraiser, had represented Trump in real estate transactions. He is the former husband of Fox News host Jeanine Pirro.²²⁶

* A pardon for Glen Moss, who acknowledged paying illegal kickbacks for referrals to his diagnostics laboratory and who also pleaded guilty to reporting only \$2,000 in taxable income in a year when his actual earnings were \$500,000. Moss is a friend of Trump, a member of Trump's Westchester County golf club, and a donor to the Trump Foundation. Although a White House statement praised Moss's charitable contributions, one of the charities it listed was unaware he had made any.²²⁷

223. Kenneth P. Vogel, *Elliott Broidy Pleads Guilty in Foreign Lobbying Case*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/2020/10/20/us/politics/elliott-broidy-foreign-lobbying.html>.

224. See Bhavan Jaipragas, *Malaysia's IMDB Scandal Echoes in US as Jho Lo Associate is Pardoned by Trump*, THIS WEEK IN ASIA (Jan. 20, 2021, 4:56 PM), <https://www.scmp.com/week-asia/politics/article/3118505/malysias-1mdb-scandal-echoes-us-jho-low-associate-pardoned>.

225. See Soo Rin Kim, *Family of Texas Man Trump Pardoned Dished out Donations to His Reelection Campaign*, ABC NEWS (Feb. 19, 2020, 1:21 PM), <https://abcnews.go.com/Politics/family-texas-man-trump-pardoned-dished-donations-reelection/story?id=69070481>.

226. See *Trump Pardons His Former Real Estate Lawyer Pirro: Spokesman*, REUTERS (Jan. 20, 2021, 10:43 AM), <https://www.reuters.com/article/us-usa-trump-pardons-pirro/trump-pardons-his-former-real-estate-lawyer-pirro-spokesman-idUSKBN29P294>; Arya Hodjat & Lachlan Cartwright, *Trump Pardons Fox News Host's Ex-Husband with Minutes Left in Office*, DAILY BEAST (Jan. 20, 2021, 11:56 AM), <https://www.thedailybeast.com/trump-pardons-fox-host-jeannine-pirros-ex-husband-albert-j-pirro-jr-at-last-minute>.

227. Rosalind S. Helderman, David A. Fahrenthold, Beth Reinhard & Josh Dawsey, *In One of His Final Acts, Trump Showered Clemency on People with Connections to Him and His Allies*, WASH. POST (Jan. 21, 2021, 8:11 PM), https://www.washingtonpost.com/politics/trump-pardons/2021/01/20/dfc79216-5b49-11eb-8bcf-3877871c819d_story.html; Ryan Basen, *Healthcare Fraudsters Among Those Pardoned by Trump*, MEDPAGE TODAY (Jan. 21, 2021), <https://www.medpagetoday.com/publichealthpolicy/healthpolicy/90814>.

* A pardon for Hillel “Helly” Nahmad, a prominent New York art dealer who owns the entire fifty-first floor of Trump Tower. In 2014, he served five months in prison and forfeited \$6.4 million as well as a painting by Raoul Dufy after pleading guilty to running an illegal sports gambling ring.²²⁸

* A pardon for Jesse Benton who had been a high-ranking official in Ron Paul’s 2012 presidential campaign; a former campaign manager for both Senator Rand Paul and Senator Mitch McConnell; and an employee of a pro-Trump SuperPAC during Trump’s 2016 campaign. Benton had completed a probated sentence for falsifying records concerning a \$40,000 payment he made on behalf of the Ron Paul campaign to an Iowa state senator shortly before the Iowa caucuses—a payment that was followed by the senator’s withdrawal of his support for another candidate and endorsement of Paul.²²⁹ Nine months after receiving his pardon, Benton was indicted for again falsifying campaign records and also for facilitating an unlawful campaign contribution by a foreign national. During the 2016 presidential campaign, he and a coconspirator allegedly secured a \$100,000 contribution from a Russian by promising that the contribution would enable the Russian to meet a candidate (unnamed in the indictment but evidently Trump). The Russian wired the money to a consulting firm owned by Benton, and the coconspirator arranged a photo of the Russian with the candidate. Benton allegedly retained much of the contribution and falsely claimed that he was the source of the \$25,000 contribution that reached committees working for the candidate.²³⁰

* A pardon for Tommaso Buti, who was charged with defrauding investors in his Fashion Café and other U.S. restaurants twenty years ago, but who avoided trial by remaining in a nation that refused to extradite him, Italy. In 1998, Trump announced that Buti would head a modeling agency

228. Sarah Bahr, *Trump Pardons Hillel Nahmad, Madison Avenue Art Dealer*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/arts/design/trump-pardons-helly-nahmad.html>; William K. Rashbaum, *Scion of Art Family, In Court, Admits Role with a Gambling Ring*, N.Y. TIMES (Nov. 13, 2013), <https://www.nytimes.com/2013/11/13/nyregion/nahmad-art-dealer-expected-to-plead-guilty-in-gambling-case.html>.

229. See Nick Coltrain, *President Trump Pardons Two Ron Paul Aides Convicted in 2012 Iowa Caucus Bribery Scandal*, DES MOINES REG. (Dec. 24, 2020), <https://www.desmoinesregister.com/story/news/politics/2020/12/24/ex-ron-paul-iowa-aides-john-tate-jesse-benton-pardoned-trump-kent-sorenson/4038489001/>; Jesse Benton, WIKIPEDIA, https://en.wikipedia.org/wiki/Jesse_Benton (last visited Sept. 24, 2021).

230. Political Operatives Indicted for Alleged Scheme Involving Illegal Campaign Contribution to 2016 Presidential Campaign, Press Release, U.S. Dep’t. of Just. (Sept. 20, 2021), <https://www.justice.gov/opa/pr/political-operatives-indicted-alleged-scheme-involving-illegal-campaign-contribution-2016>; Aaron Blake, *The Brazen Timeline of the GOP Consultant Accused of Funneling Russian Money to Trump’s 2016 Effort*, WASH. POST (Sept. 21, 2021, 2:57 PM), <https://www.washingtonpost.com/politics/2021/09/21/brazen-timeline-gop-consultant-accused-funneling-russian-money-trumps-2016-effort>.

he planned to launch. According to Trump, Buti was a “natural” for the position because he “loves women and women love him back.”²³¹

* A pardon for Ken Kurson, a longtime friend of President Trump’s son-in-law and senior advisor Jared Kushner. When Kushner owned *The New York Observer*, he made Kurson its editor-in-chief, and, while serving as the newspaper’s editor, Kurson departed from customary journalistic practice by participating in Trump’s 2016 campaign. Kurson, who also is close to Rudolph Giuliani, was the second author on Giuliani’s book *Leadership*²³² and helped manage Giuliani’s 2008 presidential campaign. In October 2020, prosecutors charged Kurson with cyberstalking five people, one of whom was a medical doctor whom Kurson blamed for the failure of his marriage. Kurson, using false names, allegedly posted negative reviews of the doctor on the Internet, and sent messages to her colleagues accusing her of having an affair with her supervisor. He also sent the doctor threatening emails and emailed his accusation of adultery to the supervisor’s wife.²³³ Trump pardoned Kurson prior to trial.²³⁴ Seven months after the pardon, the Manhattan District Attorney charged Kurson with illegally accessing his wife’s computer and her Gmail and Facebook accounts. According to the D.A.’s complaint, Kurson then anonymously disseminated his wife’s private Facebook messages.²³⁵

* A pardon for Douglas Jemal, a D.C. real estate developer who was convicted of fraud and sentenced to pay a fine and a term of probation. Jemal’s donations to both parties included \$100,000 to the Republican National Committee in 2020. Jemal owns a home on the New Jersey shore near that of Charles Kushner, Jared Kushner’s father. When Charles Kushner went to prison in 2005, Jemal gave his family a dog for protection. When Jemal was convicted three years later, Jared Kushner wrote a letter on his behalf and came to court for his sentencing. Jemal introduced Donald Trump to D.C. contacts when Trump developed the Old Post Office on Pennsylvania Avenue into the Trump International Hotel. The chief prose-

231. Samantha Lock, *Who Is Tommaso Buti? Italian Businessman Pardoned by President Trump*, NEWSWEEK (Jan. 20, 2021, 12:34 PM), <https://www.newsweek.com/tommaso-buti-italian-businessman-pardoned-president-donald-trump-1562970>; Helderman, Fahrendthold, Reinhard & Dawsey, *supra* note 227.

232. RUDOLPH W. GIULIANI WITH KEN KURSON, *LEADERSHIP* (2002).

233. Nicole Hong & Jesse Drucker, *Trump Family Ally Is Arrested on Cyberstalking Charge*, N.Y. TIMES (Oct. 23, 2020), <https://www.nytimes.com/2020/10/23/nyregion/ken-kurson-arrest-cyberstalking.html>.

234. *Here Are Some of the People Trump Pardoned*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/article/who-did-trump-pardon.html>.

235. DA Vance: Presidential Pardonee Ken Kurson Charged with Cybercrime Felonies, Press Release, New York County District Attorney (Aug. 18, 2001), <https://www.manhattanda.org/d-a-vance-presidential-pardonee-ken-kurson-charged-with-cybercrime-felonies>; see Patricia Hurtado, *Kushner Friend Pardoned by Trump is in Plea Talks on Cyberstalking Charges*, BLOOMBERG (Oct. 15, 2021, 9:54 AM), <https://www.bloomberg.com/news/articles/2021-10-15/ken-kurson-in-plea-discussions-with-d-a-over-cyberstalking>.

ctor in Jemal's case noted that Jemal's less culpable codefendants were not pardoned.²³⁶

* A pardon for Charles Kushner, the other grandfather of three of Trump's grandchildren, a \$100,000 donor to Trump's 2016 campaign,²³⁷ a billionaire real estate developer, and the father of Jared Kushner. Charles Kushner served two years in prison after pleading guilty to false statements (attributing campaign contributions in FEC filings to people who were unaware of the contributions), tax evasion (treating \$6 million in political contributions and charitable donations as deductible business expenses), and retaliating against a cooperating witness (using a prostitute to seduce the witness, Kushner's brother-in-law; secretly filming the encounter; and sending the sex tape to the witness's wife, Kushner's sister).²³⁸

After leaving office, Trump spoke at a political rally of his possible return to the presidency in 2025 and of the pardons that might follow. He declared, "If I run and I win, we will treat those people from January 6 fairly . . . and if it requires pardons, we will give them pardons because they are being treated so unfairly."²³⁹ Trump later declared he would "absolutely" pardon convicted January 6 defendants, many of whom he said were being persecuted.²⁴⁰

At the time Trump spoke, 769 people had been charged with participating in the January 6 attack on the Capitol²⁴¹—an attack that followed Trump's call to march to the Capitol and "fight like hell."²⁴² Rioters injured more than 150 law enforcement officers,²⁴³ invaded the House and Senate Chambers, drove legislators, staffers, and the Vice President into hiding,

236. Jonathan O'Connell, *Meet the Flamboyant D.C. Developer Who Got a Last-Minute Pardon from Trump*, WASH. POST (Jan. 20, 2021, 1:11 PM), https://www.washingtonpost.com/local/dc-politics/douglas-jemal-trump-pardon/2021/01/20/2eac77a8-5b2b-11eb-b8bd-ee36b1cd18bf_story.html.

237. Katy O'Donnell, *Trump Attended Big-Donor Fundraiser Last Month*, POLITICO (Aug. 23, 2015, 1:42 PM), <https://www.politico.com/story/2015/08/donald-trump-donor-fundraising-2016-121645>.

238. See Zapotosky, Dawsey, Itkowitz & O'Connell, *supra* note 202.

239. Tyler Pager, *Trump Suggests That if He is Reelected, He Will Pardon Jan. 6 Capitol Rioters*, WASH. POST (Jan. 30, 2022, 5:22 PM), <https://www.washingtonpost.com/politics/2022/01/29/trump-jan6-protesters>.

240. Ewan Palmer, *Donald Trump Doubles Down on Pardoning Jan. 6 Capitol Rioters, Says Many Not Guilty*, NEWSWEEK (Feb. 2, 2022, 6:47 AM), <https://www.newsweek.com/trump-pardon-jan6-capitol-lindsey-graham-newsmax-1675289>.

241. Madison Hall, Skye Gould, Rebecca Harrington, Jacob Shamsian, Azmi Haroun, Taylor Ardrey & Erin Snodgrass, *769 People Have Been Charged in the Capitol Insurrection So Far*, INSIDER (Jan. 31, 2022, 2:19 PM), <https://www.insider.com/all-the-us-capitol-pro-trump-riot-arrests-charges-names-2021-1>.

242. See *Transcript of Trump's Speech at Rally Before US Capitol Riot*, AP (Jan. 13, 2021), <https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27>.

243. Cameron Jenkins, *More Than a Dozen Police Officers Still on Medical Leave from Jan. 6 Injuries*, THE HILL (June 3, 2021 7:56 PM), <https://thehill.com/policy/national-security/domestic-terrorism/556796-more-than-a-dozen-police-officers-still-on>.

ransacked offices,²⁴⁴ and spread feces in the hallways.²⁴⁵ The attack caused several deaths (possibly nine).²⁴⁶ The crimes with which the defendants were charged included unlawful entry, assaulting journalists, injuring police officers, using deadly and dangerous weapons, stealing and destroying government property, obstructing an official proceeding, and seditious conspiracy.²⁴⁷

Although the defendants did not include Trump himself or any of his close associates, the former president and several of his associates had reason to fear prosecution. Trump's repeated refusal to ask the rioters to leave the Capitol violated his constitutional duty to enforce the law and made him an accomplice to the unlawful occupation itself.²⁴⁸ Evidence also indicated that Trump might have sought to obstruct a joint session of Congress²⁴⁹ and to defraud the United States.²⁵⁰ Other possible crimes by the president included Hatch Act violations, inciting an insurrection, and seditious conspiracy.²⁵¹

As president, Trump brought Special Counsel Robert Mueller's development of cooperating witnesses to a halt by denouncing "flipping" and indicating that clemency for potential witnesses was likely.²⁵² He ultimately

244. Marc Fisher, Meagan Flynn, Jessica Contrera & Carol D. Leonnig, *The Four-Hour Insurrection: How a Trump Mob Halted American Democracy*, WASH. POST (Jan. 7, 2021), <https://www.washingtonpost.com/graphics/2021/politics/trump-insurrection-capitol/>.

245. Carl Campanile & Yaron Steinbuch, *Rioters Left Feces, Urine in Hallways and Offices During Mobbing of US Capitol*, N.Y. POST (Jan. 8, 2021, 12:18 PM), <https://nypost.com/2021/01/08/rioters-left-feces-urine-in-hallways-and-offices-during-mobbing-of-us-capitol/>.

246. Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html>.

247. *One Year Since the Jan. 6 Attack on the Capitol*, U.S. ATTY'S OFF. FOR THE D.C. (Dec. 30, 2021), <https://www.justice.gov/usao-dc/one-year-jan-6-attack-capitol>; *Oath Keepers Leader, 10 Others Charged with Seditious Conspiracy for Capitol Insurrection*, PBS NEWS HOUR (Jan. 13, 2022, 6:45 PM), <https://www.pbs.org/newshour/show/oath-keepers-leader-10-others-charged-with-seditious-conspiracy-for-capitol-insurrection>.

248. Albert W. Alschuler, *The Easiest Case for the Prosecution: Trump's Aiding and Abetting Unlawful Occupation of the Capitol*, JUST SEC. (Oct. 25, 2021), <https://www.justsecurity.org/78718/the-easiest-case-for-the-prosecution-trumps-aiding-and-abetting-unlawful-occupation-of-the-capitol>.

249. C. Ryan Barber, *Liz Cheney Might Be onto Something with Criminal Charges for Trump*, *Legal Experts Say*, INSIDER (Dec. 15, 2021 4:17 PM), <https://www.businessinsider.com/trump-criminal-prosecution-charges-liz-cheney-january-6-obstruction-congress-2021-12>.

250. See Bart Jansen, *Feds Looking at Fake 2020 Elector Certificates for Potential Criminal Liability Charges, DOJ Official Says*, USA TODAY (Jan. 25, 2022), <https://www.usatoday.com/story/news/2022/01/25/doj-reviews-fake-elector-certificates-criminal-charges-cnn/9217725002>; Marshall Cohen, *What to Know About the Trump "Fake Electors" Scheme*, CNN POLITICS (Jan. 27, 2022), <https://www.cnn.com/2022/01/27/politics/fake-electors-explainer/index.html>.

251. Laurence H. Tribe, Barbara McQuade & Joyce White Vance, *Here's a Roadmap for the Justice Department to Follow in Investigating Trump*, WASH. POST (Aug. 5, 2021, 9:10 AM), <https://www.washingtonpost.com/opinions/2021/08/05/heres-roadmap-justice-department-follow-investigating-trump>.

252. See Alschuler, *supra* note 3 at 561–62, 594–604; ANDREW WEISSMANN, WHERE LAW ENDS: INSIDE THE MUELLER INVESTIGATION xxiii (2020) ("The President's dangling of pardons to

pardoned all of his convicted associates who refused to cooperate with the Mueller investigation (Paul Manafort, Roger Stone, Michael Flynn, George Papadopoulos, and Alex van der Zwaan)²⁵³ but not the two who did (Rick Gates and Michael Cohen).²⁵⁴ Trump's pledge to pardon January 6 defendants similarly might have been intended to discourage cooperation with prosecutors, but hints of a payoff deliverable in three years and contingent on winning a presidential election might prove less effective than Trump's use of clemency to impede the Mueller investigation.

When President Trump's grandstanding, cronyism, and use of clemency to silence witnesses are viewed against the 14,753 clemency applications left unresolved of people without incriminating information, movie-star champions, the support of Fox News commentators, political connections, great wealth, or political constituencies, the president's values come into focus. The Framers would have shouted the word *corrupt*.²⁵⁵

VI. HOW MUCH HAS CHANGED?

Instant historical evaluations are suspect, but President Trump clearly abused the pardon power more severely than any other U.S. president (even than President Clinton). Recent presidents other than Trump and Clinton may have pardoned for private ends no more frequently than some of their predecessors, and one recent president—Obama—seems not to have used the pardon power to benefit friends, cronies, or political boosters at all.

The current president, Joe Biden, said of President Clinton's pardon of Marc Rich, "I think either the president had an incredible lapse in memory or was brain-dead."²⁵⁶ One can hope that Biden, who granted no clemency at all during the first year of his presidency,²⁵⁷ will begin to pardon soon, develop consistent policies and procedures, and consider structural reforms—reducing the bureaucratic obstacles to clemency, moving the Office of the Pardon Attorney from the Department of Justice to the Executive Office of the President, and/or creating a nonpartisan pardon commission.²⁵⁸

those who were considering cooperating with our investigation served, by design, to thwart our uncovering the true facts."); JEFFREY TOOBIN, *TRUE CRIMES AND MISDEMEANORS: THE INVESTIGATION OF DONALD TRUMP* 233 (2020) (crediting Trump's strategy of openly indicating the likelihood of pardons with ending the Special Counsel's success in developing cooperating witnesses).

253. See *infra* text accompanying notes 193–211, 219–22.

254. See Alschuler, *supra* note 3 at 561.

255. The number of privileged and corrupt Americans the president knew and was *able* to pardon is itself astonishing. One can understand why, in 2016, many Americans might have cheered a presidential candidate's promise to drain the swamp.

256. *Clinton Finds Himself Friendless, Under Fire*, ABC NEWS (Jan. 7, 2006), <https://abcnews.go.com/WNT/story?id=131233&page=1>.

257. U.S. DEP'T OF JUST., *supra* note 20.

258. See *infra* text accompanying notes 246–47.

What most clearly differentiates the past forty years from earlier years is the extraordinary reluctance of all presidents during this period other than Obama to grant clemency to offenders without special connections. Cronyism is especially objectionable when presidents offer grounds for pardoning friends that plainly do not influence them in other cases, when the tough-on-crime stance of their election campaigns disappears in cases in which their friends seek mercy, and when they all but shut the door to thousands of petitioners without connections. A president who shows compassion for applicants he has never met and who occasionally pardons friends differs from one who routinely does favors for friends and occasionally pardons others.

VII. IF THE FRAMERS HAD CHOSEN DIFFERENTLY

If the Constitutional Convention had approved Roger Sherman's motion to require the Senate's approval of pardons, most of the controversial pardons and commutations of the past forty years would not have happened. Caspar Weinberger, Mathew Golsteyn, Ken Kurson, and Steve Bannon would have been tried; Joe Arpaio, Elliott Broidy, and Lil Wayne would have been sentenced; Scooter Libby, Roger Stone, and Michael Flynn would have gone to prison; Rod Blagojevich, Paul Manafort, Salomon Melgen, and some former Republican Members of Congress would have stayed in prison; and Marc Rich would have continued to live a life of luxury as a fugitive in Switzerland. One might accordingly applaud Sherman's prescience. At the same time, Sherman's proposed safeguard would have blocked much clemency granted for virtuous reasons. President Obama's Clemency Initiative 2014 would have been unthinkable.

For good or ill, Sherman's safeguard would have prevented President Ford's pardon of Richard Nixon and would have blocked President Andrew Johnson from pardoning thousands of former Confederate military officers and office holders.²⁵⁹ President Lincoln could not have granted the clemency he did following the U.S.-Dakota War of 1862—remitting 264 of the 303 death sentences a military tribunal imposed after summary trials of captured Dakota warriors.²⁶⁰ President Harding might not have commuted Eugene V. Debs' ten-year prison sentence for giving an anti-war speech,²⁶¹ and the delay and uncertainty incident to Senate review might have made clemency unavailable to many others.²⁶²

259. See generally JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861-1898 (1953).

260. See DAVID HERBERT DONALD, LINCOLN 392-95 (1995); Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 46-61 (1990).

261. See NICK SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST 327-28 (1984).

262. The requirement of Senate approval might not have kept President Jefferson from pardoning everyone serving sentences under the Sedition Act, see TERRI DIANE HALPERIN, THE ALIEN AND SEDITION ACTS OF 1798: TESTING THE CONSTITUTION 125 (2016), and it might not

A choice made in Philadelphia in the summer of 1787 changed lives. Over the course of two-and-one-third centuries, thousands of recipients of individual clemency grants and group amnesties could have thanked Madison and Hamilton for relief they probably would not have received if the convention had not made an exception to its usual insistence on checks and balances.

Today the broad power the Constitution gives presidents could facilitate institutional reform. The United States currently imprisons a higher proportion of its population than any other nation in the world.²⁶³ Although recent legislation has reduced the population of federal prisons,²⁶⁴ the likelihood that Congress will address mass incarceration by restoring parole or something like it seems small.²⁶⁵ In the absence of action by Congress, progressive and conservative scholars agree that presidents should revitalize clemency—perhaps by moving the Office of the Pardon Attorney from the Department of Justice to the Executive Office of the President or by creating a bipartisan board whose composition could guard against favoritism and give presidents a measure of protection from partisan criticism.²⁶⁶

have kept President Carter from granting amnesty to almost everyone who refused to serve in Vietnam. See Andrew Glass, *President Carter Pardons Draft Dodgers, Jan. 21, 1977*, POLITICO (Jan. 21, 2018, 6:30 AM), <https://www.politico.com/story/2018/01/21/president-carter-pardons-draft-dodgers-jan-21-1977-346493>. Both actions came immediately after presidents took office when they had strong Senate support.

263. Roy WALMSLEY, INST. FOR CRIM. POL'Y RSCH., WORLD PRISON POPULATION LIST 2 (12th ed. 2018); see generally Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 NYU ANN. SURVEY AM. L. 205 (2021).

264. See Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next>.

265. A “second look” tribunal—a nonjudicial body authorized to reduce a prisoner’s sentence after he has completed a substantial part of it—might resemble a parole board, but it probably should make little or no effort to assess the prisoner’s attitude, psyche, or rehabilitative potential. Attempts to make assessments of this sort in the era of federal parole probably did less to redeem errant lives than to make prison an exercise in theatre. See JESSICA MITFORD, *KIND AND USUAL PUNISHMENT: THE PRISON BUSINESS* 236–49 (Vintage ed. 1974). Moreover, unlike a prisoner released on parole, a prisoner released by a “second look” tribunal should receive supervision and services no different from those received by other released prisoners. A “second look” tribunal could consider whether a prisoner’s sentence was appropriate when imposed; whether laws or social norms had changed; whether prison crowding tilted the scales in favor of release; and whether a prisoner had obeyed institutional rules, participated in optional programs, or acted to make life better for others.

266. See Margaret Colgate Love, *Justice Department Administration of the President’s Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89, 91 (2015); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL’Y 833, 906 (2016); P.S. Ruckman, Jr., *Preparing the Pardon Power for the 21st Century*, 12 U. ST. THOMAS L.J. 446, 469–70 (2016); Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 5–6 (2015); Paul Rosenzweig, *A Federalist Conception of the Pardon Power*, HERITAGE FOUND. (Dec. 4, 2012), http://thf_media.s3.amazonaws.com/2012/pdf/lm89.pdf; Alschuler, *supra* note 63, at 1164, 1167–68; Daniel T. Kobil, *Reviving Presidential Clemency in Cases of “Unfortunate Guilt”*, 21 FED. SENT’G REP. 160, 163 (2009); Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse?*, 13 FED. SENT’G REP. 177, 177–78 (2001).

The pardon power has been corrupted, and a different constitutional design might have prevented it. The authors of the Constitution favored “easy access to exceptions in favor of unfortunate guilt,”²⁶⁷ and easy access to exceptions has existed in recent years mostly for the president’s pals. For everyone else, access to exceptions often has been nearly impossible. Of course, responsibility for the corrupted state of the pardon power does not rest primarily with the Framers. For most of our history, the pardon process worked largely as they expected. Benjamin Franklin famously offered this reply when asked what form of government the Convention approved: “A republic if you can keep it.”²⁶⁸ If you can’t, Franklin seemed to say, that’s on you.

A “second look” tribunal not tied to the pardon power would be superior to a clemency board in several respects. Empowering this tribunal to release prisoners without involving the president would make its work less political. It would establish this body on a footing independent of the wishes of each administration. It would conserve the president’s time and relieve him of a politically hazardous responsibility. It also would free him from a job he would be unlikely to do well. Finally, making a “second look” tribunal part of the “regular” criminal justice system would allow clemency to be what it once was—a minimally bureaucratized, minimally rule-bound remedy of last resort. Compare Daniel J. Freed & Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT’G REP. 119, 124 (2001) (proposing that a body of rules should replace “case-by-case pardons” to promote the equal treatment of similarly situated applicants), with John Harrison, *Pardon as Prerogative*, 13 FED. SENT’G REP. 147, 147 (2001) (observing that “[b]y and large, governments do good through rules and not outside them” but that “the framers retained one part of the royal authority that most closely fits John Locke’s definition of prerogative, the power of doing good without a rule”).

267. The FEDERALIST NO. 74 at 446, *supra* note 6.

268. Papers of Dr. James McHenry on the Federal Convention of 1787, 11 AM. HIST. REV. 595, 618 (1906).