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THE TRUMP CLEMENCIES: CELEBRITIES, CHAOS, AND LOST OPPORTUNITY

Mark Osler*

INTRODUCTION

The presidency of Donald Trump may have produced the most chaotic use of the constitutional pardon power in American history. Trump granted clemency to war criminals, to close friends, to celebrities, and to the friends of celebrities, with much of it coming in a mad rush at the end of his single term.¹ Buried beneath this rolling disaster was a brief moment of hope and a lost opportunity: the chance for a restructuring of the clemency process in the fall of 2018, enabled by a rare alignment of factors, including Trump's alienation from the Department of Justice.² This Article will explore the fullness of Trump's clemency legacy and explore what was lost when a vehicle that could have helped stem over-incarceration died on the drafting table.

What follows is rooted in two personal experiences. The first was a series of meetings at the Trump White House, where I was asked to describe a better way of evaluating clemency petitions—advice that was ultimately rejected. The second experience has been, with the help of my students, reviewing clemency warrants and compiling data on what Trump ended up doing with the Pardon Power given to him by the Constitution. This analysis revealed not only troubling patterns in Trump's clemency grants but also the tragedy of his failure to turn in a different direction through reform of the process he inherited.

Part One of this Article will describe the broken and mangled clemency evaluation system the Trump administration inherited together with a record number of unresolved petitions.

Part Two, in turn, will examine a near-breakthrough in the middle of Trump's single term, when there seemed to be serious consideration given to real reform of the clemency process. A rare moment of opportunity presented itself, as the usual stumbling block for reform—the Department of Justice—was effectively sidelined, and there was an advocate for reform (Jared Kushner) within the President's inner circle. The eventual rejection of proposed reforms by the Trump administration in favor of a more informal process planted the seeds for the chaos to come.

Part Three will delve into how Trump actually used the presidential pardon power. Trump deployed clemency unlike any of his predecessors: not only to reward

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¹ *Infra* Part III.

² *Infra* Part II.

friends (*that* had been done)³ but to serve and reward the traits he held most dear, such as loyalty, toughness, celebrity, and provocation, while disproportionately favoring those charged with crimes involving dishonesty. Part Four also addresses the patterns seen in the Trump clemency grants, particularly in terms of race and gender.

Early signals seem to show that Trump's successor, Joe Biden, is reluctant to revamp the clemency evaluation system or use clemency systemically, compounding the tragedy of the Trump years. Clemency was meant to flow from positive values close to the hearts of Americans: mercy, redemption, and reconciliation. Trump's abuses should lead us to reform the clemency review process and return to those values rather than abandon the tool by which they may be realized.

I. THE CLEMENCY TANGLE

For decades the clemency evaluation process has been broken, failing presidents of every political stripe.⁴ This failure to consistently advise the president was one of the factors leading to a drastic drop in clemency grants in the modern era, particularly in the first years of a presidency.⁵ Presidents Bill Clinton, George W. Bush, and Barack Obama granted zero petitions in their first two years, breaking from tradition.⁶ Grant rates overall crashed: President John F. Kennedy granted 33% of the clemency petitions filed, Lyndon B. Johnson 26%, Richard Nixon 36%, Gerald Ford 27%,⁷ Jimmy Carter 22%, Ronald Reagan 12%, George H. W. Bush 5%, Bill Clinton 6%, and George W. Bush 2%.⁸ President Obama is a special case—he created a focused initiative and very much tried to grant clemency broadly,⁹ but ended his term with only a 5% grant rate.¹⁰ In contrast, all of the presidents between William

³ Nicole Lewis et al., *Trump's Pardons Show the Process Has Always Been Broken*, MARSHALL PROJECT (Jan. 19, 2021, 7:05 PM), <https://www.themarshallproject.org/2021/01/19/trump-s-pardons-show-the-process-has-always-been-broken> [https://perma.cc/8P3V-4MG6]; Mark Osler, *Presidential Pardons for Friends Are Legal—but They're Wrong*, WASH. POST (Apr. 20, 2018, 11:05 AM), https://www.washingtonpost.com/opinions/presidential-pardons-for-friends-are-legal--but-theyre-wrong/2018/04/20/3a135124-4324-11e8-bba2-0976a82b05a2_story.html [https://perma.cc/PL7E-6RRX].

⁴ Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1195–204 (2010).

⁵ *Clemency Statistics*, U.S. DEP'T OF JUST. (Aug. 3, 2022), <https://www.justice.gov/pardon/clemency-statistics> [https://perma.cc/D8SV-YBMX].

⁶ *Id.*

⁷ Ford's numbers do not include the grants made through his special Presidential Clemency Board, discussed in this section. *Id.*

⁸ John Gramlich, *Trump Used His Clemency Power Sparingly Despite a Raft of Late Pardons and Commutations*, PEW RSCH. CTR. (Jan. 22, 2021), <https://www.pewresearch.org/fact-tank/2021/01/22/trump-used-his-clemency-power-sparingly-despite-a-raft-of-late-pardons-and-commutations/> [https://perma.cc/2S2F-XS74].

⁹ See, e.g., Paul J. Larkin, Jr., "A Day Late and a Dollar Short"—President Obama's Clemency Initiative 2014, 16 GEO. J. L. & PUB. POL'Y 147 (2018).

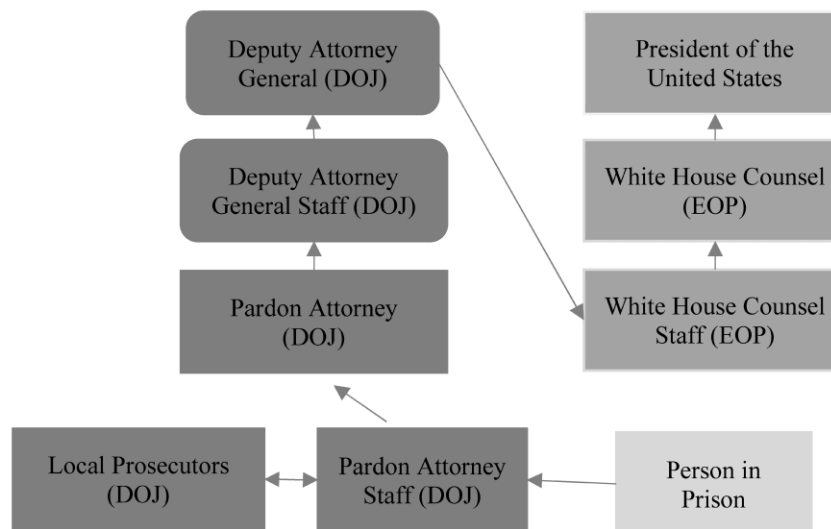
¹⁰ Gramlich, *supra* note 8. In fairness, Obama's low grant rate is in part a function of the

McKinley and Jimmy Carter had grant rates over 20%, with Harry Truman topping them all at 41%.¹¹

So why has the use of clemency plummeted, even as concerns about over-incarceration have grown? While political timidity plays a role,¹² a significant factor has been the current process used to evaluate clemency petitions and make recommendations to the president. It is an opaque system enveloped in bureaucracy and encased in endemic conflicts of interest.

This process developed haphazardly in the 1970s and 1980s. From a relatively simple system in which a petition was reviewed by the pardon attorney and then a recommendation was conveyed from the Attorney General to the President,¹³ bureaucracy grew and metastasized until the process came to include seven distinct actors, each with their own interests and biases, acting sequentially. Today, a clemency petition will be considered, in turn, by the staff of the Pardon Attorney (who must first consult local prosecutors), the Pardon Attorney, the staff of the Deputy Attorney General, the Deputy Attorney General, the staff of the White House Counsel, the White House Counsel, and finally by the President.¹⁴ The chart below depicts this awkward process.

Figure 1. Path of evaluation for a federal commutation petition



fact that his administration so actively encouraged those in prison to submit clemency petitions. *Id.*

¹¹ *Id.*

¹² Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 465, 474–85 (2017).

¹³ *Id.* at 472–74.

¹⁴ *Id.* at 477–85.

This process was not created at a single moment in time by any kind of coherent action. Rather, it grew organically over time, with actors in the system delegating authority and adding layers of review.¹⁵ The chart above reveals the bedrock flaws in the system, but it is worthwhile to focus on five primary problems.

First, the process is simply too extensive. Bureaucracy is no friend to mercy. In Federalist 74, Hamilton put it well in the course of defending the Constitution's placement of the pardon power solely in the hands of the President: "one man appears to be a more eligible dispenser of the mercy of government, than a body of men."¹⁶ When that body of people grows to the size of the clemency bureaucracy, it makes for a terrible dispenser of mercy.

Second, the reviews are done one after the other—no one reviewer sees the petition until the person in line before them has completed their review. The absurd inefficiency of seven reviewers working sequentially—rather than simultaneously as part of a board—is striking. The process even features no fewer than three redundant staff-to-supervisor reviews.

Third, the decision process is upside-down. The specialists with the most knowledge in this area are found in the Office of the Pardon Attorney, but those individuals are at the very bottom of the vertical line of decision. At the top, we find generalists who usually will lack a depth of knowledge in this field. That means that the closer we get to the decision maker (the president), the less expertise we find.

Fourth, two of the key reviewers are generalists who have built-in conflicts of interest. The Deputy Attorney General (DAG) is the direct supervisor of the United States Attorneys,¹⁷ and essentially overturning the sentences they successfully argued for threatens that relationship. The White House Counsel, in turn, may seek to steer the Office of the President¹⁸ away from controversy, and that is achieved by avoiding the risks inherent in granting clemency. Both the DAG and the White House Counsel have other pressing and often episodic duties (such as shepherding Supreme Court nominees, for the White House Counsel), and this means that clemency decisions can constantly be pushed to the back of the line of priorities.

Finally, and perhaps most importantly, the Department of Justice (DOJ) is given too strong a voice, both in the four levels of review ensconced there and through the policy directive that the views of local prosecutors be solicited and "given considerable

¹⁵ *Id.* at 470–74.

¹⁶ THE FEDERALIST NO. 74 (Alexander Hamilton).

¹⁷ *Meet the Deputy Attorney General*, U.S. DEP'T OF JUST. (June 1, 2022), <https://www.justice.gov/dag/staff-profile/meet-deputy-attorney-general> [<https://perma.cc/6XCU-GANT>].

¹⁸ Ideally, the White House Counsel serves to protect the office of the president, not the President herself. While the White House Counsel is not the president's personal attorney, she does have a range of duties that involve the power of the presidency. Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 L. & CONTEMP. PROBS. 63, 63–72 (1993).

weight.”¹⁹ It’s not hard to see the nature of this conflict of interest: the very people who sought an outcome are being asked to review it.

Trump’s predecessor wanted to do better in using the pardon power than those who came immediately before him. The Obama administration’s clemency initiative attempted to use clemency broadly but failed to replace the flawed evaluation process first—in other words, they didn’t rebuild the road before driving down it. While thousands of lawyers volunteered time and the President was pushing for results, only 1,715 sentences were commuted because the Obama Administration created a system that not only left the broken evaluation system in place but added bureaucracy to it.²⁰ A review by the DOJ’s Inspector General revealed a wealth of problems with the Obama program’s implementation,²¹ many of which could have been avoided if the underlying process had been restructured first. In the end, Obama *denied* as many clemency petitions as his five predecessors combined.²²

This is the gnarled bureaucracy that Donald Trump took on when he became president. Making things worse, Trump inherited over eleven thousand pending petitions, by far the biggest backlog facing any modern president.²³ In other words, a broken pipe was jammed with far more than it could handle just as a new owner bought the house. Things looked bleak for the institution of clemency, regardless of what one thought of the management abilities of Donald Trump.

II. THE LOST OPPORTUNITY OF 2018

A. An Unexpected Opening

When Donald Trump began his presidency in January 2017, many criminal justice reformers despaired. In his campaign against Democratic nominee Hillary Clinton, he had declared himself the “law and order candidate,”²⁴ and at the 2016 Republican National Convention he promised that “the crime and violence that today afflicts our nation will soon come to an end. Beginning on January 20, 2017, safety

¹⁹ U.S. Dep’t of Just., Just. Manual § 9-140.111 (2018).

²⁰ Osler, *supra* note 12, at 485–88.

²¹ See OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., REVIEW OF THE DEPARTMENT’S CLEMENCY INITIATIVE (Aug. 2018), <https://oig.justice.gov/reports/2018/e1804.pdf> [<https://perma.cc/BU8P-LXST>].

²² Rachel E. Barkow & Mark Osler, *Designed to Fail: The President’s Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 425 (2017) [hereinafter Barkow & Osler, *Designed to Fail*].

²³ *Clemency Statistics*, *supra* note 5.

²⁴ Louis Nelson, *Trump: “I Am the Law and Order Candidate,”* POLITICO (July 11, 2016, 3:15 PM), <https://www.politico.com/story/2016/07/trump-law-order-candidate-225372> [<https://perma.cc/4HE9-2HFC>].

will be restored.”²⁵ Trump’s anti-crime rhetoric reached a crescendo in the memorable “American Carnage” passage of his 2017 Inaugural Address:

Americans want great schools for their children, safe neighborhoods for their families, and good jobs for themselves. These are just and reasonable demands of righteous people and a righteous public, but for too many of our citizens a different reality exists. Mothers and children trapped in poverty in our inner cities, rusted out factories, scattered like tombstones across the landscape of our nation, an education system flush with cash, but which leaves our young and beautiful students deprived of all knowledge, and the crime, and the gangs, and the drugs that have stolen too many lives and robbed our country of so much unrealized potential. This American carnage stops right here and stops right now.²⁶

The table seemed set for a return to the worst drivers of over-incarceration: the federalization of state crimes, implementation of new mandatory minimums, and a reversal of the Obama administration’s tentative steps towards criminal justice reform.²⁷

Things changed, though, once Trump was in office. While the Department of Justice during the Trump years was far from a reformer’s dream,²⁸ many of the fears raised by Trump’s alarming rhetoric were unrealized. Moreover, in December 2018, President Trump actually signed a reform bill, the First Step Act,²⁹ that eclipsed even the efforts of the Obama administration by making an Obama-era reform (on

²⁵ *Flashback: What Trump Said About “Law and Order” During His 2016 RNC Speech*, AXIOS (Aug. 27, 2020), <https://www.axios.com/2020/08/27/trump-2016-rnc-speech> [<https://perma.cc/9PJ4-N5JG>].

²⁶ *Full Text: 2017 Donald Trump Inaugural Speech Transcript*, POLITICO (Jan. 20, 2017, 12:49 PM), <https://www.politico.com/story/2017/01/full-text-donald-trump-inauguration-speech-transcript-233907> [<https://perma.cc/LVX6-R2FC>].

²⁷ In an unusual step back into the academy, President Obama himself promoted his reforms in a law review commentary. See generally Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017).

²⁸ For example, Attorney General Jeff Sessions issued a charging memorandum to line prosecutors that directed them to pursue the “most serious, readily provable offense,” departing from a prior directive that allowed for more leeway. Colin Dwyer, *Sessions Tells Prosecutors to Seek “Most Serious” Charges, Stricter Sentences*, NPR (May 12, 2017, 12:10 PM), <https://www.npr.org/sections/thetwo-way/2017/05/12/528086525/sessions-tells-prosecutors-to-seek-most-serious-charges-stricter-sentences> [<https://perma.cc/J9S6-A3QW>].

²⁹ First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194, <https://www.congress.gov/bill/115th-congress/senate-bill/756/text> [<https://perma.cc/BU8P-LXST>].

crack sentencing) retroactive, reducing some mandatory minimums for drug trafficking, creating credits for release within the federal prisons, and ending some oft-abused practices like the “stacking” of gun charges under 18 U.S.C. § 924(c),³⁰ among other provisions.³¹

In the end, the Trump legacy for criminal justice reform, as a whole, had its positive moments,³² even as additional improvements went unrealized (as argued here). Two factors largely created this rare moment for reform. One was the estrangement between the Trump White House and the Jeff Sessions–led Department of Justice. This rift was driven by Trump’s anger that Sessions did little to protect him from the investigation into the 2016 election led by former FBI Director Robert Mueller.³³ That conflict reduced the influence that the Department of Justice usually deploys to tamp down reforms and maintain its own power.³⁴ The second factor was the presence of a motivated but imperfect advocate for reform within the innermost circles of the White House: Presidential advisor and son-in-law Jared Kushner.³⁵ Sadly, this reform movement did not quite extend to clemency.

1. DOJ Is Sidelined as a Bar to Reform

2018 saw an unusual event in American history: A President at war with his own Attorney General. The animosity largely stemmed from Special Counsel Robert Mueller’s investigation into Russian interference in the 2016 election.³⁶ On March 2,

³⁰ *Id.* § 403.

³¹ Notably, the legislation was the fruit of efforts by a remarkable and rare right-left coalition that encompassed both the ACLU and the Koch-backed Right on Crime. German Lopez, *The First Step Act, Explained*, VOX (Feb. 5, 2019, 9:42 PM), <https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform> [<https://perma.cc/9CHP-DXKT>].

³² Intriguingly, the federal prison population actually decreased during the Trump administration. John Gramlich, *Under Trump, the Federal Prison Population Continued Its Recent Decline*, PEW RSCH. CTR. (Feb. 17, 2021), <https://www.pewresearch.org/fact-tank/2021/02/17/under-trump-the-federal-prison-population-continued-its-recent-decline/> [<https://perma.cc/93BE-JHJJ>].

³³ See Margaret Hartmann, *The Complete History of President Trump’s Feud with Jeff Sessions*, N.Y. MAG. (Nov. 7, 2018), <https://nymag.com/intelligencer/2018/11/history-trump-jeff-sessions-feud.html?regwall-newsletter-signup=true> [<https://perma.cc/3R2H-QK95>].

³⁴ Rachel E. Barkow & Mark Osler, *Where Reform Goes to Die*, INQUEST (July 26, 2021), <https://inquest.org/doj-where-reform-goes-to-die/> [<https://perma.cc/BJ9N-MLGC>].

³⁵ See Jared Kushner, *Fifteen Things I Learned from Criminal Justice Reform*, TIME MAG. (Apr. 24, 2019, 3:15 PM), <https://time.com/5577434/jared-kushner-criminal-justice-reform-lessons/> [<https://perma.cc/2CJD-PG7Z>].

³⁶ This investigation eventually resulted in a voluminous report. 1 ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019); 2 ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019).

2017, Attorney General Jeff Sessions announced that he was recusing himself “from any existing or future investigations of any matters related in any way to the campaigns for President of the United States,”³⁷ despite President Trump’s urging that he not do so.³⁸ Presidential advisor (and future pardon recipient)³⁹ Steve Bannon reported that upon hearing of Sessions’ decision, President Trump was screaming about it and “was as mad as Bannon had ever seen him.”⁴⁰ For the rest of 2017 and into 2018, Trump unsuccessfully tried to get Sessions to reverse his recusal.⁴¹

The acrimony between Trump and Sessions was not well hidden. On June 5, 2018, for example, Trump tweeted “The Russian Witch Hunt Hoax continues, all because Jeff Sessions didn’t tell me he was going to recuse himself . . . I would have quickly picked someone else. So much time and money wasted, so many lives ruined . . . and Sessions knew more than most that there was No Collusion!”⁴² Sometimes, Sessions pushed back, including in March 2018 after Trump called him “DISGRACEFUL” [sic] in a tweet.⁴³ As early as July 2017, it was reported that Trump and Sessions were no longer speaking to each other.⁴⁴

This historic breach between the President and his Attorney General lasted over a year and a half, until Sessions’ resignation in November 2018.⁴⁵ The reason this tortured relationship between the two men (and between President Trump and the Department of Justice more generally)⁴⁶ matters is because, in more normal times, the

³⁷ Press Release, Off. Of Pub. Affs., Dep’t of Just., Attorney General Sessions Statement on Recusal (Mar. 2, 2017).

³⁸ 2 MUELLER, *supra* note 36, at 49.

³⁹ *Infra* Part III.

⁴⁰ 2 MUELLER, *supra* note 36, at 51.

⁴¹ *Id.* at 107.

⁴² Donald Trump (@realDonaldTrump), TWITTER (June 5, 2018, 7:31 AM), <https://twitter.com/realdonaldtrump/status/1003962584352030720> [<https://web.archive.org/web/20200630121251/https://twitter.com/realdonaldtrump/status/1003962584352030720>].

⁴³ Dan Merica, Laura Jarrett & Maegan Vazquez, *Sessions Pushes Back on Trump After “Disgraceful” Insult*, CNN (Mar. 1, 2018, 4:45 AM), <https://www.cnn.com/2018/02/28/politics/trump-sessions-fisa-abuse/index.html> [<https://perma.cc/DUS5-QZQY>]. Sessions avoided Trump’s all-caps rhetoric, however, simply stating that “[a]s long as I am the attorney general, I will continue to discharge my duties with integrity and honor, and this department will continue to do its work in a fair and impartial manner according to the law and Constitution.” *Id.*

⁴⁴ Aida Chavez, *Trump and Sessions No Longer Speaking to One Another: Report*, THE HILL (July 26, 2017, 8:03 AM), <https://thehill.com/blogs/blog-briefing-room/news/343836-trump-and-sessions-no-longer-speaking-to-one-another/> [<https://perma.cc/7SXL-72YV>].

⁴⁵ Peter Baker et al., *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/ses-sions-resigns.html> [<https://perma.cc/CD63-ENBM>].

⁴⁶ Tucker Higgins, *Trump Brings the Power of the Pardon to His Battle with the Justice Department*, CNBC (June 1, 2018, 1:36 PM), <https://www.cnn.com/2018/06/01/trump-brings-the-power-of-the-pardon-to-his-battle-with-the-justice-department.html> [<https://perma.cc/9X93-ZL9L>].

DOJ too often serves as a brake on reforms that may limit the power and discretion enjoyed by DOJ lawyers.⁴⁷ For example, during the ostensibly pro-reform Obama administration, the Department of Justice worked to stymie reforms to sentencing,⁴⁸ clemency,⁴⁹ compassionate release,⁵⁰ and forensic science.⁵¹

In other words, a war between the White House and the Department of Justice bore a significant benefit to reformers: the opportunity to pitch ideas to the White House without the risk of meaningful DOJ interference. Such a dynamic had produced remarkable change in the past. For example, Title IX,⁵² which revolutionized women's sports, passed into law in part because the most likely opponent, the American Council on Education, apparently did not realize how transformative the law could be and simply ignored it.⁵³ The lobbyist for the ACE declined to even testify. An opening was created, and the world changed.

2. Jared Kushner, Insider Advocate

The role of Jared Kushner within the Trump administration has been subject to critical analysis from all sides, with analysts calling him both Trump's "most dangerous enabler"⁵⁴ and "a deft bureaucratic knife fighter" who managed to achieve significant accomplishments.⁵⁵ Brought into the administration in part because he is married to Ivanka Trump, Kushner gained an unusually broad portfolio, tasked with leading efforts on Middle East relations, health care, Central America, border infrastructure, and others.⁵⁶

What he sometimes seemed to care most about, though, was criminal justice. In part, this was driven by his own personal history: his father, Charles Kushner, served time in prison for tax evasion and witness intimidation, in a case prosecuted by then-U.S. Attorney Chris Christie.⁵⁷ Kushner put it this way in an interview:

⁴⁷ Barkow & Osler, *Designed to Fail*, *supra* note 22, at 395–404.

⁴⁸ *Id.* at 406–24.

⁴⁹ *Id.* at 425–40.

⁵⁰ *Id.* at 441–48.

⁵¹ *Id.* at 449–53.

⁵² Formally, Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964, Pub. L. No. 92-318, 86 Stat. 235, codified at 20 U.S.C. §§ 1681–1688.

⁵³ Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 CLEV. ST. L. REV. 473, 477, 482 (2007).

⁵⁴ Franklin Foer, *The Good Son*, THE ATLANTIC (Aug. 13, 2020), <https://www.theatlantic.com/politics/archive/2020/08/how-jared-kushner-became-trumps-most-dangerous-enabler/615169/> [<https://perma.cc/Q89R-VRWL>].

⁵⁵ See Brian Bennett, *Inside Jared Kushner's Unusual White House Role*, TIME MAG. (Jan. 16, 2020, 6:08 AM), <https://time.com/5766186/jared-kushner-interview/> [<https://perma.cc/7EQL-5DMU>].

⁵⁶ *Id.*

⁵⁷ *Political Contributor, Developer Charles Kushner Pleads Guilty to Tax Fraud, Witness*

Over the course of 12 years, I had gone from the son of someone who was in federal prison to sitting in an office next to the President. This topic was too important to me not to give it attention. I had spent a lot of time with families of people in prison, thinking that I could share lessons to make what had been a very painful experience for me a bit easier for them. I knew from that experience how much those people would benefit from having someone in my office who cared about this issue.⁵⁸

Jared Kushner was certainly an imperfect inside advocate: inexperienced, controversial, and unconnected to many of those who had been working in the field for decades. Yet, even with all that, a single imperfect advocate was one more than reformers expected to find in a Trump White House led by the man who decried “American carnage.”

In late 2018, these two things aligned as Kushner had established himself within the White House, and the conflict between Trump and Sessions simmered on high as Sessions somehow lingered in the job.

B. The Door Slips Open

It was within this rare moment that I received an unusual email from the Trump White House—unusual only in part because I am a lifelong Democrat. The email began with this:

On Behalf of Jared Kushner, Brooke Rollins, and the White House Office of American Innovation, you are cordially invited to attend a roundtable discussion on clemency. As a great friend to the effort to increase public safety, repair broken communities, and provide opportunity and prosperity for all Americans, we welcome your presence in the Roosevelt Room of the White House. . . .⁵⁹

And that’s how I found myself in the waiting room of the White House on the morning of September 5, 2018, sitting next to my longtime collaborator and NYU law professor Rachel Barkow, Paul Larkin Jr. of the Heritage Foundation, and media

Retaliation, and Making False Statements To the Federal Election Commission, U.S. DEP’T OF JUST. (Aug. 18, 2004), https://www.justice.gov/archive/tax/usaopress/2004/txdv04kush0818_r.htm [<https://perma.cc/4LVW-9U7F>]. Kushner later received a pardon from President Trump. Amita Kelly et al., *Trump Pardons Roger Stone, Paul Manafort and Charles Kushner*, NPR (Dec. 23, 2020, 11:00 PM), <https://www.npr.org/2020/12/23/949820820/trump-pardons-roger-stone-paul-manafort-and-charles-kushner> [<https://perma.cc/J5HB-DXTZ>].

⁵⁸ Kushner, *supra* note 35.

⁵⁹ Email from Jared Kushner & Brooke Rollins, to Mark Osler, author (Aug. 16, 2018) (on file with author).

commentator Van Jones. It was a typically tumultuous day for the Trump White House, as that morning the *New York Times* had run an opinion piece by an unknown Trump insider titled “I Am Part of the Resistance Inside the Trump Administration.”⁶⁰ The anonymous op-ed,⁶¹ which described a coterie of administration officials who worked to derail Trump’s worst instincts, had Washington abuzz.⁶²

As we were ushered into the Roosevelt Room (which is across a hallway from the Oval Office), we squeezed between Press Secretary Sarah Huckabee and Presidential Advisor Kellyanne Conway, who were standing on either side of a doorway and deep in discussion until spotting Van Jones, who became their immediate focus of attention. Meanwhile, the rest of us filed into the room to find the other participants already there. They included⁶³ Federalist Society leader Leonard Leo,⁶⁴ activist lawyer Jessica Jackson,⁶⁵ Koch Industries General Counsel Mark Holden, attorney Brittany Barnett,⁶⁶ former federal judge Kevin Sharp, Georgetown Law Professor Shon Hopwood, and (to the delight of the press)⁶⁷ reality television star Kim

⁶⁰ Anon., *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html> [<https://perma.cc/8NQ9-ZSVY>].

⁶¹ The Author was later revealed to be Miles Taylor, who served as the Chief of Staff at the Department of Homeland Security. Michael D. Shear, *Miles Taylor, a Former Homeland Security Official, Reveals He Was “Anonymous”*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/10/28/us/politics/miles-taylor-anonymous-trump.html> [<https://perma.cc/3YQX-FFZ2>].

⁶² Michael M. Grynbaum, *Anonymous Op-Ed in New York Times Causes a Stir Online and in the White House*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/business/media/new-york-times-trump-anonymous.html> [<https://perma.cc/M8FX-W639>].

⁶³ Jeremy Diamond & Betsy Klein, *Kim Kardashian at White House for Clemency Review Session*, CNN (Sept. 5, 2018), <https://www.cnn.com/2018/09/05/politics/kim-kardashian-white-house-clemency/index.html> [<https://perma.cc/RNL5-VTNQ>].

⁶⁴ Leo has held a number of positions at the conservative Federalist Society, including vice-president and co-chair of the board of directors. He is best known for his influence on judicial selection, particularly at the Supreme Court. See Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, THE NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/EB57-RJM3>].

⁶⁵ Jackson played a key role in the passage of the First Step Act, but is perhaps better known as being Kim Kardashian’s legal tutor. Madison Feller, *Jessica Jackson Is a Lawyer and Criminal Justice Advocate. She’s Also Kim Kardashian’s Mentor*, ELLE (May 7, 2019), <https://www.elle.com/culture/celebrities/a27335345/jessica-jackson-cut50-kim-kardashian-west/> [<https://perma.cc/JJ7K-3JGH>].

⁶⁶ Barnett not only has a striking record in working on behalf of clemency recipients, but is the author of one of the best books about the criminal justice system, *A Knock at Midnight*. See Paul Butler, *A Young Lawyer Battling for Women Caught Up in Mass Incarceration*, WASH. POST (Oct. 16, 2020, 8:00 AM), https://www.washingtonpost.com/outlook/a-young-lawyer-battling-for-women-caught-up-in-mass-incarceration/2020/10/15/4df77418-041a-11eb-a2db-417cddf4816a_story.html [<https://perma.cc/8EYV-X28Z>].

⁶⁷ David Jackson & Gregory Korte, *Kim Kardashian Visits Donald Trump’s White House*

Kardashian.⁶⁸ Ivanka Trump sat at one end of the table and Jared Kushner at the other. It was not my usual crowd.⁶⁹

After introductions, Jared Kushner asked Rachel Barkow and me to explain what the problems were with the clemency process and how to fix them. It was something we had done several times before, beginning in 2015 with an article in the *University of Chicago Law Review*.⁷⁰ Our solution to the clemency mess was to pull that process out of the Department of Justice and put it in the hands of an appointed board with broad representation, working transparently and with clear directives.⁷¹ The Pardon Attorney and her staff would be reassigned to become the initial staff

for *Prison Reform Meeting*, USA TODAY (Sept. 5, 2018, 2:53 PM), <https://www.usatoday.com/story/news/politics/2018/09/05/kim-kardashian-visits-white-house-prison-reform-meeting/1201179002/> [<https://perma.cc/WGN6-E8DL>].

⁶⁸ The inclusion of a reality-television star in a serious discussion of policy was controversial, particularly among advocates (many of whom had worked for years on the issue) who were denied a seat at the table. Certainly, Kardashian's presence gave the event more importance to the Trumps and those around them, and she drew attention to the need for clemency reform. If there is fault to be found, it is with the celebrity-worshipping Trump administration, not with the person who responded to an invitation to the White House. At any rate, the meeting (in which Kardashian spoke only once or twice) was a masterpiece compared to a White House event the next month with Kardashian's then-husband, Kanye West. Among other things, a MAGA-hat-wearing West beseeched the President to grant a highly unlikely pardon to Larry Hoover, who is serving six life terms in the Supermax prison for crimes relating to his leadership of a Chicago street gang. Jonathan Capehart, *I Said Kanye West Was Laughable. He Proved Me Right*, WASH. POST (Oct. 11, 2018, 7:47 PM), <https://www.washingtonpost.com/blogs/post-partisan/wp/2018/10/11/i-said-kanye-west-was-laughable-he-proved-me-right/> [<https://perma.cc/3ZQ2-GP2K>].

⁶⁹ While this group represented a spectrum of views, it lacked the presence of some who had long advocated for change (such as Justice Roundtable founder Nkechi Taifa) or any of the groups for those who had themselves been in prison.

⁷⁰ See generally Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015) [hereinafter Barkow & Osler, *Restructuring Clemency*]; Barkow & Osler, *Designed to Fail*, *supra* note 22; Rachel E. Barkow & Mark Osler, *The President's Idle Executive Power: Pardoning*, WASH. POST (Nov. 26, 2014) [hereinafter Barkow & Osler, *The President's Idle Executive Power: Pardoning*], https://www.washingtonpost.com/opinions/the-presidents-idle-executive-power-pardoning/2014/11/26/3934ab1c-71aa-11e4-8808-afaa1e3a33ef_story.html [<https://perma.cc/8N9H-X9BS>]; Mark Osler, *Obama's Clemency Problem*, N.Y. TIMES (Apr. 1, 2016) [hereinafter Osler, *Obama's Clemency Problem*], <https://www.nytimes.com/2016/04/01/opinion/obamas-clemency-problem.html> [<https://perma.cc/SUA5-6QAT>]. We had also co-founded a pop-up legal center during the height of the Obama clemency initiative. NYU Law News, *Center on the Administration of Criminal Law Launches Clemency Resource Center* (July 15, 2015), <https://www.law.nyu.edu/news/Center-on-Administration-of-Criminal-Law-launches-Clemency-Resource-Center> [<https://perma.cc/F2QS-82W3>].

⁷¹ Barkow & Osler, *Restructuring Clemency*, *supra* note 70, at 19–21; Barkow & Osler, *Designed to Fail*, *supra* note 22, at 458–62; Barkow & Osler, *The President's Idle Executive Power: Pardoning*, *supra* note 70; Osler, *Obama's Clemency Problem*, *supra* note 70.

of the clemency board.⁷² These simple moves would allow for fair consideration of many more clemency petitions.

This was not an outlandish idea from the fringes. It drew from an established, successful precedent within the federal system: President Gerald Ford's Presidential Clemency Board, which successfully recommended thousands of conditional pardons for offenses related to the Vietnam War (an effort that proved so uncontroversial historically that few people remember it).⁷³ The proposed change to a formal board outside of the Department of Justice has been endorsed not just once but twice by the editorial board of the *New York Times*,⁷⁴ and in the 2020 election, it was explicitly embraced by presidential candidates Cory Booker,⁷⁵ Pete Buttigieg,⁷⁶ Kamala Harris,⁷⁷ Amy Klobuchar,⁷⁸ Bernie Sanders,⁷⁹ and Elizabeth Warren.⁸⁰

Our presentation was hindered a bit by the fact that we were placed on the same side of the table at opposite ends (so that we could not see one another), but at this point, we knew the material so well that we could have done it blindfolded. In about fifteen minutes, I summed up the problem—too much bureaucracy, DOJ's conflicts—and described the negative decision bias created by the fact that those in the chain of

⁷² Barkow & Osler, *Restructuring Clemency*, *supra* note 70, at 21; Barkow & Osler, *Designed to Fail*, *supra* note 22, at 462; Osler, *Obama's Clemency Problem*, *supra* note 70.

⁷³ PRESIDENTIAL CLEMENCY BD., REPORT TO THE PRESIDENT xi (1975).

⁷⁴ N.Y. Times Ed. Bd., *It's Time to Overhaul Clemency*, N.Y. TIMES (Aug. 18, 2014), <https://www.nytimes.com/2014/08/19/opinion/its-time-to-overhaul-clemency.html> [<https://perma.cc/RBL8-RCRS>]; N.Y. Times Ed. Bd., *Trump Corrupted the Presidential Pardon. Biden Must Repair It.*, N.Y. TIMES (Dec. 23, 2020), <https://www.nytimes.com/2020/12/23/opinion/trump-biden-pardon.html> [<https://perma.cc/RD2Q-ZWD5>].

⁷⁵ German Lopez, *Cory Booker Has A Plan to Reform the Criminal Justice System—Without Congress*, VOX (June 20, 2019, 11:00 AM), <https://www.vox.com/future-perfect/2019/6/20/18692038/cory-booker-criminal-justice-system-clemency-pardon> [<https://perma.cc/WL5M-4CZN>].

⁷⁶ Pete Buttigieg, *Criminal Justice Reform Can't Only Enact Neutral Policies. It Must Reverse Years of Racist Ones*, NBC NEWS (Oct. 26, 2019, 7:00 AM), <https://www.nbcnews.com/think/opinion/criminal-justice-reform-can-t-only-enact-neutral-policies-it-ncna1072356> [<https://perma.cc/7CWB-5NW6>].

⁷⁷ Kamala Harris, *Kamala's Plan to Transform the Criminal Justice System and Re-Envision Public Safety in America*, MEDIUM (Sept. 9, 2019), <https://kamalaharris.medium.com/kamalas-plan-to-transform-the-criminal-justice-system-and-re-envision-public-safety-in-america-f83a3d739bae> [<https://perma.cc/D2HJ-39WV>].

⁷⁸ Amy Klobuchar, *On Criminal Justice Reform, It's Time for A Second Step*, CNN (Apr. 5, 2019, 11:58 AM), <https://www.cnn.com/2019/04/05/opinions/criminal-justice-reform-second-step-klobuchar> [<https://perma.cc/U728-TU8Q>].

⁷⁹ German Lopez, *Bernie Sanders's Criminal Justice Reform Plan, Explained*, VOX (Aug. 19, 2019, 3:05 PM), <https://www.vox.com/policy-and-politics/2019/8/19/20812138/bernie-sanders-criminal-justice-reform-plan-mass-incarceration> [<https://perma.cc/SV2H-YJP9>].

⁸⁰ Elizabeth Warren, *Rethinking Public Safety to Reduce Mass Incarceration and Strengthen Communities*, MEDIUM (Aug. 20, 2019), <https://medium.com/@teamwarren/rethinking-public-safety-to-reduce-mass-incarceration-and-strengthen-communities-90e8591c6255> [<https://perma.cc/CT52-TTSC>].

decision only took a risk by saying “yes” to a petition. I described it as a pipe with seven valves, all of them spring-loaded shut, a delivery system designed not to work without extraordinary effort by many people at the same time.

When I was done, Rachel Barkow laid out our proposed solution—the creation of a clemency review board that would work with transparency and accountability, starting with the existing petitions in the backlog.⁸¹ She also emphasized the important constitutional role of clemency and why a properly functioning process was necessary to fulfill this important executive role. We emphasized that all this could and should be accomplished through executive order establishing formal procedures and lines of authority and offered to help draft any such orders. There were follow-up questions, but no expressed dissent. There seemed to be a consensus as to the best way to proceed—the way that Rachel Barkow and I had suggested. After an hour and a half, Ivanka Trump announced that her father may be coming in for pictures; Rachel and I took that as our cue to leave. I walked out of the front of the White House into the sunlight, wondering if we had made a difference.⁸² As the heavy doors were closed behind me, I dared to be optimistic.

C. *The Door Slams Shut*

My optimism was unfounded. The Trump Administration never issued an executive order reforming the clemency process, never reassigned the pardon attorney, and never convened a hard-working board to work through a growing backlog of petitions. Nor did the Trump Administration follow the Obama model⁸³ and embrace the existing process while trying to make it more productive.⁸⁴ Of about 240 clemency

⁸¹ Gregory Korte, *Kardashian Effect: Trump White House Tries to Tame a Chaotic, Celebrity-Driven Approach to Pardons*, USA TODAY (Sept. 10, 2018, 2:19 PM), <https://www.usatoday.com/story/news/nation/2018/09/09/kardashian-effect-white-house-looks-beyond-celebrity-clemency-pleas/1076355002/> [https://perma.cc/3WWM-CRM8].

⁸² Six months later, in March of 2019, I was invited to a much smaller meeting in the office of the White House Counsel, that involved Jared Kushner, Leonard Leo, White House Counsel Pat Cipollone and a few staffers, where I reiterated my earlier points.

⁸³ Obama’s “Clemency Initiative” focused on specific criteria and obtaining counsel for clemency petitioners, while leaving the clemency evaluation process (with all of its problems) intact. About 24,000 people petitioned for commutations, and nearly 1,700 received one. U.S. Sent’g Comm’n, *An Analysis of the Implementation of the 2014 Clemency Initiative*, Sept. 2017, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf [https://perma.cc/H2B7-VBET].

⁸⁴ Larry Kupers, who served as Acting Pardon Attorney under Trump, recognized that Trump ignored the established system of review to the detriment of justice, telling *The Washington Post*,

[i]t is abusive in the sense that very few of his grants, commutations or pardons really went to any legitimate purpose The purpose of the pardon power set out by Alexander Hamilton—that is mercy and reconciliation and I would add to that forgiveness. I can’t think about any of his grants that come under those categories. They are all grants to cronies or are partisan in the sense that he wants to excite and please his base.

recipients during the Trump era, only 25 came through the established process.⁸⁵ Instead, they relied on shadowy inside players working informally and out of the public eye.

Attention to process and expertise was never the Trump brand, of course; theirs was an administration based on insider plays,⁸⁶ the urgings of Fox News,⁸⁷ celebrity connections, and the rewarding of loyalties.⁸⁸ Sadly, it was these influences and Trump's core values that guided not only who received a pardon or commutation but also the clemency evaluation process that they came to use.

Rather than transparently creating the new and better process we had proposed through an executive order and appropriate regulations, Trump created and relied on a secretive and small coterie of insiders that reportedly included former Florida Attorney General Pam Biondi, Trump clemency recipient Alice Johnson, Van Jones, former Utah United States Attorney Brett Tolman and former Acting Attorney General Matthew Whitaker.⁸⁹ The shadowy group funneled cases to the president via Kushner, completely sidestepping the official process and ignoring the thousands of cases in that system.⁹⁰

While this mechanism did avoid the Department of Justice, it was a terrible alternative to a formal, transparent, and accountable structure such as the one Rachel Barkow and I had pushed for. For one thing, unlike our proposed structure, the Trump coterie did nothing for nearly all of the more than ten thousand people who had

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 [https://perma.cc/S6FS-TTVD].

⁸⁵ Kenneth P. Vogel, *The Road to Clemency From Trump Was Closed to Most Who Sought It*, N.Y. TIMES (Mar. 21, 2021), <https://www.nytimes.com/2021/01/27/us/politics/trump-pardons.html> [https://perma.cc/GC4R-YD84].

⁸⁶ Chris Riotta, *'Pardon the Swamp': Outrage Over Trump's Clemency Blitz as President Commutes Sentences for Well-Connected Insiders*, THE INDEP. (Feb. 18, 2020, 10:37 PM), <https://www.independent.co.uk/news/world/americas/us-politics/trump-pardon-clemency-rod-bлагоjevich-bernard-kerik-eddie-debartolo-corruption-charges-a9343236.html> [https://perma.cc/3AJM-KB9N].

⁸⁷ Matt Gertz, *Trump's Fox News Pardon Pipeline: A Comprehensive Review*, MEDIA MATTERS (Jan. 20, 2021, 2:00 PM), <https://www.mediamatters.org/donald-trump/trumps-fox-news-pardon-pipeline-comprehensive-review> [https://perma.cc/E3AW-9UDG].

⁸⁸ Rosalind S. Helderman et al., *In One of His Final Acts, Trump Showered Clemency on People with Connections with Him and His Allies*, WASH. POST (Jan. 20, 2021, 8:11 PM), https://www.washingtonpost.com/politics/trump-pardons/2021/01/20/dfc79216-5b49-11eb-8bcf-3877871c819d_story.html [https://perma.cc/UF5Q-GTB4].

⁸⁹ Toluse Olorunnipa et al., *White House Assembles Team of Advisers to Guide Clemency Process as Trump Considers More Pardons*, WASH. POST (Feb. 19, 2020, 8:57 PM), https://www.washingtonpost.com/politics/white-house-assembles-team-of-advisers-to-guide-clemency-process-as-trump-considers-more-pardons/2020/02/19/752d04d2-532e-11ea-929a-64efa7482a77_story.html [https://perma.cc/E9QM-M2SJ].

⁹⁰ *Id.*

followed the rules and filed a written petition with the Pardon Attorney. Those petitioners were simply ignored, leading to a historic backlog that still plagues the subsequent Biden administration.⁹¹ The secret-club approach to clemency analysis, which involved neither oversight nor regulations, also led to blurred lines between advisors and advocates. For example, Brett Tolman, a former United States Attorney in Utah and a member of the insider group, was paid as much as \$22,500 by people seeking clemency from Trump.⁹²

In a particularly terrible way, the Trump administration seemed to implement one of our suggestions—avoiding the DOJ—without the structure that should have gone with an alternative process, and with authority given to people who largely lacked knowledge of or involvement in the federal clemency process until the moment they were put in charge of it. Worse, it was done informally and in the shadows of power, opening the floodgates for the worst kinds of influences and impulses.

The fact that Trump waited until the waning days of his term to focus on clemency did not help. Some people view waiting until the end of a term to use clemency as some kind of grand tradition of the presidency, but in truth that trend began with President Clinton; prior presidents began to take clemency seriously much earlier in their presidencies.⁹³ The majority of Trump’s clemency grants—143 out of 238 total grants—came in his last 24 hours as President of the United States.⁹⁴

The results were stupefyingly bad, a parade of embarrassments that rewarded grifters, war criminals, the fabulously wealthy, prior contestants on “The Apprentice,” those who had done dirty business for Trump, and people who knew people, all while ignoring those who have been most directly harmed by over-incarceration in the United States—a group of men and woman, largely Black, convicted of drug trafficking and sentenced under laws that bear little relationship to reason or public safety.⁹⁵

III. CHAOS AND CLEMENCY

A. *The President’s Values*

Having rejected a rational and systemic fix to the clemency evaluation process, the Trump administration reverted to type and relied on informal processes and

⁹¹ Jarrell Dillard, *Lawmakers Press DOJ on Backlog of 17,000 Clemency Petitions*, BLOOMBERG NEWS (May 18, 2022, 11:51 AM), <https://www.bloomberg.com/news/articles/2022-05-18/lawmakers-press-doj-over-backlog-of-17-000-pardon-seekers-in-us> [https://perma.cc/VK8T-A2YV].

⁹² Michael S. Schmidt & Kenneth P. Vogel, *Prospect of Pardons in Final Days Fuels Market to Buy Access to Trump*, N.Y. TIMES (Mar. 21, 2021), <https://www.nytimes.com/2021/01/17/us/politics/trump-pardons.html> [https://perma.cc/48RX-G26X].

⁹³ *Clemency Statistics*, *supra* note 5.

⁹⁴ Rosalind S. Helderman et al., *Trump Grants Clemency to 143 People in Late-Night Pardon Blast*, WASH. POST (Jan. 20, 2021, 1:42 PM), https://www.washingtonpost.com/politics/trump-pardons/2021/01/20/7653bd12-59a2-11eb-8bcf-3877871c819d_story.html [https://perma.cc/9YUM-3LLK].

⁹⁵ *See supra* Part II.

closed insider networks. What happened with clemency in 2019, 2020, and the first month of 2021 was predictable and tragic. Instead of changing course, the Trump Administration accelerated an already existing clemency pattern that both rewarded and projected loyalty, celebrity, provocation, and perceived “toughness,” all while favoring those accused of crimes rooted in dishonesty.

All of this was predictable, of course. The clemency grants of a president often reflect that president’s deepest values.⁹⁶ George Washington viewed mercy as a part of strength, saying in defense of his pardons to some leaders of the Whiskey Rebellion that as part of his “sacred duty to exercise with firmness and energy the constitutional powers” accorded to him as President, he felt compelled to “mingle in the operations of Government every degree of moderation and tenderness which the national justice, dignity, and safety may permit.”⁹⁷ President Lincoln was driven by narratives and it was the stories of family members that often drove him to forgive convictions, even over the objections of his military leaders.⁹⁸ Barack Obama visited a prison and said, “there but for the grace of God,”⁹⁹ revealing the empathy for narcotics prisoners that drove his own clemency initiative.

And what did Donald Trump value? The answer to that question could have been answered clearly long before he was president: things and people he regarded as “tough,”¹⁰⁰ celebrities and television,¹⁰¹ provocation,¹⁰² and loyalty,¹⁰³ while he often viewed scrupulous honesty as overrated, particularly in the business world he

⁹⁶ Mark Osler, *Clemency as the Soul of the Constitution*, 34 J.L. & POL. 131, 136–47 (2019) [hereinafter Osler, *Clemency as the Soul*].

⁹⁷ President George Washington, *Seventh Annual Address to Congress*, Dec. 8, 1795, <https://www.presidency.ucsb.edu/documents/seventh-annual-address-congress> [<https://perma.cc/QT5N-6JH7>].

⁹⁸ Osler, *Clemency as the Soul*, *supra* note 96, at 140–42.

⁹⁹ Peter Baker, *Obama, in Oklahoma, Takes Reform Message to the Prison Cell Block*, N.Y. TIMES (July 16, 2015), <https://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html> [<https://perma.cc/AZF9-MKAF>].

¹⁰⁰ Jessica Bennett, *Trump, Biden and the Tough Guy, Nice Guy Politics of 2020*, N.Y. TIMES (Nov. 2, 2020), <https://www.nytimes.com/2020/11/01/us/politics/trump-biden-masculinity-2020.html> [<https://perma.cc/T857-XCNR>]. Trump authored a book in 2015 titled “Time to Get Tough: Make America Great Again!” DONALD J. TRUMP, *TIME TO GET TOUGH: MAKE AMERICA GREAT AGAIN!* (2d ed. 2015).

¹⁰¹ Osler, *Clemency as the Soul*, *supra* note 96, at 146–47. Trump’s love of television and celebrities came together, of course, in his hosting of “Celebrity Apprentice.”

¹⁰² Trump’s provocative side came out even in a puff piece in the right-wing press where his former aide Norma Foederer is quoted as saying “I mean Donald can be totally outrageous, but outrageous in a wonderful way that gets him coverage.” Ronald Kessler, *Donald Trump’s Tough-Guy Image Masks His Caring and Generous Side*, WASH. TIMES (July 30, 2020), <https://www.washingtontimes.com/news/2020/jul/30/donald-trumps-tough-guy-image-masks-his-caring-and/> [<https://perma.cc/DNY7-XQV2>].

¹⁰³ Meeting privately with Federal Bureau of Investigation (FBI) Director James Comey, Trump told him, “I need loyalty. I expect loyalty.” 2 MUELLER, *supra* note 36, at 34.

came from.¹⁰⁴ Perhaps the kindest thing that can be said about many of Trump's clemency grants would be that they were consistent with his values.

Those values were signaled through clemency well before the Roosevelt Room meeting in September 2018. By that time, he had granted a handful of pardons. The first of these, famously, was to former Maricopa County, Arizona Sheriff Joe Arpaio, who was facing contempt charges rooted in anti-immigrant policing policies.¹⁰⁵ Arpaio was well known nationally and sometimes identified as "America's toughest sheriff,"¹⁰⁶ meeting Trump's affinity both for supposed "tough guys" and for celebrities. Trump used the grant to promote these perceived virtues, tweeting that Arpaio was "an American patriot" who "kept Arizona safe!"¹⁰⁷ Another initial (and defensible) grant was made posthumously to boxer Jack Johnson, who would qualify both as a "tough guy" and as a celebrity.¹⁰⁸ Other early grants benefited Fox News darling¹⁰⁹ Kristian Mark Saucier, a Navy sailor who had retained classified material (and who Trump often compared favorably on the campaign trail to Hillary Clinton);¹¹⁰ right-wing provocateur Dinesh D'Souza,¹¹¹ and Dwight and Steven Hammond, "tough guy" ranchers who had destroyed federal property through the use of fire.¹¹² Another early

¹⁰⁴ Trump extolled the virtues of "truthful hyperbole," and noted that in the world he came from (real estate), "I was more accustomed to the sort of people with whom you don't want to waste the effort of a handshake because you know it's meaningless." David Barstow, *Donald Trump's Deals Rely on Being Creative with the Truth*, N.Y. TIMES (July 16, 2016), <https://www.nytimes.com/2016/07/17/us/politics/donald-trump-business.html> [https://perma.cc/T63H-A6VZ].

¹⁰⁵ Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html> [https://perma.cc/Z354-S5EC].

¹⁰⁶ Jude Joffe-Block & Terry Greene Sterling, *Joe Arpaio: Inside the Fallout of Trump's Pardon*, THE GUARDIAN (Apr. 8, 2021, 6:00 PM), <https://www.theguardian.com/us-news/2021/apr/08/joe-arpaio-sheriff-arizona-donald-trump> [https://perma.cc/P6KY-PF6M].

¹⁰⁷ Davis & Haberman, *supra* note 105.

¹⁰⁸ Johnson's case was successfully promoted by Sylvester Stallone. 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> [https://perma.cc/34XB-XSXF].

¹⁰⁹ 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/> [https://perma.cc/MM46-64VT].

¹¹⁰ 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> [https://perma.cc/8BFU-UU6Y].

¹¹¹ Anthony Zurcher, *Dinesh D'Souza: Why Did Trump Pardon the Provocateur?*, BBC (May 31, 2018), <https://www.bbc.com/news/world-us-canada-44321650> [https://perma.cc/4BCV-DSY8].

¹¹² Bill Chappell, *Trump Pardons Ranchers Dwight and Steven Hammond Over 2012*

pardon revealed his favor towards those convicted of dishonesty: it went to I. Lewis (Scooter) Libby, who had been convicted of perjury and making false statements.¹¹³

It is important to note that these values did not always lead to controversy or corruption. Like boxer Jack Johnson,¹¹⁴ Alice Marie Johnson genuinely deserved clemency. She had been sentenced to life in prison in a narcotics case, and at age 63 had served over twenty years of that sentence.¹¹⁵ On June 6, she joined the small group of early Trump grantees when she received a commutation of her sentence.¹¹⁶ Alice Johnson's case seemed different than the others—she was a Black woman who was previously neither rich nor famous. However, her clemency was wreathed in celebrity. She received a commutation—after three rejections—only after Kim Kardashian took up her cause,¹¹⁷ even going to the White House for the famous “hostage photo” visit to the Oval Office.¹¹⁸ Moreover, once she was released, Trump promoted Alice Johnson as a celebrity in her own right, featuring her both in a Super Bowl campaign ad¹¹⁹ and as a featured guest at the 2019 State of the Union Address.¹²⁰

Trump seemed to be using Johnson as a symbol of what he was doing with clemency, but that symbolism was deeply misleading. Her success came because of the intervention of a television star, and most of the clemency grants that followed hers did not reflect the qualities of merciful fairness that her freedom projected. In addition,

Arson Conviction, NPR (July 10, 2018, 10:51 AM), <https://www.npr.org/2018/07/10/627653866/president-trump-pardons-ranchers-dwight-and-steven-hammond-over-arson> [https://perma.cc/KM6C-H99G].

¹¹³ U.S. Dep't of Justice, *Pardons Granted by President Donald J. Trump*, <https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021> [https://perma.cc/H57Y-VCDM].

¹¹⁴ Jack Johnson had been convicted in a racially biased prosecution for taking a white woman over state lines. *Id.*

¹¹⁵ Peter Baker, *Alice Marie Johnson Is Granted Clemency by Trump After Push by Kim Kardashian West*, N.Y. TIMES (June 8, 2018), <https://www.nytimes.com/2018/06/06/us/politics/trump-alice-johnson-sentence-commuted-kim-kardashian-west.html> [https://perma.cc/PW5K-D2FC].

¹¹⁶ Alice Johnson actually received clemency from Trump twice: the commutation in 2018 and a pardon in 2020. Peter Baker, *Trump Extends Pardon to Alice Johnson After She Praises Him at Convention*, N.Y. TIMES (Aug. 28, 2020), <https://www.nytimes.com/2020/08/28/us/politics/trump-alice-johnson-pardon.html> [https://perma.cc/64ML-FFPB].

¹¹⁷ Baker, *supra* note 115.

¹¹⁸ Pat Ralph, *Trump Releases Photo of His Oval Office Meeting with Kim Kardashian West*, INSIDER (May 31, 2018, 10:43 AM), <https://www.businessinsider.com/kim-kardashian-west-visits-white-house-trump-alice-johnson-2018-5> [https://perma.cc/C9NW-DQHF].

¹¹⁹ Annie Karni, *What It's Like to Be the Face of Trump's Super Bowl Ad*, N.Y. TIMES (Feb. 7, 2021), <https://www.nytimes.com/2020/02/06/us/politics/alice-johnson-trump-super-bowl-ad.html> [https://perma.cc/67WN-43UG].

¹²⁰ Avery Anapol, *Alice Marie Johnson, Granted Clemency by Trump, Moved to Tears at SOTU*, THE HILL (Feb. 5, 2019, 9:54 PM), <https://thehill.com/blogs/blog-briefing-room/news/428640-alice-marie-johnson-granted-clemency-by-trump-moved-to-tears-at-SOTU> [https://perma.cc/VPT8-J88D].

the Kim Kardashian/Alice Johnson storyline in the reality show that was the Trump administration¹²¹ created a troubling dynamic in America's prisons: people seeking clemency became convinced that the route to clemency was to get a celebrity—any celebrity, but especially a Kardashian—to vouch for you.¹²² Through my own clinic, my students and I were deluged with this kind of request. As one man put it in his plea to us, “I’ll take *any* Kardashian!”¹²³ While this view was rooted in a certain reality, albeit with a sample size of one at that point, it reflected how the Constitutional clemency process was already drowning in Trump’s own whirlpool of values.

B. The Trump Clemencies

The clemency grants by Donald Trump prior to the Roosevelt Room meeting in September 2018 raised fears that Trump would use clemency to reward the rich, the famous, and the loyal. His use of clemency after that meeting, relying on his own counsel or that of the informal “secret club” he had gathered to advise him,¹²⁴ confirmed those fears. His reliance on this cabal rather than the formal process is reflected in a strange anomaly of the Trump years: because he ignored the formal process and rarely denied any cases in the pipeline, in the end, he actually granted more clemency cases than he denied by presidential action.¹²⁵

Certainly, Trump was not the first president to abuse the pardon power. As clemency scholar Jeffrey Crouch has pointed out, three of his four immediate predecessors also made controversial clemency decisions: George H.W. Bush granted pardons to six men mixed up in the Iran-Contra affair, Clinton granted pardons to his former business partner, his half-brother, and to fugitive financier Marc Rich, and George W. Bush granted a commutation of sentence to former White House staffer Scooter Libby (who was later granted a full pardon by Trump).¹²⁶

The easy narrative on Trump’s clemency grants is that he simply favored people he or his friends and family knew. While there was some of that, to really understand

¹²¹ Jason Parham, *Trump’s Latest Antics Are Just Reality TV Rebooted*, WIRED (June 25, 2020, 3:00 PM), <https://www.wired.com/story/trump-reality-tv/> [<https://perma.cc/6MND-J74D>].

¹²² Ayesha Rascoe, *Trump’s Moves May Mark a New Era of the Celebrity Pardon*, NPR (May 27, 2018, 7:01 AM), <https://www.npr.org/2018/05/27/614429395/trumps-moves-may-mark-a-new-era-of-the-celebrity-pardon> [<https://perma.cc/48XF-JZQL>].

¹²³ Mark Osler, *Mr. President, Let’s Eat Turkey and Pardon People*, WACO TRIBUNE-HERALD (Nov. 24, 2019) (emphasis added), https://wacotrib.com/opinion/columns/board_of_contributors/mark-osler-mr-president-let-s-eat-turkey-and-pardon-people/article_470ab955-83a7-5f38-9a92-82de4e752998.html [<https://perma.cc/5TJQ-4CKL>].

¹²⁴ See *supra* Part II.

¹²⁵ *Clemency Statistics*, *supra* note 5.

¹²⁶ Jeffrey Crouch, *President Trump’s Clemency Record: Extraordinary or Just Ordinary?*, 52 PRESIDENTIAL STUD. Q. 1, 4–5 (2022). Crouch notes, however, that unlike Trump, the bad grants from his predecessors were “generally deviations from their usual clemency programs.” *Id.* at 4.

Trump's clemency record requires a deeper read. It's also probably incorrect to call Trump's use of clemency "unprincipled." In fact, many of his grants were consistent with what Trump clearly valued, as described in the previous section: things and people he regarded as "tough,"¹²⁷ the importance of celebrities and television,¹²⁸ provocation,¹²⁹ and personal loyalty.¹³⁰

There is another fascinating anomaly in the Trump grants, too. Many of them—a majority, actually—involved offenses of dishonesty: fraud, obstruction of justice, misprision, false statements, and other crimes rooted in contorting or obscuring information. Notably, these are the types of crimes often leveled at members of the business community, from which Mr. Trump emerged as he entered politics.

1. Grants Based on Loyalty, Celebrity, Provocation, and "Toughness"

a. Loyalty

It's not true that Trump broadly gave pardons or commutations to all those who had served him and found themselves in trouble as a result. After all, attorney Michael Cohen had been one of Trump's closest advisors before getting a three-year sentence for tax evasion and campaign violations—charges rooted in his work on behalf of Donald Trump in paying off two women who alleged affairs with Trump.¹³¹ Despite that sacrifice, Cohen was seen as disloyal because he cooperated with investigators looking into the nefarious activity.¹³² Cohen even titled his memoir "Disloyal."¹³³ Cohen was the exception, of course. Many others stood by Trump, either as they served time or faced the prospect of doing so.

In the end, their loyalty paid off. The case of Steve Bannon strips off the façade that anything other than rewarding loyalty was at work in many of Trump's clemency grants. Bannon had been charged along with three others with fraud in a scheme to raise private funds to help build a wall between the United States and Mexico.

¹²⁷ See *supra* note 100 and accompanying text.

¹²⁸ See *supra* note 96 and accompanying text.

¹²⁹ Trump's provocative side came out even in a puff piece in the right-wing press where his former aide Norma Foederer is quoted as saying, "I mean Donald can be totally outrageous, but outrageous in a wonderful way that gets him coverage." Kessler, *supra* note 102.

¹³⁰ Meeting privately with FBI Director James Comey, Trump told him "I need loyalty. I expect loyalty." 2 MUELLER, *supra* note 36, at 34.

¹³¹ William K. Rashbaum et al., *Michael Cohen Says He Arranged Payments to Women at Trump's Direction*, N.Y. TIMES (Aug. 18, 2018), <https://www.nytimes.com/2018/08/21/nyregion/michael-cohen-plea-deal-trump.html> [<https://perma.cc/DW8B-GQNW>].

¹³² Justin Wise, *Lanny Davis: Trump Views Michael Cohen as the 'Greatest Threat to His Presidency'*, THE HILL (Jan. 13, 2019, 11:03 PM), <https://thehill.com/homenews/administration/425146-cohens-former-lawyer-trump-views-cohen-as-greatest-threat-to-his/> [<https://perma.cc/EB8G-8GK3>].

¹³³ See generally MICHAEL COHEN, *DISLOYAL: A MEMOIR* (2020).

According to the Department of Justice, they defrauded hundreds of thousands of people, raised over \$25,000,000, and diverted much of the money to themselves—including over \$1,000,000 to Bannon.¹³⁴ Trump granted a pardon to Bannon but not to the other three men involved in the scheme, including Brian Kolfage, a disabled Air Force veteran who lost three limbs while serving his second deployment in Iraq.¹³⁵ Having pled guilty, Kolfage faces prison time that Bannon evaded.

Another Trump acolyte who received a pardon was Conrad Black, a Canadian businessman who was convicted of swindling over \$60,000,000 from a corporation.¹³⁶ In a move that must have created a giant sucking sound, Black published a book titled “Donald J. Trump: A President Like No Other,” which came out a year before he received his pardon.¹³⁷ The pardon allowed Black to return to the United Kingdom’s House of Lords,¹³⁸ where he is known as “Lord Black of Crossharbour.”¹³⁹

Trump also granted clemency to a number of other loyalists, including his long-time friend and advisor Roger Stone,¹⁴⁰ former campaign manager Paul Manafort,¹⁴¹ former National Security Advisor Michael Flynn,¹⁴² and former foreign policy advisor George Papadopoulos.¹⁴³ All four of these men were involved in the election of 2016

¹³⁴ Press Release, U.S. Dep’t of Justice, Leaders Of ‘We Build The Wall’ Online Fundraising Campaign Charged With Defrauding Hundreds Of Thousands Of Donors (Aug. 20, 2020), <https://www.justice.gov/usao-sdny/pr/leaders-we-build-wall-online-fundraising-campaign-charged-defrauding-hundreds-thousands> [<https://perma.cc/QVA3-9CZ8>].

¹³⁵ Shayna Jacobs, *Disabled Vet Pleads Guilty in Border-Wall Scheme That Involved Bannon*, WASH. POST (Apr. 21, 2022, 6:48 PM), <https://www.justice.gov/usao-sdny/pr/leaders-we-build-wall-online-fundraising-campaign-charged-defrauding-hundreds-thousands> [<https://perma.cc/A96X-D4ZQ>].

¹³⁶ Annie Karni, *President Trump Grants Pardon to Conrad Black*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/us/politics/conrad-black-pardon.html> [<https://perma.cc/MXC7-2PVZ>].

¹³⁷ *Id.*

¹³⁸ *Conrad Black Plans Return to the Lords After Pardon by Trump*, BBC (May 30, 2019), <https://www.bbc.com/news/business-48457490> [<https://perma.cc/W5ZU-JQBJ>].

¹³⁹ Karni, *supra* note 136.

¹⁴⁰ Trump commuted Stone’s sentence on seven counts of obstructing a Congressional investigation into the 2016 presidential election, before he had served any of the 40-month prison term. Peter Baker et al., *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html> [<https://perma.cc/TYE7-APHY>].

¹⁴¹ Amber Phillips, *Trump’s Pardon of Paul Manafort Brings Full Circle the Undermining of the Russia Investigation*, WASH. POST (Dec. 24, 2020, 10:21 AM), <https://www.washingtonpost.com/politics/2020/12/24/trumps-pardon-paul-manafort-brings-full-circle-undermining-russia-investigation/> [<https://perma.cc/U9KC-AKEY>].

¹⁴² Charlie Savage, *Trump Pardons Michael Flynn, Ending Case His Justice Dept. Tried to Shut Down*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/11/25/us/politics/michael-flynn-pardon.html> [<https://perma.cc/T5XU-LYYF>].

¹⁴³ Dartunorro Clark, *Trump Pardons Former Campaign Advisor George Papadopoulos, Ex-GOP Congressmen and Others*, NBC (Dec. 23, 2020, 8:55 AM), <https://www.nbcnews>

and its investigation. Clemency sent a strong message as investigations were ongoing, of course: “we’ll have your back.”

Not only did loyalists get a break with clemency under Trump, but they also had a large voice in guiding his clemency decisions. For example, former New York City Mayor Rudolph Giuliani was one of Trump’s staunchest defenders as he argued that the 2020 election was “stolen” at the same time that Trump was doling out the majority of his clemencies.¹⁴⁴ He also was cited by the administration as successfully promoting clemency for numerous recipients, including financier Michael Miliken and former New York Police Commissioner Bernard Kerik,¹⁴⁵ among others.¹⁴⁶

The influence of loyalists notably led to some grants that are readily defensible—those going to those outside the “friends and family, rich and famous” categories that Jeffrey Crouch referred to as “average” people.¹⁴⁷ In particular, the influence of Alice Marie Johnson, the clemency recipient who Trump turned into a celebrity,¹⁴⁸ led to a number of these grants that fell to “average” people, including Judith Negron, Crystal Munoz, Tynice Nichole Hall,¹⁴⁹ and others.¹⁵⁰ Johnson was no doubt able to maintain her influence with Trump through her continued loyalty to him, which included promoting his re-election.¹⁵¹

.com/politics/white-house/trump-pardons-george-papadopoulos-ex-gop-congressmen-n1252167 [https://perma.cc/Z9F3-ECTU].

¹⁴⁴ Veronica Stracqualursi, *Trump Puts Giuliani in Charge of Post-Election Legal Fight After a Series of Losses*, CNN (Nov. 16, 2020, 9:00 AM), <https://www.cnn.com/2020/11/14/politics/rudy-giuliani-trump-lawsuits-2020-election/index.html> [https://perma.cc/5SQA-KGTW].

¹⁴⁵ Press Release, The White House, Statement From the Press Secretary Regarding Executive Grants of Clemency (Feb. 18, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-2/> [https://perma.cc/2LMH-AX2D].

¹⁴⁶ Press Release, The White House, Statement from the Press Secretary Regarding Executive Grants of Clemency (Jan. 20, 2021), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-012021/> [https://perma.cc/YT8C-CYAD].

¹⁴⁷ Crouch, *supra* note 126, at 6–7.

¹⁴⁸ *Supra* Section III.A.

¹⁴⁹ Beth Reinhard, *Trump Freed Alice Johnson in 2018. This Week, He Granted Clemency to Three of Her Friends*, WASH. POST (Feb. 19, 2020, 7:51 PM), https://www.washingtonpost.com/investigations/trump-freed-alice-johnson-in-2018-this-week-he-granted-clemency-to-three-of-her-friends/2020/02/19/1ea710be-5327-11ea-87b2-101dc5477dd7_story.html [https://perma.cc/T9BK-9E5Q].

¹⁵⁰ Press Release, The White House, Statement from the Press Secretary Regarding Executive Grants of Clemency (Jan. 20, 2021), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-012021/> [https://perma.cc/FPJ6-28SP].

¹⁵¹ Monica Alba, *Commutated by President Trump, Alice Marie Johnson Aims to Bolster Him with RNC Speech*, NBC (Mar. 28, 2019, 10:10 AM), <https://www.nbcnews.com/politics/meet-the-press/blog/meet-press-blog-latest-news-analysis-data-driving-political-discussion-n988541/ncrd1237634#blogHeader> [https://perma.cc/BW3A-UTVM].

Others whose loyalty was rewarded were active within broader Republican circles. That group includes Elliot Broidy, who helped raise millions for the Trump campaign and was the Deputy Chair of the Republican National Committee (RNC). Broidy was convicted of acting as an unregistered foreign agent and had resigned his RNC position after a report emerged that he had paid a Playboy model \$1,600,000 to cover up an affair.¹⁵² In granting his pardon, the Trump administration cited his “philanthropic efforts.”¹⁵³ In addition to several Republican donors like Broidy, Trump granted clemency to no fewer than seven Republicans who had served in Congress.¹⁵⁴

While Trump did not pardon himself or the members of his family (at least publicly), his core value of loyalty was on full display as he doled out clemency.

b. Celebrities

Donald Trump emerged from the world of celebrities and television. He was the creator and host of a reality show with the word “celebrity” right in the title, *Celebrity Apprentice*,¹⁵⁵ and twice hosted *Saturday Night Live*,¹⁵⁶ apparently on the basis of his image alone as he was not an actor, musician, or comic. When it came to clemency, Trump looked to celebrities as both recipients and influencers on his decision-making.

Many of the celebrity clemency grants by Trump are well known: Former Illinois Governor (and *Celebrity Apprentice* contestant) Rod Blagojevich, former Detroit Mayor Kwame Kilpatrick, and Bill K. Kapri (better known as the rapper Kodak Black) got commutations,¹⁵⁷ while Dwayne Michael Carter (the rapper Lil’

¹⁵² Spencer S. Hsu, *Major RNC, Trump Fundraiser Elliot Broidy Pleads Guilty to Acting as an Unregistered Foreign Agent*, WASH. POST (Oct. 20, 2020, 10:12 PM), https://www.washingtonpost.com/local/legal-issues/elliott-broidy-plea/2020/10/20/c41ae12c-125a-11eb-ad6f-36c93e6e94fb_story.html [https://perma.cc/W3Y3-K9B4].

¹⁵³ Press Release, The White House, Statement from the Press Secretary Regarding Executive Grants of Clemency (Jan. 20, 2021), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-012021/> [https://perma.cc/4CA9-XH6J].

¹⁵⁴ David Siders, *Trump’s ‘Crony Pardons’ Flabbergast the Political World*, POLITICO (Jan. 20, 2021, 8:39 PM), <https://www.politico.com/news/2021/01/20/donald-trump-pardons-460932> [https://perma.cc/4JWM-7GRD].

¹⁵⁵ Emily Nussbaum, *The TV That Created Donald Trump*, NEW YORKER (July 31, 2017), <https://www.newyorker.com/magazine/2017/07/31/the-tv-that-created-donald-trump> [https://perma.cc/PKX2-Z7W2]. Trump also wrangled guest spots on “The Fresh Prince of Bel Air,” “The Nanny,” and even “This Old House,” among others. *Id.*

¹⁵⁶ Tom Bissell, *Who’s Laughing Now? The Tragicomedy of Donald Trump on Saturday Night Live*, HARPER’S MAG. (Oct. 2017), <https://harpers.org/archive/2017/10/whos-laughing-now/> [https://perma.cc/2XJF-S9WL].

¹⁵⁷ *Commutations Granted by President Donald J. Trump (2017–2021)*, U.S. DEP’T OF JUST. (Apr. 28, 2021), <https://www.justice.gov/pardon/commutations-granted-president-donald-j-trump-2017-2021> [https://perma.cc/3A7X-75U9].

Wayne), and former NFL owner Edward J. DeBartolo, Jr., received pardons, among others.¹⁵⁸

It was the influence of celebrities as advocates for others, though, that probably had more of an impact. The template for that influence was set early on when Kim Kardashian successfully promoted Alice Marie Johnson's case.¹⁵⁹ By the last, furious rush, Trump (according to his own Press Office) was taking clemency advice from the rappers Gucci Mane, Lil' Pump, and Lil' Yachty,¹⁶⁰ as well as athletes Lamar Jackson,¹⁶¹ Deion Sanders,¹⁶² Phil Mickelson,¹⁶³ and Jeff Gordon,¹⁶⁴ among others who would not normally advise the president on the employment of his constitutional duties. Also suspected by some of working behind the scenes were celebrities like football player Brian Urlacher, whose brother Casey received clemency,¹⁶⁵ and Fox News personality Jeanine Pirro, whose ex-husband Albert Pirro received a pardon at the last possible moment on inauguration day.¹⁶⁶

c. Provocation

As already discussed, Trump's early grant of a pardon to Dinesh D'Souza seemed to be a reward to a fellow provocateur.¹⁶⁷ Beyond that, though, the D'Souza clemency grant (and others like it) not only went to provocateurs but also allowed Trump himself to provoke his political enemies—as one writer in Politico put it, to “troll liberals.”¹⁶⁸ The Arpaio pardon would seem to fit into that same category, as would the pardon of Roger Stone, a man so into provocation that he sported a large tattoo of Richard Nixon on his back.¹⁶⁹

¹⁵⁸ *Pardons Granted by President Donald J. Trump (2017–2021)*, U.S. DEP'T OF JUST. (Apr. 28, 2021), <https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021> [<https://perma.cc/H57Y-VCDM>].

¹⁵⁹ *Supra* Section III.A.

¹⁶⁰ In support of Bill K. Kapri (the rapper Kodak Black). Press Release, The White House, Statement from the Press Secretary Regarding Executive Grants of Clemency (Jan. 20, 2021), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-012021/> [<https://perma.cc/RN75-WTGQ>].

¹⁶¹ In support of Bill K. Kapri. *Id.*

¹⁶² In support of Dwayne Michael Carter Jr. (Lil' Wayne). *Id.*

¹⁶³ In support of William Walters. *Id.*

¹⁶⁴ In support of James Austin Hayes. *Id.*

¹⁶⁵ In support of Casey Urlacher. *Id.*

¹⁶⁶ Phillip Bump, *Even Trump's Pardon of a Fox News Host's Ex-Husband Will Stand*, WASH. POST (Jan. 20, 2021, 1:48 PM), <https://www.washingtonpost.com/politics/2021/01/20/even-trumps-last-minute-pardon-fox-news-anchors-ex-husband-will-stand/> [<https://perma.cc/5FRT-EHCA>].

¹⁶⁷ *Supra* Section III.A.

¹⁶⁸ Jacob Heilbrunn, *Trump Pardoned Dinesh D'Souza to Troll Liberals*, POLITICO (May 31, 2018), <https://www.politico.com/magazine/story/2018/05/31/dinesh-dsouza-pardon-donald-trump-218583/> [<https://perma.cc/8HUE-VCL3>].

¹⁶⁹ Danielle Abreu, *A 'Dirty Trickster' With a Nixon Back Tattoo: What to Know About*

In fact, many of Trump's grants were both mercy to the favored and a poke at someone else. For example, his grants of clemency to several men charged with or convicted of war crimes was perceived as a jab at his own military, who had successfully pursued the cases.¹⁷⁰ Of those grants, he said "we train our boys to be killing machines, then prosecute them when they kill!" leaving aside the fact that those killed were sometimes civilians or enemy combatants in custody.¹⁷¹

d. "Tough Guys"

There is no doubt that Donald Trump valued "toughness." He certainly saw himself as possessing that quality; he endlessly described his own policies as "tough," and even used the song "Macho Man" as his walk-up music at rallies.¹⁷² One pre-election profile was titled "On the Trail with the GOP's Tough Guy" and described his platform this way: "*I am strong; politicians are weak. I speak truth and never retreat; they lie and wave the white flag to our foes. They have stripped us bare; I will build us back, make this country feared the whole world over.*"¹⁷³

Not surprisingly, then, this value was reflected in his clemency grants. Setting aside commutations, it is notable that he granted seven pardons to men accused of murder or manslaughter in wartime.¹⁷⁴ While clemency for cases where death occurred are rare, Trump granted them profligately in this one narrow area, a focus that seems rooted in his belief in toughness. One of the beneficiaries was Clint Lorance, a former Army Lieutenant who was convicted of second-degree murder and sentenced to nineteen years in prison.¹⁷⁵ In July 2020, he ordered his men to fire on unarmed villagers in Afghanistan. Two men, who posed no threat, were killed.¹⁷⁶

Trump Ally Roger Stone, NBC (Feb. 20, 2020, 11:48 AM), <https://www.nbclosangeles.com/news/politics/who-is-roger-stone-what-to-know-about-the-trump-ally-facing-sentencing/2312783/> [<https://perma.cc/K5YG-8VP6>].

¹⁷⁰ Dave Philipps, *Trump's Pardons for Servicemen Raise Fears That Laws of War Are History*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/16/us/trump-pardon-military.html> [<https://perma.cc/5LDN-77C3>].

¹⁷¹ Ellen Ioanes, *Military Leaders Are Worried that Trump Pardoning Troops Accused of War Crimes Will Impair the Justice System and Undermine Overseas Bases*, BUS. INSIDER (Nov. 15, 2019, 5:09 PM), <https://www.businessinsider.com/military-leaders-worry-that-trump-pardons-will-impair-justice-system-2019-11> [<https://perma.cc/4EPQ-DE26>].

¹⁷² Martha Ross, *'Macho Man?' Trump Uses Gay Anthem at Rallies, Even After Village People Say Stop*, CHI. TRIB. (Sept. 15, 2020, 8:58 AM), <https://www.chicagotribune.com/entertainment/music/ct-ent-trump-village-people-20200915-lxae15px6rcodab6ew523baohq-story.html> [<https://perma.cc/U65F-3TDV>].

¹⁷³ Paul Solotaroff, *Trump Seriously: On the Trail with the GOP's Tough Guy*, ROLLING STONE (Sept. 9, 2015), <https://www.rollingstone.com/politics/politics-news/trump-seriously-on-the-trail-with-the-gops-tough-guy-41447/> [<https://perma.cc/SJ47-N2DH>].

¹⁷⁴ *Pardons Granted by President Donald J. Trump (2017–2021)*, *supra* note 158.

¹⁷⁵ *Id.*

¹⁷⁶ Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, N.Y.

Trump defended the pardon by saying, “when our soldiers have to fight for our country, I want to give them the confidence to fight.”¹⁷⁷

It was not just military figures who caught this break with Trump. Law enforcement agents like Joe Arpaio, who received Trump’s first grant of clemency, were celebrated for their tough-on-crime stances.¹⁷⁸ Border Patrol agents Ignacio “Nacho” Ramos and Jose Alonso Compean, for example, were convicted of shooting a man while he was running away and then covering up their actions.¹⁷⁹ President George W. Bush released them from prison, but it was President Trump who gave them pardons.¹⁸⁰ Gary Brugman was another Border Patrol Agent who got a pardon from Trump. Brugman violated the civil rights of a man at the border and served nearly two years in prison.¹⁸¹

Along with a raft of clemencies to Republican politicians, Trump also granted commutations to two Democrats: former Detroit Mayor Kwame Kilpatrick and former Illinois Governor Rod Blagojevich.¹⁸² Although neither fit Trump’s favored political profile, they did meet the “tough guy” standard. Kilpatrick was a 6’4” former football player who surrounded himself with security men even larger than he was.¹⁸³ Blagojevich was a tough-on-crime governor who did not use the power

TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/15/us/trump-pardons.html> [<https://perma.cc/QP3B-M9AX>].

¹⁷⁷ Chas Newkey-Burden, *Who Is Clint Lorance, and Why Has Donald Trump Pardoned Him?*, THE WEEK (Nov. 18, 2019), <https://www.theweek.co.uk/104388/who-is-clint-lorance-and-why-has-donald-trump-pardoned-him> [<https://perma.cc/4UR7-K3YV>].

¹⁷⁸ Amita Kelly, *President Trump Pardons Former Sheriff Joe Arpaio*, NPR (Aug. 25, 2017), <https://www.npr.org/2017/08/25/545282459/president-trump-pardons-former-sheriff-joe-arpaio> [<https://perma.cc/XJF4-BDVR>].

¹⁷⁹ Pamela Colloff, *Badges of Dishonor*, TEX. MONTHLY (Sept. 2007), <https://www.texasmonthly.com/articles/badges-of-dishonor/> [<https://perma.cc/6DG9-9AR4>].

¹⁸⁰ Lauren Villagran, *Trump Pardons El Paso Border Patrol Agents Convicted of Shooting Mexican Drug Smuggler*, EL PASO TIMES (Dec. 23, 2020, 6:20 PM), <https://www.elpasotimes.com/story/news/2020/12/23/trump-pardons-two-former-border-patrol-agents-convicted-shooting-el-paso/4025071001/> [<https://perma.cc/5M7S-AK63>].

¹⁸¹ Alex Samuels, *Donald Trump Pardons Former Border Patrol Agent Gary Brugman, Who Was Convicted of Violating a Man’s Civil Rights*, TEX. TRIB. (Dec. 23, 2020, 8:00 PM), <https://www.texastribune.org/2020/12/23/trump-pardons-gary-brugman-border-patrol/> [<https://perma.cc/KJM9-VZ7F>].

¹⁸² *Commutations Granted by President Donald J. Trump (2017–2021)*, *supra* note 157.

¹⁸³ Ric Bohy, *How Kwame Kilpatrick’s Arrogance Spawned a Reign of Corruption in Detroit*, DBUSINESS (May 23, 2011), <https://www.dbusiness.com/business-features/how-kwame-kilpatrick-arrogance-spawned-a-reign-of-corruption-in-detroit/> [<https://perma.cc/XG4K-F5MU>]. Kilpatrick, too, was a celebrity whose clemency was advanced by celebrity Trump supporters/Fox News personalities Diamond and Silk. Julie Gerstein, *Die-Hard Trump ‘Warriors’ Diamond and Silk Were Behind Former Detroit Mayor Kwame Kilpatrick’s Pardon by Trump*, BUS. INSIDER (Jan. 20, 2020, 3:47 PM), <https://www.businessinsider.in/politics/world/news/die-hard-trump-warriors-diamond-and-silk-were-behind-former-de-troit-mayor-kwame-kilpatrick-pardon-by-trump/articleshow/80364440.cms> [<https://perma.cc/W4X6-CHVR>].

of clemency himself when he had it as state executive.¹⁸⁴ He also appeared on “Celebrity Apprentice,” and when Trump fired him (for apparently getting facts wrong about Harry Potter books), he acknowledged Blagojevich’s toughness, saying, “Governor, I have great respect for you. . . I have great respect for your tenacity, for the fact that you just don’t give up.”¹⁸⁵

2. Crimes of Dishonesty

Of President Trump’s 238 grants of clemency, 120 of them—a majority—involve crimes of dishonesty.¹⁸⁶ Looking just at crimes with a primary charge of fraud, false statements, and tax offenses, there are a stunning eighty-seven grants of clemency—about one-third of the total. To put this in perspective, consider that in 2020 (the year most of the grants were made), all crimes involving fraud, false statements, and taxes sentenced under sentencing guideline 2B1.1 and 2T1.1 made up less than 8% of the federal docket;¹⁸⁷ however, these types of crimes made up at least a third of the Trump clemency grants.

Some of the grants went to people who perpetrated staggeringly large frauds. Philip Esformes, who had his twenty-year sentence commuted by Trump just months after it was imposed,¹⁸⁸ perpetrated what the Department of Justice called the biggest health care fraud they had ever pursued. Esformes, a nursing home operator, was charged with fleecing Medicare and Medicaid of over one billion dollars. The charges included the allegation that Esformes’s entities used narcotics to get elderly patients addicted and then charged the government for treatment for their addiction.¹⁸⁹

¹⁸⁴ Jennifer Soble, *Blagojevich’s Plea for Freedom Was Heard, But as Governor He Was Deaf to the Pleas of Others*, CHI. SUN-TIMES (Feb. 20, 2020, 5:14 PM), <https://chicago.suntimes.com/2020/2/20/21146137/rod-bлагоjevich-executive-commutations-clemency-pardons-illinois-governor-jennifer-soble> [<https://perma.cc/3XMK-LTJH>].

¹⁸⁵ Gillian Brockell, *That Time Trump Fired Rod Blagojevich on ‘Celebrity Apprentice’ for Harry Potter Incompetence*, WASH. POST (Aug. 9, 2019, 6:10 PM), <https://www.washingtonpost.com/history/2019/08/11/that-time-trump-fired-rod-bлагоjevich-celebrity-apprentice-harry-potter-incompetence/> [<https://perma.cc/885B-FVTX>].

¹⁸⁶ *Commutations Granted by President Donald J. Trump (2017–2021)*, *supra* note 157; *Pardons Granted by President Donald J. Trump (2017–2021)*, *supra* note 158. For purposes of this analysis, I include as “crimes of dishonesty” all types of fraud, false statements, perjury, misprision, false tax returns and other tax crimes, obstruction of justice, unauthorized access to a computer, illegal voting, tampering with VIN numbers, money laundering, transaction structuring, misbranding, serving as an unregistered agent of a foreign government, insider trading, extortion, theft of trade secrets, political contributions in the name of others, espionage, and embezzlement. The fact that Trump granted clemency to such a wide variety of crimes involving dishonesty is remarkable in itself.

¹⁸⁷ U.S. Sent’g Comm’n, *2020 Guideline Application Frequencies* (2021), <https://www.uscc.gov/research/data-reports/guideline/2020-guideline-application-frequencies> [<https://perma.cc/PR39-5C4C>].

¹⁸⁸ *Commutations Granted by President Donald J. Trump (2017–2021)*, *supra* note 157.

¹⁸⁹ Eric Lichtblau, *U.S. Says Florida Network Defrauded Medicare and Medicaid of Over*

Trump's disproportionate number of grants to those convicted of crimes involving dishonesty is troubling but consistent with what we knew of him before his election. Loyalty was a value he held dear; honesty was not.

C. Race, Gender, Clemency & Trump

The federal prison population is about 38% Black¹⁹⁰ while women make up around 7% of those incarcerated in federal facilities.¹⁹¹ Holding these numbers up against Trump clemency grants, it is clear that Black petitioners were under-represented while women were over-represented relative to the prison population.

The statistics maintained by the Pardon Attorney and the announcements of grants by the White House make no mention of race. However, by checking those who received clemency against other sources (primarily the Bureau of Prisons records), we were able to determine the race of nearly all of those who received clemency from Donald Trump. The results are disappointing but not surprising: 18% of Trump's clemency grants (forty-two individual grants) went to Black men and women.¹⁹²

Gender is more readily identifiable through public records, and we were able to identify the gender of every Trump clemency recipient.¹⁹³ The total number of women receiving either a commutation or a pardon was 38, or about 16% of all clemency grants—far outstripping their proportion of the prison population.

Looking at the intersection of race and gender, it is notable that such a large number of the Black individuals receiving clemency were female (relative to prison populations): thirteen out of forty-two, or a little less than a third.¹⁹⁴ In the end, then, it was Black men who statistically did the worst under Trump's clemency program—especially Black men who were not celebrities like Lil' Wayne, Kwame Kilpatrick, Jack Johnson, or Kodak Black.

It should be noted, however, that the First Step Act, signed by Trump in 2018, led to the early release of 3,000 people convicted of crack offenses and sentence

\$1 Billion, N.Y. TIMES (July 22, 2016), <https://www.nytimes.com/2016/07/23/us/medicare-medicare-fraud.html?searchResultPosition=2> [<https://perma.cc/HK8T-SDV9>].

¹⁹⁰ FED. BUREAU OF PRISONS, *Inmate Race*, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [<https://perma.cc/4PJ3-TGKK>] (Oct. 15, 2022).

¹⁹¹ FED. BUREAU OF PRISONS, *Inmate Gender*, https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp [<https://perma.cc/59RE-JY56>] (Oct. 15, 2022).

¹⁹² Compilation, on file with the author. We could not determine the race of six of the individuals who received clemency.

¹⁹³ Our review showed that all recipients identified as either male or female.

¹⁹⁴ This disparity was likely driven in part by the influence of Alice Johnson, who often advocated for those she knew while incarcerated. Beth Reinhard, *Trump Freed Alice Johnson in 2018. This Week, He Granted Clemency to Three of Her Friends*, WASH. POST (Feb. 19, 2020, 7:51 PM), https://www.washingtonpost.com/investigations/trump-freed-alice-johnson-in-2018-this-week-he-granted-clemency-to-three-of-her-friends/2020/02/19/1ea710be-5327-11ea-87b2-101dc5477dd7_story.html [<https://perma.cc/JP9W-5D4P>].

reductions for another 1,700.¹⁹⁵ Because First Step benefitted those sentenced under old crack sentencing laws, and those laws disproportionately led to the imprisonment of Black men and women,¹⁹⁶ the statute is achieving what clemency under Trump did not.

CONCLUSION

The Trump clemencies leave a complicated, and often infuriating, legacy.¹⁹⁷ The lessons to be taken from it, unfortunately, are the same ones we should have taken from the Obama clemencies, and the Bush clemencies, and the Clinton clemencies. Specifically, the process of evaluating clemency petitions must change, and we must honor our duty to make clemency a part of presidential campaigns and make candidates state how they would use the pardon power.

Finally, clemency needs to be something we discuss as a nation before a president takes office rather than in the waning days of an administration. Presidents use clemency in a way that reflects their values, and we must force them to articulate that connection while they are still candidates, in debates, and in other forums in which they address the media and the public. The last time that pardon policy had a prominent role in presidential debates was some forty-five years ago, when President Gerald Ford and candidate Jimmy Carter fielded a question on clemency and Vietnam-era draft offenders.¹⁹⁸ Given the importance clemency has played in recent presidencies, it certainly is fair game in a campaign.

Clemency has played an outsized role in defining our core values and those of our leaders. Trump's use of the pardon power was consistent with his values, for better or for worse. The more important story in the end, however, may be the lost opportunity to fix the endemic problems with the evaluation process for his own administration and beyond. The power of mercy will always reflect the principles of the president; the Constitution makes that clear. The best we can do to achieve better outcomes is to vet those principles carefully as voters and provide the president with

¹⁹⁵ Dartunorro Clark & Janell Ross, *The First Step Act Promised Widespread Reform. What Has the Criminal Justice Overhaul Achieved So Far?* NBC.COM (Nov. 24, 2019, 8:00 AM), <https://www.nbcnews.com/politics/politics-news/first-step-act-promised-widespread-reform-what-has-criminal-justice-n1079771> [<https://perma.cc/428W-Y8XQ>].

¹⁹⁶ M.G. Shein, Abstract, *Racial Disparity in Crack Cocaine Sentencing*, 8 CRIM. JUST. 28 (1993), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/racial-disparity-crack-cocaine-sentencing> [<https://perma.cc/2BXU-J87W>].

¹⁹⁷ It is important to note that many of those who have been my fellow travelers and heroes in the work to improve clemency did themselves receive clemency from Donald Trump—a group that would include Weldon Angelos, Amy Povah, Chalana McFarland, and Topeka Sam.

¹⁹⁸ GRAHAM G. DODDS, *MASS PARDONS IN AMERICA: REBELLION, PRESIDENTIAL AMNESTY, AND RECONCILIATION* 168–70 (2021).

a review process that can allow for a more consistent, principled, regular, and inspiring use of clemency according to those principles.

For a moment on September 5, 2018, walking out the front door of the White House into the sunshine, I thought that we might be on the verge of building a better machine to manage the Constitutional allotment of mercy, one that would gently steer a president away from the last-minute rush, from the rewarding of donors, from the whiff of corruption that too often came with a pardon warrant. I was wrong. That project still awaits.