

2022

CONSTITUTIONAL LAW—LOYALTY, MONEY, AND BUSINESS: THE NEW PRICE FOR A PRESIDENTIAL PARDON

Zachary J. Broughton

Follow this and additional works at: <https://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Zachary J. Broughton, *CONSTITUTIONAL LAW—LOYALTY, MONEY, AND BUSINESS: THE NEW PRICE FOR A PRESIDENTIAL PARDON*, 44 W. New Eng. L. Rev. 259 (2022), <https://digitalcommons.law.wne.edu/lawreview/vol44/iss2/5>

This Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University. It has been accepted for inclusion in Western New England Law Review by an authorized editor of Digital Commons @ Western New England University.

WESTERN NEW ENGLAND LAW REVIEW

Volume 44

2022

Issue 2

CONSTITUTIONAL LAW—LOYALTY, MONEY, AND
BUSINESS: THE NEW PRICE FOR A PRESIDENTIAL PARDON

ZACHARY J. BROUGHTON*

The President of the United States, pursuant to Article II of the Constitution, has the sole power to issue pardons that free individuals of the confines and limitations of federal prosecution and conviction. In his only term as President so far, Donald Trump issued approximately 143 pardons. Several of those pardons were directed to those who attempted to interfere with the 2016 presidential election by way of lying to investigators and members of Congress and by tampering with evidence and witnesses. Many other pardons issued by President Trump were given only to those who had close ties to the Republican Party or the President himself. The purpose of this Article is to showcase several of the individuals pardoned by President Trump in order to argue that he used the pardon power for personal gain and not as originally intended by the Founding Fathers. This Article also argues that constitutional amendments to the presidential pardon power are required in order to protect the American judicial system and our democratic principles from further executive abuse—be it from a potential second term of President Trump or any other future President of the United States.

INTRODUCTION

The Presidency of Donald Trump was, in large part, a break from many of the rituals that are “normal” or “typical” of the President of the United States. Each day of his presidency was part of an endless marathon of tweets, political rallies, and/or press conferences engulfed in personal attacks against those that disagreed with him. Many of President Trump’s

* Zachary J. Broughton is a licensed attorney in the Commonwealth of Massachusetts and the State of Connecticut, and he is an alum of the Western New England University School of Law and the *Western New England Law Review*. This piece is dedicated to the incredible work completed by the students and staff of the *Western New England Law Review* and their never-ending commitment to legal scholarship.

executive decisions also bucked tradition and, in some instances, altered the standing of the United States within the international community.¹ One executive tradition, however, that President Trump embraced strongly was the broad, unlimited, and largely unchecked power of the presidential pardon.² Nonetheless, even his use of the pardon authority was abnormal.

In modern-day administrations, matters pertaining to the presidential pardon power were usually overseen by the Office of the Pardon Attorney, located within the Department of Justice (DOJ).³ Generally, under both Republican and Democratic presidents, the Office of the Pardon Attorney vetted potential pardon candidates through various internal procedures and then made recommendations to the President as to which ones should be granted. President Trump circumvented this process and, instead, decided directly which pardons he would grant.⁴

From President Trump's first pardon,⁵ to those issued on his last full day in office, he engaged in an untamed pattern of granting clemency to those that (1) were employees on his presidential campaign or in the White House; (2) had strong connections to the President, either through prior

1. As of the publication of this Article, President Trump will have served only one term as President of the United States, following the election of Joseph R. Biden in November, 2020. Obviously, it is not yet known if President Trump will seek a second term at the conclusion of President Biden's four-year term. It is not the intention of this Article to evaluate or pass judgment on whether he should. For purposes of analyzing the president's pardon power, this Article will treat President Trump's first term as the only term in which he will serve as President of the United States.

2. For a detailed history of the presidential pardon power, see Zachary J. Broughton, Note, *I Beg Your Pardon: Ex Parte Garland Overruled; the Presidential Pardon Is No Longer Unlimited*, 41 W. NEW ENG. L. REV. 183, 187–216 (2019); Paul F. Eckstein & Mikaela Colby, Article, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 72–86 (2019); Mark Osler, *Clemency As the Soul of the Constitution*, 34 J.L. & POL. 131, 133–47 (2019).

3. Bernadette Meyler, *Transforming the Theater of Pardoning*, 33 FED. SENT. R. 293, 293 (2021).

4. *Id.*

5. President Trump's first pardon was for former Arizona sheriff, Joe Arpaio, on August 17, 2017, for his criminal contempt of court conviction. Laura Palacios, Note, *The Presidential Pardon Power: Interpreting its Scope and Enacting an Effective Solution to Limit its Potential for Abuse*, 40 T. JEFFERSON L. REV. 209, 211–12 (2018). Specifically, the pardon was issued after Arpaio was convicted of criminal contempt of court in 2016 for willfully disregarding a court order to stop illegally targeting and terrorizing individuals that he, and officers under his command, suspected of being undocumented immigrants. See *id.* More specifically, a federal district judge “enjoined the Sheriff and his subordinates from detaining individuals without actual knowledge that the individual was not a legal resident of the United States. When Arpaio refused to follow court orders, he was held in criminal contempt.” *Id.* President Trump, in response, “known for having a strong immigration platform and advocating for a stricter reinforcement of immigration policies, made numerous comments commending Arpaio's practices and policies that supported President Trump's agenda,” which, ultimately, led to Arpaio's pardon. *Id.*

business encounters or through political surrogates; and/or (3) were members of, or closely affiliated with, the Republican Party.⁶ It cannot be disputed that those individuals who worked for President Trump were pardoned because it benefited him indirectly, as those people were connected directly to a special investigation that had been launched into President Trump's own conduct.

The fact that President Trump was able to deploy the power of the presidential pardon to protect himself, along with people that admitted to committing crimes against the United States for the benefit of President Trump, and those that are simply rich and politically connected, without limitation or question, is the impetus that gives rise to this Article. Accordingly, this Article will parse through and analyze several of the pardons issued by the former President in order to argue that, but for a few exceptions, most of his pardons should serve as a catalyst for amending the U.S. Constitution in order to rein in the President's uncontrolled pardon authority, safeguard the American judicial system, and preclude the use of the pardon to protect corrupt individuals.

Part I of this Article will review the recent scholarship, since the pardon of former sheriff Joe Arpaio, with regard to the pardon power and the proposed changes that have arisen as a result of President Trump's actions while in office. Part II will review several pardons issued by President Trump that fit within three distinct categories: (1) former employees connected to Russian interference with the 2016 presidential election; (2) members of and donors to the Republican party, friends, and business associates; and (3) honorable mentions—individuals whose case warranted a pardon.⁷ This Article will conclude by arguing that steps must be taken in order to secure the judicial system in a manner that respects the founders' original design, yet is updated to rectify the lessons learned from the actions of presidents past, including Donald Trump.

I. PRESIDENTIAL PARDON SCHOLARSHIP SINCE AUGUST 2017

As predicted, President Trump's pardon of Arpaio ignited a new wave of scholarship that analyzed, reviewed, and critiqued the presidential pardon and challenged whether it should continue as an unlimited and

6. See *Pardons Granted by President Donald J. Trump (2017–2021)*, DEP'T OF JUST., <https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021> [<https://perma.cc/L3KG-TLFE>].

7. President Trump issued 143 pardons during his presidency. Meyler, *supra* note 3. It is important to note that not all of those pardons will be addressed in this Article, as a meaningful analysis of each would require more space than that typically allotted a law review article. However, the more paramount pardons that fit easily within the broad confines of the above-noted categories will be the focus of this Article. Further, these categories were created by this Author, following a careful review of each pardon issued by President Trump, the reasoning for same, and the various crimes that were committed or alleged.

virtually unchecked power.⁸ Scholars of all levels have dedicated time and attention to re-evaluating whether Arpaio's pardon was in fact legal and how the pardon authority should be interpreted moving forward. Additionally, scholars have also recognized the plethora of new issues that Arpaio's pardon now presents for the future of American law enforcement, the Presidency at-large, and the potential threat that the pardon poses to the other branches of government. The purpose of this Part is to recognize, recast, and—in some cases—respond to the new scholarship pertaining to the presidential pardon power that has arisen since the pardon of Arpaio and to further analyze the issues presented therein as a prelude to examining the decisions made by President Trump and reiterating the need to alter the pardon power.⁹

A. *The Arpaio Pardon*

A contempt of court conviction has been deemed an “offense against the United States” and, therefore, is pardonable by the President.¹⁰ This was the case for former Arizona sheriff, Joe Arpaio. Arpaio was held in contempt of court for violating a court order precluding him from engaging in racial profiling of individuals whom he believed were in the United States illegally.¹¹ As an avid supporter of President Trump, Arpaio gained the attention of the President—in large part—due to his firm stance on border security. In turn, President Trump became an advocate against punishing Arpaio for what the former President deemed as just “doing his job.”¹²

The pardon of Arpaio led some to question its validity¹³ and the

8. See Broughton, *supra* note 2, at 184.

9. Since the decision in *Ex parte Garland*, 71 U.S. 333, 374–75 (1866), the Supreme Court of the United States has maintained that the President's pardon authority is an unlimited power. The Supreme Court reiterated this notion a few years later in *United States v. Klein*, 80 U.S. 128, 147 (1871), wherein it held: “It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted [sic] the power of pardon; and it is granted without limit.” While this Author has argued previously that the Supreme Court's actions have, effectively, overruled its prior decision that the pardon is unlimited, the Court has not stated that officially to be the case. See Broughton, *supra* note 2, at 187.

10. *Ex parte Grossman*, 267 U.S. 87, 115 (1925).

11. Broughton, *supra* note 2, at 183.

12. See *id.*

13. See, e.g., Proposed Brief of *Amicus Curiae* The Protect Democracy Project, Inc. at 1–4, *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB (D. Ariz. 2017), 2017 WL 3773012 [hereinafter Protect Democracy Brief]; Laurence H. Tribe & Ron Fein, *Trump's Pardon of Arpaio Can—and Should—Be Overturned*, WASH. POST (Sept. 18, 2017), https://www.washingtonpost.com/opinions/the-presidential-pardon-power-is-not-absolute/2017/09/18/09d3497c-9ca5-11e7-9083-fbdfdf6804c2_story.html [https://perma.cc/D984-49UJ] (“In this circumstance, Trump's decision to pardon Arpaio was unconstitutional and should be overturned.”).

overall effect it would have on the future of presidential pardons. In fact, at or about the time the pardon was issued, several notable legal scholars filed amicus briefs with the court that was responsible for adjudicating Arpaio's crime and recognizing the pardon, including Erwin Chemerinsky, Michael Tigar, and Jane Tigar.¹⁴ The Chemerinsky Brief made three arguments: (1) Arpaio's contempt of court charge was not an "offense" under the Constitution; (2) contempt of court charges are protected from pardons; and (3) Article III courts have the power to enforce orders separate and apart from the legislative or executive branches.¹⁵ Included in the Chemerinsky Brief was the notion that the court's contempt power was separate from its right to try offenses, showing that "the inherent contempt power was not thought to be part and parcel of the power to try those accused of [a] crime."¹⁶

In a related piece, Laurence Tribe and Ron Fein argued that Arpaio's pardon should be overturned.¹⁷ More specifically, they argued that without the court's ability to enforce its contempt of court power free from presidential interference, injustice and inequality would thrive.¹⁸ As an example, Tribe and Fein highlighted the 1962 events at the University of Mississippi in which the governor refused a court order to allow African Americans into the university.¹⁹ Ultimately, the governor was held in contempt,²⁰ and it was that action, among others, that helped make sure Mississippi complied therewith. The article suggests that, but for the court's contempt action, Mississippi and other states would have continued to resist desegregation.²¹ Tribe and Fein also took the position that the language within the Constitution stating that the President "shall have power" to pardon, was permissive and, therefore, not unlimited.²² That position, however, seems incongruous with several courts throughout the United States that have interpreted "shall" as a requirement and not simply "permissive."²³

After the issuance of the Arpaio pardon, Tyler Brown explored

14. [Proposed] Memorandum of *Amici Curiae* Erwin Chemerinsky, Michael E. Tigar, and Jane B. Tigar, *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB (D. Ariz. 2017), 2017 WL 3773012 [hereinafter Chemerinsky Brief].

15. *Id.* at 1–2.

16. *Id.* at 10–11.

17. *See* Tribe & Fein, *supra* note 13.

18. *See id.*

19. *See id.*

20. *Id.*

21. *See id.*

22. *See id.*

23. *See* Angelsea Prods., Inc. v. Comm'n on Hum. Rts. & Opportunities, 236 Conn. 681, 693 (1996) ("[C]onstruction of the term 'shall' to denote mandatory obligations."); *see also* Quincy v. Mass. Water Res. Auth., 421 Mass. 463, 468–69 (1995) ("The word 'shall,' of course, 'is ordinarily interpreted as having a mandatory or imperative obligation.'" (quoting Hashimi v. Kalil, 388 Mass. 607, 609 (1983))).

several questions in his *Pepperdine Law Review* Comment: (1) is it really different from other pardons; (2) does it violate the Constitution; and (3) how does it impact the Trump administration legally and politically?²⁴ First, with regard to the similarities, Brown takes the position that it is similar in that Arpaio's pardon was unpopular, he was a public official, and he was charged originally with violating constitutional protections of others.²⁵ With regard to differences, Brown noted that other presidents stated that pardons were granted in order to reunite the country or to recognize innocent intent; whereas, for Arpaio, President Trump provided little justification for the pardon beyond recognizing Arpaio's five decades of service.²⁶ Another distinction between Arpaio's pardon and those issued by past presidents, according to Brown, is the admission of guilt. Other presidents noted the guilt of the individuals they were pardoning, in comparison to President Trump and Arpaio who both denied that anything wrong or illegal had occurred.²⁷

Brown tackles the constitutionality of Arpaio's pardon by turning to the amicus brief filed by Martin Redish.²⁸ According to Brown and Redish, a pardon cannot disrupt the due process of a third party—and by pardoning Arpaio, President Trump prevented any third parties from bringing constitutionally-based claims against Arpaio.²⁹ Similarly, they argue that amendments to the Constitution that provide for due process—the Fifth and Fourteenth specifically—preempt the prior articles in the Constitution, namely the pardon power.³⁰ Therefore, according to Brown and Redish, once those amendments were ratified, the limits to the pardon power expanded to preclude interference with due process rights.³¹ From there, Brown and Redish appear to argue that because the pardon of Arpaio would prevent others from bringing due process claims against him, the pardon could not be constitutional.³²

With regard to the legal and political impact of the Arpaio pardon on President Trump, Brown posits that he would likely not face any repercussions as a result, separate and apart from widespread criticism and

24. Tyler Brown, Note and Comment, *The Court Can't Even Handle Me Right Now: The Arpaio Pardon and Its Effect on the Scope of Presidential Pardons*, 46 PEPP. L. REV. 331 (2019).

25. *Id.* at 353–55.

26. *Id.* at 355.

27. *Id.* at 356.

28. See generally Brief of Amici Curiae Martin Redish, Free Speech for People and Coalition to Preserve, Protect and Defend in Opposition to Motion of Defendant Joseph Arpaio for Vacatur and Dismissal with Prejudice, *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB (D. Ariz. 2017), 2017 WL 3773012 [hereinafter Redish Brief].

29. Brown, *supra* note 24, at 358.

30. *Id.* at 358–59.

31. *Id.*

32. See *id.*; Redish Brief, *supra* note 28.

scrutiny that would follow him throughout his four years in office.³³ In retrospect, it is hard to tell if Brown was correct. That is, President Trump was never involved with any legal matters pertaining to the Arpaio pardon. However, he did lose re-election in 2020 to President Joseph R. Biden.³⁴ Given the complexities associated with the outcome of a presidential election, it is difficult to determine whether Arpaio's pardon had anything to do with that outcome. President Trump's pardon of Arpaio was unusual, nevertheless, in that it came in the first year of his term rather than the final hours of his presidency, like most pardons issued by his predecessors. Therefore, while it is not unfathomable to think that the pardon had an impact on voters, without more direct information Brown's analysis remains virtually impossible to explore further.

Similar to Brown, Sanya Shahrabi examined and analyzed the President's ability to pardon a contempt of court conviction issued by an Article III court.³⁵ In her Note, Shahrabi makes the argument that the President violates the Constitution's separation of powers by pardoning an individual held in criminal contempt.³⁶ As Shahrabi points out, when the President pardons a criminal contempt of court conviction, the President is, effectively, proclaiming that (1) the court erred and (2) the court's contempt power, which is paramount to its functioning overall, is less than that of the executive pardon.³⁷ According to Shahrabi, "a pardon that interferes with the functions of another branch of government runs contrary to the separation of powers principle" and that such a scenario "represents the situation surrounding . . . Arpaio's pardon."³⁸

Shahrabi further makes the argument that the pardoning of Arpaio was not what the Framers had in mind because such a pardon voided the enforcement power of the court and precluded its proper functioning.³⁹ She also challenges the notion that the pardon power is limitless by arguing that the Arpaio pardon is different from the precedent that was set forth in *Ex parte Garland* and in *Ex parte Grossman*—two paramount cases that have shaped dramatically our understanding of the pardon—due

33. Brown, *supra* note 24, at 362–63.

34. Scott Detrow & Asma Khalid, *Biden Wins Presidency, According to AP, Edging Trump in Turbulent Race*, NPR (Nov. 7, 2020, 11:26 AM), <https://www.npr.org/2020/11/07/928803493/biden-wins-presidency-according-to-ap-edging-trump-in-turbulent-race> [<https://perma.cc/9X5X-6BWW>].

35. See generally Sanya Shahrabi, Note, *Can a Presidential Pardon Trump an Article III Court's Criminal Contempt Conviction? A Separation of Powers Analysis of President Trump's Pardon of Sheriff Joe Arpaio*, 18 GEO. J.L. & PUB. POL'Y 207 (2020).

36. See generally *id.*

37. *Id.* at 210 ("The pardon prevents the court from enforcing its orders and delegitimizes it.")

38. *Id.* at 210–11.

39. *Id.* at 212.

to the nature surrounding the conviction for contempt orders.⁴⁰ Shahrabi scrutinizes both cases extensively and juxtaposes the Supreme Court's analysis therein with the facts and circumstances of the Arpaio pardon in an effort to argue that, because the Arpaio case is different, *Ex parte Garland* and *Ex parte Grossman* are inapposite and, thus, Arpaio's pardon is unconstitutional.⁴¹

In *Ex parte Garland*, the Supreme Court determined whether a law requiring a loyalty oath disclaiming past treasonous conduct in order to continue to practice law was incongruous with the reprieve provided by President Andrew Johnson's pardon to Confederate soldiers.⁴² The Court's decision in *Garland* held that the presidential pardon "extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment."⁴³ This holding clarified that Congress could not inhibit the President's pardon power by enacting a law that would hinder its effect.

In *Ex parte Grossman*, the defendant was held in criminal contempt of court for violating an injunction that instructed him to cease the sale of liquor during prohibition.⁴⁴ Grossman received a pardon from President Calvin Coolidge but was later incarcerated by the Federal District Court. The Supreme Court concluded that the presidential pardon was for all crimes against the United States and that a contempt of court conviction, in a criminal matter, constituted such a crime.⁴⁵ As part of its decision, the Court held that there was no separation of powers violation with such a pardon.⁴⁶ More specifically, the Court determined that "nowhere" in the Constitution does it declare expressly that our "three branches of government must be kept *separate* and *independent*. Although the branches have separate functions, they have the ability to check and balance each other."⁴⁷ As the Court provided, within our government, the executive is empowered to veto legislation, Congress can impeach the executive and judiciary members, the executive can issue pardons, and the Senate can stall executive appointments and confirmations.⁴⁸ Therefore, according to the Court, the Constitution permits the three branches of government to interrupt the actions and operations of one another.

The Court in *Ex parte Grossman* further noted that the pardon exists

40. *Id.*

41. *See id.*

42. *Ex parte Garland*, 71 U.S. 333, 363–64 (1866).

43. *Id.* at 380.

44. *Ex parte Grossman*, 267 U.S. 87, 107 (1925).

45. *Id.* at 117–19.

46. *Id.* at 119–22.

47. Shahrabi, *supra* note 35, at 218 (quoting *Grossman*, 267 U.S. at 119) (emphasis added).

48. *Ex parte Grossman*, 267 U.S. at 119–20.

to provide reprieve from “undue harshness” or “evidence mistake” given that American justice is not “always wise or certainly considerate of circumstances which may properly mitigate guilt.”⁴⁹ Further still, the Court saw the pardon as another check in the balance of power, and was skeptical that a President would intentionally paralyze the courts through the use of that power.⁵⁰ Of course, if the President were to engage in such conduct, the Court noted a possible solution specifically set forth in the Constitution: impeachment.⁵¹

Taking *Garland* and *Grossman* together, Shahrasbi remains unconvinced that Arpaio’s pardon falls under the precedent created therein, especially with regard to the separation of powers implications.⁵² More specifically, Shahrasbi argues that Arpaio’s pardon is distinct from the typical operation of government analysis set forth in *Grossman* because, in Arpaio’s case, the intent of the pardon was to “specifically undermine the power of another branch rather than to show mercy.”⁵³ She argues further that President Trump substituted his judgment for that of the district court in concluding that, in fact, there was no violation of the court order—something that a cursory review of the evidence against Arpaio, as well as his admission of same, would prove to be *demonstrably false*.⁵⁴ Accordingly, as Shahrasbi notes, Arpaio was not pardoned for a harsh punishment or to correct a mistake; instead, it was done to appease the political stances of the President.⁵⁵

Shahrasbi also distinguishes Arpaio’s pardon from that of *Grossman* in that, with regard to Arpaio, he violated a court order instructing him to cease detaining people based solely on the color of their skin, and thus violating their private rights; whereas *Grossman* was held in contempt of court for selling alcohol.⁵⁶ She posits that violating prohibition laws is different than violating the individual liberties in that the direct harm of the latter includes the inability for victims to seek redress and prevention.⁵⁷ Shahrasbi also notes the fact that, in *Grossman*’s case, he still was required to pay a \$1,000 fine—that is, his pardon was conditional.⁵⁸ In the matter of Arpaio, no conditions were attached; therefore, the Supreme Court’s precedent in *Grossman* would be inapplicable to evaluating Arpaio’s contempt of court conviction.⁵⁹

49. *Id.* at 120–21.

50. *Id.* at 121.

51. *Id.*

52. *Id.* at 219.

53. *See* Shahrasbi, *supra* note 35, at 220.

54. *See id.*

55. *Id.*

56. *Id.* at 221.

57. *See id.*

58. *Id.* at 221–22.

59. *See id.*

Although Shahrabi makes a compelling argument for the often-stated adage that the law operates in context, despite the distinct differences between Arpaio's and Grossman's cases, the reality remains that Arpaio, like Grossman, was issued a pardon for his contempt of court conviction. Therefore, Arpaio was, effectively, pardoned for the same crime—violating a court order. The fact that there are differences as to what those orders precluded seems unlikely to be enough to convince the Supreme Court to change its interpretation of the pardon power.

B. ' Proposed Changes to the Presidential Pardon Power

Ever since the pardoning of Arpaio, several scholars have stepped forward with proposals on how best to change the presidential pardon authority in an attempt to limit its corrupt use and, instead, develop a more equitable, justice-driven process. Whether these proposals would succeed is not for this Article to decide; rather, their identification and comparisons are vital to the continuing national discourse as to the future of the pardon authority.⁶⁰

In a recent article penned by Professor Daniel T. Kobil, of Capital University School of Law, he asks whether the Framers of our Constitution dropped the ball.⁶¹ In response to that inquiry, he argues that we should devote time to curbing some of the questionable moments of presidential pardoning by amending the Constitution to limit the pardon only to instances wherein a conviction has occurred.⁶² As Kobil points out, twenty-nine states permit executive pardons only after conviction.⁶³ This proposal is unsurprising given that the Supreme Court has determined that a presidential pardon can be issued before, during, or after conviction.⁶⁴ According to Professor Kobil, by limiting the issuance of a pardon until after a defendant has been adjudged, we can prevent it from

The precedent in *Grossman* can be argued as not controlling because the Court has never had the opportunity to decide on an unconditional pardon for a violation of a criminal contempt conviction. . . . It is plausible that if Grossman was completely pardoned for the violation, the Court would [have] determine[d] that the action would render inoperative the contempt power to make the outcome consistent with its prior ruling.

Id. at 222.

60. The Author recognizes that since the pardon of Arpaio, countless Articles, Comments, Notes, and proposals have been written about the presidential pardon authority—not all of which could be recognized or set forth above. This Author selected a handful of proposals thought to be novel solutions to the aforementioned issues. Importantly, readers interested in this topic should seek out those other articles and proposals not included herein, as they are worthy of consideration as we continue to navigate this critical conversation.

61. Daniel T. Kobil, *Article II and the Pardon Power: Did the Framers Drop the Ball?*, 33 FED. SENT. R. 307, 307 (2021).

62. *Id.*

63. *Id.* at 307 n.11.

64. *Ex parte Garland*, 71 U.S. 333, 380 (1866).

being deployed in an abusive manner.⁶⁵ More specifically, Kobil notes that such a delay would allow the legal process to *publicly* shed light on the factual underpinnings of the specific crime alleged and permit the courts to determine guilt.⁶⁶

At the outset, Kobil's proposal seems to have a major benefit: the requirement of a trial—in other words, a *public* process. A trial usually involves the following steps: (1) charges are filed, (2) the defendant enters a plea, (3) evidence is placed before the court and/or a jury, including physical evidence and witness testimony, (4) a defense is mounted by the defendant in an attempt to rebut, (5) closing arguments are delivered by both sides, (6) if there is a jury, they receive a series of instructions as to their role and the limits of their power, and (7) a verdict is rendered, followed by sentencing if found guilty. This process is a public exercise; that is, members of the public are able to observe and, to a certain extent, participate. Affording the public the opportunity to read the charges, review the evidence, hear from their peers, and evaluate for themselves the status of the defendant could have political implications for the President of the United States, as compared to instances where a pardon is issued before charges are filed and the public is unable to engage in the aforementioned deliberative process. Accordingly, Kobil's proposal seems to suggest that if the President was forced to wait until the public was able to absorb and fully understand the alleged crimes of the individual, the political fallout might actually force the President to reconsider executing the pardon power. This notion, however, is challenged by the recent fact that several allies of President Trump admitted publicly to committing various acts against the United States—as detailed by the Mueller Report and addressed more fully below⁶⁷—and yet were still pardoned by the President despite the potential political ramifications. Therefore, it is uncertain whether Kobil's suggestion would entice a President to reevaluate a pardon. Then again, President Trump's style was anything but ordinary, and a President pre-Trump might have taken the safer route as compared to Trump who often took the political road less traveled.

Similar to Professor Kobil's post-conviction proposal, Genevieve A. Bentz appears to propose, with regard to contempt of court matters, waiting until a person has been convicted of the offense and then requiring the President to point to “persuasive evidence indicating lack of due process in the contempt proceeding” before issuing a pardon.⁶⁸ According to Bentz, such a process would preserve the President's capacity to pardon

65. Kobil, *supra* note 61, at 307.

66. *Id.*

67. See discussion *infra* Section II.A.

68. See Genevieve A. Bentz, *A Blank Check: Constitutional Consequences of President Trump's Arpaio Pardon*, 11 ALB. GOV'T L. REV. 250, 282 (2018).

criminal contempt of court convictions in circumstances where (1) due process concerns exist with regard to the conviction itself or (2) that the activity that led to the contempt does not interfere with fundamental civil liberties—specifically, in situations where “the pardon does not tacitly approve or encourage unconstitutional action.”⁶⁹ Bentz contends that, although in some circumstances one branch “must acquiesce to the other,” a bifurcated review system limited to evaluating due process violations helps to maintain the separation of powers set forth in the Constitution.⁷⁰

In an effort to curb abuse of the pardon authority, other scholars have suggested a more systemic change involving the addition of others to the overall pardon decision-making process. Laura Palacios, as well as Budd N. Shenkin and David I. Levine, make the case for more legislative involvement.⁷¹ In her Note, Palacios proposed the creation of a three-part legislative enactment that aims to increase accountability, promote thoroughness in decision-making, and limit abuse.⁷² She recommends that Congress, through the Necessary and Proper Clause, create an agency that would oversee potential pardon recipients that did not go through the traditional process to evaluate whether they should be granted a pardon.⁷³ This agency, according to Palacios, would include a five-person review committee that would oversee and monitor potential pardon recipients not involved with the DOJ’s pardon review procedures.⁷⁴ The committee would examine whether a potential candidate should receive a pardon; if the committee decided not to issue one and the President concluded the opposite, then any pardon opposed by the committee would need to include a condition.⁷⁵ Lastly, the President would be required to issue a statement informing the public about the pardon and the reasons for issuing same.⁷⁶ According to Palacios, this final component would

69. *Id.*

70. *Id.* at 283.

71. See Palacios, *supra* note 5, at 213; Budd N. Shenkin & David I. Levine, *Should the Power of Presidential Pardon Be Revised?*, 47 HASTINGS CONST. L.Q. 3, 5 (2019).

72. Palacios, *supra* note 5, at 232.

73. *Id.* at 242. In 1865, Congress allocated funds to hire a pardon clerk, who assisted the Attorney General in reviewing pardon petitions. Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 286 (2013). As a result of yearly increases in pardon applications, Congress later established the Office of the Pardon Attorney within the DOJ, in order to assist the president. See Margaret Colgate Love, *Of Pardons and Collar Buttons: Reflections on the President’s Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1489 n.26 (2000). As noted previously, the Office of the Pardon Attorney was used, primarily, by most presidents in determining who should receive a pardon; however, President Trump dispensed with this procedure and, instead, followed his own process.

74. Palacios, *supra* note 5, at 233.

75. *Id.* at 234.

76. *Id.*

promote transparency.⁷⁷

Although Palacios's proposal appears to include more individuals in the pardon issuing process, and may create an additional level of transparency, such an enactment would do nothing to limit the President's actual ability to issue a pardon before, during, or after a crime has been committed. Furthermore, it would not prevent the President from abusing the power; instead, it merely requires that the President, if the proposed agency disagreed with a non-traditional pardon, provide a condition in conjunction therewith as well as a justification for same. This leaves open the ability of the President to attach any legal condition and provide any reason for the pardon. However, like Bentz's proposal, the President would be required to publicly disclose the pardon and the reasons for granting them. Depending on the nature of the alleged crime and the political atmosphere at the time, the President may think twice before executing the pardon. This type of pressure and transparency may be enough to check and balance a typical President; however, it most likely would not have restricted President Trump.

Bentz is not alone in suggesting that an additional entity should be created to assist in the process of presidential pardons. Professor Mark Osler, of University of St. Thomas School of Law, proposes creating a clemency board that is separate and apart from the DOJ, although the pardon attorney would transition to become staff director for the board, and staff for the pardon attorney would serve the board.⁷⁸ Osler further proposes that the President be required to engage in "the articulation of a clear, principled, and ambitious agenda for the use of the pardon power," including "setting . . . numerical goal[s], focusing on 'buckets' of similar cases, and looking for a mix of characteristics that can cross over several types of cases."⁷⁹ Similar to Bentz, Osler's proposal appears to create additional steps for a President to take without actually limiting the President's ability to exercise the pardon power. That is, Osler's model would likely still be plagued with some of the current problems of the pardon—that the President can execute it without limitation or interference by the other branches. This is not to say that Osler's and Bentz's proposals should not be considered—they must, as they seek to address other important issues related to the pardon.⁸⁰

77. *Id.*

78. Mark Osler, *Memo to the President: Two Steps to Fix the Clemency Crisis*, 16 U. ST. THOMAS L.J. 329, 330–31 (2020).

79. *Id.*

80. For example, Osler questions the validity and effectiveness of having the DOJ—a federal department made up of prosecutors—reviewing and evaluating the work of their colleagues, other prosecutors, in order to recommend whether a pardon should be issued. *See id.* at 334 ("[T]he very purpose of executive clemency is to serve as a check on sentences that were almost always sought by prosecutors—it makes no sense to put this corrective power in the hands of those being corrected.").

Separate from Bentz and Osler, Shenkin and Levine seek to alter the pardon process overall in a manner that would, in fact, limit the President's capacity to pardon. Shenkin and Levine propose a constitutional amendment that would create a required co-signer of all pardons who is already a constitutional officer independent of, and unassociated with, the President and also represents a coequal branch of government—the Speaker of the House of Representatives.⁸¹ This proposal would make it so that without the Speaker's co-signature, the President's pardon would be ineffective. Shenkin and Levine argue that by simply knowing that the Speaker's signature was a prerequisite, the President would review and issue pardons more thoroughly.⁸² As they note in their piece, such a proposal presents an interesting counterfactual: "Would Speaker Carl Albert have co-signed for the 1974 pardon of Richard Nixon, Tom Foley for Iran-Contra in 1992, . . . Paul Ryan for Joe Arpaio in 2017, or Nancy Pelosi for [President Trump's other pardons]?"⁸³ Although the answer to these counterfactuals is unknown, the proposal itself creates another logistical, if not political, question: would the party affiliation of the Speaker impact their willingness to co-sign the pardon? In today's political climate, it is not untenable to think that the answer is a resounding, "Yes!" More specifically, it is reasonable to posit that a Speaker of the same political affiliation as the President would be more inclined to co-sign a pardon than if the Speaker was the leader of the opposition. While there certainly are instances where this Author can imagine that Speaker Pelosi would have co-signed a pardon issued by President Trump—e.g., the pardon of Susan B. Anthony—it is far more likely that, as the leader of President Trump's opposition party, she would have declined most of his requests, especially to those individuals who pled guilty as a result of the Mueller investigation.

Professor Douglas McKechnie, of the U.S. Air Force Academy, recommends something completely different from the foregoing—seeking guidance from other constitutional democracies, namely the Slovak Republic, or Slovakia.⁸⁴ McKechnie explores how the Slovakia Constitutional Court decided to review amnesties that had been granted that "allegedly violated various principles of the rule of law" and then "applied rule-of-law principles in a way that could inform American courts faced with similar issues."⁸⁵ As noted by McKechnie, Slovakia endured extreme political turmoil and, as a result, its legislature was able to amend their constitution in order to dramatically alter the president's

81. Shenkin & Levine, *supra* note 71, at 13.

82. *Id.* at 14.

83. *Id.*

84. See Douglas B. McKechnie, *Learning the Limits of the Pardon Power from Others*, 25 PENN ST. L. REV. PENN STATIM 24, 25–26 (2021).

85. *Id.*

pardon power. More specifically, the legislature gave itself the power to annul a president's pardon, by a three-fifths vote, if the pardon "was incompatible with the principles of democracy and rule of law."⁸⁶ The amendment also required that all legislative annulments of a pardon be reviewed by the Constitutional Court, which would determine whether the annulment complied with the constitution. As a result of that new power, the legislature began annulling several pardons previously issued by the executive—of which, many annulments were upheld.⁸⁷

In its analysis, the Constitutional Court declared that "democracy and the rule of law are fundamental values that form not just a formal source, but also a material core of the Slovakia Constitution, and, therefore, every action by a constitutionally created organ is subject to constitutional review."⁸⁸ The Constitutional Court also noted that other nations "recognized the legal authority to annul amnesties for reasons such as the severity of the crime—e.g., those crimes that implicate human rights—and the identity of the perpetrator—e.g., when the offender was acting at the behest of the government."⁸⁹

Despite the plethora of differences between governmental designs that exist in Slovakia as compared to the United States, McKechnie still posits that the role the Slovakia Constitutional Court plays in the presidential pardon power is worthy of consideration for the United States, namely that review, analysis, and application of the presidential pardon should be done through the lens of the "rule-of-law" doctrine.⁹⁰ McKechnie notes that the "rule-of-law" is expressly provided for in the Slovakia Constitution, and that despite the fact that such conspicuous language is not found in the U.S. Constitution, the "rule-of-law" approach exists within the Supreme Court's decision in *Marbury v. Madison*, wherein the Supreme Court held that there were limits on government action which ensured "a government of laws, and not men."⁹¹ It is from this perspective that McKechnie posits that—notwithstanding the differences that make up the founding of the United States, the language of the Constitution, or the creation of the presidential pardon power—the "rule-of-law" approach is, perhaps, embedded in the philosophies and structures that have driven and maintained our government.⁹²

McKechnie's proposal presents an interesting challenge for the late Alexander Hamilton—the pardon's most ardent supporter. As part of his

86. *Id.* at 28 (quoting Ústavný súd Slovenskej republiky [Constitutional Court of the Slovak Republic] May 31, 2017, PL. ÚS 7/2017 (Slovk.)).

87. *Id.*

88. *Id.*

89. *Id.*

90. *See id.* at 30.

91. *Id.* at 31–32 (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803)).

92. *See id.* at 31.

attempt to ensure the ratification of the Constitution—along with the present language of the President’s pardon power—Hamilton argued that the benefit to having the right to issue pardons vested with the President alone was that of expediency: “[I]n seasons of insurrection or rebellion, there are often critical moments, when a [well-timed] offer of pardon to the insurgents or rebels may restore the tranquility The dilatory process of convening the legislature . . . would frequently be the occasion of letting slip the golden opportunity.”⁹³ The Federalist Papers, however, do not say anything about the immediate issuance of a pardon, followed by a review and revocation by the legislature. Granted, it is likely that any limitations on the presidency would have run afoul of Hamilton’s general approach to presidential power. However, issuance of a pardon followed by a careful review thereafter would not let slip a golden opportunity. To the contrary, a legislative review could help ensure that only a person deserving of a pardon receives one. Such a systemic change would not be new to our current government design—after all, Congress can override a presidential veto by a two-thirds majority vote.⁹⁴

While the aforementioned scholarship is not an exhaustive review of that which has been published on the President’s pardon power since the pardon of Arpaio, it provides a brief introduction to the extensive discourse that continues to unfold. These proposals provide a strong foundation for why changes must be explored further in light of the flagrant abuses committed by President Trump.

II. THE PARDONS OF PRESIDENT TRUMP

Many of the pardons issued throughout the presidency of Donald Trump can hardly be classified as those falling within the confines of Alexander Hamilton’s mercy argument in support of creating the pardon power.⁹⁵ Although Hamilton’s rationale may have come to fruition at various points throughout American history, it cannot be argued that the same logic applied to the flurry of pardons issued by President Trump in his last few days in office. This Part will review and analyze several of the pardons issued by President Trump under three categories: (1) those that worked for him and were implicated in the Mueller Special Counsel Investigation; (2) individuals who had close ties to President Trump either by party affiliation, friendship, or business interaction; and (3) individuals whose cases warranted pardons. The parsing of these pardons will expose the flagrant abuse of power exhibited by President Trump, in direct contravention to the reasoning behind the pardon’s creation, and argue

93. THE FEDERALIST NO. 74 (Alexander Hamilton).

94. U.S. CONST. art. I, § 7, cl. 2.

95. See THE FEDERALIST NO. 74 (Alexander Hamilton) (“The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”).

that a different pardon authority must be implemented to safeguard the American judicial system from such assault.

A. *Employees, Associates, and the Special Counsel Investigation*

On May 17, 2017, Deputy Attorney General Rod Rosenstein appointed former Federal Bureau of Investigation (FBI) Director, Robert Mueller, to investigate the role of Russian interference in the 2016 election.⁹⁶ Mueller's appointment as Special Counsel for the DOJ (the "Mueller investigation") happened shortly after (1) the FBI had confirmed that it was investigating alleged Russian interference in favor of candidate Trump,⁹⁷ and (2) President Trump had fired James Comey as Director of the FBI for, among other things, his role in investigating the President.⁹⁸

Although the Mueller investigation concluded that there was no collusion between President Trump and the Russian government, several of President Trump's closest advisers—including top campaign and/or White House staff—did not escape the inquiry unscathed. And despite their admission of guilt for lying to federal investigators or engaging in obstruction of justice throughout the investigation, President Trump felt that several of his top lieutenants deserved a presidential pardon as a result of a "witch hunt" comprised of "angry democrats" engineered to take him down.⁹⁹ All this, notwithstanding the fact that Mueller—a registered *Republican* appointed FBI Director by *Republican* President George W. Bush—was appointed by Rosenstein, also a registered *Republican*, who was appointed Deputy Attorney General by a *Republican* President: Donald Trump.¹⁰⁰

The first of President Trump's top agents was former General and National Security Adviser, Michael T. Flynn, who was pardoned on November 25, 2020.¹⁰¹ Flynn was charged with lying to investigators on January 24, 2017 in connection to two conversations that he had in 2016 with Russian Ambassador, Sergey Kislyak.¹⁰² According to the FBI, in a

96. Ann M. Murphy, *All the President's Privileges*, 27 J.L. & POL'Y 1, 3 (2018).

97. *Id.* at 3–4.

98. Eric Tucker, *The Comey Firing, As Retold by the Mueller Report*, AP NEWS (Apr. 23, 2019), <https://apnews.com/article/north-america-donald-trump-ap-top-news-criminal-investigations-james-comey-4ff1ecb621884a728b25e62661257ef0> [<https://perma.cc/H95Y-TMD3>].

99. See Rebecca Morin, *Trump Says Mueller Acted Honorably in Russia Probe*, POLITICO (Mar. 25, 2019, 1:21 PM), <https://www.politico.com/story/2019/03/25/trump-mueller-acted-honorably-1235226> [<https://perma.cc/Z3RJ-6CAR>].

100. Chris Megerian, *Deputy Atty. Gen. Rod Rosenstein, A Registered Republican, Is Confronted by Republicans Alleging FBI Bias in Russia Probe*, L.A. TIMES (June 28, 2018, 3:40 PM), <https://www.latimes.com/politics/la-na-pol-rosenstein-wray-judiciary-20180628-story.html> [<https://perma.cc/5BSK-XMY2>].

101. See Josh Gerstein & Kyle Cheney, 'Any and All Possible Offenses': Trump Pardon Grants Flynn a Sweeping Reprieve, POLITICO (Dec. 1, 2020, 2:10 PM), <https://www.politico.com/news/2020/11/30/trump-flynn-pardon-reprieve-441527> [<https://perma.cc/CZH6-A4RB>].

102. Martin Finucane, *Here's What Michael Flynn Was Charged With—and What He*

December 29, 2016 conversation with Ambassador Kislyak, Flynn asked the Russian government to withhold escalation in response to sanctions imposed by President Barack Obama for Russia's interference in the 2016 election. Flynn lied when he said that he did not make such a request and/or that he could not recall the ambassador's response thereto.¹⁰³ The FBI also alleged that Flynn had asked Ambassador Kislyak, only a few days later, to delay or defeat a vote at the United Nations Security Council. Flynn once again lied when he said that he made no such request and, further, he lied when he denied getting a report from the Ambassador pertaining to that request.¹⁰⁴

After federal investigators discovered that Flynn had lied several times during the Mueller investigation, he agreed to a plea deal in which he acknowledged that he "impeded and otherwise had a material impact on the FBI's ongoing investigation into the existence of any links or coordination between individuals associated with the campaign and Russian efforts to interfere with the 2016 presidential election."¹⁰⁵

Shortly after Flynn was pardoned, George Papadopoulos, another adviser to President Trump's 2016 campaign, also received a pardon. Similar to Flynn, Papadopoulos pled guilty to lying to FBI agents investigating Russian interference with the 2016 presidential election.¹⁰⁶ Papadopoulos met with Russian intermediaries in meetings where he attempted to secure "dirt" on Hillary Clinton. When questioned by investigators about those meetings, Papadopoulos denied that any such meetings took place or that information was exchanged.¹⁰⁷ The government argued that Papadopoulos "deliberately and repeatedly lied to agents of the FBI in the course of a highly significant investigation He chose to lie again and again to advance his personal interests to get a high-level position in the new administration."¹⁰⁸ According to the government, Papadopoulos's actions forced investigators to review over 100,000 emails, materials, and other data before they were able to confront his lies and obtain the truth. As part of his defense, Papadopoulos argued that President Trump's actions were more egregious than his own and that

Isn't, BOS. GLOBE (Dec. 1, 2017, 4:32 PM), <https://www.bostonglobe.com/news/nation/2017/12/01/here-what-michael-flynn-charged-with-and-what-isn/6zpuo769JQipW3rOgTAXKJ/story.html> [https://perma.cc/VY3Z-R2UU].

103. *Id.*

104. *Id.*

105. James Gordon Meek, *What You Need to Know About the Indictment Against Michael Flynn*, ABC NEWS (Feb. 20, 2019, 6:04 PM), <https://abcnews.go.com/Politics/indictment-michael-flynn/story?id=61147177> [https://perma.cc/93Q6-7364].

106. Carrie Johnson, *Ex-Trump Aide Papadopoulos, 1st Charged in Russia Probe, Sentenced to 14 Days*, NPR (Sept. 7, 2018, 6:30 PM), <https://www.npr.org/2018/09/07/645539743/ex-trump-aide-papadopoulos-1st-charged-in-russia-probe-sentenced-to-14-days> [https://perma.cc/SGF7-4L8W].

107. *See id.*

108. *Id.*

he was young and naïve, and trying to obtain a position in the President's new administration.¹⁰⁹

The court was not pleased with Papadopoulos's actions. As the court aptly noted, "[i]t took *six months* before Mr. Papadopoulos corrected the record and he did so in the face of proof that he lied."¹¹⁰ During that time period, key individuals who the FBI would have questioned were able to evade investigation and prosecution because, during that six month period, they fled the country.¹¹¹ As a result of his actions, the court sentenced Papadopoulos to fourteen days in prison, a fine of \$9,500, and two hundred hours community service after recognizing that, ordinarily, a first-time offense of lying to federal investigators would result in probation only. However, because the actions of Papadopoulos impeded an investigation of "grave national importance," a harsher sentence was warranted.¹¹² More specifically, the court noted that "the integrity of American democracy" was paramount and that "[b]ecause determining whether a foreign government interfered in the electoral process was 'a matter of enormous importance,' . . . Mr. Papadopoulos' crime was 'significantly more serious than the typical violation.'"¹¹³

Unlike Flynn, however, Papadopoulos seemed contrite for his actions. He told reporters that he believed the Mueller investigation "was legitimate and fair-minded" and that, while he could only speak for himself, he was "paying the price for [his] mistakes And if anyone else made mistakes, they're going to have to pay a price, too."¹¹⁴ Papadopoulos later stated that he did not expect, nor would he seek, a presidential pardon for his actions.¹¹⁵ It turned out that his expectations were inconsistent with what President Trump had in mind.

The very next day, President Trump elected to pardon his former 2016 campaign chairman, Paul Manafort. During the Mueller investigation, the court determined that Manafort had lied to federal investigators about his communications with Russian intermediaries during the 2016 presidential election.¹¹⁶ Specifically, Manafort lied about participating in a meeting "with a Kremlin-connected Russian lawyer and

109. *Id.*

110. *Id.* (emphasis added).

111. *See id.*

112. Mark Mazzetti & Sharon LaFraniere, *George Papadopoulos, Ex-Trump Adviser, Is Sentenced to 14 Days in Jail*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/us/politics/george-papadopoulos-sentencing-special-counsel-investigation.html> [<https://perma.cc/D6CL-YMFP>]. The court also noted that the sentencing guidelines do permit imprisonment for up to six months for a first-time offender lying to federal investigators. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Anthony J. Gaughan, *Putin's Revenge: The Foreign Threat to American Campaign Finance Law*, 62 HOW. L.J. 855, 897 (2019).

Russian intelligence operative who promised damaging information about Hillary Clinton.”¹¹⁷ In an effort to avoid a longer jail sentence, he pled guilty to charges for conspiring to defraud the United States, violating lobbying laws, and obstructing justice—through witness tampering—in connection with years of previously undisclosed work in Ukraine for pro-Russian entities.¹¹⁸

In the end, Manafort was sentenced to seven and a half years in prison for his actions; however, shortly after beginning his sentence, he was released to home confinement as a result of the COVID-19 virus.¹¹⁹ He remained in home confinement until he received his pardon from President Trump only a few months later. According to the White House, “[a]s a result of blatant prosecutorial overreach, Mr. Manafort has endured years of unfair treatment and is one of the most prominent victims of what has been revealed to be perhaps the greatest witch hunt in American history.”¹²⁰ However, as noted previously, this observation is belied by the fact that it was President Trump’s own Deputy Attorney General who appointed Mueller to investigate these issues.

Two days after Manafort’s pardon, President Trump issued a pardon to Alex van der Zwaan. Zwaan, a Dutch national, became the first person sentenced in connection with the Mueller investigation.¹²¹ He was an associate at the law firm of Skadden, Arps, Slate, Meagher & Flom’s London office and, during such time, was working in conjunction with Paul Manafort on matters pertaining to Ukraine and Russia.¹²² According to the Mueller investigation, Zwaan’s firm was recruited by Manafort to assist in the procurement and dissemination of unflattering information.¹²³ Zwaan allegedly lied about his communications with Russian operatives, as well as members of President Trump’s 2016 campaign.¹²⁴ As a result

117. *Id.*

118. Spencer S. Hsu, *Federal Judge Finds Paul Manafort Lied to Mueller Probe About Contacts with Russian Aide*, WASH. POST (Feb. 13, 2019), https://www.washingtonpost.com/local/legal-issues/us-judge-finds-paul-manafort-lied-to-mueller-probe-about-contacts-with-russian-aide/2019/02/13/c5209f7a-2f2c-11e9-86ab-5d02109aeb01_story.html [<https://perma.cc/FEG3-YW3C>].

119. Katherine Faulders & Luke Barr, *Former Trump Campaign Chairman Paul Manafort Released to Home Confinement Amid Coronavirus Concerns*, ABC NEWS (May 13, 2020, 7:21 AM), <https://abcnews.go.com/Health/trump-campaign-chairman-paul-manafort-released-home-confinement/story?id=70642927> [<https://perma.cc/2EM8-6S7M>].

120. Amita Kelly et al., *Trump Pardons Roger Stone, Paul Manafort and Charles Kushner*, NPR (Dec. 23, 2020, 7:38 PM), <https://www.npr.org/2020/12/23/949820820/trump-pardons-roger-stone-paul-manafort-and-charles-kushner> [<https://perma.cc/H9Z7-F39B>].

121. Soo Rin Kim, *What You Need to Know About the Indictment Against Alex van der Zwaan*, ABC NEWS (Feb. 20, 2019, 5:04 PM), <https://abcnews.go.com/Politics/indictment-alex-van-der-zwaan/story?id=61149095> [<https://perma.cc/9ZFK-77H5>].

122. *Id.*

123. *Id.*

124. *See id.*

of providing a false statement to investigators, Zwaan was sentenced to thirty days in prison and issued a fine of \$20,000.¹²⁵

Lastly, on December 23, 2020, President Trump issued a pardon to one of the most important individuals associated with the Mueller investigation: Roger Stone.¹²⁶ Stone was convicted by a jury—in connection with the investigation—of seven felonies, including making false statements to federal investigators and members of Congress, witness tampering, and obstruction of justice.¹²⁷

The evidence provided that—several months prior to the 2016 election—Stone attempted to obtain emails that Russian operatives had stolen information from computers owned by Democratic leaders and funneled that information to WikiLeaks, which had released it at various points in time during the campaign to damage Hillary Clinton.¹²⁸ According to investigators, Stone lied about his involvement therewith.¹²⁹ Additionally, Stone was found to have interfered with the testimony of Randy Credico, a New York radio host and comedian, who was also interviewed by Mueller’s team and provided testimony.¹³⁰ Stone was charged with trying to block Credico’s testimony before the U.S. House of Representatives by way of engaging in behavior that amounted to flattery, bullying, and threatening Credico.¹³¹ He also urged Credico to “Do a Frank Pentangeli” from *The Godfather: Part II* and give false testimony.¹³² More specifically, he texted Credico in late 2017 the following message before his scheduled testimony: “Stonewall it. Plead the fifth. Anything to save the plan.”¹³³ Stone even went so far as to promise Credico that there would be retaliation against him and his friends should he step out of line with testimony.¹³⁴

Significantly, Stone told congressional investigators that there were no records of the aforementioned communications because Credico “was not an email guy.”¹³⁵ The evidence, however, demonstrated that Stone and Credico exchanged more than 1,500 emails and text messages,

125. *Id.*

126. See Kelly et al., *supra* note 120.

127. Sonam Sheth, *Trump Grants a Full Pardon to Republican Strategist Roger Stone, Who Was Convicted of 7 Felonies*, INSIDER (Dec. 23, 2020, 7:51 PM), <https://www.business.com/trump-pardons-convicted-felon-roger-stone-2020-12> [<https://perma.cc/P633-RUFE>].

128. Sharon LaFraniere & Zach Montague, *Roger Stone is Convicted of Impeding Investigators in a Bid to Protect Trump*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2019/11/15/us/politics/roger-stone-trial-guilty.html> [<https://perma.cc/HW8B-9ZZF>].

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

including 72 texts on the day of Stone's congressional testimony.¹³⁶ Because Stone lied, federal prosecutors claimed that they missed out on promising leads and arrived at inaccurate conclusions as to the full extent of Russia's 2016 election interference.¹³⁷ When Credico tried to warn Stone about his text messages and his efforts, Stone responded: "Nice try. . . . Meaningless. . . . So what."¹³⁸

President Trump viewed the granting of these foregoing pardons as necessary to combat the great "witch hunt" that plagued his campaign and administration.¹³⁹ Nevertheless, these pardons are a far cry from the original purpose for which the power was designed originally. That is, in his relentless advocacy for a presidential pardon power, Alexander Hamilton argued that the purpose of the pardon was to grant mercy and that "[t]he criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions . . . justice would wear a countenance too sanguinary and cruel."¹⁴⁰

The punishments afforded Flynn, Papadopoulos, Manafort, Zwaan, and Stone were not as a result of a criminal justice system that "would wear a countenance too sanguinary and cruel."¹⁴¹ Instead—individually and collectively—their crimes, and the pardons related thereto, represent exceptional crimes against the United States and, moreover, a major threat to the American judicial system, national security, and democratic practices. Each was charged, pled guilty, and/or was convicted in connection with committing crimes that involved foreign adversaries meddling with the election of the President of the United States—that is, the attempted and successful interference with the legitimate, democratic outcomes of our country.

There is no greater threat to the United States than these individuals being able to participate in election interference and then elude accountability by virtue of a presidential pardon because those same acts were done on behalf of the person—President Trump—with the power to pardon and for whom those acts would benefit. Accordingly, it cannot be said that President Trump's pardon of Flynn, Papadopoulos, Manafort, Zwaan, and Stone was completed with an eye towards fulfilling Hamilton's original goal. His actions, instead, represent nothing more than a blatant attempt to protect and reward those that acted on his behalf and in service to electing him President of the United States. Put another

136. *Id.*

137. *Id.*

138. *Id.*

139. See Sarah N. Lynch, Steve Holland & Eric Beech, *'Witch Hunt': Trump Commutes Longtime Adviser Roger Stone's Prison Sentence*, REUTERS (July 10, 2020, 6:44 PM), <https://www.reuters.com/article/us-usa-trump-stone/witch-hunt-trump-commutes-longtime-adviser-roger-stones-prison-sentence-idUSKBN24B351> [<https://perma.cc/K8MU-9HAY>].

140. THE FEDERALIST NO. 74 (Alexander Hamilton).

141. See *id.*

way, had the opposite been true—that is, had agents of Hillary Clinton committed the same acts in an attempt to interfere with the outcome of the presidential election—it is doubtful that President Trump would countenance a pardon for any of those individuals.

It is equally doubtful that the aforementioned pardons would comport with the Supreme Court’s opinion in *Grossman*—that the pardon exists to provide reprieve from “undue harshness” or “evident mistake.”¹⁴² Flynn, Papadopoulos, Manafort, Zwaan, and Stone engaged in activity that supported Russian interference with the election of the President of the United States and then proceeded to lie to federal investigators as to their involvement, conceal pertinent information, and/or tamper with other important witnesses.

Even the courts recognized that the overarching issue was of “grave national importance” and that “the integrity of American democracy” was at stake.¹⁴³ Therefore, a few days or years in prison for the guilty actions of Flynn, Papadopoulos, Manafort, Zwaan, and Stone that threatened American democracy can hardly be classified as “undue harshness” or “evident mistake” so as to warrant a presidential pardon.¹⁴⁴ After all, it was President Trump’s own Justice Department that investigated, prosecuted, and, in some instances, secured convictions of the foregoing individuals.¹⁴⁵

B. *Republican, Supporter, and Business Associate: The Price for a Pardon*

A careful look at several of the pardons issued by President Trump that were unrelated to the Mueller investigation reveals a common pattern that cannot be ignored. Many pardons were given to individuals who were Republicans or supported the Republican Party financially, those who were friends, and/or those who were former business associates of President Trump.¹⁴⁶

The first set of pardons to be analyzed went to office holders and powerbrokers within the Republican Party, including: Bernard Kerik, the former commissioner of the New York Police Department;¹⁴⁷ Christopher

142. See *Ex parte Grossman*, 267 U.S. 87, 120 (1925).

143. Mazzetti & LaFraniere, *supra* note 112.

144. See *id.*

145. LaFraniere & Montague, *supra* note 128.

146. See 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/DF72-7JH7>].

147. Dan Barry & J. David Goodman, *Kerik Had ‘Hit Bottom.’ Then Trump Pardoned Him*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/26/nyregion/bernie-kerik-pardon.html> [<https://perma.cc/6K9B-C2R6>] (“His brand—brashly conservative, critical of federal prosecutors and close with right-wing media—precisely fit the jaw-jutting mold

Collins, a former congressman from New York;¹⁴⁸ Philip Lyman, former county commissioner and member of the Utah House of Representatives;¹⁴⁹ Mark Siljander, former congressman from Michigan;¹⁵⁰ Randall Cunningham, a former congressman from California;¹⁵¹ Paul Erickson, a major Republican party operative;¹⁵² Robert Hayes, a former congressman from North Carolina;¹⁵³ George Gilmore, former chairman of the Ocean County, New Jersey Republican Party;¹⁵⁴ William Henry, former member of the Alabama House of Representatives;¹⁵⁵ and Richard Renzi, former congressman from

avored in the White House.”).

148. Jerry Zremski, *Critics Outraged, Republicans Silent as Trump Pardons Ex-Rep. Chris Collins*, THE BUFFALO NEWS (Dec. 26, 2020), https://buffalonews.com/news/critics-outraged-republicans-silent-as-trump-pardons-ex-rep-chris-collins/article_fef6b3cc-44b2-11eb-9842-f7428af473ae.html [<https://perma.cc/A6LG-5W6V>] (“Prior to his indictment and conviction, the Clarence Republican frequently appeared on national news outlets to express support for the president.”).

149. Ben Winslow, *President Trump Pardons Utahns Weldon Angelos and Rep. Phil Lyman*, FOX 13 (Dec. 22, 2020, 11:24 PM), <https://www.fox13now.com/news/local-news/president-trump-pardons-utahns-weldon-angelos-and-rep-phil-lyman> [<https://perma.cc/9YPE-LXT6>] (“Mr. Lyman is known to be a man of integrity and character who was serving as a [Republican] county commissioner in Utah when he was subjected to selective prosecution . . .”).

150. Paul Egan, *Donald Trump’s Latest Pardons Include Michigan Congressman Mark Siljander*, DETROIT FREE PRESS (Dec. 24, 2020, 2:23 PM), <https://www.freep.com/story/news/local/michigan/2020/12/24/donald-trump-pardons-mark-siljander-michigan-congressman/4037182001/> [<https://perma.cc/N2LC-CT4S>] (As reason for the pardon President Trump’s office stated that “[d]uring his time in Congress, Mr. Siljander was one of Congress’ most stalwart defenders of pro-life principles and the namesake of the ‘Siljander Amendment,’ which prohibits U.S. funds from being used to lobby for or against abortion”).

151. *Trump Pardons San Diego’s Bribe-Taking Ex-Congressman ‘Duke’ Cunningham*, TIMES OF SAN DIEGO (Jan. 19, 2021), <https://timesofsandiego.com/politics/2021/01/19/trump-pardons-san-diegos-bribe-taking-ex-congressman-duke-cunningham/> [<https://perma.cc/HC28-YRRF>] (“President Trump granted a conditional pardon to Randall ‘Duke’ Cunningham who was released from prison in 2013. Former [Republican] Speaker of the House Newt Gingrich strongly supports this pardon.”).

152. Stephen Groves, *Trump Pardons Ex-Boyfriend of Deported Russian Agent*, AP NEWS (Jan. 20, 2021), <https://apnews.com/article/donald-trump-sioux-falls-maria-butina-us-news-russia-bc8e1858b424ca5d5d6119a53facfdd> [<https://perma.cc/6JA7-UUS7>] (“President Donald Trump . . . pardon[ed] Paul Erickson, a former conservative operative once romantically linked to [a] Russian agent . . .”).

153. Gary D. Robertson, *Ex-Rep. Hayes Pardoned by Trump for Role in Bribery Scandal*, AP NEWS (Jan. 20, 2021), <https://apnews.com/article/donald-trump-campaigns-robin-hayes-north-carolina-cf0d487814ac7d5b02fccf76b03b8fbb> [<https://perma.cc/APG6-4YJQ>] (“[A] former North Carolina congressman and state Republican Party leader who lied to FBI agents about a bribery scandal received a pardon . . .”).

154. Nikita Biryukov, *Trump Pardons Gilmore Amid Wave of Clemencies on Last Day in Office*, N.J. GLOBE (Jan. 20, 2021, 2:58 AM), <https://newjerseyglobe.com/local/ocean/trump-pardons-gilmore-amid-wave-of-clemencies-on-last-day-in-office/> [<https://perma.cc/KLP2-MKUH>].

155. Jeff Poor, *Donald Trump Pardons Former State Rep. Ed Henry*, YELLOW HAMMER

Arizona.¹⁵⁶ These individuals engaged in illegal conduct ranging from tax evasion to money laundering and bribery.

The second set of pardons to be analyzed went to staunch supporters and donors—the recipients either donated thousands of dollars to the Republican Party and/or were heavily involved in financial contributions.¹⁵⁷ Paul Pogue gave more than \$200,000 to President Trump’s reelection campaign;¹⁵⁸ John Frederick Tate attempted to conceal donations of \$73,000 in exchange for support;¹⁵⁹ Elliott Broidy was a Republican Party fundraiser, major donor to President Trump’s 2016 campaign, and former deputy finance chairman for the Republican National Committee (RNC);¹⁶⁰ Douglas Jemal donated \$100,000 to the RNC in 2020;¹⁶¹ Michael Liberty donated \$22,500 to Mitt Romney’s

(Jan. 20, 2021), <https://yellowhammernews.com/donald-trump-pardons-former-state-rep-ed-henry/> [<https://perma.cc/5Z9M-5TCQ>] (“Former State Rep. Ed Henry (R-Hartselle), who pleaded guilty in a Medicare fraud case in 2019, received a pardon with the support of Sen. Tommy Tuberville (R-Auburn), according to a release from the outgoing Trump White House.”).

156. Andrew Oxford & Ronald J. Hansen, *Trump Pardons Former U.S. Rep. Rick Renzi of Arizona Over Land Swap*, AZ CENTRAL (Jan. 20, 2021, 12:02 AM), <https://www.azcentral.com/story/news/politics/arizona/2021/01/19/former-arizona-rep-rick-renzi-pardoned-trump-land-swap-case/4184460001/> [<https://perma.cc/N59S-DT2R>] (“President Donald Trump pardoned former Rep. Rick Renzi of Arizona, who had been convicted in 2013 on racketeering, money laundering and other federal charges related to a land swap scheme.”).

157. This is not to say that donations were given in exchange for a presidential pardon; rather, that the individuals named hereafter donated to the Republican Party or played an instrumental role in procuring donations, and also received a pardon at some point.

158. Soo Rin Kim, *Family of Texas Man Trump Pardoned Dished Out Donations to His Reelection Campaign*, ABC NEWS (Feb. 19, 2020, 2:21 PM), <https://abcnews.go.com/Politics/family-texas-man-trump-pardoned-dished-donations-reelection/story?id=69070481> [<https://perma.cc/YBE3-2VWM>] (stating President Donald Trump issued a pardon for a “former construction company executive from Texas whose family members have given six-figure donations to the president’s reelection campaign”).

159. Nick Coltrain, *President Trump Pardons Two Ron Paul Aides Convicted in 2012 Iowa Caucus Bribery Scandal*, DES MOINES REG. (Dec. 24, 2020, 3:36 AM), <https://www.desmoinesregister.com/story/news/politics/2020/12/24/ex-ron-paul-iowa-aides-john-tate-jesse-benton-pardoned-trump-kent-sorenson/4038489001/> [<https://perma.cc/PUG7-W8GR>] (“[Tate was] convicted in 2016 of various public corruption charges for paying an Iowa state senator to switch his endorsement to then-U.S. Rep. Ron Paul, R-Texas, during his 2012 presidential campaign, days before the first-in-the-nation nominating event.”).

160. Jacob Jarvis, *Who is Elliot Broidy? Donald Trump Pardons GOP Fundraiser*, NEWSWEEK (Jan. 20, 2021, 4:31 AM), <https://www.newsweek.com/elliott-broidy-donald-trump-pardon-gop-fundraiser-1562908> [<https://perma.cc/Y6EE-PNS2>] (“Republican Party fundraiser Elliott Broidy has been pardoned . . . Broidy . . . had pleaded guilty to charges that he illegally lobbied the U.S. government in attempt to have it drop an investigation into embezzlement in Malaysia.”).

161. Jonathan D. Epstein, *Jemal: Pardon from Trump Won’t Change Work in Buffalo*, BUFFALO NEWS (Jan. 20, 2021), https://buffalonews.com/news/local/jemal-pardon-from-trump-wont-change-work-in-buffalo/article_1333bf84-5b05-11eb-9713-f3ccbd2824ef.html [<https://perma.cc/SC8S-Z84Z>] (“He has not been a major donor to Trump over the last four

presidential campaign¹⁶² and then to President Trump's 2016 campaign;¹⁶³ Albert Pirro, Jr., a former powerbroker in New York's Republican politics and the former husband of Jeanine Pirro, a Fox News host;¹⁶⁴ Duncan Hunter, a former congressman from California;¹⁶⁵ and Steve Bannon, a conservative media executive and political strategist.¹⁶⁶

The third category of pardons were issued to friends and business associates of President Trump, such as Conrad Black, Tommaso Buti, Kenneth Kurson, and Hillel Nahmad. Conrad Black has been dubbed by the media as President Trump's friend and biographer.¹⁶⁷ Black was convicted in 2007 of committing fraud and for obstructing justice in a scheme where he "pocket[ed] money that should have gone to stockholders."¹⁶⁸ According to President Trump's press secretary, Black was worthy of the pardon because he made "tremendous contributions to business", had written books on history and served as a tutor while in

years, with only a single \$2,700 donation in September 2016, prior to Trump's election as president. He has given more to the Republican National Committee, with \$100,000 in two gifts last summer.").

162. *Former Maine Developer Receives Pardon from Trump*, AP NEWS (Jan. 20, 2021), <https://apnews.com/article/donald-trump-portland-maine-mitt-romney-db48c37ab0e2ba9491c226a1a023f45c> [<https://perma.cc/27QS-S2PK>].

163. Maggie Severns, *In Final Years at Liberty, Falwell Spent Millions on Pro-Trump Causes*, POLITICO (Dec. 14, 2020, 4:30 AM), <https://www.politico.com/news/2020/12/14/jerry-falwell-trump-liberty-university-444661> [<https://perma.cc/B7CJ-ZR2S>]; see also *Pardon Ends Prosecution but Not Civil Case Against Developer*, AP NEWS (Feb. 4, 2021), <https://apnews.com/article/donald-trump-portland-securities-fraud-maine-e0276b95133b2f6940f32bd5b22fb9e> [<https://perma.cc/32QB-RHXM>] ("The pardon wiped out Liberty's conviction for making political contributions [to Republicans] in other people's names to evade limits on the size of donations.").

164. Dan Mangan, *Trump Issues Last-Second Pardon to Fox News Host Jeanine Pirro's Tax Cheat Ex-Husband Al*, CNBC (Jan. 20, 2021, 2:32 PM), <https://www.cnbc.com/2021/01/20/trump-pardons-judge-jeanines-ex-husband-al-pirro.html> [<https://perma.cc/R4DP-D2GR>] ("Trump on Wednesday morning issued a full pardon to Al Pirro Jr., the ex-husband of one of Trump's most slavishly loyal supporters in the media, Jeanine Pirro, host of Fox News' 'Justice with Judge Jeanine.'").

165. Kristina Davis et al., *Trump Grants Full Pardon to Former Rep. Duncan Hunter*, THE SAN DIEGO UNION TRIBUNE (Dec. 22, 2020, 4:25 PM), <https://www.sandiegouniontribune.com/news/courts/story/2020-12-22/trump-grants-full-pardon-to-former-rep-duncan-hunter> [<https://perma.cc/M8YY-7ZTX>] ("President Donald Trump on Tuesday granted a full pardon to former Republican congressman Duncan Hunter, who had pleaded guilty to illegally spending campaign money for his personal use.").

166. Pamela Brown et al., *Trump Pardons Steve Bannon as One of His Final Acts in Office*, CNN POL. (Jan. 20, 2021, 7:08 AM), <https://www.cnn.com/2021/01/19/politics/steve-bannon-pardoned-by-trump/index.html> [<https://perma.cc/5GVB-446E>] ("Mr. Bannon has been an important leader in the conservative movement and is known for his political acumen.").

167. See Laurel Wamsley, *Trump Pardons His Friend Conrad Black, Who Wrote Glowing Trump Biography Last Year*, NPR (May 16, 2019, 3:58 AM), <https://www.npr.org/2019/05/16/723849097/trump-pardons-his-friend-conrad-black-who-wrote-glowing-trump-biography-last-yea> [<https://perma.cc/VPQ7-9CBC>].

168. *Id.*

prison.”¹⁶⁹

Tommaso Buti was a business associate of President Trump. More specifically, in 1998, before entering politics, President Trump sought to open a modeling agency with Buti at the proverbial helm.¹⁷⁰ According to President Trump, Buti was perfect for the role because “Tommaso loves women and women love him back. He’s a natural to run a modeling agency.”¹⁷¹ Shortly thereafter, in 2000, Buti was indicted by the U.S. Attorney’s Office for conspiracy, fraud, and money laundering—the fifty-one-count indictment accused him of using investors’ money for personal expenses and, at the same time, falsely claiming he had invested millions of his own money in his restaurant endeavors.¹⁷² President Trump pardoned Buti and stated that he was a citizen of Italy, a respected businessman in charge of a large Italian company, created an initiative that raised funds for UNICEF, and that he was charged more than twenty years ago and had never been convicted.¹⁷³ Of course, because of the pardon, he will never be tried for his alleged crimes.

Kenneth Kurson was an indirect business associate of President Trump—he was appointed by Jared Kushner, Trump’s son-in-law, in that he was named editor of *The New York Observer*, and he was also contracted to assist in writing at least one speech for the President.¹⁷⁴ Prior to the issuance of the pardon, federal prosecutors alleged that Kurson engaged in regular, “diabolical” patterns of eavesdropping, computer trespass, and cyberstalking against his now-ex-wife by using spyware to monitor her daily technological movements.¹⁷⁵ In its press release at the time, the White House noted that there was a letter from Kurson’s ex-wife requesting that the FBI drop the charges against him.¹⁷⁶ Before Kurson could be fully charged and tried, President Trump issued the pardon.

169. *Trump Pardons Ex-Media Mogul Conrad Black*, REUTERS (May 15, 2019, 8:30 PM), <https://www.reuters.com/article/us-usa-trump-black/trump-pardons-ex-media-mogul-conrad-black-idUSKCN1SM01G> [<https://perma.cc/KT8V-Y6SP>].

170. Samantha Lock, *Who is Tommaso Buti? Italian Businessman Pardoned by President Donald Trump*, NEWSWEEK (Jan. 20, 2021, 12:34 PM), <https://www.newsweek.com/tommaso-buti-italian-businessman-pardoned-president-donald-trump-1562970> [<https://perma.cc/ZE8B-GA6D>].

171. *Id.*

172. *Id.*

173. *Id.*

174. Jonah E. Bromwich & Kate Christobek, *Kushner Friend Who Was Pardoned by Trump is Charged with Spying on Wife*, N.Y. TIMES (Aug. 18, 2021), <https://www.nytimes.com/2021/08/18/nyregion/ken-kurson-charged-trump-kushner.html> [<https://perma.cc/2NEP-N4FL>].

175. *Id.*

176. Darragh Roche, *Who is Ken Kurson? Trump-Pardoned Pal of Jared Kushner Charged with Cyberstalking*, NEWSWEEK (Aug. 19, 2021, 6:17 AM), <https://www.newsweek.com/who-ken-kurson-donald-trump-pardoned-jared-kushner-pal-charged-cyberstalking-1620922> [<https://perma.cc/S6AV-YMBH>].

However, New York state prosecutors have since resumed the case and are now charging Kurson with similar crimes, except under New York state law.¹⁷⁷ As the Manhattan District Attorney's office aptly noted, a presidential pardon is applicable only to federal crimes, not state.¹⁷⁸

Hillel Nahmad, one of New York's best-known art dealers and a member of a wealthy and influential family of art collectors, had previously served five months in prison in 2014 after pleading guilty to having led an illegal sports gambling ring.¹⁷⁹ Nahmad and President Trump have a direct business relationship: Nahmad purchased every single unit on the fifty-first floor of Trump Tower in Manhattan approximately twenty years ago and paid \$18.4 million.¹⁸⁰ Prosecutors alleged that he received nearly \$100 million in profit from the illegal gambling ring. As a result, in addition to prison, he "was ordered to pay a \$30,000 fine, forfeit \$6.4 million in earnings, and enroll in a gambling addiction program."¹⁸¹ According to the White House statement announcing the pardon, Nahmad "has lived an exemplary life and has been dedicated to the well-being of his community."¹⁸² However, the statement came without any citation to any actual steps taken by Nahmad to live "an exemplary life" or what he has done to dedicate himself to the "well-being of his community."¹⁸³ Instead, all we are left with is the fact that Nahmad paid President Trump nearly \$20 million in a prior business transaction that supported the President's real estate endeavors and, years later, he received a pardon.¹⁸⁴

The fact that the aforementioned individuals were members of—or donated to—the Republican Party, or had close ties to the president, in and of itself, is not an issue. However, none of these characteristics are a random coincidence. This Article posits that the only reason why these individuals received a pardon is because they had close ties to the Republican Party or to the President. Notably absent from the list of those who received a pardon from President Trump are, for the most part, individuals who would identify as members of the Democratic Party, liberals, or otherwise left-leaning individuals—in other words, President Trump's political opposition.¹⁸⁵

Therefore, it would seem that part of what inspired President Trump

177. *Id.*

178. *Id.*

179. Sarah Bahr, *Trump Pardons Hillel Nahmad, Madison Avenue Art Dealer*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/arts/design/trump-pardons-helly-nahmad.html> [<https://perma.cc/8M6V-57E4>].

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *See id.*

185. *See Gramlich, supra* note 146.

to issue a pardon is the party affiliation or whether he had a personal connection with the potential recipient, instead of the action they committed, the circumstances surrounding same, or any mitigating factors that would compel or warrant a presidential pardon. Simply stated, the allowance of such a practice undermines the legitimacy and purpose of the pardon power. Notwithstanding that partisan politics is a major component of the American legal system, the idea that it could also be a determinative factor in freeing someone from the confines and limitations of a guilty verdict is contrary to the reasons why the pardon authority was created and the overall democratic principles from which the United States was established.

In most of the aforementioned cases, the recipients all have at least one thing in common besides the Republican Party or a close connection with the President—they all received a presidential pardon without any demonstrative evidence that such executive mercy was warranted. That is, nothing was provided to show a miscarriage of justice, mitigating factors, or exceptional actions taken to correct the missteps of the past—unlike a handful of individuals whom the President did pardon that are discussed in the next Section. Absent a compelling, sound reason rooted in addressing a miscarriage of justice, mitigation, or exceptional behavior, only one conclusion can result: the price of a pardon under President Trump was that of loyalty, financial contribution, and/or business. Without possessing or demonstrating any of the foregoing attributes, the ability to obtain a pardon under President Trump was most unlikely.

C. *Honorable Mentions: The Few and the Far*

To argue that President Trump issued pardons only to those that worked for him, were Republicans, friends, or individuals who had engaged in prior business dealings with him—while mostly true—would not paint the full picture of his pardoning portfolio. Whether it was for political purposes, a brief feeling of altruism, or a genuine desire to correct past judicial mistakes, President Trump did issue several pardons that were fully warranted.

First among those pardons was that of Susan B. Anthony. Anthony was tried and found guilty of illegally voting in the 1872 presidential election, in Rochester, New York.¹⁸⁶ As a result, she was issued a \$100 fine. President Trump announced this pardon during a White House event in the midst of the 2020 Democratic National Convention that was in the process of formally nominating Joseph R. Biden as the Democratic Party's

186. Maggie Haberman & Katie Rogers, *On Centennial of 19th Amendment, Trump Pardons Susan B. Anthony and Targets 2020 Election*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2020/08/18/us/politics/trump-susan-b-anthony-pardon.html> [<https://perma.cc/JL59-K7AY>].

nominee for President.¹⁸⁷ Although many of Anthony's followers and supporters protested the pardon—arguing that she herself would not have wanted it because she did nothing wrong to warrant her arrest and subsequent punishment in the first place¹⁸⁸—it cannot be denied that her pardon fulfilled the original purpose for which Hamilton fought so passionately, that of granting mercy at a time when the law was too cruel.¹⁸⁹ Anthony played a consequential role in securing women the right to vote, and vacating her conviction for exercising that right—despite the fact that it was issued long after she died—recognizes the uncontested truth that there was an error in that she was even charged and convicted.

Many critics attributed President Trump's pardon of Anthony as nothing more than a political stunt that was aimed at helping him secure the votes of women in the 2020 presidential election.¹⁹⁰ However, that should not diminish the momentous occasion and reality that Anthony, at least with respect to records of the American judicial system, is now and shall forever be recognized as an individual worthy of executive mercy for engaging in an activity that she, as a woman, should have always had the right to practice—voting.

President Trump issued a second posthumous pardon, this time to John Arthur “Jack” Johnson.¹⁹¹ Johnson was the first Black heavyweight boxing champion—a title he earned in 1908.¹⁹² Unrelated to Johnson's title as heavyweight boxing champion, he was arrested and convicted in 1913 for taking his White girlfriend across state lines.¹⁹³ He was convicted under the Mann Act—a law intended, allegedly, to prevent human trafficking and protect women from prostitution.¹⁹⁴ However, unsurprisingly, the law was enforced and resulted “in racially motivated prosecutions of African-Americans and to punish political dissidents.”¹⁹⁵ During Johnson's trial, prosecutors argued that his relationship with a White woman was a “crime against nature.”¹⁹⁶ According to court records, it took less than two hours for an all-

187. *Id.*

188. Samantha Schmidt, *Susan B. Anthony Was Arrested for Voting When Women Couldn't. Now Trump Will Pardon Her*, WASH. POST. (Aug. 18, 2020), <https://www.washingtonpost.com/history/2020/08/18/susan-b-anthony-trump-pardon/> [<https://perma.cc/79AZ-YFDW>].

189. See THE FEDERALIST NO. 74 (Alexander Hamilton).

190. See Schmidt, *supra* note 188.

191. Dakin Andone, *Who Was Jack Johnson, the Boxer Who Trump Posthumously Pardoned?*, CNN (May 24, 2018, 2:09 PM), <https://www.cnn.com/2018/04/22/politics/jack-johnson-who-is/index.html> [<https://perma.cc/JMH9-YZPR>].

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

White jury to convict Johnson of his “crime.”¹⁹⁷ After his conviction and during his appeal, Johnson fled the country to Europe and continued fighting—he lost his title in 1915 and, in 1920, turned himself in to the United States at the Mexican border and then served ten months in prison.¹⁹⁸

Although President Trump recognized that Johnson’s “trials and tribulations were great”¹⁹⁹ and that his ten-month prison sentence was “for what many view as a racially motivated injustice,”²⁰⁰ his actual motivations for issuing the pardon are unclear. Notably, he was quick to point out in his remarks that his predecessor, President Barack Obama, refused to take action on this matter, despite a request to do so by members of Congress in 2015.²⁰¹ Notwithstanding those ongoing pleas, the pardoning of Johnson came after President Trump faced criticism for remarks he made that were “sympathetic to white supremacists after a deadly rally by them in Charlottesville, [Virginia].”²⁰² One political commentator noted that the pardon, “isolated, is a good gesture to right a miscarriage of justice . . . [h]owever, there are a lot of current, modern-day issues that [President Trump] could address as the living president that he chooses not to.”²⁰³ Of course, this comment would be brought to bear in the months and years to follow, with the murder of George Floyd and President Trump’s lackluster response thereto.²⁰⁴

Regardless of President Trump’s intentions, similar to the pardoning of Anthony, it cannot be denied that Johnson never should have been tried or convicted in the first place. Simply stated, the pardon was long overdue.

Before leaving office, President Trump also elected to pardon Christopher Anthony Bryant, otherwise known as Christopher II X.²⁰⁵

197. *Id.*

198. *Id.*

199. *Id.* (quoting Donald Trump (@realdonaldtrump), TRUMP TWITTER ARCHIVE (Apr. 1, 2018, 3:02 PM), <https://www.thetrumparchive.com/?searchbox=%22trials+and+tribulations%22> [<https://perma.cc/N595-X2RY>]).

200. 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/NLY2-7DF6>]. Note, this Tweet by Trump was not found within the Twitter archives.

201. *Id.*

202. *Id.*

203. *Id.*

204. See Maggie Astor, *What Trump, Biden and Obama Said About the Death of George Floyd*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/politics/george-floyd-trump-biden-obama.html> [<https://perma.cc/9E9W-MUJU>].

205. Jeremy Chisenhall, *Trump Pardons Kentucky Activist Who Once Battled Drug Addiction*, MESSENGER-INQUIRER (Dec. 24, 2020), https://www.messenger-inquirer.com/news/local/trump-pardons-kentucky-activist-who-once-battled-drug-addiction/article_e824f71b-3584-56c3-9042-1bcd0e7cfe05.html [<https://perma.cc/3L85-WVRZ>].

Bryant is currently a well-known Louisville activist who was charged, tried, and convicted of violating state and federal drug offenses back in 1985 while he also battled addiction to both cocaine and marijuana.²⁰⁶ He was sentenced to three years in prison plus five years of probation and last violated his parole in 1992.²⁰⁷ Since that time, Bryant has become an extraordinary leader in the Louisville community—that is, he founded a non-profit organization called Game Changers with the purpose of guiding youth to productive and meaningful lives.²⁰⁸ More specifically, “Game Changers focuses on early childhood education in order to prevent gun violence.”²⁰⁹ Bryant is also widely viewed to be a trusted voice of reason and peace in the Louisville area and is often called upon to help deescalate tensions between police and the local community.²¹⁰ It is unclear how President Trump came to know of Bryant’s story—it would appear that Senator Rand Paul played a major role in acquiring the pardon, as he was a staunch advocate for Bryant.²¹¹

In a similar notion, President Trump also pardoned Jon Donyae Ponder, a man who pled guilty to robbing a bank.²¹² When Ponder was a dairy manager at a Wal-Mart Supercenter in Las Vegas, he committed two bank robberies, as well as similar acts at a dry cleaner and fast-food restaurants.²¹³ Upon release from prison, in 2009, Ponder started Hope for Prisoners (HFP), a nonprofit organization that provides job training, mentorship, and counseling to those exiting the confines of prison.²¹⁴ According to its website, HFP “provides comprehensive reentry services to men, women and young adults who are returning to the community after incarceration.”²¹⁵ The HFP website also states that the organization has served nearly 3,500 clients since its inception and that only six percent of participants engage in recidivism.²¹⁶ President Trump’s office claims that he issued the pardon because HFP is making a difference for thousands of lives and bringing hope in a second chance.²¹⁷

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. Pranshu Verma & Stephanie Saul, *Trump Pardons Jon Ponder, a Convicted Bank Robber*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/08/25/us/politics/trump-jon-ponder-pardon.html> [<https://perma.cc/L9X4-EXNK>].

213. *Id.*

214. *Id.*

215. *Jon Ponder*, HOPE FOR PRISONERS, <https://hopeforprisoners.org/jon-ponder/> [<https://perma.cc/F2LM-BHNZ>].

216. *Id.*

217. See Caitlin McFall, *Who is Jon Ponder, Bank Robber Turned Activist Pardoned by Trump?*, FOX NEWS (Aug. 25, 2020), <https://www.foxnews.com/politics/who-is-jon-ponder-convicted-bank-robber-pardoned-by-trump> [<https://perma.cc/DGJ6-PAWX>].

Although imprisonment for distribution of cocaine or for robbing banks are not inherent miscarriages of justice equal to that of being punished for voting as a woman or for being Black and dating a White woman, the notion that because Bryant and Ponder took such extraordinary steps to change their lives for their betterment and that of their community suggests that, perhaps, the presidential pardon can be an instrument of good and reward for those who truly deserve it.

Yes, Bryant and Ponder both committed crimes where the nature of which threatens peace and safety in our communities. However, they have taken incredible steps to redeem their prior mistakes and to assist those in similar circumstances or to prevent others from pursuing the same path. These pardons are a good example of how President Trump did show mercy to those who, arguably, were deserving of same. Importantly, however, these types of pardons were not the lion's share of those issued by President Trump.²¹⁸ Instead, they constituted the exception to the rule that unless you were once an employee, friend, Republican, donor, or business associate of the former President, a pardon was not likely to be issued, regardless of the alleged crime, conviction, or circumstances.

CONCLUSION

The presidential pardon is one of the most awesome powers assigned to the executive branch. With the stroke of a pen, the President of the United States has the opportunity to wipe clean the slate of an individual convicted by the federal judicial system—for any crime—and release that person permanently of all confines and limitations connected thereto. Alexander Hamilton argued that such a power, vested in the executive alone, was necessary to correct mistakes of the judicial system and to allow a president to promote national healing and unification.²¹⁹ However, those issued at the direction of President Trump, 231 years after its inception, demonstrate fully how the power can be used for reasons contrary to the intended design.

As this Article highlights, President Trump devoted a significant portion of his pardons to those who: (1) conspired to interfere with the 2016 presidential election and lied about it to federal investigators; (2) were registered Republicans elected or appointed to various government positions; (3) donated to or were heavily involved with the finances of the Republican Party; or (4) had close personal ties to the President due to past business engagements. Pardons were not issued primarily to address miscarriages of justice or to heal or unify the nation; instead, they were executed to appease the characteristic President Trump valued most: loyalty. Although the President did issue a handful of pardons aimed at correcting past injustices and rewarding those that demonstrated an

218. See discussion *supra* Part II.

219. See THE FEDERALIST NO. 74 (Alexander Hamilton).

exceptional commitment to bettering themselves and their communities, this does not mitigate the fact that he reserved his execution of the pardon power for his friends, business associates, and the well-connected.

What is the perfect solution to this problem? The answer is not so simple. However, as this Article has noted, several scholars of all levels have already engaged in thoughtful consideration to propose changes that could mitigate the abuse of the pardon in the future.²²⁰ And although the final answer as to how best to solve the problem is not black and white, what is clear is that we cannot allow this unchecked abuse of power to continue.

The American people may never know the full extent of what happened with President Trump's top lieutenants and the various Russian agents involved in the 2016 presidential election; however, what will always be clear is that those individuals lied to protect themselves and President Trump, took active steps to impede any investigations related thereto, and were rewarded with pardons for so doing. As a result, our nation's security was attacked, and the perpetrators were not held accountable.

Permitting this power to remain unchecked poses nothing less than a direct, continuous threat to the national security of the United States and the legitimacy of its judicial system. In order to safeguard the integrity of our elections and the legal system at large, action must be taken. Because of the power of *stare decisis* and the two-hundred-year precedent dictated by *Ex parte Garland*, it is unlikely that Supreme Court decisions will result in anything other than the status quo. If change is to occur, a constitutional amendment is the only path. We can commence this journey by reviewing the aforementioned proposals, and those not set forth herein, as we seek to discover the best way forward for our people and our democratic principles.

220. See discussion *supra* Part I.