

EXECUTIVE JUDGMENTS: THE INSIDIOUS IMPLICATIONS OF THE PRESIDENTIAL PARDON AND COMMUTATION AUTHORITY*

I. INTRODUCTION

In 1986, President Ronald Reagan signed the Anti-Drug Abuse Act¹ into law, motivated by a desire to “get tough” on illegal drugs in the United States.² The Act established, for the first time, mandatory minimum sentences relating to the possession of specific quantities of cocaine.³ In 1994, President Bill Clinton signed into law another “tough on crime” piece of legislation, the Violent Crime Control and Law Enforcement Act.⁴ This Act included a three-strikes provision, which mandated life sentences without parole for defendants with three or more convictions for federal violent felonies or drug trafficking.⁵ As of 2016, 1,907 federal inmates are serving life sentences for drug offenses, constituting nearly thirty percent of federal inmates serving life sentences.⁶

Raymond Surratt, Jr. and Quincy Dennis were two of those federal inmates.⁷ Surratt was indicted in 2004 and charged with participation in a conspiracy lasting more than three years to possess with intent to distribute more than fifty grams of crack cocaine in

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1. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended primarily in scattered sections of 18 and 21 U.S.C.).

2. Gerald M. Boyd, *Reagan Signs Anti-Drug Measure; Hopes for ‘Drug-Free Generation,’* N.Y. TIMES (Oct. 28, 1986), <http://www.nytimes.com/1986/10/28/us/reagan-signs-anti-drug-measure-hopes-for-drug-free-generation.html> [<https://perma.cc/7ZRU-VNAK>].

3. DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIVIL LIBERTIES UNION, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW*, at i (2006).

4. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in scattered sections of U.S.C.); see also German Lopez, *The Controversial 1994 Crime Law That Joe Biden Helped Write, Explained*, VOX (Sept. 29, 2020, 10:25 AM), <http://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration> [<https://perma.cc/RTK5-J6Y8>].

5. Tana Ganeva, *Pot Prisoners: Meet Five Victims of the War on Drugs*, ROLLING STONE (Sept. 13, 2017, 7:32 PM), <http://www.rollingstone.com/culture/culture-lists/pot-prisoners-meet-five-victims-of-the-war-on-drugs-200055/> [<https://perma.cc/U25V-5K4E>].

6. Christopher Ingraham, *It’s Not Just Alice Marie Johnson: Over 2,000 Federal Prisoners Are Serving Life Sentences for Nonviolent Drug Crimes*, WASH. POST (June 6, 2018, 4:44 PM), <http://www.washingtonpost.com/news/wonk/wp/2018/06/06/its-not-just-alice-marie-johnson-over-2000-federal-prisoners-are-serving-life-sentences-for-nonviolent-drug-crimes/> [<https://perma.cc/W77S-RNQL>]. This thirty percent figure includes 103 prisoners who are serving “virtual life sentences,” meaning they were sentenced to fifty years or more for drug crimes. *Id.*

7. See *Dennis v. Terris*, 927 F.3d 955, 957 (6th Cir. 2019); *United States v. Surratt*, 855 F.3d 218, 219 (4th Cir. 2017).

North Carolina.⁸ He pled guilty and received a mandatory life sentence, in part due to his prior criminal history.⁹ Dennis was convicted in 1997 after committing a string of drug offenses.¹⁰ Because two prior drug convictions required the government to seek a sentencing enhancement, Dennis also received a mandatory life sentence.¹¹

In 2017, President Barack Obama commuted the sentences of both Surratt and Dennis.¹² President Obama's acts of clemency derived from his constitutional authority to issue pardons and commute sentences.¹³ A presidential pardon relieves an individual from the punishment connected to their criminal conviction,¹⁴ while a commutation simply substitutes a lighter punishment without restoring any civil rights.¹⁵ Most presidents, including President Obama, have exercised their pardon and commutation authority when motivated by concerns of mercy and public interest.¹⁶ Others, including President Donald Trump, have largely utilized the authority to instead serve their own personal interests.¹⁷

Surratt and Dennis, despite receiving these presidential commutations, challenged their original mandatory life sentences on separate grounds. Surratt appealed to the Fourth Circuit, arguing that he would have faced a mandatory minimum penalty of ten years under changes in sentencing calculations that were made subsequent to his conviction.¹⁸ In effect, he would have been eligible for immediate release even before President Obama's commutation of his sentence.¹⁹ Dennis filed a petition for a writ of habeas corpus with the Sixth Circuit, arguing that he should have originally faced only a twenty-year mandatory sentence because of an incorrect calculation of one of his prior convictions.²⁰

Surratt and Dennis's legal challenges required the Fourth and Sixth Circuits to separately examine the impacts of a presidential pardon or commutation on the original federal sentence. Specifically, the circuits were asked to resolve the question of whether

8. Surratt v. United States, No. 3:04-CR-250-19, 2014 WL 2013328, at *1 (W.D.N.C. May 16, 2014), *aff'd*, 797 F.3d 240 (4th Cir. 2015).

9. *Id.* at *1–2.

10. *Dennis*, 927 F.3d at 957.

11. *Id.*

12. *Commutations Granted by President Barack Obama (2009-2017)*, U.S. DEP'T OF JUST., <http://www.justice.gov/pardon/obama-commutations> [<https://perma.cc/CJL7-T6XV>] (last updated Jan. 25, 2021).

13. See U.S. CONST. art. II, § 2, cl. 1.

14. *United States v. Wilson*, 32 U.S. 150, 150 (1833).

15. *In re Charles*, 222 P. 606, 608 (Kan. 1924).

16. See Jeffrey Crouch, *The Law: Presidential Misuse of the Pardon Power*, 38 PRESIDENTIAL STUD. Q. 722, 724–25 (2008) [hereinafter Crouch, *Presidential Misuse*].

17. See Amelia Thomson-DeVeaux, *Trump's Pardons Have Been Sparse and Self-Serving – And That's Without Even Pardoning His Kids*, FIVETHIRTYEIGHT (Dec. 10, 2020, 7:00 AM), <http://fivethirtyeight.com/features/trumps-pardons-have-been-sparse-and-self-serving-and-thats-without-even-pardoning-his-kids/> [<https://perma.cc/X64E-JK79>].

18. Ann E. Marimow, *N.C. Man Serving Life for Nonviolent Crime Among Hundreds Granted Early Release*, WASH. POST (Jan. 25, 2017), http://www.washingtonpost.com/local/public-safety/nc-man-wrongly-given-life-sentence-is-among-hundreds-granted-early-release/2017/01/25/f4959cd8-c311-11e6-a453-19ec4b3d09ba_story.html [<https://perma.cc/S8FC-LVLV>].

19. *Id.*

20. *Dennis v. Terris*, 927 F.3d 955, 957 (6th Cir. 2019).

the president's exercise of his pardon or commutation authority creates a new executive judgment that fully replaces the original judicial judgment.²¹

This Comment analyzes this question, using the divergent decisions from the Fourth and Sixth Circuits to illustrate that an executive judgment ought not to override a judicial judgment. Concluding otherwise presents an insidious implication of the president's pardon and commutation authority in that it may become an aggravation of punishment, even under circumstances where the authority is used with benevolent motivations. Section II provides a background on the pardon and commutation authority and its origins in the U.S. Constitution. It then describes historical and modern uses of the authority before finally examining the decisions reached by the Fourth Circuit in *United States v. Surratt*²² and the Sixth Circuit in *Dennis v. Terris*.²³ Section III discusses the dangers inherent in the unchecked use of the pardon and commutation authority and the insidious implication of the pardon and commutation authority that the Fourth and Sixth Circuit's decisions raised.

II. OVERVIEW

A broad examination of the pardon and commutation authority is helpful to understand the potential distinction between an executive judgment and a judicial judgment, which the Fourth and Sixth Circuits examined in *Surratt* and *Dennis*, respectively. Accordingly, this Section proceeds in six parts. Part II.A discusses the general framework of the U.S. Constitution and pays particular attention to its creation of a separation of powers among the three branches of government. Part II.B offers an overview of the presidential pardon and commutation authority. Part II.C details historical reasons for, notable uses of, and trends in the uses of the presidential pardon and commutation authority. Part II.D provides an overview of how the two most recent presidents, Barack Obama and Donald Trump, exercised the presidential pardon and commutation authority. Part II.E examines the decision the Fourth Circuit reached in *Surratt* when determining whether the president's exercise of his pardon or commutation authority creates a new executive judgment that fully replaces the original judicial judgment. Finally, Part II.F explores the divergent decision the Sixth Circuit reached in *Dennis* when it answered the same question that was presented in *Surratt*.

A. Separation of Powers Under the U.S. Constitution

The U.S. Constitution declares that the Constitution itself shall, "be the supreme Law of the Land."²⁴ The Constitution created a system of government that is comprised of three separate branches, with each possessing different powers and functions.²⁵ It vests all legislative powers in a Congress of the United States,²⁶ executive powers in a

21. See *id.*; *United States v. Surratt*, 855 F.3d 218, 219 (4th Cir. 2017).

22. 855 F.3d 218 (4th Cir. 2017).

23. 927 F.3d 955 (6th Cir. 2019).

24. U.S. CONST. art. VI, cl. 2.

25. Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 694 (2006).

26. U.S. CONST. art. I, § 1, cl. 1.

president of the United States,²⁷ and judicial powers in one Supreme Court and any inferior courts that Congress ordains and establishes.²⁸ The structure of the Constitution reflects a separation of powers within the government.²⁹

While the Constitution does not explicitly define this separation of powers,³⁰ the Supreme Court has frequently “reaffirmed the importance in our constitutional scheme” of the separation of powers into the three branches.³¹ Under this doctrine, no branch of government may exercise any power that is not explicitly vested in it by the Constitution or not essential to the exercise of that power.³² This separation limits the power within each branch while permitting the exercise of the branch’s prescribed powers.³³

One effect of the separation of powers is the diffusion of government power so as to better protect the liberty of individuals.³⁴ Another is the creation of a system of checks and balances, which prevents any single branch of government from acting unilaterally.³⁵ The need for such a system derives from the premise that concentration of too much power within one branch could breed corruption or tyranny.³⁶ In turn, this could lead to the oppression of individual liberty.³⁷ James Madison elaborated on checks and balances in an essay for *The Federalist Papers*, stating that the branches of government were divided in this manner so “that each may be a check on the other.”³⁸ In theory, the separation of powers within the government creates a “self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”³⁹

In practice, however, a commingling of governmental functions has complicated the implementation of a separation of powers.⁴⁰ The Progressive Era, spanning from the 1890s through the 1920s, saw a shift in the institutional balance of power that tilted toward the executive branch of the government.⁴¹ Subsequently, programs enacted by President Franklin D. Roosevelt as a result of the New Deal led to a broadening of executive power by granting “wide, virtually undefined powers” to federal administrative agencies.⁴²

27. *Id.* art. II, § 1, cl. 1.

28. *Id.* art. III, § 1, cl. 1.

29. Garry, *supra* note 25, at 694.

30. Nat Stern, *Separation of Powers, Executive Authority, and Suspension of Disbelief*, 54 HOUS. L. REV. 125, 128 (2016).

31. *Morrison v. Olson*, 487 U.S. 654, 693 (1988); *see, e.g., Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (“The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.”).

32. 16A AM. JUR. 2D *Constitutional Law* § 236 (2019).

33. *Id.*

34. Garry, *supra* note 25, at 694.

35. Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 472 (2011).

36. *Constitutional Law*, *supra* note 32, § 236.

37. *See id.*

38. THE FEDERALIST NO. 51 (James Madison).

39. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam).

40. *See* Garry, *supra* note 25, at 698.

41. *Id.* at 699.

42. *Id.*

Since the New Deal, the Supreme Court has done little to curb further increases in executive power.⁴³ Some scholars believe that the exercise of the executive power now far exceeds the scope originally contemplated for it by the Constitution.⁴⁴ These scholars caution that the separation of powers has been allowed “to drift at the sole whim of the executive.”⁴⁵

B. *A General Overview of the Presidential Pardon and Commutation Authority*

One power the U.S. Constitution grants the executive branch is the authority to issue pardons and commute sentences.⁴⁶ Article II, Section 2 states the president “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”⁴⁷ Utilizing the principles of judicial review over matters “arising under the constitution,”⁴⁸ Chief Justice John Marshall stated in *United States v. Wilson*⁴⁹ that a pardon is “an act of grace” that provides an individual relief from the punishment connected to their criminal conviction.⁵⁰ Associate Justice James M. Wayne later added to Marshall’s definition, offering that the word pardon implies “forgiveness, release, remission.”⁵¹ A pardon could mean forgiveness for an offense, release from some financial obligation, or the remission of some other penalty.⁵² When granted, a pardon indicates that there has been a determination that “the public welfare will be better served by inflicting less than what the judgment fixed.”⁵³

Because the language describing pardons in the Constitution is general, the power extends to “all kinds of pardons known in the law.”⁵⁴ One kind of pardon is the conditional pardon.⁵⁵ This pardon allows the president to add a condition precedent or a condition subsequent to the pardon, effectively making the pardon valid only if the condition is performed by the recipient of the pardon.⁵⁶ Another kind of pardon subsumed within the general language of the Constitution is the power to commute a sentence to a milder punishment than previously adjudged against a prisoner.⁵⁷ The Supreme Court has also found that the Constitution allows for the conditional

43. See Stern, *supra* note 30, at 138.

44. *Id.* at 161.

45. Garry, *supra* note 25, at 706.

46. See U.S. CONST. art. II, § 2, cl. 1.

47. *Id.*

48. See *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

49. 32 U.S. 150 (1833).

50. *Wilson*, 32 U.S. at 150.

51. *Ex parte Wells*, 59 U.S. 307, 309 (1855).

52. *Id.* at 309–10.

53. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

54. *Wells*, 59 U.S. at 314.

55. See *id.* at 315 (affirming that the president’s power to issue a conditional pardon “exists under the constitution of the United States”).

56. *Id.* at 311.

57. See *Imprisonment of the Indian See-See-Sah-Ma*, 5 Op. Att’y. Gen. 370 (1851). The Supreme Court ruled in 1927 that Article II, Section 2 of the Constitution explicitly grants the president the authority to commute a sentence. See *Biddle*, 274 U.S. at 486–88 (upholding President Taft’s use of his constitutional authority to commute a sentence of death to imprisonment for life).

commutations of sentences, concluding that the pardoning power was also intended to include the power to commute sentences, so long as the conditions imposed do not offend the Constitution.⁵⁸

Matters involving pardons and commutations of sentences are “purely the province of the executive department.”⁵⁹ The executive’s historical use of the pardon and commutation powers has gone largely unchallenged as courts have traditionally been quick to reject any such attacks.⁶⁰ The Supreme Court reasoned in *Schick v. Reed*⁶¹ that because the power to pardon and commute sentences flows directly from the Constitution, it “cannot be modified, abridged, or diminished by the Congress.”⁶² The Constitution does, however, allow for Congress to propose and ratify amendments to the Constitution.⁶³ The Framers of the Constitution intended to “allow plenary authority in the President” to forgive an individual convicted of a crime, to reduce the penalty imposed on the convicted individual, or to alter their conviction by imposing constitutionally allowable conditions on it.⁶⁴ Notably, presidents may not aggravate punishment through the use of their constitutional powers.⁶⁵

The president exclusively retains the power to grant clemency through pardons and commutations to offenses arising under federal law.⁶⁶ The language of the Constitution cabins the clemency powers to only federal offenses by specifying that the president’s clemency powers extend to “[o]ffen[s]es against the United States.”⁶⁷ Otherwise, the power is virtually unlimited; it extends to every offense under federal law, except in cases of impeachment.⁶⁸ The power may also be exercised at any time after the commission of an offense, either before legal proceedings are undertaken, during their pendency, or after judgment and conviction.⁶⁹ If granted before conviction, a pardon “prevents any of the penalties and disabilities consequent upon conviction from attaching.”⁷⁰ If granted after conviction, a pardon “removes the penalties and disabilities, and restores him to all his civil rights.”⁷¹ Although the commutation authority derives from the president’s pardon authority on the basis that a greater power should include a lesser power, commutations

58. *Schick v. Reed*, 419 U.S. 256, 263–64 (1974).

59. *Bozel v. United States*, 139 F.2d 153, 156 (6th Cir. 1943).

60. *Schick*, 419 U.S. at 266.

61. 419 U.S. 256 (1974).

62. *Id.* at 266.

63. U.S. CONST. art. V, cl. 1. (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid . . . when ratified by the Legislatures of three fourths of the several States . . .”).

64. *Schick*, 419 U.S. at 266.

65. *Id.* at 267.

66. *Harbison v. Bell*, 556 U.S. 180, 187 (2009).

67. U.S. CONST. art. II, § 2, cl. 1. Each state has its own constitutional provision addressing a governor’s executive pardon power over state offenses. Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 IND. L.J. 1651, 1662 (2008). These constitutional provisions are considerably varied, with some granting effectively the same clemency power as the president and others granting no clemency powers at all. *See id.* at 1661–63.

68. *E.g., Ex parte Garland*, 71 U.S. 333, 341 (1866).

69. *Id.* at 380.

70. *Id.*

71. *Id.*

are distinct from pardons.⁷² A commutation “merely substitutes lighter for heavier punishment” without restoring civil rights.⁷³ Additionally, unlike a pardon, a commutation “may be effected without the consent and against the will of the prisoner.”⁷⁴

As mentioned above, the Constitution provides one explicit limit to the president’s power to pardon, holding that the power cannot be used “in Cases of Impeachment.”⁷⁵ The Framers of the Constitution designed this limit to be a remedy to the inherent danger of granting such a broad power to the president.⁷⁶ During the Constitutional Convention, George Mason warned of the dangerous implications of this broad power, expressing concerns that the President “may frequently pardon crimes which were advised by himself.”⁷⁷ James Madison, in response, advised that such a misuse of the power could give rise to grounds for impeachment, at which point the president may be removed from power once impeached and found guilty.⁷⁸ Barring the prospect of impeachment, however, the president “essentially has absolute power to pardon any individual he chooses for whatever reason he chooses.”⁷⁹

The pardon authority is typically used after someone convicted of a federal crime makes a formal request for a pardon or commutation to the Justice Department’s Office of the Pardon Attorney.⁸⁰ This office subsequently makes a recommendation to the Deputy Attorney General about whether a pardon or commutation is truly warranted.⁸¹

72. *In re Charles*, 222 P. 606, 608 (Kan. 1924).

73. *Id.* (citing *Rich v. Chamberlain*, 65 N.W. 235, 235 (Mich. 1895)).

74. *Id.*

75. See U.S. CONST. art. II, § 2, cl. 1.

76. See D.W. Buffa, *The Pardon Power and Original Intent*, BROOKINGS (July 25, 2018), <http://www.brookings.edu/blog/fixgov/2018/07/25/the-pardon-power-and-original-intent/> [https://perma.cc/GS96-D7XE]. At the Virginia Ratifying Convention, George Mason argued the president “ought not to have the power of pardoning, because he may frequently pardon crimes which were advised by himself.” *Id.* Mason continued, “If he has the power of granting pardons before indictment, or conviction, may he not stop inquiry and prevent detection? The case of treason ought, at least, to be excepted.” *Id.*

77. Paul Rosenzweig, *Trump’s Pardon of Manafort Is the Realization of the Founders’ Fears*, ATLANTIC (Dec. 24, 2020), <http://www.theatlantic.com/ideas/archive/2020/12/problem-pardons-was-clear-start/617397/> [https://perma.cc/3PYH-NY7A].

78. Gene Healy, “*The Complete Power to Pardon*” and “*the Sole Power of Impeachment*,” CATO INST.: BLOG (Sept. 1, 2017, 3:57 PM), <http://www.cato.org/blog/complete-power-pardon-sole-power-impeachment> [https://perma.cc/LN8C-YGUU] (“There is one security in this case to which gentlemen may not have adverted: if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him . . . [and] remove him if found guilty.” (alteration in original) (quoting James Madison)).

79. Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 108 (2019).

80. *A Look at the President’s Pardon Power and How it Works*, PBS: NEWSHOUR (Aug. 26, 2017, 5:12 PM), <http://www.pbs.org/newshour/politics/presidents-pardon-power-works> [https://perma.cc/B9TQ-SZ67].

81. *Id.* Factors to determine whether a pardon or commutation is warranted include:

disparity or undue severity of a sentence, critical illness or old age, and meritorious service to the government by the applicant that has not been adequately rewarded by other official actions, as well as any other equitable factors The seriousness of the offense of conviction, the applicant’s overall criminal record, the nature of the applicant’s adjustment to prison supervision, the length of time the applicant has already served, and the availability of other remedies are also considered in evaluating the merit of an application.

Finally, the recommendation arrives at the White House, where the president has the ultimate authority over whether to issue the pardon or commutation.⁸² The process, from the initial request to receiving a decision from the president, can be lengthy.⁸³ There is no fee to apply for a pardon or a commutation of a sentence, nor is legal counsel required to submit such an application.⁸⁴ The application, however, is designed to be extremely detailed to ensure that the president can make an informed judgment of whether the applicant is a suitable recipient of a pardon or commutation.⁸⁵

C. *Historical Uses of the Presidential Pardon and Commutation Authority*

Presidents have used their pardon and commutation authority since the founding of the nation.⁸⁶ This Part describes the historical reasons for, notable uses of, and trends in the uses of the presidential pardon⁸⁷ and commutation authority⁸⁸—from the first president, George Washington, to the forty-third president, George W. Bush.

1. *Reasons for and Uses of the Presidential Pardon Authority*

In total, forty-five Presidents of the United States have used their pardon authority on nearly thirty thousand individuals.⁸⁹ Appropriately enough, President George Washington used the pardon authority first.⁹⁰ President Washington used his presidential authority to pardon the only two men found guilty of treason, both of whom had been sentenced to hang for their participation in an uprising now known as the Whiskey Rebellion.⁹¹ In explaining his decision, President Washington stated that concerns of mercy and public interest motivated him⁹²:

I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet it appears to me no less consistent with the public good than it is with my personal feelings to mingle

Frequently Asked Questions, U.S. DEP'T OF JUST., <http://www.justice.gov/pardon/frequently-asked-questions> [<https://perma.cc/4L5J-URPP>] (last updated Feb. 17, 2021).

82. See *A Look at the President's Pardon Power and How it Works*, *supra* note 80.

83. *Frequently Asked Questions*, *supra* note 81.

84. *Id.*

85. *Id.*

86. Neil Vigdor, *Presidential Pardons Through History*, N.Y. TIMES (Feb. 25, 2020), <http://www.nytimes.com/2020/02/21/us/politics/presidential-pardons.html> [<https://perma.cc/YDM6-CLR6>].

87. See *infra* Part II.C.1.

88. See *infra* Part II.C.2.

89. See Mark Hughes, *The Number of Pardons Granted by U.S. Presidents Since 1789*, INFOPLEASE, <http://www.infoplease.com/us/government/executive-branch/presidential-pardon-records> [<https://perma.cc/D4A2-9NLE>] (last visited Apr. 1, 2021). As of the publication of this Comment, President Joe Biden, the forty-sixth President of the United States, has not yet used his pardon authority. *Pardons Granted by President Joseph Biden*, U.S. DEP'T OF JUST., <http://www.justice.gov/pardon/pardons-granted-president-joseph-biden> [<https://perma.cc/52DW-JCJW>] (last updated Jan. 22, 2021).

90. Crouch, *Presidential Misuse*, *supra* note 16, at 724.

91. Carrie Hagen, *The First Presidential Pardon Pitted Alexander Hamilton Against George Washington*, SMITHSONIAN (Aug. 29, 2017), <http://www.smithsonianmag.com/history/first-presidential-pardon-pitted-hamilton-against-george-washington-180964659/> [<https://perma.cc/G2MY-DFMG>].

92. Crouch, *Presidential Misuse*, *supra* note 16, at 724–25.

in the operations of Government every degree of moderation and tenderness which the national justice, dignity, and safety may permit.⁹³

Most presidents have adhered to President Washington's rationales in using the pardon power.⁹⁴ In 1868, President Andrew Johnson issued full pardons to all Confederate soldiers who fought in the American Civil War, with the hope of restoring their confidence and respect for the federal government.⁹⁵ During his term as president from 1933 to 1945, President Franklin D. Roosevelt issued nearly three thousand pardons, the most issued by any president in U.S. history.⁹⁶ Many of these pardons concerned individuals who violated prohibition laws, which had since been revoked.⁹⁷ Roosevelt's successor, President Harry S. Truman, followed suit, issuing nearly two thousand pardons during his term from 1945 to 1953.⁹⁸ President Truman issued the majority of these pardons to conscientious objectors who were imprisoned during the Second World War for their refusal to serve in the U.S. Armed Forces.⁹⁹ Many of these individuals refused to serve on the basis of their religious convictions.¹⁰⁰

Not all uses of the pardon power have been so altruistically motivated; some uses have been regarded as controversial and led to questions about presidential leadership.¹⁰¹ President Gerald Ford announced in 1974 that he would pardon former President Richard Nixon for his role in the Watergate Scandal.¹⁰² His announcement led to much discontent among the American public.¹⁰³ Congress accused President Nixon of obstruction of justice and abuse of power.¹⁰⁴ Notably, President Ford issued the pardon before Nixon

93. George Washington, President of the U.S., Seventh Annual Address (Dec. 8, 1795), in 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 182, 184 (1896).

94. Crouch, *Presidential Misuse*, *supra* note 16, at 725.

95. Andrew Glass, *All Confederate Soldiers Gain Presidential Pardons*, Dec. 25, 1868, POLITICO (Dec. 25, 2018, 8:19 AM), <http://www.politico.com/story/2018/12/25/this-day-in-politics-dec-25-1868-1074077> [https://perma.cc/JJ8B-QTJX].

96. See Tom Murse, *Numbers of Pardons by President*, THOUGHTCO., <http://www.thoughtco.com/number-of-pardons-by-president-3367600> [https://perma.cc/D87V-UV4N] (last updated Jan. 20, 2021).

97. Kenneth T. Walsh, *A History of Presidential Pardons*, U.S. NEWS (June 8, 2018, 6:00 AM), <http://www.usnews.com/news/the-report/articles/2018-06-08/the-most-prominent-presidential-pardons-in-history> [https://perma.cc/7QR3-G45F].

98. See Murse, *supra* note 96.

99. Walsh, *supra* note 97 (stating that President Truman granted pardons to about 1,500 men for violations of the Selective Training and Service Act of 1940).

100. *Id.*

101. See, e.g., 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, 222–25 (2018).

102. Laura M. Holson, 'No One Could Believe It': When Ford Pardoned Nixon Four Decades Ago, N.Y. TIMES (Sep. 8, 2018), <http://www.nytimes.com/2018/09/08/us/politics/nixon-ford-pardon-watergate.html> [https://perma.cc/7224-YSWC].

103. *Id.* The Watergate Scandal refers to the Nixon Administration's destruction of records in an attempt to cover up a break-in at the office of the Democratic National Committee in Washington D.C. *Id.* President Nixon subsequently became the first president in American history to resign following "two years of bitter public debate over the Watergate scandals," paving the way for Gerald Ford to succeed Nixon as president. See Carroll Kilpatrick, *Nixon Resigns*, WASH. POST (Aug. 9, 1974), <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm> [https://perma.cc/W45Z-3M6D].

104. Holson, *supra* note 102.

was indicted on any criminal charges.¹⁰⁵ The pardon was, however, issued at a time when “Nixon would almost certainly have been criminally prosecuted” for his involvement in the Watergate Scandal.¹⁰⁶ In his remarks about the pardon, President Ford cited both his constitutional responsibilities and his concern for President Nixon’s health.¹⁰⁷ However, he later claimed “to have acted for the good of the country, not Richard Nixon.”¹⁰⁸ President Ford’s controversial use of the pardon power “shook the public’s trust in [him]”¹⁰⁹ and may have cost him in the next presidential election, which he lost to Democratic candidate Jimmy Carter.¹¹⁰

Another controversial use of the presidential pardon power occurred in 1986, when President George H.W. Bush pardoned six actors in the Iran-Contra Affair, including the former Secretary of Defense Caspar Weinberger.¹¹¹ The Iran-Contra Affair occurred during President Ronald Reagan’s second term and involved members of his administration who secretly sold arms to Iran at a time when the country was under an arms embargo.¹¹² President Bush, who served as President Reagan’s Vice President while the affair was ongoing, denied any knowledge of it.¹¹³ However, by the time President Bush issued the pardons, evidence surfaced indicating that he did have personal knowledge of the events underlying the affair.¹¹⁴ This evidence may have resulted in him being called to testify at Weinberger’s impending trial.¹¹⁵

By issuing the pardons when he did, President Bush “essentially ensured that he himself would not have to testify.”¹¹⁶ Independent counsel Lawrence Walsh, responsible for investigating the Iran-Contra Affair, decried the pardons as the completion of a cover-up of the affair.¹¹⁷ Walsh described President Bush as having a “contempt for honesty” and an “arrogant disregard for the rule of law.”¹¹⁸ President Bush seemingly issued the Iran-Contra pardons “not for the traditional reasons of mercy or the public interest, but to protect [his] personal interests.”¹¹⁹

105. Crouch, *Presidential Misuse*, *supra* note 16, at 728.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 729.

110. Audie Cornish & Mark Osler, *The Long History of Presidential Pardons in the U.S.*, NPR (Mar. 13, 2019, 5:36 PM), <http://www.npr.org/2019/03/13/703162412/the-long-history-of-presidential-pardons-in-the-u-s> [<https://perma.cc/3MZV-U4TV>].

111. Palacios, *supra* note 101, at 224 & n.131.

112. Andrew Glass, *Bush Pardons Iran-Contra Felons, Dec. 24, 1992*, POLITICO (Dec. 24, 2018, 7:21 AM), <http://www.politico.com/story/2018/12/24/bush-pardons-iran-contra-felons-dec-24-1992-1072042> [<https://perma.cc/66V3-54VB>].

113. *Id.*

114. *See* Crouch, *Presidential Misuse*, *supra* note 16, at 730.

115. *Id.*

116. *Id.*

117. Arun Gupta, *Let’s Talk About George H.W. Bush’s Role in the Iran-Contra Scandal*, INTERCEPT (Dec. 7, 2018, 1:06 PM), <http://theintercept.com/2018/12/07/george-h-w-bush-iran-contra/> [<https://perma.cc/772P-TEUW>].

118. *Id.*

119. Crouch, *Presidential Misuse*, *supra* note 16, at 730.

Additionally, these pardons did not go through the usual process, which first requires clemency applicants to wait a specified period of time before applying.¹²⁰ A typical applicant must then also wait for the Office of the Pardon Attorney to process and investigate their application and reach a positive recommendation for the pardon to be issued.¹²¹ By circumventing these typical processes for issuing pardons, President Bush essentially “sprung [the pardons] on the public without warning.”¹²²

President Bill Clinton received widespread criticism for his 2001 pardon of Marc Rich, an oil businessman indicted on racketeering and mail and wire fraud charges.¹²³ Rich’s ex-wife, Denise, made nearly \$1.4 million in political contributions to various Democrats, among them President Clinton and his wife, Hillary Clinton.¹²⁴ President Clinton characterized his decision to pardon Rich as “in the best interests of justice” and cited various legal and foreign policy reasons in making his decision to grant the pardon, including support from Israeli officials owing to Rich’s contributions and services to Israeli charitable causes.¹²⁵ President Clinton also included a requirement that Rich waive any defenses to subsequent civil actions.¹²⁶ Nonetheless, for many, President Clinton’s pardon of Rich appeared to be motivated more out of self-interest than out of any concerns of mercy or the public interest.¹²⁷

2. Reasons for and Uses of the Presidential Commutation Authority

The second most frequently used form of clemency by American presidents is the commutation authority.¹²⁸ Similar to presidential pardons, scholars and the public alike have criticized presidents for abusing the commutation authority to further their own personal interests.¹²⁹ In 1999, President Clinton issued conditional commutations to sixteen members of the Armed Forces for Puerto Rican National Liberation (FALN), a decision that was “met with a chorus of protests from members of Congress and the public.”¹³⁰ FALN was dedicated to combatting American influence over Puerto Rico and

120. *Id.* at 732.

121. *Id.*

122. *Id.*

123. See William Jefferson Clinton, *My Reasons for the Pardons*, N.Y. TIMES (Feb. 18, 2001), <http://www.nytimes.com/2001/02/18/opinion/my-reasons-for-the-pardons.html> [<https://perma.cc/LH7P-4RJB>].

124. Eric Lichtblau & Davan Maharaj, *Clinton Pardon of Rich a Saga of Power, Money*, CHI. TRIBUNE (Feb. 18, 2001, 12:00 AM), <http://www.chicagotribune.com/sns-clinton-pardons-analysis-story.html> [<https://perma.cc/DV6J-3LHY>].

125. See Clinton, *supra* note 123.

126. *Id.*

127. See Noah A. Messing, *A New Power?: Civil Offenses and Presidential Clemency*, 64 BUFF. L. REV. 661, 734 (2016). Many of President Clinton’s pardons were either “rushed through or even rubber-stamped at the last minute.” Crouch, *Presidential Misuse*, *supra* note 16, at 732.

128. Jeffrey Crouch, *The President’s Power to Commute: Is It Still Relevant?*, 9 U. ST. THOMAS L.J. 681, 685 (2012) [hereinafter Crouch, *Power to Commute*].

129. See *id.* at 686–87.

130. *Id.* at 691 (quoting Michael A. Genovese & Kristine Almquist, *The Pardon Power Under Clinton: Tested but Intact*, in THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY 75, 84 (David Gray Adler & Michael A. Genovese eds., 2002)).

claimed responsibility for dozens of bombings purportedly carried out to help accomplish their goals.¹³¹

In 2007, President George W. Bush issued a commutation to I. Lewis “Scooter” Libby, the former Chief of Staff for Vice President Dick Cheney.¹³² Libby had been convicted of four felonies, including perjury and obstruction of justice, in connection with his role in the investigation of who leaked the identity of a covert CIA agent to the public.¹³³ Reactions to the commutation were largely negative, with some accusing the White House of being corrupt and others describing the commutation as a betrayal of the trust of the American people.¹³⁴ Like the Iran-Contra Affair pardons, President Bush’s commutation of Libby’s sentence did not go through the normal clemency process.¹³⁵

Most clemency decisions, including both pardons and commutations, have been rendered under the guise of President Washington’s twin aims of mercy and serving the public interest; but as has been demonstrated, others have largely appeared to be delivered to serve personal interests.¹³⁶ In recent decades, the number of pardons and commutations issued has decreased.¹³⁷ The percentage of successful clemency applications has similarly dropped during this same time period.¹³⁸ Legal commentators suggest there are two factors responsible for this decline: the increasingly high standards for obtaining a pardon or commutation¹³⁹ and the shift in the political ideologies regarding crime control.¹⁴⁰

D. Recent Uses of the Presidential Pardon and Commutation Authority

The decline in the percentage of successful clemency applications has continued under the two most recent presidents to serve full terms, Barack Obama and Donald Trump.¹⁴¹ In his two terms, President Obama approved just over five percent of petitions

131. *Id.*

132. *Id.* at 692.

133. *Id.*

134. See *Bush Commutes Libby’s Prison Sentence*, CNN (July 2, 2007), <http://www.cnn.com/2007/POLITICS/07/02/libby.sentence/> [<https://perma.cc/999N-EUEQ>].

135. Crouch, *Presidential Misuse*, *supra* note 16, at 732.

136. Crouch, *Power to Commute*, *supra* note 128, at 694.

137. Amelia Thomson-DeVeaux & Andrea Jones-Rooy, *Pardons Have Changed a Lot (And We’re Not Just Talking About Arpaio)*, FIVETHIRTYEIGHT (Oct. 4, 2017, 11:59 AM), <http://fivethirtyeight.com/features/pardons-have-changed-a-lot-and-were-not-just-talking-about-arpaio/> [<https://perma.cc/AM34-S5A8>]. One notable exception to this trend is President Barack Obama. See *infra* Part II.D.1 for a discussion of President Obama’s use of his pardon and commutation authority.

138. See Crouch, *Power to Commute*, *supra* note 128, at 685–86. President Jimmy Carter approved twenty-one percent of petitions for pardons or commutations, but subsequent presidents approved petitions at a much lower rate—President Ronald Reagan approved twelve percent, President George H.W. Bush approved five percent, President Bill Clinton approved six percent, and President George W. Bush approved only two percent. *Id.*

139. See, e.g., Thomson-DeVeaux & Jones-Rooy, *supra* note 137.

140. See Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty To Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1495 (2000).

141. See *Clemency Statistics*, U.S. DEP’T OF JUST., <http://www.justice.gov/pardon/clemency-statistics> [<https://perma.cc/E8TL-CBRP>] (last updated Mar. 2, 2021).

for pardons or commutations.¹⁴² During his first and only term, President Trump approved approximately two percent of petitions for pardons or commutations.¹⁴³ President Obama received recognition for the record number of commutations he issued during his time in office,¹⁴⁴ while President Trump's uses of the pardon and commutation authority have been frequently regarded as "among the most controversial ever."¹⁴⁵

1. President Barack Obama's Use of the Pardon and Commutation Authority

By the end of his presidency, President Obama granted pardons to 212 individuals and commuted the sentences of 1,715 individuals, totaling 1,927 grants of clemency.¹⁴⁶ President Obama granted more pardons and commutations than any president since President Truman.¹⁴⁷ President Obama's commutation of 1,715 sentences was not only more than the total granted by the previous thirteen presidents combined but it was also the most commutations granted by any U.S. president ever.¹⁴⁸ In one of his last days in office, President Obama broke his own record for the most acts of clemency granted by a president in a single day by granting clemency to 330 individuals.¹⁴⁹

Somewhat lost in these numbers is the percentage of clemency petitions actually granted by President Obama during his two terms. President Obama received 36,544 petitions for clemency, a figure that exceeds the total number of petitions received by the previous nine presidents combined.¹⁵⁰ President Obama thus approved just over five

142. *See id.* (indicating that President Obama approved 1,927 of a total 36,544 petitions for pardons or commutations).

143. *See id.* (showing that President Trump approved 237 of a total 12,078 petitions for pardons or commutations).

144. *See, e.g.,* Neil Eggleston, *President Obama Has Now Granted More Commutations Than Any President in This Nation*, WHITE HOUSE (Jan. 17, 2017, 4:17 PM), <http://obamawhitehouse.archives.gov/blog/2017/01/17/president-obama-has-now-granted-more-commutations-any-president-nations-history> [https://perma.cc/NH7S-DL3C] [hereinafter Eggleston, *More Commutations*]. President Franklin D. Roosevelt still holds the distinction of the most pardons issued by any president in U.S. history. *See* Murse, *supra* note 96.

145. Melissa Gomez, *Trump Has Pardoned 10 Men. Who Are They?*, L.A. TIMES (May 23, 2019, 5:45 AM), <http://www.latimes.com/nation/la-na-trump-pardons-20190523-story.html> [https://perma.cc/7UY4-ZXVW].

146. John Gramlich, *Trump Used His Clemency Power Sparingly Despite a Raft of Late Pardons and Commutations*, PEW RESEARCH CTR. (Jan. 22, 2021), <http://www.pewresearch.org/fact-tank/2017/01/20/obama-used-more-clemency-power/> [https://perma.cc/3636-HDCC].

147. *See id.*

148. *A Nation of Second Chances: President Obama's Record on Clemency*, WHITE HOUSE (Jan. 19, 2017), <http://obamawhitehouse.archives.gov/issues/clemency> [https://perma.cc/8KCF-GJZC].

149. *See* Neil Eggleston, *The Reinvigoration of the Clemency Authority*, WHITE HOUSE (Jan. 19, 2017, 2:25 PM), <http://obamawhitehouse.archives.gov/blog/2017/01/19/reinvigoration-clemency-authority> [https://perma.cc/52GU-7VW5]. President Obama initially set the record on December 19, 2016, when he granted clemency to 231 individuals. Neil Eggleston, *President Obama Grants 153 Commutations and 78 Pardons to Individuals Deserving of a Second Chance*, WHITE HOUSE (Dec. 19, 2016, 3:00 PM), <http://obamawhitehouse.archives.gov/blog/2016/12/19/president-obama-grants-153-commutations-and-78-pardons-individuals-deserving-second> [https://perma.cc/67RV-YWRG]. He subsequently broke this record on January 17, 2017, when he granted clemency to 273 individuals. *See* Eggleston, *More Commutations*, *supra* note 144.

150. *See* Gramlich, *supra* note 146.

percent of petitions for pardons or commutations,¹⁵¹ a staggering drop from President Truman's approval of forty-one percent of petitions.¹⁵²

President Obama described his usage of the pardon and commutation authority as embodying the belief that people convicted after making a mistake in their lives "deserve a second chance."¹⁵³ Obama's administration pointed to a "cycle of poverty, criminality, and incarceration" in framing President Obama's use of the authority as a means of fighting for a smarter and more equitable criminal justice system.¹⁵⁴

It was not until the second term of his presidency, however, that President Obama implemented a project known as Clemency Initiative 2014.¹⁵⁵ This initiative allowed the Department of Justice to assist President Obama with reducing disproportionate sentences that were the result of overly punitive federal drug trafficking laws.¹⁵⁶ Under this project, the Obama Administration encouraged federal prisoners sentenced under these laws to apply for commutations of their sentences,¹⁵⁷ leading to nearly triple the number of new petitions compared to the previous year.¹⁵⁸ This increased number of petitions did not correspond with an increased number of approvals until President Obama granted a barrage of pardons and commutations toward the end of his presidency, nearly two years after the initiative was first put into place.¹⁵⁹

Some have regarded President Obama's last-minute clemency push as "too little too late."¹⁶⁰ At the end of Obama's presidency, with the impending inauguration of a president unlikely to continue any clemency initiatives looming, around thirteen thousand petitions for pardons and commutations were still pending a final decision.¹⁶¹ Others have criticized how the initiative unfairly placed the burden of correcting "draconian punishments" on the individuals incarcerated instead of on the government actually responsible for administering the punishments.¹⁶²

President Obama also received criticism for individual uses of the pardon and commutation authority, particularly for his decision to commute the sentence of former

151. See *Clemency Statistics*, supra note 141 (indicating that President Obama approved 1,927 of a total 36,544 petitions for pardons or commutations).

152. Gramlich, supra note 146.

153. See *A Nation of Second Chances*, supra note 148.

154. *Id.*

155. See Paul L. Larkin, Jr., "A Day Late and a Dollar Short"—President Obama's Clemency Initiative 2014, 16 GEO. J.L. & PUB. POL'Y 147, 148 (2018).

156. *Id.*

157. Dara Lind & German Lopez, *One Day Before He Leaves Office, Obama Just Set a Record in Cutting Prisoners' Sentences*, VOX (Jan. 19, 2017, 3:06 PM), <http://www.vox.com/policy-and-politics/2016/11/23/13731448/obama-pardon-clemency-commutation> [https://perma.cc/7S4D-9XXH].

158. Charlie Smart, *Obama Granted Clemency Unlike Any Other President in History*, FIFTYTHREE (Jan. 19, 2017, 4:40 PM), <http://fivethirtyeight.com/features/obama-granted-clemency-unlike-any-other-president-in-history/> [https://perma.cc/92QZ-E562].

159. See Lind & Lopez, supra note 157.

160. *Id.*; see also Larkin, Jr., supra note 155, at 162 ("Obama should have started the initiative much earlier than he did . . .").

161. Smart, supra note 158.

162. E.g., Liliana Segura, *Obama's Clemency Problem – And Ours*, INTERCEPT (Dec. 24, 2016, 9:31 AM), <http://theintercept.com/2016/12/24/obamas-clemency-problem-and-ours/> [https://perma.cc/RE2D-M9BD].

Army intelligence analyst Chelsea Manning.¹⁶³ Manning was convicted in 2010 for leaking American military and diplomatic activities across the world through WikiLeaks and received a thirty-five year sentence, the longest punishment ever imposed in the United States for a leak-related conviction.¹⁶⁴ Republican politicians widely criticized Manning's commutation.¹⁶⁵ They felt that failing to hold Manning accountable for crimes that compromised national security created a dangerous precedent.¹⁶⁶ Additionally, some Democratic politicians echoed concerns about the potential consequences of Manning's commutation on national security.¹⁶⁷

2. President Donald Trump's Use of the Pardon and Commutation Authority

During his first and only term, President Donald Trump granted 143 pardons and commuted ninety-four sentences.¹⁶⁸ President Trump received a total of 12,078 petitions for clemency, meaning he approved approximately two percent of the petitions he received.¹⁶⁹ This figure exceeded President Barack Obama's clemency approval rate through his first term in office, which was significantly less than one percent.¹⁷⁰ Whereas President Obama was criticized early in his presidency because of his infrequent use of the pardon and commutation authority,¹⁷¹ President Trump was criticized throughout his presidency for the manner in which he has used the authority.¹⁷² Critics have classified

163. See, e.g., Jordan Cairney, *Manning Commutation Sparks Democratic Criticism*, HILL (Jan. 18, 2017, 6:52 PM), <http://thehill.com/blogs/floor-action/senate/314977-manning-commutation-sparks-criticism-from-democrats> [https://perma.cc/5ADG-3H9K].

164. Charlie Savage, *Chelsea Manning To Be Released Early as Obama Commutes Sentence*, N.Y. TIMES (Jan. 17, 2017), <http://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html> [https://perma.cc/4R6T-ZB5J].

165. *Id.*

166. *Id.*

167. Cairney, *supra* note 163.

168. *Clemency Statistics*, *supra* note 141.

169. See *id.*

170. See *id.* (showing that President Obama granted only twenty-three clemency petitions out of a total 7,328 received from 2009 to 2012, a period of time constituting the majority of President Obama's first term). It is worth noting that increased grants of clemency at the end of a presidential term "have become a routine departure ritual." Carol J. Williams, *End-of-Term Clemency Is a Centuries-Old, Often Vilified Tradition*, L.A. TIMES (Jan. 10, 2011, 12:00 AM), <http://www.latimes.com/archives/la-xpm-2011-jan-10-la-me-pardon-power-20110111-story.html> [https://perma.cc/CC5T-KQ9F]. President Obama's clemency approval rate through his first term as president was likely very low because he was elected to serve a second presidential term in November 2012, giving him four more years to grant clemency before the end of his presidency. See, e.g., Leah Libresco, *Lame-Duck Presidents Tend To Offer More Clemency*, FIVETHIRTYEIGHT (Apr. 1, 2015, 6:14 PM), <http://fivethirtyeight.com/features/lame-duck-presidents-tend-to-offer-more-clemency/> [https://perma.cc/EZ6E-DXQ8] ("[I]f his presidency follows historical trends, Obama will grant more pardons as his term comes to an end.").

171. See, e.g., George Lardner Jr. & P.S. Ruckman Jr., *Obama's Weak Approach to Pardons*, WASH. POST (Apr. 9, 2015), http://www.washingtonpost.com/opinions/obamas-weak-approach-to-pardons/2015/04/09/493b9f70-dca3-11e4-a500-1c5bb1d8ff6a_story.html [https://perma.cc/3726-9UB3] (proclaiming President Obama's clemency record as of 2015 to be dismal due to inaction in the face of a staggering backlog of clemency petitions).

172. See, e.g., Aaron Blake, *Trump's Self-Serving Pardons*, WASH. POST (May 31, 2018, 12:45 PM), <http://www.washingtonpost.com/news/the-fix/wp/2018/05/31/trumps-totally-self-serving-pardons/>

President Trump's use of the pardon and commutation authority as politically self-serving,¹⁷³ principally designed to "galvaniz[e] his political base."¹⁷⁴

During his first year in office, President Trump used the pardon authority on Joe Arpaio, a former Arizona sheriff whose controversial efforts to detain undocumented immigrants led to a conviction for criminal contempt.¹⁷⁵ Many civil rights groups, in sharp opposition to the pardon, accused Arpaio of illegally targeting and terrorizing Latino families in violation of the U.S. Constitution during his tenure as sheriff.¹⁷⁶ Arpaio supported President Trump during his presidential campaign, frequently advocating for President Trump's similar hardline stances on border security and immigration.¹⁷⁷ President Trump issued the pardon without first consulting legal counsel at the Department of Justice, the common practice of previous presidents,¹⁷⁸ and despite the fact that Arpaio had not formally requested a pardon.¹⁷⁹ Democratic politicians were quick to condemn the issuance of the pardon,¹⁸⁰ with some even asking the Ninth Circuit Court of Appeals to invalidate it on the basis that a pardon of a contempt charge was "an invalid encroachment on the authority of the Judiciary."¹⁸¹

Over the next two years of his presidency, President Trump issued more pardons to high-profile conservatives.¹⁸² One recipient was I. Lewis "Scooter" Libby, the former Chief of Staff for Republican Vice President Dick Cheney.¹⁸³ President Bush had previously issued a commutation to Libby pursuant to his role in the investigation of the leak of the identity of a covert CIA agent.¹⁸⁴ President Trump issued the pardon to Libby

[https://perma.cc/XVS4-3DW7] (concluding that President Trump is irrevocably politicizing the presidential authority to pardon and commute sentences for his own legal purposes).

173. E.g., Aaron Blake, *The Very Political Pattern of Trump's Pardons*, WASH. POST (May 16, 2019, 8:45 AM), <http://www.washingtonpost.com/politics/2019/05/16/very-political-pattern-trumps-pardons/> [https://perma.cc/G2DW-ZN27] [hereinafter Blake, *Very Political Pattern*].

174. Kevin Liptak, *Trump's Pardons Appear Prompted By TV, Friends and Politics*, CNN (May 21, 2019, 7:53 AM), <http://www.cnn.com/2019/05/21/politics/donald-trump-pardons-pattern/index.html> [https://perma.cc/425Q-9F2W].

175. Julie Hirschfield Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <http://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html?module=inline> [https://perma.cc/E6NH-3TKH].

176. Kevin Liptak, Daniella Diaz & Sophie Tatum, *Trump Pardons Former Sheriff Joe Arpaio*, CNN (Aug. 27, 2017, 2:32 AM), <http://www.cnn.com/2017/08/25/politics/sheriff-joe-arpaio-donald-trump-pardon/index.html> [https://perma.cc/D5D6-5ZLS].

177. *Id.*

178. *Id.*

179. Amita Kelly, *President Trump Pardons Former Sheriff Joe Arpaio*, NPR (Aug. 25, 2017, 8:14 PM), <http://www.npr.org/2017/08/25/545282459/president-trump-pardons-former-sheriff-joe-arpaio> [https://perma.cc/7BNJ-S2Y6].

180. Hirschfield Davis & Haberman, *supra* note 175.

181. Kate Sullivan, *More Than 20 Democrats Ask Court To Invalidate Joe Arpaio's Pardon*, CNN (May 8, 2019, 6:56 PM), <http://www.cnn.com/2019/05/08/politics/democrats-court-invalidate-arpaio-pardon/index.html> [https://perma.cc/8P7D-KSMS].

182. See Blake, *Very Political Pattern*, *supra* note 173.

183. Andrew Restuccia & Josh Gerstein, *Trump Issues Pardon for Lewis 'Scooter' Libby*, POLITICO (Apr. 13, 2018, 5:12 PM), <http://www.politico.com/story/2018/04/13/trump-pardon-scooter-libby-522055> [https://perma.cc/8BP5-YEL4].

184. See *supra* notes 132–35 and accompanying text for a summary of President Bush's controversial commutation of Libby.

concurrent with an ongoing investigation by special counsel Robert Mueller into whether President Trump's campaign team was complicit in Russia's alleged interference in the 2016 presidential election.¹⁸⁵ Critics of Libby's pardon felt it sent a message to those implicated in Mueller's investigation that President Trump would pardon them if they remained loyal to his interests, but the White House denied any connection between Libby's pardon and Mueller's investigation.¹⁸⁶

Another high-profile recipient of a pardon from President Trump was conservative commentator Dinesh D'Souza, an "outspoken supporter" of President Trump.¹⁸⁷ D'Souza, an author and filmmaker, was convicted for violating federal election campaign laws after he made illegal campaign contributions to a U.S. Senate campaign by reimbursing other financial contributors to circumvent the individual contributions limit.¹⁸⁸ Conservative circles celebrated President Trump's pardon of D'Souza, whereas their liberal counterparts widely denounced the pardon as a reward to D'Souza for his loyalty to the president.¹⁸⁹

President Trump later issued another high-profile pardon to former media mogul Conrad Black, who had been convicted of obstruction of justice and fraud for illegally taking money from shareholders of his newspaper company.¹⁹⁰ Black, a "personal friend" of President Trump,¹⁹¹ had recently published a book entitled *Donald J. Trump: A President Like No Other*, in which he staunchly defended President Trump against accusations of racism, sexism, and warmongering.¹⁹² President Trump also issued the pardon of Black without a formal pardon request from Black himself.¹⁹³ This string of President Trump's pardons have been regarded as controversial due to their "pattern of rewarding people popular with his supporters or those who have spoken glowingly of [Trump]."¹⁹⁴

In early 2019, President Trump became the target of even more criticism after he indicated that he was considering pardons for several American military service members

185. See Restuccia & Gerstein, *supra* note 183; see also *Special Counsel: What Is It and What Did Robert Mueller Investigate?*, BBC (July 24, 2019), <http://www.bbc.com/news/world-us-canada-39961732> [https://perma.cc/Y6F3-2CGJ] (mentioning that the special counsel investigation began in May 2017 and ended nearly two years later).

186. Restuccia & Gerstein, *supra* note 183.

187. Camila Domonoske & Ayesha Rascoe, *Trump Pardons Dinesh D'Souza, Who Pleaded Guilty to Campaign Finance Fraud*, NPR: THE TWO-WAY (May 31, 2018, 10:28 AM), <http://www.npr.org/sections/thetwo-way/2018/05/31/615759943/trump-says-hell-pardon-dinesh-dsouza-who-pleaded-guilty-to-campaign-finance-fraud> [https://perma.cc/T4N7-BK2D].

188. *Id.*

189. See Anthony Zurcher, *Dinesh D'Souza: Why Did Trump Pardon the Provocateur?*, BBC (May 31, 2018), <http://www.bbc.com/news/world-us-canada-44321650> [https://perma.cc/H4TU-YG7S].

190. Laurel Wamsley, *Trump Pardons His Friend Conrad Black, Who Wrote Glowing Trump Biography Last Year*, NPR (May 16, 2019, 3:58 AM), <http://www.npr.org/2019/05/16/723849097/trump-pardons-his-friend-conrad-black-who-wrote-glowing-trump-biography-last-yea> [https://perma.cc/VUF9-2NSW].

191. Annie Karni, *President Trump Grants Pardon to Conrad Black*, N.Y. TIMES (May 15, 2019), <http://www.nytimes.com/2019/05/15/us/politics/conrad-black-pardon.html> [https://perma.cc/U6C9-Z2D3].

192. Jim Waterson, *Trump Pardons Fraudster Conrad Black After Glowing Biography*, GUARDIAN (May 16, 2019, 3:59 AM), <http://www.theguardian.com/business/2019/may/15/conrad-black-trump-pardons-ex-media-mogul> [https://perma.cc/FE2Z-548Q].

193. Wamsley, *supra* note 190.

194. Gomez, *supra* note 145.

accused or convicted of war crimes.¹⁹⁵ President Trump himself acknowledged the pardons, opposed by numerous veterans groups, to be “a little bit controversial.”¹⁹⁶ President Trump’s statement came on the heels of a pardon issued only weeks earlier to Army First Lieutenant Michael Behenna, who had been convicted in 2009 by a military court for the unpremeditated murder of an Iraqi prisoner in a combat zone.¹⁹⁷ Behenna’s pardon was the first pardon ever issued by a U.S. president to a convicted murderer,¹⁹⁸ prompting the American Civil Liberties Union to declare the pardon to be a presidential endorsement of war crimes.¹⁹⁹ The White House claimed that Behenna’s case “attracted broad support from the military,”²⁰⁰ but other sources suggest the case encountered “fierce resistance from military leaders and prominent veterans.”²⁰¹

In late 2019, President Trump fulfilled his controversial pledge from earlier in the year by issuing pardons to two military service members accused of war crimes and restoring the rank of a third.²⁰² The first service member, First Lieutenant Clint Lorange, was convicted of second-degree murder and obstruction of justice after he ordered soldiers to shoot at unarmed men in Afghanistan, leading to the death of two men.²⁰³ The second service member, Major Matthew Golsteyn, was awaiting trial after being charged with the premeditated murder of a suspected bomb maker in Afghanistan.²⁰⁴ The third service member, Navy SEAL Edward Gallagher, was convicted of posing with the corpse of a captive in Iraq, leading to a one-step demotion in rank, but he was acquitted of murder charges in a recent high-profile war crimes case.²⁰⁵

In issuing the pardons and restoration of rank, President Trump ignored the advice of Pentagon officials who warned that the actions could “damage the integrity of the military judicial system.”²⁰⁶ With the pardons of Lorange, Golsteyn, and his earlier pardon of Michael Behenna, President Trump became the only president “in memory”

195. See Dave Philipps, *Trump May Be Preparing Pardons for Servicemen Accused of War Crimes*, N.Y. TIMES (May 18, 2019), <http://www.nytimes.com/2019/05/18/us/trump-pardons-war-crimes.html> [https://perma.cc/4CNP-PK9A].

196. Jonathan Lemire & Hope Yen, *Trump Considers Pardons for Soldiers Accused of War Crimes*, AP (May 24, 2019), <http://apnews.com/1b76890a47414e698812fd22daa033a6> [https://perma.cc/8WR7-87RD].

197. See Bill Chappell, *Trump Pardons Michael Behenna, Former Soldier Convicted of Killing Iraqi Prisoner*, NPR (May 7, 2019, 10:17 AM), <http://www.npr.org/2019/05/07/720967513/trump-pardons-former-soldier-convicted-of-killing-iraqi-prisoner> [https://perma.cc/VEY7-8QBW].

198. Zeeshan Aleem, *Trump Just Issued Multiple War Crime Pardons. Experts Think It's a Bad Idea.*, VOX (Nov. 16, 2019, 10:53 AM), <http://www.vox.com/policy-and-politics/2019/11/16/20967889/trump-war-crime-pardons-white-house-gallagher-lorange-golsteyn> [https://perma.cc/V7TN-J9EQ].

199. See Kyle Rempfer, *Trump's Pardon of US Soldier Is an Endorsement of War Crimes, Says ACLU*, MILITARY TIMES (May 7, 2019), <http://www.militarytimes.com/news/your-military/2019/05/07/trumps-pardon-of-us-soldier-is-an-endorsement-of-a-war-crimes-says-aclu/> [https://perma.cc/6F5S-Y7KE].

200. *Id.*

201. Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES (Nov. 22, 2019), <http://www.nytimes.com/2019/11/15/us/trump-pardons.html> [https://perma.cc/ZU99-FCFL].

202. Aleem, *supra* note 198.

203. *Id.*

204. *Id.*

205. *Id.*

206. Nicole Gaouette, Ryan Browne & Barbara Starr, *Trump Ignores Pentagon Advice and Intervenes in Military War Crimes Cases*, CNN (Nov. 18, 2019, 11:02 AM), <http://www.cnn.com/2019/11/15/politics/trump-war-crimes-intervenes/index.html> [https://perma.cc/B8R9-YRKA].

to issue pardons for violent crimes committed by military service members while in uniform.²⁰⁷ Additionally, Golsteyn's pardon has particularly been considered "strikingly unusual" because it preceded his trial for murder.²⁰⁸

In December 2019, the House of Representatives impeached President Trump for abuse of power and obstruction of Congress.²⁰⁹ The Framers of the Constitution designed impeachment to be used only when the actions of a president "corrupt[] the public interest for personal ones."²¹⁰ President Trump became only the third president to ever "be formally charged under the Constitution's ultimate remedy for high crimes and misdemeanors."²¹¹ President Trump's impeachment inquiry centered on a phone call he made to the Ukrainian president.²¹² In this phone call, President Trump allegedly leveraged American military aid to Ukraine as part of a quid pro quo scheme in return for an investigation into several Democratic political rivals, including former Vice President and then-presidential candidate Joe Biden.²¹³

After five months of hearings and investigations, the Senate acquitted President Trump in early 2020.²¹⁴ Only weeks after his acquittal, President Trump issued another batch of pardons and commutations—with many of the beneficiaries well-known or well-connected to the president.²¹⁵ Some critics characterized these acts of clemency as punctuating President Trump's "growing sense of political invulnerability" after his acquittal.²¹⁶

After losing the 2020 presidential election to former Vice President Joe Biden,²¹⁷ President Trump's final months in office were "marked by a renewed interest in granting

207. Philipps, *supra* note 201; Kori Schake, *Trump Sides With War Criminals*, ATLANTIC (Nov. 16, 2019), <http://www.theatlantic.com/ideas/archive/2019/11/trump-issues-pardons-war-criminals/602140/> [https://perma.cc/4PEY-5PUR].

208. Philipps, *supra* note 201.

209. See Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES (Dec. 18, 2019), <http://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html> [https://perma.cc/K73T-AA4P].

210. *Id.*

211. Lisa Mascaró & Mary Clare Jalonick, *Trump Impeached on Charges of Abuse of Powers, Obstruction*, AP (Dec. 19, 2019), <http://apnews.com/0756fda2b5143891c5da1c6897001cee> [https://perma.cc/L7QF-MAJA].

212. Michael Balsamo & Zeke Miller, *Memo: Trump Prodded Ukrainian Leader to Investigate Bidens*, AP (Sept. 25, 2019), <http://apnews.com/273e46e2fa324eb9ba5d69ab2a2c69cb> [https://perma.cc/RC2U-JXFT].

213. See *id.* Joe Biden was subsequently elected president in the 2020 presidential election. Mark Sherman, *Electoral College Makes it Official: Biden Won, Trump Lost*, AP (Dec. 14, 2020), <http://apnews.com/article/joe-biden-270-electoral-college-vote-d429ef97af2bf574d16463384dc7cc1e> [https://perma.cc/9FVS-LR5S].

214. Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES (Feb. 5, 2020), <http://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html> [https://perma.cc/H86U-N76N]. The final vote was split largely along party lines—every Democratic senator voted guilty on both charges while every Republican senator voted not guilty on the obstruction of Congress charge. Senator Mitt Romney (R-UT) was the only Republican to break from his party and vote President Trump guilty on the abuse of power charge. *Id.*

215. Matt Ford, *The Real Message of Trump's Latest Clemency Binge*, NEW REPUBLIC (Feb. 18, 2020), <http://newrepublic.com/article/156615/real-message-trumps-latest-clemency-binge> [https://perma.cc/89NQ-UF73].

216. *Id.*

217. Sherman, *supra* note 213.

clemency.”²¹⁸ While this type of last-minute surge in clemency is consistent with the actions of past presidents, the nature of President Trump’s final pardons was not, with the majority of his pardons “more about his personal interests than serving justice.”²¹⁹ More than half of these pardons bypassed the traditional clemency review process, with many of them not even meeting the Department of Justice’s standards for consideration.²²⁰

Among those pardoned by President Trump near the end of his presidency were former Representatives Duncan Hunter and Chris Collins, two of the first Republican politicians to publicly back President Trump’s 2016 presidential campaign.²²¹ President Trump’s late term clemencies also included pardons for four former military members, who were convicted while working as contractors for the private military company Blackwater.²²² The four individuals were convicted on charges related to the killing of seventeen Iraqi civilians in Baghdad’s Nisour Square, including children as young as eight years old.²²³ United Nations human rights experts stated that President Trump’s pardons of the Blackwater contractors violated obligations the United States has under international law, making them an “affront to justice.”²²⁴

President Trump’s final pardons also notably involved several individuals who were indicted by Special Counsel Robert Mueller.²²⁵ Mueller was appointed to conduct a probe into whether Russia interfered in the 2016 U.S. presidential election, an investigation that President Trump continually referred to as a “witch hunt.”²²⁶ Although Mueller’s probe ultimately found no evidence that President Trump’s campaign directly colluded with Russia, it “fell short of completely exonerating the president”²²⁷ and

218. Caroline Kelly, Veronica Stracqualursi & Devan Cole, *Here Are the High-Profile Pardons and Commutations Trump Has Granted During His Presidency*, CNN (Dec. 23, 2020, 8:09 PM), <http://www.cnn.com/2020/12/05/politics/trump-pardons-commutations-list/index.html> [<https://perma.cc/4YT5-J9JP>].

219. Thomson-DeVeaux, *supra* note 17 (quoting Professor Jeffrey Crouch, an expert on executive clemency).

220. Maggie Haberman & Michael S. Schmidt, *Trump Pardons Two Russia Inquiry Figures and Blackwater Guards*, N.Y. TIMES (Dec. 22, 2020), <http://www.nytimes.com/2020/12/22/us/politics/trump-pardons.html> [<https://perma.cc/2YQ3-635T>].

221. Colleen Long, Kevin Freking & Eric Tucker, *Trump Pardons 15, Commutes 5 Sentences, Including GOP Allies*, AP (Dec. 22, 2020), <http://apnews.com/article/donald-trump-campaigns-duncan-hunter-russia-87bf992ea9bece8eee58ac8ecf1f1bd6> [<https://perma.cc/59E5-4JZ5>].

222. Haberman & Schmidt, *supra* note 220.

223. *Id.*

224. *US Pardons Blackwater Guards: An ‘Affront to Justice’ – UN Experts*, UN NEWS (Dec. 30, 2020), <http://news.un.org/en/story/2020/12/1081152> [<https://perma.cc/29FZ-VSQN>] (quoting Jelena Aparac, Chair-Rapporteur of the Working Group on the Use of Mercenaries).

225. See Pamela Brown, Paul LeBlanc, Katelyn Polantz & Kevin Liptak, *Trump Issues 26 New Pardons, Including for Stone, Manafort and Charles Kushner*, CNN (Dec. 23, 2020, 9:12 PM), <http://www.cnn.com/2020/12/23/politics/trump-pardons-stone-manafort-kushner/index.html> [<https://perma.cc/2FZS-XF6K>].

226. Abby Johnston & Leila Miller, *The Mueller Investigation, Explained*, PBS: FRONTLINE (Mar. 25, 2019), <http://www.pbs.org/wgbh/frontline/article/the-mueller-investigation-explained-2/> [<https://perma.cc/4L4D-KSCR>].

227. *Id.*

produced indictments, convictions, or guilty pleas for thirty-four people and three companies.²²⁸

President Trump pardoned five individuals for convictions related to Special Counsel Robert Mueller's Russia probe. George Papadopolous, a former 2016 campaign aide who pled guilty to lying to investigators during Mueller's Russia probe, was the first pardon recipient.²²⁹ He was joined by Alex van der Zwaan, a Dutch lawyer who pled guilty to lying to Mueller's investigators and who was later deported to Europe after serving the majority of his thirty-day sentence.²³⁰ The third recipient was President Trump's former 2016 campaign manager, Paul Manafort, who received a seven-and-a-half-year prison sentence for tax and banking crimes, conspiracy, and obstruction of justice.²³¹ Roger Stone, a "longtime friend" of President Trump convicted for lying to Congress "to protect the President" received the fourth pardon.²³² President Trump issued a fifth and final pardon related to Mueller's probe to former national security advisor Michael Flynn, who pled guilty to lying about conversations with a Russian diplomat.²³³ Together, President Trump's full pardons of these five individuals served as a "reward . . . for lying to protect the President or to thwart his foes."²³⁴

Perhaps most controversially, President Trump asserted in 2018 that he had the ability to self-pardon, stating on Twitter: "As has been stated by numerous legal scholars, I have the absolute right to PARDON myself"²³⁵ Despite President Trump's claim, there does not seem to be a clear consensus among legal scholars on the subject of self-pardons.²³⁶ One scholar stated that the merciful nature of pardons may create "an implicit bar against a self-pardon,"²³⁷ while another suggested that a self-pardon would be a violation of the president's oath to faithfully execute the duties of office.²³⁸ Those

228. Ryan Teague Beckwith, *Here Are All the Indictments, Guilty Pleas and Convictions from Robert Mueller's Investigation*, TIME (Mar. 22, 2019, 6:38 PM), <http://time.com/5556331/mueller-investigation-indictments-guilty-pleas/> [<https://perma.cc/CE4D-BUXM>].

229. Kelly et al., *supra* note 218.

230. *Id.*

231. *Id.*

232. *Id.*

233. See Charlie Savage, *Trump Pardons Michael Flynn, Ending Case His Justice Dept. Sought to Shut Down*, N.Y. TIMES (Dec. 8, 2020), <http://www.nytimes.com/2020/11/25/us/politics/michael-flynn-pardon.html> [<https://perma.cc/E75A-XTSW>].

234. Katelyn Polantz, *Trump's Been Playing the Pardon Long Game His Entire Presidency*, CNN (Dec. 24, 2020, 11:56 AM), <http://www.cnn.com/2020/12/24/politics/trump-mueller-pardons/index.html> [<https://perma.cc/D2QJ-MH7T>].

235. Caroline Kenny, *Trump: 'I have the Absolute Right to Pardon Myself'*, CNN (June 4, 2018, 11:32 AM), <http://www.cnn.com/2018/06/04/politics/donald-trump-pardon-tweet/index.html> [<https://perma.cc/UGS8-WQVL>].

236. Philip Ewing & Scott Neuman, *Trump: I Have 'Absolute' Power To Pardon Myself, But Have Done Nothing Wrong*, NPR (June 4, 2018, 3:03 AM), <http://www.npr.org/sections/thetwo-way/2018/06/04/616724965/giuliani-president-trump-has-constitutional-authority-to-pardon-himself> [<https://perma.cc/Z8YP-AX4D>].

237. Tom McCarthy, *Can Trump Actually Pardon Himself? Experts Weigh In*, GUARDIAN (June 4, 2018, 1:12 PM), <http://www.theguardian.com/us-news/2018/jun/04/is-trump-correct-that-he-can-pardon-himself-experts-weigh-in> [<https://perma.cc/KD6D-CMJZ>] (quoting Professor Keith Whittington).

238. John Wagner, *Trump Says He Has 'Absolute Right' To Pardon Himself of Federal Crimes But Denies Any Wrongdoing*, WASH. POST (June 4, 2018, 1:40 PM), <http://www.washingtonpost.com/politics/>

who agree with President Trump note how the Constitution only limits the pardon authority for “Cases of Impeachment,”²³⁹ meaning the language of the text ought to be interpreted as granting an unlimited scope to the pardon authority under any other circumstance.²⁴⁰ Others suggest, however, that this interpretation is incorrect, as self-pardons were never addressed by the Framers of the Constitution, nor have they ever been addressed legally.²⁴¹

Indeed, no president has ever attempted a self-pardon, nor has any court tested the validity of a self-pardon.²⁴² During the presidency of Richard Nixon, the Department of Justice issued a memo proclaiming the president could not pardon himself under “the fundamental rule that no one may be a judge in his own case.”²⁴³ President Trump’s legal counsel, Rudy Giuliani, declared that a self-pardon would be “unthinkable” and likely yield significant political repercussions, but refrained from saying President Trump would be unable to pardon himself.²⁴⁴ One poll suggested that a majority of registered voters disagreed with President Trump, with fifty-eight percent of participants indicating that they believed President Trump did not have the authority to self-pardon and only twenty-one percent of participants indicating that they believed President Trump did possess this authority.²⁴⁵

Notably, President Trump did not issue pardons to his children or himself, yielding to warnings from legal advisors that such pardons “would place him in a legally perilous position” and leave him “vulnerable to reprisals.”²⁴⁶ President Trump’s advisors also dissuaded him from issuing pardons to Republican lawmakers potentially involved in an insurrection at the U.S. Capitol,²⁴⁷ as well as to the insurrectionists themselves, who were supporters of President Trump.²⁴⁸

trump-says-he-has-absolute-right-to-pardon-himself-of-federal-crimes-but-denies-any-wrongdoing/2018/06/04/3d78348c-67dd-11e8-bea7-c8eb28bc52b1_story.html [https://perma.cc/N2B3-KHKV] (quoting Professor Ethan Leib).

239. See U.S. CONST. art. II, § 2, cl. 1.

240. Garrett Epps, *Can Trump Pardon Himself?*, ATLANTIC (Dec. 17, 2018), <http://www.theatlantic.com/ideas/archive/2018/12/can-trump-pardon-himself/578074/> [https://perma.cc/4CHC-ZX64]. Following this logic, a president would be able to self-pardon in any circumstance, *except* in the case of an impeachment. Wagner, *supra* note 238.

241. Epps, *supra* note 240.

242. Ewing & Neuman, *supra* note 236.

243. Epps, *supra* note 240.

244. Ewing & Neuman, *supra* note 236.

245. Abigail Simon, *President Trump Says He Can Pardon Himself. Most Voters Disagree*, TIME (June 13, 2018, 12:40 PM), <http://time.com/5311182/donald-trump-self-pardon-poll/> [https://perma.cc/HA5N-U5CD].

246. Kaitlan Collins, Kevin Liptak & Pamela Brown, *Trump Talked Out of Pardoning His Kids and Republican Lawmakers*, CNN (Jan. 19, 2021, 7:12 PM), <http://www.cnn.com/2021/01/19/politics/trump-self-pardon-warning/index.html> [https://perma.cc/5EFF-D6C7].

247. *Id.*

248. See Jake Bleiberg & Jim Mustian, *Capital Rioters Hold Out Long-Shot Hope for a Trump Pardon*, AP (Jan. 19, 2021), <http://apnews.com/article/joe-biden-donald-trump-capitol-siege-riots-32a212d3ac899905be744632d236862c> [https://perma.cc/G92Y-PX8C].

On his final day in office, President Trump granted seventy-three pardons and commuted seventy sentences.²⁴⁹ Recipients again included President Trump's political allies, like former chief strategist Steve Bannon, who was under indictment for allegedly misusing money raised to fund a United States-Mexico border wall, and top 2016 campaign fundraiser Elliott Broidy, who pleaded guilty in 2020 to conspiring to violate foreign lobbying laws.²⁵⁰

E. The Fourth Circuit's Decision in United States v. Surratt

A circuit split has developed in recent years between the Fourth and Sixth Circuits concerning the question whether the president's exercise of his pardon or commutation authority creates a new executive judgment that fully replaces the original judicial judgment. The Fourth Circuit first addressed this question in a 2017 case, *United States v. Surratt*, after the appellant asked it to address the impact of a commutation on the appellant's sentence.²⁵¹ In an order only three sentences long, the Fourth Circuit dismissed the appeal, finding it to be moot.²⁵²

The appellant, Raymond Surratt, Jr., was indicted in 2004 and charged with, among other things, participation in a conspiracy lasting more than three years to possess with intent to distribute more than fifty grams of crack cocaine in North Carolina.²⁵³ In the district court, evidence against Surratt was strong, leading him to enter a guilty plea to the conspiracy pursuant to a written agreement, which specified that "Surratt was aware that his sentence would be a mandatory term of life imprisonment unless reduced for substantial assistance."²⁵⁴ As a result of this agreement, Surratt was released so he could cooperate with law enforcement, but was warned that he would face life imprisonment if he failed to abide by the conditions of his release.²⁵⁵ Upon release, Surratt did little to cooperate, "engag[ing] in activity consistent with drug trafficking and associat[ing] with known drug dealers."²⁵⁶ Surratt's bond was subsequently revoked and he later received a mandatory life sentence due to a "combination of serious drug trafficking and [his] recidivist criminal history."²⁵⁷

Although the district court judge, prosecution, and defense agreed the sentence was overly punitive, the circuit court judge nonetheless said he had no choice but to impose a mandatory life sentence due to Surratt's previous drug convictions.²⁵⁸ On January 19,

249. Ryan Lucas & Ayesha Rascoe, *Trump Pardons Steve Bannon, Lil Wayne in Final Clemency Flurry*, NPR (Jan. 20, 2021, 1:18 AM), <http://www.npr.org/2021/01/20/934139723/trump-pardons-steve-bannon-lil-wayne-in-final-clemency-flurry> [https://perma.cc/3KP4-JXNK].

250. Maggie Haberman, Kenneth P. Vogel, Eric Lipton & Michael S. Schmidt, *With Hours Left in Office, Trump Grants Clemency to Bannon and Other Allies*, N.Y. TIMES (Jan. 20, 2021), <http://www.nytimes.com/2021/01/20/us/politics/trump-pardons.html> [https://perma.cc/9XK4-RGPD].

251. *United States v. Surratt*, 855 F. 3d 218, 219 (4th Cir. 2017).

252. *See id.*

253. *Surratt v. United States*, No. 3:04-CR-250-19, 2014 WL 2013328, at *1 (W.D.N.C. May 16, 2014), *aff'd*, 797 F.3d 240 (4th Cir. 2015).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at *1–2.

258. Marimow, *supra* note 18.

2017, more than ten years after receiving his life sentence, Raymond Surratt, Jr. received a call from one of his attorneys, informing him that he was to be granted early release as the recipient of one of the record number of commutations issued by President Obama during his last full day in office.²⁵⁹ President Obama's order commuted Surratt's total sentence to a term of two hundred months' imprisonment, conditioned upon enrollment in a residential drug treatment program.²⁶⁰ This left Surratt with fewer than three years remaining on his sentence.²⁶¹

However, only six years after Surratt's conviction, the Fourth Circuit changed how previous state convictions are factored into a judge's sentencing calculations.²⁶² Under the new rules, Surratt's prior convictions would not have triggered the mandatory life sentence.²⁶³ Instead, he would have faced a mandatory minimum penalty of ten years, which would have made him eligible for immediate release even before President Obama's commutation of his sentence.²⁶⁴

Nonetheless, the Fourth Circuit dismissed Surratt's appeal, which asked the court to address the impact of a commutation on Surratt's sentence, as moot.²⁶⁵ Circuit Judge Wilkinson, concurring with the judgment, commented that the presidential commutation provided Surratt the relief he sought.²⁶⁶ He further asserted that there was a distinction between a judicially imposed sentence and a presidentially commuted sentence.²⁶⁷ In Judge Wilkinson's view, "[t]he President's commutation order simply closes the judicial door."²⁶⁸ He posited that the court was essentially powerless to react because it possessed no mechanism to alter a pardon legitimately granted by the president.²⁶⁹ Because the pardon was a lawful act made by the executive branch, the court was thus unable to "supersede a presidential pardon or commutation" with its own contravening order.²⁷⁰ Moreover, Surratt's initial sentence "was indisputably lawful when entered," even though its reasonableness has since been disputed.²⁷¹ But, in Judge Wilkinson's estimation, "[t]he President had every right to calibrate [Surratt's] commutation with these considerations in mind, bringing this saga to an end, both merciful and firm."²⁷²

Circuit Judge Wynn dissented from the dismissal of Surratt's appeal, decrying it as "if not an outright injustice, at least an abandonment of fairness."²⁷³ Judge Wynn disagreed with Wilkinson's assessment of Surratt's original sentence, finding the statute

259. *Id.* Many of these commutations concerned inmates like Surratt who had been sentenced under severe mandatory minimum laws passed in the 1980s and 1990s. *Id.*

260. *Commutations Granted by President Barack Obama (2009-2017)*, *supra* note 12.

261. Marimow, *supra* note 18.

262. *Id.*

263. *Id.*

264. *Id.*

265. *See United States v. Surratt*, 855 F.3d 218, 219 (4th Cir. 2017).

266. *Id.* (Wilkinson, J., concurring).

267. *Id.*

268. *Id.*

269. *Id.* at 219–20.

270. *Id.*

271. *Id.* at 220.

272. *Id.*

273. *Id.* (Wynn, J., dissenting).

that subjected Surratt to a mandatory life sentence to be incorrectly construed, as “Congress had established a far shorter mandatory minimum.”²⁷⁴ Surratt, with the government’s support, subsequently sought relief on the grounds that his sentence “constituted a fundamental defect of constitutional dimension,” which ultimately led to his appeal remaining unresolved for years, all while he remained incarcerated pursuant to the life sentence.²⁷⁵

Judge Wynn explained that had Surratt’s original sentence been vacated and his case remanded for resentencing, he “would likely be released because his time-served exceeds the upper end of his now-applicable Guidelines range.”²⁷⁶ Similarly, Judge Wynn stated it is also undisputed that the effect of the presidential commutation is that Surratt will remain in prison for several more years.²⁷⁷ Consequently, the “disposition of [Surratt’s] appeal will likely determine whether [he] remains in prison or is released,” making his action not moot.²⁷⁸

Circuit Judge Wynn additionally rebuked Judge Wilkinson’s notion of the “judicial door” being closed, finding no support for this idea in neither the Constitution nor case law.²⁷⁹ The president “has no authority to impose a sentence on any citizen,” but only the authority to “pardon or commute an existing judicial sentence.”²⁸⁰ Judge Wynn argued that “any part of that judicial sentence that remains after commutation remains a sentence imposed by the judiciary, not the executive branch of the government.”²⁸¹ There is no “newly created executive sentence,” as Judge Wilkinson argued.²⁸²

In commuting a sentence, the executive branch has “superimposed its mind” upon the original judgment of the court, but the sentence still remains the judgment of the court, separate from the executive branch’s input.²⁸³ A commutation does not annul a sentence of the court but instead affirms it with a modification.²⁸⁴ Accordingly, Judge Wynn declared that Surratt’s sentence “remain[ed] a judicial sentence, not a newly created executive sentence,” thereby disagreeing his case was moot.²⁸⁵ Nonetheless, because the Supreme Court denied certiorari in his case, Surratt was set to remain imprisoned until his scheduled release in 2020.²⁸⁶

274. *Id.*

275. *Id.* at 220–21.

276. *Id.* at 221.

277. *Id.*

278. *Id.* (emphasis omitted). In *Chafin v. Chafin*, the Supreme Court explained the standard for mootness, holding: “As long as the parties have a concrete interest, however small, in the outcome of litigation, the case is not moot.” 568 U.S. 165, 172 (2013) (quoting *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 307–08 (2012)).

279. *Surratt*, 855 F.3d at 221 (Wynn, J., dissenting).

280. *Id.* (emphasis omitted).

281. *Id.*

282. *Id.*

283. *Duehay v. Thompson*, 223 F. 305, 307–08 (9th Cir. 1915).

284. *Ex parte Collins*, 6 S.W. 345, 346 (Mo. 1887).

285. *Surratt*, 855 F.3d at 233.

286. *See id.* at 221. As of this Comment’s publication date, it is unclear whether Surratt was released.

F. *The Sixth Circuit's Decision in Dennis v. Terris*

In a 2019 case, *Dennis v. Terris*, the Sixth Circuit also addressed the question of whether the president's exercise of his pardon or commutation authority created a new executive judgment that fully replaces the original judicial judgment.²⁸⁷ The Sixth Circuit arrived at a decision opposite that of the Fourth Circuit, finding that a commutation does not create an executive sentence in full; it merely limits the execution of a judicial sentence.²⁸⁸ In doing so, the Sixth Circuit overturned the district court's holding that the petition was moot on the ground that the court "had no authority to question the commuted sentence," but denied the petition instead because of lack of merit.²⁸⁹

Quincy Dennis was convicted in 1997 for committing a string of drug offenses: attempting to distribute cocaine base, possessing cocaine base with intent to distribute, and possessing cocaine with intent to distribute.²⁹⁰ Because two prior drug convictions required the government to seek a sentencing enhancement, Dennis received a mandatory life sentence.²⁹¹ In 2017, President Obama commuted Dennis's total sentence to a term of 360 months' imprisonment, conditioned upon enrollment in a residential drug treatment program, and remitted the unpaid balance of a thirty thousand dollar fine.²⁹²

With a decade still left on his sentence, Dennis filed a petition for a writ of habeas corpus, arguing that he should have originally faced only a twenty-year mandatory sentence.²⁹³ He maintained that one of the prior convictions should not have counted as a felony under the sentencing enhancement.²⁹⁴ If true, the conviction would have resulted in a twenty-year mandatory minimum sentence instead of the mandatory life sentence that was ultimately imposed.²⁹⁵

The district court held that it "had no authority to alter the commuted sentence and that Dennis now serve[d] a commuted executive sentence, not the original judicial sentence."²⁹⁶ On appeal, Circuit Judge Sutton, writing for the majority, framed the case around the interaction of the executive branch's power to pardon with a limitation on the judicial branch's power to resolve only live cases or controversies.²⁹⁷ Judge Sutton conceded that the pardon power "includes the authority to commute sentences in whole or in part," but also pointed to Article III of the Constitution to illustrate that a "live cause" is needed for a court to exercise jurisdiction over a matter and thereby "give a remedy to the winner."²⁹⁸

287. See *Dennis v. Terris*, 927 F.3d 955, 957 (6th Cir. 2019).

288. *Id.* at 960–61.

289. *Id.* at 957.

290. *Id.*

291. *Id.*

292. *Commutations Granted by President Barack Obama (2009-2017)*, *supra* note 12.

293. *Dennis*, 927 F.3d at 957.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 957–58. The language of Article III specifically constrains the judicial power "to all Cases ... arising under this Constitution" and "to Controversies to which the United States shall be a Party." U.S. CONST. art. III, § 2, cl. 1.

Quoting Justice Sutherland's opinion in *United States v. Benz*,²⁹⁹ Judge Sutton asserted that "[t]he judicial power and the executive power over sentences are readily distinguishable."³⁰⁰ In short, "[t]o render [a] judgment is a judicial function," while "[t]o carry the judgment into effect is an executive function."³⁰¹ He explained that a recipient of a presidential commutation is thus still bound by a judicial sentence.³⁰² The commutation simply switches a greater sentence for a lesser one.³⁰³ Judge Sutton bolstered the court's position by relying on the existence of conditional commutations.³⁰⁴ If a president were to commute a life sentence to a shorter term on the condition that the prisoner maintain good behavior, the prisoner would still be subject to life imprisonment if he were to violate the condition and undo the commutation.³⁰⁵ The judgment "remains in place, ready to kick into full effect if the recipient [of a commutation] violates the conditional cap."³⁰⁶

In effect, Dennis was entitled to challenge his original sentence because, if he was successful, the district court would retain the ability to sentence him to a term shorter than his commuted sentence.³⁰⁷ Because there is a possibility for a reduced sentence, Dennis has a live cause that grants the court jurisdiction and prevents the dispute from becoming moot.³⁰⁸ While it is true that courts may not alter a presidential commutation, except in cases where the commutation itself violates the Constitution, the altered sentence does not become "an executive sentence in full" completely free of judicial scrutiny with respect to any mistakes the court may have previously made.³⁰⁹ Dennis "still serves a judicial life sentence, the execution of which the President's act of grace has softened."³¹⁰ The original judicial sentence is still intact, which Sutton reasoned grants the court the authority "to entertain a collateral attack on that sentence – and even act on it if it lowers the sentence . . . or . . . eliminates the conviction altogether."³¹¹

III. DISCUSSION

The historical and modern uses of the pardon and commutation authority illustrate an increasing retreat from George Washington's original concerns of public interest and mercy.³¹² Controversial uses of the pardon and commutation authority by Presidents

299. 282 U.S. 304 (1931).

300. *Dennis*, 927 F.3d at 958 (quoting *Benz*, 282 U.S. at 311).

301. *Id.* (quoting *Benz*, 282 U.S. at 311).

302. *See id.* 358–60; *see also* *Duehay v. Thompson*, 223 F. 305, 307–08 (9th Cir. 1915).

303. *Dennis*, 927 F.3d at 958.

304. *See id.*

305. *Id.*

306. *Id.*

307. *Id.* at 959.

308. *Id.*

309. *Id.*

310. *Id.* at 960 (emphasis omitted).

311. *Id.*

312. *See* Crouch, *Power to Commute*, *supra* note 128, at 694.

Gerald Ford,³¹³ George H.W. Bush,³¹⁴ Bill Clinton,³¹⁵ George W. Bush,³¹⁶ and Donald Trump³¹⁷ reflect concerns of self-interest³¹⁸ and expose the dangers inherent in the unchecked use of the pardon and commutation authority. Moreover, the split between the Fourth and Sixth Circuits in resolving whether the president's exercise of his pardon or commutation authority creates a new executive judgment that fully replaces the original judicial judgment highlights another insidious implication of the pardon and commutation authority in that it may become an aggravation of punishment, even in circumstances when it is used with benevolent motivations.

This Section proceeds in two parts. Part III.A uses the separation of powers doctrine to resolve the split between the Fourth and Sixth Circuits in favor of the Sixth Circuit's rationale in *Dennis*. It then examines the insidious implications of the ideas that initially sparked the circuit split. Lastly, Part III.B discusses how historical and modern uses of the pardon and commutation authority have further exposed the dangers inherent in the authority.

A. *Resolving the Circuit Split and Examining its Implications*

The Fourth and Sixth Circuits were each asked to resolve the question whether the president's exercise of his pardon or commutation authority creates a new executive judgment that fully replaces the original judicial judgment.³¹⁹ In *Surratt*, the Fourth Circuit delivered an affirmative answer, concluding that there was a distinction between executive and judicial judgments.³²⁰ In the Fourth Circuit's view, the executive judgment, imposed by means of a presidential pardon or commutation, closed the "judicial door," thereby rendering the court unable to make any alterations to their original judicial judgment.³²¹ In *Dennis*, the Sixth Circuit arrived at the opposite conclusion, finding that the president's exercise of his pardon or commutation authority does not create a new executive judgment, but instead limits the execution of the original judicial judgment.³²²

The Constitution separates governmental powers in the United States by allocating executive powers to the president³²³ and judicial powers to the courts.³²⁴ By the very

313. See *supra* notes 102–10 and accompanying text for a summary of President Ford's pardon of former President Richard Nixon.

314. See *supra* notes 111–22 and accompanying text for a summary of President Bush's pardon of six actors involved in the Iran-Contra Affair.

315. See *supra* notes 123–27, 130–31 and accompanying text for a summary of President Clinton's pardon of convicted oil businessman Marc Rich and commutation of sixteen members of FALN.

316. See *supra* notes 132–35 and accompanying text for a summary of President Bush's commutation of former White House Chief of Staff Scooter Libby.

317. See *supra* Part II.D.2 for a discussion of President Trump's many uses of the pardon authority.

318. See Crouch, *Power to Commute*, *supra* note 128, at 694.

319. See *Dennis v. Terris*, 927 F.3d 955, 957 (6th Cir. 2019); *United States v. Surratt*, 855 F.3d 218, 219 (4th Cir. 2017).

320. *Surratt*, 855 F.3d at 219 (Wilkinson, J., concurring).

321. *Id.* at 219–20.

322. *Dennis*, 927 F.3d at 957–60.

323. U.S. CONST. art. II, § 1, cl. 1.

324. *Id.* art. III, § 1, cl. 1.

language of the Constitution itself, the president has no power to create a judicial judgment.³²⁵ The invention of a separate executive judgment is similarly unsupported by the language of the Constitution. A judgment is encompassed within judicial powers, as it is a “decision of a court” adjudicating the rights of parties in a legal action.³²⁶ Judgments result in sentencing, an aspect also considered a judicial function.³²⁷ The Constitution does not authorize any distinction between an executive judgment and a judicial judgment.

This distinction likely instead arose from the increased deference given to executive power, which many believe now far exceeds the scope originally contemplated by the Constitution.³²⁸ This increased deference is dangerous, as it defeats the system of checks and balances that was created by the separation of powers.³²⁹ The legislative branch of government should be allowed to decide what behavior should be considered criminal and what range of sentences are appropriate to impose on individuals convicted of these defined criminal behaviors. In turn, the judicial branch should be able to render judgment on those individuals and impose sentences that accord with the legislative branch’s intent. Only at this point should the executive branch be permitted to relieve an individual from the sentence imposed through an “act of grace” enacted through their pardon and commutation authority.³³⁰ The pardon and commutation authority should only be used when there are legitimate concerns of mercy and public interest.³³¹

However, as the Fourth Circuit’s decision in *Surratt* demonstrates, this framework has not always been upheld. By viewing the commutation of Surratt’s sentence as a separate executive sentence, the Fourth Circuit felt powerless to intervene.³³² This viewpoint unnecessarily locks out a legitimate judiciary body from acting within the scope of its constitutional power to impose sentences. Moreover, this viewpoint espouses an “encroachment” of the executive branch onto the judicial branch, which the Constitution is designed to prevent through the separation of governmental powers.³³³ Through this encroachment, the executive judgment imposed by means of a commutation can inadvertently become an aggravation of punishment, instead of an act of mercy.³³⁴ By giving increased deference to the executive, the Fourth Circuit’s decision highlights an insidious implication of how the pardon and commutation authority can operate.

Raymond Surratt, Jr. and Quincy Dennis are perfect examples of how even a benign use of the commutation authority can have negative unintended consequences by becoming an aggravation of punishment. President Obama’s use of the commutation

325. *See id.* art. II.

326. *Judgment*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/judgment-law> [<https://perma.cc/D3SR-LB2B>] (last visited Apr. 1, 2021).

327. *See* Irving R. Kaufman, *Sentencing: The Judge’s Problem*, ATLANTIC MONTHLY, Jan. 1960, <http://www.theatlantic.com/past/docs/unbound/flashbks/death/kaufman.htm> [<https://perma.cc/C7V3-GB77>].

328. *See* Stern, *supra* note 30, at 161.

329. *See* Beermann, *supra* note 35, at 472.

330. *United States v. Wilson*, 32 U.S. 150, 160–61 (1833).

331. Crouch, *Presidential Misuse*, *supra* note 16, at 724–25.

332. *See United States v. Surratt*, 855 F.3d 218, 219–20 (4th Cir. 2017) (Wilkinson, J., concurring).

333. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam).

334. *See supra* notes 91–93 and accompanying text for a discussion of George Washington’s interpretation of the pardon authority.

authority, while subject to some criticism,³³⁵ sought to give people “a second chance”³³⁶ and was thus undoubtedly geared more toward public interest and mercy than his immediate predecessors.³³⁷

Both Surratt and Dennis were recipients of commutations aimed at reducing disproportionate sentences that resulted from overly punitive federal drug trafficking laws.³³⁸ Surratt was convicted of a crime, sentenced on the basis of then-current legislation, and subsequently received a commutation to correct the perceived harshness of that sentence. This accords with the Constitutional framework of the separation of powers. Nonetheless, the Fourth Circuit’s deference to the executive precluded the court from modifying Surratt’s judicially imposed sentence to release him earlier than President Obama’s commutation would have. Because the Fourth Circuit refused to act, Surratt became the victim of an act of mercy that ultimately aggravated his punishment.

The Sixth Circuit’s rationale upholds the system of checks and balances envisioned by the Constitution. By finding judicial power and executive power over sentences to be “readily distinguishable,”³³⁹ the Sixth Circuit opted to keep the “judicial door” open so that it could correct any judicial mistakes that had been previously made. The Sixth Circuit found Dennis was entitled to challenge his original sentence because doing so would afford him the opportunity to receive a corrected sentence even shorter than the presidentially commuted sentence.³⁴⁰ The Sixth Circuit’s rationale confines the nature of the challenge to purely judicial matters so as to prevent any encroachment on the pardon and commutation authority possessed by the executive branch.

Analyzing the cases from both jurisdictions highlights the insidious implications of the Fourth Circuit’s rationale and the benefits of the Sixth Circuit’s rationale. If Dennis’s case was heard in the Fourth Circuit, he would have been completely denied the opportunity to be heard under the idea of the “judicial door” being closed. Given that Dennis lost his case on the merits in the Sixth Circuit,³⁴¹ Dennis would have been denied relief in both the Fourth and Sixth Circuits. The procedure used by the Fourth Circuit to deny Dennis relief, however, would still be unfair because he would not have been allowed to argue the merits of his case.

Conversely, Surratt likely would have succeeded on the merits of his case had it been heard by the Sixth Circuit. The Sixth Circuit’s rationale allows the judiciary to correct their own mistakes, which would have allowed it to grant a sentence shorter than that required by President Obama’s commutation. This correction would still adhere to the principles of public interest and mercy embodied within the commutation.

335. See *supra* notes 160–67 and accompanying text for a summary of criticisms directed at President Obama’s last-minute use of the commutation authority and his commutation of former Army intelligence analyst Chelsea Manning.

336. *A Nation of Second Chances*, *supra* note 148.

337. See *supra* notes 146–52 and accompanying text for a discussion of President Obama’s record on commutations and notes 101–27 for a discussion of President Obama’s predecessors’ self-interested uses of the pardon and commutation authority.

338. See Larkin, Jr., *supra* note 155, at 148.

339. *Dennis v. Terris*, 927 F.3d 955, 958 (6th Cir. 2019) (quoting *United States v. Benz*, 282 U.S. 304, 311 (1931)).

340. *Id.* at 959.

341. *Id.* at 961.

If the Supreme Court grants certiorari to Dennis to examine the circuit split on the question whether the president's exercise of his pardon or commutation authority creates a new executive judgment that fully replaces the original judicial judgment, it should adhere to the Sixth Circuit's rationale. The Sixth Circuit's rationale preserves the separation of powers as envisioned by the Constitution without unnecessarily ceding control over sentencing and other judiciary matters to the executive branch. Moreover, this would allow for pardons and commutations to actually operate in the public interest and mercy, instead of allowing them to become incidental aggravated punishments.

B. The Dangers Inherent in the Pardon and Commutation Authority

The unintended negative side effect of incidentally aggravating punishments, as shown in the split between the Fourth and Sixth Circuits, is one subtle but significant way in which the pardon and commutation authority can be dangerous. President George Washington used the authority for the public interest and in the interest of mercy,³⁴² but history has provided several examples of how exercises of the pardon and commutation authority have run afoul of the authority's original intended purposes.

Many of these uses were controversial at the time and seemingly motivated more out of concerns of self-interest than anything else.³⁴³ President Gerald Ford's pardon of former President Richard Nixon is one of the most famous examples of a president's use of the pardon or commutation authority that resulted in an erosion of public trust in the executive branch.³⁴⁴ President George H.W. Bush's pardons of six actors in the Iran-Contra Affair was not only done in contravention of the usual processes³⁴⁵ but was also clearly motivated by President Bush's personal interest in avoiding direct involvement in proceedings related to the affair.³⁴⁶ President Bill Clinton's pardon of Marc Rich was similarly motivated out of President Clinton's personal interests,³⁴⁷ despite his claims to the contrary.³⁴⁸ President Clinton's commutation of sixteen members of FALN was publicly derided,³⁴⁹ as was President George W. Bush's commutation of former Chief of Staff Scooter Libby.³⁵⁰

President Donald Trump, despite issuing a relatively limited number of pardons and commutations during his only term,³⁵¹ ignited controversy that arguably exceeds that of any other president in history. Many critics of President Trump have classified his use of the pardon and commutation authority as politically self-serving,³⁵² a claim only strengthened by pardons of popular conservative figures like Joe Arpaio, Dinesh

342. Crouch, *Presidential Misuse*, *supra* note 16, at 724–25.

343. Palacios, *supra* note 101, at 222.

344. See Crouch, *Presidential Misuse*, *supra* note 16, at 728–29.

345. *Id.* at 732.

346. *Id.* at 730.

347. Messing, *supra* note 127, at 734.

348. See Clinton, *supra* note 123.

349. Crouch, *Power to Commute*, *supra* note 128, at 691 (quoting GENOVESE & ALMQUIST, *supra* note 130, at 84).

350. *Id.* at 693–94.

351. See Clemency Statistics, *supra* note 141.

352. See, e.g., Blake, *Very Political Pattern*, *supra* note 173.

D'Souza, and Conrad Black.³⁵³ His more recent pardons have been derided as a presidential endorsement of war crimes,³⁵⁴ while President Trump's suggestion that he had the authority to self-pardon³⁵⁵ was questioned by critics and the public alike.³⁵⁶

President Trump's continued pardons in the wake of his impeachment and subsequent acquittal suggested to some that he had become emboldened to issue more politically motivated and self-serving pardons.³⁵⁷ This notion was confirmed by President Trump's final round of pardons, largely issued to reward friends and allies for "lying to protect the President or to thwart his foes."³⁵⁸ One law professor summarized President Trump's treatment of clemency as exemplifying "the worst of both worlds" in how he ignored "most of the ordinary people who are deserving" and instead granted clemency to "those who were powerful, unrepentant, and proud of their criminal actions."³⁵⁹

Both historical and modern uses of the pardon and commutation authority reflect why the Framers of the Constitution envisioned a separation of powers. Many uses of the authority have been properly aimed in sight of the public interest and ideas of mercy, but the legislative and judicial branches have been rendered powerless to blunt other blatantly self-motivated uses of the pardon and commutation authority. President Trump's uses of the pardon and commutation authority leave the state of law in unprecedented and precarious territory. His attitudes and actions reflect a flagrant disregard for the Constitution, in which the clemency authority has effectively become his personal plaything, unrestrained by any other branches of government.

IV. CONCLUSION

The president's pardon and commutation authority, as originally used by President Washington, was to be motivated by concerns of mercy and public interest. Alarming, historical and modern uses of the authority largely suggest a trend that runs contrary to these original intended purposes. President Donald Trump's politically motivated and self-serving uses of the pardon and commutation authority demonstrate this trend and provide a stark example of how the separation of powers has tilted in favor of the executive.

Furthermore, even in circumstances where the authority is used with benevolent motivations, as under President Barack Obama, negative effects can still result. The Fourth Circuit's decision prevented the judiciary from acting within its constitutional power, allowing an executive judgment imposed by means of a commutation to inadvertently become an aggravation of punishment. An act of mercy should never become an aggravation of punishment. To prevent this, it is necessary to adhere to the

353. See *supra* notes 177–81, 187–94, and accompanying text for a discussion of these pardons.

354. See Rempfer, *supra* note 199.

355. Kenny, *supra* note 235.

356. See Epps, *supra* note 240; Simon, *supra* note 245.

357. See Ford, *supra* note 215.

358. See Polantz, *supra* note 234.

359. John Kruzel, *Trump's Pardons Harshly Criticized by Legal Experts*, HILL (Jan. 20, 2021, 8:51 PM), <http://thehill.com/regulation/court-battles/535147-trumps-pardons-harshly-criticized-by-legal-experts> [<https://perma.cc/TE3L-QRVC>] (quoting Professor Daniel Kobil).

separation of powers as envisioned by the Constitution and stop executive overreach into judicial matters. Failure to do so may yield other unintended insidious implications.