

## The Real Scandal of Stone's Commutation Isn't What You Think

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July 19, 2020

Donald Trump's commutation of Roger Stone prompted apoplectic reactions in all the usual places. This is a shame because nearly everyone going berserk over this case missed the most obvious implication of the president's mercy – including the president himself and the man who benefited from it.

One former federal prosecutor claimed bizarrely that showing mercy to Stone was somehow a Trump confession of Russian “collusion.” An Obama administration solicitor general advocated prosecuting Stone again, presumably during Joe Biden's presidency. A legal scholar writing for the anti-Trump website Lawfare called for amending the Constitution so presidents can no longer issue pardons. (All three of those alarmists are law school professors, by the way, which suggests yet another generation of

Trump's political opponents were no less measured. House Speaker Nancy Pelosi termed it “an act of staggering corruption.” Sen. Mitt Romney asserted, inaccurately, that the Stone commutation was “unprecedented.” Rep. Adam Schiff warned before it happened that clemency for Stone would show “contempt” for the rule of law. After it went down, he introduced constitutionally problematic legislation to restrict the president's clemency powers.

As always, Trump critics were given free rein in the media. NBC devoted a “Meet the Press” segment to the dubious idea that the Stone commutation would hurt the president politically in November. The Washington Post published a Robert Mueller op-ed decrying Trump's move. In a separate editorial, headlined “Unforgivable,” the Post termed the commutation “a betrayal of the office of the president.”

That's one way to view this case. Here's another: The Russia probe was launched by biased and politically active FBI officials demonstrably hostile to Trump's 2016 campaign. Agents obtained search warrants on information they knew to be false -- provided by a retired British spy on the Clinton campaign payroll. An inspector general found that these agents misled the courts, doctored records, and smeared innocent Americans.

In addition, Bob Mueller was named special prosecutor because of James Comey's machinations. Before Trump fired him as FBI director, Comey told Trump, “I don't do sneaky things, I *don't* leak, I *don't* do weasel moves,” even as he was doing all three. Mueller's investigative team was dominated by partisan lawyers who contributed to Democratic Party

candidates, and was led by the aggressive Andrew Weissmann, who has since emerged as a Biden campaign surrogate. But the Stone indictment Weissmann procured didn't bolster the Russia collusion story line, it eviscerated it. According to the indictment's narrative, Stone had no prior knowledge of Russian activity; and Trump officials were the last to find out. While that hardly absolves Stone from lying during the investigation, it does undermine the entire rationale for the probe. Stone was charged with a "process" crime.

Stone has been boasting about not "rolling over" on the president, which his critics see as an admission of guilt. But the evidence more closely comports with Stone's version: that prosecutors were so determined to get Trump they wanted Stone to lie. This is a serious accusation, but the grotesque pre-dawn arrest of Stone revealed a police state mentality underlying this prosecution. Instead of simply telling Stone, through his lawyer, to turn himself in, a squad of FBI agents in combat gear and night-vision goggles arrived in a half-dozen vehicles. Wearing tactical vests and brandishing heavy weapons, they banged on the door shouting, "FBI, open the door! FBI, warrant!" An obvious attempt to frighten and intimidate the defendant, it also ignored Justice Department guidelines.

With only a few exceptions, the media was untroubled by this circus: The White House Correspondents' Association recently gave CNN, which insisted it was not tipped off beforehand by a source, a prestigious award for filming the FBI's performance art.

At trial, Stone was convicted by a jury, not of his peers -- Stone lives in the swing state of Florida -- but of 12 Washingtonians, presumably all Democrats, including a liberal political activist attorney who served as jury forewoman. After the trial, it came to light that she had previously protested outside a Trump-owned hotel, repeatedly called the president a racist on social media, and expressed vitriolic contempt for Roger Stone himself. The Obama-appointed judge who presided over the trial was undisturbed by these troubling revelations. At times, it seemed that she could scarcely hide her own animus for the defendant.

So, to many people the scandal wasn't Roger Stone's commutation. It was his arrest, prosecution, and conviction. But even in this polarizing case, there is an opportunity for common ground whatever one's view of Stone, Trump, the Democrats, or the media. This potential area of mutual understanding was made implicit by the first sentence of the Washington Post's July 11 "Unforgiveable" editorial: "There are no doubt thousands of people who deserved a presidential commutation more than Roger Stone."

That observation, obviously accurate, is a point worth rallying around -- and altering.

### **High Time for Release**

It is a truism that Americans are the most incarcerated people, per capita, in the world. Reliable information is unavailable from China (No. 2), and Russia (No. 3) can't be trusted, but there is little reason to quibble. It's simply undeniable that the United States incarcerates people promiscuously and -- if the goal is rehabilitation or public safety-- keeps them locked up far too long.

At any given moment, some 2.2 million people are behind bars in this country. The rough breakdown is that 1.4 million are incarcerated in state and federal prisons, with 800,000 held in local jails, most of whom are awaiting trial or sentencing. The federal prison population is

actually declining from a decade ago, when it housed some 210,000 inmates. Yet, nearly 160,000 people are currently in the custody of U.S. Bureau of Prisons.

Roger Stone is not among them, but this is still way too many. That number includes thousands of elderly and infirm inmates, thousands of people convicted of drug offenses, thousands whose sentences were automatically enhanced by prior convictions, and thousands whose sentences were cruelly prolonged by the discredited “mandatory minimums” that federal judges abhor, but Congress is too craven to repeal.

Many organizations and individuals pushing for change have made this precise point over the past two decades. And they have had some victories. Until now, however, that success has been tempered by the exigencies of elective politics: Congress, presidents, governors, and parole boards tend to be paralyzed by a fear of paying a political price for the early parolee who commits a violent crime. But that was before the COVID-19 pandemic, before George Floyd’s appalling death galvanized political activists and traditionalists alike, and before Roger Stone’s case.

“Oddly enough, the controversy over this particular commutation presents opportunity,” attorney Holly Harris told me. “Thousands of people in federal prison are serving unfairly long sentences that don’t fit the crimes, and we urge the president to show America that his mercy extends to these individuals, and beyond the wealthy and well-connected.”

Harris is executive director of Justice Action Network, a Washington, D.C., nonprofit created in 2015 to pursue criminal justice reform. It joined forces with other groups, all of which make their arguments on the merits rather than political pressure or doling out campaign cash. Mainly, those arguments consist of presenting compelling human-interest stories that document the terrible toll draconian sentencing practices exert on families and marshalling evidence of the fiscal folly of mass incarceration.

These are neither liberal nor conservative issues. They are questions of common sense. Thirty years ago, a woman named Julie Stewart was contentedly serving as public affairs director at the right-of-center Cato Institute when her brother was given a five-year prison sentence – without possibility of parole – for growing marijuana. It was his first offense, but the trial judge’s hands were tied by congressionally imposed mandatory terms. So she formed Families Against Mandatory Minimums.

FAMM never completely succeeded in repealing mandatory minimums at the federal level, but it has helped enact sentencing reform at the state level while pushing for compassionate release of prisoners, reducing the disparity between crack and powder cocaine sentences and generally educating lawmakers and policy wonks about the cost of knee-jerk law and order policies. But this is a moment like no other. Americans have marched in a thousand cities and towns demanding more humane criminal justice policies, even as COVID-19 courses through prisons and jails. Here’s “a mandatory minimum” the government should consider: Except for those on Death Row, inmates should never die behind bars. This was a problem before the pandemic. Now it’s a crisis.

Last month, Marc Mauer, longtime executive director of The Sentencing Project, sent a bracing letter to the ranking Republican and Democratic members of the Senate Judiciary Committee pointing out that tens of thousands of inmates in this country have contracted the new

coronavirus but that the criminal justice system has been slow to protect them or give compassionate release to those who need it.

“It is this Committee’s obligation to ensure that the Department of Justice and the Bureau of Prisons do everything in their power to protect the lives of people incarcerated in federal facilities, which includes expediting releases and transfers of elderly and vulnerable people in their custody who do not present a credible threat to public safety during this health crisis,” Mauer wrote. “The potential consequence of failing to take significant action to reduce the spread of infection is staggering.”

Kara Gotsch, who directs federal advocacy work for the group, notes that the BOP’s own records show that 20% of its inmates are over 50, and her organization has been urging lawmakers and the Trump administration to immediately release them and others with underlying health conditions that make COVID-19 such a lethal threat.

“People over 50 have significantly lower rates of recidivism compared to the general prison population,” Gotsch said. “We call it aging out of crime and it applies to people regardless of their offense.”

Justice Department officials are aware of this dynamic. Attorney General William Barr, no softy on crime, wrote a memo on March 26 urging the BOP to identify medically at-risk prisoners in low or medium security facilities who could serve out their sentences at home without creating a risk to the public.

“Public safety is the No. 1 consideration,” Marc A. Levin of the Texas Public Policy Foundation, told me. “Nobody wants to release someone who’s going to commit a heinous crime, so you have to do risk assessments. But our approach is there are many individuals who are in prison too long and are no longer a danger to the public.”

Levin, I should point out, is not merely a Republican. He’s a Texas Republican. And the Texas Public Policy Foundation is a conservative organization. But the times, they are a-changin’. It’s just that they should be changin’ faster. Donald Trump himself showed how quickly a motivated president can issue a clemency order.

I asked Marc Levin if Trump should commute the sentence of thousands, or tens of thousands of federal inmates. He basically embraced the idea, with a couple of important caveats. For one, he pointed out that many of these people would require significant support systems including drug treatment, not to mention a safe place to live, and that the government should be prepared to spend the time and money to make such a program succeed. Second, regarding broad-based clemency, he favors an individualized executive branch review of the thousands of federal prisoners sentenced for drug offenses who would have qualified for a shorter sentence had the First Step Act signed last year by President Trump been in place at the time they were sentenced. “Of course, the president has the power to grant clemency to anyone,” Levin said, “but in terms of substantial numbers it is this population where I see the real opportunity.”

But this president hasn’t used his power of executive clemency very much: only 24 pardons in four years, many of them politically connected individuals. And Roger Stone was only the 11th person whose sentence he commuted. Kevin Ring, who took over the presidency of FAMM from Julie Stewart in 2017, is among those who thinks Trump could use that expansive authority to do a lot more good.

“I think grants of clemency like [the one given to Stone] wouldn’t stink so much,” Ring said, “if, for every friend of the president who got one, 1,000 regular people who were over-sentenced got one, too.”