

Donald Trump and the Clemency Process

I. Introduction

The Constitution confers on the president the “Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”¹ This power extends to all forms of clemency, including pardons (which forgive the crime and remove all federal civil disabilities resulting from the offense) and commutations (which eliminate or reduce the sentence for the crime).

The Office of the Pardon Attorney in the Justice Department has long played a major role in analyzing clemency petitions and recommending clemency grants to the president. Donald Trump circumvented the Pardon Attorney like no prior president, and instead relied on his own sources and judgment, and those of White House insiders, for clemency determinations. The extent to which he ignored the Pardon Attorney, however, has not been documented. That is our aim in this short essay. We examined all 238 of Trump’s acts of clemency to try to determine which ones were recommended by the Pardon Attorney.² The answer, we believe, is twenty-five, or 11%—a historic low.

The pardon attorney’s role began at the end of the Civil War, when Lincoln’s Attorney General, Edward Bates, established an Office of the Pardon Clerk to evaluate and make recommendations about clemency petitions in order “to control access to his notoriously merciful chief.”³ The contemporary successor to the original office, the Office of the Pardon Attorney, also evaluates and makes recommendations about clemency petitions. It is governed by Justice Department regulations and reports to the president through the deputy attorney general.

The regulations state that a pardon will be issued based on an applicant’s “good conduct for a substantial period of time after conviction and service of sentence.”⁴ They require a petitioner to wait at least five years after conviction or release date—if there is a prison sentence imposed—before filing an application for a pardon, though the Justice Department can waive this requirement.

The pardon attorney primarily considers five factors when evaluating pardon petitions: (1) “post-conviction conduct, character, and reputation”; (2) the “seriousness and relative recentness of the offense”; (3) “acceptance of responsibility, remorse, and atonement”; the “need for relief”; and (5) “official recommendations and reports.”⁵

Commutations operate a little differently. The pardon attorney generally accepts petitions for commutations only after the applicant has begun serving a sentence. When

determining whether to recommend a commutation, the pardon attorney primarily looks to the “disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner”—like cooperating with an investigation or prosecution.⁶ Demonstrated rehabilitation and the amount of time served by the petitioner, among other factors, can also influence the pardon attorney to recommend clemency.

The process for vetting a clemency petition for favorable consideration is a lengthy one that typically takes more than a year and often several years. The FBI has to investigate and write a report on the case. The U.S. Attorney in the district of conviction and the sentencing judge, and occasionally the assistant attorney general in charge of the Justice Department component responsible for the case, are consulted and they weigh in as well. “The views of the United States Attorney or Assistant Attorney General are given considerable weight in determining what recommendations the Department should make to the President,” according to the regulations.⁷ After receiving this input, the pardon attorney makes recommendations to the deputy attorney general. The petitions that the deputy approves are “presented for action to the President with a report and recommendation from the Department, and the substance of the recommendation by the United States Attorney or Assistant Attorney General is included in this report.”⁸ There are other layers of review.

The pardon attorney process faced significant criticism prior to the Trump presidency. The critics argued that the process took too long, was too complex, gave too much weight to the views of federal prosecutors (who generally dislike clemency grants), used unjust, over-demanding criteria, and resulted in too few clemency grants.⁹

President Obama sought to deal with some of these problems in his second term with a “clemency initiative” that encouraged nonviolent, low-level offenders to apply for commutations. The Pardon Attorney’s office worked with Clemency Project 2014—a nongovernmental clemency organization—to identify and recommend worthy candidates for commutation. Obama granted approximately 1,700 commutations through this initiative. But the Obama Administration’s Pardon Attorney from 2014–2016, Deborah Leff, criticized the administration for giving her office inadequate resources for the task and for guiding the office to ignore petitions for pardons and traditional commutations.¹⁰ And a subsequent Inspector General Report found



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Federal Sentencing Reporter, Vol. 33, No. 5, pp. 297–300, ISSN 1053-9867, electronic ISSN 1533-8363.
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that the Department, including the Pardon Attorney, did not effectively plan, implement, or manage the initiative.¹¹

In short, the pardon attorney process was not in great shape at the outset of the Trump administration.

II. Trump and the Pardon Attorney Process

The president is not bound by pardon attorney recommendations. He or she can ignore such recommendations and can issue pardons and commutations without them. Presidents before Trump issued clemency grants without recommendations from the Justice Department, or by circumventing the pardon attorney process in various ways. President Truman issued seven pardons at the end of his term without Justice Department input.¹² President Ford's 1975 pardon of Richard Nixon skirted the pardon attorney process, as did President Reagan's 1981 pardon of two FBI officials who had authorized illegal surveillance, and President George H. W. Bush's six Iran-Contra pardons.¹³ President Clinton skirted the pardon attorney process more aggressively, especially in the controversial pardons at the end of his second term.¹⁴

Trump's relationship to the Pardon Attorney turned the exceptional circumvention of the pardon attorney process into the rule. The *Washington Post* reported in February 2020 that White House advisers, led by Trump's son-in-law Jared Kushner, had taken "more direct control over pardons and commutations, with President Trump aiming to limit the role of the Justice Department in the clemency process."¹⁵ At the very end of the Trump presidency, the *Washington Post* reported that "rather than consult with the Justice Department's pardon attorney for recommendations, Trump has routinely subverted the process and largely favored political allies and those who are well-connected for clemency."¹⁶

While the general trend is clear, neither the White House nor the Pardon Attorney has revealed precisely how many of the 238 clemency grants were recommended by the Pardon Attorney's office. We sought to make progress on this issue by drawing various inferences primarily from two sources: the Justice Department's database that contains records of all pardon and commutation petitions filed since 1989,¹⁷ and the White House statements describing the grants.¹⁸ Based on a comprehensive assessment of all 238 clemency grants, we concluded that most likely, only twenty-five of the 238 were recommended by the Pardon Attorney. We used the following logic in reaching this conclusion.

The Trump White House made clear that eighteen of its 143 pardons and commutations announced in a White House statement on January 20, 2021 had the Pardon Attorney's support.¹⁹ We inferred that the rest (125) did not. Especially given the White House's four-year hostility to the pardon attorney process, there is no reason why the White House would mention the Pardon Attorney's support for some of the grants in this statement—something it did not do in prior pardon-related announcements—if any others were also recommended by the Pardon Attorney.²⁰ Among

the 125 who lacked the Pardon Attorney's support in this group were former Trump advisor Steve Bannon; former Republican National Committee finance chairman Elliott Broidy; and Ken Kurson, a close friend of Trump's son-in-law Jared Kushner.

We concluded that an additional forty-one grants announced before January 20, 2021, were not recommended by the Pardon Attorney because the grantees did not apply to the Justice Department for clemency and could not have been recommended by the Pardon Attorney.²¹ This category included some of Trump's most controversial clemency grants, including those issued to Trump's friend Roger Stone; his former campaign advisor, Paul Manafort; his former National Security Advisor, Michael Flynn; and his son-in-law's father, Charles Kushner.

In eighteen other cases, the person who received clemency at some point had a petition in the database, but the clemency grant did not appear to be based on that petition and thus almost certainly did not have Justice Department support.²² This could be so for one of four reasons, each of which was true of some grants by Trump. First, the person granted clemency might have had a petition that was "administratively closed" as a final action, and did not have a new active petition when receiving clemency.²³ Second, the person might have had a petition in the database that was marked "denied," and did not have a new active petition when the clemency was granted.²⁴ Third, the individual might have applied for only one form of clemency (a commutation or a pardon) and then received both a commutation and a pardon.²⁵ Fourth, the individual might receive partial clemency based on a pending petition, but then later be granted clemency again without a new petition.²⁶

CNN reported that five other grants were recommended by the Pardon Attorney.²⁷ These grants satisfy the pardon attorney criteria (as outlined above), and the docket numbers indicate that these petitions were submitted with sufficient time for the Pardon Attorney to review them and recommend clemency.

Based on the inferences thus far, about which we are fairly certain, twenty-three of the 238 Trump grants were recommended by the Pardon Attorney and 184 were not. This leaves thirty-one unaccounted-for grants, about which we are a bit less certain.

We are fairly confident that two of these thirty-one grants—those to Alfred Crum and Russell Plaisance—were supported by the Pardon Attorney. Crum had the support of former Deputy Attorney General Rod Rosenstein and the relevant U.S. Attorney, both of whom the Pardon Attorney would likely consult when evaluating a clemency petition. Additionally, Crum's case appears to satisfy the Justice Department clemency criteria. He is an older man who pleaded guilty to a relatively small crime (helping a family member distill alcohol), and he maintained a clean record for almost seventy years. Similarly, Plaisance's clemency addressed an old conviction (from 1987) for a relatively minor crime (one conversation about importing cocaine into the United States), and the White House noted that the

prosecuting attorney did not object to the pardon.²⁸ Unlike the majority of clemency grants, neither of these grantees had connections to Trump that might have indicated direct advocacy to the President and evasion of the pardon attorney process.

The remaining twenty-nine grants, we conclude, were probably not supported by the Pardon Attorney. All of these grantees had applications in the Justice Department database. We nonetheless concluded that they were not recommended by the Pardon Attorney, based on a close reading of the clemency support for each grant, an assessment of whether pardon attorney criteria were satisfied, the timing of the clemency grants, the grantees' connections to Trump, and other factors. In addition, news reports imply that several of these twenty-nine grants were not recommended by the Pardon Attorney.²⁹ Also, Dwight and Steven Hammond's clemency was recommended to Trump by Vice President Pence, and their attorney said that the two men were not granted clemency through "the standard process."³⁰ And a source with connections to the Pardon Attorney did not think that the Pardon Attorney expressed "full-throated support" for the pardons granted to Bernard Kerik and Rod Blagojevich.³¹

Of these twenty-nine, the one we are least certain lacked the Pardon Attorney's support is Rebekah Charleston. Charleston's exemplary post-conviction conduct and time elapsed since the end of her sentence makes her a candidate for clemency through the traditional Justice Department process. But there is no affirmative evidence that the Pardon Attorney recommended her, and the apparent connection of her pardon to legislation Trump signed into law led us to infer that her grant probably did not have the Pardon Attorney's support.³²

III. Conclusion

For the reasons explained above, we estimate that of Trump's 238 clemency grants, 25 (11%) had the Pardon Attorney's support and 213 (89%) did not. Even taking into account Clinton's infamous end-of-term shenanigans, no prior president skirted the pardon attorney process to nearly this degree.

We do not here take a normative stance on Trump's circumvention of the pardon attorney process. To a large degree, this circumvention was bound up with Trump's conferral of numerous politically self-serving pardons, as we have documented elsewhere.³³ But not all of Trump's clemency grants based on the informal White House process were self-serving. Some grantees—including Crystal Munoz, Tynice Hall, and Judith Negron—did not serve a Trump political agenda. Some pardon reform critics hailed these grants, and the White House process that produced them, as pointing the way to a better, more just clemency system.³⁴ Whether that is so remains to be seen.

Notes

* We thank Margaret Love for comments.

¹ U.S. Constitution, Article II Section 2.

² The fruits of our efforts can be found in this chart, which we explain below: Matthew Gluck & Jack Goldsmith, *Trump Era Pardon Attorney Recommendations for Clemency*, at <https://docs.google.com/spreadsheets/d/18HYefUVKzq5Cyd5VoT97c-wDv5FsFJN1PhHore1Skmc/edit?ts=608dc073#gid=1909960010>.

³ Margaret Colgate Love, *War Crimes, Pardons, and the Attorney General*, *Lawfare* (May 22, 2019).

⁴ Justice Manual, Pardon Attorney, § 9–140.112 · Standards for Considering Pardon Petitions.

⁵ *Id.*

⁶ *Id.* at § 9–140.113: Standards for Considering Commutation Petitions.

⁷ *Id.* at § 9–140.111: Role of the Prosecuting Component in Clemency Matters.

⁸ *Id.*

⁹ See, e.g., Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. Rev. 802 (2015); Rachel E. Barlow and Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. Chi. L. Rev. 1 2015; Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. Crim. L. & Criminology 1169, 1178–81 (2010).

¹⁰ Letter from Deborah Leff, Pardon Attorney, to Sally Yates, Deputy Attorney General, Jan. 15, 2016, <https://www.documentcloud.org/documents/2777898-Deborah-Leff-resignation-letter.html>.

¹¹ Office of the Inspector General, Department of Justice, Review of the Department's Clemency Initiative (Aug. 2018), <https://oig.justice.gov/reports/2018/e1804.pdf>.

¹² See Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 32 Cap. L. Rev. 185, 192 n.21 (2002).

¹³ *Id.* at 191 n.20.

¹⁴ *Id.* at 200–01.

¹⁵ Toluse Olorunnipa, Josh Dawsey & Neena Satija, *White House Assembles Team of Advisers to Guide Clemency Process as Trump Considers More Pardons*, *Wash. Post* (Feb. 19, 2020).

¹⁶ Rosalind S. Helderman, Matt Zaposky & Josh Dawsey, *Trump Grants Clemency to 20 People, Including Three Former GOP Members of Congress and Two Men Convicted in the Russia Probe*, *Wash. Post* (Dec. 22, 2020).

¹⁷ Department of Justice, *Clemency Case Status for Cases Opened Since 1989*, <https://www.justice.gov/pardon/search-clemency-case-status-since-1989>.

¹⁸ See, e.g., White House, Statement from the Press Secretary Regarding Executive Grants of Clemency, <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-012021/>.

¹⁹ *Id.*

²⁰ Albert Pirro's pardon was announced on January 20, 2021, but his grant was not included in the January 20, 2021, White House statement announcing 143 final-week grants, so Pirro's pardon is not included in the analysis based on this statement.

²¹ In the Justice Department database, each clemency petition has an individual docket number. If a petition is filed with the Office of the Pardon Attorney, it is automatically inserted into the database. If a petition is not in the database, it was not filed with the office. Without receiving a petition, the pardon attorney's office cannot recommend clemency to the president. Therefore, if there is no petition in the database for a certain grant, that grant was not recommended to the president by the pardon attorney. We should note that of Trump's 238 clemency grants, a total of seventy-eight have no information in the database. See Gluck & Goldsmith, *supra* note 2; but thirty-seven of those seventy-eight were already excluded in our count by the inference from the January 20, 2021, White House statement (see White House, *supra* note

- 18), so we only count the remaining forty-one in that category for present purposes.
- ²² The number of cases meeting this description was actually twenty-one, but we excluded three of these cases for present purposes because they were already accounted for as part of the 125 grants announced in the January 20, 2021, White House statement that did not have Pardon Attorney support. See *supra* note 18.
- ²³ This was what happened in the case of former soldier Michael Behenna, who had two petitions administratively closed on February 22, 2017, and May 16, 2018, before receiving a pardon on May 6, 2019.
- ²⁴ An example of this is Patrick Nolan, whose petition was denied on December 23, 2008, before he received a pardon from Trump on May 15, 2019.
- ²⁵ This is what happened in the cases of Dwight and Steven Hammond, who both submitted petitions for commutations only but were then granted commutations and pardons on July 10, 2018.
- ²⁶ This was the case for Judith Negron, who was first granted a commutation on February 18, 2020, then received another commutation on December 22, 2020, without submitting a second petition.
- ²⁷ See Jeremy Diamond, *Trump Pardons, Commutes Sentences for 7 People*, CNN (July 29, 2019), <https://www.cnn.com/2019/07/29/politics/trump-pardons-commutes-sentences-7-people/index.html>.
- ²⁸ Although Plaisance's pardon was posthumous—which is not typical for a recommendation from the pardon attorney—Plaisance died less than a month before receiving the pardon, which means his petition may have been recommended by the Pardon Attorney before his death and was awaiting approval from the White House.
- ²⁹ See, e.g., Olorunnipa et al., *supra* note 15 (Crystal Munoz, Tynice Hall, and Judith Negron); Gregory Korte, “It’s About Time”: *The 97-Year History of Jack Johnson’s Quest for a Pardon*, USA Today (May 25, 2018) (noting that “all” four of Trump’s first pardons, which included Kristian Saucier, “circumvented the Justice Department Process”).
- ³⁰ Julie Turkewitz, *How a Tycoon and Pence Friend Helped 2 Ranchers Get Pardons*, N.Y. Times (July 12, 2018).
- ³¹ Michael D. Shear & Maggie Haberman, *Trump Grants Clemency to Blagojevich, Milken and Kerik*, N.Y. Times (Feb. 18, 2020).
- ³² See Christopher Connelly, *New Law Focused On Fight Against ‘Modern-Day Slavery,’* KERA News (Jan. 23, 2019), <https://www.keranews.org/government/2019-01-23/new-law-focused-on-fight-against-modern-day-slavery>.
- ³³ Jack Goldsmith & Matt Gluck, *Trump’s Circumvention of the Justice Department Clemency Process*, Lawfare (Dec. 29, 2020); Goldsmith & Gluck, *Trump’s Aberrant Pardons and Commutations*, Lawfare (July 11, 2020).
- ³⁴ See, e.g., Mark Osler, *Trump’s Three-Track Clemency Process Just Might Work*, Hill (Mar. 2, 2020).