

The Office of the Pardon Attorney: What Comes Next?



**JEFFREY
CROUCH**

Assistant Professor
of American
Politics, American
University

I. Introduction

Article II of the Constitution gives the president of the United States the ability to “grant reprieves and pardons for offenses against the United States, except in cases of impeachment.” There are few restrictions on the pardon power,¹ and the president may generally exercise it in any manner he wishes. The “umbrella” term *federal executive clemency* includes “reprieves and pardons,” along with several other types of presidential forgiveness. As observed by Willard H. Humbert in 1941, the president may award “clemency to individuals in eight forms and to classes of individuals in two forms.”²

Donald Trump’s use of the clemency power exemplified his norm-busting approach to the presidency. A *Washington Post Magazine* story on Trump’s twenty worst violations of “unwritten traditions and expectations” listed at number 14 “abusing the pardon power” and noted Trump’s preference to “rarely follow[] the normal process of vetting pardons through the Justice Department.”³ Indeed, throughout his presidency, Trump all but ignored the Office of the Pardon Attorney, the bureaucratic apparatus in the Department of Justice charged with processing clemency applications.⁴ Looking back at the end of his term, just 25 of President Trump’s 238 clemency grants (144 pardons and 94 commutations) followed the usual practice.⁵ While Trump’s near-total abandonment of the Office of the Pardon Attorney may seem shocking, several of his predecessors had their own frustrating experiences that may have influenced Trump’s own decision to avoid it.

Reflecting on Trump’s unusual clemency approach raises three related questions: First, how did the Office of the Pardon Attorney come about, and what does it do? Second, how have presidents generally used their clemency power, and what role has the pardon attorney’s office usually played? And last, what comes next for the pardon attorney’s office following the Trump presidency?

II. The Office of the Pardon Attorney

The processes available for assisting the president with clemency requests started out as “informal and idiosyncratic.”⁶ The main reason for creating the pardon attorney position was apparently to assist President Abraham Lincoln with considering a substantial number of “Civil War–related clemency petitions.”⁷ A “fourth-class clerk” designated as the “pardon clerk” was created on March 3, 1865, in the Attorney General’s Office.⁸ The pardon clerk was replaced by an “attorney in charge of pardons” on March 3, 1891.⁹

Much like other bureaucracies, the Office of the Pardon Attorney evolved to meet the president’s needs.¹⁰ Attorneys general had worked with secretaries of state on “preliminary and advisory duties” related to presidential clemency before 1850.¹¹ In 1852, the Secretary of State and the Attorney General (Daniel Webster and William Crittenden, respectively) made an arrangement that would give the Attorney General sole responsibility for clemency petitions while the State Department would continue to generate pardon warrants.¹² President Grover Cleveland moved the responsibility to issue clemency warrants from the State Department to the Department of Justice via executive order in 1893.¹³

The Office of the Pardon Attorney is governed by federal regulations, specifically 28 C.F.R. §§1.1–1.11.¹⁴ The most recent version of these guidelines is available on the Pardon Attorney’s website, although, as former Pardon Attorney staff attorney Samuel T. Morison observes, they have not changed much since they were adopted in 1898.¹⁵ Section 1.1 of these regulations requires clemency-seekers for non-military offenses to address a petition to the President of the United States and send it directly to the Office of the Pardon Attorney.¹⁶ Section 1.2 limits who may apply for a pardon by requiring a petitioner to wait a minimum of five years “after the date of the release of the petitioner from confinement or, in case no prison sentence was imposed, until the expiration of a period of at least five years after the date” of his or her conviction.¹⁷ Section 1.11 notes that the regulations are “advisory only” and do not “restrict” the president’s constitutional power to grant clemency.¹⁸

III. Presidents and the Clemency Power

There was a time when a grant of presidential clemency was not an unusual event. Kathleen Dean Moore wrote that “[b]etween 1860 and 1900, 49 percent of the applications for presidential pardons were granted.”¹⁹ Former Pardon Attorney Margaret Love notes that “[a]lmost every year between 1900 and 1980 there were over a hundred grants of pardon and commutation.”²⁰ Between roughly 1900 and 2001, she observes, presidents pardoned “frequently and generously at regular intervals over the course of each president’s term,” and granting clemency throughout this period was seen as “a regular part of the housekeeping business of the presidency.”²¹ Albert Alschuler figured that between 1961 and 1980, presidents granted 28% of clemency applications.²² These numbers have dropped considerably. Recent presidents of both political parties have

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generally established low pardon and commutation approval percentages: Reagan (12%), George H. W. Bush (5%), Clinton (6%), George W. Bush (under 2%), Obama (5%), and Trump (2%).²³ Some of these numbers (for example, Obama's) are influenced by an unusually high number of clemency applications, but the basic point remains.

A closer look at the actual numbers of pardons and commutations granted by presidents since the 1930s brings into sharper focus the gradual decline in presidential mercy. During the middle of the twentieth century, Democratic Presidents Franklin Roosevelt (1933–1945) and Harry Truman (1945–1953) granted clemency generously, with 2,819 pardons and 488 sentence commutations and 1,913 pardons and 118 commutations, respectively. Their Republican successor, Dwight Eisenhower, granted 1,110 pardons along with 47 commutations in his eight years as president. In a presidency tragically cut short in Dallas after just three years, John Kennedy issued 472 pardons and 100 commutations. Lyndon Johnson took over after Kennedy's assassination in 1963 and served until 1969, granting 960 pardons and 226 commutations. Richard Nixon granted 863 pardons and 60 commutations before Watergate-related charges chased him from the White House during his second term. In his abbreviated White House stay, Gerald Ford infamously pardoned his predecessor, along with 381 others, and commuted 22 sentences. Jimmy Carter, who defeated the incumbent Ford in 1976 and served a single term, amassed a clemency record that featured 534 pardons and 29 commutations. Over his eight years in the White House, Ronald Reagan granted 393 pardons and commuted 13 sentences. His successor, George H. W. Bush, granted just 74 pardons and a mere three commutations during his single term as president.²⁴

Around the late 1970s and 1980s, the clemency power began to wither away. Presidents of both political parties had granted clemency regularly for decades but slowed during this time. There is no one single cause, but a partial explanation for the new presidential stinginess with clemency must include the "tough on crime" attitude ushered in by Reagan and then adopted by presidents of both parties.²⁵ Another major factor was the 1970s decision by Jimmy Carter's Attorney General, Griffin Bell, to delegate the job of recommending action on clemency petitions from himself to a lower-ranking Department official responsible for supervising federal prosecutors, essentially ensuring that clemency petitioners would be less likely to receive presidential mercy.²⁶ The new arrangement was formalized under President Reagan, and the Office of the Pardon Attorney was both figuratively and literally pushed out, "sent packing to a remote Maryland suburb."²⁷ The overall effect of presidents not wanting to invite criticism for helping criminal offenders and the devaluing of the pardon attorney's office became especially apparent under President Bill Clinton.

A. Bill Clinton

Clinton granted a robust total of 396 pardons and 61 commutations during his eight years as president. A closer

look at Clinton's clemency grants shows that many were issued after a haphazard review process. The circumstances that led to clemency chaos are clear. Early in his presidency, Clinton was reluctant to issue pardons and thereby risk losing political ground to Republicans on issues related to crime and punishment.²⁸ After years of neglect, Clinton realized near the end of his second term that his clemency record would pale in comparison to that of his predecessors (especially Reagan), so he bypassed the Pardon Attorney and welcomed clemency applicants to submit their petitions directly to the White House Counsel,²⁹ the official whose job it is to advise the president on clemency grants. Clinton used his final days in office to contemplate how to use clemency to, in Margaret Love's words, "reward friends, bless strangers and settle old scores," ultimately issuing on his last day in office an astounding 177 pardons and commutations.³⁰ These last-day grants were "unprecedented in number and in kind" and went to such controversial figures as fugitive financier Marc Rich; Clinton's half-brother, Roger Clinton; the president's former Whitewater business partner Susan McDougal; and others.³¹ This series of events was made possible by Clinton's neglect of clemency for most of his presidency, but also by a Department of Justice that hijacked the clemency process and used it to serve the needs of prosecutors rather than the President.³²

B. George W. Bush

Clinton's successor, George W. Bush, generally paid little attention to clemency and accumulated a record of 189 pardons and 11 commutations over his two terms in the White House.³³ Whereas Clinton responded to dysfunction in the Department of Justice by working around it, Bush was generally content to follow the recommendations of the Pardon Attorney.³⁴ With the exception of Scooter Libby, Bush opted not to use clemency to benefit his friends and political allies (as had Clinton);³⁵ he also did not try to tap its potential to address injustice on a larger scale.

C. Barack Obama

In contrast to George W. Bush, Barack Obama was willing to use his clemency power to attempt to effect policy change. During his two terms as president, Obama pardoned 212—not far off George W. Bush's final tally—but his 1,715 sentence commutations were the most granted by any president.³⁶ The fact that so many grants happened at all under Obama is somewhat surprising, given the process (or lack thereof) in place to review clemency applications. When Obama expressed frustration during his second term about not receiving more requests for pardons, the Department of Justice asked private groups to screen candidates for clemency whose applications could then be steered to the Department of Justice for formal consideration.³⁷ The criteria for prioritized review revealed that low-level, nonviolent drug offenders were the primary target audience for what was formally called Obama's "Clemency Initiative."³⁸ The "disarray" of this review process³⁹ and a rapidly increasing number of applications pushed the

incumbent Pardon Attorney to resign.⁴⁰ Robert Zauzmer took the reins as Acting Pardon Attorney in February 2016⁴¹ and quickly set matters in motion again. During the period April 2014 to December 2016, Obama received an avalanche of over 14,000 commutation requests and eventually granted roughly 13% of them.⁴² Still, despite handling so many commutation requests at the end of his presidency, Obama left his successor with a backlog of over 11,000 requests for pardon or commutation.⁴³ Obama's Department of Justice operated a clemency program that struggled to serve the President's goals.

D. Donald Trump

Unlike his predecessors Clinton and Obama, Trump did not seem to be interested in engaging with the Department of Justice on clemency at all. From the start, Trump established an approach to clemency that virtually ignored the Office of the Pardon Attorney.⁴⁴ Trump spoke vaguely in June 2018 about establishing a committee to evaluate clemency requests, one that unnamed advocates said would apparently rely heavily on input from Trump's son-in-law and adviser Jared Kushner and White House Counsel Don McGahn.⁴⁵ But early insider comments also suggested that Trump operated largely without a formal process, noting that he deployed clemency "impulsive[ly]," based on "seeing something on TV, reading something in a newspaper, hearing from a friend or someone lobbying him personally" before asking his lawyers to look into a case.⁴⁶

Trump's overall clemency record of 144 pardons and 94 commutations in four years as president is characterized by clemency grants offered primarily without the benefit of a formal review by the Office of the Pardon Attorney. Had the applications been submitted to the Pardon Attorney under the normal process, many Trump clemency recipients (for one example, Michael Flynn) would have likely been rejected for failing to meet the five-year waiting period required by Section 1.2, as noted earlier. Trump's clemency track record showed a clear pattern: his focus was not on average people; instead, he frequently granted pardons and commutations to celebrities and people he had a personal connection with, often his supporters.⁴⁷ Trump's first pardon went to the controversial Arizona ex-sheriff Joe Arpaio on August 25, 2017,⁴⁸ and he never looked back. While Trump's final batches of clemency decisions reflected some concern for granting clemency to individuals that he did not personally know or feel connected to, even these tracked Trump's earlier patterns by including grants for prominent political allies (Steve Bannon and Elliott Broidy) and celebrities (Lil Wayne and Kodak Black). Overall, Trump privileged those applicants with connections, resulting in, to Margaret Love, "the ultimate corruption of a system that was set up to serve a public purpose."⁴⁹

IV. What Comes Next for the Pardon Attorney's Office?

Legal experts have offered several plans to reform the president's clemency review process. Rachel Barkow and Mark

Osler argue that "clemency stands as a case study in how poor administrative design can foil even broad substantive powers."⁵⁰ They argue that having a pardon attorney "deep within the DOJ has proven to be a failure" and advocate for "a commission that has a diverse, standing membership" that "exist[s] outside the Justice Department" and "pay[s] attention to data."⁵¹ Paul Larkin points out that the Department of Justice suffers from a conflict of interest regarding clemency, since it also administers punishments. He acknowledges the idea that the U.S. Sentencing Commission or a similar body could assume responsibility for the clemency review and advising processes currently undertaken by the Department of Justice, but he prefers a plan to move the pardon attorney from the Department of Justice into the Executive Office of the President, with the vice president settling into the role of advising the president on clemency decisions.⁵² Margaret Love has proposed restructuring the pardon program within the Department of Justice to reclaim the respect it lost after the attorney general's delegation of responsibility in 1980, retaining the pardon power's historical connection with the justice system while reducing the influence of what Love characterizes as the "punitive culture of prosecutors" over clemency recommendations.⁵³

Each of these plans (and others) has its own merits and drawbacks. The problems identified by these scholars are complex, and their proposed solutions at least provide a new perspective on how to address some of the challenges that have developed over time in how the clemency review process operates. Ultimately, any of these plans will require two of the same critical elements: (1) a president who prioritizes a clemency review apparatus early on and takes the time to understand and address the shortcomings of the Department of Justice status quo; and (2) an attorney general who embraces the Department's role in dispensing mercy as well as punishment and places the president's priorities ahead of protecting convictions and other parochial concerns. This attorney general should name a pardon attorney who embraces the opportunity to recommend more positive clemency grants to show the country that forgiveness and rehabilitation are both values worth respecting and pursuing.

Given the continuing pandemic and vaccination rollout, the economy, and myriad other priorities, it seems unlikely that clemency reform will top President Joe Biden's list of concerns. At some point, though, he and Attorney General Merrick Garland should have a meeting to discuss clemency policy. When they do, they would be wise to consider the history of clemency, the historical role of the pardon attorney, and how shortcomings in the process have been exposed by Presidents Clinton, Obama, and Trump. They should talk about what they see as the president's goals for the clemency power and consider pardoning early and often.⁵⁴ By establishing a regular clemency process⁵⁵ and educating the public on the good that the clemency power can do, they can take the first steps to revitalize the pardon power for the Biden years and beyond.

Notes

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- ³ David Montgomery, *The Abnormal Presidency*, Wash. Post Magazine, Nov. 10, 2020, <https://www.washingtonpost.com/graphics/2020/lifestyle/magazine/trump-presidential-norm-breaking-list/>.
- ⁴ Office of the Pardon Attorney, Department of Justice, “Mission,” <https://www.justice.gov/pardon> (accessed Apr. 10, 2021).
- ⁵ Kenneth P. Vogel, *The Road to Clemency from Trump Was Closed to Most Who Sought It*, N.Y. Times, Jan. 26, 2021, <https://www.nytimes.com/2021/01/27/us/politics/trump-pardons.html> (Margaret Love was Vogel’s source for the total number of pardons and commutations by Trump).
- ⁶ Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. Crim. L. & Criminology 1169, 1176 (2010).
- ⁷ Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 Buff. Crim. L. Rev. 1, 35 (2005).
- ⁸ John R. Stanish, *The Effect of a Presidential Pardon*, 42 Fed. Probation 3. Also see 13 Stat. 516.
- ⁹ Stanish, *supra* note 8, at 3. Also see 26 Stat. 946.
- ¹⁰ For a comprehensive look at various aspects of the president’s pardon power, see Jeffrey Crouch, *The Presidential Pardon Power* (2009). For an overview of the pardon attorney’s office, see Love, *Twilight of the Pardon Power*, *supra* note 6.
- ¹¹ Reed Cozart, *Clemency Under the Federal System*, 23 Fed. Probation 3 (1959).
- ¹² Love, *Twilight of the Pardon Power*, *supra* note 6, 1176–77.
- ¹³ Cozart, *supra* note 11, 3; see also Grover Cleveland, Executive Order dated June 16, 1893.
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- ¹⁵ Morison, *supra* note 7, 35–36.
- ¹⁶ Office of the Pardon Attorney, *supra* note 14, § 1.1.
- ¹⁷ *Id.*, § 1.2.
- ¹⁸ *Id.*, § 1.11.
- ¹⁹ Kathleen Dean Moore, *Pardons: Justice, Mercy and the Public Interest* 53 (1989); also cited by Albert W. Alschuler, *Bill Clinton’s Parting Pardon Party*, 100 J. Crim. L. & Criminology 1131 (2010).
- ²⁰ Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton’s Last Pardons*, 31 Cap. U. L. Rev. 185, 191 (2003).
- ²¹ Love, *Twilight of the Pardon Power*, *supra* note 6, 1186.
- ²² Alschuler, *Bill Clinton’s Parting Pardon Party*, 1131.
- ²³ Clemency approval percentages through 2012 adopted from Jeffrey Crouch, *The President’s Power to Commute: Is It Still Relevant?*, 9 U. St. Thomas L. J. 681, 685–86 (2012).
- ²⁴ All numbers from this paragraph come from *Clemency Statistics*, Office of the Pardon Attorney, Department of Justice, <https://www.justice.gov/pardon/clemency-statistics>. Calculations based on numbers provided by *Clemency Statistics* through 2012 are from Crouch, *supra* note 23. These totals do not include amnesties issued by any of the presidents on the list.
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- ²⁷ Margaret Colgate Love, *Justice Department Administration of the President’s Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. Tol. L. Rev. 89, 98 (2015).
- ²⁸ Love, *Twilight of the Pardon Power*, *supra* note 6, 1195.
- ²⁹ *Id.*, 1196–97.
- ³⁰ *Id.*, 1198.
- ³¹ *Id.*, 1198–99.
- ³² *Id.*, 1200.
- ³³ *Id.*, 1201.
- ³⁴ *Id.*, 1203–04.
- ³⁵ *Id.*, 1203–04.
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- ³⁸ U.S. Dep’t of Justice, *Obama Administration Clemency Initiative* (archived), updated Jan. 12, 2021, <https://www.justice.gov/archives/pardon/obama-administration-clemency-initiative> (accessed Apr. 10, 2021).
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