

Final Report Card on Pardoning by George W. Bush

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January 27, 2009 (rev. March 13, 2009)

In the final weeks of President George W. Bush's tenure there was a good deal of speculation about whom he would pardon before leaving office. The massive pardoning at the end of Bill Clinton's term had confirmed the popular (though historically inaccurate) notion that a lot of end-of-term pardoning was to be expected, and the names of high-profile applicants appeared with some regularity in the press. A batch of pardons immediately before Christmas created a stir when the President tried to revoke one of them,¹ but his final grants were decidedly anticlimactic. When it became clear at noon on January 20, 2009, that two sentence commutations issued the previous day² were all Bush intended to grant, dozens of individuals whose hopes had been raised by an unusually accessible White House staff were bitterly disappointed.

But this disappointing pardon end-game could have been predicted based on Bush's sparse overall pardoning record. He granted fewer pardons and sentence commutations than any two-term president since Thomas Jefferson, and fewer grants per term than any full-term president since John Adams, with the exception of his own father. Statistically, Bush is tied with his father for the lowest favorable grant rate for pardon petitions (9.8%), and his grant rate for commutations barely registers (.012%). While he pardoned at fairly regular intervals throughout his two terms, his pardoning was concentrated in his final year: 76 of his 189 pardons and seven of his eleven commutations were granted between December 10, 2007 and January 20, 2009. See <http://www.usdoj.gov/pardon/statistics.htm>.

The more telling statistic relates to the number of clemency petitions President Bush denied over the course of his eight years. He received more clemency petitions than any president since FDR (not counting petitions received pursuant to general grants of amnesty), and he denied more. In eight years, he denied almost 7500 commutation and 1800 pardon requests, three times the number denied by Bill Clinton. Nearly half of these denials came in the final year of his tenure (roughly 700 pardons and 3500 commutations denied between December 10, 2007 and January 20, 2009).

It is hard to see how the small staff in OPA (5 lawyers for most of Bush's tenure) could have given many of the cases denied in this 13-month period the full review they deserved. While the Pardon Attorney's commutation case backlog was melting away (the cases carried over to President Obama's administration numbered fewer than 1000

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See David Stout and Eric Lichtblau, *Pardon Lasts One Day for Man in Fraud Case*, N.Y. TIMES, December 25, 2008 (White House directed Pardon Attorney not to execute document conveying pardon to Isaac Robert Toussie, apparently because he had made substantial campaign contributions to the Republican Party). Questions about whether the Toussie pardon had already become effective, and whether in that event it could be revoked, were unresolved at the time President Bush left office.

² Josh Meyer, *Bush Commutes Border Patrol Agents Prison Terms*, L.A. TIMES, January 20, 2009.

for the first time in a decade), the pardon backlog remained substantial, with some cases filed many years earlier still awaiting final disposition.

The profile of Bush clemency recipients in the following section shows that almost every one of his post-sentence pardons went to ordinary individuals convicted many years before of minor offenses, as evidenced by the fact that only a handful served any significant amount of time in prison. Indeed, more than 2/3 of Bush's pardons were granted to people who never went to prison at all. Of Bush's 11 commutation grants, eight went to drug offenders who had served a substantial period of time in prison. As in the past, most successful clemency applicants navigated the process without the assistance of a lawyer.

In all but a handful of pardon cases, President Bush acted on the basis of a favorable recommendation from the Justice Department. In four of his 11 commutation grants, he received no recommendation from the Justice Department, but it seems almost certain, based on the pattern established in pardon cases, that Justice recommended favorably in all or most of the other seven. If one assumes that President Bush granted most (if not all) of the cases recommended favorably by the Justice Department, as the evidence indicates, it is logical to conclude that Justice recommended in favor of pardon in less than 10% of cases decided, and in favor of commutation in at most seven out of 7500 cases. The final verdict on President Bush's clemency record therefore seems to be that its parsimony is as much the product of Justice Department policy as it is of the President's personal inclinations.

Why So Few Final Grants?

In the final three months of President Bush's term, hundreds of people filed applications for pardon and commutation, in apparent expectation that Bush would issue a large number of final grants. The Pardon Attorneys Office reports that 434 people applied for pardon and 869 applied for commutation between October 1, 2008 and January 20, 2009. http://www.usdoj.gov/pardon/actions_administration.htm. The 434 pardons exceed the total filed in any full year since the Ford Administration, with one exception.³ In a comparable period at the end of the Clinton Administration, 181 pardon applications were filed. The commutation numbers for the two periods are comparable.

Many of those filing late, evidently undeterred by the time ordinarily required to process a clemency application at Justice, decided to press their cases directly at the White House. As at the end of the Clinton Administration, the Counsel to the President was visited by a parade of aspiring pardon applicants who had political or personal connections at the White House. Yet the final product of the end-game for the two presidents was very different: while Clinton issued 171 final clemency grants, Bush issued only two.

³ The exception is FY 2008, in which 555 pardon applications were filed.

Several explanations have been given for the anticlimactic end-game of Bush's pardoning. Nancy Pelosi recounted her inauguration day conversation with the out-going President in an interview with CNN's Larry King. She reported that Bush said he was "very proud" of not issuing pardons to the politically well-connected. "He said people who have gotten pardons are usually people who have influence or know friends in high places," a route that is "not available to ordinary people," Pelosi said. "He thought that there was more access for some than others and he was not going to do any." Reports of intense lobbying by Vice President Cheney in behalf of Scooter Libby support this anti-inside-influence explanation of the paucity of final grants.⁴

Others have speculated that the President was deterred by the uproar over his December 23 pardon of Isaac Toussie, a pardon he had attempted to revoke the following day. His annoyance over the way that grant had been staffed was evident in contemporaneous White House statements to the press, and it is entirely plausible that the President decided as early as Christmas Day not to grant any more clemency requests other than the ones from the Border Patrol agents to which he had evidently long since committed himself. See notes 1 and 2, *supra*.

The anti-inside-influence and anti-scandal explanations, not inconsistent with one another, are supplemented by a third less personal explanation. Like torrent of irregular grants at the end of Clinton's, the disappointing trickle of grants at the end of President Bush's term was the product of a chronically dysfunctional pardon advisory system in the Justice Department, a system now dominated by prosecutors that produces few favorable recommendations. Clinton dealt with the problem by staffing pardons in the White House. Bush didn't deal with it at all. In both cases, at the end of the term there were very few favorable recommendations from Justice for the president to act upon. The difference in the final production of pardons for the two presidents is attributable to their very different personal inclinations to dispense forgiveness, inclinations already in evidence during their days as governor.

Profile of Bush Clemency Recipients

The following profile of Bush clemency grants is based upon press notices prepared by the Office of the Pardon Attorney describing the 189 individuals who were pardoned by President George W. Bush,⁵ and the 11 individuals whose prison sentences were commuted.

Pardons: All of the 189 pardon recipients had fully served their sentence, and almost 2/3 of them were convicted more than 20 years before they were pardoned. Twenty-five grants went to people whose convictions were more than 35 years old, and nine were

⁴ See Jim Rutenberg and Jo Becker, *Aides Say No Pardon for Libby Irked Cheney*, N.Y. TIMES, February 18, 2009.

⁵ Isaac Toussie, whose name was among 19 pardon grantees listed on the master warrant signed by the President on December 23, 2008, is not included in the total number of pardons in light of the Bush Administration's position that Toussie's pardon did not become effective. A second warrant omitting Toussie's name was signed by the President on January 1, 2009.

convicted in the 1940's and 50's. Only a handful of grantees were convicted fewer than ten years before they were pardoned. Two pardons were awarded posthumously (one accidentally).

By far the most frequently pardoned offenses fall into the general category of theft and fraud. But President Bush also pardoned 35 drug offenders and 12 people convicted of a firearms or explosives offense. In addition to the usual complement of bootleggers (11), tax evaders (8), and car thieves (7), there are bank embezzlers, forgers, counterfeiters, mail thieves, gamblers, illegal dumpers, draft dodgers, endangered species and election law violators, and the obligatory odometer cheat. Only one of the 189 was convicted of an immigration law violation, and President Bush appears to have granted no pardons to avert deportation.

In the main, the offenses pardoned were minor ones, as evidenced by the fact that few of those pardoned spent any significant amount of time in prison, and more than two thirds spent no time in prison at all. Only 19 of the 189 spent more than two years in prison, and 17 of these were convicted of drug offenses. (The other two who went to prison were an S&L fraudster sentenced to three years, and an armed bank robber sentenced to 12 years' imprisonment in 1964.) Contrary to what one might expect, the proportion of grantees that never went to prison was larger in the late-term grants: 14 of the 18 people pardoned on December 23, 2009, were sentenced to probation only, and the longest prison sentence in that batch was 18 months. Ten of the 14 people pardoned on November 24, 2008 were sentenced to probation or a fine only, and the longest prison sentence was three years.

Very few pardon recipients appear to have been well known outside of their communities, judging only by their character witnesses (as well as press reports from hometown newspapers at the time the pardons were issued) – though one recipient was recommended by a former state governor and a retired federal judge. David McCall, whose case is described below, was recommended by U.S. Senator Kay Bailey Hutchinson. Charles Thompson Winters, who was pardoned posthumously, was well known in the Jewish community as an ardent supporter of the young state of Israel.

As in the past, most successful pardon applicants were not represented by a lawyer – though my personal experience suggests that knowledgeable assistance is helpful in navigating a process that has become a minefield.

According to a Pardon Attorney response to a FOIA request, only five or possibly six of the 189 pardon grants went to people of color, including African-Americans. Four of the eight drug commutations went to African-Americans.

Until the final two pardon warrants in late 2008, all but one of Bush's pardons were granted pursuant to a favorable recommendation from the Justice Department, as evidenced by the following phrase in each of the warrants signed by the President: "after considering . . . a letter from the Department of Justice recommending executive clemency in each case. . ." (The only warrant not containing this language is the one

pardoning David McCall, former Mayor of Plano, Texas, and the father of a close friend of the President, whose 1997 conviction for bank fraud was pardoned on February 16, 2004, a few days before his death. McCall's application was reportedly processed through the Justice Department in a matter of days.) The warrant for the 14 pardons signed on November 24, 2008 did not contain the phrase "recommending executive clemency," indicating that some of those grants were not issued pursuant to a DOJ favorable recommendation. The warrant signed on December 23, 2008, and re-signed on January 1, 2009, did not contain any reference at all to a letter from the Justice Department, suggesting that at least one of those grants was made with no recommendation from Justice at all.

Commutations: Of the 11 individuals whose sentences were commuted by President Bush, eight were convicted of drug offenses in the early 1990s (in one case 1989), and three of them were within a few months of release from prison by the time their petitions were granted. Six of the eight had served more than 14 years in prison, and a seventh had served all but a few months of his 9-year sentence. The eighth drug commuttee had served more than half of a 14-year prison sentence.

The President reportedly received no recommendation from the Justice Department in four of the 11 commutation cases (Scooter Libby, Reed Prior, and the two Border Patrol agents). As to the other seven commutations, the signed warrants do not indicate one way or the other whether the Justice Department recommended clemency, or indeed whether it made any recommendation at all. Of these seven, only two were represented by counsel in connection with their clemency cases.