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New York Law Journal

CRIMINAL LAW

Lawyering or Lobbying for a Presidential Pardon?

By Evan T. Barr

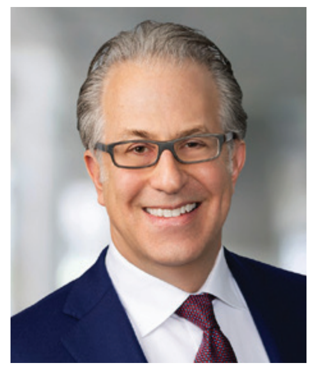
January 21, 2026

Numerous observers have expressed concern recently about the lack of transparency surrounding presidential pardons and commutations by the current administration (not to mention the large sums of money being spent on seeking relief). Unlike criminal court proceedings where almost everything is a matter of public record, clemency remains an opaque and poorly understood process.

There has also been increased curiosity by the media and others as to the identity of those who have membership in what might be called the new clemency bar. Some of those well-connected players have been quite open about their ability to tap into access to the president and his key advisors. Others have maintained a lower profile.

Ultimately any effort to gain increased visibility into the extrajudicial activities of these influential insiders may well turn on the subtle distinction between lobbying (which is subject to disclosure requirements) and traditional behind-the-scenes lawyering (which is not).

The Marc Rich Case



Courtesy photo

Evan T. Barr of Reed Smith

The lawyering/lobbying distinction first arose in connection with the Marc Rich case. On Jan. 20, 2001, President Bill Clinton granted an unconditional pardon to commodities trader Marc Rich and his business partner Pincus Green. Rich and Green had been indicted in the Southern District of New York decades earlier on tax evasion, wire fraud, racketeering and trading with the enemy offenses related to Iranian oil deals. At the time it was the largest tax-fraud case in U.S. history. Both men fled to Switzerland to avoid prosecution and remained fugitives for years. During that time, their lawyers made various unsuccessful entreaties to resolve the case with the Southern District.

The pardon generated a firestorm of controversy largely because the petition was submitted directly to the White House, circumventing the Pardon Attorney and Southern District. It soon came to light that the lawyers for Rich and Green had engaged in a robust lobbying and letter-writing campaign in support of the petition. Critics also alleged that the president had been influenced to grant the pardon based on large donations made to the Clinton Library and certain Democratic Party causes by Rich's ex-wife, Denise. By today's standards, none of this would even merit mention on MSNBC.

In any event, in February 2001, the Southern District commenced an investigation into the circumstances surrounding the granting of the pardons (full disclosure: I worked on this matter in the Office). A month later, the grand jury issued subpoenas to five lawyers who had represented Rich and Green in connection with the successful pardon application. The subpoenas sought, among other things, documents relating to "any and all efforts to obtain a resolution of the outstanding criminal charges against Marc Rich or Pincus Green."

The lawyers produced some documents relating to conversations with third parties or communications where a third party was present. But the lawyers refused to answer questions or produce any other documents, asserting they were protected under both the work product doctrine and attorney-client privilege. The government moved to compel, and (then) District Court Judge Denny Chin granted the motion. See *In Re Grand Jury Subpoenas Dated March 9, 2001*, 179 F. Supp. 2d 270 (S.D.N.Y. 2001)

Chin first noted that "lawyers sometimes act as lobbyists, and thus the issue has arisen as to whether the attorney-client and work product privileges protect communications made and materials prepared in the course of a lawyer's lobbying efforts." The "fact that a lawyer occasionally acts as a lobbyist does not preclude the lawyer from acting as a lawyer and having privileged communications with a client who is seeking legal advice." On the other hand, the judge noted, "if a lawyer happens to act as a lobbyist, matters conveyed to the attorney for the purpose of having the attorney fulfill the lobbyist role do not become privileged by virtue of the fact that the lobbyist has a law degree or may under other circumstances give legal advice to the client."

Applying those principles, Chin held that the work product doctrine did not apply because (1) the process by which Rich and Green sought their pardons was not adversarial; (2) they did not contemplate any future litigation since they never planned to return to face the charges; and (3) once they had failed to persuade the Southern District to drop the charges, their advisors had changed tactics and started acting primarily as lobbyists rather than as lawyers.

The court also found that communications by the Marc Rich lawyers about issues such as public relations, the solicitation of prominent individuals or persons with access to the White House to support the petition, and strategies for persuading the president to grant the petition were forms of lobbying, not lawyering, and thus not covered by the attorney-client privilege.

Lobbying Disclosure Act of 1995

Given the ruling of *In Re Grand Jury Subpoenas*, one might logically assume that lawyers pitching the White House for a presidential pardon or commutation could be deemed lobbyists—and hence required to register as such. But the Lobbying Disclosure Act of 1995 seems to suggest otherwise.

Under Title 2, United States Code, Section 1603(a) a person who makes a "lobbying contact" is required to register with the Senate and House provided the person derives income for such activities on behalf of a particular client that exceeds $2,500. The registration includes the name, address and principal place of business of the registrant as well as a general description of its business or activities, and details related to the clients for whom they are working.

Pursuant to Section 1602(8)(A), "lobbying contact" is defined to include any oral or written communication made to a "covered executive branch official" (which includes the president) with regard to (as relevant here) "the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government."

The statute expressly exempts (among other things) any communication made to an agency official regarding "a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding… if that agency is charged with responsibility for such proceeding, inquiry, investigation or filing." See 2 U.S.C. §1602(8)(B)(xii). The law also requires that the ostensible lobbyist must devote a minimum of twenty percent of his or her time to the client in question to trigger the registration obligation. See 2 U.S.C. §1602(10).

A request made to the president seeking clemency for one specific client would not appear to fall within the scope of "lobbying contact." Likewise, petitioning DOJ for leniency in connection with a pending criminal case would be exempt. But making a pitch to the White House seeking the kind of "class-wide" relief provided by the pardons and commutations issued to nearly 1600 people convicted of offenses related to the Jan. 6, 2021 attack on the U.S. Capitol, for example, might well fall within the definition of "lobbying contact" since the order granting those pardons seems to reflect a broader "position of the United States Government." Similarly, one could argue that advocacy in support of the pardon that was recently issued to the former Honduran President Juan Orlando Hernandez might trigger the disclosure requirement since it has potentially important foreign policy implications.

Another Pardon Investigation

The lack of clarity around pardon-related disclosure issues can have real-world consequences. In the summer of 2020, for example, the DOJ began investigating renowned white collar defense lawyer Abbe Lowell and a well-known Trump fundraiser, Elliott Broidy, in connection with an alleged scheme to offer a bribe in exchange for securing a pardon for an individual who had been convicted of tax evasion.

As reported by the *New York Times*, pursuant to a search warrant, DOJ seized various emails in which Lowell was apparently communicating with an array of third parties (including non-lawyers) in his effort to seek clemency, a campaign similar to the one undertaken for Marc Rich years ago.

The government filed an *ex parte* application seeking authorization to review Lowell's emails. In its application the government claimed that the seized emails constituted potential evidence of a "secret lobbying campaign" in which Lowell and others "acted as lobbyists to senior White House officials, without complying with the registration requirement of the Lobbying Disclosure Act" as well as an effort to offer a substantial political contribution in exchange for a pardon. Under the crime-fraud exception those communications would not be privileged.

In granting the government's motion, Judge Beryl Howell relied on the fact that most of the communications at issue had been disclosed or forwarded to third parties who did not fall within the scope of the attorney-client relationship. The judge declined to reach the government's alternative argument based on the crime-fraud exception, other than to note that the government had not yet put forth sufficient evidence to show that either Lowell or his alleged co-conspirators had engaged in "lobbying activities" for twenty percent or more of the time spend on services for that client over a three-month period so as to meet the technical threshold for registration under the Lobbying Disclosure Act.

The investigation ultimately went nowhere. But the mere fact that the government claimed in a court filing that Lowell and others had potentially committed criminal violations of the Lobbying Disclosure Act for seeking a presidential pardon without having registered gave rise to concern among many in the Washington legal community.

A Proposed Legislative Fix

In January 2025, Senator Richard Blumenthal (D-CT) introduced a bill, S. 256, entitled the Pardon Transparency and Accountability Act of 2025. The legislation, among other things, would amend the Lobbying Disclosure Act to include "the issuance of a grant of executive clemency" as expressly falling within the definition of "lobbying contact" in the statute. Under Blumenthal's bill, an advocate seeking a pardon or commutation from the president would be required to register within two days of any such contact, without regard to the percent of services provided by the lobbyist to that client.

Given the current political environment, the bill has not gotten any traction and remains stuck in committee with little prospect of becoming law anytime soon. But should the Democrats recapture the House and/or Senate next year, the pardon power, and this proposed law, may well come under renewed scrutiny. In the meantime, defense practitioners both inside and beyond the Beltway should acquaint themselves with the distinction between lawyering and lobbying in the clemency context, and the potential impact that nuance may have on issues related to both privilege and registration requirements.

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