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Non-Binding DOJ Rules Concerning The Consideration of Clemency Petitions

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9-140.110 - Office of the Pardon Attorney

The Pardon Attorney assists the President in the exercise of his power under Article II, Section 2, clause 1 of the Constitution (the pardon clause). See Executive Order dated June 16, 1893 (transferring clemency petition processing and advisory functions to the Justice Department), the Rules Governing the Processing of Petitions for Executive Clemency (codified in 28 CFR Sections 1.1 et seq.), and 28 CFR Sections 0.35 and 0.36 (relating to the authority of the Pardon Attorney). The Pardon Attorney, under the direction of the Deputy Attorney General, receives and reviews all petitions for Executive Clemency (which includes pardon after completion of sentence, commutation of sentence, remission of fine or restitution and reprieve), initiates and directs the necessary investigations, and prepares a report and recommendation for submission to the President in every case. In addition, the Office of the Pardon Attorney acts as a liaison with the public during the pendency of a clemency petition, responding to correspondence and answering inquiries about clemency cases and issues. The following sets forth guidance on clemency matters.

[added April 2018]

9-140.111 - Role of the Prosecuting Component in Clemency Matters

The Pardon Attorney routinely requests the United States Attorney in the district of conviction or if a Department litigating component was responsible for the case, the Assistant Attorney General in charge of the component to provide comments and recommendations on clemency

cases that appear to have some merit, as well as on cases that raise issues of fact about which the United States Attorney or Assistant Attorney General may be in a position to provide information. Occasionally, the United States Attorney in the district in which a petitioner currently resides also may be contacted. In addition, in cases in which the petitioner seeks clemency based on cooperation with the government, the Pardon Attorney may solicit the views of the United States Attorney in the district(s) in which the petitioner cooperated, if different from the district of conviction, or the views of the Assistant Attorney General in charge of the Department litigating component with which the petitioner cooperated, if different from the prosecuting component. When a particular Main Justice component has jurisdiction over or involvement in a case, such as approving charges or participating in the prosecution of the defendant, the Pardon Attorney will also solicit comments and recommendations from that component. For example, the Tax Division, which authorizes and supervises nearly all charges arising under the internal revenue laws, will be consulted when a defendant convicted of such a charge seeks clemency, whether or not a Division attorney was directly involved in prosecuting the case. While the decision to grant clemency generally is driven by considerations that differ from those that dictate the decision to prosecute, the United States Attorney's or Assistant Attorney's General prosecutive perspective lends valuable insights to the clemency process.

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. For this reason, and in order to ensure consistency, it is important that each request sent to the district or litigating component receive the personal attention of the United States Attorney or Assistant Attorney General. Each petition is 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.

The United States Attorney or Assistant Attorney General can contribute significantly to the clemency process by providing factual information and perspectives about the offense of conviction that may not be reflected in the presentence or background investigation reports or other sources, e.g., the extent of the petitioner's wrongdoing and the attendant circumstances, the amount of money involved or losses sustained, the petitioner's involvement in other criminal activity, the petitioner's reputation in the community and, when appropriate, the victim impact of the petitioner's crime. On occasion, the Pardon Attorney may request information from prosecution records that may not be readily available from other sources.

As a general matter, in clemency cases the correctness of the underlying conviction is assumed, and the question of guilt or innocence is not generally at issue. However, if a petitioner refuses to accept guilt, minimizes culpability, or raises a claim of innocence or miscarriage of justice, the United States Attorney or Assistant Attorney General should address these issues.

In cases involving pardon after completion of sentence, the United States Attorney or Assistant Attorney General is expected to comment on the petitioner's post-conviction rehabilitation, particularly any actions that may evidence a desire to atone for the offense, in light of the standards generally applicable in pardon cases as discussed in the following section. Similarly, in commutation cases, comments may be sought on developments after sentencing that are relevant to the merits of a petitioner's request for mercy.

In pardon cases, the Pardon Attorney will forward to the United States Attorney or Assistant Attorney General copies of the pardon petition and relevant investigative reports. These records should be destroyed by the United States Attorney or Assistant Attorney General (if in electronic form) or returned (if in hard copy) to the Pardon Attorney along with the response. In cases involving requests for other forms of executive clemency (i.e., commutation of sentence or remission of fine), copies of the clemency petition and such related records as may be useful (e.g., presentence report, judgment of conviction, prison progress reports, and completed statement of debtor forms) will be provided.

The Pardon Attorney also routinely requests the United States Attorney or Assistant Attorney General to solicit the views and recommendation of the sentencing judge. If the sentencing judge is retired, deceased, or otherwise unavailable for comment, the United States Attorney's or Assistant Attorney's General report should so advise. In the event the United States Attorney or Assistant Attorney General does not wish to contact the sentencing judge, the Pardon Attorney should be advised accordingly so that the judge's views may be solicited directly. Absent an express request for confidentiality, the Pardon Attorney may share the comments of the United States Attorney or Assistant Attorney General with the sentencing judge or other concerned officials whose views are solicited.

The United States Attorney or Assistant Attorney General may support, oppose or take no position on a pardon request. In this regard, it is helpful to have a clear expression of the office's position. The Pardon Attorney generally asks for a response within 30 days. If an unusual delay is anticipated, the Pardon Attorney should be advised when a response may be expected. If desired, the official views of the United States Attorney or Assistant Attorney General may be supplemented by separate reports from present or former officials involved in the prosecution of the case. The United States Attorney or Assistant Attorney General may of course submit a recommendation for or against clemency even if the Pardon Attorney has not yet solicited comments from the district or component. The Pardon Attorney informs the United States Attorney or Assistant Attorney General of the final disposition of any clemency application on which he or she has commented.

Should a president leave office without acting on a particular clemency petition, that petition will remain open and active until the incoming president reaches a decision.

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9-140.112 - Standards for Considering Pardon Petitions

In general, a pardon is granted on the basis of the petitioner's demonstrated good conduct for a substantial period of time after conviction and service of sentence. The Department's regulations require a petitioner to wait a period of at least five years after conviction or release from confinement (whichever is later) before filing a pardon application (28 CFR Section 1.2). The Department may grant a waiver of the five-year requirement. In determining whether a particular petitioner should be recommended for a pardon, the following are the principal factors taken into account.

- A. **Post-conviction conduct, character, and reputation.** An individual's demonstrated ability to lead a responsible and productive life for a significant period after conviction or release from confinement is strong evidence of rehabilitation and worthiness for pardon. The background investigation customarily conducted by the FBI in pardon cases focuses on the petitioner's financial and employment stability, responsibility toward family, reputation in the community, participation in community service, charitable or other meritorious activities and, if applicable, military record. The investigation also serves to verify the petitioner's responses in the pardon application. In assessing post-conviction accomplishments, each petitioner's life circumstances are considered in their totality: it may not be appropriate or realistic to expect "extraordinary" post-conviction achievements from individuals who are less fortunately situated in terms of cultural, educational, or economic background.
- B. **Seriousness and relative recentness of the offense.** When an offense is very serious, (e.g., a violent crime, major drug trafficking, breach of public trust, or white collar fraud involving substantial sums of money), a suitable length of time should have elapsed in order to avoid denigrating the seriousness of the offense or undermining the deterrent effect of the conviction. In the case of a prominent individual or notorious crime, the likely effect of a pardon on law enforcement interests or upon the general public should be taken into account. Victim impact may also be a relevant consideration. When an offense is very old and relatively minor, the equities may weigh more heavily in favor of forgiveness, provided the petitioner is otherwise a suitable candidate for pardon.
- C. **Acceptance of responsibility, remorse, and atonement.** The extent to which a petitioner has accepted responsibility for his or her criminal conduct and made restitution to its victims are important considerations. A petitioner should be genuinely desirous of forgiveness rather than vindication. While the absence of expressions of remorse should not preclude favorable consideration, a petitioner's attempt to minimize or rationalize culpability does not advance the case for pardon. In this regard, statements made in mitigation (e.g., "everybody was doing it," or "I didn't realize it was illegal") should be judged in context. Persons seeking a pardon on grounds of innocence or miscarriage of justice bear a formidable burden of persuasion.
- D. **Need for Relief.** The purpose for which pardon is sought may influence disposition of the petition. A felony conviction may result in a wide variety of legal disabilities under state or federal law, some of which can provide persuasive grounds for recommending a pardon. For example, a specific employment-related need for pardon, such as removal of a bar to licensure or bonding, may make an otherwise marginal case sufficiently compelling to warrant a grant in aid of the individual's continuing rehabilitation. On the other hand, the absence of a specific need should not be held against an otherwise deserving applicant, who may understandably be motivated solely by a strong personal desire for a sign of forgiveness.
- E. **Official recommendations and reports.** The comments and recommendations of concerned and knowledgeable officials, particularly the United States Attorney or Assistant Attorney General whose office prosecuted the case and the sentencing judge, are carefully considered. The likely impact of favorable action in the district or nationally, particularly on current law enforcement priorities, will always be relevant to the President's decision. Apart from their significance to the

individuals who seek them, pardons can play an important part in defining and furthering the rehabilitative goals of the criminal justice system.

[added April 2018]

9-140.113 - Standards for Considering Commutation Petitions

A commutation of sentence reduces the period of incarceration; it does not imply forgiveness of the underlying offense, but simply remits a portion of the punishment. It has no effect upon the underlying conviction and does not necessarily reflect upon the fairness of the sentence originally imposed. Requests for commutation generally are not accepted unless and until a person has begun serving that sentence. Nor are commutation requests generally accepted from persons who are presently challenging their convictions or sentences through appeal or other court proceeding.

In the case of a petitioner seeking relief from a sentence of death, the petitioner must have exhausted only the first motion for relief under 18 U.S.C. § 2255 before applying for clemency. In such a case, the Bureau of Prisons generally will set a date of execution upon denial of the first Section 2255 motion. Thereafter, the petitioner has a limited amount of time to submit clemency applications and materials. *See* 28 C.F.R. § 1.10.

The President may commute a sentence to time served or he may reduce a sentence to achieve the inmate's release after a specified period of time. Commutation may be granted upon conditions similar to those imposed pursuant to parole or supervised release or, in the case of an alien, upon condition of deportation.

Commutation of sentence is an extraordinary remedy. Appropriate grounds for considering commutation have traditionally included disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g., cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action. A combination of these and/or other equitable factors (such as demonstrated rehabilitation while in custody or exigent circumstances unforeseen by the court at the time of sentencing) may also provide a basis for recommending commutation in the context of a particular case.

The amount of time already served and the availability of other remedies are taken into account in deciding whether to recommend clemency. The possibility that the Department itself could accomplish the same result by petitioning the sentencing court, through a motion to reward substantial assistance under Rule 35 of the Federal Rules of Criminal Procedure, a motion for modification or remission of fine under 18 U.S.C. Section 3573, or a request for compassionate reduction in sentence under 18 U.S.C. Section 3582(c)(1), will also bear on the decision whether to recommend Presidential intervention in the form of clemency. When a commutation request is based on the serious illness of the petitioner, an expedited response from the United States Attorney or Assistant Attorney General is always appreciated. If the request involves a sentence of death, an expedited response from the United States Attorney or Assistant Attorney General is essential.

When a petitioner seeks remission of fine or restitution, the ability to pay and any good faith efforts to discharge the obligation are important considerations. Petitioners for remission also should demonstrate satisfactory post-conviction conduct.

On January 21, 1977, the President by Proclamation 4483 granted pardon to persons who committed nonviolent violations of the Selective Service Act between August 4, 1964 and March 28, 1973 and who were not Selective Service employees. Although a person who comes within the described class was immediately pardoned by the proclamation, the Pardon Attorney issues certificates of pardon to those within the class who were actually convicted of a draft violation and who make written application to the Department on official forms. When these applications are received by the Pardon Attorney, they are forwarded to the United States Attorney for the district in which the applicant was convicted to verify the facts of the case. The verification should be returned to the Pardon Attorney promptly.