

How Pardon Decisions Are Made

One striking feature of the growing literature on executive clemency is the lack of meaningful discussion about how clemency petitions are actually presented to the President, including the longstanding role played by the Justice Department in advising the President on clemency matters. To a certain extent, this lack of precision is perfectly understandable. Given the legitimate privacy concerns of clemency applicants, who are required to submit a variety of sensitive information about their lives in support of a petition, coupled with the legitimate need of the President to receive frank and uninhibited advice about the merits of cases, the clemency review process is to a large extent shielded from public scrutiny, which inevitably shrouds it with an air of mystery.

Nevertheless, it is possible to reconstruct for public view, at least in general terms, how the administrative clemency process functions without invading these legitimate interests.

Administrative Clemency Review

The historical origins of the Office of the Pardon Attorney (OPA), the agency within the Justice Department whose function is to advise and assist the President in the exercise of the clemency power, dates from the 1850's. At that time, Congress authorized funding for a "pardon clerk" as a member of the Attorney General's immediate staff to assist him in the processing of clemency petitions.

In March 1891, the name of the position was redesignated "the attorney in charge of pardons," and Congress established the Office of the Pardon Attorney as a separate component within the Justice Department. In June 1893, apparently in view of the Attorney General's prominent role in advising the President in clemency matters, President Cleveland consolidated the Justice Department's function in the clemency process by issuing an executive order (which remains in effect today) directing that "all warrants of pardons and commutations of sentence ... be prepared and recorded in the Department of Justice." Thus, from the 1850's to the present, the President has relied upon both political appointees and career officials within the Justice Department to advise him concerning the appropriate exercise of the clemency power.

OPA has functioned since 1898 under regulations approved by the President for the processing of clemency applications, which, though not legally binding on him, establish an administrative framework for the presentation of clemency petitions for his consideration. The current clemency regulations are set forth at 28 C.F.R. § 1.1 to 1.11 (2000). The D.C. Circuit has held that these regulations are solely "intended for the internal guidance of the personnel of the Department of Justice" in processing clemency petitions and do not "create new and enforceable rights in persons applying for executive clemency." This means that a clemency applicant does not have the right to sue the Justice Department to enforce strict compliance with these rules, although OPA routinely adheres to them.

Under these regulations, which have not changed dramatically over this entire period, a clemency request is initiated by the submission to the Pardon Attorney of the appropriate application form, which is formally addressed to the President. The standard forms utilized for this process request a variety of biographical information about the applicant, including his account of the offense for which clemency is being sought, any other criminal record, the nature of relief sought, and the specific reasons that the applicant believes justify a grant of clemency in his case. When the Pardon Attorney receives a clemency petition, it is initially screened to ensure that the applicant is eligible to apply under the Department's regulations, to determine whether any necessary information has been omitted from the application form, and whether the applicant's responses to the standard questions raise any issues that require further elaboration.

The current rules provide that in order to be eligible to file for commutation (reduction) of sentence, the applicant must have actually begun serving his sentence and must not have a pending appeal or other legal challenge to his conviction or sentence. Given the relatively short filing deadlines for post-conviction challenges, this typically means that an applicant will exhaust his legal remedies before resorting to an appeal for clemency, although this is not required.

In order to be eligible to apply for pardon, the applicant ordinarily must satisfy a minimum waiting period of five years after release from incarceration or, if no prison sentence was imposed, from the date of sentencing. In addition, as a practical matter, a pardon applicant must be a resident of the United States. In this regard, non-U.S. citizens should be aware that the Pardon Attorney typically contacts the Bureau of Immigrations and Customs Enforcement to verify an applicant's immigration status and solicit the agency's views about his or her suitability for a pardon. Pardon applications from foreign residents are accepted only in extraordinary circumstances because of the difficulty involved in conducting a meaningful background investigation outside the territorial boundaries of the United States.

After accepting a clemency application for processing, the Pardon Attorney considers the merits of each case, by conducting an appropriate investigation to obtain additional information about the offense of conviction and the relevant details of the applicant's life. The purpose of the investigation is to develop a sufficient factual basis upon which to make an informed judgment about the applicant's suitability for clemency.

The nature and scope of the investigation depend on the type of relief being sought and the complexity of the particular case. Where an applicant seeks commutation of sentence (which accounts for the majority of the cases filed annually), the Pardon Attorney contacts the warden at the federal prison where the inmate is incarcerated in order to obtain copies of the judgment of conviction, the presentence investigation report, and the applicant's most recent prison progress report. Taken together, these documents give the Pardon Attorney an official record of the offense for which clemency is being sought, a summary of the facts of the offense and the applicant's criminal history, and the details of his adjustment to incarceration, including such

matters as his performance in work assignments and educational programs, and his institutional disciplinary record.

In addition, the staff attorney assigned to a particular case typically obtains any published judicial opinions concerning the underlying conviction, as well as any other reported case law concerning pertinent legal issues raised in the petition. Similarly, the Pardon Attorney may obtain a wide variety of other documents related to the underlying conviction—such as a plea agreement, prosecution or sentencing memoranda, trial or sentencing transcripts, appellate briefs, unpublished judicial opinions, pleadings from post-conviction collateral challenges, and grand jury transcripts—in the event that such materials are necessary to resolve a particular case. Finally, it is commonplace for published media reports, such as newspaper and magazine articles, and correspondence with persons who support or oppose clemency to be included in the applicant’s case file.

In the majority of commutation cases, the foregoing sort of documentary information is sufficient to permit the Pardon Attorney to prepare a draft of the Department’s report to the President recommending that the petition be denied. In a minority of cases, however, there are a variety of reasons that might prompt the Pardon Attorney to engage in a further inquiry. These circumstances might include when an initial review of the petition indicates that it has some substantive merit, the available documents do not resolve questions of material fact asserted in the petition, the claims made in the petition implicate significant issues of legal policy related to the enforcement of federal criminal law, or the petition is likely to attract widespread public attention. In these circumstances, the Pardon Attorney takes the additional step of soliciting the opinions of the prosecuting authority (usually a United States Attorney) and the sentencing judge about the merits of the case prior to formulating a final recommendation to the President.

The investigative process in a pardon case is similar, but owing to the broader scope of the inquiry into the details of the applicant’s life after his release from incarceration, a successful pardon petition entails a more elaborate inquiry. According to the United States Attorney’s Manual, the “principal factors” used to evaluate a pardon application include: (1) post-conviction conduct, character and reputation, (2) seriousness and relative recentness of the offense, (3) acceptance of responsibility, remorse and atonement, (4) any specific need for relief, and (5) official recommendations and reports from officials involved in the prosecution of the underlying offense.

As an initial step, the Pardon Attorney contacts the United States Probation Office for the federal district in which the applicant was prosecuted to obtain the same sorts of documentary information described above, such as the presentence report and the judgment of conviction, as well as information regarding the applicant’s compliance with court-imposed supervision and to ascertain the Probation Office’s views regarding the merits of the pardon request.

If an evaluation of the pardon application, the information obtained from the Probation Office, and any other documents deemed to be relevant to the case suggest that the petition may have some merit, it is referred to the Federal Bureau of Investigation (FBI) in order to conduct a background investigation. The purpose of a pardon background investigation is to provide the Pardon Attorney with additional factual information about the applicant, perhaps most importantly, to enable him to assess the extent to which the applicant has accepted responsibility for the offense and has been fully rehabilitated, and is thus unlikely to recidivate.

The scope of the investigation, which is analogous to those conducted prior to the issuance of a security clearance to a federal employee, involves a potentially wide-ranging inquiry into the applicant's post-conviction life, including such matters as his involvement in any other criminal activity (whether or not it resulted in a conviction), the stability of his family life, the pattern of his employment and residence after being released from incarceration, his credit and financial history, his reputation in the local community, and his participation in charitable or other civic activities. The FBI obtains this information primarily by accessing various electronic databases, and making appropriate inquiries with other law enforcement agencies, regulatory authorities and credit reporting services. In addition, the FBI conducts personal interviews with the applicant and other relevant persons, including neighbors, family members, employers and character references. The results of the background investigation are then memorialized in a written report to the Pardon Attorney.

If the information developed during the background investigation suggests that a person is an inappropriate candidate for pardon, the Pardon Attorney prepares a report to the President recommending that the petition be denied. Conversely, if the background investigation suggests that a pardon may warranted, or in cases which are of particular importance or in which significant factual questions persist, the Pardon Attorney requests input from the prosecuting authority and the sentencing judge concerning the merits of the petition. Where appropriate, the Pardon Attorney also seeks additional information from other government agencies, such as tax, immigration, and law enforcement authorities.

Furthermore, where the offense involved an identifiable victim, the Pardon Attorney may, if he thinks it is appropriate in the particular case, ask the FBI or the prosecuting authority to notify the victim (or the victim's family) of the pendency of the clemency petition and advise him that he may submit comments concerning the pardon request.

Finally, although there is no provision for a formal "hearing" in a federal clemency proceeding (except in capital cases), the Pardon Attorney may agree to meet with clemency applicants or their counsel to discuss a case when such a meeting is requested.

After evaluating of all of the information deemed necessary to adequately advise the President about the merits of a case, the Pardon Attorney prepares a report and a proposed recommendation for the disposition of the case, subject to any express policy guidance the

President chooses to give the Justice Department concerning the operation of the clemency program.

Under the current practice, the report is prepared for the signature of the Deputy Attorney General, the second ranking official in the Justice Department, who is directly responsible for overseeing its wide-ranging criminal law enforcement functions. Though the Deputy Attorney General typically agrees with the Pardon Attorney's assessment of a case, if he disagrees in a particular case, he has the authority to direct the Pardon Attorney to modify the Department's recommendation. In either event, after the recommendation is finalized, it is signed by the Deputy Attorney General and returned to the Pardon Attorney for transmittal to the Office of the Counsel to the President, for the President's consideration. Thereafter, as he deems appropriate, the President acts on the petition and grants or denies clemency in the exercise of his exclusive discretion.

When the President decides to grant or deny clemency, the Counsel to the President notifies the Deputy Attorney General and the Pardon Attorney of the decision by a formal memorandum listing the persons whose petitions have been decided. In the event of a grant, the Pardon Attorney is responsible for preparing the appropriate clemency warrants to effectuate the President's decision, as well as a press release publicly announcing the grant. Finally, the Pardon Attorney notifies the applicant and his attorney, if he is represented by counsel, of the President's decision, as well as any government officials whose views were solicited about the outcome of the case.

There is no formal "appeal" from the President's decision to deny a clemency petition, but the administrative rules permit an unsuccessful applicant to reapply after satisfying an additional waiting period. An unsuccessful commutation applicant is permitted to reapply one year after the date of denial. An unsuccessful pardon applicant is permitted to reapply two years after the date of denial.

While it is true, to be sure, that the President is not constitutionally obligated to adhere to any of the foregoing administrative procedures, or to follow the Justice Department's advice in any particular case, it simply does not follow that the advisory process fails to effectively constrain the President's discretionary exercise of the pardon power. For better or worse, Presidents have traditionally relied heavily on the receipt of such advice in most, though certainly not in all, clemency cases. Moreover, while one can never exclude entirely the possibility that the President grants or denies clemency for his own unannounced, idiosyncratic reasons, there is in fact a very high degree of concurrence between the Justice Department's recommendations and the President's decisions in particular cases. To a large degree, then, the President has effectively delegated the exercise of the pardon power to officials in the Office of the Pardon Attorney.