

Toward Greater Access

A Proposal for a Clemency Solution for DC

THE COMMUNITY
JUSTICE PROJECT

GEORGETOWN LAW

cce Council for
Court Excellence
Improving Justice for the Community

Toward Greater Access

A Proposal for a Clemency Solution for DC

December 2016

..--THE COMMUNITY--..
JUSTICE PROJECT
.....
GEORGETOWN LAW
.....



TABLE OF CONTENTS

| | |
|---|-----------|
| About this Proposal | 2 |
| Definitions | 3 |
| Clemency System Goals | 4 |
| An Effective Clemency System | 4 |
| Increasing Local Control Over DC Affairs | 5 |
| Creating a Clemency System | 5 |
| Source of Authority | 5 |
| Clemency Model and Creation of Board | 7 |
| Board Composition | 7 |
| Number of Members | 8 |
| Public Officials or Private Citizens | 8 |
| Appointees to the Board | 8 |
| Board Decision-making | 10 |
| Clemency Eligibility | 10 |
| Standards for Clemency Grants | 11 |
| Special Considerations | 11 |
| Application Content | 12 |
| Other Materials for Considering an Application | 12 |
| Hearings | 13 |
| Public or Private Board Meetings | 14 |
| Voting Process | 14 |
| Disposition Time and Frequency of Meetings | 14 |
| Transparency/Public Reporting | 15 |
| Board Logistics | 15 |
| Chairperson | 16 |
| Terms | 16 |
| Staff | 16 |
| Staff Role | 17 |
| Board Funding | 17 |
| Conclusion | 18 |

ABOUT THE CONTRIBUTORS

This *Proposal* was prepared by Tim Huether, Johanna Schmidt, and Max Staloff, students in Georgetown University Law Center’s The Community Justice Project, for the Council for Court Excellence. The report’s analysis and findings are based on interviews with local stakeholders, returning citizens in DC, and external policy and budget research.

THE COMMUNITY JUSTICE PROJECT

The Community Justice Project (CJP) is one of seventeen clinical programs at Georgetown University Law Center. CJP students learn how to advocate for individual and organizational clients using a wide range of legal strategies and tactics, including litigation and courtroom advocacy, public policy research and analysis, media outreach, and community organizing. In CJP, students work on various projects that challenge traditional notions of lawyering because there is no obvious litigation or transactional strategy that will “solve” the problem.

CJP is committed to giving students an appreciation for the complexity of working for social justice, an understanding of the variety of skills and strategies that lawyers can use to seek justice, and the belief that they have the capacity to make a difference throughout their lives as lawyers.

COUNCIL FOR COURT EXCELLENCE

Formed in the District of Columbia in 1982, the Council for Court Excellence (CCE) is a nonprofit, nonpartisan civic organization that envisions a justice system in the District of Columbia that equitably serves its people and continues to be a model for creating stronger and more prosperous communities. CCE’s mission is to enhance the justice system in the District of Columbia to serve the public equitably. CCE identifies and proposes solutions by collaborating with diverse stakeholders to conduct research, advance policy, educate the public, and increase civic engagement.

ABOUT THIS PROPOSAL

CJP was retained by CCE to develop a proposal to create a clemency solution for DC.

Reform is urgently needed. Currently, to receive clemency, individuals who have been convicted of violating local DC criminal law (“DC Code offenders”) must apply to the President of the United States through the federal clemency process. In stark contrast, each of the fifty states are in charge of their own clemency processes for their state law offenders. Access to clemency for DC Code offenders is nearly nonexistent. Only one DC Code offender has received some form of clemency, either a commutation or pardon, since the beginning of George H.W. Bush’s presidency.¹ Over the same period, Presidents have granted clemency to 1,556 federal offenders.²

This document’s analysis is based on academic articles and research into current state clemency system practices. Furthermore, we conducted interviews with legal academics about best practices in clemency systems, individuals affiliated with CCE with knowledge of and experience with the DC criminal justice system, returning citizens—both federal and DC Code offenders—in DC who sought clemency, and local practitioners, who could talk about obstacles to clemency in the current system.

This *Proposal* functions as a complete set of recommendations that could immediately be implemented by the Council of the District of Columbia (DC Council). All recommendations in this *Proposal* work together and were chosen in part because of their relationship with other choices.

All recommendations followed from two foundational decisions:

- (1) The recommendation that a clemency board is the best system to adjudicate clemency decisions;
and
- (2) The recommendation that the authority for the clemency board be derived through legislation enacted by the DC Council.

The primary goal of this proposal is to create the most effective, complete, and feasible clemency solution possible for DC. Our recommendations were influenced by our assessment of the possibility that any given proposal could be enacted in the current political climate.

¹ Office of the Pardon Attorney, *Clemency Statistics*, DEP’T OF JUSTICE (last visited Nov. 30, 2016), <https://www.justice.gov/pardon/clemency-statistics>.

² *Id.* (as of Nov. 22, 2016).

DEFINITIONS³

CLEMENCY—A broad term which can include all types and forms of executive relief, including amnesty, commutation, expungement, pardon, remission, reprieve, respite, and sealing. However, for the purposes of this report, “clemency” will refer strictly to the two forms currently granted regularly by the President of the United States: commutation and pardon.

COMMUTATION—A reduction in sentence or the amount of a fine. Commutations decrease a sentence—for example a commutation may reduce a twenty-year sentence to a five-year sentence, or a fine from \$1,000 to \$150. Beyond this, commutations could change a death sentence to life in prison. Commutations can have conditions attached and the decision maker has wide latitude regarding the nature of the commutation.

PARDON—At common law, a pardon could provide a sweeping remission of any punishment associated with a violation of law, and could be granted before or after conviction.⁴ However, this report refers to the term “pardon” in the manner that the federal government uses it, meaning the removal of collateral consequences associated with punishment.⁵ Pardons are granted to returning citizens after their sentence has been fulfilled and they have been released from prison. They are usually granted to restore civil rights or to relieve a returning citizen of other outstanding sanctions associated with their conviction. Pardons can have conditions attached and the decision maker has wide latitude regarding the nature of the pardon (relieving some consequences but not others, for example).

RETURNING CITIZEN—A person who was previously incarcerated and/or has a criminal record. This report uses the term “returning citizen” to describe the people around whom this report centers because it is the preferred terminology in the District, as expressed by the community of people who have been directly affected by involvement with the justice system. It is a term of art chosen to express people’s desire to be fully included in the life of their community—to work, go to school, vote, serve on juries, raise their children and contribute taxes. The term “returning citizen,” as used throughout this report, does not exclude people who are not U.S. citizens.

³ Unless the source is otherwise identified, these definitions are based on those found at: P.S. Ruckman, Jr., PARDON POWER BLOG (last visited Nov. 19, 2016), <http://www.pardonpower.com>.

⁴ See Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 576 (1991).

⁵ See *Standards for Consideration of Clemency Petitioners*, OFFICE OF THE PARDON ATTORNEY (last visited Nov. 20, 2016), <https://www.justice.gov/pardon/about-office-0>.

CLEMENCY SYSTEM GOALS

As noted above, CJP was retained by CCE to develop a proposal to create a clemency system for DC. Based on our meetings with CCE leadership and interviews with local stakeholders, we identified two primary goals for this proposal: 1) to create an effective clemency system for DC; and 2) to increase local control over DC affairs.

An Effective Clemency System

This proposal presents the most effective, complete, and feasible clemency solution possible for DC based on the research and interviews conducted by CJP. From this research, we derived six ideals to be reflected in the clemency system. The system would:

- (1) Engage in individual consideration of applicants;
- (2) Give holistic considerations to applicants;
- (3) Provide for efficient evaluation of applicants;
- (4) Regularly grant clemency;
- (5) Engage a variety of stakeholder perspectives; and
- (6) Provide transparent and predictable decisions.

The system must view the applicants as individuals: **all** DC Code offenders deserve the chance to be **considered** for clemency. It should also view all applicants holistically: no piece of information should be dispositive for a grant of clemency. Instead, an application should be considered in its entirety.

An effective clemency system should adjudicate applications in a timely manner and grant clemency on a frequent and regular basis. It should allow for applicants to find out within months if they have received clemency.⁶

Moreover, an ideal clemency system should incorporate a variety of stakeholder perspectives. Decisions should reflect the larger community's perspective on who returns to the community and who can gain the full rights and obligations of a citizen. A system that reflects diverse perspectives is more likely to engage in holistic consideration of an applicant.

Lastly, an effective clemency system should provide transparent and predictable decisions. A system which does not engage in transparent decision-making may be influenced by the political considerations or other arbitrary reasons outside the specified criteria. In addition, predictable decision-making—to the extent possible when engaging in individual and holistic consideration of applicants—gives applicants, their families, and their advocates a more nuanced understanding of successful applications and how to craft them.

⁶ Margaret Love, *50-State Comparison Characteristics of Pardon Authorities*, COLLATERAL CONSEQUENCES RES. CTR. (2016), <http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparisoncharacteristics-of-pardon-authorities/>.

Increasing Local Control Over DC Affairs

A secondary goal of the creation of a DC clemency system is to advance local control over the clemency power. In all fifty states, state governments control clemency for violators of their state laws.⁷ However, the DC government does not have any control over the disposition of applications for clemency for DC Code offenders; rather, full authority is vested in the federal government through the President. Therefore, our second goal was to increase DC's ability to control its own clemency power.

CREATING A CLEMENCY SYSTEM

We recommend that CCE advocate for local legislation to establish a DC-controlled clemency board for DC Code offenders. This Clemency Board will process applications, vote on recommending applications to the President, and send the recommended applications to the White House. The President will have the final say on granting clemency.

Source of Authority

Under current federal interpretation, the President has full authority to grant clemency for DC Code convictions.⁸ Applications by DC Code offenders are sent to the Office of the Pardon Attorney (OPA) in the Department of Justice (DOJ) and are subject to the same process and standards as applications for clemency for federal offenses. Applications through the federal system currently pass through six stages before arriving at the President's desk:

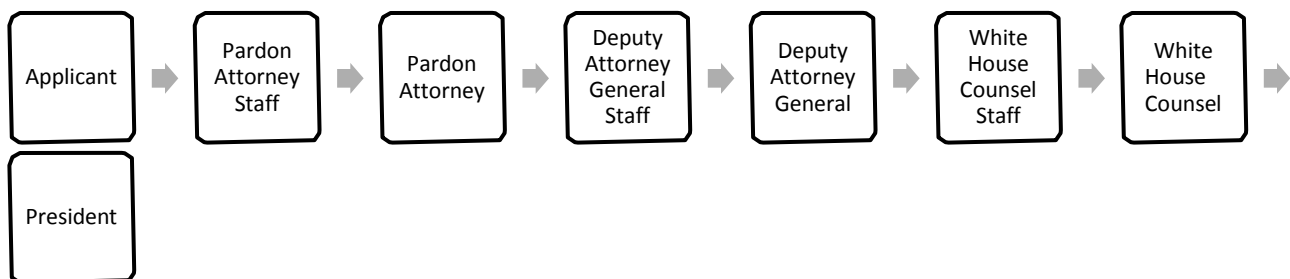


Figure 1: Federal Clemency Process⁹

The creation of a DC clemency system would require a shift of decision-making power from the federal government to the DC government. We first considered previous attempts to vest this authority in the DC government:

⁷ See *State Clemency Guide*, CRIMINAL JUSTICE POLICY FOUND. (last visited Nov. 19, 2016), <https://www.cjpf.org/state-clemency/> (detailing all the clemency systems for the fifty states, all of which are state-specific).

⁸ Except for minor offenses covered under D.C. Code §1-301.76, the President claims the pardon power over DC Code offenses, but there is a lack of positive law on the matter. Therefore, according to an official opinion by a former Pardon Attorney, federal legislation could grant full authority over local clemency to the DC government. Letter from Roger C. Adams, Pardon Attorney, to David A. Guard, Project Manager, Criminal Justice Policy Found. (2001) (on file with CCE); see also U.S. CONST. art. II, § 2 ("he shall have power to grant reprieves and pardons for offenses against the United States").

⁹ Mark Osler, *Fewer Hands More Mercy* 13 (Sept. 6, 2016), <http://dx.doi.org/10.2139/ssrn.2835668>.

- On January 6, 2016, Congresswoman Eleanor Holmes Norton introduced H.R. 4338, the District of Columbia Home Rule Clemency Act. This Act, if adopted, would allow DC to establish law authorizing the grant of clemency for DC Code offenses.¹⁰
- On March 21, 2016, Congresswoman Norton sent President Obama a letter asking him to delegate the Presidential authority to grant clemency for DC Code offenses to the Mayor. DOJ responded by explaining that the power to grant pardons is nondelegable as a part of the President's Article II powers.¹¹

These attempts by Congresswoman Norton have not been successful to provide DC sole control over its clemency power.

We recommend creating a clemency system for DC in which the ultimate decision-making power is still vested in the President.

Therefore, allowing ultimate decision-making power to remain vested in the President is the most feasible solution. We recommend a solution in which a DC clemency system would supplant the role of OPA and DOJ in the current federal scheme. The DC clemency system would work as follows:



Figure 2: Proposed DC Clemency Process

This creates a “hybrid” clemency system, with a DC Board making recommendations and the President retaining ultimate authority. It still requires some delegation of authority currently held by the President to DC, as the DC system replaces the role currently held by the DOJ.

¹⁰ District of Columbia Home Rule Clemency Act, H.R. 4338, 114th Cong. (2016).

¹¹ Press Release, Office of Congresswoman Eleanor Holmes Norton, Norton Asks President Obama to Give Local Clemency Authority to DC Mayor, (March 21, 2016), <https://norton.house.gov/media-center/press-releases/norton-asks-president-obama-to-give-local-clemency-authority-to-dc-mayor>. See also Letter from Peter Kadzik, Assistant Attorney General, to Congresswoman Eleanor Holmes Norton (Aug. 29, 2016) (on file with CCE) (stating the clemency power is a nondelegable Presidential power).

We recommend a two-part implementation plan, in which CCE advocates for both DC local legislation to establish the Board and an executive order to be signed by the President.

We recommend that the Board be established as an independent agency¹² through DC Council legislation in combination with an Executive Order from the President. Local legislation is more attainable than congressional legislation at this point in time, and will create a fairly permanent board structure with full local control. An Executive Order could supplement the legislation by indicating the President’s intent to review recommendations from the DC board.

Clemency Model and Creation of Board

To then implement the “hybrid” system, we considered what sort of clemency model should be used.

We recommend that DC create an independent board to review applications and send quality candidates to the President for ultimate disposition.

An independent board would function best in DC for four reasons:

- (1) A Board would allow for a variety of stakeholders to be represented;
- (2) The Board members would have equal voting power, and thus decisions would require deliberation and debate, with each perspective given consideration;
- (3) Each decision would be made collectively, better insulating the individuals on the Board from criticism; and
- (4) A Board would best further the goals of holistic consideration of applications, regular clemency grants, engagement with a variety of stakeholder perspectives, and predictable decisions.

BOARD COMPOSITION

This section discusses our recommendations regarding the composition of the DC Clemency Board. We recommend the Board have seven members, who may be private citizens or public officials. The seven members will each be a representative of a diverse perspective and appointed by a related official, to ensure the diversity of the board. The seven positions of the Board, as well as the entities that will have appointing power, are examined in more detail below.

¹² D.C. CODE § 2-502(5) (2016) (defining “independent agency” as any agency of the government of DC with respect to which the Mayor and the Council are not authorized by law to establish administrative procedures, other than where authorized under D.C. Code §§ 2-501-511).

Number of Members

We recommend the DC Clemency Board have seven members and be able to act with a quorum of five members.

A full Board of seven members ensures a diversity in opinions without making the Board so big as to be unwieldy. Eight states have clemency boards of seven members.¹³

We anticipate that the seven DC Board members may not be able to attend every meeting. Thus, the Board would be empowered to decide cases with a quorum of five members, enabling it to still decide cases regularly and efficiently with a diversity of viewpoints in each decision.

Public Officials or Private Citizens

We recommend that membership on the Clemency Board be open to both public officials and private citizens.

Public officials may have a greater context through which to understand political pressures within DC and may be better able to navigate the complicated dance of lawmaking and interdepartmental cooperation in DC when necessary. Conversely, private citizens can offer specific knowledge and expertise that may not be available if all Board members are public officials. As a result, appointers should have the right to choose public or private individuals to serve on the Clemency Board.

Appointees to the Board

We recommend that the Board be comprised of individuals who represent a broad, diverse, and balanced range of expertise and backgrounds.

¹³ See ARK. CODE ANN. §§ 16-93-201, -204 (2016) (using the seven-member parole board to evaluate clemency); Co. Exec. Order No. B 2012 003 (Oct.19, 2012), (enacting a seven-member clemency board); MASS. GEN. LAWS ch. 27 § 5 & ch. 127 § 154 (2016) (using the seven-member parole board to evaluate clemency); MO. REV. STAT. §§ 217.800, 552.070 (using the seven-member parole board to evaluate clemency); MONT. CODE ANN. §§ 2-15-2302, 46-23-03 (2016) (using the seven-member parole board to evaluate clemency); S.C. CODE ANN. §§ 24-21-10(B), -910, -920 (2016) (using the seven-member parole board to evaluate clemency); TENN. CODE ANN. § 41-1-505 (2016) (establishing the seven-member parole board); TENN. COMP. R. & REGS. 1100-01-01-.16 (2016) (stating the parole board evaluates clemency); TEX. CONST. Art 4, § 11 (establishing a board to evaluate clemency); TEX. REV. CIV. STAT. ANN. § 508.031 (2016) (stating the board is seven members).

Board members should represent many diverse experiences with the justice system. This will help ensure that the Board represents all relevant stakeholder’s perspectives and can make holistic and fair decisions regarding applications. In order for this diversity and impartiality to occur, we recommend the following agencies or authorities have the opportunity to appoint members:

- (1) The United States Attorney for DC will have one appointment
- (2) The Chief Public Defender for DC will have one appointment
- (3) The Attorney General for DC will have one appointment
- (4) The Chief Judge of the DC Superior Court will have one appointment
- (5) The DC Mayor will have two appointments
- (6) The DC Council will have one appointment

In addition, we recommend establishing a form of quotas in order to achieve equal representation of perspectives on the Board. There will be seven specific representatives on the Board, each appointed by an assigned official. The proposed Board members, and their corresponding appointing official, are as follows:

| Appointing Official | Board Representative |
|--|---|
| The United States Attorney for DC | A representative of the prosecution |
| The Chief Public Defender for DC | A representative of the defense bar |
| The Attorney General for DC | A representative of victim’s rights |
| The Chief Judge of the DC Superior Court | A representative of the judiciary |
| The Mayor of DC | A representative of returning citizens |
| The Mayor of DC | A representative of mental health professionals |
| The DC Council | A representative of the community at large |

Board members should also be diverse in terms of race, gender, and background. We ask that appointing authorities be cognizant of the Board’s commitment to diversity when selecting their appointees. We trust that each appointing entity will use their discretion to nominate an appropriate member to the Board to adequately represent the perspective for which they are being appointed.

BOARD DECISION-MAKING

We recommend allowing all DC Code offenders to apply for clemency. Clemency should be granted for those who are remorseful and can show they are reformed. In cases of absolute innocence, the individual must make a compelling argument demonstrating their actual innocence. The Board should give special consideration to applicants who are terminally ill, elderly, or have aged out of crime.

The content of the DC Clemency Board applications should mirror the federal clemency applications. Beyond an application, the Board should reach out to other organizations within DC to gain more information about the applicant. However, we do not recommend in-person hearings to discuss clemency.

We recommend that Board meetings be conducted in private. During these meetings, a simple majority vote from the Board will recommend an applicant to the President. We recommend that the clemency application process take no longer than six months. Finally, we recommend this process be semi-transparent, to allow for some public accountability while also protecting the President's decisions.

Each of these recommendations is examined in more detail below.

Clemency Eligibility

We recommend that every DC Code offender should be *eligible* for pardons and commutations, regardless of their underlying crimes.

The circumstances that lead to every crime are different, and no person should immediately be barred from clemency because of their crime. We recommend that to be eligible for clemency the individual must exhaust all other remedies, such as *habeas* or appellate reconsideration, as is required in the federal system.¹⁴ This will ensure that clemency remains an extraordinary remedy.

Finally, pardon applicants must wait two years from the end of imprisonment before applying, to permit them to reestablish themselves in their community and show that they will not recidivate.

¹⁴ 28 C.F.R. § 1.3 (2016) (requiring that a petition for clemency should not be filed if judicial relief is still available).

Standards for Clemency Grants

We recommend that clemency should be granted to the applicants who can show remorse and can show that they are reformed.

This standard should be evaluated holistically, through the applicant telling their unique story for why they deserve clemency. In cases in which the applicant maintains their innocence, we recommend that the applicant must make a compelling argument that demonstrates their innocence.

Commutation Applicants must:

- Exhibit that that they want to make meaningful contributions to society upon their return; and
- Be given particular consideration when the sentencing scheme for their crime was lessened after they were initially convicted of the crime.

Pardon Applicants must:

- Have not had further convictions or pending cases in the criminal justice system; and
- Describe how the receipt of a pardon would help them achieve their goals and contribute to their community.

Special Considerations

We recommend that the following groups receive special consideration when seeking clemency:

- (1) The elderly;
- (2) The terminally ill; and
- (3) Those who have aged out of crime.¹⁵

All three of these groups pose significantly less of a danger to society, and there is minimal benefit to keeping them in prison. Moreover, individuals should have the chance to argue that they should be able to spend their remaining days in the community and die free, rather than dying in prison.

¹⁵ For example, those individuals who committed crimes at a young age before their brains have fully developed. Once that happens, many of these individuals will never convict crimes again. See, e.g., Dana Goldstein, *Too Old to Commit Crime?*, JUSTICE LAB BLOG (Mar. 20 21 5), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime#.WrBPcankM>.

Application Content

We recommend that the pardon and commutation applications to the DC Clemency Board mirror their corresponding federal applications.

Current federal forms are short, easy to complete, and self-explanatory. We heard from DC returning citizens who applied using these forms that the process was relatively simple and understandable. They believed the applications allowed them to fully share their stories. Based on our research, the issues with grants of clemency have far more to do with the evaluation process, rather than the information sought on the forms themselves.

Other Materials for Considering an Application

We recommend that the Board consider materials beyond what is provided in the application materials.

To do this, we recommend that the Board reach out to other organizations to gain more information about the applicant.¹⁶ The burden should belong to the Board to collect this info, not the applicant. This is because the Board is in a much better position to conduct outreach to organizations for this information. This additional information would factor into the DC Clemency Board's evaluation process.

¹⁶ The federal pardon forms currently have an Authorization of Release of Information that allows for the Federal Bureau of Investigations to conduct a background check on the applicant. See DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, PETITION FOR PARDON AFTER COMPLETION OF SENTENCE 23 (2016), <https://www.justice.gov/pardon/file/898541/download>. We recommend maintaining this portion in the application for the DC Clemency Board to enable it to conduct similar background checks. As DC relies on DOJ to run background checks on individuals in other circumstances, DC law may be able to also ask DOJ to run these background checks and investigations here as well. See, e.g., D.C. CODE § 3-1205.22 (allowing for DOJ to do background checks on healthcare workers in DC).

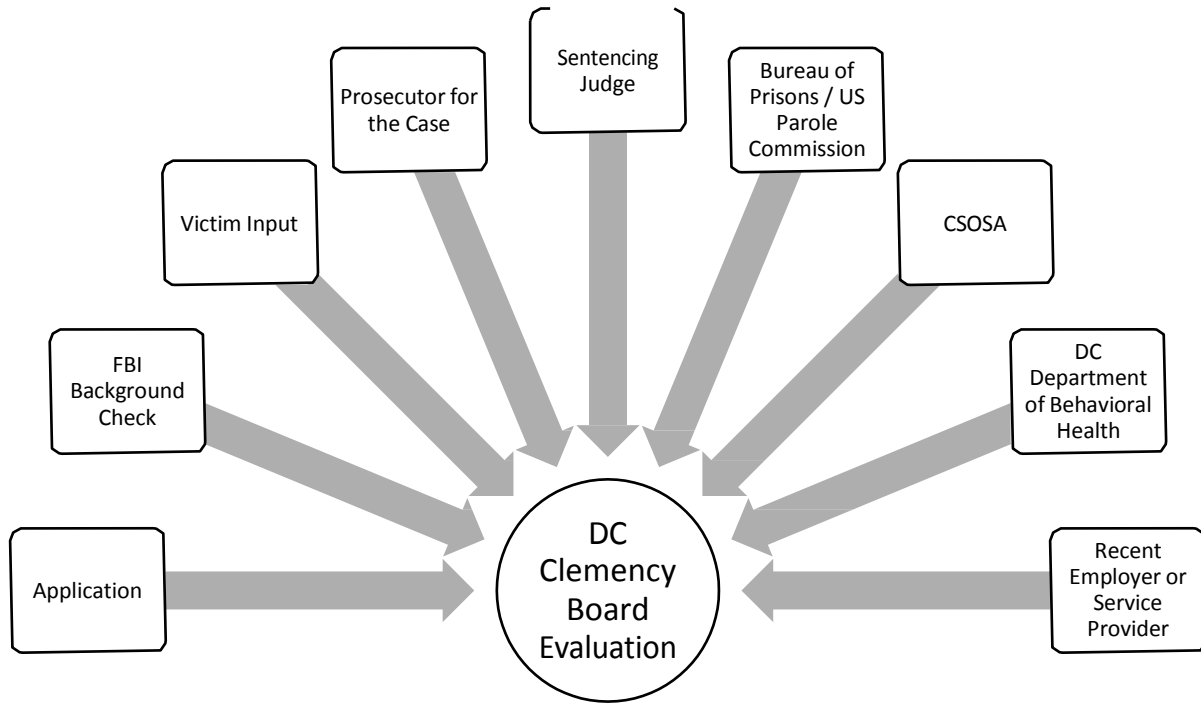


Figure 4: DC Clemency Board Evaluation Process¹⁷

None of these sources would be dispositive, but are rather intended to enable the Board to gain a fuller picture of the individual applying for clemency, and to understand the nature of his/her crime and how far the applicant has come since that time.

Hearings

We recommend that the Board have the option of video hearings with applicants during the application process.

We recommend having an option for applicants to participate in video call hearings at some point during the application process. During these video call hearings, applicants should have access to a representative, attorney or non-attorney. This option would assist the Board in making holistic and fair decisions.

¹⁷ CSOSA = Court Services and Offender Supervision Agency.

Public or Private Board Meetings

We recommend that DC Clemency Board meetings occur in private. We also recommend that all aspects of the application discussion process, from start to final vote tally, remain private.

Private meetings allow for:

- The honest and frank discussion of each application, advancing individual and holistic consideration of applications;
- The engagement of a variety of stakeholder perspectives; and
- The efficient operation of the clemency system.

Finally, conducting private meetings more closely mirrors the closed nature of the current federal process. Thus, the President may be more likely to support such a proposal, making it more feasible. These advantages outweigh any added transparency that public meetings might provide.¹⁸

Voting Process

We recommend that clemency applications be approved by a simple majority vote of the Board, with no member having veto power.

This parallels every other state clemency board, in which simple majorities are used (with exceptions in some cases for particular crimes or offenders). We recommend a simple majority in all cases, with no exceptions for a higher burden for any particular crime.

Disposition Time and Frequency of Meetings

We recommend the DC Clemency Board ideally take no more than six months for the disposition of each application. We recommend the Board meet once a month to determine dispositions.

Six months from receipt of application to determination is in line with the disposition time of some boards that frequently and regularly grant clemency, including Delaware, Oklahoma, and

¹⁸ To ensure that this can occur, the DC legislation implementing these private meetings will need to override DC Code section 1-207.42, as it mandates that all DC government board meetings are open to the public. D.C. CODE § 1-207.42 (2016). Legislation can, and does, override this DC Code provision for meetings. See, e.g., D.C. CODE § 1-204.34(c)(1) (2016) (overriding D.C. CODE § 1-207.42 (2016) for meetings of the DC Judiciary Nomination Committee).

South Dakota.¹⁹ As DC Clemency Board-approved applications would still need to proceed to the President, the final disposition would take longer.

To facilitate the efficient processing of applications, we recommend that the Board meet roughly once per month, which is in line with the practice of several state Boards.²⁰

Transparency/Public Reporting

We recommend the DC Clemency Board should adhere to a semi-transparent system for granting clemency.

This means:

- The Board should track and publish the number of applications it grants and denies, and how the President adjudicates those applications; and
- The Board should not issue public opinions regarding the disposition of any application.

This choice provides some public accountability, ensuring the public is informed that applications are regularly approved by the Board. Moreover, similar figures are routinely published in the federal clemency system, allowing the DC Clemency Board to mirror current federal practices.²¹

However, we do not recommend that individual decisions be released publicly, which also mirrors the federal system. Releasing decisions prior to Presidential adjudication would put the President in the uncomfortable position of denying reasoned Board decisions without explanation.

BOARD LOGISTICS

This section discusses our recommendations for the logistics of the DC Clemency Board. We recommend that the Board be chaired by an individual selected by the Board itself, with the chairpersonship a purely procedural designation. Appointed Board members will serve staggered terms of four years, beginning after the Board is initially established.

We recommend that the Clemency Board initially have one full-time staff member to ensure the application materials are processed and assembled for the Board to review. Because we

¹⁹ See Love, *supra* note 7 (stating Delaware, Oklahoma, and South Dakota provide “frequent and regular” clemency grants).

²⁰ See, e.g., *Board of Pardons Meeting Calendar*, DELAWARE.GOV (last visited Nov. 27, 2016), <http://pardons.delaware.gov/meetings.shtml> (noting the Board meets once a month); *Board Calendar*, IOWA BD. OF PAROLE (last visited Nov. 27, 2016), <http://www.bop.state.ia.us/BoardCalendar> (noting the Iowa Board of Parole meets at least once a month); *Pardon Hearings Docket and Decisions*, LA. DEP’T OF CORRECTIONS (last visited Nov. 27, 2016), <http://doc.louisiana.gov/dockets-and-decisions/> (indicating that hearings for pardons occur monthly).

²¹ Office of the Pardon Attorney, *Clemency Statistics*, DEP’T OF JUSTICE (last visited Nov. 30, 2016), <https://www.justice.gov/pardon/clemency-statistics>.

propose the Clemency Board be enacted through local legislation, we recommend it be funded through that same legislation. Each recommendation is examined more below.

Chairperson

We recommend that once the Board is established, the seven members then select a chairperson. The chair serves the procedural role of presiding over and running meetings.

The chair of the Board should be self-selected among appointed Board members. The chair should not correspond to a vote with greater weight, as political stakeholder opinions are accounted for in the appointment process.²²

Terms

We recommend that the appointed Board members all serve four-year staggered terms, with no term limit.

We recommend a four-year term so that Board members have the benefit of working together over a relatively long period. Working together over a prolonged period should help members engage with one another collaboratively to evaluate applications and be open to each other's points of view. Four states have four-year terms for their boards.²³ Of these states, Iowa²⁴ and Montana²⁵ have boards comparably sized to the one we are proposing for DC, indicating that for a board this size, a four-year term is sufficient in its workability among the membership. We recommend that there be no term limit for the members of the Clemency Board. Staggered terms encourage continuity among the Board membership, maintaining greater consistency in the clemency evaluation process from year to year. We suggest a staggered model based on mayoral terms.

Staff

²² See Voting Process, *supra* page 13.

²³ IOWA CODE §§ 904A.1, 904A.4 (2016) (noting the Parole Board members serve four year terms and assist with clemency determinations); MONT. CODE ANN. §§ 2-15-2302, 46-23-03 (2016) (establishing the seven members serve four year terms); S.D. CODIFIED LAWS §§ 24-13-2, 24-14-5 (2016) (establishing the Pardon & Parole Board, which handles clemency, sits for four-year terms), WASH. REV. CODE § 9.94A.880 (2016) (stating the five board members have four year terms).

²⁴ IOWA CODE §§ 904A.1, 904A.4 (2016) (noting the seven-member Parole Board members serve four year terms and assist with clemency determinations).

²⁵ MONT. CODE ANN. §§ 2-15-2302, 46-23-03 (2016) (establishing the seven members serve four year terms).

We recommend that the Clemency Board initially employ one full-time staff member.

One staff member should be sufficient to manage the DC Clemency Board. Currently, the Delaware clemency board—a board from a state with a similarly sized overall population and inmate population to DC—is managed by one person. This demonstrates that one full-time staff member can be sufficient. We propose that the Board review its staffing needs to correspond with any regular Board reviews or reports that are required by its funding sources.

Staff Role

We recommend that full-time staff member help to gather the application materials and prepare them for Board review.

Staff assistance with assembly of the application materials will promote efficient evaluation of clemency applications and is essential as members will not be serving on the Board full time. The role of the full-time staff member is to organize and collect initial applications and supplemental materials for the applications. Additionally, the full-time staff member is tasked with tracking the progress of the application.

Board Funding

We recommend funding the DC Clemency Board through its implementing local legislation.

Having the Board funded through local legislation allows the Board to have greater autonomy over its decisions, ensuring relative independence of the Board from other influence.

With one full-time staff member, the startup and overhead costs should be relatively low. The Board would initially need little office space and could use existing DC government office space to minimize costs. Pay for Board members could also be relatively low, paralleling juror payment²⁶ or payment of non-DC government employee members on other DC independent

²⁶ D.C. CODE § 11-1912 (2016) (paying jurors); *Getting Paid*, D.C. Courts (last visited Dec. 1, 2016), <http://www.dccourts.gov/internet/jurors/gettingpaid/main.jsf> (establishing jurors are currently paid \$30/day).

boards.²⁷ This pay would not add significantly to the funds requested for the Board.

CONCLUSION

DC Code offenders currently have no meaningful access to clemency, and the DC government has no control over the disposition of clemency for individuals who are convicted of violating its laws. We are searching for a pathway forward, after Congresswoman Norton's two recent attempts to vest the clemency power in DC have not gained traction.

This *Proposal* is an attempt to advance the most effective, complete, and feasible clemency solution possible for DC. We crafted this clemency solution by examining best practices, reading academic research, and speaking with a plethora of stakeholders. This solution can be feasibly implemented, would continue to have the President retain ultimate pardon authority, and would fit with the complexities of DC's system.

To that end, we propose a DC Clemency Board composed of seven Board members, all representing relevant stakeholders and the community. This Board will consider applications holistically, looking for remorse and reform within applicants, before passing recommended applications on to the President for final disposition. We believe that this proposal provides DC with the best chance at finally having a meaningful voice in the adjudication of clemency for those that have been convicted of violating its own laws, while also making those determinations in the most principled and transparent way possible.

²⁷ D.C. CODE § 32-1402 (2016) (paying non-DC government employee members of the DC Apprenticeship Council \$25/day for their work on the Apprenticeship Council).

Council for Court Excellence
1111 14th Street NW, Suite 500
Washington, DC 20005-5628
202.785.5917
www.courtexcellence.org
facebook.com/courtexcellence
twitter.com/CCE_for_DC

The Community Justice Project
Georgetown Law
600 New Jersey Avenue NW | Suite 336
Washington, DC 20001
communityjusticeproject@law.georgetown.edu

THE COMMUNITY
JUSTICE PROJECT

GEORGETOWN LAW

cce Council for
Court Excellence
Improving Justice for the Community