U.S. Department of Justice
Pardon Attorney

Washington D.C. 20530

Mr. David A. Guard
Criminal Justice Policy Foundation
1225 Eye St., N.W., Suite 500
Washington, D.C. 20005

Dear Mr. Guard:

We received your letter of September 20, 2001, asking who has authority to grant executive clemency for local offenses prosecuted in the District of Columbia. Criminal violations of the District of Columbia Code, whether or not felonies, are "offenses against the United States" within the meaning of Art. II, § 2 of the United States Constitution, which defines the pardon power of the President. *See United States v. Cella,* 37 App. D.C. 433, 435 (1911) ("crimes committed [in the District of Columbia] are crimes against the United States"). Presidents have granted pardons and commutations to persons convicted of D.C. Code offenses; the Justice Department's clemency procedure, now set forth in 28 C.F.R. §§ 1.1 to 1.11, is being applied to such offenses and has been applied to them over the years.

The President's power to grant clemency pursuant to Art. II, § 2 is exclusive as to federal offenses committed within the confines of a state, but as to local offenses committed within a territory may be made concurrent with authority granted by Congress to territorial officials, not by virtue of Art. II, § 2, but pursuant to Congress' power to provide for the governance of territories. *See, e.g.,* V.I. Organic Act of 1954, § 11 (the Governor of the Virgin Islands "may grant pardons and reprieves and remit fines and forfeitures for offenses against local laws"); 28 C.F.R. § 1.4 (clemency petitions relating to violations of laws of territories should be submitted to the appropriate territorial official or agency). The District of Columbia is unique, in that it has its own provision for governance by Congress, found in Art. I, § 8, cl. 17 of the Constitution. As explained by the United States Supreme Court in *Palmore v. United States,* 411 U.S. 389, 397 (1973), Congress' power under this provision of Art. I, § 8 "is plenary. Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes."

To the extent that Congress has directly or indirectly dealt with the issue of clemency in the District of Columbia, the only currently applicable provision in federal or District of Columbia law on the subject (leaving aside Art. II, § 2 of the Constitution) is a statute in the District of Columbia Code, § 1-301.76, which provides: "The Mayor of the District of Columbia may grant pardons and respites for offenses against the late corporation of Washington, the ordinances of Georgetown and the levy court, the laws enacted by the Legislative Assembly, and the police and building regulations of the District." Determining the meaning of this statute requires recognition that it reflects the historical development of local government in the District. The history of the governance of the District of Columbia is set forth in relevant detail in a number of court cases, including *Metropolitan R. Co. v. District of Columbia*, 132 U.S. 1 (1889), and *District of Columbia v. John R.Thompson Co., Inc.*, 346 U.S. 100 (1953). The former case explains the evolution of the District of Columbia government as follows:

> Prior to 1871 the local government of the District of Columbia, on the east side of the Potomac, had been divided between the corporations of Washington and Georgetown and the levy court of the county of Washington. Georgetown had been incorporated by the legislature of Maryland as early as 1789, . . . as Alexandria had been, by the legislature of Virginia, as early as 1748 and 1779, and those towns or cities were ... ordinary municipal corporations, with the usual powers of such corporations. When the government of the United States took possession of the District in December, 1800, it was divided by [C]ongress into two counties, that of Alexandria on the west side of the Potomac, and that of Washington on the east side; and the laws of Virginia were continued over the former, and the laws of Maryland over the latter ...; but the corporate rights of the cities of Alexandria and Georgetown ... were expressly left unimpaired .... [T]he levy courts of ... Maryland ... [had] powers related to the construction and repair of roads, bridges, ferries, the cue of the poor, etc. ... On May 3, 1802, an act was passed to incorporate the city of Washington. ... It invested the mayor and common council ... with all the usual powers of municipal bodies .... This general review of the form of government which prevailed in the District of Columbia and city of Washington prior to 1871 is sufficient to show that it was strictly municipal in its character .... The officers of the departments, even the president himself, exercised no local authority in city affairs. ... In 1871 an important modification was made in the form of the District government. A legislature was established with all the apparatus of a distinct government. By the act of February 21st of that year ... [it was] created into a government by the name of the "District of Columbia," by which name it was constituted "a body corporate for municipal purposes" ... A governor and legislature were created .... This constitution lasted until June 20, 1874, when ... the government [created in] 1871 was abolished .... By a

> subsequent act, approved June 11, 1878, it was enacted that the District of Columbia should "remain and continue a municipal corporation," ... and the appointment of commissioners was provided for ...

Metropolitan R. Co. v. District of *Columbia, 132 U.S.* at *4 - 7.*

Thus, the phrases "late corporation of Washington “ordinances of Georgetown," and the "levy court" in § 1-301.76 relate to the form of government in effect from 1801 to 1871, when the city government had a municipal organization. The "Legislative Assembly" is the name of the legislature created in 1871 as the governing body for the District of Columbia; it was abolished in 1874. *See John R. Thompson Co., Inc. v. District* of *Columbia*, 346 U.S. at 104. Finally, the phrase "police and building regulations of the District of Columbia" refers to regulations authorized by D.C. Code §§ 1-303.01 (regulations relating to such subjects as junk-dealing, pawnbroking, hacks, street vendors, dogs, noise, and litter); 1-303.03 (regulations for the protection of life, limb, health, comfort, and quiet); 1-303.43 (regulation of firearms, projectiles, explosives, or weapons of any kind); and 1-301.04 (building regulations). Offenses defined in the police and building regulations are generally prosecuted in the name of the District of Columbia and are handled by Corporation Counsel rather than the United States Attorney. *See* D.C. Code § 23-101(a).

The clemency provision in § 1-301.76 has its roots in Congress' change to the District's form of government in 1871. At that time, Congress gave the governor the power to "grant pardons and respite for offenses against the laws of the District enacted by the legislative assembly thereof," in language quite similar to § 1-301.76. Act of February 21, 1871, § 6. In 1874, however, the Legislative Assembly was abolished; the clemency provision nonetheless continued to refer to "laws of the legislative assembly." The failure to modify the language of the clemency provision (now embodied in § 1-301.76*)* to reflect the change in the District's form of government indicates that the provision was intended to refer to historical entities and enactments - *i.e.*, laws enacted by the Legislative Assembly between 1871 and 1874 - rather than to offenses described in laws adopted at any time by any District legislative body, by whatever name then or thereafter known. Thus, the clemency provision does not constitute a general grant of power to the District's executive (now the Mayor) to grant clemency in a broad class of criminal cases. Further, in 1901 the District of Columbia Code was passed, repealing "all ... acts of the legislative assembly of the District of Columbia" that were "general and permanent in their nature," with certain exceptions. 31 Stat. 1189, § 1636. (Relevant exceptions were for statutes relating to police regulations and for "[a]ll penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both,") While there may be scattered "enactments of the Legislative Assembly" that were not codified but were saved from repeat when codification of the District's laws took place, *see John R. Thompson Co., Inc. v. District of Columbia*, *supra*, any felonies and most misdemeanor offenses would have been excluded from the grant of clemency authority by virtue of the codification in 1901 in any event. Again, the clemency provision remained unchanged, despite the effects of the codification.

Thus, to the extent the positive law gives clemency power over offenses committed in the District of Columbia to anyone other than the President, the grant of authority is limited to a fairly narrow set of offenses. That Congress would authorize the Mayor to grant clemency only for minor offenses that touch most directly on purely local interests is not remarkable in the context of the general pattern of federal involvement in criminal law matters in the District. With a few exceptions, criminal cases in the District of Columbia are brought in the name of the United States and are prosecuted by the United States Attorney, even if filed in Superior Court. It is therefore not surprising that the power to grant clemency for offenses against the United States committed in the District of Columbia would be the responsibility of the President, rather than the Mayor. The historical practice of this office in handling clemency applications for D.C. offenders is consistent with that result.

I hope this discussion answers your question and provides a context that makes it more apparent why the President handles clemency in cases involving criminal violations of the D.C. Code.

Sincerelv,

Roger C. Adams
Pardon Attorney