



ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

HONORABLE JOHN D. BATES  
Director

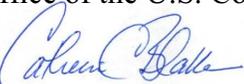
WASHINGTON, D.C. 20544

July 31, 2014

MEMORANDUM

To: Chief Judges, United States Courts of Appeals  
Chief Judges, United States District Courts  
Federal Public/Community Defenders

From: Judge John D. Bates   
Director, Administrative Office of the U.S. Courts

Judge Catherine C. Blake   
Chair, Judicial Conference Committee on Defender Services

RE: APPOINTMENT AUTHORITY IN NON-CAPITAL CLEMENCY APPLICATIONS  
**(IMPORTANT INFORMATION)**

On April 13, 2014, the Deputy Attorney General announced a new clemency initiative (“Clemency Project 2014”) for certain federal inmates currently serving lengthy sentences. Clemency is a function and responsibility solely of the Executive Branch, but this initiative may affect the courts, the United States probation offices, and the federal defenders. The Department of Justice (DOJ) has requested that federal defenders be detailed to the Office of the Pardon Attorney to assist in screening clemency applications, and some inmates have requested assistance of counsel. Questions have been raised, however, about the authority to appoint federal defenders or panel attorneys to represent clemency applicants under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A.

In light of these issues, the General Counsel of the Administrative Office (AO) of the United States Courts was asked for an opinion: (1) providing background on Clemency Project 2014; (2) addressing whether the CJA provides authority for the appointment of counsel to represent applicants for clemency under this initiative; and (3) addressing whether Federal Public Defender Organization (FPDO) employees may be detailed to the Office of the Pardon Attorney to assist in screening clemency applications. A copy of that opinion is attached for the consideration of courts facing decisions about the best way of responding to the clemency initiative and individual clemency applications.

In essence, the General Counsel of the AO has concluded that there is no authority under the CJA or any other provision of law for courts to appoint federal defenders or CJA panel attorneys to represent non-capital clemency applicants under the new Executive Branch initiative. In light of that conclusion, we must advise that CJA panel attorneys are not authorized to be paid for non-capital clemency representations. The General Counsel did conclude, however, that agreements may be entered with DOJ to detail federal defenders to the Office of the Pardon Attorney to assist with screening clemency applications, so long as it is on a fully-reimbursed basis.

The General Counsel's opinion further explains that: "the lack of court authority to appoint the FPDO to represent a clemency applicant would not preclude the FPDO from screening its client files to identify individuals who may satisfy the criteria established under this initiative or from reviewing files to assist another attorney representing a clemency applicant." Involvement by federal defenders, to the extent consistent with the law and the priorities of each office, may have practical benefits to the courts, probation offices, and clemency applicants. Defenders customarily assist clients, even after sentencing, with inquiries related to incarceration, and may be well-equipped to review presentence reports and other information to determine whether applicants meet the criteria established by the DOJ for clemency. The opinion also acknowledges that "courts have discretionary authority to appoint FPDOs to assist in various administrative tasks for the general benefit of their office, the courts, or the judiciary," but concludes that there is no authority to appoint federal defenders or panel attorneys to represent individual non-capital clemency applicants.

This memorandum and the General Counsel's opinion are provided for your information in considering appointments relating to non-capital clemency applications.

Attachment

**ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS**  
**Memorandum**

**DATE:** July 30, 2014 *LOESCHE*

**FROM:** *Robert* Robert K. Loesche, General Counsel

**SUBJECT:** Authority to Appoint Criminal Justice Act Counsel in Non-Capital Clemency Matters and to Detail Federal Public Defender Office Staff to the Office of the Pardon Attorney

**TO:** Judge John D. Bates, Director

On April 13, 2014, Deputy Attorney General James M. Cole announced a new clemency initiative for federal inmates convicted of drug offenses. This initiative is focused on reducing sentences that, if imposed under today's laws, would be substantially less for the same offense.

The Department of Justice (DOJ) will prioritize clemency applications under this initiative for inmates who meet all of the following factors:

- 1) They are currently serving a federal sentence in prison, and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense today;
- 2) They are non-violent, low-level offenders without significant ties to large scale criminal organizations, gangs or cartels;
- 3) They have served at least 10 years of their prison sentence;
- 4) They do not have a significant criminal history;
- 5) They have demonstrated good conduct in prison; and
- 6) They have no history of violence prior to or during their current term of imprisonment.

According to the announcement, this initiative applies to a limited category of petitioners whose clemency applications may be especially meritorious; however, outside of this initiative, any inmate may apply for clemency under the standard principles for which executive clemency has been granted historically.

Tens of thousands of applications for clemency under this initiative are expected to be made to the DOJ Office of the Pardon Attorney (OPA), and many, if not most, of these applicants will have been previously represented by counsel appointed under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A.<sup>1</sup> In anticipation of an extraordinarily high volume of applications, the DOJ has requested volunteers from both inside and outside the DOJ, including from Federal Public Defender Organizations (FPDOs), to assist the OPA in screening applications. In a May 7, 2014 letter the Deputy Attorney General requested the three FPDOs in the Washington, DC area<sup>2</sup> to consider detailing one or two members from each office to the OPA for a six-month period to assist in this initiative. Several U.S. district courts also have issued orders authorizing their local FPDO to represent applicants for clemency under this initiative. In response to DOJ's request for assistance from the legal profession to assist the OPA in screening clemency applications, Clemency Project 2014 has been established by various criminal defense and other organizations, including FPDOs, to attract pro bono counsel.

### **Issues Presented**

As a result of these developments, you have asked the Office of General Counsel to 1) provide background on Clemency Project 2014, 2) address whether the CJA provides authority for the appointment of counsel to represent applicants for clemency under this initiative, and 3) address whether FPDO employees may be detailed to the OPA to assist in screening clemency applications.

Following is a discussion of these issues beginning with a brief summary of clemency and additional background on this clemency initiative.

### **Background on Clemency Initiative**

The authority to grant clemency is an executive power of the President alone under Article II, Section 2 of the U.S. Constitution<sup>3</sup>. The DOJ, through its OPA, assists the President in the exercise of his executive clemency power by conducting an investigation and review of each clemency application, and, based on this, the Deputy Attorney General makes a signed recommendation to the President as to each application. The President decides each application

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<sup>1</sup> CJA counsel includes Federal Public Defender Organizations (Judiciary employees), Community Defender Organizations (private sector employees funded by a federal grant), and private attorneys who are members of a panel of qualified attorneys established by the courts and paid an hourly rate established under the CJA.

<sup>2</sup> These include the FPDOs for the District of Columbia, the District of Maryland, and the Eastern District of Virginia.

<sup>3</sup> "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." U.S. Const. art. II, § 2, cl. 1.

as he deems appropriate, and the OPA notifies the petitioner of the President's decision in writing.

As explained at the OPA website<sup>4</sup>, the executive clemency process is intended to be accessible to all persons, and representation by counsel is not required. Most clemency applications are submitted by persons who are not represented by counsel. It is a written process that involves no hearing or similar proceeding, and applicants may contact the OPA for assistance or clarification about the process. If an application is incomplete or requires additional information, OPA will contact the petitioner in writing to explain what is required. Any third party is also free to submit in writing any information s/he believes to be significant to an individual's application for clemency, and OPA will include it in the petitioner's clemency file.

As part of this new clemency initiative, Deputy Attorney General Cole also announced that he had issued a DOJ-wide call for attorneys to assist the OPA in thoroughly and rapidly reviewing these clemency petitions to determine which meet the six criteria described above and merit further consideration. He also sent a letter to the 93 U.S. attorneys for their assistance in identifying meritorious candidates for clemency.

The Bureau of Prisons (BOP) has notified inmates of this clemency initiative and of the availability of pro bono counsel through Clemency Project 2014. It also has provided interested inmates with an electronic survey that will help reviewing attorneys (DOJ and pro bono) to quickly screen applications and identify those that meet the criteria. BOP case managers will also assist inmates in submitting the appropriate paperwork for their clemency applications.<sup>5</sup>

### **Clemency Project 2014**

Clemency Project 2014 was formed in response to the Deputy Attorney General's January 30, 2014 speech at the New York State Bar Association's annual meeting in which he called for assistance in identifying appropriate clemency applications under this initiative. It is comprised of independent, outside groups, including the American Bar Association (ABA), the American Civil Liberties Union (ACLU), Families Against Mandatory Minimums (FAMM), and the National Association of Criminal Defense Lawyers (NACDL). As indicated below, these organizations have announced that federal public defenders are also participants in Clemency Project 2014. The NACDL website provides the following description, and guidance to volunteer lawyers and inmates:

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<sup>4</sup><http://www.justice.gov/pardon/faq.htm>

<sup>5</sup> BOP's Notice To Inmates: Initiative on Executive Clemency and the Executive Clemency Survey is available on BOP's website via this link: [http://www.bop.gov/resources/news/pdfs/Notice\\_to\\_Inmates\\_Initiative\\_on\\_Executive\\_Clemency.pdf](http://www.bop.gov/resources/news/pdfs/Notice_to_Inmates_Initiative_on_Executive_Clemency.pdf)

Clemency Project 2014 launched in January after Deputy Attorney General James Cole asked the legal profession to provide pro bono assistance to federal prisoners who would likely have received a shorter sentence if they'd been sentenced today. Clemency Project 2014 members are currently collaborating to recruit and train attorneys on how to screen for prisoners who meet the criteria laid out by the deputy attorney general. Clemency Project 2014 is composed of the Federal Defenders, the American Civil Liberties Union, Families Against Mandatory Minimums, the American Bar Association, and the National Association of Criminal Defense Lawyers, as well as individuals active within those organizations and other lawyers wishing to participate in this volunteer effort.

Lawyers wishing to volunteer may write to [clemencyproject@nacdl.org](mailto:clemencyproject@nacdl.org). Clemency Project 2014 will acknowledge receipt of emails of interest and will notify all volunteers of the date for the training program.

Inmates seeking representation by pro bono attorneys provided by Clemency Project 2014 attorneys should complete the online Trulinks<sup>6</sup> [sic] survey provided by the Bureau of Prisons or the paper survey that will be made available by case managers and be sure to check the box indicating that they wish to have [counsel].<sup>7</sup>

According to a May 30, 2004 ABA Journal article<sup>8</sup>, approximately 400 to 500 attorneys have already volunteered, additional volunteers continue to be solicited, and an online training for volunteers took place in early July 2014. The article also reports that approximately 15,000 prisoner surveys have already been filled out and that the BOP expects approximately 15,000 more before all prisoners are done.

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<sup>6</sup> A detailed description of the Trust Fund Limited Inmate Computer System (TRULINCS) and BOP's policy regarding its use can be found on the BOP Website via this link: [http://www.bop.gov/policy/progstat/5265\\_013.pdf](http://www.bop.gov/policy/progstat/5265_013.pdf).

<sup>7</sup> <http://www.nacdl.org/NewsReleases.aspx?id=33100>

<sup>8</sup> [http://www.abajournal.com/news/article/massive\\_volunteer\\_effort\\_will\\_help\\_with\\_obama\\_clemency\\_proposal/](http://www.abajournal.com/news/article/massive_volunteer_effort_will_help_with_obama_clemency_proposal/)

See, also, ACLU April 23, 2014 press release: <https://www.aclu.org/criminal-law-reform/clemency-project-2014-praises-justice-department-breathing-new-life-clemency>;

FAMM May 7, 2014 posting:

<http://famm.org/answers-to-your-frequently-asked-questions-about-the-new-clemency-initiative/>

**Authority to Appoint CJA Counsel for Non-Capital Clemency Representation**

Since the Deputy Attorney General's address to the New York State Bar Association and the formation of Clemency Project 2014, several U.S. district courts have issued orders (Standing, Administrative, and case specific) pursuant to 18 U.S.C. § 3006A(a)(1) and (c) authorizing FPDOs to represent individuals previously determined to be entitled to appointed counsel in seeking clemency under this initiative.<sup>9</sup> Some of these orders cite § 3006A(a)(1) and (c) as authority to appoint counsel "in the interest of justice" and/or as "ancillary" matters, respectively, under the CJA. Others cite the CJA more generally, and still others cite no authority at all.

As discussed above, the power to grant clemency under federal law is a purely executive function; only the President has that power. *See Harbison v. Bell*, 556 U.S. 180, 186-87 (2009). Moreover, the exercise of that power is not adversarial in nature and does not involve a proceeding at all, judicial or otherwise. Rather, clemency "is the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 412 (1993). There is no Sixth Amendment right to counsel for purposes of seeking executive clemency and no statutory right, except in capital cases. Our review leads to the conclusion that there is no authority under the CJA or other law to appoint counsel in non-capital clemency proceedings.

Congress has explicitly authorized CJA counsel appointed in capital cases to file clemency petitions on behalf of financially-eligible defendants. "Each attorney so appointed shall represent the defendant through every subsequent stage of available judicial proceedings . . . , and all available post-conviction process, together with stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."<sup>10</sup> 18 U.S.C. § 3599(e). But Congress has not seen fit to provide this authorization in non-capital CJA appointments, whether in the interest of justice or otherwise, although it clearly could have done so if it had been so inclined. *See* 18 U.S.C. § 3006A(a). "Congress' decision to furnish counsel for clemency proceedings [under § 3599(e)] demonstrates that it, too, recognized the importance of such process to death-sentenced prisoners[.]" *Harbison v. Bell*, 556 U.S. at 193.

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<sup>9</sup> To date, it appears that only one district court (E.D.Mo.) has issued an order authorizing CJA panel attorneys to represent applicants for executive clemency, although any such authority would apply equally to all CJA counsel.

<sup>10</sup> "[S]ubsection (e)'s reference to 'proceedings for . . . other clemency refers to [S]tate proceedings, as federal clemency is exclusively executive, while States administer clemency in various ways." *Harbison v. Bell*, 556 U.S. 180, 187 (2009)

Moreover, the plain language of subsection (c) of section 3006A makes clear that courts' authority to appoint counsel in ancillary matters extends only to those ancillary matters that are germane to judicial proceedings. "A person for whom counsel is appointed shall be represented at *every stage of the proceedings* from his initial appearance before the United States magistrate judge or the court through appeal, *including ancillary matters appropriate to the proceedings.*" 18 U.S.C. § 3006A(c) (emphasis added). This interpretation is also supported by the legislative history of the amendment to the CJA that added the "ancillary matters" provision. It indicates that this provision was intended to clarify that counsel should be compensated for pursuing remedies that are technically outside the scope of trial but which are necessary for the defense.

This provision is necessary to insure that the rights of the person are fully protected. Many times remedies technically outside the scope of the trial proper may be necessary, such as using a habeas corpus ad testificandum to secure the presence or testimony of witnesses, or filing an application under 18 U.S.C. § 3244 regarding competency to stand trial. While the District of Columbia has ruled in favor of compensation under the present Act . . . , and although there is no apparent ruling to the contrary, the express inclusion of "ancillary matters appropriate to the proceedings" will insure that the attorney who spends time and effort to protect a right considered valuable in defending the criminal charge can be compensated under the Act.

H.R. Rep. 1546, 91<sup>st</sup> Cong., 2d Sess. (Sept. 30, 1970), reprinted in 2 U.S. Code Cong. and Admin. News 3989 (1970).

Applications for clemency under this initiative also are not analogous to the 2008 and 2011 retroactive reductions in sentences for crack cocaine convictions under the U.S. Sentencing Guidelines pursuant to 18 U.S.C. § 3582(c)(2). First, although both these retroactive sentence reductions under section 3582(c)(2) and this clemency initiative are directed at reducing sentences for drug offenses, that is where the similarities end. The former is judicial in nature, and the latter is exclusively executive in nature. Second, while district courts may have relied on "ancillary matters" authority to appoint counsel in these cases, many circuit courts have rejected this interpretation. *See, e.g., United States v. Foster*, 706 F.3d 887 (7<sup>th</sup> Cir. 2013) (section 3582(c)(2) motions to reduce sentences following retroactive reductions to the sentencing guidelines are not part of a criminal prosecution or a collateral attack; thus appointment of counsel is not authorized under the CJA); *United States v. Webb*, 565 F.3d 789 (11<sup>th</sup> Cir. 2009) (section 3582(c)(2) motion to reduce sentence based on reduction in sentencing guidelines for crack cocaine not an ancillary matter, which encompasses solely those proceedings connected to the original criminal action); *United States v. Whitebird*, 55 F.3d 1007 (5<sup>th</sup> Cir. 1995) (post-conviction motion to reduce sentence in light of amendment to sentencing guideline not an ancillary matter). While this memo is not taking a position on the merits of appointing counsel in sentence reduction hearings, the simple fact that there is doubt about the availability of authority to appoint CJA counsel in those proceedings suggests that no such authority exists with regard to clemency proceedings.

In addition to § 3006A(a)(1) and (c), at least one order also cited “the discretion of the court” as authority to appoint the FPDO to determine the eligibility of indigent individuals to apply for clemency under this initiative, and, for any determined to be eligible, to seek appointment to present any motions or applications for clemency. While courts have discretionary authority to appoint FPDOs to assist in various administrative tasks for the general benefit of their office, the courts, or the judiciary,<sup>11</sup> the authority to appoint the FPDO or others to represent a specific individual, even if discretionary, derives from statute. *See, e.g.*, 18 U.S.C. § 983(b) (court may authorize counsel to represent a financially-eligible person in civil forfeiture proceeding); 18 U.S.C. 3600(c) (court may appoint counsel for indigent applicant for DNA testing); 18 U.S.C. §§ 4100(b) and 4109 (court shall appoint guardian ad litem for minors or mentally incompetent persons and counsel to represent to transfer prisoners to and from foreign countries); 18 U.S.C. § 5034 (court shall appoint counsel and may appoint guardian ad litem in juvenile delinquency proceedings). We are unaware of any non-statutory discretion that would authorize courts to appoint counsel to represent individual prisoners seeking clemency.<sup>12</sup>

### **Authority to Detail Federal Defenders to Office of Pardon Attorney**

As part of this clemency initiative, Deputy Attorney General Cole has recently reached out to FPDOs in the Washington, DC area regarding full-time arrangements with the OPA. Specifically, he has requested that each of these FPDOs consider sending one or two staff members to the OPA for a period of six months. This has led to the question as to whether the FPDOs have the authority to temporarily detail attorneys to the OPA on either a reimbursable or nonreimbursable basis.<sup>13</sup>

Unless a more specific statutory authority applies, federal agencies are authorized to provide goods and services, including personnel services, under the Economy Act, 31 U.S.C. § 1535. The Economy Act, however, requires that the performing agency be reimbursed for

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<sup>11</sup> For example, courts routinely use their discretion to appoint FPDOs to serve on CJA Panel Committees, working groups, candidate search or screening committees for various position vacancies, etc.

<sup>12</sup> However, the lack of court authority to appoint the FPDO to represent a clemency applicant would not preclude the FPDO from screening its client files to identify individuals who may satisfy the criteria established under this initiative or from reviewing files to assist another attorney representing a clemency applicant; but actual representation would have to be provided by others.

<sup>13</sup> Recently, the House passed H.R.4660, Commerce, Justice, Science, and Related Agencies Appropriations Act, 2015, which includes a prohibition on the use of funds enacted in that appropriation "to transfer or temporarily assign employees to the Office of Pardon Attorney for the purposes of screening clemency applications." If this provision were enacted, OPA would be legally prohibited from accepting any details under the Clemency Initiative.

actual costs incurred by the ordering agency. *See* 31 U.S.C. § 1535(b). As applicable to a temporary detail, the Economy Act requires that the loaning agency be reimbursed for all salary and employment-related costs of the personnel detailed to another federal agency. *See also* 64 Comp.Gen. 370 (1985) (discussing Congressional intent to address the practice of details between agencies on a nonreimbursable basis in the executive branch). Thus, the FPDOs could agree to detail personnel to the OPA pursuant to an agreement under the Economy Act requiring the DOJ to pay the personnel costs of the detailed staff members.

As to whether the FPDOs could temporarily detail personnel without reimbursement, unless specific statutory authority exists, any such detail would generally contravene the law requiring that appropriations be spent only on the object for which they are appropriated, 31 U.S.C. § 1301(a) (Purpose Statute), and result in an improper augmentation of the appropriation of the agency accepting the detail. *See* 65 Comp. Gen. 635 (1986). There are two recognized exceptions to this general rule prohibiting nonreimbursable details.

Under the first exception, a loaning agency may detail personnel to work on matters related to the loaning agency's appropriation and which would aid it in accomplishing a purpose for which the appropriation was made. *Id.* FPDOs' salaries are funded from the Defenders Services appropriation which is available for "the operations of federal defender organizations" and for the compensation and expenses of attorneys appointed to represent persons as authorized by titles 18 and 28 of the U.S. Code. Pub.L.No. 113-76, Div. E, Tit. III, Jan. 17, 2014. The Deputy Attorney General's request states that the detailed federal defenders "will be responsible for evaluating [clemency] petitions and making recommendations for or against commutation of sentence to the Pardon Attorney." These activities support the President's constitutional powers and are not related to an appointment to represent a person in a judicial proceeding pursuant to the authorizing statutes discussed above. As such, the proposed detail under the clemency initiative would not serve to accomplish a purpose of the Defender Services appropriation and thus meet the requirements of the first exception.

The second exception, which has been recognized but rarely invoked, is the de minimis exception for details that have a negligible fiscal impact on the loaning agency's appropriation.<sup>14</sup> Specifically, the Comptroller General has recognized that, notwithstanding that the Purpose Statute would technically be violated, this exception may apply for administrative convenience when a detail is for a brief period and the number of persons and costs involved are minimal. 64 Comp. Gen. at 638. Relevant case law does not give a set dollar amount of what would constitute a "negligible" cost or what is meant by "brief period", and instead allows federal agencies to make their own assessments on a case by case basis in light of the total anticipated salary and related expenses incurred by a proposed detail. However, given the recent budgetary constraints and the personnel restrictions that resulted from sequestration in federal defenders offices throughout the U.S., it would be difficult to find that the salary and related costs of one

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<sup>14</sup> The validity of this exception has been questioned by the Office of Legal Counsel in the Department of Justice. 13 U.S. Op. Off. Legal Counsel 188, 194 n. 4, June 27, 1989 (noting that Comptroller General acknowledges that the exception as stated technically violates the law).

federal defender for six months would be negligible or do nothing more than serve to support “administrative convenience.”

**Conclusion**

For the above reasons, we conclude that the federal courts lack authority to appoint CJA counsel to represent petitioners applying for clemency under this new initiative. However, we also conclude that the federal defenders may enter into agreements with the DOJ to detail federal defenders under the Economy Act, as long as each FPDO is reimbursed the salary and related costs for each detailee. We do not believe use of unreimbursed details would be proper.