



## At Sidebar

by Jordan Maglich

# DOJ's New Clemency Program Targets Nonviolent Drug Offenders

**Thousands of inmates in federal prison could soon see a** drastic reduction in their sentences—or even an early release from prison—as a result of a recent clemency initiative announced by President Barack Obama's administration seeking to address budgetary and overcrowding concerns by targeting nonviolent drug offenders. Unveiled last year by former Attorney General Eric Holder, the clemency initiative introduced new and more expansive criteria that the U.S. Department of Justice would consider when considering clemency petitions from federal inmates who would receive vastly disproportionate sentences if sentenced today for the same crimes. The push represents the latest attempt to reduce sentences for nonviolent drug offenders and marks a continued retreat from the strict sentencing trends introduced in the 1980s to combat an increase in drug offenses. Already, Obama has issued nearly three dozen sentence commutations, and many more are expected as volunteers and private organizations continue their efforts to assist eligible inmates.

The war on drugs in the 1980s is considered to be a major contributing factor to the exponential increase in the prisoner population over the past several decades. While approximately 40,000 prisoners were incarcerated for a state or federal drug offense in 1980, that figure ballooned to more than 500,000 prisoners in 2009—a *1,100 percent increase*.<sup>1</sup> In addition to increased law enforcement efforts targeted at combating drug offenses, legislators introduced new and enhanced accompanying penalties that included mandatory minimums. As the focus shifted from treatment to incarceration, inmates imprisoned for drug offenses filled America's prisons. According to the Federal Bureau of Prisons, nearly half of all federal prisoners are currently serving a drug-related prison sentence.

The trend toward incarceration has changed in recent years, beginning in 2010 with the passage of the Fair Sentencing Act (FSA). The FSA addressed glaring sentencing disparities in the amount of crack cocaine and powder cocaine required to trigger criminal penalties; for example, a defendant caught with 5 grams of crack cocaine could receive the same sentence as a defendant caught with 500 grams of powder cocaine. Several years later, the U.S. Sentencing Commission

(USSC) approved the passage of Amendment 728—more commonly known as Drugs Minus Two—which applied a two-level reduction to drug offense levels for both current and past cases. However, Drugs Minus Two was not available to many inmates, including those who were sentenced as career offenders or who were serving life sentences as a result of sentencing enhancements.

In April 2014, the Justice Department unveiled its clemency program and set forth six criteria it would consider in reviewing and expediting clemency petitions from federal inmates:

1. The inmate currently must be 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(s) today.
2. The inmate is a nonviolent, low-level offender without significant ties to large-scale criminal organizations, gangs, or cartels.
3. The inmate has served at least 10 years of his or her prison sentence.
4. The inmate does not have a significant criminal history.
5. The inmate has demonstrated good conduct in prison.
6. The inmate has no history of violence prior to or during his or her current term of imprisonment.

The Justice Department stressed that it would give priority only to those federal inmates who meet *all* of the criteria. Thus, in addition to demonstrating good conduct while incarcerated, a federal inmate must demonstrate a nonviolent past and accompanying insignificant criminal history. It is estimated that thousands of federal inmates could potentially qualify for some reduction in their sentence through clemency.

Perhaps the most important of the six criteria is the requirement that a federal inmate, if sentenced today for the same offense(s), would receive a significantly lower sentence. This analysis involves not only understanding the offense(s) of conviction but also how the resulting sentence was affected by policies in place at the time. For example, many drug offenders received sentence enhancements for prior convictions under 21 U.S.C. § 851, a process one federal judge

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recently likened to “the sentencing equivalent of a two-by-four to the forehead.”<sup>2</sup> An 851 sentencing enhancement could mean that a defendant with two prior felony drug convictions could see his sentencing range jump from 10-to-life to a mandatory life sentence. In August 2013, Holder issued a memorandum revising departmental policy on sentencing enhancements and listing several factors for prosecutors to consider before making such a determination.<sup>3</sup> An inmate who would not have received an 851 enhancement based on these new factors is likely to be able to demonstrate that he or she received a sentence that would be significantly lower if resentenced today.

In the wake of the Justice Department’s announcement, Clemency Project 2014 was formed. The group, which is composed of lawyers and advocates from organizations including the federal public defenders, the American Civil Liberties Union, Families Against Mandatory Minimums, American Bar Association, and National Association of Criminal Defense Lawyers, recruited and trained attorneys to volunteer their time to screen for eligible prisoners and provide assistance in seeking clemency. As of October 2014, more than 1,500 attorneys had volunteered their services, and more than 25,000 federal prisoners had submitted applications for consideration of their cases.

The clemency initiative has been a huge endeavor for those involved, who were no doubt encouraged by the news in December

2014, March 2015, and July 2015 that Obama had granted clemency petitions for over 75 nonviolent drug offenders.<sup>4</sup> The White House indicated that more than 6,500 people had applied for clemency in 2014—an increase of more than 200 percent from the prior year. Obama is expected to issue additional commutations in his final two years in office.

Attorneys interested in volunteering for the Clemency Project can contact [volunteer@clemencyproject2014.org](mailto:volunteer@clemencyproject2014.org) for more information. ©

### Endnotes

<sup>1</sup>See Marc Mauer, “The Changing Racial Dynamics of the War on Drugs,” [www.sentencingproject.org/doc/dp\\_raceanddrugs.pdf](http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf) (last accessed June 8, 2015).

<sup>2</sup>“Sentencing Abuse Alleged by Judge,” [www.wsj.com/articles/SB10001424052702304384104579143653480324082](http://www.wsj.com/articles/SB10001424052702304384104579143653480324082).

<sup>3</sup>Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases, [www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf](http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf).

<sup>4</sup>Commutations Granted by President Barack Obama, [www.justice.gov/pardon/obama-commutations](http://www.justice.gov/pardon/obama-commutations).

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