

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

LEGAL COUNSEL DIVISION



MEMORANDUM

~~PRIVILEGED & CONFIDENTIAL~~

TO: James Pittman
Director of Legislative Affairs
Office of Attorney General

FROM: Janet M. Robins 
Deputy Attorney General
Legal Counsel Division

DATE: January 20, 2016

SUBJECT: Legal Advice Regarding the Mayor's Power to Grant Pardons
(AL-16-010)

This memorandum responds to your request that this Office offer legal advice on whether the Mayor has legal authority to pardon offenses against the District of Columbia. We conclude that the Mayor does not have such authority except with respect to a narrow set of minor offenses.

Summary of Conclusion

Section 1-301.76 of the District of Columbia Official Code ("Code") only permits the Mayor to 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." Because the statute limits the Mayor's pardon power to largely obsolete laws, the Mayor's pardon power is restricted to a very narrow set of offenses.

Discussion

The only provision of District of Columbia law¹ that empowers the Mayor to grant pardons is "An act to empower the Commissioners of the District of Columbia to grant respites and pardons in certain cases" (the "Pardon Act"), approved April 28, 1892 (27 Stat. 22, chap. 55; D.C. Official Code § 1-301.76 (2012

¹ Courts have commonly stated that the power to pardon is not inherent in the office of the executive or any other branch of government but is instead inherent in the people and therefore must be vested in the office of their choosing through a constitution or other law. See *Jamison v. Flanner*, 228 P. 82, 87 (Kans., 1924); *State v. Nichols*, 26 Ark. 74, 77 (1870); *State v. Dunning*, 9 Ind. 20, 23 (1857); *Moore v. City of Newport*, 248 S.W. 837, 838 (Kty., 1923); *Laird v. Sims*, 147 P. 738, 739 (Ariz., 1915).

Repl.)). The Act states that “[t]he Commissioners [Mayor]² 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.”

The “late corporation of Washington, the ordinances of Georgetown, and the levy court, [and] the laws enacted by Legislative Assembly” refer to a historical organization of the D.C. government that was obsolete by the time of the Pardon Act’s passage. From 1801-1871, the District of Columbia government included the distinct corporations of Washington and Georgetown and the levy court of the county of Washington.³ In 1871, Congress repealed the charters of the cities of Washington and Georgetown, abolished the levy court, and put in place a governor and legislative assembly to govern the District of Columbia.⁴ In 1874, Congress abolished the governor and legislative assembly in favor of a three-member commission form of government.⁵

“The police and building regulations” refer to regulations promulgated under section 1 of “An Act approved January 26, 1887” (24 Stat. 368, ch. 49; D.C. Official Code § 1-303.01 (2012 Repl.)) (empowering the Council to make, and the Mayor to enforce, regulations relating to various subjects such as the inspection of pawn-broking businesses, the keeping of dogs and fowl, and loud noises in public places), section 2 of “Joint resolutions to regulate licenses to proprietors of theaters in the city of Washington, District of Columbia, and for other purposes,” approved February 26, 1892 (27 Stat. 394, Res. No. 4; D.C. Official Code § 1-303.03 (2012 Repl.)) (empowering the Council to make, and the Mayor to enforce, regulations “necessary for the protection of lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the District of Columbia”), and section 1 of “An Act to authorize the Commissioners of the District of Columbia to make and enforce regulations relative to the sale of coal, and also building regulations,” approved June 14, 1878 (20 Stat. 131, ch. 194; D.C. Official Code § 1-303.04 (2012 Repl.)) (empowering the Council to make, and the Mayor to enforce, building regulations for the District of Columbia).

The language of the Pardon Act originated in the 1871 Act, which granted the governor of the District the power to pardon offenses against the laws of the District enacted by the Legislative Assembly.⁶ The 1874 Act simply transferred all powers of the former office of the governor to the commissioners, thus the pardon power continued to apply only to “laws enacted by the legislative assembly”⁷ until the 1892 Pardon Act introduced the language still reflected in 1-301.76.⁸ While there were potentially laws enacted by the Legislative Assembly still in effect at the time the Pardon Act was enacted in 1892, the enactment

² The Pardon Act originated during a period when the District was governed by a three-member commission (“Commission”). With the passage of the Home Rule Act, changes in terminology were made to the Code to reflect the change in government. *See* D.C. Official Code § 1-301.76 note “Change in Government.”

³ *See Metro. R. Co. v. D.C.*, 132 U.S. 1, 4 (1889).

⁴ An Act to Provide a Government for the District of Columbia, approved, February 21, 1871, 16 Stat. 419, ch. 62, § 40 (hereinafter cited as the “1871 Act.”)

⁵ An Act For the Government of the District of Columbia, and for Other Purposes, approved, June 20, 1874, 18 Stat. 116, ch. 337, § 1 (hereinafter cited as the “1874 Act.”)

⁶ 1871 Act, § 2.

⁷ *See, e.g.*, The Compiled Statutes in Force in the District of Columbia, Including Acts of the Second Session of the Fiftieth Congress, 1887-89, ch. 19, § 27.

of the 1901 D.C. Code⁹ repealed most of those laws, with some exceptions, including police regulations and “[a]ll penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both,” except to the extent that those exceptions were inconsistent with or replaced by the 1901 Code.¹⁰

Because the portion of the Pardon Act referring to the laws of the “late corporation of Washington, the ordinances of Georgetown, the levy court, [and] the legislative assembly” limits pardons to legislation that was largely obsolete by the time of the Pardon Act’s enactment, it is unlikely that the Pardon Act was meant to empower the executive to pardon offenses against any laws of the District enacted at any time. The repealing sections of the 1901 Code further confirm the limited effect of the Pardon Act. Though the Mayor is empowered to pardon offenses originating from any Legislative Assembly enactments that are still in effect, few of these enactments are still in force today.¹¹ The Mayor’s power to pardon offenses against the “late corporation of Washington, the ordinances of Georgetown, the levy court, [and] the legislative assembly” is therefore limited to the narrow range of Legislative Assembly enactments still in effect today.

The portion of the Pardon Act referring to “police and building regulations” is more ambiguous as the current D.C. Code still contains the provisions permitting the Council to enact, and the mayor to enforce, general police and building regulations.¹² A conservative interpretation of this phrase would limit its meaning to those police and building regulations enacted between 1801 and 1874, as the rest of the Pardon Act contemplates legislation enacted during this period.

A more liberal interpretation is available, however. The plain language of the statute does not limit the effect of the pardon power to police and building regulations enacted under a specific period of government, and the statutes providing for the enactment and enforcement of police and building regulations have not been repealed since their inclusion in the Code. Therefore, it may be argued that the Mayor has the power to pardon any existing offenses that were created under the authority established in D.C. Code sections 1-303.01, 1-303.03, and 1-303.04. However, this too appears to refer to a limited number of offenses given the historical context of those provisions. These sections originate from congressional acts that gave the now-defunct Commission some limited quasi-legislative power over the areas enumerated in the acts, thus the offenses that could be created under that grant of power are limited as well.¹³ Instead, most offenses contained in the Code today originate either from acts of Congress or

⁹ An Act To establish a code of law for the District of Columbia, approved March 3, 1901, 31 Stat. 1129, ch. 854 (hereinafter cited as the “1901 Code”).

¹⁰ 1901 Code § 1636.

¹¹ See James C. McKay, Jr., *Finding the Law of the District of Columbia* 7 (D.C. Bar, 2010). Notably, Legislative Assembly laws relating to the criminal offense of cruelty to animals are still in effect. See Act of August 23, 1871 (Leg. Assem. p. 135, ch. 106; D.C. Official Code §§ 22-1001 *et seq.* (2012 Repl.)).

¹² D.C. Official Code §§ 1-303.01 – 303.04 (2012 Repl.).

¹³ An Act approved January 26, 1887, 24 Stat. 368, ch. 49, § 1; Joint resolutions to regulate licenses to proprietors of theaters in the city of Washington, District of Columbia, and for other purposes, approved February 26, 1892, 27 Stat. 394, Res. No. 4 § 2; An Act to authorize the Commissioners of the District of Columbia to make and enforce regulations relative to the sale of coal, and also building regulations, approved June 14, 1878, 20 Stat. 131, ch. 194, § 1. Each of these acts originally referred to the Commissioners’ power to “make and enforce” the respective regulations. Like the Pardon Act, the statutes were eventually amended to reflect the Mayor-Council form of government established by the Home Rule Act. See, e.g., D.C. Official Code § 1-303.01 note “Change in Government.”

from the broader legislative and enforcement powers granted to the Mayor and the Council in the Home Rule Act and therefore do not come within the meaning of "police and building regulations."

Therefore, while the Mayor still has the power to pardon offenses against the laws of the Legislative Assembly and against the police and building regulations contemplated by D.C. Code sections 1-303.01 – 303.04, that power is confined to the limited number of those laws still in effect today.

If you have any questions regarding this memorandum, please contact Mary Shields,* Assistant Attorney General, Legal Counsel Division, at 724-6152.

JMR/mks

*Admitted to practice only in New York. Practicing in the District of Columbia under the direct supervision of Janet M. Robins, a member of the D.C. Bar, pursuant to D.C. Court of Appeals Rule 49(c).