Order Code RS20829
Updated December 12, 2006

CRS Report for Congress

An Overview of the Presidential Pardoning Power

T.J. Halstead
Legislative Attorney
American Law Division

Summary

The Constitution of the United States of America imbues the President with broad authority to grant pardons and reprieves for offenses against the United States. This report provides an overview of the scope of the President's pardoning power, the legal effects of a pardon, and the procedures that have traditionally been adhered to in the consideration of requests for pardons.

The President's authority to issue pardons is delineated in Article II, Section 2, Clause 1 of the Constitution, which states: "The President shall...have power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." This express language itself implies the inherent limits of the pardon power. First, the pardon power is limited to "offenses against the United States," preventing the President from intruding upon state criminal or civil proceedings.[1] Likewise, the pardon power does not extend to "Cases of Impeachment," preventing presidential interference with Congress' power to impeach.[2]

Absent these limitations, the President's authority to grant pardons is essentially unfettered.[3] For instance, a pardon may be bestowed at any time after the commission of an offense, irrespective of whether charges have actually been pressed. Also, a pardon may be issued subsequent to conviction and during the service of sentence. Additionally, a pardon may be granted after a sentence has been served, in order to restore the civil

---

[1] *See Ex Parte Grossman*, 267 U.S. 87, 113 (1925); *Hickey v. Schomig*, 240 F.Supp.2d 793, 795 (N.D. Ill. 2002) ("no federal official has the authority to commute a sentence imposed by a state court.").

[2] *See Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

[3] It has been surmised that the President's pardoning power is so expansive as to allow for self-pardons. *See* House Committee on the Judiciary Hearing on Impeachment of President Clinton, Day 2, Panel 1, Prosecution Standard for Obstruction of Justice and Perjury, 105th Cong., 1998 WL 849446 (Dec. 9, 1998).

rights of the individual in question.[4] Furthermore, the President may also pardon a large group of offenders, as was done subsequent to the Civil War.[5]

The establishment of the pardon power in the Constitution was derived from English custom and the view of the Framers that "there may be instances where, though a man offends against the letter of the law...peculiar circumstances in his case may entitle him to mercy."[6] Further, this power was properly reposed in the President, according to Alexander Hamilton, as "one man appears to be a more eligible dispenser of the mercy of the government, than a body of men."[7] In determining that the President should exercise the pardon power, the Framers further decided that minimal limitations should be placed on the power. For instance, the Framers rejected a proposal that the Senate have consent power over pardons.[8] The Framers likewise rejected James Madison's argument that treason should be excepted.[9]

Based upon this broad grant of authority under the Constitution, the courts have traditionally held that the President's pardoning power may not be circumscribed by Congress. In *Ex Parte Garland*, for instance, the Supreme Court held that the pardon power "is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."[10] The Court repeated this maxim in *United States v. Klein* ("[t]o the executive alone is intrusted the power of pardon; and it is granted without limit"), and again in *Ex Parte Grossman* ("[t]he executive can reprieve or pardon all offenses...without modification or regulation by Congress"). [11] Finally, in *Schick v. Reed*, the Court declared that the President's pardon power "flows from the Constitution alone, not any legislative enactments," and "cannot be modified, abridged, or diminished by the Congress."[12]

It appears that the pardon power is generally used to pardon specific offenders for any of a broad range of crimes that might stem from a series of related events. In the case of the pardon of President Nixon, for instance, President Ford issued a pardon "for all

---

[4] *See* Brian C. Kalt, "Pardon Me?: The Constitutional Case Against Presidential Self Pardons," 106 Yale L.J. 779, 780-781 (1996).

[5] *See U.S. v. Klein*, 80 U.S. 13 (Wall.) 128 (1872).

[6] James Iredell, Address in the North Carolina Ratifying Convention, reprinted in 4 The Founders' Constitution 17 (P. Kurland and R. Lerner, eds., 1987). *See also*, Margaret Colgate Love, "Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to be Merciful," 27 Fordham Urb. L.J. 1483, 1485 (2000).

[7] The Federalist No. 74 (Alexander Hamilton).

[8] *See* 2 Farrand, "The Records of the Federal Convention of 1787" 419 (rev. ed. 1966).

[9] *Id*. at 627.

[10] *Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866).

[11] *United States v. Klein*, 80 U.S. (13 Wall) 128, 147 (1871); *Ex Parte Grossman*, 267 U.S. 87, 120 (1925).

[12] *Schick v. Reed*, 419 U.S. 256, 266 (1977); *see also*, *Public Citizen v. Department of Justice*, 491 U.S. 440, 485 (1989 (Kennedy, J., concurring) (stating that the pardon power is committed "to the exclusive control of the President").

offenses... which he... has committed or may have committed or taken part in," precluding any prosecution of President Nixon related to the Watergate Scandal.[13] Another high-profile example of broad use of the pardon power is seen in President Bush's pardon of individuals facing charges relating to the Iran-Contra Affair. Specifically, President Bush issued full pardons for six persons who had either pled guilty, been convicted, or were facing trial.[14]

While the above examples indicate that pardons are often used to completely absolve a pardonee for his or her illegal act(s), the inherent flexibility of the pardon power also establishes that the President may grant limited or conditional pardons. This is seen primarily in the commutation of sentences, which has been described by the judiciary as an inherent power woven into the President's pardon authority.[15] In *Ex parte Wells*, for instance, the Supreme Court rejected the argument that the power to pardon did not include the authority to commute, declaring that "the mistake in the argument is, in considering an incident of the power to pardon the exercise of a new power, instead of its being a part of the power to pardon."[16] The Court went on to note that "[t]he power to offer a condition, without ability to enforce its acceptance, when accepted by the convict, is the substitution by himself, of a lesser punishment than the law has imposed upon him, and he cannot complain if the law executes the choice he has made."[17]

Legal Effect of Executive Clemency

While the cases discussed above seem to establish conclusively the broad scope of the President's pardoning power, the actual legal effect of executive clemency is less clear. Specifically, courts have disagreed as to whether a pardon erases only the punishment for an offense, or whether a pardon also blots out the existence of an offender's guilt.

In *United States v. Wilson*, for instance, Chief Justice Marshall declared that a pardon "exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."[18] The Court's initial declaration that a pardon merely remits punishment was repudiated during the Reconstruction era, however. Specifically, in *Ex Parte Garland*, Chief Justice Field declared that "a pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and

---

[13] Proclamation No. 4311, 39 Fed. Red. 32,601 (1974). *See also, Murphy v. Ford*, 390 F.Supp. 1372 (W.D. Mich. 1975).

[14] *See* Robert Nida, Rebecca L. Spiro, "The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power," 52 Okla. L. Rev. 197, 214-215 (1999).

[15] *See Biddle v. Perovich*, 274 U.S. 480 (1927).

[16] 59 U.S. (18 How.) 307, 316, 15 L.Ed. 421 (1856)).

[17] *Id.*

[18] *Wilson*, 32 U.S. (7 Pet.) 150 (1833).

disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."[19]

This broad interpretation of the pardoning power was subsequently narrowed by the Court in the early part of the 20th Century. In *Carlesi v. New York*, the Court considered a situation where an individual who had received a presidential pardon was subsequently convicted of forgery in a state court.[20] Upon conviction of the later offense, the individual was sentenced as a second offender, predicated upon the pardoned offense. The Supreme Court approved of the basis for the increased sentence, stating: "...we must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted."[21]

This view has adhered in the modern era. In *Nixon v. United States*, for instance, the Court determined that "the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is an executive action that mitigates or sets aside punishment for a crime."[22] This restricted view of the effect of a pardon was further reinforced in two cases stemming from the pardons of officials involved in the Iran-Contra affair. In *In re North*, the United States Court of Appeals for the District of Columbia held that a pardon did not remove an indictment from a former CIA official's criminal record, precluding the recovery of attorneys fees under the Ethics in Government Act.[23] A similar result was reached in *In re Adams*, where the D.C. Court of Appeals, sitting *en banc*, held that a pardon did not preclude an individual from being disciplined for professional misconduct.[24]

These recent decisions seem to represent an implicit rejection of the sweeping language employed in *Garland*, in favor of a return to the view that a pardon only nullifies the punishment for an offense, with the underlying guilt remaining in effect.

Warrants of Pardon

Regarding the legal nature of warrants of pardon and their delivery and acceptance, it appears that pardons must be physically delivered before they become legally effective. In *United States v. Wilson*, Chief Justice Marshall, writing for the Court, stated: "A

---

[19] *Garland*, 71 U.S. at 380-381. It is important to note, however, that the Court found that a pardon "does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment." *Id*. at 381.

[20] *Carlesi v. New York*, 233 U.S. 51 (1914).

[21] *Id*. at 59.

[22] *Nixon v. United States*, 506 U.S. 224, 232 (1993).

[23] *In re North*, 62 F.3d 1434 (D.C. Cir. 1994).

[24] *In re Adams*, 689 A.2d 6 (D.C.) (*en banc*), *cert. denied*, 117 S.Ct. 2515 (1997); *see also, Hirschberg v. Commodity Futures Trading Commission*, 414 F.3d 679, 684 (7th Cir. 2005) ("denial of floor broker registration based on fraudulent conduct underlying a pardoned criminal conviction does not constitute a violation of the pardon clause.").

pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended..."[25] The Court further declared: "A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete, without acceptance."[26] Chief Justice Marshall went on to explain that a warrant of pardon must be pleaded like any other private instrument before any court may take judicial notice thereof.[27] This standard was reiterated in *Burdick v. United States*, where the Court stressed that the contention that pardons have automatic effect by their "mere issue" was rejected in *Wilson* "with particularity and emphasis."[28] The Court further stressed in *Burdick* that a pardon may be refused, since its acceptance may involve "consequences of even greater disgrace than those from which it purports to relieve."[29]

As a practical aid to the consideration of requests for presidential clemency, the Office of the Pardon Attorney is charged with accepting and reviewing applications for clemency, and preparing recommendations as to the appropriate disposition of applications.[30] Pursuant to Department of Justice regulations, a person "seeking executive clemency by pardon, reprieve, commutation of sentence, or remission of fine shall execute a formal petition" addressed to the President and submitted to the Office of the Pardon Attorney in Washington, D.C.[31] These regulations state that a petition for pardon should not be filed "until the expiration of a waiting period of at least five years after the date of the release of the petitioner from confinement or, in case no prison sentence was imposed, until the expiration of a period of at least five years after the date of the conviction of the petitioner."[32] Furthermore, the regulations state that "[g]enerally, no petition should be submitted by a person who is on probation, parole, or supervised release."[33]

After a petition for executive clemency is received, an investigation is conducted by employing the services of appropriate governmental agencies, such as the Federal Bureau

---

[25] 32 U.S. (7 Peters) 150, 160-161 (1833).

[26] *Id.* at 161. It also appears that a pardon may be revoked at any time prior to acceptance. In *In re De Puy*, 7 F.Cas. 506 (S.D.N.Y. 1869), the District Court for the Southern District of New York addressed a situation where a pardon issued by President Johnson on March 3, 1869 was revoked on March 6th, 1869 by incoming President Grant. *Id.* at 509. The court held that the pardon had been properly withdrawn, as it had not yet been delivered to the grantee, a person on his behalf, or to the official with exclusive custody and control over him. *Id*. at 512-513.

[27] *Id*.

[28] *Burdick v. United States*, 236 U.S. 79, 90 (1915); *See also, Chapman v. Scott*, 10 F.2d 156, 159 (D. Conn. 1925); *In re Callicot*, 4 F.Cas. 1075, 1079 (E.D.N.Y. 1870); *Hoffa v. Saxbe*, 378 F.Supp. 1221, 1242 (D.C. 1974).

[29] *Burdick*, 236 U.S. at 90.

[30] 28 C.F.R. §§0.35-0.36.

[31] 28 C.F.R. §1.1.

[32] 28 C.F.R. §1.2.

[33] 28 C.F.R. §1.2.

of Investigation.[34] Subsequently, the Pardon Attorney presents the petition and related material to the Attorney General via the Associate Attorney General, along with a recommendation as to the proper disposition of the petition.[35] In turn, the Attorney General reviews the petition and all related information, and makes the final decision as to whether the petition merits approval or disapproval by the President. This recommendation is then submitted to the President in writing.[36]

Pursuant to regulations, the petition for clemency, as well as all "reports, memoranda, and communications submitted or furnished in connection with the consideration" of a petition are generally available only to the officials involved in the proceedings. However, these documents may be made available for whole or partial inspection, where the Attorney General determines that "their disclosure is required by law or the ends of justice."[37]

It is important to note that these regulations do not appear to impose rigid restrictions on the Pardon Attorney's ability to consider petitions for pardon, but, rather, are identified as being advisory in nature.[38] Indeed, these regulations have been cited by the courts as being "primarily intended for the internal guidance of the personnel of the Department of Justice."[39] Furthermore, it is important to note that the aforementioned regulations do not have any binding effect, do not create any legally enforceable rights in persons applying for clemency, and do not circumscribe the President's "plenary power under the Constitution to grant pardons and reprieves" to any individual he deems fit, irrespective of whether an application has been filed.[40]

---

[34] 28 C.F.R. §1.6.

[35] 28 C.F.R. §1.6(a); 28 C.F.R. §0.36.

[36] 28 C.F.R. §1.6(c).

[37] 28 C.F.R. §1.5(b). It should be noted that the Court of Appeals for the District of Columbia Circuit has held that the presidential communications privilege is only applicable to pardon documents solicited and received by the President or his immediate advisors. Accordingly, other internal DOJ pardon documents are subject to disclosure pursuant to the Freedom of Information Act, absent the applicability of any exemption from disclosure contained therein. *Judicial Watch, Inc., v. Department of Justice*, 365 F.3d 1108 (D.C. Cir. 2004).

[38] 28 C.F.R. §1.11.

[39] *Yelvington v. Presidential Pardon and Parole Attorneys*, 211 F.2d 642, 643 (D.C. Cir. 1954). *See also, Hoffa v. Saxbe*, 378 F.Supp. 1221, 1243 (D.C. 1974).

[40] *See Hoffa v. Saxbe*, 378 F.Supp. at 1243. Given that the OPA's pardon consideration procedure is not binding on the President, it is axiomatic that the President may grant pardons to individuals who have not filed formal pardon applications, or who have not been fully investigated by the Office of the Pardon Attorney.