The President's Pardon Power and Legal Effects on Collateral Consequences

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Summary

Article II of the U.S. Constitution vests the President with the power "to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." The President's pardon power, which derives from English custom, is an extraordinary remedy that is sought by many but received by few. The President may use his clemency authority only for criminal penalties, not civil. Moreover, he may use his clemency authority to pardon federal offenses but not state offenses.

Typically, individuals receive either a pardon or a commutation of sentence, each of which is a type of executive clemency with different legal effects. The Department of Justice in 2014 announced a clemency initiative to prioritize the applications of federal inmates seeking a commutation of sentence, which has reportedly led to an influx of petitions. A commutation of sentence generally results in a reduced sentence, either totally or partially, but such individual will still likely face collateral consequences, that is post-sentence civil penalties or disqualifications that flow from a federal conviction. In contrast, a pardon is the President's forgiveness for commission of the offense, which removes civil disabilities and collateral consequences. However, given the evolution of jurisprudence on the President's pardon power, some recipients of a pardon may still face legal consequences from a criminal conviction despite receiving a pardon.

This report reviews the text and jurisprudence of the Pardon Clause of the U.S. Constitution, as well as the types of pardons the clemency power includes, when pardons may be issued, and how pardons are granted. The remainder of the report analyzes the effect of a presidential pardon on collateral consequences. Also discussed in the report are some alternative ways in which a former federal felon may have his or her civil rights restored and certain legal disabilities removed absent a pardon. Lastly, the report covers what role, if any, Congress may play in defining the scope of the pardon power and its effect on collateral consequences.

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Chief Justice Marshall of the U.S. Supreme Court defined a presidential pardon as "an act of grace, proceeding from the power entrusted with the execution of laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."[1] Indeed, the President's power to pardon is descended from authority that had been vested in English kings since at least the eighth century,[2] and has been described as a power "exercised from time immemorial by the executive of that nation whose language is our language and to whose judicial institutions ours bear a close resemblance."[3] The exercise of executive clemency is an extraordinary remedy, as several thousand petitions are submitted each year to the President and few are granted.[4]

This report briefly reviews the historical underpinnings of the text of the Pardon Clause of the U.S. Constitution before delving into the types of pardons the clemency power includes, when pardons may be issued, and how pardons are granted. The remainder of the report analyzes the effect of a presidential pardon on collateral consequences, which are generally considered the post-sentence civil penalties or disqualifications that flow from a federal conviction.[5] Because full presidential pardons are not often granted, also discussed in the report are some alternative ways in which a former federal felon may have his or her civil rights restored and certain legal disabilities removed absent a pardon. Lastly, the report covers what role, if any, Congress may play in defining the scope of the pardon power and its effect on collateral consequences.

Pardon Power and Origins

Article II, Section 2, Clause 1 of the Constitution provides the following: "The President … shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." The language of the clause explicitly sets forth the limits of the federal pardon power. First, the pardon power is limited to "Offences against the United States," which prevents the President from intruding upon state criminal or civil proceedings.[6] Second, the pardon power does not extend to "Cases of Impeachment," which prevents the President from interfering with Congress's power to impeach.[7]

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."[8] Moreover, this

[1] United States v. Wilson, 32 U.S. (7 Pet.) 150, 160-61 (1833).

[2] William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 476-77 (1977).

[3] *Wilson*, 32 U.S. at 160.

[4] *See* Dep't of Justice, Clemency Statistics, https://www.justice.gov/pardon/clemency-statistics (last visited July 22, 2016).

[5] *See* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634-35 (2006) ("Collateral consequences, by contrast, are not part of the explicit punishment handed down by the court; they stem from the fact of conviction rather than from the sentence of the court. These consequences include a vast network of 'civil' sanctions that limit the convicted individual's social, economic, and political access.") (internal citations omitted).

[6] Governors of each state generally have their own authority to issue pardons for state offenses. *See, e.g.*, Hickey v. Schomig, 240 F. Supp. 2d 793, 795 (N.D. Ill. 2002) ("[N]o federal official has the authority to commute a sentence imposed by a state court.").

[7] U.S. CONST. art. I, §2, cl. 5 (providing the House of Representatives "sole Power of Impeachment"); *id.* art. I, §3, cl. 6 (providing the Senate the "sole Power to try all Impeachments").

[8] James Iredell, Address in the North Carolina Ratifying Convention, reprinted 4 THE FOUNDERS' CONSTITUTION 17
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power was properly vested in the President, according to Alexander Hamilton, as "it is not to be doubted that a single man of prudence and good sense, is better fitted, in delicate conjunctures, to balance the motives, which may plead for and against the remission of the punishment, than any numerous body whatever."[9] 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, as well as Edmund Randolph's amendment that treason should be excepted from the pardon power.[10]

Types of Pardons

But for the limitations articulated in the Constitution, the President's authority to grant pardons for federal offenses is essentially unfettered.[11] The clemency power conferred upon the President gives him "plenary authority … to 'forgive' the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable."[12] There are five specific types of clemency recognized under American law: (1) pardon; (2) amnesty; (3) commutation, or the substitution of a milder punishment for the one imposed by the court;[13] (4) remission of criminal fines and forfeiture; and (5) reprieve or the temporary postponement of punishment.[14] Pardon and amnesty are the broadest forms of clemency, and carry virtually identical effects under American law.[15] Commutations are occasionally referred to as conditional pardons, but they do not have the same legal effect of a full pardon. As described by one court: "'Pardon' exempts from punishment, bears no relation to term of punishment and must be accepted or it is nugatory; while 'commutation' merely substitutes lighter for heavier punishment, removes no stain, restores no privilege, and may be effected without consent and against the will of the prisoner."[16] With the

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(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).

[9] THE FEDERALIST NO. 74, at 377 (Alexander Hamilton) (Garry Wills ed., 1982).

[10] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 419 (Max Farrand ed., rev. 1966); 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 549 (Jonathan Elliot ed., William S. Hein & Co., Inc., 2d ed. 1996) (1845).

[11] Some observers have suggested that the President's pardoning power is so expansive as to allow for self-pardons. *See Impeachment Inquiry: William Jefferson Clinton, President of the U.S., Presentation on Behalf of the President: Hearing before the H. Comm. on the Judiciary*, 105th Cong. 358-59 (1998); *see also* 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 (1999); Brian C. Kalt, *Pardon Me? The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996).

[12] Schick v. Reed, 419 U.S. 256, 266 (1974).

[13] *See Ex parte* Wells, 59 U.S. (18 How.) 307 (1856) (affirming that the President had the power to conditionally grant the pardon that changed the petitioner's punishment to life imprisonment); Biddle v. Perovich, 274 U.S. 480 (1927) (holding that the President's pardon power includes the ability to commute a sentence); Hoffa v. Saxbe, 378 F. Supp. 1221, 1224 (D.D.C. 1974) (stating that the President was empowered to issue commutation of sentence on the condition that the pardonee "not engage in direct or indirect management of any labor organization").

[14] Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 592-93 (1991).

[15] *Id*. at 577. Amnesty is usually granted to groups of individuals before conviction. While a grant of amnesty, unlike a pardon, is not meant to "eradicate the infraction for which punishment is remitted ... American law recognizes little distinction between the two forms of clemency." *Id*.; s*ee also* Knote v. United States, 95 U.S. 149, 152-53 (1877). This report uses the term pardon to include both pardons and amnesties.

[16] Stone v. Burch, 114 Fla. 460, 463 (Fla. 1934).

exception of the section "How Pardons Are Granted," which includes a discussion of standards for commuting sentences, this report discusses only full pardons, which may be unconditional or have conditions attached, as mentioned below.[17]

When Pardons May Be Issued

The Supreme Court has stated that the pardon power "may be exercised at any time after [the commission of an offense], either before legal proceedings are taken, or during their pendency, or after conviction and judgment."[18] Indeed, Presidents have exercised the pardon power quite freely, granting pardons to specific offenders for a broad range of crimes, some of which may stem from a series of related events. For example, President Jefferson pardoned all those convicted under the Alien and Sedition Acts.[19] Presidents Lincoln and Johnson, after the Civil War, granted amnesty to anyone who assisted the Confederacy, on the condition that such recipients voluntarily take an oath to uphold the Constitution.[20] In the modern era, President Ford issued a pardon to President Nixon "for all offenses … which he … has committed or may have committed or taken part in," precluding any prosecution of President Nixon related to the Watergate Scandal.[21] Likewise, President George H. W. Bush granted "full, complete, and unconditional pardons" to several high-ranking officials who had either pleaded guilty, been convicted, or were facing trial for having made false statements to Congress in relation to the Iran-Contra affair.[22]

How Pardons Are Granted

As a practical aid to the consideration of requests for presidential clemency, the Office of the Pardon Attorney within the Department of Justice (DOJ) is charged with accepting and reviewing applications for clemency, and preparing recommendations as to the appropriate disposition of applications.[23] DOJ has issued regulations that set forth the process for persons "seeking executive clemency by pardon, reprieve, commutation of sentence, or remission of fine."[24] The regulations provide that a petition for a pardon should not be filed "until the expiration of a

[17] *Ex parte Wells*, 59 U.S. at 311-12 ("A pardon is said by Lord Coke to be ... frequently conditional, … [the grantor] may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend [.] And if the felon does not perform the condition of the pardon, it will be altogether void; and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced.") (internal citations omitted).

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

[19] Kobil, *supra* note 14, at 592-93.

[20] *Id*. at 593.

[21] Proclamation No. 4311, 39 *Federal Register* 32,601 (September 10, 1974). *See also* Murphy v. Ford, 390 F. Supp. 1372 (W.D. Mich. 1975) (dismissing claim that President Ford's unconditional pardon of President Nixon was void because a pardon could not be validly granted to a person who had never been indicted, convicted, or charged with an offense against the United States).

[22] Proclamation No. 6518, 57 *Federal Register* 62145 (December 30, 1992).

[23] 28 C.F.R. §§0.35-0.36. *See* Lauren Schorr, *Breaking Into the Pardon Power: Congress and the Office of the Pardon Attorney*, 46 AM. CRIM. L. REV. 1535, 1542-46 (2009) (reviewing the history of the Office of the Pardon Attorney and noting that while the White House need not review or grant clemency applications that first come through the Pardon Attorney, that the "President has traditionally relied on this process, and there has been a high degree of concurrence between the two actors. The practice of receiving recommendations from the Pardon Attorney creates a 'presumption of legitimacy' for the President's decisions and exerts a 'constraining influence' on the President's discretionary exercise of the power.").

[24] 28 C.F.R. §1.1.

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."[25]

After a petition for executive clemency is received, the Pardon Attorney conducts an investigation by employing the services of appropriate governmental agencies such as the Federal Bureau of Investigation (FBI).[26] Subsequently, the Pardon Attorney presents the petition and related material to the Attorney General via the Deputy Attorney General, along with a recommendation as to the proper disposition of the petition.[27] From there, 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. A written recommendation is submitted to the President.[28]

Notably, DOJ's regulations on considering pardon petitions do not appear to impose rigid restrictions on the Pardon Attorney, but, rather, are identified as being advisory in nature.[29] Courts have stated that these regulations are "primarily intended for the internal guidance" of DOJ personnel.[30] Moreover, the process established by the aforementioned regulations does not have any binding effect, does not create any legally enforceable rights in persons applying for clemency, and does 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 with the Office of the Pardon Attorney.[31]

Standards for Granting Clemency

DOJ has articulated its standards for reviewing pardon petitions. Factors taken into consideration include (1) post-conviction conduct, character, and reputation; (2) seriousness and relative recentness of the offense; (3) acceptance of responsibility, remorse and atonement; (4) need for relief; and (5) official recommendations and reports.[32]

With respect to reviewing petitions related to a commutation of sentence, DOJ's traditional position has been that it is an "extraordinary remedy that is rarely granted."[33] Factors for commutation of sentence include "disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g., cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action."[34] Also taken into consideration is "the amount of time already served and the availability

[25] 28 C.F.R. §1.2. The regulations also provide that "[g]enerally, no petition [for a pardon] should be submitted by a person who is on probation, parole, or supervised release." *Id.*

[26] 28 C.F.R. §1.6(a).

[27] 28 C.F.R. §0.36.

[28] 28 C.F.R. §1.6(c).

[29] 28 C.F.R. §1.11.

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

[31] *Hoffa*, 378 F. Supp. at 1243 ("Nowhere do the regulations purport to condition the exercise of that discretion by requiring that the President first familiarize himself with the Attorney General's recommendations before he can legitimately act.").

[32] Dep't of Justice, U.S. Attorneys' Manual §1-2.112- Standards for Considering Pardon Petitions (September1997), *available at* https://www.justice.gov/usam/united-states-attorneys-manual.

[33] *Id.* at §1-2.113- Standards for Considering Commutation Petitions.

[34] *Id.*

of other remedies (such as parole) are taken into account in deciding whether to recommend clemency."[35]

In April 2014, however, DOJ announced a new clemency initiative, where it announced six criteria the Department would consider when reviewing clemency applications for commutation of sentence.[36] The Department announced that it would prioritize the clemency applications of federal inmates who meet the six factors. These factors are that the applicant (1) is 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(s) today; (2) is a nonviolent, low-level offender without significant ties to large-scale criminal organizations, gangs, or cartels; (3) has served at least 10 years of his or her prison sentence; (4) does not have a significant criminal history; (5) has demonstrated good conduct in prison; and (6) has no history of violence prior to or during his or her current term of imprisonment.[37] An applicant who does not meet these criteria may still apply for commutation of sentence, but will be considered under the "standard principles" described above.[38] Under this initiative, according to DOJ, President Obama appears to have received more petitions for commutation than his predecessors.[39]

Warrants of Pardon

For a pardon to become legally effective, it appears that a warrant of pardon must be physically delivered to the recipient. In *United States v. Wilson*, Chief Justice Marshall declared that a "pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance."[40] A recipient may reject the pardon, and if it is rejected, the court has no power to force it on him. Moreover, a pardon is a private act "and not officially communicated to the court."[41] A warrant of pardon must be pleaded like any other private instrument before any court may take judicial notice thereof.[42] The Court reemphasized the notion of delivery and acceptance in *Burdick v. United States*, where it upheld the petitioner's right to refuse a pardon and instead assert his constitutional right against self-incrimination.[43] The *Burdick* Court stressed that it had already rejected the contention that pardons have automatic effect by their "mere issue," and stated that the petitioner could refuse the pardon because its acceptance may involve

[35] *Id.*

[36] Dep't of Justice, Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants (April 23, 2014), https://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new.

[37] *Id.*

[38] *See supra* note 32 and accompanying text.

[39] Dep't of Justice, Clemency Statistics, https://www.justice.gov/pardon/clemency-statistics (last visited July 22, 2016). In a comparison of recent presidents, for example, DOJ's clemency statistics reflect that it has received 23,325 petitions for commutation during President Obama's tenure (2009-2016), compared to 8,576 petitions for commutation received during President George W. Bush's tenure (2001-2009) and 5,488 petitions for commutation received during President William J. Clinton's tenure (1993-2001). *See id.*; *see also* Dep't of Justice, Current Fiscal Year Clemency Statistics, https://www.justice.gov/pardon/current-fiscal-year-clemency-statistics (last visited July 22, 2016).

[40] United States v. Wilson, 32 U.S. (Pet.) 150, 161 (1833).

[41] *Id.* at 160-61.

[42] *Id.* at 161.

[43] Burdick v. United States, 236 U.S. 79 (1915).

"consequences of even greater disgrace than those from which it purports to relieve."[44] Under the current DOJ regulations, a warrant of pardon is mailed to the petitioner.[45]

A warrant of pardon may also be revoked at any time prior to acceptance and delivery. In *In re De Puy*, a federal district court addressed a situation where a pardon issued by President Andrew Johnson on March 3, 1869, was revoked on March 6, 1869, by incoming President Ulysses S. Grant.[46] 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.[47] In an analogous situation, President George W. Bush sent a master warrant of clemency to the Pardon Attorney on December 23, 2008, for 19 individuals.[48] One day later, the President "directed the Pardon Attorney not to execute and deliver" a pardon to one of the individuals, Isaac R. Toussie, a real estate developer who had pleaded guilty to mail fraud and using false documents to receive government-insured mortgages. It had been disclosed that Mr. Toussie's relatives had contributed significant sums of money to various politicians before his clemency petition was filed with the White House.[49] Because Mr. Toussie's clemency application had only been reviewed and recommended by White House Counsel, the President directed that Mr. Toussie's application should be reviewed by the Pardon Attorney pursuant to the DOJ guidelines, discussed above, before making a decision on whether to grant clemency.[50]

Legal Effects of Receiving a Pardon

The Supreme Court in the 19th century had an expansive view of the nature and effect of a pardon. In *Ex parte Garland*, the Court, when considering the effect of a full pardon, stated the following:

> A pardon reaches both the punishment prescribed for the offence 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 offence. 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 disabilities, and restores him to all civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.[51]

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[44] *Id*. at 90.

[45] 28 C.F.R. §1.7. When a commutation of sentence is granted, the warrant of commutation is sent to the petitioner through the officer in charge of his or her place of confinement, or directly to the petitioner if he or she is on parole, probation, or supervised release. *Id*.

[46] *In re* De Puy, 7 F. Cas. 506, 509 (S.D.N.Y. 1869).

[47] *Id*. at 511-13 ("The intention of the executive to grant a pardon can have no legal force until carried into completed act. And [the President's] instructions to his proper officers, and their work in pursuance of his instructions, are only the means by which he embodies his intentions into the completed act, and have no force out of the executive sphere until thus completed.... The completed act is the charter of pardon and delivered. This is the only step that gives title to a pardon. Until delivery, all that may have been done is mere matter of intended favor, and may be cancelled, to accord with a change of intention.") (internal citation omitted).

[48] The White House, Statement by the Press Secretary (December 24, 2008), http://georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081224-5.html.

[49] *Id*.; *see* Dan Eggen, *Bush Revokes Pardon of GOP Donors' Relative*, WASH. POST, December 25, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/12/24/AR2008122402193.html.

[50] *See* Statement by the Press Secretary, *supra* note 48.

[51] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380-81 (1866). *See also* Carlisle v. United States, 83 U.S. 147, 151 (1873) (affirming the view in *Ex parte Garland* that "the pardon not merely releases the offender from the punishment prescribed for the offense, but ... it obliterates the legal contemplation of the offense itself.").

Despite this broad view, the Court stated that a pardon "does not restore offices forfeited, or property or interests vested in others in consequences of the conviction and judgment."[52]

The Court in *Knote v. United States* reiterated that a pardon "releases the offender from all disabilities [i]mposed by the offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights."[53] Since *Garland* and *Knote*, courts have consistently opined that a full pardon restores basic civil rights such as the right to vote, serve on juries, and the right to work in certain professions.[54] In other words, a pardon should generally remove any collateral consequences that may legally attach to a person as a result of the commission or conviction of the pardoned offense.[55] However, as discussed below, the recipient of a pardon may still be unable to exercise certain rights or engage in certain activities, depending on the qualifications imposed under state or federal law. This may be due, in part, to the fact that the Court, in the 20th century, appears to have backed away from its position in *Garland*, that a pardon wipes away the existence of guilt.

In 1915, the Court, in *Burdick v. United States*, affirmed that the full pardon, had the petitioner accepted, would have "absolv[ed] him from the consequences of every such criminal act."[56] In allowing the petitioner to refuse the pardon and instead assert his constitutional right against self-incrimination, the *Burdick* Court had acknowledged that a "confession of guilt [is] implied in the acceptance of a pardon."[57] Similarly, in *Carlesi v. New York*, the Court concluded that a presidential pardon for a federal offense did not prevent the state from considering the pardoned offense under a state statute that permits enhanced sentencing upon the commission of a second offense.[58] The *Carlesi* Court reasoned that the state's action "was not in any degree a punishment

[52] *Ex parte Garland*, 71 U.S. at 381. *But see* Osborn v. United States, 91 U.S. 474 (1875) (ordering the return of confiscated property belonging to petitioner who had received a full pardon for aiding the Confederacy). Notably, the proceeds of the confiscated property was still under the control of the lower court and not yet distributed to third parties or paid into the U.S. Treasury pursuant to a final decree. As such, the lower court still had power to compel restitution of the money to the petitioner. *Id.* at 479. *See* Knote v. United States, 95 U.S. 149 (1877) (rejecting pardoned petitioner's claim for restoration of confiscated property because the funds had already been paid into the U.S. Treasury, and concluding that pardon power does not reach money in the U.S. Treasury unless authorized by Congress).

[53] *Knote*, 95 U.S. at 153.

[54] *See, e.g.*, Boyd v. United States, 142 U.S. 450 (1892) (holding that a full and unconditional presidential pardon to a person convicted of a felony restored his competency as a witness, since "the disability to testify" was a consequence of the conviction under the principles of common law); Bjerkan v. United States, 529 F.2d 125, 126-27 (7th Cir. 1975) (affirming that the right to work in certain professions, the right to vote, and the right to serve on a jury are serious collateral consequences); *see also* Dep't of Justice, Frequently Asked Questions Concerning Executive Clemency, https://www.justice.gov/pardon/frequently-asked-questions-concerning-executive-clemency#1 (last visited July 22, 2016) ("[A pardon] does not signify innocence. It does, however, remove civil disabilities—e.g., restrictions on the right to vote, hold state or local office, or sit on a jury—imposed because of the conviction for which pardon is sought, and should lessen the stigma arising from the conviction. It may also be helpful in obtaining licenses, bonding, or employment.").

[55] *See* Effects of a Presidential Pardon, 19 Op. O.L.C. 160, 162 (1995) ("A presidential pardon relieves the offender of all punishments, penalties, and disabilities that flow directly from conviction, provided no rights have vested in a third party as a consequences of the judgment."); OFFICE OF THE PARDON ATTORNEY, DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 13 (2006), *available at* http://www.justice.gov/sites/default/files/pardon/legacy/2006/11/13/collateral_consequences.pdf [hereinafter DOJ Federal Consequences].

[56] Burdick v. United States, 236 U.S. 79, 86 (1915).

[57] *Id.* at 91. In confirming that the President could commute a sentence without the consent of the recipient, the Court again suggested that a pardon does not erase one's guilt in *Biddle v. Perovich*, 274 U.S. 480 (1927).

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

for the prior crime," and that the state's action could not be constitutionally void because it did not "destroy[] or circumscrib[e] the effect" of a presidential pardon.[59] In 1974, the Court decided *Schick v. Reed*, in which it affirmed the President's authority to commute a sentence upon the condition that the prisoner not be paroled.[60] The Court emphasized the President's plenary authority under the pardon power to reduce or alter a penalty, but the Court did not address whether such power includes erasing the underlying guilt or the conviction itself. At least one scholar has opined that these cases, from the early 20th century to the present, demonstrate the Court's implicit shift away from its broad declaration in *Garland* regarding the effect of a pardon, now "suggest[ing] that a pardon does not wipe away all guilt from its recipient."[61] Notably, *Schick* examined the commutation of a sentence, in which it may have been unnecessary for the Court to discuss whether the altered sentence erased the recipient's underlying guilt, as it may have been clear that the commutation did not.[62]

Current Interpretation of the Effect of a Presidential Pardon

As one court noted, there are three prevailing views regarding the effect of a presidential pardon.[63] The first view, following *Garland*, "holds that a pardon obliterates both conviction and guilt which places the offender in a position as if he or she had not committed the offense in the first place."[64] The second view "is that the conviction is obliterated but guilt remains."[65] In deciding the effect of pardons issued by the President or a state governor, many courts appear to adhere to this second view, as discussed below.[66] The third view "is that neither the conviction nor guilt is obliterated."[67]

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[59] *Id.* at 57.

[60] Schick v. Reed, 419 U.S. 256 (1974).

[61] Ashley M. Steiner, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 EMORY L.J. 959, 972 (1997). *See also* Nixon v. United States, 506 U.S. 224, 232 (1993) (opining that "the granting of a pardon is in no sense an overturning of a judgment of a conviction by some other tribunal; it is '[a]n executive action that mitigates or sets aside punishment for a crime'").

[62] *See, e.g.*, Stone v. Burch, 114 Fla. 460, 463 (Fla. 1934) ("'[C]ommutation' merely substitutes a lighter for heavier punishment, removes no stain, restores no privilege, and may be effected without consent and against the will of the prisoner.").

[63] Lettsome v. Waggoner, 672 F. Supp. 858, 863 n.10 (D. V.I. 1987) (quoting State v. Bachman, 675 S.W.2d 41, 49 (Mo. App. 1984)).

[64] *Id.*

[65] *Id.* (referencing Samuel Willison, *Does Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 649 (1915) ("The true distinction seems to be this: The pardon removes all legal punishment for the offense. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.")).

[66] *See, e.g.*, Bjerkan v. United States, 529 F.2d 125, 128 n.2 (7th Cir. 1975) ("Thus, the fact of conviction after a pardon cannot be taken into account in subsequent proceedings. However, the fact of the commission of the crime may be considered. Therefore, although the effects of the commission of the offense linger after a pardon, the effects of the conviction are all but wiped out."); Gurleski v. United States, 405 F.2d 253, 266 (5th Cir. 1968) ("A pardon for any other reason than subsequent proof of innocence does not obliterate the defendant's previous transgressions particularly as they may bear on his present character and veracity. Any number of reasons may lie behind the granting of an executive pardon, but the granting of a pardon does not in itself indicate any defect in previous convictions."); Damiano v. Burge, 481 S.W.2d 562, 565 (Mo. Ct. App. 1972) ("The fundamental distinction suggested by Professor Williston has been generally accepted and followed by the courts since the date of his article [1915].").

[67] *Lettsome*, 672 F. Supp. at 863 n.10. *See, e.g.*, Dixon v. McMullen, 527 F. Supp. 711 (N.D. Tex. 1981) (holding that an ex-felon was still prohibited from serving as a police officer despite receiving a pardon from the Governor of Texas (continued...)

Two decisions stemming from the pardon of high-ranking officials involved in the Iran-Contra Affair illustrate the courts' adoption of the second, hybrid view of a pardon's effect. In *In re North*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reviewed whether the recipient of a pardon, a former Central Intelligence Agency official, could claim attorneys' fees under the Ethics in Government Act.[68] The act authorizes a court to award certain attorneys' fees incurred by the subject of an independent counsel investigation, but only if no indictment is brought against that person.[69] The petitioner, citing *Garland*, argued that the full pardon he received from President George H.W. Bush entitled him to petition for attorneys' fees under the act, notwithstanding the return of an indictment against him during the investigation. The D.C. Circuit, noting that four Justices dissented in *Garland*, opined that the Court "implicitly rejected" the dictum in *Garland* when it decided *Burdick*, where it had "recognized that the acceptance of a pardon implies a confession of guilt."[70] Applying *Burdick*, the D.C. Circuit concluded that "[b]ecause a pardon does not blot out guilt ..., one can conclude that a pardon does not blot out probable cause of guilt or expunge an indictment."[71] Accordingly, the court held that a pardon did not nullify the indictment against the petitioner, thereby precluding his recovery of attorneys' fees under the act.

A similar result was reached in *In re Abrams*, where the Court of Appeals for the District of Columbia, sitting en banc, reviewed whether the recipient of a pardon, a former official with the Department of State, could be disciplined under the District of Columbia Rules of Professional Conduct, which prohibit a lawyer from engaging in criminal acts of "dishonesty, fraud, deceit, or misrepresentation."[72] The petitioner argued that *Garland* prevented the court "from considering the wrongful conduct in assessing his moral character for the purpose of bar discipline."[73] The court, following "the virtually unanimous weight of authority," held that though the pardon set aside the petitioner's convictions and the consequences the law attached to his convictions, "it could not and did not require the court to close its eyes to the fact that Abrams did what he did."[74] Accordingly, the court ordered the petitioner be publicly censured, as it determined that the commission of his pardoned offense could be used to assess his moral character.

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because the pardon did not remove disqualification against ex-felon); Diaz v. Chasen, 642 F.2d 764 (5th Cir. 1981) (holding that automatic pardon for first-time offenders under Louisiana state law is not the kind of pardon that wipes criminal conviction off the books; therefore the federal agency could revoke ex-felon's customs license).

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

[69] 28 U.S.C. §593(f)(1).

[70] *In re North*, 62 F.3d at 1437. The D.C. Circuit explained that *Garland*'s expansive view of the pardon effect "turned out to be dictum," because the Court's judgment turned on whether the law passed by Congress was a bill of attainder, not on the effect of the pardon. *See also In re* Lavine, 41 P.2d 161, 164 (Cal. 1935) ("[T]he additional discussion [in *Garland*] as to the effect of the pardon was unnecessary to the decision.").

[71] *In re North*, 62 F.3d at 1437. Additionally, the court concluded that it could not authorize the payment of attorneys' fees without congressional authorization, as the Supreme Court has ruled that the pardon power does not "touch moneys in the treasury of the United States, except expressly authorized by act of Congress." *Id*. at 1436 (citing *Knote*, 95 U.S. at 154). *But see id*. at 1440 (Sneed, J., dissenting) (disagreeing with majority reasoning and stating that the Ethics in Government Act "constitutes just such an appropriation").

[72] *In re* Abrams, 689 A.2d 6, 9 (D.C. 1997) (citing Model Code of Professional Responsibility DR 1-102(A)(4) (1980)).

[73] *Id*. at 10.

[74] *Id*. at 7.

Examples of Potential Effect of Presidential Pardon Under Current Interpretation

Though there may be underlying debate as to whether a pardon eliminates an individual's guilt for having committed the pardoned offense,[75] courts generally agree that a full presidential pardon restores federal as well as state civil rights to remove consequences that legally attach as a result of a federal conviction (i.e., legal disabilities).[76] For instance, if an individual is prevented under state and federal law from possessing a firearm due to a felony conviction, a full and unconditional pardon for the federal conviction would remove the firearm disability.[77] Federal firearms laws, unlike other federal laws that impose collateral consequences upon conviction,[78] specifically provide that a person shall not be considered a convicted felon for purposes of the statute if such person "has been pardoned or has had civil rights restored," unless the pardon, expungement, or restoration of civil rights expressly provides that one may not possess or receive firearms.[79] It appears that only a handful of federal laws specifically address the effect of a pardon on one's eligibility.[80] Yet such express provisions may not be warranted because of the long-standing principle, affirmed by the courts, that a pardon removes legal disabilities that attach as a result of one's conviction.[81] Moreover, as discussed later, there appears to be no general federal statutory process whereby civil rights lost as a result of a federal conviction may be restored or "judicial records of an adult federal criminal conviction expunged."[82] Therefore, a presidential

[75] Dissenting judges in both *In re North* and *In re Abrams* opined that a presidential pardon, as described in *Garland*, removed the disability against the petitioners. *In re North*, 62 F.3d at 1339 (Sneed, J., dissenting) (stating that the pardon "should restore [petitioner's] right to sue under the Act. To do less improperly diminishes the Presidential power to pardon. The right to sue is at least as fundamental as the right to testify in court, and we have afforded the latter right to pardoned criminals for over a century."); *In re Abrams*, 689 A.2d at 33-40 (Terry, J., dissenting) (concluding that a pardon attaches not just to a criminal conviction but also to the conduct underlying the conviction, and that petitioner's pardon protected him from the disciplinary sanction, which was both a form of punishment and civil disability stemming from his involvement in the pardoned offenses).

[76] *See, e.g.*, Bjerkan v. United States, 529 F.2d 125, 129 (7th Cir. 1975) ("The pardon power would be ineffective if it could only restore a convict's federal civil rights. ... [W]e conclude that a presidential pardon restores state as well as federal civil rights."). This report does not discuss the effect the federal government gives to state pardons.

[77] *See* Harbert v. Deukmejian, 173 Cal. Rptr. 89 (Cal. Ct. App. 1981) (state firearm disability does not apply to a person who has received a full and unconditional pardon); Effects of a Presidential Pardon, *supra* note 55, at 166-67 (opining that a full and unconditional presidential pardon removes a state firearm disability arising as a result of a conviction of a federal crime).

[78] *See, e.g.*, 10 U.S.C. §504 (preventing convicted felons from enlisting in the armed forces); 29 U.S.C. §504 (prohibiting persons convicted of certain felonies from being involved with labor organizations); 22 U.S.C. §2714(a)(1) (revoking or denying of passport upon conviction of felony federal or state drug offense). *See also* DOJ Federal Consequences, *supra* note 55, at 4-14.

[79] 18 U.S.C. §921(a)(20). *See also* Beecham v. United States, 511 U.S. 368 (1994) (holding that for federal convictions the only method for regaining firearms privileges is essentially through a presidential pardon or expungement because restoration of rights must occur, not via state procedures, but under the federal provision 18 U.S.C. §925(c), which has been subject to a long-standing appropriations restriction).

[80] *See, e.g.*, 38 U.S.C. §6105 (restoring certain benefits to veterans who have received a pardon of the disqualifying offense); 42 U.S.C. §402(u)(3) (removing additional penalty that may be imposed on beneficiary of old-age and survivors insurance payments, if such person receives a pardon for the disqualifying offense); 42 U.S.C. §608(a)(8) (reinstating eligibility of an individual's Temporary Assistance for Needy Families benefit if such person receives a pardon for the disqualifying offense of fraudulent misrepresentation).

[81] SEC v. Lewis, 423 F. Supp. 2d 337 (S.D.N.Y. 2006) (lifting the agency's long-standing order against trader, who received a full and unconditional pardon for his underlying offenses, and concluding that the agency's order, which prevented the trader from associating with brokers and dealers, "appear[ed] to represent little more than continued punishment, something that a pardon clearly prohibits").

[82] DOJ Federal Consequences, *supra* note 55, at 13. *See infra* notes 97-102 and accompanying text on expungement of (continued...)

pardon is essentially the only method for restoring rights under federal law, although eligibility may be regained after a defined passage of time, as discussed below.

Nevertheless, the courts' reasoning in cases such as *In re North* and *In re Abrams* demonstrates that a pardon will not preclude a court or other entity from considering the pardoned offense for certain eligibility purposes, especially where an individual's character may be reflected by the mere commission of an offense (irrespective of whether there had been a conviction).[83] For example, a federal court of appeals upheld the Commodity Futures Trading Commission's (CFTC's) denial of an individual's post-pardon application for registration as a floor broker.[84] The court determined that the CFTC could consider the conduct underlying the pardoned conviction in ascertaining whether the applicant would be fit to act as a floor broker.[85] In upholding the agency's action, the court also concluded that the CFTC's denial did not violate the pardon power because its action did not further punish the applicant based on his pardoned conviction alone.[86] Likewise, federal law authorizes the Attorney General to consider past drug-related convictions as a factor in her decision to issue a license to a manufacturer of controlled substances.[87] Were an applicant to receive a presidential pardon for a federal drug offense, the Attorney General still could consider the pardoned offense in issuing the license because its commission may be related to the applicant's suitability for the license. If the Attorney General denied a license, it is probable that this would not violate the pardon power because the denial likely would not be construed as a further punitive legal consequence that would have otherwise stemmed from the conviction of the pardoned offense. Along similar lines, courts have held that consideration of a pardoned offense for purposes of sentencing enhancement does not violate the pardon power because such use does not undermine the effect of that pardon, nor does it "constitute separate punishment for the pardoned conviction."[88] Accordingly, even if the recipient of a pardon were to regain eligibility for a position or program from which he was originally barred due to his conviction, it is possible that he may still be disqualified if one's character is a necessary qualification for eligibility purposes.[89]

(...continued)

records.

[83] While the Court has held that a pardon restores a convicted criminal's right to testify, *Boyd v. United States*, 142 U.S. 450 (1892), the Federal Rules of Evidence allow a pardoned conviction to be used as evidence of bad character, unless the pardon was based on a finding of rehabilitation or innocence. FED. R. EVID. 609.

[84] Hirschberg v. CFTC, 414 F.3d 679 (7th Cir. 2005).

[85] *Id*. at 683.

[86] *Id*. at 682.

[87] 21 U.S.C. §823(a).

[88] United States v. McMichael, 358 F. Supp. 2d 644, 648 (E.D. Mich. 2005) ("Enhancing a subsequent conviction through a pardon may even be considered proper public policy, because committing a similar offense after a pardon is an affront to the President of the United States's generous bestowal of the privilege of the pardon."); Donald v. Jones, 445 F.2d 601 (5th Cir. 1971). *See also* Carlesi v. United States, 233 U.S. 51, 59 (1914).

[89] The DOJ Office of Legal Counsel opined on whether a presidential pardon would lift a federal prohibition on holding "any office of honor, trust, or profit under the United States" imposed as a result of a conviction under 18 U.S.C. §281 (since repealed in 1994). It had concluded that while a pardon would remove the statutory disability, it "would not obliterate all reference to the past conduct of the person pardoned." The recipient of the pardon would be eligible to hold federal office, but would not be entitled to be considered as if he had never engaged in the criminal conduct that led to the conviction. Mem. for Andrew Oehmann, Executive Assistant to the Att'y General, from Norbert Schlei, Assistant Attorney General, Office of Legal Counsel, *Re: Effect of Pardon on Disability to Hold Federal Office* at 1, 7 (August 12, 1963) (quoted in Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime, 30 Op. O.L.C. 104 (2006)).

Restoration of Rights Without a Presidential Pardon

Given that many petitions for presidential pardons are denied, this section briefly discusses expungements and other avenues by which federal felons could potentially have some civil rights, affected by their federal criminal convictions restored absent a pardon.[90]

Expungement of Records

As discussed, a pardon recipient may still encounter hurdles when character is a factor of eligibility because a pardon does not eliminate underlying guilt or the commission of the offense itself. The reason it is possible for a third party to know of and consider a pardon recipient's conviction is that, according to the Office of the Pardon Attorney, a presidential pardon "does not erase or expunge the records of a conviction."[91] Rather, the Office of the Pardon Attorney notifies, among others, the FBI so that the pardoned individual's criminal history record will reflect the grant of a pardon.[92] As such, the conviction for which one is pardoned, along with a notation of the pardon, will continue to be reported when a background check is conducted on the pardoned individual.

The continued presence of a conviction on a person's record, notwithstanding a pardon, could still raise barriers with respect to such person's suitability.[93] In the employment context, for example, the recipient of a pardon could face employment challenges in jurisdictions where employers are permitted to inquire into an applicant's criminal history.[94] As a result of interpretations of the pardon power, it is possible that an employer could disqualify a person on the basis of her pardoned offense because the person's commission of the underlying offense may be considered a reflection of the applicant's character and suitability for the position.[95] However, an expungement

[90] *See generally* Ram Subramanian, Rebecka Moreno & Sophia Gebreselassie, *Relief in Sight? States Rethinking the Collateral Consequences of Criminal Conviction, 2009-2014*, VERA Institute of Justice (December 2014), *available at* http://www.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v3.pdf. This report reviews state approaches to mitigate the burden of collateral consequences for people with certain criminal convictions.

[91] Dep't of Justice, Frequently Asked Questions Concerning Executive Clemency, https://www.justice.gov/pardon/frequently-asked-questions-concerning-executive-clemency (last visited July 22, 2016).

[92] *Id*. DOJ further states: "[A] pardon does not relieve the recipient from the obligation of disclosing his conviction in any circumstance where he is required to report that information. However, the pardoned person may include the information that a pardon has been granted and may present the warrant of pardon he has received as evidence of the pardon." *Id*.

[93] For private rental properties applications, for instance, private landlords generally have discretion to deny applicants because of their criminal backgrounds, provided that their policies do not discriminate on the basis of a protected class under federal antidiscrimination law (e.g., the Fair Housing Act (42 U.S.C. §3604). There could be additional tenant protections under state or local law.

[94] *See* Margaret Colgate Love, *Chart #5 Consideration of Criminal Record in Licensing and Employment*, National Association of Criminal Defense Lawyers (NACDL) Restoration of Rights Resource Project (July 2016), http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/. Notably, at least 24 states and several localities reportedly have enacted so-called "ban the box" or "fair chance" legislation. These laws prohibit covered employers from asking about an applicant's criminal history and delay the background check inquiry until later in the hiring process. And, at least nine states have removed the conviction history question on job applications for private employers. *See* Michelle Natividad Rodriguez & Beth Avery, *Fair-Chance Employment Ban the Box* (June 2016), http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf.

[95] *See generally* "Examples of Potential Effect of Presidential Pardon Under Current Interpretation," *supra*. It would appear that if the pardoned offense is listed as a statutory disqualification and there is no discretion to consider the character of the applicant to determine suitability, then a pardon could potentially remove such legal disability and (continued...)

of one's records generally appears to go a step beyond the effect of a pardon and removes the record of the conviction as well as the underlying guilt. Absent a pardon, seeking an expungement may be an alternative method for potentially regaining civil rights or legal privileges lost as a result of a federal conviction, as an expungement would preclude the conviction from being reported on a background check and therefore potentially eliminate the barriers that a pardon recipient would face even after receiving a pardon.[96] Notably, there may be some circumstances where an expungement of one's records may be the only way for a legal disability to be removed despite receiving a pardon. For instance, Utah provides the following: "A person who has been convicted of a felony which has not been expunged is not competent to serve as a juror."[97] This provision appears to indicate that even if a person residing in Utah has received a pardon, he is still barred from serving as a juror unless he has obtained an expungement of his records.

As discussed above, it is generally acknowledged that a pardon does not compel an expungement of related criminal and judicial records.[98] At least one federal court has addressed this issue, declaring: "[N]o proclamation of the executive has the power and authority … to order expunction of court records under the aegis of restoring to the pardoned person 'full ... other rights.'"[99] Unlike states, many of which outline the circumstances under which a person may petition for an expungement of records,[100] there is no general federal statutory procedure addressing how a federal felon can seek an expungement.[101] Moreover, the courts have described expunction as an extraordinary remedy.[102]

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restore eligibility.

[96] Notably, the Supreme Court has observed that state expungement statutes vary. Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 121-22 (1983). For instance, an expungement can include the physical destruction of records (United States v. Johnson, 941 F.2d 1101, 1111 (10th Cir. 1991)) or simply an order not to report a conviction (United States v. Sweeny, 914 F.2d 1260, 1262 (9th Cir. 1990)).

[97] UTAH CODE ANN. §78B-1-105(2). Utah appears to be an outlier with this requirement. *See infra* notes 108-110 and accompanying text.

[98] Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime, 30 Op. O.LC. at 110. ("We conclude only that a pardon does not expunge such records automatically and therefore that the relevant record-keeper is not obliged by virtue of a pardon to purge its files of all references to the pardoned offense.").

[99] United States v. Noonan, 906 F.2d 952, 956 (3d Cir. 1990)

[100] *See, e.g.*, CONN. GEN. STAT. §54-142a (erasure of records); MD. CODE ANN. CRIM. PROC. §10-105 (expungement of police record). *See* Margaret Colgate Love, *Chart #4- Judicial Expungement, Sealing, and Set-Aside*, NACDL Restoration of Rights Resource Project (July 2016), http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparisonjudicial-expungement-sealing-and-set-aside/.

[101] There is one narrow expungement provision under 18 U.S.C. §3607(c). It directs the court to expunge all official records, except nonpublic ones, of a person who has been found guilty of a misdemeanor offense of simple possession of marijuana under 21 U.S.C. §844 and who was less than 21 years old at the time of the offense. Section 3607 of Title 18 *United States Code* provides the following: "The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose."

[102] *Noonan*, 906 F.2d at 956-57 ("Clearly, a federal court has the inherent power to expunge an arrest and conviction record. However, it is equally well established that granting such relief is confined to extreme circumstances.") (internal citations omitted).

Restoration of Rights by Operation of Law or Upon Application to State

A former federal felon may be able to regain certain rights, such as the ability to vote or serve on a jury, under a state's process or laws addressing the restoration of rights. This will, however, likely vary from state to state because many state laws dealing with restoration of rights do not always expressly address how state legal disabilities that attach as a result of a federal offense may be regained, absent a federal pardon.[103]

For example, state laws determine voter qualifications for both federal and state elections, including the circumstances under which a felony conviction disqualifies a person from voting.[104] Laws on voter qualifications range from those that impose no restriction on the right to vote—that is, permitting felons to vote from prison by absentee ballot—to those that impose permanent disenfranchisement, unless restored by executive pardon.[105] The processes for restoring voting rights, absent a pardon, likewise vary by state, though several automatically restore voting rights upon completion of one's sentence.[106] For example, Utah provides that a right to vote for a convicted state or federal felon is restored when (1) the felon is sentenced to probation; (2) the felon is granted parole; or (3) the felon has successfully completed the term of incarceration to which the felon was sentenced.[107] State juror qualifications also vary by state, and the right to jury service is sometimes described as the most difficult right to regain.[108] Many states generally

[103] *See generally* Margaret Colgate Love, *Chart #1- Loss and Restoration of Civil Rights and Firearms Privileges*, NACDL Restoration of Rights Resource Project (July 2016), http://ccresourcecenter.org/resources-2/restoration-of-rights/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/; OFFICE OF THE PARDON ATTORNEY, DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY 2 (1996), https://www.ncjrs.gov/pdffiles1/pr/195110.pdf.

[104] In addition to constitutional amendments providing for specific limits on disenfranchisement, such as those based on age, gender, and race, the U.S. Constitution provides that the qualifications for voting in federal elections are initially determined by state law. U.S. CONST., art. I §2, cl. 1; *id*. art. I, §4, cl. 1; *id*. art. II, §1, cl. 2; *id*. amend. XVII. Congress could "make or alter" election regulations for national elections, including the qualifications of voters, but may not do so for state or local elections. Oregon v. Mitchell, 400 U.S. 112, 117-19 (1970).

[105] *See, e.g.*, VT. STAT. ANN. TIT. 28, §807 (right to vote not lost); IOWA CODE §48A.6 (disqualifying federal felons from right to vote unless rights are later restored by the President of the United States).

[106] *See State Felon Voting Laws*, PROCON.ORG (last updated on April 22, 2016), http://felonvoting.procon.org/view.additional-resource.php?resourceID=006025. This site notes that 14 states and the District of Columbia restore voting rights upon completion of sentence alone. S*ee also, e.g.*, HAW. REV. STAT. §831-2(a) (restoration of voting rights upon completion of sentence; person may vote during period of probation or parole); MONT. CONST. art IV, §2 (defining a qualified elector as any individual who is 18 years of age or older, who meets the registration and residency requirements, but excluding those "serving a sentence for a felony in a penal institution"). At least 20 states restore voting rights upon completion of sentence and any conditional discharge, such as parole and probation. *See, e.g.*, ALASKA STAT. §15.05.030 (restoration of voting rights after unconditional discharge completed); N.Y. ELEC. LAW §5-106(2) ("No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole.").

[107] UTAH CODE ANN. §20A-2-101.5.

[108] Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 AM. U. L. REV. 65, 161 (2003). Under federal law, any person who "has been convicted in a State or Federal court of ... a crime punishable by imprisonment for more than one year" is not entitled to serve on a federal jury unless "his civil rights have been ... restored." 28 U.S.C. §1865(b)(5). If an individual is barred due to a federal offense, then a presidential pardon will qualify as having one's civil rights restored under the statute. *See* United States v. Hefner, 842 F.2d 731, 733 (4th Cir. 1988) (holding "that some affirmative act recognized in law must first take place to restore one's civil rights to meet the eligibility requirements of section 1865(b)(5)" such as "pardon, amnesty or expunction of his conviction"). Whether a federal felon may serve on a federal jury after having had civil rights restored by a state will likely depend on the state process.

indicate that a pardon will restore one's competency to be a juror.[109] Absent a pardon, however, some states either permit ex-felons to serve on a jury upon completion of a sentence, either automatically or after a defined period of time, or require them to individually apply to the governor for restoration of rights.[110]

Notably, there are limited circumstances under federal law where a person may regain eligibility after a certain amount of time. For example, a student receiving a federal grant, loan, or work assistance under Title 20 of the *United States Code* will have his eligibility suspended if convicted under federal or state law for the possession or sale of a controlled substance.[111] However, the suspension terminates and a student may regain eligibility after a prescribed amount of time if the student meets certain conditions, such as successful participation in a drug rehabilitation program.[112] Alternatively, federal law sometimes permits an official to grant a waiver allowing a person to be eligible notwithstanding his disqualifying conviction. For example, individuals who have committed felonies are generally ineligible to enlist in the military, except that the Secretary of the affected branch "may authorize exceptions, in meritorious cases, for the enlistment of ... persons convicted of felonies."[113] Under these circumstances, a person who would otherwise be prohibited from participation need not have a presidential pardon in order to regain eligibility.

Role of Congress in the Pardon Power and Legal Effects on Collateral Consequences

The Court has consistently held that the President's pardon power may not be circumscribed by Congress. In *Garland*, the 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."[114]

In *United States v. Klein*, the Court found unconstitutional a congressional provision that purported to limit the use and effect of the President's pardon.[115] In finding that the congressional provision infringed on the President's pardon power, the Court stated: "[T]he legislature cannot

[109] *See, e.g.*, ARK. CODE ANN. §16-31-102 (disqualifying from grand or petit jury service "[p]ersons who have been convicted of a felony and have not been pardoned"); 42 PA. CONS. STAT. §4502(a)(3) (disqualifying from jury service one who "has been convicted of a crime punishable by imprisonment for more than one year and has not been granted a pardon or amnesty therefor").

[110] *Compare* N.C. GEN. STAT. §13-1 (permitting a federal felon automatic restoration of rights as long has the individual unconditionally discharged or received an unconditional pardon or satisfied all conditions of a conditional pardon) *with* CONN. GEN. STAT. §51-217(a)(2) (disqualifying from jury service anyone who has been convicted of a felony within the past seven years) *and* FLA. STAT. §940.01 (allowing applications for restoration of civil rights only after defined period of time). *See also* Kalt, *supra* note 108, at 150-57 n.376-426 and accompanying text.

[111] 20 U.S.C. §1091(r).

[112] *Id.* §1091(r)(2).

[113] 10 U.S.C. §504; s*ee also* 12 U.S.C. §1829(a)(1), (a)(2)(A) (authorizing the Federal Deposit Insurance Corporation to waive a conviction-related prohibition to permit individuals to participate in the affairs of a federally insured depository institution with the limitation that for certain offenses the agency may not waive a conviction-related prohibition until after 10-years from the date the conviction).

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

[115] United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

change the effect of such a pardon any more than the executive can change a law."[116] Likewise, the Court in *Schick* declared that the President's pardon power "flows from the Constitution alone, not any legislative enactments," and it "cannot be modified, abridged, or diminished by Congress."[117] These judicial pronouncements appear to indicate that Congress can take no action that would limit the effect or use of a presidential pardon, nor can Congress direct how or when the President may exercise his pardon authority.[118] Generally, Members of Congress have turned to introducing resolutions expressing the sense of Congress that the President either should or should not grant pardons to certain individuals or groups of individuals.[119]

It is unclear, however, whether a reviewing court would reach the same conclusion were Congress to pass a measure that expanded the effect of a presidential pardon. Notably, some states have passed legislation that clarifies the effect of a state pardon.[120] Colorado, for example, provides the following: "A pardon issued by the governor shall waive all collateral consequences associated with each conviction for which the person received a pardon unless the pardon limits the scope of the pardon regarding collateral consequences."[121] "Collateral consequences" are defined as "a penalty, prohibition, bar, disadvantage, or disqualification, however denominated, imposed on an individual as a result of the individual's conviction of an offense, which penalty, prohibition, bar, or disadvantage applies by operation of law regardless of whether the penalty, prohibition, bar, or disadvantage is included in the judgment or sentence."[122]

Similarly, Congress could enact a provision that reaffirms the existing principle that a presidential pardon restores civil rights and removes collateral consequences imposed under federal or state law as a result of a federal conviction, unless otherwise provided for by the pardon or by the state (with respect to state-imposed legal disabilities). However, if a congressional measure specified collateral consequences to be restored, this could be construed as limiting the effect of the pardon.

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[116] *Id*. at 148; *see also Ex parte* Grossman, 267 U.S. 87, 120 (1925) ("The executive can reprieve or pardon all offenses ... without modification or regulation by Congress.").

[117] Schick v. Reed, 419 U.S. 256, 266 (1974); *see also* Public Citizen v. Dep't 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").

[118] The Supreme Court, in dicta, has recognized that Congress may regulate clemency in the military and pass statutes granting immunity for cooperation in a criminal investigation. *See Ex parte Wells*, 59 U.S. (18 How.) 307, 312 (1856) ("[T]here are also pardons grantable as of common right, without any exercise of the king's discretion; as where a statute creating an offence, or enacting penalties for its future punishment, holds out a promise of immunity to accomplices to aid in the conviction of their associates."). Some scholars have proposed ways for Congress to exert influence over the pardon process, or have examined the constitutionality of past attempts by Congress to influence the pardon process, specifically S. 2042 and H.R. 3626, the Pardon Attorney Reform and Integrity Act introduced in 2000 during the 106th Congress. *See, e.g.*, Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225 (2003); Schorr, *supra* note 23, at 1549-61.

[119] *See, e.g.*, H.Con.Res. 14 (114th Cong., 1st sess.) (expressing sense of Congress that posthumous pardon should be granted to John Arthur "Jack" Johnson); H.Res. 9 (111th Cong., 1st sess.) (expressing sense of the House that the President should not grant preemptive pardons to senior officials for acts they may have taken in the course of their official duties); *see also* H.Con.Res. 24 (110th Cong., 1st sess.); H.Con.Res. 37 (110th Cong., 1st sess.).

[120] *See* COLO. REV. STAT. §16-17-103; UTAH CODE ANN. §77-27-1(14) (defining a pardon as an act that "releases the offender from the entire punishment prescribed for a criminal offense and from disabilities that are a consequence of the criminal conviction"); WASH. REV. CODE §13.50.260(6)(b) (treating juvenile offenders who receive a full and unconditional pardon as if the offense never occurred).

[121] COLO. REV. STAT. §16-17-103. Other states have considered legislation similar to Colorado's collateral consequences law. *See, e.g.*, S.B. 1063, 2013 Session Year (Conn. 2013); A.B. 8546, 234th Ann. Leg. Sess. (N.Y. 2011); S.B. 1090, 199th Gen. Assemb. (Pa. 2015).

[122] COLO. REV. STAT. §16-17-103. The term "collateral consequences" does not include imprisonment, probation, parole, supervised release, forfeiture, restitution, fine, assessment, or costs of prosecution. *Id.*

By expressly reinstating some rights over others, a reviewing court could view such a measure as modifying or abridging the effect of a presidential pardon.

Moreover, it may be possible for Congress to change the current judicial interpretation by providing that a presidential pardon erases both the underlying guilt and the existence of the federal offense itself. Although the issuance of a pardon does not automatically grant an expungement of criminal records,[123] at least one federal court has noted: "The President's power, if any, to issue an order of expunction of a criminal record must stem from an act of Congress or from the Constitution itself."[124] As it has done with simple drug possession,[125] Congress could require, upon application of a presidential pardon recipient, a federal court to enter an expungement order. In this way, a pardon recipient could avoid the current hurdles he or she may face when a background check is conducted or when the commission of the offense itself may be used to evaluate such person's eligibility.[126]

Another possibility for Congress, without addressing the effect of a pardon, could be to mirror states that have passed so-called "ban the box" or "fair chance" legislation.[127] Such measures remove the conviction history question on job applications, thereby preventing covered employers (either public or private) from considering one's criminal history until later in the hiring process. In November 2015, President Obama announced that he had directed the Office of Personnel Management (OPM) to "take action where it can by modifying its rules to delay inquiries into criminal history until later in the hiring process."[128] OPM issued a proposed rule in May 2016 that would specify to federal agencies that "unless an exception has been requested by a hiring agency and granted by OPM, agencies cannot begin collecting background information unless the hiring agency has made a conditional offer of employment to an applicant."[129] In the 114th Congress, bills have been introduced that would prohibit federal agencies and federal contractors from requesting that an applicant disclose his or her criminal history record before receiving a conditional offer.[130]

[123] United States v. Noonan, 906 F.3d 925, 956 (3d Cir. 1990) ("[T]he notion that the President has the ability through the pardon power vested under Article II, § 2, to tamper with judicial records is a concept jurisprudentially difficult to swallow. The idea flies in the face of the separation of powers.").

[124] *Id*. ("To be sure, Congress can require the judiciary to *maintain* certain records, as it has in criminal records, as an aid to effective law enforcement, 28 U.S.C. § 534, and certain circumstances to legislatively mandate expunction.").

[125] *See supra* note 101.

[126] In the 114th Congress, at least one measure has been introduced that would establish a process for federal courts to consider the expungement and sealing of records for juvenile offenders. An applicant must have received a presidential pardon to be eligible under the terms of the proposal. H.R. 3156 (114th Cong., 1st sess.).

[127] *See supra* note 94.

[128] The White House, Office of the Press Secretary, Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated (November 2, 20156), https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation.

[129] Recruitment, Selection, and Placement (General) and Suitability, 81 *Federal Register* 26173, 26174 (May 2, 2016) (amending 5 C.F.R. pts. 330 and 731). On April 29, 2016, President Obama issued a presidential memorandum directing agencies to review their procedures for evaluating an applicant's criminal records to ensure compliance with the forthcoming OPM regulations. Memorandum on Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals, 81 *Federal Register* 26993 (May 4, 2016).

[130] H.R. 3470 (114th Cong., 1st sess.); S. 2021 (114th Cong., 1st sess.).

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