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Legal Sidebar

Record Scratch: Expunging Federal Criminal Records and Congressional Considerations

February 27, 2020

Although states in recent years have enacted legislation concerning the expungement of criminal records—that is, the "process of sealing or destroying" an individual's criminal record to restore the person to the position he occupied before his involvement in the criminal justice system—few such laws exist at the federal level. While federal law does permit expungement as a remedy for those who were *invalidly* or *illegally* arrested or convicted, it rarely does so for individuals whose arrests and subsequent dispositions were *lawful*, even if they ended in acquittal. Federal appellate courts disagree over whether they possess any general authority to expunge federal criminal records in such instances. This split of authority suggests there may be a role for legislation to the extent Congress is interested, and Members have introduced legislation on this front in the 116th Congress.

The question of whether federal law should provide expungement for those rightfully arrested or convicted takes place against a backdrop of broader discussions surrounding still-recent criminal justice reform legislation. And just like those discussions, an ongoing policy debate exists over the merits of expungement as an additional reform. Some academic research suggests that expungement reduces recidivism and improves employment prospects among those with criminal records. Although many commentators share this view, law enforcement values criminal records for their public safety function. In light of these issues, this Sidebar begins by exploring what it means to expunge a criminal record before examining relevant federal law and addressing some considerations for Congress.

Expunging a Criminal Record

What it means to expunge a criminal record is unclear because the term "criminal record" has various potential meanings. While a criminal record generally includes "individual identifiers" and "describes an individual's arrests and subsequent dispositions," such as a conviction or an indictment, a record will differ depending on (1) the entity that maintains it, (2) the type of information that it includes, and (3) the extent to which the information is accessible.

With regard to the first consideration, there is an important distinction between criminal records controlled by the judiciary, such as court records of criminal proceedings, and those controlled by the executive branch, such as millions of criminal records maintained by the Federal Bureau of Investigation (FBI) through its National Crime Information Center, Interstate Identification Index, and Criminal Justice

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LSB10413

Information Services Division. Federal courts "are without jurisdiction to order an Executive Branch agency to expunge" records barring inaccuracy or "an affirmative rights violation by executive branch officers or agencies . . . ." In addition, criminal records are maintained on federal, state, and local levels. In general, state expungement laws do not affect federal criminal records, and some federal courts have been reluctant to expunge local or state criminal records, or even federal records of state offenses. With regard to the second consideration, a criminal record might include information about local, state, or federal arrests and subsequent dispositions. It might also include personally identifying information such as a defendant's fingerprints or DNA profile. Finally, with respect to the third factor, accessibility varies depending on who maintains the criminal record at issue. FBI criminal records, for example, may be accessible to law enforcement and prospective employers. Meanwhile, judicial criminal records that are not sealed and many "materials generated by a criminal proceeding" are publicly accessible and available online.

Like the term "criminal record," "expungement" also has a range of different meanings. In general, expungement is a remedy that restores a person "in the contemplation of the law, to the status he occupied before . . . arrest or institution of criminal proceedings." But the exact mechanism by which expungement occurs may vary. For example, expungement may entail the complete destruction or striking out of "records or information in files, computers, and other depositories." Alternatively, expungement may merely entail physically separating the expunged records from other records, sealing them, or restricting their authorized uses. Expungement remedies often include provisions permitting the defendant to deny that the underlying offense occurred without the threat of penalization for perjury or making a false statement. Whatever the exact mechanism, there is an important practical limit on the scope of any expungement remedy. Expungement does not reach criminal records and related information that have become public. As one court explained, criminal record information that "has already been reported in print and online" is beyond the court's purview, as "[n]othing [a] Court can do will unring that bell."

Current Federal Expungement Law

Federal law permits expungement in three primary areas. First, expungement is available to correct inaccurate information. The Privacy Act requires that any agency maintaining records permit an individual to request amendment of "any portion thereof which the individual believes is not accurate, relevant, timely, or complete . . . ." If the agency does not make the requested correction, it must notify the individual of its reason for refusing to do so, and its decision is subject to review. Second, federal courts may expunge arrest or conviction records that are the product of an invalid, unlawful, or unconstitutional process. Courts have, for example, relied on provisions of federal civil rights law to order the expungement of arrest records where the arrests were used to interfere with the right to vote.

Third, several federal statutes expressly permit varying levels of expungement under more limited circumstances. Several federal laws allow for expungement that restricts access to an individual's records. One such statute concerns individuals under age 21, sentenced to pre-judgment probation for simple possession of a controlled substance. Under that law, a court must "expung[e] from all official records . . . all references to [the qualifying individual's] arrest for the offense . . . and the results thereof," except for a nonpublic record maintained by the Department of Justice for limited purposes. Another statute involving *civil* penalties for possession of a controlled substance provides a nearly identical expungement remedy. Courts previously inferred that the Federal Youth Corrections Act (FYCA) similarly required that qualifying records be "physically removed" and "placed in a separate storage facility not to be opened other than in the course of a bona fide criminal investigation by law enforcement authorities . . . ." Congress repealed the FYCA in 1984, however. Other expungement statutes focus on eliminating a narrower set of records from a criminal defendant. For example, 10 U.S.C. § 1565 requires the Secretary of Defense to "promptly expunge" an individual's DNA records from the FBI DNA index when a court overturns a military conviction. A different federal statute requires the FBI Director to expunge DNA

records from the FBI DNA index when a court overturns convictions for qualifying offenses, including felonies and certain violent crimes.

Beyond these discrete expungement laws, whether federal law otherwise provides for a general expungement remedy in the case of an individual who was *lawfully* convicted is less certain. Although at least one court has suggested that independent expungement authority might exist under the All Writs Act, most courts have concluded otherwise. The central judicial debate has been in cases where an individual seeks expungement on common law equitable grounds (i.e., equitable expungement)—that is, grounds that rely only on notions of fairness as opposed to legal considerations such as the statutes described above or the Constitution. Federal appellate courts disagree on whether they have authority to consider equitable expungement claims, and thus far, the Supreme Court has declined to resolve the circuit split.

The First, Second, Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have all held that federal courts lack jurisdiction to consider equitable expungement. The Eleventh Circuit held the same in a non-precedential opinion. *United States v. Wahi* illustrates the typical reasoning of these courts. In *Wahi*, the Seventh Circuit observed that federal courts have limited jurisdiction and "possess only that power authorized by Constitution and statute . . . ." Thus, if an individual seeks expungement other than on statutory or constitutional grounds, the court can only grant expungement if it has jurisdiction that is "ancillary" to those grounds. As the Seventh Circuit observed, the Supreme Court narrowly defined ancillary jurisdiction in *Kokkonen v. Guardian Life Insurance Company of America*. Under that decision, courts may assert ancillary jurisdiction only "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." Applying *Kokkonen*, the Seventh Circuit concluded in *Wahi* that it lacked ancillary jurisdiction to grant equitable expungement because equitable expungement "is not factually dependent on the underlying criminal case . . . ." The *Wahi* court also held that equitable expungement "is not incidental to the court's ability to function successfully as a court."

In contrast, other federal appellate courts have applied less restrictive tests that permit federal courts to grant equitable expungement in "unusual," "extreme," or "exceptional circumstances." Generally, these tests involve a "delicate balancing of the equities," focused on factors such as the harm a criminal record causes to an individual and the government's interest in maintaining that record. Such tests have been employed by the Fourth, Fifth, and D.C. Circuits, although the Fourth Circuit recently applied *Kokkonen* in a non-precedential opinion and concluded that it lacked ancillary jurisdiction over equitable expungement claims.

Considerations for Congress

The federal circuit split presents the potential for inconsistent outcomes where a defendant's chance of success depends on the geographic area in which the expungement claim is brought. In lieu of Supreme Court review, some courts have invited Congress to act to resolve the ambiguity. As the Second Circuit observed, "our holding that [the court has] no authority to expunge the records of a valid conviction . . . says nothing about Congress's ability to provide for jurisdiction in similar cases in the future."

In this vein, some Members in the 116th Congress have introduced legislation that would modify the scope of expungement under federal law. Although the specifics of these proposals vary, they tend to be narrowly focused on providing an expungement remedy to a specified class of criminals—particularly those with criminal records resulting from (1) marijuana offenses and/or (2) nonviolent offenses.

With regards to the first category—marijuana offenses—proposals generally vary based on the entity that maintains the criminal records at issue. For example, the MORE Act (H.R. 3884, S. 2227), which focuses largely on federal marijuana conviction records maintained by the federal district courts, would require those courts to expunge such records retroactively to 1971 along with records of arrests "associated with

each expunged conviction." In contrast, the Marijuana Freedom and Opportunity Act (H.R. 2843, S. 1552) focuses on the expungement of marijuana offense records maintained by states and local governments. Thus, it takes a different approach: using federal grants to encourage expungement of marijuana convictions by states and local governments.

The expungement procedures proposed for the second class of crimes—nonviolent offenses—vary in part based on when the underlying crime was committed. At least two legislative proposals would mandate the expungement of nonviolent offense records when a certain number of years have transpired following fulfillment of the defendant's terms of sentence. With some exceptions, one such proposal, the Fresh Start Act of 2019 (H.R. 121), would require courts to order expungement for federal nonviolent offenses beginning seven years from the date the defendant completes the terms of his sentence. Another proposal, the REDEEM Act (H.R. 1893, H.R. 2410, S. 697), would create a mechanism to automatically seal federal criminal records for certain nonviolent drug offenses and juvenile nonviolent offenses. Nonviolent federal drug offenses would be sealed five years after the date on which a covered person completes his term of imprisonment, probation, or supervised release, while juvenile nonviolent offenses would be sealed three years from the date a covered person completes his "term of probation, official detention, or juvenile delinquent supervision . . . ." Both proposals permit expungement *before* their respective time thresholds, but in such an instance expungement is neither automatic nor mandatory. Rather, a defendant would have to petition the courts for expungement, and the court in turn would make a determination based on considerations such as "the interests of the petitioner," "the best interests of justice and public safety," and the petitioner's demonstrated desire to "positively contribute to the community."

Regardless of the scope of a specific proposal, because federal courts agree that they may grant expungement where Congress has expressly permitted it, proposals like those discussed above would provide new areas of expungement authority for the courts. Nonetheless, the various legislative proposals discussed are limited in their legal effect. Most obviously, because they tend to be narrowly focused on a class of criminals, none of them resolve the broader issue of a federal court's residual authority to expunge, which has divided the courts. Moreover, these proposals tend to focus on expunging *federal* criminal records perhaps because of potential federalism concerns that could be raised by federal law requiring a state government to alter its criminal records. Relatedly, some of the proposals tend to focus on criminal records controlled by the judiciary and do not expressly impose expungement obligations on executive agencies akin to the Privacy Act's current provisions for changing inaccurate federal records.

There is also a practical issue that existing and proposed expungement laws face—the internet. As discussed above, expungement orders do not apply to copies of criminal records that have been publicly disseminated. Some scholars are therefore concerned that in the internet age—where criminal records and related content are readily accessible through the internet—supplemental solutions are necessary to secure the goals of expungement, whether those objectives are reducing recidivism, increasing employment, or protecting privacy. Perhaps wary of this issue, states have experimented with additional legal mechanisms aimed at the collateral consequences of criminal records. For example, some states have enacted legislation allowing qualifying offenders to obtain certificates of rehabilitation, which can be used to "remove any bar to . . . employment automatically imposed by law by reason of [a] conviction." Others have passed laws forbidding employers from inquiring about "a prospective employee's prior arrests, criminal charges or convictions on an initial employment application . . . ." A similar federal measure, the Fair Chance Act, recently passed with the National Defense Authorization Act. That law, which goes into effect in 2021, prohibits federal agencies and contractors from requesting an applicant's criminal history before extending a conditional offer of employment. To the extent Congress concludes expungement is a worthy goal in a given context, it may consider additional supplemental measures that could further secure that goal.

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