The Constitutional Law of Pardons

Although it is frequently asserted that the President's pardoning authority is in some sense "absolute" or "unlimited," this is an exaggeration. It is perfectly true the President has the largely unreviewable discretion to grant clemency in any case that falls within the scope of the Pardon Clause, but it does not follow that his pardoning authority is therefore without discernible, albeit broad, limits. The purpose of this essay is to sketch an overview of the Supreme Court's Pardon Clause jurisprudence, in order to explain the scope and limits of the President's power and the different types of relief available through the mechanism of executive clemency.

I. Textual Limitations on the Pardon Power

The fundamental touchstone of the Supreme Court's Pardon Clause jurisprudence is the principle that "the pardoning power is an enumerated power of the Constitution and . . . its limitations, if any, must be found in the Constitution itself."[1]

The constitutional text contains two express limitations on the clemency power. First, the pardon power extends only to "Offenses against the United States," as distinguished from civil penalties or state offenses. In addition to violations of the federal criminal code, this phrase has been interpreted to include violations of the District of Columbia penal code,[2] and the Uniform Code of Military Justice,[3] both of which are creatures of federal law.[4] In the absence of a qualifying offense, the President has no inherent authority to relieve a person of either punishment or collateral disabilities.[5] Given that the vast majority of crimes continue to be prosecuted at the state level, this is a significant constraint on the President's pardoning authority.

Second, the pardon power may not be exercised "in cases of impeachment." Though it does not often arise, this restriction is politically important, since otherwise the President would

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[1] *Schick v. Reed*, 419 U.S. 256, 267 (1974).

[2] *Goode v. Markley*, 603 F.2d 973, 976 (D.C. Cir. 1979) ("Violations of the District of Columbia Code and violations of the United States Code are all crimes against a single sovereign, namely, the United States").

[3] Each Service Branch has its own Clemency and Parole Board that reviews petitions for commutation of sentence, subject to the constitutional authority of the President. By tradition, pardon applications from military defendants are handled through the normal civilian clemency process.

[4] A treaty can also bring an offense within the Pardon Clause. *Ross v. McIntyre*, 140 U.S. 453 (1891).

[5] *Ex Parte Grossman*, 267 U.S. 87, 113 (1925); *Young v. United States*, 97 U.S. 39 (1877).

have the ability to prevent himself and his subordinates from being removed from office for malfeasance, which arguably would defeat the purpose of the Impeachment Clauses.[6]

Aside from these two textual restrictions, the Constitutional Convention and the state ratifying conventions considered and rejected proposals to restrict the pardon power to "convictions" rather than "offenses," to exclude the offense of treason, and to subject at least some clemency grants to ratification by Congress.[7] The refusal to adopt any more stringent limitations certainly suggests that the founding generation understood the Pardon Clause to mean that when an offense properly falls within its terms, the decision whether to grant clemency would be subject largely to the constraints of the political process and the President's own personal sense of moral integrity.

As James Iredell put it at the North Carolina ratifying convention, the Pardon Clause was obviously not included in the Constitution for the purpose of shielding those with "powerful friends" from punishment, but rather as a concession to the frailty of the human intellect. "It is impossible for any general law," he observed, "to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice."[8] Iredell's suggestion is that, given the reality of the human condition and the inherent limitations of the legal process, the provision of a mechanism for making exceptions in cases of "unfortunate guilt" is a risk worth taking, even in a republic dedicated to the rule of law.[9] On this view, the purpose of executive clemency is to serve a liberty-enhancing function by filling the inevitable gaps in the just and humane infliction of punishment.

By the mid-nineteenth century, in its first gloss on the substantive reach of the Pardon Clause, it seemed apparent to the Supreme Court that "[w]ithout such a power of clemency, to be exercised by some department or functionary of a government, it would be most deficient in its political morality."[10] In an era still in thrall to rigid mandatory minimums and guideline

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[6] U.S. CONST., art. I, § 2, cl. 5; § 3, cls. 6, 7.

[7] William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 501-04 (1977).

[8] 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Jonathan Elliot ed. 1836).

[9] THE FEDERALIST NO. 74, at 447 (Clinton Rossiter ed. 1961) (Alexander Hamilton) ("The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.").

[10] *Ex Parte Wells*, 59 U.S. (18 How.) 307, 310 (1855).

sentencing practices, which are motivated by the false promise of administrative uniformity,[11] this is a lesson worth remembering.

II. Structural Limitations on the Pardon Power

A. Appropriations Clause

In addition to the foregoing textual limitations, the Court has held that the Constitution imposes several structural constraints on the reach of the President's pardoning authority.[12] For example, where the government has condemned property for the commission of a crime and the proceeds of the sale of the forfeited property have been paid into the federal Treasury, the President may pardon the offense, but the pardon does not remit the forfeiture or require a reimbursement of the funds to the defendant.[13]

The Court's rationale is that the Constitution unambiguously provides that any payment of public funds from the Treasury must be authorized by legislation.[14] For this reason, it would violate the separation of powers to permit the President to unilaterally allocate the disbursement of public funds by means of the pardon power, because it would impinge on Congress' authority to authorize expenditures.

B. Sovereign Immunity

In a variation on the foregoing principle, the Court has held that the reach of the pardon power is limited by a statutory filing deadline restricting the rights of litigants to the recovery of the proceeds of property seized because of an offense against the United States. Generally speaking, the doctrine of sovereign immunity provides that the government, "as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."[15] This principle extends to statutes of limitations, "[b]ecause the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity."[16]

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[11] *Blakely v. Washington*, 542 U.S. 296, 313 (2004) (noting that the Framers' "paradigm for criminal justice" rejected "the civil-law ideal of administrative perfection.").

[12] *Clinton v. City of New York*, 524 U.S. 417, 450-53 (1998) (Kennedy, J., concurring) (noting that the structure of the Constitution advances liberty by separating powers).

[13] *Knote v. United States*, 95 U.S. 149 (1877).

[14] U.S. CONST., art. I, § 9, cl. 7.

[15] *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

[16] *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

In 1863, Congress passed a statute which provided that a claimant had two years after the official end of the Civil War to file suit in the Court of Claims seeking to recover the proceeds of property that had been seized by the federal government during the war, on the condition that the claimant could prove that he had "never given any aid or comfort to the present rebellion."[17] The Court held that a presidential pardon removed the statutory bar to recovery, because it relieved the claimant from any civil disabilities imposed by reason of his having given aid and comfort to the Confederacy, which was a statutory offense against the United States. Hence, a pardon grantee was not required to prove that he had been loyal to the Union in order to be eligible to recover, despite the contrary terms of the statute. In that sense, the pardon power is immune from legislative interference.

Nevertheless, the government's seizure and sale of the property had been an entirely lawful exercise of its war powers and a pardon did not have the effect of waiving Congress' determination to impose a two-year statute of limitations on the right of recovery. Thus, where a claimant waited more than six years after the legal end of the war to file suit to recover the proceeds of his forfeited property, his claim was time-barred.[18]

C. Due Process Clause

More controversially, in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), five members of a sharply divided Court expressed the view that, in the context of a capital clemency proceeding, a commutation petitioner is entitled to some minimal procedural safeguards under the Due Process Clause, on the grounds that "[a] prisoner under a death sentence remains a living person and consequently has an interest in his life."[19]

However, none of the Justices who adopted this position attempted to spell out in concrete terms what that principle entails. Justice O'Connor, in a concurring opinion joined by Justices Souter, Ginsberg and Breyer, observed that "[j]udicial intervention might . . . be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."[20] That said, Justice O'Connor concluded that Ohio's capital clemency statute, which requires advanced notice of a hearing and entitles the applicant to participate in a

[17] 12 Stat. 820 (Mar. 12, 1863).

[18] *Haycraft v. United States*, 89 U.S. (22 Wall.) 81, 98 (1874).

[19] 523 U.S. at 287 (O'Connor, J., concurring in part & concurring in the judgment). Chief Justice Rehnquist announced the judgment of the Court in an opinion joined by Justices Scalia, Kennedy and Thomas. Justice Rehnquist believed that a death row inmate's expectation of a commutation, which was committed to the exclusive discretion of the Executive Branch, was merely a "unilateral hope" for which there was no due process protection. *Id*. at 285.

[20] *Id*. at 289.

voluntary interview, "observes whatever limitations the Due Process Clause may impose on clemency proceedings."[21]

The lone dissenter was Justice Stevens, who conceded that a state "unquestionably may allow the executive virtually unfettered discretion in determining the merits of appeals for mercy."[22] Yet, he insisted that "there are equally valid reasons for concluding that these proceedings are not entirely exempt from judicial review."[23] Whereas Justice O'Connor's opinion focuses on the extent of the process that is due in a capital clemency proceeding, Justice Stevens was concerned about the sorts of substantive violations that might trigger judicial intervention. He suggests, for example, that a clemency proceeding "infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence would [not] be constitutionally acceptable."[24]

He also raises the specter of invidious discrimination, asserting that surely "no one would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency."[25] Because an evidentiary hearing on these issues had not been conducted, Justice Stevens would have remanded the case to the district court "for a determination whether Ohio's procedures meet the minimum requirements of due process."[26]

While *Woodard* certainly reaffirms the proposition that the exercise of the pardon power is not entirely exempt from judicial review, the justification for scrutinizing the President's motives for granting or denying clemency, at least outside the context of the death penalty, remains uncertain. The Court seemed to foreclose the possibility of such an inquiry in *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981), which held that there is "no constitutional or inherent right" within the meaning of the Due Process Clause to the commutation of a valid non-capital sentence, since the defendant's interest in maintaining his liberty is extinguished by "the conviction, with all its procedural safeguards."[27]

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[21] *Id*.

[22] *Id*. at 292.

[23] *Id*.

[24] *Id*. at 290-91.

[25] *Id*. at 292.

[26] *Id*. at 295.

[27] 452 U.S. at 464. Justice O'Connor's concurring opinion in *Woodard* is not to the contrary, since she expressly relies on the death-is-different rationale. *See* 523 U.S. at 289. Justice Stevens, on the other hand, also dissented in *Dumschat*, in the belief that it is "self-evident" that an incarcerated person "possesses a residuum of constitutionally protected liberty even while he is in the legal custody of the State." 452 U.S. at 469.

The Court reasoned that the government ordinarily creates a protected liberty interest only when it places substantive limitations on the exercise of official discretion "by reference to statute, regulation, administrative practice, contractual arrangement or other mutual understanding."[28] But the Pardon Clause itself places no substantive constraints on the decision to exercise of the pardon power for offenses against the United States, except in cases of impeachment. The President is thus not "required to base [his] decisions on objective and defined criteria," but rather can "deny the requested relief for any constitutionally permissible reason, or for no reason at all."[29] Accordingly, the Constitution does not appear to give clemency applicants a "protectable liberty interest in a pardon."[30]

Moreover, the lower courts have consistently held that the administrative procedural regulations governing the submission and review of clemency applications, which were adopted by the President pursuant to his Article II authority, are intended only "for the internal guidance of the personnel of the Department of Justice," and therefore do not bind the President or his advisors by "creat[ing] new and enforceable rights in persons applying for executive clemency."[31] Similarly, the advice the President receives in clemency matters is immune from scrutiny by compelled disclosure under the Freedom of Information Act or by congressional subpoena.[32]

Even so, if the Court may legitimately limit the reach of the pardon power to avoid violating the Appropriations Clause and to protect the vested property rights of third-parties, it is difficult to resist the conclusion that it may properly inquire whether a clemency proceeding encroaches on other fundamental rights retained by the applicant. The easiest case would involve a pardon or commutation made contingent on the performance of a condition that transparently violates the grantee's constitutional rights, such as a requirement to vote only for the President's political party or renounce citizenship. The Court has intimated that such a condition would be unenforceable, and several lower courts have assumed they had the authority to scrutinize the validity of the conditions attached to a clemency grant.[33]

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[28] *Id*. at 467.

[29] *Id*.

[30] *Dumschat*, 452 U.S. at 467; *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308, 2319 (2009); *Binion v. U.S. Dep't of Justice*, 695 F.2d 1189, 1190 (9th Cir. 1983); *Vincent v. Schlesinger*, 388 F. Supp. 370, 374-76 (D.D.C. 1975).

[31] *Yelvington v. Presidential Pardon and Parole Attorneys*, 211 F.2d 642, 643 (D.C. Cir. 1954); *United States v. Birdsall*, 233 U.S. 223, 234 (1914); *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1244 (D.D.C. 1974).

[32] *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004); Memo. for the President from the Att'y Gen., *Assertion of Executive Privilege With Respect To Clemency Decision* (Sept. 16, 1999).

[33] *Schick*, 419 U.S. at 266; *Hoffa*, 378 F. Supp. at 1234.

Similarly, setting aside problems of proof, if the clemency process is conducted in a racially discriminatory manner, a court would presumably have the authority to invalidate such actions on equal protection grounds. As Daniel Kobil points out, this sort of case would not entangle the Court in the dubious task of second-guessing the Executive Branch based on its own assessment of the public welfare, "because the body of case law interpreting and applying the equal protection clause supplies a constitutional standard applicable to all governmental action."[34]

In any event, the Achilles' heel in subjecting clemency decisions to judicial review remains fashioning an adequate remedy, since a court can neither enjoin the President to issue a pardon nor grant "equitable" relief on its own authority.[35] Thus, other than the possibility of striking down an unconstitutional condition, or perhaps ordering the Justice Department to reprocess an application in a race-neutral fashion, the prospects for judicial review in a non-capital case are uncertain.

II. Types of Relief Available under the Pardon Clause

A. Reprieve

Subject to the constraints discussed above, the Court has construed the phrase "reprieves and pardons" to encompass several distinct forms of relief. The most limited form of relief is a reprieve, sometimes called a respite, which is merely a temporary suspension of punishment that otherwise leaves the sentence of the court intact.[36] A recent instance of the exercise of this aspect of the pardon power occurred in 2000, when President Clinton twice delayed the execution of Juan Raul Garza, who had been sentenced to death in the Southern District of Texas for murdering three persons in furtherance of a drug trafficking enterprise.[37] Garza was executed in June 2001, after President Bush denied his clemency petition on the merits.

B. Commutation of Sentence

While a pardon is "an act of public conscience that relieves the recipient of all the legal consequences of the conviction," a commutation of sentence or remission of fine is a more limited exercise of the clemency power that involves the "substitution of a milder form of

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[34] Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power From the King*, 69 TEX. L. REV. 569, 618 (1991). The Court has subjected the federal government to equal protection principles through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). As Kobil notes, this principle has been held to constrain discretionary executive branch decision-making, such as the exercise of prosecutorial discretion, and would presumably apply to clemency proceedings. Kobil, *supra* at 618 n.305.

[35] *United States v. Murray*, 275 U.S. 347, 356 (1928); *Ex Parte United States*, 242 U.S. 27 (1916).

[36] *Wells*, 59 U.S. at 317 ("[A] reprieve . . . only suspends the punishment for a fixed period.").

[37] EXEC. GRANT OF CLEMENCY (Aug. 2, 2000); EXEC. GRANT OF CLEMENCY (Dec. 11, 2000).

punishment" for the sentence originally imposed by a court, but does not otherwise restore the grantee's civil rights or relieve him of the collateral consequences of the conviction.[38]

Generally speaking, this form of clemency relief occurs after the applicant has been convicted and sentenced for a particular offense. However, there is no constitutional bar that prevents the President from prospectively commuting the terms of a sentence that has not yet been imposed, which would effectively set a ceiling on the extent to which an individual could be punished.[39]

In any event, as a matter of constitutional logic, the President's authority to reduce the punitive consequences of a sentence is parallel with (rather than subordinate to) Congress' plenary authority to prescribe the punishment for federal crimes. Whereas Congress sets the rules prospectively, the President may make humane exceptions to mitigate the severity of punishment in a particular case or class of cases, without regard to the terms of the existing penal code.[40] The exercise of the clemency power is thus a public act of grace, an action taken in the President's official capacity qua chief executive, which "is not subject to legislative control. . . . The benign prerogative of mercy reposed in [the President] cannot be fettered by any legislative restrictions."[41]

C. Pardon

The broadest form of relief available under the Pardon Clause is a full or unconditional pardon, which may result in the partial or complete mitigation of punishment, depending on the circumstances. In this regard, the Pardon Clause has been read to implicitly prohibit the President from granting a pardon prospectively. That is, a pardon may not be granted prior to the commission of an offense, which would be tantamount to a license to commit a crime.[42]

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[38] *Schick*, 419 U.S. at 273 n.8.

[39]In January 2001, President Clinton did just that in the case of Arnold Prosperi, a prominent Florida real estate attorney who had been convicted by a jury of tax evasion and counterfeiting securities in the course of defrauding a client of several million dollars. After the jury's verdict was returned, the district court granted Prosperi's post-trial motion for judgment of acquittal on the counterfeiting charges and the government appealed. The Eleventh Circuit reversed the district court's decision to overturn the jury's verdict on the counterfeiting charges and remanded the case for resentencing. *United States v. Prosperi*, 201 F.3d 1335 (11th Cir. 2000). Prior to being resentenced, President Clinton granted Prosperi's clemency petition, commuting "any total period of confinement that has already been imposed or could be imposed in the future upon Arnold Paul Prosperi as a result of his conviction . . . in the Southern District of Florida that is in excess of 36 months" and further providing that "any such period of confinement [is] to be served in home confinement." EXEC. GRANT OF CLEMENCY, Jan. 20, 2001. On remand, the district court sentenced Prosperi to a term of probation and a fine in deference to the President's commutation.

[40] *Schick*, 419 U.S. at 266-67; *United States v. Libby*, 495 F.Supp.2d 49 (D.D.C. 2007) (President may commute prison sentence in its entirety, on the condition of serving a pre-imposed term of supervised release, despite the fact that a term of imprisonment is ordinarily a statutory predicate to the imposition of supervised release).

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

[42] 6 OP. ATT'Y. GEN. 393, 403 (1854).

However, the President may, and occasionally does, pardon a person after he commits an offense, but prior to being indicted or convicted of any crime.[43] The most famous example, of course, is President Ford's pardon of Richard Nixon for any crimes he may have committed in the Watergate affair.[44]

But while not unprecedented, as an historical matter, this has been the exception rather than the rule. Instead, in the large majority of cases, individual pardons have been granted only after the recipient has been duly convicted, satisfied his or her sentence, and completed a substantial period of demonstrated good conduct. Thus, a pardon usually functions as a symbolic gesture of "forgiveness" by the Executive Branch for the pardoned offense, parallel in all material respects to the official moral condemnation acted out in the ritual of a judicial sentencing proceeding.[45]

Accordingly, except in the rare case of a pardon expressly granted for innocence,[46] a pardon actually presupposes the guilt of the petitioner. As the Court has remarked, "A pardon is an act of grace by which the offender is released from the consequences of the offense, so far as such release is practicable and within the control of the pardoning power. . . . It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. . . . But it does not make amends for the past. The offense being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required."[47]

The practical effect of an unconditional pardon, then, is to relieve the grantee from the legal consequences of the conviction, including any lingering punishment, if such exists, which may include the unpaid portion of a fine or restitution order. In addition, a pardon restores the civil and political rights that were forfeited by reason of the conviction and removes any statutory disabilities imposed by reason of having committed the offense.

While a pardon is widely understood to lessen the social stigma that attaches to a conviction, all else equal, pardoning authorities assume that the applicant was guilty as charged and properly convicted, at least in the absence of an exceptional showing of innocence or miscarriage of justice. For this reason, a pardon typically neither entitles the grantee to an expungement of the records of the conviction nor creates the legal fiction that the offense never

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[43] *Grossman*, 267 U.S. at 120; *Ex Parte Garland*, 71 U.S. at 380.

[44] PRES. PROC. 4311, 39 Fed. Reg. 32601-02 (1974).

[45] *Schick*, 419 U.S. at 266.

[46] *Gurleski v. United States*, 405 F.2d 253, 266 (5th Cir. 1968). The last time a President expressly granted a pardon on the basis of innocence was in 1965, when Lyndon Johnson pardoned Carl Buck, a Marine Corp master sergeant who had been unjustly convicted of larceny in a general court-martial. EXEC. GRANT OF CLEMENCY (Sept. 10, 1965).

[47] *Knote*, 95 U.S. at 153-54.

took place.[48] It follows that the grantee must continue to disclose the conviction on any application form where such information is required, although he may also disclose that he received a pardon.[49] And if the grantee reoffends, the pardoned offense may be taken into consideration for sentencing purposes under a state repeat offender statute[50] or the Federal Sentencing Guidelines.[51]

A pardon also cannot trump the vested property rights of third-parties. For example, if criminally forfeited property has been sold at auction, a bona fide "purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender."[52] This a direct corollary of the fact that the pardon power is limited to relieving the consequences of criminal offenses, since interference with the vested property rights of private parties is the functional equivalent of attempting to remit civil liability, which is likewise beyond the scope of the President's pardoning authority.[53]

For similar reasons, a pardon does not prevent regulatory agencies from imposing character and fitness requirements as a condition of holding a professional license or receiving certain government benefits. For example, it is well established that a disbarred attorney who receives a presidential pardon is not necessarily entitled to be readmitted to the practice of law, although a pardon may be considered strong evidence of rehabilitation.[54] The rationale for this policy is that the misconduct underlying the offense implicates the sort of bad moral character that renders an attorney unfit to practice law, even in the absence of a conviction.[55] The same

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[48] *United States v. Noonan*, 906 F.2d 952, 958-60 (3d Cir. 1990); *Tatum v. United States*, 310 F.2d 854, 856, n.2 (D.C. Cir. 1962); *United States v. Hirsch*, 440 F. Supp. 977, 979 (E.D.N.Y. 1977); Michelle Boardman, Dep. Asst. Att'y Gen., *Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime*, Op. Off. Legal Counsel (Aug. 11, 2006).

[49] Office of the Pardon Att'y, U.S. Dep't of Justice, Information and Instructions on Pardons ¶ 10, Effect of a Pardon.

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

[51] U.S.S.G. § 4A1.2, Application Note 10.

[52] *Knote*, 95 U.S. at 154.

[53] *Grossman*, 267 U.S. at 111; *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 151 U.S. 1, 19 (1894); *United States v. Swift*, 186 F. 1002, 1017 (N.D. Ill. 1911).

[54] *See* U.S. Attorney's Manual, Standards for Considering Pardon Petitions, § 1-2.112, ¶ 1; *Matter of G.L.S.*, 586 F. Supp. 375, 380 (D. Md. 1984), *rev'd on other grounds*, *Matter of R.M.W.*, 248 F. Supp.2d 389 (D. Md. 2006) ("Although obtaining a pardon may not . . . lead automatically to admission to the bar, it will be strong evidence to rebut the presumption that a convicted federal felon is not of good private and professional character.").

[55] *In re Abrams*, 689 A.2d 6, 16-19 (D.C. App. 1997).

standard has been applied in many other employment contexts, including doctors, stock brokers, commodities traders, real estate agents, and various public employees.

Having said that, a presidential pardon does relieve the grantee of any civil disabilities based exclusively on the fact that he committed or was convicted of a federal offense. In other words, civil disabilities may not be categorically imposed on the basis of a pardoned offense, without consideration of the grantee's present character and fitness. The distinction is subtle but important. A pardon does not compel regulatory authorities to ignore that the conduct underlying a conviction demonstrates a failure to satisfy the professional standards or moral fitness appropriate to a particular type of employment. A pardon thus does not give the grantee a legal right to be relieved of occupational disabilities, such as the revocation of a license, provided the conduct in question was sufficient to justify a continuing disqualification.

But this inquiry turns, at least in principle, on an assessment of the grantee's existing character and fitness in relation to legitimate regulatory concerns, independent of the historical fact that the grantee was convicted of a crime. If the grantee is not given an opportunity to establish that he currently has the requisite good moral character, the continued imposition of a disqualification would no longer further a regulatory purpose, but rather would constitute a civil penalty based solely on the fact of the commission of an offense. And in that event, the disability would violate the grantee's constitutional rights under the Pardon Clause.[56]

D. Amnesty

An amnesty signifies a pardon extended to an entire class of unnamed persons falling within the specific terms of the grant, typically enacted by a means of a presidential proclamation, rather than a clemency warrant issued to one or more identifiable grantees. Presidents have utilized this mechanism of pardon relief repeatedly throughout American history to restore social peace after periods of war and other episodes of political upheaval. The most recent example is President Carter's proclamation granting pardon to literally thousands of persons who had violated the Selective Service Act during the Vietnam War by refusing to register for the draft.[57] An amnesty proclamation is sometimes referred to in the case law as a "general" pardon, as distinguished from a "special" pardon granted to a specific individual, but the legal effect is precisely the same in either case. Analytically, this is not really a separate form of relief. As the Court has remarked, "[t]he distinction between amnesty and pardon is of no practical importance."[58]

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[56] *S.E.C. v. Lewis*, 423 F.Supp.2d 3373, 40-41(S.D.N.Y. 2006); *Comm'r of Metro. Dist. Comm'n v. Dir. of Civil Serv.*, 203 N.E.2d 95, 103-04 (Mass. 1964); *Slater v. Olson*, 299 N.W. 879, 880-81 (Iowa 1941); *In re Kaufmann*, 157 N.E. 730, 732-33 (N.Y. App. 1927); *In re Emmons*, 154 P. 619, 621 (Cal. App. 1915).

[57] PRES. PROC. 4483, 42 Fed. Reg. 4391 (Jan. 21, 1977).

[58] *Brown v. Walker*, 161 U.S. 591, 601 (1896).