
II(A) - PARDON POLICY & PRACTICE

Pardon has been described as the patriarch of restoration mechanisms, whose roots in America are directly traceable to the power of the English crown. Just as a power to pardon was assigned to the president in Article II of the U.S. Constitution, the constitutions of every state save two provide for an executive pardoning power.¹ Both in theory and practice, a post-sentence pardon is the ultimate expression of forgiveness and reconciliation from the sovereign that secured the conviction. For almost two centuries, executive pardon played a routine operational role in the criminal justice system throughout the United States, dispensing with court-imposed punishments and restoring rights and status lost because of conviction.

Nowadays, in most U.S. jurisdictions pardon is a shadow of its once-robust self, particularly those in which it is exercised without institutional restraint or encouragement. Since the 1980s, governors and presidents alike have been wary of exposing themselves to criticism from an ill-advised grant, and in many jurisdictions pardoning has stopped being thought of as part of the chief executive’s job -- though being labeled “soft on crime” seems thankfully no longer a political kiss of death. It is not surprising that reformers tend to regard pardon with suspicion, dubious about its legitimate operational role in the modern justice system.

Yet pardon fills an important gap in restoration schemes across the country, supplementing judicial record relief mechanisms like sealing and expungement. For example, in 20 states pardon offers the only way to regain firearms rights lost because of conviction, including California, Colorado, Florida, Georgia, Nebraska, Oklahoma, and Wyoming. In 12 states ineligibility for jury service is permanent without a pardon, including Arkansas, Delaware, Oklahoma, Pennsylvania, South Carolina, and Texas. (By comparison, expungement restores firearms rights in only five states, and jury rights in only two.) See infra, § XX. A pardon may be necessary to enable a person to stand for elected office, or to demonstrate the requisite good character to secure a professional or business license. Perhaps most important for a substantial number of non-citizens, a pardon is the only state relief mechanism recognized by federal immigration law, providing the only way for a non-citizen convicted of an aggravated felony to avoid mandatory deportation and remove the conviction-related bar to citizenship.² Sometimes pardon is sought simply as a sign of official forgiveness, not a small matter to some people.

Of greater moment, pardon represents the only potential source of record relief available for felony convictions in the 16 states whose courts have no authority to expunge or set aside more serious convictions.³ Another 14 states limit judicial record relief to people who have
been convicted of a single felony, so in these states too pardon constitutes an important auxiliary remedy for people with a lengthy felony record. It is easy to see why pardon’s vitality is or ought to be of considerable public concern to people in at least 30 states.

The good news is that the pardon power is neither dead nor fatally compromised in most U.S. jurisdictions. In fact, in a significant number of states (18) the practice of pardoning still thrives as an integral part of the justice system. In most of these states (colored gold on the map on the following page) the pardon power is either shielded from politics by institutional design or sanctioned by custom. Ordinary people who can demonstrate their rehabilitation have a good chance of official forgiveness, obtaining relief from legal disabilities and certification of their rehabilitation and good character. In more than half of these 18 states, pardon now leads to expungement of the record. In four additional states, the pardon power appears to be in the early stages of a revival.

Not surprisingly, in most of these 18 states, the governor either has little or no involvement in pardoning or is required to seek (and in some cases required to follow) the advice of other officials. In six of the 18 states (Alabama, Connecticut, Georgia, Idaho, South Carolina, Utah) the pardon power is exercised in most or all cases by an independent board of appointed officials. In five of those independent board states, the power derives from the state constitution. (In Connecticut, the power to pardon has since colonial times remained within the legislature's control, so that pardoning is both authorized and limited by statute.) In all six of these independent board states, standards are clear, the process is transparent and accessible, and a high percentage of applications are granted. In Alabama, Connecticut, Georgia, and South Carolina, hundreds of pardons are granted each year to people convicted of garden variety crimes who are seeking to mitigate the harsh lingering consequences of conviction. For example, in 2019 the Alabama board granted 889 pardons, or 80% of eligible applications, and the Connecticut board granted 593, or 80% of applications considered. The Idaho board gets fewer applications but grants a relatively high percentage of them. Utah for many years preferred to rely on a broad expungement remedy, but a recent tightening of the expungement process has produced a demand for reinforcements from the state pardon board.

In another eight of the 18 states where pardons are frequent, the governor sits on a board with other high-level officials (Minnesota, Nebraska, Nevada), or shares power with an appointed “gatekeeper” board whose affirmative recommendation is necessary before the governor may act (Delaware, Louisiana, Oklahoma, Pennsylvania, South Dakota). In these states pardon remains a viable form of relief, and pardoning occurs at regular intervals through a public process: Delaware and Pennsylvania are the stars of this category, but the governors of
Oklahoma and South Dakota have traditionally also pardoned generously, and Louisiana’s current governor has revived pardoning in that state. The three boards that include the governor as a member hold regular public hearings and grant a substantial percentage of the applications they hear, through the fourth board with this same set-up (Florida) has in recent years been notoriously stingy, recently characterized by a federal court as providing an “illusory remedy” to people who only want to regain their right to vote.\(^\text{10}\)

In the final four of the 18 states, the governors are less constrained by regulation, but they have authorized advice available to them. The governors of Illinois and Arkansas have customarily relied on a board’s recommendations produced by a formal process, though they are not required to do so. The governors of California and Virginia have also pardoned generously in recent years, though without the same degree of structure and transparency in their advisory system. But since the constitutions of both states require the governors to make a formal annual report to the legislature on their pardons, there is at least at least a post-hoc system of accountability in place.

A regular process facilitates regular pardoning, but it does not guarantee it. For example, interest in pardoning in California, Florida, Illinois, Louisiana, Maryland, and Ohio has waxed and waned depending upon the predilections of the incumbent governor. The current governors of California, Illinois and Louisiana have been enthusiastic pardoners, but the power is still in a waning phase in Florida, Maryland, and Ohio. Texas and Arizona, both of which have a well-regulated process and “gatekeeper boards” that control who the governors may pardon, have in recent years seen, respectively, very few pardons and no pardons at all. New Hampshire and Rhode Island have complex procedures requiring the approval of other elected officials, a set-up that virtually guarantees no operational role for pardon in those states.

Beyond the 18 states where the pardon power functions on a regular and productive basis, there are another three where recent efforts to revive the process are promising. Wisconsin’s governor has re-established that state’s pardon advisory board and began issuing grants in the fall of 2019 after a 9-year hiatus during which his processor expressed disdain for pardons and granted none at all; Colorado’s governor has also taken some steps to reinvigorate that state’s process; and Ohio’s current governor has enlisted two local law schools to supplement state agencies in developing an “expedited pardon project.”\(^\text{11}\) Washington’s recent governors have shown some interest in pardoning, but grants have been irregular and sparing. In the other 28 states, the District of Columbia, and the federal system pardoning takes place, if at all, in an ad hoc and unreliable fashion.

In 10 of the 18 “frequent and regular” states (Arkansas, Connecticut, Delaware, Georgia, Louisiana, Nebraska, Oklahoma, Pennsylvania, South Dakota, and Utah), a full pardon entitles
the recipient to expungement (either upon application to a court or automatically, depending on the state). In an eleventh state, Illinois, the governor may specifically authorize this additional judicial relief. Pardon is uniquely valuable to people with felony records in five of these 11 states (Connecticut, Georgia, Nebraska, Pennsylvania, and South Dakota), because they otherwise offer no judicial record-sealing for felony-level convictions.\(^{12}\)

Sealing or expunging the record of a pardoned conviction is authorized in another nine states: Indiana, Kentucky, Maryland (non-violent first offenses), Massachusetts, New Jersey, Oregon, Tennessee, Texas, and West Virginia (one year after pardon and at least five years after discharge, with certain exceptions for violent crimes). In Washington, pardons result in automatic vacatur and nondisclosure of administrative records, but petitions to seal court records are subject to a balancing test. Maine treats pardoned convictions like non-conviction records subject to non-disclosure rules.

In addition to providing record relief to individuals, pardon has been enlisted in recent years to advance criminal justice reforms on a broader basis in several states, notably to restore the vote and to implement marijuana decriminalization. In addition to large-scale programs to advance marijuana reform in states whose pardoning program is otherwise robust (notably Illinois, Nevada, and Pennsylvania), the governors of Colorado, North Dakota, and Washington have used their pardon power to deliver record relief to people convicted of marijuana possession before its decriminalization. The Colorado legislature even passed a law authorizing class-wide pardon relief.\(^{13}\) The Nevada Board of Pardons Commissioners passed a resolution at the request of that state’s governor automatically pardoning approximately 15,000 people convicted of possessing one ounce or less of marijuana between 1986 and 2017.\(^{14}\) The legislature in Illinois also gave the governor’s pardon power a part to play in Illinois’ marijuana automated sealing effort, which resulted in a mass grant of pardon to 11,000 people.\(^{15}\) The governors in Iowa, Kentucky, New York, and Virginia have all used their power to restore voting rights on a class-wide basis.\(^{16}\)

It seems unfortunate but unsurprising that in more than half the states pardoning has been sporadic or rare since the 1980’s. Many of these states have no formal statutory advisory process in place, so the governor has no institutional encouragement to engage in what may seem a politically risky activity. In two of the states in this category (Mississippi and Kentucky) the pardon power was notoriously abused when out-going governors made hundreds of controversial grants, confirming popular suspicions about the corruptibility of the pardon power. In a few others, notably Rhode Island and New Hampshire, the constitutional limits on the governor’s power almost guarantee few pardon grants. But successive governors of Alaska, Kansas, Massachusetts, and North Carolina, who have issued almost no pardons since the mid-1990s, do not have the same excuse. They are not among the few states whose governors have
no authority from the legislature to seek official assistance in their pardoning (Maine, Oregon, and Wisconsin), who have devised their own non-statutory advisory systems. A full thirty states require the pardoning authority to report annually to the legislature on their grants, frequently with reasons, including Oregon and Wisconsin.\textsuperscript{17}

The governor of Maine is joined only by the president of the United States in having neither statutory assistance nor obligation to account to the legislature for their pardoning. The federal pardon process housed in the Department of Justice has steadily declined in productivity and reputation over the past thirty years,\textsuperscript{18} though it has been ignored almost entirely by the current president through no apparent fault of its own. Overall, the number of presidential pardons granted in the past twenty years is small considering the volume of applications filed each year, and there has been only one presidential pardon granted for a D.C. Code conviction during this period.\textsuperscript{19}

In summary, in 18 states a person may file a pardon application with a reasonable expectation of success. There are signs that pardoning may revive in an additional handful of states, and hope springs eternal that future governors in other states will want to employ this uniquely
personal power to help their constituents reintegrate and to advance the cause of criminal justice reform. But it seems premature to count any but the 18 as having a fully functional and reliable pardon process for present purposes. So, there are 32 states in which pardon cannot be counted on to provide record relief for anyone convicted of a felony.

To be sure, in 23 of these 32 states there is some alternative individualized judicial record relief for felony-level offenses: nine of the 32 offer sealing or expungement for many felonies, another 12 offer relief for a single felony (usually a first felony offense), and New York and New Jersey restore rights though judicial and administrative certificates. But still and all, that means that there are 11 U.S. jurisdictions – nine states, the District of Columbia, and the federal system – in which neither executive nor judicial record relief is reliably available to people convicted of a felony.

More specific information about pardoning policies and procedures in each state is available in the 50-state material from the Restoration of Rights Project at Appendix A, and in the RRP’s individual state profiles.

ENDNOTES

1 In both Alabama and Connecticut, the power to pardon is regulated by the legislature. Ala. Const. amend. 38 (amending art. V § 124) (since 1939, power to pardon in all but capital cases in administrative board appointed by governor); Conn. Gen. Stat. § 54-124a(f) (since colonial times, pardoning regulated by the legislature). For an overview of post-sentence pardoning in the United States, and additional citations, see generally Love, et al., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW POLICY AND PRACTICE § 7:6 (“Executive Pardon: Generally”) (West/NACDL, 3d ed. 2018-2019); Margaret Colgate Love, Reinvigorating the Federal Pardon Process: What the President Can Learn from the States, 9 St. Thomas L. Rev. 730 (2013).

2 See 8 U.S.C. § 1227(a)(2)(A)(vi); see also Thompson v. Barr, 959 F.3d 476, 484 (1st Cir. 2020)(“A pardon waiver has the effect of automatically canceling removal”), Love et al., supra note 1, § 2:61(“Immigration Consequences – Pardon Waiver”), collecting cases and executive opinions.


4 See also note 10, infra, pointing out that five of the states that offer no judicial record relief for felony convictions are ones where pardoning is frequent and leads to expungement.

5 The 18 states are Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Idaho, Illinois, Louisiana, Minnesota, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, and Virginia.

6 Colorado, Ohio, Washington, Wisconsin.
7 For more detail about the organization and authority of the pardoning authority in these 18 states, see the individual state profiles in the Restoration of Rights Project, and Love et al., supra note 1, at §§ 7:8 through 7:11.

8 All six boards have brief eligibility waiting periods (no more than five years after completion of sentence), but only Connecticut’s does not require payment of court debt as a condition of eligibility for pardon. See relevant state profiles from the Restoration of Rights Project.

9 Nebraska’s pardon board has in past years been among the most prolific in the country but staffing changes in 2019 led to a reduced hearing schedule and a sharp reduction in the number of grants that year.

10 See Jones v. DeSantis, 410 F. Supp. 3d 1284, 1291-92 (“Florida has long had an Executive Clemency Board with authority to restore an individual’s right to vote. But the Board moves at glacial speed and, for the eight years before Amendment 4 was adopted, reenfranchised very few applicants. For the overwhelming majority of felons who wished to vote, the Executive Clemency Board was an illusory remedy.”)

11 In December 2019, Governor Mike DeWine announced the Expedited Pardon Project, a collaboration between the Governor’s Office and the Drug Enforcement Policy Center at Ohio State University and the Reentry Clinic at The University of Akron School of Law. This project aspires to expedite the process by which people apply for a pardon under Ohio’s laws, and will enlist law students to assist in preparing pardon applications. The Ohio Department of Corrections will conduct background investigations of applicants referred by the Project, and the Parole Board will then hold a hearing for each applicant, during which victims, judges and prosecutors involved with his or her case can offer their thoughts. The Parole Board will then vote the same day about whether to recommend clemency to the governor. See Jeremy Pelzer, Gov. Mike DeWine creates streamlined pardon process to help Ohio offenders, Cleveland.com, Dec. 3, 2019, https://www.cleveland.com/open/2019/12/gov-mike-dewine-creates-streamlined-pardon-process-to-help-ohio-ex-offenders.html.

12 See 50-state chart, “Authority for Expunging or Sealing Convictions,” supra note 3.


14 The form issued by the Board for grantees to apply for documentation evidencing the pardon is at http://pardons.nv.gov/uploadedFiles/pardonsnvgov/draft%20marijuana.pdf.

15 Illinois established a tiered procedure to deal with marijuana arrests and convictions, with non-conviction records sealed automatically by the State Police, “minor cannabis offenses” made eligible for expungement through a streamlined pardon process, and more serious marijuana offenses required to petition for relief from the court. See Ill. Comp. Stat. Ann. 2630/5.2(i)(2).


In 2018 the D.C. City Council authorized an independent pardon advisory process for those conviction of D.C. Code offenses, in an apparent effort to avoid an advisory process at the Justice Department that historically has been unfriendly to D.C. Code petitioners, but nothing appears to have come of it. See § 24-481.01 et seq.

Colorado, Indiana, Kansas, Maryland, Massachusetts, New Mexico, North Dakota, Oregon, and New Hampshire. See the first column of the 50-state chart, “Authority for Expunging or Sealing Convictions,” note 3, supra.

See id., second column (all listed states except but Delaware and Utah).

The nine states are Alaska, Arizona, Florida, Hawaii, Iowa, Maine, Montana, Texas, Wisconsin. Note that a few of these states provide for specialized relief for, e.g., youthful first drug offenses, prostitution convictions by victims of human trafficking.