

# The President's Pardon Power

Dr. Michael J. Davidson

**O**n 6 May 2019, President Donald Trump granted “a full and unconditional pardon” to a former Army officer who had been convicted at court-martial of unpremeditated murder and assault that occurred in Iraq; the officer had been sentenced to forfeiture of all pay and allowances, twenty-five years’ confinement, and dismissal from the Army.<sup>1</sup> By the time the president issued the pardon, the recipient had already unsuccessfully exhausted appeals before the U.S. Army Court of Criminal Appeals and the U.S. Court of Appeals of the Armed Forces, and he had completed five years of his sentence before he was granted parole.<sup>2</sup> The pardon received support from the Oklahoma attorney general and from numerous retired military officers.<sup>3</sup>

The president’s pardon of a former service member was not unprecedented, and media reports suggested that the president was considering additional pardons for former members of the military convicted of combat-related offenses.<sup>4</sup> Not everyone approved of the president’s exercise of his pardon power. The actual and continued exercise of the president’s pardon authority to former members of the military convicted of similar crimes in Iraq and Afghanistan,



A photo of Union army soldier Pvt. William Scott taken in 1861. Scott was court-martialed and convicted of having fallen asleep on sentry duty though mitigating witnesses asserted that he had volunteered to take the place of a fellow soldier when he was already exhausted from duty on the previous night. He was subsequently sentenced to death. President Abraham Lincoln, made aware of the circumstances surrounding Scott’s case, interceded on his behalf, and Scott’s sentence was subsequently commuted by Gen. George McClellan. (Photo courtesy of Wikimedia Commons)

however, drew criticism from other members of the military community.<sup>5</sup> On 15 November 2019, the president once again issued full and unconditional pardons



I hereby authorize and direct the Secretary  
of State to affix the Seal of the United States to  
a Warrant for the pardon of Daniel Dusky  
and Jacob Varner,

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dated this day, and signed by me, and for so doing this  
shall be his warrant.

Abraham Lincoln

Washington, 13<sup>th</sup> June, 1863.

to Army officers for wartime conduct. The president pardoned an officer who had been convicted of several offenses and had served six years of a nineteen-year sentence; additionally, the president pardoned an officer whose Article 118 charge had been referred to a general court-martial but had not yet been tried.<sup>6</sup>

Recently, presidents have pardoned former members of the military for a wide variety of military offenses. To illustrate, in one day, President Bill Clinton pardoned a former sailor for disobeying a lawful general order and negligently hazarding two vessels, a former soldier for stealing mail matter, and a sailor convicted of mutiny during World War II.<sup>7</sup> On 24 November 2008, President George W. Bush pardoned a former airman for the possession and sale of drugs, and on 3 December 2010, President Barack Obama pardoned a former airman who had been convicted of wrongful possession of cocaine and writing checks without sufficient funds.<sup>8</sup>

Throughout history, former members of the military and others seeking to avoid military service have been the recipients of presidential pardons. Further, the military community has participated in legal proceedings and has been the subject of legal opinions, which facilitated development of the body of law in this area.

## Constitutional Authority

The president's pardon authority derives from a provision in the U.S. Constitution. Article II, section 2, clause 1, provides that "the President ... shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."<sup>9</sup> Offenses against the United States include violations of the Uniform Code of Military Justice (UCMJ), which defines the military justice system and specifies criminal offenses under military law. The president, acting as commander in chief of the Armed Forces, is authorized to write rules and regulations via an executive order known as the *Manual for Courts-Martial*. The *Manual for Courts-Martial* affords a pardoned service member with a handful of enumerated

rights. The manual specifically notes that a presidential pardon bars prosecution for the pardoned misconduct, that trial counsel may not introduce evidence of a pardoned conviction during sentencing, and that a pardoned summary court-martial conviction may not be used to challenge a witness's character for truthfulness.<sup>10</sup>

A presidential pardon is rooted in the customary authority of an English monarch, and as the U.S. chief executive, the president may administer a pardon as an act of grace or mercy that forgives criminal misconduct, precludes punishment normally inflicted on a person for committing a crime, and restores the recipient's "basic civil rights such as the right to vote, serve on juries, and the right to work in certain professions."<sup>11</sup> A pardon removes legal disabilities associated with a conviction. For example, "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."<sup>12</sup> In other words, a pardon removes the adverse legal consequences associated with the existence of a conviction, such as rendering inapplicable laws that preclude felons from owning firearms, voting, or holding public office.

The president's authority to grant pardons is extremely broad and cannot be restricted by Congress, a point

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**Previous page:** During the Civil War, President Abraham Lincoln often reviewed military courts-martial convictions of Union soldiers and sometimes considered pardons for Confederate soldiers as well. In 1863, he pardoned Confederate partisan rangers Daniel Dusky and Jacob Varner who had been convicted of an 1862 mail robbery in Ripley, West Virginia. (Photo courtesy of the U.S. Government)





made clear by the U.S. Supreme Court. In *Schick v. Reed*, President Dwight Eisenhower commuted the death sentence of an Army sergeant to life imprisonment but with the restriction that the former soldier be ineligible for parole.<sup>13</sup> Convicted of murder by court-martial, Maurice Schick argued that the president exceeded his authority by imposing a condition on the reduction of his sentence that was not authorized by the UCMJ.

The court rejected the argument, determining that the president's "power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by Congress."<sup>14</sup> If there are any limitations on the president's pardon power, they "must be found in the Constitution itself."<sup>15</sup> Further, the president's pardon power is multifaceted. The Constitution gives the president 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."<sup>16</sup>

Surrounded by family members of West Point graduate 1st Lt. Henry Ossian Flipper, President William J. Clinton (center) signs a document 19 February 1999 pardoning Flipper for an 1881 conviction for conduct "unbecoming an officer and a gentleman." The dishonorable discharge accompanying the conviction had previously been changed to honorable in 1976. (Photo courtesy of the National Archives)

## The Scope of the President's Authority

The normal procedure for requesting a pardon is to submit an application to the Department of Justice's Office of the Pardon Attorney, pursuant to 28 C.F.R. §§ 1.1–1.11 for nonmilitary crimes, and to the service secretary who had original jurisdiction over the case for court-martial convictions.<sup>17</sup> Although most pardons are issued following a recommendation from the attorney general based on material prepared by the Office of the Pardon Attorney, the president's exercise of pardon power is not dependent upon a recommendation from the service secretaries or from the pardon office.<sup>18</sup> For example, on his last day in office, Clinton

granted pardons to two individuals who had submitted petitions directly to the White House with no prior notice to the pardon attorney.<sup>19</sup>

Further, the president is the only official authorized to grant a pardon; that authority cannot be delegated. To illus-

trate, in *United States v. Batchelor*, a soldier convicted of misconduct while a prisoner of Chinese forces during the Korean War argued on appeal that broadcasted comments made by an Army major, which were designed to encourage the accused and others to accept repatriation to U.S. control following the armistice, constituted “an offer of general amnesty or pardon on behalf of the Executive.”<sup>20</sup>

Rejecting the argument, the U.S. Court of Military Appeals noted that “the Constitution grants a general pardon power to the President and no one else,” and that “this pardon power is nondelegable and cannot be shared with another person or official when the power is granted in terms similar to those used in our Constitution.”<sup>21</sup>

## Preconviction

The president can pardon criminal misconduct once it has been committed but “before any criminal proceeding against the pardon recipient has been initiated.”<sup>22</sup> A proposal to prohibit preconviction pardons was rejected at the Constitutional Convention.<sup>23</sup> One of

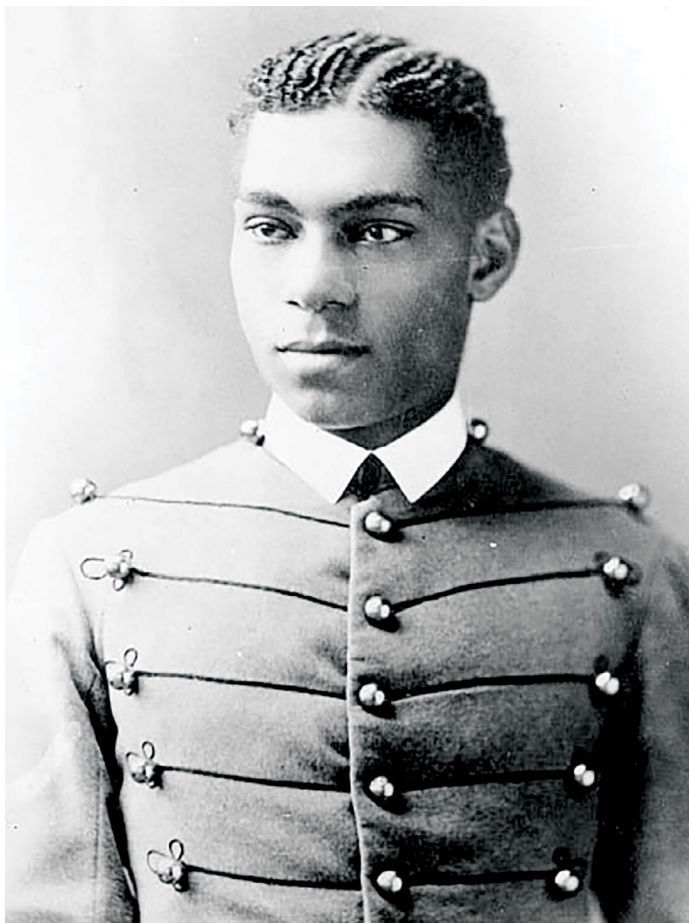
the most famous examples of the exercise of this power was President Gerald Ford’s unconditional pardon of former President Richard Nixon “for all offenses against the United States which he, Richard Nixon, has committed or may have committed” during his

presidency, prior to any charges actually being brought against Nixon.<sup>24</sup> As one court noted, “The fact that Mr. Nixon had been neither indicted nor convicted of an offense against the United States does not affect the validity of the pardon.”<sup>25</sup>

## Posthumous Pardons

As a general policy, the Office of the Pardon Attorney does not process applications for posthumous pardons, preferring to devote its limited resources to the applications of the living.<sup>26</sup> As late as 1977, however, the authority of a president to issue a posthumous pardon remained unresolved with only one inadvertent posthumous pardon issued. The Department of Justice’s Office of Legal Counsel (OLC) considered the issue in

the wake of efforts by the widow of Pvt. Eddie Slovik to correct his military records so that she would be eligible to collect on his National Service Life Insurance policy. Following his court-martial conviction for desertion, the Army panel sentenced Slovik to death. The sentence was approved by Slovik’s division commander and by then Gen. Eisenhower. Of the 142 American servicemen executed during World War II, Slovik was the only one executed for desertion.<sup>27</sup>



An 1877 class photo of Cadet Henry Ossian Flipper, the first African American to graduate from the U.S. Military Academy at West Point, New York. Flipper reportedly “served with competency and distinction” but was court-martialed and discharged from the military under suspect circumstances for conduct “unbecoming an officer and gentleman.” (Photo courtesy of the U.S. Military Academy)



The relevant statutory authority for the insurance, 38 U.S.C. § 1911, provided that “no insurance shall be payable for death inflicted as a lawful punishment for crime or for military ... offense. ...”<sup>28</sup> Slovik was executed in 1945 following his court-martial conviction. Unclear as to the president’s authority to issue a posthumous pardon, the OLC opined that assuming the president had authority, any such pardon would not remove the statutory limitation on Mrs. Slovik’s eligibility for insurance proceeds.<sup>29</sup>

Since the OLC considered the issue in 1977, three presidents have issued posthumous pardons. Trump pardoned Jack Johnson, the first African American heavyweight boxing champion, who was convicted in 1913 of violating the Mann Act, which prohibited transporting a person across state lines for immoral purposes. In addition, Trump pardoned Zay Jeffries, whose prosecution for engaging in anticompetitive conduct under the Sherman Act was deferred from 1941 until 1947 so he could work on the Manhattan Project and develop armor-piercing artillery shells. George W. Bush pardoned Charles Winters, who helped smuggle B-17 bombers into Israel in 1948 in violation of the Neutrality Act. Clinton pardoned former Army officer Henry Ossian Flipper, who was West Point’s first African American graduate and the first African American to receive a regular Army commission.<sup>30</sup> Flipper was court-martialed at Fort Davis, Texas, in 1881 for embezzling funds from the post commissary and for conduct unbecoming an officer. Acquitted of embezzling, but convicted of conduct unbecoming, Flipper was dismissed from the Army. In 1976, the Army upgraded his discharge to honorable, but Clinton believed that a “stain of dishonor remained,” and to correct an injustice, granted Flipper a full pardon.<sup>31</sup>

## Mass Pardons

In *Ex Parte Grossman*, the Supreme Court noted that the president’s pardon authority extended to “classes” of individuals and historically presidents have authorized mass pardons.<sup>32</sup> Some of the largest mass pardons have occurred in the military context. To illustrate, in an 1892 Attorney General Opinion, the solicitor general of the United States determined that the president could issue a general pardon to a large class of persons, without naming them individually, citing in support President Andrew Johnson’s pardon of all those from the Confederate States of America who took part in the rebellion and President Ulysses Grant’s pardon of all Union army deserters.<sup>33</sup>

The post-Vietnam era provides more modern examples. On 16 September 1974, as part of a “national commitment to justice and mercy,” Ford announced a conditional clemency program aimed at Vietnam War draft evaders and deserters.<sup>34</sup> The program terminated on 31 March 1975. Unconvicted draft evaders who completed a period of public service (no more than two years) and pledged allegiance in writing to the United States would not be subject to prosecution. Unconvicted military deserters could receive an undesirable discharge, or after completing a period of alternative service, receive the newly created “clemency discharge.” Convicted draft evaders and deserters were eligible for presidential pardons after completing alternative service, or in some circumstances, unconditional pardons accompanied by a clemency discharge for ex-service members. The comptroller general estimated 113,000 to 300,000 individuals were eligible to participate in the program but only 21,700 did so, with 6,052 receiving pardons.<sup>35</sup>

In a subsequent effort to heal the Nation in the wake of Vietnam, on 21 January 1977, President Jimmy Carter granted an unconditional pardon to Vietnam War draft evaders who violated the Military Selective Service Act (50 U.S.C. § 462) between 4 August 1964 and 28 March 1973 but excluded from the pardon any violations of the act involving violence as well as any violations committed by employees of the Military Selective Service System. In addition, the pardon applied only to civilians and did not extend to members of the Armed Forces who had been convicted of offenses under the UCMJ, including desertion.<sup>36</sup> Although pardon certificates were not required to effectuate the pardon, at least thirty-six individuals applied for certificates. Further, the FBI closed 625 active investigations and the Department of Justice dismissed approximately 2,400 indictments of individuals having violated the act.<sup>37</sup>

## Limitations

Although the president’s pardon authority is extremely broad, it is not without limitation. The plain language of the Constitution limits the scope of the president’s power to “offenses against the United States,” which precludes its application to “state criminal or civil proceedings,” or “Cases of Impeachment,” which fall within Congress’s authority.<sup>38</sup>

Further, the Constitution itself may limit the exercise of the president’s powers. One such limitation is the

Appropriations Clause, which provides that “no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. ...”<sup>39</sup> In short, the president’s pardon authority cannot override congressional power of the purse. To illustrate, a former CIA employee who was indicted as a result of the Iran-Contra independent counsel investigation, but who was subsequently

may elect to reject a pardon: it “carries an imputation of guilt; acceptance a confession of it.”<sup>44</sup>

As the *North* case indicates, a pardon does not provide its recipient with a completely clean slate. The U.S. Supreme Court characterized a pardon as “[a]n executive action that mitigates or sets aside *punishment* for a crime,” but it does not overturn “a judgment of conviction by

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pardoned by President George H. W. Bush, sought reimbursement for \$1,297,950 in attorney’s fees pursuant to 28 U.S.C. § 593(f)(1).<sup>40</sup> This statute authorized reimbursement of attorney’s fees related to the investigation if the claimant were not indicted. The U.S. Court of Appeals for the District of Columbia, in *In re North*, cited post-Civil War language from the Supreme Court providing that the president’s pardon power “cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress.”<sup>41</sup> Rejecting the request for reimbursement of attorney’s fees, the court determined that the plain language of section 593(f)(1) prohibited payment to someone who had been indicted and the presidential pardon did not “annul, expunge, or otherwise nullify [the] indictment.”<sup>42</sup>

Further, as made clear by the Supreme Court in *Burdick v. United States*, a pardon is only effective if accepted; the intended recipient may refuse it.<sup>43</sup> In an effort to force a newspaper editor to testify, President Woodrow Wilson issued a pardon to the editor, George Burdick, who had invoked his right against self-incrimination before a grand jury when questioned about the sources of information for various articles published in the newspaper. The editor refused the pardon and continued to refuse to answer any questions concerning the sources of his information. The Supreme Court upheld Burdick’s refusal to accept the pardon and to continue to refuse to testify. The court’s analysis also provided another reason why an intended recipient

some other tribunal.”<sup>45</sup> In other words, a pardon eliminates any legal punishment for the pardoned offense and precludes any further disqualifications from the fact of a conviction itself, but it neither precludes consideration of the underlying conduct nor prohibits further consequences from the pardoned conviction.<sup>46</sup> Similarly, the OLC has opined that a presidential pardon removes “the punitive legal consequences that would otherwise flow from conviction for the pardoned offense,” but it “does not erase the conviction as a historical fact or justify the fiction that the pardoned individual did not engage in criminal conduct” and “does not by its own force expunge judicial or administrative records of the conviction or underlying offense.”<sup>47</sup> Because of the limited effect of a pardon, it does not expunge the recipient’s criminal record. Accordingly, a background check will reveal both the record of conviction and the fact that the individual had been pardoned.<sup>48</sup>

Specific to the military, a presidential pardon for a violation of the UCMJ does not automatically result in a change to the character of the former service member’s discharge.<sup>49</sup> That a presidential pardon does not, by itself, change the characterization of a service member’s discharge is a long-standing legal principle. To illustrate, a 1957 legal article written by a Navy judge advocate cited both a 1937 opinion of the Navy judge advocate general and a 1909 opinion of the attorney general in support of his position that “it is now well settled that a Presidential pardon is not effective to change a dishonorable discharge



Marine Corps Gen. James Cartwright looks on as President Barack Obama speaks 4 May 2011 before kicking off the Wounded Warrior Project's Soldier Ride on the South Lawn of the White House in Washington, D.C. Cartwright enjoyed a distinguished career, serving as the eighth vice chairman of the Joint Chiefs of Staff from 31 August 2007 to 3 August 2011. Following his retirement, Cartwright was investigated for providing classified information to reporters, including one reporter who allegedly included the information in a book. Cartwright voluntarily agreed to be interviewed by the FBI without a lawyer present. The government never charged Cartwright with leaking any classified information to the reporters. However, he was subsequently investigated for purportedly providing inaccurate information to the interviewing FBI agents regarding the time and place of his interactions with the reporters. Subsequently, Cartwright pleaded guilty to one count of providing false statements to the FBI pursuant to an official investigation. Before Cartwright was sentenced, Obama pardoned him on 17 January 2017 and Cartwright's security clearance was restored. (Photo by Roger L. Wollenberg, United Press International/Alamy photo)

into an honorable discharge, or to restore rights which are based upon receipt of an honorable discharge.”<sup>50</sup>

In the 1908 Attorney General Opinion, “Pardon—Removal of Disabilities—Pension,” an officer assigned to the 14th Regiment Kansas Volunteer Cavalry was court-martialed, convicted, and dismissed from the Army in 1865.<sup>51</sup> The officer received a pardon in 1866 that included an offer to the governor of Kansas to recommission the officer should the governor so desire. Since the Civil War had ended, the officer did not desire a commission.

After Congress passed legislation in 1907 providing for a pension to members of the Army and Navy honorably discharged from those services, the former officer applied for a pension. The attorney general determined that he was ineligible for a pension, reasoning,

His separation from the Army in 1865 was not an honorable discharge therefrom, and when the pardon came, ten months later, he was not in the Army, and therefore the pardon, however full and complete, could not, constructively or



otherwise, operate as an honorable discharge from an army to which he did not belong. A pardon can not change existing or accomplished facts, although it may remove or prevent their consequences; and in this case the pardon can not change the fact that this officer has never been honorably discharged from the Army.<sup>52</sup>

The fact that a pardon does not change the character of a discharge will have a significant effect on a former service member's entitlement to veterans' benefits. To qualify for benefits, a former service member must be a "veteran," which is defined as "a person who served in the active military, naval, or air service, *and who was discharged or released therefrom under conditions other than dishonorable* [emphasis added by author]."<sup>53</sup> Generally, a dishonorable discharge serves as a bar to benefits.<sup>54</sup>

In addition, 38 U.S.C. § 6105(a) provides that an individual convicted of certain enumerated military (e.g., mutiny, aiding the enemy, spying) and federal (e.g., disclosing classified information, using a weapon of mass destruction, treason) offenses—referred to as "subversive activities"—"shall ... have no right to gratuitous benefits (including the right to burial in a national cemetery) under laws administered by the Secretary based on periods of military, naval, or air service commencing before the date of the commission of such offense and no other person shall be entitled to such benefits on account of such individual."<sup>55</sup> This statutory termination of benefits applies even when the service member has completed a prior period of military service that has been terminated under honorable conditions. The ban may only be lifted, and benefits restored, following a presidential pardon.<sup>56</sup>

Further, a presidential pardon does not authorize an individual to enlist in the Armed Forces or authorize a service member to reenlist. Absent an exception authorized by the relevant service secretary, 10 U.S.C. § 504 states that "no person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force."<sup>57</sup> "In Effect of Pardon on Statute Making Persons Convicted of Felonies Ineligible for Enlistment in the Army," the OLC determined that a felon remains ineligible for enlistment even if pardoned because the relevant statute merely established qualifications for enlistment, rather than imposed punishment for the pardoned offense.<sup>58</sup> Similarly, 10 U.S.C. § 508(a) provides that "no person whose term of enlistment was not honest and faithful

may be reenlisted in an armed force."<sup>59</sup> Interpreting similar language, the OLC determined that a pardon does not afford a pardoned deserter the right to reenlist because his prior term of enlistment had not been honest and faithful. The OLC reasoned, "Whilst the President's power restores the criminal to his legal rights and fully relieves him of disabilities legal attaching to his conviction, it does not destroy an existing fact, viz, that his service was not honest and faithful."<sup>60</sup>

Given the president's almost unfettered authority to grant pardons and the entirely subjective nature of his or her exercise of that discretion, even highly controversial pardon decisions will be extremely difficult to legally challenge. The president cannot issue a pardon, however, when the circumstances surrounding the pardon are themselves illegal.<sup>61</sup> Were a president to criminally abuse the pardon authority, the prevailing legal view is that an incumbent president could not be indicted or criminally prosecuted, because such actions "would unduly interfere with the ability of the executive branch to perform its constitutionally assigned duties, and would thus violate the constitutional separation of powers."<sup>62</sup> Any prosecution would have to wait until the president was no longer in office. Recognizing a president's broad pardon authority, the OLC nonetheless offered, "Of course, the intensely subjective nature of a pardon decision does not mean that the President could choose, in his discretion, to grant pardons, for example, in exchange for cash payments. The remedy for such a misuse of power would be removal from office after impeachment and conviction for treason, bribery, or other high crimes and misdemeanors."<sup>63</sup>

It remains unclear whether a president possesses the authority to pardon himself. The issue was never raised at the Constitutional Convention, and because no president has attempted to pardon himself, the issue has not been presented to the courts. Shortly before Nixon's resignation, the OLC opined that a president lacked such authority, but various commentators have argued both for and against such authority.<sup>64</sup>

## Sentence Commutation

As noted earlier, in addition to granting a full or partial, absolute or conditional pardon, the president may commute (reduce) an individual's sentence with or without conditions. Commutation of a sentence may include reduction in a period of incarceration, or remission of the unpaid portion of a fine, forfeiture, or restitution

order. As the United States Court of Appeals for the Sixth Circuit explained in *Dennis v. Terris*, “a prisoner who receives a presidential commutation continues to be bound by a judicial sentence ... [t]he commutation changes only how the sentence is carried out by switching out a greater punishment for a lesser one.”<sup>65</sup> As the Office of the Pardon Attorney notes, “It does not change the fact of conviction, imply innocence, or remove civil disabilities that apply to the convicted person as a result of the criminal conviction.”<sup>66</sup>

A common form of commutation is a reduction in the period of incarceration. Obama was particularly generous with sentence commutations, reducing 1,715 sentences. This level of commutation was the highest of any president since President William Taft’s 1,727 commutations and more than the prior thirteen presidents combined.<sup>67</sup>

The primary limitation on the president’s ability to commute a sentence conditionally is that the condition may not be “illegal, immoral, or impossible of performance.”<sup>68</sup> If the recipient of a sentence commutation violates the presidential condition, then the original sentence is reinstated. Further, unlike an unconditional pardon that can be refused by its recipient, no consent is required for a sentence commutation.<sup>69</sup>

## Conclusion

The pardon authority is vested exclusively in the president, whose exercise of such authority is

extremely broad and unfettered by any defined rules or criteria. The president’s pardon prerogative may be full, conditional, or simply limited to commuting the sentence. It may not offend other portions of the Constitution, but it is generally immune from congressional constraints. As originally envisioned by the architects of the U.S. Constitution, a presidential pardon is an act of mercy or grace that forgives a particular criminal offense or offenses, precludes further legal punishment, and restores certain rights. It is not necessarily an endorsement of the recipient, the underlying misconduct, or an affront to the law originally violated.

While the authority of the president to pardon, either unconditionally, conditionally, or to commute a sentence is almost unfettered, the legal effect of a pardon is much more limited. A pardon is not a declaration of innocence, and it will not expunge all records of the original conviction. Further, a significant limitation on the effect of a pardon is that the pardon does not change a punitive discharge into an honorable one, which will adversely impact a former service member’s eligibility for veterans’ benefits. ■

*The opinions in this article are those of the author and do not reflect the position of U.S. Immigration and Customs Enforcement, the Department of Homeland Security, or any other federal agency.*

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## Notes

1. Donald J. Trump, “Executive Grant of Clemency, Michael Chase Behenna,” Department of Justice, 6 May 2019, accessed 27 December 2019, <https://www.justice.gov/pardon/page/file/1160801/download>. The sentence was reduced to twenty years.

2. *United States v. Behenna*, 71 M.J. 228 (C.A.A.F. 2012); Mihir Zaveri, “Trump Pardons Ex-Soldier Convicted in Iraqi Man’s Murder,” *New York Times*, 7 May 2019, A16.

3. Reis Thebault, “Ex-Soldier Who Killed Detainee is Pardoned,” *Washington Post*, 7 May 2019, A3.

4. Dave Phillips, “President May Be Preparing Pardons for High-Profile War Crimes,” *New York Times*, 19 May 2019, 18.

5. See, e.g., Waltman W. Beorn, “To Prevent War Crimes, Stop Praising War Criminals,” *Washington Post*, 12 May 2019, B4; Barry McCaffrey, “Trump’s War-Crime Pardons Would Dishonor Our Forces,” *Washington Post*, 26 May 2019, A23.

6. Donald J. Trump, “Executive Grant of Clemency, Clint A. Lorance and Mathew Golsteyn,” Department of Justice, 15 November 2019, accessed 27 December 2019, <https://www.justice.gov/pardon/pardons-granted-president-donald-trump#Nov152019>.

7. “Pardons Granted by President Clinton,” Department of Justice, 23 December 1999, accessed 6 January 2020, <https://www.justice.gov/archive/opa/pr/1999/December/610civ.html>.

8. “President George W. Bush Granted Pardons,” Department of Justice, 28 September 2005, accessed 6 January 2020, [http://www.usdoj.gov/opa/pr/2005/September/05\\_opa\\_509.html](http://www.usdoj.gov/opa/pr/2005/September/05_opa_509.html); “President Barack Obama Grants Pardons,” Department of Justice, 3 December 2010, accessed 6 January 2020, <http://www.justice.gov/opa/pr/2010/December/10-opa-1383.html>.

9. U.S. Const. art. II, § 2, cl. 1.

10. *Manual for Courts-Martial United States* (Washington, DC: Joint Service Committee on Military Justice, 2019), II-114 (R.C.M. 907[b][2][D][i]), II-141 (R.C.M. 1001[b][3][A]), III-41 (M.R.E. 609[c]).

11. Richard M. Thompson II, *The President’s Pardon Power and Legal Effects on Collateral Consequences*, Congressional Research Service (CRS) No. R44571 (Washington, DC: CRS, 26 July 2016), 1, 7.

12. *Ibid.*, 10.

13. *Schick v. Reed*, 419 U.S. 256 (1974).

14. *Ibid.*, 266.



15. *Ibid.*
16. *Ibid.*
17. Thompson, *The President's Pardon Power and Legal Effects on Collateral Consequences*; Office of the Pardon Attorney, "Frequently Asked Questions," Department of Justice, 9, accessed 6 January 2020, <https://www.justice.gov/pardon/frequently-asked-questions>. Requests for sentence reductions by service members convicted by court martial are also processed by the relevant military branch, rather than by the Office of the Pardon Attorney.
18. "Frequently Asked Questions," 1.
19. *In re Grand Jury Subpoenas Dated March 9, 2001*, 179 F. Supp. 2d 270, 273 (S.D.N.Y. 2001).
20. *United States v. Batchelor*, 7 U.S.C.M.A. 354, 365, 22 C.M.R. 144, 155 (1956).
21. *Ibid.*
22. "Legal Sidebar: Presidential Pardons: Frequently Asked Questions," CRS Reports and Analysis, 28 August 2017, 1.
23. *Ibid.*
24. Proclamation No. 4311, 39 Fed. Reg. 32601-02 (10 September 1974).
25. *Murphy v. Ford*, 390 F. Supp. 1372, 1374 (W.D. Mich. 1975).
26. Office of the Pardon Attorney, "Policy on Posthumous Pardon Applications," Department of Justice, accessed 27 December 2019, <https://www.justice.gov/pardon/policies>.
27. Fred L. Borch III, "Shot By Firing Squad: The Trial and Execution of Pvt. Eddie Slovik," *Army Lawyer*, Department of the Army Pamphlet 27-50-466 (March 2012): 5-6.
28. 38 U.S.C. § 1911 (1991).
29. Summarized from Presidential Authority-Slovik Case-Constitutional Law-Posthumous Pardons-Review of Sentence (10 U.S.C. § 1552), 2 Op. O.L.C. 370 (9 September 1977).
30. "Policy On Posthumous Pardon Applications"; see also Jacob Bogage, "Trump Pardons Boxer Johnson," *Washington Post*, 25 May 2018, D2; Dan Eggen, "Bush Forgives Man Convicted for 1948 Aid to Israel," *Washington Post*, 24 December 2008, A3; "Statement from the Press Secretary Regarding Pardon of Zay Jeffries," The White House, 10 October 2019, accessed 27 December 2019, <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-pardon-zay-jeffries/>.
31. "Remarks by the President at Ceremony in Honor of Lt. Henry O. Flipper," The White House, 19 February 1999, accessed 27 December 2019, <https://clintonwhitehouse6.archives.gov/1999/02/1999-02-19-remarks-by-president-at-ceremony-to-honor-lt-flipper.html>.
32. *Ex Parte Grossman*, 267 U.S. 87, 120 (1925).
33. Amnesty – Power of the President, 20 Op. Att'y Gen. 330, 334-35 (9 March 1892).
34. Proclamation No. 4313, 50 U.S.C. app. 451, 10 U.S.C. 801 et seq. (1974).
35. *Report to Congress by the Comptroller General of the United States, The Clemency Program of 1974, Before the House and Senate Committees on Armed Services*, B-183498 (7 January 1977) (Statement by Elmer B. Staats, Comptroller General).
36. Proclamation No. 4483, 42 Fed. Reg. 4391 (1977); "Vietnam War Era Pardon Instructions," Department of Justice, accessed 27 December 2019, <https://www.justice.gov/pardon/vietnam-war-era-pardon-instructions>.
37. Victor L. Lowe to John T. Myers, "President's Amnesty Program and Subsequent Department of Justice Actions," GGD-78-39. B-171019 (13 January 1978), 2.
38. Thompson, *The President's Pardon Power and Legal Effects on Collateral Consequences*, 1.
39. U.S. Const. art. 1, § 9, cl. 7.
40. Proclamation No. 6518, 57 Fed. Reg. 62145-47 (30 December 1992).
41. *In re North*, 62 F.3d 1434, 1436 (D.C. Cir. 1994).
42. *Ibid.*
43. *Burdick v. United States*, 236 U.S. 79, 94 (1915).
44. *Ibid.*
45. *Nixon v. United States*, 506 U.S. 224, 232 (1993) (emphasis in original).
46. *Hirschberg v. Commodity Futures Trading Commission*, 414 F.3d 679, 682 (7th Cir. 2005); *In re Abrams*, 689 A.2d 6, 11 (D.C. 1997).
47. Whether A Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime, 30 Op. O.L.C. 104 (11 August 2006).
48. Thompson, *The President's Pardon Power and Legal Effects on Collateral Consequences*, 12.
49. "Frequently Asked Questions," 9.
50. James F. Chapman, "Presidential Pardons," *JAG Journal* 1, no. 3 (1957): 7-10 (citing Opinion of the Judge Advocate General of the Navy, 1937: File: MM, Reinhardt, Wm. S/P 19-1 [370416] 28 April 1937).
51. Pardon-Removal of Disabilities-Pension, 27 Op. Att'y Gen. 178 (17 February 1909).
52. *Ibid.*, 183.
53. 38 U.S.C. § 101(2) (1988).
54. 38 C.F.R. § 3.12(c)(2) (1997).
55. 38 U.S.C. § 6105(a) (2003).
56. *Ibid.*
57. 10 U.S.C. § 504(a) (2018).
58. In Effect of Pardon on Statute Making Persons Convicted of Felonies Ineligible for Enlistment in the Army, 39 Op. Att'y Gen. 132, 135 (23 February 1938).
59. 10 U.S.C. § 508(a) (1968).
60. 39 Op. Att'y Gen. 132, 133.
61. *Ex Parte Wells*, 59 U.S. 307, 312 (1855) ("unlawful in itself ... against the public good as to be indictable at common law").
62. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 260 (16 October 2000).
63. Whether the President May Have Access to Grand Jury Material in the Course of Exercising his Discretion to Grant Pardons, 24 Op. Att'y Gen. 366, 371n6 (22 December 2000).
64. "Legal Sidebar," 2 ("unsettled constitutional question"); see Thompson, *The President's Pardon Power and Legal Effects on Collateral Consequences*, 2n11. ("Some observers have suggested that the President's pardoning power is so expansive as to allow self-pardons").
65. *Dennis v. Terris*, 927 F.3d 955, 958 (6th Cir. 2019).
66. "Frequently Asked Questions," 3.
67. Office of the Pardon Attorney, "Clemency Statistics: Barack Obama," Department of Justice, accessed 27 December 2019, <https://www.justice.gov/pardon/clemency-statistics>.
68. Pardoning Power of the President, 41 Op. Att'y Gen. 251 (11 August 1955) (permissible conditions include that an alien-prisoner be deported, that a prisoner "remain law-abiding," and that a prisoner "abstain from the use of intoxicating liquor").
69. *Biddle v. Perovich*, 274 U.S. 480 (1927).