

Garden State CLE Presents:

I Beg Your Pardon



Instructors

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Lesson Plan

I. In General

A) Federal & State Constitutional Authority

FEDERAL

In Article II, Section 2 of the United States Constitution, the President is vested with pardon powers as follows:

[a]nd he shall have Power to grant Reprieves and Pardons for Offences [sic] against the United States, except in Cases of Impeachment.

Comment – By the time of the founding era, the authority to grant pardons had been vested in the King of England for centuries and was well-established in the common law of the founding era (See Ex Parte Wells, 59 U.S. 307, 311(1855)). Thus, the pardon provision in the constitution is directly related to English common law. Note that the plenary power does not expressly provide for reprieves and remissions but that practice has been deemed in the case law to be implicit in the pardon power.

The pardon power under the Constitution is so broad that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority. Trump vs. United States, 603 U.S. 593, 594 (2024).

A pardon may be granted for criminal conduct that has yet to be either investigated or charged. Ex Parte Garland, 71 U.S. 333, 373(1866).

The case law recognizes the right of a person to reject or decline to accept a presidential pardon. See Chief Justice Marshall's opinion in United States vs. Wilson, 32 U.S. 150, 160-61(1833). See also Burdick vs. United States, 236 U.S. 79, 90-91(1915).

NEW JERSEY

The pardon power vested in the governor of New Jersey is set forth in the State Constitution of 1947 in Article V, Section 2, Paragraph 1:

“[t]he Governor may grant pardons and reprieves in all cases other than impeachment and treason and may suspend and remit fines and forfeitures.”

Comment – The power to pardon and grant reprieves existed in both the Constitutions of 1776 and 1844. The language in the 1947 Constitution is expansive and specifies clemency that may take the form of both pardons and other relief.

B) Distinction Between Pardons vs. Executive Clemency

In New Jersey, pardons and reprieves are subsumed under the general category of executive clemency. It appears to be the case in the decisional law that a pardon relieves the guilty person of the civil and criminal burdens of the crimes forgiven so that the legal disabilities that are consequences of the convictions are removed.¹ By contrast, the result of an exercise of executive clemency is typically found in sentence commutations, reprieves, fine suspensions and the remission of forfeitures. Unlike the pardon, the criminal conviction and its disabilities remain with the exercise of clemency.

This constitutional authority is an executive function that is purely a matter of grace. It is not subject to judicial review under the federal and New Jersey Constitutions (See State vs. Mangino, 17 N.J.Super 587, 591(App.Div.1952)). Any appeal from the pardon or grant of executive clemency decision lies in the electoral process, the ultimate weapon of a democratic society.

¹Ex parte Fitzpatrick, 9 N.J.Super 511, 519, 75 A.2d 636(CountyCt.1950). Affirmed at 14 N.J.Super 213, 82 A.2d 8(App.Div.1951).

C) Powers of the New Jersey Governor

1) The governor may pardon a person for a criminal or quasi-criminal offense against the laws of New Jersey. The 1947 Constitution does not require the subject of pardon to have been convicted or even formally charged with an offense. Moreover, there is no requirement that the subject of the pardon be living.

2) The governor may grant a reprieve by commuting a sentence. Commutation typically involves terminating the sentence immediately or reducing its length. Reprieves can also involve terminating or reducing parole periods and other aspects of sentence imposed by a court.

3) The governor can also order that a fine be remitted. This typically will occur when the basis of the pardon has been rooted in a miscarriage of justice and the available evidence strongly suggests that an innocent defendant has been wrongfully convicted and punished by way of a fine.

4) The governor may also return real or personal property that was subject to forfeiture. This latter power includes forfeitures stemming both criminal actions and related civil court orders. This authority also appears to include forfeitures of public office.

D) Effect of a Pardon – Good Moral Character

The true line of distinction seems to be this: The pardon removes all legal punishment for the offence. Therefore, if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible. [Samuel Williston, Does A Pardon Blot Out Guilt?, 28 Harv. L. Rev. 647, 653 (1915).]

On both a federal and state level, the effect of a pardon is to remove civil disabilities associated with the underlying crime. However, it does not obliterate all the consequences. When there is a requirement that the offender show good moral character, the pardon will not preclude the use of the underlying crime, because it is not the conviction but one's character that is relevant. This is typically found in situations where a pardoned offender seeks citizenship, restoration of the right to practice a profession or hold certain licenses, or to become a law enforcement officer. By way of example:

i) No Character Issues Relevant

1) Suffrage and ability to seek public elected office - Brezizecki vs. Gregorio, 246 N.J.Super 634(LawDiv.1990) – In New Jersey, good moral character is not a requirement for either voting or seeking public elective office. Under federal law, a presidential pardon will restore all federal civil rights which are lost upon criminal conviction, including the right to run for federal office. Bjerkkan vs. United States, 529 F.2d 125, 127(7Cir.975).

2) Expungement of criminal records – In re Expungement of Criminal Records of T.O., 244 N.J. 514(2021) – Grant of a pardon rendered petitioner eligible to have the underlying conviction expunged. See also In re Petition of L.B., 369 N.J.Super 354(LawDiv.2004).

ii) Character Issues Relevant

1) Lottery Agent - Storcella vs. Lottery Commission, 296 N.J.Super 238(App.Div.1997) - Petitioner barred from operating a lottery machine notwithstanding his pardon for past gambling crimes, based upon the need for the lottery to maintain a public image of rectitude.

2) Police Officer Pension - Hozer vs. Treasury Dep't, 95 N.J.Super 196, 202(App.Div.1967) – Police officer banned from receiving his pension

following a pardon based upon lack of honorable service resulting in his criminal conviction. The panel went on to explain:

While a pardon may restore to a convicted felon his rights of citizenship and remove all penalties and legal disabilities, it cannot and does not substitute a good reputation for one that is bad; it does not obliterate the fact of the commission of the crime; it does not wash out the moral stain; it involves the forgiveness and not forgetfulness and it does not wipe the slate clean. A pardon does not close the judicial eye to the fact that once he had done an act which constituted the offense. It does not restore his character and does not obliterate the act itself.

3) Permit to Carry a Pistol - In re Application for Pistol Permit, 130 N.J.Super 21, 324 A.2d 611(Cty.Ct.1974), the applicant applied for a permit to carry a pistol following receipt of a full and unconditional presidential pardon of a federal embezzlement conviction. Holding that the pardon removed the disability to receive a permit to carry a weapon, the court nevertheless found the conviction to be *prima facie*, but rebuttable, evidence that the applicant lacked the good and moral character required by the governing statute. See also In re Application of S.S. for a Permit to Carry a Pistol, 130 N.J.Super 21, 324 A.2d 611(EssexCountyCt.1974)

E) Effect of a Federal or State Pardon on Immigration Status

Pardons will cure some, but not all, immigration consequences. In order to do so, a pardon must meet some threshold requirements: it must be a “full and unconditional” pardon, and it must be granted by the Executive, whether at the state or federal level. Foreign pardons will not prevent deportation. Pardons for certain underlying convictions that waive deportability

Section 237(a)(2)(A)(vi) of the Immigration and Nationality Act (INA), also known as the Pardon Waiver Clause, provides that a full and unconditional pardon by a governor (legislative pardons have no effect) will prevent deportation through a statutory pardon waiver for four categories of offenses:

- 1) Crimes Involving Moral Turpitude (CIMT);
 - 2) Multiple CIMT convictions;
 - 3) Aggravated felonies; and
 - 4) High-speed flight from Department of Homeland Security checkpoints
- Crimes involving moral turpitude

Specific NJ Offenses and whether they are CIMTs

Theft when a permanent taking is intended (not joyriding)

N.J.S.A. 2C:20-11 Shoplifting

Burglary – CIMT if you are there to steal not watch TV or sleep

Fraud - need intent to defraud or guilty knowledge

N.J.S.A. 2C:21-5 Bad Checks (intent to defraud is an element)

N.J.S.A. 2C:21-2.1(c) False Documents (intent to defraud is not an element)

Crimes of violence (bodily harm is intentionally or knowingly caused or threatened)

Most sex offenses

DWI plus an aggravating factor like a N.J.S.A. 39:3-40 where defendant knew his license was suspended (knowledge)

Aggravated Felonies

Definition found in INA §101(a)(43)

Generally, no relief is available to FN

Three categories:

- (1) Offenses that are AF by their very nature
- (2) Offenses that are AF based on monetary amounts or loss to victim
- (3) Offenses that are AF based upon sentence

Nature of the Offense

Murder, rape, or sexual abuse of a minor

Drug trafficking

Prostitution business

Human trafficking

Kidnapping

Child Pornography (Salmoran 3rd Circuit just said nope but it is Child Abuse)

Sentence imposed is at least one year

Theft

Burglary (NJ statute too broad – car and disorderly conduct)

Crime of violence (what is that? – next slide)

Possession of stolen property

U.S. Passport Fraud

Commercial bribery, counterfeiting, forgery, or trafficking in vehicles
Obstruction of justice, perjury or subornation of perjury, or bribery of a witness

Bail Jumping (N.J.S.A. 2C:29-7 – third degree only b/c potential sentence must be 5 years or more)

Crime of Violence at 18 USC § 16

WILSON EMILIO PEGUERO MATEO - VOID FOR VAGUENESS!

18 USC § 16a – An offense that has as an element the use, attempted use, or threatened use of physical force against a person or property.

~~18 USC § 16b – Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.~~

Resisting Arrest; Eluding Officer: NJSA 2C:29-2a(3)(b) uses any other means to create a substantial risk of causing physical injury to the public servant or another.

Look to the *mens rea* – Purposeful v. Negligence - Specific Intent to Harm v. Thoughtless or Careless Action. More than 364-day jail sentence required.

CRIME EXCEPTIONS TO THE PARDON WAIVER

§ 237(a)(2)(A)(vi) - the provision does not extend to all criminal grounds of removal, such as firearm offenses, domestic violence offenses, child abuse, violations of protection orders, controlled substance offenses, espionage, sabotage, treason and sedition

Inadmissibility

A Legal Fiction – mere physical presence in the U.S. does not mean that the FN lawfully entered or was admitted to the U.S. You had to have been inspected and authorized by an immigration officer to be admitted;

Therefore, YOU HAVE NOT BEEN ADMITTED EVEN THOUGH YOU ARE HERE!

INA § 212 – Grounds of inadmissibility

Entry without Inspection
EWI/No Inspection

F) A Short History of Controversial Pardons

All but two Presidents have issued pardons. Presidential pardons have often been controversial, mainly because the power has been used by some Presidents to pardon close friends and campaign donors. Among the more infamous or controversial examples are:

1795 - Whiskey Rebellion. Washington pardons two convicted participants in the Whiskey Rebellion

1868 - Post-Civil War Rebels. First, in 1865, President Johnson approved a measure that excluded large landowners and Confederate officials. Later that year, he began issuing individual pardons to those very same Confederate elites when they applied personally to the president. Finally, in 1868, he issued a full pardon to all remaining individuals who had participated in the Confederacy, without requiring an oath or application. These actions served to make him one of the most reviled presidents in U.S. history and led to his impeachment and near conviction in the Senate.

1971 - Hoffa. Richard Nixon issues a full pardon to former Teamster President James R. Hoffa.

1974 - Nixon. President Ford issues a full pardon to Richard M. Nixon.

1977 - Viet Nam War Draft. President Jimmy Carter pardoned approximately 200,000 draft resisters to the Vietnam War on his first day in office in 1977.

1992 - Iran-Contra. On Christmas Eve 1992, after losing his reelection bid and with only weeks to go as president, George H.W. Bush issued pardons for all six men. It was a deeply controversial measure and one that critics believed Bush would not have taken had he been reelected to office.

2001 - Family members. On his last day in office, President Clinton issued a pardon for his brother Roger. Overshadowing this action on the same day was the pardon of Marc Rich. He was a fugitive billionaire financier who had fled the United States to avoid prosecution for serious financial crimes. Rich's wife was a prodigious donor to the Democratic Party, and political opponents complained that the pardon reeked of influence trading and favoritism.

2017 – WikiLeaks. In 2017, President Barack Obama commuted all but four months of the remaining prison term of Chelsea Manning, a former U.S. Army intelligence analyst who had been convicted of leaking military information to WikiLeaks.

2020 - In-laws. President Donald Trump pardoned Charles Kushner, the father of Trump's son-in-law Jared Kushner, in 2020 for convictions of tax fraud, witness tampering and making false statements to the Federal Election Commission. Mr. Kushner has been designated to be the ambassador to France in the next Trump Administration.

2024 - Family members and others. In 2024, President Biden issued a full pardon retroactive for 10 years to his son, Hunter. He has also issued pardons 1500 pardons to a wide variety of criminal offenders and commutations to 37 federal prisoners on death row.

2024 - Governor Murphy. On Christmas Eve, Governor Murphy exercised his pardon & commutation authority for the first time by granting 33 pardons and 3 commutations to New Jersey offenders.

<https://www.nj.gov/governor/news/news/562024/approved/20241216b.shtml>

G) Pardon Application Process in New Jersey – Clemency Advisory Board

June 19, 2024, by Executive Order 362, the governor created the Clemency Advisory Board and tasked it with the responsibility for reviewing petitions for clemency. The criteria for Board consideration are as follows:

- i) The application does not seek executive clemency for a crime enumerated in the No Early Release Act, N.J.S.A. 2C:43-7.2(d);
- ii) The application seeks executive clemency for a conviction for a crime or offense which is no longer unlawful;
- iii) No objection has been received from the Prosecutor for any county in which the applicant has received a conviction for which the applicant is seeking executive clemency; or
- iv) The Conviction Review Unit within the Office of the Attorney General has referred the application for expedited consideration.

Expedited Consideration

The Board shall expedite its consideration of clemency applications from individuals who are presently serving a term of incarceration, probation, or parole supervision, or who are in a court-based diversionary program, and consider the individual merits of such applications before others that do not qualify for expedited consideration under Paragraph 8 or 9, if the application satisfies at least one of the following requirements and none of the exceptions in Paragraph 10 applies.

- a) The applicant is a victim of domestic or sexual violence or sex trafficking who was convicted of a crime or offense against the perpetrator of the domestic or sexual violence or sex trafficking, or of a crime or offense committed under the duress or coercion of such perpetrator;
- b) The application establishes that the applicant's sentence reflects an excessive trial penalty, based on a comparison of the sentence and a documented pre-trial plea offer;
- c) The application seeks executive clemency for a conviction for an offense that is no longer unlawful;
- d) The application seeks executive clemency for a conviction that would have resulted in a less severe sentence under current law or policy; or
- e) The Conviction Review Unit within the Office of the Attorney General has referred the application for expedited consideration.

The Board shall not expedite its consideration of an application for executive clemency if the applicant is requesting executive clemency for a crime involving public corruption; if the applicant has pending charges that have not yet resulted in a sentence; or if the applicant has been convicted in another jurisdiction since the offense(s) for which they are seeking executive clemency and a clemency application relating to such conviction would not receive expedited consideration under the terms of this Order if the conduct at issue had resulted in a conviction under New Jersey law.

To make an application on behalf of a client, log on to this site:
<https://www.nj.gov/clemency>