Has the Time Come for Relief for Federal Convictions?

GABRIEL J. CHIN

Edward L. Barrett Jr. Chair and Martin Luther King Jr. Professor, University of California, Davis School of Law*

DAVID SCHLUSSEL

Deputy Director, Collateral Consequences Resource Center

The collateral consequences of a federal conviction have thrust many Americans into what some have termed an "internal exile."[1] Barriers that prevent full reintegration into society are liberally distributed in federal and state laws and regulations. Congress has recently been weighing a new form of relief—a Certificate of Rehabilitation—intended to address the absence of any general federal restoration-of-rights regime, leaving aside the once robust, now rare and erratic presidential pardon power.[2]

Under the proposed RE-ENTER Act of 2019 (S. 2931)—introduced in the 116th Congress by Senator John Cornyn and cosponsored by a bipartisan group of fifteen Senators—the certificates would be issued by a judge to alleviate the burdens of a criminal record. The concept was pioneered by New York more than half a century ago and is currently authorized in thirteen states.[3] It has been recommended by the major national law reform organizations.[4] While the Senate did not take up the RE-ENTER Act in the previous Congress, an endorsement by the Business Roundtable may have given it new momentum.[5]

Now more than ever, there is a pressing need for judicial relief to supplement the federal pardon power: President Donald Trump's neglect of the Justice Department advisory process produced a 3,000-case backlog of post-sentence pardon applications.[6] If the RE-ENTER Act is reintroduced and passed in the current Congress, that would be welcome news for tens of thousands of Americans.

There are several things to like about the bill. The certificate has credibility, because it will be issued by a U.S. district court after notice, with investigation by the Office of Probation and Pretrial Services, and the opportunity for input from the Department of Justice and from victims. The court has wide discretion to consider a range of factors, but the chief probation officer's recommendation creates a rebuttable presumption in favor of issuance. The federal defender or appointed counsel may assist applicants in their petitions. Individuals are entitled to notice of the availability of certificates, and they may apply at sentencing if not sentenced to imprisonment, or after one year of post-release supervision.

This opportunity could particularly benefit people who demonstrate rehabilitation following conviction for a more serious offense. Such individuals are often excluded entirely from proposed federal relief measures such as the bipartisan Clean Slate Act of 2019 (H.R. 2348) (116th Congress), which sets out a path for automatic sealing of federal non-conviction records and certain federal drug convictions, and from petition-based sealing of certain other nonviolent federal convictions.

The downside of the legislation is that it gives certificates limited and uncertain legal effect. The operational part of the bill grants certificate holders limited relief from a handful of specific federal collateral consequences: a presumption against termination of federal housing benefits based on conviction; the right to be considered by federal judges as suitable for seating as grand or petit jurors; the right to have the certificate considered in connection with enlistment in the armed forces; a relaxation of required loss or suspension of federal benefits under 21 U.S.C. § 862 as part of a drug sentence; and the right to have the certificate "factor in favor of a clemency application" when the attorney general is considering a recommendation to the president. But there are many other federal collateral consequences that are not listed.

Another part of the bill appears to contemplate much more dramatic effects of the certificate. In grand, formal language, the bill explains that it is the "sense of Congress" that "a Federal certificate of rehabilitation shall act as an expungement of any prior conviction of an eligible offender for the purposes of any employment, licensing, education, housing, or other determination"; and that a certificate should constitute "evidence of due care" in employment, housing, and a variety of other contexts. It is unclear exactly what "expungement" means in this context, since a certificate would not limit access to the record. Read broadly, this language may be intended to bar consideration of a certificate holder's prior convictions in most public and private contexts. However, the Supreme Court has held that "sense of the Congress" statements are not binding law, even if included in a bill passed by both houses and signed by the president.[7] The ambition of S. 2931, therefore, is much greater than its actual mandate. Given the power of Congress over at least federal activities, federally funded programs, and the Federal Rules of Evidence, as well as under the Commerce Clause, it is not clear why the effects in the "sense of Congress" section were not made enforceable by law.

We hope that Congress will clarify, expand, and reintroduce the bill, looking perhaps for models to the certificates issued in New York and Ohio, both of which relieve mandatory consequences and create a rebuttable presumption against adverse treatment by discretionary decision-makers.[8] Another approach is offered by model laws

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from the American Law Institute, the Uniform Law Commission, and the American Bar Association, which authorize relief at sentencing to remove specific economic barriers to reentry, with more comprehensive relief available to signify rehabilitation after a waiting period.[9]

The limits of this bill also reflect one of the unresolved problems in restoration law generally, which is the failure of most U.S. jurisdictions to deal with inter-jurisdictional issues.[10] Even a pardon issued by one state is not always given effect by another. Here, the bill does not address whether states will give effect to a federal court's certificate. A revised RE-ENTER Act could take a major step toward addressing the inter-jurisdictional problem through making a reciprocal commitment to not impose federal consequences against anyone who has received relief from a state that agrees to give effect to a federal certificate. As between the states, the effect of state relief outside its borders could be dealt with through an interstate compact, like the one that already governs access to criminal records, with some national standards.

But if the choice is "take it or leave it" as S. 2931 now stands, we will take it. People with certificates would submit them to potential employers, landlords, and licensing agencies, many of whom will correctly conclude they mean something. Studies in Ohio found that individuals who had been issued certificates were more likely than those without to get an invitation to interview from an employer.[11] There have been similar findings for housing rental applications, and at rates not far removed from rates for those without a criminal record.[12] The presiding judge of the Cook County Criminal Court in Illinois called his state's certificates "a tool for redeeming people," and a legal aid lawyer in North Carolina noted that a court's certification "makes what has happened since the crime a fully official part of that person's record, for all employers to see."[13]

At the end of the day, part of a loaf is better than none, and the RE-ENTER Act would be an encouraging start to authorizing relief for federal convictions.

Notes

* An earlier version of this piece was published by *The Crime Report*.

1 American Bar Association & Public Defenders Service, Internal Exile (2009), http://www.americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf.

2 *See* Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. Crim. L. & Criminology 1169, 1178–93 (2010).

3 *See* Margaret Love & David Schlussel, Collateral Consequences Res. Ctr., The Many Roads to Reintegration: A 50-State Report on Laws Restoring Rights and Opportunities After Arrest or Conviction 53–61 (Sept. 2020), https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf; 2021 Ariz. Legis. Serv. Ch. 159 (HB 2067).

4 *See* Model Penal Code: Sentencing, Final Draft, §§ 7.01 through 7.06 (April 2017), *available at* http://ccresourcecenter.org/wp-content/uploads/2015/10/article-6x.pdf; Uniform Collateral Consequences of Conviction Act, §§ 10 and 11 (2010), http://www.uniformlaws.org/Act.aspx?title=Collateral%20Consequences%20of%20Conviction%20Act; ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standard 19–2.5 ("Waiver, Modification, Relief") (3d ed. 2004).

5 *See* Business Roundtable, *Advancing Racial Equity and Justice: Justice System*, https://www.businessroundtable.org/equity (last accessed May 12, 2021).

6 U.S. Dep't of Justice, Office of the Pardon Attorney, Clemency Statistics, https://www.justice.gov/pardon/clemency-statistics (last accessed May 12, 2021).

7 United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001).

8 *See* N.Y. Correct. Law §§ 701–703, 703-a, 703-b; Ohio Rev. Code Ann. § 2953.25.

9 *See* sources cited *supra* note 4.

10 *See* Wayne A. Logan, *"When Mercy Seasons Justice": Interstate Recognition of Ex-Offender Rights*, 49 U.C. Davis L. Rev. 1 (2015)

11 Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, Yale L. & Pol'y Rev. Inter Alia, Vol. 35 (2016).

12 Peter Leasure & Tara Martin, *Criminal Records and Housing: An Experimental Study*, 13 J. Experimental Criminology 527 (2017).

13 Eli Hager, The Marshall Project, Forgiving v. Forgetting (Mar. 17, 2015), https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting.

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