

**CLEMENCY FOR MARIJUANA OFFENDERS SERVING
FEDERAL PRISON SENTENCES**

PREFACE

Today, there is a broad bipartisan consensus against incarceration for marijuana offenses. Some states have led the way in revisiting marijuana convictions and sentences.¹ Here, we propose the application of the President’s clemency power² to address a small fraction of the American prison population: those serving federal sentences for marijuana offenses.³

Clemency for federal marijuana convictions helps resolve longstanding issues of fairness and justice. The crushing weight of marijuana prohibition and imprisonment has been borne by the poor, the powerless, and people of color, generating intolerable levels of mistrust and dysfunction between minority communities and those sworn to protect them. Although those eligible for clemency under our proposal are relatively few in number, the correction of lingering injustices is always important—as is the powerful message commutation will send in response to historic and continuing racial disparities in marijuana enforcement.⁴

Our proposal foresees a process involving efficient information-gathering and the application of practical yet justifiable criteria, all with the goal of ending unjust sentences still being served. The proposal envisions two pools of clemency recipients: the first group would be released expeditiously, while the second group would receive more individualized consideration. Selection and evaluation would be conducted by a special and temporary multi-person board—led by a U.S. Department of Justice (DOJ) designee and including an additional representative of the executive branch—to identify cases in the first group and evaluate more deeply the cases in the second group before making recommendations directly to the President. This program could be established by executive order.⁵

I. EXPEDITED QUALIFICATION FOR CLEMENCY

Pursuant to our proposal, individuals serving a federal sentence for a marijuana offense would qualify for clemency on an expedited basis under the following circumstances:

- (1)** The applicant is serving a federal prison sentence for a marijuana-only offense⁶ for which:
 - (a) (i)** the applicant was in substantial compliance⁷ with the relevant state’s marijuana laws at the time of conviction, or
 - (ii)** the applicant likely would not be prosecuted today because the state in which the offense occurred has legalized marijuana and the applicant’s conduct would have been in substantial compliance with that law; and
- (b) (i)** the applicant’s conduct would have been substantially covered by a (pre-2018) DOJ policy concerning non-prosecution of marijuana offenses,⁸ or

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(ii) current federal law (statutes, sentencing guidelines, DOJ policies, etc.) would require or recommend a sentence less than that already served by the applicant.

(2) The applicant does not pose a public safety risk.

We envision an applicant meeting both criteria, (1) and (2), to be eligible for expedited qualification for clemency.

For the first criterion, prong (a) is consistent with Congress's annual spending rider that places fiscal restraints on the prosecution of medical marijuana cases.⁹ Prong (a) also covers cases of non-medical marijuana and incorporates post-conviction legal developments, all premised on the rider's basic logic: no one should face a federal marijuana prosecution if they would not have been prosecuted by their home state, either when the relevant conduct occurred or under current state law. This approach is also in keeping with the "Cole Memo" and its coverage of both medical and non-medical marijuana.¹⁰ The Cole Memo's principal impact is on prong (b)(i), which incorporates this previous DOJ policy's list of priorities for federal prosecution of marijuana offenses. If applicants do not meet prong (b)(i), they might still be eligible under prong (b)(ii) and its comparison of an applicant's time served to his or her likely sentence today.

The second criterion is intended to serve as a screening device for potential threats to public safety, recognizing the ultimate crimes of conviction may not accurately portray the risks involved in release from prison. For qualification under the expedited process, we would recommend using the BOP's established metrics¹¹ and/or other reliable and valid risk assessment tools.¹²

II. QUALIFICATION FOR CLEMENCY ACCORDING TO MULTI-FACTOR TEST

If the applicant does not satisfy the requirements for expedited qualification, he or she might nonetheless qualify for clemency if the "totality of circumstances"¹³ warrants it in his or her individual case. The following factors (and perhaps others) could inform the inquiry:

1. the applicant is serving time for a marijuana-only offense;
2. the applicant was not a significant participant in any drug cartel or violent drug trafficking organization;
3. neither the applicant's background, criminal record, nor his or her conduct in prison indicates a risk of future violence; and
4. the applicant's incarceration record shows positive achievement and does not include any serious disciplinary infractions.

FACTOR 1: MARIJUANA-ONLY OFFENSE

A federal marijuana offense should anchor the incarcerated person's sentence. Our proposed clemency grant would not cover homicide or assault, for instance, just because marijuana was

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somehow implicated. Nor would it cover federal offenses involving other illicit drugs (e.g., cocaine, heroin, etc.). Conversely, an applicant shouldn't be mechanically disqualified from clemency consideration because of ancillary crimes¹⁴ that may accompany marijuana offenses, such as money laundering and simple possession of a legal firearm.¹⁵ Oftentimes these charges either do not violate the law standing alone or would not have triggered an arrest or indictment independent of a federal marijuana offense.

FACTOR 2: APPLICANT WAS NOT A SIGNIFICANT PARTICIPANT IN A VIOLENT DRUG TRAFFICKING ORGANIZATION OR A DRUG CARTEL

Depending on the definition, significant involvement in an actual “drug cartel” or “drug trafficking organization” (DTO)¹⁶ might disqualify an applicant from clemency consideration. But mere drug mules, for instance, and low-level lookouts and drivers shouldn't be precluded absolutely from clemency consideration merely because they had a connection to a DTO or drug cartel.

Moreover, participation in such organizations should not be implied by an applicant's conviction for conspiracy or engaging in a “continuing criminal enterprise” (CCE).¹⁷ U.S. Attorneys' offices can charge drug offenders with conspiracy and/or with participating in a CCE regardless of any connection to a DTO or drug cartel. Similar concerns apply to the amount of drugs alleged by the government, where the weight of marijuana attributed to a defendant may be inflated under conspiracy law and doctrines such as accomplice liability.

Likewise, a marijuana offender's pre-sentencing report (PSR) may ascribe to him or her a “gang affiliation” even when any connection was tenuous at best. A PSR may even implicate a marijuana offender in a “cartel” or “trafficking organization” when he or she simply purchased marijuana from an accomplice, who, in turn, may or may not have had a direct connection with an actual DTO or drug cartel. For such reasons, neither low-level marijuana traffickers in DTOs and drug cartels, nor those convicted of a marijuana-based conspiracy or CCE charge, should be barred absolutely from clemency consideration.

FACTOR 3: NO HISTORY OF VIOLENT CRIMINAL CONDUCT

If the applicant's record shows no history of violence,¹⁸ he or she meets this criterion. Prior marijuana convictions or non-violent transgressions should not automatically disqualify an applicant.

FACTOR 4: APPLICANT HAS MAINTAINED GOOD CONDUCT IN PRISON

Good conduct in prison has at least two components: (1) absence of citations for violence or criminal activity, and (2) a record of positive behavior (e.g., class completion, rehabilitation, work history, and other achievements). The applicant's BOP report will document much of this history. For instance, serious disciplinary infractions might be defined as “Greatest Severity Level Offenses” and “High Severity Level Offenses” in the BOP's [Inmate Discipline Program](#)—although allegations of criminal conduct in prison that do not result in convictions should be given little if any weight without independent verification. Other sources can supplement an

applicant's history, including letters of support from supervisors, wardens, correctional officers (COs), and so on. To account for an applicant's adjustment to incarceration, the presence of disciplinary citations early in his or her sentence should not disqualify him/her from satisfying this factor.

III. ESTABLISHMENT OF A TEMPORARY BOARD OF REVIEW

A temporary, multi-member "Board of Review" should be established by executive order to expedite this program while also retaining the involvement of key stakeholders, including the Department of Justice. A five-member board could be chaired by a nominee of the U.S. Attorney General, who might also select a second member. A third member could be chosen by the Federal Defender Organizations. A fourth member could represent formerly incarcerated people, while a fifth member could be chosen by the President to bring other forms of expertise or experience.

The Board's central duties would be twofold: (1) to define those in the first group described above (i.e., applicants eligible for expedited qualification), and (2) to investigate more deeply those in the second group before making recommendations to the President.

Potentially, this could be accomplished without requiring a formal application, given that the relevant cases are easily identified and not overwhelming in number. Moreover, key documents—such as the PSR and BOP Progress Report—could be made directly available to the Board of Review.

IV. FULL PARDON AND EXPUNGEMENT

The foregoing represents a crucial first step. In addition to commuting the marijuana-based sentences of those incarcerated in federal prison, the President should grant a full pardon to all individuals convicted of federal marijuana-only offenses who have no history of violence or serious crimes.¹⁹ The pains of federal marijuana convictions transcend prison walls, limiting an individual's constitutional rights and making it more difficult to get a job, access affordable housing, and receive an education.²⁰ Ultimately, a full presidential pardon, as well as expungement, will be needed to restore fully the civil rights of those convicted of federal marijuana offenses.²¹

The aforementioned Board of Review might be the appropriate body to consider applicants for a full pardon and to make recommendations to the President, employing criteria for eligibility somewhat similar to those used for sentence commutation. Pardon recipients would thereby have their federal (and state) civil rights restored, including the right to vote and to serve on juries.²² Full presidential pardons for federal marijuana offenses pose a low risk to public safety given that the potential recipients have been vetted previously through the sentence commutation process or they are already living peacefully among their neighbors.

Apparently, however, a full pardon does not eliminate the underlying conviction as a criminal record maintained by the courts.²³ Indeed, pardon recipients may be rejected for employment opportunities and denied certain government benefits or licensures because a pardoned

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conviction may still be considered in assessing an individual's character and fitness.²⁴ Congress can resolve this issue by enacting a law allowing for the expungement of federal marijuana convictions,²⁵ thereby permitting the President to keep his promise that these records will be "completely zeroed out."²⁶

NOTES AND REFERENCES

Note 1. In [Illinois](#), for instance, Governor Pritzker pardoned over 11,000 people convicted of marijuana offenses, with hundreds of thousands more people eligible for expungements and clemency after marijuana was legalized in that state. [New York](#) went a step further by enacting a law that automatically expunged almost all state marijuana convictions. To be clear, the implementation of such initiatives has not always gone according to [plan](#), offering a reminder of the need for a thoughtful approach at the federal level.

Note 2. Article II of the U.S. Constitution provides in relevant part: “The President ... shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.” U.S. CONST. art. II, § 2, cl. 1. The President’s pardon power includes at least 5 types of clemency: (1) pardon; (2) amnesty; (3) commutation; (4) remission of fines and forfeitures; and (5) reprieve. A recent report by the Congressional Research Service described the first three forms of clemency as follows:

A full pardon is the most expansive form of clemency; it “releases the wrongdoer from punishment and restores the offender’s civil rights without qualification.” A pardon may be granted at any time prior to charge, prior to conviction, or following conviction ...

Amnesty is essentially identical to a pardon in practical effect, with the principal distinction between the two being that amnesty typically “is extended to whole classes or communities, instead of individuals[.]” As an example, President Jimmy Carter granted amnesty to many who violated the Selective Service Act by evading the draft during the Vietnam War.

In contrast to pardons and amnesty, which obviate criminal punishments in their entirety, commutation merely substitutes the punishment imposed by a federal court for a less severe punishment, such as by reducing a sentence of imprisonment. ...

[F]orms of clemency such as pardons and commutations may be unconditional or may carry specific conditions that must be met for the relief to be effective.

CONG. RESEARCH SERV., R46179, PRESIDENTIAL PARDONS: OVERVIEW AND SELECTED ISSUES 4-6 (2020) [\[link\]](#). This document supports the commutation of federal sentences currently being served for marijuana-only offenses. More generally, we support a full presidential pardon to restore the civil rights of those convicted of marijuana-only offenses who have lived peacefully in their communities. The combination of commutation and full pardon will have the effect of an amnesty—judiciously implemented and mindful of public safety concerns—for federal marijuana offenses. Individuals who receive a full pardon might also be eligible for expungement of their criminal records, though this will require an act of Congress. *See* Section IV, *infra*.

Note 3. According to the most recent data, there were about 2,700 individuals serving time for federal marijuana offenses. *See* U.S. SENTENCING COMM’N, QUICK FACTS: FEDERAL OFFENDERS IN PRISON (Mar. 2021) [\[link\]](#) (listing 65,370 people incarcerated federally for drug crimes, 4.1% of whom were incarcerated for marijuana); *see also* U.S. SENTENCING COMM’N, QUICK FACTS: MARIJUANA TRAFFICKING OFFENSES (June 2021) [\[link\]](#). *See generally* FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, INMATE STATISTICS: OFFENSES (2021) [\[link\]](#). Of this pool of 2,700 people, only a subset will be eligible for clemency under the criteria proposed here. Some incarcerated persons would be ineligible for release from prison, because they’re also serving time for a non-marijuana offense. Others might be ineligible because their marijuana-related offenses involved acts or threats of violence.

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Note 4. *See, e.g.*, ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM (2020) [\[link\]](#) (report on racial disparities in arrests for marijuana possession); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 149-70 (2019) (documenting widespread racial disparities and discrimination throughout the misdemeanor system, exemplified and driven heavily by marijuana enforcement). In 2020, as in previous years, the overwhelming majority of those incarcerated for federal drug offenses were Black and Hispanic. This is perhaps unsurprising as a matter of history, given that racial prejudice and fear helped spark the drug war, including marijuana prohibition. *See, e.g.*, Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1011-19, 1021-22, 1035-37, 1055 (1970) [\[link\]](#); *see also* DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 219-23 (3d ed. 1999).

Note 5. A general pardon of all federal marijuana offenders would be consistent with the Constitution and past practices. Indeed, Presidents from both political parties have issued categorical grants of clemency when circumstances warranted it. In 1974, President Ford established a program of conditional clemency for Selective Service Act violators. *See* Proclamation No. 4313: Program for the Return of Vietnam Era Draft Evaders and Military Deserters, 39 Fed. Reg. 33,293 (Sept. 16, 1974) [\[link\]](#); Exec. Order No. 11803, 39 Fed. Reg. 33,297 (Sept. 16, 1974) [\[link\]](#); Exec. Order No. 11804, 39 Fed. Reg. 33,299 (Sept. 16, 1974) [\[link\]](#). In 1977, President Carter issued a categorical pardon to all Selective Service Act violators. *See* Proclamation No. 4483: Granting Pardon for Violations of the Selective Service Act, 42 Fed. Reg. 4391 (Jan. 21, 1977) [\[link\]](#); Exec. Order No. 11967, 42 Fed. Reg. 4393 (Jan. 24, 1977) [\[link\]](#). These acts of clemency by Presidents Carter and Ford can serve as models for marijuana clemency.

Note 6. For a definition of “marijuana-only offense,” see Section II. Factor 1, *infra*.

Note 7. We do not believe that less-than-strict compliance with state marijuana laws should bar an applicant from expedited qualification. For instance, a recent federal appellate court rejected a requirement that a defendant strictly comply with state medical marijuana laws to trigger Congress’s fiscal limits on federal prosecution:

Strict compliance ... does have the benefit of identifying a bright line body of statutes, rules, and decisions that determine whether conduct violates state medical marijuana law and thus becomes subject to federal prosecution. But those rules were not drafted to mark the line between lawful activity and cause for imprisonment. Rather, as with most every regulated market, [the relevant state’s approach to marijuana] declined to mandate severe punishments ... on participants in the market for each and every infraction, no matter how small or unwitting. To turn each and every infraction into a basis for federal criminal prosecution would upend that decision[.]

United States v. Bilodeau, 24 F.4th 705, 714 (1st Cir. 2022). *See infra* note 9 (discussing annual spending rider). We believe it’s sufficient to have substantial compliance with state laws—as well as substantial consistency with federal law enforcement priorities (as described in the Cole Memo, *see infra* note 8)—with the details to be worked out in subsequent discussions.

Note 8. *See* Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Attorneys, Guidance Regarding Marijuana Enforcement 2 (Aug. 29, 2013) [\[link\]](#). In effect from 2013-2018, this memorandum (“the Cole Memo”) updated U.S. Attorneys on federal enforcement policy in light of state marijuana laws,

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laying out a framework under which federal prosecutors would defer to state decision-making in this area except when necessary to serve eight priorities:

- (1) Preventing the distribution of marijuana to minors;
- (2) Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- (3) Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- (4) Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- (5) Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- (6) Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- (7) Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- (8) Preventing marijuana possession or use on federal property.

In his 2021 confirmation hearing, U.S. Attorney General Merrick Garland invoked the Cole Memo's sentiment: "I do not think it the best use of the Department's limited resources to pursue prosecutions of those who are complying with the laws in states that have legalized and are effectively regulating marijuana." Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General 22-23 (Feb. 28, 2021) [[link](#)]. As with the Rohrabacher-Farr Amendment, the Cole Memo's priorities (except perhaps #8) could be accommodated in a clemency grant.

Note 9. Save for periodic government shutdowns, the provision has been included in annual appropriations spending bills, and signed into law, since December of 2014, when it was known as the Rohrabacher-Farr Amendment. The rider prohibits the DOJ from using funds to prosecute marijuana activity authorized by a state's medical marijuana regime. *See, e.g., United States v. Trevino*, 7 F.4th 414, 419-20 (6th Cir. 2021) (quoting provision and noting its reenactment); *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016) (analyzing and applying provision). The language has been included in the base text of the Commerce, Justice, Science, and Related Agencies Appropriations Act since 2017. The most recent version, led by Dave Joyce (R-OH) and Earl Blumenauer (D-OR), states:

None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Before 2014, however, the DOJ would prosecute federal marijuana offenses notwithstanding the defendant's compliance with state medical marijuana laws. Clemency should rectify this temporal discrepancy by applying the Amendment's basic principle retroactively. Luke Scarmazzo's case offers an example of eligibility under this criterion. From 2004-2006, Mr. Scarmazzo owned and operated a medical marijuana dispensary in Modesto, California, pursuant to California's Compassionate Use Act of

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1996. Although other medical marijuana dispensaries operated throughout California at the time, Mr. Scarmazzo was prosecuted in federal court, and in 2008, he was sentenced to over 20 years in prison. He remains in federal prison to this day. During a White House briefing, however, Press Secretary Jen Psaki responded to a question on Mr. Scarmazzo's case by reiterating President Biden's position in support of medical marijuana. *See Press Briefing by Press Secretary Jen Psaki*, WHITEHOUSE.GOV (Apr. 20, 2021) [[link](#)].

Note 10. *See supra* footnote 7 (describing Cole Memo).

Note 11. *See, e.g.*, Section II. Factor 4, *infra*.

Note 12. Admittedly, the tools may need to be tailored or weighted based on their relevance to the unique context of clemency. *See, e.g.*, John Monahan, *Risk Assessment in Sentencing*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 77 (Erik Luna ed., 2017) [[link](#)]; Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 21 (Erik Luna ed., 2017) [[link](#)] (discussing risk assessment in bail).

Note 13. Although another test may be preferable here, the “totality of the circumstances” standard is well known in criminal law and procedure, including in federal sentencing. *See, e.g.*, *Gall v. United States*, 552 U.S. 38, 51 (2007) (substantive reasonableness of federal sentences evaluated under totality of the circumstances).

Note 14. *Cf.* DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008) (defining and analyzing ancillary crimes and other forms of overcriminalization).

Note 15. Without knowing more about the circumstances of an offense, otherwise lawful possession of a firearm should not automatically disqualify an applicant from clemency consideration. Under federal criminal law, objects like firearms and drugs may be possessed *constructively* (without actual physical possession) and even *jointly* (possessed with another person). *See, e.g.*, *United States v. Maldonado*, 23 F.3d 4 (1st Cir. 1994). Moreover, a firearm need not be brandished or used (at least in a meaningful sense) in order to trigger harsh federal sentences. *See, e.g.*, *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004) (analyzing and critiquing 18 U.S.C. § 924(c) and its application).

Note 16. According to a Justice Department definition, a “drug trafficking organization” (DTO) is a “complex organization with a highly defined command-and-control structure that produces, transports, and/or distributes large quantities of one or more illicit drugs.” U.S. Department of Justice, “Drug Trafficking Organizations,” National Drug Threat Assessment (Feb. 2010) [[link](#)]. In turn, “drug cartels” are “large, highly sophisticated organizations composed of multiple DTOs and cells with specific assignments such as drug transportation, security/enforcement, or money laundering,” where the cartels operate through “command-and-control structures . . . based outside the United States” to “produce, transport, and distribute illicit drugs domestically with the assistance of DTOs.” *Id.*

Note 17. *See* 18 U.S.C § 371 (conspiracy); 21 U.S.C § 848 (CCE). The latter statute enables the federal government to sentence drug offenders to a mandatory minimum of 20 years' imprisonment if it can show ties between the offender and four other people, however attenuated their relationship. As long as the case met the requisite amount of drugs or drug proceeds, the statute applies equally to kingpins and to low-level marijuana offenders, who could be convicted for acting in concert with other low-level

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marijuana offenders. For such reasons, a conviction under this statute alone shouldn't necessarily disqualify an applicant from clemency consideration.

Note 18. The meaning of “serious” and/or “violent” is subject to discussion, recognizing the problems with some definitions of such terms. *See, e.g.*, CONG. RESEARCH SERV., R45220, THE FEDERAL “CRIME OF VIOLENCE” DEFINITION: OVERVIEW AND JUDICIAL DEVELOPMENTS (2018) [\[link\]](#).

Note 19. The inquiry here may be similar to that discussed in Section II. Factor 3, *supra*.

Note 20. *See, e.g.*, RICHARD GLEN BOIRE, CTR. FOR COGNITIVE LIBERTY & ETHICS, LIFE SENTENCES: COLLATERAL SANCTIONS ASSOCIATED WITH MARIJUANA OFFENSES (2007) [\[link\]](#) (describing myriad collateral consequences of marijuana convictions); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002) (describing collateral consequences of drug convictions and their disparate impact on people of color). *See generally* Gabriel J. Chin, *Collateral Consequences*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 371 (Erik Luna ed., 2017).

Note 21. The proposed sentence commutation will “not change the fact of conviction ... or remove civil disabilities that apply to the convicted person as a result of the criminal conviction.” *Frequently Asked Questions: What is the difference between a commutation of sentence and a pardon?*, U.S. DEP'T OF JUSTICE, OFF. OF THE PARDON ATT'Y (last updated Dec. 7, 2021) [\[link\]](#).

Note 22. *See, e.g.*, *Bjerkan v. United States*, 529 F.2d 125, 128-29 (7th Cir. 1975); *see also* Effects of a Presidential Pardon, 19 Op. O.L.C. 160, 166-68 (1995) [\[link\]](#); *Frequently Asked Questions: Is a presidential pardon the only way a person convicted of a federal felony offense may regain his right to bear arms?*, U.S. DEP'T OF JUSTICE, OFF. OF THE PARDON ATT'Y (last updated Dec. 7, 2021) [\[link\]](#). Because “there appears to be no general federal statutory process whereby civil rights lost as a result of a federal conviction may be restored,” “a presidential pardon is essentially the only method for restoring rights under federal law.” CONG. RESEARCH SERV., R44571, THE PRESIDENT'S PARDON POWER AND LEGAL EFFECTS ON COLLATERAL CONSEQUENCES 10-11 (2016) [\[link\]](#).

Note 23. In the words of one federal court, “[t]he power to pardon is an executive prerogative of mercy, not of judicial record-keeping.” *United States v. Noonan*, 906 F.2d 952, 955 (3d Cir. 1990). While “the fact of conviction after a pardon cannot be taken into account in subsequent proceedings,” “the fact of the commission of the crime may be considered” such that “the effects of the commission of the offense linger after a pardon.” *Id.* at 958 (quoting *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975)).

Note 24. *See, e.g.*, PRESIDENT'S PARDON POWER, *supra* note 21, at 12:

[A] pardon recipient may still encounter hurdles when character is a factor of eligibility because a pardon does not eliminate underlying guilt or the commission of the offense itself. The reason it is possible for a third party to know of and consider a pardon recipient's conviction is that, according to the Office of the Pardon Attorney, a presidential pardon “does not erase or expunge the records of a conviction.” Rather, the Office of the Pardon Attorney notifies, among others, the FBI so that the pardoned individual's criminal history record will reflect the grant of a pardon. As such, the conviction for which one is pardoned, along with a notation of the pardon, will continue to be reported when a background check is conducted on the pardoned individual.... In the

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employment context, for example, the recipient of a pardon could face employment challenges in jurisdictions where employers are permitted to inquire into an applicant's criminal history. As a result[,] it is possible that an employer could disqualify a person on the basis of her pardoned offense because the person's commission of the underlying offense may be considered a reflection of the applicant's character and suitability for the position.

Note 25. The expungement of a federal marijuana offense “would preclude the conviction from being reported on a background check and therefore potentially eliminate the barriers that a pardon recipient would face even after receiving a pardon.” *Id.* at 13.

Note 26. *Democratic Debate Transcript*, NBC NEWS (Nov. 20, 2019) [[link](#)]. *See also The Biden Plan for Strengthening America's Commitment to Justice*, JOEBIDEN.COM [[link](#)] (“Biden believes no one should be in jail because of cannabis use. As president, he will decriminalize cannabis use and automatically expunge prior convictions.”); *Joe Biden on Decriminalizing Marijuana*, YOUTUBE (Oct. 27, 2020) [[link](#)].