The original documents are located in Box 8, folder "Pardons for Those with Undesirable Discharges" of the Charles E. Goodell Papers at the Gerald R. Ford Presidential Library.

PRESIDENTIAL CLEMENCY BOARD
THE WHITE HOUSE
WASHINGTON, D.C. 20500
May 7, 1975

MEMORANDUM FOR:

FROM: LAWRENCE M. BASKIR
GENERAL COUNSEL

SUBJECT: Granting of Pardons to Applicants to the Presidential Clemency Board Having Undesirable Discharges

Introduction

In the last few months, the Pardon Attorney, Jay French, representatives of the DoD, and I have held informal conversations from time to time on the question of the President's granting pardons to former servicemen with Undesirable Discharges who apply to the Presidential Clemency Board. On April 30, the Pardon Attorney, Mr. Traylor, addressed a memorandum to me on this question expressing formally his opposition to this policy (attached as Appendix A). The Board has just received a similar statement from the DoD and their views are attached as Appendix B. This memorandum does not discuss the questions raised as to the form of the warrants.

The legal staff of the Board is in agreement with Mr. Traylor that there is no question of the President's constitutional power to grant pardons in these cases. A memorandum, attached as Appendix C, discusses this point at greater length.

The Board is unanimously of the opinion that it is vital to the success of the President's program and fundamental to carrying out his intent that pardons be the appropriate expression of clemency in these cases. To do otherwise would preclude most applicants to the Board from receiving the only significant remedy likely to be offered by the President. It would be seen as a repudiation of the commonly understood intent and commitment of the President. It would also cause serious discord among the Board members, both new and old, and force a drastic reassessment of Board policy and treatment of these cases.

Background

Of the approximately 120,000 persons potentially eligible for the Board, the DoD and we estimate that about 80% were administratively discharged for absence offenses and received Undesirable Discharges. While the Board does not know precisely the breakdown of its 20,000 applications, we estimate that 70% or better are Undesirable Discharge cases.

Undesirable Discharges are awarded in two different circumstances. When faced with a serviceman with an offense of unauthorized absence, the military service may proceed to court-martial the offender and convict him of the criminal violation. The sentence may include a Bad Conduct Discharge or a Dishonorable Discharge, and imprisonment up to 3 years. The service frequently may, however, permit the person to elect an administrative separation, thereby avoiding the costs of trial and possible incarceration. These are commonly described as "Chapter 10" discharges in lieu of court-martial. In other circumstances, the service may elect to discharge a person for "unfitness" if he has a series of petty infractions, all minor, but evidencing in toto that the individual is a disciplinary problem. In both cases, the result is an Undesirable Discharge, which is a discharge "under other than honorable conditions". It is considered roughly the equivalent of a Bad Conduct Discharge, which is the usual result when an AWOL is tried by court-martial. In both instances, the Undesirable Discharge is given for an absence offense and the violation of military criminal law, although the punishment is administrative rather than judicial. It is important to remember that an Undesirable Discharge carries with it the same federal disabilities respecting veteran's rights as a Bad Conduct Discharge, the same opprobrium or even worse in the eyes of the general public, and in some states is regarded as evidence of a criminal violation for the purposes of state rights and employment. Although the nature of the reason for the Undesirable Discharge varies, all Board applicants, of course, received Undesirable Discharges for absence offenses.

Discussion

Mr. Traylor stresses in his memorandum the general policy of his office to recommend pardons only for persons judicially convicted of a criminal offense. Although the giving of pardons for

Undesirable Discharges would be a change in his usual policy, the very nature of the President's clemency program is unique and extraordinary. President Ford consciously and purposefully broke with past precedent, not only of previous Presidents' clemency proclamations, but quite obviously with the normal practice of the Pardon Attorney. Two more noticeable differences are the fact, first, that the Pardon Attorney's normal 3 year waiting period after service of sentence is not required to apply for a pardon under the clemency program; and second, the fact that the recommendations come from a specially created Presidential Clemency Board, and not from the institutionalized mechanism of the Pardon Attorney. Giving pardons for Undesirable Discharges is another difference, but not in any sense the only one, nor necessarily the most significant.

There are, of course, precedents for the Pardon Attorney's recommending and the President's granting pardons in the absence of a judicially imposed penalty for a criminal offense. To do so under the clemency program by no means involves creating a precedent for changing the Pardon Attorney's practice of refusing to accept applications from other administratively discharged persons applying outside the program. The clemency program is unique, and its precedents and policies are applicable only during its operation. Afterward, the Pardon Attorney and the President are free, legally and morally, to continue past policy or to change it, as they believe appropriate. The clemency program, being sui generis, creates no precedent for the future.

Mr. Traylor also discusses the difference of treatment between applicants to the Board and those receiving clemency from the DoD phase of the program. However, the difference of treatment presents only surface questions of equity, not real ones. There are essential differences between DoD's applicants and the Board's.

First, the DoD applicant is a fugitive from justice. In the absence of the clemency program, he is in jeopardy of a Special Court-Martial for AWOL, a Bad Conduct Discharge, and imprisonment up to 6 months, or a Dishonorable Discharge, and imprisonment at hard labor for 3 years. By participating in the program, the fugitive serviceman automatically and unconditionally is released from this penalty, and receives an Undesirable Discharge without

imprisonment or a federal criminal conviction. This is a highly beneficial result for the applicant. The opportunity to earn a Clemency Discharge in exchange for participating is inconsequential in comparison with this benefit.

It should be understood that the relief from criminal jeopardy is automatic and that once discharged with an Undesirable Discharge, the DoD applicant is under no effective inducement to complete his alternative service obligation and earn the additional Clemency Discharge. The government, whether through the DoD or the Justice Department, has no realistic means of enforcing the obligation to perform alternative service. Mr. Hoffmann can elaborate on this point.*

By contrast, Presidential Clemency Board applicants have already received all the punishment legally permitted for their offense. Having received their Undesirable Discharges, they are under no additional or continuing jeopardy for their past absence offense. They apply to the Board for a change in their legal and symbolic status.

In return for the performance of alternative service, the Board has assumed that the President offers a pardon, as well as a Clemency Discharge. The Clemency Discharge is of no value whatever. Despite the clear words and apparent intent of the Proclamation that the Clemency Discharge be a neutral discharge with no connotation, the DoD has officially characterized it as "under other than honorable conditions", the same and the equivalent of an Undesirable Discharge. This interpretation has been made public, it is followed by other Departments, and is so understood by the general public, most applicants, and all Presidential Clemency Board members. This re-designation destroys any advantage the President intended for the Clemency Discharge, as compared with the Undesirable Discharge. It is also the belief of many Board members and much of the public that, again contrary to the President's intent, the Clemency Discharge has a worse connotation, because it clearly and unequivocally labels the possessor as a "Vietnam deserter".

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*In short, the DoD loses all jurisdiction once an individual is discharged, and can not prosecute his later failure to perform alternative service under the United States Code of Military Justice. The Department of Justice may theoretically prosecute for fraud, but this involves a question of intent which is extraordinarily difficult to prove. In effect, the DoD program is universal, unconditional, and automatic amnesty, except relative U.D.

Because the Clemency Discharge has no practical value, the Board unanimously decided that a remedy with substantial meaning must be offered to the applicant with an Undesirable Discharge in return for his performance of alternative service. To request and receive a period of public service, at low pay and at a serious disruption in an individual's life, in return only for the remedy of clemency in the form of an empty Clemency Discharge, would be unjust and deceptive.

The Board in its early days debated at length the form and nature of the clemency it was authorized to recommend. Because the Proclamation does not anywhere explicitly state that a pardon was to be offered, the issue was presented to the President. He affirmed the Board's interpretation.

The Board has since proceeded to devise a system whereby it can determine the period of alternative service appropriate in each case as a condition for clemency. It has predicated its work on the understanding that a pardon would be the form of clemency issued in all cases, including Undesirable Discharge cases. If the President is now persuaded that only a Clemency Discharge is appropriate in this kind of case, the Board must revise its procedures for about 70% of the applicants. While the issue has not been discussed by the original members in some time, it is fair to predict that such a decision will cause much consternation and disruption in the Board. In the short time the new members have met, a number of them have also expressed serious reservations about the value of a Clemency Discharge.

Conclusion

The impact of such a decision on the public should not be underestimated. However justifiably, the public is of the impression that clemency from the Presidential Clemency Board means a pardon. To change this for the vast majority of the 20,000 applicants will be regarded as a change in policy - not as an elaboration or clarification. It will be seen as the President's reneging on a promise, they honestly believe he has made, impairing the spirit of reconciliation that moved him to announce the program, and seriously impairing his credibility. There is little question in my mind that a decision not to offer pardons at this date will make a mockery of the President's program, and persuade the general public that it was an unqualified failure.

Attachments:

Appendix A
Appendix B
Appendix C

United States Department of Justice
Office of the Pardon Attorney
Washington, D.C. 20530

April 30, 1975

MEMORANDUM FOR
Lawrence M. Baskir
General Counsel
Presidential Clemency Board

Re: Presidential Pardoning Power as it Relates to Undesirable Discharges

As noted in your memorandum of April 22, 1975 we have no problems with the form and text of your warrants for military pardons, which we recently reviewed. I suggest that the pardon recipients be named in the body of the warrant rather than on an attached sheet.

I would like to take this opportunity to express my concern and opposition to the proposal which I understand you are considering to recommend pardons for those recipients of undesirable discharges who have not been convicted of an offense but who come within the jurisdiction of the Presidential Clemency Board. I am opposed because such use of the pardon power (1) would tend to cheapen or diminish the value and importance of a pardon and (2) would establish a precedent which could reasonably be expected to result in a flood of pardon applications from persons with undesirable discharges who are not with the jurisdiction of the Clemency Board.

I have no quarrel with the conclusion that the President may pardon a person who has received an undesirable discharge for the offense which constituted the basis for the discharge. On the other hand, it is quite clear that the pardon power in general has been limited to cases in which a conviction has been obtained. The rules governing applications for Executive clemency (28 CFR 1.1 - 1.9) contemplate that applications for pardon will not be entertained in the absence of a conviction (See sec. 1.3). These rules, promulgated by the Attorney General with the approval of the President, reflect Presidential policy in this area. Moreover, the two wartime "amnesty" proclamations of President Truman in 1945 and 1952, granting pardons to certain honorably discharged veterans of World War II and the Korean War who had committed Federal offenses prior to their entry into service, pardoned only offenses which had resulted in convictions. It should be noted also that current practice excludes misdemeanor convictions from Presidential consideration in the absence of the showing of a compelling need for pardon.

It seems to me that the rules and practice reflect a Presidential judgment that the use of the pardon power should be strictly limited to cases of felony convictions and should not be used, as indeed it may be, to forgive any offense whatsoever against the United States. The exceptions, it seems to me, tend merely to emphasize the general policy. Over the years since 1900 there have been a number of cases in which the full Presidential pardoning power has been exercised in the absence of conviction and the Nixon pardon is merely the most recent. As to the individual cases falling within this category it, perhaps, would be fair to suggest that the uniqueness of the particular case was the factor most influential in the decision to grant pardon. However, in the veterans forfeiture cases, for which present rules

permit pardon applications in the absence of conviction, the primary factor is that a Presidential pardon will automatically entitle the recipient to benefits to which he otherwise would not be entitled.

I doubt that either of the above factors would be applicable to the undesirably discharged veteran falling within the Clemency Board's jurisdiction. Clearly there is nothing unique about his situation. Furthermore, the Presidential pardon would not automatically entitle him to benefits to which he would not otherwise be entitled. Indeed, the pardon would not even be a necessary first step to enable military authorities to review and upgrade his discharge.

The precedent of awarding pardons to the undesirably discharged veteran would appear to pose a serious practical problem for the President in the administration of his pardon power. First, the unconvicted military absentees who surrendered to military authorities under the terms of the Presidential clemency program have received undesirable discharges. Those who have received such discharges would not be recommended for Presidential pardons since they are not within the jurisdiction of the Clemency Board. However, from an equitable point of view they would seem as deserving of a Presidential pardon as those within the jurisdiction of the Board and considerable pressure could be anticipated to grant them a similar measure of clemency. Since neither the Justice Department nor the Board would have jurisdiction to consider their cases, they could not be considered unless the President should broaden the rules governing petitions for Executive clemency to accomodate them. Moreover, the veterans of other wars with undesirable discharges undoubtedly -- and with good reason -- would feel discriminated against if they did not have similar recourse.

The foregoing considerations lead me to believe that any value to the President in terms of advancing his quest for national reconciliation would be more than offset by the adverse factors and that the clemency program as a whole might be damaged, rather than advanced.

Lawrence M. Traylor

Lawrence M. Traylor
Pardon Attorney

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

MEMORANDUM FOR Mr. Lawrence M. Baskir, General Counsel
to The Presidential Clemency Board

SUBJECT: Conditional Clemency Grant

This is in response to your request of April 8th for our review of your draft of the form to be used in the grant of clemency to those former members of the armed forces whose cases are favorably considered by the Presidential Clemency Board.

With respect to substance, it is noted that the first paragraph of your proposed document refers to the "grant [of] a full pardon and a clemency discharge" to certain former military members. A presidential pardon has no relationship to administrative discharges from military service. Pardons have traditionally been associated with criminal convictions or the prospect of future criminal convictions. Administrative discharges from military service do not result from a court-martial conviction. Therefore, use of the President's unique pardon authority in behalf of former members of the armed forces who were separated administratively with an undesirable discharge would be wholly inappropriate. Further, the inevitable result from a practical standpoint will be to associate administrative discharges with the punitive discharges which emanate from the judgments of courts-martial. This popular confusion will, in turn, provide added impetus in Congress for equating these two fundamentally different methods of discharge, a result that will have significantly adverse consequences for the military Services.

With respect to form, it derogates from the prestige of the Presidency to have the incumbent of that high office "granting" a discharge. Discharges from military service are ministerial acts which are "issued" by administrative process pursuant to regulations prescribed by the Secretaries of the military departments. Accordingly, it would be more appropriate to have the President direct the Secretary concerned to issue a clemency discharge upon satisfaction of any conditions that may be attached. In addition, presidential issuances are normally self-contained in their entirety without

attachments of any kind. Therefore, it is suggested that the names of the persons involved should be incorporated in the document signed by the President. Finally, it hardly seems appropriate to have the President causing the seal of the Department of Justice to be affixed to this document. Agency seals are normally affixed only to documents emanating from the issuing agency. If a seal is desired, the presidential seal would seem to be a better choice.

Martin R. Hoffmann

Martin R. Hoffmann

Senator Goodell:

Per Larry yesterday, you were to dictate a a cover note to Phil Buchen and send him the attached.

Marilyn M.
5/14

PRESIDENTIAL CLEMENCY BOARD
THE WHITE HOUSE
WASHINGTON, D.C. 20500
May 14, 1975

MEMORANDUM FOR: CHARLES E. GOODELL
CHAIRMAN

FROM: LAWRENCE M. BASKIR
GENERAL COUNSEL

SUBJECT: Granting of Pardons to Applicants to the Presidential Clemency Board Having Undesirable Discharges

Introduction

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Discussion

Mr. Traylor contends, first, that issuing pardons in large numbers of administrative discharges would cheapen the value of a pardon. There is, of course, no evidence to support this. The large numbers were implicit in the very creation of the President's program.

Mr. Traylor stresses in his memorandum the general policy of his office to recommend pardons only for persons judicially convicted of a criminal offense. Although the giving of pardons for Undesirable Discharges would be a change in his usual policy, the very nature of the President's clemency program is unique and extraordinary. President Ford consciously and purposefully broke with past precedent, not only of previous Presidents' clemency proclamations, but quite obviously with the normal practice of the Pardon Attorney. Two more noticeable differences are the fact, first, that the Pardon Attorney's normal 3 year waiting period after service of sentence is not required to apply for a pardon under the clemency program; and second, the fact that the recommendations come from a specially created Presidential Clemency Board, and not from the institutionalized mechanism of the Pardon Attorney. Giving pardons for Undesirable Discharges is another difference, but not in any sense the only one, nor necessarily the most significant.

There are, of course, precedents for the Pardon Attorney's recommending and the President's granting pardons in the absence of a judicially imposed penalty for a criminal offense. To do so under the clemency program by no means involves creating a precedent for changing the Pardon Attorney's practice of refusing to accept applications from other administratively discharged persons applying outside the program. The clemency program is unique, and its precedents and policies are applicable only during its operation. This no more requires the Pardon Attorney to consider administrative discharges in the future, than it requires him to issue pardons to those with AWOL courts-martial. Afterward, the Pardon Attorney and the President are free, legally and morally, to continue past policy or to change it, as they believe appropriate. The clemency program, being sui generis, creates no precedent for the future.

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up to 6 months, or a Dishonorable Discharge, and imprisonment at hard labor for 3 years. By participating in the program, the fugitive serviceman automatically and unconditionally is released from this penalty, and receives an Undesirable Discharge without imprisonment or a federal criminal conviction. This is a highly beneficial result for the applicant. The opportunity to earn a Clemency Discharge in exchange for participating is inconsequential in comparison with this benefit.

It should be understood that the relief from criminal jeopardy is automatic and that once discharged with an Undesirable Discharge, the DoD applicant is under no effective inducement to complete his alternative service obligation and earn the additional Clemency Discharge. The government, whether through the DoD or the Justice Department, has no realistic means of enforcing the obligation to perform alternative service. Mr. Hoffmann can elaborate on this point.*

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The Board in its early days debated at length the form and nature of the clemency it was authorized to recommend. Because the Proclamation does not anywhere explicitly state that a pardon was to be offered, this precise issue was presented to the President. He decided that pardons would be granted in Undesirable Discharge cases.

The Board has since proceeded to devise a system whereby it can determine the period of alternative service appropriate in each case as a condition for clemency. It has predicated its work on the understanding that a pardon would be the form of clemency issued in all cases, including Undesirable Discharge cases. If the President is now persuaded that only a Clemency Discharge is appropriate in this kind of case, the Board must revise its procedures for about 70% of the applicants. While the issue has not been discussed by the original members in some time, it is fair to predict that such a decision will cause much consternation and disruption in the Board. In the short time the new members have met, a number of them have also expressed serious reservations about the value of a Clemency Discharge.

Conclusion

The impact of such a decision on the public should not be underestimated. However justifiably, the public is of the impression that

clemency from the Presidential Clemency Board means a pardon. To change this for the vast majority of the 20,000 applicants will be regarded as a change in policy - not as an elaboration or clarification. It will be seen as the President's reneging on a promise they honestly believe he has made, impairing the spirit of reconciliation that moved him to announce the program, and seriously impairing his credibility. There is little question in my mind that a decision not to offer pardons at this date will make a mockery of the President's program, and persuade the general public that it was an unqualified failure.

Attachments:

Appendix A
Appendix B
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Appendix A

United States Department of Justice
Office of the Pardon Attorney
Washington, D.C. 20530

April 30, 1975

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The foregoing considerations lead me to believe that any value to the President in terms of advancing his quest for national reconciliation would be more than offset by the adverse factors and that the clemency program as a whole might be damaged, rather than advanced.

Lawrence M. Traylor

Lawrence M. Traylor
Pardon Attorney

Appendix B

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

MEMORANDUM FOR Mr. Lawrence M. Baskir, General Counsel
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Martin R. Hoffmann

Appendix C

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THE WHITE HOUSE
WASHINGTON, D.C. 20500
February 7, 1975

MEMORANDUM FOR: LAWRENCE M. BASKIR

FROM: WILLIAM KLEIN & JAMES H. POOLE

SUBJECT: The Presidential Pardoning Power As It Relates To Undesirable Discharges

The purpose of the memorandum is to discuss the pardoning power of the President of the United States and to analyze whether it extends to military offenses which result in an Undesirable Discharge. This power as it is set out in the Constitution of the United States has roots deep in the history of English Law and for this reason we have included the following historical material to show that the right to pardon is a sovereign right; that this right reposes in the Presidency and may be executed at will in a variety of ways and circumstances so long as the exercise of the power is not repugnant to public policy.

I. TRACING THE HISTORY OF THE POWER TO PARDON[1]

The Norman Conquest of 1066 brought with it, through William the Conqueror, "the view that clemency was an exclusive privilege of the King."[2] But by the 14th Century, Parliament was strongly contending for supremacy through attempts to curtail royal power, including the power to pardon. With the rise of the Tudors, however, and in particular Henry VIII, Parliament succumbed in the struggle and the power to pardon was lodged solely in the King with the enactment of 27 Henry VIII, ch. 24 in 1335.[3]

[1]This historical background of the Presidential Pardon Power draws extensively upon the research contained, in dicta, in the opinion of John H. Pratt, U. S. District Judge in the case of Hoffa et al v. Saxbe civil action number 74-424 dated July 19, 1974.

[2]C. Jensen, The Pardoning Power in the American States, 1 (1922).

[3]See Grupp, Same Historical Aspects of the Pardon in England, 7 Am. J. of Legal History 51, 55 (1963). Also Humbert, The Pardoning Power of the President, 14-15 (1941).

After having recognized the King's pardon prerogative as "exclusive", Parliament, slowly evolving as the supreme political power of England, began a process of limiting the King's prerogative in certain particulars. By the time of the Constitutional Convention, Parliament's supremacy was clearly demonstrated, by three important limitations of the King's pardoning power: (1) the Habeas Corpus Act with forbade clemency to persons who imprisoned English citizens "beyond the realm": (2) the Bill of Rights which prohibited the King from granting "dispensations", i.e., suspending or disregarding a given law in particular cases: and (3) the Act of Settlement prohibiting the use of pardon in cases of impeachment. It was implicitly understood, however, that unless specifically limited, the King's power was plenary and without restriction.

By the time our Constitutional Convention of 1787, the framers could draw upon their knowledge of English practices as well as their more immediate experience with colonial charters in devising the structure of our National Government. The founding fathers devoted little attention to the question of the pardoning power and decided with sparse debate that the power should be lodged solely with the Chief Executive.[4] Similarly, the substantive extent of the power was scarcely questioned except that it was readily agreed that the pardoning power should not apply

[4]By the time of our Constitutional Convention, public opinion had apparently moved in the direction of placing the pardoning power solely in the hands of the Executive. Attorney General's Survey of Release Procedures, Vol. III: Pardon, 27 (1939). There was a proposal by Roger Sherman that would have required the Senate's consent to a Presidential Pardon, but the motion was soundly defeated. See Humbert, Pardoning Power, supra note 3 at 13-16. See also The Federalist No. 74 at 496-99 (Ford ed. 1898) where Hamilton presents the argument against giving the legislature any control over the pardoning power.

to impeachments.[5] In recent times, the Supreme Court, after noting that the King's pardoning authority had by the date of our Constitutional Convention been circumscribed, held that:

> "the framers of our Constitution had in mind no necessity for curtailing this feature of the King's prerogative in transplanting it into the American governmental structures save by excepting cases of impeachment..."[6]

The framers of our Constitution were aware of the various limitations which had been imposed on the King's prerogative by Parliament, as well as the limitations imposed by the State Constitution, but deliberately chose to limit the President's authority in one particular only, viz., in cases of impeachment. We start then not with a narrowly defined and circumscribed power but with the full power of the sovereign, i.e., under our system of government, the full power of the People, to pardon those who have perpetrated offenses against them. This is not to say the power is limitless; it must be exercised in the public interest and, most importantly, it cannot infringe on the Bill of Rights which expressly reserves to the people certain fundamental rights.

The United States Constitution, Article II, Section 2, clause 1, gives the President "Power to grant Reprieves and Pardons for offenses against the United States,

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[5]It was suggested by Edmund Randolph that another exception be made in cases of treason but the proposal was also defeated. See Farrand, The Records of the Federal Convention of 1787, Vol. II, 626-27 (rev. ed. 1937). See also, The Federalist No. 68 at 460 (Ford ed. 1898, A. Hamilton) "The power of the President in respect to pardons would extend to all cases except those of impeachment" (emphasis in original): J. Kent, Commentaries on American Law, Vol. I. 303 (8th ed. 1854). "The power of pardon vested in the President is without any limitations except in the single case of impeachment."

[6]Ex Parte Grossman, 267 U.S. 87, 113 (1925).

except in cases of impeachment" (emphasis added). Generally, the courts have uniformly supported a very broad interpretation of the President's pardon power.

This broad interpretation extends to the present as is emphasized by the following statement by the U. S. Pardon Attorney. "The President's power to pardon extends to all offenses against the United States and he may grant this executive clemency at anytime after the breach of the law."[7]

II. PRECEDENTS

Between 1963 and 1966 Presidents Kennedy and Johnson pardoned three individuals for violating the Hiss Act.[8] These three individuals made false statements in application forms relating to employment with the Government of the United States. Were the individuals convicted, they would have, by law, been deprived of their civil service retirement annuity. In all three cases no charges were brought and no conviction entered. All three received Presidential Pardons. A memorandum from the Pardon Attorney setting forth the facts of these cases in greater detail is attached (Enclosure 1).

The Pardon Attorney by his own rules and regulations requires that a petitioner applying for executive clemency with respect to military offenses "...submit his petition directly to the Secretary of the military department which had original jurisdiction over the court-martial trial and conviction of the petitioner."[9] This wording, however, does not specifically prohibit the recipient of an Undesirable Discharge from receiving a pardon. Even were there such a requirement, the President would not be bound to follow it since the regulations of the Pardon Attorney are without effect in the implementation of the Presidential Clemency Program. For example, the Pardon Attorney, by regulations, requires a 3 year waiting period

[7] Memorandum from U. S. Pardon Attorney, Lawrence M. Traylor, to the Office of the Deputy Attorney General, dated September 24, 1974.

[8] 8 USC 8311

[9] 28 CFR 1.1

or 3 years after release of the petitioner from prison before a petition for pardon can be filed.[10] Obviously, this requirement is not followed in the clemency program.

The President's broad power to pardon is best illustrated in the pardon of Former President Richard M. Nixon. There, President Ford, not only pardoned an offense for which no formal charges were brought, but also pardoned Mr. Nixon for any offenses that he might have committed during his administration. The Former President was pardoned for possible offenses which were not even identified or known to have taken place. Thus, it is clear that the President can pardon an offense even though no conviction has been entered and it matters not that the offense resulted in and Undesirable Discharge.

III. POLICY CONSIDERATIONS

The President has offered pardons to individuals who have received punitive discharges. The pardon forgives the offense, it does not obliterate the conviction or the finding of guilt; Prisament v. Brophy 317 U.S. 625.[11] It follows that individuals who have been discharged administratively with an Undesirable Discharge, are also entitled to an outright pardon or a pardon upon completion of alternative serivce.

A Commanding Officer's decision to offer an Undesirable Discharge rather than trial by court-martial is not so much an act of charity as it is an act of expediency. Administrative Discharges reduce the number of man hours consumed by court-martials, are less costly, require less involvement of legal personnel and substantially reduce the number of cases on otherwise crowded dockets. An Administrative Discharge does not change the nature of the offense. Even where an Undesirable Discharge is given for a series of minor absence or absence-related offenses, the discharge is granted because there has been a violation of military law--an offense or offenses against the United States.

[10] 28 CFR 1.3

[11] Prisament v. Brophy 317 U.S. 625.

There is, for the purpose of granting a pardon, no distinction between a punitive and an administrative discharge, for it is the offense that is pardoned, not the administrative action or the conviction in the case of punitive discharges.

The President's authority to pardon offenses against the United States, regardless of whether or not there has been a judicial review or conviction is well-established; that much has been made clear by the Pardon Attorney when he stated that "The President's power to grant pardons extends to all offenses against the United States and he may grant clemency at any time after the breach of the law."[12]

To deny pardons to recipients of Undesirable Discharges would in our view compromise the integrity of the clemency program and undermine the President's desire for fairness in his quest for National reconciliation.

Enclosure

[12]Memorandum from U. S. Attorney, supra note 7.

Mr. John V. Wilson
Assistant Director
Office of Public Information

September 10, 1974

Lawrence M. Traylor
Pardon Attorney

Precedents of pardons granted prior to conviction

I have just learned of three pardons granted prior to conviction and I had earlier stated that I did not know of any in recent time. This question came up with regard to the Nixon pardon.

The Hiss Act in 1954 was enacted to deny to Alger Hiss a civil service retirement annuity but it was later discovered that this Act applied to a few other Federal government employees and this was not the intent of the Hiss Act.

On October 10, 1963, President Kennedy granted a pardon to Milton Alexander Pogorelskin who had made false statements in applications for or relating to employment with the Government of the United States but no charges were ever brought and thus no conviction entered. The pardon was granted to allow Mr. Pogorelskin to receive his annuity to which he would have been entitled but for the offense.

On November 8, 1963, President Kennedy granted a pardon to Herbert Fuchs who had made false statements and concealed a material fact in a matter within the jurisdiction of the Government of the United States but no charges were ever brought and thus no conviction entered. The pardon was granted to allow Mr. Fuchs to receive his annuity to which he would have been entitled but for the offense.

On December 29, 1966, President Johnson granted a pardon to Liana Haberman who had made false statements and concealed a material fact in a matter within the jurisdiction of the Government of the United States but no charges were ever brought and thus no conviction entered. The pardon was granted to allow Ms. Haberman to receive her annuity to which she would have been entitled but for the offense.

I have no information at this time as to why no charges were brought against these three persons. It may be that the statutes of limitations had run against the offenses.

It would seem desirable that names not be used if this information is to be given to the press but all of the information is from public records and available without restriction.

You may want to consider passing this information on to Mr. Hushen.