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APPENDIX J.

J. HISTORY



APPENDIX J

THE HISTORICAL PERSPECTIVE OF CLEMENCY

I. CONSTITUTIONAL AUTHORITY TO PARDON

(There are no changes to Chapters II through V, Appendix J)

CONSTITUTIONAL AUTHORITY TO PARDON

English Heritage

Article II, Section 2 of the Constitution of the United States reads, in part, that the President "shall have the Power to grant Reprieves and Pardons for Offences against the United States, except in cases of impeachment."^{1/} By the time the Founding Fathers wrote the Constitution, they could draw upon their knowledge of English and colonial precedents in order to shape our own national constitution. The First Supreme Court opinion which considered the President's pardoning power expressly recognized the important link provided by our English heritage:

As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions we bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. ^{2/}

To properly place and interpret the President's pardoning power, it is therefore appropriate to trace the development of the pardoning power in England.

Clemency during the Anglo-Saxon period, up until the Norman Conquest of 1066 was extremely vague. The king possessed relatively little power during this period, for the real authority lay with the clan chiefs, in whom the authority to pardon was vested. The privilege of pardon was a question of power, not yet a problem of law. ^{3/} Although the king technically had the authority to pardon, the existence of the right of private vengeance and retaliation, and the opposition of powerful nobles combined to confine the exercise of the clemency power to those offenses which were committed by members of the king's household, or to offenses which posed a personal threat to the security and authority of the king.^{4/}

The Norman Conquest brought with it the belief that the pardon power was an exclusive prerogative of the sovereign. 5/ However strong this belief may have been in Norman political thought, it rarely was accepted by the groups contending for power with the king. Other contenders for the pardoning power includes the great earls 6/, the church (through the use of "benefit of clergy" 7/), and finally, parliament.

The fourteenth century witnessed a long series of parliamentary attempts to curtail the royal power. From time to time Parliament enacted laws restricting the king's power to pardon. In 1389, Parliament enacted a law 8/ which provided that no pardon for treason, murder, or rape could be allowed unless the offense were particularly specified in the pardon decree. In the case of murder, the pardon decree had to state whether the murder was committed by lying in wait, assault, or with malice. According to Sir Edward Coke, Parliament enacted such a statute in order to curtail the king's use of his pardon power when the enumerated felonies were committed. The king would be less likely to grant a pardon for these kinds of offenses if he publicly had to disclose it. 9/

During the reign of Henry VIII, the full pardon power shifted back to the King. In 1535 Parliament enacted a statute which provided the kind with the exclusive authority to grant a pardon:

"No person or persons, of what estate or degree soever they be... shall have any power or authority to pardon or remit...but that the Kings' highness, his heirs and successors, kings of this realm, shall have the whole and sole power and authority thereof united and knit to the Imperial Crown of this realm, as of good right and equity it appertaineth..."10/

Within two-hundred years following this enactment, Parliament enacted three import restrictive measures on the kings authority to pardon: The Habeas Corpus Act of 1679 11/, the Bill of Rights 12/, and the Act of Settlement. 13/

Section eleven of the Habeas Corpus Act of 1679 prohibited arbitrary imprisonment and made it an offense against the King and his government "to send any subject of this realm of prisoner into parts beyond the seas." Any person committing such an offense could not receive a pardon from the King. The Bill of Rights Act of 1689 prohibited the granting of dispensations, by declaring it illegal for the Crown to claim its previously claimed power of the right to suspend a given law and also the right to disregard the law in the execution of a particular case. The Act of Settlement, enacted twelve years later, after the king abused his pardoning power by shielding his favorites from punishment, probihited the use of pardon in cases of impeachment, although it did not prohibit its use after the impeachment had been heard.

In addition to the above limitations on the kings pardoning prerogative, it is also noted that the King could not pardon anyone who had harmed a private individual. The King could only pardon offenses against the crown or the public. 14/ By 1721, Parliament gave itself the authority to grant pardons.15/

The Kings authority to grant pardons included the right to make such pardons conditional. Blackstone pointed out that "The king may extend his mercy upon what terms he pleases, and may annex to his bounty a condition, either precedent or subsequent, on performance where of the validity of the pardon will depend, and this by the common law." 16/

One particular situation where conditional pardons were utilized by the king was time of war. During time of war, pardons were generously granted, subject to the condition that the particular individual agreed to serve one year during the military. 17/ It was not necessary, however, that the criminal serve in a foreign land in order to secure a pardon during war time. Securance of the good offices of a nobleman who was in the service of the King overseas and/would testify as to the criminal's innocence, was sufficient. With the outbreak of hostilities, the King needed the support of the lords and bishops, and he was eager to do them a favor. 18/

Banishment was another form of conditional pardon utilized by the King. The individual being pardoned had to agree to transport himself to some foreign country, usually the American colonies, for life, or for a term of years. 19/ All felons under death could petition the king for a pardon on condition of their agreeing to transport themselves to the colonies either for life or for a specified term. The usual procedure was for the king, if he were willing to grant such a pardon on these terms, to require the felon to enter into a bond himself, and to provide sureties for his transportation. 20/ If the offender did not live up to the conditions, English judges were willing to hold that the condition upon which the original pardon was given was broken, with the offender remitted to his original punishment of death. 21/

Colonial and State Government Practice Up Until the 1789

As the American colonies became settled, the English legal con-

ceptions of the seventeenth and eighteenth centuries were trans-

planted to the new world.^{22/} Included in these concepts was

the principle of pardon and clemency for criminal offenders.

In most of the colonial charters the king delegated his authority to

grant pardons. However, the ultimate individual(s) who could

grant a pardon pursuant to the King's delegation of authority varied

from colony to colony, and sometimes changed within a given

colony as new charters were written. For instance, in the first

Virginia charter of 1606 no mention occurs regarding the pardoning

power, but in the second charter of 1609 there is granted:

"until the said treasurer and company, and their successors, and to such Governors, Officers, and Ministers, as shall be by our Council constituted full and absolute Power and authority to correct, punish, pardon, govern, and rule all such the subjects of us, . . . as shall from time to time adventure themselves in any Voyage thither . . . as well in cases capital and criminal, as civil, both Marine and other. So always as the said Statutes Ordinances and Proceedings as near as conveniently may be, be agreeable to the Laws, Statutes, Government, and Policy of this our realm of England." ^{23/}

The third Virginia charter written in 1612 contained no reference to the pardon power. When this charter was annulled by writ of quo warranto in 1624 Virginia became a royal colony and the pardon power from then on to the American Revolution was exercised by the royal governor. ^{24/}

When Maine became a royal colony in 1639 Sir Ferdinando Georges and his successors were given the authority to pardon, remit, and release all offenses and offenders against any of the laws or ordinances within the boundaries which comprised Maine. ^{25/} In

1677 Maine was purchased by the Massachusetts Bay Company and became incorporated into that colony. It remained a part of Massachusetts until 1820.

Connecticut did not receive a charter until 1662. This charter provided that the General Assembly, or the major part thereof, under their common seal could release or pardon offenders if the governor and six of the assistants were present in such assembly or court. Unlike Virginia and Maine, Connecticut's pardoning authority did not rest solely with the royal governor. The General Assembly was given the authority to pardon offenders as long as the governor and six of his assistants were present.^{26 /}

The Carolinas received their first charter in 1663. The Lord proprietors were given the authority to remit, release, pardon, and abolish, whether before judgment or after, all crimes and offenses of every character against the laws of the colony. In 1665 the proprietors granted the settlers who had settled in Carolina a government through an instrument known as "Concessions and Agreements of the Lord Proprietors of the Province of Carolina." Under this instrument, the governor and council, after

an individual was condemned could reprieve a case for cause until the case with a copy of the whole trial proceedings could be presented to the proprietors who would either grant the individual a pardon or command execution of his sentence.

A new charter was granted to the lord proprietors in 1665 in which the pardon power remained as it was in the first charter. Later, when the Carolinas became royal colonies the pardon power became lodged in the hands of the royal governors. 27/

In 1664 The Duke of York was granted New York. In this same year, the Duke transferred to Lord John Berkeley and Sir George Carteret that part of his domain which now comprises the State of New Jersey. These proprietors set up a government in the same year, allowing the governor and his council to issue reprieves to condemned offenders until the case could be presented with a copy of the entire trial proceedings to the proprietors who would either pardon or command the execution of the sentence. 28/

Sometime later, Berkeley and Carteret divided their original holdings. Berkeley sold his share, the western part, to William Penn and other Quakers. The Quakers provided that any person who should prosecute or prefer any indictment or information against others for any personal injuries or for other criminal matters (treason, murder, and felony only excepted) should be "master of his own process, and have full power to forgive and remit the person or persons offending against him or herself only, as well before as after judgment and condemnation, and pardon and remit the sentence, fine and imprisonment of the person or persons offending, be it personal or other whatsoever."^{29/}

On August 6, 1680, the Duke of York made a second grant for both the land and government of West Jersey to William Penn and five other persons. This grant included the authority to grant pardons and other forms of clemency. In March 14, 1682, the Duke of York granted the pardoning power to twenty-four proprietors in East

Jersey. In the following year they set up a government known as the Fundamental Constitutions for the Province of East New Jersey which provided that the power of pardoning should never be made use of but by the consent of eighteen of the proprietors or their proxies. In addition, the governor, with four proprietors who were to be judges of the Court of Appeals, could reprieve any person after the day of execution had been set, not to exceed one month. In 1702 the proprietors of East and West Jersey surrendered their "pretended right of Government" to the governor and from then on the exercise of clemency was vested in the royal governor.

In New Hampshire, before it became a royal colony, it was provided that in all criminal cases where the punishment extends to the loss of

life or limb, wilful murder only excepted, the person convicted shall either be sent to England with a statement of his case, or execution of sentence was upheld until the case could be reported to the Privy Council and a decision reached. When New Hampshire became a royal colony the pardon power was vested in the same governmental authority as in other royal colonies.

31/

In 1681 William Penn received from Charles II a charter for the province of Pennsylvania. Included in this grant was a delegation to the proprietor and his heirs of full power to remit, release, pardon, and abolish, whether before judgment or after, all crimes and offenses with the exception of treason and wilful and malicious murder. For these particular offenses, the proprietor could only grant reprieves until the royal will could be determined. From then on until the American Revolution it appears that the granting of

clemency was placed in the hands of the Executive Council of the province. Delaware, also acquired by William Penn, in 1682, contained the same plan for administering clemency that existed in Pennsylvania.

^{32/}
The Georgia charter granted in 1732 conferred authority upon the corporation to "sell, impose, and inflict reasonable pains and penalties upon offenders, and to mitigate the same as they or the major part of them present shall see requisite." When Georgia became a royal colony this power reverted to the crown. ^{33/}

In general, it can be said from an examination of the above colonial charters that the crown delegated the pardoning power in the colonies. This power was lodged in the hands of an executive authority, which varied from the proprietor himself or to a group of proprietors. In the so called royal colonies the proprietor usually could not grant pardons for treason and wilful and malicious murder. ^{34/} In these instances they could only empower to grant reprieves until the royal will could be determined.

With the outbreak of the American revolution colonial governments

were replaced by new state governments. Because the executive

department in the state governments had not yet gained the confidence

of the people, due to the lingering memories of royal governors and

their opposition to colonial rights, most state governments provided

that the powers of government would be concentrated in the legisla-

ture. ^{35/} Accordingly, in New Hampshire, Massachusetts,

Pennsylvania, and Virginia, the pardoning power could be exercised

only by the governor with the consent of the executive council.

Vermont, although not one of the original states, provided in its

constitution of 1777 that the pardoning authority would be exercised

36/ by the governor and the executive council. Rhode Island and

Connecticut made no changes in the administration of clemency

and retained their charter form of government for many years. ^{37/}

Georgia authorized the governor only to "reprieve a criminal or

suspend a fine until the meeting of the assembly, who may determine

therein as they shall judge fit." ^{38/} Only in the states of New York

Delaware, Maryland, North Carolina, and South Carolina was the

pardon authority vested in the governor alone.^{39/}

The President's Grant of authority under the Federal Constitution:

By the virtue of English and colonial precedent,

The Founding Fathers had ample precedent to establish

the pardoning power for the President. Little debate occurred on

how the power should be utilized. Part of it was directed at the

suggestion that the President would need the consent of the United

States Senate before he could grant a pardon. That suggestion was

rejected by a vote of 8-1. A journal^{40/} kept by James Madison on

the day to day proceedings of the Federal Convention provides the

following:

Saturday, August 25th, 1787

Mr. Sherman moved to amend the 'power to grant
reprieves and pardons,' so as to read, 'to grant re-

'reprieves until the ensuing session of the Senate,
and pardons with consent of the Senate.'

On the question, --Connecticut, aye, --1, New
Hampshire, Massachusetts, Pennsylvania, Maryland,
Virginia, North Carolina, South Carolina, Georgia,
no--8.

The words, 'except in cases of impeachment,'
were inserted, nem, con. after 'pardons.'

Two days later, on August 27, 1787, a suggestion was made that the

President should have the authority to grant a pardon only after

the offender had been convicted. That suggestion was quickly

withdrawn, however, after an objection was made to it:

Monday, August 27th, 1787

In Convention, --Article 10, Section 2, being
resumed, --

Mr. L. Martin moved to insert the words, 'after
conviction,' after the words, 'reprieves and pardons.'

Mr. Wilson objected, that pardon before conviction
might be necessary, in order to obtain the testimony of
accomplices. He stated the case of forgeries, in which
this might particularly happen.

Mr. L. Martin withdrew his motion.

Later, Edmund Randolph of Virginia proposed to add the words,

"except in cases of treason." His motion was rejected by a vote

of 8-2:

15

Saturday, September 15th, 1787

Article 2, Sect. 2. 'He shall have power to grant reprieves and pardons for offences against the United States,' &c.

Mr. Randolph moved to except 'cases of treason.' The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The traitors may be his own instruments.

Col. Mason supported the motion.

Mr. Gouverneur Morris had rather there should be no pardon for treason, than let the power devolve on the Legislature.

Mr. Wilson. Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he be himself a party to the guilt, he can be impeached and prosecuted.

Mr. King thought it would be inconsistent with the constitutional separation of the Executive and Legislative powers, to let the prerogative be exercised by the latter. A legislative body is utterly unfit for the purpose. They are governed too much by the passions of the moment. In Massachusetts, one assembly would have hung all the insurgents in that State; the next was equally disposed to pardon them all [Shays Rebellion]. He suggested the expedient of requiring the concurrence of the Senate in acts of pardon.

Mr. Madison admitted the force of objections to the Legislature, but the pardon of treasons was so peculiarly improper for the President, that he should acquiesce in the transfer of it to the former, rather than leave it altogether in the hands of the latter. He would prefer to either, an association of the Senate, as a council of advice, with the President.

Mr. Randolph could not admit the Senate into a share of the power. The great danger to liberty lay in a combination between the President and that body.

Col. Mason. The Senate has already too much power. There can be no danger of too much lenity in legislative pardons, as the Senate must concur; and the President moreover can require two-thirds of both Houses.

On the motion of Mr. Randolph, --
Virginia, Georgia, aye--2; New Hampshire,
Massachusetts, New Jersey, Pennsylvania,
Delaware, Maryland, North Carolina, South
Carolina, no--8; Connecticut, divided.

Thereafter, Alexander Hamilton, in Federalist No. 74 presented
an argument that the legislative ^{U R E} should not have any control
over the pardoning power:

39/ W

But the principal argument for reposing the power of
pardoning in this case in the chief magistrate, is this:
in seasons of insurrection or rebellion, there are often
critical moments, when a well-timed offer of pardon
to the insurgents or rebels may restore the tranquility
of the commonwealth; and which, if suffered to pass
unimproved, it may never be possible afterwards to
recall. The dilatory process of convening the legisla-
ture, or one of its branches, for the purpose of obtaining
its sanction, would frequently be the occasion of letting
slip the golden opportunity. The loss of a week, a day,
an hour, may sometimes be fatal. If it should be
observed, that a discretionary power, with a view to
such contingencies, might be occasionally conferred
upon the president; it may be answered in the first
place, that it is questionable, whether, in a limited
constitution, that power could be delegated by law; and

in the second place, that it would generally be impolitic beforehand to take any step which might hold out the prospect of impunity. A proceeding of this kind, out of the usual course, would be likely to be construed into an argument of timidity or of weakness, and would have a tendency to embolden guilt.

Ultimately, the Founding Fathers concluded that there was no need,

contrary to the English practice, to curtail the President's

authority to grant pardons, except to one particular situation:

cases of impeachment. As one supreme court decision noted:

The framers of our Constitution had in mind no necessity for curtailing this feature of the king's prerogative in transporting it into the American governmental structure save by excepting cases of impeachment. . . . (Ex parte Grossman, 267 U.S. 87, 113, 45 S. Ct. 332, 334, 69 L.Ed. 527 (1925).

I. The Exercise of the President's Power to Pardon as shown by applicable case Law:

A. Conditional Pardons

1) In general:

The applicable case law has uniformly supported a very broad interpretation of the President's pardoning authority.

^{42/} Ex Parte Wells,

one of the first Supreme Court decisions interpreting the President's

pardoning authority, upheld a pardon granted by President Fillmore to

a convicted murderer on the condition that he submit to life imprisonment in place of his death sentence. The high Court held that the

power of the President to pardon includes the power to grant less than

^{43/} full pardons.

2) Limits of a Conditional Pardon:

Even if an individual accepts a conditional pardon, the condition may

not be valid if beyond the President's authority to pardon. In other

words, the President does not have an unlimited right to attach ANY

condition he may desire. One measure of the lawfulness of a condition

^{44/} is that it be reasonable and neither illegal nor against public policy.

State courts have also held that for a conditional pardon to be valid it

must not be "unlawful, unreasonable, immoral or impossible of

45/
performance."

Saxbe 46/
In Hoffa v. United States, one of the most recent Federal cases to

consider the question of conditional pardons, the District Court for the

District of Columbia, after summarizing the precedents established by

earlier cases stated:

"We find in these admittedly imprecise standards two overriding concerns in determining the lawfulness of a condition. First, there is a public policy concern, which can be expressed in terms of the President's duty to exercise his discretion under the pardoning power in the public interest. Second, there is the concept of illegality, which in some instances may be painfully apparent, but which, for the purposes of cases like the one at bar, might

also be taken to reflect the concern that a condition might unduly override the rights and liberties of the convicted person in a manner constitutionally impermissible. Based on our study of the precedents, we therefore arrive at a two-pronged test of reasonableness in determining the lawfulness of a condition: first, that the condition be directly related to the public interest; and second, that the condition not unreasonably infringe on the individual commutee's constitutional freedoms." 47/

The court in Hoifa went on to approve a four-part test enunciated

in United States v. O'Brien,^{48/} a case where "speech", a right

guaranteed under the First Amendment and "nonspeech" elements

were combined in the same course or conduct:

"(A) government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."^{49/}

The most recent Supreme Court decision on the nature of the presidential

pardoning power is Schick v. Reed,^{50/} a case dealing with a conditional

commutation. The Court, in upholding a particular condition imposed

by President Eisenhower, when he pardoned the petitioner in 1960,

recognized that the President's pardoning power is not absolute and

is limited by the Constitution.⁵¹

"A fair reading of the history of the English pardoning power, from which our Art. II, § 2, derives, of the language of that section itself, and of the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress. Additionally, considerations of public policy and humanitarian impulses support an interpretation of that power so as to permit the attachment of any condition which does not otherwise offend the Constitution. The plain purpose of the broad power conferred by § 2 was to allow plenary authority in the President to "forgive" the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable. If we were to accept petitioner's contentions, a commutation of his death sentence to 25 or 30 years would be subject to the same challenge as is now made, i.e., that parole must be available to petitioner because it is to others. That such an interpretation of § 2 would in all probability tend to inhibit the exercise of the pardoning power and reduce the frequency of commutations is hardly open to doubt. We therefore hold that the pardoning power is an enumerated power of the Constitution and its limitations, if any, must be found in the Constitution itself. It would be a curious logic to allow a convicted person who petitions for mercy to retain the full benefit of a lesser punishment with conditions, yet escape burdens readily assumed in accepting the commutation which he sought. (Emphasis added)

3) The recipient of a conditional pardon or commutation must accept it before it can become legally valid:

Applicable case law shows that with the exception of the commutation

of a prisoners death sentence by the President, the offeree of a pardon

or commutation has the option of either accepting the conditional commutation or pardon, or of rejecting it. Two Supreme Court decisions speak of this necessity: United States v. Wilson, ^{52/} and Burdick v. United States. ^{53/}

In the Wilson case, the issue before the court was whether or not a Presidential pardon was judicially noticeable or had to be specially pleaded. The Court stated that the pardon had to be pleaded because a pardon was in the nature of a private deed requiring acceptance and delivery:

"A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him." ^{54/}

The Court pointed out that the lower court could not give notice to a pardon where the recipient specifically "waived and declined any advantage or protection," ^{55/} which might have been provided by the pardon. The Court went on to say:

"It may be supposed that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment." ^{56/}

Hence, the recipient has the choice of rejecting the offer of clemency

and abiding by his initial sentence. ^{57/}

The Court pointed out that the pardon could be rejected because it

might involve "consequences of even greater disgrace than those

from which it purports to relieve." ^{58/}

B. The Pardoning Power of the President is not subject to legislative control:

The Supreme Court stated in Ex Parte Garland ^{59/} that except for

impeachment, the President's pardoning power extends to every

offense known to the law, and may be exercised at any time after its

commission, either before legal proceedings are taken, or during

pendency, or after conviction and judgment.

The Supreme Court held that Garland did not have to take the oath,

notwithstanding that Congress had enacted a law requiring the oath,

for if Garland had to do so, it would restrict the President's power to pardon. The Court said:

"The Constitution gives him unlimited power in respect to pardon, save only in cases of impeachment. The Constitution does not say what sort of pardon; but the term being generic necessarily includes every species of pardon, individual as well as general, conditional as well as absolute. . . . It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed on him cannot be fettered by any legislative restrictions."⁶⁰/

NOTES

Appendix B

The Historical Perspective of Clemency

Chapter I, Constitutional Authority to Pardon

1. U.S. Const. Art II § 2.
2. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833).
3. Attorney General's Survey of Release Procedures, Vol. III: Pardon, 27 (1939).
4. Grupp, Some Historical Aspects of the Pardon in England, 7 Am J. Legal History 51, 53-54 (Jan, 1963)
Jensen, The Pardoning Power in the American States 1 (1922).
"In cases of flagrant or aggravated injury vengeance was permitted without waiting for slow redress from law. If any one slew another openly, he was delivered over to the kindred of the person slain. If a man detected anyone with his wife or daughter, or with his sister or mother, within closed doors, or under the same coverlet, he might slay him with impunity." See Allen, Inquiry into the Rise and Growth of the Royal Prerogative in England () London.
5. In 1827 See Grupp, Historical Aspects of the Pardon in England, supra note at 57. Grupp, supra Note 4, at 55.
"As representative of the state, the king may frustrate by his pardon an indictment prosecuted in his name. In every crime that affects the public he is the injured person in the eye of the law, and may therefore, it is said, pardon an offense which is held to have been committed against himself." See Allen, supra Note 4, at 108.
6. The great Earls obtained the right to exercise a power of clemency within their jurisdiction. They had the same right as the king to remit and pardon treasons, murders, and felonies. By the act of 27 Henry VIII, c. 24, the greater part of the privileges that had belonged to them were taken away. See Allen, supra note 4 at 109.
7. Benefit of clergy "originally . . . meant that an ordained clerk charged with a felony could be tried only in the Ecclesiastical Court. But, before the end of Henry III's reign, the king's court, though it delivered him to the Ecclesiastical Court for trial, took a preliminary inquest as to his guilt or innocence . . . In time it [benefit of clergy] changed and became a complicated set of rules exempting certain persons from punishment for certain criminal offenses. It was extended to secular clerks, then to all who could read." -Humbert, The Pardoning Power of the President, at 10. It arose out of the church-state conflict of the twelfth century. It remained in effect until abolished by statute.
8. 13 Richard II, St. 2 C. 1
9. Blackstone, Commentaries, Book IV, p. 401. - To circumvent this statute, the king claimed that he had the right to suspend the execution of a law and to dispense with its execution in particular cases. The use of the royal dispensing power was fairly common. It was apparently introduced into English Law by Henry III in about the year 1252. Parliament, in the English Bill of Rights enacted in 1689, declared that both of these alleged powers were illegal. Humbert, supra note 7 at 11, P. Brett, Conditional Pardons and the Commutation of Death Sentences, 20 Modern Law Review, 131, 133 (1957).

NOTES

Chapter I, (Contd)

10. 27 Henry VIII, C. 24. It should be noted that notwithstanding this particular statute, the King's pardoning authority was not absolute. As previously noted, all those who could claim the "benefit of clergy" were exempted from criminal responsibility, until it was abolished by statute in 1827. The institution of sanctuary also served as an encroachment upon the king's prerogative. If an offender left the realm, forfeited all of his goods and submitted to a life of banishment, he could obtain the same effect that a king's pardon would bestow upon him. See Grupp, Historical Aspects, supra note 4, at 57-58.
11. 31 Charles II, Stat. 11, c. 2.
12. 1 William and Mary, sess. II, c. 2.
13. 12 and 13 William III, c. 2.
14. As Blackstone put it, the king had no power to pardon "where private justice is principally concerned" under the doctrine of "non potest rex gratiam facere cum injuria at damno alirum" (the king cannot confer a favour by the injury and loss of others). Blackstone, Commentaries, supra note at 399. Blackstone also states that the king could not pardon a common nuisance while it remained unredressed. However, after the abatement of the nuisance, the king could remit the fine. Blackstone states that although the prosecution of a common nuisance is vested in the king so as to avoid multiplicity of suits, it is, until abated, more in the nature of a private injury to each individual in the neighborhood. In addition, the king could not pardon an offense against a popular or penal statute after information has been brought. Once a private individual has brought such information he acquires a private property right in his part of the penalty.
15. Stephen, New Commentaries on the Laws of England (London, 1903), Vol. II, p. 370. A pardon granted by Parliament had one particular feature that a pardon granted by the king did not. A pardon granted by an Act of Parliament had to be judicially noticed by a court. It did not have to be pleaded. However, if an individual received a pardon by the king under the Great Seal, the pardon had to be pleaded at a particular stage in the proceeding. An individual who failed to plead his pardon at the appropriate stage could be held to have "waived the pardon" and to be precluded from pleading it at a later stage. See Blackstone, supra note 10 at 402 and Brett, supra note 10 at 132.
7 George I, ch. 29 (172). "The power and jurisdiction of Parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. It has sovereign and uncontrollable authority in the making, conforming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal."

NOTES

Chapter I, (Contd)

16. Blackstone, Commentaries, supra, note 10, at 401.
17. As soon as war was declared, it was the custom to issue a proclamation in which a general pardon of all homicides and felonies was granted to everyone who would serve for a year at his own cost. The terms were readily accepted, and the king increased his force by a number of men who would perhaps be inferior to none in courage, though they might not improve the discipline of the army. The rolls according abound with instances in which a pardon was alleged for military service, and allowed without dispute. Grupp, supra note 4, at 58.
18. See Attorney General's Survey, supra note 3 at 30.
19. Blackstone, Commentaries, supra note 10, at 401.
20. P. Brett, supra note 10, at 134.
21. Ibid.
22. Jensen, Pardoning Power in the Colonies, p. 3
23. Ibid. p. 4.
24. Ibid. p. 4.
25. Ibid. p. 5.
26. Ibid. p. 5.
27. Ibid. p. 6.
28. Ibid. p. 6.
29. Ibid. p. 6.
30. Ibid. p. 7.
31. Ibid. p. 7.
32. Ibid. p. 8.
33. Ibid. p. 8.
34. Ibid. p. 8.
35. Ibid. p. 9.
36. Constitution of New Hampshire, 1784; Massachusetts, 1780, Part II, chap. ii, Sec. 1, Art. 8; New Jersey, 1776, Part IX; Pennsylvania, 1776, Sec. 20; Virginia, 1776, cited in Jensen, Ibid. at p. 10.
37. Ibid. p. 10.
38. Ibid. p. 10
39. Ibid. p. 10
40. Tansill, (ed) Documents Illustrative of the Formation of the American States, Government Printing Office, Washington, D.C., at 620 (1927).
41. The Federalist No. 74, at 500 (J. Cooke, Ed. 1961) - In Federalist No. 69, Hamilton summarized the proposed §2 powers, including the power to pardon, as "resembl(ing) equally that of the king of Great Britain and the Governor of New York." Ibid., at 464.

42. Ex Parte Wells, 59 U.S. (18 How.) 307 (1856)
43. In this particular case, the offender had his death sentence commuted to a sentence of life imprisonment. The Court held that the commutation of a sentence is, essentially, a quid pro quo. The President offers a remission of a sentence coupled with a condition--the "convict" has the choice of remaining under his judicially imposed sentence or accepting the remission of his sentence and abiding by the condition on which it was offered. There are additional cases upholding conditional pardons: In Re Ruhl, 20 F. Cas. 1335 (No. 12,124)(D.C. Nev. 1878), in which the condition had been payment of certain fines and costs; Kavalin v. White, 44 F.2d 49 (10th Cir. 1930), where the condition was deportation of the prisoner from the United States; United States v. Six Lots of Ground, 27 F. Cas. 1097 (No. 16,299)

that he refrain from pressing certain claims against the government for land which had been confiscated; Lupo v. Zerbst, 92 F.2d 362 (5th Cir. 1937), where the petitioner's sentence was commuted on the condition that he be law-abiding and not associate with people of "evil" character; Bishop v. United States, 223 F.2d 582 (D.C. Cir. 1955), where the President commuted the petitioner's death sentence to life imprisonment with the further condition that the life term be measured, for the purposes of parole eligibility, from the date of commutation and not from the date of initial incarceration; and Hoffa v. Saxbe, 378 F.Supp. 1221 (1974), where the condition of a commutation of a sentence was that the petitioner not engage in direct or indirect management of any labor organization for nine and one-half years.

A commutation of a sentence is the substitution of a lesser punishment for a more severe punishment. It is considered to be part of the power to pardon. Id. at 316.

44. In Bishop v. United States, supra, the President commuted the petitioner's death sentence to life imprisonment with the condition that the life term be measured, for the purposes of parole eligibility, from the date of commutation and not from the date of initial incarceration. The Court held, in sustaining the condition, that "it would seem clear that the power to commute the death

44. Continued

sentence would necessarily include the power to attach reasonable conditions." In Lupo v. Zerbst, supra, the President commuted petitioner's sentence on the condition that he be law-abiding and not associate with people of "evil" character. In sustaining the condition attached by the President, the Court said "(t)here is nothing illegal or against public policy in any of the conditions therein contained." Id. at 364.

45. See also State et nel Bailey v. Mayo, 65, So. 2d 721, 722 (Fla. 1953). Guy v. Utecht, 216 Minn. 255, 12 N.W. 2d 753, 757 (1943). Silvey v. Kaiser, 173 S.W. 2d 63, 64 (Mo. 1943) (en bono); Huff v. Aldredge, 192 Ga. 12, 14 S.E. 2d 456, 458-459 (1941). Commonwealth et nel Meredith v. Hall, 277 Ky 612, 126 S.W. 2d 1056, 1057 (1939). Wilborn v. Sanders, 170 Va. 153, 195 S.E. 723, 726 (1938).

46. Hoffa v. Saxbe, supra.

47. In applying the first part of the test, Hoffa stated that the conditions must "relate to the reason for the initial judgment of conviction, because it is the crime and circumstances that give use to the public interest in regulating and circumscribing the future behavior of the offender." Id. at 1236. The Court in Hoffa used as its standard the standard employed in setting the conditions of parole, itself an outgrowth of the conditional pardon. Id. at 1236, citing C. L. Newman, Sourcebook on Probation, Parole and Pardons, 18 (3rd ed. 1968). Under the federal system, the U.S. Board of Parole can release prisoners on parole where there is a "reasonable probability that such prisoner will live and remain at liberty without violating the laws" and where "such release is not incompatible with the welfare of society." 18 U.S.C. § 4203(a). Also, the release may be "upon such terms and conditions ... as the Board shall prescribe." The conditions, however, must be reasonably related to the valid ends of the interests that the Government retains after the prisoner is released. In Birzon v. King, 469 F.2d 1241 (1972), the Second Circuit sustained the standard condition that a parolee not associate with persons who have a criminal record, stating:

"Although a parolee should enjoy greater freedom in many respects than a prisoner, we see no reason why the Government may not impose restrictions on the rights of the parolee that are reasonably and necessarily related to the interests that the Government retains after his conditional release." Id. at 1243.

47. Continued

Hoffa went on to state that the lawfulness of a conditional pardon or commutation is much the same, but with respect to Presidential pardons, the President has a broader discretion "which encompasses a regard for protective measures in the public interest." Hoffa v. Saxbe, supra, at 1237.

With respect to the second condition, namely, that the condition not unreasonably infringe on the individual commutee's constitutional freedoms, Hoffa recognized that when an individual is granted a conditional pardon or commutation, reasonable restrictions may be placed on the future conduct of the commutee, and when particular constitutional rights are curtailed as a result of restricting future conduct, a sufficiently important governmental interest in regulating the future conduct can justify incidental limitations on one's rights guaranteed under the Bill of Rights. Id. at 1238-40. There are numerous cases that uphold the restriction on constitutional rights provided that the restrictions are precisely drawn to accomplish a legitimate governmental purpose. See Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); Dunn v. Blumstein, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); Bullock v. Carter, 405 U.S. 134, 140-141, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971); Williams v. Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); Konigsberg v. State Bar of California, 366 U.S. 36, 49, 81 S.Ct. 997, 6, L.Ed.2d 105 (1961).

48. United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

49. Id. at 377, 88 S.Ct. at 1679. The Hoffa court went on to note that conditional commutations are within the President's power under Article II, Section 2, Clause One of the Constitution, and that with respect to Mr. Hoffa, the Government had satisfied the other three elements of the four-part test.

50. Schick v. Reed, 95 S.Ct. 379 (1974).

51. Ibid. at 385.

52. United States v. Wilson, 32 U.S. (7 Pet.) (1833)
53. Burdick v. United States, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476 (1915).
54. United States v. Wilson, supra at 161.
55. Id. at 158.
56. Id.
57. Burdick v. the United States, supra, also illustrates this point. In this particular case President Wilson offered a pardon to the petitioner. The effect of the pardon would have been to immunizing him from any liability for incriminating statements made in the course of testifying before a federal grand jury. The petitioner had previously refused to testify concerning alleged fraud violations, claiming his right against self-incrimination under the Fifth Amendment would be violated. Even though President Wilson offered petitioner Burdick a pardon, he still refused to testify, and was therefore held in contempt. Upon a writ of habeas corpus, the Supreme Court reversed the contempt conviction, arguing that the petitioner did not have to accept the pardon, because he had the right to refuse to testify:

"Granting, then, that the pardon was legally issued and was sufficient for immunity, it was Burdick's right to refuse it, as we have seen; and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted." Ex Parte Wells, supra at 312.

58. Id.
59. Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1866).
60. Id. at 351-52. See also Schick v. Reed, 483 F.2d 1266, 1268 (D.C. Cir. 1973) cert. granted, 42 Bishop v. United States, 223 F.2d 582, 588 (D.C. Circuit. 1955).

APPENDIX K.



K. GALLUP POLL

APPENDIX _____: The Gallup Poll of August, 1975.

For many years the Gallup Organization has polled the American People on a variety of subjects, including clemency. As we were about to close the Clemency Board, Gallup again felt the country's pulse on the issue which was central to our work. We feel the results of that poll are instructive and have included part of them in the following pages.

Question One

"Have you heard or read anything about a program which would grant a limited pardon to those who evaded the draft or deserted from the armed forces during the Vietnam war?"

| | Yes | | | | | | |
|----------------|-----|--|--|--|--|--|--|
| NATIONAL | 72 | | | | | | |
| SEX | | | | | | | |
| Male | 74 | | | | | | |
| Female | 71 | | | | | | |
| RACE | | | | | | | |
| White | 75 | | | | | | |
| Non-white | 52 | | | | | | |
| EDUCATION | | | | | | | |
| College | 86 | | | | | | |
| High School | 73 | | | | | | |
| Grade School | 55 | | | | | | |
| REGION | | | | | | | |
| East | 73 | | | | | | |
| Midwest | 74 | | | | | | |
| South | 67 | | | | | | |
| West | 79 | | | | | | |
| AGE | | | | | | | |
| Total Under 30 | 73 | | | | | | |
| 18-24 years | 74 | | | | | | |
| 25-29 years | 72 | | | | | | |
| 30-49 years | 75 | | | | | | |
| 50 & older | 70 | | | | | | |

"Have you heard or read anything about a program which would grant a limited pardon to those who evaded the draft or deserted from the armed forces during the Vietnam war?"

Yes

| | Yes | | | | | | |
|---------------------|-----|--|--|--|--|--|--|
| INCOME | | | | | | | |
| \$20,000 & over | 82 | | | | | | |
| \$15,000 - \$19,999 | 85 | | | | | | |
| \$10,000 - \$14,999 | 74 | | | | | | |
| \$7,000 - \$9,999 | 75 | | | | | | |
| \$5,000 - \$6,999 | 58 | | | | | | |
| \$3,000 - \$4,999 | 61 | | | | | | |
| Under \$3,000 | 61 | | | | | | |
| POLITICS | | | | | | | |
| Republican | 74 | | | | | | |
| Democrat | 69 | | | | | | |
| S. Democrat | 60 | | | | | | |
| Other Democrat | 72 | | | | | | |
| Independent | 77 | | | | | | |
| RELIGION | | | | | | | |
| Protestant | 72 | | | | | | |
| Catholic | 69 | | | | | | |
| OCCUPATION | | | | | | | |
| Prof. & Bus. | 86 | | | | | | |
| Cler. & Sales | 78 | | | | | | |
| Manual Workers | 70 | | | | | | |
| Non-Labor Force | 63 | | | | | | |
| CITY SIZE | | | | | | | |
| 1,000,000 & over | 71 | | | | | | |
| 500,000 - 999,999 | 77 | | | | | | |
| 50,000 - 499,999 | 77 | | | | | | |
| 2,500 - 49,999 | 72 | | | | | | |
| Under 2,500, Rural | 68 | | | | | | |

Question Two:

"Do you happen to know which of these groups are eligible for the program?" (Respondents were handed a card with choices; see over for column headings.)

| | ① | ② | ③ | ④ | ⑤ | ⑥ | ⑦ | ⑧ | ⑨ |
|----------------|----|----|----|-----|----|---|----|-----|---|
| NATIONAL | 43 | 17 | 14 | 15 | 21 | 4 | 8 | 31 | |
| SEX | | | | | | | | | |
| Male | 45 | 19 | 15 | 17 | 22 | 4 | 10 | 26 | |
| Female | 41 | 16 | 14 | 13 | 11 | 4 | 7 | 31 | |
| RACE | | | | | | | | | |
| White | 44 | 18 | 14 | 15 | 21 | 4 | 8 | 29 | |
| Non-white | 30 | 12 | 16 | 10 | 11 | 7 | 9 | 45 | |
| EDUCATION | | | | | | | | | |
| College | 63 | 27 | 15 | 20 | 11 | 7 | 3 | 21 | |
| High School | 43 | 17 | 15 | 15 | 22 | 5 | 9 | 26 | |
| Grade School | 17 | 5 | 10 | (7) | -- | 5 | 12 | 31 | |
| REGION | | | | | | | | | |
| East | 44 | 19 | 15 | 15 | 21 | 3 | 8 | 30 | |
| Midwest | 43 | 15 | 12 | 15 | 11 | 4 | 11 | 27 | |
| South | 38 | 14 | 13 | 11 | 11 | 5 | 5 | 41 | |
| West | 47 | 25 | 18 | 18 | 23 | 5 | 9 | 21 | |
| AGE | | | | | | | | | |
| Total Under 30 | 51 | 21 | 16 | 14 | 31 | 3 | 6 | 52 | |
| 18-24 years | 50 | 19 | 16 | 15 | 31 | 3 | 7 | 32 | |
| 25-29 years | 54 | 23 | 17 | 13 | 33 | 3 | 4 | 42 | |
| 30-49 years | 48 | 17 | 11 | 15 | 11 | 4 | 8 | 127 | |
| 50 & older | 31 | 14 | 15 | 15 | 12 | 5 | 11 | 40 | |

1. Draft evaders and deserters who are now in Canada and other foreign countries.
2. Draft evaders and deserters who are fugitives in the United States.
3. People who served in Vietnam and then deserted the armed forces after they came home.
4. Draft evaders and deserters who have already gone through the courts and have been punished for their offenses.
5. People who demonstrated against the Vietnam war.
6. First offenders convicted of non-violent federal crimes.
7. Service men still on active duty who have been court-martialed for non-violent military offenses.
8. None are eligible.
9. Don't know

"Do you happen to know which of these groups are eligible for the program?"

| | (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) | (9) |
|---------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| INCOME | | | | | | | | | |
| \$20,000 & over | 62 | 27 | 18 | 17 | 3 | 1 | 2 | 5 | 19 |
| \$15,000 - \$19,999 | 55 | 22 | 10 | 13 | 1 | - | 4 | 7 | 24 |
| \$10,000 - \$14,999 | 44 | 15 | 16 | 17 | 2 | 1 | 4 | 10 | 25 |
| \$7,000 - \$9,999 | 39 | 13 | 11 | 14 | 1 | 1 | 4 | 9 | 33 |
| \$5,000 - \$6,999 | 27 | 15 | 15 | 15 | - | 1 | 5 | 9 | 37 |
| \$3,000 - \$4,999 | 27 | 17 | 14 | 7 | 3 | 2 | 4 | 13 | 38 |
| Under \$3,000 | 26 | 10 | 14 | 15 | 3 | 2 | 5 | 5 | 53 |
| POLITICS | | | | | | | | | |
| Republican | 47 | 18 | 15 | 17 | - | - | 3 | 7 | 29 |
| Democrat | 36 | 15 | 14 | 14 | 1 | 1 | 5 | 9 | 35 |
| S. Democrat | 29 | 12 | 15 | 12 | 2 | 1 | 6 | 7 | 45 |
| Do Democrat | 40 | 17 | 14 | 15 | 1 | 1 | 5 | 9 | 31 |
| Independent | 49 | 20 | 13 | 13 | 2 | 2 | 4 | 9 | 25 |
| RELIGION | | | | | | | | | |
| Protestant | 43 | 17 | 12 | 14 | 1 | 1 | 4 | 8 | 33 |
| Catholic | 38 | 16 | 17 | 16 | 1 | 1 | 6 | 11 | 27 |
| OCCUPATION | | | | | | | | | |
| Prof. & Bus. | 59 | 25 | 15 | 16 | 2 | 1 | 2 | 5 | 23 |
| Cler. & Sales | 54 | 20 | 13 | 14 | - | - | 7 | 8 | 22 |
| Manual Workers | 39 | 16 | 14 | 14 | 1 | 1 | 4 | 9 | 31 |
| Non-Labor Force | 31 | 12 | 15 | 16 | 2 | 2 | 4 | 12 | 41 |
| CITY SIZE | | | | | | | | | |
| 1,000,000 & over | 44 | 18 | 15 | 13 | 1 | 3 | 3 | 10 | 23 |
| 500,000 - 999,999 | 47 | 26 | 17 | 22 | 1 | 1 | 5 | 5 | 25 |
| 50,000 - 499,999 | 50 | 20 | 18 | 13 | 1 | - | 3 | 8 | 28 |
| 2,500 - 49,999 | 37 | 15 | 11 | 14 | 2 | - | 5 | 9 | 35 |
| Under 2,500, Rural | 36 | 10 | 10 | 14 | 3 | 1 | 4 | 8 | 41 |

Question Three

"Which would you favor: a pardon after completion of alternative service, a pardon without requiring alternative service, or no pardon at all?"

| | With alternative service | Without alternative service | No pardon | No opinion |
|----------------|--------------------------------|-----------------------------------|--------------|---------------|
| NATIONAL | 47 | 18 | 24 | 11 |
| SEX | | | | |
| Male | 44 | 18 | 30 | 8 |
| Female | 49 | 18 | 18 | 15 |
| RACE | | | | |
| White | 48 | 17 | 25 | 10 |
| Non-white | 38 | 21 | 19 | 22 |
| EDUCATION | | | | |
| College | 53 | 25 | 18 | 4 |
| High School | 47 | 17 | 26 | 10 |
| Grade School | 38 | 10 | 26 | 26 |
| REGION | | | | |
| East | 47 | 20 | 24 | 9 |
| Midwest | 51 | 17 | 22 | 10 |
| South | 43 | 12 | 27 | 18 |
| West | 45 | 24 | 23 | 8 |
| AGE | | | | |
| Total Under 30 | 52 | 24 | 18 | 6 |
| 18-24 years | 51 | 27 | 16 | 6 |
| 25-29 years | 54 | 19 | 20 | 7 |
| 30-49 years | 46 | 15 | 29 | 10 |
| 50 & older | 43 | 16 | 24 | 17 |

"Which would you prefer: a pardon after completion of alternative service, a pardon without requiring alternative service, or no pardon at all?" /

| INCOME | | | | | |
|----------------------|----|----|----|----|--|
| \$20,000 & over | 52 | 24 | 20 | 4 | |
| \$15,000 - \$19,999 | 47 | 17 | 30 | 6 | |
| \$10,000 - \$14,999 | 49 | 14 | 28 | 9 | |
| \$7,000 - \$9,999 | 47 | 20 | 21 | 12 | |
| \$5,000 - \$6,999 | 40 | 16 | 22 | 22 | |
| \$3,000 - \$4,999 | 46 | 19 | 19 | 21 | |
| Under \$3,000 | 46 | 21 | 13 | 20 | |
| POLITICS | | | | | |
| Republican | 54 | 11 | 21 | 14 | |
| Democrat | 39 | 20 | 28 | 13 | |
| S. Democrat | 35 | 19 | 25 | 21 | |
| No Democrat Other | 40 | 21 | 29 | 10 | |
| Independent | 52 | 19 | 21 | 8 | |
| RELIGION | | | | | |
| Protestant | 47 | 14 | 26 | 13 | |
| Catholic | 47 | 19 | 23 | 11 | |
| OCCUPATION | | | | | |
| Prof. & Bus. | 51 | 25 | 20 | 4 | |
| Cler. & Sales | 46 | 23 | 23 | 8 | |
| Manual Workers | 45 | 14 | 28 | 13 | |
| Non-Labor Force | 45 | 14 | 24 | 17 | |
| CITY SIZE | | | | | |
| 1,000,000 & over | 52 | 22 | 16 | 10 | |
| 500,000 - 999,999 | 48 | 21 | 22 | 9 | |
| 50,000 - 499,999 | 43 | 19 | 27 | 11 | |
| 2,500 - 49,999 | 42 | 16 | 34 | 8 | |
| Under 2,500, Rural | 49 | 13 | 20 | 18 | |

Question Four

"The deadline for application in the program by those seeking a pardon has passed. Do you believe the application deadline should be extended or should not be extended?"

| | Should | | | No | Opinion |
|----------------|--------|-----|----|----|---------|
| | Should | Not | No | | |
| NATIONAL | 42 | 48 | 10 | | |
| SEX | | | | | |
| Male | 41 | 53 | 6 | | |
| Female | 43 | 44 | 13 | | |
| RACE | | | | | |
| White | 40 | 50 | 10 | | |
| Non-white | 57 | 30 | 13 | | |
| EDUCATION | | | | | |
| College | 49 | 45 | 6 | | |
| High School | 41 | 51 | 8 | | |
| Grade School | 38 | 43 | 19 | | |
| REGION | | | | | |
| East | 45 | 45 | 10 | | |
| Midwest | 43 | 48 | 9 | | |
| South | 36 | 50 | 14 | | |
| West | 48 | 47 | 5 | | |
| AGE | | | | | |
| Total Under 30 | 56 | 38 | 6 | | |
| 18-24 years | 56 | 37 | 7 | | |
| 25-29 years | 55 | 39 | 6 | | |
| 30-49 years | 35 | 57 | 8 | | |
| 50 & older | 39 | 47 | 14 | | |

"The deadline for application in the program by those seeking a pardon has passed. Do you believe the application deadline should be extended or should not be extended?"

| | Should | Not | No Opinion | | | |
|---------------------|--------|-----|---------------|--|--|--|
| INCOME | | | | | | |
| \$20,000 & over | 43 | 52 | 5 | | | |
| \$15,000 - \$19,999 | 42 | 51 | 7 | | | |
| \$10,000 - \$14,999 | 38 | 56 | 6 | | | |
| \$7,000 - \$9,999 | 43 | 45 | 12 | | | |
| \$5,000 - \$6,999 | 43 | 44 | 13 | | | |
| \$3,000 - \$4,999 | 44 | 36 | 20 | | | |
| Under \$3,000 | 51 | 32 | 17 | | | |
| POLITICS | | | | | | |
| Republican | 35 | 53 | 12 | | | |
| Democrat | 43 | 46 | 11 | | | |
| S. Democrat | 42 | 43 | 15 | | | |
| Other Democrat | 43 | 48 | 9 | | | |
| Independent | 46 | 48 | 6 | | | |
| RELIGION | | | | | | |
| Protestant | 39 | 51 | 10 | | | |
| Catholic | 44 | 46 | 10 | | | |
| OCCUPATION | | | | | | |
| Prof. & Bus. | 45 | 48 | 7 | | | |
| Cler. & Sales | 45 | 48 | 7 | | | |
| Manual Workers | 42 | 50 | 8 | | | |
| Non-Labor Force | 36 | 46 | 18 | | | |
| CITY SIZE | | | | | | |
| 1,000,000 & over | 59 | 35 | 6 | | | |
| 500,000 - 999,999 | 45 | 45 | 10 | | | |
| 50,000 - 499,999 | 43 | 48 | 9 | | | |
| 2,500 - 49,999 | 37 | 53 | 10 | | | |
| Under 2,500, Rural | 31 | 55 | 14 | | | |

Question Five

"Persons who receive a pardon under the present program have done a period of alternative service to the country. How would you react to such a person in terms of his becoming a neighbor?"

(Respondents were handed a card with the following alternatives:
I would welcome him MORE than I would welcome someone else; I would welcome him LESS than I would someone else; I would welcome him ABOUT AS MUCH AS I would welcome someone else.)

| | Welcome More | Welcome Less | About Same | No opinion |
|----------------|--------------|--------------|------------|------------|
| NATIONAL | 5 | 13 | 74 | 8 |
| SEX | | | | |
| Male | 4 | 19 | 70 | 7 |
| Female | 5 | 7 | 78 | 10 |
| RACE | | | | |
| White | 4 | 13 | 75 | 8 |
| Non-white | 8 | 7 | 73 | 12 |
| EDUCATION | | | | |
| College | 4 | 10 | 82 | 4 |
| High School | 4 | 13 | 76 | 7 |
| Grade School | 6 | 16 | 62 | 16 |
| REGION | | | | |
| East | 5 | 10 | 74 | 11 |
| Midwest | 4 | 12 | 77 | 5 |
| South | 5 | 18 | 65 | 12 |
| West | 4 | 9 | 82 | 5 |
| AGE | | | | |
| Total Under 30 | 5 | 4 | 86 | 5 |
| 18-24 years | 5 | 2 | 88 | 5 |
| 25-29 years | 4 | 7 | 84 | 5 |
| 30-49 years | 4 | 16 | 74 | 6 |
| 50 & older | 16 | 16 | 66 | 12 |

| | Welcome More | Welcome Less | About Same | No Opinion |
|---------------------|-----------------|-----------------|---------------|---------------|
| INCOME | | | | |
| \$20,000 & over | 5 | 13 | 80 | 2 |
| \$15,000 - \$19,999 | 3 | 15 | 75 | 7 |
| \$10,000 - \$14,999 | 4 | 15 | 75 | 6 |
| \$7,000 - \$9,999 | 5 | 13 | 74 | 8 |
| \$5,000 - \$6,999 | 3 | 9 | 25 | 13 |
| \$3,000 - \$4,999 | 8 | 9 | 69 | 14 |
| Under \$3,000 | 11 | 10 | 67 | 12 |
| POLITICS | | | | |
| Republican | 3 | 14 | 73 | 10 |
| Democrat | 5 | 14 | 71 | 10 |
| S. Democrat | 5 | 15 | 65 | 15 |
| Co. Democrat | 5 | 13 | 74 | 8 |
| Other | 5 | 11 | 79 | 5 |
| Independent | 5 | 11 | 79 | 5 |
| RELIGION | | | | |
| Protestant | 5 | 14 | 73 | 8 |
| Catholic | 3 | 12 | 74 | 11 |
| OCCUPATION | | | | |
| Prof. & Bus. | 4 | 13 | 77 | 6 |
| Cler. & Sales | 3 | 15 | 77 | 5 |
| Manual Workers | 5 | 11 | 78 | 6 |
| Non-Labor Force | 6 | 15 | 64 | 15 |
| CITY SIZE | | | | |
| 1,000,000 & over | 4 | 8 | 81 | 7 |
| 500,000 - 999,999 | 5 | 10 | 77 | 8 |
| 50,000 - 499,999 | 5 | 16 | 72 | 7 |
| 2,500 - 49,999 | 5 | 15 | 71 | 9 |
| Under 2,500, Rural | 5 | 12 | 73 | 10 |

If the sample was limited to persons who had heard or read something about the program [A "Yes" response to Question One], the results of the subsequent question are as follows: [National Only]

Question Two: Who was eligible?

| | |
|------------|-----|
| Response 1 | 54% |
| 2 | 22% |
| 3 | 17% |
| 4 | 18% |
| 5 | 1% |
| 6 | 1% |
| 7 | 4% |
| 8 | -- |
| 9 | -- |

Question Three? Which do you favor?

| | |
|------------------|-----|
| Pardons with A/S | 50% |
| Pardons, no A/S | 20% |
| No Pardons | 23% |
| No Opinion | 7% |

Question Four: Should the application deadline be extended?

| | |
|------------|-----|
| Yes | 44% |
| No | 50% |
| No Opinion | 6% |

Question Five: How would you welcome a pardonee in terms of other people?

| | |
|------------------|-----|
| Welcome him more | 5% |
| Welcome him less | 13% |
| About the same | 77% |
| No Opinion | 5% |

If the sample was limited to those who had heard about the program ["Yes" on Question One] and who knew who was eligible for the Presidential Clemency Board [Response Four on Question Two], the results of the subsequent questions are as follows: [National Only]

Question Three: Which do you favor ?

| | |
|------------------|-----|
| Pardons with A/S | 53% |
| Pardons, no A/S | 21% |
| No Pardons | 23% |
| No Opinion | 3% |

Question Four: Should the application deadline be extended?

| | |
|------------|-----|
| Yes | 50% |
| No | 46% |
| No Opinion | 4% |

Question Five: How would you welcome a pardonee in terms of other people ?

| | |
|------------------|-----|
| Welcome him more | 4% |
| Welcome him less | 14% |
| About same | 79% |
| No opinion | 3% |

APPENDIX L.

L. PEARMAN STUDY



An Analysis of the Impact of Clemency Discharges
on Recipient's Employment Prospects

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This study is directed at assessing the impact that receipt of a clemency discharge under the recent Presidential Clemency Program will have on an individual's employment chances.

Military discharges can be viewed as being of two basic types: administrative and punitive. The administrative types include honorable, general and undesirable. The punitive types are bad conduct and dishonorable. The clemency discharge can be classified as being of the administrative type.¹

Although exact empirical evidences are not always available, Army regulations, military court proceedings and various congressional hearing presentations imply that a discharge under other than honorable circumstances may have substantial consequences for the civilian life of the recipient. The current study attempts to examine one aspect of this problem, namely consequences in terms of future employment. It also attempts to empirically evaluate the various types of discharges in relation to each other. The main concern is with an assessment of the clemency discharge relative to other types of discharges.

Data presented in this report were obtained through a mailed questionnaire. The study was conducted in two stages. Stage one consisted of a systematic random sampling drawn from a list of prospective employers listed in the College Placement Annual and a second list comprising the Harrisburg, Pennsylvania Industrial Directory.

Stage two entailed an accidental non-random sample representing small businesses and local employers in the Lancaster, Pennsylvania area, not likely to be primarily recruiting college graduates.²

The data demonstrate that the clemency discharge is perceived by employers as being slightly less favorable than the general discharge, but considerably more favorable than the undesirable discharge. The clemency discharge is also perceived by the prospective employers as being more favorable than either of the punitive types, bad conduct or dishonorable. Evidences for these generalizations follow below.

Personnel directors, placement officers and company officials engaged in the hiring process were asked to react to various types of discharges on a scale of from one to five. Specifically, they were asked, "What would be your reaction to the following people if they came to you

seeking employment?". The types of persons suggested were:

- A) A former serviceman with an honorable discharge.
- B) A former serviceman with a general discharge, who was not eligible for the Presidential Clemency Program.
- C) A former serviceman with an undesirable discharge for desertion, who did not participate in the clemency program.
- D) A former serviceman with a bad conduct discharge, who did not participate in the clemency program.
- E) A former serviceman with a dishonorable discharge for desertion, who did not participate in the clemency program.
- F) A former serviceman who had been discharged for desertion, but who received an outright Presidential pardon and clemency discharge under the clemency program.
- G) A former serviceman who had been discharged for desertion, but who received a Presidential pardon and clemency discharge after completing three to twelve months of alternative service under the clemency program.
- H) A convicted draft offender who did not participate in the clemency program.
- I) A convicted draft offender who received an outright Presidential pardon under the clemency program.
- J) A convicted draft offender who received a Presidential pardon after completing three to twelve months of alternative service under the clemency program.

The scale of responses represented the employers' reaction toward the above ten types. A score of one indicated an inclination to give preference in hiring over other job applicants. A score of two indicated that a prospective employee with the stated characteristic could expect the same treatment as most other job applicants. A score of three indicated that the person would be considered, but that the employer would be less inclined to hire him than most other job applicants. A score of four indicated that a person of the given characteristics would be considered, but that the respondent would be reluctant to hire him. Finally, a response of five indicated refusal to consider the candidate.

The following table indicates the mean response given by the employers as to their willingness to employ the ten types.

Table I

Distribution of Mean Scores Depicting
Employers' Willingness to Hire Various
Discharge Types

Mean Scores
(Scale 1-5)

| Discharge Type | National Sample | Local Sample | Combined Score |
|---|-----------------|--------------|----------------|
| Honorable Discharge | 1.71 | 1.64 | 1.68 |
| General Discharge | 2.40 | 2.50 | 2.45 |
| Undesirable Discharge | 3.31 | 3.97 | 3.59 |
| Bad Conduct Discharge | 3.51 | 4.30 | 3.70 |
| Dishonorable Discharge | 3.54 | 4.21 | 3.87 |
| Clemency Discharge | 2.67 | 3.24 | 2.95 |
| Clemency Discharge with alternate Service | 2.53 | 2.88 | 2.71 |
| Convicted Draft Offender | 3.24 | 4.15 | 3.70 |
| Convicted Draft Offender with Clemency Discharge | 2.64 | 3.42 | 3.03 |
| Convicted Draft Offender with Clemency Discharge with alternate Service | 2.51 | 2.94 | 2.72 |

As can be seen in the above table, the four clemency discharge types all are rated somewhere between the general and the undesirable types of administrative discharge. Those clemency discharges to which alternate service has been attached are perceived slightly more favorably than those to which it is not. In the national sample the former serviceman who has gone through clemency proceedings is perceived just slightly better than the civilian draft offender, while in the local sample this reverses. This reversal may be due to a history of alternate service by various groups in the local sample area.

The average score for the four clemency type discharges was 2.59 for the national sample, 3.12 for the local sample and 2.85 for the combined sample. In every case, national, local, and combined sample, the average of the four clemency type discharges was closer to the perception of the general discharge than to the undesirable discharge.

Table II below compares the percentage of prospective employers stating that they would give something less than equal consideration to persons of varying types of military discharge status. Something less than equal consideration is operationalized as a rating of three or less on the scale of from one to five.

Table II

Comparison of Various Military Status Types
According to Employers Inclination to Give
Less Than Equal Employment Consideration

| Discharge Type | Per Cent of Prospective Employers Indicating Less than Equal Considera- tion | | |
|---|--|--------------|--------------------|
| | National Sample | Local Sample | Combined Sample |
| Honorable | 0 % | 0 % | 0 % |
| General | 36 % | 41 % | 39 % |
| Undesirable | 67 % | 82 % | 75 % |
| Dishonorable | 69 % | 88 % | 79 % |
| Clemency | 40 % | 54 % | 47 % |
| Clemency with Alternate Service | 36 % | 45 % | 40 % |
| Civilian Draft Offender with Presidential Pardon under Clemency Program | 40 % | 73 % | 57 % |
| Civilian Draft Offender with Presidential Pardon under Clemency with Alternate Service | 33 % | 48 % | 41 % |

The above table indicates that on the average, the prospective employers included in the national sample tend to discriminate against persons with clemency type discharges in approximately equal proportion to those receiving general discharges. The civilian draft offender who receives a Presidential pardon and performs alternate service is discriminated against slightly less than the former serviceman with a general discharge. Persons with undesirable or dishonorable discharges seem to be twice as likely to be given less than equal consideration for employment than persons undergoing the clemency process. Similar trends appear in the data obtained in the local sample, however, alternate service appears as an important consideration there.

The table below reports outright refusal on the part of prospective employers to consider various military status types.

Table III

Comparison of Various Military Status Type
According to Employers Refusal to
Consider for Employment

| Discharge Type | Per Cent of Prospective Employers Indicating Refusal to Consider for Employment | | |
|---|---|--------------|--------------------|
| | National Sample | Local Sample | Combined Sample |
| Honorable | 0 % | 0 % | 0 % |
| General | 3 % | 6 % | 5 % |
| Undesirable | 23 % | 45 % | 34 % |
| Dishonorable | 43 % | 61 % | 52 % |
| Clemency | 11 % | 24 % | 18 % |
| Clemency with Alternate Service | 6 % | 18 % | 12 % |
| Civilian Draft Offender with Presidential Pardon under Clemency Program | 9 % | 24 % | 16 % |
| Civilian Draft Offender with Presidential Pardon under Clemency with Alternate Service | 6 % | 18 % | 12 % |

When we analyze only the refusals to consider for employment, clemency discharges maintain the same relative position as earlier, i. e. somewhere between the general and undesirable discharge type, closer to the general. A relatively small percentage of employers, approximately 16%, refuse to consider a person with clemency discharge for employment. Alternate service does add some appeal to the consideration.

Respondents were asked whether they would be more likely to hire a clemency recipient if he had been a Vietnam Veteran whose desertion offense was not in a combat situation. 41% of the national sample, 36% of the local sample, and 39% of the combined sample answered in the affirmative. A substantial number of respondents who would not have given clemency recipients equal consideration for employment probably would if they knew more about the nature of the offense, and if it were non-combatant.

The employers were asked, "Would you view a clemency recipient differently depending on the type of job he was seeking?". 17% of the National sample answered in the affirmative, while the smaller businessmen in the local sample answered "yes" 42% of the time. The data on consideration according to type of job can be summarized as follows: prospective employers were less likely to consider individuals with clemency discharges for professional or sales jobs, slightly more likely to give equal consideration with other job applicants for clerical or blue collar skilled jobs, most likely to give equal consideration with other job applicants for unskilled or labor jobs. There is a tendency to not consider persons with clemency discharges for jobs which will result in substantial contact with the public, or presentation of the company to the outside world.

Respondents were asked both why they might not hire a clemency recipient, and why they might hire him. In both cases they were given eight possible reasons as well as the opportunity to provide 'other' answers. They were encouraged to check as many responses as applied. The respondents in the national sample provided approximately as many reasons for not hiring as for hiring clemency recipients. The local respondents gave two times as many negative as positive responses. The three most frequently offered reasons for not hiring a clemency recipient in the national sample were: 1) It is unfair to give him a job when so many veterans with honorable discharges are unemployed, 2) He may be untrustworthy or undependable as an employee, 3) His fellow employees might not accept him well. The above three were noted by 38, 31, and 27 per cent of the respondents respectively. Local respondents also checked #1 and #2 above as their main reasons as to why they might not hire a clemency recipient, but as their third most often cited reason they offered, "He has not fulfilled his obligation to his country". These responses were offered by 58, 42 and 42 per cent of the respondents respectively.

In the national sample the three most frequently cited reasons why an employer might hire a clemency recipient were: 1) His draft or desertion offenses have nothing to do with how well he will perform his job, 2) If he performed alternative service, he has fulfilled his obligation to his country, and 3) It would be discriminatory and unfair to

hold these offenses against him. These responses were checked by 42, 36, and 16 per cent of the respondents respectively. In the local sampling the three most often cited reasons why an employer might hire a clemency recipient were: 1) If he performed alternative service, he has fulfilled his obligation to his country, 2) His draft or desertion offenses have nothing to do with how well he will perform his job, 3) He stood up for what he believed. These responses were offered by 33, 27, and 18 per cent of the respondents respectively. Again, alternative service seems to lessen the stigma attached to a discharge that is other than honorable.

An indication of employer's agreement with the President's clemency program was solicited. At the national level, 47% of the respondents said they personally agreed with the program, 40% personally disagreed with the program and 13% did not answer. On the local level, 39% personally agreed with the program, 58% personally disagreed with the program, and 3% did not answer.

The disagreements were analyzed separately as to whether the respondent disagreed because he felt the clemency program to be too generous, or because he perceived it as being not generous enough. On the national level the disagreement were divided into 71% feeling the program was too generous, 22% feeing the program was not generous enough, and 7% simply registering disagreement. On the more conservative local level, the negatives divided into 79% feeling the program was too generous, only 5% feeling it was not generous enough, with the balance of the replies feeling that some aspects of the program were too generous, others not generous enough.

Data was obtained on other sociologically and demographically relevant variables. These included the scope of the employment operation, the number of persons employed, the type of business or industry involved, the role of military status in the hiring process. Generally, larger more specialized businesses expressed a greater willingness to employ clemency recipients. More detailed information on this aspect of the study will be reported elsewhere.

¹For a clearer distinction between the various types of discharges the reader is referred to Army Regulation No. 635-200, Para. 1-5 C 15 Jul. 1966. The distinction is also presented in "The Gravity of Administrative Discharges: A Legal and Empirical Evaluation" by Major Bradley R. Jones in Military Law Review Vol. 59, Winter 1973, pp. 1-25

²The data presented in this article is drawn from replies received at the time of writing. It is expected that sample size will increase while and after the current report is in press. The national sample, as stated, draws from companies which engage in nationwide recruiting of personnel. The local sample is biased in the direction of such industries as small retail, construction, food and restaurant, and repair services.



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