VI

VI. AN HISTORICAL PERSPECTIVE

CHAPTER VI: AN HISTORICAL PERSPECTIVE

A survey of American History provides a fuller appreciation of the destiny and responsibility of the American people. To place the issue of Executive Clemency in its proper perspective, one must leaf through the pages of history and take note of the manner in which Washington, Lincoln, Truman and Ford applied their powers of Executive Clemency in dealing with persons charged with, or convicted of, war-related offenses.*

Past acts of Executive Clemency have become a part of our political heritage. Close scrutiny of previous Chief Executives' uses of clemency powers in dealing with war-related offenses will disclose particulars that have often been ignored by both opponents and proponents of clemency. Advocates at either end of the spectrum--those espousing "no clemency" and those urging "universal and unconditional amnesty might temper their pleas if they would study all previous Presidential actions rather than merely citing the one instance that is supportive of their own position. Lessons can be learned from studying past individual actions, but the uniqueness of historical moments must be remembered. This uniqueness precluded adoption of a Lincoln program or a Truman program to resolve a present-day dilemna. The resisters of the Vietnam Era are not in the same category as Southerners who were defeated on the battlefield, nor are they in the same category as those who failed to serve during World War II.

Past Presidential grants of Executive Clemency have each been tailored to fit a particular situation. They differ from one another in significant way. President Ford's clemency program is not unmindful of programs initiated by his predecessors, yet it is distinctly tailored to the Vietnam Era.

Much of the interest and concern over Executive Clemency stems from a fear

*In Appendix, we trace the history of Executive Clemency from English history through the Post-Vietnam Era, including a description of the Australian Clemency Program.

that leniency towards draft-evaders and military deserters might undermine the Nation's future ability to mobilize and maintain a strong military force. The moral dilemma surrounding war and participation in war will always be with us, but it seems unlikely that the prospect of a limited and conditional amnesty at some uncertain future date would lead anyone to break the law by evading the draft or deserting the military. No one can point out any great harm ever suffered by the military as a result of past acts of Executive clemency. However, the negative consequences--if any --of a universal and unconditional amnesty remain unknown inasmuch as no President has ever proclaimed a truly universal and unconditional amnesty.

A review of American history demonstrates that war and conscription have often caused dissension among our people. It also reveals the many instances in which Presidents have used their Constitutional powers to forge reconciliation by offering certain outcasts and offenders an opportunity to regain the full benefits of citizenship.

Washington acted decisively to put down the Whiskey Rebellion. Urged on by Hamilton and others, he was determined to establish the power and authority of the newly constituted Federal government. After finding the courts unable to enforce the laws, and after issuing a Presidential proclamation demanding that the insurrectionists obey the laws, Washington then called on the military to quell the rebellion. Subsequently he pardoned all offenders except two leaders who were under indictment. They were later pardoned after conviction.

The clemency actions of Lincoln and Johnson during and after the Civil War are important because the Civil War involved the first use of significant numbers of conscripts by the US Army. Draft evasion and desertion were commonplace throughout the war. Lincoln's many personal interventions to commute death sentences that had been meted out for desertion displayed his personal eagerness to temper justice

with mercy. Nevertheless, his acts of clemency were primarily a method of carrying out military and political aims. Amnesty for Union deserters was predicated on their rejoining their regiments and thus being available to fight the rebels. Lincoln's early amnesty offers to supporters of the Confederacy were surely intended to undermine Jefferson Davis' army and suppress the rebellion. Johnson's post-war clemency was designed to dispense the grace and favor of the government to secessionist followers, but Confederate leaders were not to be treated lightly. Johnson's actions were highly political; in addition to his struggle against impeachment, he was continually wrestling with Congress over his program of Reconstruction.

Truman took great pride in his military service, and he held little sympathy for those who refused to wear the uniform. His high regard for the serviceman was demonstrated by his Christmas 1945 pardon of several thousand ex-convicts who served the military. Truman's Amnesty Board was restricted to reviewing only Selective Service violations. Only three prisoners secured release from confinement as a result of Amnesty Board recommendations. The other 1,520 receiving Presidential pardon had already completed their prison sentences. At Christmas-time in 1952, Truman restored citizenship rights to approximately 9,000 peace-time deserters but no pardon, remission, or mitigation of sentence was involved. At the same time, Truman restored civil rights for Korean War veterans who had received civil court convictions prior to their service in the Korean War.

To put President Ford's program in perspective, in the rest of this chapter we summarize the ways in which Washington, Lincoln, Johnson, and Truman adhered to or departed from the six principles of President Ford's Clemency Program. These principles, described elsewhere in this report, are the following: (1) The Need for a Program; (2) Clemency, Not Amnesty; (3) A Limited, Not Universal, Program;

(4) A Program of Definite, not Indefinite, Length; (5) A Case-by-Case, not Blanket, Approach; (6) Conditional, not Unconditional, Clemency.

The Need for a Program

President Washington's use of the Presidential pardoning power is attributed to his personal inclination to act with "moderation and tenderness". The Whiskey Rebellion consisted primarily of fiery speeches against unjust taxation; there had been little gunfire. Consequently, the Whiskey Rebellion was not of such magnitude as to require a Presidential program of reconciliation in its aftermath. Although the Jeffersonians condemned the Federalists for using military forces instead of juries to uphold the laws, Congress praised Washington for his firm action.

Some of the clemency acts associated with the Civil War were proclaimed both during the war and throughout President Johnson's term following the war. They were primarily a means of reuniting the nation; others served more narrow military and political aims. As the war ended, Lincoln and Johnson both recognized the need for a program that would not treat the South as a conquered nation, but as a part of a reunited America. Amnesty was to be a basis for reconstruction, individual rights had to be restored before States could again become a part of that Union.

Between 1945 and 1952, President Truman issued four Proclamations of Executive clemency; each covered a different class of individuals. His program for civilian draft offenders was announced over two years after the end of World War II. Although there was a certain amount of pro-amnesty agitation during this period, the issue did not spark a major public debate and there was no need for a program of reconciliation in the sense that such programs were needed following the Civil War and the Vietnam War.

President Ford's program was comparable to, but not quite the equivalent of Johnson's Civil War clemencies in terms of responsiveness to a clearly felt need. While the Vietnam conflict did not separate States from the Union, it did foster a divisiveness of such magnitude among the population that the Chief Executive was obliged to initiate a clemency program to heal America's wounds. His program was proclaimed sooner after the war's end than Truman's, but less swiftly than Washington's or Johnson's. However, like Johnson President Ford announced his clemency program exactly six weeks after assuming his office.

Clemency, Not Amnesty

The Whiskey Rebellionists were recipients of clemency, not amnesty. Amnesty for acts of treason would have been unthinkable for a new nation still in the process of establishing the authority of the Federal government. Clemency for former insurrectionists who now expressed a readiness to obey the laws seemed the proper course. In his December 1795 address to Congress, Washington commented on his leniency towards the insurrectionists: "The misled have abandoned their errors." "These circumstances have induced me to pardon generally the offenders here referred to, and to extend forgiveness to those who had been adjudged to capital punishment."

The numerous Civil War "amnesties" did not conform to the dictionary meaning of the word. The entreaties to Union Army deserters were not acts of oblivion; they were acts of leniency, and they were intended to entice soldiers to return to their regiments. The early offers to Secessionists were in reality appeals to abandon the Confederate cause; thus was the cloak of amnesty used to weaken the Confederacy. For Confederates there was no blotting out of the crime, the oath that was required implied repentance.

Truman's Amnesty Board, despite its name, gave no grants of amnesty. The Board was charged with making recommendations for Executive clemency and it did so by recommending individual pardons.

President Ford specifically rejected amnesty, calling instead for a clemency program with the objective of "making future penalties fit the seriousness of each individual's offense and of mitigating punishment already meted out in a spirit of equity".

A Limited, not Universal, Program

Washington limited his clemency program by placing exclusions in his Proclamations. Few persons actually benefited from his action, since only a handful had been indicted and only two were adjudged guilty of treason.

Neither Lincoln nor Johnson ever issued a universal amnesty; there were many persons excluded from their programs. Johnson's first proclamation declared 14 classes of persons ineligible for amnesty. Johnson is known to have seriously considered proclaiming a universal amnesty just prior to the 1868 Democratic National Convention, but only for political reasons. Johnson's "universal" amnesty of Christmas 1868 was universal in the sense that it applied to all rebels; inasmuch as it did not remove disabilities from those who had been convicted of draft evasion or desertion from the Union Forces, it was not universal in application.

Each of Truman's Proclamations was limited, not universal, in scope. In rejecting a universal program Truman's Amnesty Board reported "to grant a general amnesty would have restored full civil status to a large number of men who neither were, nor claimed to be, religious objectors."

President Ford's program was more universal than either Johnson's or Truman's in that it did not specifically, consciously exclude major categories of offenders. (This exclusion was made not by Truman, but by his Amnesty Board.)

However, it did not affect as many people as Johnson's program. The 125,000 eligible persons and 22,500 applicants to President Ford's program made it the second largest in our nation's history.

A Program of Definite, not Indefinite Length

The Whiskey Excise Law was amended in June, 1795 and soon thereafter the Federal tax collectors were being challenged by the Pennsylvania farmers. Although Washington issued three Proclamations concerning the Whiskey Rebellion, only the last of them carried his offer of pardon. This third Proclamation was published in July, 1795, so the issue was settled within about a year from its inception.

Civil War amnesty did not amount to a "program". Rather, Civil War amnesty began with Lincoln's War Department Executive Order of 1862, extended through 1898 when the political disability imposed by the Fourteenth Amendment was removed.

Truman's Amnesty Board completed its work within one year. Truman's other Proclamations were one-time actions and did not entail establishment of "programs."

Like Truman's program for draft evaders, President Ford's clemency program lasted for only one year. Unlike Truman,s however, he combined all of his initiatives in a single proclamation and a single program. By contrast, Washington and Johnson implemented their clemency programs gradually, through a series of proclamations.

A Case-by-Case, not Blanket Approach

Only about twenty persons were apprehended as Whiskey Rebillionists, so Washington followed a blanket approach in granting them pardons. Lincoln, in a 1864 Message to Congress acknowledged his willingness to grant clemency, stating that "no voluntary application has been denied". Despite his lenient policy, his actions would seem best classified as case-by-case. Lincoln's 1862 Executive Order

called for case-by-case review in that the Secretary of War was given discretionary power to keep in custody persons "whose release at the present moment may be incompatible with the public safety." There is no clear record as to the number of former Confederates obliged under the Fourteenth Amendment to request full restoration of citizenship, but the Forty-first Congress passed on approximately twenty thousand names.

When repentant Confederates came forward to take the oath of amnesty, a record was to be made and the original forwarded to the Secretary of State. A blanket approach to the deserter problem would be Lincoln's February 1864 decree "that the sentences of all deserters who have been condemned by Court Martial to death, and that have not been otherwise acted upon by me, be mitigated to imprisonment during the war". This blanket commutation of sentence also offered case-by-case clemency in that general officers with court martial authority were given the power to release imprisoned deserters and return them to duty. By contrast, Johnson's clemency offers were made and applied more generally.

The 1945 pardon of ex-convicts who subsequently served honorably in the Armed Forces was a blanket clemency in that it extended to all persons in a carefully defined category. The same may be said of Truman's 1952 Proclamations. Truman's Amnesty Board, however, determined that a blanket approach would not be a proper way of handling clemency for Selective Service violators. The Board recommendations were based on a case-by-case review.

Like Truman, President Ford appointed a Clemency Board to hear all cases of punished offenders. However, this Board denied clemency in only 5% of its cases--contrasting sharply with the Truman Board's denial of clemency to 80% of its cases.

Like Lincoln, he gave the military a major role in the resolution of cases involving deserters.

Conditional, not Unconditional, Clemency

Washington conditioned his offer of pardon by requiring that the Pennsylvanians involved in the Whiskey Rebellion subscribe to "assurances of submission to the laws". Refusal or neglect to subscribe such assurance apparently barred one from the benefits of pardon.

Civil War amnesties were conditional in nature. Union Army deserters were required to return to their regiments; Confederates were required to take an oath that amounted to public repentance. Political prisoners released by War Department Executive Order #1 of 1862 were required to subscribe to "a parole engaging them to render no aid or comfort to the enemies".

There were no conditions attached to any of Truman's four Proclamations of Executive clemency. Because the qualifications for coverage under the Truman clemencies were so carefully prescribed, no future conditions were seen as necessary.

President's Ford's program was the only one to apply a condition of Alternative Service to most of his grants of clemency. Unlike Washington and Lincoln, he did not attach any condition restraining clemency recipients' future conduct. Instead, he attached a condition of Alternative Service as a means of demonstrating one's commitment to national service. Like Washington and Lincoln, he required some clemency recipients to sign a loyalty oath.

Conclusion: The Precedential Impact of the President's Program

An analysis of the history of executive clemency shows that different wars have produced different post-war grants of clemency. To a large extent, the Presidential policies have reflected the need for national reconciliation during

the post-war period. When there was little such need, there was little or no clemency offered. When the need was considerable--such as when Washington was trying to build a nation at the time of the Whiskey Rebellion, or when Lincoln was making plans to reunite it during the late stages of the Civil War--the grants of executive clemency were considerable. We expect that President Ford's clemency program will be viewed in much the same manner as Washington's and Lincoln's programs have been.

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We believe that this clemency program is the most generous ever offered, when equal consideration is given to the nature of benefits offered, the conditions attached, the number of individuals benefited, and the speed with which the program followed the war. However, if each factor is taken separately, the President's program does not break precedent in any fundamental way. Washington's pardon of Whiskey Rebellionists was a speedier action, but it affected only a very small number of people. Lincoln's Civil War amnesties for deserters were more clement, but he set more stringent conditions. Johnson's amnesties for Southern Secessionists benefited more individuals, but 30 years passed before their full rights were restored. The Truman amnesty of draft evaders imposed no conditions, but it denied clemency to 80% of its cases.

President Ford only established one new precedent: The condition of alternative service. Had he announced universal, unconditional amnesty, his program would have been much more of a break from precedent. While historians might still have viewed it as a tailored response to a distinguishable war, its impact upon a future generation of draftees and combat troops would be much harder to predict. These were risks well worth avoiding.

VII

VII. CONCLUSIONS AND RECOMMENDATIONS

CHAPTER VII: CONCLUSIONS

The President's Clemncy Program was, very broadly speaking, an effort to heal some of the wounds of the Vietnam era. The Presidential Proclamation gave a clear mandate to our Board and to the Departments of Defense and Justice to achieve that objective.

Inescapably, we must ask whether the clemency program did in fact carry out the President's mandate. How successfully did we implement the spirit of each of the President's six principles:

(1) The need for a program

(2) Clemency, Not Amnesty

(3) A Limited, not universal, program

(4) A program of definite, not indefinite length

(5) A case-by-case, not blanket, approach

(6) Conditional, not Unconditional clemency

Earlier in this report, we have described what we and other agencies have done to implement these six principles. On the whole, we are confident that the program had reflected the spirit of the Presidential Proclamation which created it.

E. The Need for a Program

As requested by the President, the designated agencies did develop a program which dealt directly with the issue of reconciliation for draft resisters and military deserters. Therefore, the public need for a Presidential response to this issue, very clearly felt just one year ago, now no longer exists. The President's Clemency Program is not the answer that many would have chosen, but it has been widely accepted as a compromise. A recent survey of public opinion conducted by the Gallup Organizationin August, 1974, discovered that ___% of the American people approve of President Ford's Clemency program. (The others who offered opinions were almost equally divided between the ___% who thought he was too

generous and the ___% who thought he was not generous enough).* We are confident that the President's program has helped enable all Americans to put their war-engendered differences aside and live as friends and neighbors once again. The same Gallup Poll found that the overwhelming manority of Americans -- __% -- are now willing to accept clemency recipients into their communities on at least equal terms. We are strongly convinced that an unconditional amnesty would have achieved much less of a reconciliation among persons who had strong differences of opinion during the Vietnam War. In fact, such a policy might have exacerbated those differences.

The discussion of clemency or amnesty in the public forum has abated with surprising swiftness since the announcement of the program. It once was the constant subject of Congressional debate, newspaper editorials, and opinion polls. After the program started,discussion focused more on the details of the program than on the broader question of clemency versus amnesty. Today, the issue is virtually dormant. Whether this reflects positive acceptance, quiet acquiescence, or disinterest on the part of the public is a question which we cannot answer.

Part of the reasons for the diminished public interest in clemency may have been the low profile maintained by the other agencies and ourselves. We do wonder whether a higher profile might have led to an even greater public acceptance of the program. We believed, at first, that the same public which had shown such keen interest in the amnesty issue beforehand would be reasonably well informed about what was in the President's offer of clemency. During the late winter

* Contrast this with a Gallup/Newsweek poll in ____, which found that only ____% favored a program of conditional clemency, with ____% favoring unconditional amnesty and _____% no program at all. The complete results of the recent Gallup Poll are included in Appendix ____.

weeks we tried to focus more public interest on the program. As we traveled throughout the country to speak with local media and counseling organizations, we were boggled by the misconceptions we found. It was indeed the rare person who already knew of the eligibility of former servicemen with bad discharges because of desertion offenses--who constituted 100,000 of the 125,000 persons covered by the President's program. We also found that many people who originally had been critics of the program came away from our meetings as supporters, once their misconceptions had been corrected. Everyone was astonished to learn that, in the overall clemency program, there were three times as many applicants who were Vietnam veterns as there were Canadian exiles. Unfortunately, we suspect that a majority of Americans still misunderstand what the program offered, who was eligible, and what the typical clemency applicant was like.

On balance, we consider the program's very low profile from September through January to have been a mistake. We believe that the program could have been very popular with the American public. It also could have reached more eligible persons. Despite this, the need for a program has been satisfied and the American people seem reasonably content with the program which evolved. Along the way, some of the wounds of the Vietnam Era may well have been healed.

Finally, the President's clemency program was not--and should not be interpreted as--a denigration of the sacrifices of those who served honorably or lost loved ones in the Vietnam conflict. We are particularly concerned about the employment opportunities of the 2,500,000 veterans who served in Vietnam and feelings of the estimated 250,000 parents, wives, brothers, sisters, and children of soldiers who lost their lives in Vietnam. These are individuals deserving of our utmost respect. We are confident that the President's clemency program did them no harm; we are equally confident that a program of unconditional amnesty would have led many of these people to believe, in good conscience, that their sacrificies had been downgraded.

Clemency, Not Amnesty

While it was never intended that the clemency program offer reparations or even a total restoration of status for all its applicants, it was intended that the program be "clement" and offer something of value to its applicants. Did applicants in fact receive anything of value?

Beyond question, applicants to the Department of Justice program received something of value. They are the only clemency recipients who will emerge with a clean record; once they complete their alternative service, their prosecutions will be dropped. Thus, their draft offenses should not affect their future opportunities to find jobs, housing and so forth. However, their clean record comes at some risk. If a fugitive draft resister returned from Caneda and enrolled in the Justice program, he must complete his alternative service. If he does not, he could be subject to immediate prosecution for his draft offense and would not be allowed to return to Canada if he so chose.

Applicants to the Defense program were benfited primarily insofar as they immediately ended their fugitive status and avoided the risk of facing a court-martial and possible imprisonment. They immediately received Undesirable Discharges. (If he was one of 42 particularly meritorious cases, he received full entitlement to Veteran's Benefits). Although he can be held accountable for failure to complete alternative service, he is unlikely to be prosecuted for such a failure. For such a prosecution to succeed, it must be shown that he did not intend to do alternative service at the time he enrolled in the program--a subjective piece of evidence which is difficult to prove. If he does complete alternative service, he receives a clemency discharge to replace the undesirable discharge given him when he enrolled in the Defense program.

Critics of the President's program contend that a clemency discharge is at best worth nothing, since it is not a discharge under honorable conditions; and confers no veterans benefits. They further contend that it may be harmful, since it

stigmatizes individuals as having committed AWOL or desertion offenses. /

The major offering of the Presidential Clemency Board was a Presidential Pardon, the highest symbolic Constitutional Act which the President could do on behalf of any of our applicants. Still, pardons result in no more than a partial restoration of an applicant's records and rights, blotting out neither the fact nor the record of conviction. Under present practice, no records are sealed. The benefits of a pardon lie in its restoration of the right to vote, hold office, hold trade licenses, and enjoy other rights described earlier. In Dr. Pearman's survey of employer attitudes, he found that 41% of national and local employers would discriminate against a convicted draft offender who performed alternative service and received a pardon, versus 75% who would discriminate against him if he did not receive clemency. / Only 12% would refuse to consider hiring a former draft offender who earned his pardon, whereas 37% would refuse to hire him otherwise. / Local employers would discriminate against him much more than national employers.

In a recent survey of about 100 national and local (Pennsylvania) employers, Dr. William Pearman found that employers view Clemency Discharges as almost the equivalent of General Discharges. / If a job applicant with a Clemency Discharge earned it through alternative service, the percentage of employers who would discriminate against him (40%) is about the same as if he had a General Discharge (39%), and much less than if he had an Undesirable Discharge (75%). / The percentage of employers who would refuse to consider hiring him (6%) is not much larger than if he had a General Discharge (5%), and much less than if he had an Undesirable Discharge (34%).

The reasons why some employers discriminated against clemency recipients were the unfairness of giving him a job when so many veterans with Honorable Discharges are unemployed, and the likelihood of his untrustworthiness and undependability.

/ There is no truth to the further allegation that a clemency discharge disqualifies an individual from ever receiving veterans' benefits; it simply does not alone bestow benefits. Whatever appeal rights one had with an Undesirable or Bad Conduct Discharge, one still has with a Clemency Discharge.)

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The reasons why some employers discriminated against clemency recipients were the unfairness of giving him a job when so many veterans with Honorable Discharges are unemployed, and the likelihood of his untrustworthiness and undependability. The reasons given for not discriminating against them are his satisfaction of his national service obligation through alternative service, and the lack of any relationship between his desertion offenses and his potential performance on the job. National employers would discriminate against Clemency Discharges less often than local employers.

This study cannot be considered conclusive evidence of the worth of a Clemency Discharge, but it does indicate that there may be a reservoir of generosity and good will towards those who sought and earned clemency. If this is true, then applicants to the Defense program do receive something of value for performing alternative service. Still, their greatest benefit from applying for clemency is the end they put to their fugitive status and to their chances of going to jail for their AWOL offenses.

Almost none of the applicants to the Presidential Clemency Board were fugitives, the rate exception being the civilian who fled to avoid punishment after his conviction. As a result, the major benefit of the other two programs--putting an end to one's fugitive status--if of no consequence to our typical applicant. He had already settled his score with civilian or military authorities. He owed no further obligations, but still suffered from the consequences of his civilian conviction, Court-Martial conviction, or Bad Discharge.

_/ The percentage who would discriminate against if he did no alternative service would be 57%.

_/ The percentage who would refuse to consider hiring him if he did no alternative service would be 16%.

_/ Dr. Pearman's Study is presented in full in Appendix____. His findings on discrimination against Undesirable and General Discharges are corroborated by two other surveys on the subject. See_____.

_/ The percentage who would discriminate him if he did no alternative service is 47%.

_/ The percentage who would refuse to consider hiring him if he did no alternative service is 18%.

A military applicant to the PCB receives a pardon as well as a Clemency Discharge. If he had any felony Court-Martial conviction, the pardon restores the same rights to him as to a civilian applicant with a Federal draft offense conviction. If he never had a felony Court-Martial conviction (for example, if he received an administrative discharge), the pardon neither restores rights nor immunizes him from further prosecution, since he already enjoys such an immunity by reasons of his discharge. The usefulness of the pardon is limited to its possible impact on military discharge review boards, courts, and other agencies which otherwise would be obligated to take note of his prior Court-Martial conviction and bad military record. Whether a Clemency Discharge plus a Presidential Pardon means more to employers than a Clemency Discharge standing alone is unclear; it is possible, perhaps even likely, that it adds nothing in tangible terms--except where trade license restrictions are involved.

However, we realize that most of our applicants were interested in more tangible benefits--especially veterans benefits. While we do not suggest that most of our applicants should have rejected these benefits, some of them were combat veterans. Others had injuries or disabilities resulting from their military service. It is not yet clear whether clemency recipients will be dealt with clemency by agencies which review their subsequent appeals for discharge upgrades or veterans benefits.

Beyond this, we are concerned that many of our applicants will not understand what they have received from the clemency program. Staff conversations with applicants indicate that there are many applicants who do not understand our telegrams and letters describing their grants of clemency.

Without face-to-face counseling, it is possible that many of them will never know what to write on employment application forms about their discharge. Many others may not realize that they can still apply to Discharge Review Boards for a discharge upgrade or to the Veternas Administration for veterans benefits.

Impact on Persons Not Receiving Clemency

It was a consistent principle of the President's Clemency Program that no one be coerced into applying for clemency--or made worse off as a result of having applied. To do otherwise would be neither clement nor fair. For this reason, we are concerned about the impacts of the clemency program on those who did not apply, did not complete alternative service, or were denied clemency. The Clemency Program may have stimulated a greater public tolerance for everyone who committed draft or AWOL offenses during the Vietnam era.

If so, those who did not receive clemency could benefit from the goodwill extended to those who did. We expect that this will be the case.

Of course, the reverse may be true: Individuals who could have applied for clemency but failed to do so (out of choice or ignorance) might face greater public disrespect than ever before. If an individual was eligible for but did not receive clemency, it is possible that adjudicative or administrative bodies will take adverse notice of that fact when dealing with that individual. For example, a military Discharge Review Board might look with particular skepticism at an upgrade appeal of a person who might have applied for clemency, but did not. The Veterans Administration may do the same for former servicemen appealing for Veteran's benetis despite their bad discharges. Sentencing judges, law enforce-

ment officials, licensing bodies, credit agencies, and others may likewise look askance at an eligible person's failure to receive clemency. With over 100,000 of the estimated 125,000 eligible persons not having applied for clemency, these possibly adverse impacts are of greater significance.

We are the only clemency granting agency who denied clemency to some of our applicants (about 5%--or 800 cases). In making those case dispositions, we did not intend to leave those individuals in a worse position than before they applied. It is possible that those to whom we denied clemency--or who fail to complete alternative service--may be worse off than before they applied. Being denied clemency may be a personal **embarrassment** and, perhaps a stigma. We did not announce the names of those denied clemency, and we are concerned that the confidentiality of those individuals not be infringed upon by anyone else. We are equally concerned about the confidentiality of those who fail to complete their alternative service.

· A Limited, Not Universal, Program

On balance, we consider the scope of the program to have been quite generous. Rather than require a test of sincere opposition to the Vietnam War (which would have been unfair to people less able to articulate their views), the program was designed to include anyone whose offense may have involved opposition to the war or the military. Sixteen percent of the military applicants to our program and 81% of the applicants to the DOD program went AWOL out of opposition to the war or the military, demonstrating the generosity of the program in defining eligibility. However, some categories of individuals remained ineligible despite the obvious relationship between their offenses and thier opposition to the war. The clearest example of this was the serviceman who refused to obey an order to go to Vietnam. In his case, the military could have discharged him either for missing movement (qualifying him for clemency) or for disobeying orders (not qualifying him for clemency).

A Program of Definite, Not Indefinite, Length

The Clemency program was at first scheduled to accept applications for 4½ months. Because of a surge in our applications, two one month extensions were granted by the President. His apparent purpose of ending the program was to put the issue of clemency behind us as quickly as possible, or that we might also put the War behind us as quickly as possible.

Out of an estimated 123,000 persons eligible for clemency, only 22,500 actually applied to the three separate programs. This 18% application rate seems disappointing at first glance; however, for a program which accepted applications for only six months, that percentage is unusually large. To our knowledge, there has been no other Federal program which has drawn such a rapid response during its first six months. For example, HEW's Supplemental Income Security program, offering case grants for low-income elderly persons, received applications from only 9% of its eligible target group during its first six months, and it took a full year for the program to match the clemency program's figure of 18%. This was true despite SIS's well-financed promotional campaign. Given the short time span and limited resources of our outreach efforts, we consider our application rate to be rather high.

Unfortunately, we can take little solace from that fact. The SIS program is still accepting applications, but we are not.

We believed, at first, that those eligible for clemency would be well-educated well-informed, and alert to a communications "pipeline" among themselves which would carry the news about the program. We also believed that veterans counselors would correctly advise former servicement with bad discharges about their eligibility for the program. Both of these assumptions were wrong. A late December survey of twelve persons eligible for clemency showed that not one of them knew he could apply. In early January, the mother of a Vietnam Veteran with a bad

discharge because of AWOL contacted General Lewis Walt of our Board to ask if the local Veterans Administration office had been correct when it told her that her son was not eligible for clemency.

Our Public Information campaign did not begin until mid-January, yet it stimulated a five-fold increase in applications before the month ended -- and over a twenty-fold increase before the second deadline extension expired at the end of March.

The application period was surely sufficient for those who knew from the start what the program offered them. They had ample time to make up their minds about applying. We suspect (but we cannot be sure) that virtually all of those eligible for the Department of Justice had such a sufficient period. However, it is our understanding that the number of applicants to the Department of Defense program was less than it might have been because of widespread misunderstandings about the fairness and decency of the procedures followed by the Clemency Processing Center at Fort Benjamin Harrison. Likewise, it is our firm belief that the small percentage of applications to the Presidential Clemency Board is attributable to the lack of public awareness of our eligibility criteria. The rising monthly tallies of new Board applications (800 through December, 4000 in January, 6000 in February, 10,000 in March) indicates that even more applications would have been received had our program (and Public Information campaign) continued. Informal Telephone Polls conducted by our Staff found that even as late as March, 90% of our applicants had only learned of their eligibility within the past few days. Usually a news article or television announcement had been responsible for their application.

The degree to which the American public still misunderstands the President's program was illustrated by the recent Gallup poll. A substantial ___% of the American public had heard of the clemency program; ___% realized that it included fugitive draft resisters, and ___% knew that it was for fugitive deserters.

However, very few -- ___% and ___%, respectively -- understood that convicted draft offenders and discharged AWOL offenders could apply. Only ___% thought that a Vietnam Veteran discharged for a later AWOL could apply for clemency. It is worth noting that the percentage of the public which understood our eligibility criteria corresponded almost exactly with the percentage of our eligible persons who applied by the March 31, deadline.

It is our firm conviction that many eligible persons did not apply because, even by the end of March they still did not know they could apply. As the Gallup poll indicated, they probably still do not know that the program was for them.*

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* The Gallup Poll discovered that a slight majority of Americans (___% versus ___%) do not favor a reopening of the President's program. However, the widespread misunderstanding about our eligibility criteria requires that a different perspective be taken of these results. In effect, ___% favor giving eligible persons a second chance to apply. We expect that a much greater percentage would favor giving uninformed eligible persons a first chance to make up their minds about applying.

A case-by-Case, Not Blanket, Approach

Despite the wholly discretionary character of any grants of executive clemency, our program must be judged in terms of the fairness of our rules and the consistency with which we followed them. To be worthy of the respect and confidence of all citizens, we must have observed the basic principles of a fair legal process.

Questions of process arise primarily in any clemency/Amensty program which follows a case-by-case approach.

Any blanket amnesty program would raise relatively few, if any, due process issues. The proper context for any discussion, therefore, is whether the President's program satisfactorily dealt with this extra burden. Absolute --- not comparative -- standards apply. Administrative requirements cannot be used as a justification for any short-cuts of due process.

At the Presidential Clemency Board, we have made every effort to apply fair rules and follow them with consistency. We occasionally had to modify our rules in mid-course, sometimes before corresponding changes could be made in our regulations. However, this was only done when it appeared that the rights and interests of our applicants would not be affected. The procedures which we imposed upon ourselves--quality control of casework, codification of policy precedents, the 30-day period for applicants to comment on their case summaries, and post audit of case dispositions--often--added time and administrative difficulty to our process, but we considered them essential to maintain the quality of our work. The seriousness with which we took our responsibilities was exemplified by our publication of an in-house professional journal, the Clemency Law Reporter. Our Board and staff of over 300 attorneys maintained a continuousdialogue about how our procedures were or were not consistent with due process; when changes were felt necessary, they were made. Ours was not a perfect process--it certainly was too time-consuming to suit us--but it was a reasonable one, carried out in good faith.

We consider our baseline formula, mitigating factors, and aggravating factors to have been fairly developed and fairly applied. Uniformly, they were developed through a clear process of Board consensus about what was relevant about the backgrounds of our applicants. Through the publication of policy precedents in the Clemency Law Reporter, we internally codified our policies. We applied them as consistently as could be expected, given the fact that all but a few hundred of our cases were decided in three-person Board panels.

Of the other two parts of the programs, we were particularly pleased with the fair and humane process which the Defense Department implemented at its Fort Harrison Clemency Processing Center. Unlike ourselves, the Defense Program had clemency applicants personally at hand during the case disposition process. Independent observers and applicants alike have spoken high praise of the procedures followed at Fort Harrison. Like ours, it was not a perfect process-lacking any opportunity for personal appearans or appeals, for example-but it was a reasonable one, carried out in good faith.

Conditional, Not Unconditional Clemency

The qualities of mercy and forgiveness inherent in the President's program should not be interpreted as an admission that those who broke the law were correct. By creating the program, the President never intended to imply that the laws were wrong or that the clemency applicants were right. We believe that rights and responsibilities or citizenship are central to the theme of any meaningful clemency or amnesty program and any such program must be evaluated in terms of its reinforcement of those rights and responsibilities.

We realize that there is not now and may never be a national consensus on what a citizen's responsibilities are during time of war--especially if that citizen cannot support the war on religious or ethical grounds. We can only take a position on the subject in the same manner as any citizen (or group of citizens) might. We represent a cross-section of backgrounds, views, and personal interests,

however, so our own consensus on this point may be of some interest.

We believe that when a citizen breaks a law he considers unjust, it is his responsibility to accept the designated punishment for his offense. Likewise, it is the responsibility of his government either to punish him or to change its laws, to prevent others from believing that they too can break laws without sanction. Once the preventive (or deterrent) impact of punishment is no longer important--in other words, once the unpopular war has ended--it is the government's further responsibility to temper its punishment with compassion and mercy. However, official forgiveness for an individual's failure to serve his country in time of war does not discharge him from his outstanding obligation of national service. Only in circumstances where an individual's punishment could be construed as a fulfillment of his obligations of national service do we believe that anyone can be officially "forgiven" without performing alternative service in the national interest.

Likewise, we consider it fair for the President to have conditioned his grants of clemency upon a good faith application from an eligible person. Executive clemency means more when it is an offer, not just a preemptory gift. The President, speaking for the American people, offered reconciliation. That reconciliation must be mutual. If the 100,000 non-applicants were to have knowingly accepted his offer, this President--and, indeed, this country--would owe them nothing more. Our only concern about those who did not apply is that many have failed to realize in time that they were eligible.

VIII

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TOTALLY EMBARGOED
UNTIL 11:30 A.M., EDT

SEPTEMBER 16, 1974

Office of the White House Press Secretary

THE WHITE HOUSE

FACT SHEET

PROCEDURES TO BE FOLLOWED

UNCONVICTED DRAFT EVADER AND MILITARY ABSENTEE

DRAFT EVADER	MILITARY ABSENTEE (including Coast Guard)
Report to United States Attorney where offense was committed	Report as prescribed by the military department concerned or for members of the Coast Guard report to the Secretary of Transportation
Acknowledge allegiance to the United States by agreeing with the United States Attorney to perform 24 months alternate service or less based on mitigating circumstances	Oath of Allegiance to United States
	Agree with the concerned Military Department to perform 24 months alternate service or less based upon mitigating circumstances
Perform alternate service under the auspices of the Director of Selective Service	Upon request, Military Department forgoes prosecution, and issues undesirable discharge
Director of Selective Service issues certificate of satisfactory completion of alternate service	Perform alternate service under the auspices of the Director of Selective Service

DRAFT EVADER	MILITARY ABSENTEE (including Coast Guard)
Receipt by United States Attorney of a certificate of satisfactory completion of alternate service	Director of Selective Servic issues certificate of satisfactory completion of alternate service
Dismissal of indictment or dropping of charges	Receipt of a certificate of satisfactory completion of alternate service by the concerned Military Departme
	Clemency discharge substitut for undesirable discharge
Apply to Clemency Board	Apply to Clemency Board
Clemency Board may recommend clemency to the President	Clemency Board may recommend clemency to the President, including substitution of a clemency discharge for a punitive or undesirable discharge
Clemency Board may condition recommendation of clemency on period of alternate service	Clemency Board may condition recommendation of clemency on period of alternate service
President may grant clemency	President may grant clemency, including substitution of a clemency discharge for a punitive or undesirable discharge

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rules and regulations

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each month.

Title 2—Clemency

CHAPTER I—PRESIDENTIAL CLEMENCY BOARD

ADMINISTRATIVE PROCEDURES AND SUBSTANTIVE STANDARDS

The Presidential Clemency Board published its proposed administrative procedures and substantive standards on November 27, 1974 (39 FR 41351). Since that time, the Board has considered the first military cases before it, and has had the benefit of more than 40 comments on its proposed regulations. With the benefit of this additional experience and these comments, the Board publishes the final regulations setting out its procedures and standards.

It is the intent of the Board to provide notice to the public of the standards it uses to make recommendations to the President concerning individual applications for clemency. The Board also wishes to ensure equity and consistency for applicants under the President's clemency program.

Because it is a temporary organization within the White House Office, the sole function of which is to advise the President with respect to the exercise of his constitutional power of executive clemency, the Board does not consider itself formally bound by the Administrative Procedure Act. Nonetheless, within the time and resource constraints governing it, the Board wishes to adhere as closely as possible to the principles of procedural due process. The administrative procedures established in these regulations reflect this decision.

The Board may publish changes in individual sections as it deems necessary. The Board welcomes continuing comment on problems which may arise in the application of particular sections of these procedures and invites recommendations on how best these problems may be resolved.

Several dozen technical changes have been made in these regulations in response to new circumstances that were presented to the Board. Some clarify significantly the rights and procedures available to applicants. The following is an explanation of those changes which seem to the Board to be most significant:

Jurisdiction. Section 101.3 has been added in order to incorporate the criteria for determining whether or not a person is eligible for consideration by the Presidential Clemency Board. It restates the criteria established in Proclamation 4313 (Announcing a Program for the Return of Vietnam Era Draft Evaders and Military Deserters) and repeated in Executive Order 11803 (Establishing a Clemency Board * * *).

Remedies. Section 101.4 has been added to explain the remedies available from the Presidential Clemency Board. It states the authority with which the Board is vested by Executive Order 11803, issued pursuant to Proclamation 4313.

A Presidential pardon restores those federal civil rights lost as a result of a felony conviction. State law recognizes Presidential pardons as a matter of comity, usually restoring the right to vote in federal and state elections, to hold public office, and to obtain licenses for trades and professions from which convicted felons are barred under state law. Since conviction by military court-martial is treated as a felony conviction by many states, and since an Undesirable Discharge may have the same consequences as a court-martial conviction, the benefits of a pardon apply to former servicemen as well as to civilian draft evaders.

A Clemency Discharge neither entitles its recipient to veterans benefits nor bars his receiving those benefits to which he is otherwise entitled. The Veterans Administration and other agencies may extend veterans' benefits to some holders of a Clemency Discharge, but it is contemplated that most will not receive veterans benefits.

Availability of files to applicant and his representative. Section 101.7(c) clarifies which files an applicant and his representative have a right to see. At the offices of the Board, information collected by the Board independently of any other government agency is readily available to an applicant or his representative. All files obtained from other agencies are available to the extent not barred by the rules of the agency owning the file. For example, the Selective Service System file is available to him and his representative. Files from another agency are cited in a summary when they are used as the basis of statements in that summary. Reason for denial of access to any of these files is stated in writing upon request.

This subsection is in response to comments that §§ 201.5(b) and 201.6(c), read together, were either unclear or overbroad.

Completed case summary. The completed case summary consists of the initial case summary, amendments as described in the §§ 101.8 (c) and (e), and the materials submitted by the applicant and his representative as described in § 101.8(b). Where, in the opinion of the Board, there is a conflict of fact, false statement, or omission material to the Board's consideration of an aggravating or mitigating circumstance, as specified in §§ 102.3 and 102.4, the case is tabled. The action attorney is instructed to obtain additional facts.

This is in response to comments from the private bar.

Hearing before the Board. Subsection 101.9(c) provides for a personal appearance as a matter of right if an applicant can show that an oral presentation is necessary to the Board's understanding of a mitigating circumstance or an aggravating circumstance which applies to his case. The Board has provided a right to personal appearance in response to several comments.

Reconsideration. Subsection 101.11(b) has been amended in order to add standards which must be met if the Board is to consider an applicant's petition for reconsideration. In the proposed regulations, consideration of such petition by the Board was a matter of discretion. This amendment limits the circumstances under which reconsideration will be granted, but provides that when an applicant shows that any of those circumstances are present, reconsideration will be granted as a matter of right.

Transmittal to other agencies of Presidential decisions. Section 101.12 provides that grants of immediate pardon by the President are transmitted formally to other government agencies, as appropriate. Pending completion of the alternative service requirement, grants of conditional clemency are communicated to another federal agency only to the extent this information is necessary for the agency to perform its functions under the clemency program or for other necessary action respecting the applicant. Upon completion of alternative service, notification of the pardon is forwarded to all appropriate agencies. Denials of clemency by the President are held confidential by the Board.

The intent of this section, adopted here in response to several comments is that a person who applies for clemency should not be prejudiced in his pursuit of other remedies through the military services' discharge review processes or elsewhere.

Other remedies available to applicant. Section 101.15(b) requires that Board staff inform both applicants to the Board and persons who inquire about the clemency program, but are clearly not under the Board's jurisdiction, of the remedies available to them under military discharge review processes and through the judiciary. Applicants to the Board or to one of the other agencies administering part of the clemency program may pursue such other remedies simultaneously or subsequently to, or instead of their remedies under the clemency program. The Board's staff informs them of their other options.

Aggravating and mitigating circumstances. Sections 102.3 and 102.4 contain new aggravating and mitigating circumstances which the Board deems material to its decisions.

The Board notes that it has seen a number of cases of persons who behaved with valor during combat, but then committed AWOL offenses because of mental stress caused by combat. The Board calls attention to this mitigating circumstance as one which it considers particularly important in some cases.

A number of comments from the private bar have suggested that the Board should add as a mitigating circumstance "evidence that an applicant would probably have obtained a Selective Service status or military discharge or reassignment beneficial to him, but failed to apply due to lack of knowledge or confusion." Mitigating circumstances #1, 8, and 9, in conjunction, are adequate to meet this problem.

Calculation of length of alternative service. Subsection 102.5(c) has been added in order to make clear the Board's decision that the initial baseline period of alternative service for applicants with Undesirable Discharges is three (3) months.

Eligibility of clemency recipients for military discharge review remedies. The Presidential Clemency Board notes, although the matter is not one for inclusion in its regulations, that it has received numerous comments which assume that a recipient of executive clemency under the President's clemency program is ineligible for consideration under the military services' discharge review processes.

This is incorrect. Any applicant to the Board for executive clemency may also seek review of his discharge through one of the military services' discharge review boards or boards for the correction of military records. Applying to the Board does not exclude a former serviceman from the jurisdiction of the military services' boards, nor does it preclude the remedies which are available from those boards.

The Presidential Clemency Board notes that a veteran who receives a Clemency Discharge through the Board may subsequently seek, according to the Department of Defense, an upgrading of that discharge through the military services' normal discharge review processes.

This chapter will become effective immediately.

Issued in Washington, D.C. on March 18, 1975.

CHARLES E. GOODELL,
Chairman, Presidential Clemency Board, The White House.

1. Part 101 is added to read as follows:

PART 101—ADMINISTRATIVE PROCEDURES

Sec.

AUTHORITY: Executive Order 11803, 39 FR 33297, as amended.

§ 101.1 Purpose and scope.

This part establishes the procedures of the Presidential Clemency Board. Certain other matters are also treated, such as the assistance to be given to individuals requesting determinations of jurisdiction, or requesting information respecting those parts of the Presidential Clemency Program which are administered by the Department of Defense and the Department of Justice under Presidential Proclamation 4313 (39 FR 33293).

§ 101.2 General definitions.

"Action attorney" means an attorney on the staff of the Board who is assigned an applicant's case.

"Applicant" means an individual who invokes the jurisdiction of the Board, and who has submitted an initial filing.

"Board" means the Presidential Clemency Board as created by Executive Order 11803 (39 FR 33297) or any duly authorized panel of that Board.

§ 101.3 Jurisdiction.

Jurisdiction lies with the Board with respect to a particular person if such person applies to the Board not later than March 31, 1975 and:

(a) He has been convicted for failure under the Military Selective Service Act (50 App. U.S.C. 462) or any rule or regulation promulgated thereunder to register or register on time, to keep the local board informed of his current address, to report for or submit to preinduction or induction examination, to report for or submit to induction itself, or to report for or submit to, or complete (alternative) service under section 6(j) of the Act for offenses committed during the period from August 4, 1964 to March 28, 1973, inclusive; or

(b) He has received a punitive or undesirable discharge as a consequence of offenses under Article 85 (desertion), 86 (AWOL), or 87 (missing movement) of the Uniform Code of Military Justice (10 U.S.C. 885, 886, 887) that occurred between August 4, 1964 and March 28, 1973, inclusive, or is serving a sentence of confinement for such violation.

(c) Jurisdiction will not lie with respect to an individual precluded from re-entering the United States under 8 U.S.C. 1182(a)(22) or other law.

§ 101.4 Remedies.

(a) The Board is empowered only t make recommendations to the President on clemency applications. The Board has no final authority of its own. The Board may recommend to the President that he take one or more of the following actions:

(1) Grant an unconditional pardon without a requirement of alternative service;

(2) Grant an unconditional pardon upon the satisfactory completion of a specified period of alternative service not to exceed 24 months;

(3) Grant a clemency discharge in substitution for a Dishonorable, Bad Conduct, or Undesirable Discharge;

(4) Commute the sentence; or

(5) Deny clemency.

(b) In unusual circumstances and as authorized by Executive Order 11803, the Board may make other recommendations as to the form that clemency should take. This shall only be done in order to give full effect to the intent and purposes of the Presidential Clemency program.

§ 101.5 Initial filing.

(a) In order to comply with the requirements of Executive Order 11803, as amended, an individual must make an initial filing to the Board not later than March 31, 1975. The Board considers sufficient as an initial filing any written communication postmarked not later than March 31, 1975, and received by the Board, the Department of Justice, the Department of Defense, the Department of Transportation, or the Selectiv Service System. In the communication an individual or his representative must request consideration of the individual's case or raise questions which evidence a serious interest in applying for the program. Oral applications made not later than March 31, 1975 are considered sufficient if reduced to writing, and postmarked not later than May 31, 1975.

(b) If an initial filing is made by a representative, the case is not considered by the Board unless and until the applicant submits a written confirmation of his clemency application. This confirmation by the applicant may be sent either directly or through a representative, but it must be mailed not later than May 31, 1975. A statement by an attorney that he is acting on behalf of an applicant is sufficient. Applications by a representative on behalf of an applicant may be considered by the Board where good cause is shown why the applicant is unable to apply.

§ 101.6 Application form.

(a) Upon receipt of an initial filing, a member of the Board's staff makes a determination of probable jurisdiction. Persons who are clearly beyond the Board's jurisdiction are so notified in writing. A person who questions this determination should promptly write the General Counsel, Presidential Clemency Board, The White House, Washington, D.C. 20500, stating his reasons for questioning the determination. The Genera Counsel of the Board makes the final de termination of probable jurisdiction and

so notifies the applicant or his representative in writing stating the reasons why. In doubtful cases, a final determination of jurisdiction is made by the Board.

(b) A person who has been notified that jurisdiction does not lie in his case is considered as having made a timely filing if the final determination is that the Board has jurisdiction over his case.

(c) A person who is within the jurisdiction of the Board is sent an application form, information about the Presidential clemency program, instructions for the preparation of the application form, a statement describing the Board's procedures and method of determining cases, and a list of volunteer counseling services.

(d) The person is urged to return the completed application form to the Board as soon as possible. Completed application forms must be postmarked within sixty (60) days of the time they were mailed by the Board, in order to qualify for the Board's consideration as a matter of right.

§ 101.7 Assignment of Action Attorney, case number, and determination of jurisdiction.

(a) Upon receipt by the Board of the completed application form or of information sufficient for the Board to request the records and files specified in paragraph (b) of this section, the applicant's case is reviewed for preliminary determination of the Board's jurisdiction. If it appears that the Board has jurisdiction over the case, a file is opened and a case number assigned. The Board will then request from all appropriate government agencies the relevant records and files pertaining to the applicant's case.

(b) In normal circumstances, the relevant records and files for civilian cases are the applicant's files from the Bureau of Prisons and information that he has sent to the Board. For military cases, they will include the applicant's military personnel records, military clemency folder, record of court martial, if any, and information that the applicant has sent to the Board. Applicants and their representatives have the right to request that the Board consider other pertinent files. The Board will attempt to comply with these requests.

(c) At the offices of the Board, information collected by the Board independently of any other agency is readily available to an applicant or his representative. All files obtained from other agencies are available to the extent not barred by the rules of the agency owning the file. Files from another agency are cited in a summary when they are used as the basis of statements in that summary. Reason for denial of access to any of these files is stated in writing upon request.

(d) Where the initial filing contains adequate information, the Board staff may assign a case number and request records and files prior to receipt of the completed application form.

(e) If the Action Attorney determines that the Board does not have jurisdiction in a particular case, he promptly notifies the applicant or his representative in writing, stating the reasons for such a determination.

(f) An applicant or his representative who questions this adverse determination of jurisdiction should write the General Counsel of the Board in accordance with the provisions of § 101.6(a).

§ 101.8 Initial case summary.

(a) Upon receipt of the necessary records and files, the Action Attorney prepares an initial case summary of the applicant's case. The files, records, and any additional sources used in preparing the initial case summary are listed. No other material is used. The initial case summary includes the name and business telephone number of the Action Attorney who may be contacted by the applicant or his representative.

(b) The initial case summary is sent by certified mail to the applicant or his representative. The summary is accompanied by an instruction sheet describing the method by which the summary was prepared and by a copy of the guidelines used by the Board for the determination of cases. Applicants are encouraged to review the initial case summary for accuracy and completeness and advised of their right to submit additional sworn or unsworn material. Additional material may be submitted in any length. Nothing over three (3) single-spaced, typewritten, letter-sized pages in length is read verbatim to the Board. Where necessary, therefore, an applicant should summarize his additional material to comply with this verbatim presentation requirement. If this is not done, the Action Attorney does so.

(c) At any time before Board consideration of his case, an applicant may submit evidence of inaccurate, incomplete, or misleading information in the complete Board file or other files. This information is incorporated in applicant's Board file.

(d) An applicant's case is ready for final consideration by the Board not sooner than thirty (30) days after the initial case summary is mailed to the applicant. Material which amends or supplements the applicant's initial case summary must be postmarked within this thirty (30) day period to ensure that it is considered. An applicant's request that this thirty (30) day period be extended is liberally granted by the Action Attorney, if the request is received prior to Board action and is reasonable.

(e) Upon receipt of the applicant's response to the initial summary, the Action Attorney notes all such amendments, supplements, or corrections on the initial summary submitted by the applicant or his representative. All such amendments are attached to the initial case summary with notation by the Action Attorney of any discrepancies of fact which in his opinion remain unresolved. The complete case summary consists of the initial summary, amendments as described in paragraph (c) and this section, and the materials submitted by the applicant and his representative as described in paragraph (b) of this section.

(f) Where, in the opinion of the Board, there is a conflict of fact, false statement, or omission material to the Board's consideration of an aggravating or mitigating circumstance, as specified in §§ 102.3 and 102.4, the case is tabled. The Action Attorney is then instructed to obtain additional facts.

§ 101.9 Consideration before the Board.

(a) At a regularly scheduled meeting of the Board, an applicant's case is considered. The Board may provide by rule, however, that cases will be initially considered by panels of not less than three Board members. Any case may be brought before a majority of the full Board for consideration at the request of a panel member. Panel recommendations will be considered and approved by a majority of the full Board.

(b) The Action Attorney presents to the Board a brief statement of the completed case summary and, as provided in § 101.8(b), the material submitted by the applicant.

(c) The Board grants a personal appearance to an applicant and his representative if they can show in a written statement that such an appearance is necessary to the Board's understanding of the applicant's case. The Board considers each request for an oral presentation at a regular meeting and informs the applicant and his representative whether or not his request has been granted.

(d) Any oral presentation granted by the Board shall not exceed a reasonable period of time. Neither applicant nor his representative may be present when the Board begins deliberations, but should remain available for further consultation immediately thereafter.

(e) After due deliberation the Board decides upon its recommendation to the President listing the factors it considered in making its recommendation.

§ 101.10 Recommendations to the President.

(a) At appropriate intervals, the Chairman of the Board submits to the President certain master warrants listing the names of applicants recommended for executive clemency and a list of the names of applicants considered by the Board but not recommended for clemency. The Chairman will also submit such terms and conditions for executive clemency, if any, that have been recommended in each case by the Board.

(b) Following action by the President, the Board sends notice of such action in writing to all applicants whose names were submitted to the President. Each applicant is sent a list of the mitigating and aggravating circumstances decided by the Board to be applicable in his case.

§ 101.11 Reconsideration.

(a) An applicant may ask the Board for reconsideration of his case. Petitions for reconsideration, including any supplementary material, must be postmarked within thirty (30) days of Board mailing specified in § 101.10(b).

(6) Prior refusal to fulfill court ordered alternative service;
(7) Violation of probation or parole;
(8) Multiple AWOL/UA offenses; and
(9) AWOL/UA of extended length.

(c) Whenever an additional aggravating circumstance not listed is considered by the Board in the discussion of a particular case, and is material to the disposition of that case, the Board postpones final decision of the case and immediately informs the applicant and his representative of their opportunity to submit evidence material to the additional circumstance.

§ 102.4 Mitigating circumstances.

(a) Presence of any of the mitigating circumstances listed below or of any other appropriate mitigating circumstance is considered as cause for recommending that the President grant executive clemency to an applicant, and as cause for reducing the applicant's alternative service below the baseline period, as determined under § 102.5.

(b) Mitigating circumstances of which the Board takes notice are:
(1) Lack of sufficient education or ability to understand obligations or remedies available under the law;
(2) Personal and family problems either at the time of offense or if applicant were to perform alternative service;
(3) Mental or physical condition;
(4) Employment and other activities of service to the public;
(5) Service-connected disability, wounds in combat or decorations for valor in combat;
(6) Period of creditable military service;
(7) Tours of service in the war zone;
(8) Substantial evidence of personal or procedural unfairness;
(9) Denial of conscientious objector status, of other claim for Selective Service exemption or deferment, or of a claim for hardship discharge, compassionate reassignment, emergency leave, or other remedy available under military law, on procedural, technical, or improper grounds, or on grounds which have subsequently been held unlawful by the judiciary;
(10) Evidence that an applicant acted for conscientious, not manipulative or selfish reasons;
(11) Voluntary submission to authorities by applicant;
(12) Behavior which reflects mental stress caused by combat;
(13) Volunteering for combat, or extension of service while in combat;
(14) Above average military conduct and proficiency; and
(15) Personal decorations for valor.

(c) An applicant may bring to the Board's attention any other factor which he believes should be considered.

§ 102.5 Calculation of length of alternative service.

(a) Having reached a decision to recommend that the President grant executive clemency to a particular applicant, the Board will then decide whether or not clemency should be conditioned upon a specified period of alternative service and, if so, what length that period should be:

(1) The starting point for calculation of length of alternative service will be 24 months.

(2) The starting point will be reduced by three times the amount of prison time served.

(3) The starting point will be further reduced by the amount of prior alternative service performed, provided that the prescribed period of alternative service has been satisfactorily completed or is being satisfactorily performed.

(4) The starting point will be further reduced by the amount of time served on probation or parole, provided that the prescribed period has been satisfactorily completed or is being satisfactorily performed.

(5) Subject to paragraphs (b) and (c) of this section, the baseline period of alternative service will be the remainder of these four subtractions or final sentence to imprisonment, whichever is less.

(b) In no case will the baseline period of alternative service be less than three (3) months.

(c) For applicants who have received an Undesirable Discharge from a military service, the baseline period of alternative service shall be three (3) months.

(d) The Board may consider mitigating circumstances as cause for recommending clemency upon satisfactory completion of a period of alternative service that is less than an applicant's baseline period of alternative service, or for recommending an immediate pardon.

(e) In cases in which aggravating circumstances are present and are not, in the Board's judgment, balanced by mitigating circumstances, the Board may consider such aggravating circumstances as cause for recommending clemency upon satisfactory completion of a period of alternative service exceeding, by three (3), six (6), or nine (9) additional months, the applicant's baseline period of alternative service. In extraordinary cases, as an alternative to denying clemency, the Board may increase the baseline period to a maximum of not more than 24 months.

PART 201—[REVOKED]

3. Part 201 is revoked.

PART 202—[REVOKED]

4. Part 202 is revoked.

[FR Doc.75-7464 Filed 3-20-75;8:45 am

TOTALLY EMBARGOED
UNTIL 11:30 A.M., EDT

September 16, 1974

Office of the White House Press Secretary

THE WHITE HOUSE

ANNOUNCING A PROGRAM FOR THE RETURN OF
VIETNAM ERA DRAFT EVADERS AND MILITARY DESERTERS

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BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

The United States withdrew the last of its forces from the Republic of Vietnam on March 28, 1973.

In the period of its involvement in armed hostilities in Southeast Asia, the United States suffered great losses. Millions served their country, thousands died in combat, thousands more were wounded, others are still listed as missing in action.

Over a year after the last American combatant had left Vietnam, the status of thousands of our countrymen -- convicted, charged, investigated or still sought for violations of the Military Selective Service Act or of the Uniform Code of Military Justice -- remains unresolved.

In furtherance of our national commitment to justice and mercy these young Americans should have the chance to contribute a share to the rebuilding of peace among ourselves and with all nations. They should be allowed the opportunity to earn return to their country, their communities, and their families, upon their agreement to a period of alternate service in the national interest, together with an acknowledgement of their allegiance to the country and its Constitution.

Desertion in time of war is a major, serious offense; failure to respond to the country's call for duty is also a serious offense. Reconciliation among our people does not require that these acts be condoned. Yet, reconciliation calls for an act of mercy to bind the Nation's wounds and to heal the scars of divisiveness.

NOW, THEREFORE, I, Gerald R. Ford, President of the United States, pursuant to my powers under Article II, Sections 1, 2 and 3 of the Constitution, do hereby proclaim a program to commence immediately to afford reconciliation to Vietnam era draft evaders and military deserters upon the following terms and conditions:

1. Draft Evaders - An individual who allegedly unlawfully failed under the Military Selective Service Act or any rule or regulation promulgated thereunder, to register or register on time, to keep the local board informed of his current address, to report for or submit to preinduction or induction examination, to report for or submit to induction itself, or to report for or submit to, or complete service under Section 6(j) of such Act during the period from August 4, 1964 to March 28, 1973, inclusive, and who has not been adjudged guilty in a trial for such offense, will be relieved of prosecution and punishment for such offense if he:

(i) presents himself to a United States Attorney before January 31, 1975,

(ii) executes an agreement acknowledging his allegiance to the United States and pledging to fulfill a period of alternate service under the auspices of the Director of Selective Service, and

(iii) satisfactorily completes such service.

The alternate service shall promote the national health, safety, or interest. No draft evader will be given the privilege of completing a period of alternate service by service in the Armed Forces.

However, this program will not apply to an individual who is precluded from re-entering the United States under 8 U.S.C. 1182(a)(22) or other law. Additionally, if individuals eligible for this program have other criminal charges outstanding, their participation in the program may be conditioned upon, or postponed until after, final disposition of the other charges has been reached in accordance with law.

The period of service shall be twenty-four months, which may be reduced by the Attorney General because of mitigating circumstances.

2. Military Deserters - A member of the armed forces who has been administratively classified as a deserter by reason of unauthorized absence and whose absence commenced during the period from August 4, 1964 to March 28, 1973, inclusive, will be relieved of prosecution and punishment

under Articles 85, 86 and 87 of the Uniform Code of Military Justice for such absence and for offenses directly related thereto if before January 31, 1975 he takes an oath of allegiance to the United States and executes an agreement with the Secretary of the Military Department from which he absented himself or for members of the Coast Guard, with the Secretary of Transportation, pledging to fulfill a period of alternate service under the auspices of the Director of Selective Service. The alternate service shall promote the national health, safety, or interest.

The period of service shall be twenty-four months, which may be reduced by the Secretary of the appropriate Military Department, or Secretary of Transportation for members of the Coast Guard, because of mitigating circumstances.

However, if a member of the armed forces has additional outstanding charges pending against him under the Uniform Code of Military Justice, his eligibility to participate in this program may be conditioned upon, or postponed until after, final disposition of the additional charges has been reached in accordance with law.

Each member of the armed forces who elects to seek relief through this program will receive an undesirable discharge. Thereafter, upon satisfactory completion of a period of alternate service prescribed by the Military Department or Department of Transportation, such individual will be entitled to receive, in lieu of his undesirable discharge, a clemency discharge in recognition of his fulfillment of the requirements of the program. Such clemency discharge shall not bestow entitlement to benefits administered by the Veterans Administration.

Procedures of the Military Departments implementing this Proclamation will be in accordance with guidelines established by the Secretary of Defense, present Military Department regulations notwithstanding.

3. Presidential Clemency Board - By Executive Order I have this date established a Presidential Clemency Board which will review the records of individuals within the following categories: (i) those who have been convicted of draft evasion offenses as described above, (ii) those who have received a punitive or undesirable discharge from service in the armed forces for having violated Article 85, 86, or 87 of the Uniform Code of Military Justice between August 4, 1964 and March 28, 1973, or are serving sentences of confinement for such violations. Where appropriate, the Board may recommend that clemency be conditioned upon completion of a period of alternate service. However, if any clemency discharge is recommended, such discharge shall not bestow entitlement to benefits administered by the Veterans Administration.

4. Alternate Service - In prescribing the length of alternate service in individual cases, the Attorney General, the Secretary of the appropriate Department, or the Clemency Board shall take into account such honorable service as an individual may have rendered prior to his absence, penalties already paid under law, and such other mitigating factors as may be appropriate to seek equity among those who participate in this program.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of September in the year of our Lord nineteen hundred seventy-four, and of the Independence of the United States of America the one hundred and ninety-ninth.

GERALD R. FORD

# # # # #

TOTALLY EMBARGOED
UNTIL 11:30 A.M., EDT

SEPTEMBER 16, 1974

Office of the White House Press Secretary

THE WHITE HOUSE

EXECUTIVE ORDER

ESTABLISHING A CLEMENCY BOARD TO REVIEW CERTAIN CONVICTIONS OF PERSONS UNDER SECTION 12 OR 6(j) OF THE MILITARY SELECTIVE SERVICE ACT AND CERTAIN DISCHARGES ISSUED BECAUSE OF, AND CERTAIN CONVICTIONS FOR, VIOLATIONS OF ARTICLE 85, 86 or 87 OF THE UNIFORM CODE OF MILITARY JUSTICE AND TO MAKE RECOMMENDATIONS FOR EXECUTIVE CLEMENCY WITH RESPECT THERETO

By virtue of the authority vested in me as President of the United States by Section 2 of Article II of the Constitution of the United States, and in the interest of the internal management of the Government, it is ordered as follows:

Section 1. There is hereby established in the Executive Office of the President a board of 9 members, which shall be known as the Presidential Clemency Board. The members of the Board shall be appointed by the President, who shall also designate its Chairman.

Sec. 2. The Board, under such regulations as it may prescribe, shall examine the cases of persons who apply for Executive clemency prior to January 31, 1975, and who (i) have been convicted of violating Section 12 or 6(j) of the Military Selective Service Act (50 App. U.S.C. §462), or of any rule or regulation promulgated pursuant to that section, for acts committed between August 4, 1964 and March 28, 1973, inclusive, or (ii) have received punitive or undesirable discharges as a consequence of violations of Article 85, 86 or 87 of the Uniform Code of Military Justice (10 U.S.C. §§ 885, 886, 887) that occurred between August 4, 1964 and March 28, 1973, inclusive, or are serving sentences of confinement for such violations. The Board will only consider the cases of Military Selective Service Act violators who were convicted or unlawfully failing (i) to register or register on time, (ii) to keep the local board informed of their current address, (iii) to report for or submit to preinduction or induction examination, (iv) to report for

or submit to induction itself, or (v) to report for or submit to, or complete service under Section 6(j) of such Act. However, the Board will not consider the cases of individuals who are precluded from re-entering the United States under 8 U.S.C. 1182(a)(22) or other law.

Sec. 3. The Board shall report to the President its findings and recommendations as to whether Executive clemency should be granted or denied in any case. If clemency is recommended, the Board shall also recommend the form that such clemency should take, including clemency conditioned upon a period of alternate service in the national interest. In the case of an individual discharged from the armed forces with a punitive or undesirable discharge, the Board may recommend to the President that a clemency discharge be substituted for a punitive or undesirable discharge. Determination of any period of alternate service shall be in accord with the Proclamation announcing a program for the return of Vietnam era draft evaders and military deserters.

Sec. 4. The Board shall give priority consideration to those applicants who are presently confined and have been convicted only of an offense set forth in section 2 of this order, and who have no outstanding criminal charges.

Sec. 5. Each member of the Board, except any member who then receives other compensation from the United States, may receive compensation for each day he or she is engaged upon the work of the Board at not to exceed the daily rate now or hereafter prescribed by law for persons and positions in GS-18, as authorized by law (5 U.S.C. 3109), and may also receive travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 5703) for persons in the government service employed intermittently.

Sec. 6. Necessary expenses of the Board may be paid from the Unanticipated Personnel Needs Fund of the President or from such other funds as may be available.

Sec. 7. Necessary administrative services and support may be provided the Board by the General Services Administration on a reimbursable basis.

Sec. 8. All departments and agencies in the Executive branch are authorized and directed to cooperate with the Board in its work, and to furnish the Board all appropriate information and assistance, to the extent permitted by law.

Sec. 9. The Board shall submit its final recommendations to the President not later than December 31, 1976, at which time it shall cease to exist.

GERALD R. FORD

THE WHITE HOUSE,

September 16, 1974.

TOTALLY EMBARGOED
UNTIL 11:30 A.M., EDT

SEPTEMBER 16, 1974

Office of the White House Press Secretary

THE WHITE HOUSE

FACT SHEET

PRESIDENTIAL CLEMENCY BOARD

The President has today established by Executive Order a nine member Presidential Clemency Board. The Board will review the records of two kinds of applicants. First, those who have been convicted of a draft evasion offense committed between August 4, 1964 and March 28, 1973, inclusive. Second, those who received a punitive or undesirable discharge from the armed forces because of a military absentee offense committed during the Vietnam era or are serving sentences of confinement for such violations. The Board will recommend clemency to the President on a case-by-case basis. In the absence of aggravating factors, the Clemency Board would be expected to recommend clemency.

When appropriate, the Board could recommend clemency conditioned upon the performance of some alternate service. In the case of a military absentee, the Board could also recommend that a clemency discharge be substituted for a punitive or undesirable discharge.

The Board has been instructed to give priority consideration to individuals currently confined. The President has also asked that their confinement be suspended as soon as possible, pending the Board's review.

The Board will consider the cases only of persons who apply before January 31, 1975. It is expected to complete its work not later than December 31, 1976.

# # # #

VIII

B

APPENDIX ___

THE HISTORICAL PERSPECTIVE OF CLEMENCY

I. Constitutional Authority to Pardon

II. Clemency During the Nation's Formative Years

III. Civil War

IV. Twentieth Century Amnesties

V. The Australian Clemency Program

APPENDIX __

THE HISTORICAL PERSPECTIVE OF CLEMENCY

I. Constitutional Authority to Pardon

A. English Heritage

B. Colonial and State Government Practice Prior to 1789

1. The Bacon Rebellion

2. The War of the Regulation

C. The President's Grant of Authority Under the Federal Constitution

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 nationa whose language is our language, and to whose judicial institutions our 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 Normal 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 vengence 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 perogative 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/who 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 Prior to 1789

As the American colonies became settled, the English legal concepts of the seventeenth and eighteenth centuries were transplanted to the new world.[22] Included in these concepts was the principle of pardon and clemency for criminal offenders. An examination of the colonial charters reveals that the crown generally delegated the pardoning power in the colonies. 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.

In the first Virginia charter no mention occurs regarding the pardoning power, but in the second charter there is granted:

> unto 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]

After Virginia became a royal colony the pardon power was exercised by the royal governor until the advent of the American Revolution. Likewise, in the royal colony of Maine the governor was given the authority to pardon, remit, and release all offenses and offenders

against any of the laws or ordinances.[24] Connecticut's pardoning authority did not rest solely with the royal governor. The Connecticut 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.

William Penn and other Quakers reserved the right of pardon to the person offended against. The Quakers provided that any person who should presecute 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."[25]

The Bacon Rebellion was one of the more significant uprisings in the colonial period and its aftermath provides an example of the King's use of the pardoning power. Most historians (but not all) view Bacon as a patriot who exposed the inept leadership of Virginia Governor Sir William Berkeley. In 1676 Nathaniel Bacon formed a volunteer group to attack hostile Indians after Berkeley had failed to organize a militia force to pursue the Indians who had massacred a number of settlers.[26]

Berkeley termed Bacon a rebel and traitor and refused to issue him a military commission. There was much discontent with the Berkeley administration; Bacon and his supporters believed the king was not properly informed of the many problems plaguing Virginia and in September 1676 they revolted against the Governor. Bacon's forces attacked Berkeley and drove him from Jamestown, the capital.[27] Bacon died of natural causes in October and the insurrection faltered with the loss of his leadership. Berkeley mounted a force which suppressed the rebellion and he caused 37 of its leaders to be hung.[28] A royal commission that had been dispatched from England to look into Berkeley's conduct arrived with a general pardon for the rebels from Charles II, but the rebel leaders had already been put to death.[29]

A century passed before another serious uprising occurred. The War of the Regulation offers further insight into the practice of clemency in the English colonies. Nearly 2,000 North Carolinians, known as "Regulators", mounted protests against the laws of Governor William Tryon. In September 1768 the Governor promised a pardon to all "Regulators" except the leaders, upon the condition that they surrender and become law-abiding citizens.[30] Several subsequent Proclamations were issued by the Governor and in a Proclamation of June 1771 a new condition was added: to be eligible for pardon, one would have to subscribe to an oath of allegiance. Thirteen of the rebel leaders were adjudged guilty of treason and seven of these were hung.[31] One of the leaders of the North Carolina "Regulators", Herman Husband, surfaced again a quarter-century later as a participant in the Whiskey Rebellion.[32]

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 legislature.[33] 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, provided in its constitution of 1777 that the pardoning authority would be exercised by the governor and the executive council.[34] Rhode Island and Connecticut made no changes in the administration of clemency and retained their charter form of government for many years.[35] 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."[36] In the states of New York

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

By the virtue of English and colonial precedent, [illegible], 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[38] 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-

prieves until the ensuring 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:

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 leinity in legislative pardons, as the Senate must concur; and the President moreover can require two-thirds of both Houses.

> 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 kings 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).

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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 legislature should not have any control over the pardoning power:[39]

> 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 legislature, 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 questionalbe, whether, in a limited constitution, that power could be delegated by law; and

NOTES
Appendix ___
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 facese cum injuria at damno alirum" (the king cannot confer a favour by the injury and loss of others). Blackstone, Commentaries, supra note at 399. Blacksone 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 1, 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., at 4.
24. Ibid., at 5.
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32. Morison.
33. Jensen.
34. Ibid., p. 10.
35. Constitution of New Hampshire, 1784; Massachusetts, 1780, Part II, chapt. ii, Sec. 1, Art. 8; New Jersey, 1776, Part IX; Pennsylvania, 1776, Sec. 20; Virginia, 1776, cited in Jensen, Ibid., at p. 10.
36. Ibid., at 10.
37. Ibid., at 10.
38. Tansill, (ed) Documents Illustrative of the Formation of the American States, Government Printing Office, Washington, D.C., at 620 (1927).
39. 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.

APPENDIX ___

THE HISTORICAL PERSPECTIVE OF CLEMENCY

II. Clemency During the Nation's Formative Years

A. Continental Congress Recommends Compassion and Mercy

B. Loyalists - the Early Dissenters

C. Washington

D. Adams

E. Jefferson

F. Madison

G. Jackson

CLEMENCY DURING THE NATION'S FORMATIVE YEARS

Continental Congress Recommends Compassion and Mercy

An early offer of Congressional pardon is recorded in the Journals of the Continental Congress, April 1778. The offer was directed toward Americans who had joined the British forces.

The Resolution prompted Thomas Jefferson, then a member of the Virginia House of Delegates, to introduce a Bill offering "full and free pardon" on 13 May 1778.[1] Jefferson's Bill was practically a verbatim recitation of the April Resolution that had been issued by the Continental Congress. In writing to Richard Henry Lee on 5 June 1778, Jefferson advised "We (the Virginia House) passed the bill of pardon, recommended by Congress, but the Senate rejected it"[2] The probable cause of failure to pass in the Virginia Senate was the unrealistic cut-off date; "penitents" being required to return by 10 June to be eligible for pardon. Jefferson's "Bill Granting Free Pardon to Certain Offenders" is quoted in its entirety:

> Whereas the American Congress by their resolution passed on the 23d. day of April last past, reciting that persuasion and influence, the example of the deluded or wicked, the fear of danger or the calamities of war may have induced some of the subjects of these states to join aid, or abet the British forces in America, and who, tho' now desirous of returning to their duty, and anxiously wishing to be received and reunited to their country, may be deterred by the fear of punishment: and that the people of these

> states are ever more ready to reclaim than to abandon, to mitigate than to increase the horrors of war, to pardon than to punish offenders: did recommend to the legislatures of the several states to pass laws, or to the executive authority of each state, if invested with sufficient power, to issue proclamations, offering pardon, with such exceptions, and under such limitations and restrictions, as they shall think expedient, to such of their inhabitants or subjects, as have levied war against any of these states, or adhered to, aided or abetted the enemy, and shall surrender themselves to any civil or military officer of any of these states, and shall return to the state to which they may belong before the 10th.day of June next: and did further recommend to the good and faithful citizens of these states to receive such returning penitents with compassion and mercy, and to forgive and bury in oblivion their past failings and transgressions.
>
> Be it therefore enacted by the General assembly that full and free pardon is hereby granted to all such persons without any exception who shall surrender themselves as aforesaid, and shall take the oath of fidelity to this Commonwealth within one month after their return thereto.[3]

Loyalists--The Early Dissenters

At the time of the Revolutionary War, a significant portion of the American populace chose to support the King; they were called Loyalists or Tories. It became common practice to require suspected Loyalists to take an oath of loyalty to the United States. Refusal to renounce the King and swear allegiance to the United States often resulted in fine, imprisonment, loss of civil rights, or confiscation of private property. Even Washington is said to have been in favor of hanging a few prominent Loyalists![4]

Sentiment against Loyalists was so pronounced that many voluntarily decided to leave their homes; some going into temporary exile, others permanently settling outside the United States. The majority of Loyalists who left the United States chose Canada, while a smaller number selected Great Britain or the West Indies.

The Peace Treaty of 1783 which granted independence to the thirteen United States attempted to end disharmony between the Loyalists and those who fought for independence. Article V of the Treaty stated in part:

> It is agreed that the Congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights and properties which have been confiscated,...and that Congress shall also earnestly recommend to the several States a reconsideration and revision of all acts or laws regarding the premises, so as to render the said laws or acts perfectly consistent, <u>not only with justice and equity, but with that spirit of conciliation which, on the return of the blessings of peace, should universally prevail</u>. (emphasis added)

Article VI of the Treaty further provided:

> That there shall be NO future confiscations made, nor any prosecutions commenced against any person or persons for, or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account suffer any future loss or damage, either in his person, liberty or property; and that those who may be in confinement on such charges, at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued.[5]

While perhaps as many as 80,000 Loyalists left the States, their decision to migrate was a voluntary decision. A far larger number opted to remain in the states and many Loyalists who chose self-exile later elected to return.[6]

Animosity towards the Loyalists was not wholly abated by a termination of the fighting. But the passage of time, the tremendous challenge of building a new nation, and the common heritage of the early Anglo-Americans served to cool tempers and promote the "spirit of conciliation" which had been promised in the Paris Peace Treaty. Americans of the 1770's and 1780's--revolutionaries and counter-revolutionaries alike--shared too many common beliefs to become permanently estranged from one another. The dissonance of the 1770's gave way to unity of purpose after Great Britain acknowledged the independence of the United States.

Washington

The pardoning power of the President was first exercised by George Washington in his dealings with the insurrectionists of Western Pennsylvania. Many of the Western Pennsylvania mountain men operated stills to produce corn whiskey and they objected to the attempts of Federal revenuers to collect an excise tax on the whiskey they distilled.

Their opposition to the tax grew into an armed rebellion in which the home of the District Inspector of Revenues was set ablaze.[7] Treasury Secretary Hamilton urged prompt and firm action against the rebels, action that would clarify and strengthen the authority of the Federal government.[8]

Washington called for an end to the insurrection in a Proclamation issued 7 August 1974:

> ...I,...do hereby command all persons being insurgents..., on or before the 1st day of September next to disperse and retire peaceably to their respective abodes.....[9]

The unrest continued and Washington found it necessary to mount an expedition against the rebels. (The Federal government's reaction to the Whiskey Rebellion brought a tangential issue to light--the merits of a standing army versus the merits of a militia that could be Federalized or could provide volunteers in time of need.) In a second Proclamation, issued 25 September 1974, Washington stated:

> ....the moment is now come when the overtures of forgiveness, with no other condition than a submission to law, have been only partially accepted; when every form of conciliation not inconsistent with the being of Government has been adopted without effect.....[10]

The President accepted his title of Commander-in-Chief literally; he took to the field, traveling to Carlisle, Pennsylvania to see first hand the troops that were being formed for the trek across the Alleghenies and into the Western counties of Pennsylvania. The encounter between the rebels and the Federal forces was rather anti-climactic, the rebels melted away upon the approach of the Federals.

In his third Proclamation relating to the Whiskey Rebellion, President Washington on 10 July 1795, granted a "full, free and entire pardon" to all insurrectionists except those under indictment. The two ringleaders of the rebellion were convicted of treason but were subsequently pardoned by the President.[11]

In explaining to Congress his use of the President's constitutionally derived pardoning power, Washington said

> "For though I shall always think it a sacred duty to exercise with firmness and energy the Constitutional powers with which I am vested, yet my personal feeling is to mingle in the operations of the government every degree of moderation and tenderness which the national justice, dignity, and safety may permit."

Adams

Like Washington, President Adams encountered a group of rebellious Pennsylvanians during his tenure in office. The trouble began when the Federal Government attempted to collect $237,000 from Pennsylvanians by levying a tax against houses, land, and negro slaves.[12]

John Fries, an auctioneer well-known in the community, was the principal agitator and the calamity came to be known as Fries' Rebellion. Fries had served with the troops that put down the Whiskey Rebellion but he now found himself opposing the Federal Government.

The beginning of the Fries Rebellion is recounted in Adams' Proclamation of 12 March 1799 commanding the insurgents "to disperse and retire peaceably":

> ...the said persons, exceeding one hundred in number and armed and arrayed in a warlike manner, ...having impeded and prevented the commissioner...by threats and personal injury, from executing the said laws...[13]

In his 3 December 1799 address to the Sixth Congress, President Adams reported further on the Fries Rebellion:

> ...the people in certain counties of Pennsylvania (having) openly resisted the law directing the valuation of houses and lands... it became necessary to direct a military force to be employed....[14]

After the insurrectionists had freed prisoners taken by the US Marshal, Fries was arrested by Federal troops and charged with treason. He was found guilty and a death sentence was imposed. President Adams, however, pardoned him.[15]

By his Proclamation of 21 May 1800, President Adams pardoned all insurrectionists except those then under indictment or standing convicted. Adams stated that future prosecutions were unnecessary since "peace, order, and submission to the laws of the United States were restored,...the ignorant, misguided and misinformed counties (having) returned to a proper sense of their duty."[16]

Jefferson

Although Washington pardoned participants in the Whiskey Rebellion and Adams issued pardons to certain Pennsylvania insurrectionists, Thomas Jefferson was the first US President to grant a pardon to military deserters. Desertion from the Continental Army had been rampant throughout the Revolution but in the post-war era neither Washington nor Adams ordered action against war-time deserters.

On 15 October 1807, Jefferson offered deserters full pardon in exchange for their surrender to the military and return to duty. The Proclamation in its entirety reads:

> Whereas information has been received that a number of individuals who have deserted from the Army of the United States and sought shelter without the jurisdiction thereof have become sensible of their offense and are desirous of returning to their duty, a full pardon is hereby proclaimed to each and all of such individuals as shall within four months from the date hereof surrender themselves to the commanding officer of any military post within the United States or the Territories thereof.[17]

Twelve days after signing the Proclamation, in his Seventh Annual Message to the Senate and House of Representatives, Jefferson cited circumstances which "seriously threatened the peace of our country."[18] Thus, it may be conjectured that Jefferson offered the pardons as a means of building up the size of the Army in a time of national peril.

Jefferson's inclination to favor clemency for deserters is reflected in a letter he wrote to General Washington in the spring of 1775 suggesting a pardon for a Revolutionary War soldier who had voluntarily turned himself over to Army authorities.

> The bearer Horseley enlisted for 2 years. . . . In the winter now past, and before his time was out, he was unfortunate enough to desert from the service... I let him know that ...if he would come in I would venture to state the fact to your excellency that he might have all the benefit which a voluntary return to duty and resignation of his life into your hands would give him, and could not help hoping he would obtain your pardon if it could any way square with the rules you may have laid down....Having now discharged my promise and returned I hope a good soldier to the use of his country; the residue remains with your excellency. . . .[19]

Madison

In 1812 the United States was ill-prepared to go to war. The Army ranks were so insubstantial in number as to be an almost totally impotent force. The defense policy of the new nation had been the maintenance of a small standing Army with the thought that, in time of actual war, the militia would be used. But many governors were hesitant to order out their troops for participation in "Mr. Madison's War"; a war they violently opposed. The New England States took the position that the militia were available as a Federal force only for the purposes of suppressing insurrection or repelling invasion. As they understood the Constitution, the militia should not be mobilized to participate into a foray into Canada. For the first time in our Nation's history, the idea of drafting men into the Army was proposed, but Daniel Webster and others spoke our forcefully against involuntary inductions.[20]

The anti-war faction lost the national elections of December, 1812 and President Madison was re-elected. With many Governors refusing to call out the Militia, and with Congress unalterably opposed to conscripting an Army, it became necessary to offer land bounties to entice enlistments. This had the unfortunate result of causing soldiers to desert and then reenlist in another regiment under another name in order to collect another bounty.

Madison issued three amnesty proclamations that may have been intended to return deserters to duty so that they could participate in the war with Great Britain. These proclamations,--issued 7 February 1812, 8 October 1812, and 17 June 1814--were granted with the understanding that the deserters had "become sensible of their offense and desirous of returning to duty." [21] To receive pardon, deserters were required to surrender at a military post.

The Army had been accustomed to dealing harshly with apprehended deserters. Just 10 days before Madison's 17 June 1814 pardon of deserters, Brigadier General Winfield Scott (at 27, the youngest general in the Army) had caused his troops to witness the execution of soldiers who had been convicted of desertion and sentenced to death. General Scott apparently thought that forcing his troops to witness this punishment would remove the temptation to desert. The 5 deserters under death sentence were placed next to open coffins and newly dug graves. The volley of fire by the appointed executioners killed 4 of the deserters. It had been earlier decided that the fifth--a teenager--would be spared and no live rounds were aimed at him.[22]

In December 1814, Massachusetts put out a call for the New England States to participate in a secret meeting that had as one of its purposes an earnest discussion of secession. This meeting came to be known as the Hartford Convention. Immediate secession was quickly ruled out and commissioners were named to proceed to Washington to discuss the Report and Resolutions of the Convention with President Madison. Many of those attending the Convention believed that if Congress failed to respond adequately to the demands of the Convention, secession would then take place.[23]

While enroute to Washington, the Commissioners learned of Jackson's Victory at New Orleans and, arriving in Washington, word reached them of the Treaty of Ghent. With the United States having avoided defeat and with peace at hand, the commissioners could only abandon their mission. One of the resolved clauses of the Report is of especial interest:

> That it be and hereby is recommended to the legislatures of the several states represented in this Convention, to adopt all such measures as may be necessary efectually to protect the citizens of said states from the operation and effects of all acts which have been or may be passed by the Congress of the United States, which shall contain provisions, subjecting the militia or other citizens to forcible drafts, conscriptions, or impressments not authorized by the constitution of the United States.[24]

Madison issued a fourth amnesty proclamation on 6 February 1815. The 1815 Proclamation is unique with respect to the class of offenders pardoned--it is specifically addressed to Jean Lafitte's pirates:

> . . .provided, that every person claiming full benefit of this pardon in order to entitle himself thereto shall produce a certificate in writing from the governor of the State of Louisiana stating that such person has aided in the defense of New Oreleans and the adjacent country during the invasion thereof as aforesaid.[25]

While most amnesties have dealt with war dissenters, Madison amnestied pirates who came to the aid of their country. Lafitte's men had spurned a cash offer by the British, choosing instead to join with General Jackson at the Battle of New Orleans.

Jackson

President Andrew Jackson extended a form of Executive clemency to military deserters in 1830. Jackson's action was prompted by Congressional repeal of the law imposing the death penalty for peacetime desertion. War Department General Order Number 29, issued by Secretary of War Eaton on 12 June 1830, provided that deserters under sentence of death and all deserters remaining unapprehended were to be discharged from the Army and barred from future enlistment. Personnel who were under arrest for desertion were to be returned to duty. An excerpt from the General order suggests that forgiveness, compassion, and generosity were not the most compelling motives underlying the Executive clemency to deserters not then under military control:

> It is desirable and highly important that the ranks of the Army should be composed of respectable, not degraded, materials. Those who can be so lost to the obligations of a soldier as to abandon a country which morally they are bound to defend, and which solemnly they have sworn to serve, are unworthy, and should be confided in no more.[26]

The spirit of reconciliation generally found in acts of Executive clemency is absent from Jackson's Order. Rather, the deserters still at large were characterized as unworthy and undeserving of redemption through subsequent military service.

NOTES
Appendix
The Historical Perspective of Clemency
Chapter II, Clemency During the Nation's Formative Years

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