

# Oklahoma Law Review

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Volume 38 | Number 2

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1-1-1985

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### Recommended Citation

Richard A. Saliterman, *Reflections on the Presidential Clemency Power*, 38 OKLA. L. REV. 257 (1985), <https://digitalcommons.law.ou.edu/olr/vol38/iss2/6>

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## COMMENTARY

### Reflections on the Presidential Clemency Power

RICHARD A. SALITERMAN\*

#### *Introduction*

Ten years ago our nation was torn by a civil and legal strife paralleled, perhaps, only by the crisis that challenged the nation during the Civil War. For the first time in history, a United States president had resigned from office. For the first time in recent history, the United States military, the State Department and other departments of the executive branch, and the Congress all had come under broad, scathing criticism. Some critics argued that as a nation we were wrong in becoming involved in the Vietnam War; other critics were disturbed by the fact that for the first time in our nation's history, we either had lost or were losing a war. Social institutions that had traditionally served as a stabilizing force in our society—churches, universities, and even art and cultural centers—experienced the social tremors. Even today the outlines resulting from tremors of the Vietnam era have not been fully mapped.

President Ford, like President Lincoln at the end of the Civil War, faced a formidable task as he took office. Fortunately, President Ford had the courage, the presence of mind, and enough experience with governmental processes to competently face the task, and he did not attempt merely to muddle through. Two of his more important decisions resulted in the pardon for President Nixon<sup>1</sup> and a grant of clemency to persons who had committed military and civilian crimes directly related to the Vietnam War.<sup>2</sup> This article focuses on the latter decision—one that has never received substantial public attention and which has attracted only nominal interest in the legal community.

The catalyst that led to this article was my ten-year reunion with those connected with the Presidential Clemency Board. Our reunion, characterized by gentle conversations beside a mirror-like pond in a prosperous Washington suburb, contrasted starkly with the tense, hurried atmosphere of our earlier work together on the Clemency Board. The pressures of the earlier atmosphere left us only limited time to contemplate or analyze. Since 1974, some members of the Board have written and spoken publicly about their experiences. Very

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1. President Gerald Ford pardoned former President Richard Nixon for all crimes he might have committed against the United States during his presidency. See Proclamation No. 4311, 39 Fed. Reg. 32,601-02 (1974).

2. See L. BASKIR & W. STRAUSS, CHANCE AND CIRCUMSTANCE 210-16 (1978).

few, however, have come to grips with or analyzed the legal significance of what occurred.

### *The Program*

President Ford first announced in August of 1974 that he would consider the possibility of granting clemency or of pardoning on a conditional basis those guilty of offenses related to the Vietnam War.<sup>3</sup> At that time, Congresswoman Bella Abzug represented the absolutist view in Congress that complete clemency was necessary and in the best interests of our nation.<sup>4</sup> Others in Congress and in the Washington community, however, regarded a clemency program as an insult to those servicemen and women who had served their country honorably. Despite this polarization of Congress, President Ford moved forward with a program of conditional clemency,<sup>5</sup> which, according to a Gallup Poll released in August of 1975, was supported by approximately 47 percent of the American public.<sup>6</sup>

The Presidential Proclamation and Executive Order for Clemency was issued on September 16, 1974 and provided relief for those facing sentencing, those whose charges were pending, or those in danger of possible apprehension and who came within the terms of the order.<sup>7</sup> Groups of offenders covered by the order included (1) fugitive draft offenders, (2) fugitive military absence offenders, (3) convicted draft offenders, and (4) former servicemen discharged for unauthorized absences.<sup>8</sup> As an additional limitation, only those persons whose offenses had occurred between August 4, 1964 and March 28, 1973 were eligible for the program. The group of eligible offenders was estimated to number some 113,000 identifiable individuals and another 250,000 who could not be identified because they failed to register for the draft.<sup>9</sup>

To implement the clemency program, President Ford assembled a group of private citizens representing a broad spectrum of ideological backgrounds to serve on the Clemency Board and to work to "bind the nation's wounds."<sup>10</sup> It was hoped that the Board would serve to provide a middle ground between the divided and misrepresentative congressional views. At the start, the Board's role was limited to reviewing cases involving convicted draft offenders and discharged military offenders and making recommendations as to the disposition of each case to the President. The President would then use the authority of his office to grant clemency in appropriate cases by specific order.

3. *Id.*

4. See L. BASKIR & W. STRAUSS, RECONCILIATION AFTER VIETNAM 13 (1977) (A Report of the Vietnam Offender Study, University of Notre Dame Center for Civil Rights) [hereinafter cited as RECONCILIATION AFTER VIETNAM].

5. See BASKIR & STRAUSS, *supra* note 2, at 210-13.

6. RECONCILIATION AFTER VIETNAM, *supra* note 4, at 25.

7. *Id.* at 28.

8. *Id.*

9. *Id.*

10. *Id.* at 37.

*The Presidential Clemency Power*

The presidential power to grant clemency inheres in the constitutional power of the President to grant pardons.<sup>11</sup> Article II, section 2 of the Constitution confers on the President the power to “grant reprieves and pardons for offenses against the United States, except in Cases of Impeachment.” Since the President is also charged with the duty to “take care that the Laws be faithfully executed,”<sup>12</sup> the President has a unique role in deciding whether to prosecute a crime. The President’s decision to prosecute is within the “executive authority and absolute discretion” of the President.<sup>13</sup> No other individual or body shares in that discretion.<sup>14</sup> Because the power resides in the President alone,<sup>15</sup> his exercises of the pardon power are not subject to judicial review.

The executive pardon power is a carryover from the English common law practice recognizing the power of the Crown to have mercy on those who had offended the law. In *Ex parte Garland*,<sup>16</sup> the Supreme Court recognized that the presidential power to pardon contained in article II was essentially the same in operation and effect as the power that had existed in England.<sup>17</sup> The Framers of our Constitution recognized the potential breadth of the pardon power, but the proposed limitations on the exercise of that power (such as requiring concurrent consent by the Senate or excepting the crime of treason) were ultimately defeated at the Constitutional Convention.<sup>18</sup> Thus, the pardon power, a power uncharacteristic of the constitutional framework of checks and balances and limited democracy, was carried over into the Constitution.

The Framers believed that recognition of a power to pardon in the executive would serve a number of purposes. Alexander Hamilton explained the “chief reason” for adopting the power: “[I]n seasons of insurrection or rebellion,” Hamilton said, “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.”<sup>19</sup> In addition to promoting tranquility in times of strife, the Framers sought to afford the executive the power to correct perceived injustices. As Hamilton explained: “The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions

11. U.S. CONST. art. II, § 2.

12. U.S. CONST. art. II, § 3.

13. *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869)).

14. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-10, at 193 (1978) (noting that the only limitation on the President’s pardoning power is impeachment).

15. See, e.g., *Murphy v. Ford*, 390 F. Supp. 1372 (W.D. Mich. 1975) (upholding President Ford’s pardon of former President Nixon).

16. 71 U.S. (4 Wall.) 333 (1866).

17. See also *United States v. Wilson*, 33 U.S. (7 Pet.) 150 (1833) (Chief Justice Marshall noting the congruity of the pardon power in England and the United States).

18. 2 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, 419 (1911). See also *Schick v. Reid*, 419 U.S. 256, 262 (1974).

19. THE FEDERALIST NO. 74 (A. Hamilton), reprinted in *THE FEDERALIST PAPERS* (Bantam ed. 1982).

in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”<sup>20</sup> Thus, inclusion of this broad and unchecked power not only permitted the President a means by which to restore domestic tranquility, it also allowed the executive to excuse those who were “unfortunately” guilty.

The pardon power is so broad and unchecked that it indeed resembles a power of the sovereign. The power extends to all offenses in violation of federal law<sup>21</sup> and to offenses against the military.<sup>22</sup> The power may be exercised at any time after the commission of an offense, even before an indictment has issued.<sup>23</sup> The President may pardon whole classes of offenders,<sup>24</sup> and he may restore all civil rights to those pardoned.<sup>25</sup> While the presidential power to pardon does not exclude the power of Congress to pass acts of general amnesty,<sup>26</sup> neither can Congress modify, abridge, or diminish the President’s power.<sup>27</sup>

Under the program adopted by the Ford administration, not all offenders were given a full pardon remitting all punishment.<sup>28</sup> Rather, the program focused on “clemency,” a term denoting mildness or leniency. Some of the offenders were required to do alternative service as a condition of their clemency. The conditional exercise of the pardon power was upheld by the Supreme Court in *Schick v. Reid*.<sup>29</sup> In that case, the Court ruled that the President could condition the commutation of a death sentence on the prisoner’s acceptance of a life term of imprisonment without possibility of parole. The Court reasoned that since the pardon power is an expressly enumerated constitutional provision, “its limitations, if any, must be found in the Constitution itself.”<sup>30</sup> Absent any such limitations, it was perfectly acceptable to condition the exercise of the power on the offender’s agreement to a lesser punishment.

Although the pardon power is capable of beneficial, and indeed necessary, exercise, its expansive use must not be taken lightly. Such an expansive power is inherently dangerous if not used with prudence. This concept of discretionary and absolute power should be of special interest to lawyers, whose profession and perspectives are governed by the “rule of law” and the ideal of “equal justice under the law.” The experience of the Clemency Board at the end of the Vietnam War helps us, as lawyers, to understand the nature of this vast power and to guide its future exercise.

20. *Id.*

21. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872).

22. *See* Schick v. Reid, 419 U.S. 256, 267 (1974).

23. *See Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867).

24. *See, e.g.,* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872).

25. *See, e.g., Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867).

26. *Brown v. Walker*, 161 U.S. 591, 601 (1896).

27. *Schick v. Reid*, 419 U.S. 256, 266 (1974).

28. A “full” pardon operates to remit all punishment, while a true amnesty simply overlooks the offense. *See* *Burdick v. United States*, 236 U.S. 79, 95 (1915).

29. 419 U.S. 256 (1974).

30. *Id.* at 267. *See also* Note, *The Conditional Presidential Pardon*, 28 STAN. L. REV. 149 (1975) (suggesting limitations on the power to pardon conditionally).

The references herein to shortcomings or law-related imperfections in the use of this power following the war are provided to highlight areas worthy of special sensitivity in such future exercises, not to characterize its overall use or the net effect of its use under President Ford.

*Equitable, Comprehensive, and Conclusive Exercise  
of the Clemency Power*

The exercise of the clemency power, in practical effect, imposes an ad hoc legal regime on a particular factual setting. If the regime is to best serve its purpose, it must strive for integrity and respect, and it must produce the results it was created to obtain. The Vietnam Clemency Program did not completely fulfill these purposes. As noted above, an estimated 113,000 offenders came within the coverage of the program, and another 250,000 individuals perhaps could have been within the program but could not be identified because they had not registered for the draft. Despite the large number of individuals eligible for clemency, the voluntary program resulted in only 27,000 individual applications for clemency, 21,800 of which were from eligible offenders. Three years after the program ended, there remained some 80,000 Vietnam-era offenders who still faced the risk of prosecution and the attendant loss of civil rights, or who carried with them the badge of an undesirable military discharge.

The effectiveness of the Clemency Board was also somewhat limited by the conditional nature of the clemency granted to those eligible applicants.<sup>31</sup> The program was criticized by some as inequitable because some offenders were not required to do alternative service. Some individuals, for example, received a clemency discharge without a substituted term of alternative service. Others, however, would be required to do alternative service after a hearing on the merits. Some differences in result were attributable more to the manner and place of surrender to authorities than to the merits of particular cases. This resulted in some perception that the government was not giving the same bargain to all who were similarly situated.

Another possible weakness of the program was the lack of thorough follow-up once a term of alternative service was imposed. Many of the offenders who were required to perform alternative service as a condition of clemency were not pressed to complete the term of service. At one time the Defense Department estimated, for example, that of the approximately 10,000 fugitive deserters eligible for clemency and required to do alternative service, only 6,000 individuals applied, and only 500 actually completed the term of alternative service.<sup>32</sup> It has been suggested that those who failed to complete their terms of service could be prosecuted for fraudulently obtaining a discharge. There is no evidence, however, that the Pentagon ever followed through by pressing such charges. A similar failure to follow through occurred in the civilian sector where many offenders simply lost interest in the program, or, believing that the federal government had lost interest, returned to the

31. RECONCILIATION AFTER VIETNAM, *supra* note 4, at 41-42.

32. BASKIR & STRAUSS, *supra* note 2, at 220.

Kafkaesque world of underground living in fear of federal prosecution.

The Clemency Program's inability to encourage participation by more offenders is harder to understand. The limited participation may have been due in part to a misconception of the underlying assumptions of certain officials charged with the administration of the program in the early stages. Much of the rhetoric in Congress and in Washington reflected an erroneous belief that those who evaded the draft and disobeyed the laws of the military were predominantly white, well-educated, and ideologically opposed to the Vietnam War. The experience of the Clemency Board proved quite the contrary. As one commentator has summarized: "Almost half of all draft evaders were members of minority groups who never registered for the draft. Three-quarters of the deserters were high school drop-outs, and less than one percent ever graduated from college. Most offenses were motivated primarily by personal or family problems."<sup>33</sup> With regard to military deserters in particular, it has been observed that:

For every one of the 7,000 servicemen who fled when ordered to Vietnam, there were three who left American duty stations after completing full tours in Vietnam. Many served with distinction, only to "desert" when they failed to receive adequate post-combat rehabilitation. Twenty percent of all "deserters" served full Vietnam tours. . . . Very few "desertion" offenses were connected with service in Vietnam. . . . 24 servicemen were convicted of desertion to avoid hazardous duty in Vietnam.<sup>34</sup>

Thus, the Clemency Board was born amid misconceptions by many about the nature of the offenders with whom it was assigned to deal. An effective clemency program must at the very least ensure that everyone involved completely understands the character of the offenders involved and then tailor the program to attract participation by that kind of individual. Only then can such a program claim to make a comprehensive effort.

It should be noted that the problems of the Ford administration clemency program were, to a very large extent, attributable to the very nature of the war and the times themselves. The burden of the Vietnam War fell heavily and primarily on Americans of middle and lower-middle socioeconomic classes. Many of the offenses were related to simple immaturity, lack of social acculturation, or the less than accommodating social and political environment that characterized the United States at that time. This was the "wounded generation" and many young adults did not trust any governmental program.<sup>35</sup> This lack of trust clearly hindered the program's effectiveness. It would seem wise for any future program to make an all-out attempt to create a certain amount of trust among offenders themselves. This aim is

33. RECONCILIATION AFTER VIETNAM, *supra* note 4, at 2.

34. *Id.* at 2.

35. See THE WOUNDED GENERATION ix-xii (A. Horne ed. 1981).

perhaps best obtained by simply being direct with the offenders concerning their alternatives.

*The Need for Integration With the Military Justice System*

A fundamental premise underlying the military justice system is that the use of courts-martial and discharge proceedings should be a last resort when the system is operating properly. Good military and civilian leadership, especially at post-Vietnam tour-of-duty phases, could have averted many military offenses ultimately directed to the Clemency Board. Military leadership became the focus of much criticism following the Vietnam War, and the military legal system expeditiously responded by reevaluating its priorities.

During the period of the Clemency Board's operation, the military, in an effort to cut costs, plea bargained many bad conduct discharge cases that came to the attention of the Board.<sup>36</sup> Although the military justice system certainly operated equitably and even admirably for the most part, this emphasis on action dictated by dollar costs seems inappropriate and ultimately detrimental to the military.

An additional problem of the Clemency Board vis-a-vis the military justice system was the frequent inability of the Board to act because of the limited number of offenses against military law that were subject to clemency. The Clemency Board's "jurisdiction" was limited to offenses related to desertion, of which there were relatively very few. Offenses other than desertion that may have been equally deserving of clemency, such as insubordination, failure to obey rules, and assault, could not be reviewed by the Board.

Finally, and of somewhat broader interest, in an evaluation of the relationship of the clemency program to military justice, it might be noted that our experience indicates that despite much publicity to the contrary, American soldiers on the whole performed admirably and in accordance with military law in Vietnam. Also, and perhaps most important for the future, in organizing a clemency program there was and is the overriding concern that military justice may not be totally forgiving if it is to function under wartime conditions. The impact of this forgiveness factor on military performance has not been fully put to the test in modern times.

*Coordination With Law Enforcement Authorities*

The Clemency Board's experience also indicates a need for emphasis on coordination of the clemency program with other law enforcement programs. An estimated 250,000 people never registered for the draft and were never prosecuted. Another 110,000 burned their draft cards, refused induction, or committed other offenses against the draft but were never charged with any crime.<sup>37</sup> Of the 210,000 individuals referred to the Justice Department for possible draft law prosecution, only 25,000 were indicted. Of those, only 10,000

36. BASKIR & STRAUSS, *supra* note 2, at 216.

37. RECONCILIATION AFTER VIETNAM, *supra* note 4, at 15.

were tried, and 8,800 were convicted.<sup>38</sup> It is estimated that for every draft offender who went to prison, almost 200 went free.<sup>39</sup> Moreover, the United States Attorney's Offices were reluctant to prosecute clemency program alternative service dropouts. Even worse, the Justice Department dismissed thousands of draft offender cases without informing the defendants that they were free to live their lives without the fear of prosecution.<sup>40</sup> This problem of coordination of the efforts of the Clemency Board and those of other law enforcement officials seriously damaged the effectiveness of the program. As one commentator has observed: "[L]ike the Defense Department, the Justice Department saw the Clemency Program not as a way of extending official forgiveness but as a way of trimming its backlog of fugitive cases."<sup>41</sup> To best promote the goals of efficiency and justice, any future clemency program must be in full cadence with other law enforcement programs and vice versa.

#### *Relation to the Court System*

The Clemency Board's experience points up the need for effective coordination of judicial authority. For instance, Vietnam-era offenders were, of course, free to plead guilty to crimes against the draft in the federal courts. Under rule 20 of the Federal Rules of Criminal Procedure, those willing to plead guilty could determine their own destiny by going to the district court of their choice. Since some judges clearly were more sympathetic than others to the plight of draft offenders, the offender could seek out those judges in the hope of avoiding even the alternative service. Many offenders did just that and escaped punishment altogether. The inequity of such a result is apparent. Disposition of draft offenders should not be determined on the basis of the offender's guile or luck. Any future clemency program must implement a coordination procedure with the federal court system to avoid this end-run around the clemency authority.

#### *Conclusion*

It is clear that the Clemency Program had some deficiencies. However, President Ford's decision to exercise the power of clemency was consistent with its exercise as contemplated by the Framers of the Constitution. America was in turmoil. The exercise of the clemency power in this instance did contribute to alleviating national stress and restoring tranquility. The decision to exercise the power was also motivated by the desire to lend justice a human element and forgive those who, in Hamilton's words, were the victims of "unfortunate guilt." Nonetheless, it must not be forgotten that the power to pardon is a broad discretionary power that defies the rule of law. As lawyers, we have a role to perform in ensuring that the power is properly motivated

38. *Id.* at 3.

39. *Id.* at 15.

40. *Id.* at 36.

41. *Id.* at 34.

and fairly and effectively administered. Clemency power is like a parachute for very troubled times, and we should be sure that our gear is in order if and when the parachute may have to be sprung open in the future.

In retrospect, we might ask whether our nation is now stronger because of the Vietnam War and the resulting clemency program. Constitutional Law Professor William Y. Elliot sheds some light on a possible answer. In his essay on amnesty, Professor Elliot concludes:

It is clear, therefore, that amnesties are effective as legal protection only in constitutional states under the rule of law which courts can enforce, or in absolute monarchies or dictatorships where the ruler is of tried good faith. Wherever the government feels itself insecure they are of doubtful worth. In fact, from the standpoint of the group in power, amnesties are politically expedient only when the regime is safe from further violence, and when clemency may not be mistaken for weakness.<sup>42</sup>

The use of the clemency power ten years ago, despite the weaknesses referred to herein, not only was timely, it was and is a reflection of the overall strength and resilience of our legal and political system.

42. Elliot, *Amnesty*, in II *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 36, 38, (1930).

