

**Gerald Ford's Clemency Board:
Revisited and Reassessed**

by

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ABSTRACT

Intended mainly as a vehicle for rehabilitating draft evaders after the Vietnam War, the Presidential Clemency Board (“PCB”) was largely an orphan of the Ford presidency. Created in the wake of the Nixon pardon as an unpopular compromise between those who opposed any sort of clemency and those who urged a general amnesty, the PCB was plagued by attacks from both the right and the left, internal dissent, and numerous administrative difficulties. Little has been written about the PCB in the four decades since it concluded its work, and those historians who have evaluated it have reached the conclusion that it was largely unsuccessful. Using recently-available records and notes of Ford’s advisors and PCB participants, this thesis will demonstrate that while the PCB did little to accomplish its stated goal of “healing the nation” and was boycotted by the draft evaders who were its primary intended beneficiaries, it was nonetheless a bureaucratic achievement of some note and an incidental success for its least important beneficiaries, common soldiers who had been cast aside by American society.

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Preface

A historian might say there are three aspects of an interesting life: to participate in history, to be aware of it at the time, and to live long enough to give the experience some perspective. Many are not so privileged.

As a young man, I was bound up in the civil tumult over the Vietnam War and saw the war itself. My military experience led to my employment as an attorney on Gerald Ford's Presidential Clemency Board when I was just 27. I was fully aware that I was participating in history. It was not the grand history of my father's generation, but it was the defining history of my generation.

Half a century later, I have been granted some perspective on the experiences of my youth, completing the third aspect. As an unexpected fourth blessing, I have been given the opportunity to use the tools of a historian to investigate and write about it. This thesis is my attempt to put the history I lived into perspective and make some sense of it. I am keenly aware of my good fortune. It's been an interesting life.

Alan Jaroslovsky
August, 2019

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I.

Introduction

For Americans, the late summer of 1974 was a tumultuous time. On August 9, Richard Nixon resigned the presidency and Gerald Ford was sworn in. On September 8, Ford stunned the nation by pardoning Nixon. Eight days later, Ford announced a clemency program for the hundreds of thousands of deserters and draft evaders spawned by the divisive Vietnam War. Included in his decree was the formation of the Presidential Clemency Board (hereinafter “PCB”) to review and recommend conditional pardons for convicted deserters and draft evaders.

Although the Vietnam War was ending, America was still a deeply divided society. Arguing that the war was immoral, many young men had refused to register for the draft or had fled to Canada. These were mainly the educated sons of the middle class, and America was evenly divided as to how or whether to bring them home. Many argued that because the war had been immoral the draft evaders had done the right thing and were deserving of blanket amnesty. Those who disagreed argued that they had broken the law and deserved to be punished; anything less would be an affront to the families of more than 50,000 dead soldiers who had not avoided their obligations and paid the ultimate price for their duty.

Almost an afterthought to the subject of clemency were tens of thousands of

military deserters, some of whom had been captured or turned themselves in and many still out in the cold. These were largely the children of poor families, often drafted or allowed to enlist despite near certainty that they were unfit for military service. Very few had actually deserted from combat. Many had served honorably in Vietnam, only to return home to family problems and a society which blamed them for the war.¹ Since these were the children of the underprivileged and had not used opposition to the war to explain their conduct, nobody much cared about them.

Given the state of the nation and especially his pardon of Nixon, Ford decreed a compromise that he hoped would “heal the nation.” Under Ford’s program, fugitive draft evaders could turn themselves in, perform alternative service as a means of earning re-entry into society, and receive a pardon thereafter.² Fugitive deserters could turn themselves in for an immediate undesirable discharge and then seek a clemency discharge after performing alternative service.³ For those who had already been

¹Typical of many deserters was a young black soldier who grew up as one of ten children in a low-income family in the South. His father was a disabled farm laborer. The applicant quit school after the 8th grade to work as a farm laborer. He was drafted into the Army and served a full tour of duty in Vietnam. He then deserted to support his family, working as a farm laborer. Ford Library, Goodell Papers, Box 8, Memoranda – President and White House Staff, 39. Similar is the case of a young Hispanic soldier who left the Army after completing a full tour in Vietnam to deal with the imprisonment of his father and the pregnancy of his girlfriend. *Ibid.*, 37. In fact, of the 29 cases summarized in those papers, opposition to the war was a factor in only one.

²The draft evader community largely boycotted Ford’s program; only 736 fugitives applied. Lawrence Baskir and William Strauss, *Reconciliation After Vietnam: Program of Relief for Vietnam Era Draft and Military Offenders* (Notre Dame and London: University of Notre Dame Press, 1978), 29.

³About half of the 10,115 fugitive deserters turned themselves in, but almost all of these did so for the immediate undesirable discharge with no intent to seek a pardon by

convicted of a crime or discharged as a deserter, the PCB was established to review their cases on an individual basis and recommend a pardon after a specified term of alternative service.

The problem for Ford was that America was not ready for a compromise. Draft resistance organizations quickly announced a boycott of Ford's program, arguing that accepting any alternative service would be an admission that they had been wrong. Veterans' organizations denounced the idea that anyone who had shirked his responsibility could earn a pardon by safely performing alternative service when so many had faced the real dangers of combat. Nobody was interested in a compromise.

Ford quickly realized that he had broken a cardinal rule of politics: he had created a program that pleased nobody, and was not going to heal anything. He had made lots of enemies and no friends. For the most part he thereafter distanced himself from his own program, realizing that any reminders of the program in the press would only harm his chances to retain the presidency. It fell to Ford's old friend from the House, Charles E. Goodell, to take up the thankless task of creating and directing the PCB. And Goodell had to do it quickly, cheaply, fairly, and without presidential support.

This thesis will be an examination of how Goodell went about his task and the hundreds of federal workers he enlisted in the unpopular cause of clemency. Little has been written about this subject, and even less sufficiently removed from the war to be free of the strife and polarization of the times. Underneath the divisive feelings, the rhetoric,

alternative service. Few if any were ever prosecuted for failure to perform alternative service. Ibid.

and the early assessments of success or failure is a very human story of fairness, perseverance, invention, accomplishment and individual justice. There might be valuable lessons for future presidents as well.

Historiography

Three aspects of late 20th Century American history form the basis for this thesis. First, there is the history of the PCB itself, which has been the subject of two published books and several scholarly works. Second is the history of the Ford presidency, dominated by issues of clemency large and small. Third is the aftermath of the Vietnam War, so polarizing that it is only recently capable of being discussed dispassionately. The task of any historian of the period is to evaluate how the passions of the time colored its history and to re-evaluate when circumstances warrant.

The historiography of the PCB is dominated by two books, *Reconciliation After Vietnam: Program of Relief for Vietnam Era Draft and Military Offenders* and *Chance and Circumstance: the Draft, the War, and the Vietnam Generation*, written in the 1970s by two former officials of the PCB, Lawrence Baskir and William Strauss.⁴ However, these works cannot be considered the last word on the PCB for three reasons. First, the authors were too close, both physically and temporally, to fully evaluate the PCB and therefore lacked historical perspective. Second, they were proponents of further programs for clemency and were therefore motivated to minimize the accomplishments of the PCB.

⁴Lawrence Baskir and William Strauss, *Chance and Circumstance: The Draft, The War, and the Vietnam Generation* (New York: Alfred A. Knopf, 1978), and Lawrence Baskir and William Strauss, *Reconciliation After Vietnam: A Program of Relief for Vietnam Era Draft and Military Offenders* (Notre Dame and London: University of Notre Dame Press, 1978). Baskir was the PCB General Counsel, Strauss its Director of Planning, Management and Evaluation.

Third, as officials of the PCB they had a natural tendency to ignore or downplay issues of potential embarrassment to themselves.

A good example of minimizing the achievements of the PCB was the repeated assertion of Baskir and Strauss that a clemency discharge was “meaningless” and no better than the undesirable discharge it replaced.⁵ As they well knew, in addition to restoration of any lost civil rights, better employability and other intangibles, a clemency discharge was often the first step toward restoration of veteran’s benefits, at the very least for medical treatment of wounds suffered in combat.⁶ Similarly, Baskir and Strauss decried what they described as the low participation rate despite knowing that many of the numbers they used were rough estimates and that it would have been impossible for the PCB to handle more applications. It took extraordinary effort (doubling the PCB membership, dividing into panels, using law students as attorneys, cajoling funds from the budgets of other agencies) to consider the applications that were made.

Baskir and Strauss also failed to note aspects of the PCB that could have embarrassed them professionally as lawyers. For instance, they never mention that the PCB was taken completely by surprise when a White House lawyer brought to their attention a federal law limiting the life of the PCB to one year. Likewise, they made no comment on the PCB’s use of law students as lawyers, a grey area of professional ethics.

While Baskir and Strauss were the first word on the PCB, they were not the last.

⁵Baskir and Strauss, *Reconciliation After Vietnam*, 34.

⁶As Baskir and Strauss themselves noted, a clemency discharge from the PCB “virtually guaranteed” at least some veterans’ benefits to Vietnam veterans. *Chance and Circumstance*, 232.

Subsequent scholarship, the passing of some 45 years, and especially the availability of the records of the PCB and the private notes of its members and the White House staff, have made a revisit and reassessment of the PCB a feasible and necessary endeavor.

The Ford presidency itself is bound up in issues of clemency; many historians and Ford biographers attribute Ford's failure to retain the presidency to his pardon of Richard Nixon, which in turn made Vietnam-related pardons a necessity or at the very least the fair thing to do. Ford himself gave scant attention to the PCB and took little pride from it. In his 450-page 1979 autobiography he devoted exactly two paragraphs to it, summarizing the program and then noting:

The details of the plan, I knew, wouldn't satisfy liberals, who wanted me to give general amnesty. Nor would it please conservatives, who demanded harsher punishment. Still, I thought it was fair, and I was hopeful that the Clemency Board – which I'd asked former Senator Charles Goodell to head – would get off to a quick start in processing the thousands of applications that I expected it to receive.⁷

Evidencing no pride in the PCB nor discussing its results, Ford implicitly treated the PCB as a failure.

Many of Ford's biographers failed to mention the PCB at all, and some of those who did considered the PCB a failure in search of a scapegoat. Biographer James Cannon, an ardent admirer of Ford, failed to mention the PCB at all in his first history of the Ford presidency and in the second commented:

Once announced, Ford's clemency program floundered. As he had kept it secret from the White House staff, Ford had not appointed anyone to carry

⁷Gerald R. Ford, *A Time to Heal: The Autobiography of Gerald R. Ford*. (New York: Harper and Row, 1979), 182.

out his proposal. Neither he nor [Chief of Staff Robert T.] Hartmann had thought through how the board would be organized, who would serve on the board, and how it would carry out its mission. . . . As it turned out, the operation was a disaster.⁸

There is some irony that, reconsidered half a century, there is a good argument that the PCB was successful and should have been a source of pride rather than embarrassment.⁹

As to the tortured history of the Vietnam War and its aftermath, the passing of half a century is barely enough time to deal with it apolitically. The title of just about every work on the soldiers of that war telegraphs its position, often uncompromisingly at odds with each other. Compare, for example, Christian Appy's *Working-Class War* with Sue Berryman's *Who Serves? The Persistent Myth of the Underclass Army*.¹⁰

The historiography of Project 100,000, under which the military lowered its minimum intelligence standards and accepted men not previously deemed qualified, demonstrates the very worst effects of Vietnam War passions. During the war and for decades afterward, antiwar and pro-administration writers often only cited like-minded historians and ignored inconsistent works rather than engaging them, resulting in the

⁸James Cannon, *Gerald R. Ford: An Honorable Life* (Ann Arbor: The University of Michigan Press, 2013), 216. In his prior history of the Ford presidency, *Time and Chance: Gerald Ford's Appointment With History* (New York: HarperCollins Publishing, Inc., 1994), Cannon did not mention the PCB at all.

⁹Although Douglas Brinkley never mentioned the PCB in his history of Ford's presidency, *Gerald R. Ford* (New York: Henry Holt and Co., 2007), he nonetheless listed "offering of amnesty to draft resisters" as one of Ford's three finest accomplishments as president, along with ending the Vietnam War and supporting the Helsinki Accords. *Ibid.*, 116.

¹⁰Christian G. Appy, *Working-Class War* (Chapel Hill: The University of North Carolina Press, 1993); Sue E. Berryman, *Who Serves? The Persistent Myth of the Underclass Army* (Boulder, CO: Westview Press, Inc., 1988).

perpetuation of falsehoods or half-truths. For instance, Michael Foley in *Confronting the War Machine: Draft Resistance During the Vietnam War* recited what was considered common knowledge among antiwar historians, that “half of the 400,000 men who joined the military through Project 100,000 went to Vietnam. Worse, they had a death rate twice as high as that of American forces as a whole and 40 percent of them were black – compared to 10 percent for the military overall.”¹¹ A detailed analysis of his sources and their sources reveals only a round-robin of antiwar sentiment with no definitive support for the assertion.

Pro-military evaluators of Project 100,000 were hardly better than the anti-war writers. They glossed over or ignored the unanticipated effect the Vietnam War had on men admitted under Project 100,000 and the broken promises of valuable training. They made no mention of the disaster their military experience proved to be for thousands of men who should have never been accepted for service. Typical is the essay on Project 100,000 by Harold Wool and Eli S. Flyer included in Peter Doeringer’s *Programs to Employ the Disadvantaged*. To call Project 100,000 a “spectacular success” evidences a monumental lack of sensitivity, empathy and compassion.¹²

The most recent evaluation of Project 100,000, Geoffrey W. Jensen’s “Project 100,000: A Parable of Persisting Failure” contained in *Beyond the Quagmire: New Interpretations of the Vietnam War*, notes that much of the criticism of the program is

¹¹Michael S. Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003), 56.

¹²Peter Doeringer, Ed., *Programs to Employ the Disadvantaged* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1969), 223.

little more than parroting accusations made in the 1960s and 1970s. Jensen concludes with the probable verdict of history that Project 100,000 “was not the absolute failure or moral atrocity that it has been made out to be” but cannot be called a complete success, either.¹³

For purposes of this thesis, the author has used both sides to attempt a synthesis despite the scarcity of un-polarized evaluation. One of the few areas of general agreement is that the soldiers of the Vietnam War came home to shabby treatment and, for thousands of men, being accepted into the military resulted in a personal tragedy not entirely of their own making. As veterans, these men were desperately in need of a program to improve their condition and ameliorate the harsh consequences of their military experiences. Whether by intention or inadvertence, the only such program for many years after the Vietnam War was Gerald Ford’s Presidential Clemency Board.

¹³Geoffrey Jensen and Matthew Stith, Eds. *Beyond the Quagmire: New Interpretations of the Vietnam War* (Denton, TX: University of North Texas Press, 2019), 145, 168. In the process, Jensen provides evidence refuting many of the statistical arguments taken as gospel by 20th century antiwar writers, noting, for instance, that two-thirds of men admitted to the military under Project 100,000 became clerks, technicians, cooks and mechanics, not combat soldiers. *Ibid.* at 166.

Terminology

The terminology used in this thesis can be confusing, and many of the terms have been used incorrectly, inconsistently, or interchangeably by policy makers and historians as well. The following are brief definitions of terms used throughout this thesis, as intended by the author.

Clemency means nothing more than the exercise of the presidential power granted by Article II, Section 2, of the U.S. Constitution. Clemency may take the form of a pardon, erasing a criminal conviction; or a commutation or reduction of a sentence, or a reprieve; or remission of a fine; or amnesty, the granting of immunity from prosecution for a crime which has been committed but for which the recipient has not yet been convicted.

Pardon is a form of clemency usually granted to someone who has been convicted of a crime. It does not erase the fact of conviction, but it restores any rights forfeited as a result of the conviction and excuses the recipient from serving any prison sentence not already served.

Amnesty is a form of pardon that often causes confusion because it can mean two different things. It can mean a pardon to someone who has committed a crime but has not yet been convicted.¹⁴ It can also mean pardons given to a large group of

¹⁴These are the author's understandings, based on dictionary definitions; there are certainly others. For instance, another author defines "amnesty" to include both the convicted and the unconvicted, Edward F. Dolan, Jr., *Amnesty: The American Puzzle*

individuals for the same act (“blanket” amnesty).¹⁵ For instance, President Jimmy Carter granted blanket amnesty to the tens of thousands of men who had violated the Selective Service Act but had not been prosecuted, assuring them that they would never be prosecuted for evading the draft. President Ford’s pardon of President Nixon could be described as a form of amnesty, as Nixon had not been convicted of any crime.

In the aftermath of the Vietnam War, “amnesty” was often interpreted as having an element of vindication for having done the right thing, even if it was a violation of the law, whereas “pardon” implied forgiveness of a bad act.¹⁶ Thus, draft evaders who fled to Canada rejected Ford’s offer of a pardon but accepted Carter’s amnesty. This interpretation is unique to the time, not a general understanding. There is little in either law or custom for such a distinction.¹⁷

(New York: Franklin Watts, 1975), 3.

¹⁵The Merriam-Webster Dictionary gives two separate definitions of “amnesty”: pardon granted to a large number of individuals, and pardon before trial or conviction.

¹⁶During the 1976 election campaign, Jimmy Carter put out a statement explaining, in his opinion, the difference between “amnesty” and “pardon,” basing his understanding on “the ruling of the Supreme Court and in accordance with the definition in the dictionary.” “Amnesty means that what you did was right. Pardon means that what you did, whether it’s right or wrong, you are forgiven for it.” Papers of James. M Cannon, Ford Library, Box 3, Amnesty, 2. Carter probably was referring to *Burdick v. U.S.* (see note 17, *infra*) but that is not really what the Supreme Court said.; overlooking an offense is not the same thing as declaring it the right thing to have done.

¹⁷In 1877, the Supreme Court noted that “the distinction between amnesty and pardon is one rather of philological interest than of legal importance.” (*Knote v. United States*, 95 U.S. 149, 153 (1877)). That is probably still correct, though in *Burdick v. U.S.*, 236 U.S. 79, 95 (1915), the Court noted “incidental differences of importance” in that “the one overlooks offense; the other remits punishment” though there is no difference as to their ultimate effect. The Court also noted that amnesty is usually addressed to classes or communities rather than individuals. Since the *Burdick* decision did not hinge on the

The term “amnesty” has often been used casually or inappropriately even by White House staff and presidents. For instance, in the Ford Library many of the White House staff papers relating to the Presidential Clemency Board are in files marked “Amnesty” even though Ford’s program was insistently not any form of amnesty. Similarly, President Harry Truman’s Amnesty Board only dealt with individuals who had been convicted of crimes and therefore probably should have been better called a Pardon Board or a Clemency Board.

The contemporary confusion over the meanings of “amnesty” and “clemency” is reflected in a Q and A sheet for a press briefing after the PCB had concluded its work. It reads:

QUESTION: What about the charge that this was an amnesty-oriented staff and Board. Are you for Unconditional Amnesty?

ANSWER: The Clemency Board and the Clemency Program have nothing to do with Amnesty. That is a whole other thing. We are talking about people who have already been punished, and may be eligible for Clemency for their offenses. Amnesty is a forgiveness of all sins - for all people – unconvicted etc. *There is so much confusion about this issue, I wish we could clear it up once and for all.* [emphasis added]¹⁸

Draft Evader means any person who violated the Selective Service Act by failing to register for the draft or failing to report for military service, whether or not the person was prosecuted. The vast majority of draft evaders during the Vietnam era were never

difference between amnesty and pardon, its discussion of the difference is probably *dicta* and not binding in other cases, adding to confusion over the terms rather than clarifying things.

¹⁸Memorandum from Nia Nicholas, PCB Press Officer, dated September 22, 1975. Ford Library, Goodell Papers, Box 9, Press Relations, 51-66.

prosecuted.

Deserter means a person in the military who went absent without leave or failed to return from authorized leave, with no intent to return; intent to desert can be presumed when the unauthorized absence is for more than 30 days. The term does not necessarily mean abandoning a person's combat duties. During the Vietnam war, desertion in a combat area was rare. Moreover, many deserters had completed full combat tours in Vietnam before deserting.¹⁹

Punitive Discharge means a discharge from the U.S. military as punishment for a crime. Early in the Vietnam War, deserters were often tried by court martial and, if convicted, given a bad conduct discharge or a dishonorable discharge, both of which were the equivalent to a felony conviction and resulted in loss of veteran's benefits. After the mid-1960s, deserters were usually given the opportunity to agree to an undesirable discharge in lieu of a court martial, and most accepted. An undesirable discharge carried the same legal consequences as a bad conduct discharge. Accused deserters gave up many legal rights they would have had in a court martial, but an undesirable discharge was attractive to them because it was immediate and entailed no further punishment. When the term "bad discharge" or "punitive discharge" is used in this paper, it means a bad conduct discharge, a dishonorable discharge, or an undesirable discharge.

¹⁹See note 1, *supra*, for examples.

II.

A Demanding Compromise

Ford biographers have commented on Gerald Ford's innate inclination to compromise. Nowhere is this more evident than in his decision to establish a clemency program, a compromise between his conservative political inclination to deny clemency and the demands of the time, the pardon of President Nixon, and the urging of his family.²⁰ Unfortunately for Ford, his clemency compromise did not work out the way he hoped. One biographer called it "a prime example of the contrast between high purpose and inexperience that he displayed in his first weeks as President."²¹ Still, the worst that should be said about Ford's compromise was that it was impolitic. It was certainly fair, at least in his mind.²²

Baskir and Strauss felt that Ford's clemency program was inadequate and they advocated further relief.²³ Not surprisingly, they called Ford's program an "awkward

²⁰Ford's three draft-age sons, none of whom served in the military, were among the most zealous advocates of some form of clemency. John R. Greene, *The Presidency of Gerald R. Ford* (Lawrence, Kansas: University Press of Kansas, 1995), 39.

²¹James Cannon, *Gerald R. Ford: An Honorable Life*, 217.

²²See footnote 7, *supra*.

²³In *Reconciliation After Vietnam* Baskir and Strauss argued, "Despite good intentions and original high hopes of the Ford clemency program, it was not a sufficient response to the needs of draft and military offenders. Something more must be done."

compromise” whose procedures were “complex and expensive.”²⁴ But that was the very nature of Ford’s compromise. It would have been simple and cheap to grant blanket amnesty, and simpler and cheaper to offer no clemency at all. Only a compromise entailed difficulties and expense. That is undoubtedly why case-by-case clemency on a large scale had only one precedent, Harry Truman’s Amnesty Board, and has not been repeated since. But to call Ford’s program an awkward compromise is unfair. It was a compromise. Most compromises of vigorous disputes are awkward.²⁵

The PCB was the direct offspring of the only other pardon board in U.S. history, Truman’s Amnesty Board. In the wake of victory in World War II, Truman established his Amnesty Board to review all convictions for violations of the Selective Service Act (i.e. draft evasion or refusal to serve when called). Although the report of Truman’s board was not published, a copy found its way into Goodell’s files from the office of Senator Edward Kennedy, together with a 1972 memorandum from counsel for the Senate Subcommittee on Administrative Practice and Procedure.²⁶ Goodell was clearly influenced by Truman’s board; the functioning of the PCB had many aspects in common with the Amnesty Board. But there were significant differences as well.

p.49.

²⁴Baskir and Strauss, *Reconciliation After Vietnam*, 45-46.

²⁵As an angry Calvin once noted, “A good compromise leaves everybody mad.” Bill Watterson, *Calvin and Hobbes*, November 1, 2011.

²⁶Owen J. Roberts, Willis Smith, and James O’Neil, *Report of the President’s Amnesty Board*, December 1947. Initially not published, it was inserted into the Congressional Record, Volume 119, p. 16884, on May 24, 1973. This *Report* and Kennedy’s memorandum are in the Ford Library, Goodell Papers, Box 10.

Like the PCB, Truman's board set out to review the 15,805 convictions under the Selective Service Act on a case-by-case basis. Unlike the PCB, the exact number of such convictions was known and there was no application procedure; each conviction was automatically reviewed. Unlike the PCB, there was no hearing nor any provision for counsel or the offender to appear personally before the board, though the offender could submit a voluntary statement for consideration.

Like the PCB, each case was initially summarized by a "corps of trained reviewers," looking for aggravating and mitigating circumstances as identified by the board. Unlike the PCB, the "trained reviewers" were not lawyers or law students and played no part in the review beyond report preparation. And unlike the PCB, which could and did condition many pardons on alternative service, Truman's board had only two choices, pardon or no pardon.

Significantly, Truman's Amnesty Board consisted of only three members and no attempt was made to make them diverse. The chairman of Truman's board was a retired associate justice of the U.S. Supreme Court, Owen J. Roberts, and as such dominated the proceedings. The other two members were lawyer Willis Smith, a former president of the American Bar Association, and James F. O'Neil, chief of police of Manchester, New Hampshire.

In the end, Truman's board recommended only 1,523 pardons, about ten percent of the convictions it considered. The PCB offered pardons to over 90% of those applicants who were eligible.

Despite the similarities, the PCB evolved quite differently from Truman's

amnesty board. Even though the U.S. had emerged from World War II completely victorious, it seemed that Truman's board looked for reasons to deny clemency. Only in a few types of cases – most notably interned citizens of Japanese descent – did that board express any sympathy for the offenders.²⁷ By contrast, Jehovah's Witness offenders – about a quarter of the total – garnered little sympathy and were generally not recommended for pardon. In contrast, the U.S. had lost the Vietnam war, yet the PCB evolved toward relief as the default decision, with denial of relief the exception. In the case of Truman's board, its recommendations were probably a reflection of the personal views and legal knowledge of its chairman. The reason for the PCB's liberality was more than just a reflection of the views of its chairman, as Goodell did not have nearly the gravitas of a Supreme Court justice and had to deal with vocal opposition from within the PCB itself. The active involvement of so many attorneys may have steered the PCB in directions Truman's board could not go. Whatever the reason, it is clear that the PCB evolved much differently from Truman's board in ways that neither Ford nor Goodell foresaw.

The work of Truman's Amnesty Board was concluded within just under one year of its creation, which meant it must have convened daily and worked furiously. Truman's decree establishing the Amnesty Board had stated that it would exist until its final submission of recommendations, so it would appear that, like the PCB, Truman's board

²⁷Significantly, the chairman of Truman's board was retired Supreme Court Justice Owen Roberts, who had been one of the three dissenters in *Korematsu v. United States*, 323 U.S. 214 (1944). In that decision the majority of the Court found the internment of U.S. citizens of Japanese descent during World War II to be constitutional.

did not know about the one-year restriction on the use of appropriated funds for entities created by presidential decree.²⁸ If Truman's board had mentioned this restriction in their report, they might have allowed the PCB to avoid the same unpleasant discovery that it had only one year from creation to complete its work.

²⁸31 USC section 696, also known as the "Russell Rider," enacted during the administration of Franklin Roosevelt.

III.

Charles Goodell

Charles Goodell was Ford's choice to chair the PCB. He shaped the operation of the PCB, and its outcome was to a great extent the result of the decisions he made. In order to fully understand the PCB, it is necessary to know his background and his politics.

Born in 1926 in Jamestown, New York, Goodell was 48 years old in 1974. He served in the Navy in World War II as an enlisted sailor; after the war, he obtained both a law degree and a master's degree in Government from Yale. He returned to the military as an Air Force officer during the Korean war. After that war, he practiced law and worked in Washington until 1959, when he was elected to the House of Representatives as a Republican from New York. In the House, Goodell was one of the "Young Turks" who wrested control of the Republican leadership in the House from the older generation and succeeded in elevating Gerald Ford to Speaker of the House. Goodell served in the House until 1968, when he was named to the Senate by New York governor Nelson Rockefeller to complete the term of Robert Kennedy, who had been assassinated.

During his few years as a senator, "to the astonishment of everyone who knew him, Goodell metamorphosed from a solid Republican conservative to wooly liberal, constant critic of President Nixon, and vocal opponent of the Vietnam War."²⁹ Vice

²⁹Cannon, *Gerald R. Ford: An Honorable Life*, 216.

President Spiro Agnew called Goodell a “radical liberal” and attacked him as the “Christine Jorgensen” of the Republican Party, a reference to a male celebrity who had sex change surgery. President Nixon, who had praised Goodell when he was first named to the Senate, placed Goodell on his notorious “enemies list.” Among Goodell’s actions in the Senate were proposed legislation to cut off all funds for the Vietnam War, to allow conscientious objection to specific wars and, significantly, to grant amnesty for antiwar draft resisters. In 1969, Goodell participated in an antiwar march on Washington together with Senator George McGovern and Eugene McCarthy.

The 1970 election proved to be the end of Goodell’s career as an elected politician. Despite endorsement by a long list of antiwar activists including the Berrigans, Naom Chomsky, Jane Fonda, Betty Friedan, Coretta King, Benjamin Spock, and many others,³⁰ he was urged to withdraw from the election when polls showed him trailing badly. Goodell refused, and was defeated ignominiously, coming in third. He and the Democratic nominee split the liberal vote, giving the election to conservative James Buckley.

Many considered Goodell a political pariah after losing the 1970 election.³¹ However, the rise of Ford to the presidency in 1974 gave Goodell new political life, with some friends believing that Ford would name him attorney general, appoint him to the Supreme Court, or even name him as a running mate in the 1976 election. Goodell quickly accepted Ford’s offer to chair the Presidential Clemency Board within days of

³⁰Letter to the Editors, *The New York Review of Books*, October 22, 1970.

³¹Cannon, *Ibid.*

Ford's becoming president.

Ford's selection of Goodell to head the PCB is an interesting one, as well as one strange to twenty-first century sensibilities. While Ford was a moderate to conservative Republican, Goodell had turned himself into a full liberal, if not a radical, especially where the Vietnam War was concerned. After the losing the Senate election, Goodell had written a book, *Political Prisoners in America*, a history of political repression from the Whiskey Rebellion to the civil rights movement and the Vietnam War.³² In his book, Goodell expressed support for the Black Panther Party and its imprisoned leaders as well as Angela Davis and Daniel Ellsberg. Goodell significantly wrote:

For our victims at home as well as overseas, the [1960s] seared more than it soared. Our racial sins finally caught up with us and "Burn, baby, burn" became a literal reality, matched only by the blind brutality of a foreign policy expressed in the wrenching words: "We had to destroy that village in order to save it." Race and war, the two great political issues which gripped America throughout the decade, enmeshed thousands in the criminal process.³³

The reasons for Ford's selection of Goodell to chair the PCB are unclear. They were in fact friends, in the days when political opponents could argue vociferously and still share a collegial meal, but there was certainly more to the decision than that. Nothing in Ford's public statements or his autobiography hinted at any latent sympathy for draft evaders or deserters, and it appears he would have done nothing for them but for the Nixon pardon, so only an ardent Fordophile would give him credit for a deeply-held

³²Charles E. Goodell, *Political Prisoners in America* (New York: Random House, 1973).

³³*Ibid.*, 4.

desire to pardon them. Perhaps Ford wanted to give his clemency program credibility by naming an ardent liberal and opponent of the war. If that was his intent, it would appear that it did not work. Despite endorsement during his Senate campaign by a veritable Who's Who list of antiwar activists, Goodell came to be seen as a tool of the establishment rather than the liberal firebrand who wrote *Political Prisoners in America*.

Goodell's reasons for accepting the chairmanship of the PCB are also not clear. Perhaps he saw it as a chance to do something for "political prisoners," only to discover after it was too late that there was little political motivation among the thousands seeking relief from the PCB. Perhaps he saw it as a way to "get back in the game" after his 1970 election defeat removed him from the halls of government; and possibly he saw it as a stepping-stone to higher office as a close friend of Ford.. Or perhaps it was just ego, with the lure of White House mess privileges coloring his judgment. Whatever his motivation, he devoted himself to the work of the PCB with energy and dedication. While he did not have the last word on who was pardoned, the decisions he would make as chairman of the PCB dictated how it would conduct its business and to what degree its applicants would see any relief.

Goodell's performance as chair of the PCB is the subject of considerable historical disagreement. Goodell was well savaged by Ford biographer James Cannon, who in *Gerald R. Ford: An Honorable Life* called him "injudicious and inept" and the PCB a "disaster."³⁴ Cannon died before publication of this book and before he could prepare source notes and a bibliography, so there is no way to engage him in his analysis

³⁴Cannon, *Gerald R. Ford: An Honorable Life*, 216.

except to note his clear fondness for Ford and his position as Ford's Assistant to the President for Domestic Affairs as possible reasons for making Goodell the scapegoat for the "failure" of the PCB. In contrast to Cannon's views, historian John Greene described the PCB as a "well-run and dutiful commission" with an impressive record.³⁵

A significant piece of evidence in Goodell's favor is the extensive "Report of the Interagency Team to Survey the Presidential Clemency Board" dated May 16, 1975. The report was commissioned by the White House Office of Management and Budget – no friend of Goodell – and noted, "It is evident that Chairman Goodell has done a commendable job in leading the Board through a number of critical phases in its existence."³⁶

A review of Goodell's notes and consideration of the difficulties Ford saddled him with easily justifies an assessment more in line with Greene and the Interagency Team and different from that of Cannon. Moreover, if the antiwar community had not turned fickle on Goodell he might well have emerged as a hero of the left and the PCB acclaimed as an unqualified success.

³⁵John R. Greene, *The Presidency of Gerald R. Ford*, 42.

³⁶Ford Library, Goodell papers, Box 7, Interagency Team Survey Report (2), 12. See note 109, *infra*, regarding Goodell's sometimes frayed relations with the OMB.

IV.

A Fractious Team

Truman's Amnesty Board, the only prior attempt to review candidates for clemency on an individual basis, consisted of only three members selected for the uniformity of their backgrounds and politics. Not so the PCB, which was intentionally discordant. Ford had decreed an even balance between conservative, moderate, and liberal members. Given the strong and polarized views of the times, internal strife and dissent were built into the structure of the PCB.³⁷

The only requirement for membership on the PCB was that a member be committed to a program of earned clemency as opposed to either no clemency at all or blanket amnesty. The role of the PCB, as he saw it, was clearly stated by its most well-known conservative member, Marine Corps Lt. General Walt:

³⁷Some historians have described the dynamic of the PCB as military men vs. the others (e.g. Sharon Rudy Plaxton, "To Reconcile a Nation: Gerald Ford, Jimmy Carter and the Question of Amnesty, 1974-1980." Dissertation, Queen's University, Kingston, Canada (1996), 10; Courtney Carver, "To Forgive or Not to Forgive? A Reappraisal of Vietnam War Evaders and Deserters in President Gerald Ford's Clemency Program." Masters Thesis, University of New Orleans (2018), 12), but this was not so. Most of the PCB had some military background, and two of the moderates and liberals (James Maye and Lewis Puller) had been seriously wounded in Vietnam. The ranks of attorneys and interns included many Vietnam veterans as well. Moreover, General Walt had made considerable effort to explain and justify the PCB to veterans' groups, and Walt, Maye, and James Dougovito had together petitioned Ford to upgrade the discharges of several Vietnam veterans. The dynamics of the PCB were much more than a simple conflict between those who had served and those who had not.

This Board cannot be allowed to become a wailing wall. We cannot allow ourselves to become overly lenient with those who broke the law. There are not “good law breakers” or “bad law breakers” - - only mitigating and aggravating matters concerning them. They are not defendants and this Board does not represent them alone.

We must not lose our objectivity. We are a “Clemency Board” not “Pardon Board”. We are working for the President and representing all the people in an attempt to heal the “wounds” left by a very misunderstood and unpopular war. These “wounds” are associated, not only with those thousands who broke the laws of our Nation to avoid service to our Country but also with those millions of veterans who faithfully served our Country, many thousands of them sacrificing their well being and the families of the tens of thousands more who lost their loved ones.

The President has given us guidelines – within those guidelines we must find a “medium”. We must search each man’s record. We must consider matters of mitigation and matters of aggravation. We must make our decisions with unemotional objectivity and be prepared to defend them from all angles of attack. We must constantly keep in mind, the long range effects of our decisions and the irreparable [sic] damage which could be done to the effectiveness of Selective Service and the discipline of our Armed Forces.³⁸

Although Walt’s views were probably close to those of Ford himself, he was frequently at odds with the majority of the PCB. The urgent needs of the PCB, and the crucial decisions made by Goodell as chairman, caused the PCB to evolve in a way more in keeping with the feelings of the moderate and liberal members.

Walt had retired after 34 years of service. He was a decorated veteran of the Second World War, Korea, and Vietnam, where he commanded the 3rd Marine Division.³⁹

Included among the original nine members of the PCB were two other conservatives,

³⁸Goodell Papers, Box 1, Alternatives to Pardon, 3.

³⁹Walt had served as assistant commandant of the Marine Corps. He had two sons who were members of the Marine Corps Reserves during the Vietnam war. They did not see action. People Magazine, “The Board That Sits in Judgment on Men Who Chose Not to Fight,” October 17, 1974.

Ralph Adams and James Dougovito. Adams was the President of Troy State University in Alabama and a brigadier general in the Alabama Air National Guard. Dougovito had served as a Marine officer in Vietnam, where he had been wounded and decorated. While Walt and Adams were generally respected by the staff of the PCB, not so Dougovito, who was widely despised as the least mature, most dogmatic and least flexible member of the Board with no apparent empathy for the applicants.⁴⁰ When the PCB was expanded to eighteen, the conservatives were joined by John Everhard, retired Air Force Colonel and legal officer; Harry Riggs, retired Army colonel; and Fred Agnich, Republican National Committeeman from Texas and member of the Texas House of Representatives.

The three moderate members of the original PCB were attorney Robert Finch, a former Secretary of Health, Education and Welfare, who stated of himself that on a scale of one to ten, “I’m a seven against amnesty”⁴¹; James Maye, a former Marine pilot paralyzed from the waist down as a result of a combat injury in Vietnam and subsequently president of the Paralyzed Veterans of America; and Aida O’Connor, a lawyer of Puerto Rican descent and a Republican from New York. When the PCB expanded, they were joined by Timothy Craig, former Marine and president of a non-ideological Vietnam veterans’ organization; Antoinette Ford, former member of the Washington City Council; and Frederick Morrow, Director, Institute for Urban and Minority Education, Educational

⁴⁰Memorandum to Goodell from Larry Baskir dated June 23, 1975, endorsing a formal complaint about Dougovito from one of the attorneys. Goodell Papers, Box 7, Memoranda – Board Members, 35-38.

⁴¹People Magazine, “The Board That Sits in Judgment on Men Who Chose Not to Fight,” October 17, 1974.

Testing Service, Princeton.

The three liberal members of the original PCB were chairman Charles Goodell, a liberal, anti-war former Republican congressman and senator who had served in both the Second World War and Korea; Vernon Jordan, lawyer and Executive Director of the Urban League; and Father Theodore Hesburgh, Catholic priest and President of Notre Dame University. The three added liberals were Joan Vinson, wife of an airman missing in action in Vietnam; Monsignor Francis Lally, Catholic priest; and Lewis Puller, Jr., former staff attorney for the PCB. Puller was the son of Marine Corps Lt. General Lewis “Chesty” Puller, the most highly-decorated Marine in U.S, history. As a Marine officer, the younger Puller had been horribly wounded and permanently disabled while in combat in Vietnam.⁴²

Significantly, ten of the members of the PCB had a military background and at least five had served in Vietnam. Also, three of the members were black. These demographics became significant when the PCB took up the cases of deserters from the military, many of whom were black men from underprivileged backgrounds.

At first, there was little disagreement between conservative and liberal members of the PCB. The initial determinations of aggravating and mitigating circumstances had been agreed upon with only a few dissents. In fact, even the most conservative members recognized that when members of the military returned home they were met with an anti-military atmosphere in which their service was not appreciated and, as a result, “peer

⁴²Puller, Jr., would go on to win a 1992 Pulitzer Prize for his autobiography. He committed suicide in 1994.

pressure forced them to do things which under normal conditions they would not have done.”⁴³ As one historian has noted:

As the combat troops came home from Vietnam, they received a welcome that, for many, was as traumatizing as their combat experience itself. Their country was not as grateful for their service as much as it was relieved that the need for it had come to an end. Politicians all but ignored Vietnam veterans; their plight was too graphic a reminder of the politicians’ own policy blunders.⁴⁴

The eventual split that led to the “minority report” of the conservative members was primarily the result of the number of outright pardons the PCB recommended for many of the deserters. All members of the PCB had originally committed themselves to a program of earned clemency, not a pardon without any community service. Over time, the views of the majority evolved from the concept of a “clemency board,” as described by Walt, to more of a “pardon board.”

The conservative members of the PCB felt betrayed by the moderate and liberal members, but they did not realize that the attitudes of many of the members of the PCB had merely evolved. There were at least two identifiable reasons for the evolution.

First, the PCB was a microcosm of American jurisprudence and as such subject to natural evolution, especially given the passionate belief in forgiveness held by most of the attorneys and interns who themselves evolved into advocates. Their reasoned arguments,

⁴³Memorandum for the President of February 6, 1975, signed by Walt, Dougovito, and Maye, urging discharge upgrades for Vietnam veterans who deserted after returning from combat. Ford Library, Goodell Papers, Box 8, Memoranda – President and White House Staff, 52.

⁴⁴John R. Green, *The Presidency of Gerald R. Ford*. (Lawrence, Kansas: University Press of Kansas, 1995), 37.

using established precedents as reported in the *Clemency Law Reporter*, gave the liberals and many of the moderates on the PCB the justification they needed to vote for outright pardons.

Second, there was an unexpressed suspicion that for many (if not most) of the deserters a requirement of even 30 days' public service was the same thing as a denial of clemency. While draft evaders were intelligent and connected and easily able to fulfill a public service requirement, many of the deserters had only been accepted into the military under Project 100,000 and lacked the ability to arrange for public service even if they understood what was required and were in a position to perform it.⁴⁵

In the end, the split was not nearly as serious as it could have been. Walt, not wishing to embarrass Ford, cancelled a press conference and an appearance on "Meet the Press" and limited expression of his dissatisfaction with the majority of the PCB to veterans' groups. In return, Walt asked only that Ford not publicly do or say anything that could be interpreted as an endorsement of the actions of the PCB, which was fine with Ford and his advisors anyway.⁴⁶ Thus, the work of the PCB passed into history

⁴⁵In fact, a year after the PCB had completed its work, fully half of the deserters who had begun public service had dropped out. Memorandum of Byron Pepitone, Director of the Selective Service System, November 9, 1976. Ford Library, Papers of James M. Cannon, Box 3, Amnesty, 6. Baskir and Strauss estimated that only about 23% of deserters given the opportunity to receive a pardon in return for public service actually completed public service. *Reconciliation after Vietnam*, 30. The figure would have been even lower if so many underprivileged and "new standards" veterans had not been given outright pardons.

⁴⁶Confidential memorandum to White House advisors from Russ Rourke dated September 12, 1975. Ford Library, Buchen Papers, Box 5, Clemency Program – General (6), 17.

without fanfare or recognition, though Ford accepted its recommendations. The consensus of the PCB had cracked, but not broken.

V.

Boycott

As Goodell himself had noted in his book, *Political Prisoners in America*, political power in the 1970s in the United States resided “somewhere between the heart and the pocketbook” of the middle-class families whose sons had resisted the draft.⁴⁷ These were to be the primary intended beneficiaries of Ford’s clemency program, and the friends Ford hoped to make. Almost as an afterthought were the tens of thousands of military deserters, whose families had little or no political power. The primary irony of Ford’s offer of clemency was that it was immediately rejected by the middle-class draft evaders he hoped to please. The primary beneficiaries turned out to be the sons of underprivileged families Ford did not really care about or even understand.

Although the draft resistance community was well-organized and politically active, the hurried nature of Ford’s clemency program left Ford no time to measure the reception his program would receive among draft resisters, let alone engage in any sort of negotiation.⁴⁸ Ford could only hope for a warm reception and was certainly deeply disappointed when his program was largely rejected. Within a week of its announcement,

⁴⁷Charles Goodell, *Political Prisoners in America*, 133.

⁴⁸The Nixon pardon in particular put great pressure on Ford to announce the details of his program quickly and without adequate planning. Baskir and Strauss, *Reconciliation After Vietnam*, 46

organized draft resisters announced a boycott of the program and demanded universal and unconditional amnesty, not the conditional pardons Ford offered.⁴⁹

Most draft evaders, probably more than 300,000, had never been prosecuted.⁵⁰ For them, the problem with Ford's program was that it offered forgiveness, not vindication. By requiring public service as a condition of pardon, draft evaders would be forced to face up to the fact that they had violated the law and failed to serve at a time when other men had complied with the law and had risked injury or death as a result. In the logic of the time, those who refused to serve claimed the moral high ground – that they had done the right thing and not just the safe thing – and so were entitled to be praised, not forgiven. By the same logic, of course, the vast majority of men who had complied with the law and put themselves at risk were immoral and wrong, an attitude that persisted for years after the Vietnam War was over and made it even harder for veterans to return to American society. Thus, Ford's compromise program not only failed to heal the nation's rifts, it actually prolonged the emotional debate over the war itself.

Instead of the warm reception he hoped for, Ford received a "cold shoulder" from

⁴⁹"Deserters and Evaders Plan an Amnesty Boycott," *The New York Times*, September 22, 1974.

⁵⁰According to Baskir and Strauss, 250,000 men never registered for the draft and another 110,000 burned their draft cards, or committed other offenses but were never charged. *Reconciliation After Vietnam*, 15. These men would never be prosecuted, as President Jimmy Carter announced a blanket amnesty in 1977. Neither Ford nor Carter would be re-elected; both probably paid some political price for their clemency. It might have been politically wiser for both to have merely let the five-year statute of limitations run out.

the antiwar community.⁵¹ Draft resisters attacked the program as extracting retribution, punishment without trial, presuming guilt. One exile attacked Ford's program as concealing its real intent to punish in "deceitful and misleading language."⁵² Goodell, Ford's choice to chair the PCB, had been endorsed by a long list of nationally-known antiwar activists in his 1970 run to retain his Senate seat, so Ford may have thought the selection of Goodell would make his program palatable to draft evaders. If that was his thinking, he was quickly disappointed. Ford's pardon of Richard Nixon also may have undermined his offer of clemency to the antiwar community.

While Ford's program was largely rejected by the tens of thousands of draft evaders who had escaped capture or prosecution, a decent percentage of those actually convicted sought a pardon. There were only 8,700 actual convictions for draft evasion during the Vietnam War, and 1,757 - about 20% - applied to the PCB.⁵³ Unlike military deserters, convicted draft evaders were sent individual application kits and therefore had

⁵¹Plaxton, "To Reconcile a Nation," 231.

⁵²Ibid. The last accusation is completely unfair. All historians of the Ford presidency have agreed that Ford did not have a deceitful bone in his body, even when at times he could have used one. Typical is Douglas Brinkley, who called Ford the "exemplar of no-frills Midwestern straightforwardness" defined by a "rock-hard moral core." *Gerald R. Ford* (New York: Henry Hole and Co., 2007), 68, 74. James Cannon described Ford as "so incapable of pretense that he was also bereft of showmanship." *Time and Chance: Gerald Ford's Appointment With History* (New York: HarperCollins Publishing, Inc., 1994), 395. Edward L. and Frederick H. Schapsmeier, in *Gerald R. Ford's Date with Destiny; A Political Biography* (New York: Peter Lang, 1989), 165, noted that Ford believed he could "allay the national mood of mistrust simply by setting a personal example of honest candor and forthright performance" of his duties. Following on the heels of Richard Nixon, the national mood was not so easily changed.

⁵³*Presidential Clemency Board Report to the President* (Berkeley: University of California Libraries Collection, 1976), xiii.

full knowledge of the PCB.⁵⁴ More would probably have applied if they had known that over 80% of the convicted draft evaders would receive outright pardons, without the need for any public service.⁵⁵

Like everything else about the potential beneficiaries of the PCB, the nature of the convicted draft evaders was misunderstood when the program was announced. According to Baskir and Strauss, only about half of them had been motivated by opposition to the war. Twenty percent were Jehovah's Witnesses, another 5% had other religious objections, and 20% were convicted of offenses which did not reflect opposition to the war.⁵⁶ Father Hesburgh, writing after the PCB had completed its work, commented:

After I reviewed the first few dozen cases, the facts about draft resisters

⁵⁴Testifying before Senator Kennedy's hearings of the Senate Subcommittee on Administrative Practice and Procedure on December 18, 1974, Goodell testified that he had obtained the names and addresses of convicted civilian draft offenders from federal probation officials and they were all being notified about the PCB. He added that he had requested the same information from military officials but had received no reply. A copy of the published Senate proceedings is located in Box 10 of Goodell's papers at the Ford Library. The cited testimony is at pages 47 – 48 of the publication, pages 28 and 29 of 155 of the "Senate Hearings" file.

⁵⁵*Report to the President*, 123.

⁵⁶*Baskir and Strauss, Reconciliation After Vietnam*, 15. Jehovah's Witnesses received much more sympathetically from the PCB than they had received from Truman's board. Of the first 25 cases decided by the PCB, five were Jehovah's Witnesses. Four of the five were recommended for outright pardon. Ford Library, Papers of Robert T. Hartmann, Box 9, folder "Amnesty (2)." Typical is Case #21:

This applicant is white and grew up in the Midwest. He has been an active Jehovah's Witness since the age of nine. His draft board granted him conscientious objector status, but he refused to perform public service, since to do so would have compromised his religious beliefs. He was sentenced to three years imprisonment and he has been actively involved in his religion during the 10 months he has spent in prison.

Disposition: Pardon.

and deserters became clear. To my surprise, convicted draft resisters were often Jehovah's Witnesses, Muslims, clients of incompetent lawyers, and other victims of a fantastically uneven enforcement of the draft laws. Deserters were often youngsters whose low IQs or family problems had interfered with their soldiering and gotten them in trouble.⁵⁷

Similarly, another member of the PCB, Vernon Jordan, recalled how surprised he was when he saw that "the conventional image of the spoiled rich kid who ran away to Canada to beat the draft just didn't hold true."⁵⁸ Like draft evaders in general, the convicted draft evaders who applied to the PCB were largely white (87%) and came from "average American families."⁵⁹ What set them apart was mainly their willingness to go to prison for their beliefs rather than seek deferments or escape prosecution.⁶⁰

Even many of the convicted draft evaders who had been motivated by opposition to the war accepted Ford's offer of clemency. As convicted felons, they had lost some of their civil rights and were barred from many occupations. Having already been convicted of a crime, they were much less concerned with vindication and much more concerned with getting their lives back on track. For them, Ford's offer of clemency was attractive even if it involved some form of public service.⁶¹

⁵⁷Baskir and Strauss, *Reconciliation After Vietnam*, viii.

⁵⁸Baskir and Strauss, *Chance and Circumstance*, 222.

⁵⁹*Report to the President*, 32.

⁶⁰*Ibid.*, 33.

⁶¹One case recalled by the author was a young white law student attending a West Coast university. Ordered to report for his induction physical during the holiday season, he appeared wearing fisherman's hip-wader boots filled with red and green paint which made a huge mess when he disrobed. Convicted of a felony, he would be barred from the practice of law unless he received a pardon. He was therefore most welcoming of the

opportunity for a pardon, notwithstanding the position of most antiwar activists.

VI.

The Only Chance of the Irrelevant

While the PCB has been criticized by historians as inadequate to address the needs of military deserters, for many years after the war it remained the only widely-publicized attempt to do anything at all for them. “It would take more than a decade for any organized show of appreciation to surface for the returned veterans, and even then they were welcomed from a distance, almost as if a hug or a handshake implied support for the war.”⁶² Most of the post-Vietnam attention was on civilian draft evaders, not former soldiers.

Ironically, the PCB was able to better the lives of many veterans because of a fundamental mistake about who the deserters were. Perhaps influenced by the prominent role in the antiwar movement played by organizations such as the Vietnam Veterans Against the War (VVAW), Ford and his advisors assumed that military deserters were motivated by antiwar feelings, and thus were entitled to re-integration into society as much as the draft evaders.⁶³ Only after the applications started to come in did anyone

⁶²John R. Green, *The Presidency of Gerald R. Ford*, 37.

⁶³An example of ignorance regarding the nature of deserters can be found in an editorial note to the “Deserters’ Manifesto” reprinted in *Vietnam and America*. Citing the *New York Times*, the note recites that the number of deserters “still at large” in 1974 was 28,661, and that number was six times the number of draft evaders and resisters. The note therefore concludes “Since the overwhelming majority of the armed forces was

realize that only 14% deserters had been motivated in any way by antiwar sentiment.⁶⁴

Far more typical were cases like that of a 19-year-old white youth from Virginia with an eighth-grade education who was allowed to enlist in the Army despite an AFQT score of 10 and an approximate IQ of 64.⁶⁵ After repeated absences, he was accused of desertion and designated for court martial, his superior noting that he “has repeatedly shown a complete lack of interest in becoming a satisfactory soldier and his conduct indicates that he will never serve an [sic] useful purpose while in service.”⁶⁶

Had he known the truth, Ford might well have ignored the deserters altogether.

As one history has aptly expressed:

The media, the Congress, the executive branch, the veterans organizations, almost without exception, concentrated their energies on the struggle for the ideology of the war . . . or on the struggle of those who

drawn from the working class, these statistics offer powerful evidence that resistance to the war was stronger among young working-class men than among more affluent draft-age men.” Marvin E. Gettleman, et al., Eds. *Vietnam and America: A Documented History* (New York: Grove Press, 2nd Ed. 1995), 319. The number of draft resisters was probably grossly understated (see note 50, *supra*) and the conclusion is a non-sequitur, but in 1974 it was generally accepted truth.

⁶⁴Bruce D. Bell and Thomas J. Houston, “The Vietnam Deserter: Characteristics of Unconvicted Army Deserters Participating in the Presidential Clemency Program.” U.S. Army Research Institute (1976), ii.

⁶⁵The Armed Forces Qualification Test is scored from 1 to 99, placing this soldier in the tenth percentile. Scores of 30 or less generally were insufficient for admission into the military. This soldier was almost certainly a “new standards” man admitted under Project 100,000. See generally Sue E. Berryman, *Who Serves: The Persistent Myth of the Underclass Army* (Boulder, CO: Westview Press, Inc., 1988), 9.

⁶⁶Goodell papers, Box 9, Referrals to Full Board, 22-25. The PCB attorney assigned to the case flagged it for review after a panel decision required three months of alternative service on the sound basis that with an AFQT of 10 he “should never have been in the military.”

opposed the war while it was being fought.

None acted as an advocate for Vietnam veterans while the war was underway, so it is not surprising that new advocacy was not forthcoming at the war's close. When the war ended, quarreling U.S. institutions did not carry their dead from the battlefield, offered no dignity to their wounded, but simply withdrew, leaving those whom they implicitly regarded as irrelevant to make their own way home.⁶⁷

Much to the surprise of Ford and the members of the PCB, military deserters were not generally motivated by politics or questions of morality. They were therefore, in Ford's mind, irrelevant.

Goodell himself, no stranger to the antiwar community, admitted in testimony before Congress that he was surprised that the applicants to the PCB did not fit his preconceived stereotypes. Instead of deserters motivated by antiwar sentiments, he found ordinary, apolitical men "with wives about to leave them, whose fathers had died leaving a family without any means of support, or whose mother, wife or child had become acutely ill."⁶⁸ He further noted that the applicants were generally "unsophisticated, inarticulate people" who were unable to ask for help. "Had they been able to do so, many of these applicants would have received hardship deferments or conscientious objector deferments, or compassionate reassignments or hardship discharges in the military. They just did not know how to proceed."⁶⁹

Even Susan Plaxton, whose overall assessment of Ford's clemency program was

⁶⁷David E. Bonior, Steven M. Champlin, and Timothy S Kolly, *The Vietnam Veteran: A History of Neglect* (New York: Praeger Publishers, 1984), xiii.

⁶⁸Testimony before U.S. Senate, December 18, 1974. Ford Library, Goodell papers, Box 10, Senate Hearings.

⁶⁹Ibid.

“bankrupt,” recognized that for deserters the PCB was “possibly the only chance to improve their situation.”⁷⁰ The only thing limiting deserter applications was lack of knowledge of the program, not rejection of its terms. While convicted civilians were given individual notice of the PCB, no effort was made to contact convicted deserters directly and individually. Neither they nor the many deserters given undesirable discharges without a conviction could know about the availability of a pardon unless they saw or heard a public service announcement, saw a poster, or were fortunate enough to have a veterans counselor.⁷¹ Even so, these soldiers constituted over 80% of the 21,500 applications to the PCB.⁷²

Since the abolishment of the draft and institution of an all-voluntary military, employers generally do not ask about military service; an undesirable discharge is not likely to be the reason for rejection of an employment application. That was not the case

⁷⁰Plaxton, “To Reconcile a Nation,” 235.

⁷¹A study of deserters who participated in Ford’s clemency program compared them with those deserters who had not applied. It found that “[t]he groups were remarkably similar. Those differences which were detected could most easily be explained by assuming that non-participation was mainly a function of not having heard about the Program. . . . Furthermore, among those who had heard of the Program, only 17% realized that fugitives living in this country (the bulk of the men) were eligible for the Program.” Bell, D. Bruce and Houston, Thomas J., “The Vietnam Deserter: Characteristics of Unconvicted Army Deserters Participating in the Presidential Clemency Program.” U.S. Army Research Institute (1976), iii.

⁷²The favoring of civilian draft evaders over military deserters persisted well beyond the Ford administration. Carter’s first act as president was to grant amnesty to draft evaders, but did not include deserters. Discharge review boards were established during Carter’s presidency to continue the work of the PCB, but their work was done quietly, out of the spotlight, and relief was granted only on an individual basis. There was never any blanket relief for deserters.

in the 1970s, when men were being drafted and the Second World War was only a generation earlier. In those days, the first question asked by most employers was about the applicant's military record. Thus, a bad discharge not only meant denial of veterans' benefits but also was a black mark that severely limited future opportunities. While this might have seemed fair if all military recruits had an equal opportunity to succeed, that was not the case. The confluence of the need for soldiers and a well-intentioned desire to use the military to lift some young men out of poverty resulted in Project 100,000, a Pentagon program whereby about 350,000 "new standards" men were drafted or allowed to enlist despite not meeting the minimum intelligence and aptitude requirements for military service.

It is not possible to assess the work of the PCB without discussing Project 100,000. Still, that is no easy task. If the road to Hell is indeed paved with good intentions, the route taken by many new standards men to the stain of a punitive discharge was a smooth one.

The history of Project 100,000 is more polarized and emotional than that of the war itself, with very sensitive issues of race and class coloring the debate. It can best be described as a well-intentioned program intended to lift underprivileged men out of poverty that, due to the circumstances surrounding the Vietnam War, had disastrous consequences. However, few of the historians who have addressed the subject have come away with this assessment; they either attack the program as a cynical, racist decision to let the least advantaged men fight an unpopular war – what one historian has called the

“circle of class and race discrimination that marked the entire Vietnam experience”⁷³ – or tout the program as a success while glossing over the disproportionate toll the war took on the most powerless elements of American society.⁷⁴ The dual nature of military service, as both burden to be borne and a privilege evidencing full American citizenship, has allowed historians to see one side while ignoring the other.

World War II – the “Good War” – was fought mainly by white men. Black Americans, if they were allowed to enlist at all, were designated as black and assigned only to segregated units and assigned to menial or support tasks. In fact, two of the draft evaders pardoned by Truman’s Amnesty Board had been a full-blooded native American and a half-native American who had tried to enlist as white but had been rejected on

⁷³Plaxton, “To Reconcile a Nation,” 270. Similar sentiments can be found in Christian G. Appy, *Working-Class War* (Chapel Hill: The University of North Carolina Press, 1993), and Peter Barnes, *Pawns; the Plight of the Citizen-Soldier* (New York: Knopf, 1972). The latter commented, “One does not have to be a statistical wizard to recognize that Project 100,000 serves as a vehicle for channeling poor, mostly Southern and Negro youths to the front lines in Indochina.” *Ibid.*, 46.

⁷⁴The experience with Project 100,000 “provides substantial support for the conclusion recently affirmed by Secretary of Defense Clifford that “Project 100,000 has been a spectacular success. . . . On balance, the experience to date clearly supports Secretary McNamara’s original premise that previous minimum mental standards were unduly restrictive and had deprived many young men with high motivation and performance potential of an opportunity for entering military service.” Peter B. Doeringer, Ed., *Programs to Employ the Disadvantaged*. Harold Wool and Eli S. Flyer, “Project 100,000” (Englewood Cliffs: Prentice-Hall, Inc.1969), 223. “Given this highly successful record of performance, it is not clear why critics, both military and civilian, continue to declare the project a failure.” Thomas G. Sticht, William B. Armstrong, Daniel T. Hickey, and John S. Caylor, *Cast-off Youth* (New York: Praeger Publishers, 1987), 64.

racial grounds and told they must enlist as black.⁷⁵ Even after Truman desegregated the military in 1947, white resistance to integration of the services remained strong. It is therefore far from fair to reject outright the claims of the American government that Project 100,000 was a program designed to create racial equality. Since the end of the Vietnam war and the abandonment of the draft in favor of an all-volunteer military, service in the military has been seen more as a right than an obligation.⁷⁶ The claims of good intentions asserted by President Lyndon Johnson and Secretary of Defense Robert McNamara about their motivations for creating Project 100,000 are not rightly dismissed as excuses for creating cannon fodder, no matter where the project led. In fact, no president since Abraham Lincoln had done more to better the condition of black Americans than Johnson.

Moreover, the history of the Vietnam war is poorly remembered and often misunderstood. Media archives and movie depictions of the war as firefights in the jungle and house-to-house combat in the cities were accurate enough for 1965 – 1969, but

⁷⁵Senate Subcommittee on Administrative Practice and Procedure, Memorandum to Senator Edward Kennedy from Counsel, “President Truman’s post-World War II Amnesty Board,” February 29, 1972, Appendix II, Paragraph 8. Ford Library, Goodell Papers, Box 10.

⁷⁶Far from celebrating their exemption from the dangers of military service, women and homosexuals have fought for the right to be accepted into the military. They view the right to serve as an essential element of being accepted as “full citizens, deserving of civil rights and equal protection of the law.” Steve Estes, *Ask & Tell* (Chapel Hill: University of North Carolina Press, 2007), 2. W.E.B. DuBois expressed similar sentiments (albeit controversially) in urging fellow black Americans to enlist during World War I. Sue E. Berryman, *Who Serves? The Persistent Myth of the Underclass Army* (Boulder, CO: Westview Press, Inc., 1988), 3. “For he to-day that sheds his blood with me shall be my brother; be he ne’er so vile, this day shall gentle his condition.” *Henry V*, act IV, scene iii.

the war ground on for another four years after the bulk of American infantry and Marines had been withdrawn. After 1969, only volunteers served on the ground in Vietnam. American combat after 1969 involved primarily the Air Force and the Navy, services where the risks of combat were more equally shared. The heaviest fighting of the war by far, including the mining of Haiphong, the North Vietnamese Easter Offensive, and the Christmas bombing of Hanoi, all took place in 1972. While black casualties were disproportionately high in the early years of the war, in later years the trend was reversed so that the percentage of black casualties in Vietnam for the war as a whole was roughly the same as the percentage of blacks in the civilian population.⁷⁷

The decline in black casualties in Vietnam was not just a matter of the changing nature of America's combat role. After criticism of the number of black casualties by Martin Luther King, who had initially refrained from speaking out about the war, the Johnson administration took affirmative steps to equalize the casualties.⁷⁸

Disproportionate casualties was a concern of the Johnson administration, not a goal.⁷⁹

Whatever the motivations for Project 100,000, two basic facts are undisputed.

⁷⁷12.5% vs. 11%. Christian G. Appy, *Working-Class War*, 19.

⁷⁸*Ibid.*, 20-21. Appy says the conscious effort to reduce black casualties may have only been undertaken by the Army. *Ibid.*, 325n19. See also Marvin E. Gettleman, et al., Eds. *Vietnam and America: A Documented History* (New York: Grove Press, 2nd Ed. 1995), 324.

⁷⁹Kirklin J. Bateman, "Project 100,000: New Standards Men and the U.S. Military in Vietnam," Dissertation, George Mason University, Fairfax, Virginia (2014), 41. Bateman chronicles the continuing concern of those responsible for Project 100,000 regarding casualties and the efforts of the Department of Defense "to get some of the lower class individuals and African Americans out of the draft to avoid these groups from carrying a disproportionate share of casualties in Vietnam." *Ibid.*

First, due to the widely available draft deferments for college students and the aptitude requirements for more technical (and somewhat safer) specialties within the military, the “new standards” men inducted under Project 100,000 bore a disproportionate share of the ground combat in Vietnam between 1965 and 1967.⁸⁰ Second, as expected, their rate of punitive discharges was much higher as well.

Notwithstanding the disproportionate casualty numbers for part of the war, it is quite a leap to call Project 100,000 an intentional program to provide “cannon fodder” for the Vietnam war or a complete failure. Significantly for the PCB, Baskir and Strauss were ready to make that leap. They wrote:

In the opinion of many military leaders, social planners, and liberal critics, Project 100,000 proved a failure. While it expanded the wartime manpower pool, it also required additional resources which the services could ill afford. Above all, it was a failure for the recruits themselves. They never got the training that military service seemed to promise. They were the last to be promoted and the first to be sent to Vietnam. They saw more than their share of combat and got more than their share of bad discharges. Many ended up with greater difficulties in civilian society than when they started. For them, it was an ironic and tragic conclusion to a program which promised special treatment and a brighter future, and denied both.⁸¹

For the PCB, the correctness of Baskir and Strauss’ assessment is not nearly as important as the fact that this is how Project 100,000 was portrayed to the PCB and the

⁸⁰Ibid. While Project 100,000, was intended to ease underprivileged men into the military, draft rules at the same time eased the ability of the privileged to avoid service. See, e.g., Michael Foley’s description of how Bill Clinton, Dan Quayle, George W. Bush and others legally dodged the draft. *Confronting the War Machine*, 11-13. It was this contrasting treatment which probably brought Project 100,000 into disrepute more than the program itself.

⁸¹Baskir and Strauss, *Chance and Circumstance*, 131.

lawyers and interns assigned to review the applications.⁸² This assessment of Project 100,000, together with the Nixonian cynicism prevalent at the time, led most of the PCB as well as staff to view the deserters, many of whom were clearly “new standards” men, with a great deal of sympathy.⁸³ Typical of the information available to the PCB regarding Project 100,000 was a lengthy memorandum prepared by a staff attorney for members of the PCB. In the memorandum, the attorney oversimplified the purpose of Project 100,000:

The Project 100,000 came about in response to the War needs of 1966. At that time the Selective Service system was faced with two alternatives. One was to induct the college kids who were being exempted. The other was to lower the mental and physical standards and induct those in the Category IV range. Politically at the time it was easier to select the second alternative. . . .

Because the college kids got out of the war so easily, clemency, if justified for no other reason, might be justified to those in Category IV who though unsuitable for military service, did to the extent that they were able to give whatever service they could.⁸⁴

In fact, the PCB came to view the application of a soldier accepted into the military under Project 100,000 very favorably on the grounds that he “should never have been in the

⁸²The military did not specifically identify soldiers as part of Project 100,000. However, their Armed Forces Qualification Test (AFQT) score was part of their file. An AFQT score in Category IV, tenth to thirtieth percentiles, usually meant a “new standards” man admitted or drafted pursuant to Project 100,000.

⁸³For a typical “new standards” applicant, see note 65 and accompanying text, *supra*. While the U.S. military did not officially designate a soldier as admitted under Project 100,000, the low test scores left no doubt.

⁸⁴“Category IVs and Project 100,000” dated September 1, 1975. Goodell papers, Box 8, Memoranda – Internal (4), 2.

military in the first place.”⁸⁵ This sympathy led to PCB precedents for outright pardons without public service.⁸⁶

⁸⁵Ibid.

⁸⁶The notes of the PCB meeting of June 18, 1975, reflect Goodell’s observation that “when Mitigating Factor #8 ‘evidence of unfairness’ is marked, the applicant usually, but not always, has received a Pardon without alternative service on the grounds that he never should have been accepted into the military service.” Goodell papers, Board – Minutes, Box 1, 35.

VII.

Fairness and Evolution

Citing newspaper articles and opinion pieces of the time, historians have characterized the PCB as a “bureaucratic Vietnam” or “erratically administered by a conglomerate of lawyers, soldiers, politicians, and bureaucrats.”⁸⁷ However, these accusations are unfair and inaccurate. The short time available and the intentionally diverse membership made smooth functioning impossible and disagreement inevitable, but within its practical constraints the PCB did an admirable job of reviewing applications fairly and expeditiously. At least one later historian has described the PCB as a “well-run and dutiful commission” with an impressive record.⁸⁸

Like everything else about the PCB, its methods of hearing cases evolved quickly and in unplanned ways. Instead of being a static review board similar to Harry Truman’s post-war board, the PCB became a microcosm of American jurisprudence. This was the result of a fundamental policy decision made by the PCB early in the process: its commitment to fairness and the appearance of fairness. In order to understand and

⁸⁷Susan Plaxton, “To Reconcile a Nation,” 104-105.

⁸⁸John R. Greene, *The Presidency of Gerald R. Ford*, 42.

evaluate the work of the PCB, it is necessary to understand how the commitment to fairness as well as the realities of time and resources shaped its staffing, procedures, and ultimate results.

There is no legal requirement that a president exercise the power to pardon fairly; the president is free to be arbitrary and pardons are not subject to challenge in court on grounds of fairness to those seeking pardons. Nonetheless, Ford felt that for his program to be a success there needed to be public certainty on how the PCB would treat applicants, the need for a public perception of fairness of the program, the desirability of ensuring that similarly situated applicants are treated the same, the necessity for consistency in policy and treatment, and procedural due process.⁸⁹ These principles were outlined to the PCB in a memorandum by a White House special counsel in the fall of 1974, before the PCB had begun work or established its procedures.⁹⁰

Consistent with the desire for fairness and the appearance of fairness, the PCB established rules governing the consideration of applications and published them in the Federal Register, while noting in the preamble that “time and resource constraints” might

⁸⁹In the preamble to its published procedures, the PCB noted that because it was a temporary organization within the White House whose only purpose was to advise the President in the exercise of his constitutional power of clemency, it was not bound by laws governing administrative procedures. It added, “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.” Federal Register, Vol. 40 no. 56, March 21, 1975.

⁹⁰Memorandum from White House special counsel Richard Tropp on October 4, 1974. Ford Library, John Marsh Papers, Box 2, Amnesty– Presidential Clemency Board, 3-17.

cause the PCB to stray from its desire to provide due process.⁹¹ These rules established the PCB's jurisdiction and provided that after jurisdiction had been established the case was assigned to a staff "action attorney" for preparation of a case summary which the attorney presented to a panel of the PCB. The applicants were given the right to review the case summary and supplement it, as well as have their own attorneys and to seek to address the PCB in person.⁹²

The American Civil Liberties Union undertook to evaluate the PCB's published procedures, notwithstanding the PCB's position that it was providing due process voluntarily. Ignoring the PCB's position, the ACLU noted that the PCB "hears and determines cases, much the same as any other administrative agency performing adjudicative functions" and therefore was obligated by law to provide procedural due process. While the ACLU commended the PCB generally for publishing its rules, it did urge the PCB to amend its rules to provide for appearance by the applicant as a matter of right, not discretion of the PCB.⁹³ However, the "time and resource constraints" were about to become the driving forces in the evolution of PCB procedures, not the ACLU comments.

Ford's clemency program had been largely assembled on the fly as a reaction to

⁹¹The original procedures were published at 39 F.R. 41351, November 27, 1974.

⁹²Very few applicants exercised these rights.

⁹³Edwin J. Oppenheimer and Henry Schwarzschild, "Comments of the American Civil Liberties Union on the Proposed Presidential Clemency Board Procedures and Substantive Standards," December 11, 1974. Ford Library, Goodell papers, Box 9, Procedural and Substantive Standards - ACLU comments.

public criticism of the Nixon pardon. Because it was done in a hurry, the White House had done little research on the reception of the program, the types of applicants who were likely to seek clemency, or the number of applications the PCB could expect. Some of this ignorance had beneficial consequences, but the lack of any advance preparation left the PCB very much in the dark; its members would have no idea of the task they had undertaken until all of the applications were in.

Initially, the PCB was alarmed by the lack of applications for pardons; by January 1, 1975, the PCB had received only about 700. Realizing the need to publicize, the two most prominent members of the PCB, Father Hesburgh and General Walt, recorded public service announcements. At least one of these appeared during or near the broadcast of Super Bowl IX on January 9, 1975, resulting in a torrent of applications.⁹⁴ By March 1, over 10,000 men had applied; the total reached 21,500 by the extended deadline of April 1. The good news for the PCB was that they knew the number of applications; the bad news was that they now had less than six months to individually review and adjudicate 21,500 of them.

The PCB was on a one-year deadline which nobody recognized initially. Ford created the PCB by executive order on September 16, 1974. Section 9 of that order

⁹⁴A memorandum from Goodell to Ford dated January 27, 1975, indicated that since January 6 of that year the PCB had sent out 6,000 application kits to convicted draft offenders; distributed public service announcements to 2500 television and radio stations; circulated 27,000 notices to post offices, community action agencies, prisons, veterans' counselors, etc.; and had five PCB members make personal appearances in 15 cities. Ford Library, Philip Buchen Papers, Box 5, Clemency Program General (4), 30. All these efforts may well have helped stimulate the flood of applications after January 7, but, like so many things related to the PCB, the happenstance of a Super Bowl announcement may have been the biggest factor.

specified, “The Board shall submit its final recommendations to the President no later than December 31, 1976, at which time it shall cease to exist.”⁹⁵ Although the PCB was cobbled together with some haste in the aftermath of the Nixon pardon, that considerable work had been done by the date of the executive order is evident from the fact that the nine original members of the PCB and Goodell’s chairmanship were included in the order. However, it would appear nobody on the PCB nor any of the White House staff realized that the existence of the PCB was limited to one year, not the 25 months stated in Ford’s order. A law enacted during the administration of Franklin Roosevelt provided that no funds appropriated by Congress for any purpose could be used to fund any federal agency, including those established by Executive Order, after the agency had been in existence for more than one year.⁹⁶ Since the Board was established on September 16, 1974, it had to cease operations on September 15, 1975, instead of December 31, 1976, as initially announced.

It is unclear exactly when White House counsel realized that the PCB had just a year to complete its work; the original executive order was not revised to reflect a termination date of September 15, 1975, until September 10, 1975. However, White House memoranda reflect knowledge of the law long before then. The earliest mention is in a memorandum to White House counsel John Marsh from Weldon Latham, Assistant General Counsel to the White House Office of Management and Budget, dated January 2,

⁹⁵Clemency Board Regulations, *Federal Register*, vol. 40, no. 56, March 21, 1975.

⁹⁶31 USC section 696, also known as the “Russell Rider.”

1975.⁹⁷ Goodell's papers do not reflect when he was told about the statute or his reaction to it, but he was probably told about it within a few weeks of the Latham memorandum.⁹⁸

Nor could the PCB foresee that it would have to complete its work without presidential support. Given the state of the nation and the fact that he had just pardoned Nixon, Ford hoped that his compromise offer of conditional clemency would help to heal the nation. Unfortunately, America was not ready for a compromise. Draft resistance organizations quickly announced a boycott of Ford's program, arguing that accepting any alternative service would be an admission that draft evaders had been wrong. Veterans' organizations denounced the idea that anyone who had shirked his responsibility could earn a pardon by safely performing alternative service when so many had faced the real dangers of combat. Worse, just as the PCB was beginning its work the American people were treated to the mortifying televised spectacle of the fall of Saigon, replete with thousands of South Vietnamese abandoned to their fate, desperate efforts to secure a seat on helicopters evacuating the besieged U.S. embassy, and aircraft being tossed off carrier flight decks in order to make room for more unplanned and haphazard landings. The nation was in no mood to be "healed."

⁹⁷Ford Library, Papers of John O. Marsh, Box 1, Amnesty – Presidential Clemency Board Administration (2), 3 – 7.

⁹⁸If Goodell learned about the deadline in early January, he might not have been to concerned as there had only been a few applications by then. However, he would have been aghast if he was not told until February, when applications already numbered several thousand. At that point, he would have realized that the PCB had just seven months to complete its work rather than the 22 months in Ford's initial proclamation. That would certainly explain the abrasiveness of the ordinarily congenial Goodell in his requests for support from the White House. See note 109, *infra*.

Ford soon distanced himself from his own program, realizing that it would harm his chances of retaining the presidency.⁹⁹ He prevailed upon his old friend from the House of Representatives, Charles E. Goodell, to take up the enormous task of creating and chairing the PCB, with no guidance and only grudging support from the White House.

Goodell had no way of knowing how quickly his work would fall out of favor with the White House. His original assurances are contained in an unsigned, handwritten memo in Goodell's files, apparently from Ford himself, reciting:

Memo TO MARSH:

I have assured Charlie Goodell that the Presidential Clemency Board would be independent of supervision by any governmental agency, would have the authority to employ a reasonable /small staff and that the Board would also have people detailed for support from Defense, Justice or other appropriate sources.

We also agreed it would be desirable to at once make space for the Chairman and at least five staff members in the old E.O.B. I consider this as a commitment to C.G.

The upper right corner bears the notation “[10/74?]”, indicating that Goodell found the need to include the memo at a later date from when he received it. His treatment by the White House after formation of the PCB gives ample explanation of Goodell's need to

⁹⁹As Baskir and Strauss noted, “The clemency program was the result of President Ford's personal convictions. These convictions were not shared by members of his staff or the rest of his administration. They believed that the president's decision had been a mistake, so they tried to minimize its political consequences. Upon their urging, President Ford rarely associated himself in any public way with his clemency initiative.” Baskir and Strauss, *Reconciliation After Vietnam*, 47.

repeatedly invoke the memo.¹⁰⁰

On the other hand, the desire of the White House to distance itself from the PCB gave the PCB a free hand in determining its own methods and procedures. This was no easy task, given the diverse views of its members. However, once the procedures were agreed upon they were not subject to any review from the White House.

The members of the PCB understood that Ford's clemency program was a compromise which would require far more work than either of the two alternatives. Liberals had urged Ford to grant blanket amnesty to all draft evaders, without assessing their individual conduct or considering each applicant's circumstances. Conservatives wanted no clemency whatsoever. Ford's middle ground of earned clemency was a reasonable compromise, but entailed far more effort than either a blanket pardon or no clemency at all. Moreover, Ford certainly realized that the work of the PCB had to be fair and perceived as fair by the country. It fell to the PCB, and Goodell as its chairman, to invent procedures which could fairly review 21,500 applications for clemency within the narrow time limits imposed by law.

As soon as he saw the number of applications, Goodell knew that the bulk of the staff of the PCB had to be lawyers. While this need was occasionally questioned by White House staff, it was never opposed. Goodell made a compelling argument that,

¹⁰⁰Goodell's notes reveal numerous times he attempted to get Ford's guidance or rulings on unanswered questions being debated by the Board, only to be rebuffed or ignored by White House staff. Goodell asked Ford to visit the PCB offices in order to boost morale, but the request was ignored until after the PCB had concluded its work when the White House hosted a reception for the PCB in the Rose Garden. By this time, most of the staff of the PCB had returned to their home agencies or had gone home.

because the major work of the PCB staff was the review of civil and military court records, the staff needed to understand the law involved and there was simply no time to teach non-lawyers what they needed to know. Accordingly, several hundred lawyers from all agencies of the Executive Branch were “detailed” to the Board while their salaries were paid by their home agencies.¹⁰¹

The PCB determined that the best way to individually adjudicate so many applications was first to determine general categories of aggravating and mitigating circumstances and then apply them to each case. They envisioned a three-step process: First, the Board would meet, establish, and publish what circumstances it would consider favorable and unfavorable to the granting of a pardon.¹⁰² Next, the staff attorneys would

¹⁰¹The initial “tap” of attorneys was made by Paul O’Neill, Deputy Director of Office of Management and Budget, on March 27, 1975. It called for 268 attorneys from two dozen agencies ranging from the Department of Agriculture to NASA to the Veteran’s Administration. A second “tap” for a further 230 attorneys, was made the next month. However, from the beginning the number of attorneys actually arriving was significantly lower than the taps. By April 17, only 164 of the promised 268 had actually reported to the PCB. The exact number of attorneys actually on board is difficult to ascertain from the records, and may not have been known even by Goodell himself. A personnel roster dated May 30, 1975, listed 313 professionals, including interns. At that time, at least 498 attorneys had been promised to Goodell and there had been adequate time for them to report. An estimate that only 40% of the detailees of the first tap successfully reported to the PCB appears to have held true for subsequent taps.

¹⁰²Aggravating circumstances were agreed to include other adult convictions, false statements to the PCB, use of physical force in committing the offense, AWOL in Vietnam, selfish motivation for offense, failure to do alternative service, violation of probation or parole, multiple AWOL offenses, missed overseas movement, non-AWOL offenses contributing to discharge, and apprehension by authorities. Mitigating circumstances included inability to understand obligations or remedies, personal or family problems, mental or physical condition, public service employment, service-connected disability, extended creditable military service, Vietnam service, procedural unfairness, questionable denial of conscientious objector status, conscientious motivation for offense, voluntary submission to authorities, mental stress from combat, combat volunteer, above

write up summaries of each case, pointing out aggravating and mitigating circumstances, as defined by the Board, and recommend a disposition in accordance with Board guidelines in each case. Third, the Board would hold a hearing for each application and decide to either accept the attorney's recommendation or make a different disposition.

The first problem they encountered in implementing this system was that there were too many cases for the Board to decide as a group. They therefore agreed to divide themselves into three- or four-member panels. This would allow more cases to be heard, but also created a risk that the panel decisions might not be uniform and that the same case could have different results depending on the panel to which it was assigned. To address this issue, any dissenting panel member was given the right to have a case reviewed by the whole Board. In this way, the PCB acted somewhat like a federal circuit court of appeals, which decides cases by three-judge panels but allows for review of decisions by the court as a whole sitting *en banc*.

The second fairness issue that needed to be addressed is that the PCB's attitude towards aggravating and mitigating circumstances changed and evolved as it heard cases; it would be unfair to have an individual's case decided differently depending on whether it had been decided early or late in the decision-making process. To address this issue, the PCB created the *Clemency Law Reporter* to inform case attorneys of recent decisions of the Board and modifications or clarifications of aggravating and mitigating circumstances. This gave the attorneys the ability to argue that a particular case was like

average military performance ratings, decorations for valor, and wounds in combat. *Report to the President*, xviii-xix.

a prior case where a pardon was or was not recommended and should therefore have the same outcome, or to distinguish a prior case where its outcome did not seem fair when applied to other cases.

Of course, the procedures the PCB set up to insure fairness were very familiar to the hundreds of lawyers detailed to the PCB. They first reviewed the Board aggravating and mitigating circumstance guidelines (statutory law), reviewed decisions of the Board summarized in the *Clemency Law Reporter* (case law), and used them to both prepare a case summary (legal brief) and present the case to a panel of the Board (oral argument). Case attorneys were also authorized to seek full Board review of a panel decision the attorney felt was inconsistent with established Board precedent (appeal).¹⁰³

In return for engagement, the attorney detailees as a group made demands which, given their role in the process, the PCB was obligated to honor. First and foremost, the attorneys insisted that they be present at the presentation of their cases to the Board. Some of the conservative members of the Board had resisted the presence of attorneys, feeling, with some justification, that some attorneys were abandoning neutrality and advocating for the applicants.¹⁰⁴ However, the attorneys as a group would have refused to

¹⁰³Case attorneys had the right to “flag” cases they believed were decided inconsistently with previous decisions. These cases were then audited for consistency by the legal analysis staff and submitted to Goodell for referral to the full Board at his discretion. *Presidential Clemency Board Report to the President* (Berkeley: University of California Libraries Collection, 1976), 162-63.

¹⁰⁴The first draft of the *Report to the President* noted that “many case attorneys broke from the standing rule of impartiality and began advocating an applicant’s case in the manner of an adversary attorney representing a client.” Goodell Papers, Box 5, Final Report Draft 8/29/75 (11), 24. In the final version of the *Report*, “many” was changed to “some.” *Report to the President*, 162.

do the tedious work of reviewing and summarizing cases if denied the opportunity to “go to court” and see their cases to completion. Attorneys were given the power to make recommendations to the Board, consistent with Board policy and precedent, and were also given the power to flag a case for review by the full Board if they felt a panel decision was too harsh.

Lawyers being lawyers, and many of the applications calling out for justice and compassion, case attorneys fairly quickly began to consider the applicants in the cases assigned to them as their clients and to see their roles as advocates.¹⁰⁵ Most attorneys resisted the temptation to be overt about this, maintaining at least the appearance of the neutrality the Board, and especially the conservative members of the Board, expected. This was a constant source of tension between the Board and the lawyers, but one the Board had to live with given the important role the lawyers played in the process and the revolt which would have followed any restrictions on the lawyers.¹⁰⁶

¹⁰⁵The phenomenon was common enough that the drafters of the final *Report* felt compelled to mention it. *Ibid.* The reaction of the attorney detailees to assignment to the PCB was varied. Many assumed the worst and considered their assignment to the PCB as an indication that they were not valued at their home agency. Some were unhappy to learn that a long-planned vacation needed to be cancelled because the PCB could not afford to lose man hours. But many, bored by routine assignments given to them as junior attorneys by their home agencies, were excited by the chance to do something interesting and meaningful and with more responsibility than they enjoyed at their home agency. *Report to the President*, 155.

¹⁰⁶The conservative members were always uneasy with the role which the case attorneys came to play in the PCB, as they felt, with some justification, that many of the attorneys were acting as advocates, using their skills as lawyers and their ability to argue from precedent in a way that skewed the PCB to leniency. These concerns were certainly justified from their point of view, but the lawyers were supported by the majority of the PCB members who were looking for ways to be lenient within PCB precedent. Moreover, the lawyers would have refused to continue to work on cases if they were

The PCB process evolved in two other ways. First, the PCB realized that there was not enough time for them to adjudicate all of the applications within the time allowed, even dividing into panels. The solution to this problem was to double the membership of the Board from 9 to 18. This was done on May 1, 1975. In introducing the new Board members, Goodell was careful to note that the Board would remain ideologically balanced, as three of the new members were liberals, three were moderates and three were conservatives. Goodell used the occasion to specify that there would be three-person panels made up of one conservative, one moderate and one liberal. He also noted that the only essential criteria applied to the new members were that they be available a minimum of four days a week through September 15, that they generally supported Ford's clemency program as opposed to either support for unconditional amnesty or opposition to any kind of clemency at all, and that they had some knowledge of the problems associated with the draft and military service.¹⁰⁷

The second evolution involved the use of interns. Originally, Goodell's vision was that 150 legal interns would be hired by the Department of Defense.¹⁰⁸ Goodell fought hard for these interns, who were expected to have a combination of legal and

excluded from the decision process.

¹⁰⁷Memorandum from Charles Goodell to William Walker, May 1, 1975. Goodell Papers, Box 1, Board - Appointment of New Members (2), 2.

¹⁰⁸Goodell may well have been thinking of using legal interns as the PCB's "corps of trained reviewers" of Truman's Amnesty Board.

military experience, to assist attorneys in the preparation of cases.¹⁰⁹ However, the actual number of interns supplied by the DOD was less than promised and the number of attorneys who actually reported to the PCB was considerably less than promised as well. Moreover, many of the interns had served in Vietnam and had valuable experience with both military justice and the problems of many of the applicants.¹¹⁰ The PCB accordingly amended its definition of “Action Attorney” in its regulations from “an attorney on the staff of the Board who is assigned an applicant’s case” to “any individual on the staff of the Board who is assigned an applicant’s case.”¹¹¹ The interns were then used as attorneys with the same responsibilities and status as government attorney detailees.¹¹²

¹⁰⁹Goodell’s handwritten notes of meetings in mid-May of 1975 show that he was pushing hard for more interns and already anticipating using them as attorneys. His record of a meeting on May 21, 1975, with Paul O’Neill contains a quoted exchange in which O’Neill told him, “You’re really being a prick about this” to which Goodell replied, “You have too. It’s fortunate that we have the relationship we do, in this situation.” Goodell then noted, “DOD interns. Now agreed to 125. Let’s monitor it, may need more.” Ford Library, Goodell papers, Box 8, Memoranda – OMB, 21.

¹¹⁰The author was one of these interns.

¹¹¹Clemency Board Regulations, *Federal Register*, vol. 40, no. 115, June 13, 1975.

¹¹²The use of interns as lawyers was no secret inside the PCB, though it was never discussed with outsiders or mentioned in the *Report to the President*. Baskir and Strauss made no mention of it either in their subsequent discussions of the PCB. Documentation of the use of interns as lawyers is scattered throughout Goodell’s papers, with the author clearly identified as an attorney in several places, e.g., Goodell Papers, Miscellaneous, Box 8, 77.

Use of interns as lawyers was not illegal, but was an ethical grey area for the many lawyers on the staff of the PCB, including Baskir and Strauss. On the one hand, Ford’s clemency program was entirely outside the judicial branch of government, so Ford was entitled to set it up any way he saw fit. On the other hand, ethical rules governing attorneys generally forbid them from assisting non-lawyers in the practice of law. See, e.g., Canon 3 of the American Bar Association Model Code of Professional Responsibility provides, “A Lawyer Should Assist in Preventing the Unauthorized

Evidence of the important role the interns played in the operation of the PCB is contained in both the official *Report to the President* and the unofficial minority report. Although the official *Report* failed to mention explicitly that many interns were used as attorneys, it noted that “Summer legal interns were found to have a better learning curve and higher production peak than detailed government attorneys, perhaps because of different job motivation.”¹¹³ The *Report* also gave the interns credit for allowing the PCB to complete its work, stating that “[t]he summer interns were so productive that it was never again to be possible to give case attorneys more work than they could finish.”¹¹⁴ On the other hand, in their minority report the conservative members of the PCB singled out the interns for criticism, accusing them of being biased, lacking knowledge of the military, and having been instructed by senior staff to present cases in the best light for the applicant.”¹¹⁵

One final point must be made when considering how the procedures adopted by the PCB shaped its results. All of the scholars who have assessed the PCB – including Baskir and Strauss, who fully understood the PCB procedures – counted the PCB a

Practice of Law.” There is no indication that the issue was ever raised within the PCB, and even if it had been raised necessity would certainly have trumped a potential harmless violation of ethical rules. Moreover, while the interns often acted as *de facto* advocates for applicants, they were not supposed to act that way under the rules of the PCB.

¹¹³*Report to the President*, p. 157.

¹¹⁴*Ibid.*, 161.

¹¹⁵Ford Library, Marsh papers, Box 2, “Presidential Clemency Board Final Report,” 21-34. The minority seems to have been unaware that many of the interns were Vietnam veterans.

failure because only a fraction of those eligible for clemency actually applied to the PCB.¹¹⁶ However, given the PCB's commitment to fairness and individual review of applications, it would have been physically impossible for the PCB to have heard any more applications. It took the eighteen Board members, the hundreds of government lawyers, interns, and support staff, and a great deal of creative funding¹¹⁷ to review the 21,500 applications the PCB received within the few months the law permitted the PCB to operate. Any more applications and Ford would have been forced to either abandon his

¹¹⁶Baskir and Strauss estimated the total number of men eligible to apply to the PCB at 113,000, though they conceded (and sometimes forgot) that most of this number was only a guess. *Reconciliation After Vietnam*, 30.

¹¹⁷The primary source of funding, at least for the initial operations of the board, was the \$500,000 Unanticipated Needs Fund authorized by Congress as part of the 1975 fiscal year appropriations. While allocations from this fund would be sufficient for the Board's needs while it was still small and housed on the Old Executive Office Building, Goodell knew that it would be nowhere near sufficient once the business of the Board ramped up as it moved to its own quarters and began adjudicating cases. Funds for the majority of the Board's work came from the other government agencies which continued to pay the attorney salaries, funds budgeted to other agencies, and negotiations with the General Services Administration and the Office of Management and Budget.

Expenses for rent, telephone, secretarial services, and office supplies were a constant source of concern. In June of 1975, the General Services Administration gave the PCB notice that federal law prohibited any agency from incurring obligations in excess of available funds. After considerable discussion and negotiation, a total of \$256,00 was provided by the GSA, the Department of Defense and the Department of Justice thereby balancing the books for at least FY 1975.

Estimating the total cost of the PCB is not an easy matter, given the heavy reliance on other executive branch agencies to supply personnel, transfer funds or absorb expenses. Officially, the cost was \$240,000 from the Unanticipated Needs Fund for FY 1975 and another \$281,000 for FY 1976, for a total of \$521,000. However, a budget included in the first draft of the *Report to the President* but not used in the final draft estimated that the true cost was \$5,625,600, after factoring in contributions from other agencies. Baskir and Strauss estimated the total cost at \$10 million, without any sort of breakdown, as did Plaxton. She probably took her figure from them, but without attribution.

commitment to fairness and individual review or else go hat in hand to Congress, which would have only made things worse. It is wrong to call the PCB a failure when it handled the maximum amount of applications it was capable of reviewing. Proper evaluation must center on the applications the PCB did hear, not the thousands more it could not have heard.¹¹⁸

¹¹⁸In fact, the PCB was unable to hear 900 cases due to missing information. These were turned over to the Department of Justice at the end of the PCB's life. "Presidential Clemency Board Transition Questions and Answers," Ford Library, Buchen papers, Box 6, Clemency Program – Termination of Clemency Board, 74. Particularly vexing were files damaged or destroyed by the infamous St. Louis, Missouri military records warehouse fire of July 12, 1973, which destroyed 16 - 18 million military personnel records. Some military files could not be produced for the PCB at all, while many arrived half-burned. See Walter W. Stender and Evans Walker, "The National Personnel Records Center Fire: A Study in Disaster," *The American Archivist*, Volume 37, number 4, October 1974.

VIII.

Relief for a Few, or Relief for Many?

The PCB recommended 13,603 pardons, almost half with no requirement of alternative service. Was this just a few pardons, or many? Compared to what? Evaluating the PCB by statistical analysis is a troublesome method that masks the PCB's contributions to American society in the aftermath of the Vietnam War minimizing their impact.

Evaluating the PCB by comparing the number of applicants to the hypothetical number of potential applicants may have originated with Senator Edward Kennedy (D-New York) who asked, in late 1974 hearings before his subcommittee, the reason for the "low response" to Ford's clemency program, which Kennedy pegged at 2.5%, a number he probably arrived at using the estimated total of bad military discharges without realizing that only a fraction of these – estimated to be 18% – were for desertion.¹¹⁹ This method of assessment has persisted, with wild estimates of the proper number of eligible persons to use as the denominator. In fact, nobody has ever known this number. The

¹¹⁹Senate Judiciary Subcommittee on Administrative Practice and Procedure, hearings the practices and procedures of the Presidential clemency program, held on December 18, 1974, p. 3. A copy of the printed transcript is located in Box 10 of Goodell's notes at the Ford Library.

number most commonly used for bad discharges for desertion, 90,000, is an estimated percentage of an estimated total. And it must be remembered that the PCB only had jurisdiction over bad discharges for absence-related offenses while the Department of Defense did not have an accurate figure of the total bad discharges, let alone any idea how many of them were absence-related.¹²⁰

The first formal evaluations of the work of the PCB, aside from its own *Report to the President* in 1975, were Baskir and Strauss' *Reconciliation After Vietnam* in 1977 and *Chance and Circumstance* in 1978. These works set the tone for future evaluations of the PCB, and relied heavily on the same statistics to disprove the effectiveness of the PCB; subsequent assessment attempts have largely followed suit. However, Baskir and Strauss were not objective, as they were strong advocates of further relief they thought necessary – in *Reconciliation* they proposed a follow-on program to the PCB – and therefore were motivated to portray the work of the PCB as inadequate. The statistics they used were highly subjective.

It was typical of Baskir and Strauss to pick a huge number of potential applicants out of thin air, compare it to actual applicants, and conclude the program was a failure or a disappointment. Typical is their statement on *Chance and Circumstance* that “only 6% of the roughly 350,000 eligible persons ever applied to the program.”¹²¹ Reduce the

¹²⁰Ford's Executive Order 11083 of September 16, 1974, establishing the PCB, limited its jurisdiction soldiers who received punitive or undesirable discharges “as a consequence of violations of Article 85 [desertion], 86 [absent without leave] or 87 [missing movement of ship, aircraft or unit] of the Uniform Code of Military Justice.”

¹²¹Baskir and Strauss, *Chance and Circumstance*, p. 215.

arbitrary estimate, and deduct from that the number of draft evaders not even known to the government or immune from prosecution due to the statute of limitations, deduct deserters who were not being sought, and eliminate soldiers discharged for non-absence-related offenses and you come up with a more reasonable participation rate. In fact, Baskir and Strauss themselves did something like that in *Reconciliation After Vietnam* and arrived at a 19% participation rate.¹²² The rate gets even better if you deduct deserters with little education or representation who never learned about the program and expatriots who could not apply for clemency without violating the laws of their adoptive country or losing employment. The dubious statistical evaluation originating with Kennedy and sometimes adopted by Baskir and Strauss does not stand up to close scrutiny.

Moreover, the number of draft evaders or deserters who did not apply is a meaningless statistic. First of all, they were all estimates, and varied widely. Second, since the PCB reviewed each case on its own merits, it was not capable of hearing any more cases than it did. In fact, the number of applications was just manageable enough for individual review. There certainly would have been more applications had anyone known that over 40% of those whose cases were heard by the PCB would receive outright pardons, but that was the result of evolution of the PCB itself.¹²³ In terms of the compromise which created the PCB, there is some sense of justice that the requirement of

¹²²Baskir and Strauss, *Reconciliation After Vietnam*, pp. 30 - 31.

¹²³Over 21,000 applications were filed, but the PCB only had jurisdiction over 14,514 of them. Full pardons without need of alternative service were granted to 6,052 of these. *Report to the President*, p. 124.

alternative service was waived for many of those who, by applying, expressed the willingness to perform alternative service.

In addition, the vast majority of the tens or hundreds of thousands of draft evaders did not really need any relief. They were rarely prosecuted even if they were known, and the government had no means to identify men who failed to register for the draft.¹²⁴ Moreover, no prosecution would be possible for any man who failed to register and reached age 23 without being indicted.¹²⁵ The mere passage of time would give such men all the relief they needed. It makes no sense to call Ford's program a failure because it was boycotted by men who did not need relief anyway. Most of the 8,700 convicted draft offenders, who really did need a pardon to erase their convictions, were given individual notice of their right to apply to the PCB. The PCB gave over 80% of the 1,757 who applied full and unconditional pardons.¹²⁶

The statistical method of evaluating the PCB also founders when considering the

¹²⁴The numbers cited by Baskir and Strauss – all estimates, of course – were that of 470,000 draft offenders, 360,000 were never identified. There were 210,000 identified and accused, but only 8,700 convicted. Of the “untold hundreds of thousands” who failed to register for the draft, only 250 were ever convicted. *Chance and Circumstance*, pp. 84-85.

¹²⁵In 1970, the Supreme Court in *Toussie v. United States*, 397 U.S. 112, held that the five-year statute of limitations applicable to the Selective Service Act barred prosecution for failure to register once the man reached the age of 23 years and five days. For those who failed to report for military service, the five years began at the time of the act.

¹²⁶*Report to the President*, p. 123. The rest could earn a pardon with as little as 30 days alternative service. Only 26 applications from the convicted draft evaders were denied. *Ibid.* It should also be noted that while notices of the PCB were sent to all convicted draft violators, Goodell was only sure that about 6,000 actually received the notice.

nature of bad discharges from the military. Early in the Vietnam War, deserters were generally given a bad conduct or dishonorable discharge as the result of trial and conviction by a court martial. However, by the middle 1960s it was far more common for the military to offer the deserter an undesirable discharge by administrative process, even though the legal consequences were much the same as a bad conduct discharge.¹²⁷ The military was unable to give the PCB a comprehensive list of the names and addresses of men actually convicted for desertion by court martial; it could not even supply the *number* of undesirable discharges given administratively, let alone how many were for absence-related offenses.¹²⁸

To properly evaluate the work of the PCB, the focus needs to be shifted from hypothetical percentages of participation to the nature of the recipients. The perspective of time allows a better evaluation than one based on statistics. Ford's program is the only instance in U.S. history of presidential pardons (as opposed to commutation of sentences) offered to common soldiers, and needs to be considered in that light.

True evaluation should start with the 3,700 men who applied to the PCB who

¹²⁷J. M. Hirschhorn, "Due Process in Undesirable Discharge Proceedings." 41 *University of Chicago Law Review*, 164 - 193 (1973), 165; Bradley K. Jones, "The Gravity of Administrative Discharges: A Legal and Empirical Evaluation." 59 *Military Lw Review* 1 - 26 (1973), 15. Deserters usually were eager to trade their right to due process for the immediacy of the separation from the military and the waiver of any further punishment.

¹²⁸The only number provided by the Department of Defense was an "educated guess" that 90,000 of the bad discharges issued by the military were for desertion. Baskir and Strauss, *Reconciliation After Vietnam*, 30.

were Vietnam veterans.¹²⁹ By risking their lives, these men had earned and deserved every benefit to which a veteran was entitled, only to lose those benefits after returning home to an ungrateful nation. Many were poor and black, alumni of project 100,000. Many were unemployable due to their punitive discharges. Some had sustained serious wounds in combat, and were barred from further government treatment for those wounds. A pardon by recommendation of the PCB undid many of these injustices, most without need of alternative service. It takes a great deal of cynicism to call a program with these results a failure.

Likewise, evaluation of the PCB's effectiveness regarding civilians must begin with the 8,700 convicted draft offenders, not the "hundreds of thousands" who would never be prosecuted. These men were individually invited to apply, and 1,757 did so, a huge number considering that these were the most principled of draft resisters, actively choosing to be prosecuted rather than quietly failing to register or fleeing the country. Ford's PCB was far more generous than Truman's Amnesty Board, recommending pardons for Jehovah's Witnesses who received no sympathy from Truman. Since all convicted draft offenders had an opportunity to apply for a pardon and most that did apply were given outright pardons, the achievements of the PCB cannot be fairly disparaged by comparing their number to those who chose not to apply or those who did not really need a pardon.

A better measure of the effectiveness of the PCB is to consider its effect on individuals. For those men expelled from the military for desertion, the PCB is the only

¹²⁹*Report to the President*, p. xiv. For typical examples, see note 1, *supra*.

instance in history where the U.S. government forgave desertion by recognizing that those who should not have been accepted into the military in the first place should not bear the lifelong disabilities associated with the crime. It was an act of kindness, however unplanned, to recognize that “new standards” men inducted pursuant to Project 100,000 were entitled to relief because their failure to complete military service was not entirely their fault.

Likewise, while the PCB did not forgive the draft evader community as a whole it did pardon many of the most principled evaders who chose to accept prosecution and punishment rather than flee the country, go into hiding, or merely “forget” to register for the draft. Truman’s amnesty Board recommended only 10% of offenders for a pardon, whereas the PCB gave relief to 20% of the offenders and almost all who asked for it.

The PCB was kinder, more generous, and more understanding than Truman’s Amnesty Board or any other clemency program that preceded it. Given the circumstances, the PCB did the most it could have done to do the right thing for the draft evaders and deserters who applied for clemency. It gave real relief to those who really needed it, rather than moral vindication to those who were never going to be punished. Statistics are meaningless to measure its success, and would still be meaningless even if they were reliable.

IX.

Healing the Nation

If prior historians were not declaring the PCB a failure because of its alleged “low participation” rate, they were disparaging Ford and his clemency program for failing to “heal the nation.” If by “healing the nation” Ford meant only making the right and left friends again, allowing both supporters and opponents of the Vietnam War to lock arms and forgive each other, then yes, his program failed. But every wound is different and treatments are not all the same. While some may be healed with TLC and chicken soup, boils need to be lanced. Realistically, the only thing that could heal the divisiveness caused by the Vietnam War was time. By stopping prosecutions and providing a means for deserters and draft offenders to come home, Ford allowed the country to begin to put that sorrowful and divisive episode behind it. That was Ford’s thinking in pardoning Richard Nixon, so an examination of the Nixon pardon might well apply to pardons Ford offered to draft offenders and deserters.

In his autobiography, Ford barely mentioned his clemency program for draft offenders and deserters, but devoted page after page to his agonizing over the Nixon pardon.¹³⁰ Ford expressed a belief that “We are not a vengeful people; forgiveness one of

¹³⁰Gerald R. Ford, *A Time to Heal: The Autobiography of Gerald R. Ford*, 160.

the roots of the American tradition.”¹³¹ However, he insisted that he pardoned Nixon out of concern for the nation, not Nixon:

It was the state of the country’s health at home and around the world that worried me. As Army Major Bob Barrett, one of my military aides, said: “We’re all Watergate junkies. Some of us are mainlining, some are sniffing, some are lacing it with something else, but all of us are addicted. This will go on and on unless someone steps in and says we, as a nation, must go cold turkey. Otherwise we’ll die of an overdose.” A period of such prolonged vituperation and recrimination would be disastrous for the nation. America needed recovery, not revenge. The hate had to be drained and the healing begun.¹³²

Most Ford biographers have argued that Ford’s thinking was correct and that the Nixon pardon was necessary to heal the nation. Typical is John Greene, who concluded that Ford “had healed the scars of the spirit caused by Watergate and Vietnam, and the nation was stronger in 1976 than it had been in 1974.”¹³³ The Schapsmeiers called the Nixon pardon a political mistake, but “a delayed vindication has come about through the perspective of time.”¹³⁴ Andrew Crain called the pardon “the right decision.”¹³⁵ The very same thinking applies to the PCB even though it received little attention at the time. It was the right decision at the time, and helped put the strife of the Vietnam War in the rear view mirror. It is deserving of vindication, however long delayed.

¹³¹Ibid

¹³²Ibid., 160 - 61.

¹³³John Greene, *The Presidency of Gerald R. Ford*, 193.

¹³⁴Edward L. and Frederick H.Schapsmeier, *Gerald R. Ford’s Date with Destiny; A Political Biography*, 178.

¹³⁵Andrew Crain,*The Ford Presidency: A History* (Jefferson, N.C. and London: McFarland & Co., 2009), 63.

X.

Conclusion and Reassessment

Not surprisingly, The Presidential Clemency Board itself, in its *Final Report*, stated its confidence that its work “reflected the spirit of the Presidential Proclamation which created it” and “helped enable Americans to put their war-engendered differences aside and live as friends and neighbors once again.”¹³⁶ A minority report, issued by the most conservative members of the Board, questioned or even disproved this vague and optimistic conclusion. General Walt certainly did not believe that the country had benefitted in any way and just a few years later would disparage the PCB as a communist plot:

After serving a year on President Gerald Ford’s Clemency Board, I became convinced that the amnesty program was in part instigated to weaken our armed forces. The staff of this board which had been assembled by former Sen. Charles Goodell was headed by a man who had a large sign on the wall in the back of his plush office desk which read, “Better Red than Dead.” I learned later that his name had been carried on lists of the House Committee on Un-American Activities before it was disbanded.¹³⁷

Baskir and Strauss, as two senior members of the Presidential Clemency Board staff, reached a different conclusion than the official report. Pointing out the awkward

¹³⁶*Report to the President*, 183.

¹³⁷Lewis W. Walt, *The Eleventh Hour* (New York: Caroline House Publishers, Inc., 1979), 53.

and unpopular nature of the compromise underlying the clemency program, the serious misconceptions about Vietnam-era offenders, the meager relief the program could offer, the lack of sufficient time or publicity, and the essential abandonment of the clemency program by Ford himself, they concluded that the program was a “clear disappointment.”

Three scholars have evaluated the PCB, either calling it a success for very vague and subjective reasons or declaring it an outright failure. In his thesis, Joshua Dunton noted all the deficiencies listed by Baskir and Strauss but concluded, based on selected newspaper editorials of the period, that Ford’s clemency program was successful in “creating an atmosphere of reconciliation and unification” and “began the process of healing the wounds caused by the United States involvement in Vietnam.”¹³⁸ In other words, Dunton accepted the conclusion of the Board’s official report notwithstanding the problems detailed by Baskir and Strauss. Similarly, Courtney Carver found merit in the PCB only because the applicants “added valuable voices to the public record.” Carver argued that the applications “support, contradict, enlarge, and enhance our understanding of the Vietnam War. For this reason alone, Gerald Ford’s Clemency Program can be considered a success.”¹³⁹ In her dissertation, Sharon Plaxton concluded that the program was “bankrupt” and not only provided “little substantive reconciliation,” but actually

¹³⁸Joshua Dunton, “To Heal the Nation: the Creation of President Ford’s Clemency Program.” Masters Thesis, University of Waterloo, Ontario, Canada (2009), 100.

¹³⁹“To Forgive or Not to Forgive? A Reappraisal of Vietnam War Evaders and Deserters in President Gerald Ford’s Clemency Program.” Masters Thesis, University of New Orleans (2018), 48. This seems like a very thin silver lining on a very large grey cloud.

made things worse. She felt that the program “fell within the circle of class and race that marked the entire Vietnam experience” and “laid the groundwork for the Vietnam syndrome of later years.”¹⁴⁰

Ford biographer James Cannon minced no words in calling the PCB a “disaster,” blaming Goodell for its failure and calling Goodell “injudicious and inept.”¹⁴¹ However, he gave no evidence or even reasoning for this assessment, and his status as a Ford advisor during Ford’s presidency certainly tainted his opinion. Cannon’s negative opinion is most valuable in showing the thoughts of the White House on the effectiveness of the PCB. Cannon, and probably Ford himself, viewed the PCB negatively because it did relatively little for the middle class men Ford sought to reconcile with their country. The White House was unable to see what the perspective of time has made clear: the PCB’s primary impact was on men from more humble backgrounds. Ford was a decent enough man that he might have taken more pride if he could have realized that his PCB helped thousands, even if they were not the beneficiaries he originally had in mind.

Totally forgotten in prior historical assessments, just as always have been, are the apolitical deserters who applied to the PCB. Whether they were the underprivileged, with little influence in American society, or the deficient, accepted by a military with which they were unable to cope, or the Vietnam veterans, who completed a combat tour before falling from grace, it seems that however many years pass by they remain largely irrelevant. The PCB’s greatest impact was to improve the situation of these former

¹⁴⁰Plaxton, “To Reconcile a Nation,” 270.

¹⁴¹Cannon, *Gerald R. Ford: An Honorable Life*, 216.

soldiers few people cared about. They should be part of the discussion in any attempt to evaluate the PCB, even if they didn't matter to Ford when he created the PCB. To the extent prior historians have failed to consider the relief the PCB afforded to the apolitical deserters, they have missed the mark.

The misconception about the nature of most offenders, coupled with the indignant boycott by middle-class draft evaders, meant that the PCB could concentrate on giving relief to those who actually needed it most and had nowhere else to go. This was instantly recognized by the staff of the PCB, who set about helping thousands of lost souls who were among the real victims of the Vietnam war. The staff of the PCB did the most that they could, within the rules laid down by Ford and the PCB itself, to give recipients of punitive discharges some relief. The staff regretted that they could not do more, but that did not in any way trivialize their efforts, which resulted in at least some benefit to those who needed it most.

In a bout of cynicism not shared by most of the members and staff of the PCB, William Strauss used the term “gavotte” – a dance without substance – to describe the lengths to which the PCB went to consider the individual cases of deserters because the relief the PCB could offer – a presidential pardon and a clemency discharge – was of little value.¹⁴² In this, Strauss was certainly wrong. The pardon restored civil rights and privileges, not only for those who had been actually convicted by court martial but also

¹⁴²Memorandum from Strauss to Baskir dated August 4, 1975. Ford Library, papers of Charles Goodell, Box 7, Memoranda – Internal (3), 6.

for those administratively discharged.¹⁴³ Although Strauss could not know it at the time, Ford's pardon was the first step to veteran's benefits for many.¹⁴⁴ Employers could and did consider the pardon as permitting employment of a veteran who would otherwise not be considered due to a bad discharge. And, perhaps most importantly, the pardon restored some sense of personal dignity to individuals who tried but failed to fully perform a duty from which many ran away.

Though polar opposites in their political views and their personal views on clemency, both General Walt and Father Hesburgh shared the view that the PCB was mainly about common soldiers, not repairing the political damage to the nation wrought by the war.¹⁴⁵ In a letter written to Ford after the conclusion of the PCB, Father Hesburgh got it right. Avoiding the vague "heal the nation" rhetoric, Father Hesburgh wrote:

While there were times during the year when I regretted having said "yes" when invited to serve on the Presidential Clemency Board,

¹⁴³State laws may interpret "conviction" as including an undesirable discharge. Consequences of such an interpretation include disfranchisement, loss of right to hold public office, and loss of employment, judicial, domestic, and property rights. Bradley K. Jones, "The Gravity of Administrative Discharges: A Legal and Empirical Evaluation." 59 Military Law Review 1 - 26 (1973), 13.

¹⁴⁴Goodell's files contain a memorandum dated October 17, 1975, documenting an agreement between the Department of Justice and the Department of Defense "to effectuate the select recommendations of the Presidential Clemency Board to upgrade less than honorable discharges to honorable discharges with entitlement to full veterans' benefits." The agreement also called for review of all cases by military discharge review boards. Goodell Papers, Box 1, Alternative Service, 12.. The "select recommendations" included those discussed in notes 32 and 38, *supra*.

¹⁴⁵"It was in their empathy for the common soldier that, despite all their differences, Hesburgh and Walt found a common ground." John Lungren, Jr., *Hesburgh of Notre Dame: Priest, Educator, Public Servant* (Kansas City MO: Sheed & Ward, 1987), 85.

especially when problems mounted and decisions became very difficult. I must say in retrospect that it has been a great experience and I am grateful to you for making it possible. I have high hopes that during the years ahead we will be able to stand back and take a longer look at the great mass of facts that have been compiled and see emerging from them great public policies that will make for a stronger and better America. None of this would have been possible without your having initiated the program in the first place. While all of us, like yourself, received many nasty letters from the right and the left, I am sure in retrospect and, especially in historical perspective, this will emerge as one of the most generous and responsible programs in national clemency. There may well be more tasks yet to perform, but at least you should take some pride and satisfaction from the thought that many thousands of young men do indeed have a new lease on life, thanks to your initiative.¹⁴⁶

Many thousands of young men did in fact gain meaningful relief from the PCB.

Even though they were from the least important and least understood segment of society, they still mattered. Intended or not, the pardons they received made the PCB a success.

¹⁴⁶Letter dated September 23, 1975. Goodell Papers, Box 9, Personnel Matters (1), 77.

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