



Veterans Legal Services Clinic YALE LAW SCHOOL

MEMORANDUM

RE: PRESIDENTIAL AUTHORITY TO PARDON
VETERANS WITH BAD PAPER

NOVEMBER 14, 2016

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The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

MEMORANDUM

To: President Barack Obama
W. Neil Eggleston, White House Counsel

Cc: Ashton B. Carter, Secretary, Department of Defense
Jennifer M. O'Connor, General Counsel, Department of Defense

From: Elizabeth Dervan, Rebecca Ojserkis, and Emma Roth, Law Student Interns
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Date: November 14, 2016

Re: Presidential authority to pardon veterans with bad paper

QUESTION PRESENTED

What is the scope of President Barack Obama's legal authority to pardon veterans with an other-than-honorable (OTH) discharge and mental health condition, so as to upgrade their discharge status to general or honorable?

SHORT ANSWER

The President has the legal authority to pardon veterans with an OTH whose misconduct stemmed from undiagnosed posttraumatic stress disorder (PTSD) and other mental health issues, including pre-existing conditions. The Constitution confers sweeping power on the President to issue pardons that forgive individuals of criminal and civil offenses.¹ Past presidential administrations have issued far-reaching proclamations in military contexts and have specifically granted clemency and discharge upgrades to individuals who served, or were drafted to serve, during the Vietnam War. In one instance, President Ford started a clemency program for Vietnam veterans on his *final* day in office. Moreover, the Supreme Court has long upheld the expansive nature of the President's pardon power.

* The views expressed in this memorandum do not purport to reflect the views of Yale Law School.

¹ U.S. CONST. art. II, § 2, cl. 1. *See generally* Noah Messing, *A New Power?: Civil Offenses and Presidential Clemency*, 64 BUFF. L. REV. 661 (2016) (examining presidential power to pardon civil offenses); Peter L. Markowitz, *Can Obama Pardon Millions of Immigrants?*, N.Y. TIMES, July 6, 2016, at A21 (correcting the "common assumption that pardons can be used only for criminal offenses" to advocate for a presidential pardon of undocumented immigrants).

Thus, in light of the text of the Constitution, legal precedent, and strong historical examples of veteran pardons, the current presidential administration has the legal power to grant clemency to veterans with an OTH discharge. Nevertheless, a mass presidential pardon might not automatically give these veterans access to benefits administered by the U.S. Department of Veterans Affairs (VA), as past military proclamations did not confer rights to benefits.

BACKGROUND

Approximately 260,000 Vietnam veterans² and 125,000 post-9/11 veterans³ have received “bad paper” discharges.⁴ Many of these service members were experiencing symptoms of PTSD as a result of combat, military sexual trauma, or other traumatic events at the time of their separation.⁵ Because PTSD was not a recognized medical disorder until 1980, this pattern was particularly damaging for Vietnam veterans.⁶ An estimated 80,000 or more Vietnam veterans erroneously received bad paper after engaging in conduct attributable to their undiagnosed condition.⁷ Though the military has since adopted PTSD screening policies, at least 10,000 veterans of Operations Iraqi Freedom (OIF) and Enduring Freedom (OEF) likely have bad paper and PTSD.⁸

Bad paper discharges have enormous consequences for former service members and their families. These discharges generally bar veterans from critical VA benefits, including health care, disability compensation, housing, and burial benefits.⁹ Further, bad paper renders veterans ineligible for the G.I. Bill, subjects them to intense stigma, and dramatically limits their private sector employment opportunities following service.¹⁰

Veterans with bad paper who determine that they suffered or are suffering from PTSD may seek discharge upgrades through administrative boards at the Department of Defense.¹¹ Historically,

² SUNDIATA SIDIBE & FRANCISCO UNGER, VETERANS LEGAL SERVS. CLINIC, JEROME N. FRANK LEGAL SERVS. ORG. AT YALE LAW SCH., UNFINISHED BUSINESS: CORRECTING “BAD PAPER” FOR VETERANS WITH PTSD 3 (2015), <https://www.law.yale.edu/system/files/documents/pdf/unfinishedbusiness.pdf>.

³ VETERANS LEGAL CLINIC, LEGAL SERVS. CTR., HARVARD LAW SCH., UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER 8 (2016), <https://www.swords-to-plowshares.org/sites/default/files/Underserved.pdf>.

⁴ Bad paper includes OTHs, Bad Conduct Discharges (BCDs), and Dishonorable Discharges (DDs).

⁵ Rebecca Izzo, *In Need of Correction: How the Army Board for Correction of Military Records Is Failing Veterans with PTSD*, 123 YALE L.J. 1587, 1589, 1594 (2014).

⁶ *Id.* at 1593-94.

⁷ See *How Common Is PTSD?*, U.S. DEP’T VETERANS AFF., <http://www.ptsd.va.gov/public/PTSD-overview/basics/how-common-is-ptsd.asp> (estimating that approximately 30% of all Vietnam veterans suffered from PTSD at some point in their lifetimes).

⁸ See *id.* (estimating that 11-20% of OEF and OIF veterans have PTSD).

⁹ UMAR MOULTA-ALI & SIDATH VIRANGA PANANGALA, VETERANS’ BENEFITS: THE IMPACT OF MILITARY DISCHARGES ON BASIC ELIGIBILITY, CONG. RES. SERV. 7 (2015), <https://www.fas.org/sgp/crs/misc/R43928.pdf>.

¹⁰ SIDIBE & UNGER, *supra* note 2, at 3; see also Izzo, *supra* note 5, at 1588; Marisa Peñaloza, *Other-Than-Honorable Discharge Burdens like a Scarlet Letter*, NPR (Dec. 9, 2013), <http://www.npr.org/2013/12/09/249342610/other-than-honorable-discharge-burdens-like-a-scarlet-letter> (“[Bad paper is] a red flag on any job application.”).

¹¹ These boards include the Discharge Review Boards (DRBs) and the Boards for the Correction of Military Records (BCMRs). See 10 U.S.C. §§ 1553, 1552 (2012).

however, these boards have failed to grant veterans discharge upgrades. Prior to 2014, for example, they denied over 95% of Vietnam veterans' applications.¹² In September 2014, the Secretary of Defense directed some of the boards to give liberal consideration to applications that included evidence of PTSD.¹³ Since then, roughly half of veterans who applied to the Army's BCMR received upgrades to the status of "general under honorable conditions."¹⁴

While these reforms have benefited many former service members, they have failed to reach a substantial number of veterans in need. First, a small fraction of veterans have actually pursued upgrades at the DRBs or BCMRs.¹⁵ Second, it is unclear whether all boards across the service branches are implementing the Defense Secretary's 2014 directive.¹⁶ Finally, the directive does not apply to veterans whose conduct stemmed from "pre-existing conditions" (i.e., those service members whose mental health disabilities pre-date their service), and may not apply to veterans with service-related mental health disabilities besides PTSD.¹⁷ Because it would take years of significant outreach and advocacy efforts to ensure that all veterans who deserve discharge upgrades receive one, a presidential pardon of all veterans with OTHs and mental health diagnoses would be an immediate and comprehensive remedy.

ANALYSIS

I. The President's pardon power is deeply rooted and expansive.

The presidential clemency power derives from Article II, Section 2, Clause 1 of the U.S. Constitution, which states, "The President shall . . . have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."¹⁸ The Supreme Court has long interpreted the pardon clause as an expansive grant of authority to the President.¹⁹ The President receives assistance with the exercise of his clemency power from the Pardon Attorney at the U.S. Department of Justice.²⁰ Presidents have varied in the frequency with which they have used their

¹² SIDIBE & UNGER, *supra* note 2, at 3.

¹³ SEC'Y OF DEF., SUPPLEMENTAL GUIDANCE TO MILITARY BOARDS FOR CORRECTION OF MILITARY/NAVAL RECORDS CONSIDERING DISCHARGE UPGRADE REQUESTS BY VETERANS CLAIMING POST TRAUMATIC STRESS DISORDER (2014), https://www.law.yale.edu/system/files/documents/pdf/Clinics/vlsc_Hagel_Memo.pdf.

¹⁴ SIDIBE & UNGER, *supra* note 2, at 2.

¹⁵ In 2015, the Army BCMR adjudicated fewer than 200 upgrade petitions. *Id.* at 5-6.

¹⁶ *Id.* at 6-7.

¹⁷ See SEC'Y OF DEF., *supra* note 13, at 1 (excluding pre-existing conditions from the guidance's application and failing to define what "related conditions" are covered).

¹⁸ U.S. CONST. art. II, § 2, cl. 1.

¹⁹ See, e.g., *Pollock v. Bridgeport Steam-Boat Co. (The Laura)*, 114 U.S. 411, 413-14 (1885) ("[E]xcept in cases of impeachment, and where fines are imposed by a co-ordinate department of the government for contempt of its authority, the president, under the general, unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of congress . . .").

²⁰ See 28 C.F.R. §§ 0.35-36, 1.6 (2016). The Pardon Attorney leads any necessary investigations and prepares a report and recommendation to the President for each pardon application. *Id.* The U.S. Attorneys' Manual outlines five factors the Pardon Attorney evaluates when making a recommendation. See UNITED STATES ATTORNEYS' MANUAL § 1-2.112 (last updated Jan. 13, 2015), <https://www.justice.gov/pardon/about-office-0>.

powers to pardon or commute sentences.²¹ While a granted pardon does not signify an individual's innocence, it does remove civil disabilities associated with conviction (for example, restrictions on the right to vote or hold public office).²² However, pardons do not necessarily grant access to rights or benefits that individuals did not hold prior to their conviction, including benefits administered by the VA.²³

II. Presidents have used this power to pardon veterans for military (mis)conduct.

There are historical precedents for the executive use of the clemency power to correct perceived wartime injustices. On September 16, 1974, President Ford issued a proclamation pardoning individuals who had evaded the draft for the Vietnam War in violation of the Military Selective Service Act or who had deserted their troops in violation of the Uniform Code of Military Justice between August 1964 and March 1973.²⁴ In order to receive pardons under the proclamation, the “draft evaders and military deserters” were required to present themselves to a U.S. Attorney before January 31, 1975, execute agreements acknowledging allegiance to the United States, and engage in two years of alternate service under the Director of Selective Service, unless mitigating circumstances counseled in favor of a shorter period of alternate service.²⁵ The proclamation stated that members of the Armed Forces who applied for pardons would receive undesirable discharges until they completed their alternate service, at which point they were eligible to receive a “clemency discharge” in lieu of an undesirable or OTH discharge.²⁶ The proclamation established a Presidential Clemency Board by Executive Order to review the records of draft evaders and individuals who had received punitive or undesirable discharges.²⁷ By the end of President's Ford's tenure, approximately 19,000 veterans had applied for clemency.²⁸

The effects of President Ford's clemency program were limited, as the proclamation expressly granted clemency discharges rather than honorable discharges and stated that clemency

²¹ For example, President Obama has granted significantly fewer criminal pardons than President George W. Bush and President Clinton. *Current Fiscal Year Clemency Statistics*, U.S. DEP'T JUSTICE (last updated Oct. 7, 2016), <https://www.justice.gov/pardon/clemency-statistics>. However, he has used his clemency power to grant more commutations of criminal sentences than his predecessors. *Id.*

²² *Frequently Asked Questions Concerning Executive Clemency*, U.S. DEP'T JUSTICE (Mar. 2, 2016), <https://www.justice.gov/pardon/frequently-asked-questions-concerning-executive-clemency>. *But see Robertson v. Shinseki*, 26 Vet. App. 169, 179 (C.A.V.C. 2013), *aff'd sub nom.*, *Robertson v. Gibson*, 759 F.3d 1351 (Fed. Cir. 2014) (noting that a Presidential pardon “relieves the pardonee of the legal disabilities incident to a conviction of an offense . . . but does not eliminate the consideration of the conduct . . . that led to the conviction”).

²³ *See Robertson*, 759 F.3d at 1357-58 (denying a veteran's claim that a Presidential pardon conferred eligibility for benefits through the VA in part by arguing that this veteran did not lose access to previously acquired rights as a result of his discharge status).

²⁴ PRES. GERALD FORD, PROCLAMATION 4313: ANNOUNCING A PROGRAM FOR THE RETURN OF VIETNAM ERA DRAFT EVADERS AND MILITARY DESERTERS (Sept. 16, 1974), <https://www.gpo.gov/fdsys/pkg/STATUTE-88/pdf/STATUTE-88-Pg2504.pdf>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Memorandum from Gerald R. Ford, President of the United States, to the Secretary of the Army, Secretary of the Air Force, and Secretary of the Navy (Jan. 19, 1977), <http://www.presidency.ucsb.edu/ws/?pid=5576> [hereinafter Ford Memorandum].

discharges “shall not bestow entitlement to benefits administered by the Veterans Administration.”²⁹ To address the program’s limited impact, President Ford issued a memorandum on January 19, 1977, that directed the Presidential Clemency Board to grant honorable discharges to veterans “who were wounded in combat or who received decorations for valor in combat in Vietnam and subsequently received [OTH] discharges,” absent a “compelling reason to the contrary in any case.”³⁰

On January 21, 1977, President Carter issued an additional proclamation granting pardons to individuals who evaded the draft for the Vietnam War between August 4, 1964, and March 28, 1973, in violation of the Military Selective Service Act.³¹ President Carter excluded from his pardon individuals who were convicted of offenses in violation of the Military Selective Service Act that involved force or violence.³² President Carter also excluded individuals who violated the Military Selective Service Act in connection with duties or responsibilities arising out of employment as agents, employees, or officers of the Military Selective Service System.³³ In other words, his pardon applied only to civilians who committed non-violent violations of the Military Selective Service Act during the proscribed period.³⁴

In a subsequent instruction in March 1977, President Carter ordered the Department of Defense to create the Special Discharge Review Program (SDRP) to reform the discharge upgrade process for Vietnam veterans. The SDRP went into effect on April 4, 1977. However, on October 8, 1977, Congress passed a law requiring the discharge review boards to affirm discharge upgrades granted by the SDRP in order for veterans to gain the right to VA benefits.³⁵ This legislation had the effect of barring veterans who received status upgrades from the SDRP from receiving the benefits those discharge statuses would otherwise confer. Whether the statute would continue to bar veterans from receiving benefits as a result of a future presidential pardon remains an open question.³⁶

²⁹ PRES. GERALD FORD, PROCLAMATION 4313, *supra* note 24; *see also Robertson*, *supra* note 23 (holding that the presidential pardon did not bar the VA from considering the circumstances of a veteran’s less-than-honorable discharge when evaluating his eligibility for benefits).

³⁰ Ford Memorandum; *see also Robertson*, 759 F.3d at 1358 (recognizing that the President “did provide veterans’ benefits to clemency program applicants,” though rarely, to “decorated soldiers who had been wounded, disabled, or traumatized in combat”).

³¹ PRES. JIMMY CARTER, PROCLAMATION 4483: GRANTING PARDON FOR VIOLATIONS OF THE SELECTIVE SERVICE ACT (Jan. 21, 1977), <https://www.justice.gov/pardon/proclamation-4483-granting-pardon-violations-selective-service-act>; PRES. JIMMY CARTER, EXEC. ORDER NO. 11,967: RELATING TO VIOLATIONS OF THE SELECTIVE SERVICE ACT (Jan. 21, 1977), <https://www.justice.gov/pardon/federal-register-executive-order-11967>.

³² PRES. JIMMY CARTER, PROCLAMATION 4483, *supra* note 31; *see also Vietnam War Era Pardon Instructions*, U.S. DEP’T JUSTICE (last updated Mar. 3, 2016), <https://www.justice.gov/pardon/vietnam-war-era-pardon-instructions>.

³³ PRES. JIMMY CARTER, PROCLAMATION 4483, *supra* note 31.

³⁴ *Vietnam War Era Pardon Instructions*, *supra* note 32.

³⁵ Act of Oct. 8, 1977, Pub. L. No. 95-126, 91 Stat. 1106 (1977) (codified at 38 U.S.C. § 5303(e)).

³⁶ Section 5303(e)(1)(A) limits the availability of benefits for veterans who receive discharge upgrades through the DRBs under 10 U.S.C. § 1553 by requiring a case-by-case review for benefits eligibility under “published uniform standards” that are “historically consistent with criteria for determining honorable service.” 38 U.S.C. § 5303(e)(1)(A) (2012). However, veterans receiving upgrades through a presidential pardon would avoid the DRBs entirely, placing them beyond the scope of this restriction. Section 5303(e)(2)(A) may present a further barrier. This subsection requires a case-by-case review for benefit entitlement of persons discharged with an OTH who were “awarded a general or honorable discharge under *revised standards* for the review of

CONCLUSION

These historical examples demonstrate that the President has the constitutional authority to order a blanket pardon to correct perceived injustices regarding the treatment of veterans. The efforts of Presidents Ford and Carter reveal no constitutional barriers to President Obama issuing pardons that confer discharge upgrades. However, this history does not provide precedent for presidential proclamations that automatically guarantee access to benefits at the VA. Accordingly, we recommend that a presidential pardon should occur in conjunction with other proposals that would provide veterans with both discharge upgrades and the benefits they deserve.

discharges . . . as implemented subsequent to April 5, 1977,” where these revised standards were “not made applicable to all persons administratively discharged” under OTH conditions. 38 U.S.C. § 5303(e)(2)(A) (2012) (emphasis added). A presidential pardon issued to veterans with mental health conditions and OTHs does not necessarily constitute a “revised standard[] for the review of discharges,” in which case veterans who receive honorable discharges under a presidential proclamation would not automatically be barred from benefits by § 5303(e)(2)(A)(iii). However, earlier clauses of this subsection refer to Ford and Carter’s presidential pardons, suggesting that Congress may have intended the “revised standards” language to bar benefits eligibility even for beneficiaries of future presidential grants of clemency. Moreover, if a court were to deem a presidential pardon to be a “revised standard for the review of discharges,” the court might also conclude that the standard was “not made applicable to all persons administratively discharged,” such that beneficiaries would remain ineligible for VA benefits pursuant to § 5303(e). *See Robertson v. Shinseki*, 26 Vet. App. 169, 179 (2013), *aff’d sub nom., Robertson v. Gibson*, 759 F.3d 1351 (Fed. Cir. 2014) (holding that a veteran’s presidential pardon under the Ford clemency program did not prevent the VA from considering the conduct that led to his general court-martial and denying him VA benefits). On the other hand, any court interpreting § 5303 must construe all ambiguities in favor of the veteran. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) (invoking a rule of statutory interpretation that “interpretive doubt is to be resolved in the veteran’s favor” in a case involving a veteran’s claim for VA disability benefits).