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THE WHITE HOUSE

WASHINGTON

April 9, 1975

MEMORANDUM TO: PHILIP W. BUCHEN

FROM: JAY T. FRENCH 

In accordance with your request I reviewed the memorandum of Chairman Goodell to the President dated April 10, 1975 concerning S. 1290. A copy of the memoradnum and the Senate bill are attached in Tabs A and B respectively.

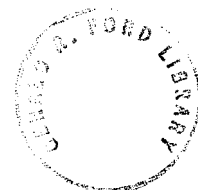
It is my opinion that S. 1290 raises several larger issues than those which are raised in Chairman Goodell's memo. Generally these larger issues concern the infringement of the President's pardon power by the Congress.

By discussing my concerns informally with Bruce Fein at the Department of Justice, I learned that last year the office of Legal Counsel testified on a different amnesty bill indicating in its testimony generally that the proposed measure was unconstitutional.

Also, Jack Marsh in a recent memo has stated that Marty Hoffman will be testifying for the Defense Department on S. 1290. Marty Hoffman wants to be certain that all administration spokesmen carry the same message to the Hill.

It is recommended that we request an informal opinion from the Justice Department with respect to the constitutionality of S. 1290, and that we then convene a meeting of all those who will be testifying on this bill to reach a consensus.

If you concur, I will take appropriate action to obtain such an opinion, and I will set up a meeting for friday, April 11, to discuss these issues. The meeting would include Justice, Defense, Clemency Board, Jack Marsh and you.



A



94TH CONGRESS
1ST SESSION

S. 1290

IN THE SENATE OF THE UNITED STATES

REORGANIZATION OF EXECUTIVE DEPARTMENTS AND

MARCH 21 (legislative day, MARCH 12), 1975

Mr. NELSON (for himself and Mr. JAVITS) introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To reorganize the Clemency Board, the Department of Defense, the Department of Justice, and the Department of Transportation to provide fair and efficient consideration of all individuals eligible for amnesty relating to military service in the war in Southeast Asia, and for other purposes.

1 Be it enacted by the Senate and House of Representa-

2 tives of the United States of America in Congress assembled,

3 That this Act may be cited as the "Clemency Board Reor-

4 ganization Act of 1975".

5 REORGANIZATION OF THE PRESIDENTIAL CLEMENCY BOARD

6 SEC. 2. The Presidential Clemency Board created by

7 Executive Order 11803, dated September 16, 1974, is

8 hereby established by law and reorganized to assume such



1 responsibilities and powers granted to it by this Act and is
 2 directed to execute such responsibilities and powers in a
 3 manner consistent with the provisions of this Act. The Board
 4 shall be composed of nine members to be appointed by the
 5 President, one of whom shall be designated by the President
 6 to serve as Chairman.

7 REORGANIZATION OF EXECUTIVE DEPARTMENTS AND
 8 AGENCIES AND TRANSFER OF POWERS

9 SEC. 3. (a) Any jurisdiction, responsibility, or function
 10 which the Department of Defense has with respect to any
 11 draft evader or military deserter, as defined by this Act,
 12 under any law, regulation, Presidential proclamation, or Ex-
 13 ecutive order, shall be transferred to the Presidential Clem-
 14 ency Board. The Department of Defense shall thereafter be
 15 relieved of all such jurisdiction, responsibility, or function,
 16 except as may otherwise be provided for by this Act.

17 (b) Any jurisdiction, responsibility, or function which
 18 the Department of Justice has with respect to any draft
 19 evader or military deserter, as defined by this Act, under
 20 any law, regulation, Presidential proclamation, or Executive
 21 order shall be transferred to the Presidential Clemency
 22 Board. The Department of Justice shall thereafter be relieved
 23 of all such jurisdiction, responsibility, or function, except as
 24 may otherwise be provided for by this Act.

1 (c) Any jurisdiction, responsibility, or function, which
 2 the Department of Transportation has with respect to any
 3 draft evader or military deserter, as defined by this Act,
 4 under any law, regulation, Presidential proclamation, or Ex-
 5 ecutive order shall be transferred to the Presidential Clem-
 6 ency Board. The Department of Transportation shall there-
 7 after be relieved of all such jurisdiction, responsibility, or
 8 function, except as may otherwise be provided for by this
 9 Act.

10 THE FUNCTIONS OF THE PRESIDENTIAL CLEMENCY BOARD

11 SEC. 4. (a) The Board, under such regulations as it may
 12 prescribe, shall examine the cases of all draft evaders and
 13 military deserters who apply for Executive clemency.
 14 (b) The Board shall report to the President its findings
 15 and recommendations as to whether Executive clemency
 16 should be granted or denied in any case. If clemency is rec-
 17 ommended, the Board shall also recommend the form that
 18 such clemency should take, including clemency conditioned
 19 upon a period of alternate service in the national interest. In
 20 recommending any period of alternate service, the Board
 21 shall consider, among any other factors it deems appropriate,
 22 any prison term, or part thereof, or other punishment which
 23 the individual has served or endured for any offense specified
 24 in subsection (a) or (b) of section 14 of this Act. In the
 25 case of an individual discharged from the Armed Forces with

1 a punitive or undesirable discharge, the Board may recom-
 2 mend to the President that a clemency, general or honorable
 3 discharge be substituted for a punitive or undesirable dis-
 4 charge. The President shall make the final determinations
 5 as to whether Executive clemency should be offered and, if
 6 so, under what conditions.

7 (c) The Board shall give priority consideration to
 8 those applicants who are presently confined and have been
 9 convicted only of an offense specified in subsection (a) or
 10 (b) or section 14 of this Act, and who have no other out-
 11 standing criminal charges pending against them.

12 (d) Any alternate service recommended by the Board
 13 under subsection (b) of this section shall not be longer than
 14 two years and shall promote the national health, safety, or
 15 interest. No applicant shall be permitted to complete all or
 16 any part of such alternate service by service in the Armed
 17 Forces. The alternate service shall be completed in accord-
 18 ance with such regulations as the Board may prescribe and
 19 under the auspices of any department or agency of the
 20 United States which the Board deems appropriate. Any
 21 applicant who satisfactorily completes the period of any al-
 22 ternate service proposed by the President will be relieved
 23 of arrest, prosecution, and punishment for any offense speci-
 24 fied in subsection (a) or (b) of section 14 of this Act.

RIGHTS OF APPLICANTS

SEC. 5. (a) Notwithstanding any other law or regulation, any draft evader or military deserter residing in a foreign country may return to the United States for purposes of applying for Executive clemency under the provisions of this Act. Such individual shall be required to make an application with the Board for Executive clemency within thirty days after the date of entry into the United States and shall not be arrested, prosecuted, or punished for any offense specified in subsection (a) or (b) of section 14 of this Act until the expiration of that thirty-day period. (b)

(b) No applicant shall be arrested, prosecuted, or punished for any offense specified in subsection (a) or (b) or section 14 of this Act until thirty days after he receives notice of the President's disposition of the recommendation made by the Board with respect to that applicant, or until thirty days after he receives notice of the President's disposition of any appeal made to the Board, whichever is later, and then only if Executive clemency is not offered or if offered, is not accepted. Any applicant who entered the United States from another country under the limited immunity granted by subsection (a) of this section and who rejects any offer of Executive clemency by the President may return to that other country at the point of entry.

(c) Notwithstanding any other law or regulation, any

1 draft evader or military deserter, whether or not a United
 2 States citizen, who resides in a foreign country and has not
 3 been indicted or convicted of any offense other than those
 4 specified in subsection (a) or (b) of section 14 of this Act,
 5 shall, upon application, be given a thirty-day nonimmigrant
 6 visa at least once each year if he otherwise qualifies for such
 7 visa. No draft evader or military deserter holding such a
 8 nonimmigrant visa shall be arrested, prosecuted, or punished
 9 for any offense specified in subsection (a) or (b) of section
 10 14 of this Act.

11 (d) Any regulations adopted by the Board pursuant to
 12 section 4(a) of this Act shall account for and preserve any
 13 and all legal and constitutional rights which a draft evader
 14 or military deserter may have.

15 REACQUISITION OF UNITED STATES CITIZENSHIP

16 SEC. 6. Notwithstanding any other law or regulation,
 17 any applicant who has renounced his United States citizen-
 18 ship and acquired the citizenship of another country may
 19 have his United States' citizenship restored by appearing
 20 before a United States district court judge and renouncing
 21 citizenship of that country and pledging allegiance to the
 22 United States.

23 SEALING OF RECORDS

24 SEC. 7. Any and all records of an offense for which a

1 Presidential pardon has been granted under this Act shall be
 2 sealed and shall not be disclosed except—
 3 (a) in response to an order of a court of competent
 4 jurisdiction;
 5 (b) at the request of the pardoned applicant;
 6 (c) at the request of a department or agency of the
 7 United States which is conducting a lawful investigation
 8 necessary for a security clearance or presidential ap-
 9 pointment; or
 10 (d) at the request of a department or agency of the
 11 United States which is conducting a lawful investigation
 12 of fraud in the application for or the granting of Execu-
 13 tive clemency under the provisions of this Act.

14 **VETERANS BENEFITS**
 15 SEC. 8. Unless otherwise granted by the President, the
 16 issuance of a clemency discharge shall not automatically con-
 17 fer rights to veterans benefits: *Provided*, That the Veterans'
 18 Administration or the Department of Defense may review
 19 each case of an applicant receiving a clemency discharge for
 20 the purpose of determining whether or not veterans benefits
 21 should be granted; such review shall be without regard to
 22 any acts for which a Presidential pardon has been granted.

23 ADMINISTRATION

24 SEC. 9. Each member of the Board, other than an officer
 25 or employee of the United States, shall be entitled to com-

1 compensation for each day he is engaged in the work of the
 2 Board at a rate not to exceed the daily rate prescribed by law
 3 for persons and positions in GS-18 and shall also be entitled
 4 to receive travel expenses, including per diem in lieu of
 5 subsistence, as authorized by law for persons in Government
 6 service employed intermittently.

7 ~~REGISTRATION OF BOARD~~ ADMINISTRATIVE SERVICES

8 ~~SEC. 10.~~ SEC. 10. Necessary administrative services and support
 9 may be provided to the Board by the General Services
 10 Administration on a reimbursable basis.

11 ~~REGISTRATION OF BOARD~~ COOPERATION OF OTHER DEPARTMENTS AND AGENCIES

12 ~~SEC. 11.~~ SEC. 11. All departments and agencies in the executive
 13 branch are authorized and directed to cooperate with the
 14 Board in the conduct of its work and to furnish the Board, to
 15 the extent permitted by law, all appropriate information and
 16 assistance.

17 ~~REGISTRATION OF BOARD~~ FINAL RECOMMENDATIONS; TERMINATION OF BOARD

18 ~~SEC. 12.~~ SEC. 12. The Board shall submit its final recommenda-
 19 tions to the President not later than December 31, 1976, at
 20 which time it shall cease to exist. Any functions assigned to
 21 the Board under this Act shall thereafter be assumed by the
 22 Department of Justice.

23 ~~REGISTRATION OF BOARD~~ AUTHORIZATION

24 SEC. 13. There are authorized to be appropriated such

1. If sums as may be necessary to carry out the provisions of this
2. Act, it is the duty of the Government to provide the same.
3. The Government shall have power to make such definitions as may be necessary for the purposes of this Act.

4 SEC. 14. As used in this Act—

5 (a) "The term "draft evader" means any individual who
6 has been or may be indicted or convicted of any offense com-
7 mitted on or after August 4, 1964, and prior to March 29,
8 1973, in violation of section 6(j) or 12 of the Military Se-
9 lective Service Act (50 App. U.S.C. 462) or of any rule or
10 regulation promulgated under such sections, or of any related
11 law, rule, or regulation.

12 (b) The term "military deserter" means (A) any indi-
13 vidual who has received or may receive a punitive or unde-
14 sirable discharge for one or more violations of article 85, 86,
15 or 87 of the Uniform Code of Military Justice (10 U.S.C.
16 885, 886, 887), or any related article, committed on or
17 after August 4, 1964, and prior to March 29, 1973, or (B)
18 any individual who is serving a sentence for one or more
19 such violations.

(c) "Executive clemency" means a pardon or other act of mercy or forgiveness by the President, under such terms and conditions as the President may prescribe, pursuant to powers granted to the President by article II of the United States Constitution.

25 (d) "Presidential Clemency Board" or "Board" means

the body created by this Act to consider the cases of draft evaders and military deserters and to recommend to the President whether such evaders or deserters should receive executive clemency and, if so, under what conditions.

(e) "Clemency applicant" or "applicant" means any draft evader or military deserter who applies for clemency under the provisions of this Act.

(f) "Clemency discharge" means a military discharge granted by the President pursuant to the provisions of this Act to signify that the applicant left the military service under honorable conditions.

(g) The term "Military Selective Service Act" means the Military Selective Service Act or any prior corresponding Act.

(h) "Military Selective Service Act" means the Military Selective Service Act or any prior corresponding Act.

(i) "Executive clemency" means a pardon or other act of mercy or forgiveness by the President under such terms and conditions as the President may deem proper.

(j) "Powers granted to the President by article II of the United States Constitution."

(k) "Presidential Clemency Board" means

94TH CONGRESS
1ST SESSION

S. 1290

A BILL

To reorganize the Clemency Board, the Department of Defense, the Department of Justice, and the Department of Transportation to provide fair and efficient consideration of all individuals eligible for amnesty relating to military service in the war in Southeast Asia, and for other purposes.

By Mr. NELSON and Mr. JAVITS

MARCH 21 (legislative day, MARCH 12), 1975

Read twice and referred to the Committee on
Government Operations

PRESIDENTIAL CLEMENCY BOARD
THE WHITE HOUSE

WASHINGTON
April 7, 1975

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to
gay*

NOTE FOR PHIL BUCHEN

Attached is a memorandum which I am sending to the President, requesting that he establish his policy on four questions which I expect to arise during the clemency hearing before a House Judiciary Subcommittee next Monday. The Subcommittee will treat my statements as Administration policy, and I want to ensure that I will be equipped to accurately reflect what the President feels on these issues.

I will be grateful if you will give some attention to the memorandum today or tomorrow, so that it will be possible to have a clear statement from the President on the four issues--whether by his checking boxes on the memorandum, or in a meeting--by Friday afternoon.

Charles Goodell
CHARLES E. GOODELL

Attachment

*Send copy vanto
to Jack Marsh
as well
P.
(has been
sent)*

PRESIDENTIAL CLEMENCY BOARD
THE WHITE HOUSE

WASHINGTON
April 10, 1975

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES E. GOODELL

SUBJECT: Your Position on Congressional
Proposals to Extend the Clemency Program

is 6 cme
S. 1290

This memorandum presents four questions upon which you should decide what your policy is to be. In my White House staff capacity as Chairman of your Presidential Clemency Board, I have been invited to submit testimony on Monday, April 14, before the Subcommittee on Courts, Civil Liberties, and Administration of Justice of the House Judiciary Committee. I need to have decisions by you on these four questions in order to be able to state Administration policy on your behalf at that hearing.

I will not raise these questions in my testimony, but I am sure that they will arise in the Q & A. At that point, I will state whatever positions you indicate.

- I. Should you support Congressional extension of your clemency program?

BACKGROUND

Senators Javits and Nelson have introduced legislation whose primary purpose is to extend indefinitely the clemency program. This is not unconditional amnesty legislation, but rather an attempt to extend indefinitely the application period of essentially the program which you have established.

DISCUSSION

The Congressional supporters of the Javits-Nelson bill (S. 1290) support your program, are opposed to unconditional amnesty, and believe that the Administration has failed to communicate your offer of clemency to most of those eligible for it. Their stated intention is for Congress, in institutionalizing your program, to share the political responsibility for it, and to help you in explaining to the American people why a clemency program is necessary and appropriate.

The principal argument for taking a position in support of S. 1290 is that it essentially urges Congressional adoption of your program. Congressional passage of the bill will constitute, in the public's eyes, a statement that your clemency program has broadly-based national support, and that it was the right kind of program to create. If there are to be political costs of an extension of the application deadline, those costs would thereafter be shared by Congress.

On the other hand, institutionalization of the clemency program may keep alive an issue which you sought to have closed in a limited period of time. You set an application deadline originally because you did want closure on public discussion of the issue. Indefinite extension of the deadline may prevent that closure, and may prolong the life of clemency as a political issue.

I do not believe that argument to be dispositive, because I believe that clemency will remain a political issue irrespective of the position you take, and that deadline extension will not contribute to the intensity of discussion of that issue. The Clemency Board has ended its public information campaign, and there will be no more television advertisements, barnstorming trips, or press conferences. If applicants continue to come into your program, they will do so quietly, without any public visibility.

It has been my consistent experience, confirmed by the experience of the other Board members, that most of the opposition to your program is based on ignorance and confusion. Whenever we have explained its details, whether General Walt to veterans groups, or Father Hesburgh and I to others, initial hostility has changed at least to tolerance and very often to explicit support. For example, many service organizations are surprised to learn that the program has real benefits for VN veterans. It is my belief, and the Board members concur, that your program -- properly explained -- can be popular, and widely accepted as a fair and reasonable solution to the difficult amnesty/clemency issue.

There is a danger, should S. 1290 come out of committee to the Senate and House floors, that a spate of floor amendments will change a simple extension which you find relatively unobjectionable into a hodge-podge which you will feel compelled to veto.

If you support Congressional extension of the deadline, you will provide a live option for some supporters of unconditional amnesty to coalesce quietly around, in lieu of public debate on the merits of unconditional amnesty. If you oppose Congressional extension of the deadline, there will be substantial debate on the Hill. That debate will probably rise

in decibel level if supporters of unconditional amnesty decide, seeing no live option that they can get passed, to focus debate instead on unconditional amnesty.

On balance, therefore, it seems to me unwise for you to oppose S. 1290, and there is some political benefit to you in supporting it. I am compelled against the conclusion that you should support it, however, by the simple argument that if you favor extension of your program, you can extend it yourself by executive order, and ask the Hill for an appropriation. If you come out in favor of S. 1290, its Congressional supporters and those on their left will make the argument that you are abdicating responsibility by not extending your own program yourself.

OPTIONS

- (a) Support indefinite Congressional extension of your clemency program (S. 1290)
- (b) No position, but you will not veto S. 1290 if Congress assumes the responsibility of enacting it
- (c) No position, and no statement on whether you will sign S. 1290 if Congress enacts it
- (d) Oppose S. 1290

RECOMMENDATION

I recommend option (b)--that you take no position, but intend not to veto S. 1290 if Congress should enact it.

DECISION (a) _____ (b) _____ (c) _____ (d) _____

- II. If your clemency program is extended, should all parts of it be folded into the Presidential Clemency Board?

BACKGROUND

S. 1290 provides that the functions currently under the jurisdiction of the Departments of Justice, Defense, and Transportation be transferred to the Presidential Clemency Board until the end of 1976, when the Board goes out of existence under your executive order. At that point, the whole clemency program is to revert to the Department of Justice.

DISCUSSION

The Congressional supporters of S. 1290 believe that equity and consistency in the treatment of similarly situated applicants will be greatest if all the parts of your clemency program are under the jurisdiction of the Clemency Board, instead of being split between the Board and three Departments. Moreover, the Congressional supporters of the bill argue that the Board projects to potential applicants an image of your clement intent which is more likely to attract applicants to the clemency program than the images projected by the three Departments.

On the other hand, you originally split the jurisdiction of your program four ways because the Justice Department is uniquely qualified to engage in plea bargaining negotiation with draft evaders who have not yet been indicted, and the Defense and Transportation Departments are uniquely qualified to handle through their normal procedures military deserters who have not yet been discharged from their service.

The rationale for that original decision remains, although the history of your clemency program does support the proposition that inequities and inconsistencies in assignment of length of alternate service have been present as a result of the program's being split into four jurisdictions.

OPTIONS

- (a) Support Congressional folding of all clemency decisions into the Presidential Clemency Board, removing jurisdiction from the three Departments
- (b) No position
- (c) Oppose Congressional folding of all clemency decision-making into the Presidential Clemency Board

RECOMMENDATION

I recommend option (c)--that you remain consistent with your original decision to split jurisdiction under the clemency program, and oppose Congressional folding of the whole program into the Board.

DECISION (a) _____ (b) _____ (c) _____

- III. Should draft evader and deserter exiles in foreign countries be permitted to visit this country for thirty days each year?

BACKGROUND

S. 1290 provides that those eligible for your clemency program who choose not to apply for clemency will be permitted to come home to visit, under a non-immigrant visa, for thirty days a year, with immunity from arrest and prosecution during those thirty days.

DISCUSSION

Although most potential applicants under your program have turned out not to be ideologically motivated, there are some who have not accepted your clemency offer either for ideological reasons or because they have stable families and jobs in other countries, and dare not disrupt those stable situations.

The Javits-Nelson bill assumes that there is a significant number of such people who will never come back to this country to live, but who have families here. The bill seeks to permit the reunification of those troubled families by allowing an annual visiting period.

This issue raises again the specter of the exiles -- the most politically sensitive group, on which excessive media has been focused.

OPTIONS

- (a) Support thirty-day visiting period for exiles
- (b) No position
- (c) Oppose thirty-day visiting periods for exiles

RECOMMENDATION

Consistently with your taking no position on the legislation as a whole, I recommend option (b)--no position on the visiting period question. If there is to be an act of mercy to exiles and their families, let Congress assume the responsibility for the immunity from prosecution decision which is essential to that act of mercy.

DECISION (a) _____ (b) _____ (c) _____

- IV. Assuming extension of your clemency program, should its scope be broadened to include offenses other than draft evasion and desertion?

BACKGROUND

Several bills have been introduced in the House to provide unconditional amnesty for a variety of categories of offenses. Most of those bills

cover offenses beyond draft evasion and desertion, such as failure to obey a lawful order and draft counselling. Some of the bills provide for amnesty for any offense if it is shown that the offense was substantially motivated by moral opposition to the Indochina war.

DISCUSSION

In choosing to have your clemency program cover only draft evasion and desertion offenses, you extended an offer of clemency to two categories of people most of whose offenses were not related to moral opposition to the war. The Congressional sponsors of amnesty legislation admit that extension of coverage to different offenses would fold into the clemency program a large number of people who did not act out of conscience. They further argue, however, that your original clemency program has already done that--and they are correct.

One possible task is to enumerate a list of offenses (draft counselling, for example) not included in your clemency program, but committed by many people for reasons of conscience. An alternative tack, designed to restrict clemency to those who acted for moral reasons, is to broaden the jurisdiction of your clemency program to cover any offense, but to stipulate that clemency may only be offered if a clear showing is made that the offense was committed as an act of conscience in opposition to the war. A third tack is to maintain that you have already covered most of those who have acted in conscience, since most of them are evaders and deserters, and that the program's jurisdiction should not be extended to further offenses, however motivated.

Since it has turned out that most of the evaders and deserters before the Board have not committed their offenses because of moral opposition to the war, it seems irrational to me to take that third tack, even though that is most consistent with your original position.

We can justly argue, based on the experience of the Board and of the Defense Department, that we have learned since September that most of those eligible for your clemency program did not act out of moral opposition to the war, and there are a lot of people who did and whose offenses are not covered by the program. A change in your position is justified by your having learned new facts from the experience of your program.

OPTIONS

- (a) Support broadening of scope of clemency program to include several new specified categories of offenses
- (b) Support broadening of scope of clemency program to include any offense, provided that a showing is made in individual cases that the offense was committed as an act of conscience
- (c) No position, but would not veto broadening as in option (b) above
- (d) No position
- (e) Oppose broadening to other offenses

RECOMMENDATION

Consistently with your taking no position on clemency extension as a whole, and consistently with what you have learned about the clemency problem since your program began, I recommend option (c)--no position, but you would not veto broadening to any offense, provided a showing is made that an individual offense was committed as an act of conscience.

DECISION

- (a) _____ (b) _____ (c) _____ (d) _____
- (e) _____