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PRESIDENTIAL CLEMENCY BOARD
THE WHITE HOUSE
WASHINGTON, D.C. 20500

FELONS ON SEVENTH LIST

Tab A (Civilian Pardons) - none

Tab B (Civilian Alternative Service) - 2
906
1564

Tab C (Military Pardons) - 3
2373
3260
8163

Tab D (Military Alternative Service) - 2
2312
3768

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Case No: 306 -C
Age: 22
Present Status: On Probation
Date of Application: 22 Jan 1975

Summary Completed: 28 Apr 1975
Current Sentence: 18 months probation
Court: USDC, S. Fla.
Total Time Served: 7 months probation
Offense: Failure to advise Draft Board of Current Address

Background:

This applicant is Caucasion, married and was born on 27 Jun 52 in Chile. He is the younger of two brothers and his parents were divorced when he was an infant. Applicant entered the United States with his mother on 15 Apr 62 when he was 9 years old. He was raised in Miami, Florida, and left school at 15 while in the 9th grade. He is a permanent resident of the United States. Applicant's Beta I.Q. is 103 and he has worked as a construction worker, salesman and service station manager. He has one previous state conviction for breaking and entering on 26 Apr 71. Applicant stated that prior to his violation of the Selective Service Act, he tried to join the armed forces, but was advised by his local recruiting office that he was ineligible as he was a convicted felon. Thereafter, he believed he was no longer required to inform his draft board of his address.

Circumstances of Offense:

Applicant registered with his draft board at Miami, Florida 1 Oct 70. He moved from Miami on 10 Feb 72. On 1 Aug 72 he failed to report for a physical. He was indicted on 26 Apr 73 and arrested on 24 Jul 73. He was convicted of failure to advise his draft board of his address on 1 Oct 73 and was scheduled to be sentences on 1 Nov 73. He failed to appear on that date and a bench warrant was issued. Applicant was rearrested by the FBI on 2 Jan 74, and on 14 Feb 74 he was sentenced to 18 months probation, to be commenced after completion of a period of incarceration for his failure to appear for setencing. Applicant stated he ran away prior to sentencing because his attorney advised him that he faced up to five years inprisonment. He stated he was indignant about the situation as he was unaware that he was required to keep his draft board advised of his address since he had been told he was ineligible for the armed services. As of 30 Apr 75, applicant has served seven months probation.

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Chronology:

27 Jun 1952	Date of Birth
15 Apr 1962	Entered United States
1969	Left school during 9th grade
1 Oct 1970	Registered for draft
1 Aug 1972	Failed to Report for Physical
26 Apr 1973	Indicted
24 Jul 1973	Arrested
1 Oct 1973	Convicted
1 Nov 1973	Failed to appear for sentencing
2 Jan 1974	Rearrested
14 Feb 1974	Sentenced
26 Nov 1974	Married
22 Jan 1975	PCB Applicantion

Sources:

Presentence Report
Letters to Board

Felon

PRESIDENTIAL CLEMENCY BOARD
Case Summary

Case NO.: 1564 -C
Age: 23
Date of Application: 28 Jan 75
Present Status: Probation

Summary Completed: 15 Apr 75
Current Sentence: 3 yrs probation
Court: USDC, New Jersey
Total Time Served: 1 year, 9 mos. probation
Offense: Failure to Submit to Induction

Background:

The applicant is 23 years old, white and born on October 11, 1951 in Newark, New Jersey. He is one of four children born to his natural parents, one of whom died several days after birth. A cousin also was raised by his natural parents from a very early age. The applicant's family relationships are close despite rather long periods of work related absences by his father. The family environment is stable. After completing the tenth grade, the applicant left school due to lack of interest. He had been employed since that time in several different occupations. The applicant has one serious prior conviction for distribution of marijuana and LSD which occurred in the fall of 1972. He was sentenced in state court on February 16, 1973 to an indeterminate reformatory period. He was released from the state correctional institution on August 1, 1973 and is subject to state parole until September 19, 1977 (telephone conversation with U.S. Probation Officer). Since his release the applicant has been employed in industry (probation report).

Circumstances of Offense:

The applicant registered for the draft on October 15, 1969 and subsequently was classified 1-A. On February 11, 1971, after passing his physical examination, the applicant received orders to report for induction on February 22, 1971. Between February and March of 1971 the applicant requested the Selective Service to reclassify him 1-O as a conscientious objector. The appropriate forms were submitted to the Selective Service three days prior to the applicant's scheduled induction. Although Selective Service records show that the applicant was advised that it would be necessary for him to report for induction even though his request for conscientious objector status was pending (presentence report), the applicant maintains that he had been advised by a draft counselor that he was entitled to a hearing on the question of his conscientious objector status prior to induction (presentence report). The applicant explains that his failure to step forward for induction was based on this advice and his belief that he could not be held responsible because he had not yet received a hearing on his conscientious objector status (presentence report). On March 28, 1973, the applicant was convicted following a jury trial. He was sentenced to 3 years probation

commencing on August 1, 1973.

Chronology:

11 Oct 51	Date of birth
Jun 68	Withdrew from school after tenth grade
15 Oct 69	Registered for draft
28 Jul 70	Classified 1-A
22 Sep 70	Physical examination
11 Feb 71	Mailing of orders to report for induction
Feb 71 to Mar 71	Attempted to be reclassified as conscientious objector
22 Feb 71	Refused to step forward for induction
4 Oct 72	Arrested by state police for possession and distribution of controlled dangerous substances
16 Feb 73	Sentenced for distribution of controlled dangerous substances
28 Mar 73	Convicted for Selective Service violation
25 May 73	Placed on probation for Selective Service violation
1 Aug 73	Released by state authorities; commencement of probation for Selective Service violation
28 Apr 75	Application to PCB

Sources:

Presentence Report
Probation Report
Telephone conversation with Probation Officer

PRESIDENTIAL CLEMENCY BOARD
Case Summary

PCB Attorney:
Telephone:
Summary Completed: 22 Apr 75
Total time Served: None
Discharge Status: Undesirable Discharge in lieu of Court Martial
Offense: AWOL: 20 Apr 71 25 Jun 73 (two years two months five days)
Total Creditable Service: one year 11 months, three days

Case No.: 2373 -M
Branch of Service: Army
Age: 23
Present Status: Civilian
Date of Application: 3 Feb 75

Background

Applicant is an only child, white male, married, and born on 22 Jul 51 in Georgia. His parents are divorced and his mother, who is his natural guardian, gave parental consent to the applicant's enlistment. The applicant left school after the 10th grade. His GT is 87 and his AFQT is 46 (Category III), and his Army MOS was personnel carrier driver. His highest grade was SP4. He received four excellents in both conduct and efficiency before his return from Vietnam. Applicant is presently on civilian parole for (2) two-year convictions (served concurrently: 6 Sep 73, passing a forged instrument, and 13 Sep 74, forgery). The applicant was paroled on 26 Mar 75, and his expected discharge date is 28 Feb 76. The reason given for both crimes is that it was close to Christmas and he needed the money for his family.

Circumstances of Offense

The applicant's AWOL, 20 Apr 71 to 25 Jun 73, resulted in the discharge request. Apparently, the applicant married during his service time and he claims support of his family and being unable to adapt to stateside duty after Vietnam service as the causes of his AWOLs. The applicant was apprehended by civilian authorities on 25 Jun 73.

Vietnam Service

(25 Sep69-5 Oct 70) One year. Served as rifleman and personnel carrier driver and took part in the 11th Campaign.

Chronology

22 Jul 51	Date of birth
6 Dec 68	Entry in Army
25 Sep 69-5 Oct 70	Vietnam Service
20 Apr 71-25 Jun 73	AWOL

Chronology cont'd

12 Sep 73	Request for discharge
24 Sep 73	Discharge
3 Feb 75	PCB Application

Awards and Decorations

Army Commendation
Vietnam Service Medal
Combat Infantry Badge
Republic of Vietnam Campaign Medal
Two overseas bars
Sharpshooter (Rifle)
National Defense Service Medal

Prior Military Offenses

12 Aug 69	SpCM: AWOL, 15 May 69-23 Jul 69. Five months at hard labor, suspended forfeiture of $82/month for five months.
3 Aug 70	NJP: AWOL 11 Jul 70-31 Jul 70. Reduction from SP4 (E-4) to PFC (E-3)

Sources

Army Personnel File
22 Apr 75 Telecon: District Parole Officer

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PRESIDENTIAL CLEMENCY BOARD
Case Summary

PCB Attorney:
Telephone:
Summary Completed: 29 Apr 75
Discharge Status: Undesirable Discharge for reasons of unfitness
Offense: UA (AWOL), 19 Dec 69 - 27 Dec 69 (9 days)
Total Creditable Service: 1 yr., 8 mos.

Case No.: 3260- -M
Branch of Service: Army
Age: 25
Date of Application: 27 Jan 75
Present Status: Civilian

Background:

This black applicant was born on 28 Jul 49 in Illinois and is one of 10 children. Upon graduation from a technical high school in 1967 in Nebraska, the applicant was employed continuously in several different jobs. His GT score is 98 and his AFQT measures 70 (Group II). The applicant's marks in proficiency and conduct were excellent during the first year and one half of his service. On 17 Dec 69, while stationed in Vietnam, he reenlisted for an additional three years. His marks in both proficiency and conduct dropped to unsatisfactory shortly thereafter. The applicant has one conviction for uttering a forged instrument which occurred on 26 Dec 73. He is presently serving a prison term of 18 months to 3 years and will be paroled within the next few weeks. He is single and hopes to find employment upon his release from state prison.

Circumstances of Offense:

The applicant's military difficulties apparently commenced in Dec 69 after he was assigned to a new unit captain while stationed in Vietnam. Prior to this time, the applicant achieved excellent marks in both proficiency and conduct and, as a result, he reenlisted on 17 Dec 69 for an additional three-year period. Shortly thereafter, on 19 Dec 69, the applicant went AWOL for a brief period of nine days. The record does not show whether any form of punishment was administered for this AWOL. On 12 Mar 70 the applicant was cited for standing in an Off Limits Area and an NJP subsequently issued on 15 Mar 70. The record does not show any other violations of military law or regulations by the applicant. In late March 69, in a memorandum recommending that the applicant be barred from further reenlistment, the applicant's immediate supervisor

(captain) stated that the applicant was a constant disciplinary problem and that he demonstrated a negative tendency toward all authority. However, no specific instances or examples are cited and none appear elsewhere in the record. Shortly thereafter, the applicant was told that he was no longer wanted by the military and an undesirable discharge proceeding was instituted. The record is unclear whether an Administrative Discharge Hearing was held or whether the applicant waived any of his rights. Within a matter of days after the applicant was notified, he received an undesirable discharge effective on 1 May 70.

The applicant states that he was mentally harrassed and threatened by his first sergeant and immediate commanding officer for several reasons (telephone conversation with applicant). Firstly, he stated that a tremendous amount of stress and strain was placed on the men in his unit. Although the applicant believes racial prejudice was one of the causes, he also believes all enlisted soldiers within his unit were unduly harrassed. The applicant became somewhat of a spokesman for these men and often presented their grievances. Secondly, the applicant states that at the time of his AWOL he was married under Buddhist law to a Vietnamese girl who was pregnant (telephone conversation). Apparently the applicant requested his commanding officer for permission to marry his Buddhist wife according to U.S. law. After this request was denied, the applicant's Vietnamese relationship became a constant source of resentment between himself and his immediate commanding officer. The applicant states that his commanding officer became openly hostile toward him and threatened to transfer him to another unit further removed from his Buddhist wife and closer to enemy action (telephone conversation with applicant). Shortly thereafter, applicant was informed that his commanding officer desired his discharge. The applicant believes he had no choice but to accept the discharge (telephone conversation). Upon his return to the United States, the applicant states that he entered a hospital in Nebraska for a short period of time for mental exhaustion (telephone conversation). Although he hoped to return to Vietnam and join his Buddhist wife, his financial condition prevented such a reunion.

Vietnam Service:

The applicant served in Vietnam as a stock control and accounting specialist from Aug 69 to Apr 70. He was awarded the Vietnam Service Medal, the Vietnam Campaign Medal, the Republic of Vietnam Campaign Medal and 2 O/S Bars. Applicant participated in the 1969 TET Counteroffensive and another unnamed campaign.

Chronology:

28 Jul 49	Date of birth
Jun 67	Completed high school
22 Aug 68	Enlisted (3 years)
2 Aug 69	Sent to Vietnam
8 Dec 69	Assigned to new Unit Captain
16 Dec 69	Honorable Discharge
17 Dec 69	Reenlisted (3 years)
19 Dec 69 - 27 Dec 69	AWOL (9 days)
15 Mar 70	NJP
20 Mar 70	Bar to reenlistment issued
Apr 70	Return from Vietnam
1 May 70	Discharge executed
26 Dec 73	Civil conviction
27 Jan 75	PCB application

Awards and Decorations:

National Defense Service Medal
Sharpshooter Medal
Vietnam Service Medal
Vietnam Campaign Medal
Republic of Vietnam Campaign Medal
2 O/S Bars

Military Offenses:

15 Mar 70 NJP. Standing in an Off Limits Area on 12 Mar 70. Awarded reduction in grade and partial forfeiture for one month.

Other offenses underlying undesirable discharge: none.

Sources:

Military Personnel File
Telephone conversation with applicant
Telephone conversation with warden

Felon

PRESIDENTIAL CLEMENCY BOARD
CASE SUMMARY

PCB Attorney:
Telephone No.:
Summary Completed: 8 May 75
Total Time Served: No confinement
Discharge Status: Undesirable
Discharge in lieu of Court-Martial
Offenses: AWOL, 23 Jun- 6 Sep 72 (2 mos., 15 days)
11 Sep-22 Sep 72 (11 days)
27 Sep 72-29 Mar 73 (6 mos., 3 days)
Total AWOL: 8 mos., 29 days

Case No.: 8163- -M
Branch of Service: USMC
Age: 20
Present Status: Civilian
Date of Application: 19 Feb 75

Background:

The applicant is caucasian, single, and was born in New Orleans, La. on 24 September 1954. He is the youngest of three children born to his natural parents; his mother is remarried and has a child from her second marriage. Applicant completed vocational high school in 1971. Prior to his enlistment in the Marine Corps on 28 September 1971, he was arrested for simple burglary when he was 17, and was told he wouldn't be prosecuted if he joined the armed forces (letter to the Board from applicant's mother). The applicant's GCT is 99, his AFQT measures 28 (Category IV), and he served in the military as an infantryman. While in the service the applicant's proficiency rating was 4.2 and conduct rating was 4.2. Subsequent to his discharge, the applicant was convicted for the crime of simple burglary and served one year in jail (letter from applicant's mother).

Circumstances of Offense:

In his statement to the military authorities the applicant indicated that he only joined the Marine Corps in order not to be prosecuted for his crime of simple burglary. Prior to his discharge the applicant was AWOL on three occasions: 23 June - 6 September 1972; 11 September - 22 September 1972; and 27 September 1972 - 29 March 1973, which was terminated by surrender. The applicant stated that he went AWOL because he was unable to adjust to military life and he was needed at home to help out his family financially. He said that his mother was ill and was to be put in the hospital and he indicated that while he was AWOL he worked to help pay the family's bills.

The military psychologist who examined him stated that the applicant was immature and that his potential for productivity in the service was nil. The applicant requested a UD in lieu of Court-Martial, and the UD was executed on 25 May 1973.

Vietnam Service: None

Chronology:

24 Sep 54	Date of birth
Sep 71	Arrested for simple burglary
28 Sep 71	Enlisted
23 Jun - 6 Sep 72	AWOL, terminated by apprehension
11 Sep - 22 Sep 72	AWOL, terminated by apprehension
27 Sep 72 - 29 Mar 73	AWOL, terminated by surrender
25 May 73	UD
19 Feb 75	PCB application

Awards and Decorations:

National Defense Service Medal

Prior Military Offenses:

29 Feb 72	NJP, AWOL: 25 Feb 72 (1 day). Awarded partial forfeiture of pay, 14 days restriction, 7 days extra duty.
10 Mar 72	NJP, AWOL: 29 Feb - 10 Mar 72 (3 mos., 11 days), terminated by surrender. Awarded partial forfeiture of pay, 30 days correctional custody.
16 May 72	SCM, AWOL: 21 Mar - 9 Apr 72 (19 days), terminated by apprehension. Awarded CHL for 30 days, partial forfeiture of pay. Confined 15 May - 12 Jun 72 (27 days).

Total Time AWOL for these offenses: 2 months, 1 day

Total Time in confinement for these offenses: 27 days

Sources:

Military Personnel File
PCB Application
Letter from applicant's mother

PRESIDENTIAL CLEMENCY BOARD
CASE SUMMARY

PCB Attorney:
Telephone:
Summary Completed: 23 Apr 75
Current Sentence: Bad Conduct Discharge, confinement at hard labor for 4 months, partial forfeiture, reduction to pay grade E-1
Court: Special Court-Martial, U.S. Naval Station. Norfolk, virginia
Total Time Served: 5 mos. 3 days (1 month & 3 days pre-trial)
Discharge Status: Bad Conduct Discharge
Offense: AWOL 2 Apr 66 - 8 May 66 (36 days)
9 Jun 66 - 22 Jul 66 (43 days)
10 Sep 66 - 8 Oct 66 (28 days)
Total Absence: 3 mos. 17 days
Total Creditable Service: 1 year, eleven mos., 17 days

Case No; 2312 M
Branch of Service: Navy
Age: 28
Present Status: Civilian
Date of application: 20 Jan 75

Background:

This applicant is Caucasion, single and was born in North Carolina on 29 Jan 47. He is the oldest of four children in an intact family. He left school after completing 10½ years due to family financial problems. (Applicant's letter to PCB). He states that he enlisted in the Navy on 3 Feb 64 at the age of 17 to get away from his father, who was a chronic gambler. Applicant stated he believed he could help his family by sending home part of his military pay. (Applicant's letter to PCB). His GCT score is 53. Applicant states that he spent 12 months in Vietnam on the U.S.S. Mount Baker (AE-4). The file does not give the dates of this duty. Applicant is entitled to wear the Armed Forces Expeditionary Medal and the National Defense Service Medal. Applicant has recently completed serving a five year sentence for forgery.

Circumstances of Offense:

On 2 Apr 66, applicant commenced the first of three instant absences which lasted 36 days, 43 days, and 28 days respectively. (Prior to those offenses, applicant had an unauthorized absence which commenced 4 Nov 65 and lasted 29 days.) He testified at the Special Court-Martial that the unauthorized absences were occassioned by the fact his father was absent from the family home. Applicant believed he was needed at home to supplement the family income, which was cut off by his father's absence, and to provide emotional support to his mother, who during this time began working day and night and was on the verge of a nervous breakdown. During these periods applicant worked for a roofing company. In addition, he had $55 of his monthly pay alloted to his mother for her support. (Record of Trial 23-26) Applicant's father returned home during the last of his unauthorized absence, and shortly thereafter, applicant surrendered to civilian authorities. (Record of Trial 26) He was tried and convicted by a Special Court-Martial on 30 Nov 66.

Vietnam Service:

Applicant served in Vietnam for 12 months aboard an ammunition ship, the USS Mount Baker (AE4). (letter to the Board)

Chronology:

29 Jan 47		Date of Birth
Jan 64		Left school during 11th grade
3 Feb 64		Enlisted in Navy
2 Apr 66 -	8 May 66	UA/AWOL (36 days) surrendered
9 Jun 66 -	22 Jul 66	UA/AWOL (43 days) apprehended
10 Sep 66 -	8 Oct 66	UA/AWOL (28 dyys) surrendered
8 Oct 66		Surrendered to Civil Authroties
30 Nov 66		Special Court-Martial
17 May 67		Discharge Executed
20 Jul 75		PCB Application

Awards and Decorations:

Armed Forces Expeditionary Medal
National Defense Service Medal

Prior Military Offenses:

16 Jul 64 NJP, UA(AWOL) 7 Jul 64, 10 Jul 64.
Awarded 20 days extra duties and reduction in grade.

30 Jul 64 NJP, UA(AWOL) 24 Jul 64.
Awarded 30 days restriction and reduction in grade.

11 Sep 64 NJP, UA(AWOL) 5 Sep 64 - 8 Sep 64.
Awarded correctional custody for 7 days.

31 Dec 64 Summary Court-Martial, UA(AWOL) 23 Nov 64.
Awarded restrictions for 60 days

1 Sep 65 NJP, UA(AWOL) 24 Aug 65. Awarded 30 days extra duty.

14 Dec 65 Special Court-Martial, UA(AWOL) 4 Nov 65 - 3 Dec 65, missed movement. Awarded confinement at hard labor for 3 months.

Sentence History:

30 Nov 66 Special Court-Martial: Bad Conduct Discharge, confinement at hard labor for six months, forfeiture of $86 per month for six months, reduction to grade E-1.

24 Jan 67 Convening Authority Action: approved adjudged sentence.

23 Feb 67 Commandant Fifth Naval District approved only so much of the sentence as provides for confinement at hard labor for four months, forfeiture of $59 per month for four months, reduction to pay grade E-1 and Bad Conduct Discharge.

Sources

Military Personnel File
Record of Trial
Applicant's Letter to Board

PRESIDENTIAL CLEMENCY BOARD
Case Summary

PCB Attorney:
Telephone:
Summary Completed: 25 Apr 75
Discharge Status: Undesirable Discharge for unfitness
Offense: Frequent Involvement
Total Creditable Service: 9 mos., 4 days

Case No.: 3768- M
Branch of Service: Army
Age: 29
Present Status: Civilian
Date of Application: 29 Jan 75

Background:

Applicant is Caucasian, born 28 Feb 46 in southern California. He is one of 8 children and completed 9 years of education. His AFQT is 24 (Group IV) and his GT is 64. He was in the Army National Guard from May 62 to Feb 63 and was released with an Honorable Discharge on 7 Feb 63 because of his minority. He was inducted into the Army on 18 May 67. After an approved waiver, due to prior misdemeanor convictions, he volunteered for Airborne Parachute Training on 5 Jun 67. Applicant has recently been released (28 Mar 75) from incarceration for a felony possession of marihuana, reduced from a charge of selling (call to correctional facility). Applicant was single at the time of discharge, and nothing in the file indicates that he now is married.

Circumstances of Offense:

Applicant by letter claims that his fiancee broke their engagement, which put great emotional stress on him and was a definite factor in his going AWOL in that year. He also states that he has a great feeling of inferiority due to being captured in 1968 from being AWOL. He felt people did not respect him or hold him as being equal for his AWOL offenses and he felt alienated and rejected throughout his service. Because of these feelings, which caused suspicions about his mental health, applicant states that he became unhappy with the service and went AWOL. Applicant also complains bitterly about being operated on in the service for the removal of an area of skin on his back which has left a "great scar", which caused "great damage to his self confidence and his outlook on his physical stature." He claims the operation was unnecessary since the skin growth removed was not malignant. (Note: There are extensive medical records of a suspected cancerous growth of extensive area which was finally diagnosed as benign. The records indicate plastic surgery was performed by a skin graft which was well healed.)

Applicant was offered an undesirable discharge for reasons of unfitness because of his multiple AWOL's and accepted this on 10 Apr 70.

Chronology:

28 Feb 46	Date of birth
20 May 62 - 7 Feb 63	California National Guard
18 May 67	Inducted into Army
16 Feb - 8 Apr 70	Confined (predischarge)
10 Apr 70	UD for unfitness
29 Jan 75	PCB application

Vietnam Service: None

Awards and Decorations:

NDSM

Military Offenses:

14 Jul 67 — NJP for AWOL 3 Jul - 12 Jul 67. Punishment: 14 days extra duty.

5 Oct 67 — SpCM for AWOL 13 Aug - 31 Aug 67, 1 Sep - 8 Sep 67, and 14 Sep - 18 Sep 67. Punishment: partial forfeiture, 6 mos. CHL (reduced to 3 mos.), and reduction in grade.

13 Feb 68 — SpCM for AWOL 15 Dec 67 - 30 Jan 68. Punishment: partial forfeiture, CHL for 5 mos. (reduced).

15 Jul 69 — SpCM for AWOL 24 May - 23 Jul 68, 23 Sep - 30 Sep 68, 9 Oct 68 - 27 Jan 69, 10 Feb - 7 Apr 69, 16 Apr - 21 May 69. Punishment: partial forfeiture, reduction in grade, CHL for 6 mos.

1 yr., 9 days total time absent without authority in these instances.

10 mos., 25 days total time in confinement for these offenses.

Sources:

Letter from applicant
Military files

July 29, 1975

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NOTE FOR JAY FRENCH

Attached is a copy of the seventh set of transmittals to the President. You will recall our recent conversation in which I discussed the fact that the Board was considering cases of persons with prior and subsequent convictions. The Board wishes this fact brought to the President's attention explicitly, even though it has been evident from the summaries we have sent in the past. For this reason, we have flagged the appropriate summaries in this transmittal, and discussed the matter in the memo to Mr. Buchen. At your further suggestion, we have removed from this and the next transmittals, all cases in which a person is still incarcerated for a subsequent offense. We will discuss the matter of alternative service with Selective Service in the next few days.

Lawrence M. Baskir

Attachments

kimball/7/29/75

July 29, 1975

MEMORANDUM FOR: PHILIP W. BUCHEN

FROM: LAWRENCE M. BASKIR

SUBJECT: RECOMMENDATIONS FROM THE PRESIDENTIAL CLEMENCY BOARD

Attached is the seventh collection of recommendations from the Presidential Clemency Board, totalling 399 individuals. The recommendations in this transmittal fall into four categories, reflected in the tabs attached to the Chairman's letter to the President. Each of the formal documents is the same as those used in the previous transmittals to the President. No unexecuted discharges are included in this transmittal.

We are attaching for the President's information copies of the original staff summaries prepared for Board action. However, because the number of recommendations in this and future transmittals is becoming larger and the transmittals more frequent, I would suggest that we no longer include copies of the actual summaries in later transmittals. The summaries remain available should you wish to review them at any time.

The Board expressly directed the Chairman to bring to the President's attention the policy it has adopted with respect to persons with criminal convictions in addition to the offenses which qualify them for the Clemency Program. This transmittal does not include recommendations for persons currently incarcerated. The concluding paragraph of the Chairman's letter to the President discusses the matter in more detail.

In accordance with past practice, the lists indicating the period of alternative service recommended for each person should not be released publicly in order to preserve the privacy of the individuals concerned. The copies of the staff summaries have been expurgated to remove any clearly identifiable information such as the applicant's initials and the name of the staff attorney assigned to the case.

Attachments

LMB:lk:tg

July 29, 1975

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

The Presidential Clemency Board, established by Executive Order No. 11803, dated September 16, 1974, to review certain convictions of persons under Section 12 or 6(j) of the Military Selective Service Act and certain discharges issued because of violations of Article 85, 86, or 87 of the Uniform Code of Military Justice, submits the following as its seventh report.

The Board recommends that Executive Clemency be granted to 399 individuals - 204 civilians and 195 military - whose names appear on the attached lists, attested as to correctness by the Executive Secretary of the Board, and that each person named shall receive, as appropriate, either (TAB A) an immediate Pardon; (TAB B) a Pardon conditioned upon a period of alternative service performed in the national interest; (TAB C) an immediate Pardon and a Clemency Discharge; (TAB D) a Pardon and a Clemency Discharge conditioned upon a period of alternative service performed in the national interest. Unlike the last transmittal, there are no recommendations for those whose discharge has not been executed.

As to the 204 civilians, the Board recommends the following:

176 persons - immediate Pardon
16 persons - three months alternative service
9 persons - six months alternative service
2 persons - nine months alternative service
1 person - eleven months alternative service

As to the 195 military persons, the Board recommends the following dispositions:

93 persons - a Pardon and a Clemency Discharge, not conditioned upon any period of alternative service
51 persons - three months alternative service

2 persons - four months alternative service
33 persons - six months alternative service
12 persons - nine months alternative service
1 person - ten months alternative service
3 persons - twelve months alternative service

As you have already noted from your review of the summaries included in earlier transmittals, the circumstances of each applicant vary widely. Some have led blameless lives, other than the offense which led to their application. Others, however, have been in trouble before or after their qualifying offense. The Board considers an individual's background in great detail, and gives heavy weight to convictions for other violations of the law. It also considers persons who may be presently incarcerated for subsequent convictions. The Board decided that it would not reject an applicant solely and automatically because of his having an additional conviction, but any additional conviction would be a seriously aggravating factor in its evaluation of the case. The Board wishes that its policy on the matter be brought to your special attention. For your convenience in this transmittal, we have indicated those summaries of persons who have had other felony convictions in addition to their qualifying offense. For the time being we will not transmit recommendations respecting persons currently incarcerated for outside offenses until we have discussed the question of alternative service for this group with Selective Service.

Sincerely,

Charles E. Goodell
Chairman

Attachments

L.Baskir/l.e.k.7/29/75

July 29, 1975

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kimball/7/29/75

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SUBJECT: RECOMMENDATIONS FROM THE PRESIDENTIAL CLEMENCY BOARD

Attached is the seventh collection of recommendations from the Presidential Clemency Board, totalling 399 individuals. The recommendations in this transmittal fall into four categories, reflected in the tabs attached to the Chairman's letter to the President. Each of the formal documents is the same as those used in the previous transmittals to the President. No unexecuted discharges are included in this transmittal.

We are attaching for the President's information copies of the original staff summaries prepared for Board action. However, because the number of recommendations in this and future transmittals is becoming larger and the transmittals more frequent, I would suggest that we no longer include copies of the actual summaries in later transmittals. The summaries remain available should you wish to review them at any time.

The Board expressly directed the Chairman to bring to the President's attention the policy it has adopted with respect to persons with criminal convictions in addition to the offenses which qualify them for the Clemency Program. This transmittal does not include recommendations for persons currently incarcerated. The concluding paragraph of the Chairman's letter to the President discusses the matter in more detail.

In accordance with past practice, the lists indicating the period of alternative service recommended for each person should not be released publicly in order to preserve the privacy of the individuals concerned. The copies of the staff summaries have been expurgated to remove any clearly identifiable information such as the applicant's initials and the name of the staff attorney assigned to the case.

Attachments

LMB:lk:tg

July 29, 1975

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

The Presidential Clemency Board, established by Executive Order No. 11803, dated September 16, 1974, to review certain convictions of persons under Section 12 or 6(j) of the Military Selective Service Act and certain discharges issued because of violations of Article 85, 86, or 87 of the Uniform Code of Military Justice, submits the following as its seventh report.

The Board recommends that Executive Clemency be granted to 399 individuals - 204 civilians and 195 military - whose names appear on the attached lists, attested as to correctness by the Executive Secretary of the Board, and that each person named shall receive, as appropriate, either (TAB A) an immediate Pardon; (TAB B) a Pardon conditioned upon a period of alternative service performed in the national interest; (TAB C) an immediate Pardon and a Clemency Discharge; (TAB D) a Pardon and a Clemency Discharge conditioned upon a period of alternative service performed in the national interest. Unlike the last transmittal, there are no recommendations for those whose discharge has not been executed.

As to the 204 civilians, the Board recommends the following:

176 persons - immediate Pardon
16 persons - three months alternative service
9 persons - six months alternative service
2 persons - nine months alternative service
1 person - eleven months alternative service

As to the 195 military persons, the Board recommends the following dispositions:

93 persons - a Pardon and a Clemency Discharge, not conditioned upon any period of alternative service
51 persons - three months alternative service

2 persons - four months alternative service
33 persons - six months alternative service
12 persons - nine months alternative service
1 person - ten months alternative service
3 persons - twelve months alternative service

As you have already noted from your review of the summaries included in earlier transmittals, the circumstances of each applicant vary widely. Some have led blameless lives, other than the offense which led to their application. Others, however, have been in trouble before or after their qualifying offense. The Board considers an individual's background in great detail, and gives heavy weight to convictions for other violations of the law. It also considers persons who may be presently incarcerated for subsequent convictions. The Board decided that it would not reject an applicant solely and automatically because of his having an additional conviction, but any additional conviction would be a seriously aggravating factor in its evaluation of the case. The Board wishes that its policy on the matter be brought to your special attention. For your convenience in this transmittal, we have indicated those summaries of persons who have had other felony convictions in addition to their qualifying offense. For the time being we will not transmit recommendations respecting persons currently incarcerated for outside offenses until we have discussed the question of alternative service for this group with Selective Service.

Sincerely,

Charles E. Goodell
Chairman

Attachments

L.Baskir/l.e.k.7/29/75

8/12

Senator Goodell.

Twenty-three "convicted felons" cases have been sent to the President in packets 7-10*, broken down as follows:

Packet 7 -	civilian/alt. service	2	
	military/pardon	3	
	military/alt. service	2	
	total		7
Packet 8 -	military/alt service		4
Packet 9 -	none		-
Packet 10 -	military/pardon	5	
	military/alt ser	7	
	total		12
	total		23

Attached is copy of transmittal memoranda which accompanied 7th packet. or 15 copies

GMH

* 7 flows were handled differently in first 7 packets and we're breaking them

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for Senator Cowell:

re: Board policy concerning felony convictions.

from:

Dennis Adelson
254-3015

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Aug 14, 1975

Dear Senator Goodell,

I appeared before the Full Board yesterday to present a case that had been referred due to the presence of a felony conviction on the part of the applicant. I sincerely appreciate the respectful and sympathetic hearing you gave to my presentation concerning the legality of Agg. Factor #1. I understood quite well that Board policy on this issue had been determined, but as I learned that this final determination had been recent, and that many of the practices of which I complain are of recent generation, I felt it entirely appropriate to present legal arguments to pursuade the Board to reconsider its policy.

I did not have a chance to present some of the more specific legal arguments bearing on the issue that I would have liked to. Out of respect for Board's decision, I agreed to rest my case. I still feel that the issue is ripe for reconsideration, and toward that end, I am submitting to you a copy of a note I developed for the Clemency Law Reporter, and which Mr. Ebel has said may likely appear soon. I hope you will find it enlightening. I regret that it is not as complete as it could be, and deals with ancillary issues to our discussion yesterday. Since it was written, new developments have outdated some of it. Essentially, it demands strict adherence to the spirit and letter of the Executive Order and the Federal Regulations, which once published, are legally binding upon the Board.

If I may be permitted a personal comment, I have found the manner in which the panels handle felony cases, and especially the Board's actions, to be shocking. Time and time again, I have seen members pursue counsel with the intention of eliciting from them the dirty and gory details of each and every crime. I fear that Board members relish their task with a ghoulish delight. Certainly rapes are juicier and more interesting than AWOLs. This has been extended even to compelling

counsel to read police reports, policemen's notebooks, arrest records, indictments, etc. As a lawyer you must understand the evidentiary value of such material to be nil in a court of law, unless introduced under rigorous requirements. These are not present at panel hearings. Instead, the introduction of such material is highly prejudicial to the applicant, and violates the presumption of innocence.

I am afraid that with each venture into the circumstances of the offense, the Board sinks into an insoluble morass of trying to second-guess judges and juries, to re-try the case before a non-judicial panel. If they are to do this, then presumably they should give the applicant the opportunity to appear with counsel and re-present his case in defense.

Further, I must take exception with the Senator's statement that the PCB affords more due process than most government agencies. I wish this were true. While its effort and sincerity are not questioned, the actions of the Board negate its good intentions. Due process means more than a hearing. It means complete notice to the applicant of the relevant data that will be considered in his case, and the potential effect of each piece of data on his chances for clemency. It means procedures which assure the maximum equality of treatment for all applicants. I think the Board falls short of this goal.

I believe the Board has been led astray from its purpose by the smell of blood. Felonies are not relevant to clemency. Indeed, the power of pardon is exercised almost wholly in felony cases. And here, the presidential pardon does not even extend to a person's civilian crines (other than draft evasion). These men are not walking out of jail because they receive clemency. The spirit of the program is to "grant" clemency, not deny clemency. We should not feel compelled to look for cases to deny, in order to make the rest seem more deserving. It is conceivable, though certainly not likely, that every applicant could be deserving of a pardon. We should not arbitrarily single out one aspect of an applicant's life, wholly irrele-

vant to his military or draft record, and deny clemency on that basis. It is unfortunate that convicts are easy to single out. They cannot complain about their fate, and their voices are not heard. It is clear that many of the convictions are directly related to the undesirable discharges these men have received. They are thus doubly punished. The clemency program was devised to cut these men a break, to break the chain of unfortunate events that have occurred in the lives of these young men.

I am submitting this note in the hope that you and Mr. Baskir may find it useful in triggering a discussion of this issue. I would be happy to meet with you to present my views on the matter. I will be with PCB another week. After that date, I will remain available if you wish to contact me, as I am attending George Washington Law School.

As a law student, I have taken my work here with the seriousness and professionalism of a lawyer. I hope that attitude matches the seriousness with which the Board members have approached their work here. But as a lawyer, I have been sensitive to the legal ramifications of the Clemency program. When the Board hired persons such as myself, with my training, they could expect no less. This issue is one which I feel cries out for redress. For my own part, I could not remain silent in the face of what I perceived to be an egregious violation of fairness by the Board.

I thank you for your consideration of this matter and look forward to receiving your response.

Sincerely,

Dennis Adelson

Dennis Adelson
254-3015
(home phone: 979-9173)

cc: Mr. Lawrence Baskir

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Felony Convictions
and the
Denial of Executive Clemency

It is the purpose of this note to examine certain practices of the Presidential Clemency Board and their effect on the consideration of the cases of applicants with felony convictions. The arguments and proposals offered herein are respectfully submitted in the hope that the PCB members and staff will choose to adopt those processes of analysis which will assure fair, equitable and expeditious review of every applicant for executive clemency.

Aggravating Factor #1 was designed to encompass both civil felony convictions and special and general courts-martial for offenses other than an applicant's qualifying offense, regardless of whether these occurred prior or subsequent to that offense(1 CLR-No.1 Appendix,1). Recent applications of this factor by panels of the Board have evidenced interpretations of its standards which both contravene the President's Proclamation of September 16, 1974 and Executive Order 11803, and deny fundamental fairness to those seeking clemency.

Consideration of prior and subsequent felony convictions is entirely irrelevant to those issues which should properly be the subject of the Board's consideration. If the Board is to recommend the granting or denial of clemency, it should consider the nature and severity of the applicant's qualifying offense, and those factors which directly aggravate or mitigate that offense. With regard to military applicants, neither a prior nor a subsequent civil felony conviction relate in any way to the applicant's military service or to any offenses committed during such service. A subsequent conviction is relevant only to the question of alternative service, in that it may

serve as an indication that the commencement of such service may be delayed pending the expiration of the applicant's prison term.

Courts-Martial convictions, of course, do characterize the applicant's military service, and may well relate directly to the qualifying offense. This is clearly so where a series of such proceedings has led to the applicant's disaffection with the military, and his desire to get out. But those convictions not reasonably related either to the qualifying offense, or to a better understanding by the Board of the applicant's reason for committing that qualifying offense, are irrelevant, and should not be considered.

With regard to civilian applicants, it is equally true that prior and subsequent convictions bear no rational connection to the qualifying Selective Service offense. Whether the applicant was a check-forger, a burglar or even a murderer, can in no way alter the fact that he may or may not have acted contrary to the draft laws as a matter of conscience. It is to the qualifying offense alone, that the Board should direct its attention and inquiry.

A conviction appearing in the record of the applicant is properly a part of his "background". It is as much an event in one's life as being born to a large and poor family, or dropping out of school at the age of 16. However, under what may be termed the "bad person" rule, the Board has chosen to consider those applicants who have experienced the criminal process as less deserving of favorable consideration than their brethren who have had no such experience. The assumption is that a convicted felon is a "bad person", that he is innately and irrevocably oriented toward anti-social behavior, that he is somehow a lesser person than the law-abiding citizen. A conviction relegates an applicant to the criminal class, from which there is no "upward

social mobility". The disadvantages of membership in this class have been frequently cited. Among them are the loss of civil and political rights, the exclusion from certain occupations and professions, and the unrelenting prejudice and scorn of "decent" people.

The thrust of the Federal corrections program, and those of enlightened states as well, has been to rehabilitate criminals, to re-orient them to pro-social behavior and make possible their successful integration into law-abiding society. The greatest single obstacle to the realization of this goal is the attitude of the public toward the criminal class. No act or series of acts can serve to restore in our minds a convict's good reputation. We are not satisfied to confine the convict in a prison for a term of years, but rather, we imprison him in that cell of opprobrium which we attach to conviction, and from which we allow him no exit. We violate that principle of respect for human dignity which Louis Nizer, the well-known trial attorney, characterized so succinctly when he said, "I may hate the crime, but never the criminal."

The stigma which the Board chooses to place on conviction is contrary to the policies of the Federal Bureau of Prisons, as they have developed over time, and to those of many state penal systems. As a temporary, advisory body to the Executive, the PCB should not arrogate to itself the power to undo the carefully-conceived work of a sister agency of longer standing and greater permanence. Moreover, as a matter of comity, the PCB should not obstruct the reform efforts of state penal systems. The ephemeral nature of its quasi-judicial power would seem to dictate that, rather than constitute an aberration in our judicial and penal systems, the PCB should attempt to harmonize its unique role with those systems. Guidance is provided by the

Presidential Proclamation of September 16, 1974:

> "In furtherance of our national commitment to justice and mercy these young Americans...should be allowed the opportunity to earn return to their...communities, and their families..."

Present Board practice runs counter to the spirit of this proclamation. Where clemency is denied altogether, the applicant returns to his community uncleansed of the stigma of his undesirable discharge or prison term. Where a conviction is the basis of increased alternative service, the applicant's return to his community is unreasonably delayed.

While it is true that the Board's consideration of the "other convictions" factor is provided for in the rules of procedure governing the PCB(40 Fed. Reg. 12763, s.102.3(b)(1)), the use of that factor must be in harmony with other provisions of those rules, and with overall Presidential intent. Such use can only be justified when the conviction is directly and rationally related to the applicant's qualifying offense, and when knowledge of the crime is necessary to the Board's proper determination of a recommendation.

In addition to considering all felony convictions of applicants for clemency, the Board has made a distinction between felonies in general, and those which are "serious" (1 CLR-No.2 41) or "heinous and repugnant" (1 CLR-No.2 70). A simple felony is considered in aggravation of a qualifying offense, while the others may serve as grounds for denying clemency outright. Notwithstanding their impropriety, the distinction and its consequences are highly unfortunate for several reasons.

It is senseless to speak of a serious felony, for all felonies are serious. The word "felony" is defined as "a grave crime".(Webster's

Seventh New Collegiate Dictionary). It would make more sense to speak of crimes against property or persons, crimes of violence, or victimless crimes. A "heinous" felony is no clearer a description of what the Board has in mind as a ground for denial of clemency. Heinous means "hatefully or shockingly evil".(Webster's, surpa). The danger in such a definition is that what may be shocking to one Board member may not be shocking to other members. It is possible, for example, that one member may feel that a robbery committed with a knife or gun is an odious crime of violence. Another may feel that since robbery is such a common crime, especially in the case of a dishonorably discharged and unemployed veteran, and is less likely to succeed without a weapon, there should be no villainous or malicious intent attributed to the robber.

It is clear that the use of such descriptive terms as serious and heinous imparts a subjective quality to the standards of applying Aggravating Factor #1. Because the Board's procedure is to consider individual cases on a personal and subjective basis, the use of subjective standards compounds the difficulty of decision-making. Rather than subjective application of subjective standards as its means of analysis, the Board should subjectively apply <u>objective</u> standards. To apply a factor comprising serious or heinous felonies is as ambiguous as considering "all bad crimes". This would be tantamount to applying as aggravating factors, "really long AWOLs" or "a lot of absence-related offenses". In the latter two areas, the Board has acted to narrow the scope of inquiry by affording precise standards which can be objectively applied. The number and length of AWOLs constituting an aggravating factor is not determined by separate panels exercising independent preference and whim, but is determined

in a uniform manner by all of the panels. If the Board is to continue to apply Aggravating Factor #1, though I strongly urge that it not do so, then at least it should adopt precise, objective criteria by which to judge felony convictions. This would imply enumeration of those specific crimes, or circumstances, which would suffice to increase the alternative service baseline, or to support a denial of clemency.

It is suggested, however, that even with the adoption of more precise standards, the use of "heinous" felony convictions to deny clemency is contrary to Executive Order 11803 and the Presidential Proclamation, and results in contradictory internal practice by the Board. The Presidential Proclamation of September 16, 1974 states that:

> "I have this date established a Presidential Clemency Board which will review the records of [the following categories of individuals..."(s.3, emphasis added)

Executive Order 11803 of September 16, 1974 requires that:

> "The Board...shall examine the cases of persons who apply for Executive Clemency..." (s.2, emphasis added)

As a matter of practice, the Board has made the denial of clemency nearly automatic in the case of heinous felonies. Thus the only issue which need be considered by a panel is the applicant's criminal conviction. It is no longer necessary to read and consider the summaries of either his civilian record or of his military record. No reference need be made even to his qualifying offense. The Board thus fails to fulfill its mandate to review and examine the records in each case. It looks only to one isolated fact. By logical extension, it becomes unnecessary for an action attorney to prepare a summary of the record. He need only serve the role of clerk of the court which convicted the applicant. The evil of this practice is that it usurps

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the rightful power of the President to grant or deny clemency on the basis of a well-researched, carefully considered recommendation. There is no basis in the Presidential mandate to the Board to withdraw from consideration for clemency a whole class of cases. It is ordered that each case is to be given full and fair consideration. While the Board may prescribe its own rules and regulations, it may not arbitrarily and independently adopt such standards of practice as would amount to the creation of its own clemency program.

The practice of denying clemency is in direct contravention of the PCB's "Jail-Mail" campaign, in which invitations to apply were directed to inmates of penal institutions. Many of these inmates will now find that their applications were in vain, that they were ineligible for clemency from the moment they applied. This practice can only serve to arouse suspicion and ill-will among a large class of applicants, and through them, the public at-large. This is unfortunate because the success of the Clemency Program is so inescapably dependent on public opinion.

It has been suggested by some panel members that the denial of clemency, even where it is admittedly a harsh and unjust result, can be of no consequence to one who already has a felony conviction, for a presidential pardon cannot restore rights which a state has taken away. While it is probably true that state rights cannot be restored merely by action of a presidential pardon, the same is clearly not true with regard to Federal rights, nor does it apply to Federal prisoners. the power of the President to pardon offenses against the United States is unlimited. (Constitution, Article II, s.2; Ex Parte Garland, 71 U.S. 333,380, 1866). Due to the large number of appeals, he can only rely on the PCB to bring to his

attention those cases deserving of a pardon. The Board's automatic refusal to recommend clemency in the cases of certain felons, however, places those applicants beyond the reach of the clement hand of the Executive.

As to those convicted of state offenses, it is irrational to deny clemency merely because it can have no effect on state rights. If the felon should receive a gubernatorial pardon, or a restoration of his civil rights by other means, the presidential pardon may be of great importance in completing the panoply of civil and political rights to which he was formerly entitled. Without such a presidential pardon, he is only half-restored. The PCB cannot assume arbitrarily that the applicant will not at some future time receive such a pardon or restoration. It must proceed on the assumption that a presidential pardon is a benefit to which the applicant is entitled by force of Executive Order. It cannot withhold the recommendation of such a benefit merely because it is of no immediate value to the applicant. Ultimately, each applicant has the right to decide for himself whether he wishes to accept the pardon, and any conditions thereto. The PCB cannot presume to make that decision for him.

A disturbing corollary of the Board's use of convictions is their recent practice of conducting an in-depth inquiry into the circumstances of that conviction. The particular evil of that practice is that the "circumstances" are not limited to the trial record of an apllicant's conviction. Rather, they encompass the charges or indictment against the accused, and statements or claims from any other source.

All of these sources are notoriously unreliable as indicators of the true circumstances of any offense. This is so primarily because

of the operation of the criminal justice system. Few offenses are adjudicated by a full trial. Instead, the guilty plea of the accused is accepted in lieu of trial. This serves to avoid a wasteful and time-consuming proceeding, and also results in "convictions" in those cases where the prosecution's case is too weak to convince a jury of the accused's guilt. The process is known as plea bargaining. It is generally characterized by a variance between the offense charged and the offense to which the accused pleads guilty. This variance occurs in two distinct ways. The accused may be indicted for "armed robbery" and will agree to plead guilty to the lesser offense of "unarmed robbery", in return for a lighter sentence. The state is only too happy to accept this plea, for it assures an easy conviction. The result is that the record of conviction will show that the accused was found guilty of a lesser offense than that for which he was indicted. Thus we have no way of knowing if he did in fact commit a more serious offense.

The other aspect of the process is the common practice of prosecutors to inflate the indictment, to charge the accused with offenses of greater severity than those he may actually have committed. This is frequently done in the hope that the array of serious charges will convince the accused of the futility of attempting to present a successful defense to all of them, and that he will instead plead guilty to the lesser of them. This technique is highly effective in discouraging legitimate defenses, especially where, due to indigence or inability to obtain witnesses, the accused faces a lengthy prison term on several charges.

The plea bargain presents to the PCB a situation in which it is not possible to know with any degree of certainty the circumstances of

the applicant's offense. It may be that he has committed an act more serious than his plea indicates, but it may equally be true that the charges against him were an exaggeration of the offense he actually committed.

When the Board looks behind the record of conviction to the charges or indictments, it places itself in a gray area of uncertainty. When it regards the charge as identical with the offense, it violates our traditional presumption that one is innocent until proven guilty. A charge, or an indictment, is no more than an allegation, a claim by the state that the accused has done something criminal. Until there has been some form of trial of the facts, the circumstances are in doubt. For the Board to look at the indictment in a plea bargained case is equivalent to considering those charges of which an accused was found innocent at trial, as having constituted a part of his actual offense. This denies the finality of the guilty plea, which at law is the same as a finding of guilt as to that offense, and that offense alone. It should properly be as conclusive and binding upon the PCB as it is upon courts of law.

A logical consequence of the Board's practice is that applicants with charges and allegations on their record will be treated more harshly than those without such a record, even though the latter may have committed equally serious offenses. The victim of an over-zealous prosecutor is victimized a second time by the PCB's automatic denial of clemency. His luckier counterpart, who was either charged with a less serious offense or has managed to completely avoid indictment on a serious charge, is twice blessed, for his good record is given more favorable consideration. This result obtains even where both may have committed the same offense.

A further inequity results between prior and subsequent convictions. A prior conviction will invariably appear in an applicant's military record(if a civilian, then his penal record). A subsequent conviction, however, will appear only if, at the time of application for clemency, the applicant is incarcerated. Even then, unless the action attorney is prompted to investigate, the fact of conviction and incarceration will go unnoticed. The applicant who has been released from prison prior to his application for clemency will appear to have no criminal record at all. There is, unfortunately, no way of equalizing the treatment of these cases, short of either abandoning such inquiry or pursuing a full inquiry in the case of every applicant as to whether or not he has ever committed an offense which does not appear in the record. This would necessitate reference to private, non-governmental sources. As one cannot say with certainty where such inquiry would end, the abuses could be substantial.

The rules of procedure of the PCB provide that:

> "The Board takes all steps in its power to protect the privacy of applicants." (40 Fed. Reg. 12766, s.101.13(b)).

While this rule is stated in the context of safeguarding the applicant from the improper dissemination of data of a personal nature, it is reasonable to conclude that the surest way to afford such protection is to avoid the gathering of data which are irrelevant to the disposition of the case. The rules further provide that:

> "The Board will...request from all appropriate government agencies the relevant records and files pertaining to the applicant's case." (40 Fed. Reg. 12765, s.101.7(a)(1), emphasis added).

As to what is relevant, the rules offer the following guidance:

> "In normal circumstances, the relevant records and files for civilian cases are the applicant's files from the Bureau of Prisons...For military cases, they will include the applicant's military records..."(40 Fed. Reg. 12765, s.101.7(b)).

Taken together, these provisions suggest that only relevant material is to be considered by the Board, and only information from appropriate agencies is to be requested. For a civilian, only his Federal prison record is relevant, because it will provide information on his draft offense. For a military case, the military record is relevant. The rules do not suggest that penal records may be considered relevant to a military case, or that non-Federal penal records may be used in a civilian case. Accordingly, such use may be presumed to be without legal authority.

The Board's practice of inquiring into the circumstances of an applicant's other convictions constitutes an invasion of material properly held private. The unreasonableness of the inquiry derives from its lack of relevancy to the case before the PCB. The recommendation of clemency can easily be made independently of any inquiries into an applicant's criminal record. Further, the application for clemency can in no way be considered a waiver of the applicant's right to privacy. He can waive confidentiality only to that relevant material contained in appropriate records. By his act of application, an individual places at issue only those facts and records which the Board's rules of procedure have deemed relevant. Each applicant is thus afforded notice as to the kinds of data which the Board will consider, and he may reasonably expect that it will consider no others. When the Board does consider irrelevant material, it violates its own rules of procedure and vitiates that notice upon which the applicant has relied. This is a denial of fundamental fairness and due process

to the applicant. As such, it is squarely in violation of the Fifth Amendment to the Constitution.

It has been stated by some members of the Board that the consideration of convictions, and the circumstances surrounding them, is necessary to avoid embarrassing the President by recommending that he grant clemency to those convicted of a heinous felony. While the concern of the Board is laudable, it is unnecessary, and results in prejudicial practices. The President has ordered that "the Board shall report...its findings and recommendations...in each case."(Executive Order 11803, September 16, 1974, s.3).The Board cannot shortcut the disposition process by recommending the denial of clemency on the basis of a heinous felony, without having reviewed the applicant's case in its entirety. To do so is to deny the President that careful, case-by-case analysis which he requires to make meaningful and consistent decisions as to clemency. To present the President with a series of cases, some of which have received in-depth consideration, and others of which have received only cursory attention, would constitute an inequity which itself could potentially be a source of embarrassment to both the President and the Board.

Certainly the President is entitled to receive a recommendation based on the record in each case, and is fully capable of choosing, at his discretion, to grant or deny clemency to those convicted of heinous crimes. He is the best judge of what may or may not be embarrassing to him or to his Office. The Board cannot exercise the right to decide which cases will ultimately receive Presidential Clemency, and then withhold from the President's judgment that particular class of cases. That judgment will necessarily turn upon political, as well as moral and conscientious, considerations. These can only be made by

the President himself. The Board may, however, in full accord with its advisory role, review a case and recommend clemency on the basis of the applicant's qualifying offense and the non-criminal portions of his record. A notation may then accompany the report on the case to the President, to the effect that while clemency is recommended, the President is cautioned that the applicant is a convicted felon. So advised, he may exercise or withhold his power of pardon.

While the Board must seek to bring its practice into conformity with its advisory role, the action attorney must also revise his role in the clemency process. As before, he must search the appropriate records and prepare an objective summary of all the relevant facts. He must be sufficiently familiar with the record to clarify the panels' questions and doubts, so as to provide them with a full and fair basis from which to make their recommendation. The action attorney bears a heavy responsibility to maintain his objectivity and to avoid the presentation of material which is either unduly flattering, or unfairly prejudicial, to the applicant.

Moreover, the attorney, being trained in the law, is in a position to advise the panel on questions of law with which it may not be familiar, and which may be necessary to a proper review of the case. It is abundantly clear that attorneys before the Board are not advocates in the sense of advancing private interests in an adversarial setting. Instead, they serve the panels as advisors and counselors whose task it is to assist each panel in reaching a result, albeit subjective, that comports with the accepted procedures of the PCB and assures fairness to the applicant. For this purpose, it is entirely proper for an attorney to offer options and suggest courses of action to the panel which will assure that its recommendation is both procedurally

correct and proper. This is no more than the exercise of the powers and duties of the General Counsel by his subordinate staff of attorneys. The action attorneys must aid the panels in converting a series of highly individualized cases into a body of consistent recommendations, and in organizing case-by-case hearings into an efficient and equitable process of review and disposition.

To conclude, it is herein suggested that the consideration by the Board of applicant's felony convictions is contrary to the intent of the President in establishing a clemency program; that it is further contrary to the goals of the Federal and state penal reform programs; that it violates the Board's own rules of procedure; and, is a violation both of due process to the applicant and of his right to privacy. Accordingly, the use of Aggravating Factor #1 should be discontinued.

It is further suggested that the distinction between felonies and heinous felonies is improvidently drawn. When employed to deny clemency automatically, it usurps Presidential authority and contravenes Executive Order 11803. As an alternative to the discontinuance of the use of Aggravating Factor #1, the "heinous" distinction, and any automatic consequences attaching to it, should be discarded.

If the Board should decide to continue the use of Aggravating Factor #1, then it is suggested that, at a mimimum, it cease its practice of inquiring into those circumstances of the felony which are not a part of the criminal record. The use of allegation and indictment in place of adjudicated fact renders any clemency recommendation subject to the anomalies and vagaries of individual judicial systems. In addition, it can only result in inequitable treatment, dependent entirely on the moment in time at which the conviction occurred.

In addition, it is suggested that the Board should not automatically deny clemency, and therby neglect to review a case fully, merely because it believes the President might be embarrassed by a grant of clemency to the applicant. This is a decision reserved to the President himself, and not to an advisory body.

Finally, it is suggested that the role of the action attorney must adapt to provide that counsel which the Board requires to make fair, procedurally proper, and consistent recommendations.

---Dennis Adelson

9 July 1975