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THE WHITE HOUSE

WASHINGTON

June 12, 1975

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHIL BUCHEN

FROM: JAMES E. CONNOR

SUBJECT: Presidential Clemency Board Decision Memorandum

Your memorandum to the President of June 4 on the above subject has been reviewed and the following was noted:

1. That you indicate your approval or disapproval of the Board's request to grant pardons to those in Category B. Approve.

2. That after deciding this issue you meet with the Presidential Clemency Board for the purpose of encouraging them to complete disposition of their cases by September. Approve.

3. That after meeting with the Presidential Clemency Board you also meet briefly with the Board's staff to encourage them in their tasks. Approve.

Please follow-up with the appropriate action.

cc: Don Rumsfeld

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THE WHITE HOUSE

WASHINGTON

June 11, 1975

MEMORANDUM FOR: JIM CONNOR

FROM: DICK CHENEY

Jim, the attached decision memo on the Clemency Board was given to me by Phil Buchen.

It's already been signed off on by the President.

I don't believe it went through the system. You ought to take it and call Phil Buchen and see what the disposition of it should be.

Don't talk to anybody except Buchen about it, because it is sensitive.

I will assume you have the action on follow up in accordance with Phil's wishes.

Attachment

Note: Jim Connor spoke to Phil Buchen re above 9:15 am 6/12.

THE WHITE HOUSE

WASHINGTON

June 4, 1975

MEMORANDUM FOR: THE PRESIDENT

FROM: PHILIP W. BUCHEN P.W.B.

SUBJECT: Presidential Clemency Board Decision Memorandum

A decision memorandum concerning the Presidential Clemency Board is attached for your consideration.

I recommend that you review the positions of each interested agency, and then meet with Chairman Goodell, Paul O'Neill and me for a brief discussion.

THE WHITE HOUSE

WASHINGTON

June 4, 1975

ACTION

MEMORANDUM FOR: THE PRESIDENT

FROM: PHILIP W. BUCHEN P.W.B.

SUBJECT: Presidential Clemency Board Proposal

I. BACKGROUND

About 18,000 applications to the Presidential Clemency Board are from former servicemen. These military cases fall into two categories:

A. Those in which the servicemen were convicted by military courts-martial for their absentee offenses (5,000 cases). This category received prison terms and punitive discharges.

B. Those in which the servicemen were released administratively from the service for their absentee offenses instead of being tried by courts-martial (13,000 cases). This category of persons received undesirable discharges (the lowest type of administrative discharge).

Under your Proclamation and Executive Order the Board may recommend both a pardon and clemency discharge for those in category A. However, because those in category B were never tried or convicted for their offenses, there is a difference of opinion among the Departments of Defense and Justice, and the Board as to whether these persons should receive pardons (and clemency discharges) or only clemency discharges. Set forth below are the positions of each interested agency.

II. OPTIONS

A. Approve the Presidential Clemency Board's request to recommend pardons for those in category B.

The Presidential Clemency Board unanimously recommends your approval for reasons which are set forth in a memo attached in Tab A. These reasons are summarized below.

1. The clemency discharge standing alone is not a sufficient benefit to these applicants in return for their agreement to perform alternate service.

2. Chairman Goodell believes he raised the issue with you last fall and that at that time you approved pardons for persons in category B.

B. Disapprove the Board's request to recommend pardons for those in category B.

The Department of Justice recommends disapproval for reasons which are set forth in a memo attached in Tab B. These reasons are summarized below.

1. There already exists a possibility that those in category A (who will receive pardons and clemency discharges) will sue for veterans benefits on the theory that a pardon wipes out offenses on a serviceman's military record. Justice believes there is a low probability that such a suit would be successful. However,

extending the pardon to those in category B may increase the likelihood that a suit will be brought because of the large number of persons in that category.

2. While amnesties, under the President's clemency authority, have applied in the past to large numbers of unconvicted persons, pardon warrants have not been given in the past to such a large category of unconvicted persons. To give Presidential pardon warrants to those unconvicted persons in category B would be unprecedented, and such action would cheapen the future use of pardon warrants.

The Department of Defense recommends disapproval for reasons which are set forth in a memo attached in Tab C. These reasons are summarized below.

1. The cases of those in category B are the same as the cases of servicemen in a deserter status who were required to report to Defense under your program. Returnees to Defense have been benefited under the program by exercise of prosecutorial discretion not to court-martial but have not been pardoned. Thus, inequitable treatment would occur if the Board's applicants are pardoned.

III. RECOMMENDATIONS

A. The White House Counsel recommends that you disapprove the Board's request for two reasons.

1. Pardons for those who are unconvicted have traditionally been given when there was at least the possibility of prosecution. Those in category B have been discharged from military service and they cannot be tried for their offenses.

2. To pardon these former servicemen who received administrative discharges (undesirable discharges herein) is to create a strong implication that such discharges were punitive, not administrative, in nature. This implication could be used as precedent for the position that anyone holding an undesirable discharge (for any period of military service during war or in peacetime) should be eligible for clemency through the Pardon Attorney's office. Presently, it is our policy only to consider the cases of those who were convicted (by courts-martial) for their offenses.

B. The White House Counsel and OMB believe that both the Board and its staff (now about 450 persons) need your further encouragement to achieve the goal of processing all cases by September.

RECOMMENDATIONS

1. That you indicate your approval or disapproval of the Board's request to grant pardons to those in category B.

Approve MRF Disapprove_____

2. That after deciding this issue you meet with the Presidential Clemency Board for the purpose of encouraging them to complete disposition of their cases by September.

Approve MRF Disapprove_____

3. That after meeting with the Presidential Clemency Board you also meet briefly with the Board's staff to encourage them in their tasks.

Approve MRF Disapprove_____

Tab A

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

June 2, 1975

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES E. GOODELL
CHARIMAN

SUBJECT: Granting of Pardons to Applicants to the Presidential Clemency Board Having Undesirable Discharges

Introduction

Early in the life of your clemency program, the Presidential Clemency Board, after full consideration and a discussion we had on the issue, decided that it would recommend pardons and Clemency Discharges for former servicemen with Undesirable Discharges applying for clemency to the Presidential Clemency Board.

The Justice Department and the Department of Defense, in written memoranda and in a meeting we had with Phil Buchen last week, have expressed their disagreement with the decision you made last fall.

The legal staff of the Board is in agreement with the Pardon Attorney that there is no question of your legal or constitutional power to grant pardons in these cases.

Summary

The Board is unanimously of the opinion that it is vital to the success of your program and fundamental to carrying out your intent that pardons be the appropriate expression of clemency in these cases. To do otherwise would preclude most applicants to the Board from receiving the only significant remedy you can offer them. It would be seen as a repudiation of the common understanding of your intent and commitment. It would also cause serious discord among the Board members, both new and old, and force a drastic reassessment of Board policy and treatment of these cases.

Background

Of the approximately 120,000 persons potentially eligible for the Board, about 70% were administratively discharged for absence offenses and received Undesirable Discharges. We estimate that 70% or better of the 20,000 applications to the Presidential Clemency Board are Undesirable Discharge cases.

Undesirable Discharges are awarded in two different circumstances. When faced with a serviceman with an offense of unauthorized absence, the military service may proceed to court-martial the offender and convict him of the criminal violation. The sentence may include a Bad Conduct Discharge or a Dishonorable Discharge, and imprisonment up to three years. The service frequently may, however, permit the person to elect an administrative separation, thereby avoiding the costs of trial and possible incarceration. These are commonly described as "Chapter 10" discharges in lieu of court-martial.

In other circumstances, the service may elect to discharge a person for "unfitness" if he has a series of petty infractions, all minor, but evidencing in toto that the individual is a disciplinary problem.

In both cases, the result is an Undesirable Discharge, which is a discharge "under other than honorable conditions". It is considered roughly the equivalent of a Bad Conduct Discharge, which is the usual result when an AWOL is tried by court-martial. In both instances, the Undesirable Discharge is given for an absence offense and the violation of military criminal law, although the punishment is administrative rather than judicial. It is important to remember that an Undesirable Discharge carries with it the same federal disabilities respecting veterans' rights as a Bad Conduct Discharge, the same opprobrium or even worse in the eyes of the general public, and in some states is regarded as evidence of a criminal violation for the purposes of state rights and employment. Although the nature of the reason for the Undesirable Discharge varies, all Board applicants, of course, have received Undesirable Discharges for absence offenses.

Discussion

In his memorandum to the Presidential Clemency Board of April 30, the Pardon Attorney stresses the general policy of his office to recommend pardons only for persons judicially convicted of a criminal offense. Although the giving of pardons for Undesirable Discharges would be a change in his usual policy, the very nature of your program is unique and extraordinary. You consciously and purposefully broke with past precedent, not only of previous Presidents' clemency proclamations, but quite obviously with the normal practice of the Pardon Attorney. Two other more noticeable differences are the fact, first, that the Pardon Attorney's normal three year waiting period after completing

service of sentence is not required to apply for a pardon under the clemency program; and second, the fact that the recommendations come from a specially created Presidential Clemency Board, and not from the institutionalized mechanism of the Pardon Attorney. Giving pardons for Undesirable Discharges is another difference, but not in any sense the only one, nor necessarily the most significant.

There are, of course, other precedents for the Pardon Attorney's recommending and Presidents' granting pardons in the absence of a judicially imposed penalty for a criminal offense. To do so under the clemency program by no means involves creating a new precedent for changing the Pardon Attorney's practice of refusing persons applying outside the program. The clemency program is unique, and its precedents and policies are applicable only during its operation. Afterward, the Pardon Attorney and you are free, legally and morally, to continue past policy or to change it, as you believe appropriate.

The Justice Department and the Department of Defense have cited the difference of treatment between applicants to the Board and those receiving clemency from the Department of Defense phase of the program. However, the difference of treatment presents only surface questions of equity, not real ones. Because the applicant to the Justice Department program, the applicant to the Department of Defense program, and the three kinds of applicants to the Presidential Clemency Board all are in different legal and practical circumstances, it is not necessary and it is not possible to provide that they be in identical positions once they have been granted clemency. For example, the Justice Department applicant is a fugitive from justice, having failed to appear to answer criminal charges placed against him for a Selective Service violation. Yet when he receives clemency and satisfies the condition, his charges are dropped and he has a totally clean record. The Presidential Clemency Board applicant who has been convicted of his Selective Service offense has that conviction remaining on his record even if he receives a Presidential pardon. Similarly, there are essential differences between the Department of Defense applicants and the Board's. To treat these two classes of persons the same would do serious inequity rather than afford equal justice.

The Department of Defense applicant is a fugitive from justice. In the absence of the clemency program, he is in jeopardy of a Special Court-Martial for AWOL, a Bad Conduct Discharge, and imprisonment up to 6 months, or a Dishonorable Discharge, and Imprisonment at hard labor for 3 years. By participating in the program, the fugitive serviceman automatically and unconditionally is released from this penalty, and receives an Undesirable Discharge without imprisonment or a federal criminal conviction. This is a highly beneficial result for the applicant. The opportunity to earn a Clemency Discharge in exchange for participating is inconsequential in comparison with this benefit.

It should be understood that the relief from criminal jeopardy is automatic and that once discharged with an Undesirable Discharge, the Department of Defense applicant is under no effective inducement to complete his alternative service obligation and earn the additional Clemency Discharge. The government, whether through the Department of Defense or the Justice Department, has no realistic means of enforcing the obligation to perform alternative service.*

By contrast, the Presidential Clemency Board applicants have already received all the punishment legally permitted for their offense. Having received their Undesirable Discharges, they are under no additional or continuing jeopardy for their past absence offense. They apply to the Board for a change in their legal and symbolic status.

In return for the performance of alternative service, the Board has assumed that you will offer a pardon, as well as a Clemency Discharge. The Clemency Discharge is of no value whatever. The Department of Defense has officially characterized it as "under other than honorable conditions", the same and the equivalent of an Undesirable Discharge. This designation destroys any advantage for the Clemency Discharge, as compared with the Undesirable Discharge. It is also the belief of many Board members and much of the public that the Clemency Discharge has a worse popular connotation, because it clearly and unequivocally labels the possessor as a "Vietnam deserter".

Because the Clemency Discharge has no practical value, the Board unanimously decided that a remedy with substantial meaning must be offered to the applicant with an Undesirable Discharge in return for his performance of alternative service. To request and receive a period of public service, at low pay and at a serious disruption in an individual's life, in return only for the remedy of clemency in the form of an empty Clemency Discharge, would be unjust and deceptive.

The Board, in its early days, debated at length the form and nature of the clemency it was authorized to recommend. Because the Proclamation does not anywhere explicitly state that a pardon was to be offered, you and I discussed this issue last fall and it is my firm recollection you decided that pardons would be granted in Undesirable Discharge cases. Otherwise, the Presidential Clemency Board program would be virtually meaningless for 70% of our applicants.

---

*The Department of Defense loses all jurisdiction once an individual is discharged, and cannot prosecute his later failure to perform alternative service under the United States Code of Military Justice. The Department of Justice may theoretically prosecute for fraud, but this involves a question of intent which is extraordinarily difficult to prove. In effect, the Department of Defense program is universal, unconditional, and automatic amnesty.

The Board has since proceeded to devise a system whereby it can determine the period of alternative service appropriate in each case as a condition for clemency. It has predicated its work on the understanding that a pardon would be the form of clemency issued in all cases, including Undesirable Discharge cases. If you are now persuaded that only a Clemency Discharge is appropriate in this kind of case, the Board must revise its procedures for about 70% of the applicants. While the issue has not been discussed by the original members in some time, it is fair to predict that such a decision will cause much consternation and disruption in the Board. In my opinion, it is the one remaining issue that could result in mass resignations and protests from the Board. I am not overstating the importance of this issue.

Conclusion

The impact of such a decision on the public should not be underestimated. However justifiably, the public is of the impression that clemency from the Presidential Clemency Board means a pardon. To change this for the vast majority of the 20,000 applicants will be regarded as a change in policy - not as an elaboration or clarification. It will be seen as the President's reneging on a promise they honestly believe he has made, impairing the spirit of reconciliation that moved him to announce the program, and seriously impairing his credibility. There is little question in my mind that a decision not to offer pardons at this date will make a mockery of your program, and persuade much of the general public that it was a failure.

Tab B

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

June 2, 1975

To: Phillip Buchen
Counsel to the President

From: Harold R. Tyler, Jr.
Deputy Attorney General

Subj: Clemency Board's Proposal to Recommend Pardons for Military Deserters who Received Administrative Discharges

The Department opposes the Clemency Board's proposal which would authorize it to recommend pardons for military deserters who received administrative discharges. Two reasons explain this opposition.

First, the President's Proclamation announcing the Clemency Program clearly states that an individual who receives a clemency discharge shall not thereby acquire rights to benefits administered by the Veterans Administration. If deserters who received an undesirable discharge received both a pardon and a clemency discharge, they might acquire an arguable legal claim to VA benefits. The Proclamation clearly did not intend this result.

Second, as the attached memorandum of the Pardon Attorney indicates, granting pardons to those who received only administrative discharges would be unprecedented and might cheapen the use of the pardon power.

Attachment

United States Department of Justice
Office of the Pardon Attorney
Washington, D.C. 20530

June 4, 1975

MEMORANDUM FOR

Philip W. Buchen
Counsel to the President

Re: Presidential Pardoning Power as it Relates to Undesirable Discharges

I would like to take this opportunity to express my concern and opposition to the proposal which I understand the Presidential Clemency Board is making to recommend pardons for those recipients of undesirable discharges who have not been convicted of an offense but who come within the jurisdiction of the Clemency Board. It is my understanding that approximately 13,000 such persons have applied to the Board for relief. I am opposed to the granting of pardons to them because such use of the pardon power (1) would tend to cheapen or diminish the value and importance of a pardon, (2) would be of limited value to persons with undesirable discharges since they do not lose any civil rights, and (3) would establish a precedent which could reasonably be expected to result in a flood of pardon applications from persons with undesirable discharges who are not within the jurisdiction of the Clemency Board.

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Although I am not aware of any instance in the past of a pardon having been granted to a person solely on the basis of an undesirable discharge, I have no quarrel with the conclusion that the President may pardon a person who has received an undesirable discharge for the offense which constituted the basis for the discharge. On the other hand, it is quite clear that the pardon power in general has been limited to cases in which a conviction has been obtained. The rules governing applications for Executive clemency (28 CFR 1.1 - 1.9) contemplate that applications for pardon will not be entertained in the absence of a conviction (See sec. 1.3). These rules, promulgated by the Attorney General with the approval of the President, reflect Presidential policy in this area. Moreover, the two wartime "amnesty" proclamations of President Truman in 1945 and 1952, granting pardons to certain honorably discharged veterans of World War II and the Korean War who had committed Federal offenses prior to their entry into service, pardoned only offenses which had resulted in convictions. It should be noted also that current practice excludes misdemeanor convictions from Presidential consideration in the absence of the showing of a compelling need for pardon.

It seems to me that the rules and practice reflect a Presidential judgment that the use of the pardon power should be strictly limited to cases of felony convictions and should not be used, as indeed it may be, to forgive any offense whatsoever against the United States. The exceptions, it seems to me, tend merely to emphasize the general policy. Over the years since 1900 there have been a number of cases in which the full Presidential pardoning power has been exercised in the absence of conviction and the Nixon pardon is merely the most recent. As to the individual cases falling within this category it, perhaps, would be fair to suggest that the uniqueness of the particular case was the factor most influential to the decision to grant pardon. However, in the veterans forfeiture cases, for which present rules permit pardon applications in the absence of conviction, the primary factor is that a Presidential pardon will automatically entitle the recipient to benefits to which he otherwise would not be entitled. It should be noted that in these cases the veterans concerned had received honorable discharges but their benefits subsequently had been forfeited by administrative action of the Veterans Administration.

I doubt that either of the above factors would be applicable to the undesirably discharged veteran falling within the Clemency Board's jurisdiction. Clearly there is nothing unique about his situation. Furthermore, the Presidential pardon would not automatically entitle him to benefits to which he would not otherwise be entitled. Indeed, the pardon would not even be a necessary first step to enable military authorities to review and upgrade his discharge.

In the case of persons with undesirable discharges a pardon would not serve the primary purpose for which it is generally granted and most frequently needed and thus would be of limited value to such persons. The primary purpose of the pardon is to assist the recipient in obtaining a restoration of those civil rights which he may have forfeited as a consequence of a conviction. As far as I am aware, however, no state disqualifies a person from voting or exercising other civil rights on the basis of an undesirable discharge. The disqualifying factor is generally a conviction of felony grade.

The precedent of awarding pardons to the undesirably discharged veteran would appear to pose a serious practical problem for the President in the administration of his pardon power. First, the

unconvicted military absentees who surrendered to military authorities under the terms of the Presidential clemency program have received undesirable discharges. Those who have received such discharges would not be recommended for Presidential pardons since they are not within the jurisdiction of the Clemency Board. However, from an equitable point of view they would seem as deserving of a Presidential pardon as those within the jurisdiction of the Board and considerable pressure could be anticipated to grant them a similar measure of clemency. Since neither the Justice Department nor the Board would have jurisdiction to consider their cases, they could not be considered unless the President should broaden the rules governing petitions for Executive clemency to accomodate them. Moreover, the veterans of other wars with undesirable discharges undoubtedly -- and with good reason -- would feel discriminated against if they did not have similar recourse.

The foregoing considerations lead me to believe that any value to the President in terms of advancing his quest for national

reconciliation would be more than offset by the adverse factors and that the clemency program as a whole might be damaged, rather than advanced.

Lawrence M. Traylor

Lawrence M. Traylor
Pardon Attorney

Tab C

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

3 June 1975

MEMORANDUM FOR Honorable Philip W. Buchen
Counsel to the President

SUBJECT: Presidential Clemency Program

This is in response to your request for the Department's position on the issues raised at the May 29 meeting with Mr. Goodell on the President's Clemency Program.

Mr. Goodell believes that the President's Program provides no practical relief to applicants to the Clemency Board who were administratively separated from the service with an undesirable discharge. As currently contemplated, these persons will receive a Clemency Discharge (CD) which Mr. Goodell feels does not make any practical or tangible change in the life of the recipient. He wants authority to recommend the granting of Presidential Pardons to this class of applicants in the same manner as other applicants to the Clemency Board who were discharged by reason of court-martial or Federal Court conviction. Alternately, it has been suggested that in lieu of a pardon, the same effect could be achieved by an enhancement of the CD, i.e., recipients thereof, although not entitled to VA benefits, will be deemed to have been separated under honorable conditions.

The Department's position is as follows:

1. The Department opposes the proposal to grant pardons to applicants with Undesirable administrative discharges because: (a) it would create a significant dissimilarity in treatment for 5,500 persons already processed by DoD, and (b) would establish an extremely undesirable precedent which could undermine the efficacy of the military administrative separation system.

2. The Department opposes a suggestion to upgrade the Clemency Discharge (CD) to mean discharge "under honorable conditions". The Department does not agree that a CD has no tangible effect on a person's life; rather that it has the same effect as a Presidential Pardon.

The DoD is opposed to the proposal concerning pardons not only because it would create a significant dissimilarity in treatment, but also because the Pardon power ordinarily relates to offenses resulting in convictions in a court of law. Presidential Pardons have never been granted in conjunction with the hundreds of thousands of "for cause" administrative separations from the Armed Forces. To do so now would create an extremely undesirable administrative precedent, and would spawn a new flood of pardon requests to the White House.

The alternative proposal to upgrade the CD to mean separation "under honorable conditions", or separation "under other than dishonorable conditions" would seem to require a Proclamation change. Presently, the Presidential Proclamation declares that a CD does not bestow entitlement to VA benefits. There is no other description of the CD except a general reference that it serves as evidence of an earned return into American society. To give the practical and tangible effect desired by Mr. Goodell, the President would have to proclaim that a CD is equated to at least a General Discharge. This means that post-discharge conduct, i.e., performance of alternate service, would be considered as justification for recharacterization of previous unsatisfactory military service. This anomaly is unacceptable to the Department.

We believe a CD is no less tangible than a Presidential Pardon. The only difference is that the general public is not familiar with a CD, but is fully aware of, and therefore automatically attaches greater significance, to a Presidential Pardon. Accordingly, Mr. Goodell's concern may well be allayed by further public representations by the President concerning the intent of his Program, and by a change in the format of the certificate itself to indicate that the individual has been absolved of culpability in respect to his military service.

Martin R. Hoffmann