The original documents are located in Box 6, folder "Clemency Program - Requests for White House Guidance (3)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE
WASHINGTON

Mr. Buchen

I suggest that you forward these comments to Chairman Goodell. They have been cleared with Marty Hoffman at Defense.

Jay

THE WHITE HOUSE

WASHINGTON

February 12, 1975

MEMORANDUM FOR: CHAIRMAN GOODELL

FROM: PHILIP BUCHEN

After a careful review of the Presidential Clemency Board's Memorandum of February 6, 1975, I would like to offer the following comments and alternate suggestions.

General Comments

The effect of these recommendations is to

1. significantly alter and expand the scope of the program to provide for honorable discharges,

2. encourage those who favor unconditional amnesty, veterans benefits, honorable discharges, and additional extensions of the application deadline,

3. make the President appear as if he is enticing applicants for the earned return program.

Specific Comments and Suggestions

The first recommendation could be ~~given effect~~ accomplished to a degree without enlarging the scope of the program by allowing recommendations for honorable discharges. This could be accomplished by the President forwarding a request to the Secretary of Defense that further consideration and review be given to these five cases in light of the Board's comments. The Board could convey its comments by a separate letter which could accompany recommendations for pardon and a Clemency Discharge. By this course, the earned reentry program would not be amended and the comments of the Board would be given thorough review and consideration.

The second recommendation involves the consideration of several matters.

My first concern is whether any review of the Clemency Discharge is proper unless it has been permitted by the President. Specifically, is the Clemency Discharge such an integral part of the President's act of clemency that no extra presidential review is proper unless the President has permitted it? Although there is no clear answer to this issue, it is my opinion that the President could avoid any invasion of his constitutional authority by either directing automatic review (as the Board suggests) or permitting review upon application by the serviceman.

Second, automatic review of all of the Board's cases by the military department review boards is undesirable because these boards already have a backlog of cases and such a directive would only cause greater congestion. Also, automatic review would create a significant inequity within the earned reentry program because no automatic review is contemplated for those servicemen who were processed by the Department of Defense.

Third, regardless of whether automatic review is directed or merely permitted, it is my understanding that a pardon does not expunge the record of a serviceman's offenses. Therefore the military department review boards are not precluded from considering the full record. In your memorandum, you indicated that the review boards were precluded from considering these offenses.

Because of these considerations, I suggest an alternate approach to automatic review.

First, I propose that the President notify the Secretary of Defense that the issuance of a Clemency Discharge under the earned reentry program shall not preclude review by the military department records review boards.

Second, I recommend that the appropriate military department should inform each serviceman at the time he is issued a Clemency Discharge of his right to apply for further review to these boards. Each serviceman should be provided forms to facilitate such application.

Finally, I recommend that we meet with Jack Marsh as soon as possible to discuss these matters.

February 12, 1975

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Finally, I recommend that we meet with Jack Marsh as soon as possible to discuss these matters.

French, Jay
Leo pkg.

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

13 FEB 1975

MEMORANDUM FOR MR. PHILIP BUCHEN
COUNSEL TO THE PRESIDENT

THROUGH: MR. THOMAS LATIMER

THROUGH: MAJOR GENERAL RICHARD LAWSON
MILITARY ASSISTANT TO THE PRESIDENT

SUBJECT: Senator Charles E. Goodell's memorandum of February 6, 1975, concerning "Action on Presidential Clemency Board Recommendation to grant Upgraded Discharges for Five Special Clemency Cases"

As noted in Senator Goodell's memorandum, the Presidential Clemency Board has recommended to the President that he upgrade discharges in five cases considered by the Board to be exceptionally meritorious and therefore deserving of better than a Clemency Discharge.

Since this recommendation serves to greatly expand the scope of the Clemency Program and is not contemplated in the Proclamation establishing the Board, the Department feels it would be unwise for the President to act on this recommendation. Rather, if the President decides to grant clemency in accordance with the established Clemency Program and then desires further action regarding these five cases, it is recommended that he refer them to this Department for further referral to the appropriate Service Discharge Review or Correction Boards.

It is the Department's view that review by Service Boards is not limited by the recent holding in Schick v. Reed, ____ U.S. ____, 43 U.S.L.W. 4083, (December 23, 1974). However, if there is any doubt, then the President should specifically indicate in his action on these cases that his action does not preclude the further review by the Service Boards.

Senator Goodell also raises the subject of automatic review of all cases where clemency has been granted. This simply is not necessary because grant of Presidential Clemency under the extant program does not and should not automatically indicate a need for further correction. It should be sufficient that the Service Boards will hear the case of anyone who applies, especially when the Services will provide prospective applicants the appropriate application forms upon issuance of the Clemency Discharge.

In this regard, Senator Goodell refers to the necessity of communicating to 110,000 former members about the benefits of the Clemency Program. Tab A reflects the problems associated with such a communication. However, the Department did agree to notify former members with BCD's/DD's as a result of court-martial conviction. That task, which included examination of over 30,000 service records and the mailing of over 22,000 letters will be completed by close of business today. To locate those with other than court-martial convictions would require an examination of over 11.7 million records and a cost in excess of 2.93 million dollars. Therefore, the Department strongly opposes any future participation in individual notification of potential applicants for clemency.

Martin R. Hoffmann

Encl

* Sec Def discussed this with the President about two weeks ago —

THE WHITE HOUSE

WASHINGTON

February 27, 1975

MEMORANDUM FOR: Philip W. Buchen

FROM: Jay T. French

SUBJECT: Clemency Board Proposals

You will recall that the Board proposed three actions:

(a) That the Board be permitted to recommend the issuance of honorable discharges

(b) That the President indicated that the legal effect of his pardon (in military cases) is to preclude consideration by Military Department review boards of the actions which underly the convictions

(c) A second extension for two months

Also, the President expressed (orally to Jack Marsh) his interest in discussing whether the Board should conclude its consideration of cases as soon as possible in order to avoid the need for congressional appropriations.

A meeting was held with the President on February 25, 1975, to discuss these points. Paul O'Neill, Jack Marsh and I were present.

Chairman Goodell submitted Tab A and Jack Marsh and Counsel's Office submitted the materials in Tab B.

The several papers which were presented to the President concerning funding, are attached in Tab C.

The President made no decisions at the meeting. However, I understand he is leaning toward an extension for the Board alone.

The President lay to rest one point: funding of the Board. He indicated to Chairman Goodell that he did not want to go to the Hill for a congressional authorization and appropriation for the Board. OMB, in light of that statement is preparing a plan by which the Board will be able to conclude consideration of cases by September 15, 1975.

Enclosures

Tab A

A

PRESIDENTIAL CLEMENCY BOARD
THE WHITE HOUSE

WASHINGTON
February 24, 1975

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES E. GOODELL

SUBJECT: Three Decisions on Your Clemency Program

This memorandum forwards, on behalf of a unanimous Presidential Clemency Board, three recommendations for decision by you. Each issue has been discussed with Jack Marsh, Martin Hoffmann, and representatives of the Justice Department and of the White House Counsel's office in a meeting last Thursday afternoon. The questions for decision, your options, and the positions of the parties involved are presented below.

I. Should you issue military discharges "under honorable conditions," upon recommendation by the Presidential Clemency Board, to ex-servicemen whom the Board believes to be particularly meritorious?

BACKGROUND

The Clemency Board has, in its review of applications before it, discovered that some of the veterans seeking upgrading of bad discharges had meritorious Vietnam combat experience. The Board recommends that you order General Discharges for these cases.

Since your Counsel believes that such an order requires amendment of the Executive Order which created the Board, the Board further recommends that you direct that the Executive Order be amended to specify that the Board may, in exceptional cases, recommend that you order a discharge "under honorable conditions."

DISCUSSION

Jack Marsh, Martin Hoffmann, and I agree that you have a political decision to make: If you choose to follow the Clemency Board's recommendation, should you openly and publicly grant better than

Clemency Discharges to particularly meritorious cases, or should the Department of Defense upgrade these discharges quietly through its normal processes?

In the Thursday meeting, the Defense Department--while maintaining its official opposition to the Board's recommendation on the grounds that such upgrading would be inconsistent with the Department's treatment of clemency applicants--stated that your upgrading of these discharges would cause no problem of precedent. The Department has itself granted 33 such upgradings in cases under its jurisdiction, by removing those particularly meritorious cases from normal clemency processing at Fort Benjamin Harrison and sending them to other military bases for upgraded discharge processing.

The Board believes that you should order the recommended upgradings, and do so publicly, because of the merits of the cases themselves and because of the political impact which will follow. Each of the five veterans whose cases we have commended to you have served gallantly in combat in Vietnam, and have clearly extenuating circumstances for their AWOL. Taken as a whole, their records support the grant of an upgraded discharge.

General Walt and Jim Maye have discussed these cases with veterans and with representatives of the various veterans groups. They have received an unofficial, but unanimous, impression of support from the veterans' groups leaders, although those leaders feel that they cannot publicly reverse their opposition to the clemency program as a whole.

The Vietnam veterans on the Board felt so strongly about these cases that they asked to write a separate memorandum to you. That memorandum, which eloquently expresses their views, is attached.

The most important reason for you to make this decision, and to do so openly, is because equity clearly suggests that these particular cases, and exceptional ones like them which the Board may discover in the future, deserve veterans benefits and public recognition of their service to the country. Your emphasizing that that is your feeling will increase the growing public awareness that there is much more to your clemency program than people returning from Canada--indeed, that the program has critical value for Vietnam veterans. Veterans around the country, as they begin to understand the Presidential Clemency Board's part of the

program have been increasingly sympathetic to it. Your public announcement will further increase public understanding of the program.

OPTIONS

(a) Issue discharges "under honorable conditions" for the five cases recommended by the Board, amend the Executive Order in order to explicitly grant the Board authority to make such recommendations in the future, and announce to the public your action in the five cases.

(b) Direct the Department of Defense to issue quietly the five upgraded discharges, do not amend the Executive Order, and make no public announcement.

(c) Do not upgrade these five discharges to "under honorable conditions."

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

II. Should you direct the Department of Defense that its discharge review boards not consider pardoned AWOL offenses as part of a serviceman's record if he has received clemency from you upon recommendation by the Presidential Clemency Board?

BACKGROUND

Each military department has a discharge review board to which all veterans have the right to apply for review and upgrading of their discharges. A veteran retains this right after he has received clemency under your clemency program upon recommendation of the Board--he may still apply to have his Clemency Discharge upgraded to a General or an Honorable Discharge. The question is whether, when he applies to the military review board, that board should treat the offense which you have pardoned as if the offense were not in the file at all.

DISCUSSION

The Clemency Board feels, as a matter of equity, that the offense pardoned should no longer be considered by the military discharge review board. The Defense Department and the Counsel's office oppose the Board's recommendation. At Thursday's meeting, the Justice Department representative indicated that as a matter of law that probably has to be done even absent any action by you. We feel, therefore, that what we are asking you to do is to make explicit, in the perception of the military review boards and of potential clemency applicants, what the law already probably requires if you are silent on the question.

You may, of course, decide that your pardon should provide that the pardoned offense explicitly should be considered in the military review process. We feel that it is that position--and not the Board's recommendation--which would be a significant change in the program as you created it. We note, moreover, that you have already granted 28 irrevocable unconditional pardons.

There is certainly no danger of this procedure opening the floodgates and resulting in most Clemency Discharges being upgraded further, since the military itself will implement the discharge review process, and is by no means disposed to grant upgrades in large numbers.

If military review boards do not give full effect to your pardon, there inevitably will be lawsuits on this issue during 1976. We believe it preferable to avoid judicial consideration of this issue, much less adverse judicial decision, next year.

OPTIONS

(a) Direct that military discharge review boards not consider AWOL offenses pardoned under your clemency program as part of the serviceman's record.

(b) Remain silent on the issue, leaving discretion to the military review boards to consider such offenses part of the record.

(c) Require that the military review boards consider such pardoned offenses as part of the record.

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

III. Should you extend the Presidential Clemency Board's application deadline for two months?

BACKGROUND

Since the Board began its information program, its applications have risen from 850 in early January to 8,000 by mid-February. The surge in applications has continued unabated after January 31, at a constant rate of nearly 1,500 per week. Board members traveling the country, the reaction of the media, and the letters we receive all make it unquestionably clear that the public is just now learning that exiled draft evaders and deserters are not the only people eligible for clemency. Until this week, many veterans' groups did not even realize that Vietnam veterans with later AWOL discharges could apply.

The Board recommends that you extend its phase of the program an additional two months, and the Departments of Justice and Defense recommend that their phases of the program not be extended.

DISCUSSION

Pursuant to your order, the Department of Defense mailed over 20,000 notices to eligible veterans about a week ago. Many responses from this notice will not come in until after the March 1 deadline. Defense has indicated that they cannot reach the other 90,000 eligible veterans by mail, and we therefore need increased time to get the word to them through local media and grass-roots veterans counseling groups.

Should you approve the Board's recommendation on upgraded discharges in exceptionally meritorious cases, you should allow time for the media to make this decision known to potential applicants before the program ends. Moreover, the several hundred grass-roots veterans' counseling groups have indicated that they will help spread the word on your decision if they have the time. Veterans with meritorious Vietnam service should have the opportunity to respond to the decision you make.

Terminating the program and announcing the upgradings thereafter, without giving Vietnam veterans a chance to accept your offer of clemency, will be subject to serious criticism from the public and from veterans groups.

Whatever your decision on deadline extension, it should be announced before March 1.

OPTIONS

(a) Extend the application deadline for two months for the Clemency Board only.

(b) Extend the application deadline for all phases of the program.

(c) Announce that there will be no extension beyond March 1, 1975.

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

Attachment

A

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

February 6, 1975

MEMORANDUM FOR THE PRESIDENT

FROM: LEWIS W. WALT
JAMES DOUGOVITO
JAMES MAYE

In reference to those cases of Vietnam veterans, being recommended by the Presidential Clemency Board for upgrading to a general discharge with veterans' benefits, we, as active participants of the Vietnam War and as Members of the Presidential Clemency Board, would like to express our views.

We are in favor of the upgrading for the following reasons:

(1) These men served our Country well in Vietnam, some of them distinguished themselves on the battlefield and suffered wounds in combat.

(2) Upon their return home, they were confronted by an anti-war - anti-military atmosphere in which they were not recognized as heros but as individuals who had committed crimes. Their service to our Country was not appreciated.

(3) It is always difficult for a man to adjust when he returns home from war. The general attitude of our American public made this adjustment even more difficult for these young Americans, and peer pressure forced them to do things which under normal conditions they would not have done.

We earnestly believe that an act of compassion and an expression of appreciation for their combat service in Vietnam is justified.

Mr. President, it may be helpful to you to know that each of us has spoken of these cases at various meetings with veterans and press groups around the Country. We outlined the cases and stated our recommendations. In every case, the response was very favorable. In view of the aforementioned facts, we recommend, in these specific cases, a Presidential Pardon, an upgrading to a general discharge, and the granting of appropriate veterans' benefits.

Lewis W. Walt
James P. Dougovito
James D. Maye

Tab B

B

THE WHITE HOUSE

WASHINGTON

February 24, 1975

MEMORANDUM FOR: JOHN O. MARSH, JR.

FROM: JAY T. FRENCH

SUBJECT: Recommendations of Presidential Clemency Board

ISSUE A - Recommendation that the Board be permitted to recommend the issuance of honorable discharges in meritorious cases.

1. (a) The problem that the Board wants to have expanded authority to correct is a larger and different problem than that problem which the Board and the program were designed to correct.

(b) Each Military Department has existing civilian and military records review boards which are capable of rectifying any wrongs in these cases.

(c) This action is a significant departure from the program.

(d) Counsel takes no position on the merits but points out that the Secretary of the Army does not believe these cases are meritorious.

2. (a) White House Counsel and Justice believe that the Executive Order establishing the Clemency Board would have to be amended. See Section 3 of the Executive Order.

(b) Justice points out that such authority was considered and rejected by those who drafted the original documents of the program.

3. (a) The Board wants to publicize the fact of this expanded authority, if you concur. We believe this is unwise politically.

(b) Also, these five (5) cases were selected from the first 60 cases. It is estimated, by the Board, that it may deal with 6,000 military cases; therefore 500 cases would ultimately be given honorable discharges. This is a significant broadening of the Board's authority.

(c) If honorable discharges are issued under the program, the recipients will be able to obtain veterans benefits. Publication of this fact will be misunderstood by the public. Also, it will appear that you are enticing applicants.

(d) Another extension may be required merely to allow time for the board to inform servicemen of this new authority.

ISSUE B - Extension of the Clemency Board's Application Date

1. The first extension really aided the Clemency Board because there was no great increase in Defense's or Justice's applications after the first extension. Another extension, however, is simply not necessary for the Board. It began its information campaign in mid January and we believe by March 1st that ample time has been allowed. - Information v. persuasion -

2. Existing clemency avenues remain available at the Department of Justice after the program concludes.

ISSUE C - What legal effect should be given to the pardon for the purpose of further review of cases by the Defense Department review boards.

1. (a) The White House Counsel agrees with the Clemency Board that further review of military cases, which have been processed by the Board, should be permitted by existing review boards at Defense.

(b) However, these review boards should consider the entire record of the serviceman. If the pardon "wipes out" the offenses of unauthorized absence, then the boards at Defense will have to upgrade the Clemency Discharge (which you have just given) to an honorable discharge which will allow veterans benefits in about 30% of the cases.

(c) The Board's request is that you permit "boot strapping" by which 30% of those servicemen who apply to the Board use your pardon to get the Clemency Discharge changed to an honorable one. This defeats the purpose of your program.

B

February 24, 1975

MEETING WITH CHARLES E. GOODELL
Monday, February 24, 1975
3:30 p.m. (30 minutes)
The Oval Office

I. PURPOSE

A. To discuss the following recommendations of the Clemency Board:

(a) That you allow the Board to recommend honorable discharges in meritorious cases.

(b) That you extend the application deadline for the Board only.

(c) That you give your pardon (in military cases only) an effect which will wipe out these absence offenses on the record; therefore, upon further review of these cases by Defense review boards, these cases will have to be given honorable discharges.

B. To discuss whether the Board should finish consideration of cases by the end of FY '75 (avoiding congressional appropriations). The Board could finish by this time if it alters its procedure for considering cases and if it is detailed about 35 more staff.

II. PARTICIPANTS & PRESS PLAN

A. Participants: Charles E. Goodell
John O. Marsh, Jr.
Jay T. French

B. Press Plan: None.

III. TALKING POINTS

A. (a) The Board's first recommendation highlights an interesting problem: should you treat differently those servicemen who served willingly in Vietnam, returned home and then went AWOL from those who went AWOL in order not to go to Vietnam.

Any solution to this problem, however, should come from the Defense Department. They have existing service record review boards that can handle these problems.

If you adopt this recommendation you will not solve the problem for a serviceman who willingly served in Vietnam, returned home and violated some other provision of the U.C.M.J. This would be too gross an inequity.

(b) A further extension of the application date is not warranted, even for the Board alone. It's time to rely on existing clemency mechanisms at the Department of Justice, as well as other forms of discretion available to Defense and Justice.

(c) If a former serviceman, whose case is processed by the Clemency Board, can thereafter apply to a Military Department review board and use his pardon to have his Clemency Discharge upgraded to an honorable discharge, doesn't this circumvent the purpose of giving a Clemency Discharge?

It would be more consistent with the reconciliation program to say the pardon shall not prevent a further review of the serviceman's record by these Defense review boards, and that the full record (including the offenses for which the serviceman was just pardoned) shall be considered by these boards.

B. Can the Clemency Board conclude consideration of its cases (about 9,500) by the close of Fiscal Year 1975 if it substantially changes its procedures?

3

THE WHITE HOUSE

WASHINGTON

February 25, 1975

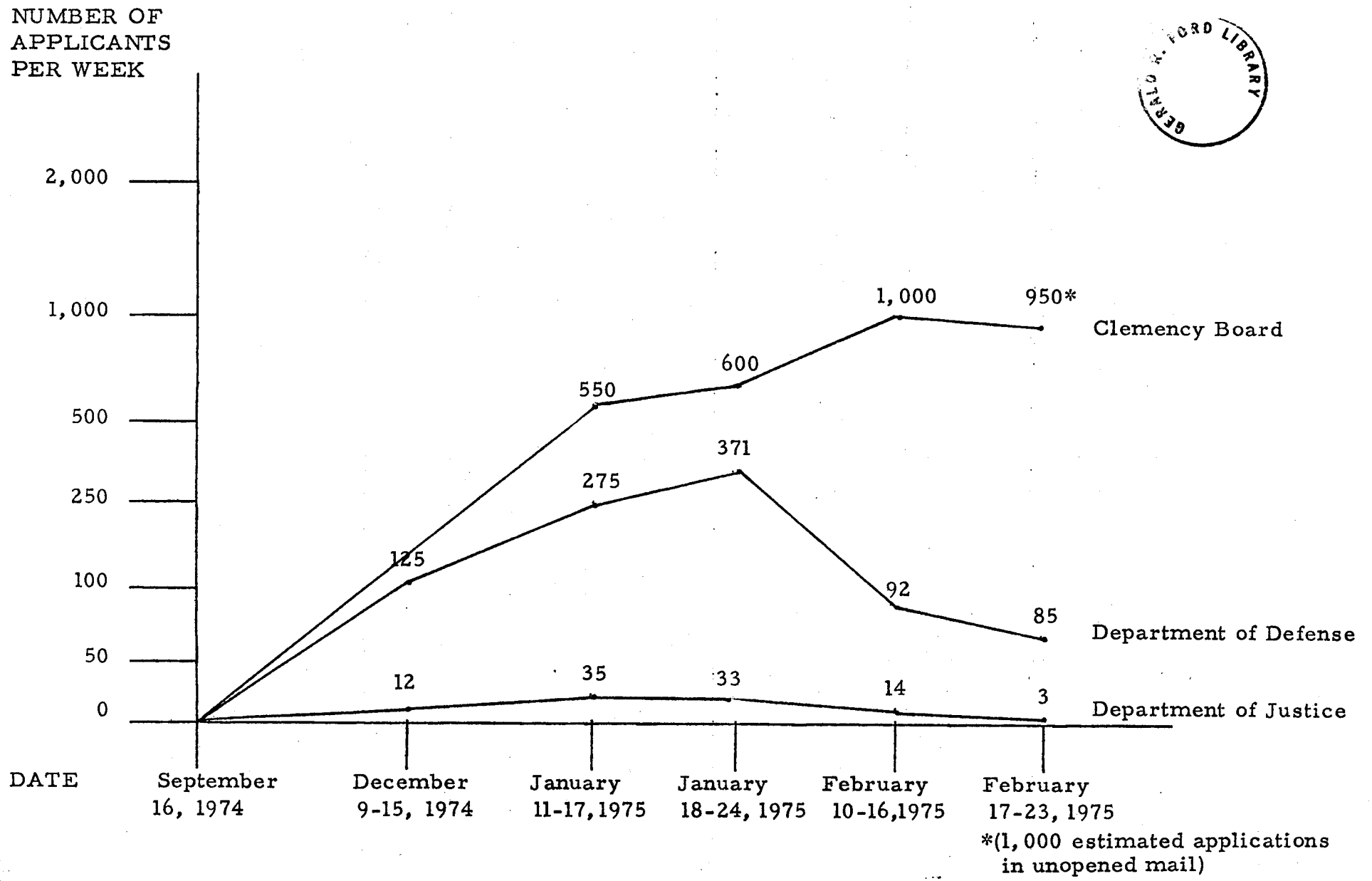
MEMORANDUM FOR: THE PRESIDENT

FROM: JACK MARSH

SUBJECT: STATISTICS FOR RECONCILIATION PROGRAM

The attached chart is submitted to you in accordance with your request at the meeting with Chairman Goodell.

STATISTICS
RECONCILIATION PROGRAM
RATE OF RETURNEES PER WEEK



	Total Eligible	Total Applicants (February 24, 1975)
Clemency Board	130,000 (85,000 Undesirable Discharges 45,000 All Others)	9,600 (includes 1,000 estimated applications in unopened mail)
Department of Defense	12,500	4,700
Department of Justice	4,400	445

Tab C

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

GENERAL COUNSEL

MEMORANDUM TO: John O. Marsh, Jr.

THRU: William M. Nichols

FROM: Weldon H. Latham

Subject: Clemency Board Funding Estimates

Mr. French of White House Counsel's Office has asked us to prepare preliminary estimates of the cost of operating the Presidential Clemency Board ("Board") based on the following assumptions that he presented. It should be noted that Board staff greatly differs with these assumptions and estimates that the increased staff requirement would be 280 and 105 for alternatives A and B, respectively. The Board staff also suggests an increase of 5 and 1 Board members for each assumption.

Alternative B: Assumptions:

(1) Total number of cases will approximate 10,500 upon expiration of the program on March 1, 1975. To date 200 cases have been completed.

(2) The Board drastically revises its current procedures* of reviewing cases in an attempt to conclude operations by June 30, 1975 (the end of the FY 75).

(3) Forty (40) additional nonreimbursable detailess are provided (25 lawyers and 15 secretarial/clerical).

(4) Board meetings are increased from twice a month to weekly meetings and case review is increased from 200 cases to 2,600 cases per month.

Estimated cost $95,000. Source: Unanticipated Personnel Needs Fund.

---

*Abandons case-by-case approach -- staff suggests that some Board members would object to this approach as tantamount to blanket amnesty, others would object because it breaches due process.

Alternative 3: Assumptions:

(1) Same as 3 above.

(2) The Board partially revises its current procedures of reviewing cases in an attempt to conclude operations by January 31, 1976. Detailees would continue and Unanticipated Funds would be utilized until June 30, 1975, the end of FY 75.

(3) Fifteen (15) additional nonreimbursable detailees would be provided immediately (10 lawyers and 5 secretarial/clerical) until the end of FY 75. FY 76 appropriations would be requested for the period from July 1, 1975 to January 31, 1976 to cover all costs associated with Board operation including reimbursement of detailee salaries and administrative expenses heretofore assumed by other agencies.

(4) Board meetings are increased from monthly meetings to weekly meetings and case review is increased from 200 cases to 950 cases per month.

Estimated cost $95,000 remainder FY 75. Source: Unanticipated Fund.

$1,000,000 July 1, 1975 to January 31, 1976. Congressional Appropriation

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

February 24, 1975

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES E. GOODELL

SUBJECT: CLEMENCY BOARD FUNDING ESTIMATES

The following are my estimates of what resources would be required for the Presidential Clemency Board to review 10,500 to 12,000 cases by June 30, 1975 (Alternative A), December 31, 1975 (Alternative B), and September 30, 1975 (Alternative C). You will note that our resource estimates are seven times greater than the estimates made by your Counsel's office. You should also be aware that the Board has not yet approved any of the procedural alternatives mentioned below:

Alternative A: (Completion by June 30, 1975)

Assumptions:

(1) The total number of cases will be between 10,500 and 12,000 by March 1, 1975. (This is a minimum figure. Actual applications could amount to as many as 12,000).

(2) The Board drastically revised its current procedures of reviewing cases. The drastic change means near abandonment of the case-by-case approach. Several Board Members would object to this blanket approach, and other Board Members might consider it an abridgment of due process.

(3) Two hundred and eighty (280) additional unreimbursible detailees are provided, (185 professionals and 95 secretarial/clerical). Detailees would continue and unanticipated funds would be used until June 30, the end of FY 1975. After that date, non-reimbursible detailees would be provided immediately. Appropriations for FY 76 would be requested from the Congress.

(4) Five additional Board Members are named.

(5) Board Member-days per month are increased to 90, and case review is increased to 3,500 cases per month by April 1.

Estimated Cost: $95,000 + (Extra detailees may involve additional overhead.)

Sources: Unanticipated personnel needs fund.

Alternative B: (Completion by December 31, 1975)

Assumptions:

(1) Same as A above (10,500 to 12,000 cases).

(2) The Board partially revises its current procedures of reviewing cases.

(3) One hundred and five (105) additional paid staff are provided (70 professionals and 35 secretarial/clerical).

(4) One new Board member is named.

(5) Board member-days per month are increased to 55, and case review is increased to 1100 cases per month by April 1.

Estimated Cost: $1,365,000

Sources: $95,000 for the remainder of FY 1975 from unanticipated personnel needs fund, plus $1,270,000 from Congress for FY 1976.

Alternative C: (Completion by September 30, 1975)

Assumptions:

(1) Same as A above (10,500 to 12,000 cases).

(2) Same as B above (partial revision of current Board procedures).

(3) One hundred-eighty (180) additional paid staff are provided (120 professionals and 60 clerical).

(4) Five additional Board members are named.

(5) Board member-days per month are increased to 90, and case review is increased to 1800 per month by April 1.

Estimated Cost: $170,000

Sources: Unanticipated personnel needs fund. (Technically, OMB counsel says that unanticipated reserve funds cannot be obligated beyond June 30; however, this alternative anticipates completion by June 30 with a spillover of three months).

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FEB 24 1975

INFORMATION

MEMORANDUM FOR: THE PRESIDENT

FROM: JAMES T. LYNN for Signed Paul H. O'Neill

SUBJECT: CONTINUED FUNDING FOR THE CLEMENCY BOARD

The current reassessment of the future of your Clemency Board should take into consideration certain questions concerning the legality of its funding beyond June 30, 1975.

The direct costs of the Board are presently funded from the Unanticipated Personnel Needs Fund, which has an appropriation of $500,000 for the current fiscal year. Most of the Board's staff personnel are detailed from the Departments of Defense and Justice. The Unanticipated Personnel Needs balance is probably adequate to fund the Board at its current activity rate through June 30, 1975. The budget request for the Fund for Fiscal Year 1976 is $1 million. However, there is a question whether the Fund will be available for Clemency Board activities in Fiscal Year 1976 since the Board was in existence when the 1976 Budget was prepared and its need for funds may not reasonably fall in the category of "unanticipated". The General Accounting Office has not had an occasion to render an opinion on this question.

A more serious problem is presented by Section 696 of Title 31, U.S. Code. That section provides that no appropriation may be used to fund any agency or instrumentality, including those established by Executive order, after such an entity has been in existence for more than one year if Congress has not appropriated money specifically for it or specifically authorized expenditures by it. The Clemency Board was established on September 16, 1974.

We do not believe that the Board can legally be funded after September 15, 1975 unless the Congress appropriates funds to it or authorizes expenditures by it.

Bruce Wilson

Hoffman After Tue

Admiral Finneran

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Dep. Ass't

Sec of Def. for

Military

Policy

~~Res~~ Army Discharge Review Board

THE WHITE HOUSE

WASHINGTON

March 25, 1975

MEMORANDUM TO: PHILIP W. BUCHEN

FROM: JAY T. FRENCH

SUBJECT: ATTACHED MEMO FROM JACK MARSH CONCERNING THE CLEMENCY PROGRAM

The question is whether you believe Defense should informally review military cases which the Clemency Board determines are worthy of honorable discharges even though the President has decided not to expand the authority of the Board to issue honorable discharges.

Several weeks ago you may recall discussing this subject with me after you had held a conversation with Chairman Goodell who requested another meeting with the President on this subject. At that time you asked me to discuss this informal approach with Jack Marsh. If he agreed with this approach you wanted him to call Martin Hoffman. Apparently he believes you should make the call.

I believe Defense should be more responsive in this instance. There are existing mechanisms at Defense for review of meritorious cases and undoubtedly in a few of these cases an honorable discharge would be appropriate.

THE WHITE HOUSE

WASHINGTON

March 20, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: JACK MARSH

You will recall the matter that Charlie Goodell brought to our attention involving special Presidential consideration for certain veterans clemency cases where the veteran had a distinguished combat record in Vietnam. Goodell and the Board want the President to award general discharges under honorable conditions.

This matter has become quite aggravated in the last week or so and allied with Charlie, as a strong supporter, is General Lou Walt. Goodell and Walt both want an audience with the President to address this particular problem. General Walt is particularly strong in his view on this question.

The problem is occurring at the Department of Defense where it seems they are digging in their heels to resist the recommendations of the Clemency Board. The Clemency Board recognizes that the matter should be handled at Defense rather than through the President, but it seems they are at loggerheads and want specific guidance from the President to Defense addressing this special case.

It is felt that if you were to give a call to Marty Hoffman this might be sufficient to get them to change their view.

Jay French has followed this matter closely and can give you additional information.

PRESIDENTIAL CLEMENCY BOARD
THE WHITE HOUSE
WASHINGTON, D.C. 20500
February 7, 1975

MEMORANDUM FOR: LAWRENCE M. BASKIR

FROM: WILLIAM KLEIN & JAMES H. POOLE

SUBJECT: The Presidential Pardoning Power As It Relates To Undesirable Discharges

The purpose of the memorandum is to discuss the pardoning power of the President of the United States and to analyze whether it extends to military offenses which result in an Undesirable Discharge. This power as it is set out in the Constitution of the United States has roots deep in the history of English Law and for this reason we have included the following historical material to show that the right to pardon is a sovereign right; that this right reposes in the Presidency and may be executed at will in a variety of ways and circumstances so long as the exercise of the power is not repugnant to public policy.

I. TRACING THE HISTORY OF THE POWER TO PARDON[1]

The Norman Conquest of 1066 brought with it, through William the Conqueror, "the view that clemency was an exclusive privilege of the King."[2] But by the 14th Century, Parliament was strongly contending for supremacy through attempts to curtail royal power, including the power to pardon. With the rise of the Tudors, however, and in particular Henry VIII, Parliament succumbed in the struggle and the power to pardon was lodged solely in the King with the enactment of 27 Henry VIII, ch. 24 in 1335.[3]

[1]This historical background of the Presidential Pardon Power draws extensively upon the research contained, in dicta, in the opinion of John H. Pratt, U. S. District Judge in the case of Hoffa et al v. Saxbe civil action number 74-47 dated July 19, 1974.

[2]C. Jensen, The Pardoning Power in the American States, 1 (1922).

[3]See Grupp, Same Historical Aspects of the Pardon in England, 7 Am. J. of Legal History 51, 55 (1963). Also Humbert, The Pardoning Power of the President, 14-15 (1941).

After having recognized the King's pardon prerogative as "exclusive", Parliament, slowly evolving as the supreme political power of England, began a process of limiting the King's prerogative in certain particulars. By the time of the Constitutional Convention, Parliament's supremacy was clearly demonstrated, by three important limitations of the King's pardoning power: (1) the Habeas Corpus Act with forbade clemency to persons who imprisoned English citizens "beyond the realm": (2) the Bill of Rights which prohibited the King from granting "dispensations", i.e., suspending or disregarding a given law in particular cases: and (3) the Act of Settlement prohibiting the use of pardon in cases of impeachment. It was implicitly understood, however, that unless specifically limited, the King's power was plenary and without restriction.

By the time our Constitutional Convention of 1787, the framers could draw upon their knowledge of English practices as well as their more immediate expeience with colonial charters in devising the structure of our National Government. The founding fathers devoted little attention to the question of the pardoning power and decided with sparse debate that the power should be lodged solely with the Chief Executive.[4] Similarly, the substantive extent of the power was scarcely questioned except that it was readily agreed that the pardoning power should not apply

[4]By the time of our Constitutional Convention, public opinion had apparently moved in the direction of placing the pardoning power solely in the hands of the Executive. Attorney General's Survey of Release Procedures, Vol. III: Pardon, 27 (1939). There was a proposal by Roger Sherman that would have required the Senate's consent to a Presidential Pardon, but the motion was soundly defeated. See Humbert, Pardoning Power, supra note 3 at 13-16. See also The Federalist No. 74 at 496-99 (Ford ed. 1898) where Hamilton presents the argument against giving the legislature any control over the pardoning power.

to impeachments.[5] In recent times, the Supreme Court, after noting that the King's pardoning authority had by the date of our Constitutional Convention been circumscribed, held that:

> "the framers of our Constitution had in mind no necessity for curtailing this feature of the King's prerogative in transplanting it into the American governmental structures save by excepting cases of impeachment..."[6]

The framers of our Constitution were aware of the various limitations which had been imposed on the King's prerogative by Parliament, as well as the limitations imposed by the State Constitution, but deliberately chose to limit the President's authority in one particular only, viz., in cases of impeachment. We start then not with a narrowly defined and circumscribed power but with the full power of the sovereign, i.e., under our system of government, the full power of the People, to pardon those who have perpetrated offenses against them. This is not to say the power is limitless; it must be exercised in the public interest and, most importantly, it cannot infringe on the Bill of Rights which expressly reserves to the people certain fundamental rights.

The United States Constitution, Article II, Section 2, clause 1, gives the President "Power to grant Reprieves and Pardons for offenses against the United States,

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[5]It was suggested by Edmund Randolph that another exception be made in cases of treason but the proposal was also defeated. See Farrand, The Records of the Federal Convention of 1787, Vol. II, 626-27 (rev. ed. 1937). See also, The Federalist No. 68 at 460 (Ford ed. 1898, A. Hamilton) "The power of the President in respect to pardons would extend to all cases except those of impeachment" (emphasis in original): J. Kent, Commentaries on American Law, Vol. I. 303 (8th ed. 1854). "The power of pardon vested in the President is without any limitations except in the single case of impeachment."

[6]Ex Parte Grossman, 267 U.S. 87, 113 (1925).

except in cases of impeachment" (emphasis added). Generally, the courts have uniformly supported a very broad interpretation of the President's pardon power.

This broad interpretation extends to the present as is emphasized by the following statement by the U. S. Pardon Attorney. "The President's power to pardon extends to all offenses against the United States and he may grant this executive clemency at anytime after the breach of the law."[7]

II. PRECEDENTS

Between 1963 and 1966 Presidents Kennedy and Johnson pardoned three individuals for violating the Hiss Act.[8] These three individuals made false statements in application forms relating to employment with the Government of the United States. Were the individuals convicted, they would have, by law, been deprived of their civil service retirement annuity. In all three cases no charges were brought and no conviction entered. All three received Presidential Pardons. A memorandum from the Pardon Attorney setting forth the facts of these cases in greater detail is attached (Enclosure 1).

The Pardon Attorney by his own rules and regulations requires that a petitioner applying for executive clemency with respect to military offenses "...submit his petition directly to the Secretary of the military department which had original jurisdiction over the court-martial trial and conviction of the petitioner."[9] This wording, however, does not specifically prohibit the recipient of an Undesirable Discharge from receiving a pardon. Even were there such a requirement, the President would not be bound to follow it since the regulations of the Pardon Attorney are without effect in the implementation of the Presidential Clemency Program. For example, the Pardon Attorney, by regulations, requires a 3 year waiting period

[7] Memorandum from U. S. Pardon Attorney, Lawrence M. Traylor, to the Office of the Deputy Attorney General, dated September 24, 1974.

[8] 8 USC 8311

[9] 28 CFR 1.1

or 3 years after release of the petitioner from prison before a petition for pardon can be filed.[10] Obviously, this requirement is not followed in the clemency program.

The President's broad power to pardon is best illustrated in the pardon of Former President Richard M. Nixon. There, President Ford, not only pardoned an offense for which no formal charges were brought, but also pardoned Mr. Nixon for any offenses that he might have committed during his administration. The Former President was pardoned for possible offenses which were not even identified or known to have taken place. Thus, it is clear that the President can pardon an offense even though no conviction has been entered and it matters not that the offense resulted in and Undesirable Discharge.

III. POLICY CONSIDERATIONS

The President has offered pardons to individuals who have received punitive discharges. The pardon forgives the offense, it does not obliterate the conviction or the finding of guilt; Prisament v. Brophy 317 U.S. 625.[11] It follows that individuals who have been discharged administratively with an Undesirable Discharge, are also entitled to an outright pardon or a pardon upon.completion of alternative serivce.

A Commanding Officer's decision to offer an Undesirable Discharge rather than trial by court-martial is not so much an act of charity as it is an act of expediency. Administrative Discharges reduce the number of man hours consumed by court-martials, are less costly, require less involvement of legal personnel and substantially reduce the number of cases on otherwise crowded dockets. An Administrative Discharge does not change the nature of the offense. Even where an Undesirable Discharge is given for a series of minor absence or absence-related offenses, the discharge is granted because there has been a violation of military law--an offense or offenses against the United States.

[10] 28 CFR 1.3

[11] Prisament v. Brophy 317 U.S. 625.

There is, for the purpose of granting a pardon, no distinction between a punitive and an administrative discharge, for it is the offense that is pardoned, not the administrative action or the conviction in the case of punitive discharges.

The President's authority to pardon offenses against the United States, regardless of whether or not there has been a judicial review or conviction is well-established; that much has been made clear by the Pardon Attorney when he stated that "The President's power to grant pardons extends to all offenses against the United States and he may grant clemency at any time after the breach of the law."[12]

To deny pardons to recipients of Undesirable Discharges would in our view compromise the integrity of the clemency program and undermine the President's desire for fairness in his quest for National reconciliation.

Enclosure

[12] Memorandum from U. S. Attorney, supra note 7.

Mr. John V. Wilson
Assistant Director
Office of Public Information

September 10, 1974

Lawrence M. Traylor
Pardon Attorney

Precedents of pardons granted prior to conviction

I have just learned of three pardons granted prior to conviction and I had earlier stated that I did not know of any in recent time. This question came up with regard to the Nixon pardon.

The Hiss Act in 1961 was enacted to deny to Alger Hiss a civil service retirement annuity but it was later discovered that this Act applied to a few other Federal government employees and this was not the intent of the Hiss Act.

On October 10, 1963, President Kennedy granted a pardon to Milton Alexander Pogorelskin who had made false statements in applications for or relating to employment with the Government of the United States but no charges were ever brought and thus no conviction entered. The pardon was granted to allow Mr. Pogorelskin to receive his annuity to which he would have been entitled but for the offense.

On November 8, 1963, President Kennedy granted a pardon to Herbert Fuchs who had made false statements and concealed a material fact in a matter within the jurisdiction of the Government of the United States but no charges were ever brought and thus no conviction entered. The pardon was granted to allow Mr. Fuchs to receive his annuity to which he would have been entitled but for the offense.

On December 29, 1966, President Johnson granted a pardon to Liana Haberman who had made false statements and concealed a material fact in a matter within the jurisdiction of the Government of the United States but no charges were ever brought and thus no conviction entered. The pardon was granted to allow Ms. Haberman to receive her annuity to which she would have been entitled but for the offense.

I have no information at this time as to why no charges were brought against these three persons. It may be that the statutes of limitations had run against the offenses.

It would seem desirable that names not be used if this information is to be given to the press but all of the information is from public records and available without restriction.

You may want to consider passing this information on to Mr. Hushen.