**The original documents are located in Box 2, folder "Controlling Discretion in Sentencing (Article in the "Notre Dame Lawyer")" of the Charles E. Goodell Papers at the Gerald R. Ford Presidential Library.**

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March 10, 1976

Honorable Charles Goodell
Hydeman, Mason and Goodell
1225 19th Street, N.W.
Washington, D.C. 20036

Dear Senator Goodell:

Amidst my work with Larry on the book about Vietnam-era offenders, I am preparing an article about the Clemency Board's legal procedures for the June issue of the Notre Dame Lawyer.

The title of the article is "Controlling Discretion in Sentencing -- the Presidential Clemency Board as a Working Model." In it, I (and co-author Mike Remington) will be presenting the Board's legal procedures as a model which sentencing judges may wish to follow. The emphasis will be on how the creation of rules (especially the aggravating and mitigating factors) and the application of those rules contributed to the consistency and fairness of Board decisions.

I would be very pleased if the article could include some statements attributed to you. I would appreciate your comments on any or all of the following:

1. The Board's difficulties with its first 16 cases in October;

2. The Board's desire to create rules as a means of channeling its discretion;

3. How hard (or easy) it was to apply those rules;

4. Your general impression of the fairness and consistency of Board decisions; and

5. Your general views about the applicability of Clemency Board techniques to sentencing judges.

In order to include your comments in the article, I must have them by March 24. You could either send me a letter or give me a statement over the phone (202/296-1767). I appreciate any help you can give, and I hope this article will attract some favorable attention to the Board.

With best wishes,

Sincerely,

William A. Strauss

# CONTROLLING DISCRETION IN SENTENCING: THE CLEMENCY BOARD AS A WORKING MODEL

by

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and

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# CONTROLLING DISCRETION IN SENTENCING: THE CLEMENCY BOARD AS A WORKING MODEL

## I. INTRODUCTION

The exercise of discretionary judgment is fundamental to any system of justice -- but equally fundamental is the consistent treatment of all individuals. To achieve the latter, a reasonable balance is necessary between flexibility and strict accountability to rules. Conscious efforts to achieve this balance are made throughout almost all of the American legal system. However, in at least one area -- the sentencing of convicted criminals -- the system is wanting.

Attorney General Edward Levi has accused the sentencing process of having "an accidental quality" in which imprisoned offenders consider themselves "losers in a game of chance."[1/] This, he concludes, can only harm efforts at rehabilitation:

> "Not only may it appear to an offender that his imprisonment was just bad luck rather than the inevitable consequence of wrongdoing, the unfairness bred of inefficiency and unwillingness to impose uniform punishment may make the society outside the prison wall seem mean and hostile, a society that itself does not follow the rules of conduct it expects the ex-offender to follow. 2/

Typically, judges are free to make sentencing decisions according to their own personal standards.[3/] As an inevitable result, "the sentence a particular defendant gets is often dependent in considerable measure on the trial judge he got -- or

who got him."[4] What is ironic is that this unstructured sentencing decision follows a very highly disciplined legal process for establishing guilt. Yet in most criminal cases, the sentence -- and not the question of guilt -- is the key issue.[5] Recognizing this problem, critics of sentencing practices have called for more structure in the process:[6]

> "The power of judges to sentence criminal defendants is one of the best examples of unstructured discretionary power that can and should be structured. The degree of disparity from one judge to another is widely regarded as a disgrace to the legal system. All the elements of structuring are needed -- open plans, policy statements and rules, findings and reasons, and open precedents. [7]

One manifestation of the reaction to the undisciplined discretion of sentencing judges is the effort to impose mandatory minimum sentences -- and even mandatory sentences.[8] This achieves structure, but at the price of all discretion. It equates consistency with severity. Better solutions must be found. Unfortunately, working models have been slow to emerge from American courts and legislatures.[9]

The Presidential Clemency Board recently developed such a working model, inspired in part by the Board's reaction to the uneven treatment of convicted draft offenders by Federal judges.[10] In its final report, the Clemency Board noted that sentences for draft offenses were "inconsistent and widely varying, dependent to a great extent upon year of conviction, geography, race, and religion."[11] From 1968 to 1974, the

percentage of draft offenders sentenced to prison declined from 74% to 22%.[12/] Some judges never sent a draft offender to prison, while others always imposed the five-year statutory maximum.[13/] Blacks, Jehovah's Witnesses, and others outside the middle-class mainstream were treated more harshly for crimes that were no worse than those of other draft offenders.

Having seen the consequences of uncontrolled discretion, the Clemency Board decided that it had to impose a measure of discipline upon itself. According to Father Theodore M. Hesburgh, a member of the Clemency Board, "The Board was willing to do anything it could to get away from the vast swing of the draft sentences." As a result, rules were developed -- and made binding. Board members often became restless under these rules. They were torn between the competing demands of consistency and flexibility, sometimes complaining that strict adherence to rules interfered with the reaching of fair judgments in individual cases. What emerged was a balance between the mechanical application of rules and the subjective exercise of discretion.

As it disciplined its exercise of discretion, the Clemency Board implemented a number of techniques which should be applicable to sentencing judges.[14/] First, the Board developed and published a clear set of substantive rules to serve as criteria for case judgments, and it followed procedures which

ensured that these rules were explicitly applied in each case. Second, it identified past precedents and employed them as a basis for deciding subsequent cases. Third, it implemented a system of internal appellate review through which inconsistent judgments could be identified and reconsidered. Fourth, it created a record which enables its decision-making performance to be evaluated.

Taken together, these efforts resulted in a startling -- and measurable -- degree of consistency and fairness in case judgments. Statistics show that the Board did in fact follow its designated rules.[15/] As a consequence, the Board achieved one of its major goals -- that of treating persons with disadvantaged backgrounds in an evenhanded manner.[16/] What may be even more significant is that once the Board began controlling its discretion, case judgments became less severe, not more so.[17/]

## II. THE CLEMENCY BOARD EXPERIENCE

### A. A Bad Experience with Uncontrolled Discretion

The Presidential Clemency Board was charged with the responsibility of making clemency recommendations for some 15,000[19] applicants to President Ford's program for Vietnam-era draft and military offenders.[20] The Board had to decide whether each individual should be granted a Presidential pardon[21] -- and, if so, how much alternative service he had to perform to earn it.[22] Although the Board was bestowing benefits rather than imposing punishment, it had a decision-making function comparable to that of a sentencing judge.[23] A judge's decisions range from minimal probation to the maximum period of imprisonment allowed by law. The Clemency Board's judgments ranged from immediate pardons to the maximum 24-month period of alternative service set by the President[24] -- with the most severe judgment being the denial of clemency in any form.[25]

President Ford directed the Board to review every application on a case-by-case basis to achieve equity among applicants and to build public confidence in the clemency program.[26] Aside from the limited and unpersuasive precedent of the Truman Amnesty Board,[27] the Clemency Board had no prior experience to guide it in recommending executive clemency on a case-by-case basis. However, the Board had to determine

the substantive standards and procedures to be followed in acting upon these cases.[28] The Board very quickly recognized the importance of making fair and consistent decisions which would be accepted as such by the clemency applicants and the general public.[29]

With little guidance from the President, no help from any precedents, and a predominantly lay membership,[30] the Clemency Board was faced with the problem of determining how to proceed. At its very first meeting, the Board agreed that it would identify and publish a list of factors to help it review cases.

The Board's original intent was to have these factors serve as informal guidelines for case judgments, reserving the right to identify and apply other criteria freely. The Board honed this tentative list into what it called "mitigating" and "aggravating" factors, using them to review its first sixteen cases. As nothing more than guidelines, the factors contributed little to the Board's decisionmaking process. Sharp disagreements arose among Board members about the purpose of the clemency program, resulting in some near-resignations.[31] "Everybody was going in different directions in these cases," notes Father Hesburgh. "Some Board members wanted to give everyone the maximum, and some always wanted to give the minimum."

In these first sixteen cases, virtually identical cases were decided differently. For example, two draft offenders had each committed the same crime under almost identical circumstances; the one who was white, religious and from a well-to-do family was recommended for an immediate pardon -- but the black immigrant from the West Indies was denied clemency apparently because of an off-hand comment in his record that he was "clever." In these and the other fourteen cases, analysis later proved that Board decisions were based on aspects of the case which had no relationship to any of its mitigating and aggravating factors. A juvenile arrest record for possession of beer, involvement in an alternative-lifestyle commune, participation in a "rock" band, and even jaywalking convictions were the apparent but unspoken bases for judgments by the Board.[32/]

These inconsistent case judgments and the application of irrelevant standards were a result of the ad hoc process the Board used in reaching decisions. Each member focused on aspects of the case he or she thought most important. Often, members did not articulate the real basis for their decisions. No attempt was made to reach a collective agreement in each case on the presence or absence of the criteria the Board had previously designated as relevant. Consequently, there was no way to prevent any member from applying his or her personal, and often unconscious standards -- or even to know what those standards might be.

Board members seemed reasonably satisfied with their decisions in each case, but the overall results were disturbing. If there was any pattern at all in this first collection of decisions, the Board seemed to be favoring applicants with middle-class backgrounds, with a demonstrated respect for authority, and with a conventional lifestyle. In fact, a statistical analysis of those sixteen cases showed that "conventionality of lifestyle" was a more significant predictor of Board judgments than any of the officially designated aggravating and mitigating factors. In effect, the Board had discarded its agreed-upon list of substantive rules, and was proceeding on the more comfortable basis of "gut-level" justice.

The bad experience with these sixteen cases proved a blessing. Once the Board was alert to what it was doing, it imposed much tougher standards of consistency on itself and on the staff attorneys who prepared cases. In doing so, the Board reluctantly acknowledged the need to control its exercise of discretion through adherence to more rigorous procedures.

B. Developing Rules

Right after the Board's assessment of its first sixteen case decisions, it met in executive session to transform its tentative guidelines into binding rules. The Board clarified the alternative service "baseline" formula and the mitigating and aggravating factors which would be used as the explicit bases for all case judgments.[33] Only when mitigating factors outweighed aggravating factors could the alternative service assignment be reduced below the baseline. Conversely, the alternative service assignment could be increased above the baseline -- or clemency might be denied altogether -- only when aggravating factors outweighed mitigating factors. The Board went up or down from its baseline in three- or six-month increments according to subjective measures of the relative strength of the factors. With minor modifications, this became the structure for the exercise of Board discretion and the making of consistent case judgments.

The alternative service "baseline" was a fixed formula used as a starting point for determining the amount of alternative service.[34] It was a jerry-built mathematical calculation which took account of an applicant's initial sentence, his time in jail, and other factors.[35] One theory behind the formula was that the Board should, without discretion, give credit for court-imposed penalties paid by each applicant.

Equally fundamental to the formula was the Board's belief that only nominal amounts of alternative service should be assigned to most applicants. The formula resulted in initial baselines of 3-6 months for 99% of the applicants -- well below the 24-month maximum set by the President.[36/]

With applicants having virtually identical baselines, the mitigating and aggravating factors accounted for almost all of the differences in Board judgments. The sixteen mitigating factors and twelve aggravating factors represented a composite of the concerns of Board members with different philosophies. Some argued strongly for mitigating factors which would take account of conscientious opposition to the Vietnam War and disadvantaged socio-economic backgrounds. Others were primarily concerned about applicants' criminal records and experience as soldiers. Although majority approval was required, the Board usually designated as a factor anything which any Board member felt strongly about. Only once did the Board ever vote against a proposal to establish a new factor.[37/]

Board members had three standards in mind as they developed the list of mitigating and aggravating factors:[38/]

(1) Had an applicant demonstrated that he had already earned a grant of clemency?

(2) Was his background such as to qualify him for clemency?

(3) Could the Clemency program help him in any particular way?

The notion of "earning" clemency was central to the philosophy behind the President's program -- earned re-entry into the mainstream of American society.[39] This was based on the view that some measure of justice had to be struck between clemency applicants and those who had satisfactorily discharged their obligation of national service. Also underlying this notion of "earning" clemency was a theory of general deterrence. The clemency program had to demonstrate to future generations of soldiers and draft-eligible persons that those who unlawfully evaded service would not receive clemency unless they earned it. This was consistent with the President's -- and the Board majority's -- view that most clemency applicants still owed a debt of service to their country.

For some, this debt had already been partially or completely satisfied. A surprising percentage (27%) of Clemency Board military applicants were Vietnam veterans, many with combat wounds or decorations.[40] Even those who never went to Vietnam often had performed long periods of meritorious military

service before committing their offenses. Many convicted draft offenders had performed substantial periods of court-ordered alternative service. These and other related circumstances were designated as "mitigating." Considered "aggravating" were indications of an applicant's failure to serve when called upon -- for example, by deserting in a war zone, failing to report to Vietnam when ordered, or failing to complete court-ordered alternative service.

The worthiness of an individual's application for clemency was far more subjective. The majority view, by no means unanimous, was that the conscientious war resister was the clemency applicant for whom the program was especially intended. As the Board began to hear military cases, it discovered that military applicants seldon went AWOL because of expressed opposition to the war. The more common reasons were personal or family problems, procedural unfairness on the part of the military, or a lack of sufficient intelligence or language skills to cope well with military life. The Board believed that all of these reasons could be sympathetic enough to make an individual worthy of clemency. Conversely, individuals whom the Board thought the President did not have in mind were distinguished on the basis of certain aggravating factors -- long or repeated AWOL offenses, the use of force in committing the qualifying offense, and a record of non-draft-related felony convications.[41/]

The final notion -- that of helping or rehabilitating a person through a grant of clemency -- had more limited application. Some applicants had service-incurred disabilities, others had serious mental or physical problems, and many more had unresolved personal problems. For some, alternative service was seen as a means of self-help; for others, with serious personal or family problems, it would have been a heavy and meaningless burden. Certain categories of military applicants were recommended by the Board for veteran's benefits, especially medical benefits, which would help them readjust to civilian life after difficult tours in Vietnam.[42] Some mitigating factors were created to account for these rehabilitative needs, and others were marked "strong" in true hardship cases. The only way an applicant's lack of rehabilitative potential was translated into an aggravating factor was if he had a criminal record for a very serious felony offense -- especially if he was currently facing a long period of incarceration. For these individuals, the clemency program could be of little help.

The full list of mitigating and aggravating factors is presented in Figure 1,[43] with notation of how frequently each was applied in civilian and military cases.

Figure 1: FREQUENCY OF AGGRAVATING AND MITIGATING FACTORS (Percent)

| | | Civilian | Military |
|---|---|---|---|
| Agg 1 | Other adult convictions | 4% | 53% |
| Agg 2 | False statement to the Board | 0 | 0 |
| Agg 3 | Use of physical force in offense | 0 | 0 |
| Agg 4 | AWOL in Vietnam | 0 | 2 |
| Agg 5 | Selfish motivation for offense | 15 | 31 |
| Agg 6 | Failure to do alternative service | 4 | 0 |
| Agg 7 | Violation of probation or parole | 5 | 7 |
| Agg 8 | Multiple AWOL offenses | 1* | 36 |
| Agg 9 | Extended AWOL offenses | 0 | 72 |
| Agg 10 | Missed overseas movement | 0 | 7 |
| Agg 11 | Unfitness discharge with other offenses | 0 | 5 |
| Agg 12 | Apprehension by authorities | 8 | 37 |
| | No Aggravating Factors | 72 | 1 |
| Mit 1 | Inability to understand | 3 | 32 |
| Mit 2 | Personal or family problems | 9 | 45 |
| Mit 3 | Mental or physical condition | 9 | 19 |
| Mit 4 | Public service employment | 57 | 2 |
| Mit 5 | Service-connected disability | 0 | 2 |
| Mit 6 | Extended military service | 2* | 35 |
| Mit 7 | Vietnam service | 1* | 26 |
| Mit 8 | Procedural unfairness | 6 | 14 |
| Mit 9 | Questionable denial of CO status | 8 | 0 |
| Mit 10 | Conscientious motivation for offense | 72 | 3 |
| Mit 11 | Voluntary submission to authorities | 59 | 37 |
| Mit 12 | Mental stress from combat | 0 | 5 |
| Mit 13 | Combat volunteer | 0 | 9 |
| Mit 14 | Above average military performance | 1* | 39 |
| Mit 15 | Decorations for valor | 0 | 2 |
| Mit 16 | Wounds in combat | 0 | 4 |
| | No Mitigating Factors | 5 | 2 |

* A small number of civilian applicants entered military service after their draft offenses.

To structure the application of these rules, the Board implemented standard procedures by which all cases were processed.[44/] Based upon official records, a completed application form, and communication with the applicant, a staff attorney prepared a summary for each case.[45/] After an internal review, the case summary was submitted to Board members for study. During Board meetings, staff attorneys and their immediate supervisors were present to answer Board member questions or read statements submitted by applicants.

The Clemency Board's baseline formula, mitigating and aggravating factors, and general case procedures were published in the Federal Register on November 27, 1974, approximately one month after the Board had reassessed its first sixteen cases.[46/] The primary purpose of publication was to make the rules binding on the Board. Another purpose was to enable potential applicants to understand the basis by which the Board would make judgments in their cases. Board regulations and application materials encouraged applicants to submit information establishing the presence of mitigating factors or the absence of aggravating factors. Unfortunately, applicants were not well counseled.[47/] Few had lawyers, and not many of the rest understood the importance of submitting

information bearing on the factors. Thus, the Clemency Board's rules were much more effective as a means of controlling its own discretion than as a means of helping applicants to improve their chances before the Board.

C. The Use of Precedents

The establishment of clearly defined rules produced a marked and immediate improvement in decisions. All of the first sixteen cases were reconsidered, with the results much more consistent and justifiable than before. The black immigrant from the West Indies received an immediate pardon, like his white counterpart. By the time the Board published its regulations in late November, it had made 45 case recommendations to the President. The pattern of judgments in the Board's subsequent 14,500 cases generally matched the pattern of these first cases.[47/]

When the first 45 decisions were announced by the President, each was accompanied by a condensed case description, which attempted to summarize the elements of the case upon which the result was based. This was an effort to establish open written precedents for the guidance of the Board and future applicants. Unfortunately, this experiment failed. First, it proved too difficult to reconstruct accurately the reasons for each collective Board decision. Second, the Board refused to recognize the public case descriptions as open and binding precedents.

One applicants' attorney requested a recommendation of an immediate pardon by citing analogous case descriptions and results, but the predominantly lay Board felt that a process of deciding cases by arguing from precedents was too "legalistic" and would infringe upon its legitimate exercise of discretion.

Specifically bound only by its published regulations in this early period, the Board in effect developed its own unwritten "common law" of policy precedents -- even though most Board members, not being lawyers, failed to recognize this. These precedents were applied informally but effectively by the Board. At the time, simply having binding mitigating and aggravating factors was enough to achieve consistency. Later, this would not be so.

Not only were cases decided more consistently as a result of having rules -- they ware also decided more leniently. The Board's original judgments on the first 16 cases included only two immediate pardons, four denials of clemency, and an average of 16 months alternative service for the rest. After reconsideration, these very same cases included eight immediate pardons, no denials of clemency, and an average of only six months alternative service for the rest. In part, this greater leniency resulted from an emerging Board consensus that the Clemency Board should be clement in deed as well as in name. Also -- and more significantly -- this leniency was attributable to

the Board's greater confidence in the accuracy with which it could distinguish among applicants.[48] In the end, the Board denied clemency to seven percent of its applicants,[49] but by selecting out those cases according to clear rules and precedents, it became more generous with all other applicants. Over time, four out of five received immediate pardons[50] or alternative service assignments of six months or less.

During its first few months, the nine-member Board took about 20 minutes on each case to calculate a baseline, identify mitigating and aggravating factors, and reach a judgment. At the time, the Board's projected caseload was about 1,000 cases, a disappointing but manageable size. Soon, the caseload dramatically increased to 15,000 cases,[51] and the President set a six-month deadline for completing all Board operations. These new developments forced radical changes in Board operations, requiring new techniques to guide and monitor Board decisions. It was no longer sufficient merely to apply the substantive rules carefully and methodically.

Because of the expanded caseload, the Board was doubled in size to eighteen members, and the staff expanded ten-fold. This had two important consequences for the way in which cases were decided. First, the Board began hearing cases in three-member panels rather than en banc, thus creating new possibilities for inconsistency of results. Second, the presence of 400 staff attorneys transformed the Clemency Board into a large and complex organization in which procedures could no longer be informal.[52]

By having three-member panels, it was thought that Board rules could be applied just as consistently as the nine-member Board had been doing. The idea of having single-member judgments was rejected as too vulnerable to misapplication of rules and wayward judgments. The Chairman tried to balance the composition of each panel, wherever possible assigning one conservative, one moderate, and one liberal to each.[53/] Likewise, panels were reconstituted weekly to prevent any particular panel from drifting away from established rules.

Because of the very large caseload, panels could only spend an average of four minutes on every case. Each member reviewed the cases before panel meetings, and reached tentative personal conclusions about what the judgments should be. During the meetings, a consensus was reached within a few minutes on all but the most difficult cases.

This process put a heavy burden not only on Board members but also on the staff attorneys preparing cases. In addition to preparing a factual summary for each case, attorneys were then asked to calculate the baseline and recommend which mitigating and aggravating factors might be applied by the Board. Staff attorneys spent, on average, four to six hours preparing each case and obviously had more occasion than the

hard-pressed Board members to understand all aspects of a case. Even so, the Board unanimously rejected a proposal to have staff attorneys recommend final case judgments based upon Board precedent; this was considered too much of an infringement upon Board discretion.

These shifts in Board and staff procedures were fine in theory, but very difficult to implement in practice. Two handicaps had to be overcome. First, half of the Board and nine-tenths of the attorneys were new to the process and could not be expected to understand immediately the unwritten nuances of the mitigating and aggravating factors. Second, with panels spending only four minutes per case, there was a clear danger of hasty decisions and the arbitrary exercise of discretion.

These handicaps were partly overcome through the codification of Board precedents in the Clemency Law Reporter.[54/] The Reporter's five issues comprised an updated "hornbook" of Clemency Board practice policies. Each factor was defined in explicit terms -- often after Board debate -- and each definition was accompanied by factual condensations or "squibs" of cases in which that factor had been applied by the Board.[55/] The "squibs" were reviewed by the Chairman before publication, and he deleted those which he felt were improper or misleading applications of Board policy. In this way, the Reporter became

a means by which the Chairman sought to control the exercise of discretion by Board panels. He intended it to be a normative set of precedents to which Board panels were bound, at least in theory.

Staff attorneys were instructed to follow the Reporter in making preliminary designations of mitigating and aggravating factors in each case as a guide for Board members. Their designations were carefully monitored, again with the Reporter as a guide. Finally, staff supervisors were present at all Board panel sessions and were instructed to use the Reporter to advise Board members of an incorrect application of factors.

These staff procedures worked reasonably well, but the Board members were unable or unwilling to use the Reporter themselves. Board members still based their final designations of mitigating and aggravating factors on their own personal recollections of Board rules. A few rejected the advice of staff supervisors about how factors should be applied, insisting that Board members could properly exercise their discretion without being bound by precedents. Despite this resistance to formal precedents, panels rarely wandered far from what precedent dictated. When they did, this became a basis for the staff-attorney initiated appellate review procedures discussed below.

D. Internal Appellate Review

Standing alone, the Clemency Law Reporter was not enough to ensure the consistency of case judgments. At best, it only indicated whether factors were being applied correctly. It did not offer any guidance to the Board in translating those factors into a final judgment.

Consequently, some purely procedural steps were used to structure the exercise of this discretion. As a standard practice, Board panels waited to discuss a final judgment until after all applicable factors had been agreed upon and designated for the record. This tended to focus Board members on the designated factors and away from extraneous issues.

Still, cases with identical baselines and factors were often decided differently -- sometimes by accident and sometimes by design. To check Board panels' exercise of discretion in making final judgments, an internal system of appellate review was implemented. The basic rule of this appellate system was that any Board member could refer any panel judgment to the full Board for reconsideration. Dissenting panel members referred about three percent of all cases for reconsideration, usually to no effect.[56/] More significantly, this rule permitted the Chairman to refer divergent cases identified by other review procedures which the Board employed.

Staff attorneys were directed to flag cases they believed to be decided inconsistently with Board precedents. These cases then went through a carefully monitored system of internal review, in which they were reviewed first by a specially-trained team and then by the Chairman. Through this procedure, approximately ~~100~~ 400 cases were flagged by staff attorneys and about ~~25~~ 200 were ultimately reconsidered by the full Board.

~~However,~~ The most important and unusual aspect of this appellate system was STAREDEC, a computer review.[57/] A gift from the National Aeronautics and Space Administration,[58/] STAREDEC was programmed to analyze the Clemency Board's precedents and identify patterns in the rendering of final judgments. STAREDEC evolved from early manual efforts to trace the impact of mitigating and aggravating factors on case judgments. Through these ad hoc procedures, errant cases were identified for possible reconsideration by the full Board before final recommendations were sent to the President. Once the Board's caseload expanded, however, this could only be done by computer. With only about one month of planning and preparation, STAREDEC became the foundation of a systematic review of all case judgments before their submission to the President.

STAREDEC became operational through the recording of every case judgment on a computer-input sheet, along with the Board's designation of mitigating and aggravating factors. Not only did this create accurate and retrievable case records, but it also provided a means by which case judgments could be comparatively analyzed. After separating civilian and military cases, STAREDEC sorted them according to their respective combinations of mitigating and aggravating factors. For each factor combination, STAREDEC identified all prior case judgments by the Board. Again for each combination, STAREDEC identified the median case judgment and the cases with the most extreme ("harsh" or "lenient") judgments. In flagging these extreme cases, STAREDEC had two criteria: (1) the judgment had to be among the ten percent most deviant cases for that factor combination, and (2) the judgment had to be at least six months away from the median for that factor combination. 59/

Once STAREDEC flagged a case, the staff appellate review team studied the case summary to determine whether there appeared to be a reasonable justification for the Board's judgment. Obviously, the facts supporting a factor could make that factor apply more strongly in one case than in another. In effect, what the legal analysis staff did was to ascertain whether each case judgment was within a fair exercise of Board discretion. In most of the reviewed cases, there was such a justification.

Through STAREDEC, approximately 200 cases were referred to the Chairman for possible reconsideration. The Chairman then referred some 75 cases to the full Board for reconsideration. The Board reconsidered the STAREDEC-flagged cases en banc (as it did the attorney-flagged cases) with full knowledge of the Board panels' earlier judgments. In almost every instance, the full Board overruled the earlier panel decisions.

Some of the cases flagged by STAREDEC and staff attorneys represented flagrant errors. Two cases had been denied clemency despite the absence of any aggravating factors. Other cases had been treated harshly because staff attorneys had improperly presented irrelevant and prejudicial facts, such as arrest records. Still other cases had simply landed on the docket of a Board panel in an unusually harsh mood. Without the appellate review, these cases would have been routinely sent to the President as originally decided by the panels.

Another stage of appellate review took place after the President approved the Board's case recommendations. To inform each applicant about the decision in his case, the Board sent him a worksheet identifying the specific mitigating and aggravating factors which the Board identified in his case. The purpose was to give him an understanding of the reasons underlying the Board's judgment. An accompanying letter informed him of his right to appeal that judgment.[60/]

Roughly 275 applicants did appeal, and their cases were then reviewed by the carry-over Clemency Office at the Department of Justice. The Clemency Board had disbanded by the time the appeals were reviewed, so there was no direct Board input into those latter decisions. In general, the Clemency Office applied Board precedents in acting uppn these appeals. An estimated 15% of these appeals were successful, resulting in more favorable case recommendations being sent to the President.[61/]

E. Evaluating Performance

Throughout the Clemency Board's year of operations, there was a constant staff effort to provide the Board -- and especially its Chairman -- with feedback about decision-making patterns. For most of the year, the feedback was mostly subjective, bolstered only by administrative tallies which told little about the quality of case judgments. Once work was underway on the Board's final report, however, some provocative, objective data was developed -- principally through a survey of some 1,500 cases[62/] and the final output of STAREDEC. Although this information was collected too late to be useful as feedback, it did help the Board fulfill its strong commitment to be accountable to the public for the consistency and fairness of case judgments.

What the data show is significant, but so too is the fact that it exists at all. Had it not been for two circumstances -- the Chairman's eagerness for feedback and the Board's application of clear, measurable factors in its decisions -- an evaluation of the Board's performance would have been subjective and impressionistic only. As it is, the data tell a story of a decision-making process which, despite some weaknesses, accomplished much.[63/]

1. Process Accomplishments

Considering the Clemency Board's tumultous and erratic beginnings, the record shows a surprising pattern of consistent decision-making. This consistency took a number of forms: (1) applying mitigating and aggravating factors decisively in case judgments; (2) judging similar cases similarly, and different cases differently; (3) treating applicants from disadvantaged backgrounds evenhandedly; and (4) making consistent case judgments over time.

The actual application of mitigating and aggravating factors in Board decisionmaking was always a matter of concern. The Board clearly did not apply its factor "guidelines" in its first sixteen tentative judgments; once those factors became "rules," the picture changed. STAREDEC confirmed the Board members' subjective sense that a number of mitigating and aggravating factors were very important -- indeed, decisive -- in judging cases. STAREDEC analysis showed that twelve of the sixteen mitigating factors and seven of the twelve

aggravating factors had either a "very strong" or "strong" relationship to case decisions.[64/] The factors most closely related to Board decisions were too whose importance was often reaffirmed by Board members: mitigating factor #10 (conscientious reasons for the offense) and aggravating factor #1 (other adult convictions).

Cases with similar factors can be considered similar cases, albeit imperfectly. If the Board were applying its rules correctly, one would generally expect to see cases with identical mitigating and aggravating factors getting comparable judgments -- and cases with different factors getting different judgments. Figures 2, 3, and 4 illustrate the Board's application of its factors in making case judgments.[65/] These tables show what happened to cases with selected factor combinations. Although they encompass only a fraction of all Clemency Board cases,[66/] they illustrate the general pattern of Board decision-making. Fully 97% of the civilian cases and 84% of the military cases received judgments within three months of the median for their factor combinations. Moreover, Board decisions became progressively more severe as mitigating factors were subtracted or aggravating factors added. These tables show an occasional stray case, but all of these were flagged by STAREDEC and reviewed for possible resubmission to the Board.

Figure 2: IMPACT OF SELECTED AGGRAVATING AND MITIGATING FACTORS ON CIVILIAN CASE DISPOSITIONS

| Agg # | Mit # | # of Cases | Pardons | 3 AS | 4-6 AS | 7+ AS | NC |
|---|---|---|---|---|---|---|---|
| - | 4,9,10 | 14 | 14 | - | - | - | - |
| - | 4,10 | 144 | 139 | 4 | 1 | - | - |
| - | 10 | 74 | 69 | 3 | 2 | - | - |
| - | - | 25 | 16 | 5 | 1 | 3 | - |
| 4 | - | 20 | 1 | 9 | 8 | 1 | 1 |
| 1,5 | - | 4 | 1 | - | - | 1 | 2 |
| 1,5,7 | - | 2 | - | - | - | - | 2 |

Figure 3: IMPACT OF SELECTED AGGRAVATING FACTORS ON MILITARY CASE DISPOSITIONS

| Agg # | Mit # | # of Cases | Pardons | 3 AS | 4-6 AS | 7+ AS | NC |
|---|---|---|---|---|---|---|---|
| - | 6 | 2 | - | 1 | 1 | - | - |
| 8 | 6 | 11 | - | 5 | 5 | 1 | - |
| 5,8 | 6 | 17 | 1 | 2 | 7 | 7 | - |
| 1,5,8 | 6 | 34 | 2 | 2 | 14 | 6 | 10 |
| 1,5,8,9 | 6 | 38 | - | 2 | 9 | 16 | 11 |
| 1,5,8,9,11 | 6 | 3 | - | - | - | 1 | 2 |

Figure 4: IMPACT OF SELECTED MITIGATING FACTORS ON MILITARY CASE DISPOSITIONS

| Agg # | Mit # | # of Cases | Pardons | 3 AS | 4-6 AS | 7+ AS | NC |
|---|---|---|---|---|---|---|---|
| 1,8,9,12 | 1,2,6,7,14 | 11 | 11 | - | - | - | - |
| 1,8,9,12 | 2,6,7,14 | 28 | 23 | 3 | 1 | - | 1 |
| 1,8,9,12 | 2,6,14 | 79 | 34 | 21 | 18 | 3 | 3 |
| 1,8,9,12 | 2,6 | 114 | 20 | 29 | 47 | 13 | 5 |
| 1,8,9,12 | 2 | 50 | 2 | 3 | 13 | 26 | 6 |
| 1,8,9,12 | - | 7 | - | - | 1 | 1 | 5 |

The Clemency Board was very conscious of the need to apply its rules fairly to persons with disadvantaged backgrounds. In fact, the first two mitigating factors were intended to give

credit to those whose offense had resulted from severe educational handicaps or personal problems.[67] Disadvantaged persons did not fare better than others in Board judgments, but they did receive equal treatment.[68] Figure 5 shows that the Board judgments neither favored nor disfavored blacks, whites, low IQs, high IQs, high school dropouts, college graduates, low incomes, or high incomes.[69]

Figure 5: CLEMENCY BOARD TREATMENT OF DIFFERENT CATEGORIES OF APPLICANTS

| | Civilian Cases | | Military Cases | |
|---|---|---|---|---|
| | % Pardon | %No Clemency | % Pardon | %No Clemency |
| Black | 75 | 5 | 47 | 14 |
| White | 76 | 1 | 39 | 7 |
| Low IQ (or AFQT) | 59 | 6 | 46 | 9 |
| Medium IQ (or AFQT) | 63 | 3 | 37 | 10 |
| High IQ (or AFQT) | 68 | 2 | 33 | 5 |
| High school dropout | 59 | 3 | 39 | 9 |
| High School graduate | 77 | 1 | 41 | 8 |
| College graduate | 82 | 0 | 25 | 0 |
| Disadvantaged economic background | 72 | 0 | 41 | 5 |
| Not disadvantaged | 74 | 0 | 36 | 3 |

Another measure of the fairness of a process is its consistency over time. For all but the first 5% of its cases, Clemency Board judgments were comparable from month to month. Figure 6 shows how Board case judgments varied throughout the year, as reflected by the "pardon rate" for military and civilian cases.[70/] The civilian pardon rate hovered around 90%, and the military pardon rate around 45%. Likewise (but not shown in Figure 6), the "no clemency" rates were also unsteady at first, then steady in the second half of the Board's year. Note that the rapid pace of post-April Board operations did not impair the consistency of case judgments. In fact, the more cases per panel-day, the more consistently they were decided.

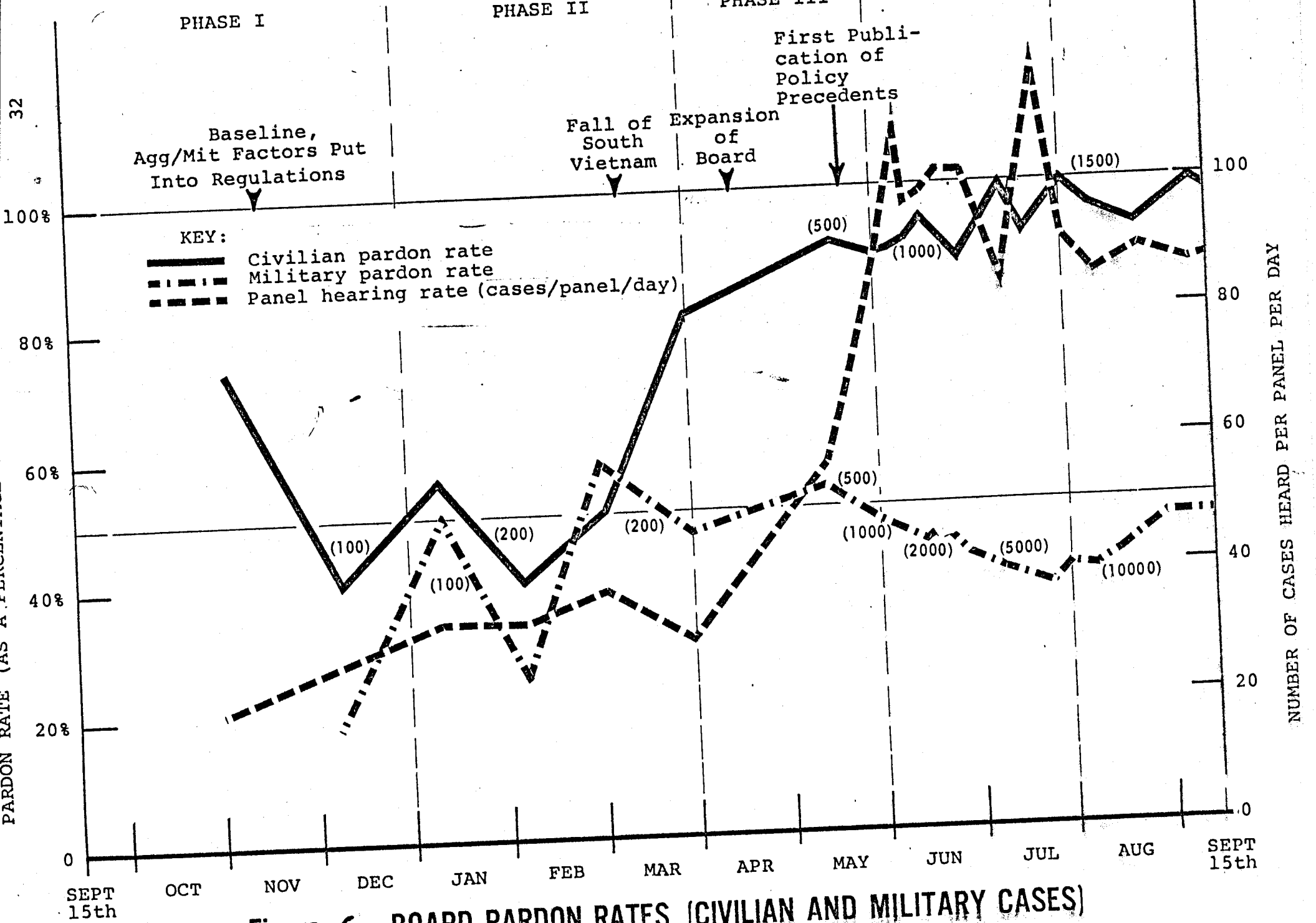


**Figure 6 - BOARD PARDON RATES (CIVILIAN AND MILITARY CASES)**

NOTE: Numbers in parentheses show cumulative cases heard by given date.

2. Process Disappointments

The generally good performance of the Clemency Board in achieving consistency and fairness in its case judgments should not be misinterpreted as an indication that everything went well. It did not. None of the techniques described above was implemented easily, and the Board's decision-making process was far from ideal.

Some of the mitigating and aggravating factors were based on questionable logic. For example, the fact that an applicant was previously convicted by court-martial for AWOL made aggravating factor #1 (other adult convictions) applicable, even though that court-martial, had it led to a discharge, would itself have made him eligible for the clemency program. Secondly, the Board decided to presume that the reason for an applicant's offense was "selfish and manipulative" (aggravating factor #5) in the absence of any evidence about his reasons, shifting the burden to the applicant to show that he was not selfish. Thirdly, the fact that an applicant was AWOL for a long time was held against him (aggravating factor #9) even though the difference between a short and long AWOL was usually attributable only to the vigilance of the police in an applicant's home town. Finally, a heroin habit was considered mitigating (#3), not aggravating -- to the strong displeasure of some Board members.

Certain key mitigating factors -- such as educational handicaps (#1), family problems (#2), and mental or physical

problems (#3) -- were not decisive in very many cases,[71] even though Figure 5 shows that they did contribute to the evenhandedness of Board decisions. Conversely, one of the Board's most controversial aggravating factors -- selfish motivation for the offense (#5) -- did have a decisive impact.

The panels hearings were plainly a flawed process. Applicants or applicants' counsel were almost never present, and thousands of cases were decided at a rate of speed which was unfortunate, however necessary. While aggregate data show that four minutes per case did not adversely affect the overall consistency of judgments, this fast pace sometimes interfered with the fair treatment of individual cases. Board members, being human, occasionally sped through cases which should have been given more time and discussion.[72] Some Board members were resentful when staff attorneys tried to compensate for this by presenting an applicant's case in an especially favorable light.

The Clemency Law Reporter was not used to anything approaching its true potential as a "hornbook" of Board policies. This was partly due to the press of time, but primarily it was because some lay members of the Board clearly felt uncomfortable with a staff-prepared instrument which monitored their exercise of discretion.

The computer-aided appellate review system was just being perfected when the Board went out of business. At least twice as many cases would have been reconsidered by the Board en banc had there been time. Also, like any experimental computer

program, STAREDEC had its flaws. It was based on a narrower concept of precedent than it might have been; this too could have been corrected in time.[73/]

The process of reviewing applicants' appeals was inappropriate per se. The appeals were heard not by the Board -- which no longer existed by then -- but by a carry-over staff of attorneys who had middle-management positions at the Clemency Board. From all indications, it appears that they administered the appeals process fairly, but they were the wrong individuals to be making appellate decisions.

In general, these inadequacies resulted from (1) an awkward compromises among Board members with different philosophies, (2) the lay character of the Board, and (3) the press of time.

* * *

From looking at the accomplishments -- and notwithstanding the disappointments -- it appears that the Clemency Board did achieve a rather good record for consistency and fairness of judgments. Much of the credit for this must go to the fair-mindedness and hard work of the eighteen men and women who made them -- and, one should add, to the quality of the preparatory work of the 400 staff attorneys. But high-mindedness and hard work are not by themselves guarantees of good results. What is more significant is that the Clemency Board developed rules, followed those rules, and evaluated its performance in applying them. The mitigating and aggravating factors, the

Clemency Law Reporter, the internal appellate system, and the computer analysis together provided the mechanism by which this was accomplished.

## III. APPLICABILITY OF THE CLEMENCY BOARD MODEL TO JUDICIAL SENTENCING

The experience of the Clemency Board in controlling adjudicative discretion suggests that sentencing judges might improve the consistency of their decisions if they implemented some of the techniques tested by the Board. Indeed, the Clemency Board model may have an even wider application -- to decisions by parole boards, military discharge review boards,[74/] and other adjudicative bodies.

What makes the Board's experience particularly transferrable to sentencing judges is the comparability of the alternative service decision to the sentencing decision. When a judge chooses between probation and incarceration -- and, whichever his choice, when he fixes the length of sentence -- he is doing essentially the same thing the Clemency Board did. Certainly, the task of the sentencing judge is more difficult. The Clemency Board reviewed only two categories of offenses[75/] and had fairly homogeneous defendants;[76/] sentencing judges must act upon a much wider range of offenses and offenders. The Clemency Board had problems enough interpreting its vague mandate of "bind[ing] the nation's wounds;"[77/] sentencing judges must base their decisions upon the much more problematic

and conflicting notions of deterrence, rehabilitation, and the protection of society.

The more complicated task facing sentencing judges should not excuse them from having to apply clear decision-making rules. On the contrary, the complexity of judges' sentencing decisions makes the use of such rules all the more important. Of course, this greater complexity does mean that the rules applicable to the sentencing process would have to be more sophisticated than the rules applied by the Clemency Board.

The Board offers only a first-stage experiment with baseline formulas, mitigating and aggravating factors, the use of case precedents, appellate review, and computer-aided analysis of consistency. Each of these techniques needs testing in the actual sentencing process before any conclusions can be drawn about their usefulness to a judge. However, there is every reason to believe that such a sentencing experiment would be as successful as the Clemency Board model.

The components of a sentencing experiment could be much like that described below, tailored to the needs of a particular jurisdiction. It should encompass as many sentencing judges and offense categories as possible to provide the most meaningful test of consistency.

1. A "baseline" would be stablished for each type of offense, giving the sentencing judge a starting point for his exercise of discretion. The baseline would be the presumptive sentence for all cases involving that offense. Also, a minimum and maximum sentence "range" would be set for each offense, indicating the outer limits of a judge's exercise of discretion. For example, the "baseline" for armed robbery might be five years, with a "range" of one-to-twenty years.

2. A list of mitigating and aggravating factors would be developed as the basis for the judge's sentencing decision. The factors would take into account the diverse purposes of sentencing. For example, the mitigating factors might include such notions as mental duress, restitution to victims, and evidence of current rehabilitation. The aggravating factors might encompass the use of firearms, prior convictions, and substantial evidence of bad character. Of course, these lists would be much longer and would have to be prepared with great care.[78/]

3. With the factors articulated in advance, judges would only consider these factors in rendering sentences. If experience were to demonstrate the need for the creation of additional factors, these would also be articulated and established by rule, and not simply applied in an ad hoc fashion.

4. The information upon which the sentence is based would be restricted to that which bears upon the designated mitigating and aggravating factors.

5. Sentences would be group decisions, perhaps by three-judge panels. This would ensure that the true basis for each judgment would be the articulated rules -- not one judge's personal standards.

6. Sentencing judges would be required to note for the record which factors applied to a particular defendant before pronouncing sentence.

7. If the mitigating and aggravating factors balance each other out, the "baseline" sentence would be imposed. If the mitigating factors outweigh the aggravating factors, the sentence would be reduced below the baseline. Conversely, if the aggravating factors outweigh the mitigating factors, the sentence would be increased above the baseline. Obviously, in no case would the sentence fall outside the legislated outer limits of the judge's discretion.

8. Sentencing judges' identification of mitigating and aggravating factors would have to be consistent with case precedents showing prior use of those factors.

9. Each sentencing decision would be analyzed by a STAREDEC-type computer before appeal to provide an immediate,

objective measure of consistency. Eventually, each sentencing judge might be given feedback about how comparable cases were being decided.

10. Sentences would be made subject to appeal, with appeals based on either (1) a wrong identification of factors, or (2) an inappropriate sentence, given the applicable factors. Appellate courts would, through their decisions, try to maintain consistent patterns in sentences.

11. All sentencing judges would meet periodically to maintain conformity in their interpretation of the rules and their implementation of experimental procedures.

12. A comprehensive survey of cases would be conducted as a means of evaluating the experiment. An identical survey of a non-experimental "control group" would be useful for comparison.

Not all of these techniques need be applied in any one experiment. The three-judge concept, the STAREDEC-like computer review, and the appellate review of sentencing decisions are separable items. However, all aspects of the model reinforce one another and should enhance the prospects for a successful experiment.

Reduced to its simplest features, this Clemency Board model consists of establishing clear rules, following those rules, and measuring performance. The exercise of discretion is

controlled -- and the quality of decision-making improves as a result.

Even with its discretion disciplined, the Clemency Board had its wayward moments and applicants were sometimes asked to do too much or too little alternative service. Sentencing judges, with almost limitless discretion, can be expected to be wayward much more often. When they are, the price is paid by an underprotected public or by an overpunished offender. Either way, the price is too high.

FOOTNOTES

1/ Address by Attorney General Edward H. Levi before the Governor of Wisconsin's Conference on Employment and the Prevention of Crime, February 2, 1976.

2/ Id.

3/ Judge Lombard gave the following example at the 1965 Philadelphia Judicial Sentencing Institute: "You may have heard of the visitor to a Texas court who was amazed to hear the judge impose a suspended sentence where a man had pleaded gulty to manslaughter. A few minutes later the same judge sentenced a man who pleaded guilty to stealing a horse and gave him life imprisonment. At recess he was introduced to the judge, and he expressed surprise at these sentences. The judge thought a moment and replied, "Well, down here there is some men that need killin', but there ain't no horses that need stealin.'" Lombard, SENTENCING AND LAW ENFORCEMENT, 40 F.R.D. 399, 409 (1965).

4/ M. Frankel, Comments on an Independent, Variable Sentencer, 42 U. Cinn. L. Rev. 667 (1973). See, e.g., American Bar Association Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES, 27-28 (Approved Draft 1968); R. Dawson, SENTENCING, ch. 8 (1969); S. Rubin, et al., THE LAW OF CRIMINAL CORRECTION, 116-119 (1963).

5/ See the report of the American Bar Association, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES, as quoted in W. Gaylin, IN SERVICE OF THEIR COUNTRY, 323-324 (1970).

6/ Many of these critics are judges themselves. See, e.g., M. Frankel, CRIMINAL SENTENCES (1973); Devitt, How Can We Effectively Minimize Unjustified Disparity in Federal Criminal Sentences? , in INSTITUTE OF SENTENCING, 42 F.R.D. 175, 218 (1967); Levin, Toward a More Enlightened Sentencing Procedure, 45 Neb. L. Rev. 499 (1966); Rubin, DISPARITY AND EQUALITY OF SENTENCE, 40 F.R.D. 55 (1967); Wyzanzki, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281 (1952).

7/ Kenneth Culp Davis, DISCRETIONARY JUSTICE, 133 (1971).

8/ See especially S. 2698 and S. 2699, introduced in the current session of Congress by Senator Edward M. Kennedy of Massachusetts. At the time of this writing, these bills are still pending.

9/ Sentencing councils and appellate review of sentencing have been implemented by a number of jurisdictions. See generally the ABA STANDARDS (approved drafts) relating to sentencing alternatives and procedures. See also the A.L.I. Model Penal Code (1962).

10/ See also Sentencing Selective Service Violators: A Judicial Wheel of Fortune, Col. J. of Law and Soc. Prob., Vol. 5:2, 164 (1969).

11/ Presidential Clemency Board, REPORT TO THE PRESIDENT (hereinafter referred to as REPORT), 49 (1975).

12/ Id., cited from the ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF UNITED STATES COURTS for 1968 and 1974.

13/ The most extreme sentence was given to a black civil rights worker in Louisiana -- five concurrent five-year sentences for separate draft violation charges. By contrast, a Wisconsin defendant recently received a sentence of probation for one day under the FEDERAL YOUTH CORRECTIONS ACT (under which his conviction record was then expunged).

14/ These techniques are described infra in the order presented here.

15/ See infra. See also the Clemency Board REPORT, ch. 5.

16/ See infra.

17/ See infra.

18/ The Presidential Clemency Board was created on September 16, 1974, by President Gerald R. Ford in Proclamation 4313 and the accompanying Executive Order 11803 of the same date (reproduced in the Clemency Board REPORT, App. B). The Clemency Board was originally to have been in existence until December 31, 1976 (see §9 of the Executive Order), but it was instead terminated on September 15, 1975. The Board submitted its REPORT TO THE PRESIDENT on December 15, 1975. Carry-over administrative tasks were delegated to a newly designated Clemency Office in the Office of the Pardon Attorney, Department of Justice. Upon completion of these functions, scheduled for March 31, 1976, any residual matters are the responsibility of the Pardon Attorney himself.

footnote 18/ continued:

The Chairman of the Clemency Board was Charles E. Goodell, former United States Senator from New York. The Board had a total of nine members: Dr. Ralph Adams, James P. Dougovito, Robert H. Finch, Father Theordore M. Hesburgh, Vernon E. Jordan, James A. Maye, Aida Casanas O'Connor, and General Lewis W. Walt. In April, 1975, the Board was expanded by Executive Order to eighteen members because of the expanded workload. The new members were Timothy Lee Craig, John A. Everhard, W. Antoinette Ford, John Roy Kauffmann, Rev. Msgr. Francis J. Lally, E. Frederick Morrow, Lewis B. Puller, Jr., Harry Riggs, and Joan Vinson. Robert H. Finch resigned from the Board in June and was replaced by Robert S. Carter. For biographies of the Board members, see Id., App. A.

19/ The Clemency Board received approximately 21,500 applications, of which some 6,000 were found to be ineligible. From among the 15,468 eligible applications, the Clemency Board made 14,514 case recommendations to the President before it terminated operations on September 15, 1975. The Board took no action on the remaining 954 cases because of insufficient information; the carry-over Clemency Office in the Department of Justice later made case recommendations for those cases in which the necessary information could be obtained. Id., 163-165. Clemency Board case recommendations were not final. Only the President can exercise the constitutional power to grant pardons, and no Clemency Board case recommendation was final until approved by him. See Art. II, §2, cl. 1 of the Federal CONSTITUTION and the discussion in the Clemency Board REPORT, 11-12. As of March 1, 1976, the President had acted upon all but about 750 case recommendations -- and, without exception, he accepted the judgment of the Board.

20/ The Clemency Board had jurisdiction over draft offenders who had been convicted for one of the following violations of §12 of the SELECTIVE SERVICE ACT: (1) failure to register for the draft, or failure to register on time; (2) failure to keep the local draft board informed of his current address;(3) failure to report for or submit to preinduction or induction examination; (4) failure to report for or submit to induction; or (5) failure to complete alternative service to satisfy the requirements of a conscientious objector exemption. Draft offenders who were fugitives still charged with such violations were the jurisdiction of the Department of Justice, which implemented a separate

footnote 20/ continued:

part of the President's clemency program. To be eligible, an applicant must have committed his offense between August 4, 1964, and April 28, 1973, and he must not have been an alien excluded by law from entering the United States under U.S.C. 1182(a)(22).

The Clemency Board also had jurisdiction over military offenders who received Undesirable, Bad Conduct, or Dishonorable Discharges as a result of violations of Articles 85 (desertion), (86) AWOL, or 87 (missing movement) of the Uniform Code of Military Justice (10 U.S.C. 885, 886, and 887). Military offenders who were fugitives still charged with such violations were the jurisdiction of the Department of Defense, which implemented a separate part of the President's clemency program.

Of the 8,700 convicted draft offenders eligible to apply to the Clemency Board, 1,879 (22%) applied. Of the approximately 90,000 discharged military offenders eligible to apply to the Board, 13,589 (15%) applied. Of the 4,522 fugitive draft offenders eligible for the Department of Justice clemency program, 706 (16%) applied. Of the 10,115 fugitive military offenders eligible for the Department of Defense clemency program, 5,555 (55%) applied. Altogether, 21,729 of the approximately 113,000 eligible persons applied -- for an overall participation of 19%.

For a further description of eligibility criteria and application statistics, see Id., 7-9 and 21-22.

21/ The Presidential pardon was the remedy offered convicted draft offenders who applied to the Clemency Board. For discharged military offenders, the remedy was a Presidential pardon and a recharacterization of discharge as a "Clemency Discharge," a new type of discharge created for the purposes of this program. For a discussion of the implications of these remedies (and a description of the remedies offered by the Department of Justice and Department of Defense clemency programs), see Id., 15-21.

22/ This alternative service was to be performed in a position which served the "national health, safety, or interest" and which did not take a job away from any other qualified individual. Applicants to the Clemency Board who were assigned to six months or less of alternative service could fill part-time, volunteer positions which would not require an interruption of their regular jobs. The Selective Service System was given the responsibility of supervising the performance of assigned periods of alternative service. See Executive Order 11804,

footnote 22/ continued:

September 16, 1974, and the Clemency Board REPORT, 17-21. The performance of alternative service has been uneven so far, and it appears that perhaps as many as 4,000 of the Clemency Board applicants will fail to complete alternative service.

23/ Curiously, one point of disagreement between the Clemency Board and the pro-amnesty community has been over whether the Board was in fact engaged in "sentencing" of applicants. The latter always maintained that alternative service was punitive and that the Clemency Board was meting out alternative service "sentences." See the Statement made by Henry Schwarzschild of the ACLU Amnesty Project in the CLEMENCY PROGRAM PRACTICES AND PROCEDURES, Hearings of the Subcommittee on Administrative Practice and Procedure, U.S. Senate Committee on the Judiciary (1975). However, the Board's position was that it was offering a benefit which could be accepted or rejected by every applicant. Indeed, every Clemency Board applicant could refuse to perform alternative service without legal jeopardy, and no Presidential pardon could be effective unless accepted by its recipient. This was not as much a debate over whether the Board was following or should follow procedures comparable to those of a sentencing judge, but rather over the merits of the alternative service aspect of the President's clemency program.

24/ Presidential Proclamation 4313.

25/ Executive Order #11803, §3.

26/ See generally Proclamation 4313 and accompanying Presidential statement, both dated September 16, 1974.

27/ The 1946-47 Truman Amnesty Board decided cases according to broad categories, not on a case-by-case basis. Also, it denied clemency to 90% of its 15,805 applicants. Its Report is reproduced in full in SELECTIVE SERVICE AND AMNESTY, Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 185-199 (1972).

28/ Clemency Board REPORT, 83ff.

29/ Clemency Board case judgments were as follows:

| | Civilian Cases | | Military Cases | |
|---|---|---|---|---|
| | # | % | # | % |
| Immediate pardon | 1432 | 82% | 4620 | 36% |
| Alternative service: | | | | |
| 3 months | 140 | 8% | 2555 | 20% |
| 4-6 months | 91 | 5% | 2941 | 23% |
| 7+ months | 68 | 4% | 1756 | 14% |
| No clemency | 26 | 1% | 885 | 7% |

(Source: Id., xxiii).

30/ The eighteen-member Board consisted of five lawyers and thirteen non-lawyers.

31/ The Board included a number of individuals who had earlier taken strong public positions on these issues. For example, Father Theodore M. Hesburgh (President of the University of Notre Dame) had been a long-standing opponent of the Vietnam war and an advocate of unconditional amnesty; General Lewis W. Walt (Commandant of Marine forces in Vietnam during the war) had the opposite point of view. The Board's Chairman, Charles E. Goodell, had opposed the war as a United States Senator but was not in favor of unconditional amnesty. Understandably, the development of consensus Board positions required substantial time and compromise.

32/ At the time, staff attorney procedures were just as unstructured as Board procedures. Vague, unsubstantiated, or irrelevant facts were sometimes included in case summaries. After the first sixteen cases, the work of staff attorneys was monitored by a special quality control unit.

33/ At first, the Board established eleven mitigating factors and seven aggravating factors, later expanded to sixteen and twelve, respectively. See Figure 1, infra, for the final list of factors.

34/ It should be noted that this "baseline" was neither a minimum nor a maximum. It was more of a target median, with the expectation that equal numbers of cases would be decided on either side of it. As a general rule, an applicant's baseline calculation was found to be the most important determinant of his case judgment. See Id., 126.

35/ The "other factors" were the time spent on probation or parole, time spent performing alternative service, and the judge's initial sentence. The baseline formula worked as follows:

(1) Starting with the maximum baseline of 24 months, three months were reduced for every month of confinement. The baseline was further reduced by one month for every month of court-ordered alternative service, probation, or parole previously served, provided that the applicant had not been prematurely terminated because of lack of cooperation.

(2) If this baseline calculation was greater than the applicant's sentence from a Federal judge or court-martial, that original sentence became the baseline.

(3) The minimum baseline was three months, without exception.

(4) Applicants who had been sentenced to probation or discharged administratively from the Armed Forces were considered to have sentences of zero months imprisonment. Their baseline was the three-month minimum. Id., 95-96.

36/ The Clemency Board assigned much less alternative service than either the Department of Justice or the Department of Defense clemency programs. Each of the latter had a fixed baseline of 24 months which was reduced in some cases because of mitigating circumstances. Most applicants to the Justice and Defense programs were assigned to 18-24 months of alternative service. Id., 145-147. The Clemency Board justified its more lenient decisions as a reflection of "the basic difference between Clemency Board applicants and those eligible for the Justice and Defense programs. Clemency Board applicants had already paid a legal penalty for their offenses; they had received civilian or military convictions, or less-than-honorable administrative discharges. Also, a pardon could never be as beneficial a remedy as complete relief from prosecution or administrative punishment." Id., 95.

37/ The only factor ever rejected was a proposal to make habitual drug use an aggravating factor. At the time, the Board was applying mitigating factor #3 (mental or physical problems) to persons with serious drug habits, and it voted continue that practice.

38/ For a list of these factors, see Figure 1, infra. The standards noted here were not specifically articulated by the Board, but they were implicit in Board discussions. The Clemency Board REPORT notes that the factors can also be categorized as follows: the reason for the offense, the circumstances surrounding the offense, the individual's overall record in the military, his overall record in the civilian community, and circumstances surrounding his application for clemency. Id., 97ff.

39/ See generally Proclamation 4313 and the accompanying Presidential statement, both dated September 16, 1974.

40/ See the Clemency Board REPORT, ch. 3-4 for a description of the applicants and the exact manner in which the Board applied each mitigating and aggravating factor. The Vietnam veteran discussion appears at 60-65.

41/ The Clemency Board's experience with this last aggravating factor reflects the compromise and fragile consensus which went into the establishment of these rules. Some Board members considered these offenses to be unrelated to the clemency mission, urging that they be disregarded altogether. Others insisted that applicants convicted of felony offenses be denied clemency automatically, much as the Truman Amnesty Board had excluded persons with criminal records. Instead, the Board adopted the middle view, considering felony convictions to be a "highly aggravating factor." Id., xxi.

42/ Proclamation 4313 specifically notes that Clemency Discharges "shall not bestow entitlement to benefits . . . ." Despite this, the Clemency Board recommended that the President personally exercise his authority as Commander-in-Chief of the Armed Forces by (a) personally directing the discharge upgrades of the most meritorious applicants, (b) referring other cases with slightly less merit to the military discharge review boards for special consideration, and (c) referring cases involving service-incurred physical disabilities to the Veterans' Administration for medical benefits only. The President never specifically acted on these recommendations -- and, given the passage of time, it appears that they have been "pocket-vetoed."

43/ Clemency Board REPORT, 127

44/ Id., 24-26 and 85-94.

45/ Each applicant had a 30-day opportunity to comment on his case summary. Because of the press of time, cases were decided before the end of the 30-day comment period. Comments were rarely received about case summaries; when this happened, a case was submitted to another Board panel de novo if the comments or corrections were possibly significant.

46/ 39 FR 41351.

47/ See note ____.

48/ Father Hesburgh attributes the Board's leniency directly to the fact that Board members had to follow a clear set of rules. "If we had to fight all cases one-by-one, we would not have been as successful in making clement dispositions."

49/ For a discussion of what kinds of cases were denied clemency, see Id., 136-138 and 141-143.

50/ For a discussion of what kinds of cases received immediate pardons, see Id., 134-135 and 139-141.

51/ This increase resulted from the Board's concerted efforts to educate the public about who was eligible for the clemency program. Before this public information campaign, most people thought that the program only included exiles and fugitives -- and not punished offenders. Immediately after this information campaign was begun, Clemency Board applications showed a sharp increase. For this reason, the President extended the application deadline for two months (from January 31, 1975 to March 31, 1975). The Clemency Board's application rate was still increasing when the deadline was reached. See Id., 20-23.

52/ The total staff of the Clemency Board grew from 100 to 600 in a period of just a few weeks. For a description of the "crisis management" aspect of Board operations, see Id., ch. 6.

53/ Among the Board members, there was unanimous approval for the concept of balancing these panels. Very rarely did a panel result in a sharp two-against-one voting pattern. According to Father Hesburgh, "there was shared input from all sides, as we all recognized that we had to compromise occasionally." Had the panels not been balanced philosophically, the judgments would have been very uneven.

54/ The CLEMENCY LAW REPORTER began as a staff paper illustrating how the Board was applying its mitigating and aggravating factors. Later, it served as a guide to Board precedents and as an internal forum for staff-prepared articles on issues of professional concern. An index to the REPORTER issues, with article highlights, is included in the Clemency Board REPORT, App. D. Appendix D to the REPORT also contains the entire fifth issue of the CLEMENCY LAW REPORTER, the final statement of the Board's case precedents. All five issues are available to the public at the National Archives, Washington, D.C.

55/ As illustrations, the definitions and case examples for mitigating factor #7 (Vietnam service) and aggravating factor #4 (AWOL in Vietnam) are shown below. They are extracted from the fifth issue of the REPORTER, reproduced in the Clemency Board REPORT, 310-311 and 292.

MITIGATING FACTOR #7: Tours of Service in the War Zone

This factor is applicable in cases where the applicant has served a minimum of three months in Vietnam or on a Navy ship that had a sea patrol off the coast of Vietnam. It can be applied where the applicant had not completed a tour, but while on authorized leave from Vietnam assumed an unauthorized absence status. Shorter periods of Vietnam service are not covered, unless the applicant was injured in Vietnam or transferred out of the war zone by the military service for reasons other than serious military or nonmilitary offenses (including AWOL offenses).

(1) During his initial enlistment, applicant served as a military policeman and spent 13 months in that capacity in Korea. He then served two tours of duty in Vietnam, as an assistant squad leader during the first tour, and as a squad leader and chief of an armored car section during the second.

(2) Applicant served in Vietnam for eleven months.

(3) Applicant served in Vietnam with the 101st Airborne as a light weapons infantryman. His tour lasted four months and 22 days. He returned to the United States on emergency leave for five months. Applicant stated that he went AWOL because he could not face going back to Vietnam, due to the incompetence of his officers and the killing of civilians.

footnote 55/ continued:

(4) The applicant served for three months in Vietnam in a combat status. While in Vietnam, he was given emergency leave back to the United States because of the death of his mother. Applicant overstayed his leave and became AWOL. He was apprehended shortly thereafter.

(5) Applicant saw service in Vietnam for a period of two months, 13 days. He served as a combat medic. While in Vietnam, he broke his ankle. He was operated on and was evacuated for rehabilitation.

(6) Applicant served in Vietnam for nine months as a mortar specialist and participated in two combat campaigns. He received fragment wounds necessitating evacuation to Japan and then to the United States.

(7) Applicant was wounded after 3 months in Vietnam, requiring two operations and prolonged convalesence.

(8) Applicant served aboard the USS Buchanan for seven months off the coast of Vietnam.

AGGRAVATING FACTOR #4: Desertion During Combat or Leaving Combat Zone

This factor indicates that an applicant went AWOL from his unit either during actual enemy attack or before any reasonably anticipated enemy attack. Going AWOL directly from Vietnam gives automatic rise to this factor. However, departing AWOL from R&R outside of Vietnam or home leave from Vietnam does not constitute this factor though it does constitute Aggravating Factor #10. An applicant's reasons for his qualifying offense do not affect the applicability of this factor.

(1) Applicant was an infantryman in Vietnam when he went AWOL. He was picked up in a rear area by Military Police and ordered back to the field by two lieutenants. He refused to fly out to join his company.

(2) Applicant commenced the first of three AWOLs while in Vietnam. He flew back to California. His subsequent AWOLs occurred after his apprehension in the U.S.

footnote 55/ continued:

(3) Applicant stated at his trial that he became extremely frightened in combat. He went AWOL after he was sent to a rear area for chills and fever.

(4) Applicant bought orders to return to the U.S. from Vietnam.

(5) Applicant received an Undesirable Discharge for unfitness; two of four AWOL offenses occurred while applicant was in Vietnam.

56/ Usually, these Board-member referrals reflected basic philosophical differences with the policies of the Board majority. Half of these cases were referred by one particular Board member. See Id., 124-125.

57/ STAREDEC, named after the legal concept of stare decisis cost approximately $75,000 to implement, staff time included -- or roughly $5.00 per case. For a more detailed description of STAREDEC, see Id., App. E. The complete STAREDEC tape is available to the public at the National Archives, Washington, D.C.

58/ The idea of having a computer review of panel judgments arose from a recommendation of the Inter-Agency Team to Survey the Presidential Clemency Board, a team of management specialists sent by the White House to help plan the expansion of Board operations. Because the Board was making decisions so quickly, the Inter-Agency Team suggested that a "post-audit review" be conducted before case judgments were submitted to the President. The computer program was based upon prior staff statistical analyses of Board precedents. With the help of NASA (which absorbed most of the cost), STAREDEC took only one month to become fully operational. Id., App. E.

59/ The following example shows how STAREDEC worked. There were 114 military cases which had the factor combination of 2 and 6 mitigating and 1, 8, 9, and 12 aggravating. Those cases were decided as follows:

| Immediate Pardon | 3 months alt. serv. | 4-6 months alt. serv. | 7-9 months alt. serv. | 10-24 months alt. serv. | no clemency |
|---|---|---|---|---|---|
| 20 | 24 | 47 | 11 | 2 | 5 |

The median Clemency Board judgment was a four-to-six month alternative service recommendation. The two judgments of 10-24 months of alternative service and the five "no clemency" judgments were flagged by STAREDEC as "harsh" cases.

60/ The worksheet and letter sent to clemency recipients are included in Id., App. D.

61/ Because of the Selective Service rule that applicants with six months or less of alternative service could complete this obligation through part-time work (see note 22, supra), the Clemency Office frequently reduced appellants' assignments to six months. Appeal decisions were made with the CLEMENCY LAW REPORTER as a guide.

62/ The primary purpose of this survey was to learn about the background characteristics of clemency applicants. It was based upon a representative sample of 1,009 military cases and 472 civilian cases. See the Clemency Board REPORT, App. C. Survey findings are presented in Id., ch. 3 and 5.

63/ These "process" accomplishments do not necessarily translate into substantive achievements. The overall clemency program is in fact subject to much criticism on the ground that it offers little if any tangible benefit to applicants. While the Presidential pardon has great symbolic value and restores civil rights lost by reason of the underlying criminal conviction, it does not translate directly into improved economic circumstances. The Clemency Discharge by definition does not confer rights to veterans' benefits, and it is uncertain how it will affect the decisions of military discharge boards and the Veteran's Administration when they review subsequent applications for benefits by clemency applicants. Successful participation in the program requires a sustained interest on the part of applicants, most of whom are socially, economically, and educationally disadvantaged. As a consequence, there has been a high drop-out rate due to undeliverable notices, failure to report for alternative service, and failure to complete alternative service.

64/ Id., 126-132.

65/ Id., 133.

66/ The case judgments shown in Figures 2, 3, and 4 represent only 13% of the Board's civilian cases and 3% of the military cases. Comparable tables can be made of other factor combinations, based upon STAREDEC's final print-out.

67/ Mitigating factor #1 (inability to understand obligations) and mitigating factor #2 (personal or family problems). Id., 290-291.

68/ The Board consciously tried to be clement towards applicants with disadvantaged backgrounds, with a number of mitigating factors (#1, 2, 3, 5, and 8) made directly applicable to them. Curiously, this resulted in evenhanded treatment -- and not more favorable treatment, which the Board intended. This indicates that applicants with disadvantaged backgrounds probably would have been treated much worse than others had the Board's intent not been so strong, and had these mitigating factors not existed.

69/ These statistics are drawn from the comprehensive survey of Clemency Board applicants. See note ___. For further data about who received pardons and who was denied clemency, see Id., 134-145. Only one category of applicants fared badly because of circumstances which did not reflect upon their behavior: those for whom the military or Federal court system had not compiled complete records. These partial records tended to focus on an applicant's offense and not his background, providing more evidence about aggravating factors than about mitigating factors. This unfortunate inequity marred an otherwise quite even-handed pattern of judgments.

70/ Id., 173.

71/ Id., 126-132. Board member Timothy Craig "strongly disagrees" with this observation, but it is demonstrated clearly by statistics. See Figure 5 and note 68, supra.

72/ Father Hesburgh believes that Board judgments were, if anything, more fair when cases were decided in panels. He considers full Board judgments to have involved "posture and charade," with the panels having given more serious attention to the circumstances of each applicant's case.

73/ The principal flaw in the STAREDEC program was its inability to develop a precedent pattern for cases which had unique combinations of mitigating and aggravating factors. Since they were the only cases with those combinations, they were also the median cases -- and thus were not flagged. To compensate for this, the legal analysis staff automatically reviewed judgments of "no clemency" or more than twelve months of alternative service. This shortcoming of STAREDEC could be overcome by applying a regression formula to cases with unique factor combinations -- or, indeed, to all cases.

74/ Congressman Thomas Downey of New York recently introduced H.R. 11097, a bill to alter the Armed Forces discharge review procedures. This bill would require military discharge review boards to apply sixteen "mitigating" and fifteen "extenuating" circumstances when reviewing applications for discharge. The bill has no provisions for aggravating circumstances, under the apparent assumption that those boards will consider them without being required to do so by an Act of Congress. The experience of the Clemency Board indicates that the inclusion of aggravating factors is even more important than mitigating factors for the protection of the individual. Aggravating factors require the structuring and recording of negative feelings, preventing irrelevant facts from being applied to anyone's detriment. Likewise, the Clemency Board's legal analysis staff found their review of aggravating factors to be more determinative than the review of mitigating factors.

75/ Draft offenses and military absence offenses can each be considered single categories, although each encompasses a range of specific offenses. See note 20, supra.

76/ Clemency Board applicants proved to be much more diverse than the Board had expected, but they still were far more homogeneous than defendants in criminal trials. The applicants were virtually all between the ages of 21-35, all military applicants had military backgrounds per se, and virtually no one had committed a violent act as part of his draft or military absence offense. See the Clemency Board REPORT, ch. 3.

77/ Proclamation 4313.

78/ See generally the A.L.I. MODEL PENAL CODE (1962).

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October 18, 1976

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Senator Charles E. Goodell
Hydeman, Mason and Goodell
1220 19th Street, N.W.
Washington, D.C. 20036

Dear Senator:

We have enclosed a reprint of our article about the Clemency Board in the Notre Dame Lawyer.

Our "white paper" will be printed soon, and we'll get a copy of that to you as soon as it is ready. Thank you for your comments and maybe this time we'll spell your name right.

Sincerely,

Lawrence M. Baskir

William A. Strauss

encl.

# notre dame lawyer

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