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

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## I. Introduction

The exercise of discretionary judgment is fundamental to any system of justice; but equally fundamental is the consistent treatment of all individuals. Yet to achieve the latter necessitates a reasonable balance between flexibility and strict accountability to rules. Conscious efforts to achieve this balance are normally made throughout 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.”<sup>1</sup> 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.<sup>2</sup>

Typically, judges are free to make sentencing decisions according to their own personal standards.<sup>3</sup> 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.”<sup>4</sup> What is ironic is that this unstructured sentencing decision

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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 guilty 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’, and there ain’t no horses that need stealin’.”

Lombard, *Sentencing and Law Enforcement*, 40 F.R.D. 399, 409 (1965).

4 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, THE LAW OF CRIMINAL CORRECTION, 116-119 (1963).

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.<sup>5</sup> Recognizing this problem, critics of sentencing practices have called for more structure in the process:<sup>6</sup>

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.<sup>7</sup>

One reaction to the undisciplined discretion of sentencing judges is the effort to impose mandatory minimum sentences, including certain provisions in the controversial Senate bill, S. 1.<sup>8</sup> Other proposals have been advanced, but working models have been slow to emerge from American courts and legislatures.<sup>9</sup>

The Presidential Clemency Board recently developed a working model, inspired in part by the Board's reaction to the uneven treatment of convicted draft offenders by Federal judges.<sup>10</sup> In its final report, the Clemency Board noted that

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 the critics are judges themselves. See, e.g., M. FRANKEL, CRIMINAL SENTENCES (1973); Devitt, *How Can We Effectively Minimize Unjustified Disparity in Federal Criminal Sentences?* 42 F.R.D. 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); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARVARD L. REV. 1281 (1952).

7 K. DAVIS, DISCRETIONARY JUSTICE, 133 (1971).

8 E.g., S. 2698, 94th Cong., 1st Sess. (introduced November 20, 1975, by Senator Kennedy). The bill would provide minimum sentences of two years for burglary, aggravated assault, the use of a deadly weapon, and other specified offenses. The mandatory minimums do not apply if the defendant is under 18 years, if he was acting under duress, if he suffers from substantially impaired mental capacity, or if no serious bodily harm was inflicted.

Moreover, The Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. (1975), is the current proposal for the reform of the federal criminal code. It provides only general guidance for judges, except for the imposition of capital punishment. Judges are directed to consider the nature and circumstances of the offense, the background of the defendant, deterrence, protection of the public, rehabilitation, "respect for the law" and "just punishment" in determining how much imprisonment or probation to adjudge (Sections 2102, 2302). In imposing fines, the court is directed to consider, in addition, the defendant's ability to pay, any economic hardship on himself and his dependents, and the likelihood of reparation or restitution to the victim (Section 2202). S. 1 also provides for appellate review of sentences, authorizing an increase or reduction in severity if the sentence is "clearly unreasonable" (Section 3725). S. 1 is far more precise with respect to the imposition of the death penalty. The penalty is mandatory if the court or jury finds present one or more of 11 specified factors and the defendant has been convicted of a Class A felony involving murder, treason, sabotage or espionage. The penalty is precluded if, nonetheless, one or more of six extenuating circumstances are present (Section 2401).

S. 2699, 94th Cong., 1st Sess. (introduced on November 20, 1975, by Senator Kennedy) sets forth similar criteria for the imposition of fines, probation or imprisonment. It would create a Commission on Sentencing, one of whose major functions would be to develop guidelines for the determination of appropriate sentences. Judges would have to apply these guidelines in determining sentences and their decisions would be subject to appellate review to determine whether the guidelines were properly applied.

9 Sentencing councils and appellate review of sentencing have been implemented by a number of jurisdictions. See generally the A.L.I. MODEL PENAL CODE (1962).

10 See also *Sentencing Selective Service Violators: A Judicial Wheel of Fortune*, 5:2 COL. J. OF LAW & SOC. PROB. 164 (1969).

sentences for draft offenses were "inconsistent and widely varying, dependent to a great extent upon year of conviction, geography, race, and religion."<sup>11</sup> From 1968 to 1974, the percentage of draft offenders sentenced to prison declined from 74% to 22%.<sup>12</sup> Some judges never sent a draft offender to prison, while others always imposed the five-year statutory maximum.<sup>13</sup> 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.<sup>14</sup>

Cognizant of these consequences of uncontrolled discretion, the Clemency Board decided that it had to impose a measure of discipline upon itself.<sup>15</sup> 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 rigid 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 by sentencing judges.<sup>16</sup> 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 enabled 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.<sup>17</sup> As a consequence, the Board achieved one of its major goals: that of treating persons with disadvantaged backgrounds in an evenhanded manner.<sup>18</sup>

The Clemency Board's experience was limited in time and context, and cannot be regarded as a panacea for the complex problems inherent in judicial sentencing. However, the procedures worked and can serve as a case study for application in other areas of the law. After examining and analyzing the Board's procedures, this article suggests measures which may be useful to the sentencing process.

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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 REPORT, *supra* note 11, at 49.

15 According to Board member Hesburgh, "the Board was willing to do anything it could to get away from the vast swing of the draft sentences." Conversation with Rev. T. Hesburgh.

16 These techniques are described *infra* in the order presented here.

17 See *infra*. See also REPORT, *supra* note 11, at ch. 5.

18 See notes 16-53, 67-76, and accompanying text *infra*.

## II. The Clemency Board Experience

### A. Initial Experience with Uncontrolled Discretion

The Presidential Clemency Board<sup>19</sup> was charged with the responsibility of making clemency recommendations for some 15,000<sup>20</sup> applicants to President Ford's program for Vietnam-era draft and military offenders.<sup>21</sup> The Board had

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<sup>19</sup> 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 REPORT, *supra* note 11, 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.

The Chairman of the Clemency Board was Charles E. Goodell, former United States Senator from New York. The Board originally had a total of eight members: Dr. Ralph Adams, James P. Dougovito, Robert H. Finch, Father Theodore M. Hesburgh, Vernon E. Jordan, James A. Maye, Aida Casanas O'Connor, and General Lewis W. Walt. In April, 1975, the Board was increased by Executive Order to 18 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 REPORT, *supra* note 11, App. A.

<sup>20</sup> 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.*, at 163-165. Only the President can exercise the constitutional power to grant pardons, and no Clemency Board case recommendation was final until approved by him. See U.S. CONST. art. I, § 2, cl. 1, and the discussion in REPORT, *supra* note 11 at 11-12. As of March 1, 1976, the President had acted upon all but 750 case recommendations and, without exception, he accepted the judgment of the Board.

<sup>21</sup> 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 part of the President's clemency program. To be eligible, an applicant must have committed his offense between August 4, 1964, and March 28, 1973, and he must not have been an alien excluded by law from entering the United States under 8 U.S.C. 1182(a)(22) (1970).

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, 887 (1970)). 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 resulting in an overall participation of 19%.

For a further description of eligibility criteria and application statistics, see REPORT, *supra* note 11, at 7-9, 21-22.

to decide whether each individual should be granted a Presidential pardon,<sup>22</sup> and how much, if any, alternative service he had to perform to earn it.<sup>23</sup> Although the Board was bestowing benefits rather than imposing punishment, it had a decision-making function comparable to that of a sentencing judge.<sup>24</sup> 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,<sup>25</sup> with the most severe judgment being the denial of clemency in any form.<sup>26</sup>

President Ford directed the Board to review every application individually.<sup>27</sup> Aside from the not very helpful precedent of the Truman Amnesty Board,<sup>28</sup> the Clemency Board had no prior experience to guide it in recommending executive clemency on a case-by-case basis.<sup>29</sup> Accordingly, the Board had to independently fashion the substantive standards and procedures applicable for these cases.<sup>30</sup> In doing so, it very quickly recognized the importance of making the fairness and consistency of its decisions apparent to the clemency applicants and the

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22 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 program), see REPORT, *supra* note 11, at 15-21.

23 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, 39 Fed. Reg. 33297 (1974), and REPORT, *supra* note 11, at 17-21. The performance of alternative service has been uneven so far, and it appears that perhaps as many as 6,000 of the Clemency Board applicants will fail to complete alternative service.

24 One point of disagreement between the Clemency Board and the proamnesty 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 *Hearings on Clemency Program Practices and Procedures Before the Subcomm. on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 93d Cong., 2d Sess. 73-74 (1974). 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 so 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.

25 Presidential Proclamation 4313, 39 Fed. Reg. 33293 (1974).

26 Executive Order #11803, 39 Fed. Reg. 33297, § 3 (1974).

27 See generally Proclamation 4313 and accompanying Presidential statement, 39 Fed. Reg. 33297 (1974).

28 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 *Hearings on Selective Service and Amnesty Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 92d Cong., 2d Sess., 185-89 (1972).

29 The Pardon Attorney in the Department of Justice recommends pardons after a case-by-case review, but the Board did not think that his procedures could be applied to the clemency program.

30 REPORT, *supra* note 11, at 83ff.

general public.<sup>31</sup>

With the delegation of broad discretion from the President, no help from any precedents, and a predominantly lay membership,<sup>32</sup> 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 16 cases. As guidelines, the factors contributed little stability to the Board's decision-making process.<sup>33</sup> Indeed, sharp disagreements arose among Board members about the purpose of the clemency program, resulting in some near-resignations.<sup>34</sup>

In these first 16 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, perhaps because of an offhand comment in his record that he was "clever." In these and the other 14 cases, Board decisions were often based on aspects of the case which had no relationship to any of the mitigating and aggravating factors previously established. Rather, a juvenile arrest record for possession of beer, involvement in an alternative-lifestyle commune, participation in a "rock" band, and even jaywalking convictions became the actual but unspoken bases for judgments by the Board.<sup>35</sup>

The application of inappropriate standards and the resulting inconsistent case judgments were the necessary product of the ad hoc process the Board used in reaching decisions. While each member privately focused on aspects of

31 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.)

32 The eighteen-member Board consisted of five lawyers and thirteen nonlawyers.

33 "Everybody was going in different directions in these cases," notes Board member Hesburgh. "Some Board members wanted to give everyone the maximum, and some always wanted to give the minimum." Conversation with Rev. T. Hesburgh.

34 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 Board positions required substantial time and compromise.

35 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 16 cases, the work of staff attorneys was monitored by a special quality control unit.

the case he or she thought most important, they rarely articulated 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.

While board members seemed reasonably satisfied with their decisions in each case, the overall results were disturbing. If any pattern emerged in this first collection of decisions, it was a favoring of the applicant with a middle-class background, with a demonstrated respect for authority, and with a conventional lifestyle. In fact, statistical analysis of those sixteen cases shows 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.<sup>36</sup>

The bad experience with these sixteen cases proved a blessing. Once alerted to what it was doing, the Board imposed more stringent standards of consistency both on itself and on the staff attorneys preparing the cases. In doing so, the Board reluctantly acknowledged the need to control its exercise of discretion through adherence to more rigorous procedures. It solved this problem through a number of techniques which appear equally applicable to the judicial sentencing process.

## B. *Developing Rules*

### 1. *Baseline Formulation*

Right after the Board's assessment of its first 16 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.<sup>37</sup> 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.<sup>38</sup> Mathematically calculated, it took account of an applicant's initial sentence, his time in jail, and

<sup>36</sup> REPORT, *supra* note 11, at 328.

<sup>37</sup> 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.

<sup>38</sup> 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 approximately equal numbers of cases would be decided on either side of it. See REPORT, *supra* note 11, at 126.



other factors.<sup>39</sup> 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 philosophy that only nominal amounts of alternative service should be assigned to most applicants. The formula resulted in initial baselines of 3 to 6 months for 99% of the applicants—well below the 24-month maximum set by the President.<sup>40</sup>

With applicants having virtually identical baselines, mitigating and aggravating factors accounted for nearly all differences in Board judgments. The 16 mitigating factors and 12 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 socioeconomic backgrounds. Others were primarily concerned about applicants' criminal records and experience as soldiers. Almost all factors were established by consensus; only a few were put to a vote.<sup>41</sup>

## 2. Developing Mitigating and Aggravating Factors: Policy Considerations

Board members had three standards in mind as they developed the list of mitigating and aggravating factors:<sup>42</sup>

- (1) Had an applicant demonstrated that he had already earned a grant of clemency?
- (2) Was his background such as to make him "worthy" of clemency?
- (3) Could the clemency program help him in a particular way?

39 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.*, at 95-96.

40 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.*, at 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.*, at 95.

41 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 to continue that practice.

42 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. REPORT, *supra* note 11, at 97ff.

The notion of "earning" clemency was central to the philosophy behind the President's program: one earned re-entry into the mainstream of American society.<sup>43</sup> This stressed that some measure of justice had to be struck between clemency applicants and those who had satisfactorily discharged their obligations of national service. 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. 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.<sup>44</sup>

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.<sup>45</sup> Yet as the Board began to hear military cases, it discovered that military applicants seldom 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, believing these reasons could be sympathetic enough to make an individual worthy of clemency, established them as mitigating factors. Conversely, individuals whom the Board thought the President did *not* have in mind were distinguished on the basis of certain aggravating factors such as long or repeated AWOL offenses, the use of force in committing the qualifying offense, and a record of nondraft-related felony convictions.<sup>46</sup>

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

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43 See generally Proclamation 4313 and the accompanying Presidential statement, 39 Fed. Reg. 33293 (1974).

44 Yet 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. 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. See REPORT, *supra* note 11, at 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.

45 Some Board members wanted to deny clemency to conscientious war resisters who, it was said, "knew what they were doing" when they committed draft offenses.

46 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." REPORT, *supra* note 11, at xxi.

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.<sup>47</sup> Some mitigating factors were created to account for these rehabilitative needs. 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,<sup>48</sup> with notation of how frequently each was applied in civilian and military cases.

### 3. Insuring Consistent Application: General Case Procedures

To structure the application of these rules, the Board implemented standard procedures by which all cases were processed.<sup>49</sup> Based upon official records, a completed application form, and communication with the applicant, a staff attorney prepared a summary for each case. After an internal review,<sup>50</sup> 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 16 cases.<sup>51</sup> The primary purpose of publication was to make the rules binding on the Board—an element essential to any application of this model in the judicial setting. Another purpose was to enable potential applicants to understand the basis by which the Board would make judgments in their cases. It was hoped that notice of Board regulations and application materials would encourage applicants to submit information establishing the presence of mitigating factors or the absence of aggravating factors. Unfortunately, applicants were not well counseled.<sup>52</sup> Few applicants had lawyers, and many of the rest did not appreciate 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 discre-

47 Proclamation 4313, 39 Fed. Reg. 33293 (1974), 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."

48 REPORT, *supra* note 11, at 127.

49 *Id.*, at 24-26, 85-94.

50 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 material.

51 39 Fed. Reg. 41351 (1974).

52 Only about two percent of the applicants had any legal assistance. REPORT, *supra* note 11, at 94.

tion than as a means of helping applicants to improve their chances before the Board.

While the actual impact of this notice provision was disappointing, this experience should prove helpful in fashioning the Board's model to suit other sentencing situations. Surely, there are more sophisticated means available to the courts in seeking information of this nature than was available to the Board, such as presentencing reports, probation and parole records, and evidentiary

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

	<i>Civilian</i>	<i>Military</i>
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 Lengthy AWOL offense	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 obligations	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 Substantial 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.

showings. Courts could avoid the Board's inability to determine the presence of various factors on their own.

### C. *The Use of Precedents*

#### 1. Clemency Board Common Law

The establishment of clearly defined rules produced a marked and immediate improvement in decisions. When the initial 16 cases were reconsidered, the results were more consistent, fair, and rational 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.<sup>53</sup>

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.<sup>54</sup> 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 applicant's 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 were also decided more leniently.<sup>55</sup> In part, this greater leniency resulted from an emerging Clemency Board consensus that it 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 its ability to make distinctions among applicants.<sup>56</sup> In the end, the Board denied clemency to seven percent of its applicants,<sup>57</sup> but by selecting those cases according to clear rules and precedents,

<sup>53</sup> See note 85 and accompanying text *supra*.

<sup>54</sup> Full case summaries were not released because of considerations of privacy.

<sup>55</sup> 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.

<sup>56</sup> 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." Conversation with Rev. T. Hesburgh.

<sup>57</sup> For a discussion of what kinds of cases were denied clemency, see REPORT, *supra* note 11, at 136-38, 141-43.

it became more generous with all other applicants. Over time, four out of five received immediate pardons<sup>58</sup> or alternative service assignments of six months or less.

## 2. Impact of Time and Volume

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,<sup>59</sup> 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 18 members, and the staff expanded tenfold. 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. Second, the presence of 400 staff attorneys transformed the Clemency Board into a large and complex organization in which procedures could no longer be as informal.<sup>60</sup>

By having three-member panels, it was hoped 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.<sup>61</sup> Likewise, panel memberships were changed 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.<sup>62</sup> This put a heavy burden not only on Board mem-

58 For a discussion of what kinds of cases received immediate pardons, see *id.*, at 134-135, 139-141.

59 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.*, at 20-23. The total number of applications was 21,500—of which 6,000 were later found ineligible. See note 19, *supra*.

60 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 REPORT, *supra* note 11, at ch. 6.

61 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. Conversation with Rev. T. Hesburgh.

62 This figure does not include time spent by Board members reviewing staff-prepared case summaries before panel meetings and arriving at 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. Sometimes complex or controversial cases were discussed for an hour or more before decisions were made.

bers but also on the staff attorneys preparing cases. In addition to preparing a factual summary for each case, attorneys were asked to calculate the baseline and recommend which mitigating and aggravating factors might be applied by the Board. Staff attorneys spent, on an 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 prerogatives.

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.

### 3. Clemency Law Reporter

These handicaps were partly overcome through the codification of Board precedents in the *Clemency Law Reporter*.<sup>63</sup> The *Reporter's* five issues comprised an updated "hornbook" of Clemency Board practice. 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.<sup>64</sup> The "squibs" were reviewed by the Chairman

63 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 Clemency Board 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.

64 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 *REPORT, supra* note 11, at 310-311, 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.

(4) The applicant served for three months in Vietnam in a combat status.

before publication, and he deleted those which he felt were improper or misleading applications of Board policy.<sup>65</sup> In this way, the *Reporter* became a means by which the Chairman sought to channel the exercise of discretion by Board panels and staff attorneys. He intended it to be a normative set of precedents to which the Clemency Board was 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 supervised, 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 any inconsistent application of factors.

These staff procedures and the *Reporter's* rule codifications resulted in several key cases being debated and decided very strictly according to the rules.<sup>66</sup> These cases set the pattern for the remainder, but problems still arose. Many Board members were unable or unwilling to use the *Reporter* themselves. Some 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 help. Despite this resistance to formal precedents, panels rarely wandered far from what prece-

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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 convalescence.

(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.

(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.

65 Where these misapplications were especially prejudicial, the cases were flagged for reconsideration.

66 Chairman Godell estimates that 100 cases, among them the most controversial, were decided by Board votes on explicit questions of rule interpretation. Conversation with Sen. C. Godell.



dent dictated. When they did, their judgements were reviewed by the internal appellate 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 procedure 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 the panels' 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, often to no effect.<sup>67</sup> More significantly, this rule permitted the Chairman to refer cases identified by other review procedures which the Board employed.

Staff attorneys were directed to flag cases they believed to be inconsistent with Board precedents. These cases then went through a carefully monitored system in which they were reviewed first by a specially trained team and then by the Chairman. Through this procedure, approximately 100 cases were flagged by staff attorneys and about 25 were ultimately reconsidered by the full Board.<sup>68</sup>

The most important and unusual aspect of this appellate system was STAREDEC, a computer review.<sup>69</sup> A gift from the National Aeronautics and Space Administration,<sup>70</sup> 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.

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67 Usually, these Board-member referrals reflected basic philosophical differences with the policies of the Board majority. Half of these cases were referred by one Board member and reflected his continuing disagreement with one particular Board policy decision.

68 These totals do not include cases flagged by STAREDEC.

69 STAREDEC, named after the legal concept of *state decisis*, cost approximately \$75,000 to implement, staff time included, or roughly \$5.00 per case. For a more detailed description of STAREDEC, see REPORT, *supra* note 11, at App. E. The complete STAREDEC tape is available to the public at the National Archives, Washington, D.C.

70 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.

STAREDEC became operational through the recording of every case judgment on a computer-input sheet, along with the mitigating and aggravating factors designated by the Board for each case. 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")<sup>71</sup> 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.<sup>72</sup>

Altogether, STAREDEC flagged approximately 1,000 cases. A staff legal analysis team studied the summary for each case 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 reasonable exercise of Board discretion. In most of the reviewed cases, there was such a justification.

Through STAREDEC, approximately 400 cases were referred to the Chairman for possible reconsideration. After his careful review, the Chairman then referred some 200 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 panel's earlier judgments. In almost every instance, the full Board overruled the earlier panel decisions.<sup>73</sup>

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.

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.* at App. E.

<sup>71</sup> "Lenient" cases were flagged because some members strongly objected to a post-decision review policy which operated only to liberalize recommendations. The Board reconsidered only about ten cases flagged by STAREDEC as "too lenient" versus almost 200 flagged as "too harsh." Staff attorneys rarely flagged cases they considered too lenient.

<sup>72</sup> 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.

<sup>73</sup> No separate records were kept of these cases. But Chairman Godell estimates that 80-90% were overruled. Conversation with Sen. C. Godell.

Still other cases had simply landed on the docket of a Board panel in an unusually harsh mood.<sup>74</sup> Without such 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.<sup>75</sup>

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 upon these appeals. An estimated 15% of these appeals were successful, resulting in more favorable case grants of clemency by the President.<sup>76</sup>

### 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 under way on the Board's final report, however, some provocative, objective data was developed—principally through a survey of some 1,500 cases<sup>77</sup> and the final output of STAREDEC. Although this information was collected too late to be useful as a basis for modifying Board practices, it did help the Board fulfill its strong commitment to be accountable to the public for the consistency and fairness of case judgments. As it is, the data tell a story of a decision-making process which, despite some weaknesses, accomplished much.<sup>78</sup>

74 According to Board member Vinson, "one Board member could be compassionate one day and very hard-nosed the next." Conversation with Mrs. J. Vinson.

75 The worksheet and letter sent to clemency recipients are included in *Id.*, App. D. Applicants had already been sent a copy of their case summary.

76 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.

77 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* REPORT, *supra* note 11, at App. C. Survey findings are presented in *id.*, ch. 3, 5.

78 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 offered 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 Veterans' Administration when they review subsequent applications for benefits by clemency applicants. Successful participation in the

## 1. Process Accomplishments

Considering the Clemency Board's tumultuous 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 which were decisive in determining 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 relationship of mitigating and aggravating factors to Board decisions was always a matter of concern. The Board did not apply its factor "guidelines" properly in its first 16 tentative judgments, but once those factors became "rules," the picture changed. STAREDEC confirmed the Board members' subjective sense that a number of mitigating and aggravating factors were decisive in judging cases. STAREDEC analysis showed that 12 of the 16 mitigating factors and 7 of the 12 aggravating factors had either a "very strong" or "strong" relationship to case decisions.<sup>79</sup> The factors most closely related to Board decisions were two 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.<sup>80</sup> These tables show what happened to cases with selected factor combinations. Although they encompass only a fraction of all Clemency Board cases,<sup>81</sup> they illustrate the general pattern in Board decision-making. As one might expect, 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.

The Clemency Board was very conscious of the need not to discriminate against persons with disadvantaged backgrounds. In fact, the first two mitigating factors were intended to give credit to those whose severe educational handicaps or personal problems had contributed to their offenses.<sup>82</sup> Disadvantaged persons did not fare better than others in Board judgments, but they did receive equal

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program required 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.

<sup>79</sup> REPORT, *supra* note 11, at 126-32.

<sup>80</sup> *Id.* at 133.

<sup>81</sup> 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.

<sup>82</sup> Mitigating factor #1 (inability to understand obligations) and mitigating factor #2 (personal or family problems). REPORT, *supra* note 11, at 290-91.

treatment.<sup>83</sup> Figure 5 shows that the Board judgments neither favored nor disfavored blacks, whites, low IQs, high IQs, high school dropouts, college grad-

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

Agg #	Mit #	# of						NC
		Cases	Pardons	3 AS	4-6 AS	7+ AS		
—	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						NC
		Cases	Pardons	3 AS	4-6 AS	7+ AS		
—	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						NC
		Cases	Pardons	3 AS	4-6 AS	7+ AS		
1,8,9,12	1,2,6,7,14	11	11	—	—	—	—	
1,8,9,12	2,6,7,14	18	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	

83 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. This resulted in evenhanded treatment, and not more favorable treatment, which the Board intended. This indicates that applicants with disadvantaged backgrounds might have been treated worse than others had the Board's intent not been so strong, and had these mitigating factors not existed.

uates, low incomes, or high incomes.<sup>84</sup>

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	59	6	46	9
Medium IQ	63	3	37	10
High IQ	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.<sup>85</sup> Figure 6 shows how Board case judgments varied throughout the year, as reflected by the "pardon rate" for military and civilian cases.<sup>86</sup> 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.

## 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

<sup>84</sup> These statistics are drawn from the comprehensive survey of Clemency Board applicants. See note 62, *supra*. For further data about who received pardons and who were denied clemency, see *id.*, at 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. This was particularly true for those who had received administrative discharges, for whom the military had not compiled judicial 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 evenhanded pattern of judgments.

<sup>85</sup> The slight downward slope in the military pardon rate is attributable to the addition of two new aggravating factors (#11 and #12) in May and June. Board member Puller believes that these late-stage rule additions resulted in uneven treatment of certain categories of military applicants. Conversation with Mr. L. Puller.

<sup>86</sup> REPORT, *supra* note 11, at 173.

above was implemented perfectly, 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-

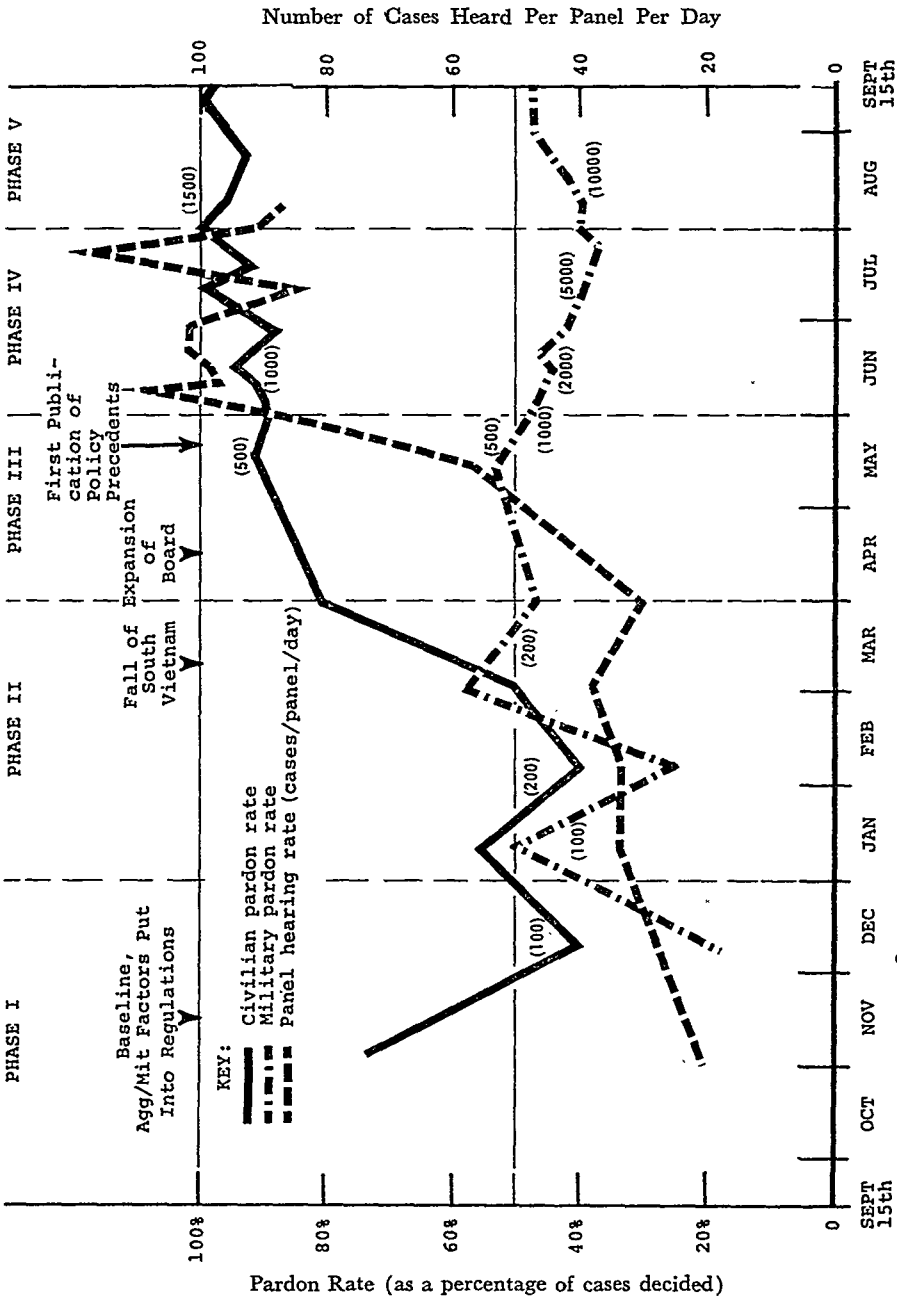


Figure 6. - BOARD PARDON RATES (CIVILIAN AND MILITARY CASES)

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

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, placing the burden on the applicant to show that he was *not* selfish.<sup>87</sup> 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 could well be attributable only to the vigilance of the police in an applicant's hometown.

Certain key mitigating factors such as educational handicaps (#1), family problems (#2), and mental or physical problems (#3), were not strongly influential in very many cases,<sup>88</sup> 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 panel hearings were plainly an imperfect process.<sup>89</sup> 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.<sup>90</sup>

The process was much more *ex parte* than had been expected. Very few applicants or their counsel requested personal appearances,<sup>91</sup> so the fairness of case judgments depended substantially on the quality of staff work in preparing summaries. Some Board members were resentful when a staff attorney tried to compensate for an applicant's absence by acting as his advocate.

The *Clemency Law Reporter* was not used to anything approaching its true potential as a "hornbook" of Board precedent. 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 decisions.

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87 This made explicit a policy that most Board members had been following before the rules were clarified. The rationale for this policy was that all individuals had a reasonable opportunity to explain why they committed their offenses. According to Chairman Godell, when the factor was marked for this reason, it was not given much weight. Conversation with Sen. C. Godell.

88 *Id.* at 126-132. Board member Craig "strongly disagrees" with this observation, but it is demonstrated clearly by statistics. See Figure 5 and note 68, *supra*. Conversation with Mr. T. Craig.

89 Board member 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. Conversation with Rev. T. Hesburgh.

90 According to Board member Puller, panel members got tired amidst the heavy workload. This sometimes worked to an applicant's favor, sometimes to his detriment, but always contrary to the evenhandedness of the process. Conversation with Mr. L. Puller.

91 Although the Board's regulations did not permit personal appearances as a matter of right, the Board almost always granted requests by applicants or their counsel. Most requests were denied because they were not considered potentially beneficial for an applicant, such as where a request was made after the Board had made a recommendation for an immediate pardon in his case.



The computer-aided appellate review system was just being perfected when the Board went out of business. A greater number of 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 application of precedent than it might have been; this too could have been corrected in time.<sup>92</sup>

The process of reviewing applicants' appeals after the President's decisions was inappropriate. The appeals were heard not by the Board—which no longer existed by then—but by a carry-over staff of attorneys who had held 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) compromises among Board members with different philosophies, (2) the lay character of the Board, or (3) the press of time.

### 3. Summary

After 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 18 men and women who made these judgements 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 substantive 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 application to decisions by parole boards, mili-

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92 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.

tary discharge review boards,<sup>93</sup> and other adjudicative bodies. What makes the Board's experience particularly transferable 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<sup>94</sup> and had relatively homogeneous defendants;<sup>95</sup> 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";<sup>96</sup> sentencing judges must base their decisions upon the much more problematic and conflicting notions of deterrence, rehabilitation, and the protection of society. Nonetheless, 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.

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.<sup>97</sup>

93 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 the 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 immaterial facts from being applied to anyone's detriment. Likewise, the Clemency Board's legal analysis staff found that their review of aggravating factors resulted in more reconsidered cases than the review of mitigating factors.

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

95 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 REPORT, *supra* note 11, at ch. 3.

96 Proclamation 4313, 39 Fed. Reg. 33293 (1974).

97 The 20th Century Fund Task Force on Criminal Sentencing has recently proposed an approach similar to that developed by the Board. It involves the use of "presumptive sentences" of a specified term for each type of offense. These sentences would be increased by fixed percentages for repeat offenders. The presence of aggravating and mitigating factors would increase or decrease the sentence, again by a pre-established percentage. The proposal does not allow for different combinations of factors. The Board's system allowed for more flexibility in weighing factors and it was therefore required to institute procedures to guard against unwarranted deviations. TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976).

1. A "baseline" would be established for each type of offense, giving the sentencing judge a starting point for his exercise of discretion.<sup>98</sup> 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. The "baseline" and "range" would be the means by which the sentencing process would distinguish among offenses of varying severity.<sup>99</sup> 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 same list would be applied to all categories of offenses. 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 weapons, infliction of bodily harm, and prior felony convictions. The selection of factors goes to the essence of the purposes of sentencing and establishing the list would probably be a difficult and controversial process.

3. The factors would be binding upon all sentencing decisions, and judges would consider only 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 each sentence is based would be restricted to that which bears upon the designated mitigating and aggravating factors.

5. Wherever possible, 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 and 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. (Although the Clemency Board did not do so, each decision should also be accompanied by a written statement of reasons.)

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 application of those factors to given fact situations.

9. Each sentencing decision would be analyzed by a STAREDEC-type computer before appeal to provide an immediate, objective measure of consistency. Over time, each sentencing judge would be informed as to how comparable cases were being decided.

10. Sentences would be subject to appeal, with appeals based on either (1) an unsupported application of factors, or (2) an inappropriate sentence, given

<sup>98</sup> See Attorney General Levi's speech, recommending that a new judicial sentencing commission be established to recommend a baseline for each type of offense. Note 1, *supra*.

<sup>99</sup> At present, sentencing judges typically have a statutory "range" but no baseline.

the applicable factors. Appellate courts would, through their decisions, try to maintain consistent patterns in sentences.

11. All sentencing judges would meet periodically to ensure consistency 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 nonexperimental "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, enhancing the prospects for a successful experiment.

Reduced to its simplest features, this Clemency Board model consists of establishing substantive 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 arbitrary moments and applicants were sometimes asked to do too much or too little alternative service. Sentencing judges, with almost limitless discretion, are inconsistent 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.