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cc: Deputy A.G.  
Mr. Schlei  
Mrs. Copeland ✓  
Miss Lawton  
Files

4 MEMORANDUM  
4 FOR THE ATTORNEY GENERAL

~~Re: Federal Action to Restore Civil and  
Political Rights to Convicted Persons~~

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On June 7, 1965 you requested this Office, in consultation with the Pardon Attorney, to examine whether some federal procedure to restore rights to convicted persons, more objective and less complex than the pardon system, would be possible and appropriate. This Office prepared a tentative memorandum on the subject which was circulated to the Criminal Division, the Office of Criminal Justice and the Board of Parole as well as to the Pardon Attorney. The views of these offices have now been received.

Based upon the material contained in the tentative memorandum and the comments and suggestions of the various offices consulted, the following conclusions have been reached.

1. <sup>10</sup> A federal procedure for the restoration of the civil and political rights of convicted persons, while limited in its effectiveness, would be feasible and may be desirable.
2. <sup>10</sup> A federal restoration procedure should be limited, at least initially, to first offenders showing definite evidence of rehabilitation.
3. <sup>10</sup> A federal restoration procedure should remove only the general disqualifications and disabilities imposed by federal law and should not affect special disqualifications flowing from conviction of specific offenses.

- 4.<sup>10</sup> A restoration of rights should be noted on the record of any person affected, but the record of conviction should remain and should be subject to disclosure, at least for certain purposes. One whose rights have been restored should not be authorized to deny the fact of conviction.

The Office of Criminal Justice has suggested that the views of the various Divisions and Offices regarding the restoration of rights be made available to the Corrections Task Force of the National Crime Commission and recommends that no Departmental action on this matter be initiated until the views of the Commission have been expressed. This Office concurs in that recommendation.

Attached is a detailed memorandum discussing the problems involved in federal action to restore civil and political rights and examining several possible approaches to restoration. This memorandum is based largely on the earlier memorandum circulated by this Office, but it incorporates some of the comments and suggestions of other Divisions and Offices. The memoranda of those Offices commenting on our tentative memorandum are also attached.

4/Norbert A. Schlei  
/Assistant Attorney General  
/Office of Legal Counsel

4 Feb 14 1966

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4 FEDERAL ACTION TO RESTORE CIVIL AND  
POLITICAL RIGHTS TO CONVICTED PERSONS

In May 1965, the New York Legislature passed a comprehensive plan for restoring the rights of convicted first offenders. Although the bill was vetoed by Governor Rockefeller, it served to focus attention on the problem of restoring convicted persons to a better place in our society. Indeed, federal legislation patterned closely on the New York amnesty bill has been introduced by Congressman Farbstein, H.R. 8373, 89th Cong., 1st sess. Accordingly, the Attorney General requested the Office of Legal Counsel to examine the feasibility and desirability of some form of federal action in this area.

The following memorandum discusses various methods of restoring rights, including several specific laws and proposals of this type; it considers the particular problems of federal action in this area; and it concludes that federal legislation to restore the federal rights of convicted persons is feasible and probably desirable. Despite some uncertainty as to the constitutional authority of Congress to provide an "amnesty" system, the legislative approach to this problem is suggested, because any executive action to restore rights would undoubtedly require continuous presidential action and would be little improvement over the present pardon system in this respect.

Even legislative action can be of only limited effectiveness, but this memorandum concludes that the limitations on federal authority to restore rights lost by conviction need not preclude federal action. It is pointed out that in some States at least, federal amnesty might serve to restore rights and privileges under State law. Moreover, federal leadership may encourage State action in this area.

Finally, this memorandum discusses some of the basic policy decisions which must precede the drafting of any such federal legislation. These may be summarized as follows:

1. To what category of federal offenders should such legislation apply?

2. Should such legislation remove all federal disqualifications and disabilities?

3. Should the disclosure of information relating to the offense and conviction of an amnestied offender be restricted?

4. Should the fact of conviction be admissible to impeach the testimony of an amnestied offender?

It is recommended that the question of the feasibility and desirability of federal action in this area be referred to the Corrections Task Force of the National Crime Commission for further study and that final decision on these policy questions be deferred until the views of the Task Force are received. However, subject to the views of the Task Force, this memorandum discusses the problems involved in these areas and offers the following views: 1) Federal action involving restoration of rights should be limited to first offenders showing evidence of rehabilitation; 2) Only general disqualifications and disabilities should be removed automatically; 3) Disclosure of convictions should not be prohibited; and 4) Former conviction should be available to impeach the testimony of an amnestied offender, at least in certain circumstances.

1. The Legislative Approach to the Restoration of Rights

At present, pardons for federal offenses are granted by the President and this is customarily done on an individual basis. It has been suggested, however, that some less individualized procedure might be devised to restore rights to all those who have completed their sentences and shown evidence of rehabilitation. The New York amnesty proposal has been cited as an example of one possible method of

accomplishing this. The New York proposal is, of course, a legislative system and there are other legislative systems designed to restore rights to convicted persons. Before discussing these, however, it is necessary to consider the constitutional authority for such acts.

#### A. Constitutionality of Legislative Amnesty

The U.S. Constitution contains no reference to amnesty, but it does provide that the President shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, Art. II, sec. 2, cl. 1. It has been said, moreover, that the President's pardon authority includes the authority to grant amnesty<sup>#</sup> and there is ample precedent to support this, 20 Op. A.G. 330 (1892). In this opinion Solicitor General Taft pointed out that Presidents since Washington had granted amnesty without any express statutory authority, relying on the constitutional power of pardon. He commented that congressional acts expressly authorizing the President to grant amnesty, e.g. § 13 of the Act of July 17, 1862, 12 Stat. 592, repealed by the Act of July 21, 1867, 14 Stat. 377, and § 6 of the Act of Mar. 22, 1882, 22 Stat. 31, are merely recommendations of the Congress. Such acts do not require the President to grant amnesty nor does their repeal restrict his authority to do so.

Since the President has the constitutional authority to grant amnesty as well as pardon, the question arises whether this authority is exclusive or whether Congress has concurrent authority. In 1892, Solicitor General Taft indicated that various State courts had determined that the power to grant amnesty was vested exclusively in the Executive, and he implied that this would also be true in the federal system, 20 Op. A.G. 330, 338 (1892). However, we are not aware of any Supreme Court decision so holding.

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The distinction between a pardon and an amnesty is that a pardon applies to an individual and is a remission of guilt, while an amnesty applies to a class and is an act of oblivion or forgetfulness, 11 Op. A.G. 227, 228 (1865). See 39 Am. Jur., Pardon sec. 10.

In an early case, Chief Justice Marshall referred, by way of dicta, to English history and pointed out that both the King and Parliament were empowered to grant pardon and amnesty, but the issue of the exclusiveness of the pardon or amnesty authority under the U.S. Constitution was neither raised nor decided, United States v. Wilson, 32 U.S. 149, 162 (1833). In The Laura, 114 U.S. 411 (1885), the Court

held that the pardon power of the President included the power to remit fines, penalties and forfeitures. It concluded that this power was not exclusive and that Congress could vest similar power in inferior officers. The decision did not deal with amnesty authority, however, nor did it consider whether Congress might exercise such authority itself rather than vesting it in other executive officers.

The authority of Congress to grant immunity from prosecution was challenged in Brown v. Walker, 161 U.S. 591 (1896). The Supreme Court indicated that immunity from prosecution is virtually an amnesty, and it held that Article II, section 2, clause 1 of the Constitution does not prevent Congress from granting amnesty even though the President also has this power, Id. at 601. The "amnesty" involved in Brown, however, was immunity from prosecution, not a wiping away of a conviction. There is at least some authority to indicate that a legislature may prevent a prosecution but may not pardon after conviction, 39 Am. Jur., Pardon sec. 21.

In United States v. Hughes, 175 Fed. 238 (W.D. Pa. 1892), aff'd 154 U.S. 505 (1893), the court considered the validity of a Pennsylvania statute providing that completion of a sentence would operate as a pardon, at least to the extent of restoring such rights as the right to testify. The court, in sweeping language, cited Chief Justice Marshall's reference to English history and concluded, "While pardons are usually granted by the executive, the pardoning power by no means is confined to that branch of the government." 175 Fed. at 241-242. The case, of course, involved a question of State rather than federal law, although the language of the opinion is not so limited.

The most that can be said then, is that the authority of Congress to grant amnesty is unclear. It must be pointed out, however, that Congress has established a form of amnesty under the Federal Youth Corrections Act, 18 U.S.C. 5005-5026, and its authority to do so has apparently not been questioned. It may be that in this century at least, congressional authority to provide for vacation of convictions has been tacitly conceded.

### B. Legislation and Legislative Proposals to Restore Rights

Before considering the feasibility and appropriateness of federal legislation to restore rights to convicted persons, it may be helpful to review some of the provisions which are now in effect or have been proposed. These provisions vary in the approach taken and the scope of application. There is one federal provision, the Youth Corrections Act. We have also examined two State provisions which utilize entirely different approaches to this problem -- the California Rehabilitation Law and the New York Amnesty proposal. Finally, there are a proposed Uniform Act and a provision in the proposed Model Penal Code which also relate to the restoration of rights. Each of these is summarized below.

#### 1. The Federal Youth Corrections Act.

The Federal Youth Corrections Act, 18 U.S.C. 5005-5026, does not expressly restore any civil or political rights. However, the Act does provide that a conviction may be set aside automatically if certain conditions are met, 18 U.S.C. 5021. Presumably, once the conviction has been set aside, all federal disqualifications and disabilities which would otherwise flow from that conviction are removed. It is not clear, however, what effect the setting aside of the conviction may have on the disabilities imposed by the laws of the various States. *AL*

The Act applies only to persons who are under 22 years of age at the time of conviction. Such persons -- youth offenders -- may be placed on probation or given an indeterminate sentence within certain statutory limits, 18 U.S.C. 5010.

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Since the Act was implemented in 1954, the Youth Division of the Board of Parole has set aside the conviction of almost 2,000 youths. This represents approximately 70 to 80 per cent of those who are not returned as parole violators.

The Youth Division of the Board of Parole may conditionally release a committed youth offender, and may discharge him unconditionally one year after his conditional release, 18 U.S.C. 5017. If he is unconditionally discharged before the expiration of his maximum sentence, the conviction of a youth offender is automatically set aside and he receives a certificate to this effect, 18 U.S.C. 5021(a). A youth offender placed on probation may be unconditionally discharged by the court prior to the expiration of the maximum period of probation, and such discharge automatically sets aside his conviction, 18 U.S.C. 5021(b).

Aside from Presidential pardon, this is the only federal law having the effect of annulling a valid conviction and restoring rights which would otherwise be lost by that conviction.

## 2. The New York Proposal

The New York amnesty bill which was vetoed<sup>131</sup> would have added a new article to the State Civil Rights Act. It was

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2/ The Governor's veto is reported in the New York Times, July 23, 1965, p. 1, col. 7, p. 32, cols. 6-7. The Times stated: "In one of his longest veto messages this year, Mr. Rockefeller denounced the bill as 'unsound' and 'too broadly conceived.' It described the message as objecting to the concept of treating all types of offenders alike and quoted: "A convicted embassier would be entitled to deny his conviction upon application for a position in a bank and a sex offender would be free to deny his conviction when seeking employment as a teacher."

In the same article the New York Civil Liberties Union is reported as voicing its disappointment with the veto: "The bill was designed to eliminate a major cause of recidivism \* \* \*. Today a single conviction is a permanent handicap in securing employment. Adoption of the bill would have helped to reduce the crime rate by providing a powerful incentive toward self-rehabilitation."

limited in its application to first offenders but would not have applied to first offenders determined by the sentencing court to be suffering from a serious personality disorder marked by a propensity for continuing criminal conduct. It would have granted automatic amnesty to any first offender who completed his sentence and the prescribed probationary period (five years for a felony, three for a misdemeanor, and one for a youth or juvenile offense) and who was not convicted of another offense involving moral turpitude during that period.

The amnesty would have given the first offender the following rights: (1) annulment of his conviction and an expunging of the record of conviction as well as the indictment, information or complaint relating to it; (2) the absolute right to negate under oath or otherwise the fact of his

arrest, charge, conviction, etc., whenever asked to state such facts by any private agency or public authority; (3) full accreditation as a witness; (4) the right to vote and serve as a juror; (5) the right to hold public office; (6) the right to obtain any federal, state or local license, if otherwise qualified, and to reinstatement of a professional, trade or occupational license lost by conviction, if otherwise qualified. The facts of conviction and amnesty would not have been disclosed even in a subsequent trial of the same person for a second offense. However, upon conviction of certain subsequent offenses in any jurisdiction all rights resulting from amnesty would have been forfeited.

On issuance of a certificate of amnesty, all records, fingerprints, photographs and similar information pertaining to the arrest and conviction would have become privileged and confidential and would have been sealed against inspection and disclosure except to authorized law-enforcement officers.

The amnesty of a first offender would not have terminated or affected the conditions imposed by parole, probation, pardon or conditional commutation. In granting parole, pardon or commutation the parole board or the Governor could have recommended a reduction in the probationary period for amnesty or a grant of immediate amnesty. Such a recommendation would have become final and effective unless timely objection were raised by the sentencing court or the district attorney. Sentencing courts would also have been empowered to reduce the probationary period or grant immediate amnesty in certain circumstances.

These provisions are the ones on which H.R. 8373, Congressman Farbstein's bill, is based.

### 3. The California Provision

The California law regarding restoration of rights provides an alternate procedure for obtaining an executive pardon, Cal. Penal Code, 4852.01-4852.17 (West). It does

not apply to persons convicted of misdemeanors, those subject to mandatory lifetime parole, those sentenced to death, or military personnel. Only those showing evidence of three year's residence in California are eligible (4352.01).

After release from prison, an eligible person may file with the court at his place of residence a notice of intention to petition for a certificate of rehabilitation, and a copy of this notice, together with a photograph, fingerprints and other pertinent information, must be filed with the local law-enforcement officer (sec. 4852.02). The "period of rehabilitation" begins upon filing this notice. The duration of the period is three years plus a length of time bearing a ratio to the length of the maximum sentence which could have been imposed for his particular offense (sec. 4852.03). Having satisfactorily completed this probationary period, the person may petition the court for a certificate of rehabilitation (sec. 4852.06). After investigation and hearing, the court may grant the certificate and recommend that the Governor issue a pardon (secs. 4852.07-4852.13). The Governor may issue a pardon without further investigation (sec. 4852.16).

The granting of the certificate and pardon does not effect the authority of various licensing and examining boards to refuse a license or certificate (sec. 4852.15), but it does restore all civil and political rights and it becomes a permanent part of the records of the California Bureau of Identification and is also sent to the F.B.I. (sec. 4852.17). There is a specific provision, however, indicating that one convicted of violating the dangerous weapons law is not restored the right to own a gun by virtue of the pardon (sec. 4852.17).

#### 4. The Uniform Act on the Status of Convicted Persons

On August 7, 1964, the National Conference of Commissioners on Uniform State laws approved a proposed Uniform Act on the

Status of Convicted Persons (1964 Handbook of National Conference of Commissioners on Uniform State Laws p. 292). This Act has not been adopted as yet by any State.

The Uniform Act would apply to persons convicted of a felony under federal law or the law of any State (sec. 1). From the time of sentencing until final discharge, such persons would not be entitled to vote, run for office or hold public office, but those released on probation or parole would be entitled to vote (sec. 2(a)). A person holding public office at the time of sentencing would forfeit that office regardless of whether he initiates an appeal, but one whose conviction is reversed would be entitled to reinstatement (sec. 2(b)). Except as specifically provided in the Uniform Act, a convicted person would retain all political, personal and civil rights and would not suffer "civil death," corruption of blood, or forfeiture of estates (sec. 3). The Uniform Act would not affect a court's authority to impose conditions of probation or parole; it would not restrict the administrative authority of penal institutions; it would not affect specific legal disqualifications regarding holding particular offices, jury service, voting rights, eligibility for designated professions, trust authority, specific licenses or privileges; it would not affect the rights of others arising from the conviction, except those dependent on "civil death," forfeiture or corruption of blood; and it would not affect the laws prohibiting a murderer from inheriting from his victim (sec. 4). Upon final discharge from custody and supervision, a convicted person would be entitled to a certificate indicating the restoration or resumption of rights, and a copy of the certificate would be filed in the sentencing court (sec. 5).

#### 5. The Model Penal Code Provision

The May 1962 Proposed Official Draft of the American Law Institute's Model Penal Code contains a provision relating to the restoration of rights of convicted persons (sec. 306.06).

This provision would authorize the sentencing court to issue an order to the effect that, so long as the defendant is not convicted of another crime, the judgment against him will not constitute a conviction for purposes of any disqualification or disability imposed by law. Such an order may be issued in the following circumstances: (1) When a young adult offender is sentenced to a special term or any other sentence other than imprisonment; (2) When the court has suspended sentence or sentenced to probation and the defendant has satisfied the sentence and complied with all conditions thereof; (3) When the defendant has been released from prison on parole, has satisfied the conditions of parole, and has been discharged; or (4) Where the defendant has served his sentence and has led a law-abiding life for two years.

The sentencing court may issue an order vacating a conviction entirely when a defendant was discharged from probation or parole prior to the expiration of the maximum term or when he has fully satisfied his sentence and has led a law-abiding life for at least five years.

An order removing the effects of a conviction or an order vacating a conviction would have prospective effect only and would not require restoration to a public office lost because of that conviction. Nor would such orders preclude proof of conviction as evidence of the commission of the crime when the fact of commission is relevant to the determination of an issue involving the rights or liabilities of others. Likewise, such orders would not preclude proof of conviction for the purpose of sentencing the same person for a subsequent crime. Proof of conviction as evidence of the commission of a crime would be permitted when that fact is relevant to the exercise of discretion by a court, agency or official authority in passing on the competency of the individual to perform functions or exercise rights or privileges which that court, agency or authority is empowered to deny, but due weight must also be given to the order removing the effects of conviction or vacating conviction. Issuance of

such an order would not preclude proof of conviction in order to impeach the individual's testimony as a witness, but the fact that the order was issued may also be adduced for purposes of demonstrating rehabilitation. Finally, issuance of an order would not justify an individual in denying his conviction or stating that he has not been convicted unless he does so by calling attention to the order which vacated his conviction or removed the legal effects of conviction.

### \* C. Summary and Conclusions

Assuming the constitutional authority of Congress to provide an amnesty system for convicted persons, there would be several advantages to a legislative enactment. A statute providing for the granting of amnesty upon fulfillment of certain conditions would probably have greater permanence and certainty than a system or policy adopted by Executive Act, and subject to change by the next President. Moreover, any system established by the President would undoubtedly require his personal attention, at least with respect to the final act of pardoning. The powers enumerated in Article II, section 2, clause 1 -- the power of Commander-in-Chief, the authority to require Opinions from Cabinet Officers, and the Pardoning Power -- have always been exercised personally, and it has apparently been assumed that they are not delegable. On the other hand, Congress could designate some inferior officer to administer an amnesty law or could place the final authority in the courts.

The only clear advantage of an amnesty system created by Executive act is that it would avoid any possible question of constitutionality. This is a considerable advantage, of course, but if the administrative burden of issuing all pardons is to be left to the President himself, it may be preferable to retain the present system.

The California provision offers something in the nature of a compromise -- a legislative act vesting final authority in the Executive. The California provision, however, establishes an elaborate system of notice, investigation and hearing. It is essentially subjective, like the present federal system, and may be more time-consuming and expensive. If the purpose of reconsidering the problem of restoration of rights to federal offenders is to provide an alternative to the present individualized, time-consuming and expensive system of granting pardons, the California system would not appear to offer a satisfactory solution.

A statute providing for the restoration of rights without presidential pardon might take several approaches. The proposed Uniform Act may have certain advantages from the offender's point of view since it provides for the retention of most rights, even after conviction, and merely suspends those rights during the time of the sentence. This approach would also avoid the constitutional question since there is no doubt that Congress, which imposes the legal disabilities and disqualifications, might repeal disabling statutes and provide for the suspension of rights instead. On the other hand, many of the disabilities and disqualifications suffered by convicted persons are imposed by State rather than federal law. Since Congress could not repeal these State laws, a federal provision modeled on the Uniform Act would have very limited effect.

The Model Penal Code provision, the Youth Corrections Act and the New York Amnesty proposal all provide for setting aside or wiping away a conviction. These provisions vary as to scope, application and implementation but each is intended to remove the effects of conviction by removing the conviction itself. It is true that federal legislation of this type could not guarantee the restoration of the rights of State

citizenship in every case, but each State would be free to interpret the effect of a federal amnesty under its law, and many States might recognize such an amnesty as restoring rights lost by conviction.

The New York Amnesty proposal would provide greater benefits to the offender than any of the other provisions. It would not only cancel the conviction itself but would suppress knowledge of the conviction by expunging records or limiting the disclosure of records. This would do much to relieve the nonlegal disabilities which flow from the stigma of conviction, such as the refusal to hire one who is known to be an "ex-convict." For reasons discussed below, however, it is unlikely that the federal government could enact an effective nondisclosure provision and such a provision would be undesirable, in any case.

## **II. The Problems of Federal Legislation to Restore the Rights of Convicted Persons**

Before discussing the feasibility and desirability of federal legislation to restore the rights of convicted persons, it is important to review some of the problems in this area. Under our present system, a convicted person is sentenced and imprisoned or placed on probation. Theoretically there are three purposes of sentencing: punishment, rehabilitation and deterrence. The relative emphasis on each of these purposes may change from time to time, but all are present in the system and increasing emphasis is being given the rehabilitative aspects of sentencing.

When a man is discharged from probation, prison or parole, it is customary to say that he has "paid his debt to society," and work of rehabilitation is on its way. It has often been overlooked, however, that the "debt to society" carries certain "interest charges" that are not discharged by serving

the sentence. Federal law imposes certain disabilities and disqualifications on the convicted person and these are not automatically discharged by completion of the sentence. There are not many such federal laws and it is doubtful that they constitute a serious burden to most offenders, but they do have some impact.

Many States impose a variety of disabilities and disqualifications on convicted persons, e.g., voting disqualification, disqualification as a witness, ineligibility for State licenses, and ineligibility for State-regulated occupations and professions. Not all States impose these on federal offenders, but apparently many States do. Usually these disabilities are not removed merely by completing the sentence, and they may have serious impact on an offender and on his ability or motivation to achieve full rehabilitation.

There is also a stigma attached to conviction which may seriously affect the offender's ability to obtain employment. This stigma is not lost upon completion of the sentence, nor is it necessarily removed by pardon or amnesty. Yet it is the stigma of "ex-convict" which may have the greatest impact on the offender and may do most to reduce all hope of final rehabilitation.

The problem of federal legislation in this area is one of limited jurisdiction. If desired, Congress could, of course, remove all federal disabilities and disqualifications. It is very doubtful, however, that Congress could require the removal of disabilities imposed by State law, even though some States may voluntarily accept a federal amnesty as restoring State rights and privileges.

The stigma attached to conviction can only be removed if all knowledge of the conviction is removed, and this is impossible. There are some steps which might be taken to

limit knowledge of the conviction by limiting the disclosure of official records. This could not prevent an employer from requiring the individual to state under oath whether he has been convicted, however, nor could the federal government guarantee an individual that he will not be prosecuted for perjury if he denies his conviction under oath. This would depend on the perjury statute of the State. No conviction can be completely hidden.

Thus, while the federal government might alleviate some of the effects of conviction, the extent to which it could improve the status of a rehabilitated offender is limited. A more detailed discussion follows.

**A. Disabilities Imposed by Federal Law**

Federal law imposes few general legal disqualifications on convicted persons, but there are some. For example, persons convicted of a felony are not eligible for jury service in a federal court unless their rights have been restored by pardon or amnesty, 28 U.S.C. 1861. Similarly, such persons may not enlist in the Army or Air Force unless the disqualification is waived, 10 U.S.C. 3253, 8253.

In addition to the general disqualifications there are certain limited ones designed to serve specific purposes. For example, a person convicted of certain types of felonies is barred from holding a union office or labor relations office for 5 years, unless his rights have been restored or the Board of Parole, after a hearing, waives the disqualification, 29 U.S.C. 504. ~~A~~ A person convicted of certain types of "financial crimes" may not register as an investment adviser within 10 years of that conviction, 15 U.S.C. 80b-3.

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3/ The portion of this statute which barred members of the Communist Party from union office was held to be a bill of attainder and, therefore, unconstitutional, United States v. Brown, 381 U.S. 437 (1965). This decision did not involve the prohibition against convicted persons holding such office, however, and this portion of the statute presumably remains in effect, see DeVeau v. Braisted, 363 U.S. 144 (1960).

The more common disqualification or disability in federal law is that imposed as an additional penalty for a specific crime. Eligibility for public office may be lost permanently or for a term of years upon conviction of certain crimes such as: bribery or conflict of interest, 18 U.S.C. 201-218; abuse of public office, 18 U.S.C. 1901-1915; destruction of public documents, 18 U.S.C. 2071; treason, sedition or subversive activities, 18 U.S.C. 2381-2391; use of troops at the polls, 18 U.S.C. 592-593; or desertion from the military or draft evasion during time of war, 38 U.S.C. 1425. In addition, certain financial benefits conferred by the federal government are lost or reduced by conviction of subversive activities, although these benefits may be restored by Presidential pardon, e.g., government annuity, 5 U.S.C. 2285; veterans' benefits, 38 U.S.C. 3505; and social security, 42 U.S.C. 402(u).

The disqualifications imposed by federal law were enacted by Congress and there is no question that Congress could remove these disqualifications with respect to those meeting certain standards of rehabilitation. It would not be necessary to amend each provision separately. A general provision in an amnesty or restoration of rights law to the effect that all disqualifications imposed by federal law shall be inapplicable would be sufficient.

On the other hand, most disqualifications found in federal law are imposed for a specific purpose or as an additional penalty for a specific crime. The question arises, therefore, whether it would be desirable to enact a general provision removing these specific disqualifications automatically whenever a convicted person meets certain rehabilitation standards. For example, should a former official convicted of accepting a bribe in violation of 18 U.S.C. 201(c) be allowed to return to public office, no

matter how notorious his offense, just because he has served his sentence and lived a law-abiding life for a certain period? A similar question might be asked with respect to section 504 of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 504. That provision resulted from extensive congressional hearings highlighting serious abuses among some labor unions. It bars certain convicted persons from union office for five years, and under section 504 this disqualification can be removed only by full restoration of rights or by action of the Board of Parole following an individual hearing. The legislative history does not indicate what form of "restoration of rights" was envisioned by Congress; but, since the usual federal and State system is individual pardon and since the alternative contained in the Act is an individualized determination by the Board of Parole, it is probable that Congress contemplated that exceptions would be permitted only in special cases determined on an ad hoc basis. It is very doubtful that a "semi-automatic" amnesty provision was considered in this connection.

The decision whether to remove all federal disqualifications upon restoration of rights or whether to leave certain ones unaffected is, of course, a policy decision. If some disqualifications are to be unaffected by a restoration of rights, there may be rather difficult drafting problems. Moreover, that decision would have some impact on any provision designed to restrict the disclosure of records. This is one of many problems involved in this type of legislation. */b/*

#### B. Disabilities under State law

As already mentioned, most legal disabilities and disqualifications flowing from conviction are imposed by State

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Our views on the question of which disqualifications should be removed by a federal amnesty provision are discussed in part III, below.

rather than federal law. For example, except as limited by particular constitutional provisions and Acts of Congress implementing them, the qualifications of voters are determined by the States. Thus, it is up to the individual State to determine whether a person convicted of a felony shall be permitted to vote and to decide by what procedure the right to vote, if lost by conviction, may be restored. Further, some States may distinguish between federal convictions and convictions in State court. For example, conviction of an "infamous crime" in Ohio or any other State renders a person ineligible to vote in Ohio, Page's Ohio Rev. Code Ann. §§ 2961.02, but these provisions have been interpreted as inapplicable to convictions in federal court, 1950 Op. Ohio A.G. No. 1499. Thus, a federal conviction would not result in a loss of voting rights in Ohio.

The differences in State laws regarding voter qualifications, the effects of a federal conviction on the right to vote, and the means by which voting rights may be restored would make it difficult, if not impossible, to draft federal legislation which would restore voting rights in every State. Nor would it appear to be possible to compel States to restore voting rights to a convicted person who has received some form of federal amnesty. Federal legislation restoring voting rights to convicted persons in the several States would not come within the scope of the federal power regarding the voting rights, and it is our view that the federal government could not require that amnestied federal offenders be permitted to vote.

Similar problems arise in connection with State laws prohibiting convicted persons from holding State office, operating businesses for which State licenses are required, practicing medicine, gaining admission to the bar, serving on juries, testifying as witnesses, etc. The laws relating

to these rights and privileges vary from State to State and it is likely that the interpretation of the effects of a federal amnesty law would also vary. Conceivably it could be argued that the denial of these rights and privileges to an amnestied offender violates the Fourteenth Amendment and may, therefore, be prohibited by federal legislation. However, in the exercise of their police powers, States may establish reasonable and non-discriminatory qualifications for these various rights and privileges. Statutes barring convicted persons from various rights and privileges have been upheld as constitutional against challenges that they violated the Fourteenth Amendment or constituted bills of attainder or ex post facto laws, Hawker v. New York, 170 U.S. 189 (1898); DeVesey v. Braisted, 363 U.S. 144 (1960). If the Fourteenth Amendment does not prohibit States from enacting such disqualifications, it is doubtful that federal legislation "implementing" the Fourteenth Amendment could do so. Yet there would appear to be no other constitutional authority which might even be suggested as justifying federal legislation requiring States to restore specific rights and privileges to amnestied federal offenders.

There would appear to be no way that the federal government could guarantee an amnestied offender a full restoration of the rights of State citizenship. Yet it is these rights which may be most important to the individual. This is one of the most difficult problems affecting federal legislation in this area.

### C. The "Social Stigma"

For many convicted persons, the social stigma which follows an "ex-convict" all his life may be the most painful of all "disabilities." Its impact is economic as well as psychological. Employers refuse to hire such persons, particularly if the job requires the handling of money or

valuables, and bonding companies refuse to insure the risk of such an employee. Businessmen and lending institutions may refuse to extend him credit and local credit agencies report convictions along with credit information.

Other than persuasion, there is little the federal government can do to prevent this. Theoretically, employers involved in interstate commerce might be prohibited from "discriminating" against amnestied offenders just as racial discrimination is prohibited, but the burden of showing that such "discrimination" is unreasonable and has an adverse effect on interstate commerce would be great indeed! It would be even more difficult to establish that a bonding company which, in effect, insures the integrity of an individual is "discriminating" when it refuses to insure a convicted person. A federal amnesty could do little to relieve the economic consequences of conviction resulting from the actions of private individuals.

The ostracism and suspicion of "respectable" society toward a convicted person cannot be eliminated by federal amnesty although a grant of amnesty may serve to reduce the stigma. The attitudes of family, neighbors and communities cannot be altered by Act of Congress even though the effect of these attitudes may do more to encourage recidivism than any legal disability or disqualification. The only certain way to eliminate the stigma of a conviction would be to eliminate all knowledge of the conviction, and this is virtually impossible.

#### D. Destruction or Nondisclosure of Records

If it were possible to expunge all records relating to arrest, indictment, conviction and sentencing, the disabilities, disqualifications and stigma would also be

eliminated. However, a total destruction of all such records is neither possible nor desirable.

From the standpoint of the federal government alone, there are several considerations which militate against the total destruction of records. Presumably, a grant of amnesty would represent a judgment that the individual is permanently rehabilitated and is unlikely to engage in further criminal conduct. This is only a prediction. Should the individual commit a later crime, detection and appropriate sentencing could be hampered by destruction of his previous record. For example, identification and arrest would be more difficult if fingerprints, photographs, description of a "method of operation," etc., had been destroyed. Further, if all record of the prior conviction had been erased, the individual would again be considered and probably sentenced as though he were a first offender. In Carlesi v. New York, 233 U.S. 51 (1914), a person pardoned for a federal offense argued that a New York court, having convicted him of a subsequent felony, could not sentence him as a second offender because his first offense had been pardoned. The Court held the pardon did not wipe away the prior conviction to this extent and the more severe penalty for the second offense was permitted. Had all record of the prior conviction been destroyed, however, there would be no evidence to indicate a prior offense and such a person might again be sentenced as a first offender.

It should also be considered that a total destruction of records might hamper security investigations regarding appointments to sensitive positions. ✓ Even if it is determined advisable to grant amnesty to a particular individual

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In its comment on our tentative memorandum the Criminal Division notes, "the specter of an amnestied convict employed as an FBI agent requires no comment."

and permit him to hold any position for which he is qualified, the fact of conviction might still be pertinent to a security investigation. Indeed, a conviction which has otherwise been erased from the record might render an individual particularly susceptible to extortion and, from that standpoint, a poor security risk. Accordingly, the impact of a total destruction of records on a security investigation might also make such destruction inadvisable.

From a practical standpoint, total destruction of records is not possible. In some case, the initial arrest of an individual may have been made by State or local law-enforcement agents, even though the suspect was turned over to the federal government for prosecution. The arrest would be recorded by the State or local officers and that record may also show the ultimate disposition of the case. Should such a person be convicted and later annested, the record of the federal conviction might be destroyed, but the arrest would be a matter of State record. There does not appear to be any basis on which Congress could compel the State to destroy or surrender that record. Thus, some record of the offense might remain even though all federal records are destroyed.

It should be noted that a federal conviction, appealed to a circuit court, may be reported in the Federal Reporter. It would be impossible after several years to expunge the opinion from the law reports and, in our legal system, it would be most undesirable to cease reporting the opinions in criminal cases. Yet as long as the decision is reported, the conviction remains a matter of open public record. Even if the official reports fail to identify convicted persons, moreover, newspaper reports may contain names and photographs and these would remain available in newspaper archives even if official records were expunged. Thus, it would be impossible to hide all trace of a conviction.

➤ There would also be serious administrative problems involved in destroying all official records of the offense. Records pertaining to arrest, indictment, conviction, sentencing, imprisonment, parole and amnesty would be in the custody of various units of government and may be scattered geographically. If all such records were to be destroyed, they would have to be collected from investigating agencies, the F.B.I., the U.S. Attorneys, courts, prisons, and other agencies involved, or notice would have to be sent to each of these to destroy the particular record. This would involve a serious administrative burden and would complicate the record keeping and statistical reporting of each of the government units involved.

The alternative to total destruction of records would be a procedure forbidding disclosure or limiting the circumstances under which such records may be disclosed. This is the approach taken by the New York Amnesty provision. Many of the problems mentioned above could be avoided by adopting a nondisclosure policy. For example, in the event of a future criminal act by the individual, records might still be available for detection purposes and for purposes of determining the appropriate sentence. Such records would also be made available for security investigations.

The problem of State arrest records would remain, since the federal government would lack authority to limit their disclosure. However, State officials who might be unwilling to destroy records might be persuaded, as a matter of comity, to limit disclosure of certain records at the request of the federal government.

A nondisclosure arrangement would also entail administrative difficulties. If all records were to be collected and deposited in a single location, the problems relating to collection from various agencies and locations and the complication of the recording systems of the individual agencies would be the same as those involved in the destruction of records. It may be possible, however, to

develop a simpler procedure. For example, upon a grant of amnesty, a circular could be sent to all agencies or offices which might have records. The circular might direct that records relating to the commission of a specific crime by the particular individual be set aside in a "limited disclosure" file or that they be stamped or otherwise marked "Limited Disclosure - - Amnesty." Such a procedure would minimize the administrative burdens.

#### E. Denial of Conviction by the Individual

An official policy of nondisclosure by the federal government is of limited value to the individual if he can be compelled to disclose his record himself. Yet the federal government is limited in its authority to protect the individual from compulsory self-disclosure.

There is no question that the federal government could grant to the individual the right to deny any fact relating to his arrest, conviction or amnesty without violating any federal law relating to perjury or any law or regulation relating to disclosure of information. Moreover, information relating to the conviction could be barred from use against the individual in any federal court to impeach his testimony. He could be given the "right" to deny under oath that he had ever been arrested, convicted and sentenced, but this "right" would only govern his relations with the federal government.

The individual States have the right to define what shall be perjury in that State and to establish penalties for refusal to disclose information when applying for State licenses, public employment, etc. State perjury laws cannot be redefined by the federal government. There are circumstances in which the federal government can protect an individual from State prosecution. For example, the federal government may grant immunity from both federal and State

prosecution in order to compel self-incriminating testimony, Reina v. United States, 364 U.S. 507 (1960). Moreover, testimony compelled by grant of immunity cannot be used against an individual in either federal or State court regardless of the scope of the immunity statute, Murphy v. Waterfront Commission, 378 U.S. 52 (1964). Where no incrimination is involved, however, it is doubtful that the federal government could grant an amnestied offender immunity from State prosecution for perjury. Further, the federal government would have no authority to prevent the use of a conviction in State court to impeach the individual's testimony as a witness nor could it prevent his discharge from State employment because of a failure to disclose his prior conviction.

There appears to be little the federal government can do to prevent a State or private individual or agency from asking an individual if he has ever been arrested or convicted. Nor can it compel States or individuals to accept a "no" answer to such a question when, in fact, the individual has been arrested, convicted and amnestied.

### III. Feasibility and Desirability of Federal Legislation

Despite the problems outlined in part II, above, it is possible to draft federal legislation which would provide a more "automatic" means of restoring rights to federal offenders. While there is some uncertainty regarding the constitutionality of congressional action in this area, there is already a federal statute providing for vacation of convictions. If the Youth Corrections Act is constitutional, and it must be presumed to be, then similar legislation on a slightly broader scale would very likely be constitutional also.

Federal legislation might be drafted in such a way as to wipe out or set aside the convictions of federal

offenders who have shown a potential for rehabilitation. Wiping away the conviction could remove all or some of the disqualifications imposed by federal law. Such legislation might also be drafted to provide that the amnesty granted shall be deemed equivalent to a pardon for purposes of the restoration of rights. This might well serve to restore State rights and privileges in those States which recognize federal pardons for this purpose. Legislation might also provide the individual with some certificate of rehabilitation or amnesty which may help reduce the stigma attached to conviction and may assist in obtaining employment. To a limited extent, it may also be possible to restrict the disclosure of federal records relating to the offense and conviction.

While legislation of this type may never restore an offender to the status quo ante, it would certainly improve the status of unpardoned federal offenders. The extent of improvement may vary depending upon the State in which the offender resides. Yet it is possible that federal leadership and persuasion may prompt more States to give effect to a federal amnesty and to provide restoration systems of their own.

The psychological impact of an amnesty program and its potential effect on recidivism cannot be measured. It is not unreasonable to assume, however, that the restoration of rights and reduction of stigma may help convince an offender that the government's interest in his rehabilitation and return to normal life is real, and that it is prepared to assist to the limit of its authority.

It is our view that some form of federal legislation providing for the restoration of rights to federal offenders would be feasible and may well be desirable. The Pardon Attorney, the Board of Parole and the Office of Criminal Justice are generally in accord with this view, but the Criminal Division has expressed reservations concerning

the effectiveness of federal legislation in this area. The Board of Parole recommends that any federal legislation of this type be individualized rather than automatic, perhaps along the lines of the Youth Corrections Act. The Criminal Division suggests that the procedures outlined in the Model Penal Code may be the most desirable. The Office of Criminal Justice has suggested that no specific proposals be considered until the matter has been studied by the National Crime Commission. Because of the numerous problems involved and the importance of considering all proposed changes in the correctional system on an integrated basis, we agree that this matter should be referred to the National Crime Commission for further study. /2/

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It is pertinent to note here that this Office, the Office of the Pardon Attorney, and the Board of Parole consider H.R. 8373 an unsatisfactory method of restoring rights to federal offenders for several reasons: (1) It would be limited to those convicted of crimes defined in title 18, and would not apply to criminal offenses defined elsewhere, e.g., antitrust violations (15 U.S.C. 2); (2) Like the New York provision, it purports to give the offender an absolute right to deny his arrest and conviction, under oath or otherwise, to any public authority or private agency; (3) It purports to restore the right to vote, to hold any public office and to obtain any federal, State or municipal license; (4) It would authorize a prosecution and a treble damage libel action against any person who willfully alludes to the conviction of an amnestied offender and neither truth nor lack of malice would appear to be a defense; (5) It adopts the language of the New York provision even to the extent that amnesty can be lost by conviction of "knowingly consorting with criminals or persons of evil reputation" -- an offense defined in New York law but not in federal law. In summary, H.R. 8373 follows the New York provision too closely and fails to take into account the difference between rights derived from federal citizenship and rights and privileges derived from State citizenship.

Although we do not consider it appropriate to discuss specific legislation at this time, there are certain questions of policy which should be discussed in this memorandum. There is, first of all, the question of what category of federal offenders should be included in amnesty legislation. It is our present view that a federal program for restoring rights should be limited, at least at the outset, to first offenders who have shown evidence of rehabilitation. This view is shared by the Pardon Attorney, the Office of Criminal Justice and the Criminal Division, although the Office of Criminal Justice points out that the National Crime Commission might find persuasive argument to support the view that certain multiple offenders should also be included. The Board of Parole suggests that amnesty be granted on a selected basis rather than on the basis of a particular category of offenders. The question of the type of offenders who should be covered by federal amnesty legislation is one which requires careful consideration before any specific proposal is drafted.

Another question of policy which merits discussion is whether amnesty should remove all federal disqualifications or disabilities, even those imposed as additional penalties for specific crimes. It is our view that only general disabilities should be removed automatically and that specific disqualifications such as the five-year limit on holding union office or the disqualification of certain offenders from public office should be removed only on an individual basis, in the exercise of discretion. The Criminal Division, the Office of Criminal Justice, and the Pardon Attorney concur in this view. Indeed, the Criminal Division commented: " \* \* \* most of the relatively few Federal disabilities which exist should not be removed as they were imposed with the view of protecting society. To remove them automatically, even though only with regard to first offenders, would subject innocent citizens to detriments probably not counterbalanced by a corresponding rehabilitative benefit to the offender." This matter also

requires serious consideration before any federal amnesty legislation could be drafted.

Perhaps the most difficult decision to be made in considering federal amnesty legislation involves the disclosure of the records of conviction. We consider it impossible and totally undesirable to attempt to destroy all record of a conviction. Nor do we believe that records pertaining to a conviction should be sealed against all disclosure. If disclosure were to be restricted at all such a restriction should not apply to duly authorized investigators. The Criminal Division also indicated opposition to a nondisclosure of records provision and noted the problems of withholding such information from investigators. Similarly, the Office of Criminal Justice, the Board of Parole and the Pardon Attorney expressed the view that records of conviction should be available at least to those who have a legitimate interest in investigating and requesting such information. There would, of course, be no objection to noting the fact of amnesty on all official records.

A related question, prompted by provisions in the New York Amnesty proposal and H.R. 8373, is whether an amnestied offender should be authorized to deny his former conviction even under oath. The Criminal Division, the Office of Criminal Justice, the Parole Board, the Pardon Attorney and this Office all share the view that such a provision would be undesirable in any federal amnesty law. It should be enough for any amnestied offender to recite the fact of amnesty without denying the original conviction.

Another difficult question relating to the disclosure of the former conviction of an amnestied offender is whether the conviction should be available to impeach his testimony as a witness. The Criminal Division strongly believes that a former conviction should be available to impeach the testimony of a witness regardless of amnesty. That Division noted that this could be particularly relevant if the

former conviction were for perjury. We tend to agree with this view, although various considerations might justify different rules depending whether the amnestied offender testifies as a defendant, as a witness in a criminal case, or as a witness in a civil case.

An amnestied offender appearing as a defendant in a subsequent criminal case is, of course, entitled to a presumption of innocence. He would also be entitled to take the witness stand in his own behalf. Such a person might be willing and anxious to testify but for the fact that his prior conviction could be brought out and might prejudice the jury. If amnesty is to represent official "forgetfulness," then it might be argued that the prior offense should not be available to impeach a defendant's testimony. On the other hand, trials are intended to arrive at the truth and a prior conviction, even though "officially forgotten," may be a relevant fact. This problem will require careful consideration in any further study of federal amnesty legislation.

There are somewhat different considerations involved in deciding whether a conviction should be admissible to impeach the testimony of an amnestied offender appearing as a witness. In such cases the rights of a third party are involved. Where the testimony relates to a civil action involving property rights, public policy might justify barring any reference to the prior conviction. But where the life or liberty of a third party is involved, protecting the amnestied offender from disgrace or stigma is far less important. Whatever other provision may be considered regarding the use of a former conviction to impeach the testimony of an amnestied offender, we urge that the fact of conviction be available for use in impeaching the testimony of a witness in a criminal case.

The problems discussed above are only some of the areas which must be considered in deciding whether to propose federal amnesty legislation and in drafting any such proposals. Other specific problems are mentioned in the attached comments of the various Offices and Divisions. It is evident that additional study of this subject would be necessary before a specific proposal could be drafted. If such study is considered desirable, we recommend that the matter be referred to the Corrections Task Force of the National Crime Commission. This Office would, of course, be willing to cooperate with the Task Force in any such study.