MEMO

To: Deanne & Howard
From: Grace Lidia Suarez
Subject: Felony conviction provision
Date: July 11, 1995

I think I have answered my own question regarding whether the application of the felony conviction provision to existing office holders might violate due process, the ex post facto clause or constitute a bill of attainder. Apparently not.

In *De Veau v. Braisted*, 363 US 144, pp. 157 - 160, 4 L Ed 2d 1109 (1960) a union official was barred from office under a state law passed in the 1950's due to his conviction for larceny incurred in 1920. He challenged the statute on grounds of pre-emption, violation of due process, ex post facto, and bill of attainder.

After disposing of the pre-emption argument (not important to us), the Court dealt with the remaining issues:

> Appellant's argument that § 8 of the Waterfront Commission Act is contrary to the Due Process Clause of the Fourteenth Amendment depends, as it must, upon the proposition that barring convicted felons from waterfront union office, unless they are pardoned, or receive a "good conduct" certificate, is not, in the context of the particular circumstances which gave rise to the legislation, a reasonable means for achieving a legitimate state aim, namely, eliminating corruption on the waterfront.
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> In disqualifying all convicted felons from union office unless executive discretion is exercised in their favor, § 8 may well be deemed drastic legislation. But in the view of Congress and the two States involved the situation on the New York waterfront regarding the presence and influence of ex-convicts called for drastic action. Legislative investigation had established that the presence of ex-convicts on the waterfront was not a minor episode but constituted a principal corrupting influence. The Senate Subcommittee which investigated for Congress conditions on the New York waterfront found that "[c]riminals whose long records belie any suggestion that they can be reformed have been monopolizing controlling positions in the International Longshoremen's Association and in local unions. Under their regimes gambling, the narcotics traffic, loansharking, shortganging, payroll 'phantoms,' the 'shakedown' in all its forms--and the brutal ultimate of murder--have flourished, often virtually unchecked." S Rep No. 653, 83rd Cong, 1st Sess (1953), p. 7.

In light of these findings, and other evidence to the same effect,<fn 3> the Congress approved as appropriate if indeed not necessary a compact, one of the central devices of which was to bar convicted felons from waterfront employment, and from acting as stevedores employing others, either absolutely, or in the Waterfront Commission's discretion. No positions on the waterfront were more conducive to its criminal past than those of union officials, and none, if left unregulated, were felt to be more able to impede the waterfront's reform. Duly mindful as we are of the promising record of rehabilitation by ex-felons, and of the emphasis on rehabilitation by modern penological efforts, it is not for this Court to substitute its judgment for that of Congress and the Legislatures of New York and New Jersey regarding the social surgery required by a situation as gangrenous as exposure of the New York waterfront had revealed.

Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas. Federal law has frequently and of old utilized this type of disqualification. Convicted felons are not entitled to be enlisted or mustered into the United States Army, or into the Air Force, but "the Secretary ... may authorize exceptions, in meritorious cases." 10 USC §§ 3253, 8253. This statute dates from 1833. A citizen is not competent to serve on federal grand or petit juries if he has been "convicted in a State or <*pg.1120> Federal court of record of a crime punishable by imprisonment for more than one year and and [sic] his civil rights have not been restored by pardon or amnesty." 28 USC § 1861. In addition, a large group of federal statutes disqualify persons "from holding any office of honor, trust, or profit under the United States" because of their conviction of certain crimes, generally involving official misconduct. 18 USC §§ 202, 205, 206,207, 216, 281, 282, 592, 1901, 2071, 2381. For other examples in the federal statutes see 18 USC § 2387; 5 USC § 2282; 8 USC § 1481. State provisions disqualifying convicted felons from certain employments important to the public interest also have a long history. See, e. g., Hawker v New York, 170 US 189, 42 L ed 1002, 18 S Ct 573. And it is to be noted that in § 504(a) of the 1959 Federal Labor Act, quoted earlier in this opinion, Congress adopted this same solution in its attempt to rid all unions of criminal elements. Just as New York and New Jersey have done, the 1959 Federal Act makes a prior felony conviction a bar to union office unless there is a favorable exercise of executive discretion. In the face of this wide utilization of disqualification of convicted felons for certain employments closely touching the public interest, remitting them to executive discretion to have the bar removed, we cannot say that it was not open to New York to clean up its waterfront in the way it has. New York was not guessing or indulging in airy assumptions that convicted felons constituted a deleterious influence on the waterfront. It was acting on impressive if mortifying evidence that the presence

on the waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation.

Finally, § 8 of the Waterfront Commission Act is neither a bill of attainder nor an ex post facto law. The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt. See United States v Lovett, 328 US 303, 90 L ed 1252, 66 S Ct 1073. Clearly, § 8 embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction; and so it manifestly is not a bill of attainder. The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession. See Hawker v New York (US) supra. No doubt is justified regarding the legislative purpose of § 8. The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony.

Affirmed.

The only difference I can see with our provision is that the conviction may never be expunged, and also that the Convention did not make the detailed findings of need made above. I could see someone with a twenty or thirty year old conviction that was marginally relevant to his fitness for office arguing that our provision violates due process.