The original documents are located in Box 1, folder "American Bar Association" of the Charles E. Goodell Papers at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE
WASHINGTON

Friday, Dec 20, 1974

To Ray Mitchell,

This is really directed more to your family, than to you: Because you have stayed and worked with extraordinary competence when others haven't, you obviously understand the significance of what you are doing for the President and the country.

I don't apologize to your wife for what you've

done, & congratulate her. She, too, - perhaps even more than you - has suffered and sacrificed.

Please tell her how grateful I am.

May Christmas yet be one you can share "semi-fully" with your family.

You have done much to make the holiday season better for others.

Thank you.

Charlie Goodell

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SUMMARY AND ANALYSIS

"Shoot To Kill" Order Renders Mayor Liable For Illegal Shooting By Police

A city mayor, whose hard law and order stand was symbolized by the "machine gun" lapel pin he used in his political campaigns, may have to pay for the political popularity he derived from ordering city policemen to "shoot to kill" those "engaged in lawlessness and anarchy." The mayor is liable, according to the U.S. District Court for middle Georgia, for damages sustained by a 12-year-old boy who was unlawfully shot while fleeing a policeman investigating a suspected misdemeanor. (Palmer v. Hall, 7/29/74)

Under Georgia law, a policeman has the authority to shoot only in self defense or in situations where one who is about to be arrested for a felony flees. The mayor, by ordering his officers to shoot "whoever is involved" in any "anarchy or civil disobedience," ordered his officers to exceed their lawful authority.

Admittedly, the mayor did not pull the trigger or directly order the policeman involved to shoot the boy. But, "his 'shoot to kill' order and related statements * * * created the feeling of authority * * * that caused [the policeman] to do what he did to the plaintiff." (Page 2082)

Earned Immunity Act Gets ABA's Approval

After considerable debate and a close floor vote, the American Bar Association's House of Delegates decided to support the concept embodied in the Earned Immunity Act of 1974, S. 2832. The same body, which met during the ABA's 97th Annual Meeting in Honolulu last week, approved, by a substantial margin, a resolution that sub silentio calls for the prosecution of former President Nixon.

The House vote on earned immunity was presaged by the Association's President in his opening remarks. The legal profession, Chesterfield Smith urged, is called upon for leadership to resolve the "present plight" of the Vietnam veterans and war resisters. Smith, however, advocated a position much beyond the earned immunity concept. Earned immunity, he reasoned, is at best only a limited solution to a small part of the problem. At worst, "it is a moral abdication of the right to full repatriation of those who reacted to the draft out of conscience."

When the Association's assembly failed to gather a quorum necessary to consider recommendations from the entire membership, the House Standing Committee on Resolutions took the "unusual" step of reporting such resolutions directly to the House. One recommendation, which was passed without debate, resolves that the Association "continues its dedication to the principle of fair, just and impartial application and enforcement of the law regardless of the position or status of any individual alleged to have violated the law." A second, also passed without debate, notes that all applicable disciplinary rules apply to lawyers at all times, whether or not acting in their professional capacity. All attorneys engaged in political activity or policy-making positions in Government are called upon "to recognize and adhere to their professional ethical responsibilities."

The House also endorsed a proposed National Institute of Justice that would provide services "which existing groups simply cannot provide." According to the Commission on the National Institute of Justice, no existing body possesses the broad jurisdiction of subject matter, inter-disciplinary approach, independent status, significant resources, and public attention and prestige that the Institute would hopefully possess. Opposition to the proposal termed the concept another example of the "marvelously American characteristic" of over-organization.

Another potentially controversial recommendation, from the Section of Individual Rights and Responsibilities, urged the repeal of all laws classifying as criminal prostitution or solicitation by a prostitute. Opposition was substantial and the resolution was defeated by voice vote. (Page 2083)

AMERICAN BAR ASSOCIATION

REPORT TO THE
HOUSE OF DELEGATES

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

The Section of Individual Rights and Responsibilities recommends adoption of the following:

BE IT RESOLVED, that the American Bar Association supports in principle the passage of Senate Bill 2832, the Earned Immunity Act of 1974 and H.R. 13001, an identical bill introduced in the House of Representatives. This proposed legislation provides persons who unlawfully avoided military service, with an opportunity to earn immunity from prosecution and punishment.

BE IT FURTHER RESOLVED, that the President or his designee is authorized to present the substance of the foregoing resolution to appropriate committees of Congress.

REPORT

I. The Purpose of Earned Immunity Legislation Merits the ABA's Support.

Earned Immunity from prosecution for draft resistance, commonly referred to as earned or conditional amnesty, is a critical national problem. It concerns the lives of

nearly 30,000 1/ young men who have evaded the draft and who are now living in Canada or other countries, or are "living underground" in the United States. Many of these young men continue to lead tragic lives as a result of their separation from their families and their homeland. Some have not returned to their homes and families for fear of prosecution for the crime of draft resistance.

Now is the time for the American Bar Association to support legislation directed at alleviating this problem. This legislation is directed toward those who have resisted the draft. Many of these draft resisters have been victims of bad judgment and poor advice. Others, however, have acted out of deep personal objection to the cause which our country followed as the United States became involved in the Viet Nam War. Now is the appropriate time to question whether we will offer these young men an opportunity to become productive citizens in their country or force them to remain abroad or underground. We must question whether it is more in the interest of justice to have them spend up to three years in jail or an indeterminate period in exile rather than to have them earn immunity through some type of alternative service to their country. Now that American involvement in the shooting war in Viet Nam has ended, it is appropriate for the ABA to support legislation offering these draft resisters an opportunity to rejoin their fellow citizens in a manner that allows them to earn immunity from prosecution for draft resistance by providing some type of alternative service to their country.

In regard to those young men who resisted the draft as a result of their convictions, it is worth noting that because of the change in the law regarding conscientious objectors it is possible that two brothers from the same family with the same conscientious objections to the war in Viet Nam may have been classified differently for

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1/ The exact number of such persons is in dispute. Staff analysis by aides to Senator Robert Taft, lead to the estimate that at least 18,500 individuals were abroad because of resistance to the draft. As of July 23, 1973, the Department of Justice reported that another 1,351 persons were indicted and awaiting trial and 300 men were imprisoned. No one knows how many are living "underground" in the United States. But the most conservative estimate is about 10,000. In sum about 30,000 men are affected by this proposed legislation.

purposes of the Selective Service Law. Under a peculiarity of the law the elder of the two may be subject to prosecution, but the younger of the two may have been relieved of his obligation to serve in the military because of his conscientiously held beliefs. The Supreme Court, during the Viet Nam War period, gradually broadened its definition of conscientious objection, justifying exemption from service in the Armed Forces. See Welsh v. The United States, 398 U.S. 333 decided on June 15, 1970. Before that decision, individuals seeking conscientious objector status had to raise their objection in relation to their belief in a Supreme Being. The Supreme Court, in Welsh, ruled that belief in a Supreme Being was no longer required, and that other deep-felt views could suffice to justify receipt of the conscientious objector status. Obvious inequities have become evident, such as the example cited above where the elder of two brothers may be subject to prosecution for resisting the draft to abide by his conscience while the younger obtained conscientious objector status.

Also there are many individuals who were motivated solely by conscience in resisting the draft during the Viet Nam War period although their beliefs did not legally qualify them for conscientious objector status. Under Gillette v. United States, 401 U.S. 431 (1971), the Supreme Court held that selective opposition to the Viet Nam War did not justify the conferral of conscientious objector status on a young man who was otherwise subject to the draft. Nevertheless, it is clear that many young men who resisted the draft because of selective objection to the Viet Nam War did so because of their conscientiously held beliefs.

Enforcement of the Selective Service Laws has created its own set of problems. For example, many draft resisters have not been prosecuted in the past if they agreed to enlist in the Armed Services. This approach had been the policy of the Justice and Defense Departments before the expiration of the draft. In this regard, let us review a July 23, 1973 letter of Assistant Attorney General Henry Peterson, Head of the Criminal Division, Department of Justice, to Senator Robert Taft. Mr. Peterson says as follows:

> "It was our policy to allow such a man, in the absence of aggravating circumstances, to remove his delinquency under the Military Selective Service Act by submitting to induction processing and to authorize the dismissal of his indictment upon

successful completion of induction. That policy was terminated on July 1, 1973, because of the expiration of the induction authority on that date. In our view, that policy was beneficial to all concerned for the reason that the inductee would rather render valuable service to our country for a period of 24 months and he would have the satisfaction of having fulfilled his service obligations. On the other hand, men convicted and sentenced for violation of the Act perform no worthwhile service of any kind, and in most instances were permitted to return to their normal way of life in considerably shorter period of time. For example, in fiscal year 1972, the average term of imprisonment imposed for draft law violations was 36.2 months; however, the average actual time served in custody was 9.1 months. Moreover, 1,178 of the 1,643 defendants convicted were placed on probation by the courts, with the result that less than 1/3 of the men convicted received a prison sentence."

Mr. Peterson continued by explaining that this policy had to be dropped at the insistence of the Defense Department. Thus, all draft resisters are now subject to prosecution:

"Subsequent to July 1, 1973, it was our policy to inform a draft delinquent prior to indictment that he was in violation of the law and prosecutive action against him was contemplated unless he were willing to correct his delinquency by enlisting in the United States Army. In that event, consideration would then be given to permitting him to purge his violation without being subjected to criminal charges. That policy has been abandoned, however, because the Department of Defense advised us that it would not accept for enlistment men who are in violation of the draft law, whether under indictment or not. We were recently informed that the enlistment policy was reconsidered, at our request, within the Department of Defense and by the Secretary of Defense, but it was concluded that it should continue in effect. Since that decision could place substantial procesutive burden on United States attorneys throughout the country, as they no longer have a viable alternative to offer the defendants other than prosecution, we are again asking the Department of Defense to reconsider this matter."

This situation raises the problem of unequal prosecution in different districts and a heavy burden on United States attorneys. Senator Taft reports 2/ that statistics from the 1973 semi-annual report of the Director of the Administrative Office of the United States Courts would indicate that this burden on the Justice Department has been translated into a very uneven approach to prosecution so that the disposition of an accused often depends on the geographical region of the country in which he is prosecuted. For example, during Fiscal Year 1972 only one of Ohio's 218 defendants in Selective Service cases served a prison sentence compared to Minnesota's record of 47 prison sentences out of a total of 141 defendants with 94 convictions. Finally, many prominent Americans, including former Secretary of Defense Melvin Laird who bore the responsibility of the entire Defense establishment during a critical period of the Viet Nam conflict, have supported earned immunity. In a letter to Commander Ray R. Soden, Veteran of Foreign Wars of the United States, Secretary Laird said:

> "Throughout my career of public service, I have learned to avoid absolute, dogmatic positions. Neither the political system nor the judicial system of the United States works on 'blanket' and arbitrary approaches. Both recognize the vital roles of (1) circumstances and (2) motivation in determining political or judicial solutions to our problems. As I have stated, we pride ourselves on administering justice with mercy and understanding....It is my view that circumstance and motivation on a case-by-case basis, under our concept of justice, must be taken into account today when dealing with violators of our selective service laws. It is noteworthy that only a small percentage of these men have thus far been prosecuted by the Department of Justice, and in these cases widely differing penalties have been assigned to individuals varying by jurisdiction." (Emphasis added.)

2/ Testimony of Senator Robert Taft is support of S. 2832 before House Judiciary Committee, Subcommittee on Courts, Civil Liberties and the Administration of Justice, March 11, 1974.

II. Congress Has Authority to Legislate Immunity From Prosecution for Draft Resistance

Congress has authority to legislate immunity from prosecution for draft resistance. Congress has done so in the past and can do so again. For example, in 1865, Congress directed the President to issue a proclamation announcing a pardon for all deserters who returned to their posts within 60 days. (Act, of March 3, 1865, 13 Stat. 190-191. For a similar use of the legislative pardon power see Act of June 17, 1862, 12 Stat. 592.) This legislative power of immunity has also been exercised numerous times when it has been considered necessary to obtain testimony in connection with criminal investigations. The constitutionality of this legislative exercise was upheld by the Supreme Court in Brown v. Walker, 161 U.S. 591 (1896). See also The Laura, 114 U.S. 411 (1884).

The responsibility to determine which person should be granted this immunity has been placed by legislation in Federal agencies, prosecutors, and Congressional committees. See, for example, the "Use" Immunity Provisions of the Organized Crime Control Act of 1970, 18 U.S.C. ss 6001 - 6005. Kastigar v. United States, 406 U.S. 441 (1972) upheld these provisions.

Congress also has the undisputed power to modify the terms and conditions of judicial sanctions imposed on those convicted of crimes. This authority has been delegated to the Federal Board of Parole, granting that Board broad discretion in determining whether it should mitigate or alter the form of punishment imposed. See 18 U.S.C. ss 4201 and following. The authority exercised by the Board of Parole is probably the most common use of Congress' power to legislate immunity.

While the question has been raised whether Congress has the constitutional authority to enact "amnesty" legislation or whether granting "amnesty" is an exclusively Presidential power, nearly every legal scholar who has addressed this question has concluded that Congress has the constitutional authority to enact such legislation. These scholars are led by Professor Louis Lusky of the Columbia University Law School, who authored "Congressional Amnesty for Resisters: Policy Considerations and Constitutional Problems" 25 Vanderbilt Law Review 525 (1972). Only one statement questions the constitutionality of Congressionally enacted amnesty legislation. It was made

by Leon Ulman, 3/ a Deputy Assistant Attorney General in the Office of Legal Counsel, who appeared as the Administration spokesman at a Congressional hearing, apparently expressing an Administration policy as well as its legal position. On the basis of the foregoing, we believe that it is clear that Congress has the authority to enact amnesty legislation.

III. S. 2832 AND H.R. 13001 WOULD ESTABLISH AN IMMUNITY REVIEW BOARD WITH POWER TO GRANT IMMUNITY IN CONSIDERATION FOR THE PERFORMANCE OF NATIONAL SERVICE

This legislation would be directed at providing relief for persons who are currently subject to criminal prosecution for evading the draft. It would not affect deserters from the Armed Services or persons subject to criminal prosecution for violation of other law. It is concluded that deserters should be treated separately because they are subject to prosecution under a totally separate body of law, the Uniform Code of Military Justice, which is based on unique legal and policy considerations. Further, statistics available to Senator Taft indicate that as few as 5% of all deserters during the years 1966-1971 deserted on idealogical grounds. 4/ Some young men deserted because of trouble with an officer or because they committed a crime on a military base, or because of difficulty with civilian authorities near the base. A blanket amnesty that would include deserters would thus appear to be unfair and to pose the danger of disruption to military discipline.

The Immunity Review Board, to be established by this legislation, would be authorized only to review violations of the Selective Service Act and would be empowered to grant immunity upon the completion of alternative service of up to two years in the Armed Services or in public or private service contributing to the national health, safety, or welfare. Individuals serving prison sentences for crimes

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3/ Statement of Leon Ulman to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of Committee for the Judiciary, House of Representatives, March 8, 1974.

4/ See Senator Taft's comments on this subject in 119 Cong. Rec. No. 200 (Dec. 19, 1973).

unrelated to Selective Service violations would not be eligible for such immunity, nor would individuals under indictment for any offense unrelated to the Act. Examples of contemplated public service would be two years in the Peace Corps or VISTA, with compensation at a level which provided a standard of living comparable to service in the Armed Services at the lowest pay grade. Other public service permissible could include the various types of duties that were formerly assigned to conscientious objectors.

The Board would not be permitted to deny immunity to any qualified individual, but it would be given discretion regarding the length of alternative service with an upper limit of two years. Each individual case would be reviewed on its own merits, with the Board specifically authorized to consider mitigating circumstances with regard to the service requirements.

For example, S. 2832 sets forth the following six circumstances as mitigating the length of service required:

(1) An inaccurate interpretation of the Selective Service Act by an individual contributing to his having committed the violation.

(2) The applicant could have qualified for classification as a conscientious objector under Welsh v. United States, supra, but was denied conscientious objector status because he applied for conscientious objector status before Welsh was decided.

(3) The applicant's family is in immediate and desperate need of his personal presence.

(4) The applicant lacked mental capacity to have committed the violation of the Selective Service Act.

(5) The applicant has in the past or is currently subject to imprisonment or parole for committing offenses for which he seeks immunity. The Board could give credit for time already served.

(6) Such other circumstances as would be consistent with those above.

While S. 2832 makes no provision for judicial review of the type or length of service required by the Board, it is concluded that its judgment should be subject to judicial review within the limitations of the Administrative Procedure Act. Such a provision would thus eliminate even the appearance of arbitrary administrative action.

It should be noted that none of the above listed reasons provides for a reduction of the maximum term of service solely on the basis of the applicant's opposition to the Viet Nam War. Such individuals, while not disqualified from securing immunity, could not use that factor as the sole basis for any reduction in term because it has never been the basis for a similar action by any of the draft legislation or regulations. Further, the Supreme Court specifically determined that this was not the basis for refusing induction in Gillette v. United States, supra.

Accordingly, on the basis of the above report, it is hereby recommended that the American Bar Association support legislation providing for earned immunity from prosecution for those persons who evaded the draft during the period beginning August 4, 1964 and ending January 27, 1973, at which time the United States agreed to withdraw its military forces from the Viet Nam Conflict. It is important that the American Bar Association support this resolution because currently, while several bills are pending before Congress providing for such earned immunity to draft resisters, cognizant Congressional committees have chosen to avoid the issue for fear that many Americans reject the concept of any type of amnesty.

In conformance with Association policy, copies of this report and recommendation have been sent to the following Association entities for their review and comment:

Administrative Law Section, Criminal Justice Section, General Practice Section, Young Lawyers Section, the Law Student Division; Standing Committee on Lawyers in the Armed Forces; Standing Committee on Legislation, Standing Committee on Military Law and the Special Committee on the Administration of Criminal Justice.

The above report and recommendation were approved by a majority of the Council of the Section of Individual Rights and Responsibilities in a telephone poll conducted in June, 1974.

Respectfully submitted

Albert E. Jenner, Jr.
Chairman

August 1974