**The original documents are located in Box 4, folder "Final Report - Draft, 8/29/75 (1)" of the Charles E. Goodell Papers at the Gerald R. Ford Presidential Library.**

PRESIDENTIAL CLEMENCY BOARD
THE WHITE HOUSE
WASHINGTON, D.C. 20500

August 29, 1975

MEMORANDUM FOR: BOARD MEMBERS

FROM: LAWRENCE M. BASKIR

SUBJECT: DRAFT FINAL REPORT

Attached you will find a draft prepared by the staff to serve as the basis for your discussions on the Final Report at Camp David.

The draft contains a number of omissions including numbers and citations which the staff will be collecting over the next few days. This draft was prepared by a number of individuals under a severe time pressure and I must ask your indulgence for any typographical errors, grammatical mistakes, and imperfect syntax. We have tried, however, to present you with a draft which gives a complete description of the Board's operations, and an explanation of the context in which the Board operated.

If you should have any individual questions you wish answered, the staff will be available during your discussions at Camp David and, of course, at any other time.

Attachment

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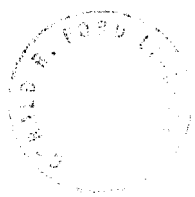

IV
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# I. INTRODUCTION

# CHAPTER I:

# INTRODUCTION

Current situations often parallel previous ones, causing leaders facing similar problems to reach similar conclusions. In studying President Ford's Clemency Program, one need only look back a hundred years to observe a like situation confronting another President of the United States. Just days after the Civil War ended, President Andrew Johnson began weighing whether an amnesty should be declared to heal the wounds which still divided his reunited nation. The President sought advice from Attorney General James Speed who counseled to act with moderation.

> "The excellence of mercy and charity in a national trouble like ours ought not to be undervalued. Such feelings should be fondly cherished and studiously cultivated. When brought into action they should be generously but wisely indulged. Like all the great, necessary, and useful powers in nature or government, harm may come of their improvident use, and perils which seem past may be renewed, and other and new dangers be precipitated."—/

Just six weeks after he became President, Johnson followed Attorney General Speed's advice. He declared a limited and conditional amnesty. To many it was insufficient while to others it was too generous. To the President, it was a reasonable approach which people of all pursuasions could find acceptable. Had the President's program not approached the middle ground, the perils and dangers identified by Attorney General Speed might well have come to pass.

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Over a century later, President Gerald Ford was concerned about the need to heal America's wounds following another divisive war. Like President Andrew Johnson, he announced a clemency program six weeks after succeeding to office; like Johnson, he pursued a course of moderation. No program at all would have left old wounds festering. Unconditional amnesty would have created more ill feeling than it would have eased. Reconciliation was what was needed, and reconciliation could only come from a reasoned middle ground.

To the members of the Presidential Clemency Board, the President's program assumed a greater meaning. We came to the Board as men and women whose views reflected the full spectrum of the public opinion on the war and on the question of amnesty. As we discussed the issues, a consensus began to emerge: we all came to see the President's program as more than a mere compromise, but also an appropriate and fair solution to a very difficult problem.

It appeared to us that the President's program was anchored by six guiding principles. Taken together, they provide an excellent means of understanding the spirit behind his clemency proclamation. They also established guidelines to help out Board implementation of the President's program.

The first principle was one about which there was no disagreement: the need for a program. After almost nine years of war and nineteen months of an acrimonious debate about amnesty, President Ford decided

that it was time to act. America needed some Presidential response to the issue of amnesty for Vietnam era draft resisters and deserters. As he created the program, the President authorized three agencies--the Department of Justice, the Department of Defense, and the Presidential Clemency Board-- to review cases of different categories of draft and AWOL offenders. He designated a fourth entity, the Selective Service System, to implement the alternative service aspect of the program.

The second principle was that the program should offer clemency, not amnesty. Too much had happened during the war to enable Americans to forget about what had taken place. The President often stated that he did not want to demean the sacrifice of those who served--or the conscientious feelings of those who chose not to serve. But the inability to forget does not mean an incapacity to forgive. President Ford declared that he was placing "the weight of the Presidency in the scales of justice on the side of mercy." By ordering that prosecutions be dropped, that military absentees be discharged and that persons punished for draft or desertion offenses be eligible for Presidential pardons, he tried to make America whole again. He offered to restore the rights and opportunities of American citizenship to people who had been made outcasts because of conscientious beliefs or their inability to deal effectively with their legal obligations.

Third, he declared that this was to be a limited, not universal, program. Had he included only those who could prove that their offense had resulted from their opposition to the war, he would have been unfair

to less educated persons. Instead, the President listed several draft and desertion offenses which, if committed during the Vietnam era, would automatically make a person eligible to apply for clemency. On balance, he drew the eligibility line generously; of the 125,000 made eligible, only an estimated 25% actually committed their offenses because of a professed conscientious opposition to war.—/

Fourth, he decided that this was to be a program of definite, not indefinite, length. There would be an application deadline, giving everyone more than four months' time from the program's inception to apply (later extended by two months). This would enable all cases to be decided within one year, and--even more important--it would put an end to the amnesty issue. It was hoped that the reconciliation among draft resisters, deserters, and their neighbors would take place as quickly as possible. Altogether, about 22,500 eligible persons applied for clemency.—/

His fifth principle was the cornerstone of the program: all applicants would have their cases considered through a case-by-case, not blanket, approach. Clemency would not be dispensed automatically, by category, or by any rigid formula. The agencies authorized to review clemency applications were to consider the merits of each applicant's case, with full respect given to their rights and interests. To the extent possible, case dispositions had to be fair, accurate, consistent, and timely.

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His final principle was that he would offer most applicants conditional, not unconditional, clemency. Clemency would have to be earned through performance of several months of alternative service in the national interest. Regardless of the rightness of wrongness of an applicant's draft or desertion offenses, he still owed a debt of service to his country. That debt would have to be satisfied before he could be forgiven for his offenses.

During the past twelve months the Presidential Clemency Board has heard close to 16,000 cases. It has tried to apply the spirit of these principles to every case. In this report, we explain what actions we took, what we learned about our applicants, and what we think we accomplished. Where possible, we also try to put the President's entire clemency program in some perspective. The policies and procedures of the Department of Justice, the Department of Defense and the Selective Service System are useful benchmarks for understanding the full context of the Board's own policies and procedures.

The report begins with a discussion of how the Board implemented each of the President's six principles. We then describe how it managed what was at times a crisis operation. Next, we describe what we learned from the case histories about the experiences of the civilian and military applicants. We then try to put the President's program into an historical perspective through a comparative analysis of other instances of executive clemency in Amerivan history. Finally, we discuss what we think the

President's program accomplished. We make specific recommendations to the President about actions he might consider in furtherance of the spirit underlying the principles of his program.

II
A

# II. THE PRESIDENT'S CLEMENCY PROGRAM

## II. THE PRESIDENT'S CLEMENCY PROGRAM

### A. THE NEED FOR A PROGRAM--AND ITS CREATION

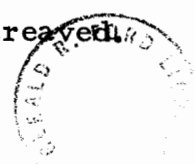
## CHAPTER II:

## THE PRESIDENT'S CLEMENCY PROGRAM

### A. The Need for a Program -- and Its Creation

Regardless of one's political or philosophical perspective, the war in Vietnam had a significant impact on the lives of most American citizens. The war resulted in the loss of hundreds of thousands of lives, including 56,000 Americans. It forced many more people to leave their homes and countries. Nightly, color television brought the war into every American living room, and the nation witnessed the carnage in Vietnam Divisions between pro- and anti-war advocates widened dramatically. Accentuating the divisiveness among the opposing factions were such slogans as "America, Love It or Leave It," "Peace with Honor," "Better Red than Dead," and "Unconditional Amnesty Now." Patriotism meant different things to different people. Most still believed that love of country could best be demonstrated by defending America on the battlefield. But others insisted that love of country required a critical assessment of national policy. They felt that by opposing the war and resisting military induction, they could change American foreign policy.

Over and above the political consequences of the war are the personal tragedies resulting from the conflict. Fifty-six thousand Americans lost their lives; fifty-six thousand Americans families lost their loved ones. Untold numbers were maimed and crippled. Unfortunately, a grateful country could do little more than honor the dead and try to console the bereaved.



As the war ended, it became painfully clear that even those who chose not to serve had also suffered. Not only had the war affected the lives of these 125,000 people, but their families and friends had also suffered the trauma of long separations -- many of indefinite duration. The decision to grant clemency to the evaders and deserters did nothing to diminish the supreme sacrifice of those who died or lost their loved ones.

It is recognized that a country's most difficult decision is to send its sons to war, yet sometimes that decision becomes unavoidable. However, the decision to go to war should not necessarily color a subsequent decision to be merciful. By creating a program of conditional clemency, the President not only exercised his personal authority under the Constitution, but, hopefully, he also developed a program which would allow reconciliation with the greatest degree of public cooperation and understanding.

Shortly after assuming his office, President Ford wanted to "bind the Nation's wounds and to heal the scars of divisiveness," As one of his first initiatives as President, he created the Clemency Program. When the Program began on September 16, 1974, over a year had passed since the last American combatant had left Vietnam. The President felt that "in furtherance of our national commitment to justice and mercy" it was time for an "act of mercy" aimed at national "reconciliation." He issued Proclamation 4313 to outline how his program was going to be implemented. _/

President Ford recognized that desertion in wartime and draft evasion are serious offenses which, if unpunished, could have an adverse effect on

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__/ The full text of the Proclamation together with Executive Order 11803 creating the Clemency Board are reproduced verbatim in Appendix _____.

military morale and discipline. Nevertheless, he called for reconciliation. "Reconciliation among our people does not require that these acts be condoned." It did require, however, that certain deserters and evaders have an opportunity "to contribute a share to the rebuilding of peace among ourselves and with all nations," and "to earn return to their country." Thus, President Ford created his Clemency Program. He entrusted its administration to three existing government agencies--the Departments of Justice and Defense, as well as the Selective Service System--and created the Clemency Board within the Executive Office of the President to consider applications from people who did not fall within the purview of the other agencies. These four governmental units were ordered to implement a program offering forgiveness and reconciliation to approximately 125,000 draft resisters and military deserters. Never before in this nation's history had a President offered executive clemency so soon after the conclusion of the war which gave rise to draft or desertion offenses.

The Presidential Clemency Board

Under the Proclamation and the Executive Order, the Clemency Board was entrusted with authority to make recommendations to the President concerning applications received from individuals who (1) had been convicted of five specific draft evasion offenses,[1] or (2) had received a punitive or Undesirable Discharge as a consequence of AWOL or desertion offenses, or

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[1] Included were violations of Sections 50 App. U.S.C. §462 and 12 or 6(j) of the Military Selective Service Act.

[2] See Articles 85, 86 and 87 of the Uniform Code of Military Justice, 10 U.S.C. §§ 885, 886, and 887.

(3) were
/incarcerated at the time of the Proclamation in a military or civilian prison for any of the above offenses.

Of the approximately 125,000 people eligible to participate in the program, a vast majority had already been punished for their Vietnam-era offenses. Their cases became the responsibility of the Clemency Board. Thus, the number of persons eligible to apply to the Board included 8700 convicted civilians and approximately 100,000 former servicemen given bad discharges for absence-related offenses.

In order to obtain executive clemency, a Presidential Pardon for civilian offenders and a Pardon plus a Clemency Discharge for military offenders, an individual had to apply __/ no later than March 31, 1975, and complete a period of alternative service, if any, that was required by the President pursuant to our recommendation.

At the time of the Board's creation, the President originally appointed nine members of national standing who represented a cross-section of views both on the war and on the question of amnesty.

Beginning in September, the Board met on a regular basis in Washington, D.C. As the number of applications began to swell from 860 in early January to almost 21,000 by the end of March, it readily became apparent that the nine original Board Members and the initial staff of eighteen could not complete the Board's work within a September 15th deadline set by the

__/We were extremely liberal about what we construed to be an application. In essence, it was any communication received by us or any government agency.

President. Thus, in May the President expanded the Board to eighteen members and allowed the staff to increase to over 600 to complete the work on time.

The expanded Board included members with widely ranging experiences and points of view. Two members openly advocated unconditional amnesty, and others spoke out strongly against the war. Several believed that our mistake lay in not pursuing the war effort more vigorously, and a few were concerned, at first, that the President's clemency program was hastily conceived and too generous. Five of our eighteen members are Vietnam veterans; one commanded the Marine Corps in Vietnam during the latter half of the war; two are disabled; three are women; one of whom has a husband still listed among those missing in action. Three blacks and one Spanish-speaking person are on the Board. We also have a former local draft Board member, an expert in military law, and others with special backgrounds and perspectives which contribute to a well-balanced Board.

The Department of Justice

Eligible, unconvicted draft evaders were the responsibility of the Justice Department. Sometime after the issuance of the Proclamation, the

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from the applicant, his relative, or his designated representative; provided, that, if necessary, the applicant himself perfected the application within a reasonable time.

__/Of those convicted draft evaders in group (1) above, _____were eligible for our segment of the Program and _____ applied; of those discharged absentees in group (2), _____were eligible and _____applied; and of those incarcerated absentees in group (3), _____were eligible for the Program and _____ applied to us.

Attorney General released a list identifying 4,522 names of individuals the Justice Department considered indictable for draft offenses within the purview of the President's program. If an individual's name appeared on this list and he wanted to apply for clemency, he personally reported to the United States Attorney in the jurisdiction in which he committed the offense. He then proceeded to participate in a process similar to plea bargaining whereby he negotiated the amount of alternative service which had to be completed before the draft evasion charges against him would be dropped.

In order to be relieved of criminal liability, the applicant would have to have turned himself in by March 31, 1975, acknowledged his allegiance to the United States, and satisfactorily fulfilled his pledge to complete up to 24 months of alternative service. By applying the loose guidelines that were given by the Attorney General each of the 94 United States Attorneys (or an Assistant United States Attorney under his direction) considered the cases of applicants who had committed requisite draft evasion offenses in their judicial districts.

Of the 4,522 who were eligible for this segment of the program, over 700 applied and were referred to alternative service work.

The Department of Defense

If a member of the armed forces had been administratively classified as being an unauthorized absentee and had not been discharged, his case came under the purview of the Defense Department's segment of the program.

These people were technically still part of the military, and the Department of Defense had the physical facilities and the administrative capability to establish a procedure for dealing fairly with the undischarged absentees.

To have received clemency -- to have been relieved of prosecution for the absence offense, given an immediate Undesirable Discharge, and offered the opportunity to earn a Clemency Discharge -- the applicant must have applied before the application deadline, taken an oath of allegiance to the United States, and taken a pledge to complete up to 24 monthos of alternative service. According to the Defense Department of 10,115 eligible persons, 5,495 returned and were referred to do alternative service. /

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II

B.

## II. THE PRESIDENT'S CLEMENCY PROGRAM

### B. CLEMENCY, NOT AMNESTY

## B. CLEMENCY, NOT AMNESTY

In the years before President Ford assumed office, opinion was sharply divided over what the government's policy should be toward Vietnam-era draft resisters and deserters. Many felt that their actions could not be forgiven in light of the sacrifices endured by others during that war. On the other hand, many Americans believed that war resisters acted in good conscience to oppose a war they believed wrong and wasteful. Nothing could repay the war's other victims. They approved, but universal and unconditional amnesty could end the personal sacrifices of the war resisters.

President Ford chose a middle course. He acknowledged that no aspect of the Vietnam War should ever be forgotten, officially or otherwise. Too many casualties had been suffered. But a country lacking the desire to forget can still have capacity to forgive. The rancor that divided our country had sapped its spirit and strength at home and abroad. The national interest required that Americans put aside their strong personal feelings for the good of the country. The divisions had to be put to one side in a spirit of reconciliation so that America could begin its recovery from the tragedies of the Vietnam era. Therefore, President Ford announced a program of clemency, of forgiveness, of reconciliation for Vietnam-era draft resisters and deserters.

To unconvinced draft resisters, he offered the promise that they would not be punished for their actions, and they could avoid having a felony

conviction on their records. Their prosecutions would be dropped. All others whose cases had not yet resulted were relieved of any future danger of prosecution.[1]

To undischarged deserters, he offered an immediate end to their fugitive status, with the promise that they would not be court-martialed or imprisoned for their offenses. They would receive an immediate Undesirable Discharge. To a small number of absentees with particularly good records or other special circumstances, application to the program resulted in an immediate discharge under honorable conditions.

To convicted draft resisters, he offered official forgiveness for their actions through the highest constitutional gesture available to him. They would receive a full Presidential Pardon.

To deserters who received bad discharges, he also offered official forgiveness. They would also receive a full Presidential Pardon, plus an upgrade to a Clemency Discharge.

To those who were then serving prison terms for desertion or evasion, he ordered an immediate furlough for each person who wished to apply for clemency. With (one) exception, each of the 170 incarcerated servicemen and 100 incarcerated civilians applied to the Presidential Clemency Board and were released.[2] Under the President's directions, the Presidential Clemency Board gave priority to those cases, and all had their sentences

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permanently commuted when the President accepted the Board's recommendation that they receive clemency.

In the remainder of this section, we discuss what an "amnesty" program might have offered applicants, along with more details about what the President's program actually did. In doing so, we explore the sources of the President's power to grant executive clemency.

"Clemency"

Clemency can be defined as the tendency or willingness to show forbearance, compassion, or forgiveness in judging or punishing, or an act or deed of mercy of lenience.[1] The President's authority to grant clemency is derived from a number of specific powers which he has under the Constitution. His authority to grant pardons permits him to grant clemency to a particular person or group of persons. By granting a pardon to a particular individual the President is often prompted by the desire to show compassion or leniency.[2] It is not necessary that the individual be convicted of or even charged with an offense. In addition to the President's Constitutional authority to grant pardons, the President is Commander-in-Chief of the Armed Forces.[3] Pursuant to this authority the President may order any branch of military service to upgrade the discharge of those who were previously given discharges. The President may also grant clemency through his ability, as the Chief

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of the Armed Forces.[1] Pursuant to this authority the President may order any branch of military service to upgrade the discharge of those who were previously given discharges. The President may also grant clemency through his ability, as the Chief Executive of the Executive Branch, to direct that federal criminal prosecutions be dropped. He may instruct subordinate federal officers not to enforce particular criminal statutes against individuals to whom he wants to grant clemency. He may commute sentences and fines, (but not return sums already paid).
And he may, of course, grant stays or relief from execution -- a constitutional "reprieve."

The Presidential Pardon is the supreme constitutional act of forgiveness or mercy. It is an act made by society, through the Chief Executive, signifying that it will disregard the offense for which an individual was originally prosecuted. It thus removes the social blot of a criminal conviction and relieves any continuing legal disabilities. Because a pardon is an act of executive grace, it may be given to right a wrong, to correct an injustice, or to excuse a repentant wrongdoer. It may be offered to ease the harshness of the law when personal hardship or the public good is involved. The Constitution grants the President the sole discretion to exercise his power of pardon. He is not answerable to the judiciary or to Congress for his decisions. He may not be ordered to grant pardons, nor may his pardons be revoked.

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He is answerable in his exercise of this power only to his conscience and to his understanding of the country's welfare.

Once an individual receives a Presidential Pardon, it restores federal civil rights lost as a result of the conviction, such as the right to vote, hold federal office, or sit on a federal jury. Also, the laws of most states recognize Presidential Pardons as a matter of comity, restoring the right to vote in state elections, to hold office, and to obtain licenses for trades and professions from which convicted felons are often barred under state law. A pardon does not change history, and it does not compensate for any rights or benefits, legal or economic, that the individual has already suffered before his pardon. The pardon operates prospectively only. A pardon is merely a Presidential expresssion that the stigma of conviction has been removed, and that its recipient should no longer be discriminated against when seeking jobs, credit, housing or any other opportunities. However, a pardon offender is not considered as though he never committed the offense. /

Although the Executive Order did not state explicitly that a Presidential Pardon was to be the form of clemency offered to applicants, it was clear to the Board that this was the President's obvious intent. There is no other form of clemency action which would have had meaning. The Board discussed the problem in its first sessions, and the President confirmed the Board's understanding that he wished a pardon to be the form of clemency offered to

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convicted evaders and to military absentees, whether they had been discriminated against when seeking jobs, credit, housing or any other opportunities. However, a pardon offender is not considered as though he never committed the offense for which he was pardoned. A full pardon removes most of the legal disabilities of the offense, but it does not bring to the pardoned man treatment equal to that accorded a person who has never commited an offense.[1]

Although the Executive Order did not state explicitly that a Presidential Pardon was to be the form of clemency offered to applicants, it was clear to the Board that this was the President's obvious intent. There is no other form of clemency action which would have had meaning. The Board discussed the problem in its first sessions, and the President confirmed the Board's understanding that he wished a pardon to be the form of clemency offered to convicted evaders and to military absentees, whether they had been discharged by court-martial or administrative action. The grant of a pardon to a person who had violated military law and who had been discharged for this act without a conviction in a military court raised a new issue. Traditionally, pardons have been given only following criminal convictions. A review of the President pardoning power reveals that he pardons the act, not merely the judicial consequences that may have flowed from it. On a number of prior occasions, past Presidents have granted pardons to persons who had

[1] "On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible."

suffered administrative penalties for a wrongful act, even though they had never been convicted of a crime. President Ford, therefore, decided he would offer pardons to the persons who had been given Undesirable Discharges for AWOL but who had not been convicted in a military court. This group comprised over half of all applicants to the Presidential Clemency Board.__/

In his Proclamation, the President also ordered that Clemency Discharges should be offered to former servicemen. The circumstances of violators of military discipline are different from those who violate civilian law. A military offender not only may receive a sentence of imprisonment or a fine, but he also may be released with a discharge which characterizes his unsatisfactory service. While a pardon affects the conviction, it has no impact on the type of discharge granted.__/ For that reason, the President provided that recipients of clemency should also have their discharge recharacterized with a Clemency Discharge, a new designation created especially for this program.

The Clemency Discharge is intended by the President to be a "neutral" discharge, and is considered neither under "Honorable Conditions" nor under "Other Than Honorable" conditions. Military records (i.e., DD-214 forms) are recharacterized with the new Clemency Discharge, which is "in lieu of" and in "substitution for" the earlier discharge which could have been Dishonorable (under dishonorable conditions), or Bad Conduct or Undesirable (under other than honorable conditions).

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__/The Pardon of Former President Nixon is the best known, but by no means the first or only precedent for this.

__/(insert A.G. opinion)

A Clemency Discharge is better than a Bad Conduct or Undesirable Discharge because it is neutral, but not as good as a General Discharge, which is affirmatively under honorable conditions.[1] By express direction in the Proclamation, a Clemency Discharge bestows no veterans benefits in and of itself. Neither, however, does it adversely affect any veterans rights which might have conditionally been available to holders of Undesirable or Bad Conduct Discharges. Otherwise, the President's act of clemency would have the ridiculous effect of impairing and not improving the lot of applicants. Neither common sense nor the language of the Proclamation supports such a result. Thus, while there is no change in benefit status for individuals who receive a clemency discharge, those who originally had Undesirable Discharges or Bad Conduct Discharges can still appeal to the Veterans Administration for veterans' benefits.

The President's Program was intended as a unique and supplemental form of relief to certain classes of former servicemen. It was not intended to operate to deny the statutory or administratively granted avenues of relief that already exist. While perhaps the relinquishment of those rights could have been made a condition of the President's Program, clearly no such intent was expressed in his Proclamation. For that reason, all military applicants who receive a Clemency Discharge can also apply for a further

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upgrade through the appropriate military review boards.[1] Their chances for success should be much better with a Pardon and Clemency Discharge than with their original discharge.

Although the Board's phase of the clemency program offered pardons and clemency discharge, the Department of Justice and Department of the Navy phases also offered important benefits. The Department of Justice program had the effect of dropping pending federal criminal prosecutions against fugitive civilians who were indicted for specific draft evasion offenses. The Defense Department program gave relief from possible court-martial proceedings against military absentees. Each person who chose to participate in the Department of Defense and Department of Justice program was in jeopardy of a conviction. For fugitive servicemen, the maximum penalty was five years imprisonment and a Dishonorable or Bad Conduct Discharge. By participating, these servicemen automatically ended their fugitive status and were relieved of this prospect. They simply spent one to three days at Fort Harrison and received an Undesirable Discharge. Even if they failed to complete alternative service, no charges would be brought against them unless it could be shown that they did not intend to perform alternative service when they received their discharge. Therefore, they could re-enter society in vastly improved circumstances. To be sure, however, many DOD participants did sign up for alternative service in order to earn the additional social advantages of a Clemency Discharge.

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In some respects, the DOJ program was the most generous of the three segments. Fugitive civilians with draft evasion charge faced the possibility of a criminal conviction and a maximim of 5 years in prison and $____ fine. In return for no more than 2 years alternative service, and in many cases less, their prosecutions were dropped and they were relieved

(GO TO PAGE 11)

of their dreadful prospect. They also were freed from the enduring stigma of a felony conviction. In this they were even more fortunate that their counterparts in the Clemency Board program, since it is far better to have no felony conviction that a pardoned conviction.

The Clemency Program also resulted in the closing of case files of all civilians who may have committed specific Vietnam-era draft offenses but who were never indicted for those offenses. On _____, the Department of Justice requested all United States Attorneys to submit a list of all persons against whom they either had or would soon have indictments issued. Prior to this request, 6,239 prosecutions had been commenced by the United States Attorney and a larger number of investigations were underway which could result in indictments. As the lists were submitted, 1,717 prosecutions were, in effect, dismissed. Some of the United States Attorneys discontinued nearly all of their prosecutions. In the Northern District of California, well known for its leniency towards draft violators, 286 of 315 pending cases were closed. In the Eastern District of Missouri, only 27 out of 216 cases were closed. On _____, Attorney General Edward Levi declared that the Department of Justice would not prosecute Vietnam-era draft violators who were not on the final list of 4,522 persons. Those 1,717 individuals with indictments pending received what amounted to unconditional amnesty. If they were in exile and had committed no other offenses, they were free to come home. If they were in the United States, they could plan for the future without worry.

The DOD Program provided a special form of clemency to 46 individuals who were diverted from the Department of Defense clemency program at Fort Harrison. Most of these individuals had served meritoriously in Vietnam or had been the victims of severe administrative errors which led to their offenses. They received immediate discharges under honorable conditions, qualifying them for full veterans' benefits. Two other individuals were allowed to return to military service, with no penalty. They were much like the _____individuals which the Board had recommended to receive upgraded discharges by the President.

Not "Amnesty"

The debate over the President's program was often framed in terms of whether the President should have granted "amnesty" and not merely "clemency."[/] The word amnesty derives from amnestia, the Greek word for forgetfulness. It connotes full official forgetfulness, an obliteration of the fact that a past offense ever existed. It restores rights and benefits lost on account of the past offense to the maximum effect possible under law. "Its effect is to obliterate the past, to leave no trace of the offense, and to place the offender exactly in the position which he occupied before the offense was committed, or in which he would have been if he had not committed the offense.[/]

The difference between amnesty and clemency is as much a semantic dispute as anything else. The terms have been used interchangeably in American history. The differences between advocates of clemency and advocates of amnesty really involve what rights or benefits sould be offered to recipients of a reconciliation program.

(type in footnotes)

Under the President's program, civilian participants who were unconvicted received as much as they could -- they were freed from prosecution. Those who were convicted received a pardon, which is the most a President can give to a convicted offender. Indeed, there is no significant legal difference between a pardon and an amnesty:

> "Some distinction has been made, or attempted to be made, between pardon and amnesty. It is sometimes said that the latter operates as an extinction of the offense of which it is the object, causing it to be forgotten, so far as the public interests are concerned, whilst the former only operates to remove the penalities of the offense. This distinction is not, however, recognized in our law. The constitution does not use the word 'amnesty,' and, except that the term is generally employed where pardon is extended to whole classes of communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance."—/

Even though the President may grant a particular group of convicted individuals an "amnesty," each member of the group would only receive a pardon. The President could not constitutionally return any fines paid, or compensate for time spent in prison. This requires a legislation appropriation by Congress. The President could not, moreover, expunge and erase all records of a conviction, since this would also require legislative authority to obliterate the record of a judicial act. At most, the President may direct that Executive branch records of convictions be sealed.

The President legally could have offered more benefits to military participants. Through his authority as Commander-in-Chief, he could have provided that they receive discharges under honorable conditions, with full entitlement to veterans' benefits. The President however, believed that it would be wrong to reward unsatisfactory service with benefits the law intended to go only to those whose service has been satisfactory.

—/(to be supplied)

II
C

## II. THE PRESIDENT'S CLEMENCY PROGRAM

### C. A LIMITED, NOT UNIVERSAL, PROGRAM

A Limited, not Universal, Program

When the President announced his clemency program, he made it applicable only to those who had been punished for draft or AWOL offenses during the Vietnam War, and to those who had been charged with these offenses but were still at large.

Inescapably, some line had to be drawn between those who were eligible and those who were not. That line was drawn in a very generous manner. In order to emcompass Vietnam-era offenders who opposed the war on conscientious grounds, the President enumerated a sizeable list of offenses. He deliberately decided not to impose a test of conscience. He did so both because he felt it was necessary to offer clemency to a broader class of individuals, and because there was no other fair way to include the less articulate whose offenses were caused by opposition to the war.

As a consequence, the President opened his program to thousands of persons who did not necessarily commit their offense because of clearly identifiable moral or ethical objections to the war. Inevitably, objective definition included individuals whose offense was in no way attributable to opposition to the war. But, in another sense, it would have been improper to regard those with articulate opposition to the war as the only persons with a legitimate claim for clemency. The complex Selective Service procedures favor the better-educated, and the sophisticated. Those who could not express themselves well may have had deeply felt feelings about the war, but may not have been successful in pursuing their legal opportunities. A fair program of clemency cannot be restricted to those already favored by education, income, or background.

In a broader sense, moreover, the atmosphere of division, debate, and confusion about the war had an impact on all those called to serve. If the war had been universally regarded as critical to the survival of America, few would have placed

their personal needs or problems above those of the country. This was not such a war, and many of those who failed to serve did so, consciously or not, because the needs of the country were not as evident to them as the personal sacrifices they or their families had to endure.

For these reasons, the President's definition of those eligible to participate was properly phrased in terms of offenses committed, and not the reasons for the offense. By so doing, the President extended a clemency offer to Vietnam veterans who went AWOL to fin a civilian doctor to treat their wounds, or who they could not adjust to garrison duty. Likewise, he extended it to servicemen with families on welfare who went AWOL to support them -- and to civilians from disadvantaged backgrounds whose itinerancy led to their failing to keep their draft boards informed of their wherabouts. In the thousands of cases like these which we have reviewed, we have reviewed, we have found that they were victims of the Vietnam era as much as those who conscientiously opposed the war.

In the discussion below, we explain the clemency program's eligibility criteria in some detail. We then pose some of the difficult questions of eligibility or jurisdiction which we had to decide, giving the reasoning behind our decision.

CRITERIA

The Presidential Proclamation established three criteria for eligibility:

First, because the intent of the President was to "heal the scars of divisiveness" that were caused by the Vietnam War, the Program applied only to offenses that occurred during this war. This period was defined as extending from the Gulf of Tonkin Resolution (August 4, 1964) through the day

that the last American combatant left Vietnam (March 28, 1973).

Secondly, the Program was not a universal program that applied to all offenses that occurred within the qualifying period. For an applicant to be eligible for clemency, he must have committed one of the offenses specifically listed in the Proclamation. Military applicants must have violated Articles 85, 86, or 87 of the Uniform Code of Military Justice. These articles apply to desertion, absence without leave, and missing movement, respectively. Draft evaders must have committed one of the following violations of Section 12 of the Selective Service Act: *

(1) Failure to register for the draft or register on time,

(2) Failure to keep the local draft board informed of his current address,

(3) Failure to report for or submit to preinduction or induction examination,

(4) Failure to report for or submit to induction itself, or

(5) Failure to report for or submit to or complete alternative service under the Act.

Thirdly, to be eligible, an applicant must not have been an alien precluded by law from reentering the United States. **

The eligibility tests set by the President did exclude some fugitives, convicted offenders, and discharged servicemen whose offenses were in fact related to their opposition to war. For example, there were a few military

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* The cite for the Military Selective Service Act was incorrect in Proclamation 4313 and Executive Order 11803.

** See 8 USC 1182 (a) (22).

applicants who, out of conscientious objection to the war, refused to report to Vietnam. Instead of going AWOL, these men faced Court-Martial for willful disobedience of a lawful order. Had they gone AWOL, they would have received clemency; because they remained on their bases and accepted the punishment for their actions, they still have their bad discharges. Other examples include the applicant who had been convicted of draft card mutilation or aiding or abetting draft evasion. Both of these were Section 12 offenses of the Selective Service Act, but these applicants were ineligible for clemency.

Before the President announced his program, there was considerable debate in Congress and elsewhere about the kinds of offenses that properly should be included in a clemency or amnesty program. As with most disputes on the subject, there was little consensus. There were no differences, however, over the propriety of including absence offenses and induction offenses, because the vast proportion of Vietnam-related offenses were of this type. * The inclusion of other categories of offenses involving calculated interference with the draft system, or with military discipline, or involving violence or destruction of property would have had a far more serious impact on respect for law and military discipline.

When we began applying the eligibility criteria, there were obvious cases of persons eligible to receive clemency. Any one convicted for having committed one of the specified Selective Service offenses during the designated time period was eligible. Similarly, anyone receiving a "bad discharge" as a consequence of an absence offense committed during the period was also eligible.

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* Over half of the - Undesirable, Bad Conduct, and Dishonorable Discharges during the Vietnam era were for AWOL.

Honorable or General Discharge cases were not eligible, nor were any discharges prior to August 4, 1964. The Board also rejected cases in which the underlying facts of the offense may have supported a charge over which we had jurisdiction, but in which the individual was in fact prosecuted for a non-qualifying offense. Thus, an Article 92 conviction for failure to obey an order to go to an appointed place could have been charged as an AWOL. An individual discharged for a civilain conviction could also have been discharged for AWOL. The Board, however, was bound by the clear words of the Executive Order.

However, between the areas of obvious jurisdiction and those where there was obviously none, there were numerous gray areas in which difficult legal determinations of jurisdiction had to be made. Here, too, the actions of the Board were committed by the terms of the Proclamation and Executive Order. We, nontheless, recognized that this was a clemency program, requiring us to interpret broadly and generously the jurisdictional boundaries. To be narrow and unduly legalistic in determing eligibility would be contrary to the spirit of the program.

One of the first questions presented was that of timely applications. We decided to accept oral, written, and third-party applications for the purposes of satisfying the January 31, and later March 31, deadline. We also accepted applications misdirected to the Department of Justice or to other federal offices. We recognized that many people were not fully aware of the details of the program, and we did not wish to penalize anyone whose intent to apply was clear. However, we ultimately had to receive a written, personal confirmation of the applicant's desire to participate.

While the rules were readily agreed upon, individual cases sometimes presented difficult questions of proof, especially when persons made oral

applications to other agencies and written evidence of the call was not kept. We recognized the danger of having rules so informal as to encourage abuse. Fortunately, there were few instances in which a question of timeliness arose.

The definition of qualifying offenses posed more difficult legal questions. For example, a person might have failed to report to induction prior to August 4, 1964, but indicted after that date. The Executive Order clearly stated that the date of conviction was not determinative, but rather the date of the offense. The Selective Service Act obligations covered by the program are of a continuing nature. The obligation exists until the conviction is final.

If an individual failed on two or more occasions to report, he was indicted only for his last failure. The individual had technically committed a criminal act with each failure. Because the offense was a continuing offense, we had jurisdiction over the applicant's case. This meant that for all draft evasion offenses listed in the Executive Order, we had jurisdiction if either the offense had commenced or a conviction had been rendered within the qualifying period.

A second problem involving timing of the offenses arose in a few civilian cases in which an indicted individual had declined to participate in the Justice Department program and insisted on a trial which had not been concluded when he applied to the Board. After much consideration and discussion with the Department of Justice, we agreed to accept anticipatory applications of persons whose convictions, if they occurred, would happen after the deadline for applcations passed. To refuse these applications would have meant, in effect, denying the individual's constitutional right to stand trial for his offenses. We accepted these applications with the understanding that our existence was limited in time, and the applications could not remain pending indefinitely.

The military cases presented more difficult questions of interpretation, especially as regards the meaning of the phrase "as a consequence" in the Executive Order provision:

"The Board.....shall consider the case of persons who...(1) Have received punitive or undesirable discharges as a consequence of violations of Articles 85, 86, or 87...."

We decided that the phrase did not mean "as a consequence" only of an AWOL. For this reason, cases involving mixed discharges - - - discharges for AWOL and other non-qualifying offenses -- were accepted. This meant that when an individual was administratively discharged for unfitness or frequent involvement with authorities, and AWOLs were among the acts which led to the discharge, the AWOL could be viewed as one, if not the only, cause of the discharge. This occasionally meant that an individual might have been administratively discharged for unfitness for one hour's AWOL, plus numerous other minor infractions. It was impossible to devise any objective method to separate out cases in which the AWOL could be determined as legally irrelevant to the discharge. For this reason, we accepted jurisdiction in these mixed cases but reserved decision on the question of whether clemency should be granted, and on what conditions. * We did not wish to reject any application for which we conceivably had jurisdiction, since the right to have a case considered should be broadly granted.

The court-martial cases presented similar difficulties because, unlike civilian courts, sentences are not rendered separately when an individual is convicted on several different charges, one of which was an AWOL. Since an individual might well have been court-martialed for a major felony and a very short AWOL, it was obvious that the discharge would have been awarded irrespective of the AWOL offense. In

court-martial cases, however, military regulations defined the maximum punishments for different offenses. Thus, we consulted the Manual for Court-Martial, 1969, Table of Maximum Punishments to formulate simple rules to determine when we had jurisdiction. If an applicant received a BCD, DD, or an Undesirable Discharge in lieu of court-martial:

(1) We had jurisdiction if the AWOL offenses that commenced within the qualifying period standing alone were sufficient to support the discharge that the applicant received;

(2) We had jurisdiction if neither the AWOLs that commenced within the qualifying period nor any of his other offenses--considered independently--were sufficient for the discharge that the applicant received;

(3) We did not have jurisdiction if the AWOLs that commenced within the qualifying period were insufficient and one of his other offenses--considered independently-- was sufficient for the discharge that the applicant received.

The exclusion from the program of persons who were precluded by law from re-entering the United States posed difficult problems. If an order of a court or the Immigration and Naturalization Service had already decided the question, we were bound by that determination. But we considered ourselves incompetent to decide complex questions of immigration and citizenship law properly within the province of the courts and the Department of Justice. For that reason, we provisionally accepted the cases of persons for whom no such determination had yet been made. We made tentative decisions on the cases subject to a determination by the Justice Department on eligibility, and we forwarded them to the President with a recommendation that he not act until proper judicial or administrative determinations had been made.

Conclusion:

Despite these difficult questions of jurisdiction, almost 7% of our 2,100 ineligible cases were for such simple reasons as discharges unrelated to AWOL

and discharges prior to August 4, 1964. Only ( ) cases fell into the categories which involved the more difficult questions of interpretation described above.

II
D

## II. THE PRESIDENT'S CLEMENCY PROGRAM

### D. A PROGRAM OF DFFEINITE, NOT INDEFINITE, LENGTH

## D. A Program of Definite, not Indefinite Length

When President Ford announced the establishment of the Clemency Program, his Proclamation specifically limited the period of time in which applicants could be accepted. Originally, he set January 31, 1975 as the application deadline. Due to the publicity and press coverage that heralded the announcement of the Clemency Program, we and the others newly involved in its administration assumed that all eligible people knew about their eligibility and understood what benefits could be derived from applying for clemency. Therefore, we thought that four and one half months gave potential applicants an ample opportunity to decide if they were going to apply.

For the first three months of its existence, the Presidential Clemency Board maintained a low profile. We reasoned that people should not be pressured while making up their minds whether to apply and that it would be improper for us to solicit their applications. To have done otherwise might have aggravated the wounds the President desired to heal. Because we assumed that those who were eligible knew about their eligibility, we decided to quietly process our applications and not try to encourge anyone to apply. We soon learned, however, that this assumption was incorrect for our part of the program. After reviewing the first several hundred cases, we learned that most of our applicants were not well-educated, articulate persons--but rather poorly-educated, disadvantaged individules who were not likely to be informed about the details of the President's program.

Our military applicants did not fit the stereotype of the war resister. We were concerned that all the media attention on Canadian exiles might have been keeping these discharged servicement from learning that they, too, could apply for clemency.

In the middle of December, when only about 800 people had applied to the Clemency Board, a limited survey of potential applicants took place in Seattle, Washington. A veteran's counseling organization located twelve former servicemen eligible for our segment of the program. All of the twelve knew about the existence of the Program. However, none of them knew that they were eligible for clemency.

On the other hand, it appears that people eligible to participate in the other parts of the program were better informed. The chart which follows on page ___ identifies a consistent rate of applications for the Justice and Defense Departments' aspects of the program. Contrast that with the Clemency Board application rate, which increased dramatically between January 6 and March 31, 1975.

Much of the early publicity surrounding the program highlighted the activities of those who fled to Canada. It was the emigrant draft evader and military deserter who formed the basis of the stereotype that most Americans perceived would benefit from the program. Because they had fled, they generally knew that charges were pending against them and that returning without applying for clemency meant apprehension and trial.

By contrast, the vast majority of our applicants had already completed the punishment for their offense and were trying with greater or lesser success to rehabilitate their lives. They usually had heard about the program, but mistakenly had thought it was designed to help those who had gone to Canada.

Once we realized that many of those eligible to apply to us knew nothing about their eligibility, we began an extensive public information program. On January 7, 1975, through the cooperation of the Department of Justice, 7,000 information kits were mailed to convicted draft evaders. Throughout the month of January, similar kits were mailed to government agencies that possibly could have some contact with our applicants, such as the Veteran's Administration, employment offices, welfare offices, penal institutions, and post offices. Board Members General Lewis Walt and Father Theodore Hesburgh taped public service radio and television announcements explaining how one could apply to the Clemency Board.__/ On January 14, 1975, these announcements were mailed to 2,500 radio and television stations across the United States. During the month of January seven members of our Board participated in one-day "blitzes" of sixteen of the major cities across the country. These visits consisted of a Board member going to a city for one day, holding press conferences, participating in various radio and television talk shows, and giving interviews to reporters

__/To comply with the "fairness doctrine," these announcements neither advocated nor defended the program; they simply informed the public of a possible benefit and how to learn more about it.

from the city's major newspapers.__/ To keep national media focused on the program, Chairman Charles E. Goodell held numerous press conferences in Washington, D. C., and elsewhere during January. Unfortunately, the media kept its spotlight on the 15,000 fugitives and Canadian exiles rather than the 110,000 convicted draft resisters and discharged servicemen who we were trying to reach. However, the result of our public information campaign was a dramatic increase in our application rate. Indeed, applications to the Board increased from 870 on January 7, 1975, to 5,403 before the January 31st deadline expired. Due to this increase, the President extended the application deadline to March 1, 1975.__/

The public information campaign was continued in earnest. On February 17, 1975, the Department of Defense mailed 21,000 information kits to discharged military personnel with punitive discharges who were eligible for the program. Kits were not sent to the 75,000 eligible persons with administrative discharges because of the excessive costs of obtaining their addresses and the difficulty of identifying those whose administrative discharges resulted from AWOL-related offenses.

More information kits were sent to government agencies, and radio and television announcements were distributed to another 6,500 stations. Several Board members made additional one-day visits to eight key cities, some of which had previously been visited.__/ Chairman Goodell continued to hold several press conferences in order to draw attention to prior

__/The cities visited were _____
__/Cite Presidential announcement.
__/The cities visited were _____

misunderstandings concerning our eligibility criteria. Finally, the media began to recognize the difficulties we were having in communicating with our potential applicants.—/

Again there was a dramatic increase in our application rate: An additional 6,000 applications were received during the month of February, with our total exceeding 11,000. At our request, the President extended the application deadline for one last time. Knowing that March 31, 1975 was going to be the final deadline, we intensified our efforts to reach our applicants. We continued our earlier efforts and we sent the staff across the country to regional offices of the Veterans Administration. Workshops in thirty-three cities were attended by over 3,000 veterans' counselors--many of whom, surprisingly, had not yet learned that former servicemen with bad discharges were eligible for clemency.

Close to 10,000 applications were received during March, and 21,000 applications by the time we finished counting. We had ten or twenty times what we once thought possible. Eventually, we learned that 16,000 of those 21,000 were eligible for our program. Some ineligibile cases were referred to the Justice and Defense Departments for processing, but most of the 5,000 ineligible applications could not come under any part of the President's program. Some applicants had served in previous wars, while others had committed offenses that were not covered under the Proclamation or the Executive Order.—/



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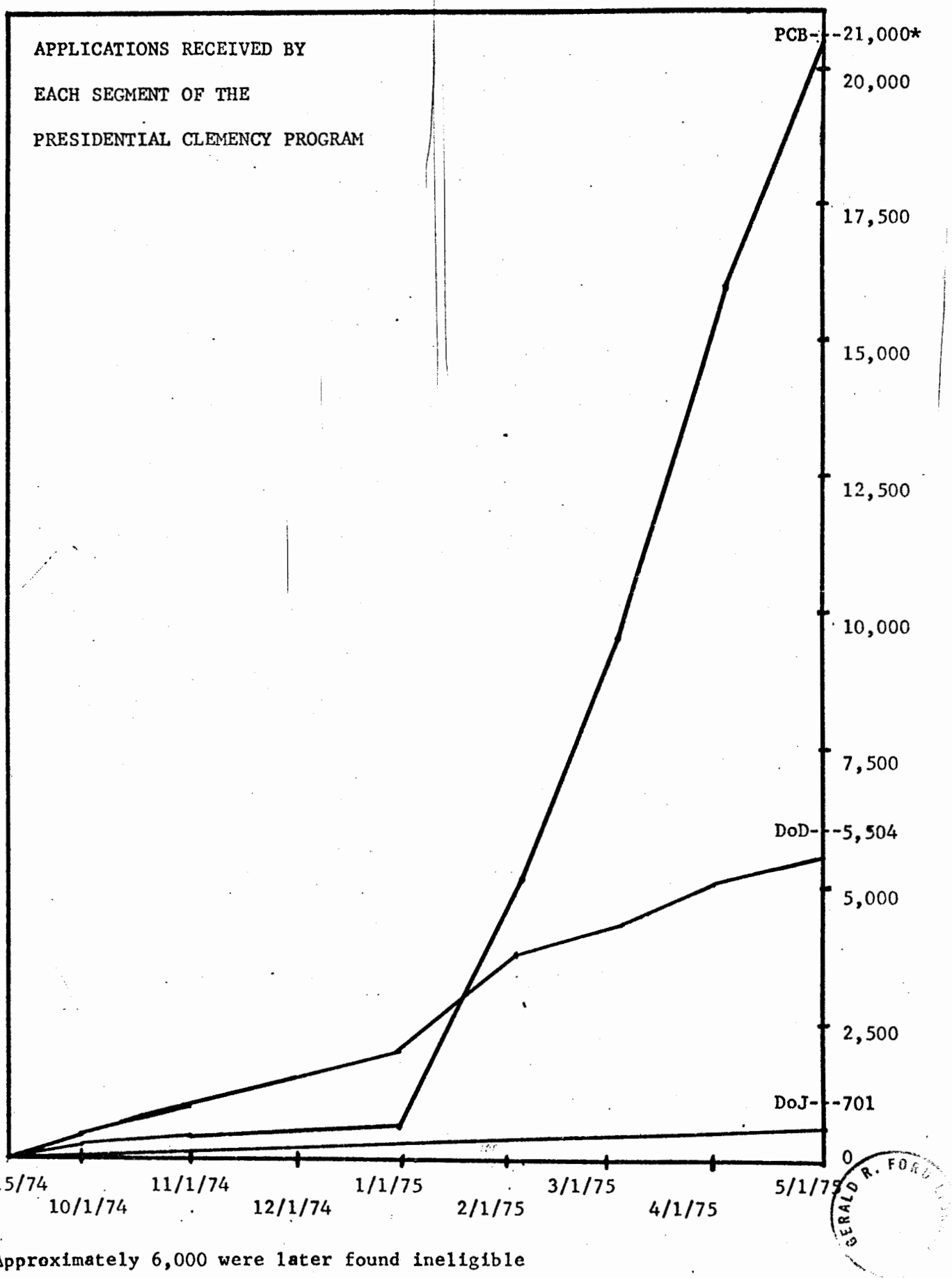
—/ Appendix shows examples of changes in newspaper coverage.

—/ See Chapter _____.

The administrators of the Departments of Justice and Defense segments of the program also attempted to inform their applicants concerning their eligibility under the programs. Although no coordinated effort was initiated by the Department of Justice, some United States Attorneys took it upon themselves to inform the public about the program. For example, the United States Attorney in Detroit agreed to be interviewed by radio stations in Canada.

In December, the Department of Defense mailed 7,000 letters to the parents of known military absentees. Most of the Defense Department's success in reaching applicants resulted from the complimentary descriptions by applicants of the humane treatment they had received at Fort Benjamin Harrison.

The final application tallies were 700 out of 4,522 eligible for the Justice program (a 16% response); 5,600 out of 10,115 eligible for the Defense program (a 55% response); 2,000 out of 8,700 convicted civilians eligible for our Board's program (a 23% response); and 14,000 out of approximatdy ~~100,000~~ 90,000 former servicemen also eligible for our program (a 14% response). Altogether 22,300 applied to the President's program, 17% of the 123,000 believed eligible to apply.




* Approximately 6,000 were later found ineligible

II
E

## II. THE PRESIDENT'S CLEMENCY PROGRAM

### E. A CASE-BY-CASE, NOT BLANKET, APPROACH

E. A Case-By-Case, Not Blanket, Approach

Introduction:

The President could not have been clearer in his request to each agency to act upon clemency applications on a case-by-case basis. His proclamation declares that "in prescribing the length of alternative service in individual cases, the Attorney General, the Secretary of the appropriate Department, and the Clemency Board shall take into account such honorable service as an individual may have rendered prior to his absence, penalties already paid under law, and such other mitigating factors as may be appropriate to seek equity among those who participate in this program." (Emphasis added).

In the words of our Chairman, Charles E. Goodell, our mandate was "to deal with applicants as individuals, not as an undifferentiated mass."

The Supreme Court of the United States has consistently read the Constitution to authorize the President to exercise his pardon power on a case-by-case basis, recently noting that the very essence of the pardoning power is to treat each case individually.

While many who opposed the President's program did so because they believed that a blanket approach to the problem was best, the President's approach had significant advantages. Primarily, it permitted the Board and the other agencies to distinguish among individuals with differing backgrounds, offenses, and circumstances. While more difficult to administer, the case-by-case approach enabled the program to do justice, by fashioning results to fit the many differing people who applied to the program. Advocates of a blanket approach often believed that the sterotype of the morally sincere pacifist who acted on principle is the only type of individual involved in this clemency. The Board consistently decided to recommend an immediate pardon to this individual, but fairness would not have been achieved if the program treated the less deserving in the same way. A case-by-case approach was more costly, and

it required greater time and staff to administer, but it was the heart of the President's approach. Treating applicants by classes or groups, with automatic dispositions for each general category would have demeaned the value of a Presidential Pardon; it would have treated the individuals who applied as groups of objects, rather than as human beings and citizens with whom reconciliation was the goal.

The Presidential Proclamation and Executive Order were much less clear, however, as to the procedures and substantive standards which we were to use in reaching individual case dispositions. We found ourselves in a situation similar to the allegorical King Rex in Lon Fuller's The Morality of Law. King Rex wanted to reform the legal system of his country. Possessing the general power of law-maker, but lacking the tools to write a code, he decided to proceed on a case-by-case basis. He hoped that certain rules and regulations would become apparent with the passing of time:

> "Under the stimulus of a variety of cases, he hoped that his latent powers of generalization might develop and, proceeding case by case, he would gradually work out a system of rules that could be incorporated in a code. Unfortunately, the defects in his education were more deep-seated than he had supposed. The venture failed completely. After he had handed down literally hundreds of decisions, neither he nor his subjects could detect in those decisions any pattern whatsoever. Such tentatives toward generalization as were to be found in his opinions only compounded the confusion, for they gave false leads to his subjects and threw his meager powers of judgment off balance in the decision of later cases."

King Rex died "old before his time and deeply disillusioned with his subjects." 6/



To avoid the fate of King Rex, we had to understand the limitations as well as the advantages of a case-by-case approach. It facilitates protection of individual rights, but it also threatens inconsistency and slowness of judgment. It places a great burden on techniques of administration and

and management. It also leads to higher stakes. A mistake, error, omission or abuse of discretion may lead to total confusion or chaos in decision-making -- leading to the embarrassment of the President and an unfair treatment of our applicants.

Rather than proceed like King Rex, we took a number of steps to insure the fairness, accuracy, consistency, and timeliness of our case dispositions. Essentially, we imposed rules upon ourselves. These procedural and substantive rules changed periodically as circumstances required, but they provided us with a measure of self-control which benefited our processes and, we think, our applicants.

In this chapter, we describe these rules and the procedures we established for setting and following them. At the outset, however, it is important to understand the basic philosophy of our case-by-case process.

The Board desired to make the procedure as simple as possible, with a minimum of technical requirements with which an individual had to comply. We wanted the procedure as open as possible, so that the applicants would be aware of how the Board was proceeding with his case and what it was using as the basis for its actions. We wanted to encourage the fullest possible participation by applicants. Above all, the Board and the staff wished to make the Presidential Clemency Board a model of fair and open administration in keeping with the Presidential nature of our responsibilities and the importance of our task.

Unfortunately, the Presidential Clemency Board had no direct precedents to guide it in setting up procedures. When the Board first met, it looked for guidance from past precedents of other clemency programs and the law of clemency. However, there has been very little written on processing clemency applications and the procedures used by Presidents in arriving at a decision to pardon. Articles and cases dealing with the pardon power usually talk only

in terms of substance. Witness the following statement by Alexander Hamilton:

> "Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.... The reflection, that the fate of a fellow creature depended on his sole fiat, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance would beget equal circumspection, though of a different kind".

Hamilton did not refer to procedure. He did speak, however, of the President's sense of responsibility and feelings for humanity as possible restraints on the pardon power. Similarly, decisions of the United States Supreme Court were often couched in terms of "publicy policy" and "humanitarian considerations." They referred to the general precepts of democratic government, that the President represents the people and that he must act on their behalf.

How do these general instructions relate to the procedural obligations of a Board such as ours? The panoply of rights accorded individuals under the Due Process Clauses do not apply to the clemency process. The rights to clemency review and to a clemency hearing are nowhere guaranteed in the Federal Constitution. A recent federal court decision disposed of arguments in the contrary by stating:

> "...we find plaintiff's argument that he was entitled to a due process hearing before the President could attach the challenged condition to be clearly specious." (Footnote)

Therefore, it cannot be argued that procedural due process, as formulated by the United States Supreme Court in more common administrative proceedings, is required by law. In those cases, the court has generally found that the requirement of a fair hearing prior to the termination of various public benefits requires certain procedural elements peculiar to an adversary trial-type proceeding: Timely and specific notice, opportunity to confront

and cross-examine witnesses, opportunity to appear in person or through counsel, and impartial decision-maker, and a written decision stating the result and the reasons therefor. The more discretionary and personal nature of the clemency process is not necessarily bound by these specific requirements.

The Board concluded, therefore, that it was sui generis and not required to follow any particular requirements. It considered itself not bound by the Administrative Procedure Act, for example, since it was only an advisory body to the President, assisting him with recommendations as to how he should exercise his personal power under the Pardon Clause. Although not required to do so, the Board followed the APA as a model for its procedures and operations, since the Act represents the considered judgment of Congress on how agencies should proceed. As we stated in our final regulations,

> "Because it is a temporary organization within the White House Office, the sole function of which is to advise the President with respect to the exercise of his constitutional power of executive clemency, the Board does not consider itself formally bound by the Administrative Procedure Act. Nonetheless, within the time and resource constraints governing it, the Board wishes to adhere as closely as possible to the principles of procedural due process. The administrative procedures established in these regulations reflect this decision."

The Board devised a provisional set of regulations which we published in the Federal Register on November 27. Copies were sent to veterans groups, civil liberties groups, amnesty and clemency organizations, and to every member of Congress. In all, the Board distributed _____ copies of our proposals and we received 40 written responses to the proposed rules and many other informal comments. For the most part, the regulations were well received.

Having rules--and following those rules--only matters if those rules are reasonable and fair. We developed rules of procedure and substance to reflect, as best we could, the cement spirit of the President's program. In the first half of this chapter, we describe these procedures in more detail: What kinds of information we used, how ca

summaries were prepared, how the Board decided cases, and how we tried to protect the privacy of our applicants. In the second half, we focus on our substantive rules--our baseline formula and our aggravating and mitigating factors. At the outset, however, an overview of our process is helpful.

Summary of Procedures

In brief, our process began with a telephone call or letter from an individual inquiring about clemency. The PCB program was entirely voluntary and no person suffered any penalty for declining to participate, or for withdrawing at any time, even after a formal offer of clemency by the President. For this reason we accepted any affirmative expression of interest as a provisional application, whether oral or written, and we accepted applications made on an individual's behalf by third parties. While these were sufficient to satisfy the application deadline, we required a perfected application before we would complete action on a case.

When an application was received, we mailed back a full set of instructions explaining the program, the individual's rights, and information on other avenues of relief he might wish to pursue in addition to the clemency program. In order to make the process as unthreatening as possible, we required from the individual only the minimum amout of information necessary for us to order pertinent government records. We did encourage the applicant to send in as much additional information as he wished, and we informed him of the important factors which the Board would look to in reviewing his case. We encouraged the applicant to seek legal counseling and we informed him of specific sources that might be available. We assured him of the confidentiality of our process.

We then began his case file and gave him a case number. Preliminary questions of jurisdiction were resolved by our staff, who then began the information-gathering process. First, we ordered official records and files. After they had been received, a staff attorney was assigned to his case summary, which would later be used as the basis of our case disposition. This case summary was the key element of our entire

case-by-case appraoch. When the case summary had been prepared, our quality control staff reviewed it carefully for fairness and accuracy. The case was then ready for presentation to our Board, and the summary was mailed to the applicant for his comment. Because of our reliance on government files, we counted heavily on the individual's review of his summary for corrections and elaborations. We also wished the individual to know what materials the Board was considering in reviewing his case. Finally, we used the mailing of the summary as another opportunity to encourage the applicant to send additional information to us on his own behalf.

A three or four-person Board panel then received copies of the applicant's case summary a few days before the actual case presentation. Each panel member read the case summary, making notes and tentative personal evaluations. When the panel acted on the applicant's case, the staff attorney who prepared the summary was present with the entire file to answer questions and make additional comments on the case. Also present were a scribe to keep accurate records and a panel counsel to advise that the staff attorney and Board panel on our rules and precedents.

In our deliberations, we usually had to answer four questions: First, did the applicant deserve clemency of any kind? If the answer was "yes," we determined the applicant's baseline or starting point for the calculation of his alternative service assignment; we identified which of our aggravating and mitigating factors applied in his case, and we finally decided what period of alternative service he had to perform to earn his clemency. If he were a military applicant with combat experience, we asked a fifth question: Should we recommend him for an immediate discharge upgrade and veterans benefits? The staff attorney, scribe, and panel counsel were present during all deliberations, which were closed to the public to ensure privacy. The individual had a right to be present, and the Board granted personal statements in instances where it was necessary for a full understanding of the case.

In order to attain as much consistency in decisionmaking as possible, any memb

of the Board could freely refer a case for reconsideration by the Full Board. A computer-aided review of Panel dispositions helped Board members identify which cases they wished to reconsider by the full Board. A case was considered final only when acted on by the President.

Our final disposition was sent to the President as a recommendation. He then signed a master warrant, which was returned to us so we could notify the applicant of the President's decision. The applicant had the right to file a motion for reconsideration within 30 days. If he did not file such a motion, he either accepted or refused the President's offer of clemency.

Acquiring Information

To act upon our applications on a case-by-case basis, we needed specific information about our applicants. Naturally, we could not expect each Board member to review the voluminous files for each case. We relied on our legal staff to gather and summarize pertiment information. The quality, industry and dedication of the staff attorneys played a key role in how the case came to us. While every Board member had the right to examine any information, this right was never actually exercised. We collected and used four different kinds of data: (1) application and intake information; (2) official records; (3) written correspondence from applicants, their representatives, or other interested parties; and, (4) personal contacts and oral statements by applicants or their representatives.

Our collection of information about applicants often began with their first contact with us. Many letters from applicants explained the reasons for their offenses and described their present circumstances. When submitted, these materials proved very enlightening. The impact of a personal letter from an individual detailing the circumstances of his situation was very effective in most instances. It often made a dramatic difference in the kind of recommendation the Board made. Unfortunately

written personal statements were submitted in only % of the cases. They were read verbatum whenever available.

For the most part, however, we placed a high reliance on official records. Lacking the time and resources to do much independent investigation, we had to assume the accuracy of the records unless they were evidently in error. There was good cause for worry about the accuracy and completeness of the official records. A survey of our staff revealed that 61% of the military files were not adequate to understand the individual and his circumstances fully. Over 20% of the files contained incorrect, contradictory or confusing information. Specific instances of omission and neglect in file-keeping involved miscalculation of periods spent AWOL, dates of summary and special court martials, time spent in confinement, and amount of creditable military service. In cases concerning individuals who were told to "go home and await assignment orders", the personnel file often revealed no record of any kind. The Military Personnel File was often not sufficient in detail to draft a case summary which would inform the Board of the "whole" individual and the specific reason for the offense.

When problems arose, staff attorneys resolved them on a case-by-case basis. They made extensive attempts to reach the applicant or his family, and other possible sources of information. Because the staff did not have the means to make investigative trips, these efforts were limited to phone calls. They were further limited by the fact that the privacy and confidentiality rights of applicants preclosed some avenues, such as employers, which might have proved useful.

In the civilian cases, our action attorneys normally used presentence reports as their primary source of information.[1/] We realized that the original function of the

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1/ Sections of the Federal Rules of Criminal Procedure describe the contents these reports:

*(1) When Made. The probation service of the court shall make a presentence investigation and report to the Court before the imposition of sentence or the granting of probation unless the court

presentence report was solely to aid the sentencing judge in deciding whether or not to assign probation or a particular length of incarceration. Statistics show that in the United States, 80 - 90% of all criminal cases are resolved by guilty pleas. Our own statistics showed that 67.6% of our civilian applicants pled guilty, and that 5.9% pled nolo contendre. Thus, the crucial determination for the judge in these cases was to determine what sentence to impose, and not whether or not the defendant was guilty or innocent. Presentence reports were developed to provide the sentencing court with precise information upon which to base a rational sentencing decision.

The Federal Rules encourage the use of presentence investigations by the probation services. Rule 32(c), as amended in 1966, provides that the sentencing court "may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation". (emphasis added). Because practice has differed from one judge to another, many defendants never saw the evidence upon which the sentencing judge based his decision. In cases where defendant or counsel never saw the presentence report, there is a greater likelihood of inaccuracies, erros, and omissions.

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1/ cont'd from P. E-11

or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial conditions and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as shall be required by the court. The court-before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

Although the Presidential Clemency Board relied primarily on presentence reports as the basis for its knowledge in civilian cases, its use had some drawbacks. If the applicant did not take advantage of his opportunity to "correct" his case summary, we may have made decisions on the basis of erroneous information in the reports. Second, in cases where the applicant had never seen his presentence report, and did not exercise his right to see our files, our case summary may have been the bearer of information such as IQ score, history of mental difficulties, wife's statements, or parent's observations as to why applicant committed his original offense, which the defendant was not aware of at the time of his judicial sentencing. Third, a terrific burden was placed on both our action attorneys and quality control attorneys to search for and verify information. Action attorneys contacted the applicants in ____% of our cases. They also often talked with parents, probation officers, or prison officials. However, reliance on oral communications with applicants, both civilian and military, posed difficult problems. Locating the applicant was never easy, since he was most likely at work or away during normal working hours. Considerations of privacy dictated not contacting him at his place of work. Applicants were often surprised and tongue-tied by a call from a White House office, and they were often less articulate than usual. Memory under such circumstances was often hazy.

Perhaps the most serious of the problems the staff faced in oral communications involved incriminating information. The staff attorney's role was neither that of counsel for the applicant nor that of his adversary. His function was to elicit as much relevant information, good and bad, as he could. Yet, our attorneys had a professional responsibility to inform the applicant that he need not submit any information and especially not aggravating material. Balancing these considerations and

and insuring that the applicant also understood them required a high degree of professional care. Instructions on these matters were distributed and reinforced by oral reminders to our attorneys. The high sense of professional responsibility and concern for applicants' rights exhibited by our staff was an important element in insuring that this procedure worked well.

Our heavy reliance on oral communications had one important corollary advantage. Applicants were greatly impressed with the individual attention their cases were receiving. Many had never had such close and personal contact with a government office before, much less from an attorney on the staff of a White House activity. We are convinced that the time and trouble that our staff took to discuss cases with applicants convinced them and their families of the seriousness of the program and the importance attached to it by the President.

As American involvement in the Vietnam War drew to a close, some judges began automatically giving probation rather than imprisonment for draft offenses. While this lenient treatment was welcomed by defendants, ironically it put them in a more difficult position before the Board, because we had no information upon which to evaluate their applications.

Case Summary Preparation

Our preparation of the file for decision revolved around the case summary. The Case Summary, generally about two pages in length, included a short statement from existing governmental files summarizing all information on an applicant that may be relevant to the Board's decision regarding clemency. We forewarned the case writer that the summary would be sent to the applicant for additions and corrections, that it would be given to Board panel for detailed review and would be the basic document for all further action concerning the applicant, and that it might become public.

We felt it crucial that the completed form contain a narrative which identified the individual as a person and that it allow us to look behind the welter of dates and offenses at a human being. It had to present the individual in human terms.

Our action attorneys received detailed instructions concerning the drafting of the case summary's four major parts: (1) Offense and Present Status; (2) Background; (3) Circumstances of Offense; and (4) Chronology. The following describes the contents of each part:

1. Offense and Present Status. The offense was stated in correct, but not legal language. (Applicable statutes, regulations, or Code were not cited.) Present status was similarly made clear. The remaining items included name of sentencing court; total time served; discharge status; total creditable service; age; and date of application. The purpose of these latter items was to give the Board a first impression of the individual in terms of the factors directly affecting his case.

2. The Background statement provided a narrative picture of the applicant as an individual. Use of the following, family background/stability; place where raised; race; age; educational level and test scores; phsyical health and mental health; marital status and present residence; number of dependents; employment history; parole recommendation; custody level; type of conscientious objector status; and a brief statement of his beliefs. The list of "possibles" was neither inclusive nor exclusive, and it formed the nucleus of the paragraph. Most action attorneys followed a record of chronological order in presentation of facts. They were instructed to use only information taken from official files, and personal conclusions were kept to a minimum. Any judgments madee were labeled as such, and the sources from which they came were identified.

3. Circumstances of Offense. The basic circumstances surrounding the applicant's offense was also stated in specific, but not legal language. The statement provided a narrative description of the when, why, and where of the applicant's offense. Included was information concerning any event in

the life of the applicant which was pertinent to the particular offense. Whenever possible, the action attorney phrased the statement of circumstances of the offense in terms of the aggravating and mitigating circumstances utilized by the Board. The action attorney did not, however, make subjective statements concerning mitigating and aggravating circumstances. All pertinent entries in this section were identified. All derivative or conclusory judgments were always cited to the source.

4. The Chronology was as detailed as space permitted. The action attorney started with Date of Birth and proceeded through the last recorded date of interaction with the legal or military system. This was sometimes in the future for such events as "expiration of full term" for incarcerated prisoners, "expiration of probation" for those out on probation, and so forth. All entries were non-technical and transparently clear, such as graduated from high school" or "jumped bail." Possible errors or contradictions were marked with asterisks, and a brief explanation was given at the botton of the page. Although the summary was designed to be as full a statement as possible of relevant facts, the Board decided some information was extremely prejudicial and should not be brought to its attention. Thus, the summary did not include mere arrests, misdemeanors, or juvenile offenses. We omitted closely identifying information such as names, specific addresses, college or high schools, and employers. The staff was instructed to avoid making subjective characterizations, generalizations or conclusionary statements. Specifically prejudicial matter which had no bearing on the case were omitted. We created an unusual internal check on the preparation of the case summary to control staff error, omission, abuse of discretion, and inconsistencies. This check, referred to as "Quality Control," functioned by a special group of attorneys checking the work of all others. As a general proposition, the Quality Control

unit reviewed the summary for improper characterizations, excludable terms, and prejudicial material. All corrections, additions and deletions suggested by Quality Control were conclusive unless the action attorney could convince the quality control attorney that the suggested changes should not be made. This was a unique operation, for which we could find no parallels in government legal processing. Although we relied heavily on the professionalism, knowledge, and experience of attorney sin preparing case-work, the Board felt that an independent control was necessary. The Board's legal staff of over 300 was drawn from many different agencies. Naturally, no attorney had ever practiced Clemency Board law before. In order to ensure that rapidly changing Board rules were followed, and that all cases were written in a consistent, complete and accurate manner, the independent quality control function was necessary. Without one, the Board could have no confidence that the summary before it was an accurate reflection of the information bearing on the case. For all its uniqueness, the process worked extremely well, and staff attorneys did not regard this as a reflection on their professional competence.

We instituted a further check by allowing the applicant to participate in the drafting of his case summary. The following letter, pursuant to Section 101.8(b) of our Rules and Regulations, was sent with the initial case summary to each applicant:

"Your application to the Clemency Board has been received. We are sending to you some additional information which will help you understand how we will review your case.

The most important thing that you should look at is the Initial Case Summary. This is a brief statement of the facts of your case and your personal background that has been made from your files. The summary has been enclosed so that you may see the main tool that the Board will use when we review your case. Like the Board, you and your attorney may also see your entire file.

Please read your summary very carefully. If anything in the summary is wrong or if there is anything you want to explain, please tell the Board. You

may also tell the Board of any other information that you think we should consider. If we do not receive your comments twenty days from the date of this letter, we may have to go on with your case without them.

We have also sent to you the Instructions for preparing summaries. This is what the Presidential Clemency Board gave to its lawyers to tell them how to prepare your summary. We hope that it will explain to you what each item on your summary means."

Sending the applicant a copy of his summary was the only means we had of checking the accuracy of the official files that formed the basis of our information. It also served as a double-check on the accuracy of our staff work. In some measure, it served as a substitute for the lack of personal contact we had with the applicant.

On whole, the responses from applicants demonstrated that the summaries were generally free from significant error. The Board was disappointed, however, in the low number of persons who responded to the summary. While this may have been due to the acceptability of the document to the applicant, we suspect that many individuals did not fully understand the importance of responding to us. In all, about (  %) of our applicants submitted written comments or corrections to the summaries.