The original documents are located in Box 10, folder "Senate Hearings on Clemency Board Practices and Procedures (Published Report)" of the Charles E. Goodell Papers at the Gerald R. Ford Presidential Library.

CLEMENCY PROGRAM PRACTICES AND PROCEDURES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

ON

REVIEW OF AGENCY PRACTICES AND PROCEDURES IN THE ADMINISTRATION OF THE PRESIDENTIAL CLEMENCY PROGRAM

DECEMBER 18 AND 19, 1974

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WEDNESDAY, DECEMBER 18, 1974

CLEMENCY PROGRAM PRACTICES AND PROCEDURES

WEDNESDAY, DECEMBER 18, 1974

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2228, Dirksen Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Also present were Senators Hart, Burdick, Thurmond, and Mathias.

Also present: Thomas M. Susman, chief counsel, Mark Schneider, investigator, and Janet Alberghini, staff assistant.

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. The subcommittee will come to order.

The Senate Subcommittee on Administrative Practice and Procedure opens hearings this morning into the procedures and practices of the President's clemency program.

This hearing continues this subcommittee's history of concern with the administration of the Selective Service System during the Vietnam War, a concern which led to both administrative and legislative reform in the procedural protections to individual registrants. It also follows a 1972 3-day subcommittee inquiry into the administrative possibilities for amnesty available to the President.

At that time, the subcommittee heard from witnesses representing Federal agencies, veterans groups, Gold Star parents, POW wives, individual resisters, and eminent historians and theologians.

They debated the implications for the Nation of amnesty after Vietnam. They disputed the advantages and disadvantages of the various forms of amnesty. And they explored the long tradition of amnesty in America.

That tradition is clear. Two hundred years ago at Philadelphia, the First Continental Congress had set in motion the forces that were to lead to revolution. The wrenching experience of civil turmoil that followed divided families, friends, and communities.

Reconciliation was an essential part of the war's aftermath when George Washington chose not to pursue either those who had fought against the revolution or those who had deserted the revolutionary ranks. A short time later, he showed the same compassion and mercy when he offered unconditional amnesty to those who had participated in the Whiskey Rebellion.

Three-quarters of a century later came the trial of the Civil War. At its conclusion, after President Lincoln and then President Johnson chose reconciliation, with a final declaration by President Johnson

on Christmas Day 1868, extending unconditional amnesty to all those who had participated in the rebellion.

Yet, during the 1972 Presidential campaign, following those hearings, the issue of amnesty became a political issue, the subject of demagoguery and derision by the former Chief Executive.

Disregard for our Nation's history of compassion, disregard for the state of the Nation, and disregard for the deep divisions among our people, characterized his widely publicized statements, and I believe represented a failure of Presidential leadership.

In one of his first public speeches after taking office, President Ford separated himself from his predecessor by announcing an intention to offer some form of amnesty. I supported his decision then as a vital first step away from the tragedy of Vietnam. Many, including myself, questioned the conditional nature of the amnesty as well as its limitation on those who would be eligible to receive it. But we welcomed it as a step in the direction of reconciliation.

Ultimately, that process must grow both from an understanding of the need for national reconciliation and from a renewal of respect for the individual act of conscience.

Reconciliation must encompass all of the victims of Vietnam: the young men who lost their limbs, the young men who risked their lives, the widows and dependents of the 55,000 Americans killed in Vietnam, the families of the MIA's.

For too many veterans the return to America was a return to a land that wanted desperately to forget them.

Reconciliation must be even more. For if we have done too little for the veteran, until a few months ago, we had done nothing for the young men who became outcasts from this land.

On September 16, 1974, President Gerald Ford issued a Presidential Proclamation establishing a clemency program designed as the proclamation stated "to afford reconciliation to Vietnam era draft evaders and military deserters upon the following conditions. . . ."

Tim Kendall is one who has not participated. A 25-year-old Notre Dame graduate in theology, Tim Kendall refused to cooperate with the draft system when he was ordered for induction, according to his father's testimony. He expressed his total unwillingness to participate in any aspect of the Vietnam war and his readiness to follow in the tradition of Thoreau to bear witness to that opposition. He turned himself in to Federal law authorities and ultimately was sentenced to 4½ years in prison, a term later reduced to 2 years. He was released finally a year ago.

His father, Sam Kendall, a World War II veteran, told our subcommittee 2 years ago of his son's actions and the reasons for them. Sam Kendall unfortunately is now in a hospital in Richmond. Tim is now married and attempting to help support his 12 brothers and sisters as well as his own family. However, his felony conviction for a Selective Service violation has affected his ability to obtain a job.

Presumably, Tim Kendall would be a perfect candidate for the Presidential clemency program. Yet he has never been informed about the program. We intend in this hearing to find out why not and to find out as well what is being done to let others like him know of this program.

Since its inauguration only 2.5 percent of the minimum estimate of 131,000 persons potentially eligible for the clemency program have been processed. We intend to ask in these hearings as well what are the reasons for the low response to the program. The proclamation also stated that the program was being conducted "In furtherance of our national commitment to justice and mercy. * * *" Yet since the program began, critics have questioned whether the agencies administering it are sensitive to these objectives. We intend to learn whether this program and its operations are fulfilling the President's goals of "justice and mercy."

The President stated in his proclamation that "reconciliation calls for an act of mercy to bind the Nation's wounds and to heal the scars of divisiveness."

How far has the program gone to achieve those goals? How much farther must it travel to achieve the goal of reconciliation?

These are questions which concern many Americans. They should concern all Americans. Yet, they are questions which remain unanswered.

In the next 2 days, we hope to obtain information from the Chairman of the Presidential Clemency Board, former Senator Charles E. Goodell, from legal experts familiar with the program, from individuals with a personal interest in its working, and from representatives of Justice and the Defense Department and the Selective Service System.

Our objective is to bring before the Congress and the American people additional information about the current clemency program, its record, its successes, and its failures. In so doing, we hope to achieve a more equitable, more effective, and more successful program to bind the Nation's wounds.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Mr. Chairman, I think my position is well known on clemency. I am in favor of following the law, and the law has been that one who evades the draft and deserts the service will be tried by court. That is the only fair way you can handle it. It is not right for some people to serve their country in answer to the law and others to be allowed to evade it. If we don't enforce this law you won't be able to enforce other laws. Respect will be lost for the law, and therefore, I don't think we provide equal protection to the citizens if we pick out this particular class of people and say although you didn't agree with the law when the law required you to serve, and therefore since you didn't agree with it, you don't have to be punished.

There are some people who don't believe in liquor laws. There are some people who don't believe in highway laws. There are some people who don't believe in other kinds of laws. But whether they agree with it or not, if it is the law I think that has to be observed or people have to be tried in court for violations.

I just wanted to mention this point. I mentioned it before when the Civil War was referred to. Individuals who fought on the side of the South fought with their States unless they voluntarily came down from the other States. People from my State and the other States fought with their States. My State joined the Union voluntarily, as did the other States. The people from my State decided to withdraw

from the Union voluntarily. They thought they had the right to do so, and only force prevented that, the force of arms prevented that.

All of the States of the South who fought on the side of the South thought they had a right to voluntarily withdraw from the Union since they voluntarily joined the Union. It would seem they had that right under our form of government, because each State in this Nation is a sovereign power, each State in this Nation has all the powers of a foreign nation except those specifically denied it by the Union, and this was not denied in the Constitution to the States.

So these people who fought for my State or other States in the South were fighting with their States, whole States. They didn't individually withdraw. They were not traitors to the Nation, they were merely standing by their States which withdrew, and they would have been untrue to their States if they took any other course under the circumstances.

So, speaking of clemency for people of that category is a different situation entirely from someone who violates the law when they are called to serve in time of war or to answer to the draft.

Those are just a few comments I make at this time. I may have some others to make as we go along. I understand this program hasn't gotten a tremendous response, and that those people who evaded the service or evaded the draft and deserted the service don't want to take advantage of it. That is their privilege, and nobody is going to compel them to take advantage of the program. They have a right to stay in Sweden or Canada. They have a right to refuse to take advantage of it. Simply because it hasn't been a popular thing is no reason why we should change our form of Government to suit a certain class of people. What about these 50,000 men who lost their lives in Vietnam and what about their families? How do they feel about this? What about the 300,000 wounded there who have come back and are now citizens of this country, how would they feel about excusing those who would refuse to serve. After all, they have a great country, but to preserve it and defend it and protect it we have got to be willing to fight if we are called. If our country needs us and we don't answer the call then we have got to pay the penalty of the law. It is merely enforcing the law equally upon all citizens.

Thank you, Mr. Chairman.

Senator KENNEDY. Senator Burdick.

Senator BURDICK. No questions.

Senator KENNEDY. Senator Mathias.

OPENING STATEMENT OF SENATOR MATHIAS

Senator MATHIAS. Thank you, Mr. Chairman.

I would just very briefly like to welcome Senator Goodell and the members of the President's Clemency Board to this hearing and to thank them for undertaking a pretty enormous job, a job of great difficulty because of the kind of emotions that are bound to be involved, because of the difficulty of doing justice in a situation in which it is essential that exact equal justice be done, because of the nature of the task itself.

Senator Thurmond has mentioned history. I think history is important, because this involves not only the traditions of this country, but it involves our will and our capacity to deal with future crises. It is a prospective as well as a retrospective task.

I am mindful, however, that there are many facets in the Lincoln legend, many aspects of Abraham Lincoln's Presidency that have become part of the fabric of American life, and that one of the strong recurrent notes in the Lincoln legend are his acts of clemency, his way of dealing with soldiers who fought in the U.S. Army and were for one reason or another found to be afoul of the rules and regulations. Lincoln's ability to perform acts of clemency without weakening the will of the fabric or the strength of the Union cause is one of the enduring parts of the Lincoln that we all know today. I think it is an important part of the tradition that should help guide the Clemency Board in its activities.

Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much.

Mr. Goodell, I want to welcome you here today. You served with great distinction in the U.S. Senate. These hearing rooms are not strange to you. You have perhaps seen them from a different vantage point. We feel the President chose wisely when he chose you to head up this Board, and we look forward to your comments this morning.

We extend a warm welcome to you.

STATEMENT OF CHARLES E. GOODELL, DIRECTOR, PRESIDENTIAL CLEMENCY BOARD

Mr. GOODWELL. Thank you, Mr. Chairman, members of the subcommittee. It is a great pleasure to be here, and I particularly appreciate the opportunity you are affording the Clemency Board and the other agencies that are undertaking to implement the President's clemency program, to explain the program further and to inform the subcommittee, the Congress, and the people as to the nature of this program.

My name is Charles Goodell and I am an attorney in private practice in Washington, and I am Chairman of President Ford's Presidential Clemency Board, which is a part of the White House Office.

The program that I am going to discuss is part of the operations of the President's Clemency Board. The program suffers from insufficient public awareness and from confusion among potential applicants. These hearings will broaden understanding of what the program is about and in doing so will be of service to those young people who will decide whether or not to participate in the program.

With the subcommiteee's consent, I would like to submit the entire statement for the record and read highlights and then answer your questions.

At the outset, let me share with you several observations about the program, some of which I have come to appreciate only after becoming immersed in it.

The Clemency Board has been continually impressed with the depth of feeling that the President has about this program, and with the personal attention that he gives to it. He was personally involved in the rewriting of the initial proposals, and devoted a considerable amount of time to that. At the Board's first meeting, he met with us in the Cabinet room for a lengthy discussion of his hopes for the clemency program. He met with us in the Cabinet room again for the signing of the first pardons and conditional pardons and conditional

clemencies under the Board's part of the program. He has spoken with me several times to give guidance to the Board about how it should treat applicants coming to it.

In August, in his first days in office, the President replaced two of the portraits in the Cabinet room with portraits of Presidents Truman and Lincoln. He told his staff then that he particularly admired those Presidents because they were the ones who took substantial political risks in granting clemency in order to reunite the country in times of bitterness and strife.

The President cares deeply about this program, asks about its progress frequently, participates in shaping it even now. Its goals are critical to his vision of what this country should be.

The members of the Presidential Clemency Board have been impressed also by the degree to which the applicants coming before us do not fit the stereotypes we had assumed.

Many of the draft and military law violations which we have examined were not at all consciously and directly related to opposition to the Vietnam war. For the most part, we have seen applicants with wives who were about to leave them, whose fathers had died leaving a family without any means of support, or whose mother, wife, or child had become acutely ill. Personal problems overwhelmed them and led to violations of the law. We have many applicants who are not from educated and middle-class backgrounds, certainly not with college educations. Rather, they are generally unsophisticated, inarticulate people who were unable to pursue their remedies properly within the legal system. Had they been able to do so, many of these applicants would have received hardship deferments or conscientious objection deferments, or compassionate reassignments or hardship discharges in the military. They just did not know how to proceed.

We have seen some cases in which there has been genuine conscientious objection to killing. For the most part, however, even these people tend to be ones who did not understand how to pursue their rights properly through the selective service system. They are predominantly Jehovah's Witnesses, Muslims, and a few others who have clear religious or ethical beliefs which are evident to the Board from the letters which they write to us, from their probation records, and from other files predating even their conviction.

Our applicants have often proven to be the unfortunate orphans of an administrative system in which success was determined by being educated, clever, articulate, and sophisticated, whether sincere or not. The applications which the Presidential Clemency Board has received indicate to us with overwhelming force that the image which we have had of the typical Vietnam-era draft "evader" is simply wrong. We have been surprised and impressed, finally, by the extraordinary public support which the President's clemency program has received.

Without great fanfare, many employers, church groups, veterans' groups, and lawyers' groups have written and called us and asked, "What can we do to help?" The church groups and veterans' groups, in particular, have established counseling programs for potential applicants to the various parts of the clemency program. Numerous employers have offered opportunities for alternate service under the program. Other organizations which are not in total agreement with

the clemency program have united on the local level in one common goal: Helping the human being involved with the major personal decisions which they have to face if they are to come home to the President's program.

Nearly everyone who could potentially help these young people has said, "We may not entirely agree with the way that the program was set up, but the important thing is to help these boys who are thinking about coming back to us. Let's concentrate on them, not on our differences with each other."

We have learned that people in this country really do want to have a reconciliation which will bring former draft evaders and deserters back into full integration in the community. We have been humbled and touched by the stream of offers of help from people in all parts of the country.

Let me now describe to you, if I may, what the Clemency Board's jurisdiction is, what remedies we offer to prospective applicants, what administrative procedures we have established, and what substantive criteria we apply in weighing applications for clemency.

The Presidential Clemency Board was created by Executive order on September 16, 1974, to implement part of President Ford's proclamation on clemency issued that same day. The Board, organizationally within the White House, is composed of nine part-time members. Each member is in private employment and is compensated by the Federal Government only for time spent on Board business.

[The Executive order referred to above follows:]

[Office of the White House Press Secretary]

[THE WHITE HOUSE]

[EXECUTIVE ORDER 11803]

September 16, 1974.

ESTABLISHING A CLEMENCY BOARD TO REVIEW CERTAIN CONVICTIONS OF PERSONS UNDER SECTION 12 OR 6(j) OF THE MILITARY SELECTIVE SERVICE ACT AND CERTAIN DISCHARGES ISSUED BECAUSE OF, AND CERTAIN CONVICTIONS FOR, VIOLATIONS OF ARTICLE 85, 86 OR 87 OF THE UNIFORM CODE OF MILITARY JUSTICE AND TO MAKE RECOMMENDATIONS FOR EXECUTIVE CLEMENCY WITH RESPECT THERETO

By virtue of the authority vested in me as President of the United States by section 2 of article II of the Constitution of the United States, and in the interest of the internal management of the Government, it is ordered as follows:

Section 1. There is hereby established in the Executive Office of the President a board of 9 members, which shall be known as the Presidential Clemency Board. The members of the Board shall be appointed by the President, who shall also designate its Chairman.

Sec. 2. The Board, under such regulations as it may prescribe, shall examine the cases of persons who apply for Executive clemency prior to January 31, 1975, and who (i) have been convicted of violating section 12 or 6(j) of the Military Selective Service Act (50 App. U.S.C. section 462), or of any rule or regulation promulgated pursuant to that section, for acts committed between August 4, 1964 and March 28, 1973, inclusive, or (ii) have received punitive or undesirable discharges as a consequence of violations of article 85, 86 or 87 of the Uniform Code of Military Justice (10 U.S.C. sections 885, 886, 887) that occurred between August 4, 1964 and March 28, 1973, inclusive, or are serving sentences of confinement for such violations. The Board will only consider the cases of Military Selective Service Act violators who were convicted for unlawfully failing (i) to register or register on time, (ii) to keep the local board informed of their current address, (iii) to report for or submit to preinduction or induction examination, (iv) to report for or submit to induction itself, or (v) to report for or

submit to, or complete service under section 6(j) of such Act. However, the Board will not consider the cases of individuals who are precluded from re-entering the United States under 8 U.S.C. 1182(a)(22) or other law.

Sec. 3. The Board shall report to the President its findings and recommendations as to whether Executive clemency should be granted or denied in any case. If clemency is recommended, the Board shall also recommend the form that such clemency should take, including clemency conditioned upon a period of alternate service in the national interest. In the case of an individual discharged from the armed forces with a punitive or undesirable discharge, the Board may recommend to the President that a clemency discharge be substituted for a punitive or undesirable discharge. Determination of any period of alternate service shall be in accord with the Proclamation announcing a program for the return of Vietnam era draft evaders and military deserters.

Sec. 4. The Board shall give priority consideration to those applicants who are presently confined and have been convicted only of an offense set forth in section 2 of this order, and who have no outstanding criminal charges.

Sec. 5. Each member of the Board, except any member who then receives other compensation from the United States, may receive compensation for each day he or she is engaged upon the work of the Board at not to exceed the daily rate now or hereafter prescribed by law for persons and positions in GS–18, as authorized by law (5 U.S.C. 3109), and may also receive travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 5703) for persons in the government service employed intermittently.

Sec. 6. Necessary expenses of the Board may be paid from the Unanticipated Personnel Needs Fund of the President or from such other funds as may be available.

Sec. 7. Necessary administrative services and support may be provided the Board by the General Services Administration on a reimbursable basis.

Sec. 8. All departments and agencies in the Executive branch are authorized and directed to cooperate with the Board in its work, and to furnish the Board all appropriate information and assistance, to the extent permitted by law.

Sec. 9. The Board shall submit its final recommendations to the President not later than December 31, 1976, at which time it shall cease to exist.

GERALD R. FORD.

NOTE: The White House announced the appointment of the following persons as members of the Presidential Clemency Board:

DR. RALPH ADAMS, 59, educator, has been president of Troy State University in Troy, Ala., for 10 years. He is a graduate of Birmingham-Southern College with LL.B. and J.D. degrees from the University of Alabama, and a brigadier general, Air National Guard of Alabama.

JAMES P. DOUGOVITA, 28, is a full-time teaching aide of minority students in the department of applied technology, Michigan Technological University. Mr. Dougovita is a veteran and has been awarded the Combat Infantryman Badge, Silver Star, Bronze Star, Purple Heart, and is now a captain in the Michigan National Guard.

ROBERT H. FINCH, 51, is a lawyer and partner in the firm of McKenna, Fitting & Finch in Los Angeles, Calif. He was formerly Secretary of Health, Education, and Welfare and Counsellor to President Nixon.

CHARLES E. GOODELL, 48—Chairman—is a former Senator from New York who is currently in the private practice of law. He was a Ford Foundation Fellow at Yale and was a graduate of Williams College.

REV. THEODORE M. HESBURGH, 57, is president, University of Notre Dame, and holds honorary degrees from numerous colleges and universities. He is a permanent Vatican delegate. He has served as Chairman of the U.S. Commission on Civil Rights and as a member of the Committee on an All-Volunteer Armed Force.

VERNON E. JORDAN, 39, is executive director of the National Urban League, an organization concerned with the advancement of the minority groups. Mr. Jordan is a lawyer by profession and served previously as the executive director of the United Negro College Fund, director of the voter education project, Southern Regional Council, and as Attorney-Consultant in the U.S. Office of Economic Opportunity.

JAMES MAYE, 31, is executive director of Paralyzed Veterans of America in Washington, D.C. He is a graduate of Bridgewater College, Bridgewater, Va., and received his master's degree from Virginia Commonwealth University.

AIDA CASANAS O'CONNOR, 52, is a woman lawyer with a master of laws degree from George Washington University, Washington, D.C. She is a member of the Bar of the State of New York, the Supreme Court of Puerto Rico, U.S. District Court of Puerto Rico, and the Supreme Court of the United States. Presently she is assistant counsel to the New York State division of housing and community renewal in New York City.

GEN. LEWIS W. WALT, USMC (Ret.), 61, retired after 34 years in the Marine Corps and is a veteran of the Second World War, the Korean and Vietnamese war. He was an Assistant Commandant of the Marine Corps. He has received the Navy Cross, Silver Star, Legion of Merit, Bronze Star, the Purple Heart, and numerous other military decorations.

[From Presidential Documents]

PROGRAM FOR THE RETURN OF VIETNAM-ERA DRAFT EVADERS AND MILITARY DESERTERS

Good morning:

In my first week as President, I asked the Attorney General and the Secretary of Defense to report to me, after consultation with other Governmental officials and private citizens concerned, on the status of those young Americans who have been convicted, charged, investigated, or are still being sought as draft evaders or military deserters.

On August 19, at the national convention of Veterans of Foreign Wars in the city of Chicago, I announced my intention to give these young people a chance to earn their return to the mainstream of American society so that they can, if they choose, contribute, even though belatedly, to the building and the betterment of our country and the world.

I did this for the simple reason that for American fighting men, the long and divisive war in Vietnam has been over for more than a year, and I was determined then, as now, to do everything in my power to bind up the Nation's wounds.

I promised to throw the weight of my Presidency into the scales of justice on the side of leniency and mercy, but I promised also to work within the existing system of military and civilian law and the precedents set by my predecessors who faced similar postwar situations, among them Presidents Abraham Lincoln and Harry S. Truman.

My objective of making future penalties fit the seriousness of each individual's offense and of mitigating punishment already meted out in a spirit of equity has proved an immensely hard and very complicated matter, even more difficult than I knew it would be.

But the agencies of Government concerned and my own staff have worked with me literally night and day in order to develop fair and orderly procedures and completed their work for my final approval over this last weekend.

I do not want to delay another day in resolving the dilemmas of the past, so that we may all get going on the pressing problems of the present. Therefore, I am today signing the necessary Presidential proclamation and Executive orders that will put this plan into effect.

The program provides for administrative disposition of cases involving draft evaders and military deserters not yet convicted or punished. In such cases, 24 months of alternate service will be required which may be reduced for mitigating circumstances.

The program also deals with cases of those already convicted by a civilian or military court. For the latter purpose, I am establishing a Clemency Review Board of nine distinguished Americans whose duty it will be to assist me in assuring that the Government's forgiveness is extended to applicable cases of prior conviction as equitably and as impartially as is humanly possible.

The primary purpose of this program is the reconciliation of all our people and the restoration of the essential unity of Americans within which honest differences of opinion do not descend to angry discord and mutual problems are not polarized by excessive passion.

My sincere hope is that this is a constructive step toward a calmer and cooler appreciation of our individual rights and responsibilities and our common purpose as a nation whose future is always more important than its past.

At this point, I will sign the proclamation that I mentioned in my statement, followed by an Executive order for the establishment of the Clemency Board, followed by the signing of an Executive order for the Director of Selective Service, who will have a prime responsibility in the handling of the matters involving alternate service.

Thank you very much.

PROGRAM FOR THE RETURN OF VIETNAM-ERA DRAFT EVADERS AND MILITARY DESERTERS

[Proclamation 4313.]

September 16, 1974.

The United States withdrew the last of its forces from the Republic of Vietnam on March 28, 1973.

In the period of its involvement in armed hostilities in Southeast Asia, the United States suffered great losses. Millions served their country, thousands died in combat, thousands more were wounded, others are still listed as missing in action.

Over a year after the last American combatant had left Vietnam, the status of thousands of our countrymen—convicted, charged, investigated or still sought for violations of the Military Selective Service Act or of the Uniform Code of Military Justice—remains unresolved.

In furtherance of our national committee to justice and mercy these young Americans should have the chance to contribute a share to the rebuilding of peace among ourselves and with all nations. They should be allowed the opportunity to earn return to their country, their communities, and their families, upon their agreement to a period of alternate service in the national interest, together with an acknowledgement of their allegiance to the country and its Constitution.

Desertion in time of war is a major, serious offense; failure to respond to the country's call for duty is also a serious offense. Reconciliation among our people does not require that these acts be condoned. Yet, reconciliation calls for an act of mercy to bind the Nation's wounds and to heal the scars of divisiveness.

NOW, THEREFORE, I, GERALD R. FORD, President of the United States, pursuant to my powers under Article II, Sections 1, 2 and 3 of the Constitution, do hereby proclaim a program to commence immediately to afford reconciliation to Vietnam era draft evaders and military deserters upon the following terms and conditions:

1. *Draft Evaders.*—An individual who allegedly unlawfully failed under the Military Selective Service Act or any rule or regulation promulgated thereunder, to register or register on time, to keep the local board informed of his current address, to report for or submit to preinduction or induction examination, to report for or submit to induction itself, or to report for or submit to, or complete service under Section 6(j) of such Act during the period from August 4, 1964 to March 28, 1973, inclusive, and who has not been adjudged guilty in a trial for such offense, will be relieved of prosecution and punishment for such offense if he:

(i) presents himself to a United States Attorney before January 31, 1975,

(ii) executes an agreement acknowledging his allegiance to the United States and pledging to fulfill a period of alternate service under the auspices of the Director of Selective Service, and

(iii) satisfactorily completes such service.

The alternate service shall promote the national health, safety, or interest. No draft evader will be given the privilege of completing a period of alternative service by service in the Armed Forces.

However, this program will not apply to an individual who is precluded from re-entering the United States under 8 U.S.C. 1182(a)(22) or other law. Additionally, if individuals eligible for this program have other criminal charges outstanding, their participation in the program may be conditioned upon, or postponed until after, final disposition of the other charges has been reached in accordance with law.

The period of service shall be twenty-four months, which may be reduced by the Attorney General because of mitigating circumstances.

2. *Military Deserters.*—A member of the armed forces who has been administratively classified as a deserter by reason of unauthorized absence and whose absence commenced during the period from August 4, 1964 to March 28, 1973, inclusive, will be relieved of prosecution and punishment under Articles 85, 86 and 87 of the Uniform Code of Military Justice for such absence and for offenses

directly related thereto if before January 31, 1975 (i) he takes an oath of allegiance to the United States and (ii) executes an agreement with the Secretary of the Military Department from which he absented himself or for members of the Coast Guard, with the Secretary of Transportation, pledging to fulfill a period of alternate service under the auspices of the Director of Selective Service. The alternate service shall promote the national health, safety, or interest.

The period of service shall be twenty-four months, which may be reduced by the Secretary of the appropriate Military Department, or Secretary of Transportation for members of the Coast Guard, because of mitigating circumstances.

However, if a member of the armed forces has additional outstanding charges pending against him under the Uniform Code of Military Justice, his eligibility to participate in this program may be conditioned upon, or postponed until after, final disposition of the additional charges has been reached in accordance with law.

Each member of the armed forces who elects to seek relief through this program will receive an undesirable discharge. Thereafter, upon satisfactory completion of a period of alternate service prescribed by the Military Department or Department of Transportation, such individual will be entitled to receive, in lieu of his undesirable discharge, a clemency discharge in recognition of his fulfillment of the requirements of the program. Such clemency discharge shall not bestow entitlement to benefits administered by the Veterans Administration.

Procedures of the Military Departments implementing this Proclamation will be in accordance with guidelines established by the Secretary of Defense, present Military Department regulations notwithstanding.

3. *Presidential Clemency Board.*—By Executive Order I have this date established a Presidential Clemency Board which will review the records of individuals within the following categories: (i) those who have been convicted of draft evasion offenses as described above, (ii) those who have received a punitive or undesirable discharge from service in the armed forces for having violated Article 85, 86, or 87 of the Uniform Code of Military Justice between August 4, 1964 and March 28, 1973, or are serving sentences of confinement for such violations. Where appropriate, the Board may recommend that clemency be conditioned upon completion of a period of alternate service. However, if any clemency discharge is recommended, such discharge shall not bestow entitlement to benefits administered by the Veterans Administration.

4. *Alternate Service.*—In prescribing the length of alternate service in individual cases, the Attorney General, the Secretary of the appropriate Department, or 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.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of September in the year of our Lord nineteen hundred seventy-four, and of the Independence of the United States of America the one hundred and ninety-ninth.

GERALD R. FORD.

PROGRAM FOR THE RETURN OF VIETNAM ERA DRAFT EVADERS AND MILITARY DESERTERS

DELEGATION OF CERTAIN FUNCTIONS VESTED IN THE PRESIDENT TO THE DIRECTOR OF SELECTIVE SERVICE

[Executive Order 11804]

September 16, 1974.

By virtue of the authority vested in me as President of the United States, pursuant to my powers under article II, sections 1, 2 and 3 of the Constitution, and under section 301 of title 3 of the United States Code, it is hereby ordered as follows:

SECTION 1. The Director of Selective Service is designated and empowered, without the approval, ratification or other action of the President, under such regulations as he may prescribe, to establish, implement, and administer the program of alternate service authorized in the Proclamation announcing a program for the return of Vietnam era draft evaders and military deserters.

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SEC. 2. Departments and agencies in the Executive branch shall, upon the request of the Director of Selective Service, cooperate and assist in the implementation or administration of the Director's duties under this Order, to the extent permitted by law.

GERALD R. FORD.

FACT SHEETS CONCERNING THE PROGRAM

The President has today issued a proclamation and Executive orders establishing a program of clemency for draft evaders and military deserters to commence immediately. This program has been formulated to permit these individuals to return to American society without risking criminal prosecution or incarceration for qualifying offenses if they acknowledge their allegiance to the United States and satisfactorily serve a period of alternate civilian service.

The program is designed to conciliate divergent elements of American society which were polarized by the protracted period of conscription necessary to sustain United States activities in Vietnam. Thus, only those who were delinquent with respect to required military service between the date of the Tonkin Gulf Resolution (August 4, 1964) and the date of withdrawal of United States forces from Vietnam (March 28, 1973) will be eligible. Further, only the offenses of draft evasion and prolonged unauthorized absence from military service (referred to hereinafter as desertion) are covered by the program.

Essential features of the program are outlined below.

1. Number of Draft Evaders. There are approximately 15,500 draft evaders potentially eligible. Of these some 8,700 have been convicted of draft evasion. Approximately 4,350 are under indictment at the present time, of whom some 4,060 are listed as fugitives. An estimated 3,000 of these are in Canada. A further 2,250 individuals are under investigation with no pending indictments. It is estimated that approximately 130 persons are still serving prison sentences for draft evasion.

2. Number of Military Deserters. Desertion, for the purposes of this program, refers to the status of those members of the Armed Forces who absented themselves from military service without authorization for 30 days or more. During the Vietnam era it is estimated that there were some 500,000 incidents of desertion as so defined. Of this 500,000 a number were charged with offenses other than desertion at the time they absented themselves. These other offenses are not within the purview of the clemency program for deserters. Approximately 12,500 of the deserters are still at large of whom about 1,500 are in Canada. Some 660 deserters are at present serving sentences to confinement or are awaiting trial under the Uniform Code of Military Justice.

3. Unconvicted Evader. Draft evaders will report to the U.S. attorney for the district in which they allegedly committed their offense.

Draft evaders participating in this program will acknowledge their allegiance to the United States by agreeing with the United States attorney to perform alternate service under the auspices of the Director of Selective Service.

The duration of alternate service will be 24 months, but may be reduced for mitigating factors as determined by the Attorney General.

The Director of Selective Service will have the responsibility to find alternate service jobs for those who report. Upon satisfactory completion of the alternate service, the Director will issue a certificate of satisfactory completion to the individual and U.S. attorney, who will either move to dismiss the indictment if one is outstanding, or agree not to press possible charges in cases where an indictment has not been returned.

If the draft evader fails to perform the agreed term of alternate service, the U.S. attorney will be free to, and in normal circumstances will, resume prosecution of the case as provided in the terms of the agreement.

Aliens who fled the country to evade the draft will be ineligible to participate in the program.

4. *Unconvicted Military Absentees.*—Military absentees who have no other pending charges may elect to participate in the program. Military deserters may seek instructions by writing to:

a) Army—U.S. Army Deserter Information Point, Fort Benjamin Harrison, Ind. 46216.

b) Navy—Chief of Naval Personnel, (Pers 83), Department of the Navy, Washington, D.C. 20370.

c) Air Force—U.S. Air Force Deserter Information Point, (AFMDC/DPMAK) Randolph Air Force Base, Tex. 78148.

d) Marine Corps—Headquarters, U.S. Marine Corps, (MC) Washington, D.C. 20380.

Those who make such an election will be required to execute a reaffirmation of allegiance and pledge to perform a period of alternate civilian service. Those against whom other charges under the Uniform Code of Military Justice are pending will not be eligible to participate in the program until these other charges are disposed of in accordance with the law. Participants in the program will be separated with an undesirable discharge. Although these discharges will not be coded on their face in any manner, the Veterans Administration will be advised that the recipients were discharged for willful and persistent unauthorized absence. They will thus not be eligible for any benefits provided by the Veterans Administration.

The length of required alternate civilian service will be determined by the parent Services for each individual on a case-by-case basis. The length of service will be 24 months but may be reduced for military service already completed or for other mitigating factors as determined by the parent Service. After being discharged each individual will be referred to the Director of Selective Service for assignment to prescribed work. Upon certification that this work has been satisfactorily completed, the individual may submit the certification to his former Service. The Service will then issue a special new type of discharge—a clemency discharge—which will be substituted for the previously awarded undesirable discharge. However, the clemency discharge shall not bestow entitlement to benefits administered by the Veterans Administration.

5. *Alternate Civilian Service.*—Determining factors in selecting suitable alternate service jobs will be:

(a) *National health, safety or interest.*

(b) *Noninterference with the competitive labor market.*—The applicant cannot be assigned to a job for which there are more numerous qualified applicants than jobs available.

(c) *Compensation.*—The compensation will provide a standard of living to the applicant reasonably comparable to the standard of living the same man would enjoy if he were entering the military service.

(d) *Skill and talent utilization.*—Where possible, an applicant may utilize his special skills.

In prescribing the length of alternate service in individual cases, the Attorney General, the military department, or the Clemency Board shall take into account such honorable service as an individual may have rendered prior to his absence, penalties already paid under the law, and such other mitigating factors as may be appropriate to seek equity among participants in the program.

6. *No Grace Period.*—There will not be a grace period for those outside the country to return and negotiate for clemency with the option of again fleeing the jurisdiction. All those eligible for the program and who have no additional criminal charges outstanding who re-enter the United States will have 15 days to report to the appropriate authority from the date of their re-entry. However, this 15-day period shall not extend the final date of reporting of January 21, 1975, as set forth in the proclamation.

7. *Inquiries.*—Telephone inquiries may be made to the following authorities:

Evaders:	
Department of Justice	(202) 739–4281
Military Absentees:	
U.S. Navy	(202) 694–2007
	(202) 694–1936
U.S. Marine Corps	(202) 694–8526
U.S. Army	(317) 542–3417
U.S. Air Force	(512) 652–4104
U.S. Coast Guard	(202) 426–1830

PROCEDURES TO BE FOLLOWED, UNCONVICTED DRAFT EVADER AND MILITARY ABSENTEE

DRAFT EVADER

Report to United States attorney where offense was committed

Acknowledge allegiance to the United States by agreeing with the United States

attorney to perform 24 months alternate service or less based on mitigating circumstances
Perform alternate service under the auspices of the Director of Selective Service
Director of Selective Service issues certificate of satisfactory completion of alternate service
Receipt by United States attorney of a certificate of satisfactory completion of alternate service
Dismissal of indictment or dropping of charges

MILITARY ABSENTEE

(including Coast Guard)

Report as prescribed by the military department concerned or for members of the Coast Guard report to the Secretary of Transportation
Oath of allegiance to United States
Agree with the concerned military department to perform 24 months alternate service or less based upon mitigating circumstances
Upon request, military department forgoes prosecution and issues undesirable discharge
Perform alternate service under the auspices of the Director of Selective Service
Director of Selective Service issues certificate of satisfactory completion of alternate service
Receipt of a certificate of satisfactory completion of alternate service by the concerned military department
Clemency discharge substituted for undesirable discharge

The Executive order covers three major categories of persons. First, there are those who are presently absent without authority from a military service, but who have not been convicted of an offense or discharged. They must return to their military service, which processes them and issues them an undesirable discharge. At the completion of alternate service of up to 24 months, they are issued a clemency discharge.

Second, unconvicted persons who have violated the selective service laws must return to a U.S. attorney. Through a process very similar to plea-bargaining or pretrial diversion, they are offered up to 24 months alternate service. Upon satisfactory completion, charges are dropped.

The Presidential Clemency Board's jurisdiction is entirely different than these first two programs. We recommend clemency for persons who have already been convicted for or have admitted an offense, whether civilian or military; and who have already received punishment. The Board has jurisdiction over civilian draft evasion offenses, and over military unauthorized absence, desertion and missing movement offense. Our jurisdiction over military personnel extends both to those courtmartialed and to those administratively discharged. We recommend to the President how he should exercise his discretion under article II, section 2 of the Constitution.

The Board has received more than 800 written applications, of which 150 have already become ripe for decision under the administrative procedures we have established. Eighteen have been referred to the President thus far, all civilian cases; others have been decided by the Board and will be forwarded to the President in the next several days. Within the next 2 weeks we estimate the President will receive more than 200 additional applicants to the Board.

To the civilian applicant for clemency, the Board can offer, on behalf of the President, executive clemency in the form of a full pardon.

Each form of executive clemency may be offered unconditionally, or conditioned upon a specified period of alternate service.

When the President accepted the unanimous recommendation of the Board that clemency be granted to the initial 18 civilian cases, he granted eight full and unconditional pardons effective immediately, and ten conditional clemencies which will become full and unconditional pardons upon completion of the specified alternate service. Of those who received conditional clemencies, the lengths of alternative service were 3 months of alternate service for three applicants, 6 months for five applicants, 10 months for one applicant, and 12 months for one applicant.

While we cannot reveal the Board's recommendations prior to the President's decision on them, I can tell you that the distribution of 32 other recommendations which are shortly to go to the President on civilian cases is roughly similar to the distribution in the first 18 cases.

A pardon restores to an applicant his Federal civil rights. Just as importantly, it is the custom in most States to remove most civil disabilities, as well as licensing restrictions which prevent ex-convicts from working in a variety of occupations. Without a pardon, the typical ex-offender cannot work in any professional occupation or, in many States, as an ambulance attendant, a watchmaker, a tourist camp operator, a garbage collector, a barber or beautician, a practical nurse, or a plumber.

Since most States honor Federal pardons as a matter of comity, although they are not required to do so as a matter of law, the real effect of a pardon is to make the ex-offender employable again.

The military applicant for clemency comes to us worse off than the civilian applicant. Not only does he frequently have Federal felony conviction for violation of military law, but he also has the stigma and the employment problems attached to a "bad paper" discharge.

To the former military applicant, we offer a full pardon, plus an upgrading of his discharge to at least a clemency discharge, either unconditionally or conditioned upon a specified period of alternate service.

Some of the military applicants have wounds from service in Vietnam, decorations for valor, and multiple tours of honorable military service. They went AWOL after this honorable service, and received bad discharges. Some of them even went AWOL or deserted after they had volunteered for second and third tours of duty in Vietnam.

The Board has decided that in such special cases we will recommend to the President that he immediately upgrade their punitive or undesirable discharges to a general discharge or, in exceptional cases, to an honorable discharge.

Senator KENNEDY. On that point it appears to me to be at least a significant departure from what you have been willing to recommend in the past. Are you then prepared under certain circumstances to recommend that some young people would even receive an honorable discharge?

Mr. GOODELL. It is not a departure from what we have recommended in the past.

Senator KENNEDY. Have you recommended previously to the President that individuals receive honorable discharge?

Mr. GOODELL. We are recommending to the President in this first batch of military cases. We have been making our first batch. That in at least three instances that the discharge itself be upgraded by the President to "under honorable conditions."

These are the first military cases that we have sent forward to the President. The reason for that was it took longer to get the military files, they had to come from three or four different sections of the country. In many instances they were in the hands of the military services themselves. In addition, the civilian cases were already in prison at the time of the proclamation and given priority because they had to be given 30-day furloughs from prison, and we wanted to reach a decision and a recommendation for the President without the necessity of these individuals having to go back to prison until the decision had been made.

So it is not a departure. It is our first recommendations on military cases.

The cases which we request the President to upgrade immediately will be the unusual ones, the ones in which justice unambiguously demands immediate corrective action. We will recommend pardons and clemency discharges in many more cases, however. In all of those other cases, we will recommend that the President direct the military discharge review boards or other appropriate military tribunal to review the cases anew in order to determine whether there should be further upgrading of discharges beyond a clemency discharge.

Senator KENNEDY. Why can't the Board do this at the time of their initial decision? Why would you turn this over to a military board? Why would you recommend separate proceeding?

Mr. GOODELL. A board could do it, at least the President could do it upon the recommendation of the board.

It is the board's feeling that for the most part, the President conceived of this program upgrading through the clemency board through a clemency discharge. That is the way it was written in the Executive order and in the proclamation.

We have departed from that only in these exceptional cases where we feel the President himself would want to take the action of upgrading.

We also feel that the discharge is peculiarly a military function. A discharge is a characterization of a man's military service. We feel that for the most part the military should have the responsibility of upgrading those discharges beyond the clemency discharge if they feel they are justified.

I would point out that in reviewing these cases the military would be looking at the man's military record, absent the offenses for which he has been pardoned by the President. We feel that is more commensurate with the procedures of the military, will disturb the procedures of the military the least and is peculiarly appropriate under these circumstances.

And we will recommend that de novo review be conducted without reference to the offense for which a pardon has been granted, as if that AWOL or desertion offense were not on the record.

Senator KENNEDY. In this area there are some points that come to mind. For example, what would that mean in terms of eligibility for veteran's benefits?

Mr. GOODELL. For those the President upgrades immediately to a general discharge or an honorable discharge, it is likely they would be eligible for veteran's benefits. This is another reason why we think the bulk of these cases should be determined by the military.

In order to be eligible for veteran's benefits an individual must have served at least 180 days. I would estimate that not half would qualify.

The military service itself and the President can upgrade discharges and make it clear that individuals, although they have discharges under honorable conditions, are not eligible. That is a decision that the President or the services can make. The value of that is that you would be upgrading the certificate in the nature or categorization of the man's military service but you would not be giving him veteran's benefits. The bulk of these cases overwhelmingly would not receive veteran's benefits and the board would not recommend that they do.

Senator BURDICK. Mr. Chairman.

Senator KENNEDY. Yes.

Senator BURDICK. Welcome to the subcommittee.

Mr. GOODELL. Thank you.

Senator BURDICK. I will refer to the last sentence which you read which is as follows: "We will recommend that the de novo review be conducted without reference to the offense for which a pardon has been granted—as if that AWOL or desertion were not on the record."

Are you recommending expungement?

Mr. GOODELL. No, the President does not have the power to expunge, even if we were recommending.

Senator BURDICK. What do you mean, as if the AWOL and desertion offense were not in the record?

Mr. GOODELL. The individual may have been in the service for 10 or 12 months. He may have honorable service. In some instances, as I mentioned, he may have fought in Vietnam. We had one individual who volunteered as a helicopter doorgunner, perhaps the most dangerous position in Vietnam.

Senator THURMOND. Volunteered as what?

Mr. GOODELL. Helicopter doorgunner. He came back to the United States, and after being here a short while wanted to go back to Vietnam, because he said he couldn't take the shoeshining and spit and polish. He wanted to go back and fight. He was denied that opportunity and he went AWOL two or three times. He was picked up and given a general court martial and originally sentenced to a dishonorable discharge, later upgraded to a bad conduct discharge.

I am talking this kind of example to make clear to you what we mean. In that instance, if he went before a military discharge review board the President would have pardoned his AWOL's, and therefore the military discharge review board would examine his military record without reference to those AWOL's and see if they feel it deserves an upgrading beyond a clemency discharge. That is what I mean by ignoring the AWOL offenses.

The military discharge review board would look at the character of that man's military service, his honorable service, service overseas, decorations for valor, whatever else, and they would make a determination whether it ought to be upgraded further, setting aside the AWOL's which have been pardoned by the President.

Senator BURDICK. Then there is no physical expungement in any phase of this?

Mr. GOODELL. There is no expungement in any phase of it, that is correct. All that happens is a man has a dishonorable discharge and a conviction in the military record or if he has been convicted in Federal Government, draft evasion, his record is stamped pardoned and the record remains the same.

Senator KENNEDY. In this particular example, if that same person deserted, would he be eligible for the clemency program?

Mr. GOODELL. If he deserted?

Senator KENEDY. Yes.

Mr. GOODELL. If he had been deserted from the military service, if he had been picked up and punished, he had been convicted, he would be eligible. If he had not been picked up he goes back through the military.

Senator KENNEDY. What if he stays in the service but refuses to fight?

Mr. GOODELL. He is not eligible for the program.

Senator KENNEDY. What is the distinction in terms of the people? How does that make any sense? You have the same background. If the guy stays in the service, he isn't eligible for clemency, but, if he goes over-the-hill, then he is eligible?

Mr. GOODELL. I can give a good many other examples.

Senator KENNEDY. Can you help me on this one first, and then give me the other examples?

Mr. GOODELL. What I would hasten to point out to you is that all kinds of examples of that nature are not covered. The President limited the program to absence-related offenses which were the most direct ways of protesting or the most direct ways that individuals who were confused or got involved with the law, and for those draft evasion offenses that were specifically covered.

As far as the difference in the President's program and the case you give, there is no difference in terms of the conscientious motivation. There is a difference in the form of protest that he chose to express his opposition, and in that example you can make an argument that there is danger of undermining military discipline more and refusing to obey orders than there is to leave.

I wouldn't make that argument particularly. I think when you start drawing lines here you have to draw them somewhere, and the President drew them on the absence-related and draft offenses.

Senator KENNEDY. I would think that from a military point of view, it is more dangerous to have deserters than individuals who are refusing to obey, particularly if they have an ongoing battle.

Mr. GOODELL. Quite conceivably. That would depend on the nature of the offense and where they did it. I would suspect if somebody refused to shoot his guns on the front lines that would be a very serious offense.

Senator KENNEDY. I suppose this gets back to part of the problems you are faced with when attempting to delineate through a set of circumstances and motivations in any particular case. But I also suppose it raises some questions as to how that particular dilemma fits into the more general comment of the President and what he hoped to be able to achieve with the clemency procedure. But obviously you are limited in terms of the order itself.

Mr. GOODELL. That is correct. Might I make one other point in reference to this. The President very carefully created a program in which there would be no attempt to have a hearing and a determination of the degree of conscientious feeling that was involved. Individuals who came on this program were offered the opportunity and are offered the opportunity automatically to get alternate service and to qualify either for a discharge from the military or have the charges dropped in Federal court.

When an individual comes back, for instance, on the other phase of the program from Canada to the U.S. attorney, there is no discussion about his motivation. The only discussion is whatever he might have been doing to reduce the 24-month period, the length of that alternate service. The President intended it that way. He didn't want people to come back to forums and bring in their ministers and their friends and say I was conscientious. They qualify automatically. The same is true under the clemency program if we feel their overall record justifies it. We do consider it mitigating if there are conscientious factors clear in the record. We consider it aggravating if there are minipulative, deceptive aspects in the record.

Senator KENNEDY. Before we leave this point on the procedural ability to upgrade the discharge on the recommendation of the Clemency Board, I want to determine if that same procedure is available if the individual runs through a DOD procedure and gets a clemency discharge?

Mr. GOODELL. He is eligible to apply to these boards, discharge review boards after he gets an undesirable clemency discharge.

Senator KENNEDY. Are the procedures the same, whether they come from a Clemency Board being able to upgrade his discharge or go through the DOD?

Mr. GOODELL. The only difference is we are recommending to the President that he request the Board to automatically review the ones that come from ours.

Senator KENNEDY. And it is not automatic——

Mr. GOODELL. Not automatic in the case of the military. They would have to apply.

Senator KENNEDY. Why shouldn't it be the same?

Mr. GOODELL. We don't control the Defense Department's program. They may actually intend to do that. I am not aware it if they do.

Senator KENNEDY. We will get to this point a little later. The fact is that we do have three different channels working on this and some difference in the procedures are apparent in each.

In the minds of most Americans you are the prime mover in this area, as I believe quite frankly you are and should be; yet, you have these differences in terms of procedures or regulations which obviously will have a real impact on the type of justice that individuals will receive.

Mr. GOODELL. Well, there are differences in the procedure, no question about it. These applicants, however, are in different situations. They have a different history.

In the case of the individuals who go to the U.S. attorney, these are civilians who never went into the military, they went underground to Canada or Sweden or whatever. Now they want to go back and they go to the U.S. attorney. They are subject to indictment and prosecu-

tion. They have in many instances charges pending against them. So they are treated differently.

In the case of the military, these are cases of individuals who were in the services who deserted and left and have never been picked up, 12,500 of them out there, according to the Defense Department's estimate and they can come back and the military handles them.

In our case, we are handling either military or civilians who have been picked up, punished, stayed here either out of conscientious feeling and went to prison or because they were mixed up and confused about trying to conform to the Selective Service, or they had family problems if they were in the service.

Senator KENNEDY. A point I thought you made quite effectively earlier is that many of the applicants are not from educated or middle-class backgrounds and are generally unsophisticated, inarticulate people. What we are saying is that it makes a rather significant difference whether the young man having problems makes up his mind to avoid the draft before he gets in the Selective Service System. If he decided to avoid the draft system altogether and consequently went to prison, then he would have to apply for amnesty through the Clemency Board. On the other hand, if he registered for the draft and then opted to leave the country, he would apply for clemency through the Department of Justice and later face the U.S. attorney, who in many situations may be a hard-driving prosecutor in what he believes are the regulations. And third, if he went into the military, he is now required to follow the clemency procedures established by the Department of Defense. There are obviously three distinctive procedural avenues to follow for consideration of one offense.

You can point out that you are consolidating them, coordinating them, and getting a similar kind of plan, but one of the things generally of concern to me and others is that you are getting a lot of different applications of these rules and regulations as we saw all the way through the draf system. The mechanic in Boston never got an occupational deferment, but he did in Detroit. One of them was slugging around in Vietnam while the other one was sipping beer.

We have seen a lot of these differences because procedures and the regulations were different. I am concerned that with three diverse agencies handling this program, you will get a dissimilarity in the kinds of justice they receive.

Mr. GOODELL. I understand your concern, and I will say to you it is absolutely true. We had some 3,000 draft boards around the country. That is the way the system was set up and centralized to have those individuals make the decisions.

I would point out to you another factor that should be understood when we are talking about a clemency program. The college youngster had a big advantage. We know that during the great deferment, the sixties, a great deal of that occurred on the college campuses. Most of those men did not go. They had educational deferments. They had advisory committees set up to help them.

Senator KENNEDY. They got married and were able to pyramid their deferments.

Mr. GOODELL. There were a variety of things that happened. The bulk of the young people who were eligible, voting age, I mean age-wise, did not go. So we have to keep that in mind when we talk about

dealing with this very small number of individuals who got involved in this system, and most of them, I say to you from what we have seen of the nature of them who come here, were low in education, relatively low income with a multiplicity of family problems, emotional problems which occur in every war period, and as a matter of fact, in peacetime.

You as Senators see them, have them apply to you constantly, and we found that the veterans' groups, now that they see the nature of most of the applicants, are helping. They help them, as the American Legion, go before the military in various existing tribunals to get various upgraded discharges.

Senator HART. What is the circumstance of that one case? What kind of individual is the American Legion assisting? I speak not critically of the Legion.

Mr. GOODELL. That individual's application has not been presented to the Board as yet, so I can't tell you in detail the nature of his situation.

I can tell you that when informed by the staff of the American Legion that they were representing one, it was on the basis that his circumstances were very similar to thousands of others that the American Legion regularly tries to help in dealing with the VA or the military in upgrading discharges. But I can't give you the details. I am sorry, Senator Hart.

Senator HART. Well, I am glad that they are taking that attitude.

Mr. GOODELL. We are, too, as a matter of fact. I can't obviously speak for those groups, they will speak for themselves, but I think we have benefited greatly, and I hope they have, since the creation of the Clemency Board.

Senator KENNEDY. I'm glad you mentioned that, Mr. Goodell. I think there have been a lot of questions as has been pointed out. The enormous amount of emotion involved in this whole kind of question results in a wide variety of differences about how to proceed, all across the population. I think when a group of individuals are attempting to play a constructive role in working our way through a very thorny problem, they ought to be recognized for it.

Mr. GOODELL. It probably is appropriate for me to interrupt my own statement. I made reference to the 9-member Clemency Board. We have on that Board Commander Walters, Commanding General in Vietnam in the Marines, retired now. We have an individual who lost the use of his leg in Vietnam, an individual who won the Silver Star in Vietnam, we have representatives from a variety of other points of view, Father Hesburgh and Mr. Jordan. We started out with some pretty tempestuous sessions. We started to go through the cases individually and just kept discussing the approach that we should take to dispose of these cases. I am very proud to tell you that the Board is unanimous on the substantive regulations, on the approaches we take, the results we recommend. We have some divided votes, which is really 3 months up or down in the length of alternate service. But the Board has been virtually unanimous in its approach. This has been an outgrowth of the educational process that we went through as we looked at these cases and discussed what was the fair and just thing to do. I am very proud that has been the option.

I hope there can be enough enlightenment to the people generally

in the country as to the nature of the program for the same thing to happen in the country.

Senator HART. Mr. Chairman, could I ask Mr. Goodell if one or more Board members have discussed the point raised earlier that only about 10 percent of those eligible actually went into service; that 90 percent, for many reasons, didn't. Why should the few who went and who are before us now under this program be required to do still extra service?

Mr. GOODELL. Well, let me address myself directly to that, Senator Hart.

As you know, I was one of those opposed to the war in Vietnam and argued very strenuously against it. I felt from a conservative viewpoint this was a terrible mistake, and I say that advisedly. I felt we were spending our American lives and our American fortune and decimating a country and a people for no good reason to serve national security.

During that period, I was asked frequently what would I do if I were a young man and I got orders to go in the service, and I said consistently I would go. That is the law. That is my obligation, even if I differ with my country. I respect those who as a matter of conscience feel they cannot go, but I would.

I feel, Senator Hart, that even though any system you have for Selective Service is inevitably unfair. There is no way of selecting out of 27 million people 500,000 or 750,000 to go and to say that this is 100 percent fair. The country makes some arbitrary judgments. They feel it is valuable to the country that an individual have an education, for instance, more valuable for the service that they go in after education than before. The country makes decisions about hardship deferments, about physical qualifications which are necessary. It is not very fair if an individual happens to have a lame foot or bad back or some other disability that he does not have to go and somebody else goes over and gets shot and dies; this is inevitable.

I think those who are called do have an obligation. I feel very deeply about President Ford's program. What he has done here with this program is say to these individuals, all right, we had our divisions throughout the period of war in Vietnam. I don't think you were right, and you don't think the country was right. But now we are offering you the opportunity to come back and discharge your continuing obligation to your country that you as a matter of principle said you couldn't do in the military during the war in Vietnam. I think that is eminently fair. If they want to come back and discharge that continuing obligation, it is a neutral approach, not a punitive one, in my view, but they do have the obligation and they must discharge it. That is the President's program.

Now, there is no way that my friends who believe in unconditional amnesty are going to be persuaded by my comments, obviously. I am sure a great many people who are sincere in principle who went to Sweden or Canada are not going to be persuaded and I respect them. The Clemency Board is not in the business of trying to recruit or solicit or persuade. We are in the business of trying to be fair in administering a program that is available for those who want to use it.

My biggest concern is that a bulk of the people who are eligible who got picked up and punished, who I am convinced don't know they are eligible or they would be applying. They have nothing to lose to apply. If we say no clemency they remain in exactly the status

they are in right now. There is no prosecution, no punitive aspect. If we give them clemency and say do 12 months of alternate service and get a pardon, if they don't want to they don't get their pardon. They can stay right where they are. We don't have any more than the other two programs.

Interestingly enough, it is the Defense Department that is getting the largest number, percentagewise. They are close to 20 percent of the eligible applicants to the military program.

Senator HART. I was just curious as to whether the suggestion had been made explicitly in Board discussions.

Mr. GOODELL. It was. It was discussed at some length in our Board.

Senator HART. I respect the position that you maintained here in the Congress over those years very greatly.

Mr. GOODELL. Thank you.

Sorry I diverted.

Senator KENNEDY. Just to carry on the point that Senator Hart made, is the reason for the alternate service, as you view it, punishment?

Mr. GOODELL. No; not any more than it is punishment when you are called to serve your country in the first place. Maybe you call it a patriotic duty or privilege. We had the situation in this country at least until the sixties with a war that was very unpopular and unjustified, but in World War II it was not punishment. You had the opportunity to go and serve your country. I know I and many others tried very hard to get into the service.

Senator KENNEDY. Is it your position that if the reason is not punishment, it is in our national interest to have these men serve in this kind of employment?

Mr. GOODELL. Yes; I think it is.

Senator KENNEDY. We have 8.4 percent unemployment in Massachusetts. It is extremely difficult for returning veterans to get jobs. If we have these young men taking jobs away from other people, if that is really in our national interest, if that is what we are considering, and if alternate service is not viewed as punishment, then should we be looking at it from a job market point of view and saying that it is the most effective way to meet some of our needs, or the best way to find hospital attendants, librarians, or other community assistants?

Mr. GOODELL. As you know, the President was very explicit. Under no circumstances would any of these jobs be in a competitive market or taking jobs from others who are out there trying to get jobs and getting help, veterans particularly, of course. That is a phase of the program that is handled by the Selective Service System, and I recommend to you—I know you will question them when they appear. They have appeared before the Clemency Board twice to brief us. They have assured us that none of the jobs in the competitive market are being taken away from anybody else. These are relatively low-paying jobs or noncompetitive type jobs.

Senator KENNEDY. They are extremely low-paying jobs, aren't they?

Mr. GOODELL. Some are not very low-paying, but they are not very competitive. They have one doctor.

Senator KENNEDY. What do they receive in compensation?

Mr. GOODELL. The language is a comparable standard of living to what they would have in the military. It does not limit the wages as

such. So technically this is something that Selective Service should testify on. Technically I presume a man who would be a lieutenant in the military, his comparable standard of living outside would be significantly higher. I don't know whether they have very many of those.

Senator BURDICK. Mr. Chairman, just so I get this thing clear——

Mr. GOODELL. We are getting the questions over early here.

Senator KENNEDY. I am sorry. I have been the guilty one.

Senator BURDICK. This is purely an executive program?

Mr. GOODELL. That is correct.

Senator BURDICK. Your Board was appointed by the President and you have no other powers than recommendation?

Mr. GOODELL. Yes.

Senator BURDICK. The legislative branch is not involved?

Mr. GOODELL. That is correct.

Senator BURDICK. Your recommendations are acted upon favorably or unfavorably by the President?

Mr. GOODELL. Yes.

Senator BURDICK. You have no input into the judiciary?

Mr. GOODELL. None whatsoever.

Senator BURDICK. I know the young man who must have been in Canada in my home State appeared before the court and said here I am, no recommendation available for your Board for that reason?

Mr. GOODELL. No; that matter is entirely in the hands of the Justice Department and the court.

Senator BURDICK. So there is nothing the legislative branch has to do with this at all?

Mr. GOODELL. Well, you may be called upon to give us a little financing down the road, but other than that, nothing else.

Senator BURDICK. That is all.

Thank you.

Mr. GOODELL. We have received a firm indication from the Department of Defense that it is amendable to the procedures which we propose for upgrading discharges.

Let me now turn to the Board's procedures, a copy of which is attached to my statement. We have sent copies for comment to every Member of Congress, to veterans' and civil liberties groups, to antiwar organizations, to every State and major local bar association and to a number of private attorneys. I am pleased to say that for the most part, the proposed rulemaking appears to have been well-received. Suggestions and criticisms will be reflected in final rulemaking which we will issue in a few days.

[The document referred to above follows:]

TITLE 2—CLEMENCY, CHAPTER II—PRESIDENTIAL CLEMENCY BOARD, PART 201—ADMINISTRATIVE PROCEDURES, PART 202—SUBSTANTIVE STANDARDS OF THE PRESIDENTIAL CLEMENCY BOARD

PROCEDURES AND STANDARDS

In order to accommodate new regulations being issued by the Presidential Clemency Board, the heading of Title 2 of the Code of Federal Regulations is changed to read: Title 2—Clemency. In addition, a new Chapter II, Presidential Clemency Board, is added, reading as set forth below.

This notice of rulemaking sets forth in Part 201 the administrative procedures

and in Part 202 the substantive standards to be used by the Presidential Clemency Board (hereinafter "the Board") in accepting and processing applications from individuals subject to the jurisdiction of the Board and in the determination of its recommendations to the President concerning those individuals.

The Presidential Clemency Board has made every reasonable effort to assure to both applicants and those individuals who may be subject to the jurisdiction of any of the three parts of the Presidential clemency program every procedural consideration. Applicants will be sent notice concerning the procedures and standards used by the Board; their privacy will be respected in every way possible within the bounds of the law. All information concerning the applicant which is sought by the Board from governmental sources will be open to inspection by the applicant or his representative. The records and files concerning the applicant will be summarized by an attorney on the staff of the Board, and sent to the applicant for his amendment and correction. A sure process for the appeal of adverse determinations has been established. In the Board's discretion, the applicant or his representative may be allowed to present an oral statement to the Board prior to its determination of his case. Each applicant will have an opportunity to petition for reconsideration of the decision to recommend, grant, or deny executive clemency in his case.

Individuals who may be subject to the jurisdiction of the Department of Justice or the Departments of Defense or Transportation will be assisted in confidence in determining their status with respect to the clemency program.

Finally, it cannot be too often stated that an applicant may apply to the Clemency Board without risk. His application will be held in confidence, and he may withdraw his application at any time.

It is the intent of the Presidential Clemency Board to provide notice to applicants, and to maximize public certainty and predictability, about the substantive standards which the Board will apply in recommending to the President proposed dispositions of applications for executive clemency under Proclamation 4313 (published in the FEDERAL REGISTER on September 17, 1974, 39 FR 33293). It is further the intent of the Board to ensure equity and consistency in the way that similarly situated applicants are treated.

The Presidential Clemency Board therefore herein publishes the substantive standards to which it has committeed itself in the implementation of the clemency program. Applicants for executive clemency under the program are invited to submit evidence suggesting that one or more of the mitigating circumstances listed below apply to their case, or that one or more of the aggravating circumstances listed do not apply to their case. Applicants are also invited to submit letters from third parties containing such evidence, or to ask other people to write directly to the Board on their behalf.

It is contemplated that the Board will weigh the factors listed below in each individual case. It is not contemplated, however, that any one of these factors will necessarily be dispositive of a particular case.

Actions taken and determinations made by the Presidential Clemency Board and members of the Board's staff prior to the issuance of these regulations have been in substantial compliance with the provisions thereof.

Because of the short duration of the Presidential clemency program, and for other good cause appearing, it is hereby determined that publication of this chapter in accordance with normal rule-making procedure is impracticable and that good cause exists for making these regulations effective in less than thirty (30) days. Notwithstanding the abbreviated rulemaking procedure, however, comments and views regarding the proposed chapter are solicited, and may be filed to be received no later than 5 p.m. d.s.t., December 12, 1974. Comments should be submitted in five (5) copies, and directed to:

Office of the General Counsel
Presidential Clemency Board
The White House
Washington, D.C. 20500

(Executive Order 11803, 39 FR 33297)

In consideration of the foregoing, this chapter will become effective immediately.

Issued in Washington, D.C., on November 25, 1974.

CHARLES E. GOODELL,
Chairman,
Presidential Clemency Board.

1. Part 201 is added to read as follows:

Sec.
201.1 Purpose and scope.
201.2 General definitions.
201.3 Initial filing.
201.4 Application form.
201.5 Assignment of Action Attorney and case number, and determination of jurisdiction.
201.6 Initial summary.
201.7 Final summary.
201.8 Consideration before the Board.
201.9 Recommendations to the President.
201.10 Reconsideration.
201.11 Referral to appropriate agencies.
201.12 Confidentiality of communications.
201.13 Representation before the Board.
201.14 Requests for information about the clemency program.
Appendix A.

AUTHORITY: E.O. 11803, 39 FR 33297.

§ 201.1 Purpose and scope.

This subpart contains the regulations of the Presidential Clemency Board, created pursuant to Executive Order 11803 (39 FR 33297) concerning the procedures by which the Board will accept and process applications from individuals who avail themselves of the opportunity to come within its jurisdiction. Certain other matters are also treated, such as the assistance to be given to individuals requesting determinations of jurisdiction, or requesting information respecting those parts of the Presidential Clemency Program which are administered by the Department of Defense and the Department of Justice under Presidential Proclamation 4313 (39 FR 33293).

§ 201.2 General definitions.

"Action attorney" means an attorney on the staff of the Board who is assigned an applicant's case and is thereafter responsible for all information-gathering and communications concerning that applicant's case from the applicant's initial filing until final disposition has been made by the Board.

"Applicant" means an individual who is subject to the jurisdiction of the Board, and who has submitted an initial filing.

"Board" means the Presidential Clemency Board as created by Executive Order 11803, or any successor agencies.

§ 201.3 Initial filing.

In order to comply with the requirements of Executive Order 11803 as to timely application for consideration by the Board, an individual must make an initial filing prior to January 31, 1975. The Board will consider sufficient as an initial filing any written communication received from an individual or his representative which requests consideration of the individual's specific case or which demonstrates an intention to request consideration. Oral initial filings will be considered sufficient if reduced to writing and received by the Board within thirty (30) calendar days.

§ 201.4 Application form.

(a) Upon receipt of an initial filing a member of the Board's staff will make a determination of probable jurisdiction. Applicants who are clearly beyond the Board's jurisdiction will be so notified in writing. An applicant who questions this adverse determination of probable jurisdiction should promptly write the General Counsel, Presidential Clemency Board, The White House, Washington, D.C. 20500, stating his reasons for questioning the determination. The General Counsel of the Board shall make the final determination of jurisdiction.

(b) An applicant who has been notified that probable jurisdiction does not lie in his case will be considered as having made a timely filing should the final decision be that the Board has jurisdiction over his case.

(c) Applicants who are within the probable jurisdiction of the Board will be sent by mail:

(1) An application form (see appendix "A" [1]);

[1] Filed as part of the original document.

(2) Information about the Presidential Clemency program and instructions for the preparation of the application form (see appendix "B");

(3) A statement describing the Board's procedures and method of determining cases.

(d) The applicant will be urged to return the completed application form to the Board as soon as possible. In the absence of extenuating circumstances, completed application forms must be received by the Board within thirty (30) calendar days of receipt.

§ 201.5 Assignment of Action Attorney and case number, and determination of jurisdiction.

(a) Upon receipt of all necessary information, the applicant's case will be assigned to an Action Attorney, who will make a preliminary determination of the Board's jurisdiction. If the Action Attorney determines that the Board has jurisdiction over the applicant, a file for the applicant's case will be opened and a case number for that file will be assigned. With the opening of the file, the Action Attorney shall request from all appropriate government agencies the relevant records and files pertaining to the applicant's case before the Board.

(b) In normal cases, the relevant records and files will include for civilian cases the applicant's files from the Selective Service System and the Bureau of Prisons, and for military cases the applicant's military personnel records, military clemency folder, and record of court martial. Applicants may request that the Board consider other pertinent files, but such applicant-requested files will not be made available to the applicant and his representative as of right.

(c) Where the initial filing contains adequate information, Board staff may assign a case number and request records and files prior to receipt of the completed application form.

(d) If the Action Attorney determines that probable jurisdiction does not exist, he will promptly notify the applicant in writing, stating the reasons therefor.

(e) An applicant who questions this adverse determination of jurisdiction should write the General Counsel of the Board in accordance with the provisions of § 201.4(a).

§ 201.6 Initial summary.

(a) Upon receipt of the necessary records and files, the Action Attorney will prepare an initial summary of the applicant's case. The files, records, and any additional sources used in preparing the initial summary will be noted thereupon; no material not so noted will be used in its preparation. The initial summary shall include the name and business telephone number of the Action Attorney who prepared it, and who may be contacted by the applicant or his representative.

(b) The initial summary shall be sent by certified mail to the applicant. The summary will be accompanied by an instruction sheet describing the method by which the summary was prepared, and by a copy of the guidelines that have been adopted by the Board for the determination of cases. Applicants will be requested to review the initial summary for accuracy and completeness, and advised of their right to submit additional sworn or unsworn material. Such additional material may be submitted in any length, but should be accompanied by a summary of not more than three (3) single-spaced, typewritten, letter-sized pages in length. If a summary of suitable length is not submitted with the additional material, the Action Attorney will prepare such a summary.

(c) At any time after the mailing to the applicant of his initial summary, the applicant's complete Board file, and the files from which the summary was prepared, may be examined at the offices of the Board by the applicant, his representative, or by any member of the Board. An applicant or his representative may submit evidence of inaccurate, incomplete, or misleading information in the complete Board file.

(d) An applicant's case will be considered ready for consideration by the Board not earlier than twenty (20) days after the initial summary has been received by the applicant. Material which amends or supplements the applicant's initial summary must therefore be received by the Board within twenty (20) days to insure that it will be considered, unless within that period the applicant requests and receives permission for an extension. Permission for late filing shall be liberally granted, if the request is received prior to Board action.

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§ 201.7 Final summary.

(a) Upon receipt of the applicant's response to the initial summary, the Action Attorney will note such amendments, supplements, or corrections on the initial summary as are indicated by the applicant.

(b) The final summary shall then consist of the intial summary with appropriate amendments and additions, and the summary of the materials submitted by the applicant as described in § 201.6(b).

§ 201.8 Consideration before the Board.

(a) At a regularly scheduled meeting of the Presidential Clemency Board, a quorum of at least five (5) members being present, the Board will consider the applicant's case.

(b) The Action Attorney will present to the Board, a brief statement of the final summary of the applicant's case. The Action Attorney will then stand ready to answer from the complete file any questions from the members of the Board concerning the applicant's case.

(c) At the Board's discretion, it may permit an applicant or his representative to present before the Board an oral statement, not to exceed ten (10) minutes in length. Neither applicant nor his representative may be present when the Board begins deliberations, but should remain available for further consultation immediately thereafter for a period not to exceed one hour.

(d) After due deliberation, the Board will decide upon its recommendation to the President concerning the applicant's case, stating the reasons for its recommendation.

§ 201.9 Recommendations to the President.

(a) At appropriate intervals, the Chairman of the Board will submit to the President certain master warrants listing the names of applicants recommended for executive clemency, and a list of names of applicants considered by the Board but not recommended for clemency. The Chairman will also submit such terms and conditions for executive clemency if any, that have been recommended in each case by the Board.

(b) Following action by the President, the Board will send notice of such action in writing to all persons whose names were submitted to the President. Persons not receiving executive clemency will be so notified.

§ 201.10 Reconsideration.

(a) An applicant may petition the Board for reconsideration of his grant or denial of executive clemency, or of the terms and conditions thereof.

(b) Such petitions for reconsideration, including any supplementary material, must be received by the Board within thirty (30) days of the mailing of the notification in § 201.9(b).

(c) At a regularly scheduled Board meeting, a quorum being present, the Board will consider the applicant's petition for reconsideration.

(d) In appropriate cases, the Board may permit an applicant or his representative to present before the Board an oral statement not to exceed fifteen (15) minutes in length.

(e) After due deliberation, the Board may either:

(1) As to any person granted executive clemency, let stand or mitigate the terms and conditions upon which executive clemency was granted;

(2) As to any person denied executive clemency, recommend to the President that he grant executive clemency in accordance with such terms and conditions as may be appropriate; or

(3) As to any person denied executive clemency, again not recommend the applicant for executive clemency.

§ 201.11 Referral to appropriate agencies.

After the expiration of the period allowed for petitions for reconsideration, the Chairman of the Board shall forward for further action to the Secretaries of the Army, Navy, and Air Force, the Secretary of the Department of Transportation, the Director of the Selective Service System, and the Attorney General, as appropriate, the President's determination as to each recipient of executive clemency.

§ 201.12 Confidentiality of communications.

(a) The Board has determined that it will take all steps possible to protect the privacy of applicants and potential applicants to the Presidential clemency program. No personal information concerning an applicant or potential applicant and related to the Presidential clemency program will be made known to any agency, organization, or individual, whether public or private, unless such disclosure is necessary for the normal and proper functioning of the Presidential Clemency Board. However, information which reveals the existence of a violation of law (other than an offense subject to the Presidential clemency program) will of necessity be forwarded to the appropriate authorities.

(b) In order to have his case considered by the Board, an applicant need submit only information sufficient for a determination of jurisdiction, and for the retrieval of necessary official records and files. The application form will therefore require the applicant's name; date of birth; selective service number; military service and service number, if applicable; information concerning the draft evasion offenses or absence-related military offenses and the disposition thereof; and the mailing address of either the applicant or his representative. If the applicant submits such information as part of his initial filing, the completion of the application form itself is not necessary.

§ 201.13 Representation before the Board.

(a) Although an applicant may bring his case before the Board without a representative or legal counsel, each applicant is entitled to representation and will be encouraged to seek legal counsel experienced in military or selective service law. Upon request, Board staff will attempt to refer an applicant to a skilled volunteer representative.

(b) An applicant who does not wish to file his application in person may have his representative do so on his behalf.

§ 201.14 Request for information about the clemency program.

(a) Upon receipt by the Board of an oral or written request for information or consideration concerning an individual who is clearly beyond the jurisdiction of the Board, a member of the Board's staff shall inform the individual:

(1) That jurisdiction does not lie;

(2) Whether jurisdiction may lie within the Presidential clemency program, and if so, with which agency;

(3) That in the event the individual prefers not to contact personally such other agency that an Action Attorney will obtain from such other agency information concerning the individual's status with respect to the Presidential clemency program, and provide to the individual that information.

(b) The Action Attorney shall submit to the Executive Secretariat of the Presidential Clemency Board a summary of the communication with, and information provided to, such individuals.

APPENDIX A

INSTRUCTIONS FOR APPLICATION FOR CLEMENCY

On September 16, 1974 the President announced a program of clemency. Depending on your case, you may apply to the Presidential Clemency Board, the Department of Justice, or the Department of Defense.

You may be eligible for clemency by the Presidential Clemency Board if you have been convicted of a draft evasion offense such as failure to register or register on time; failure to keep the local board informed of current address; failure to report for or submit to pre-induction or induction examination; failure to report for or submit to or complete service, during the period from August 4, 1964 to March 28, 1973; or if you have received an undesirable, bad conduct, or dishonorable discharge for desertion, absence without leave, or missing movement, and for offenses directly related, between August 4, 1964 to March 28, 1973.

If you are now absent from military service or have a charge against you for a Selective Service violation and have not been convicted or received a discharge, you may still be eligible for elemency under another part of the President's program. If you have any questions, please contact the Board and we will try to answer your questions.

If you believe that you are eligible to be considered by the Presidential Clemency Board but are not sure, you should apply to the Board. If it turns out that you are not eligible for consideration by the Board, you may possibly qualify under another part of the clemency program. You do not have to identify your current location. We will then be able to notify you of the proper agency

to contact. If you are appealing a conviction or a military discharge you may continue your appeal, and still apply to the Board at the same time.

I. The Board will not give its files to any other federal agency. It will keep any information you provide in strictest confidence, except evidence of a serious crime which is not covered in the Presidential Clemency program.

II. Although you may apply to the Board without attorney or any other representative if you wish, we encourage you to obtain the help of legal counsel. If you do not have a counsel but desire one, we will be glad to refer you to a lawyers' organization which will help you find one. These organizations will help you get legal assistance even if you cannot afford to pay.

III. To apply to the Board, you need only supply the information necessary to find your file from other departments. If you do not wish to file your application personally, you may select a representative of your own choice to do it for you, but you must tell us that he is authorized. The Board will maintain its own file on your case and that file will be available for examination by you or your own attorney.

IV. You are encouraged to submit evidence which you feel helps your case, and to submit letters from other people on your behalf. You may submit evidence in order to correct inaccurate, incomplete, or misleading information to the Board's file.

V. A personal appearance by you before the Board will not be necessary.

If you have any questions, please call or write the Presidential Clemency Board. The White House, Washington, D.C. 20500, (202–456–6476). If application is made by a representative on your behalf, it is not necessary that your home address and telephone number be included. Your representative should indicate his capacity (attorney, friend, etc.) and give us his address and telephone number.

Application for people not in custody should be completed and mailed to the Board no later than midnight, January 31, 1975. Special procedures will be established for persons incarcerated whether or not they have been released on furlough.

2. Part 202 is added to read as follows:

Sec.
202.1 Purpose and scope.
202.2 Board decision on whether or not to recommend that the President grant executive clemency.
202.3 Aggravating circumstances.
202.4 Mitigating circumstances.
202.5 Calculation of length of alternative service.

AUTHORITY: E.O. 11803, 39 FR 33297.

§ 202.1 Purpose and scope.

This part articulates the standards which the Presidential Clemency Board will employ in deciding whether to recommend that the President grant executive clemency to a particular applicant, and in then deciding whether that grant of clemency should be conditional, and, if so, upon what specified period of alternative service.

§ 202.2 Board decision on whether or not to recommend that the President grant executive clemency.

(a) The first decision which the Board will reach, with respect to an application before it, is whether or not it will recommend to the President that the applicant be granted executive clemency. In reaching that decision, the Board will take notice of the presence of any of the aggravating circumstances listed in § 202.3, and will further take notice of whether such aggravating circumstances are balanced by the presence of any of the mitigating circumstances listed in § 202.4.

(b) Unless there are aggravating circumstances not balanced by mitigating circumstances, the Board will recommend that the President grant executive clemency to each applicant.

§ 202.3 Aggravating circumstances.

(a) Presence of any of the aggravating circumstances listed herein either will disqualify an individual for executive clemency or may be considered by the Board as cause for recommending to the President executive clemency conditioned upon a length of alternative service exceeding the applicant's "baseline period of alternative service," as determined under § 202.5.

(b) Aggravating circumstances of which the Board will take notice are:

(1) Prior adult criminal convictions.

(2) False statement by applicant to the Presidential Clemency Board.

(3) Use of force by applicant collaterally to AWOL, desertion, missing movement, or civilian draft evasion offense.

(4) Desertion during combat.

(5) Evidence that applicant committed the offense for obviously manipulative and selfish reasons.

(6) Prior refusal to fulfill alternative service.

(7) Prior violation of probation or parole requirements.

§ 202.4 Mitigating circumstances.

(a) Presence of any of the mitigating circumstances listed herein will be considered by the Board as cause for recommending that the President grant executive clemency to a particular applicant, and will in exceptional ceases be further considered as cause for recommending clemency conditioned upon a period of alternative service less than the applicant's "baseline period of alternative service," as determined under § 202.5.

(b) Mitigating circumstances of which the Board will take notice are:

(1) Applicant's lack of sufficient education or ability to understand obligations, or remedies available, under the law.

(2) Personal and family hardship either at the time of the offense or if the applicant were to perform alternative service.

(3) Mental or physical illness or condition, either at the time of the offense or currently.

(4) Employment or volunteer activities of service to the public since conviction or military discharge.

(5) Service-connected disability, wounds in combat, or decorations for valor in combat.

(6) Tours of service in the war zone.

(7) Substantial evidence of personal or procedural unfairness in treatment of applicant.

(8) Denial of conscientious objector status, of other claim for Selective Service exemption or deferment, or of a claim for hardship discharge, compassionate reassignment, emergency leave, or other remedy available under military law, on procedural, technical, or improper grounds, or on grounds which have subsequently been held unlawful by the judiciary.

(9) Evidence that an applicant acted in conscience, and not for manipulative or selfish reasons.

(10) Voluntary submission to authorities by applicant.

§ 202.5 Calculation of length of alternative service.

(a) Having reached a decision to recommend that the President grant executive clemency to a particular applicant, the Board will then decide whether clemency should be conditioned upon a specified period of alternative service and, if so, what length that period should be.

(1) The starting point for calculation of length of alternative service will be 24 months.

(2) That starting point will be reduced by three times the amount of prison time served.

(3) That starting point will be further reduced by the amount of prior alternative service performed, provided that a prescribed period of alternative service has been satisfactorily completed.

(4) That starting point will be further reduced by the amount of time served on probation or parole, provided that a prescribed period of alternative service has been satisfactorily completed.

(5) The remainder of those three subtractions will be the "baseline period of alternative service" applicable to a particular case before the Board: *Provided*, That the baseline period of alternative service shall not exceed a judge's sentence to imprisonment in any case: *And provided further*, That the baseline period of alternative service shall be, notwithstanding the remainder of the calculation above, not less than a minimum of three (3) months.

(6) In exceptional cases in which mitigating circumstances are present, the Board may consider such mitigating circumstances as cause for recommending

clemency conditioned upon a period of alternative service less than an applicant's baseline period of alternative service.

(7) In cases in which aggravating circumstances are present and are not, in the Board's judgment, balanced by mitigating circumstances, the Board may consider such aggravating circumstances as cause for recommending clemency conditioned upon a period of alternative service exceeding, either by three (3) additional months or by six (6) additional months, the applicants' baseline period of alternative service.

[FR Doc. 74-27863 Filed 11-26-74; 8:45 am]

It took some time to develop these regulations. In part, this is explained by the fact that the Presidential Clemency Board has no precise historical model to follow, and no clear precedents in assisting the President in what is a unique executive function. We also wished to become very familiar with the types of cases before us, prior to issuing any rules. Even now we find new aspects in the cases which require further elaboration of our rules. Let me describe briefly how the Board operates.

First, when we receive a communication expressing interest by or on behalf of a possible applicant in any part of the President's program, we mail out an instruction kit.

[The instruction kit referred to above follows:]

PRESIDENTIAL CLEMENCY BOARD
THE WHITE HOUSE
WASHINGTON

Dear Sir:

We understand that you may be interested in applying for clemency under the President's clemency program. Enclosed is an application form which you must return to us if you want your case considered by the Presidential Clemency Board. We have also enclosed materials which describe the procedure that the Board intends to use and some of the factors which it will consider in examining your case.

If you wish to apply, please complete the application form as soon as possible. You should also send us any information you consider favorable to your case. You can send it with your application, or as quickly afterwards as you can. When we receive your application and any additional papers you may want to submit, the Board will begin to review your case.

You will not have to appear personally before the Board. You may, however, call or see one of our staff and you are invited to add to your file whatever you think helpful. You do not need an attorney to apply for clemency, but we do suggest that you seek the advice of one. If you do not know how to get an attorney, we can tell you.

Sincerely,

Charles E. Goodell

Charles E. Goodell
Chairman

Enclosures

PRESIDENTIAL CLEMENCY BOARD
APPLICATION

I hereby apply to the Presidential Clemency Board for consideration.

NAME Last First Middle

Mailing Address City State Zip Code

Phone & Area Code Social Security No. Date of Birth

If you were convicted in federal civil court, or military court-martial, please describe the offense, give date of offense, and the date and place of conviction:

Location of prison where last confined

Former military personnel who were court-martialed or administratively discharged from a military service please complete the following:

Branch of Service Military Service No.
If Soc. Sec. No., please indicate

Year entered military Date of Discharge

Type of Discharge How awarded (check one):

Court-martial ( ) Admin. Discharge Board ( )

Own request to avoid trial ( )

Offenses on which Administrative Discharge based:

Date Signature

PRESIDENTIAL CLEMENCY BOARD
THE WHITE HOUSE
WASHINGTON

INSTRUCTIONS FOR APPLICATION FOR CLEMENCY

On September 16, 1974 the President announced a program of clemency. Depending on your case, you may apply to the Presidential Clemency Board, the Department of Justice, or the Department of Defense.

You may be eligible for clemency by the Presidential Clemency Board if you have been convicted of a draft evasion offense such as failure to register or register on time; failure to keep the local board informed of current address; failure to report for or submit to pre-induction or induction examination; failure to report for or submit to or complete service, during the period from August 4, 1964 to March 28, 1973; or if you have received an undesirable, bad conduct, or dishonorable discharge for desertion, absence without leave, or missing movement, and for offenses directly related, between August 4, 1964 to March 28, 1973.

If you are now absent from military service or have a charge against you for a Selective Service violation and have not been convicted or received a discharge, you may still be eligible for clemency under another part of the President's program. If you have any questions, please contact the Board and we will try to answer your questions.

If you believe that you are eligible to be considered by the Presidential Clemency Board but are not sure, you should apply to the Board. If it turns out that you are not eligible for consideration by the Board, you may possibly qualify under another part of the clemency program. You do not have to identify your current location. We will then be able to notify you of the proper agency to contact. If you are appealing a conviction or a military discharge you may continue your appeal, and still apply to the Board at the same time.

I. The Board will not give its files to any other federal agency. It will keep any information you provide in strictest confidence, except evidence of a serious crime which is not covered in the Presidential Clemency program.

II. Although you may apply to the Board without attorney or any other representative if you wish, we encourage you to obtain the help of legal counsel. If you do not have a counsel but desire one, we will be glad to refer you to a lawyers' organization which will help you find one. These organizations will help you get legal assistance even if you can not afford to pay.

III. To apply to the Board, you need only supply the information necessary to find your file from other departments. If you do not wish to file your application personally, you may select a representative of your own choice to do it for you, but you must tell us that he is authorized. The Board will maintain its own file on your case and that file will be available for examination by you or your own attorney.

IV. You are encouraged to submit evidence which you feel helps your case, and to submit letters from other people on your behalf. You may submit evidence in order to correct inaccurate, incomplete, or misleading information to the Board's file.

V. A personal appearance by you before the Board will not be necessary.

THE FOLLOWING ARE SOME OF THE FACTORS THE BOARD WILL CONSIDER IN EXAMINING YOUR CASE:

1) Education and ability to understand obligations under the law.

2) Personal and family circumstances at the time of offense and afterwards.

3) Mental or physical condition.

4) Employment and other activities since conviction or military discharge.

5) Service-connected disability, wounds in combat or decorations for valor in combat.

6) Tours of service in the war zone.

7) Substantial evidence of personal or procedural unfairness in your case.

8) Denial of conscientious objector status on procedural, technical or improper grounds.

9) Period of imprisonment for the offense.

10) Personal statement regarding the reasons for the offense.

11) Any other information the applicant may wish to submit.

These factors will not necessarily be the only ones which the Board will consider. If you feel there are other facts about your case that should be considered, please submit evidence about them. ANY FALSE STATEMENT TO THE BOARD WILL BE CONSIDERED AN AGGRAVATING FACTOR HIGHLY UNFAVORABLE TO YOUR CASE.

If you have any questions, please call or write the Presidential Clemency Board, The White House, Washington, D. C. 20500, (202 - 456-6476). If application is made by a representative on your behalf, it is not necessary that your home address and telephone number be included. Your representative should indicate his capacity (attorney, friend, etc.) and give us his address and telephone number.

Application for people not in custody should be completed and mailed to the Board no later than midnight, January 31, 1975. Special procedures will be established for persons incarcerated whether or not they have been released on furlough.

This kit describes the program, the Board's procedures, and other aspects of the Board's operations. If the individual is not under the Board's jurisdiction, but falls within the jurisdiction of the Department of Justice or the Department of Defense, we tell him how to pursue his case with them. If he is not under the jurisdiction of any part of the clemency program, we try to suggest other avenues for the relief he seeks.

Once the necessary information is obtained from an applicant, and his files are obtained from Justice or the military services, a Board attorney prepares a summary of the files. The instructions to Board attorneys have been submitted to you. We have an elaborate internal procedure to ensure that the summaries are properly prepared.

[The instructions referred to above follow:]

THE PRESIDENTIAL CLEMENCY BOARD
OLD EXECUTIVE OFFICE BUILDING
WASHINGTON, D.C. 20500

October 5, 1974

PHONE: (202) 456-6476

MEMORANDUM

TO: Staff Attorneys
Presidential Clemency Board

FROM: General Counsel

SUBJECT: Preparation of Initial Summaries of cases

The purpose of the Initial Summary is to pull together a short statement from existing governmental files summarizing all information on an applicant that may be relevant to the Board's decision regarding clemency. This form should be sent to the applicant for additions and corrections. It will be given to the Board for their detailed review, and will be the basic document for all further Presidential Clemency Board action concerning the applicant. It may well become public; this should be kept in mind when preparing the Summary.

It is crucial that the completed form contain a narrative which identifies the individual as a person and allows the Board to look behind the welter of dates and offenses. The Background paragraph especially should be carefully written to present the individual in human terms.

I. Detailed Instructions

A. Offense and Present Status. The offense should be stated in correct, but not legalistic terms. Do not cite applicable statutes, regulations, or Code. Present status should be similarly clear. The remaining blocks are self-explanatory. The purpose of these blocks is to give a first impression of the individual in terms of the factors directly affecting his case before the Board.

B. The Background blocks are to provide a narrative picture of the applicant as an individual, as mentioned above. Use as many of the entries as necessary from II. Possible "Background" entries with whatever additional information you feel helps to present the applicant. The list of "possibles" is neither inclusive nor exclusive, but should form the nucleus of the paragraph. Try to follow a roughly chronological order in presentation, such as is provided in the list of "possibles". Use only information taken from official files. Keep it factual - make no personal conclusions. Cite judgments by source. Example: Comes from broken home (probation report).

C. Mitigating and Aggravating circumstances have been defined by the Board, and are listed in III. Additional pertinent circumstances. Include any information concerning any event in the life of the applicant which is pertinent to the defined circumstances. Be brief but use complete sentences. Minimize or omit non-criminal offenses in prior record, such as traffic offenses. Do not make subjective judgments concerning either mitigating or aggravating circumstances. All entries on the Initial Summary form must be directly traceable to an official file, in both form and content. Derivative judgments should always be cited.

D. The Chronology should be as detailed as space permits. Start with Date of Birth and proceed through the last recorded date of interaction with the legal or military system. This date may be 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. IMPORTANT: Whenever an entry is made reflecting sentencing of the applicant, provide the name of the court in standard form, "DCNC(MD)" for District Court, North Carolina, Middle District. Present the Chronology in two columns, date first. Use two lines only when necessary for clarity. All entries must be non-technical and transparently clear, as "graduated high school" or "jumped bail." The event, not its location, is usually of primary importance (with the exception of the sentencing court, as noted above). It is not unusual for conflicts to emerge from the construction of the Chronology. Asterisk possible errors and contraditions with brief explanatory note at bottom of Chronology. It is usually helpful to construct the Chronology prior to writing the Background paragraph.

II. Possible "Background" entries (in approximate order):

Age
Family size and birth order
Family background/stability
Place where raised
Educational level and test scores
Physical health and mental health
Marital status and present residence
Number of dependents
Employment history
Parole recommendation
Custody level
Type of C. O. and brief statement of belief

III. Additional pertinent circumstances.

The following mitigating and aggravating circumstances have been defined by the Board, and should be highlighted in each summary.

A. Mitigating circumstances

1. Lack of sufficient education or ability to understand obligations under the law.
2. Personal hardship, either at the time of the offense or now.
3. Acute mental or physical illness.
4. Employment of service to the public since conviction or military discharge.
5. Service-connected disability, wounds in combat, or decorations for valor in combat.
6. Tours of service in the war zone.
7. Substantial evidence of personal or procedural unfairness in applicant's case.
8. Denial of conscientious objector status on procedural, technical, or improper grounds.
9. Period of imprisonment for the same offense.
10. Personal statement regarding the offense.
11. Any other information the applicant may wish to submit.

B. Aggravating circumstances

1. Desertion under fire.
2. Use of force collateral to the desertion.
3. Other criminal record.
4. False statement to the Board.

This summary is then mailed to the applicant along with the preparation instructions. The applicant is encouraged to review the summary, submit any additions or corrections, and to send the Board anything he believes the Board should consider when it reviews the case.

Once this process is completed, the case is presented to the Board together with the material the applicant has sent in. We urge individuals to get attorneys and other kinds of assistance. We refer them to those organizations which are available, and make attorneys available.

After the Board examines the case and makes a recommendation, the President reviews that recommendation and issues his decision on clemency. Under the Board's rules, an applicant then has 30 days after the President's action to ask for reconsideration if he feels dissatisfied with the decision. He next passes to the jurisdiction of the Selective Service for the performance of any required alternate service.

Once the service is satisfactorily completed, the Board confirms that the clemency has been earned, and a pardon is issued.

The President's proclamation contemplates a case-by-case evaluation of the applications to the Board, rather than a blanket treatment of whole classes of people. We have carefully drawn our substantive standards so that they are a tool to assist the Board in weighing each case on its merits. The standards help us to separate out cases which should be treated differently, and to treat with consistency and equity those which are similarly situated.

We give special weight to time already spent in prison, and to alternate service and probation or parole already satisfactorily completed under judicial order in deciding appropriate lengths of alternate service.

Equity compels us to consider factors beyond simply time spent in prison. For this reason, for example, Jehovah's Witnesses who have served a little time in prison, but whose violations of law were motivated by deeply held religious beliefs, typically have been offered outright pardons, or have been asked to serve minimal amounts of time where aggravating circumstances have existed in particular cases. On the other hand, persons who acted from no apparent sincerely held ethical or religious convictions about the war have received clemency contingent upon longer lengths of alternate service, even when those persons may have served more time in prison.

The Board has been diligent in creating procedural and substantive rules which can be readily understood by a layman who gives them a careful reading, as well as by a lawyer or other counselor who has not specialized in selective service or military law. We have tried to use simple and clear language, and we have tried to bring the greatest practical degree of due process to a procedure which is, constitutionally, inherently discretionary on the part of the President.

Anyone calling or writing into the Presidential Clemency Board is guaranteed that his name, address, telephone number, and any other information which he gives us will be held in the strictest confidence, unless he has committed a serious nondraft-related or nonAWOL-related criminal offense such as homicide. The Justice Department

has agreed that with this exception, we may keep our own records completely sealed to other agencies.

Since most evaders and deserters within our jurisdiction apparently do not read the New York Times or watch Walter Cronkite frequently, we have taken pains to communicate to them that they are eligible for the President's program. We are mailing information about the program to the last addresses of each person convicted of draft evasion and eligible for Board consideration, thanks to the very fine cooperation of the Federal Probation Service and the Administrative Office of the U.S. Courts. Assuming that such addresses are available from the Department of Defense and the Coast Guard, we will do a mailing to over 114,000 convicted AWOL's and deserters as well. Everyone who applies or inquires to the Board is advised of the advantages of legal assistance. We give to any person who needs counsel the names of organizations which provide volunteer services.

The American Legion, the Los Angeles County Bar, the New York County Bar, the American Bar Association and the Harvard Military Justice Committee have either offered their services as volunteer representatives or expressed a strong interest in doing so.

[A letter from Havard Military Justice Committee follows:]

COMMITTEE ON MILITARY JUSTICE,
HARVARD LAW SCHOOL,
Cambridge, Mass., January 21, 1975.

HON. EDWARD M. KENNEDY
Washington, D.C.

DEAR SENATOR KENNEDY: It has recently come to our attention that during the course of the December hearings of the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure, Charles Goodell indicated in his testimony that the Committee on Military Justice has agreed to act as a referral agency for legal counseling on behalf of the Presidential Clemency Board. This information supplied by Mr. Goodell was incorrect. The assistance of the Committee on Military Justice was sought by the Presidential Clemency Board shortly after the Clemency/Amnesty Law Coordinating Office (CALCO) withdrew its assistance from the program on November 25, 1974. On December 16th, 1974, several days before Mr. Goodell's unfortunate misrepresentation, this Committee sent a letter to Lawrence Baskir, General Counsel for the Clemency Board, indicating that the Committee had declined, by a vote of 27 to 0 with two abstentions, to act as referral agency for the board. Citing the deficiencies in due process in the administration of the program, the program's lack of ultimate value to the applicant, and the program's shortage of funds with which to effectuate legal assistance; the Committee decided it cannot, under present circumstances, participate as a general referral counsel for the Presidential Clemency Board. This remains to this day the position of the Committee.

Sincerely,

JOHN NEBAL,
(For the Committee).

But with the application period over half-completed, many potential applicants are undecided on how to proceed. I would like to see everyone of the 800 who have already applied put in touch with a volunteer attorney. I cannot hide my disappointment that a number of legal organizations have declined to help because of political or philosophical differences with the program. I urge them to put aside these differences in favor of the needs of the applicants.

[A letter from ACLU follows:]

55-550 O - 75 - 4

AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
New York, N.Y., December 23, 1974.

HON. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure, U.S. Senate, Washington, D.C.

DEAR SENATOR KENNEDY: The American Civil Liberties Union is grateful to the subcommittee, and especially to you and to Senator Hart, for the thoughtful and effective fashion in which the hearings last week examined some of the problems and failures of the Presidential clemency program.

Permit me to supplement the record of the hearings with respect to the complaints voiced by Senator Charles E. Goodell in his testimony as Chairman of the Presidential Clemency Board about the refusal of a number of lawyers' group to let the Board refer to those applicants for clemency who seek legal counsel and representation. If my memory is correct, Mr. Goodell expressed his "outrage" at the failure of these groups, many of whose leaders he counted as personal friends, to serve as the "clemency bar" to the Board.

The shoe fits here. The American Civil Liberties Union, through its project on amnesty and through its participation in the Clemency/Amnesty Law Coordinating Office (CALCO) in Washington, has so far declined the request by the Board systematically to refer clemency applicants to us for legal representation. We have not, however, altered in the slightest our commitment, publicly made and systematically implemented, to provide such counsel and such representation to every war resister who wishes to apply for clemency or to pursue other legal options. Our clemency litigation director, Edwin J. Oppenheimer, who is attached to this office, our military rights project attorneys in Washington, and our lawyers concerned with the military clemency operation at Ft. Benjamin Harrison, Indiana (Professor Edward Sherman of the Indiana University School of Law and Gerald Ortman of our staff), together with ACLU staff and volunteer attorneys, represent a goodly number of clemency applicants. They have not and will not refuse an inquiry or a request for legal counsel from war resisters, whether or not the matter is directed to the Presidential clemency program.

What we have so far refused is the desire of the Clemency Board to use ACLU and other groups working with CALCO as legal referral services. We have made the reasons for that abundantly plain to the Board and its staff in a lengthy series of meetings, letters, and memoranda. Until late in November, better than halfway through the application period for clemency, the Board had failed to issue rules and regulations for its own operation and had not even made clear what the remedies and relief would be that it might ultimately offer to applicants. This fundamental failure was so injurious to the interests of the applicants and so crippling to the functioning of responsible lawyers that we felt it essential not to lend ourselves as an emblem of the Board's public respectability by becoming the organized "clemency bar." To have neither a humane and just amnesty nor even minimal due process from the Board within the clemency program but to be able to say that they were doing their level best to be decent—look, even so far out an organization as the ACLU is working with us—that was the intent of the Board which we opposed. ACLU and CALCO set forth certain minimal procedural and substantive demands, short of which we could not cooperate with the Presidential Clemency Board. The Board since then has published certain guidelines, which yield to some of those demands, and the Chairman of the Board announced at your hearings other, totally new, procedures with respect to clemency processing and remedies. We shall promptly consider these, as we gave careful and meticulous attention to the Board's published guidelines, to which we filed lengthy comments. It is now less than six weeks from the expiration of the period in which persons may apply for clemency, and the Board's procedures and the nature of the clemency offered are still in flux. If outrage is in order, surely it must be at the Board, not at those who assert the rights and interests of the war resisters but refused to dignify the Board's failures by becoming publicly associated with it.

We reciprocate Mr. Goodell's confirmation of personal friendship. He cannot wish that friendship to supersede our commitment to due process of law or to the interests of those who continue to suffer the injuries that the Vietnam War inflicted on the American people. To the measure to which the Board's operations approach these commitments, we shall offer it our cooperation.

Sincerely yours,

HENRY SCHWARZSCHILD,
Director, Project on Amnesty.

This is a particularly serious problem because, as I mentioned earlier, many persons eligible for the program, both civilian and military, are not highly sophisticated, well-educated individuals who opposed the war for articulate, well-thought out reasons. Typically, we have a man who found his family ill, or in dire financial straits, or who had domestic problems. Often we find veterans with good and faithful service, often in combat, scarred psychologically by their war experiences and unable to adjust to garrison duty back home. Many of these veterans went AWOL only after being refused a request to return to combat. The President's program offers very real benefits. Criticism that the program does not go far enough only hides the fact that it does go very far indeed. An individual can receive a full pardon restoring his civil rights: His right to vote, his right to apply for a license to be a bartender, a plumber, a barber, a practical nurse or a lawyer.

For those who were in the military service the program may offer not only a clemency discharge, but a full pardon as in the civilian cases, and an automatic review by the military Discharge Review Boards that could lead to a discharge under honorable conditions. These exceptional cases include, among others, men who were wounded or decorated for valor in Vietnam, had several tours of honorable military service, or volunteered for combat duty and subsequently got into personal problems.

In the light of this, I think, that it is outrageous for any volunteer legal group which is concerned about the rights of citizens, and their right to counsel, to refuse to offer legal aid to applicants. It grieves me to say that some very well known groups who differ with the program are refusing to cooperate with the Clemency Board in allowing us to advise applicants that they will provide counsel. We have pleaded with these groups, not for ourselves, but for the people who have applied to the Clemency Board and need help. They, not the Board, lose by the obstinacy of these members of the bar.

Let me close with a final comment about the program.

President Ford has acted in the tradition of Presidents Truman, Wilson, Lincoln, and Washington. I hope that this hearing today will help make more American aware of the deep historical roots of clemency and of the country's need for it now. Perhaps, if it serves that purpose, our being here today will make it just a little bit easier for those who do come back to integrate themselves fully, with dignity and with pride, as Americans and as members of their community again.

Thank you, Senator.

Senator HART. Thank you very much. I apologize for being late.

Before turning to my colleagues may I clarify one point which we approached but didn't nail down. You say the record is not expunged. It is sealed or is it still a public record with the overstamp "pardoned"?

Mr. GOODELL. It is a public record with the overstamp "pardoned."

Senator HART. Would you require authorization to seal the record?

Mr. GOODELL. I believe we could. I believe it is possible the President could order sealing in these cases. We have undertaken to explore that situation. Certainly it would take legislation to expunge the record. Certainly it is conceivable the President could seal it by his own authority.

Senator HART. One more observation from personal experience which I imagine Senator Thurmond might confirm, is that even in popular wars dishonorable discharges might have been given for reasons of expediency. For example, a commander and an AWOL soldier cut a deal: the commander doesn't want the soldier, and the doesn't want to be there so he gets a dishonorable discharge. The soldier is happy to get the discharge because he can't foresee the damage that will do him in the future. The commander is preoccupied with the need to have men who perform instead of someone who is always jamming things up.

I am sure that situation occurred with great frequency during the Vietnam war.

As I gather, that fellow is not eligible for this clemency program unless the discharge was assigned for reason of desertion?

Mr. GOODELL. Absence related, that is correct.

Senator HART. Doesn't the situation I have described include an awful lot of young who now regret deeply cutting the deal that seemed so easy from everybody's point of view at the time he cut it, what can we do for him?

Mr. GOODELL. Let me say first of all that an individual of that nature would not get a dishonorable discharge. That is given only after a general court martial, convicted after a major offense. He would get an undesirable discharge for the good of the service.

Senator HART. But that ticket does cause trouble.

Mr. GOODELL. An undesirable discharge is an undesirable thing for an individual. It is a stigma upon him, it is a burden, very difficult to overcome.

All administrative charges are not under our jurisdiction. This is a program designed to meet these discharges and court martials which were related to Vietnam in some way. The President has chosen inevitably and to a degree arbitrarily offenses and violations which would apply them to this program.

There have been for many years discharge review boards. The individual may apply and try to get his discharge upgraded. There is a board of correction, record correction and the military themselves have the authority to do it in some instances.

Senator KENNEDY. Senator Burdick.

Mr. GOODELL. Senator Burdick, before you ask the question, may I ask the subcommittee's consent to place the material referred to in the record?

Senator KENNEDY. It will be so included.

Senator Burdick.

Senator BURDICK. I developed that this was an executive program. I just want your opinion of a program that we have developed in the Subcommittee on Penitentiaries of the Judiciary Committee. The Senate has passed a bill called the diversion bill, which would apply mostly to first offenders, and at the option of the prosecuting attorney and the judge a man could be diverted from trial without having to plead guilty or not guilty, and if, during a period of time, he worked out well, then his charge could be dismissed. The bill is still resting over in the House, and I was wondering what you think of this approach of the use of the judicial system. In this way, if an offender does have a record, gets a chance to rehabilitate himself, would this be an avenue that might be acceptable, not in competition with you but in concert with you?

Mr. GOODELL. It is somewhat comparable to the Justice Department program now. Individuals who come back are offered an alternative service and they do not actually get prosecuted—maybe indicated at the time—withhold the charges, and if they complete it, all charges are dropped.

Senator BURDICK. This is making use of the judicial system.

Mr. GOODELL. I have enough problems without getting into legislation, but I generally appreciate the legislative approach.

Senator BURDICK. This is done in the judicial system where they have merit.

Mr. GOODELL. Yes, there are many cases where an individual can be prevented from going through the process of incarceration, which in some instances may lead to a higher rate of recidivism than the diversion.

Senator BURDICK. Thank you.

Senator KENNEDY. As you pointed out in your testimony, in terms of percentages the program has not been enormously successful. As I understand, the Clemency Board has the lowest participation rate with only 800 out of 112,000 qualified persons applying. To what do you attribute this low level of participation, specifically with regard to the Clemency Board?

Mr. GOODELL. I am sure there are individuals out there who are going to come back and say they will not ask for pardon because they didn't do anything wrong. They feel they are right and they have paid the penalty and they are not going to apply. I would, however, believe they are in the minority.

I think overwhelmingly the reason individuals are not applying for the Clemency Board program is their lack of information and understanding about the program. They don't know they are eligible. A great many out there between 1964 and 1973 who had draft offenses of one nature or another who had an AWOL offense and were discharged just do not think they are eligible. This is very difficult to communicate with them. We are doing our best, but I am absolutely convinced that that is the case. That has been even more reinforced by the nature of the applications we have had thus far, which I indicated tend to be the lower educated people in the country who didn't know how to cope. I might say they come from all over the country. There are a great many from the South, Southwest, Midwest. They certainly aren't centered in the major cities. If I estimate, I think there are probably more from the rural areas than there are from the cities. It is lack of information. They have nothing to lose in applying to the Clemency Board.

I don't think that is the case with the response of those who went to Canada. It would be my guess that those who went to Canada know about this program and they are making a conscious decision about whether to come back or not.

Senator KENNEDY. You commented briefly in your statement on a program through which you have sent out some letters recently. Could you elaborate on that?

Mr. GOODELL. The letters to potential applicants?

Senator KENNEDY. Yes.

Mr. GOODELL. We have sent letters to all the 8,000 civilians who went through the Federal criminal system for draft evasion. We are in the

process of trying to get the addresses of the roughly 180,000 military, and if we get them we are going to send them directly there.

Senator KENNEDY. But you haven't gotten those yet, correct?

Mr. GOODELL. Right.

Senator KENNEDY. When did these 8,000 letters go out?

Mr. GOODELL. They are not all done because they are getting addresses from probation offices around the country. They are in the process of going out now as quickly as we get the addresses.

Senator KENNEDY. Well, given the Christmas mail, given the fact that one of the greatest percentages, the 180,000 still have not gone out, does it make much sense for the program to expire in the middle of January?

Mr. GOODELL. Let me say, Mr. Chairman, that I don't know what is going to happen with reference to the expiration date. To my knowledge there will not be an extension. I think it would be irresponsible for me in my position to in any way intimate that there might be an extension, because those individuals out there who are eligible ought to apply before January 13. As far as I am aware, there will be no extension.

Senator KENNEDY. Realizing that we are pretty close to Christmas, and that if you only notified part of the 180,000 then contacting others which will affect the greatest majority, will run into the first of the year. Part of the problem, as you have just testified, is the lack of information and knowledge. What sense will it make to have the clemency program terminate on January 31 without people receiving notification until the end of January?

Mr. GOODELL. You have a good point. We are going to do our best to inform them through the media. We are, General Walt and Father Hesburgh have each done radio and television spots which we hope will be broadcast as a public service and will be emphasized. These are not recruitments, but solicitations, spots to tell people that they are eligible, or if they think they may be, to inquire. We will do our best.

I must say to you if the program were extended a year I don't think sending them to the latest addresses we get will accomplish that job, either. You take the latest addresses that the Army or one of the other services have for a man discharged in 1964 or 1965 your chances are not very good.

Senator KENNEDY. That is why I am wondering what the sense of terminating the program really is. It doesn't make much sense to terminate the program, given the efforts that you are making now.

Mr. GOODELL. Well, I intend to make a recommendation to the President. I must say I don't think people need to count on anything.

Senator KENNEDY. Can you tell us what your recommendation will be?

Mr. GOODELL. I think that would be rather unwise.

Senator KENNEDY. Can you speculate that it won't be for termination?

Mr. GOODELL. I will leave the speculation to you, if I may, Mr. Chairman.

Senator KENNEDY. It seems to me, quite frankly, Mr. Goodell, with the greatest personal respect of your opinion in terms of understanding the motivation of young people, because obviously you have been dealing with them in a very direct way, that the conditional provisions of

the program are keeping a great number of young people from applying.

I personally believe that is the greatest hindrance to their participation. There obviously are different views about whether there should be or shouldn't be, but I think that is a very powerful deterrent to having a number of people participate.

Why should a young person who perhaps has served a prison term for not serving in the war, come before the Clemency Board, when the possibility of the Board's recommendation is that they serve more time in alternate service. Knowing that after they serve additional time, maybe 3 months, 6 to 12 months, they will receive a clemency discharge. Let me point out that there are many who wonder about the real significance of the clemency discharge and about how that is going to help them to be a useful part of their community or their society. Don't you think that the possibility of additional service, after they have already been in jail or prison, is a hinderance to young people coming to the Board?

Mr. GOODELL. Well, what you are saying is that if there were unconditional amnesty just for application, I am sure you would get many more applications, there is no question about that. That is not the Prseident's program. The President's program is earned reentry. What the Clemency Board has done in our deliberations is work out a formula for credit time in person. The instance you described, for instance, the formula would work, we give 3 days' credit alternate service for every day in prison, which means in essence anybody who served 8 months or more ends up with no alternate service.

We then have a 3-month minimum alternate service and the Board deliberates as to whether to move that up or down from the 3-month point. The Board makes an independent determination that if there are mitigating circumstances that justify it to pardon it or move it up. In normal circumstances we don't go up more than 3 month increments, that is 3 months or 9 months. We also take as a maximum whatever sentence the individual receives. We feel we should accord that much respect.

You say what do they have to gain. They have a great deal to gain. One gets not only a clemency discharge but a pardon by the President of the United States. Whatever arguments we make about the effect of a clemency discharge, it is my strong belief that an individual out there in Paducah who has a Presidential pardon has something that is worth something in going for a job, going for licenses, whatever else it be. I think it is something that they should be aware of. It is of great value. In some instances they may even be upgraded further, as I mentioned, by the military tribunal.

Senator KENNEDY. Let's take the formula that you have outlined here, giving credit for the amount of time that a person served in prison. For example, in one case, there may have been mitigating circumstances for a lighter sentence. If the judge took that into consideration, and therefore gave a lesser term, why should you be second guessing that decision?

Mr. GOODELL. That is another one of our precedural rules we agreed on unanimously, we agreed the length of the judge's sentence also becomes a maximum for us.

Senator KENNEDY. The individual is found guilty, but the judge finds there are mitigating circumstances and gives him a lighter sentence. Then you apply your formula and say he got a lighter sentence,

and therefore, he will have to serve more alternative service. What sense does that really make in terms of dividing the degree of justice? If there were sufficient mitigating circumstances in the first place, in view of the judge's sentencing procedure, why are you saying that because he got a lesser sentence, you will require more alternative service for him to get the pardon?

Mr. GOODELL. The first thing I would like to emphasize in responding to that is, to give you an example, if a judge gave an individual a 6-month sentence because he felt there were strong mitigating circumstances in that instance, then 6 months is the maximum we take on the Board for alternate service on the Board. That is the judge's determination. So we do give credit for that and we do respect the judiciary's decision on clemency itself and leniency.

In addition, if there are mitigating circumstances which came to the attention of the judge presumably they will come to the attention of the Board, also. So we purposely do move down and up, depending upon the degree of mitigation or aggravation that is involved. I must say we also have aggravating conditions which causes the Board to increase the base amount after we go through these processes for crediting time served and crediting the judge's sentence.

Senator KENNEDY. If the person avoided induction 5, 8, or 9 years ago, and there were particular circumstances then, it seems to me that those mitigating circumstances could be easily brought up to date to appeal to a modern board. It would certainly be more difficult, and may very well, I would think, prejudice a situation.

Let me ask you this. What really is the effect of the pardon or a clemency discharge? Does that erase the record of a conviction? Does it prevent employment discrimination or overcome any obstacles to Government employment, security clearances or bar association entry? Does it really return any lost civil rights?

Mr. GOODELL. It restores the individual's Federal civil rights. In most instances it restores—his other civil rights are determined by State and local governments, licensing, professions all the way down to a variety of other activities of jobs. In some States a convicted felon is deprived of his right to vote, and normally a Presidential pardon will restore that right to vote.

A Presidential pardon is not binding on the States, but generally the States give comity to that pardon and restore the rights of the individual. There are not a great many Presidential pardons. As far as employers are concerned, the Federal Government as an employer, it wipes it out. The Federal Government's rights are restored.

As far as other employers are concerned I presume it would vary tremendously. But I would not underrate the importance of an individual having considered by the President of the United States and be given a pardon. I think that will have major impact on potential employers.

Senator KENNEDY. It varies though, in different jurisdictions, doesn't it? It is unclear in many States and local communities what their reaction is going to be, and again, it will be a situation, almost by accident of birth, that determines what is going to be the restoration of those rights.

Mr. GOODELL. All we can go on is the record of the past with reference to comity given with respect to pardon. They have generally given comity to Presidential pardon.

Senator KENNEDY. In the regulations one of the areas we have been interested in making some recommendations on the past Selective Service Act was the opportunity for personal appearances before local boards. You don't, as I understand, guarantee the right for any personal apperance for any of the applicants, do you?

Mr. GOODELL. That is correct. We guarantee we will consider any requests for personal appearances and make a determination if justice compels an opportunity be afforded.

Senator KENNEDY. Shouldn't there be an opportunity as a matter of right for a person to appear in a case of this importance?

Mr. GOODELL. Let me say that the Clemency Board is an advisory committee of the President of the United States and advises him how to use his clemency powers under the Constitution. The Clemency Board has gone far beyond what I believe any board in the history of this country has gone in guaranteeing the rights. They can look at their files, they have attorneys, their attorneys can look at the files, they have ample opportunity to correct the record. These rights are normally not guaranteed with an advisory committee advising the President on how to use his discretionary power. We have not had a single request for an attorney, for an individual to appear before the Board as yet. I don't know what the Board's decision will be when we get such a request.

But the procedures we have are abundantly fair to these individuals, and I don't think it is encumbent for the Board to grant an appearance as a matter of right.

Senator KENNEDY. Do they get a decision after the Board meets as to the reason they may have turned it down? Do they get a written report?

Mr. GOODELL. If the Board turns down clemency, yes. They will receive a notification from the Clemency Board that they have been turned down and the reasons have been listed as aggravating in their case.

I might say to you, Mr. Chairman, in our deliberations thus far, although we may have required some additional alternate service for aggravating circumstances, the Board has generally granted considerable clemency.

Senator KENNEDY. Do they have a right to appeal that decision at all?

Mr. GOODELL. After the President announces his decision they have a right to apply within 30 days for reconsideration and give any reasons why they don't agree with the decision and the Board will reconsider.

Senator KENNEDY. Is that procedure spelled out in the regulations?

Mr. GOODELL. Yes.

Senator KENNEDY. Senator Thurmond.

Senator THURMOND. Senator Goodell, I have a page of questions here. It would save time if you would like to take them and answer them for the record.

Mr. GOODELL. All right. We will be delighted to do that, Senator.

Senator THURMOND. There are a few more questions I have.

Anyone who evades the draft violates the law, doesn't he?

Mr. GOODELL. That is correct.

Senator THURMOND. Whether he remains in this country, goes to Canada, Sweden, or wherever he goes?

Mr. GOODELL. I can only say—you say, violates the law—the Government has the obligation to follow the proper procedure to due process and so forth, and there have been a great many instances where individuals have been indicted for what appeared to be violations and they were acquitted because the Selective Service System or some other aspect of the system did not follow due process and the courts, therefore, dismissed the cases.

Last year I believe one-third of those indicted for draft evasions were convicted. The year before it was 28 percent were convicted.

What we should keep in perspective when we say it is in violation of the law, it certainly is—on the face of it.

Senator THURMOND. Is it a violation of the law to evade the draft?

Mr. GOODELL. If you evade the draft under circumstances and procedures which the courts feel is your constitutional rights the courts feel it is a crime.

Senator THURMOND. So it is a violation of the law if one intentionally evades the draft, is that right?

Mr. GOODELL. Under the assumptions that I have stated, and of course you have some other exceptions. The law provides for conscientious objector status.

Senator THURMOND. If one was away and didn't hear about it until later that is an excuse. That is one thing. But if he intentionally evades the draft to avoid service when he is called that is a clear violation of the law, isn't it?

Mr. GOODELL. Not necessarily. If he is in a conscientious objector status the law provides for that. Our first eight pardons, the first of them were gentlemen who have as——

Senator THURMOND. If he is a conscientious objector he is in another category. He can come up and take that position and explain it and possibly be classified that way. He couldn't just ignore the law and claim, himself, "I am a conscientious objector" and refuse to appear?

Mr. GOODELL. That is correct.

Senator THURMOND. Now, when one evades the draft and violates the law then he is tried in court, and the judge who hears the case can hear both sides of it and hear everything he has to say and if he proves he is a conscientious objector and so forth he will take that into consideration and he will take into consideration all facets. I was a circuit judge once, and in trying cases I would certainly want to hear everything about one charge of a crime, because there are many factors that enter into the trial of such an offense and as to the sentence that will be imposed, whether there should be a parole and so forth.

So the judge would go into each case carefully and then determine what the sentence, if any, should be meted out to the violator; that is correct, isn't it?

Mr. GOODELL. Yes, that is correct.

Senator THURMOND. I would like to ask you this, now. Since a judge would do that in each case, carefully in each case, then what special advantage is there in your Board? I want you to bring that out and explain what is the advantage?

Mr. GOODELL. First of all, I would emphasize it is obviously not a single judge. Thousands of judges are doing this around the country.

Second, in this period the law has been changing, not only the law was changed by Congress, but the law was changed by interpretation of the higher courts. But generally what you said is true.

What is the advantage of our Board? The President of the United States has recognized that from 1964 to 1973 this country was in tumult, torture, we were a divided Nation, there were many differences of opinion among our people as reflected in the Constitution of the United States and elsewhere, and that the time has come to recognize these individuals who were caught up in this process as a matter of conscience or as a matter of their own inability to cope, because of educational background, or whatever else, to be given clemency, to bring the country into a new era of looking forward and forget about that past that has divided us so horribly.

That is the nature of the program. That is the function of the Clemency Board as the Justice Department and Defense Department phases of the program.

Senator THURMOND. If a case is tried before the judge will he take this into consideration?

Mr. GOODELL. The judge is not in a position to take that into consideration. If a man is technically guilty he must find him guilty and sentence him. He can reduce the sentence some, and in some cases he did. He must find him guilty of a crime. He has a criminal record.

Senator THURMOND. The judge will take into consideration his background, his lack of education, his stamina, if he is ill, if he is supporting other people. What facts of your Board can be brought to your attention that cannot be brought to a judge's attention?

Mr. GOODELL. I will take a number of cases and read you a background.

This applicant is white, mid-twenties, raised in the Midwest, a Jehovah's Witness, after graduating he devoted full time to church work. He married and worked steadily as a carpenter. His draft board granted him conscientious objection status. He refused to work. His religion does not allow him to obey an order from his draft board. He would have performed alternative service if ordered by a judge. He was sentenced to 3 years in prison. He has spent almost a full year in confinement. That was an outright pardon by the President.

Senator THURMOND. In each of the cases——

Mr. GOODELL. But each case is different.

Senator THURMOND. Did you say the judge allowed him to serve somewhere, or what did you say about that?

Mr. GOODELL. He said he would have served alternate service if ordered by the judge, but not the Selective Service Board because he considered it part of the military and his religion prevented him from obeying alternate service from the military. So the judge didn't take it into consideration. He obviously didn't. He sentenced him to 3 years in prison.

Senator THURMOND. Any violator, if they claim conscientious objection, they will be excused if they can prove it, but if they can't that is another thing. Isn't that what the courts are set up for?

Mr. GOODELL. There were injustices that resulted from this. The President's Board is there to try to ameliorate what injustices were imposed.

Senator THURMOND. Was it an injustice? In your opinion it may have been an injustice, but if a judge tried the case I wouldn't construe that he meant to mete out an injustice, would you?

Mr. GOODELL. I would not assume any judge is trying to mete out injustice.

Senator THURMOND. Don't you think judges who are trained to hear thousands of cases, they go into every case carefully, don't you think they do the best they can to mete out justice?

Mr. GOODELL. I also think they do the best they can, and I also think the end result is very uneven.

Senator THURMOND. You mentioned a few moments ago if he was tried and convicted, then I believe your Board could recommend a pardon?

Mr. GOODELL. That is correct.

Senator THURMOND. Is that the difference your Board would have where he would get a pardon if he didn't otherwise?

Mr. GOODELL. That is correct.

Senator THURMOND. Couldn't the Parole Board that is set up now, couldn't they recommend a pardon?

Mr. GOODELL. In the first place, the cases we have considered so far, the normal pardon procedures would not apply. They were still in prison at the time. The pardon attorney normally only considers individuals who have been out of prison for 3 years. They would have to finish their prison term and apply. These individuals could apply for pardons after 3 years under the pardon attorney's authority to recommend to the President. The President determined there were a very large number of individuals who were in that category, having been caught up with the great divisions that occurred in our country in the sixties, and they deserved to have this program designed especially for them, to operate to give clemency and try to bring this country back together and heal those wounds.

Senator THURMOND. There have been divisions in this country of people not agreeing, many times, many times; the Selective Service Act was barely passed. There was a division in the Senate. But because there is a division, we have to abide by the authority.

Isn't it true that the Parole Board could recommend a pardon to the President, and the President could grant it if he saw fit?

Mr. GOODELL. The pardon attorney in the Justice Department can recommend a pardon after the individual has been out of prison for 3 years or more.

Senator THURMOND. I am going to have to go to the floor now, and if you will kindly answer these for the record to save time.

Mr. GOODELL. Yes; I will be glad to.

Senator THURMOND. Thank you very much. We are glad to see you.

Senator HART. Just as Senator Thurmond, I have a number of questions, which in order to save time, I will submit to you and ask for responses for the record.

Mr. GOODELL. I will certainly do that.

[The questions and answers referred to above follow:]

THE WHITE HOUSE,
PRESIDENTIAL CLEMENCY BOARD,
Washington, D.C., February 10, 1975.

Hon. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: At the conclusion of my testimony on December 18, you submitted some 19 questions, numbered from 3–22, with subparts. I am supplying my answers to them below.

Question 3.—What could be done to change the structure of the Clemency Program to achieve more effectively the President's stated objective of healing the wounds of the war and of bringing about some national reconciliation?

Answer.—As I stated in my testimony, I believe the program is well-suited to the President's objective. Rather than changes in structure, I believe that what the program needs most is more widespread information to those who are eligible. The Board has found that most persons do not understand that the program offers not only clemency discharges but pardons to over 100,000 persons who have already been punished for absence or draft-offenses.

Question 4a.—There has always been a question about whether—if offered—a "conditional amnesty" would be accepted by those in need of amnesty. The response so far seems to indicate a negative answer. *Why* do you feel they are not availing themselves of your part of the program?

Answer.—At least insofar as the Presidential Clemency Board's jurisdiction is concerned, I believe the low turnout is a product of ignorance or confusion about the program. Since applicants to the Board have already been punished, and can freely reject any offer of clemency without additional penalty, these persons lose nothing by applying. This has been confirmed by the extraordinary upsurge in applications in January following the Board's extensive information campaign. Applications have increased by 7 or 8 times in the last three weeks.

Question 4b.—What is to be gained for the ultimate binding of our nation's wounds by allowing such pain and hardship to continue without relief—a direct product of the agony of the Vietnam War?

Answer.—I disagree with the premise. It is a mistake to ignore the fact that those who apply to the Presidential Clemency Board do get relief in the guise of a Presidential pardon and, for those with courts-martial discharges at least, the removal of their punitive discharges.

Question 5.—The Clemency Board regulations provide for consideration of cases based on summaries only. The Action Attorney assigned to a case will prepare a summary of the file, which will be sent to the applicant for correction; then the case will be presented in summary to the Board. The applicant or the Board can inspect the file, but there is no provision for copies of the file to be made. This raises a number of questions. Often an attorney can only find good defenses by an inspection of the entire file. How detailed will the summaries be? For example, will they include all physical disabilities claimed at the time of physical examination?

Answer.—Staff attorneys are instructed to include any mention of physical or mental condition, as well as all other details as set forth in the instructions for preparing summaries. The summaries are very detailed and contain every relevant fact about the individual's background and offense. They also will contain every comment, addition or correction submitted by the applicant. The best analogy is to that of a court "master" who is charged with collating facts on behalf of the judge, who then decides the issues in the case. All attorneys support the program and they are carefully instructed to be thoroughly fair and objective in extracting all relevant information. Should there be gaps in the records, attorneys are instructed to obtain the necessary missing information. Of course, the full file is always available for inspection by a representative of the applicant.

Question 6a.—The role of the Action Attorney seems at best ambiguous. Just who will the Action Attorney represent? The applicant? The Board? Or neither? If neither, how can he be expected to do an adequate job for either side?

Answer.—The Action Attorney performs a reporting function for the Board. He "represents" neither the Board nor the applicant as that term is understood in adversary proceedings.

Question 6b.—What is the procedure by which the Clemency Board will make its decisions? What will the summaries include? Who will decide this?

Answer.—These questions are best answered by reference to sections 101.3 and 11.4 of the regulations, and appendix A of the instructions for preparing summaries. In both instances, these documents represent Board decisions.

Question 6c.—How will it be possible for an applicant to know whether the summary is a fair representation of the material in his file? Memories of draftees and AWOLs for events years in the past will probably not be accurate.

Answer.—The applicant has both his memory and the opportunity to review his complete file. It is highly unlikely that the individual will have forgotten relevant information about what is a significant episode in his life.

Question 7.—It is not clear just when or how a man could argue that he was in fact illegally processed and that the Clemency Board should—effectively—reverse a bad court decision. The only provision for personal appearance is for ten minutes at the Board's discretion. It is possible that the man's attorney could submit a brief, but how meaningful would this be without access to a copy of the full file? What opportunity will there be for this kind of argument?

Answer.—Since the applicant and his attorney have access to the complete file, the premise of this question is fautly. No line of argument is improper, and the Board has noted already some cases of apparent legal or administrative error. Any questions raised by the applicant are investigated and verified to the greatest extent possible. Thus far the Board has received less than a dozen requests for a personal appearance out of hundreds of cases being processed. It will decide those requests at the next Board meeting in February.

Question 8.—In the case of many veterans with other-than-honorable discharges, draft records may be relevant. These have often, however, been destroyed (in our experience). What provision is being made to deal with this problem? Where the file has been destroyed, will the presumption be that the Selective Service System made no errors (if the man claims they did), or will claims of Selective Service errors themselves be mitigating where a file has been destroyed?

Answer.—Thus far, no such instance has arisen. It is difficult to see how a draft board error could be relevant in an AWOL situation. However, the Board most likely would adopt the usual legal rule of accepting the prima facie case of the applicant if the Government is unable to produce rebutting evidence.

Question 9.—The regulations appear to make the "aggravating circumstances" applicable in all cases, but to make "mitigating circumstances" applicable only in "exceptional cases." Was this the intent? If so, why?

Answer.—This is not the intent of the regulations. Obviously, mitigating factors are applicable in any case wherein they appear.

Question 10.—How are judgments made as to whether the applicant's three-month baseline of service will be waived? Response to any answer: It seems as ultimately arbitrary as any case-by-case review must be, given the impossibility of determining absolutely a man's motives.

Answer.—The Board reviews the applicable factors and determines whether, in its judgment, the baseline period—whatever it may be—should be waived. This evaluation is not based exclusively on motives; it may be for any mitigating factor. A reduction or increase may be based on the Board's evaluation and weighing of any factor or combination of factors.

Question 11.—How is your means of evaluating motive superior to that used by the Selective Service System, when they denied C.O. status to some 81 percent of all such applicants during at least one of the later Vietnam War years? How are you getting over the obvious lack of trust problem posed by any governmental agency dealing with these men?

Answer.—Motive is not the decisive factor in the Board's determinations. If the record shows a nonselfish motive and there is no contradictory evidence, this will be accepted as an additional mitigating factor. Obviously overcoming this distrust is not easy. But the Board has devised its procedures with this in mind and has strived to be fair, honest and candid with all applicants. Its dispositions have also reflected this attitude, and we hope that knowledge of its record will go far towards restoring confidence.

Question 12a.—What will happen to the men who were furloughed and haven't applied for clemency? Does the Clemency Board have jurisdiction over them? If not, who does? And is the policy of that agency that these men will be forced to return to prison if they fail to apply for "clemency"?

Answer.—The Board requested two 30-day extensions of the furlough. It did not request a third extension on December 17 for those who had failed to apply to the Board. Only 3 persons fell in this category who had unexpired terms to serve. One was in state custody. Another did not wish to apply, and the third could not be contacted despite the best efforts of the Board and his probation officer. Of course, the Board has no jurisdiction over the furlough question, but it has worked closely with the Bureau of Prisons of the Justice Department in working out the problems of individuals incarcerated for draft offenses.

Question 12b.—Does a pardon expunge the record of the conviction from the applicant's record or does it seal the record? What protection does a pardon have if neither of those possibilities occur? Doesn't the applicant still have a "record"?

Answer.—A pardon neither seals nor expunges a prior conviction. It is an act of executive grace which removes the future legal disabilities of the conviction

but does not obliterate its existence. The individuals' official records are marked as having received a Presidential pardon, and this act is given comity by the states.

Question 12c.—R.B. is not eligible for any aspect of the Clemency Program. He was granted C.O. status by his northern New England draft board, but felt he could not accept alternative service because it also violated his conscience by implied cooperation with the war effort. He spent a year in a Federal penitentiary, with his wife and child on welfare during his incarceration. He is now out of prison and trying to earn enough money to go to graduate school. Query: Since this young man represents the most courageous type of civil disobedience, should not any Clemency Program address itself to an expunging from his record of all legal disabilities and stigma resulting from a felony conviction?

Answer.—The Board, even if it wished, would have no power to change history or erase the judicial record of R.B.'s conviction. But he is eligible under the Presidential Clemency Board part of the program and could get a pardon. For other cases with similar facts, applicants like R.B. have received pardons with minimal if any alternate service.

Question 13.—Legally, what if any value does a pardon or "clemency discharge" have? Practically, in terms of job placement and admission to professions, what effect do they have?

Answer.—A Presidential pardon, as stated above, restores the federal civil rights lost upon conviction. Its acceptance by private persons, states, and professions is a matter of custom and comity. At the minimum, the conviction would no longer be an automatic disqualification for many jobs. A clemency discharge is a significant improvement for any person with a bad conduct discharge or dishonorable discharge as the result of a court-martial conviction. And we believe it is also an improvement over an administrative undesirable discharge.

Question 14.—Of what value is forced labor in the national interest? (For PCB, of what possible value are 3 months of such service?)

Answer.—I disagree with the premise. Persons participating in the program are being asked to discharge an obligation of citizenship which is usually satisfied by military service. It is an alternative which is compatible with an individual's moral objections to war or military service and it is an alternative which has been successfully and acceptable employed for conscientious objectors throughout our nation's recent history. By no proper means could it be termed "forced labor."

Question 15.—Given economic realities, what justification is there for giving these men returning any job-hiring preference? What jobs are not competitive in today's market?

Answer.—Alternate service does not grant job preferences of any sort. The Selective Service informs us that there are noncompetitive jobs available.

Question 16.—Isn't it difficult to imagine that persons would now accept the alternative service offered, when it was not offered 4, or 5, or more years ago when many of these same individuals requested it but were denied their requests?

Answer.—Since it is offered now, and can earn a Presidential pardon, there is every reason to believe alternate service will be attractive. For those who improperly were denied C.O. status, the Board has quite consistently not required alternative service as a pre-condition to a pardon.

Question 17.—Not included in list.

Question 18.—The President's Executive Order 11803 eliminates from consideration for clemency any individuals who are precluded from reentering the United States under 8 U.S.C. 1182(a)(22). Do you think it is equitable, in the context of clemency, to exclude people who, rightly or wrongly, felt compelled to acquire foreign citizenship rather than participate in the Vietnam War?

Answer.—The President believes, I think rightly, that anyone who deliberately renounced his American citizenship should not be eligible for the program. Indeed, it is difficult to see why anyone who did so would wish to participate since it would not have the effect of restoring the lost citizenship. Of course, under recent court rulings, it is difficult to prove a deliberate renunciation of citizenship if contested.

Question 19.—Only already discharged veterans with "undesirable" or punitive discharges for absenteeism offenses are now eligible for consideration by the PCB. Given this clemency option for the worst offense the military knows, shouldn't all veterans with bad discharges be permitted redress by the Board? We note, for example, that most minority group veterans with bad discharges did not get them for absenteeism offenses.

Answer.—The program focuses on absence offenses since this was the most common form of offense committed by those who opposed the war. To offer the

program to anyone with a bad discharge would change it from a Vietnam reconciliation program to a military discharge reform program, an entirely different proposition.

Question 20.—Case A: W. L. enlisted in the Navy upon graduation from high school, and three weeks after entering the service came down with spinal meningitis. He was hospitalized for 12 weeks and ended up with rheumatoid arthritis of the knee. At this point in his Navy career, he applied for a discharge as a C.O., but his application was torn up in his presence. He spent eight months sea duty on an Auxiliary Tug between Vietnam and Japan, and when the ship was decommissioned, he applied again for a C.O. discharge. When it was again denied, he went AWOL. Soon after, he turned himself back in, spent three weeks in a county jail, and the Navy finally gave him the choice of staying in the Navy with 30 days imprisonment, of a Special Courts Martial, or an undesirable discharge. He chose the latter, and since then he has not been able to find any steady job, and has had two mental breakdowns. He is eligible for consideration by the Clemency Board, and probably even for Navy disability benefits, but he has been too bruised by his experiences to trust any Government representative, and there are no funds for professional legal help. His parents feel that the tension of waiting for a Clemency Board decision would destroy the delicate mental stability he has now.

Case B: M. C. applied for C.O. status in New Jersey, but was turned down and accepted induction. He managed to get an assignment to play in an Army band, but continued overtly his anti-war protest activities which had begun prior to his induction. The Army finally gave him an undesirable discharge if he would just go quietly. Now of course, he is virtually unemployable. Unlike most veterans with bad discharges, he is white and middle class and has a wife who is successfully employed. It is unlikely that he will suffer the same disability of the others, a large percentage of whom end up in prison because of lack of education and employment opportunity. He is not eligible for consideration by the Clemency Board because his discharge is for other reasons than desertion.

Query.—Is it just for a society to make no provision to alleviate the economic disability of hundreds of thousands of veterans with bad discharges for reasons other than desertion, but still not crimes according to civilian standards? Should not the society recognize that its demand for military service, so easily avoided by 90 percent of the draft-age young men, created a situation whereby the men who served, already from the poorest sector, reenter the society more disadvantaged than before induction by reason of their military service?

Answer.—This question relates more to the inequities of the draft or of the military justice system than to the Vietnam clemency program. As to case A, W. L. very likely would receive a pardon without any requirement of alternative service. If the fact supported such a result, the Board might well recommend a general or honorable discharge to the President, as it has done in a number of other especially deserving cases. Of course, there is no way the Board can deal with W. L.'s desire not to apply. But with greater cooperation from volunteer-lawyer organizations, we could refer his case to private counsel.

Case B is not eligible for the program as it is defined.

Question 21.—If I understand you correctly, the Clemency Board will now recommend the issuance of honorable and general discharges to certain of the clemency applicants and will leave to the Military Discharge Review Boards of the military services the upgrading of "clemency discharges" for other applicants. General and honorable discharges normally entitle veterans to Veterans' benefits. But is it not true that chapter 53 of the Veterans' Benefits Statute (section 3103 of title 19 of U.S.C.) provides in relevant parts that the

> "discharge of any person . . . as a deserter . . . shall bar all rights of such person under laws administered by the Veterans' Administration . . .".

Will this mean that persons to whom a general or honorable discharge is given as a result of clemency will still be excluded from veterans' benefits? Will they still remain second-class veterans, despite clemency?

Answer.—It is our understanding, based on Veterans' Administration regulations and legal opinions, that the issuance of a discharge under honorable conditions in place of the original bad discharge avoids the disabilities of 38 U.S.C. 3103.

Question 22.—One asks whether it is wise or safe to allow the national discussion of amnesty to end so quickly, essentially by legislative fiat? There are lots of unresolved issues—the status of veterans, for one—and issues left over from the Indochina War that simply would not be swept under the rug. Do you view "earned reentry" as the final solution to the amnesty problem, or rather do you see further developments in the future?

Answer.—The clemency program does not pretend to answer the other Vietnam questions such as veterans' benefits, MIAs, and the like. It is, I believe, the proper approach to the amnesty problem.

I hope these answers satisfy your needs. If I or the Board staff can be of further help, please do not hesitate to call on us.

Sincerely,

CHARLES E. GOODELL,
Chairman.

Senator HART. Several of them bear on procedural items, only one of which I will raise now because there was some discussion about it. This is the issue of the right of the individual who seeks to proceed before your Board and personally to appear. This is not a question. This is just a comment.

I remember, and have a hunch that you probably join us here in the Senate, that during the sixties some of us felt that the selective service boards should be required to have a hearing at which the applicant and his lawyer could present pleas for disability, conscientious objection, or other claims. It would seem to me logical that if we sought to ensure that opportunity prior to entry into service, a person should also now have that right to make his case.

Mr. GOODELL. Your hunches are usually pretty good. I join you on that. I do believe it worked out quite well with the selective service boards. They do have a right to appear before a board, particularly on a question of conscientious objection, for a hearing.

I do think, however, the nature of these cases is quite different. I would give them a complete opportunity to complete that record. We may very well grant those requests that appear personally before the Board, 832 cases thus far; there has not been a request to appear before the Board.

I must say that if we get anywhere near the 111,000 applicants that are eventually eligible, if we did get a large number of personal appearances, we are going to be in existence until probably 1980.

Senator HART. Well, that is inherent in the system that has been chosen to decide this on a case-by-case basis.

Mr. GOODELL. Right, it is not an argument against granting opportunity to come before the Board, and we will look at those as the applications brought to the Board.

Senator HART. It may be a chance for Congress drawing a deep breath and granting amnesty. Maybe the reason to do that is to ask for so much money to run your operation that the economy minded here will join you.

Mr. GOODELL. Well, I won't take that as an invitation.

Senator HART. The experience of the program thus far in terms of the very low response from each of the qualifying categories reflects a lack of knowledge. Further, this would be more likely to be true for the category you described as the disadvantaged young. Those who understand the program, are offended by the prospect of conditions, and therefore won't apply. Unless you have an enormously effective educational campaign, there will still remain unresolved this large pool of young men with a record.

I guess my windup question would be, do you feel that earned reentry is the final solution to this problem?

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Mr. GOODELL. I think this is the only clemency program you are going to have in the foreseeable future. I do not see there is going to be a further move toward unconditional amnesty as such. It is conceivable, to the experence of this program, that there would be some other forms of conditional clemency to be offered in some of those marginal areas where they didn't quite qualify as to the offense involved. At this point, we want to complete the program and do it as fairly as we can and get as much information as to those potential applicants as we can.

I would also like to emphasize that I did not mean to imply that we do not have applications on intelligent, college educated or not, individuals of conscience, whatever their IQ, were very courageous and took their place in the war, some of them were very articulate and some were not. Certainly most of our cases involved confusion or lack of motivation with reference to that particular war.

As far as this whole problem of getting the information to these individuals is concerned, it is very, very difficult, even if we mailed directly to them.

I might say, we probably, in reference to your earlier point about appearances, the individuals who are most critical of our Board for not giving personal appearances are the individuals who are refusing to make themselves available, are the ones who are refusing to appear and let us tell them there are attorneys available to them. I am sure there would be fewer problems, these individuals say they are taking a position, it is like saying I am not going to help you with your legal problem because I don't like the law that you violated, I don't believe it is a just law. It doesn't make any sense at all. These are respected friends of mine, but as you can tell, I get a little incensed.

Senator HART. Well, I don't want any young man to think this is a conclusion I made after detailed examination of the Selective Service, but, after listening to this 3-month bench more and more, I have a hunch that if I were one of these unfortunately placed young men, the lawyer might tell me, "Don't go to this program. Rather let's go into the courthouse and we might get better treatment."

Mr. GOODELL. He can't get better treatment if he has been convicted, in most cases convicted, he has been to prison, served his sentence. The Clemency Board can give him clemency and a pardon. He cannot get that from a court.

Senator HART. I am not wishing ill of your effort to generate participation. My own feeling has long been, and I have said it at earlier hearings of Senator Kennedy, that my only question about blanket amnesty is that it would include some fellow who left because he had taken the headquarters company fund. Except for that, I do not think this case-by-case process will resolve this issue in a way that history will find praiseworthy.

Mr. GOODELL. I appreciate your viewpoint on that, Senator Hart, and I know you are well aware there are a large number of people out there on the other side of this issue who feel very deeply. They feel there should be no clemency whatsover. I know you appreciate that historically President Ford has taken the most forthright and courageous position on clemency or amnesty of any President in our history. This is the most extensive clemency program ever in this country. It took a lot of courage and vision for President Ford to do it.

He knew full well in doing it he was not going to satisfy those for unconditional amnesty and he was not going to satisfy those who think you ought to go out and hang them all. There are a few of those around.

The President is a very decent and generous and tolerant man. He felt very deeply. There are scars and wounds that were very deep in this country in the sixties, people with great sincerity and purpose on each side of that controversy and you and I were swirling in the middle of it. as was Senator Kennedy. Now we ought to look forward and get this behind us.

I do not think that even if the President were persuaded for unconditional amnesty that the country would support it in terms of the convictions of divisions in this war.

Senator HART. Well, the country hasn't supported certain other actions he has taken with respect to other individuals.

Mr. GOODELL. Don't get me into that, please.

Senator HART. No; I don't want to, because I think in many respects that is a cheap shot, and I don't want to fire it. But if you judge that which is supported by that reasoning——

Mr. GOODELL. I don't mean that is to be supported broadly by the public. This is a great conviction in the country and I think it would have ultimately divided the country more at that point and perhaps kept those divisions alive longer. That is my view. I respect those who feel otherwise.

Senator HART. Yes.

Thank you, Mr. Chairman. Thank you, Mr. Goodell.

Senator KENNEDY. Thank you very much. We appreciate your presence here and look forward to working with you up to January and beyond.

[The prepared statement of Charles Goodell follows:]

PREPARED STATEMENT OF CHARLES E. GOODELL, CHAIRMAN, PRESIDENTIAL CLEMENCY BOARD

Mr. Chairman, members of the Subcommittee, my name is Charles E. Goodell. I am an attorney in private practice in Washington, and I am Chairman of President Ford's Presidential Clemency Board, which is a part of the White House Office.

I am grateful to the subcommittee for this opportunity to describe to you and to the American public the operations of the Presidential Clemency Board. The program suffers from insufficient public awareness and from confusion among potential applicants. These hearings will broaden understanding of what the program is about and, in doing so, will be of service to those young people who must soon decide whether or not to participate in the program.

With the subcommittee's consent, I would like to submit the entire statement for the record, read its highlights, and then will answer your questions.

At the outset, let me share with you several observations about the program, some of which I have come to appreciate only after becoming immersed in it.

The Clemency Board has been continually impressed with the depth of feeling that the President has about this program, and with the personal attention that he gives to it. He was personally involved in the rewriting of the initial proposals, and devoted a considerable amount of time to that. At the Board's first meeting, he met with us in the Cabinet room for a lengthy discussion of his hopes for the clemency program. He met with us in the Cabinet room again for the signing of the first pardons and conditional clemencies under the Board's part of the program. He has spoken with me several times to give guidance to the Board about how it should treat applicants coming to it.

In August, in his first days in office, the President replaced two of the portraits in the Cabinet room with portraits of Presidents Truman and Lincoln. He told his staff then that he particularly admired those Presidents because they were

the ones who took substantial political risks in granting clemency in order to reunite the country in times of bitterness and strife.

The President cares deeply about this program, asks about its progress frequently, participates in shaping it even now. Its goals are critical to his vision of what this country should be.

The members of the Presidential Clemency Board have been impressed also by the degree to which the applicants coming before us do not fit the stereotypes we had assumed. Many of the draft and military law violations which we have examined were not at all consciously and directly related to opposition to the Vietnam War. For the most part, we have seen applicants with wives who were about to leave them, whose fathers had died leaving a family without any means of support, or whose mother, wife or child had become acutely ill. Personal problems overwhelmed them and led to violations of the law.

We have many applicants who are not from educated and middle-class backgrounds, certainly not with college educations. Rather, they are generally unsophisticated, inarticulate people who were unable to pursue their remedies properly within the legal system. Had they been able to do so, many of these applicants would have received hardship deferments or conscientious objection deferments, or compassionate reassignments or hardship discharges in the military. They just did not know how to proceed.

We have seen some cases in which there has been genuine conscientious objection to killing. For the most part, however, even these people tend to be ones who did not understand how to pursue their rights properly through the Selective Service system. They are predominantly Jehovah's Witnesses, Muslims, and a few others who have clear religious or ethical beliefs which are evident to the Board from the letters which they write to us, from their probation records, and from other files predating even their conviction.

Our applicants have often proven to the unfortunate orphans of an administrative system in which success was determined by being educated, clever, articulate, and sophisticated. Those who believed deeply but couldn't express their feelings adequately wound up with conviction records and sometimes jail sentences. The glib and sophisticated, whether sincere or not, got a better shake.

The applications which the Presidential Clemency Board has received indicate to us with overwhelming force that the image which we have had of the typical Vietnam-era draft "evader" is simply wrong.

We have been surprised and impressed, finally, by the extraordinary public support which the President's clemency program has received.

Without great fanfare, many employers, church groups, veterans' groups, and lawyers' groups have written and called to us and asked "What can we do to help?" The church groups and the veterans' groups, in particular have established counselling programs for potential applicants to the various parts of the clemency program. Numerous employers have offered opportunities for alternate service under the program. Other organizations which are not in total agreement with the clemency program have united on the local level in one common goal—helping the human beings involved with the major personal decisions which they have to face if they are to come home to the President's program.

Nearly everyone who could potentially help these young people has said "We may not entirely agree with the way that the program was set up, but the important thing is to help these boys who are thinking about coming back to us. Let's concentrate on them, not on our differences with each other."

We have learned that people in this country really do want to have a reconciliation which will bring former draft evaders and deserts back into full integration in the community. We have been humbled and touched by the stream of offers of help from people in all parts of the country.

Let me now describe to you what the Clemency Board's jurisdiction is, what remedies we offer to prospective applicants, what administrative procedures we have established, and what substantive criteria we apply in weighing applications for clemency.

JURISDICTION

The Presidential Clemency Board was created by Executive Order on September 16, 1974 to implement part of President Ford's Proclamation on clemency issued that same day. The Board, organizationally within the White House, is composed of 9 part-time members. Each member is in private employment and is compensated by the Federal Government only for time spent on Board business.

The Proclamation covers three major categories of persons. First, there are

those who are presently absent without authority from a military service, but who have not been convicted of an offense or discharged. They must return to their military service, which processes them and issues them an undesirable discharge. At the completion of alternate service of up to 24 months, they are issued a clemency discharge to replace the undesirable discharge.

Secondly, unconvicted persons who have violated the Selective Service laws must return to a U.S. Attorney. Through a process very similar to plea-bargaining or pretrial diversion, they are offered up to 24 months alternate service. Upon satisfactory completion, charges are dropped.

The Presidential Clemency Board's jurisdiction is entirely different. We recommend clemency for persons who have already been convicted for or have admitted an offense, whether civilian or military; and who have already received punishment. The Board has jurisdiction over civilian draft evasion offenses, and over military unauthorized absence, desertion and missing movement offenses. Our jurisdiction over military personnel extends both to those court-martialed and to those administratively discharged. We recommend to the President how he should exercise his discretion under article II, section 2 of the Constitution.

WHAT REMEDIES DOES THE BOARD OFFER TO APPLICANTS?

The Board has received more than 800 written applications, of which 150 have already become ripe for decision under the administrative procedures we have established. Eighteen have been referred to the President thus far, all civilian cases; others have been decided by the Board and will be forwarded to the President in the next several days.

To the civilian applicant for clemency, the Board can offer, on behalf of the President, executive clemency in the form of a full pardon. Each form of executive clemency may be offered unconditionally, or conditioned upon a specified period of alternate service.

When the President accepted the unanimous recommendation of the Board that clemency be granted to the initial 18 civilian cases, he granted 8 full and unconditional pardons effective immediately, and 10 conditional clemencies which will become full and unconditional pardons upon completion of the specified alternate service. Of those who received conditional clemencies, the lengths of alternative service were: 3 months of alternate service for 3 applicants, 6 months for 5 applicants, 10 months for 1 applicant, and 12 months for 1 applicant.

While we cannot reveal the Board's recommendations prior to the President's decision on them, I can tell you that the distribution of 32 other recommendations which are shortly to go to the President on civilian cases is roughly similar to the distribution in the first 18 cases.

A pardon restores to an applicant his Federal civil rights. Just as importantly, it is the custom in most states to remove most civil disabilities, as well as licensing restrictions which prevent ex-convicts from working in a variety of occupations. Without a pardon, the typical ex-offender cannot work in any professional occupation or, in many states, as an ambulance attendant, a watch-maker, a tourist camp operator, a garbage collector, a barber or beautician, a practical nurse, or a plumber.

Since most states honor Federal pardons as a matter of comity, although they are not required to do so as a matter of law, the real effect of a pardon is to make the ex-offender employable again.

The military applicant for clemency comes to us worse off than the civilian applicant. Not only does he frequently have a Federal felony conviction for violation of military law, but he also has the stigma and the employment problems attached to a "bad paper" discharge.

To the former military applicant, we offer a full pardon, plus an upgrading of his discharge to at least a clemency discharge, either unconditionally or conditioned upon a specified period of alternate service.

Some of the military applicants have wounds from service in Vietnam, decorations for valor, and multiple tours of honorable military service. They went AWOL after this honorable service, and received bad discharges. Some of them even went AWOL or deserted after they had volunteered for second and third tours of duty in Vietnam.

The Board has decided that in such special cases, we will recommend to the President that he immediately upgrade their punitive or undesirable discharges to a general discharge or, in exceptional cases, to an honorable discharge.

The cases which we request the President to upgrade immediately will be the unusual ones, the ones in which justice unambiguously demands immediate corrective action. We will recommend pardons and clemency discharges in many more cases, however. In all of those other cases, we will recommend that the President direct the military discharge review boards or other appropriate military tribunal to review the cases anew in order to determine whether there should be further upgrading of discharges beyond a clemency discharge. And we will recommend that that de novo review be conducted without reference to the offense for which a pardon has been granted as if that AWOL or desertion offense were not in the record.

We have received a firm indication from the Department of Defense that it is amenable to the procedures which we propose for upgrading discharges.

ADMINISTRATIVE PROCEDURES OF THE BOARD

Let me now turn to the Board's procedures, a copy of which is attached to my statement. We have sent copies for comment to every Member of Congress, to veterans' and civil liberties groups, to antiwar organizations, to every State and major local bar association and to a number of private attorneys. I am pleased to say that for the most part, the proposed rulemaking appears to have been well-received. Suggestions and criticisms will be reflected in a final rulemaking which we will issue in a few days.

It took some time to develop these regulations. In part this is explained by the fact that the Presidential Clemency Board has no precise historical model to follow and no clear precedents in assisting the President in what is a unique Executive function. We also wished to become very familiar with the types of cases before us prior to issuing any rules. Even now we find new aspects in the cases which require further elaboration of our rules.

Let me describe briefly how the Board operates.

First, when we receive a communication expressing interest by or on behalf of a possible applicant in any part of the President's program, we mail out an instruction kit. This kit describes the program, the Board's procedures, and other aspects of the Board's operations. If the individual is not under the Board's jurisdiction, but falls within the jurisdiction of the Department of Justice or the Department of Defense, we tell him how to pursue his case with them. If he is not under the jurisdiction of any part of the clemency program, we try to suggest other avenues for the relief he seeks.

Once the necessary information is obtained from an applicant, and his files are obtained from Justice or the military services, a Board attorney prepares a summary of the files. The instructions to Board attorneys have been submitted to you. We have an elaborate internal procedure to ensure that the summaries are properly prepared.

This summary is then mailed to the applicant along with the preparation instructions. The applicant is encouraged to review the preparation instructions. The applicant is encouraged to review the summary, submit any additions or corrections, and to send the Board anything he believes the Board should consider when it reviews the case.

Once this process is completed, the case is presented to the Board together with the material the applicant has sent in.

After the Board examines the case and makes a recommendation, the President reviews that recommendation and issues his decision on clemency. Under the Board's rules, an applicant then has 30 days after the President's action to ask for reconsideration if he feels dissatisfied with the decision. He next passes to the jurisdiction of the Selective Service for the performance of any required alternate service.

Once the service is satisfactorily completed, the Board confirms that the clemency has been earned, and a pardon is issued.

THE SUBSTANTIVE CRITERIA FOR EVALUATING APPLICATIONS

The President's Proclamation contemplates a case-by-case evaluation of applications to the Board, rather than a blanket treatment of whole classes of people. We have carefully drawn our substantive standards so that they are a tool to assist the Board in weighing each case on its merits. The standards help us to separate out cases which should be treated differently, and to treat with consistency and equity those which are similarly situated.

We give special weight to time already spent in prison, and to alternate service and probation or parole already satisfactorily completed under judicial order in deciding appropriate lengths of alternate service.

Equity compels us to consider factors beyond simply time spent in prison. For this reason, for example, Jehovah's Witnesses who have served a little time in prison, but whose violations of law were motivated by deeply held religious beliefs, typically have been offered outright pardons, or have been asked to serve minimal amounts of time where aggravating circumstances have existed in particular cases. On the other hand, persons who acted from no apparent sincerely held ethical or religious convictions about the war have received clemency contingent upon longer lengths of alternate service, even when those persons may have served more time in prison.

The Board has been diligent in creating procedural and substantive rules which can be readily understood by a layman who gives them a careful reading, as well as by a lawyer or other counsellor who has not specialized in Selective Service or military law. We have tried to use simple and clear language, and we have tried to bring the greatest practical degree of due process to a procedure which is, constitutionally, inherently discretionary on the part of the President.

PROTECTIONS OF APPLICANTS

Anyone calling or writing in to the Presidential Clemency Board is guaranteed that his name, address, telephone number, and any other information which he gives us will be held in the strictest confidence, unless he has committed a serious nondraft-related or nonAWOL-related criminal offense such as homicide. The Justice Department has agreed that with this exception, we may keep our own records completely sealed to other agencies.

Since most evaders and deserters within our jurisdiction apparently do not read the New York Times or watch Walter Cronkite frequently, we have taken pains to communicate to them that they are eligible for the President's program. We are mailing information about the program to the last addresses of each person convicted of draft evasion and eligible for Board consideration, thanks to the very fine cooperation of the Federal Probation Service and the Administrative Office of the U.S. Courts. Assuming that such addresses are available from the Department of Defense and the Coast Guard, we will do a mailing to over 114,000 convicted AWOLs and deserters as well.

Everyone who applies or inquires to the Board is advised of the advantage of legal assistance. We give to any person who needs counsel the names of organizations which provide volunteer services.

The American Legion, the Los Angeles County Bar, the New York County Bar, the American Bar Association and the Harvard Military Justice Committee have either offered their services as volunteer representatives or expressed a strong interest in doing so. But with the application period over half-completed, many potential applicants are undecided on how to proceed. I would like to see every one of the 800 who have already applied put in touch with a volunteer attorney. I cannot hide my disappointment that a number of legal organizations have declined to help because of political or philosophical differences with the program. I urge them to put aside these differences in favor of the needs of the applicants.

Many of the persons eligible for the clemency program are not highly sophisticated or well educated individuals who could cope effectively with the problems that they faced. They need help now in applying to the Clemency Board. The President's program offers very real benefits. Criticism that the program does not go far enough only hides the fact that it does go very far indeed. An individual can receive a full pardon restoring his civil rights—his right to vote, his right to apply for a license to be a bartender, a plumber, a barber, a practical nurse, or a lawyer.

For those who were in the military service the program may offer not only a clemency discharge, but a full pardon as in the civilian cases, and an automatic review by the military Discharge Review Boards that could lead to a discharge under honorable conditions. The review will be conducted on the basis of the men's military record as if the AWOL or desertion offense were not in the record.

In some exceptional cases, the Board is recommending that the President immediately upgrade the discharge so that it will be under honorable conditions. These exceptional cases include, among others, men who were wounded or deco-

rated for valor in Vietnam, had several tours of honorable military service, or volunteered for combat duty and subsequently got into personal problems.

In the light of this, I think that it is outrageous for any volunteer legal group which is concerned about the rights of citizens, and their right to counsel, to refuse to offer legal aid to applicants. It grieves me to say that some very well known groups who differ with the program are refusing to cooperate with the Clemency Board in allowing us to advise applicants that they will provide counsel. We have pleaded with these groups, not for ourselves, but for the people who have applied to the Clemency Board and need help. They, not the Board, lose by the obstinacy of these members of the bar.

Let me close with a final comment about the program.

President Ford has acted in the tradition of Presidents Truman, Wilson, Lincoln, and Washington. I hope that this hearing today will help make more Americans aware of the deep historical roots of clemency and of the country's need for it now. Perhaps, if it serves that purpose, our being here today will make it just a little bit easier for those who do come back to integrate themselves fully, with dignity and with pride, as Americans and as members of their community again.

Senator KENNEDY. While we are waiting for the panel, which includes John Schulz, editor in chief, Military Law Reporter, Mr. Schwarzschild, director, American Civil Liberties Union project on amnesty, and James Wilson, director of national security, American Legion, I am going to insert into the record the statement of Col. Phelps Jones, of the Veterans of Foreign Wars.

[The statement of Colonel Jones follows:]

PREPARED STATEMENT OF COLONEL PHELPS JONES, USA (RET.), DIRECTOR, NATIONAL SECURITY AND FOREIGN AFFAIRS, VETERANS OF FOREIGN WARS

On behalf of John J. Stang, commander in chief of the Veterans of Foreign Wars of the United States, I am most pleased to be able to appear before this distinguished body for the purpose of placing into the record the views of our organization on the subject before your subcommittee, i.e., "An Assessment of the Efficacy of the President's Clemency Program for Draft Violators and Military Deserters."

We believe it is most appropriate that the views of the V.F.W. be carefully weighed on this matter as it was before our National Convention on August 19, 1974 that President Ford made his first public reference to the clemency program which he set into motion by means of a proclamation on September 16 of this year.

Your subcommittee's distinguished chairman, Senator Kennedy, also selected the V.F.W. as that organization before whom, on August 21, he urged support of the President's August 19 proposal.

The purposes of your subcommittee's hearings, as we understand them, are:

a) to assess the policies and procedures of the Departments of Defense and Justice, the Selective Service System, and the President's Clemency Board to ascertain why so relatively few draft law violators and military deserters have come forward; and

b) in light of the foregoing assessment, to recommend procedural changes to increase the program's productivity.

(I fully understand that these hearings are not being called to argue "amnesty," pro or con. As I'm certain you gentlemen know, the V.F.W.'s opposition to "amnesty" is both total and unapologetic. Should a member or a staff aide desire our position or our rationale, I would be most pleased to provide him or her with it on an individual basis.)

What are the results, to date, of the President's clemency program? Subject to refinement by government witnesses, we find:

Of 12,507 military deserters eligible, some 2,007 have been processed.

Of approximately 111,000 holding less-than-honorable discharges, some 508 have sought "earned reentry."

Of 8,700 convicted of draft evasion, 234 have volunteered for alternative service.

Of 6,660 being sought for draft evasion, only 103 have signed clemency agreements.

While these figures are—except for military deserters—clearly low, we do not believe that the "success" of the President's program can be viewed in the same light as salesmen's goals or recruitment objectives.

Mr. Goodell has publicly and repeatedly assured those eligible that they cannot be hurt by seeking Presidential clemency through recourse to his Board.

On November 2, the Secretary of Defense publicly assured the next-of-kin of "no-show" military deserters that:

a) those seeking clemency would be given the opportunity to consult with a military lawyer or counsel of their own choice before undertaking obligations associated with the program;

b) there is no uniform or hair grooming requirement; and,

c) the program would end on January 31, 1975.

A point has recently been made by some that there is a "Catch 22" aspect to the program as follows: (a) a young man believes he is in violation of the draft law, but does not know whether he is being investigated or not, (b) he seeks to find out whether or not he is under investigation and, by so doing, is picked up by the system and is placed under investigation.

I suggest that the above example, while it makes a good "debating point," misses the more central issue.

Should a law violator be spared investigation simply because of inefficiencies in the surveillance and law enforcement mechanisms?

We believe the answer is "no," and that those who fear self-incrimination must, like all facing possible legal sanctions, choose either (1) to accept their responsibility as citizens by coming forward, or, (2) live in limbo and take their chances.

My point can be made even clearer if, for the words, "possible draft evasion," one substitutes the words, "possible income tax evasion."

As to policies and procedures, a few thoughts are in order.

The military personnel who manned the "Joint Clemency Processing Center" performed with manifest restraint and professionalism in what, for many, must have been a distasteful task. Returning deserters were not, according to their own language, "hassled." In fact, there have been very few "war resisters" among the group. The deserters were, as many of us have long held them to be, men who deserted for reasons as old as armies: personal problems and inability or unwillingness to accept discipline.

As to the Clemency Board, two points: 1) on November 27 this Board asked the V.F.W. (presumably along with others) to assist with providing legal counsel to men exploring their legal options before seeking clemency; and, 2) On December 5, Mr. Goodell forwarded to the V.F.W.'s commander-in-chief, John J. Stang, "proposed rulemaking" to govern Board procedures for our comment.

(Copies of these two letters, and our answers thereto, are appended to this statement.)

Mr. Chairman, the Clemency Board had been in existence for well over two months before this body sought to move on two self-evident requirements: availability of legal counsel and codification of internal procedures.

This snail-like performance should not provide rationale to extend President Ford's program beyond January 31, 1975, although it does provide its own comment on the efficacy of boards and commissions in accomplishing the people's business.

A summary of our views follows:

a) The military services are to be commended for their professional response to the Clemency Program.

b) The relatively small numbers of draft dodgers and "bad paper" discharges involved in the program should not be accepted as prima facie evidence that the program has "failed" and quad erat demonstratum must be further liberalized. We submit that the President's decently-motivated effort to "bind up the wounds" has not met with numerical "success" because many to whom the program is addressed, and more crucially their proponent groups, have not, for whatever reasons, met the President's program and concern with a like-minded effort to place a divisive past behind us.

The program has not failed its non-participants. They, and their supporters, want and need the "amnesty" issue. Incremental procedure adjustments with existing regulations will not meet their objections; only total vindication will and, it is our unchanged judgment, that such a development would be a tragic and irreversible policy blunder.

Attachments.

PRESIDENTIAL CLEMENCY BOARD,
THE WHITE HOUSE,
Washington, D.C., November 27, 1974.

Mr. JOHN J. STANG,
Veterans of Foreign Wars,
Washington, D.C.

DEAR MR. STANG: As you know, on September 16, 1974, President Ford established a clemency program as part of his efforts to heal the divisions caused by the Vietnam War. Under this program, persons who have been convicted for draft-related offenses and persons who have received a less-than-honorable discharge from the Armed Forces for absence-related offenses may apply to the President Clemency Board for clemency.

It is the Board's belief that the individuals eligible for the Presidential Clemency Board's program have a right to legal counsel to assist them in pursuing their cases before the Board. We believe this right to be crucial to the operation of the program. We make every effort to advise applicants of the importance of obtaining legal advice, and urge them to do so.

The board has had many requests from eligible persons seeking legal assistance. It has had less success in providing information as to how such assistance may be secured. Your group has traditionally provided counsel, or encouraged the provision of counsel, to persons otherwise unable to obtain representation. Therefore, we ask your help in creating a means by which applicants may be assisted in obtaining legal counsel. We believe that every eligible individual should have the means to make the most enlightened personal decision as to his own case. We also believe that this inalienable right should transcend any difference of opinion that may exist as to the clemency program.

Because the deadline for applying to the Board is January 31, 1975, we hope that your organization will consider this matter most expeditiously. We would like to pursue it with you further, at your earliest convenience.

Sincerely,

LAWRENCE M. BASKIR,
General Counsel.

VETERANS OF FOREIGN WARS,
Washington, D.C., December 4, 1974.

LAWRENCE M. BASKIR,
General Counsel, Presidential Clemency Board,
The White House, Washington, D.C.

DEAR MR. BASKIR: I have received your letter of November 27 and, as you point out, since the deadline for applying to the Clemency Board is January 31, 1975, I am replying expeditiously to your request that the Veterans of Foreign Wars of the United States "help in creating a means whereby applicants (to the Clemency Board) may be assisted in obtaining legal counsel."

The purpose of the V.F.W. is set forth in an Act of the 74th Congress (section 3, chapter 471, 49 Stat. 1390, 1391, May 28, 1936) which I cite below:

SECTION 3—PURPOSE OF CORPORATION

"That the purpose of this corporation shall be fraternal, patriotic, historical, and educational: to preserve and strengthen comradeship among its members: to assist worthy comrades: to perpetuate the memory and history of our dead, and to assist their widows and orphans: to maintain true allegiance to the Government of the United States of America, and fidelity to its Consitution and laws: to foster true patriotism: to maintain and extend the institutions of American Freedom, and to preserve and defend the United States from all her enemies, whomsoever."

Membership in the V.F.W. is defined by section 5 of the same Public Law which I cite below:

SECTION 5—MEMBERSHIP

"That no person shall be a member of this corporation unless he has served honorably as an officer or enlisted man in the Armed Forces of the United States of America in any foreign war, insurrection, or expedition, which service shall be recognized as campaign-medal service and governed by the authorization of the award of a campaign badge by the Government of the United States of America."

Routinely, and I believe effectively, the V.F.W. represents servicemen or veterans before Army, Navy, and Air Force Boards for the Correction of Military Records. Such cases are, I suspect you would agree, markedly different from those of individuals exploring legal options before submitting themselves to your Board for possible clemency.

By definition, the individuals you are attempting to serve would fit neither the criteria for V.F.W. membership nor advance the Congressionally-chartered purpose of our organization.

The American Civil Liberties Union and the American Bar Association would appear to be more helpful to your stated need.

Sincerely,

JOHN J. STANG,
Commander in Chief.

PRESIDENTIAL CLEMENCY BOARD,
THE WHITE HOUSE,
Washington, D.C., December 5, 1974.

DEAR SIR: The Presidential Clemency Board has reached unanimous agreement on the administrative procedures and the substantive standards which it proposes to employ in determining its recommendations to the President on applications for clemency under the President's clemency program. These procedures and standards haye been published in last Wednesday's Federal Register. It is the intent of the Board to publish a revised rulemaking after the end of the comment period on December 12.

The Board would be very grateful if you will examine the proposed rulemaking and give us your comments by December 13 on how it should be improved. We are interested in learning from both your own reactions to the proposed rulemaking and from the comments that you may have heard from potential applicants. Since a large number of people communicate with you who probably do not attempt to give their views directly to the Executive Branch, it will be particularly helpful to the Board to learn about the comments which have been given to you.

As you know, the Presidential Clemency Board deals only with those individuals who have received punishment for their offenses.

I appreciate your help.

Sincerely,

CHARLES E. GOODELL,
Chairman.

DECEMBER 6, 1974.

CHARLES E. GOODELL,
Chairman, Presidential Clemency Board,
The White House, Washington, D.C.

DEAR SENATOR GOODELL: As commander-in-chief of the Veterans of Foreign Wars of the United States, I am replying to your letter of December 5, which enclosed proposed rules and regulations governing clemency procedures to be followed pursuant to Presidential Proclamation 4313.

As I'm certain you know, the V.F.W. has been at the forefront of those organizations and individuals who have consistently opposed either general or conditional amnesty. While we have not (and will not) question our President's motives in setting up the mechanism which you head charged with dispensing clemency, our objection to this development was two fold: (a) American justice both civil and military has inherent to it a discerning sense of compassion; hence, (b) the "clemency mechanism"—which implies a lack of confidence in our homegrown judicial procedures—is both unneeded and, as the draft rules and regulations you forwarded so clearly attest, unwieldy.

In light of the foregoing, my comments will be brief:

(a) no VA benefits of any type should be extended to any applicants under this program;

(b) no alternate service in the VA at any level, should be permitted;

(c) alternate service must never be offered in any active duty or reserve component of any of the military services; and, finally,

(d) ample time has been afforded under the program for those eligible to apply. The program needs no more time beyond January 31, 1975, its announced termination.

I will closely follow adherence to the points I have just enumerated and the future advocacy of the V.F.W. will be largely geared to these four critical points.

Sincerely,

JOHN J. STANG,
Commander in Chief.

Senator KENNEDY. I am sorry we didn't have time for all interested groups to personally testify. We will keep our record open for a few weeks to include all submissions.

As the witnesses would understand, in the wrapup of the Congress there are a series of continuing conferences which we are members of. Even now while we are here, there is an OEO conference, which I should be at. I am chairing conferences this afternoon on health management and manpower and continuing our subject on this in the morning, so we didn't have the time on this particular occasion to include all the people we would like to.

I extend an apology as the chairman of this subcommittee, but we want to say that in no way effects our interest in their comments and the value of their recommendations.

STATEMENTS OF A PANEL CONSISTING OF JOHN SCHULZ, EDITOR IN CHIEF, MILITARY LAW REPORTER; HENRY SCHWARZSCHILD, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION PROJECT ON AMNESTY, ACCOMPANIED BY EDWIN J. OPPENHEIMER, ACLU; AND JAMES WILSON, DIRECTOR OF NATIONAL SECURITY, AMERICAN LEGION

Senator KENNEDY. Mr. Schwarzschild.

STATEMENT OF HENRY SCHWARZSCHILD

Mr. SCHWARZSCHILD. Thank you, Mr. Chairman, Senator Hart.

I am Henry Schwarzschild, the director of the project on amnesty of the American Civil Liberties Union. I appear here pursuant to the request of the subcommittee to present the views of the American Civil Liberties Union on the administration of the clemency program, which was instituted by President Gerald Ford through Proclamation 4313 and Executive Order 11804 on September 16, 1974.

I am accompanied today by Edward J. Oppenheimer, the ACLU's clemency litigation director. I should add that both Mr. Oppenheimer and I are members of the steering committee of the clemency/amnesty law coordinating office (CALCO), organized here in Washington shortly after the clemency program was instituted, in order to provide free legal services where necessary to persons who apply for clemency. Other members of the CALCO steering committee are staff members of such concerned groups as the National Legal Aid and Defender Association, the Lawyers Committee for Civil Rights Under Law, the Public Law Education Institute, the Central Committee for Conscientious Objectors, the National Conference of Black Lawyers, the Center for Social Action of the United Church of Christ, the Washington Council of Lawyers, the National Interreligious Service Board for Conscientious Objectors, and others. In its efforts to structure a legal referral service for clemency applicants, CALCO was compelled to look at the administrative and substantive infirmities of the

clemency program, and it has been in persistent negotiation with all the governmental agencies involved to cure some of the most glaring defects of the program. While I do not speak this morning with the formal authorization of CALCO, I know that this body has complained of and tried to correct most of the problems and defects in the clemency program that I shall have cause to set forth. These defects continue to be so massive and crippling, in CALCO's judgment, that this organization felt constrained not to make itself available as "clemency bar" and, as responsible attorneys, to refuse the request of the Presidential Clemency Board that CALCO act as a referral agency to which clemency applicants might be sent for legal assistance.

Senator KENNEDY. It will be received and printed as if read.

Mr. SCHWARZSCHILD. The comments I offer this morning on the administration of the clemency program must be understood in the context of the ACLU's position on the larger issue of amnesty, which is inseparable from any consideration of the clemency program now in operation.

For several years now, the ACLU has urged this country and its political leaders to enact a universal and unconditional amnesty for all those who have already undergone or still face criminal or administrative penalties for any nonviolent violations of law arising from their conflict with the draft, the military, and the war in Southeast Asia. The Nation was deeply divided over the moral, political, military, and even legal and constitutional justification of that tragic war. Direct American military involvement in that war ended almost 2 years ago. Our prisoners of war are home. Our troops have been withdrawn. It is time also to heal the other wounds that we have inflicted upon our Nation in the context of that war. Hundreds of thousands of men live with the disabilities of less-than-honorable discharges from the military services; tens of thousands bear the stigma of felony convictions or suffer the threat of military or civilian criminal prosecution arising from their response to the war.

The demand for amnesty does not rest primarily upon a judgment of whether these men and women were right or wrong. First and foremost, the call for a true amnesty says to the American people that the world and our own people have suffered enough over that war. Let us stop continuing to make American war casualties out of our own children and let them return to our—their—society without judgment and without punishment. Amnesty, which has a long and distinguished tradition in American history, is the way to end the process of victimizing ourselves in the context of a problematic war that has, in some respects, been brought to an end.

In that perspective, the ACLU finds the Presidential clemency program unsatisfactory in its moral and political assumptions. We welcome, of course, the impulse that caused the President to take some action to alleviate the continuing problems of those who, for whatever reasons, refused to lend their services, their bodies, their lives, to the war in Indochina. We admired the President's courage in announcing in so hostile a forum as a veterans' convention his intention of providing some form of clemency. We offered the White House every assistance, during the time the program was formulated and organized toward making it humane, just, and effective. But it became quickly evident, with the President's proclamation and Executive order of Sep-

tember 16, 1974, that the program in effect declares that those who refused to participate in the war committed an offense against American society which we are entitled—indeed compelled—to punish. The punishment in some circumstances would be mitigated by Presidential clemency; but the Government's position is reaffirmed that war resisters committed the punishable crimes of the war. It is the punitive and stigmatizing nature of the Presidential clemency program to which the ACLU profoundly objects which has also been the cause of its evident and dramatic lack of success.

Even within the assumptions on which the Presidential clemency program rests, it was, it seems to us, ill designed. Its division among four governmental agencies is cumbersome and confusing. Its limited scope is discriminatory. Its strenuous effort to distinguish among various categories of war resistance and to deal with each case on the basis of some individual judgment of his personal merits is fruitless and hurtful. Its threatened penalties for many people who under present law have committed no crime are shocking. Its loyalty oath is demeaning. Its alternate service requirements are useless, punitive, and inequitable. Its clemency discharge is stigmatizing. Most of its administrative apparatus is hostile to the moral and political commitments of the war resisters. Many of its procedural aspects are very probably violative of Federal statutes and the U.S. Constitution.

It is because of the hurtful moral and political assumptions that underlie the program and because of its complex and discriminatory implementation that the program is, to date, such a massive and dramatic failure. Overall, only about 2.5 percent of those qualified to apply for clemency under the program have done so in the first 3 full months of its existence. [The time for applying for clemency only has 6 or 7 weeks more to run.]

The war resistance community, especially those in exile, have declared their boycott of the clemency program. The amnesty movement in this country—comprising very broad elements of the American religious community, together with civil libertarians, civil and community organizations, some veterans and peace-oriented groups, and others—has joined the boycott and has taken the position that the clemency program is unacceptable. We advise persons qualifying for clemency that in many, if not most, instances they may very likely have legal options available to them better than the clemency offered by the program. At the same time, we have offered to counsel and represent persons wishing to participate in the program to assert their interests and rights, and we have endeavored to improve some of the substantive and procedural problems that we see in the program.

Let me come to specific problems in the administration of the program. By arrangement with the staff of the subcommittee, I shall present comments only on those parts of the clemency program that are administered by the Presidential Clemency Board and the Department of Defense, leaving comments on the Department of Justice and the Selective Service System to Mr. John Schulz of the Public Law Education Institute.

I need not describe the jurisdiction of the Board which its chairman has very ably described before you. The Board, under Executive Order 11804, was given jurisdiction to receive applicants for Presidenial clemency from persons who have been convicted by Federal courts

for violations of the Military Selective Service Act (i.e., desertion, absence without leave, and missing a military movement), from persons who have been discharged from the military services with bad conduct or dishonorable discharges by sentence of court martial for such absence offenses, and for persons who were discharged from the military administratively with an undesirable discharge because of such offenses, if these acts occurred between August 4, 1964 and March 28, 1973. For applicants who, in the Board's judgment, merit Presidential clemency, the Board may recommend to the President the granting of executive clemency, contingent where appropriate upon the satisfactory completion of a period of alternate, civilian service not to exceed 24 months.

The clemency applicants to the Board, in other words, are either persons who have already gone through the civilian or military criminal process and have suffered such punishments as these courts imposed, or veterans with less-than-honorable discharges issued by military administrative fiat.

Not until the middle of November, fully half-way through the period for clemency applications, did the Board formulate procedural and substantive standards for considering clemency applications for the estimated 120,000 potential applicants. Even now, it is difficult to see what real advantages the clemency program offers persons qualified to apply to the Board.

Take a young man who refused induction into the military because, like millions of Americans, including many members of Congress, he believed the war in Southeast Asia to be a human and political catastrophe. He was arrested, tried, and convicted, and served his sentence in a Federal penal institution. He is now free to apply to the Board for executive clemency. The Clemency Board may recommend to the President the grant of clemency contingent upon the applicant's spending another period of his life doing alternate service under the supervision of the U.S. Government instead of pursuing his own life. Even a full pardon will not expunge his felony record and does not automatically relieve him of civil disabilities. Some lesser form of executive clemency will do nothing whatever for him. The Clemency Board has only recently made it known that recommendations for full pardons are available to some clemency applicants. So far, the indications are that alternate service will be a condition for most of them.

The applicant has no right to a hearing before the Board for himself or his attorney. He has no right to a hearing even if he finds the clemency recommendation unjust and requests a reconsideration by the Board. He cannot see the reasons for the Board's recommendations to the President before the President sees them, so that there is no opportunity to rebut erroneous facts or conclusions. In the Board's computation of his alternative service-time, a prior criminal conviction will be held against him, even though he has presumably "paid his penalty" for any such offense and should not be twice punished for it. Wrongful processing by the Selective Service System of claims he may have had for exemption or deferral will be held in mitigation, though such violations of laws and regulations by the Government should be exculpatory rather than mitigating in their effect. The length of any prison or other sentence served will diminish his alternate service period, but this means in effect that the Board acts as a

corrective sentencing authority—where the draft refuser had a humane or lenient judge in court, who gave him a lesser sentence, the Board's computation will now substitute its own penalties in greater measure.

Former military personnel run all these hurdles and a very substantial additional one. Those qualified to apply for clemency from the Board now hold a less-than-honorable discharge—either an undesirable discharge, given administratively to 85,000 men, or a court martial; imposed bad conduct or dishonorable discharge to 26,500. In their cases, the Board may recommend that the President issue such applicants a "clemency discharge" (newly established by the Presidential Proclamation), after they satisfactorily complete a period of alternate service. But the clemency discharge is distinctly worse than the undesirable discharge that most of these men now hold; undesirable discharges, crippling as they are in respect to employment, civil service qualifications, and other needs of postmilitary careers, are held by tens of thousands of veterans for a great variety of reasons. But a clemency discharge will stigmatize a veteran for life as a deserter, if not as a traitor to his country. An undesirable discharge leaves the Veterans' Administration certain discretion with respect to the bestowal of veterans benefits. An undesirable discharge may be taken before the military services' discharge review boards for appeal and upgrading; but it is very doubtful that these discharge review boards have jurisdiction to upgrade a clemency discharge given by the President as an act of executive grace. In fact, the issuance of a clemency discharge is a downgrading of the undesirable discharge, and, for this, the program expects the veteran to do up to 2 years of alternate, ill-paid civilian work, in addition to the time he has already spent in the military service and the disabilities already inflicted upon him by virtue of the undesirable discharge!

The subcommittee should also be aware that there is no satisfactory rationale for offering clemency only to veterans whose less-than-honorable discharges were given because of absence offense. Tens of thousands of veterans, including many who served honorably and heroically in Vietnam, some who have serious battle wounds from that war, were administratively discharged by the services for every imaginable variety of petty offense, most of them offenses that do not even exist in civilian life, much less have any bearing on their post-military life. Yet the rest of their life is blighted by their "bad" discharge. The discharge policies of the military services are urgently in need of systematic review and correction.

Serious questions have been raised recently, in a major analysis in the Harvard Civil Liberties/Civil Rights Law Review, about the legal validity of the present system of administrative discharges. Indeed, it is subject to question whether the President has the authority by executive action alone to create an additional, sixth class of "clemency discharge." But even if he had the power, we urge that the express intent of the President's clemency program—to alleviate the harshness with which we otherwise punish those who came into conflict with the war—be made real by giving every veteran a discharge that will not haunt his entire post-military life and career. Only an honorable discharge will accomplish that goal. It is tragic indeed that the clemency program should compound the injury, rather than mitigating or abolishing it. That is what a clemency discharge does. It remains perhaps the single most objectionable feature of the clemency

program. The President's Proclamation and Executive order leave room to hope that some change of the discharge issue may be accomplished within its framework. If not, the program should be amended by the President to remove this most injurious feature of its so-called remedies.

We have welcomed some of the recent procedural and substantive decisions made by the Board. The formal acknowledgement that full and complete pardons are at the end of the tunnel for some, if not all, the applicants; the possibility of brief hearings before the board (though at the Board's discretion, rather than as a matter of the applicant's right), both on the original application and upon a request for reconsideration of the Board's recommendation; finally, the inclusion in the Board's standards for mitigation of the applicant's conscientious motivation for the act subject to the clemency. These are very considerable steps in the direction of what a true and generous amnesty might someday look like. Given the limitations of the Presidential clemency program, they cannot overcome the ACLU's objections to it, or the resistance and rejection on the part of the war resistors generally. That resistance and that rejection are so strong that the Presidential Clemency Board to date has received applications from no more than about seven-tenths of one percent of those qualified to apply. About 800 applications out of a possible 120,000—only one in every 150. It is that small number on which the chairman of the Board builds a structure of analysis about how men came in conflict with the law. It must be remembered that men who had intellectual, religious, or personal objections to the war are least likely to apply for clemency because they find the program objectionable. Surely, national reconciliation after the divisive experience of the Vietnam war is not being accomplished by the Presidential Clemency Board. The Congress and the American people should learn why this is so.

The Department of Defense has jurisdiction, within the Presidential clemency program, over persons who are subject to military authority and who have (or may have) violated the military laws against desertion, absence without leave, or missing a military movement (articles 85, 86, and 87 of the Uniform Code of Military Justice), if these acts occurred between August 4, 1964 and March 28, 1973. The Department of Defense has stated that there are about 12,500 military absentees qualified to participate in the program. Some 2,200 military returnees have so far been processed through the DOD's clemency machinery, about 18 percent of the number eligible. I shall explain presently why, in our judgment, the Defense Department's program is, compared to the other parts of the clemency program, so successful.

Military absentees who surrender to military authorities are sent to Fort Benjamin Harrison, Ind., where the four services have established a Clemency Processing Center. The returnee is normally processed there in one business day. He is required to sign a reaffirmation of allegiance, an admission of his violation, and a pledge to do an assigned period of alternate service. A Joint Alternate Service Board (JASB), composed of a colonel each from Army, Air Force, and Marine Corps, and a Navy captain, considers the returnee's military personnel record and a form filled out by the clemency applicant. The 1-page form contains only three questions: (1) Reason for absence from military service; (2) Employment during absence from military

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service; (3) Other matters I want the Board to consider. The returnee is given an undesirable discharge from his branch of the service. Upon the satisfactory completion of the alternate service, the returnee may obtain a clemency discharge in place of his undesirable discharge.

Our objections to the administrative practice of the military clemency program are numerous:

(1) We believe that clemency judgments concerning military violators, especially alleged deserters, are not best made by the Military Establishment itself, which is naturally antagonistic to the very notion of leniency for those who violate its own code of behavior, especially with respect to desertion. Virtually all the military absentees who qualify under the clemency program are enlisted men. The Joint Alternate Service Board is composed of four field-grade, career officers, whose sympathies toward enlisted men charged with desertion are unlikely to be warm.

(2) The required reaffirmation of allegiance is flagrantly offensive to the returnees, since in effect it charges them with having denied their allegiance, when all that can be charged against them is a violation of military law, not a failure of allegiance to the country. The returnees are acutely aware that no General Lavelle and no ranking officer involved in the My Lai coverup (see the Peers report) and no civilian or military official who lied to the Congress and the American people about the bombing of Cambodia has been required to "reaffirm allegiance" to the United States.

(3) The forms signed by the military clemency applicant include an admission of guilt, and a confession of having violated military laws. Before signing the applicant is not given constitutionally required warnings about his rights nor a preliminary hearing at which an impartial official might explain the charges against him and make an impartial assessment of whether the acts charged constitute a military offense.

(4) In the extremely brief processing period at the Clemency Processing Center, there is no adequate opportunity for the applicant to have his personnel file reviewed by competent counsel acting in his behalf to see whether ther are legal defenses against the absence offense that might make his application for clemency unnecessary. To our information, there is no review of the lawfulness of the applicant's induction, no review of whether there may have been a wrongful denial of an in-service application for discharge for hardship, dependence, or conscientious objection, and the like.

(5) The applicant has no opportunity to appear before the JASB to state his case or to make a plea for mitigating considerations.

(6) The three-question form filled out by the applicant, aside from being sparse and inadequate to say the least, gives him no hint as to what standards the JASB considers in mitigation and, therefore, is ill-designed to help the applicant state his case to his advantage.

(7) The published standards in mitigation of the maximum (and usual) 24-month alternate-service sentence include only personal hardship and "good soldier" elements. No weight whatever is given to the conscientious and unselfish motives that prompted the acts of many of the military absentees. Eighty percent of the military returnees have been given alternate service sentences of from 19 to 24 months, approaching the maximum.

(8) There are no published procedures and standards that describe how the JASB considers cases and in votes upon determinations of terms of alternate service or class of discharge to be given.

(9) The JASB gives no statement of reasons for its determinations, nor is there provision for any appeal or review of its actions.

(10) The judgment of the military services, normally made by the authority of the Commanding General of Fort Benjamin Harrison, as to the eligibility of a military absentee to participate in the clemency program are not appealable.

(11) The clemency discharge held out to military returnees under the clemency program has precisely the same incurable defects that I have already mentioned in my comments on the Presidential Clemency Board.

(12) There has been a major conflict of statements by Department of Defense spokesmen concerning the question of whether a military absentee who pledges but fails to do his assigned alternate service time can and will be prosecuted. The problem arises because the returnee, after signing his alternate service pledge and the other forms, is discharged from the service with an undesirable discharge. Once discharged, the military normally has no further jurisdiction over him.

If he fails to perform the alternate service, the only means of enforcement appears to be an action by military authorities under article 83 of the Uniform Code of Military Justice for having fraudulently obtained his undesirable discharge or by the Department of Justice under 18 U.S.C. 10001 for making a false or fraudulent statement to an agency of the U.S. Government. In order to prove fraud, the prosecution would have to prove the deserter's fraudulent intent at the time he signed the alternate-service pledge. But in most cases that would be extremely difficult and can be made virtually impossible by thoughtful action on the part of the returnee. On September 19, 1974, Defense Department spokesman, Ken Pease, and Justice Department spokesman, John Russell, were quoted in the Washington Post as having declared that there was nothing either Department could do to enforce the deserter's alternate-service pledge. The briefing given by military officers to the returnees at Fort Benjamin Harrison continues openly to give them this advice. On October 7, 1974, however, the New York Times quoted Martin Hoffman, General Counsel of the Defense Department, who will be appearing here tomorrow, as saying that they would institute prosecution in appropriate cases, and the Justice Department was similarly heard to mumble about prosecution under title 18 of the United States Code. We think it essential that this matter be authoritatively clarified. The Defense Department and the White House have claimed that this so-called deserters' loophole was not accidental but knowingly and intentionally created in the clemency program (New York Times, Sept. 19, 1974). If that is the case, the threats of prosecution are sheer harassment. It would be extremely helpful if the subcommittee could obtain a final and authoritative ruling on this matter.

The apparent unenforceability of the deserter's alternate-service pledge accounts entirely for the fact that the military clemency program is relatively the most successful of the program's divisions. About 18 percent of the potential applicants have submitted, compared with 7

percent of the Board's potential clientele and about 2 percent of the Justice Department's. This is dramatic evidence for our contention that no punitive system of clemency, no conditional amnesty, will achieve the President's objective of healing the Nation's wounds and overcoming the divisiveness of the Vietnam war among ourselves. The military clemency program, to all intents and purposes, is unconditional, and despite its other serious shortcomings, that fact alone accounts for its strikingly higher ratio of success in returning war resisters to our society.

In concluding, let me only add this: The legal cloud that has been cast over the deserters' loophole accentuates one of the chief objections that must be raised against the Presidential clemency program generally.

The program obliges war resisters to reaffirm allegiance to their country, which they had never denied but rather passionately affirmed; it forces them to admit that they have committed crimes, when the world and many of our fellow citizens, including much of our moral and political leadership, came to believe that the war itself was a crime; it compels them to confess that they did not fulfill their obligations as citizens, when they have spent years of their young lives either in prison, underground in their own country, in exile abroad, or in the military service itself; it now asks them to concede that this Government has the moral and legal authority to impose punishment upon them for their acts of war refusal. The loophole problem makes it quite clear; the Presidential clemency program demands that war resisters lie to the Government in the process of begging it for mercy. That is not the way a country makes peace with its young sons.

The war in Southeast Asia was a catastrophe for the world, a horror for the peoples of Indochina, and a tragedy for our country. Amnesty—or clemency—should be one gesture in the direction of ending the tragedy. The Presidential clemency program, it seems to us, prolongs the tragedy for tens of thousands of young Americans.

Modifications in the present program are essential and might mitigate some of the worst features of its implementation. But the program's very conception will remain punitive, demeaning, discriminatory, and hurtful. No clemency that is conditional, that makes the impossible attempt to assess the personal, subjective, religious, moral, ideological, religious or political motivations of people's acts of war refusal, that offers clemency to some but not to others in similar situations. No such system will reconcile us with those young men and women for whom the war should now also come to a close. For that reason the Presidential clemency program is and will remain a failure, not only statistically but also morally and humanely. We hope devoutly that hearings help persuade the American people and the President that it is time to end the war for our own sons, and that only a universal and unconditional amnesty will accomplish that noble purpose.

I shall leave comments on the other two major aspects of the Presidential clemency program to my colleague, John Schulz, of the Public Law Education Institute, the editor of the Military Law Reporter and former editor of the Selective Service Law Reporter.

Senator KENNEDY. Thank you very much. We have some questions, but we will withhold those questions for a little while.

We will hear from Mr. Wilson now. For the benefit of the witnesses we will continue until about 12:50 and then recess until 2:15 p.m. Senator Hart will chair the hearings this afternoon. I will be unable to attend.

Senator HART. Mr. Chairman, let me apologize for leaving now. I shall be back.

STATEMENT OF JAMES WILSON

Mr. WILSON. I just wanted to say before you leave, Senator, that I did bring one of our representatives of our rehabilitation staff here who have been handling these cases.

But one point I want to make clear is that we did not suddenly have an enlightened opinion on this whole thing. We have been representing young men with less-than-honorable discharges when the war began and we will continue after the January 31 deadline.

Senator HART. I am delighted. I did read your statement in which you make that point very clear.

I suppose the reason I did not assume that this service was gone was because of the very explicit opposition that we in the Legion as an organization took with respect to those who said, in short, "I cannot serve in this war." It was a pretty hard-nosed position throughout.

Mr. WILSON. I just want to clarify this one matter. I will summarize very briefly, and not read my statement.

The American Legion was opposed to unconditional amnesty, and from what I have heard here this morning it seems that the Legion's position was certainly valid and that each case should be considered on its individual merits. That is all we ask for.

Senator HART. I am still not convinced that the case-by-case procedure will do other than accumulate a lot of files and reach only a small percent of those who we should be reaching. If you can tell me how we can protect against giving a ribbon to the fellow who robbed the headquarters company fund, if you can tell me how we can keep him out, I am still for blanket amnesty.

Mr. WILSON. Of course, we will continue to be opposed to a blanket amnesty, but we will continue to represent men with less than honorable discharges, even though these young men cannot belong to the American Legion. We finance the representation of these young men out of dues of people who are honorably discharged. We have 500,000 members who are Vietnam-era veterans, honorably discharged. We will continue to perform that service.

Senator HART. Among my Legionnaire brethren are the fathers of a lot of young men who all of a sudden found that they had to go to the doctor to accumulate a big file for the time they were called up. The whole inconsistency of this thing is what contributes to my desire to see if we can't just lay a blanket under it, and as the word means, forget it.

Mr. WILSON. Mr. Chairman, if I may, I would just briefly like to go over my statement. It will just take 2 to 3 minutes.

Senator KENNEDY. You may take what time you need.

Mr. SCHULZ. Mr. Chairman, I am happy to wait until the afternoon except there is one single matter in the oral statement I wish to make which I think is of extreme urgency to the young men abroad

in Canada, the 10,000 to 30,000 young men who think they are draft violators and who are not. It would be a shame, Mr. Chairman, that this could not be said when the press is here.

Senator KENNEDY. I am sure, Mr. Wilson will give you 2 to 3 minutes to say it, but then I want to give him a chance to continue.

Mr. SCHULZ. Thank you very much.

Let me say my name is John Schulz, editor in chief, Military Law Reporter, and former editor of the Selective Service Law Reporter. In that prior role I learned a lot about the administration of the draft, and in fact, it was brought home more recently in concrete form that about 200,000 young draft registrants were considered violators by Selective Service in the 10 years covered by President Ford's plan and had their cases referred for prosecution to the Justice Department. No more than 10 percent, about 19,000, were even indicted, and about a third of those were convicted. In other words, about 3 percent of the 200,000 young men who refused induction between 1964 and 1973 are in fact not draft violators, yet many of them, I think, are still out there and consider themselves to be draft violators. I am talking about people who have not committed a crime, people whose cases were dropped by the Justice Department's attorneys.

As I said, this was brought home to me when a young man came to me who had been living underground for 2 years. He told me about his draft case. I thought something was wrong. I called the U.S. attorney, who told me that this man was indicted in 1971, but that his case was dismissed in 1972 for an error. And he never knew, his family never knew, the case was dropped although he had been told many times by Selective Service, by the FBI, by the U.S. attorney that he was a violator. This man, whose name is Alan K. Merkle, is in the hearing room today and for the first time, he can use his name publicly.

Senator KENNEDY. What are you suggesting?

Mr. SCHULZ. As a minimum, 20 percent of the people whose cases were declined are innocent. That makes 40,000, perhaps 60,000. It seems to me it would be minimum decency in normal times for the Justice Department to tell these people that they are not criminals. Many of these people still think they are criminals. They received an induction order and did not know the induction order was illegal since the induction board made a mistake. Travis, which was this man's alias, lived underground for 2 years or more, although he committed no crime. It seems there is some obligation on the Justice Department or Selective Service to tell such a man that he is not a violator. How much stronger is that obligation, Mr. Chairman, in what is said to be a clemency program, in a period, according to President Ford, in which justice and mercy should predominate? Yet to this day, the Justice Department has taken no steps to help out these 30,000 to 70,000 young men in limbo.

With Christmas coming up nothing could be more appropriate. One way to inform the innocent might be to establish an official closed list of people that are considered to be violators, with the possible exception of people who did not register, and then let everyone call, preferably, an independent organization that they could trust to see if their name is on that list.

Or perhaps, one might publish a list of the 70,000 to 80,000 who were found not to be criminals. Their reputations have already been sullied by FBI agents running about in their communities and contacting their families and neighbors about their "crimes." They would be in effect vindicated if the Justice Department were to publish a list saying they were not draft violators. They don't need clemency. That is the most urgent aspect of this problem. These are simply not criminals, in the most concrete sense of the word.

That is all I would like to say at this point, Mr. Chairman.

Senator KENNEDY. Well, I think that is an eminently sound and fair suggestion, and one which the Justice Department should follow. We will have a chance to bring it up with the Justice Department representative who will be testifying here tomorrow.

I don't know how you could possibly argue with the reasoning of that proposal. You could object to the lack of manpower and resources to do it, but I think this suggestion is one which certainly should be followed up.

Mr. SCHULZ. Let me express my thanks to Mr. Wilson for letting me have these few minutes.

Senator KENNEDY. Do you have any reaction to that, Mr. Wilson?

Mr. WILSON. No, we have no objection, Mr. Chairman. We would like every young man who is guilty of nothing to be aware of it.

I might say also, Mr. Chairman, before proceeding with this very short statement, that I felt a special obligation in coming up here, because as you are aware and as you pointed out in your preliminary statements, that there are many, many organizations in this town who have qualified representatives who perform the same services as the American Legion who would have liked to appear before this subcommittee. Frankly, the ratio isn't too good today, but we are willing to take the odds we are facing today.

But anyway, I would like to briefly state how we view the situation at the present time.

Senator KENNEDY. You seem to be doing very well for your side, Mr. Wilson.

Mr. WILSON. Thank you very much.

For the record, and as this subcommittee is aware, the American Legion by action of succeeding national conventions offered a different means of resolving the amnesty issue than that chosen by President Ford. We felt then, and we feel now, that the handling of the cases of deserters and/or draft evaders should be through already established judicial systems.

We presented our viewpoint to both Senate and House committees and to the President himself. However, once the President's proclamation was issued, the matter was resolved. We used all of our means of communication to make the provisions of the President's plan well known to our membership of nearly 2.7 million veterans.

Perhaps this effort was redundant for press, radio and television, in fact, almost every form of communication has repeatedly covered this matter in depth. The media should be commended for the splendid job it accomplished in making known to all Americans, but particularly to those affected, of the opportunity President Ford's proclamation provided.

In announcing his "earned reentry" program, President Ford clearly stated his objective "to give these young people a chance to earn their return to the mainstream of American society so they can, if they choose, contribute to the building and betterment of our country and the world."

President Ford "promised to throw the weight of his Presidency into the scales on justice or the side of leniency and mercy, but (to) also work within the existing system of military and civilian law and the precedents set by (his) predecessors."

In keeping with the spirit of the clemency program, it is our view that the program is not vindictive. It has and does provide a just opportunity for more than 128,000 young men to reenter American society with far less sacrifice and risk than those who chose to serve. The program has been in effect for more than 3 months and those eligible for its provisions may still enter for 6 more weeks. However, the "open hand" of reconciliation should be terminated as announced on January 31, 1975.

The vast majority, more than 85 percent, of those covered by the clemency program are military deserters or absentees who still have redress after the program's termination date. Each convicted military absenteee and a far larger number of Vietnam era men separated with less-than-honorable discharges may apply to the Discharge Review Board and/or the Board for Correction of Military Records of their respective service.

The circumstances surrounding their violation of the Uniform Code of Military Justice are a "mixed bag," and this is exactly what Mr. Goodell said. Seldom does their misconduct stem from a fervent personal or moral opposition to the war in Vietnam. Their reasons for absenting themselves parallel their fellow servicemen in nonhostile and other hostile period, personal and family problems, inability to adjust to military society, overriding financial obligations, and a myriad of other reasons completely unrelated to Vietnam.

The American Legion, upon application, has and will continue to provide administrative assistance and counsel before the discharge review boards and the boards for the correction of military records to these former servicemen.

Mr. Fattig, one of our representatives before these boards is here, and if there are any technical aspects of this he will be delighted to answer questions.

For the benefit of the Clemency Board, these men are not lawyers, and for that reason their appearance as counsel for the Clemency Board would be of questionable value.

First, we strongly opposed the assignment of draft evaders or military deserters to Veterans' Administration hospitals, which we felt would be a direct insult to many of those who served and who are reminded daily of their painful sacrifice. Furthermore, it would be grossly unfair to those who chose not to serve.

Second, we are concerned that some alternate service assignments would eliminate jobs for Vietnam veterans, particularly the 20–24 age category whose unemployment rate has risen to a distressing 12.4 percent. We have received assurances from both the Administrator of Veterans Affairs and the Director of the Selective Service System that neither of them will occur.

The American Legion has followed the progress of the amnesty program since its inception last September. Special briefings have been held for the National Security Commission in Indianapolis dealing with the procedure for processing military deserters through Fort Harrison and Camp Atterbury and with Selective Service responsibility. My staff and I also attended the recent press conference held by the President's Clemency Board and kept in touch with the Government agencies to determine how well the program was being received. Much of this information has been transmitted to our national officers, to our policymaking bodies and to the membership at large.

We feel that every young American to whom President Ford has offered the chance to earn his way back into society is aware of the provisions and mechanics of the program. However, if this is not the case, time still remains to apprise any who may not have knowledge of the program.

The fact that more have not taken advantage of the program is not, in our judgment, through lack of information about it or how to proceed to apply, rather we believe the draft evader, particularly, does not feel it is enough. Nothing short of complete, unconditional, automatic amnesty will satisfy this category among all those who refused to serve.

Based on our assessment, it is our recommendation that the program's deadline should not be extended nor its provision liberalized.

Thank you very much, Mr. Chairman.

Senator KENNEDY. Let me violate my own rule that I said about letting everybody speak, but since we have had comments and since I will not be able to be here, I would like to ask you a question, Mr. Wilson. Do you really believe that if there was to be a broader amnesty that this would impair the opportunity to raise a military force for our country at sometime in the future?

Mr. WILSON. I think it would definitely have an effect on the raising of armies in any future conflicts, and God forbid that we ever get into another one.

Senator KENNEDY. So your view is that a broader kind of amnesty program would pose a threat to the country in its ability to raise a military force for its self-defense?

Mr. WILSON. Senator, it might not seriously impair them, because as was the case in Vietnam, I am sure somebody else would step up to take their place. But I get back to the fact that the amnesty program is not correct, or if the law that brought these young men into service was not correct then I think it would be incumbent upon the executive as well as the legislative to make needed changes. As Senator Thurmond said we are a nation of laws, and if we become a nation of men who violate the law, we will be in serious shape in the future.

I might say one last thing, Senator. If the Congress in its good judgment or the President in his good judgment finally decided and the plan was changed or the law itself was changed the American Legion would not oppose the law. We never have and we never will. We abide by the law.

Senator KENNEDY. We will recess, and I hope you will all be able to come back at 2:15 so we can continue with questions at that time. I have further questions from Senator Mathias and a few other members as well.

We will recess until 2:15. I want to thank you all very much.

[Whereupon, at 12:55 p.m., the subcommittee was recessed until 2:15 p.m., the same day.]

AFTERNOON SESSION

Senator HART [presiding]. The subcommittee will be in order.

We always make the promise that we will read the record to inform ourselves as to what happened when we were necessarily absent. That doesn't help me learn at 2:15 what happened after I left.

Who remains to be heard?

STATEMENTS OF A PANEL CONSISTING OF JOHN SCHULZ, EDITOR IN CHIEF, MILITARY LAW REPORTER; HENRY SCHWARZSCHILD, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION PROJECT ON AMNESTY, ACCOMPANIED BY EDWIN J. OPPENHEIMER, ACLU; AND JAMES WILSON, DIRECTOR OF NATIONAL SECURITY, AMERICAN LEGION—Resumed

Mr. SCWARZSCHILD. Both I and Mr. Wilson have made our statements. Mr. Schulz is left to make his statement.

STATEMENT OF JOHN SCHULZ

Mr. SCHULZ. Senators Hart and Thurmond, in fact I did make a brief statement before lunch of what I consider to be the most crucial part of my testimony, namely the continual refusal of the Justice Department to tell a large number of young men—a figure which on their own analysis may be as great as 40,000 persons—that they in fact committed no violation of the selective service law during the 10 years covered by President Ford's program, but young men who think they violated the law.

They think they violated the law because most of them got an induction order, not knowing it was illegal, and because the FBI contacted them; and they think they violated the law because they were indicted. But nobody in this group was told that the Department of Justice later decided that they had not violated the law.

Senator HART. The decision being a class situation?

Mr. SCHULZ. Mr. Chairman, no. Data supplied to this subcommittee by the Justice Department indicates that 20 percent of the 200,000-odd cases in which prosecution was declined between 1964 and 1973, were bad cases.

My own analysis, which you can find in my written statement, suggests that the percentage of those 200,000 decisions to drop cases which represent bad cases, bad files because of Selective Service mishandling, may be as high as 80 percent. But even if it is only 20 percent, that means 40,000 persons. If my analysis is correct, the figure is over 100,000. If it is somewhere in between, we are talking about maybe 75,000.

This state of affairs was brought home to me when a young man came to me who had been living underground for quite a while thinking he was a draft offender. He told me his story. I thought that something was wrong in the handling of his case. I called, in fact, yesterday, I checked with the assistant U.S. attorney in Detroit about it. The young man had been indicted in 1971, but the Justice Department dismissed his indictment in 1972. Afterwards, he lived underground needlessly without knowing any better, because although the FBI and the Selective Service repeatedly told him he was a violator, nobody

bothered to tell him or his family that he was home free, that he was innocent.

Instead of having to go by the alias of Travis, this man can use his name, Alan Merkle. I wonder if he would stand up for the record. He is a carpenter here in Washington now and can now ply his trade publicly.

Senator HART. So that I may understand it, you say that the Justice Department knows by name several thousand men who have been found to be not guilty of a charge that is in the files some place?

Mr. SCHULZ. I am not absolutely sure they know all these names.

Senator HART. That would be my question. How are you going to notify the ones?

Mr. SCHULZ. There is a way for them to notify them.

First of all, I believe that the position the Justice Department has taken would be outrageous in normal times, but in a period of clemency a time when its major responsibility as outlined by the President is to emphasize justice and mercy, this becomes indefensible.

There are several ways to go about informing these people, even if not every U.S. attorney has files, as good as those of the Detroit U.S. attorney. It is possible to ask Justice to prepare a complete list of all the people it still does want to prosecute with the possible exception of cases of nonregistration, which I am not referring to.

Nonregistration is a sort of offense that never came to the attention of the Justice Department, and I would accept their refusing to disclose their list for nonregistration cases.

But for all the other violations, the Justice Department has told the president of the institute I work for, Mr. Thomas P. Alder, that they firmly believe they want nobody but the 7,000 currently under indictment and investigation. So, I think, Justice could make a list available. To protect people, it would not necessarily have to be fully public; rather, it could be given in trust to an independent organization which these underground people and fugitives could then call to discover if their name is on the list; if not, they are innocent.

The Department of Justice has made one list public already, but as soon as it was given to the National Council of Churches, Assistant Attorney General Henry Petersen hastened to say it was not reliable, not a complete list, that is, that some persons considered violators were not on the list, and some persons on the list were not considered violators. What we need is an official closed list.

In a curious way, this problem is not really the gist of the Justice Department clemency program as they see it. They think that there are no young men who are innocent but think themselves guilty. But Alan Merkle came to me. And I understand that the counseling offices in Canada are beginning to discover literally hundreds of people in the same situation.

[See appendix for correspondence relating to this case, pp. – .]

Mr. Chairman, the Justice Department response to this problem generaly illustrates its overall handling of the clemency program. In short, the Justice Department program has not been implemented and operated in a spirt of clemency. Rather, I think, it looks mainly like prosecution business as usual. U.S. attorneys are in charge of it. I guess you can't expect much more from them. Their normal job is to be prosecutors. There are nearly 100 of them. They do things differently, so the program isn't uniform. Guidelines go out to them

labeled "prosecutorial" instead of clemency, so of course they must be supersecret; and potential applicants cannot learn about the program they are supposed to make a decision about and come and sign up for.

In fact, the day the program was announced by President Ford, Deputy Atty. Gen. Laurence Silberman said in a White House press conference that the Justice Department part of this clemency program closely resembled a pretrial diversion program in the courts. In the usual case a person thought to be guilty of an offense is diverted into a probation-like program without ever going through a court proceeding which finally determines his guilt or innocence. The Justice Department's "clemency" program is quite similar.

Indeed, it is instructive, I think, to compare the Justice Department program with a routine pretrial diversion purogram. I think on such a comparison the Justice Department program, which is supposed to represent clemency, comes out a decided best.

First of all, in the Justice Department program a large and indeterminate number of persons are supposed to come in off the street. Of these, only a low percentage are guilty. Only 3½ percent of the 200,000 referred for draft prosecution who once thought themselves violators in fact, have ever been convicted. Only about 30 percent of those indicted have been convicted in the last 10 years, which is a far lower percentage than in Federal bank robberies or narcotics convictions, where 80 to 90 percent are convicted. So there is less certainty that one entering the Justice Depatment program is in fact guilty, than in the normal diversion program.

In the second place, both programs have some kind of screening. In the Justice Department arrangement, there is no firm guarantee that counsel will be supplied. In his November 13 telegram, Mr. Saxbe, the departing Attorney General, said "an effort will be made" to supply counsel for indigents. Parenthetically, it seems to me that the Criminal Justice Act applies to persons under the clemency program. It is coextensive with the constitutional right to counsel, which attaches as soon as a person becomes a suspect under *Escobedo* v. *Illinois*.

In contrast, a routine diversion program supplies counsel normally.

And counsel is not an academic point. As I already said, the mix of persons coming into the Justice Department may include a large number of people who aren't guilty and who really need the help of counsel to screen them out.

Finally, the Justice Department program imposes a more onerous obligation on participants than the routine pretrial diversion mechanism. With Justice, the outcome is usually 2 years obligatory labor at low wages. In contrast, pretrial diversion in the courts usually only requires a person to keep his nose clean for a certain period of time and stay in a certain geographical area.

In conclusion, Mr. Chairman, the Justice Department "clemency" program is harsher, than its normal "criminal' counterpart at every point of comparison. Moreover, each of these aspects reinforces the others. Since the outcome is harsher, more rigorous due process standards should be observed, but are not. Since only few potential particpants may be guilty, counsel should be supplied automatically, yet it is not. What we have is a program that is flawed at every step.

Frankly, I don't understand how this public national clemency program has turned into a secret, individualized prosecution program in the hands of the Justice Department.

Senator HART. It is my understanding that each of our panelists have had an opportunity to make their presentations.

Let me inquire of Senator Thurmond if he has some questions. He must leave very soon.

Senator THURMOND. Thank you very much, Mr. Chairman. I appreciate your courtesy. I have a couple of questions here for Mr. Wilson of the American Legion.

Mr. Wilson, for the record, would you tell us what is the American Legion's opinion of the Presidential Clemency Board, and express your opinion on it?

Mr. WILSON. Senator, we feel the Board itself is excellently balanced. We feel that we have opinions on both sides of the question, and yet enough wisdom and charity, and I think this is evidenced by the Board's first recommendations to the President that justice and fairness will prevail with this composition. I see no reason to doubt otherwise.

Senator THURMOND. What steps are being taken by the American Legion to assist people who want to apply to the Presidential Clemency Board?

Mr. WILSON. Senator, I did mention this morning to the chairman, but I will repeat it. We have a full-time paid staff, that since the American Legion was first organized and our rehabilitation service set up, have always provided free service for any man with less than an honorable discharge. These are normally referred in from the field where we take power of attorney. When they come in we have a staff of experts, although they are not attorneys, who represent our people before the boards for correction of military records and also the discharge review boards.

Not to blow our own horn on this, but these are people not eligible for American Legion membership, as I pointed out to the chairman, and we certainly have nothing to gain from this, but we feel it is the thing to do and that is our record and will continue to be a service provided to these people after January 31.

Senator THURMOND. What is the American Legion's stand on clemency for draft evaders and service deserters?

Mr. WILSON. Pardon me, sir?

Senator THURMOND. What is the stand of the American Legion on draft evaders and service deserters; what is the position of the American Legion?

Mr. WILSON. Well, our position, Senator, based on several national conventions has been opposed to general and unconditional amnesty. In my statement we indicated that once the President made his decisions, we considered the matter resolved. We tried to prevail upon the Congress. Our commander a few years ago appeared before Senator Kennedy's subcommittee, and then we appeared before Congressman Kastenmeier's committee—and made our plea for the case-by-case handling procedure. Our present national commander went to see President Ford and made our recommendations, but once the President had made his decision we have tried to accommodate ourselves to the decision that was made on amnesty.

Senator THURMOND. Thank you very much.

Now, I have just a few questions here for Mr. Henry Schwarzschild, Director of the American Civil Liberties Union.

What do you believe the proper role of lawyers outside the Government should be in helping to make the President's clemency program work?

Mr. SCHWARZSCHILD. The proper role of lawyers outside the Government is to advocate to the best of their ability the interests and rights of their clients, and that is certainly and very emphatically true with the war resisters of the Vietnam era. The question remains whether it is the judgment of these lawyers and other organizations whether the best interests of the war resisters are advocated in this program or not. In our judgment, a great many of the people qualified under the program have better legal options in the legal process outside the clemency, because as Mr. Shulz has indicated, a great many have turned out to be not violators at all and in service claims wrongly handled and defenses against the charges of desertion and draft violation, and we make judgments all the time as lawyers do in the ordinary course of this work what the best interests and rights of their clients are. The ACLU has represented, and continues to represent war resisters in great numbers before the various agencies involved in the clemency program and other legal channels appropriate to their best interests.

Senator THURMOND. Are you satisfied with the degree to which lawyers' organizations around the country have fulfilled their role in connection with the amnesty program?

Mr. SCHWARZSCHILD. We have been traditionally very much in need of additional volunteer legal services for people in conflict with the draft and the military and the war in Vietnam. At the present time, organizations have made judgments with respect to their responsibilities within the limits of their capability and their resources so to apply their legal resources that they can best serve the interests of the community of those who came into conflict with the law in the context of the war.

I am satisfied that all the organizations I know of and have worked with have done so. I think it would be an enormous asset to the clemency program if the Presidential Clemency Board and the other agencies involved would make a formal determination that the procedures fall within the purview of the Criminal Justice Act and they can be compensated under the act in the clemency program.

Senator THURMOND. Since the ACLU was established to represent indivdual clients with civil liberty problems, your organization has expressed differences with the shape of the President's clemency program. Notwithstanding those differences and the fulfilling of your mandate to help individuals in need of legal representation, how many individual applicants have obtained counsel from the ACLU?

Mr. SCHWARZSCHILD. I cannot say that with any specific certainty, we have full-time lawyer on base at Fort Harrison. He is supervised by Professor Sherman, professor of law at Indiana University, a clemency litigation director, who is sitting here beside me, Mr. Oppenheimer, of the military rights process here in Washington. There are so many cases with respect to the military aspect of the program, the Justice Department's aspect and the Clemency Board that he cannot give you at this moment a correct figure.

We would be prepared to furnish legal representation to any war resister who qualifies under the program and whenever we have the

requests we have been able to and will continue to meet that request for legal assistance.

Senator THURMOND. Thank you very much.

Thank you, Mr. Chairman. I appreciate your kindness.

Senator HART. On that last point, remembering an exchange with Mr. Goodell this morning, I got the impression that he felt that representation was not being provided, at least with respect to certain areas, under this clemency.

Mr. SCHWARZSCHILD. I am grateful for the opportunity of responding to that.

The story on that is the following, Senator. As I have just explained to Senator Thurmond, we represent a great many war resisters in all aspects of the clemency program, and in other legal matters that read down to their interest.

The problem that Senator Goodell referred to is the following: The ACLU, together with other important lawyer organizations and other concerned organizations around the country, when the clemency program was first announced, organized the clemency organization in Washington. On the steering committee of that ad hoc group sat staff members not only from the ACLU, the Lawyers Committee for Civil Rights Under Law, National Legal Aid and Defenders Association, Public Law Education Institute, Central Committee for Conscientious Objectors, National Conference of Black Lawyers, Center for Social Action of the United Church of Christ and the Washington Council of Lawyers, and the like.

That group was formed in order to be a method of channeling applicants for clemency to legal representation, to be an intermediary between applicants for clemency and legal services from volunteer lawyers.

From the very moment of the inception of that program it began necessarily to look into the question of what procedure boards and what the remedies were offered. We began to immediately observe from the middle of September that the Clemency Board had established no procedures, that remedies were either vague or distinctly hurtful to the interests of the potential clients, and we therefore began to explore extended discussions and negotiations with the staff and leadership of the Board to consider the remedies which were being held out to them.

Since relief did not come until just a week or so ago, perhaps 2 weeks, better than halfway through the clemency program, at which time it got around to publishing tentative procedures and regulations, that group of organizations decided that while it might furnish individual counsel to individual applicants for clemency it would not serve the Presidential Clemency Board as a clemency bar for these reasons: The men who might apply for Clemency Board were not in any legal jeopardy. They had already had their legal jeopardy, convicted or discharged punitively from the service, and they didn't need representation very urgently. Meanwhile, lawyers couldn't responsibly represent to the country procedures that weren't even remotely satisfactory.

This group of lawyers said, second, unless certain essential statements were made on the record about procedures and records we could not permit the Board to act as though this lawyer's organization approved of procedures of the Board. We said at all times that when these matters were settled in the minimum interest of due process and

humane remedies these organizations would reconsider what in effect was a boycott of the request of the Board.

Very recently, within the past 2 weeks, and again this morning very material changes have been made, and the organizations are ready and are in the process of reconsidering whether these challenges will meet the needs, and if that is true, we shall be glad to serve as the clemency bar for the Board.

Senator Hart, we have, during all this period been willing and ready, and in fact implemented our attempt to represent every clemency applicant who requires our legal representation.

Senator HART. Senator Goodell, as I recall it, said when I suggested perhaps a lawyer would conclude that his client's best interest lay in the regular process rather than this clemency, that no one could say that was true with respect to the individual who had already been found guilty and perhaps done time. Only the pardon would be a useful remedy. Do you agree with that?

Mr. SCHWARZCHILD. No, I do not. That is not entirely accurate even with respect to those cases under the Clemency Board, and certainly not true of those cases within the jurisdiction of the Justice and Defense Departments. Even before the Board it is not true. For example, persons convicted under the Federal statutes, including Federal Service Act, can apply for a Presidential pardon after a period of 3 years upon termination of their sentence. If granted, that pardon would not carry an alternate service sentence. It would not obligate them in addition to their prison sentence of serving up to 2 years service. So there is a better remedy.

I might ask Mr. Schulz and Mr. Oppenheimer to comment on that because they are more competent with respect to the other legal remedies that persons convicted have.

Senator HART. There is a matter on the floor that I might find out about. Pardon me for a moment.

[A short recess was taken.]

Senator HART. I apologize, gentlemen.

Mr. OPPENHEIMER. Senator, alternative remedies to applications to the Presidential Clemency Board include a motion under title 28, United States Congress, section 2255, to set aside the verdict based on changes in selective service law which occurred since the man's conviction. Certainly if the man was convicted and sentenced under the Youth Corrections Act he is allowed to apply to expunge his conviction. The Supreme Court held in the *Davis* case that remedies were certainly available. They are more comprehensive and go to the question of expunging conviction totally which a pardon does not do, certainly a more viable remedy.

Much of the contention necessary which has occurred to men who apply to the Board tend to center around those provisions, that applications should be forthcoming as a primary consideration. I think any attorney would consider that not so.

As to the question of representation, there is a question the subcommittee has not touched on, and that is the administration of the Administrative Procedure Act. That has continually been the procedure of the Presidential Clemency Board that administrative practices do not apply. It seems to me if the Board of Parole acknowledges this the Clemency Board would. It means many discretionary provisions or right to a statement of reasons by the Board which the Board now

considers itself to be discretionary would be mandatory under the APA. I would certainly hope this subcommittee, being the Subcommittee on Administrative Practice and Procedure, would explore the possibility of making sure APA procedure was asserted on the Clemency Board.

Senator HART. How recent was the district court's——

Mr. OPPENHEIMER. *Pickus* v. *Board of Parole* in the District of Columbia Court of Appeals.

Senator HART. Mr. Wilson, you recommend that the program terminate as of the date fixed for its expiration, the end of January. Senator Goodell this morning did not testify as to what his recommendation on that would be, but it is clear that a very high percentage of eligibles are not yet participating. I think there is disagreement between you and Snator Goodell as to why.

Mr. WILSON. Well, I understood when the Chairman was testifying that he didn't hold out much hope for it being extended on January 31; perhaps I misunderstood him.

Senator HART. He said he wouldn't tell us what his recommendation was.

Mr. WILSON. I may have misunderstood him, but I thought he gave a little personal prognostication that he didn't think the chances were very good.

The only thing in our research after World War II, the old Roberts board was in existence from 1946 to 1947, which by comparison and precedent would indicate that this board, of course, had a shorter life than did the original Roberts board, for whatever it is worth.

Mr. SCHWARZSCHILD. Senator, I think there may be a slight misunderstanding here. The life of the Board by virtue of the Executive order of President Ford does not expire until the end of 1976. Its life continues through December 3, 1976. What expires on January 31, 1975, 6 weeks from now, is the time in which qualified applicants may submit their petitions for clemency to the Clemency Board or the Defense Department or Justice Department. The Board continues for another 2 years beyond that for the processing of applications by the time January 31 of next year rolls around.

Senator HART. I was not clear on that.

But even with that clarification, it is true that for the 80 percent of the eligibles have not applied by the end of January the opportunity to participate in the program is over unless the President extends the date.

Mr. SCHWARZSCHILD. The time for applying for clemency. Twenty percent of the number eligible would be an extraordinary rise from present developments, because as you have heard, only 2 percent of those eligible have so far applied and only 2 percent of those eligible to apply to the Justice Department. The figure for the Defense Department is higher, about 80.

The military clemency program is in fact unconditional. It cannot compel the returing military absentee to perform his service.

Our own sense on the question you raise with respect to the extension of the deadline is really rather complicated. We believe this Presidential clemency program to be so deficient in its moral and political assumptions and so deficient in its rehabilitation that we think it is very misleading to the American people with respect to the notion there

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has been amnesty for those who came in conflict with the war in Vietnam. We are concerned and emphasize that misrepresentation of what has been going on.

Since our position remains that really only an unconditional universal amnesty with our own children who came in conflict, and are quite inclined to think there is a material injustice in saying that people who appply by January 31 may have clemency, and that people who have not heard about it until then or have been prosecuted will not have the option for applying for clemency, but it is that internal injustice which makes us more convinced that only a general amnesty will meet the needs of the people.

If I may, in that connection, Senator, allude to something. You alluded to that 2½ years ago, and I had occasion to testify then on the question you raise this morning with respect to the possibility that a general amnesty might also offer relief to somebody who has made off with the petty cash fund. I would like to apply as to how we see the answer to that. The general amnesty would not relate to theft, but to offenses that arise because of refusal to participate in the war in Vietnam, ordinary crimes, murder, assault, embezzlement or theft would of course not be related to that. We do not propose that an amnesty for the offenses were caused by the war to cover the offenses of murder. That I hope will meet your concern.

Beyond that, let me say this, if I may, the attempt to distinguish in a very precise and narrow way between the motivations, honorable, dishonorable, selfish, ideological, what have you, that prompted people to do various things, the attempt to distinguish that is not only inherently virtually impossible, but will hurt so many more people than it would help that it seems to me we ought to apply a general amnesty, which is after all a lawful relief from the injuries that the law has done. We ought to apply the principle that Anglo-American jurisprudence has adopted that it is better that 10 guilty men go free than one innocent man be punished.

In the horror that the war imposed and the tragedies it inflicted on America, it seems to us if someone were to be guilty of making off with the petty cash, if he were to receive no punishment it would inflict virtually no hardship upon itself by virtue of the fact if it persisted in no amnesty.

Senator HART. If we are going to legislate amnesty, and I can understand why a President, if he wanted to give amnesty and were concerned for some measure of public acceptance, would have to make every effort short of disabling the general grant of amnesty to kind of hold safe——

Mr. SCHWARZSCHILD. We have done some drafting in that field, and I think it is possible to distinguish ordinary crimes which need to fall under a general grant of amnesty from violations of law or possible violations of law that had anything to do with people in conflict with the war. I think it is possible to distinguish those in legislative language and statutory language. The attempt has been made. I think it can be improved. I would certainly welcome very greatly the continuing effort on the part of the legislative branch which has concurrent power to enact power legislatively to attempt to do that and to broaden the remedies and the relief it gives to those American citizens

who found the war unbearable and unacceptable and refused to participate in it.

Senator HART. Mr. Wilson, did you have something you would like to add?

Mr. WILSON. No, in my statement, Senator, we have pretty well said that most of the people who got in trouble would have gotten in trouble whether there was a war or whether it was peacetime. We figure it is over and above those people, and the matter of crimes would have to be resolved. I think the President's amnesty program realizes that all these people didn't flee because they felt Vietnam was wrong. I think there was one case in the original recommendations of the President's board where the man wanted to go back to Vietnam and when he was refused that, I think he went a.w.o.l., and of course they were right in looking at the man's previous record and saying, look, this is a good man, a good soldier and he just wanted to go back again. Why, I don't know. You know, a blanket amnesty is so unfair, really.

I would hate to see everybody lumped together because if we have the misfortunte to get into another conflict and any fellow feels he can get away with anything we are going to have a tough job of keeping some discipline in the Armed Forces.

Senator HART. Well, we are saved by the second segment of votes occurring on the floor.

I will have to recess, returning after that vote.

Mr. WILSON. Senator, would you mind, I have a very urgent matter and I will leave the field with my worthy opponents here.

Senator HART. No, you are excused.

Mr. SCHWARZSCHILD. Are we all excused?

Senator HART. Yes.

Mr. SCHWARZSCHILD. Thank you very much.

Senator HART. Mr. Meis will be heard as soon as I get back.

[A short recess was taken.]

[The prepared statements of John Schulz, Henry Schwarzschild, and James Wilson follow:]

PREPARED STATEMENT OF JOHN E. SCHULZ, EDITOR IN CHIEF, MILITARY LAW REPORTER

Mr. Chairman, I appreciate the opportunity of appearing here this morning at your request. My name is John Schulz. I am a lawyer and editor of the Military Law Reporter (MLR) a periodical legal service covering administrative, judicial and statutory developments in the field of military, veterans and selective service law.[1] MLR is the successor to the Selective Service Reporter, which I edited between 1970 and 1972. My interest in the Presidential clemency program stems primarily from the rather detailed knowledge of the administration of the draft which I acquired as editor of SSLR, where I was able to observe the constant interplay between selective service administration, court decisions, Department of Justice prosecution policy, and congressional action.

Mr. Chairman, the draft law developments of the last decade have, I believe, profound implications for the Presidential clemency program. It is primarily to these that my statement is devoted.

I. INTRODUCTION

On September 16, 1974, President Ford announced an earned reentry program for Vietnam-era draft and military evaders, designed to "heal the scars of divisive-

[1] The Reporter is published by the Public Law Education Institute, 1346 Connecticut Avenue NW., suite 610, Washington, D.C. 20036.

ness" through a "national commitment to justice and mercy." Briefly, the program offered clemency for resisters in exchange for up to two years of low-pay alternate service. Evaluation of cases was placed in the hands of two existing agencies, the Department of Justice for unconvicted "alleged" draft evaders, and the Department of Defense for unconvicted military absentees, and a newly-created body, the Presidential Clemency Board, for already convicted persons in both categories. Authority to fashion and administer an alternative service program was delegated to the Selective Service System.

The earned reentry program has now been in operation almost exactly three months. On the basis of experience to this point—two-thirds of the way through the window period which ends January 31, 1975—there is little basis for believing that the program will succeed in meeting the above objectives: only a tiny fraction of those thought to be eligible for the program have chosen to take part.

Agency	Persons qualified [approximate]	Persons processed by December 1974 [approximate]	Rate of participation (percent)
DOD	12,000	2,200	18.3
DOJ	7,000	130	1.9
PCB	112,000	800	.07

As indicated, the Department of Defense and Justice were assigned very similar roles in the reentry program, both being made responsible for handling unconvicted offenders. It is thus remarkable that the DOD program to date enjoys a participation rate some nine times as great as does its DOJ counterpart. Many different explanations may be offered for this discrepancy, but I submit that it must be traced in good part to several substantial defects in conception and operation of the DOJ program, most of which relate to its being administered by United States Attorneys as though it were normal, even secret, prosecutorial business.

These remarks, Mr. Chairman, are primarily devoted to the major flaws in the DOJ program listed immediately below. I shall also address myself briefly to the SSS reconcilation service program.

The major defects to date in the DOJ program are:

(1) Failure to clarify the status of tens of thousands of evaders who currently believe themselves guilty but whom DOJ knows to be innocent.

(2) Failure to publicize key aspects of the program, including standards for determining alternative service periods, grounds for mitigation, and other terms of the agreements applicants are expected to sign.

(3) Failure to insure availability of counsel for all applicants and to take action to secure funds for appointed counsel under the Criminal Justice Act (18 U.S.C. section 3006A).

II. JUSTICE DEPARTMENT PROGRAM [2]

Basically, the Justice Department element of the clemency program borrows heavily from the carefully-considered approach of Senator Taft's proposed "Earned Immunity Act of 1974," S. 2382, with one important exception: the cases of unconvicted draft resisters are now to be reviewed by this prosecutorial agency rather than an independent Immunity Review Board. Thus, the basic wisdom of having a new agency with a specific clemency mandate review these cases has been lost or overlooked.

Under these circumstances it is hardly surprising that Justice Department officials should frankly acknowledge their program to be an extension of the prosecutorial process.[3] It also means that the program lacks central direction and uniformity, since it is administered by 96 U.S. Attorneys in the field rather than a central review board.

Indeed, the DOJ program resembles, as much as anything else, the Department's earlier practice of clearing post-indictment cases by giving violators the

[2] I wish to thank Thomas P. Alder, Esquire, president of the Public Law Education Institute, for the invaluable contribution he made to this part of my statement, and for his skillful assistance throughout the remainder of it.

[3] In the White House conference of September 16, 1974, Deputy Attorney General Laurence Silberman explicity likened the DOJ program to a criminal pretrial diversion program and emphasized the role of the U.S. Attorney prosecutorial discretion.

option of submitting to induction in lieu of prosecution. By the Justice Department's own account, induction in lieu of prosecution was the preferred vehicle throughout the Vietnam war for clearing draft cases.[4] That option ended with the termination of induction authority on July 1, 1973, putting the DOJ to the task of either prosecuting a greater number of cases or washing out a substantial portion of its case backlog. At this time, the DOJ repeatedly but unsuccessfully asked the DOJ to permit enlistment of draft evaders in lieu or prosecution.[5] From this perspective, the Department's program appears principally as a revival of that pretrial diversion program. Just as during the war Justice claimed that the overriding purpose of its prosecutorial policy was to secure manpower for the services by pressuring alleged violators to accept induction, so now the Department claims to be serving the national interest by giving such persons a means of stepping forward and clearing their records.

A. Failure to inform evaders of declined prosecution

It is a matter of public, although not well-publicized, record that the vast majority of Vietnam-era "draft evaders"—over 96 percent to be exact—were never convicted. That is, out of 203,922 cases the Selective Service System referred to Justice for prosecution as violators between 1964 and 1973, U.S. Attorneys chose to prosecute only 19,272 (9.45 percent) despite elaborate screening by SSS prior to referral.[6] And the Federal courts convicted decreasing frac-

(a)	(b)	(c)		(d)		
		Indictments and complaints		Convictions		
Fiscal year	Cases referred by SSS to DOD for prosecution	Number	Prosecutions as percentage of referrals	Number	Percentage of prosecutions	Percentage of referrals
Total	209,204	21,342	10.20	8,619	40.38	4.11
Total, 1964–73	203,922	19,272	9.45	7,933	41.16	3.89
1964	13,589	276	2.03	206	74.64	1.51
1965	13,661	341	2.49	242	70.97	1.77
1966	13,835	516	3.72	371	71.90	2.68
1967	19,714	996	5.05	748	75.10	3.79
1968	21,331	1,192	5.59	784	65.77	3.68
1969	27,444	1,744	6.35	900	51.60	3.28
1970	26,475	2,833	10.70	1,027	36.25	3.88
1971	25,504	2,973	11.66	1,036	34.85	4.06
1972	29,091	4,906	16.86	1,642	33.46	5.64
1973	13,278	3,495	26.32	977	27.95	7.35
1974	5,282	2,070	39.18	686	33.14	12.99

Sources: (1) Letter from Assistant Attorney General Henry E. Peterson to Representative Robert Kastenmeier, Mar. 1, 1974, reprinted in amnesty, hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, 93d Cong., 2d sess. 36 (1974) (hereinafter Kastenmeier hearings) (all figures in column (a) except 1974, which was supplied by Selective Service System National Headquarters). (2) 1974 Semiannual Report of the Director, Administrative Office of the U.S. Courts 62, fig. 32 (as supplemented for fiscal 1974 by preliminary figures from 1974 annual report).

tions of indicted draft evaders over the years, the rate dropping from 75 percent in fiscal 1964 to 28 percent in fiscal 1973,[7] a strikingly low figure in Federal criminal law. By contrast, the conviction rate over the same period in all Federal narcotics offenses was 75.8 percent,[8] in all Federal bank robbery prosecutions, 82 percent.[9]

Both of the above figures for draft offenses are prima facie so unusual as to call out for some explanation. Ever since 1972, their proper interpretation has

[4] See Letter of Assistant Attorney General Henry Peterson to Senator Robert Taft, November 9, 1973, reprinted in Amnesty, Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice House Judiciary Committee, 93rd Cong., 2d Sess. 344–45 (1974) (hereinafter, Kastenmeier Hearings).

[5] Id.

[6] The detailed figures are given as totals and by fiscal year in the following table. The 2d total figure, covering 1964–73, most nearly covers the period of President Ford's clemency program.

[7] Id.

[8] Calculation by author from figures in figure 30, 1964 semi-annual report, supra, note 4.

[9] Kastenmeier Hearings at 158.

been a matter of sharp debate between, on the one hand SSS and DOJ and, on the other, experienced draft lawyers and counselors.

The government view.—SSS and DoJ have consistently attributed the low draft indictment and conviction rates mainly to delinquent registrants' willingness to accept induction in exchange for nonprosecution or dismissal of indictment. Thus, for example, in Rep. Kastenmeier's hearings this year, former SSS General Counsel Walter Morse acknowledged that 10,153 of the 19,271 registrants indicted between August 4, 1964 and December 29, 1972 had their indictments dismissed before trial; this, he said, was "for the most part for the reason that they . . . submitted to induction or upon an FBI investigation it was found that their violation was not willful." [9] Likewise, he said, all but 17,000 of the 200,000-odd young men referred for prosecution had their offense purged by submitting to induction or as the result of FBI investigation.[10]

You may remember, Mr. Chairman, that in 1972 Assistant Attorney General Robert Mardian, then responsible for draft prosecutions, gave the same explanation to this subcommittee. Eighty percent of all registrants who refuse induction eventually submit, he said.[11] This view seems to be supported by the fact that the great majority of nonconvictions have taken the form of dismissals rather than acquittals. That fact does not, however, lead inexorably to his conclusion; selective service cases are routinely disposed of on the merits by pretrial motions to dismiss under Fed. R. Crim. P. 12, the legality of induction order uniformly being treated as a court rather than a jury issue. See, e.g., *Cox* v. *U.S.*, 332 U.S. 422, 432 (1947) (whether or not SS classification has basis in fact not a jury question); *U.S.* v. *Boardman*, 419 F. 2d 110, 114 (1st Cir. 1969), cert. denied, 90 S.Ct. 1124 (1970); *U.S.* v. *Seeley*, 301 F. Supp 811 (D.R.I. 1969) (since improper processing of defendant would not be admissible before jury to negative intent, disposition of merits of case on motion to dismiss is sensible, fair and economical).

The other view.—Many registrants, experienced draft counsels and attorneys took the low draft conviction and prosecution rates of the war years as confirmation of their uniform anecdotal experience with the rampant errors, incompetence, vindictiveness, and inconsistency of SS administration.[12] This is not the place to rehash such matters in detail; suffice it to observe that in one lear, 1970, the Supreme Court invalidated three key parts of selective service practices and procedure:

(1) The High Court struck down as "blatantly lawless" the power asserted by local boards to declare registrants "delinquent" and then "punitively" strip them of deferments, order them prematurely for induction, or order them for induction without a physical exam.[13]

(2) It threw out Selective Service's restrictive interpretation of the conscientious objector law, ruling that to qualify as a conscientious objector one need not entertain "religious beliefs." [14]

(3) And finally, the Court invalidated a routine selective service procedure which, in effect, permitted local boards to deny deferment claims without permitting any administrative appeal.[15]

The moment of truth: fiscal 1974.—Until fiscal 1974, it was impossible (absent a very detailed comparison between total induction orders issued and total in ductions) to know conclusively whether the Department was in error in attributing the high dismissal rate to voluntary induction by violators. Induction authority expired on July 1, 1973, however; since that date nobody has been drafted, and, as noted above, nobody under indictment has been permitted to enlist. This, of course, simply means that no part of the fiscal 1974 nonconviction rate can be attributed to dismissals due to acceptance of induction. Yet, the conviction rate for fiscal 1974 was only 33 percent [16]—only 5 percent higher than in 1973.

In other words, it appears that about 93 percent of all dismissals in fiscal 1973 and before were due to legal defects, not submissions to induction.

[9] Kastenmeier Hearings at 158.
[10] Id.
[11] Letter from Assistant Attorney General Robert Mardian to Senator Edward M. Kennedy, February 23, 1972, reprinted in Selective Service and Amnesty, Hearings of the Administrative Practice and Procedure Subcommittee, Senate Judiciary Committee, 92d Cong., 2d Sess. 398, 400 (1972) (hereinafter, Kennedy Hearings).
[12] See generally Tigar, The Rights of Selective Service Registrants, in The Rights of Americans 499 (Dorsen ed. 1971); Shulz, Statement, Kennedy Hearings at 85–104.
[13] *Gutknecht* v. *United States*. 396 U.S. 295 (1970).
[14] *Welsh* v. *United States*, 398 U.S. 333 (1970).
[15] *Mulloy* v. *United States*, 398 U.S. 410 (1970).
[16] See table, note 4, supra.

Likewise, indictments rose by only 15 percent between 1973 and 1974.[17] This suggests that only about 17.5 percent of declined prosecutions in 1973 were attributed to acceptance of induction. If so, more than 80 percent of all cases of declined prosecution in 1973 and prior years were attributable to invalid induction orders.

Even if one accepts the more conservative estimates derived from Department of Justice submissions to this subcommittee in 1972,[18] one-third of all referrals were rejected by DOJ for legal flaws. That is, about 68,000 persons (one-third of 203,922) were found not to be violators after being so declared by SSS and, in some cases, after indictment. In fact, even on the supported DOJ figure of 20 percent cited earlier, over 40,000 individuals are involved.

Persons who ran afoul of Selective Service regulations and requirements were repeatedly told that they were violators; few, if any, have ever been told, either by DOJ or SSS, that they were cleared. As a result, many of them continue to live under what they believe to be the threat of a felony prosecution.

A case in point concerns a young man called Travis who contacted me not long ago, at the suggestion of a friend who knew that I was familiar with selective service law. Travis was not this young man's real name. He had been using it since the summer of 1971 when, after refusing induction, he fled Ann Arbor, Michigan to begin the uncertain, rootless life of a fugitive "underground" in America. He traveled first to California, then in quick succession to Washington State, Arizona, California again, Louisiana, back to Michigan briefly for Christmas 1971 and finally to Washington, D.C. at the end of 1971.

When Travis told me the story of his dealings with SSS, it seemed clear that his induction order was invalid. His experience was, I think, rather typical. He applied for conscientious objector status after leaving school in 1970; his local board turned him down without explanation, as did his appeal board; within the month he got an induction order. His letter requesting some indication of the weakness in his case and some more time went unanswered—until, sometime after his induction date, he was informed that his board has no further power to review his case since it was "in the hands of the U.S. Attorney."

Just the other day I asked the Detroit U.S. Attorney's office about Travis' case and was told by Assistant U.S. Attorney Christopher Andreoff that Alan K. Merkle, alias Travis, had indeed been indicted on September 17, 1971 (criminal complaint No. 71–3459) and that his indictment had been dropped on August 16, 1972. In other words, Alan K. Merkle spent 2 anxious, rootless years underground although he committed no crime.

Why? Simply because both SSS and DOJ diligently and repeatedly told him he was a violator in 1971, but neither ever bothered to inform him, in 1972 or after, that in fact he was innocent.

This I have confirmed from both Travis and his mother, who always sent on communications from the government. From SSS, she sent Travis the letter referred to earlier; from DOJ, an FBI letter in the summer of 1971 warning that Travis would be indicted unless he submitted promptly to induction. Later, she told him, the FBI visited her several times. Nothing did she ever receive to suggest that Travis' case had been dropped.

This state of affairs is quite general. No draft counselor I know ever heard of SSS or DOJ sending men word that they were no longer wanted. Further, Kevin Maroney of the Justice Department Criminal Division told me in September 1974 that DOJ feels it has no obligations to let draft evaders know their cases have been dropped.

Nor was notice given by the Attorney General's October 31 announcement that "no individual will be required to perform alternative service if the Department does not believe the evidence against him is sufficient to justify a draft evasion prosecution." This is simply too general. Indeed, the problem was compounded by the Attorney General's quick addendum, "This does not mean, however, that any individual who is not currently under indictment or investigation can be assured that he will not be required to perform alternative service or be prosecuted."

Nor will the ignorant innocent be aided by Mr. Saxbe's November 13 act of ordering all U.S. Attorneys to review all pending cases. First, this review simply will not extend to the 40,000 to 70,000 referred to above. Their cases have, for

[17] Id.
[18] In response to a question from the subcommittee, the DOJ submitted a table categorizing reasons for all dismissals which occurred between March 1971, and February 1972. Kennedy Hearings at 396. According to the table, 23 of all dismissals were due to "voluntary" inductions.

the most part, long been closed. They have only lacked notice that this is so. Moreover, the means, used to contact individuals found to be cleared namely dispatch of a first class letter to last known address without even a return receipt, is plainly inadequate to give notice to a population of which as many as two-thirds are in fugitive status. Finally, the initial reports of this screening do not show that it is being conducted vigorously or uniformly. In general, very few cases have been dismissed, running on the order of 10–20 percent by early count; and some jurisdictions have reduced their loads not at all (e.g., the Western District of Pennsylvania washed out none of its 59 pending cases), while others have managed significant reductions (e.g., Connecticut dropped 19 of 59 cases).[19]

For its part, SSS did not direct local boards to send word to cleared violators until August 1973, when a new section was added to its Registrants' Processing Manual requiring such notice.[20]

The refusal of DOJ to let young men know that they are no longer considered violators would be of questionable fairness even under normal conditions. In what is supposed to be a clemency program dedicated to "justice and mercy," it is not too much to ask that the Department, with the assistance of SSS, develop an affirmative and serious campaign to reach each and every one of them.

B. Failure to publicize key parts of program

On September 16, the Attorney General issued "Prosecutive Guidelines" to U.S. Attorneys concerning the DOJ clemency program. This document[21] contains a large amount of information of importance to potential program applicants. For example, it includes the text of the program alternative service agreement (which requires the applicant to agree to waive his constitutional right to speedy trial and due process, and against double jeopardy),[22] the base line for alternative service (24 months), and grounds of mitigation (whether registrant was erroneously convinced he was not violating the law, whether his family presently has a desperate and irreplaceable need of his presence, whether he lacked mental capacity to understand his actions, etc.), procedures (right to have, but not to be supplied with, counsel, to see file, to make a submission, but not to appeal).

The problem is that this key document was not made public. In fact, its confidentiality was stringently maintained. This policy contrasts sharply with the way the impending directives of all other participating agencies were handled; DOD (Secretary of Defense memorandum and implementing service directives freely available), SSS (reconciliation service regulations published in Federal Register) and PCB (standards and guidelines published in Federal Register).

How can anyone be expected to sign up for the DOJ program in the information vacuum it has created? How is it possible to monitor U.S. Attorney performance without the benefit of publicly available standards?

C. Failure to ensure availability of competent counsel

The DOJ Guidelines specify that applicants are entitled to counsel, and the Attorney General's November 13 telegram pledges that some effort will be made to find counsel for those who are indigent.

Frankly, Mr. Chairman, a national program ought to be able to do better than this. The need for skilled counsel is by no means academic since, as developed above, a majority of potential applicants are probably innocent and in no need of doing alternative service.

Although pressed on this point in a public meeting of the Clemency Board a month ago, the Justice Department has evidently made no effort to advise U.S. Attorneys of the substantial likelihood that funds may be secured for appointed counsel under the Criminal Justice Act, 18 U.S.C. section 3006A. The weight of opinion is to the effect that the CJA is coextensive with the constitutional right

[19] Given the statistics displayed in footnote 4, supra, it seems clear that these prosecutorial reviews have not been nearly so rigorous as courts would require. Of course, one cannot reasonably expect prosecutors to take a really objective view of their cases.

[20] Section 642.12 (August 1, 1973). Some local boards did send registrants new classification cards telling them that they had been placed in class "1–H." Many, having absolutely no idea what this notation meant, simply assumed that it confirmed their status as violators.

[21] A copy is appended to this statement as appendix A.

[22] The speedy trial right is most significant in draft cases in which, because of the documentary nature of its proof and its ability to rely on the presumption of regularity, the government normally suffers little or no harm from delay, while the defendant is likely to be severely prejudiced. See *U.S.* v. *Daneals*, 370 F.Supp 1289, 2 MLR 2348 (W.W.N.Y. 1974).

to counsel, which attaches, of course, at the moment an individual becomes a suspect. *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

Indeed, in a few jurisdictions, U.S. Attorneys have participated in development of excellent programs being CJA funds. For example, in Oregon, counsel have been appointed under the CJA for absent defendants and paid to travel to Canada to seek men out for a review of their files.

D. Conclusion: Prosecutorial diversion without clemency and without fairness

The defects analyzed above all seem to reinforce a single point, namely that the DOJ has implemented its part of the Presidential clemency program as though it simply involved prosecutorial business as usual. Indeed, it would be surprising to expect U.S. Attorneys, who are after all prosecutors, to act in a spirit of clemency or, as the President put it, of justice and mercy.

As for the overall direction of the Department's program, there has been little evidence of genuine interest in clemency or even of a sympathy with the President's stated goals. Again this should not seem surprising since the departing Attorney General only last year denounced amnesty and the idea of "earned immunity" for resisters, saying:[23]

> Some arguments have been raised that amnesty should be granted if these individuals now serve in . . . nonmilitary service. This is ridiculous and a direct slap in the face to the fine men and women who are currently in uniform. . . .
>
> We are well rid of the draft dodgers and deserters. . . . They made their bed, let them sleep in it.

In conclusion, Mr. Chairman, I think that by comparing the DOJ program with the type of pretrial diversion program routinely utilized in criminal courts, the clemency program comes out decidedly second best. First, there is less certainty that persons entering the clemency program are criminals. In the routine diversion program, a person is considered for pretrial diversion only after apprehension, so there is a very good chance that he may be proven guilty, given typical high conviction rates. In the clemency program, a great number of potential applicants must present themselves and, as was shown above, very few of them are guilty although they so consider themselves.

Second, screening in the clemency program is less adequate although the need is greater. Criminal diversion programs work in conjunction with appointed counsel for the many indigents in the criminal justice process. The DOJ program does not guarantee appointment of counsel to those who need it. Moreover, there is no guarantee that participating counsel be adequately qualified in selective service law, which after all is such an extremely specialized form of administrative law that the normally-equipped criminal lawyer, even if highly expert, cannot adequately advise a draft registrant.[24]

Finally, the noncriminal obligation imposed by the clemency program is more harsh than its routine criminal counterpart. Two years of mandatory labor at low pay is the norm for the clemency program, while criminal diversion normally results in a routine probation order which requires nothing more onerous than to stay in a certain area, report periodically to a probation officer and, perhaps, refrain from association with unsavory individuals.

In short, I submit, Mr. Chairman that the DOJ clemency program fails to meet the minimum standards of fairness required by the Due Process clause of the Constitution.

III. SELECTIVE SERVICE SYSTEM—RECONCILIATION SERVICE

The Selective Service System, being the end component of the clemency program—the one to which appplicants from the other three components all are expected to report—is in some ways the most important. It is the Selective Service System that in most cases will be the final arbiter of whether or not a person actually receives the remedies available through the program, through its role in adjudging a person's civilian work performance satisfactory or not. Unfortunately, the SSS seems to have taken its function as punitive rather than restorative, and in so doing has perpetuated many of the injustices that marked the

[23] Letter from Hon. William Saxbe to Lima Draft Information Center, February 28, 1973, a copy of which is appended to this statement as appendix C.

[24] This was generally recognized during the Vietnam war and led, in some places at least, to formation of special CJA panels of draft-law experts who alone were appointed in draft cases.

alternative service program under the draft. These comments will focus on three of those areas.

A. Improper delegation of authority to State directors with no right to appeal their decisions

Local versus central authority for program.—Prior to the 1971 amendments to the MSSA, local boards were responsible for assigning and administering the alternative service program for persons falling under their jurisdiction. An amendment to section 6(j) changed this policy to put the National Director of SSS in charge of the program.[25] Despite this amendment, however, the practical control of the program was given to State Directors, a policy that evoked considerable protest in the hearings conducted before this subcommittee in 1972. Several witnesses pointed out to the subcommittee the wide disparity in philosophy among State Directors, mentioning specifically several who had publicly stated their intention to assign conscientious objectors to nothing but the most menial positions in state hospitals.[26] Despite the protests, regulation 1660.1(b), giving control to State Directors, was put into effect.[27]

There is a similar gap between the Executive Order establishing the reconciliation service program and the regulations issued by SSS to implement it. In his order of September 16, the President specified that the National Director was to establish and administer the program,[28] yet the regulations give all effective power to State Directors.[29] The widely disparate policies of State Directors will therefore continue to exist. Some State Directors will have a relatively liberal policy of job approval while others will operate under a highly restrictive standard. The inequity to the persons involved in the program is obviously, as is the parallel with the excessive discretion of U.S. Attorneys in the DOJ program, discussed above.

Nonappealability of State Director decisions.—Not only is control of the program put in the hands of State Director, but in a seeming effort to compound the violation of the President's intention, no provision is made anywhere in the Reconciliation Service regulations for an appeal to anyone other than the State Director. In particular, there is no provision for appealing any decisions to the National Director, who theoretically is in control of the program. Unappealable decision to be made by State Directors include the following:

(1) The decision to deny a returnee's proposal for civilian work.[30]

(2) The job assignment made after denial of a returnee's proposal.[31]

(3) The transfer assignment to another job when the returnee's first job terminates through no fault of his own.[32]

(4) The determination that termination of a returnee's job was due to his failure to work satisfactorily, and that he will therefore be reported as unsatisfactory.[33]

(5) The determination that, absent the termination of the job, a returnee is not working satisfactorily and report of same.[34]

(6) The determination that there is "good cause" to reassign a returnee to another job, without a finding of any kind as to the quality of work.[35]

The practical effect of vesting this broad unreviewable authority in State Directors is to perpetuate all of the possibilities of inequality and inconsistency that marked the alternative service program under the draft law. Indeed, the program as implemented appears to look upon the work period as a period of punishment, with the State Director acting in the capacity of a warden, and the returnee having no right of appeal to anyone on any subject.

B. Standards for approvable jobs

Types of jobs.—When the draft was in effect, one of the problems which plaqued the SSS alternative service program was the lack of clear and specific standards for approvable jobs. A person seeking to propose a work requirement

[25] Military Selective Service Act, section 6(j).
[26] Hearing, Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee, 1972; pages 113–114, 160–161, 173–174, etc.
[27] 32 CFR 1660.1(b), put into effect December 10, 1971.
[28] Executive Order 11804, September 16, 1971 (39 FR 33299).
[29] See 2 CFR 200.2(b)(1), (2) and 2 CFR 200.5(a), (b).
[30] 2 CFR 200.5(a).
[31] 2 CFR 200.5(a).
[32] 2 CFR 200.6(b).
[33] 2 CFR 200.6(b).
[34] 2 CFR 200.6(a).
[35] 2 CFR 200.5(b).

had only the vague guidelines of "the national health, safety or interest"; it was left to the whim of the System to decide whether or not a proposed job fit those guidelines. The consequence of this was that conscientious objectors seeking work frequently were subjected to delays and harassment in their search for jobs. For example, in 1972 this subcommittee learned of a registrant in Indiana who was denied a job in a school for retarded children because the local board felt that "the registrant should not be allowed to have a position that might influence any young Americans.[36]

Despite this history, the Selective Service System has seen fit to put into effect for the clemency program virtually the very same regulations on types of approvable jobs—regulations which are models in vagueness.[37] The Reconciliation Service program, dealing as it does with persons who have been adjudged as law violators, presents an opportunity for the same type of discrimination.

Compensation for jobs.—The regulation dealing with this matter provides that compensation for civilian jobs should reasonably compare with the standard of living that the same person would have enjoyed had he entered military service. It adds, however, that the State Director may waive the provision when such action is determined to be in the national interest and would speed the placement of the returnee in service.[38]

No specific standards are given for determining that the pay provisions should be waived, and no guarantee that State Directors will not assign men to low-paying jobs which may not allow them to meet their financial responsibilities or support their dependents.

Given the current status of the country's economy, this is not an idle concern. SSS is likely to have real trouble generating an adequate number of jobs meeting the comparability provision, which would mean a wage at least 36 percent above the minimum wage,[39] without interfering with the civilian labor market.[40] In other words, there is a very real possibility that people returning under the clemency program will be used as a source of cheap labor, performing menial jobs at subsistence salaries.

C. Failure to prepublish regulations and to publish RSM

Prepublication of regulations.—The 1971 amendments to the Military Selective Service Act included a provision requiring that all regulations issued under that Act be published in the Federal Register at least 30 days prior to their becomng effective; this requirement was made waivable by the President, if he determined that compliance would impair the national defense.[41] The legislative history of the provision shows that it was accepted in conference—in the interest of equity.[42] In the 3 years since the adoption of that amendment, SSS has prepublished all changes to the Selective Service regulations, thus allowing a period of time for public comments and criticisms before making the changes effective.

Notwithstanding this Congressional mandate and subsequent history, the regulations issued by the SSS to govern the Reconciliation Service program, published on September 26, 1974, were made effective upon publication.[43] Accompanying the regulations was an introduction stating that the Director of Selective Service had determined that since it was "impracticable, unnecessary and contrary to the public interest," good cause existed for making the regulations effective immediately.[44]

There is no justification for dispensing with public comment on these regulations; the President did not waive the requirement, and if haste was required (doubtful in view of the slow start of the program), SSS could, like the Clemency Board, have made its regulations effective immediately while also soliciting public comments.

[36] Hearings, see note 6 supra, page 163.
[37] See 2 CFR 200.3 and 2 CFR 200.4.
[38] 2 CFR 200.4(a)(3).
[39] The $2 per hour federal minimum wage provides $347 per month for a 40 hour week. The military recruit, however, receives a basic pay of $344.10 per month, plus a tax-free $73.30 for subsistence, $63.30 for housing, free health care equivalent to $20 per month in a group health plan and clothing equivalent to $10 per month. His standard of living, therefore, including income and other compensation, amounts to about $530 per month, 36 per cent higher than the minimum wage. (Washington Star-News, October 6, 1974).
[40] 2 CFR 200.4(a)(2).
[41] Military Selective Service Act, section 13(b).
[42] Joint Explanatory Statement, House Report 92–433, June 30, 1971, page 29.
[43] Title 2, Code of Federal Regulations, Part 200 (39 FR 34511).
[44] 39 FR 34511.

No publication of Reconciliation Service Manual.—The Reconciliation Service Manual (RSM) is an "internal" manual of the Selective Service System, designed to provide its employees with procedural guidelines for administering and implementing the program of civilian work. If that were all it was, the failure to publish the Manual might not be significant. But, the Manual, in fact, adds to and clarifies the regulations in such a manner that it ought to be available to persons coming under the program and the interested public. A few examples of the differences between the regulations in 2CFR and the Manual (RSM):

(1) 2 CFR section 200.2(b)(2) states simply that the State Director will monitor the work assignments. RSM section 2209(2)(b), adds specifically that this monitoring is to include auditing employer's records and supervisory reviews to be conducted at 3-month intervals, incluuding on-the-job interviews.

(2) 2 CFR section 200.5(a) specifies that the State Director will assign returnees to a job to begin within 30 days after they report and will consider any job proposed by the person. Under RSM section 2207(8)(9), a returnee will be allowed 20 days to submit his own job; if such proposal is not approved or if none is submitted, he will be assigned before 30 days.

(3) 2 CFR section 200.5(b): The State Director may, for good cause, or, upon the instruction of the Director, shall reassign a returnee. RSM section 2209(4)(b): Returnees may submit a written request to State Director requesting a job transfer. Such request shall include the justification for the transfer and a statement from the proposed employer about the job; the State Director will notify returnee in writing of his decision.

(4) 2 CFR section 200.6(a): When a job terminates, the State Director will normally conduct an investigation; if he finds the departure improper, he will report to the Director; if he finds no failure to work satisfactorily, he will reassign the person with credit for intervening time. RSM section 2209(3)(d)–(g): When job terminates, State Director will normally conduct an investigation with three possible outcomes: 1) if no failure to work satisfactorily, reassignment with credit; 2) if failure to work satisfactorily but with mitigating circumstances, reassignment without credit; 3) if repeated failure, report to Director.

These examples, I submit, demonstrate the substantive nature of the RSM. SSS failure to publish it violates the clear intent of Congress as expressed in both the Military Selective Service Act (MSSA), section 13, and the Federal Register Act, 44 U.S.C. section section 301 et. seq. Fairness plainly requires that potential participants in the clemency program have an opportunity to learn about the reconciliation service before making the decision to do something that could drastically alter their lives.

APPENDIX A

Office of the Attorney General
Washington, D.C. 20530

September 16, 1974

MEMORANDUM

TO: All United States Attorneys

FROM: William B. Saxbe
Attorney General

SUBJECT: Clemency

The attached documents are for use in implementing the President's Proclamation announcing a program for the return of Vietnam era draft evaders and military deserters. All reasonable attempts should be made to notify those who are eligible to participate in the program.

For specific problems, please call Kevin Maroney, Criminal Division, 202-739-2333.

Attachments

PROSECUTIVE POLICY WITH RESPECT TO CERTAIN PERSONS ALLEGED TO HAVE VIOLATED SECTION 12 OF THE MILITARY SELECTIVE SERVICE ACT (50 APP. U.S.C. 462) PURSUANT TO THE PRESIDENT'S PROCLAMATION

I. This directive applies to all persons eligible to participate in the alternate service clemency program as provided in the President's Proclamation announcing a program for the return of Vietnam era draft evaders and military deserters. However, this directive is inapplicable to any person who has fled the country and is prevented from re-entry by virtue of 8 U.S.C. 1182 (a)(22) or other law. This directive alters the present Departmental policy to effectuate the President's declared policy of clemency to draft evaders and resisters.

II. Each eligible violator of Section 12 of the Military Selective Service Act who is willing to perform alternate service as an indication of his allegiance to the United States should report to the United States Attorney for the district in which he violated or is alleged to have violated the Act.

III. Any person presently under indictment or investigation who presents himself to the United States Attorney before January 31, 1975, and agrees to perform a period of alternate service, under the auspices of the Director of Selective Service, as an acknowledgement of his allegiance to the United States, will not be prosecuted if he satisfactorily performs such service. If no agreement is reached, the alleged violator may be prosecuted for the Section 12 violation.

IV. The length of alternate service shall normally be 24 months, but the United States Attorney may reduce the term in light of the following circumstances:

(1) whether the applicant, at the time he committed the acts allegedly constituting a violation of Section 12 of the Military Selective Service Act, was erroneously convinced by himself or by others that he was not violating the law;

(2) whether the applicant's immediate family is in desperate need of his personal presence for which no other substitute could be found, and such need was not of his own creation;

(3) whether the applicant lacked sufficient mental capacity to appreciate the gravity of his actions; and

(4) such other similar circumstances.

V. In the determination by the United States Attorney of the length of service as provided in IV, an applicant shall be permitted to:

(1) have counsel present;

(2) present written information on his behalf;

(3) make an oral presentation; and

(4) have counsel make an oral presentation.

An applicant shall not have access to investigatory records in the possession of the United States Attorney except as provided by 32 C.F.R. 160.32. The United States Attorney shall make his decision on the basis of all relevant information. No verbatim record of the proceedings shall be required.

VI. If the alleged violator fails to complete the period of alternate service to which he has agreed, the United States Attorney may proceed to prosecute the case.

VII. If the United States Attorney receives a certificate from the Director of Selective Service indicating that an alleged violator has satisfactorily completed his period of alternate service, then he will either move the court to dismiss the Section 12 indictment against the violator with prejudice, or terminate any Section 12 investigation of the alleged violator, whichever is appropriate.

VIII. If an alleged Section 12 violator is apprehended before January 31, 1975, the violator will be treated as if he voluntarily presented himself to the United States Attorney as provided in II, if the violator so desires.

IX. Upon request of any individual who thinks he may be under investigation for violating Section 12 of the Military Selective Service Act, the United States Attorney shall promptly review that individual's case file, if any exists, and in any event inform the individual whether or not Section 12 charges against him will be pursued if he does not report as provided in II.

X. An individual who is neither under indictment nor investigation for an offense covered by this directive but who reports as provided in II and admits to such an offense

will be subject to prosecution unless he makes an agreement as provided in III.

XI. The United States Attorney may delegate any function under this directive to an Assistant United States Attorney.

UNITED STATES OF AMERICA

VS.

Name _____ File No. _____

Street Address _____ Telephone No. _____

City and State _____

AGREEMENT FOR ALTERNATE SERVICE

It appearing that you have committed an offense against the United States on or about _____ in violation of Title 50 App. United States Code, Section 462, in that

_____

_____

_____

Therefore, on the authority of the Attorney General of the United States, by _____, United States Attorney for the District of _____, prosecution in this District for this offense shall be deferred for the period of _____ months from this date, provided you sign the following agreement:

Agreement

I, _____ understand that the Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy trial. I understand that the Fifth Amendment prohibits double jeopardy for the same offense. I understand that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the Court may dismiss an indictment, information, or complaint for unnecessary delay in presenting a charge to the grand jury, filing an information or in bringing a defendant to trial. I understand that constitutional due process may require dismissal of an indictment that has been unfairly delayed.

_____
Date

55-550 O - 75 - 8

As an acknowledgement of my allegiance to the United States of America, I agree to perform alternate service for a period of _____ months in a job acceptable to the Director of Selective Service as provided in President's Proclamation announcing a program for the return of Vietnam era draft evaders and military deserters. I will report to the Director within _____ days. I also knowingly and voluntarily agree to waive the constitutional right against double jeopardy and the right to use any delay during the period of my alternate service to establish a defense based upon Rule 48(b) of the Federal Rules of Criminal Procedure, the constitutional right to due process or a speedy trial, and the statute of limitations in a prosecution initiated because of my violation of this agreement. I understand that I may be prosecuted if I violate this agreement.

In exchange for the promises of _____, the United States will defer any prosecution of _____ for violation of Title _____, United States Code, Section 462 for a period of _____ months. The United States also agrees to drop any investigation or indictment of _____ for violation of the aforesaid offense with prejudice upon receipt by the United States Attorney for the District of _____, of a certificate from the Director of Selective Service indicating that _____ has satisfactorily completed his period of alternate service.

In the event _____ is prosecuted under 50 U.S.C. App. 462 if he violates this agreement, nothing stated herein shall be used against him during the trial of such offense.

_____ _____
Name of Alleged Violator Name of Attorney for Alleged Violator

_____ _____
Date Date

_____
Name of United States Attorney

_____
Date

Re: United States v. _____

Criminal File No. _____

Dear _____:

This letter concerns reports received by this office that you have committed an offense against the United States on or about _____ in violation of Section 12 of the Military Selective Service Act.

In accord with the President's policy of granting leniency to certain individuals who are charged with violating Section 12 of the Military Selective Service Act, you are eligible for diversion to an alternate service program. Should you agree to undertake acceptable alternate service as an acknowledgement of your allegiance to the United States this office will refrain from prosecution. Note, however, that if no agreement is reached the United States will be free to prosecute you for the Section 12 charge. If the Director of Selective Service certifies to us that you have successfully completed your service, the pending charge against you will be dropped. However, failure satisfactorily to complete the alternate service will probably cause us to resume prosecution of the Section 12 charge.

A decision to seek acceptance into this program is one that must ultimately be made by you. Nevertheless, it is important that you immediately discuss this matter with your attorney inasmuch as your participation in this program will require a waiver of certain rights afforded to you by the Constitution. For example, you must waive your right to a speedy trial and right to have an indictment presented to the grand jury, if one has not already been obtained, within the prescribed statute of limitations. We suggest that you consult with your attorney who will explain the program to you and the nature of the waivers mentioned above.

Very truly yours,

_____
United States Attorney

By:

_____

ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

APPENDIX B

Department of Justice
Washington 20530

November 7, 1974

Mr. Henry Schwarzchild
Director
American Civil Liberties Union
Foundation
22 East 40th Street
New York, New York 10016

Dear Mr. Schwarzchild:

This is in response to your letter of October 24, 1974, wherein you request confirmation of your understanding of information telephonically provided to you by Kevin T. Maroney, Deputy Assistant Attorney General, pertaining to the 15-day grace period extended to draft law violators entering this country for the purpose of taking advantage of the President's Clemency Program.

Your understanding is correct. The sole purpose of the 15-day period, during which the execution of outstanding warrants of arrest will be suspended, is to permit those individuals desirous of taking advantage of the Clemency Program, to enter the country and report to the respective United States Attorney, without fear of arrest, for the purpose of concluding an agreement for alternate civilian service. On the other hand, if after a draft law violator enters this country, he demonstrates by his actions that his purpose in returning was for reasons other than that for which the 15-day period was designed, the arrest warrant will be executed.

Sincerely,

Henry E. Petersen

HENRY E. PETERSEN
Assistant Attorney General

APPENDIX C

JOHN C. STENNIS, MISS., CHAIRMAN
STUART SYMINGTON, MO. — STROM THURMOND, S.C.
HENRY M. JACKSON, WASH. — JOHN G. TOWER, TEX.
HOWARD W. CANNON, NEV. — PETER H. DOMINICK, COLO.
MARGARET CHASE SMITH, MAINE — BARRY GOLDWATER, ARIZ.
HOWARD H. BAKER, JR., TENN. — WILLIAM B. SAXBE, OHIO
HARRY F. BYRD, JR., VA. — WILLIAM L. SCOTT, VA.
HAROLD E. HUGHES, IOWA
SAM NUNN, GA.

T. EDWARD BRASWELL, JR., CHIEF COUNSEL AND STAFF DIRECTOR

United States Senate
COMMITTEE ON ARMED SERVICES
WASHINGTON, D.C. 20510

February 28, 1973

Lima Draft Information Center
875 West Market Street
Lima, Ohio 45805

Dear Friends:

This will acknowledge your recent comments on the amnesty question.

When these individuals had a choice to make, they fled rather than serving their country. Many brave Americans served and served - some giving their lives in that service. I do not argue with their freedom to make the choice they did, but to grant them amnesty discredits the basic goals of this nation. They made their bed, let them sleep in it.

Some arguments have been raised that amnesty should be granted if these individuals now serve in either the armed services or in other non-military service. This is ridiculous and a direct slap in the face to the fine men and women who are currently in uniform or in those other programs.

We are well rid of the draft dodgers and deserters. They had an obligation to the United States - and they chose not to honor it. Our only obligation to them is to prosecute them to the fullest extent of the law. You cannot allow each individual to decide whether or not he is going to agree with the law, that is a poor way to run a country. Laws can be changed, but until that happens through the correct legislative processes, the law stands.

Too many people want the freedom and benefit of living in the United States without accepting the responsibility that goes with it.

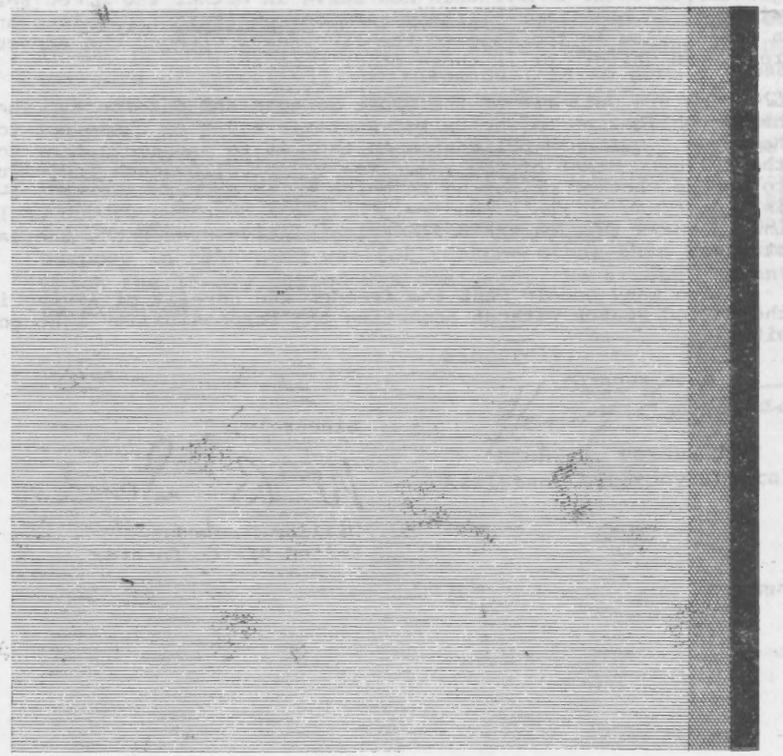
Best regards.

Sincerely,

Wm B Saxbe

William B. Saxbe
United States Senator

WBS lrb



SUBMITTED WITH STATEMENT OF JOHN SCHULZ, Editor-in-Chief, *Military Law Reporter*

PREPARED STATEMENT OF HENRY SCHWARZCHILD, DIRECTOR, PROJECT ON AMNESTY, AMERICAN CIVIL LIBERTIES UNION

I am Henry Schwarzchild, the Director of the Project on Amnesty of the American Civil Liberties Union. I appear here pursuant to the request of the Subcommittee to present the views of the American Civil Liberties Union on the administration of the clemency program, which was instituted by President Gerald Ford through Proclamation 4313 and Executive Order 11804 on September 16, 1974.

I am accompanied today by Edwin J. Oppenheimer, the ACLU's clemency litigation director. I should add that both Mr. Oppenheimer and I are members of the steering committee of the clemency/amnesty law coordinating office (CALCO), organized here in Washington shortly after the Clemency Program was instituted, in order to provide free legal services where necessary to persons who apply for clemency. Other members of the CALCO steering committee are staff members of such concerned groups as the National Legal Aid and Defender Association, the Lawyers Committee for Civil Rights Under Law, the Public Law Education Institute, the Central Committee for Conscientious Objectors, the National Conference of Black Lawyers, the Center for Social Action of the United Church of Christ, the Washington Board for Conscientious Objectors, and others. In its efforts to structure a legal referral service for clemency applicants, CALCO was compelled to look at the administrative and substantive infirmities of the clemency program, and it has been in persistent negotiation with all the governmental agencies involved to cure some of the most glaring defects of the program. While I do not speak this morning with the formal authorization of CALCO, I know that this body has complained of and tried to correct most of the problems and defects in the Clemency Program that I shall have cause to set forth. These defects continue to be so massive and crippling, in CALCO's judgment, that this organization felt constrained not to make itself available as the "clemency bar" and, as responsible attorneys, to refuse the request of the Presidential Clemency Board that CALCO act as a referral agency to which clemency applicants might be sent for legal assistance.

I. GENERAL CONSIDERATIONS

A. *Amnesty.*—The comments I offer this morning on the administration of the Clemency Program must be understoood in the context of the ACLU's position on the larger issue of amnesty, which is inseparable from any consideration of the clemency program now in operation.

For several years now, the ACLU has urged this country and its political leaders to enact a universal and unconditional amnesty for all those who have already undergone or still face criminal or administrative penalties for any nonviolent violations of law arising from their conflict with the draft, the military, and the war in Southeast Asia. The nation was deeply divided over the moral, political, military, and even legal and constitutional, justification of that tragic war. Direct American military involvement in that war ended almost 2 years ago; our prisoners of war are home; our troops have been withdrawn. It is time also to heal the other wounds that we have inflicted upon our own nation in the context of that war. Hundreds of thousands of men live with the disabilities of less-than-honorable discharges from the military services; tens of thousands bear the stigma of felony convictions or suffer the threat of military or civilian criminal prosecution arising from their response to the war.

The demand for amnesty does not rest primarily upon a judgment of whether these men and women were right or wrong. First and foremost, the call for a true amnesty says to the American people that the world and our own people have suffered enough over that war. Let us stop continuing to make American war casualties out of our own children and let them return to our—their—society without judgment and without punishment. Amnesty, which has a long and distinguished tradition in American history, is the way to end the process of victimizing ourselves in the context of a problematic war that has, in some respects, been brought to an end.

B. Presidential clemency program.—In that perspective, the ACLU finds the Presidential clemency program unsatisfactory in its moral and political assumptions. We welcome, of course, the impulse that caused the President to take some action to alleviate the continuing problems of those who, for whatever reasons, refused to lend their services, their lives, their bodies, to the war in Indo-

china. We admired the President's courage in announcing in so hostile a forum as a veterans' convention his intention of providing some form of clemency. We offered the White House every assistance, during the time the program was shaped and organized, toward making it humane, just, and effective. But it became quickly evident, with the President's Proclamation and Executive Order of September 16, 1974, that the program in effect declares that those who refused to participate in the war committed an offense against American society that we are entitled—indeed compelled—to punish. The punishment in some circumstances would be mitigated by presidential clemency, but the government's position is reaffirmed: that war resisters committed the punishable crimes of the war. It is the punitive and stigmatizing nature of the Presidential clemency program to which the ACLU profoundly objects which has also been the cause of its evident and dramatic lack of success.

Even within the assumptions on which the Presidential clemency program rests, it was, it seems to us, ill designed. Its division among four governmental agencies is cumbersome and confusing. Its limited scope is discriminatory. Its strenuous effort to distinguish among various categories of war resistance and to deal with each case on the basis of some individual judgment of his personal merits was fruitless and hurtful. Its threatened penalties for many people who under present law have committed no crime are shocking. Its loyalty oath is demeaning. Its alternate-service requirements are useless, punitive, and inequitable. Its "clemency discharge" is stigmatizing. Most of its administrative apparatus is hostile to the moral and political commitments of the war resisters. Many of its procedural aspects are very probably violative of federal statutes and the United States Constitution.

It is by reason of the hurtful moral and political assumptions that underlie the program, and because of its complex and discriminatory implementation, that the program is, to date, such a massive and dramatic failure. Overall, only about 2.5 percent of those qualified to apply for clemency under the program have done so in the first 3 full months of the program. (The time for applying for clemency only has 6 or 7 weeks more to run.) The war resistance community, especially those in exile, have declared their boycott of the clemency program. The amnesty movement in this country, comprising very broad elements of the American religious community, together with civil libertarians, civic and community organizations, some veterans and peace-oriented groups, and others, has joined in the boycott and has taken the position that the clemency program is unacceptable. We advise persons qualifying for clemency that in many, if not most, instances they may very likely have legal options available to them better than the clemency offered by the program. At the same time, we have offered to counsel and represent persons wishing to participate in the program to assert their interests and rights, and we have endeavored to improve some of the substantive and procedural problems that we see in the program.

Let me come to specific problems in the administration of the program. By arrangement with the staff of the Subcommittee, I shall present comments only on those parts of the clemency program that are administered by the Presidential Clemency Board and the Department of Defense, leaving comments on the Department of Justice and the Selective Service System to Mr. John Schulz of the Public Law Education Institute. With your permission, Mr. Chairman, I should like to supplement my full statement for the record of these hearings with our additional comments on the parts of the clemency program to which I shall not address myself this morning.

II. THE PRESIDENTIAL CLEMENCY BOARD

The Board, under Executive Order 11804, was given jurisdiction to receive applicants for presidential clemency from persons who have been convicted by Federal courts for violations of the Military Selective Service Act (i.e. desertion, absence without leave, and missing a military movement), from persons who have been discharged from the military services with bad conduct or dishonorable discharges by sentence of court martial for such absence offenses, and from such persons who were discharged from the military administratively with an undesirable discharge because of such offenses, if these acts occurred between August 4, 1964 and March 28, 1973. For applicants who, in the Board's judgment, merit presidential clemency, the Board may recommend to the President the granting of executive clemency, contingent where appropriate upon the satisfactory completion of a period of alternate, civilian service not to exceed 24 months, and of a clemency discharge.

The clemency applicants to the Board, in other words, are either persons who have already gone through the civilian or military criminal process and have suffered such punishments as these courts imposed, or veterans with less-than-honorable discharges issued by military administrative fiat.

Not until the middle of November, fully half-way through the period for clemency applications, did the Board formulate procedural and substantive standards for considering clemency applications from the estimated 120,000 potential applicants. Even now, it is difficult to see what real advantages the clemency program offers persons qualified to apply for clemency to the Board.

Take a young man who refused induction into the military because, like millions of Americans including many Members of Congress, he believed the war in Southeast Asia to be a human and political catastrophe. He was arrested, tried and convicted, and served his sentence in a federal penal institution. He is now free to apply to the Board for executive clemency. The Clemency Board may recommend to the President the grant of clemency contingent upon the applicant's spending another period of his life doing alternate service under the supervision of the United States Government instead of pursuing his own life, and to receive in exchange therefor some form of clemency which may or may not be a full pardon. Even a full pardon will not expunge his felony record and does not automatically relieve him of civil disabilities. Some lesser form of executive clemency will do nothing whatever for him. The Clemency Board has only recently made it known that recommendations for full pardons are available to some clemency applicants. So far, the indications are that alternate service will be a condition for most of them.

The applicant has no right to a hearing before the Board for himself or his attorney. He has no right to a hearing even if he finds the clemency recommendation unjust and requests a reconsideration by the Board. He cannot see the reasons for the Board's recommendations to the President before the President sees them, so that there is no opportunity to rebut erroneous facts or conclusions. In the Board's computation of his alternate service time, a prior criminal conviction will be held against him, even though he has presumably "paid his penalty" for any such offense and should not be twice punished for it. Wrongful processing by the Selective Service System of claims he may have had for exemption or deferral will be held in mitigation, though such violations of laws and regulations by the Government should be exculpatory rather than mitigating in their effect. The length of any prison or other sentence served will diminish his alternate service period, but this means in effect that the Board acts as a corrective sentencing authority—where the draft refuser had a humane or lenient judge in court, who gave him a lesser sentence, the Board's computation will now substitute its own penalties in greater measure.

Former military personnel run all these hurdles and a very important additional one: Those qualified to apply for clemency from the Board now hold a less-than-honorable discharge: either an undesirable discharge, given administratively (ca. 85,000 men) or a court-martial from the military: imposed bad conduct or dishonorable discharge (about 26,500). In their cases, the Board may recommend that the President issue such applicants a "clemency discharge" (newly established by the Presidential Proclamation), after they satisfactorily complete a period of alternate service. But the clemency discharge is distinctly worse than the undesirable discharge that most of these men now hold: undesirable discharges, crippling as they are in respect to employment and civil-service qualifications and other needs of post-military careers, are held by tens of thousands of veterans for a great variety of reasons. A clemency discharge will stigmatize a veteran for life as a deserter, if not a traitor to his country. An undesirable discharge leaves the Veterans Administration certain discretion with respect to the bestowal of veterans' benefits. The clemency discharge absolutely disqualifies the veteran from all benefits. An undesirable discharge may be taken before the military services' discharge review boards for appeal and upgrading; but it is very doubtful that these Discharge Review Boards have jurisdiction to upgrade a clemency discharge given by the President as an act of executive grace. In fact, the issuance of a clemency discharge is a downgrading of the undesirable discharge—and for this the program expects the veteran to do up to 2 years of alternate, ill-paid civilian work, in addition to the time he has already spent in the military service and the disabilities already inflicted upon him by virtue of the undesirable discharge!

The subcommittee should also be aware that there is no satisfactory rationale for offering clemency only to veterans whose less-than-honorable discharge was given because of an absence offense. Tens of thousands of veterans, including many who served honorably and heroically in Vietnam, who have serious battle wounds from that war, were administratively discharged by the services for every imaginable variety of petty offense, most of them offenses that do not even exist in civilian life, much less have any bearing on their post-military life. Yet the rest of their life is blighted by their "bad" discharge. The discharge policies of the military services are urgently in need of systematic review and correction.

Serious questions have been raised recently, in a major analysis in the Harvard Civil Liberties/Civil Rights Law Review, about the legal validity of the present system of administrative discharges. Indeed it is subject to question whether the President has the authority by executive action alone to create an additional, sixth class of "clemency discharge." But even if he had the power, we urge that the express intent of the President's clemency program—to alleviate the harshness with which we otherwise punish those who came into conflict with the war—be made real by giving every veteran a discharge that will not haunt his entire post-military life and career. Only an honorable discharge will accomplish that goal. It is tragic indeed that the clemency program should compound the injury, rather than mitigating or abolishing it. That is what a clemency discharge does. It remains perhaps the single most objectionable feature of the clemency program. The President's Proclamation and Executive Order leave room to hope that some change of the discharge issue may be accomplished within its framework. If not, the program should be amended by the President to remove this most injurious feature of its so-called remedies.

We have welcomed some of the recent procedural and substantive decisions made by the Board. The formal acknowledgement that full and complete pardons are at the end of the tunnel for some, if not all, the applicants; the possibility of brief hearings before the Board (though at the Board's discretion, rather than as a matter of the applicant's right), both on the original application and upon a request for reconsideration of the Board's recommendation; finally the inclusion in the Board's standards for mitigation of the applicant's conscientious motivation for the act subject to the clemency—these are very considerable steps in the direction of what a true and generous amnesty might some day look like. Given the limitations of the Presidential clemency program, they cannot overcome the ACLU's objections to it, or the resistance and rejection on the part of the war resisters generally. That resistance and that rejection are so strong that the Presidential Clemency Board to date has received applications from no more than about .07 percent of those qualified to apply. About 800 applications out of a possible 120,000—only 1 in every 150! Surely, national reconciliation after that divisive experience of the Vietnam war is not being accomplished by the Presidential Clemency Board. The Congress and the American people should learn why this is so.

III. THE DEPARTMENT OF DEFENSE

The Department of Defense has jurisdiction, within the Presidential clemency program, over persons who are subject to military authority and who have (or may have) violated the military laws against desertion, absence without leave, or missing a military movement (articles 85, 86, and 87 of the Uniform Code of Military Justice), if these acts occurred between August 4, 1964 and March 28, 1973. The Department of Defense has stated that there are about 12,500 military absentees qualified to participate in the program. Some 2,200 military returnees have so far been processed through the DOD's clemency machinery, about 18 percent of the number eligible. I shall explain presently why, in our judgment, the Defense Department's program is, compared to the other parts of the clemency program, so successful.

Military absentees who surrender to military authorities are sent to Fort Benjamin Harrison, Indiana, where the four services have established a Clemency Processing Center. Their processing there is accomplished normally in one business day. The returnee is required to sign a reaffirmation of allegiance, an admission of his violation, and a pledge to do an assigned period of alternate service. A Joint Alternate Service Board (JASB), composed of a colonel each from the Army, the Air Force and the Marine Corps and a Navy Captain, considers the returnee's military personnel record and a form filled out by the clemency applicant. The 1-page form contains only three questions: "(1) Reason for absence from military service; (2) Employment during absence from military service:

(3) Other matters I want the board to consider." The returnee is given an undesirable discharge from his branch of the service. Upon the satisfactory completion of the alternate service, the returnee may obtain a clemency discharge in place of his undesirable discharge.

Our objections to the administrative practice of the military clemency program are numerous.

1. We believe that clemency judgments concerning military violators, especially alleged deserters, are not best made by the military establishment itself, which is naturally antagonistic to the very notion of leniency for those who violate its own code of behavior, especially with respect to desertion. Virtually all the military absentees who qualify under the clemency program are enlisted men. The Joint Alternate Service Board is composed of four field-grade, career officers, whose sympathies toward enlisted men charged with desertion are unlikely to be warm.

2. The required reaffirmation of allegiance is flagrantly offensive to the returnees, since in effect it charges them with having denied their allegiance, when all that can be charged against them is a violation of military law, not a failure of allegiance to the country. The returnees are acutely aware that no General Lavelle and no ranking military officer involved in the My Lai cover-up (see the Peers report) and no civilian or military official who lied to the Congress and the American people about the bombing of Cambodia has been required to "reaffirm allegiance" to the United States.

3. The forms signed by the military clemency applicant include an admission of guilt, a confession of having violated military laws, without the applicant having been given constitutionally required warnings about his rights, and indeed without a preliminary hearing at which an impartial official might explain to the returnees the charges against him and might make an impartial assessment of whether the acts charged constitute a military offense.

4. In the extremely brief processing period at the Clemency Processing Center, there is no adequate opportunity for the applicant to have his personnel file reviewed by competent counsel acting in his behalf to see whether there are legal defenses against the absence offense that might make his application for clemency unnecessary. To our information, there is no review of the lawfulness of the applicant's induction, no review of whether there may have been a wrongful denial of an in-service application for discharge for hardship, dependence, or conscientious objection, and the like.

5. The applicant has no opportunity to appear before the JASB to state his case or to make a plea for mitigating considerations.

6. The three-question form filled out by the applicant, aside from being sparse and inadequate to say the least, gives him no hint as to what the standards are that the JASB considers in mitigation and therefore, is ill-designed to help the applicant state his case to his advantage.

7. The published standards in mitigation of the maximum (and usual) 24-month alternate service sentence include only personal hardship and "good soldier" elements but give no weight whatever to the conscientious and unselfish motives that prompted the acts of many of the military absentees, and indeed 80 percent of the military returnees have been given alternate-service sentences of from 19 to 24 months.

8. There are no published procedures and standards that describe the JASB's procedures in considering cases and in voting upon determinations as to terms of alternate service or class of discharge to be given.

9. The JASB gives no statement of reasons for its determinations, nor is there provision for any appeal or review of its actions.

10. The judgment of the military services, normally made by the authority of the Commanding General of Fort Benjamin Harrison, as to the eligibility of a military absentee to participate in the clemency program are not appealable.

11. The clemency discharge held out to military returnees under the clemency program has precisely the same incurable defects that I have already mentioned in my comments on the Presidential Clemency Board.

12. There has been a major conflict of statements by Department of Defense spokesmen concerning the question of whether a military absentee who pledges but fails to do his assigned alternate service time can and will be prosecuted. The problem arises because the returnee, after signing his alternate service pledge and the other forms, is discharged from the service with an undesirable discharge. Once discharged, the military normally has no further jurisdiction over him. If he fails to perform the alternate service, the only means of enforcement appear

to be an action by military authorities under article 83 of the Uniform Code of Military Justice for having fraudulently obtained his undesirable discharge or by the Department of Justice under 18 U.S.C. 1001 for making a false or fraudulent statement to an agency of the United States Government. In order to prove fraud, the prosecution would have to prove the deserter's fraudulent intent at the time of his signing of the alternate-service pledge. But in most cases that would be extremely difficult and can be made virtually impossible by thoughtful action on the part of the returnee. On September 19, 1974, Defense Department spokesman Ken Pease and Justice Department spokesman John Russell were quoted in the Washington Post as having declared that there was nothing either Department could do to enforce the deserter's alternate-service pledge. The briefing given by military officers to the returnees at Ft. Benjamin Harrison continues openly to give them this advice. On October 7, 1974, however, the New York times quoted Martin Hoffman, General Counsel of the Defense Department as saying that they would institute prosecution in appropriate cases, and the Justice Department was similarly heard to mumble about prosecution under title 18 of the United States Code. We think it essential that this matter be authoritatively clarified. The Defense Department and the White House have claimed that this so-called "deserters' loophole" was not accidental but knowingly and intentionally created in the clemency program (New York Times, September 19, 1974). If that is the case, the threats of prosecution are sheer harassment. It would be extremely helpful if the subcommittee could obtain a final and authoritative ruling on this matter.

The apparent unenforcebility of the deserter's alternate service pledge accounts entirely for the fact that the military clemency program is relatively the most successful of the program's divisions. About 18 percent of the potential applicants have submitted, compared with .07 percent of the potential clientele of the Board's and about 2 percent of the Justice Department's. This is dramatic evidence for our contention that no punitive system of clemency, no conditional amnesty, will achieve the President's objective of healing the nation's wounds and overcoming the divisiveness of the Vietnam war among ourselves. The military clemency program, to all intents and purposes, is unconditional, and despite its other serious shortcomings, that fact alone accounts for its strikingly higher ratio of success in returning war resisters to our society.

IV. CONCLUSIONS

In concluding, let me only add this: The legal cloud that has been cast over the "deserters' loophole" accentuates one of the chief objections that must be raised against the Presidential clemency program generally: The program obliges war resisters to reaffirm allegiance to their country, which they had never denied but rather passionately affirmed; it forces them to admit that they have committed crimes, when the world and many of our fellow citizens, including much of our moral and political leadership, came to believe that the war itself was a crime; it compels them to confess that they had not fulfilled their obligations as citizens, when they have spent years of their young lives either in prison, or underground in their own country, in exile abroad, or in the military service itself; it now asks them to concede that this government has the moral and legal authority to impose punishment upon them for their acts of war refusal. The loophole problem makes it quite clear: The Presidential clemency program demands that war resisters lie to the government in the process of begging it for mercy. That is not the way a country makes peace with its young sons!

The war in Southeast Asis was a catastrophe for the world, a horror for the people of Indochina, and a tragedy for our country. Amnesty—or clemency—should be one gesture in the direction of ending the tragedy. The Presidential clemency program, it seems to us, prolongs the tragedy for tens of thousands of young Americans.

Modifications in the present program are essential and might mitigate some of the worst features of its implementation. But the program in its very conception will remain punitive, demeaning, discriminatory and hurtful. No clemency that is conditional, that makes the impossible attempt to assess the personal, subjective, religious, moral, ideological, religious or political motivations of people's acts of war refusal, that offers clemency to some but not to others in similar situations—no such system will reconcile us with those young men and women for whom the war should now also come to a close. For that reason the

Presidential clemency program is and will remain a failure, not only statistically but also morally and humanly. We hope devoutly that hearings help persuade the American people and the President that it is time to end the war for our own sons, and that only a universal and unconditional amnesty will accomplish that noble purpose.

I shall leave comments on the other two major aspects of the Presidential clemency program to my colleague, John Schulz, of the Public Law Education Institute, the editor of the Military Law Reporter and former editor of the Selective Service Law Reporter.

Prepared Statement of James R. Wilson, Director, National Security—Foreign Relations Division, The American Legion

Very late last week, the American Legion learned that this subcommittee would hold hearings on the progress of the several Government agencies and the Clemency Board in administering the President's amnesty program.

Had witnesses been limited to the Government agencies, the American Legion would not have requested this appearance. However, when we learned that outside witnesses representing views diametrically opposed to ours were being invited, we requested the opporunity to appear.

I feel honored to have been given the privilege to present the views of our organization for there are many individuals and organizations who either were not aware of these hearings or will not have the opportunity to appear.

For the record, and as this subcommittee is aware, the American Legion by action of succeeding national conventions offered a different means of resolving the amnesty issue than that chosen by President Ford. We felt then, and we feel now, that the handling of the cases of deserters and/or draft evaders should be through already established judicial systems.

We presented our viewpoint to both Senate and House committees and to the President himself. However, once the President's proclamation was issued, the matter was resolved. We used all of our means of communication to make the provisions of the President's plan well known to our membership of nearly 2.7 million veterans.

Perhaps this effort was redundant for press, radio and television, in fact, almost every form of communication has repeatedly covered this matter in depth. The media should be commended for the splendid job it accomplished in making known to all Americans, but particularly to those affected, of the opportunity President Ford's proclamation provided.

In announcing his "earned re-entry" program, President Ford clearly stated his objective "to give these young people a chance to earn their return to the mainstream of American Society so they can, if they choose, contribute to the building and betterment of our country and the world."

President Ford "promised to throw the weight of (his) Presidency into the scales of justice on the side of leniency and mercy, but (to) also work within the existing system of military and civilian law and the precedents set by (his) predecessors."

In keeping with the spirit of the clemency program, it is our view that the program is not vindictive. It has and does provide a just opportunity for more than 128,000 young men to re-enter American society with far less sacrifice and risk than those who chose to serve. The program has been in effect for more than three months and those eligible for its provisions may still enter for six more weeks. However, the "open hand" of reconciliation should be terminated as announced on January 31, 1975.

The vast majority, more than 85 percent, of those covered by the clemency program are military deserters or absentees who will still have redress after the program's termination date. Each convicted military absentee and a far larger number of Vietnam era men separated with less than honorable discharges may apply to the discharge review board and/or the board for correction of records of their respective service.

The circumstances surrounding their violation of the Uniform Code of Military Justice are a "mixed bag" according to reports from the clemency board. Seldom does their misconduct stem from a fervent personal or moral opposition to the war in Vietnam. Their reasons for absenting themselves parallel their fellow servicemen in non-hostile and other hostile periods—personal and family problems, inability to adjust to military society, overriding financial obligations, and a myriad of other reasons completely unrelated to Vietnam.

The American Legion, upon application, has and will continue to provide administrative assistance and counsel before the discharge review boards and the boards for the correction of military records to these former servicemen.

Shortly after the establishment of the clemency board, we expressed two deep concerns about the alternate service phase. First, we strongly opposed the assignment of draft evaders or military deserters to Veterans Administration hospitals, which we felt would be a direct insult to many of those who served and who are reminded daily of their painful sacrifice. Furthermore, it would be grossly unfair to those who chose not to serve.

Secondly, we are concerned that some alternate service assignments would eliminate jobs for Vietnam veterans, particularly the 20–24 age category whose unemployment rate has risen to a distressing 12.4 percent. We have received assurances from both the administrator of veterans affairs and the director of the selective service system that neither of these will occur.

The American Legion has followed the progress of the amnesty program since its inception last September. Special briefing sessions have been held for the national security commission in Indianapolis dealing with the procedure for processing military deserters through Fort Harrison and Camp Atterbury and with selective service responsibility. My staff and I also attended the recent press conference held by the President's clemency board and kept in touch with the Government agencies to determine how well the program was being received. Much of this information has been transmitted to our national officers, to our policymaking bodies and to the membership at large.

We feel that every young American to whom President Ford has offered the chance to earn his way back into society is aware of the provisions and mechanics of the program. However, if this is not the case, time still remains to apprise any who may not have knowledge of the program.

The fact that more have not taken advantage of the program is not, in our judgment, through lack of information about it or how to proceed to apply, rather we believe the draft evader, particularly, does not feel it is enough. Nothing short of complete, unconditional, automatic amnesty will satisfy this category among all those who refused to serve.

Based on our assessment, it is our recommendation that the program's deadline should not be extended nor its provisions liberalized.

STATISTICS OF CLEMENCY PROGRAM

Draft Evaders (Convicted) 263 of 8,700 have applied to Clemency Board. Military Absentees (Convicted)[1] 559 of more than 100,000 have applied to Clemency Board. Draft Evaders 131 of 6,800 have signed agreements with U.S. Attorneys. Military Deserters[2] 2,233 of 12,500 have been processed through Fort Harrison and Camp Atterbury.

Senator HART. We will be in order. I apologize for this delay, Mr. Meis and we welcome you. Our next and concluding witness is Mr. William Meis.

STATEMENT OF WILLIAM MEIS

Mr. MEIS. Thank you, sir. I would like to read a short statement and then we can go into questions.

My name is Bill Meis and I am a draft evader. Three months ago I left my home and family in Montreal and returned to the United States to challenge President Ford's "earned reentry" program. I surrendered myself to the authorities in Springfield, Ill., where I was arrested, arraigned, and placed under a $2,000 bond. There I awaited a trial which was to have taken place on March 3, 1975.

On December 2 of this year, the assistant U.S. attorney in Springfield, after receiving authorization from the General Counsel's Office of the Attorney General's in Washington, presented a motion before the Seventh District Federal Court, asking that my indictment be dismissed. Judge Harlington Wood agreed, the indictment was dismissed and I am a free man today.

[1] Eligible to appeal to Discharge Review Board (unless discharged by General Court Martial) (15-year limit), and/or Board for Correction of Military Records (3-year limit).
[2] If convicted, will be eligible to appeal to Discharge Review Board (unless dicharged by General Court Martial) (15-year limit), and/or Board for Correction of Military Records (3-year limit).

Since I am the first draft evader to return and refuse the Ford reentry program, the Justice Department's refusal to prosecute must be viewed as a significant victory. However, I cannot let my own happiness hide the fact that there are still thousands of men and women who live each day under the threat of imprisonment. Neither can I forget that the Government seems intent on sticking with President Ford's program even though it is an obvious failure.

Other witnesses have presented the factual and practical problems with "earned reentry." I would like to share with you a short summary of my feelings over the past 6½ years and how they affected my choice between permanent exile, earned reentry or the possibility of jail.

It is:

1968—I receive the final rejection of my application for conscientious objector status. My wife, Elaine, and I discuss my going to jail but we decide it is better to leave. We are afraid; we don't want to leave America, our families, the life we have made together. But we cannot support the war, so 2 weeks later we leave for Montreal.

1969—The war goes on under a new President. My brother decides to get married and sends us an invitation. We are a close family and I want to be there, but I can't. I have been indicted and I risk a prison term.

1970—My grandmother dies and I can't go to her funeral. Heavy depression sets in. Decide to stop thinking about America and try to make a success of becoming Canadian.

1971—American public opinion turns heavily against the war, but I can't allow myself to feel optimism. The loneliness is too difficult if I admit it. Elaine and I decide to buy our house and stay in Montreal.

1972—My son Jamie is born. He can't be President because he is born on foreign soil. His grandparents want to see him as a new-born baby, but it is a long trip. They don't make it.

1973—Direct American participation in the war ends. Amnesty grows as an issue. Watergate breaks and exposes a lot of what we said. My friends and I are sure it means a total amnesty is in the works.

1974—Starts a happy year. My daughter, Marika is born, President Nixon resigns and Gerald Ford assumes the Presidency. I am sure President Ford will call for a new beginning and a healing of the wounds. Instead he pardons Nixon and then says we exiles must accept guilt and punishment, that we must earn our way back and sign a loyalty oath. I am shocked and hurt. I decide to come back and stand up for what I believe in.

Today, as I sit here in this room, I can say those nightmares and painful memories are beginning to fade. Since my return to the States I have rediscovered the basic goodness and sense of justice within the American people. I know total amnesty is coming; it is just a matter of time.

How can I say that? I say that because I have received messages of support from men lying shot up in a VA hospital in Denver; I say it because I have spoken to Vietnam veterans and received a warm reception; a say it because two local commanders of the V.F.W. and a commander of the U.S. Marine League have publicly stated their support; I say it because I have been in the heart of the heartland, the middle of the Midwest and received countless messages of support from common, everyday people.

But most of all, I can say it because the American people do want to heal the wounds of the last 10 years. They want to be united again as a people prepared to face the difficult problems that lie ahead. And they know unity cannot come until all the legacies of the Vietnam war have been dealt with. That is the task we must set ourselves.

Senator HART. Well Mr. Meis, yours is a very brief but I think very eloquent plea. I would like to be able to share your optimism that, as you put it, total amnesty is coming, it is just a matter of time.

Mr. MEIS. Exile teaches one to learn patience, Senator.

Senator HART. I would hope you are right. The time will be shortened, assuming you are right, time will be shortened in proportion to the voices in leadership positions that urge the whole community to understand the benefits and the equities. I am not sure that enough voices are raised to that point.

When President Ford announced his program I expressed delight and then, regret that it didn't go as far as it should. The voice in the White House really is th one voice that can give the kind of leadership that a concept like this most requires. This should not mean by the silence of people in Congress, but there is a whale of a difference in the reach of our voices. There are some questions that have had developed that I would like to ask you.

Mr. MEIS. Fine, sir.

Senator HART. One Administration official said that an appropriate alternate service would provide the participant room and board plus $100 a month compensation. Tell us how you are taking that job of kind, whether it effects your ability to support your wife?

Mr. MEIS. Well, from just a practical point of view, I frankly could not support a wife and two children with the kind of job you are talking about. I think it is totally unrealistic to believe that I would do so.

A lot of people forget—like Mr. Goodell this morning who referred to us as young people, inarticulate, confused, mixed-up and unfortunate boys—that we are older. In my opinion, we were never as Mr. Goodell describes us, and we are certainly not now. Most of my friends run from 27 to 37 years old, and we have been in Canada or Sweden or wherever for a long time. We have made successful lives for ourselves as immigrants and we are not desperate to come home if coming home means punishment.

Senator HART. You are not a lawyer?

Mr. MEIS. No, I am not.

Senator HART. As a layman, how would you react to this question: Participants in this clemency program, as you may have noted, are required to reaffirm allegiance to the United States.

Mr. MEIS. Yes; that's correct, sir.

Senator HART. Do you feel that you ever foreswore allegiance to the United States?

Mr. MEIS. No, I don't, Senator. I feel this is a very important point: Those of us who stood against the war did so in the very highest allegiance to the United States. This is one of the reasons I feel there is a real need for amnesty. We had a situation in America where we were very close to a civil war because both sides thought they were acting in the best interests of our country and in the best interests of their consciences. The best way to resolve that kind of situation is to have an amnesty.

Senator HART. You said in your testimony that you returned 3 months ago to challenge——

Mr. MEIS. Yes?

Senator HART. To challenge the clemency program?

Mr. MEIS. Yes.

Senator HART. Expand a little in addition to what you said in your testimony why you didn't accept this clemency?

Mr. MEIS. Why didn't I accept it?

Well, as everyone who has seen the form knows, you sign away certain constitutional rights, you sign away your right to appeal, you sign away your right to double jeopardy. I feel very strongly that earned reentry implies that we admit guilt, that we admit that at one time we were disloyal to our country, that we are willing to accept punishment without appeal. I feel proud of what I did. I was acting in the best interests of myself and my country. I was trying to stop the deaths in Vietnam.

It is my generation which suffers from that war. My friends, families that I knew, kids that I grew up with died over there, you know, which is a very heavy thing that weighs on my mind. So, I cannot accept a program such as the reentry program, which is not willing to put behind us those years of suffering and fighting between ourselves. But I did feel that if I wanted to challenge the program and be treated with respect, with dignity, then I could not do that from Canada and I felt it was necessary to return to the United States. After talking it over with my wife and friends and the American organization which helped me, we decided to do it.

Senator HART. How many with a like attitude have followed you back from Canada, do you know?

Mr. MEIS. I am not sure at this point in time.

Senator, I think I should make it very clear that what I did was only able to do because of the support of a lot of people and because, as a novelist, I am in a position where I could take a few months off and attempt this kind of challenge.

For most of us, there are very real problems in refusing the reentry program and deciding to go through the system of justice. This can be a very long, difficult, and expensive procedure. I know there are a number of people who are contemplating doing it. I think, until there is a total amnesty, people will do it. There will be a number of challenges launched. But it is not something that everybody can do at the drop of a hat. Do you understand what I mean?

Senator HART. Did you have a lawyer representing you when you presented yourself to the U.S. District Attorney at Springfield?

Mr. MEIS. Yes, sir, I did. I would advise anyone to have a lawyer whether they enter into the plan or refuse it.

Senator HART. Do you have any impression as to whether if you had volunteered for the clemency program the U.S. Attorney then might have dropped the indictment on you?

Mr. MEIS. Well, for me to accept the program as I understand it, I suppose it is conceivable they would have given me no alternate service at which point, the indictment would have been dropped. But they have been giving everyone some length of alternate service as far as I know. I am not up-to-date on all these questions, Senator.

But no, they would not drop the indictment until I completed the

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alternate service. I think the reentry program states—you might ask a lawyer—I think the indictment remains in effect until you perform the alternate service. So it is the kind of thing they can hold over you.

Senator HART. Your experience with the U.S. Attorney's office there, and I don't want to personalize this——

Mr. MEIS. Thank you.

Senator HART [continuing]. Describe what happened, what was the atmosphere like when you walked in?

Mr. MEIS. When I first turned myself in?

Senator HART. Yes.

Mr. MEIS. It was a madhouse, really, because there was an awful lot of press coverage and attention paid to this cause. I was arraigned, arrested, and set free on bond. The total process took about 45 minutes.

We could unclog this Nation's courts if things always moved that fast. They moved me through very quickly. I will have to say that everyone was very correct, very proper. I was offered the reentry program. I was asked by my own lawyer if I wanted to sign it.

I would say it seemed to follow a rather proper and correct pattern from what I could understand. Is that what you meant by your question, Senator?

Senator HART. Yes; the reception, the process.

Mr. MEIS. Well everything was done publicly, so I don't know how much we can interpret from my experience how other people would be treated. I really don't know. I hope the Government would treat everyone that way. I suspect they would not, but I really don't know.

Senator HART. Let me get it more precisely in time.

Mr. MEIS. Right.

Senator HART. Three months ago you came in from Montreal. You surrendered to authorities in Springfield on what date?

Mr. MEIS. October 3.

Senator HART. Then on December 2 the indictment was dismissed?

Mr. MEIS. That is right. It took about 2 months.

Senator HART. I was trying to find the time lag between your arrival and dismissal.

Mr. MEIS. The judge gave us 60 days to present motions and my lawyer drew up a motion for dismissal. We presented it to the assistant U.S. attorney who said it looked pretty good and he didn't want to prosecute. He said he would have to send it to Washington. So he sent it to the Attorney General's office where they had it for approximately 3 weeks. They reviewed it, under a number of considerations, I would imagine, and they sent it back to the assistant U.S. attorney, whose public statement was that they were not willing—I don't want to misquote him—but it is something to the effect that they were not willing to publicly prosecute a case which they might not win and therefore they themselves would present a motion for dismissal. We only had 60 days for motions and that came on the sixtieth day.

Senator HART. Before you presented yourself to the U.S. attorney did you feel that the agencies dealing with the clemency program were dispassionately dealing with the applicants' cases or was there a feeling of adversary position, was there a prosecutor in the role of a plea bargainer?

Mr. MEIS. Was the prosecutor acting as a plea bargainer?

Senator HART. Or in the role of an adversary rather than——

Mr. MEIS. If I understand the question, my answer would be that the prosecutor was acting as a plea bargainer.

Senator HART. You did have that impression, notwithstanding the fact that within that rather brief period of time you saw the prosecutor move to dismissal?

Mr. MEIS. I am not sure that I understand the question.

Senator HART. Well, the question here is what concept did you have of what you would find at the U.S. attorney's office before you got there? Did you anticipate walking into somebody that was a prosecutor as the movies on the TV present?

Mr. MEIS. I suspect I probably did; yes.

Senator HART. Now, that you have been through the experience, does the district attorney still have that style, in your mind?

Mr. MEIS. No; not at all.

He acted as a plea bargainer between my lawyer and the Department of Justice in Washington. That was the role I saw him play.

Senator HART. And returning—before we leave—to your expression of the belief that unconditional amnesty will come, total amnesty will come in time, you have described a number of people who have encouraged you, including patients in our VA hospitals.

Mr. MEIS. Yes. Vietnam veterans, two commanders of V.F.W. posts, and a commander of the Marine Corps League.

Senator HART. Have you had contact with either brothers or sisters who have been killed in Vietnam or parents of men killed?

Mr. MEIS. Yes, yes. I don't mean to say that no one opposes amnesty. The President of the Gold Star Mothers' Chapter in my home town is pretty violently opposed to amnesty. She is an old friend of our family. She and my mother talk, but she still is very much against amnesty.

But there are others who are in favor of it. I have talked to sisters and brothers and parents who express a favorable opinion.

What I am saying is that there is not the massive resistance that a number of politicians and representatives of certain veterans groups have tried to depict. They paint the picture that there is a massive resistance to amnesty, particularly if you are aware, not from New York City, or Los Angeles, that if you go out into the heartland everybody wants to string up war resisters. That is not the case at all.

I honestly feel that among these who lost friends or relatives in Vietnam, there is at least a significant number, significant percentage, who are in favor of amnesty. I don't know what percentage, I don't think anyone knows; but it is a lot more than I think you or I would assume.

Among the general American population in a very conservative area like my home town where I would say the greatest resistance is—I feel uncomfortable making these kind of guesses, but I would say it is kind of 50–50. And again, I make the point that this percentage is for a very conservative constituency.

Senator HART. What is your home town?

Mr. MEIS. Decatur, Ill.

Senator HART. What do you plan to do now, what are you going to do about the challenge that you came back to?

Mr. MEIS. For my own personal case there is not a great deal more that I can do. I am happy that I am free, and it is a good feeling.

I plan to keep working for full amnesty to the extent that I can be involved, but I do think hearings like this and the public exposure which is coming will bring about total amnesty. I am fairly confident that I am not going to have to work on it all my life.

I also plan to continue my career, and my family and I will eventually move down into the States. We do have a house and a lot of obligations in Montreal that need to be taken care of. But I will say we will be moving back here.

Senator HART. What prediction do you make as to what will be the decision of others with whom you are closely associated in Canada?

Mr. MEIS. What will they do?

Senator HART. What will they do?

Mr. MEIS. If there is a total amnesty soon, we will begin the process of coming home. If there is no total amnesty there will continue to be a series of challenges until there is total amnesty.

I think we war resisters along with the Vietnam veterans, have received extremely shabby treatment and we will continue to be a thorn in the side of the Government until those in power are prepared to treat us with dignity and respect. One of the greatest ironies of the last 10 years is that the two groups of people who did take a stand during the Vietnam war either by serving in the Armed Forces or by standing up and saying no, are the two groups that are being dealt with with most harshly today. Sooner or later Americans are going to have to deal with the war. There will continue to be challenges, annoying incidents, things will continue to move by different forms of protests until there is an amnesty for war resisters and until Vietnam veterans benefits are commensurate with the benefits for veterans of other wars.

Senator HART. Well, I don't know what the dictionary's definition of reconciliation is, but I would assume it takes two to dance.

Mr. MEIS. Right.

Senator HART. And absent unconditional amnesty, those like you will not be reconciled.

Mr. MEIS. Even without amnesty, many of us are becoming reconciled in the sense that we love our country, that we care very much. My roots are in America, Senator, and I feel that kind of reconciliation. But I think that true reconciliation demands that we both look at each other with respect, and as you say, it takes two to tango.

Senator HART. Well, thank you very much.

As just an individual I would think the country would want you to return and want you here.

Mr. MEIS. Thank you, Senator.

We are adjourned until 10 o'clock tomorrow morning.

[Whereupon, at 4 o'clock, the subcommittee was adjourned until the following morning.]

CLEMENCY PROGRAM PRACTICES AND PROCEDURES

THURSDAY, DECEMBER 19, 1974

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Edward M. Kennedy [chairman of the subcommittee] presiding.

Present: Senators Kennedy [presiding] and Hart.

Also present: Thomas M. Susman, chief counsel, Mark Schneider, investigator, and Janet Alberghini, staff assistant.

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. The subcommittee will come to order.

The second day of hearings of the Subcommittee on Administrative Practice and Procedure begins this morning on the operation of the Presidential clemency program. We seek to elicit information about the workings of the Ford amnesty program; to clarify the policies and procedures of the agencies involved in administering the program; to highlight problems and deficiencies where they may have appeared; and to recommend improvements in the administration of the program.

Yesterday we heard testimony from former Senator Charles E. Goodell, Chairman of the Presidential Clemency Board. Senator Goodell suggested that one of the primary weaknesses of the clemency program was its failure to reach out to the thousands of young men eligible for clemency and to inform them of their options. Less than than one-tenth of 1 percent of those eligible for clemency have applied to the Board so far.

However, Senator Goodell yesterday announced a new effort to reach the more than 100,000 convicted draft evaders and discharged military deserters to inform them of their eligibility.

Other witnesses stated that the low rate of participation in the clemency program is due to the absence of procedural protections, to inequities and unfairness in the processing of applicants, particularly by the Defense Department and the Justice Department to unfair requirements imposed upon the participant, and to the lack of any predictibility—and ultimately confidence—in the process. As one witness explained, many lawyers are counselling clients who may be eligible for clemency that they may receive more leniency and more equity by exercising their legal options outside the clemency program.

Both the American Legion and the American Civil Liberties Union agreed to one point: Many young men are not going to come forward voluntarily unless there is a full and unconditional amnesty; and that is far from what is being offered them today.

Whether or not we are satisfied with the scope or the nature of the present earned reentry program announced by President Ford on September 16, that program is in operation. For those who might want to participate, the program should be publicized, the procedures made more equitable, the terms clearer, the results fairer. With this in mind, and in light of the testimony we have heard so far, I offer these preliminary recommendations.

First: I believe that the criminal records, either civilian or military, of those receiving pardons or clemency discharges should be ordered sealed by the President, the Attorney General, or the Secretary of Defense. This appears not only possible, but entirely desirable in light of our past traditions and in response to the spirit of President Ford's call for national reconciliation. These files should not haunt the young men who complete the clemency process if our goal is to remove the barriers to their full reentry into our national life.

Second: I think it imperative that the Justice Department, and/or the Selective Service System compile final and definitive lists of those in jeopardy, of prosecution and of those whose files have been closed because of procedural errors or any other reason. This list should then be provided to some intermediary organization in confidence, where men can call or write without fear of self-incrimination. The Department also should make its own effort to notify individuals who are no longer liable to criminal action.

Third: Even while recognizing the limitations of the President's conditional approach, I believe it can be expanded to more closely approximate the goals of leniency and evenhandedness. Particularly for the soldier who received an undesirable discharge, perhaps after protesting the war by refusing to return to Vietnam, but who did not desert, the program seems unjust. If he had deserted he would be eligible for consideration for the program. But since he decided to stay and accept imprisonment for disobeying an order, then he is ineligible.

Clearly, the program should be expanded to other recipients of dishonorable discharges where there is any indication of a Vietnam motivated action that led to his discharge. Also, it seems unfair for a veteran, who came to the conclusion that he could not participate further in Vietnam, to find that the Defense Department does not count deep moral objection to Vietnam as a mitigating factor, although the Clemency Board has.

Perhaps even more important, can a program that was ordered into effect on September 16, a program that on December 16 had not yet notified all eligible persons, can that program be ended on January 31 and be considered adequate?

Only the expansion and extension of the program beyond January 31 can begin to alleviate these particular inequities.

Finally, I believe that each agency charged with administering portions of the clemency program must reform and adjust its practices and procedures to conform with the requirements of the Administrative Procedure Act, at the very least with the procedural protections that were available under the Selective Service Act.

These recommendations stem from the reports we have received and from the testimony of witnesses yesterday, testimony which was

deeply disturbing in its reflection of serious defects in the Presidential clemency program.

Even judging the program within the limitations imposed by President Ford, I find it difficult to understand why so many eligible individuals have not been notified, why so many discrepancies in the treatment of participants exist in the different programs, why the benefits for some are so limited, and why a program conceived in a spirit of compassion and reconciliation may impose greater penalties on an individual than the normal military or judicial process.

Our witnesses today represent the Defense Department, the Justice Department, and the Selective Service System. I hope that each of them will be prepared to address themselves to these questions and to the recommendations that I have put forward.

Our first witness is Martin Hoffmann, General Counsel, Department of Defense. Mr. Hoffmann is from Stockbridge, Mass. He previously served as Special Assistant to the Secretary of Defense and is familiar with Capitol Hill proceedings. He was legal counsel to Senator Percy.

We extend a warm welcome to you this morning.

Accompanying Mr. Hoffmann is Captain Miller of the U.S. Navy.

I understand that members of the Naval Command College, class of 1975, which include officers representing 38 nations from the free world are here today, and we would like to welcome them.

STATEMENT OF MARTIN R. HOFFMANN, GENERAL COUNSEL, DEPARTMENT OF DEFENSE, ACCOMPANIED BY CAPT. WILLIAM O. MILLER, U.S. NAVY

Mr. HOFFMANN. Mr. Chairman, it is a pleasure to be here to respond to our request for a description of the procedures by which military absentees are returned to and separated from military service under the President's clemency program. I am accompanied by Captain William O. Miller, U.S. Navy, who serves with the Assistant Secretary of Defense for Manpower and Reserve Affairs.

The President's program is outlined in Presidential Proclamation 4313 and Executive Orders 11803 and 11804 dated September 16, 1974. The implementing responsibility of the Department of Defense related to those individuals who are subject to military jurisdiction: that is, members of the military services who have been dropped from the rolls as deserters by reason of an unauthorized absence of more than 30 days starting between the dates August 4, 1964 and March 28, 1973. It is estimated that 12,500 eligible absentees were at large. Also eligible were approximately 500 individuals who were in military custody at the time of the proclamation, but who for various reasons had not been separated from the military service or brought to trial for their offense.

On September 17, 1974, the Department of Defense provided extensive guidelines to the military departments on implementation of the program. A copy is attached to this statement. The controlling philosophy is that the program should provide an effective, expeditious procedure fully protective of the rights and options of the returnee whereby eligible military absentees may enter the program, become separated from the military service and undertake alternate service.

Upon completion of the prescribed period of service, a clemency discharge would be issued in lieu of the undesirable discharge previously received upon separation from the military.

The specific requirements for eligibility are set forth in the Presidential proclamation. They are as follows:

The unauthorized absence is in violation of article 85, 86 or 87, of the Uniform Code of Military Justice, and during the period August 4, 1964, through March 28, 1973.

Other pending offenses, if any, have been disposed of.

The member must report not later than January 31, 1975.

The member affirms his allegiance and pledges to perform the specified period of alternate service.

Certain aspects of the specific guidance issued by the Department of Defense should be highlighted:

The deserter must return to military control, just as the draft evader must present himself to the U.S. Attorney.

Eligibility may be determined by telephone or letter to the clemency information point. The information disclosed in these inquiries will not be used to apprehend the member for a desertion-related offense during the eligibility period.

Absentees coming into the country will not be apprehended at the border but will be given 15 days to report to military authority.

All participants will be centrally processed by the respective military service at Fort Benjamin Harrison, Ind. We were processing returning absentees at Camp Atterbury during the early part of the program when we had the initial large numbers. Since then the processing center has been consolidated for convenience at Fort Benjamin Harrison.

Senator KENNEDY. On page 2 of your testimony, you have a reference to the fact that the deserter must return to military control.

I understand the Marine Corps regs use the words "the individual technically apprehended." What does that mean?

Mr. HOFFMANN. I would think that refers to a status. When he returns, he comes back on the rolls of the military until he is separated. Whether or not he is technically in custody is practically a matter of the way Fort Ben Harrison is run. He is not in actual physical custody at that time.

Senator KENNEDY. What are his limitations? Can he come and go freely?

Mr. HOFFMANN. He can come and go as he likes.

Senator KENNEDY. What if he changes his mind, can he walk out the door?

Mr. HOFFMANN. I think as a practical matter he can. I think if he manifests this turn of mind in such a way that people in charge there were put on notice, he would be taken into custody. He is not a fugitive and not treated as a fugitive so long as he is manifesting a desire to participate under the program.

Senator KENNEDY. What if you have a situation where an individual didn't register for the draft, and he walks into the office to give himself up about 3 months before the statute of limitations is going to expire. He never registered for the draft but he knows that under the State and Federal law the statute is going to expire. Shouldn't he get some advice prior to the time that he actually surrenders himself to what the implications could be? I can see a situation where he would

incriminate himself by signing up. Shouldn't he be aware of some of the rights he has?

Mr. HOFFMANN. Perhaps you can refer that question to the Justice Department. Unless he has entered the military service he will not come into that end of the program to which I am addressing myself, which is the DOD.

If he has entered the military and has been dropped from the rolls, he is classified as a fugitive. The statute would not run with respect to him.

Senator KENNEDY. Fair enough.

Mr. HOFFMANN. Participation in the clemency program further rests on agreement by the individual to the following:

A request for discharge for the good of the service must be submitted.

Senator KENNEDY. What happens if there are procedural errors which would give him a good defense to the charges? Do they prevent him from having to go through the complete clemency proceeding?

Mr. HOFFMANN. I think I should use this opportunity to make the point that he is actually briefed on an election he may or may not make. In other words, when he gets through the entire process his options are laid out for him and he knows what he is in for.

If, in the course of the review of his record by his lawyer or lawyers, there are procedural defects, if as a practical matter the board that reviews his record to make a determination of the alternate service length finds defects, he may not proceed until those are resolved one way or the other. If, based on his judgment and his lawyer's judgment, he has a defense to the charges pending under the Uniform Code, he can, of course, go back that route and have them processed thereunder. I think several have done that.

Now, again, you see, under the unauthorized absence offense, which merely consists of being AWOL or being absent without leave, that is a fairly simple offense and simple in its proof. He knows if he has been gone without leave, and it is easily established, the prima facie case is ordinarily made by proving the records that are in his service record. So it is not a proceeding of great complexity, and to the extent he does have defenses, procedural or otherwise, for instance, the pendency when he left of conscientious objector application or hardship discharge or that sort of thing, the system is designed so they will be accommodated according to the advice he receives there and according to his own judgment of what he ought to do.

Senator KENNEDY. On page 8 of your testimony, since we are on this point, you refer to the responsibility of his counsel, civilian or military, to make these facts known to the absentee himself with the military discharge authority. Again, we are talking about legal defenses available to him. Does the Board have any responsibility here? What responsibility does the Board have in terms of these defenses?

Mr. HOFFMANN. The Board is not charged with any responsibility of that nature. They have his record before them and under their procedures they review the whole record. In the event it appears he may have made an improvident choice—this is more practice than regulation—they would send it back to ascertain whether he wishes to avail himself of other choices.

Senator KENNEDY. Does he get a chance to look at the whole record?

Mr. HOFFMANN. Yes, sir.

Senator KENNEDY. The complete file?

Mr. HOFFMANN. Yes, sir, with his lawyer or lawyers.

This is one of the reasons why the processing center is at Fort Benjamin Harrison. That is a repository for the record center, so that right there we have any records that he may want.

Senator KENNEDY. I would like to mention at this point, that it is my understanding and that of other members of Congress, that the way people are treated by the Defense Department in terms of the atmosphere—and this is irrespective of the procedures—has been very positive and a credit to the people involved in the program.

Mr. HOFFMANN. We appreciate that recognition. They have worked very hard to implement the spirit of the program in the processing of the program.

Senator KENNEDY. Fine. Will you continue?

Mr. HOFFMANN. The unauthorized absence would render him triable and could lead to a punitive discharge.

Issuance of formal legal charges is not required.

The individual electing to participate in the program must reaffirm his allegiance and execute a pledge to complete alternate service.

During the initial stages of processing, each individual is given a complete legal briefing by a military attorney assigned to represent him. This involved a group session, usually no larger than ten, with opportunity for individual sessions at that time or any time during processing. The consequences of an undesirable discharge are fully explained to him, as well as the legal implications of all aspects of the program. Additionally, each member is advised that he is entitled to consult a civilian attorney of his choice. He may have his own counsel if he has retained one. The local bar association in Indianapolis, at our request, has provided a referral service of attorneys who provide advice, free of charge, to any returning absentee. Office space at Fort Benjamin Harrison has been provided for private consultation between attorney and client.

After the individual has established his legal representation and been fully advised, the processing continues. His pay accounts are placed in order, and he is given an opportunity to provide information to the Joint Alternate Service Board at Fort Benjamin Harrison for its consideration in determining the amount of alternate service he will be required to perform. He is also given a complete physical examination. As the proclamation requires, each case is reviewed for the assignment of alternate service, 24 months being the standard. The Board considers reductions on an individual basis in the length of alternate service from the maximum of 24 months, taking into account the following circumstances: previous satisfactory military service, combat service, awards and decorations, wounds and injuries, and nature of employment while absent.

Senator KENNEDY. Before we proceed in that area, I would like to refer to the three different sets of mitigating circumstances established by the Clemency Board, the Department of Justice, and the Department of Defense. As it appears to me they are different, substantially different. The Clemency Board points out these mitigating circumstances: "applicants' lack of sufficient education or ability to understand obligations, or remedies available, under the law; personal and family hardship either at the time of the offense or if the applicant were to perform alternative service; mental or physical illness or condition, either at the time of the offense or currently; employment or volunteer activities of service to the public since conviction or military discharge; service-connected disability, wounds in combat, or decorations for valor in combat; tours of service in the war zone; substantial evidence of personal or procedural unfairness in treatment of applicant; denial of conscientious objector status, of other claim for selective service exemption or deferment, or of a claim for hardship discharge, compassionate reassignment, emergency leave, or other remedy available under military law, on procedural, technical, or improper grounds, or on grounds which have subsequently been held unlawful by the judiciary; evidence that applicant acted in conscience, and for manipulative or selfish reasons; and, voluntary submission to authorities by applicant."

That seems to be generally a very compassionate description of what could be included in the mitigating circumstances.

If you look over the list in the DOD, the mitigating circumstances that you have there are more targeted toward a sort of military involvement in this, and I think they are a much tougher and harder set of factors. And then the ones in the Department of Justice are about the same as the DOD. So you have, at least I would think that you have, a difference. Even though mitigating circumstances are being applied by all, they are defined by a good deal of difference by what is included in any of those factors, and I am wondering whether this makes any sense.

Mr. HOFFMANN. I think the basic difference between the Clemency Board standards and our standards will be found in the basic difference between the status of the individuals that are being addressed between these two segments of the program.

With respect to the Clemency Board, they have been as a practical matter already addressed by the full legal process that would apply to their situation; that is, they have been tried. They are in a different status with respect to the program than those who have fled, who have not completed either a period of inducted service or a commitment under an enlistment, or have not completed a period of alternate service as a conscientious objector who has achieved relief from military service. So that the criteria, I think, would be different in dealing with those two cases.

Now, if you review the criteria one by one, you will find that all of ours are included in theirs. Those having to do with the length of service, decorations, wounds if any, and that sort of thing. Several of the Board's criteria would be included in a defense to a court martial, such as mental state, inability to comprehend the seriousness of the offense and that sort of thing. So that they would be excluded from consideration once an individual had elected the program rather than trial.

Criteria dealing with individual hardship we felt were inappropriate for consideration, since we couldn't balance equities against the conscientious objector who had been required to serve alternate service notwithstanding hardship or individuals who served in the military. So that is the basis for the difference in rationale between those circumstances.

I think one might also point out that the legal effect of the term mitigation is somewhat different in the two cases. In one where there has been a conviction where a more pure form of a pardon power rather than prosecutorial discretion is in operation. There you are looking at the operation of the total system in its finality and using such things as the lack of compassion or consideration and the sort of things we have there. That would not be applicable, simply because the man has absented himself and he has not been brought to trial and has not had his matter disposed of under the Uniform Code and under the normal way of proceeding.

Senator KENNEDY. Even given what you have said Mr. Hoffmann, under your regulations you talk about comprehension, length of service in Southeast Asia, wars, wounds, nature of service, and then you have additional guidelines. As I understand, there haven't been additional guidelines.

Mr. HOFFMANN. Correct.

Senator KENNEDY. That is considerably different from the ones I have read to you.

Mr. HOFFMANN. That is correct, I will grant you the difference.

Senator KENNEDY. Your regulations don't even include hardship. You provide a discharge procedure for hardship cases even within the military, but you don't include hardship here.

The thing I am having difficulty understanding is that you have one Presidential order but different interpretations of that in terms of what the criteria for mitigating circumstances are going to be. Even given what you have said about their status in terms of legality or in terms of service or whatever, it seems to me that a rather different standard is being used by DOD in trying to reach the President's order on the questions of mitigating circumstances between the departments.

Mr. HOFFMANN. Senator, I think perhaps we differ. We don't see that difference in philosophy of implementation. Take for instance the example you pose, that of a hardship situation. As you know, in the military, in the event that an individual who is serving in the military either enlisted or under the draft has a hardship situation which would warrant discharge, he may apply for it. Under our program if he has applied for it that can be reviewed to see if it was improvidently withheld. He has already had under the existing system, following induction into the military enlistment, an opportunity to exercise that option and have the availability of the system.

Now, if he has not done that, it seems to us that is not an appropriate criteria to consider when we are balancing off the treatment he is getting.

Senator KENNEDY. Why not? That is an amazing statement. Because an individual hasn't used the reasons to justify a hardship discharge under one circumstance, you are not going to consider what might have been considered factors in a hardship situation as a mitigating factor in reaching the President's Executive order? That seems to me to reflect a hard line attitude on this question of mitigating circumstances that quite clearly is different from the clemency board.

I can view that as a legal question, but in terms of the President's order I don't see how you can reach that conclusion, but obviously you have.

The fact that amazes me is the existing attitude within the Defense Department. The acknowledgment that you are not even going to consider those factors, runs completely contrary to the President's

order. Whatever it was that concerned a young person to take the extraordinary actions which he took in separating himself from the service, assuming that there were factors that obviously impacted his decision, whether it is family hardship, physical illness, or other reasons. Because that individual either lacked the knowledge about how to procedurally get a discharge, or felt that he did not have a sufficient case to carry it further, or was emotionally compelled at the particular moment not to go through the rather lengthy process required, he goes over the hill and then comes back.

Those factors were very real in terms of the motivation of why he separated from the service, and that is a point of difference that we have obviously reached.

I have studied the order, I have spoken in complete support of it, I have talked with the President about it and he has talked with me about it. From my personal considerations with him I believe that runs contrary to what he intended.

It talks about reconciliation, calls for an act of mercy to bind up the Nation's wounds, to heal the scars of divisiveness, and yet you have not repaired the hardships that motivated a person to run through the procedures in the military to take a hardship discharge.

Mr. HOFFMANN. I think I would say, in the formulation of the program, there is no question that the hardships endured by many in spending time as fugitives and having the condition in which they left in the first place, same idea was one of the things that motivated doing away with prosecutions, and in fact, giving clemency with respect to these offenses. But I don't think that I can make a point that desertion because of hardship is a specific element in the program.

I think you are right, we differ. This was thrashed out in the course of formulating these things on an interdepartmental basis as well as a Department——

Senator KENNEDY. You differ from the Clemency Board?

Mr. HOFFMANN. That is correct.

Senator KENNEDY. And you have one Presidential order?

Mr. HOFFMANN. We differ in the criteria. We are stating that we do not differ in the philosophy and practical effect of considerations——

Senator KENNEDY. Of course, you differ in the philosophy. It is clear in the language, and the instructions that you are giving on it. It is clear as can be. It is as clear as the English language. They ought to consider personal and family hardship, they ought to consider mental or physical illness, they ought to consider the lack of sufficient education or ability to understand the obligations or remedies available. It is just evidence that an applicant acted in conscience and not for manipulative and selfish reasons.

All those terms seem to apply to what was in the mind of that young person at the time he made the decision to go over the hill. But from your testimony it is clear that, if he didn't take advantage of the hardship discharge, then we are in effect not taking a look at those mitigating circumstances at this time. That is the way I read your testimony this morning. I would like to be relieved of that interpretation, but that is the way I interpret it. You are further indicating that is the way we are at DOD and that is the way we are at the Clemency Board. We are operating under the President's Executive order, but we just reach different conclusions, and I think that is where it is left.

Mr. HOFFMANN. I think we reach different conclusions because of a difference in perception with respect to alternate service. Looking at those circumstances under which a soldier who was otherwise honorably serving and did not serve his 2 years, and the circumstances under which a conscientious objector would have assigned to him, 2 years of service to the country of public service-type employment in lieu of military service, we attemped to apply a criteria by which we assign the service corresponding to the situation in which those individuals found themselves, and under those terms, Senator, hardship is entitled a considerably higher threshold than is implied by your philosophy—your phrasing and your understanding of this criteria and the Clemency Board rule.

Senator KENNEDY. You are familiar with this sheet, the statement to the Board for alternative service, the form you use?

Mr. HOFFMANN. Which one is that?

Senator KENNEDY. It is a statement to the board for alternative service.

Mr. HOFFMANN. Yes; I have got it if you can identify it.

Is this the statement submitted by the individual to the Alternate Service Board?

Senator KENNEDY. I will give you this one to take a look at.

Mr. HOFFMANN. Yes; this is the form for the individual to use as a guide to submit whatever he would like to in mitigation to the Board.

Senator KENNEDY. You have three questions on this. One is the reasons for absence of service, then the employment during the absence, and other matters to be considered. There is probably enough space for about one line on each of those questions.

Mr. HOFFMANN. Well, for convenience this is bunched up together. As a practical matter he can submit whatever he wants in any length he wants. It is made clear to him he does not need to do it on this form. He does not need to label it.

He is given in writing the criteria that we have just discussed. All this is made clear to him by his counsel or counsels. He can ask questions about it. He prepares with his counsel present, with his counsel assisting him in any way he can with his full record available.

Senator KENNEDY. It seems to me that just by the nature of that sheet that anybody who is going to answer that would answer it in the space that is available. It is like any examination or test.

Mr. HOFFMANN. I think, Senator, if that were the sheet, and I am not sure it is, because the ones I saw were at Camp Atterbury and considerably longer, everybody is told this is not the exclusive sheet of paper, and they could submit whatever they like, including affidavits, which many had, including their employment during absence and that sort of thing. We don't restrict them to a single sheet of paper.

Senator KENNEDY. Will you give us the other form? I understand that this was one of the forms that was being used, but I would be interested in seeing it.

Mr. HOFFMANN. These are the materials on the form.

The form which follows is a copy of the form in use at Fort Benjamin Harrison. A copy is attached to this statement. It must be recognized that an individual's statement is not limited to one page but can be as lengthy as the individual deems necessary. One statement, in fact, had 19 lengthy attachments. The absentee is not required to make any statement other than to assure the Board that he has been

given the opportunity to make one. Approximately 80 percent make statements, about 5 percent of which are lengthy with attachments, affidavits, and so forth. About 20 percent make no statement. Each Board member reads all statements and attachments.

Each member of the Board very carefully considers the statement submitted by each participant, along with any and all documentation that he may desire to present in his own behalf. The latter has included among others, letters of favorable comment from friends, family relatives, and employers; recommendations from personal lawyers, personal doctors, employers, and law enforcement officials; performance ratings from schools as well as employers; information from locally provided legal counsel; personal copies of previously submitted requests for hardship discharge or conscientious objector status; personal copies of citations for awards and decorations; and petitions for leniency signed by friends, relatives, fellow workers, and members of the subject's church and community. Every statement and all documentation is thoroughly reviewed along with each participant's total record. The Board actively attempts to obtain all relevant information that would assist the Board members to arrive at the most equitable decision.

[The form referred to above follows:]

STATEMENT TO BOARD FOR ALTERNATE SERVICE

I, _____, Social Security Number, _____, submit the following matters to the alternate service board for consideration in their determination of the number of months of alternate service that I must serve. I voluntarily submit this statement with full knowledge and understanding that I am not obligated to make this statement or complete any part of this form. The information submitted in this statement is true and correct to the best of my knowledge.

1. Reason for absence from military service:

2. Employment during absence from military service:

3. Other matters I want the Board to consider:

_____
Signature

WITNESS:_____
CPT, JAGG

Current Mailing Address:

Date RMC_____. _____
Street, Route

Discharge Date_____. _____
Town, State, Zip

Senator KENNEDY. Can you tell us what you know about any impressions that are gathered by those that are counseling the returnees to make sure that when they fill these applications out, they do not claim war resistance as a motive? The impression I gather, or at least the staff has, from talking to counselors and attorneys, is that they advise not to mention the war opposition as a motive because it is their belief, whether right or wrong, that that tends to bring a little longer alternative service. Have you heard that? Do you know it to be the case, and can you tell us what the policy is?

Mr. HOFFMANN. I had not heard that either at Camp Atterbury or subsequently. I would not think that would be the case. Of course, it is not in the criteria.

I would not think offhand there would be any reason to mention that one way or the other. I am sure if the individual were worried about it or asked his lawyer, his lawyer would tell him what he thought based on all the circumstances, and I couldn't give you a composite of how that would run with respect to the individuals out there.

Now, in general we get the impression which corroborates the earlier material that we had on it that only about 7 percent of individuals who are coming back mention at any stage of the proceeding an objection to the war as a reason for their absence. A survey was taken, prior to the institution of the program—I think it was done perhaps in 1972 or 1973—possibly the time of this subcommittee's last hearings, in which a number of deserters who were abroad where they could be reached were interviewed. In that group I think approximately 5 percent had an objection to the war and an additional 3½ percent were conscientious objectors.

So that I am not sure there are that many who would have had that in their minds when they left.

So to answer your question, I had not heard that.

Senator KENNEDY. Possibly one of the reasons that they might not mention war opposition as a motive is because they have a belief that if they were to mention that, it may bring about a more extended period of alternative service. That is what has been represented to us, and I think it is worth finding out.

Mr. HOFFMANN. Well, we will be happy to have those from whom you got your information contact us about it and give us the specifics. I will look into it at any case.

Senator KENNEDY. Your position, at least now, is that the opposition to war will not be considered an aggravating factor?

Mr. HOFFMANN. It would not be. No; the intent was to make these deliberations free of any impact of that one way or the other.

The Board actively considers all information, data, and documentation that serves to further the interest of equity among participants. A participant's stated opposition to the Vietnam war, to national policies, to individual service policies and/or procedures is not held to his disadvantage during the Board's review and does not preclude a reduction in the period of alternate service.

The composition and procedures of the Joint Alternate Service Board may be of interest to you.

The Board was established jointly by the Secretaries of the military departments at the beginning of the program. All military absentees, under the jurisdiction of the military departments, have had their alternate service determinations made by the Joint Alternate Service

55-550 O - 75 - 10

Board. The Board is composed of one 0–6 grade officer who is a Colonel or Captain of the Navy, from each of the military services. All four officers consider the case of each returning absentee. The officer from the military service of the absentee presides during the consideration of his case. In the case of a tie vote, that officer's determination is controlling. As noted earlier, the individual has the opportunity to present a written statement to the Board. The Board will not consider his case until it determines that the individual either has taken advantage of the opportunity, or has specifically declined to do so. In the preparation of this statement the individual has complete access to his counsel.

Upon being advised as to the length of alternate service, the individual is given a further opportunity to consult with his attorney or attorneys. He must then make his final determination as to whether or not he wishes to participate in the program.

In the great majority of cases processed through the Joint Processing Center, action is completed within a 24-hour period.

The individual is advised that after discharge he must report to the Director of the Selective Service System in the State in which he intends to reside. The Selective Service System thereafter works with him to provide a suitable alternate service job.

Senator KENNEDY. Our subcommittee has been very interested in the development of the procedures in the Selective Service Act. As I understand it, there is no opportunity for personal appearance before the Board. Is that correct?

Mr. HOFFMANN. That is correct.

Senator KENNEDY. And there is no opportunity for a representative to appear before the Board?

Mr. HOFFMANN. That is correct.

Senator KENNEDY. If the decision is adverse, are the reasons for the decision, other than just the decision itself, available to the applicant?

Mr. HOFFMANN. If the——

Senator KENNEDY. Are the reasons given for the Board's decision to refuse, for example, to grant a clemency discharge or the reasons why one might get 24 months of alternative service and another person get 3 months?

Mr. HOFFMANN. Well, the Board's function is limited to that determination of alternate service. If the individual qualifies under the criteria that I have recited here that come from the proclamation he is eligible. The only thing left is determination of alternate service. The only reason we leave his final election to participate following the determination of the length of service is so that he can see the entire result under the program before he commits himself.

The Board does not issue a decision or reasons. It expresses its view of a case in terms of the length of alternate service it assigns.

Senator KENNEDY. But, if an individual gets 24 months and he feels he only should have gotten 6, there is no way for him to know what the factors were in the consideration of whether it is going to be 24 months or 6?

Mr. HOFFMANN. No, sir.

Senator KENNEDY. If he gets 24 months and he thinks he ought to have gotten 6, is there any opportunity for him to appeal that length of time?

Mr. HOFFMANN. He could appeal up the chain of command, yes. The individuals on the Board sit as representatives of authority.

Senator KENNEDY. Have any of them done that?

Mr. HOFFMANN. No.

Senator KENNEDY. Have they been told they can do that?

Mr. HOFFMANN. I believe so. I will check on that and let you know. It operates parallel to and directly in the chain of command. This process replaces the article 32 investigation that would normally attend the case where the convening authority has decided the case should be investigated prior to court-martial. So that it is done under the authority of the convening authority that would act in the event he elected the court-martial instead of the program.

Absentees are not specifically advised that they can seek reconsideration of the Board's determination.

They are advised, however, tha an appeal system is available for a review of their military discharge. DD form 293 common to all military services is customarily used to request such a review. This form is shown to the absentee and the lawyer emphasizes that the burden of proof for a better than undesirable discharge is the absentee's responsibility. The absentee is advised by the military lawyer during his in processing legal briefing and again during his person-to-person legal briefing during out processing of the following:

1) The absentee may appeal to his service Discharge Review Board or Board for Correction of Military Records for what he may consider to be injustices regarding the character of his discharge. DD form 293 is available to returnee if requested.

2) In the event the absentee is deprived of military administrative review, or has exhausted his administrative remedies, he can have an action initiated in Federal court.

3) Regarding the number of months of alternate service assessed by the JASB for which there are no appellate procedures officially established the absentee is advised that the ABCMR might take

jurisdiction and rule on the returnee's appeal to them, since the alternate service is a matter of his Army records.

[A copy of the form referred to above follows:]

APPLICATION FOR REVIEW OF DISCHARGE OR SEPARATION FROM THE ARMED FORCES OF THE UNITED STATES

Form Approved Budget Bureau No. 22-R014.1

(See instructions on reverse before completing application. Please type or print.)

BRANCH OF SERVICE

[ ] ARMY [ ] NAVY [ ] MARINE CORPS [ ] COAST GUARD [ ] AIR FORCE

1. LAST NAME - FIRST NAME - MIDDLE INITIAL | 2. SERVICE NUMBER

3. RATE OR GRADE AT SEPARATION | 4. ORGANIZATION AT TIME OF SEPARATION

5. NATURE OF SEPARATION OR TYPE OF DISCHARGE RECEIVED | 6. DATE AND PLACE OF SEPARATION

NOTE: Navy and Marine Corps attach discharge certificate

7. I REQUEST THE FOLLOWING CORRECTIVE ACTION BE TAKEN:

8. EVIDENCE SUBMITTED IN SUPPORT OF APPLICATION IS LISTED BELOW AND FORWARDED. (Affidavits of witnesses may be used if desired, or they may appear in person. Affidavits must be notarized. You may also submit a brief containing arguments in support of application. If space is insufficient, use additional sheet.)

9. I DESIRE TO APPEAR BEFORE THE BOARD IN PERSON (No expense to the Government) [ ] YES [ ] NO

10. I DESIRE TO BE REPRESENTED BY COUNSEL (For instructions re Counsel, see reverse side.) [ ] YES [ ] NO

11. NAME AND ADDRESS OF COUNSEL (If any)

I MAKE THE FOREGOING STATEMENTS AS A PART OF MY APPLICATION WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT. (U. S. Code, Title 18, Section 1001, formerly Section 80, provides a penalty as follows: A maximum fine of $10,000 or maximum imprisonment of 5 years, or both.)

STREET OR RFD | CITY AND STATE

DATE | SIGNATURE OF APPLICANT

NOTE: If veteran is deceased or incompetent and the application is therefore signed by a person other than whose name appears in Item 1 above, indicate status in box below. If veteran is deceased, application will be signed by his spouse, next of kin or legal guardian. Legal proof of death or incompetency must accompany application.

[ ] NEXT OF KIN [ ] LEGAL REPRESENTATIVE [ ] SURVIVING SPOUSE

Signature by mark (X) must be witnessed by two persons to whom the applicant is personally well known.

SIGNATURE AND ADDRESS OF PERSON WITNESSING MARK | SIGNATURE AND ADDRESS OF PERSON WITNESSING MARK

DD FORM 1 DEC 62 293 PREVIOUS EDITIONS ARE OBSOLETE

Senator KENNEDY. With regard to an appearance, a representative appearing for him, or clearly stating the reasons for a decision, procedures do exist, as I understand it, under the Military Justice Code, the Selective Service System, or even under the Administrative Procedures Act. Is that correct?

Mr. HOFFMANN. Yes, sir. I think from a legal point of view our feeling is that this is an exercise of executive discretion rather than

prosecutorial discretion with respect to prosecution under the system. The Administrative Procedure Act would not apply and we feel that the procedures are appropriate for many of the same reasons Senator Goodell feels it is inappropriate or unnecessary for them to appear before the Clemency Board.

Given the full opportunity to consult with counsel, the full opportunity to make representation to that Board in any form of any material they think is relevent, even notwithstanding the criteria, I am not sure the right to a particular hearing, the opportunity to come in and meet with the members or sit down and make oral presentations as opposed to written presentation would make a great deal of difference. It is not essentially an adversary proceeding, as you know.

Senator KENNEDY. What about the Clemency Board, do they permit personal appearances?

Mr. HOFFMANN. I don't believe they do.

Senator KENNEDY. Yes, they do.

Mr. HOFFMANN. Do they?

Senator KENNEDY. It is a matter of discretion, as I understand, for the Board. At the Board's discretion the applicant or his representative may be allowed to present an oral argument to the Board prior to determination of his case. It also points out in their regulations that each applicant will have an opportunity for reconsideration of the decision, and that was what you have mentioned here, that they can inspect all their own records. That is in clemency rules and regulations of the citation.

Mr. HOFFMANN. Yes, but my impression is that it is not the normal course that they come before the Board.

Senator KENNEDY. They have only granted 18 so far.

Mr. HOFFMANN. Yes, sir.

Senator KENNEDY. Can you tell us why they do in one and don't do in another? Is there a reason for it in light of all the interagency communications that you are having on this program?

Mr. HOFFMANN. Well, I have not had any discussions with them as to why they did it.

We did not do it, because we did not feel it would add a great deal more to the process in terms of letting the member have the complete record before him and given the opportunity to present whatever election after the assistance of his counsel and with the assistance of his counsel to the Board in writing. So we didn't see anything useful substantially to be gained.

As a practical matter, given the caseload out there, particularly during the early stages, I think it probably would have been a detriment to the program in terms of expeditious proceeding and really have very little substantive effect on judgments they were making.

I had very little opportunity to check with the Board following the judgment of the program.

Senator KENNEDY. That is the argument used for the Freedom of Information Act; don't bother us with it because it will be a burden on us, don't set out procedures of the APA Act, even though it does grant rights to individuals, it will make the workings more complex and costly. You hear the same argument here, and there are important individual rights that are being affected by it.

These are matters which I am sure you are sensitive to, but they are procedures which in many instances I think deal directly with the

substance of whether justice is going to be achieved. Certainly one of the major kinds of responsibilities of this subcommittee in relationship to regulatory agencies generally, and as a matter of considerable interest, is how procedurally those particular rights are being protected under this Executive order.

We grant it is an Executive order, but it is of interest to us as well, since we have a legislative opportunity to move in this area and need to be informed of what is exactly being done here.

Mr. HOFFMANN. The details of the alternate service program are to be addressed by the Director of the Selective Service System. One point bears mention, however. The Selective Service System notifies the individual's military service when he has satisfactorily completed his alternate service. When this notification is received, the military services will issue the individual a clemency discharge in lieu of the undesirable discharge.

A statistical summary of our implementation of the program, attached to this statement, reflects that as of 0800, December 16, 1974, we have received over 6,000 inquiries from all sources about the program. Also included are the numbers of cases completed and those still being processed. Also reported is a breakdown of the disposition of cases in terms of the period of alternate service prescribed. Let me deal, briefly, with certain aspects of the program that have been of particular interest.

The first is the nature of the clemency discharge. Military discharges are designed to describe the quality of an individual's military service. An honorable discharge is issued in recognition of honorable and faithful service during a committed period of military service. The general discharge is given for satisfactory military service, and the undesirable discharge is given for unsatisfactory service. The bad conduct discharge and the dishonorable discharge are punitive discharges, issued only by reason of an approved sentence of a special or general court martial.

The usual eligible absentee is given an undesirable discharge. The Department of Defense guidelines, and those promulgated by each of the military departments, provide that an absentee must be fully counseled of the adverse nature of the undesirable discharge. He is informed that it is a military discharge under conditions other than honorable, and that generally he will not be eligible for veterans' benefits.

The clemency discharge is designed to be issued once a dischargee has satisfactorily performed his period of alternate service. It is, in effect, a testimonial to the fact that the individual has satisfied the obligation undertaken pursuant to the President's program. It is not intended, in any way to effect a change in the characterization of the individual's military service as unsatisfactory, or to effect a recharacterization of an other-than-honorable-conditions military discharge. It is intended, however, to indicate as public testimonial that the individual has accepted the offer of clemency, and has complied with his undertaking pursuant to the President's program. For this he deserves recognition, which the President has sought to symbolize through the issuance of the clemency discharge.

With respect to Veterans' Administration benefits, the fact that an individual serves his alternate service and is thereafter awarded a clemency discharge in lieu of an undersirable discharge is not intended

to affect his entitlement to Veterans' Administration benefits one way or another.

The second aspect of the program which deserves individual comment is the extent to which the Department has endeavored to protect the rights of every individual processed under the program.

The Department of Defense has insisted that every individual being processed should have full and complete legal advice available.

Senator KENNEDY. Just before we leave the questions of the clemency discharge, I would like to bring up the testimony we heard yesterday from Mr. Goodell. When the Clemency Board's recommendations carried out a clemency discharge granted by the Board, it would be automatically reviewed by the Board for upgrading by the panel. This review would occur without regard to the offense pardoned. Would the Defense Department institute the same policy?

Mr. HOFFMANN. We have that under study. I read the Senator's statement, and he indicated he had made that request of us. He made a firm statement he would do that. We have to look at that to see what the utility would be and whether or not it is appropriate under the circumstances.

Now, there is no question that each individual who wishes to have his discharge taken to the Discharge Review Board at any time may do so. The question that was presented to me is whether that would be a sua sponte review taken by the Review Board or whether we would wait for the individual to come and apply.

At a minimum, and I discussed this with the Senator, everyone should be advised of their rights and provided with the forms and a briefing on the procedures which we could give, but whether a sua sponte review by the Board would be appropriate we have to look at the cases.

Senator KENNEDY. Are you also going to look at the offense which they are being charged with?

Mr. HOFFMANN. That is the responsibility of the Board, and the reason for having it, once application is made for review of a discharge, is to ascertain whether or not justice was done and whether or not procedures were followed and whether a discharge was properly issued. That is the whole point, that system has been in existence and has been in existence for years.

Senator KENNEDY. When are you gong to make a decision? Under the President's order, there is not a great deal of time left.

Mr. HOFFMANN. I am not sure when the decision would be made. We are moving on it expeditiously, and I think the services have presented their views or had presented them yesterday, and I will make my decision on it when I get them. It wouldn't make much sense for the Clemency Board to provide that opportunity and the Defense Department not to.

They are asking us to undertake a sua sponte review in each case whether or not the man applied for it. But there is no question about the right of the man to go over there in any case.

Senator KENNEDY. It is different if it is a right or if they have got a voluntary kind of program available to them. And quite clearly there is a difference in the way the Clemency Board is handling it and the way you are at the present time. You are reviewing it, but I would think if there is a distinction in terms of procedure, there would be one additional area where you have different implementation. This is a matter of considerable concern to us. You have a sort of three-

prong different clemency program; one ordered from the President——

Mr. HOFFMANN. Let me make it clear I am attempting to discuss with you what the ingredients of that decision will be in the services, but we have not made a decision. I am not prepared to say which way we will go on it. We will talk to Senator Goodell about his objectives.

I will agree the discharge review process is available to these individuals and should be available.

[A copy of the DOD memorandum to the Chairman, Presidential Clemency Board, dated January 13, 1975, follows:]

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

13 January 1975

MEMORANDUM FOR Chairman, Presidential Clemency Board

THROUGH: Mr. Thomas Latimer

THROUGH: M/G Richard Lawson
Military Assistant to the President

SUBJECT: Review of Clemency Discharges by Military Department Discharge Review Boards and Boards for Correction of Military (Naval) Records

You asked whether the Military Departments, acting through either their respective Discharge Review Boards or Boards for Correction of Military Records, would review, sua sponte, those cases in which former military members, through recommendation of the Presidential Clemency Board, have had their discharges upgraded to a Clemency Discharge. The purpose of such a sua sponte review would be to determine if further upgrading of the discharge would be warranted. You further suggested that such a review should be conducted without reference to the offense which led to his punitive or undesirable discharge, which, it appears, is intended to be the subject of a Presidential pardon.

Upon considerable reflection following our conversation, sua sponte review of discharges issued following recommendations by the Presidential Clemency Board does not appear to have been envisioned as a part of the President's Clemency Program, and does not appear appropriate based on the operation of the pardon itself.

While the pardon does serve to eliminate certain prospective effects of conviction, it does not operate to change existing or accomplished facts, to change the other-than-honorable nature of an individual's military discharge, or to eliminate the circumstances which underlay it.

Also, since veterans' benefits were not intended to be changed by reason of the clemency program, it would not appear appropriate to suggest, as a sua sponte review would imply, that more relief would be forthcoming than the President presented in his program.

Any former military member who feels that his discharge does not accurately reflect the quality of his military service, or who feels that an error or injustice was done in his case, has available the procedures for review provided by sections 1552 and 1553 of title 10, United States Code. This includes those former members who, through the procedures of the Presidential Clemency Program, receive a Clemency Discharge. All returning absentees who are processed under the Department of Defense portion of the Clemency Program are advised of the availability of these procedures. This advice is also appropriate to those who receive a Clemency Discharge based on recommendations of the Presidential Clemency Board. The Department of Defense will be pleased to provide this advice, together with appropriate application forms, as a part of the package transmitting the Clemency Discharge to these individuals.

Martin R. Hoffmann

Senator KENNEDY. Fine.

Mr. HOFFMANN. Moreover, no information received from an individual inquiring as to his eligibility or during his processing will be used against him for prosecutive purposes. If there are legal defenses available to him which would indicate that he could not be successfully prosecuted for his unauthorized absence offense, it is the responsibility of his counsel, civilian or military, to make these facts known to the absentee himself or to the military discharge authority. The decision to request a discharge under this program, or to elect to have his case processed under the normal military procedure, is a matter solely up to the individual himself and his counsel.

Finally, in an effort to ensure that all eligible military absentees receive notification of their eligibility if at all possible, the military departments recently sent letters to the next of kin of those eligible absentees who had not already contacted us. We sent about 7,000 of these letters. Over 2,200 of these have been returned as undeliverable, but we have had 375 telephone inquiries in response to these letters and about 68 individuals have returned to their military service with the letter in their posession.

That concludes my prepared statement, Mr. Chairman. I will be pleased to answer any questions which you may have.

Senator KENNEDY. Once again to get back to the point we talked about earlier, responsibility. If there are legal defenses, and what you consider are the responsibilities of the Board toward those legal defenses, whether they are noted by the applicant or not noted by the applicant or the defense attorney, do you think there is any positive responsibility at all for the Board to raise these points.

Mr. HOFFMANN. Yes sir, I think there is. There is an affirmative responsibility on the part of any member of the processing team there at Fort Benjamin Harrison. If there may be a legal defense or

some reason in the records, an imperfection, that they should bring that to the attention of the individual. That is the whole thrust of the program.

Senator KENNEDY. What if a participant doesn't participate in the alternative service program and merely accepts the undesirable discharge? Can he be prosecuted? I note that on September 19 the Defense Department and Justice Department spokesman indicated in the Washington Post that there was nothing the Department could do to enforce the alternative pledge. And, you were quoted as saying they would institute prosecution in appropriate cases. Can you tell us what the situation is?

Mr. HOFFMANN. The situation is the latter view that was taken which I believe I outlined at Camp Atterbury in a press conference. There is a provision in the Uniform Code of Military Justice that says if one fraudulently procures a discharge, he can be prosecuted. What I stated was that prosecutions would be undertaken not on the basis of harassment, but depending on whether or not a good case could be made.

Now, as a practical matter, in order to prove the charge under the Uniform Code you have to prove that at the time the individual was procuring the discharge he did not have an intent to complete alternate service and I alluded to, as others have, the difficulties of proof under that article of the Code. It is to some extent the same difficulties of proof that one has under the desertion article as opposed to the unauthorized absence article, because to establish disertion one has to prove that at the time the man left he had an intent to stay away permanently.

To an extent, what we have said is that we acknowledge that prosecutions will be difficult. If we have an appropriate case, as was presented to us in press questioning by an individual who said he was going to return to Camp Atterbury, and he had no intention of serving alternate service, though he represented he did. In such a case if he were to go through and if he had then refused to do his alternate service, we would prosecute.

What we have observed, I think in fairness, due to the way the facts are taken, it is not likely that we would have a great number of cases.

Senator KENNEDY. Senator Hart.

Senator HART. Thank you.

Mr. Hoffmann, I apologize for getting in late.

It is almost irrelevant, I suppose, but going through your prepared testimony I noticed that provision is made under the clemency program in the military section for officers, commissioned officers. I have been thinking in terms of enlisted men. How many officers are in this category?

Mr. HOFFMANN. We have had two, sir.

Senator HART. Two who have come in under the program?

Mr. HOFFMANN. Have come in under the program; yes, sir.

Senator HART. Of the 12,000-odd whom you carry as eligible, is there any estimate as to how many officers are involved?

Mr. HOFFMANN. 53 total, sir, 53 officers.

Senator HART. Is there any doubt that 53 are unaware of the program? Isn't it a reasonable assumption that they know about this program?

Mr. HOFFMANN. Well, I would think it was. As I indicate in my testimony, we have attempted to reach everybody. There has been a considerable amount of publicity: (1) As to the fact there is a program; and (2) with respect to where you can find out about the program and what is going on.

I know, for instance, as a point of interest there have been several individuals returned from Canada and from Sweden who have apparently reacted positively to the program and informed us that they were sending materials back. One of the individuals asked us for packets of material he could send back to Canada to let them know of the program.

There have been organized communities, as in expatriot situations, who have been reached by informing individuals about coming back under the program. We had some 2,300 letters come back as addressee unknown or undeliverable in which we couldn't make that contact.

Senator HART. I am not sure where it leads me, but at least I plead guilty to having a stereotype sort of notion who is out there. It is an enlisted man, and he is either a sensitive conscientious objector or a poor, befuddled fellow that couldn't learn how to strip a rifle and, you know, goofed off. Now, in the 53 officer personnel out there, what is the profile on them?

Mr. HOFFMANN. I don't believe we have a profile directed specifically to them. I adverted earlier to a profile that we did have, which was current as of I think December 1973, of the reasons and circumstances for desertion by those who went to foreign countries. You see, if they were in the country, they would be fugitive and we could identify them. There was an effort to contact those absent. We have those figures if you would like to have them.

Senator HART. I was not aware that there was that number of commissioned personnel, carried how? As deserters?

Mr. HOFFMANN. The terminology is "dropped from the roles as a deserter." I think that is less than an adequate legal description, because the one—until they came back and were discharged——

Senator HART. Why wouldn't the Department of Defense have very strong motive to know the circumstances at least with respect to officer personnel who are carried that way? Wouldn't you be able to tell us for the record at least? There are only 50 men.

Mr. HOFFMANN. I can check and see what information is available. We do have an interest in that and that interest is being manifested in the results of the program, and the reasons given by individuals are being collated out there so we will get some information from that.

There has been no study directed specifically to the profiles of the 53 officer absentees who are eligible for this program. There is a general deserter-profile study done annually by the Department of Defense, however. The latest typical absentee deserter profile, fiscal year 1973, is attached.

TYPICAL ABSENTEE/DESERTER PROFILE

FISCAL YEAR 1973

Services	Typical Absentee/Deserter Characteristics					
	Age	Rank	Marital Status	Education Level	Time in Service	Enlistee
Army	18-21	E-4 or below	Single	Non-high school graduate	Less than 2 yrs	X
Navy	21	E-3	Single	Non-high school graduate (11 yrs)	18 mos	X
USMC	18-21	E-2 or E-3	Single	Non-high school graduate (10 yrs)	13-14 mos	X
USAF	25 or below	E-4 or below	Single	High school graduate	2-4 yrs	X

Other characteristics frequently identified with the military absentee are:

1. Immature and irresponsible, with a history of personal failures in civilian life.
2. A product of an unstable home (either a broken home, or a home plagued by some type of social/psychological maladjustment).
3. Very emotional, with a low frustration threshold.
4. Is a repeat AWOL offender
5. Not adaptable to regimentation.
6. One-third have a history of disciplinary and administrative action.

Senator HART. Captain, did you wish to say something?

Captain MILLER. No, sir.

Senator HART. I just have a gut feeling that the Defense Department would give very high priority to trying to understand why commissioned personnel would walk off.

Now, on the other side of the coin, has any thought ever been given in the Department to having an enlisted man on that board? You have four colonels or equivalents on it and there are 53 commissioned men who may turn up and 12,000 enlisted men. Have you ever thought about it? Would it be desirable or hurtful?

Mr. HOFFMANN. I was not myself involved in any discussions with enlisted personnel. Parallel, of course, is the convening authority which are the officers who convene courts-martial and whore view, based on article 32, whether or not it should proceed and based on the testimony presented. That is the parallel, and I couldn't say whether or not it was——

Senator HART. I know all the parallels in the service would not raise that question, but I raise the question, and not even I am implying that I am convinced it would be a wise thing, but certainly it is something that ought to be discussed.

Mr. HOFFMANN. It would be undesirable. The board is composed of officers of senior grades, since these officers are either themselves the officer exercising general court-martial jurisdiction, usually a general or flag officer, or the direct representative of such an officer.

Senator HART. I have a number of detailed questions that I will submit to you for information.

[The questions of Senator Hart and their responses from the Clemency Board follow:]

QUESTIONS FOR DEPARTMENT OF DEFENSE BY SENATOR HART

NUMBER OF APPLICATIONS

Question. Why has the Presidential clemency program not attracted a greater number of applicants? The number of applicants, compared with the number of people qualified to apply, suggests that the program is headed for failure, isn't that true?

Answer. Not in the view of the Department of Defense. As of 10 January 1975, the DOD has processed 2,898 individuals, through its portion of the program. These men have been totally relieved of the burdens of court-martial trial and punishment. They are no longer fugitives, and need no longer fear legal action against them. It is very difficult to characterize as a failure a program which has provided such benefits to such a large number of people.

	Persons qualified (approximate)	Persons processed (approximate)	Percent
Clemency Board	112,000	800	0.07
Justice Department	7,000	130	2
Defense Department	12,000	2,200	18

Question. How many have applied for the "clemency" program?

Answer. As of January 10, 1975, the DOD has processed 2,898 individuals.

Question. Of these, how many turned themselves in? How many came to the program from pretrial confinement?

Answer. We do not have an exact number of those in pretrial confinement. However, those awaiting trial not in confinement and those in pretrial confinement, thus far processed by DOD as of January 10, 1975 totaled 562.

WALK-ONS

Question. The distinctions between men in pretrial confinement and "walk-on" is not very clear. Apparently many of the walk-ons were arrested and placed in pretrial confinement, then turned themselves in (or were turned in) to the program. Thus, how many of the "walk-ons" were people actually voluntarily turning themselves in?

Answer. All "walk-ons" are voluntary.

Question. How many were people apprehended and then referred to the program?

Answer. None, except as they may be included in the 562 mentioned above.

THE PLEDGE

Question. Why must draft resisters and deserters sign an oath and pledge that forces them to turn against their beliefs and admit guilt when they believe they committed no crime by refusing to participate in the Indochina war?

Answer. There is no admission of guilt in any of the documents which a returning absentee must sign. The reason for the new oath is that, by absenting themselves without authority from their military service, the absentees violated their prior oath of induction or enlistment.

WHO DECIDES QUALIFICATION

Question. When a military deserter inquires about his qualification to participate in the clemency program who makes the decision on his qualification?

Answer. The Clemency information point of the respective miltary service.

Question. Is a negative decision appealable? How?

Answer. Eligiblity is established by meeting qualifying standards. If the individual is under military control and has nonqualifying offenses, he can request the commander exercising general court martial authority to dismiss the nonqualifying charges. This would make him eligible, provided all other criteria were met.

WHAT ABOUT IN SERVICE CLASSES

Question. The Secretary's memorandum of September 17, 1974 implementing the clemency proclamation indicates that the persons who have been discharged from the military by reason of an absence offense "or other purely military offense directly related thereto" may apply for clemency to the Presidential Clemency Board. Why do the criteria for qualifying for amnesty for present members of the military not also include "other offenses directly related" to the absence offense?

Answer. They do. Please see Presidential Proclamation 4313, paragraph 2.

HOW MANY QUALIFIED

Question. How many persons presently on the rolls of the military services are qualified to apply for clemency?

Answer. About 13,000, less those who have already been processed and discharged.

Question. How is that figure arrived at?

Answer. The figure, as it relates to DOD represents those military members, who, at the commencement of the program, were in status of unauthorized absence, or were in military control awaiting trial for such an offense, whose absence commenced during the eligibility period.

IS A LIST POSSIBLE

Question. Does the Department have the capability of producing a list, e.g., by computer, of persons presently being sought for unauthorized absence?

Answer. Yes.

Question. Can the list be made to show the date of the last unauthorized absence so that the absentee's qualification for clemency can de determined?

Answer. Yes.

Question. Is that list complete, i.e., can we have an authoritative list of all persons in jeopardy of military prosecution under articles 85, 86, and 87, so that persons not on the list know they are not in jeopardy and do not need to apply for clemency?

Answer. The listing is complete and authoritative.

Question. Can the list be made available to agencies that provide counseling and legal representation to military deserters.

Answer. No. The Department considers such would be an unwarranted invasion of the privacy of individuals whose names appear on the list. Any individual can seek information as to his eligibility—without fear of legal action against him—simply by calling his service clemency information point.

LIST OF THOSE WITH OTHER OFFENSES

Question. Is a list available, or could it be established, that would inform a "deserter-at-large" whether his record contains other offenses which may preclude his participation in the clemency program?

Answer. Yes, by the individual or interested party checking with the Clemency Information Point at telephone numbers widely publicized. The records have been screened for eligibility.

WHAT PROTECTIONS

Question. What due process protections are afforded by the procedures established by DOD?

Answer. Those individuals who inquire as to eligibility are advised, in writing, of the requirements of the program. During initial processing, they are again fully advised of the details of the program and of their legal rights. They are afforded military lawyer counsel, free of charge, and afforded opportunities to consult counsel of their choice. They are given an opportunity to present a written statement of matters which they wish considered in making a determination whether or not the standard period of 24 months alternate service should be reduced, and they are, thereafter, again provided advice of lawyer counsel. At this point in the processing, the individual must make an election to participate, or not to participate, in the program. If he elects to participate, he is discharged almost immediately.

Question. Are individuals afforded legal counsel concerning possible defenses to their absenteeism.

(NOTE: One Army lawyer at Indianapolis said 50 percent of returnees could probably get honorable discharges through court-martial route.)

Answer. Yes, legal counsel is afforded free of charge. If there are legal defenses available—and if it is probable that normal disciplinary processing procedures would result in an honorable discharge—the attorney should, and no doubt does, so advise his client, who should then elect to not participate in the clemency program.

RIGHT TO COUNSEL

Question. Does a military absentee being processed at Ft. Benjamin Harrison have an opportunity and time to consult military or civil counsel of his own choice.

Answer. Yes. Civil counsel of choice or military counsel as provided is a fundamental element of the DOD program.

Question. To see the military personnel record which will be before the Joint Alternate Service Board in order to rebut inaccuracies or false information contained in the file?

Answer. Yes. The individual and his counsel have complete access to his personnel, medical and finance records which the Board may review. He may submit matters, in letter, affidavit, statement or other form to amplify, clarify or rebut what appears in the files.

PROCEDURES

Question. Is the absentee told what the criteria are for mitigating the standard 24-months alternate service period so that he can inform the Joint Alternate Service Board of the mitigating circumstances in his case?

Answer. Yes, by counsel.

Question. Why does the Joint Alternate Service Board consist only of field grade career officers whose view may likely be unsympathetic to those of the war resisters and deserters?

Answer. The structure of the Board was determined by agreement of the Secretaries of the Military Departments who were tasked by Presidential Proclamation 4313 with determination the length of alternate service. These officers are of senior grade, since they are either, themselves, the General court-martial authority—and hence, the discharge authority (Navy and Marine Corps)—or a direct representative of the discharge authority (Army and Air Force). These officers are thoroughly experienced troop leaders and have been briefed with respect to their duties. In the determination of the required period of alternate service, they reflect the appropriate sensitivity. This would not be enhanced by placing e listed members on the board.

Question. Does the absentee have an opportunity to present his case to the Joint Alternate Service Board, either in person or with his attorney?

Answer. He may present, in writing, any material to the Board which he desires. In making this decision, and in preparing his presentation, he is entitled to—and is provided free of charge—assistance of military counsel, or he may seek civilian counsel of his own choice.

Question. Are the proceedings of the Joint Alternate Service Board public, and does the Joint Alternate Service Board state its reasons for assessing the particular alternate-service sentence it metes out to returnees?

Answer. The proceedings are not public. The Board does not state its reasons for assessing the mitigating circumstances.

Question. Is the alternate-service sentence of the Joint Alternate Service Board appealable? To whom, and through what procedures?

Answer. There is no procedures provided for an appeal of their determination, although there is no reason why an individual could not request reconsideration by either the Board or by the Secretary concerned if he feels aggrieved by the determination.

Question. What care is taken to see that the returnee can claim whatever legal defenses he may have to the absence charges (e.g., unlawful induction, wrongfully denied in-service medical, hardship, dependency, or conscientious objection claims) by reason of which the absence charges could not stand and he would not need clemency?

Answer. Military legal counsel is provided. An individual's election to participate in the program is made based on the advice of his counsel as to the availability and probable effectiveness of any defense which he may believe he has. If he feels his defenses are meritorious, he may, of course, elect to have them tested in the normal court-martial proceedings.

Question. What are the mitigating criteria for alternate service?

Answer. See enclosed appendix.

Question. Why are the criteria in mitigation of the 2-year period more restrictive than those of the Presidential Clemency Board (e.g., the Presidential Clemency Board's "evidence that the applicant acted in conscience, and not for manipulative or selfish reasons")?

Answer. The DOD decision is similar to the exercise of prosecutorial discretion, of one who has not already been convicted or discharged. The Clemency Board's

determination relates to an entirely different dircumstance—pardon or clemency for one who has been convicted, discharged and/or who has served a period of confinement. Also, we do not feel this is an acceptable reason for reducing one's period of alternate service. It has never been considered as such in the administration of the conscientious objector alternate service program by the Selective Service System.

Question. Does this not raise fundamental questions of equal protection and fairness?

Answer. Please see answer immediately above.

BASES FOR ALTERNATIVE SERVICE LENGTH

Question. Regarding mitigating factors: The sentencing practices of the Joint Alternate Service Board seem rather strange. The New York Times carried a story of a man who served his full term in the Navy, was discharged honorably, was drafted illegally, accepted induction, and then went AWOL. This would appear to be an airtight case, yet the man received a 3-month alternate service assignment. How can such an action be justified? What effort is made to determine if a returnee has a defense to court-martial?

Answer. The Joint Alternate Service Board does not issue a sentence. The agreement to perform the required alternate service is a condition precedent to discharge under the President's program. If the individual considers the required period to be unfair or unjust, he may elect to be processed under normal disciplinary procedures. See answers above relating to "legal defenses."

Question. And where a defense is present, does the man have the right to withdraw his "guilty plea" and present his defense?

Answer. A returning absentee does not enter a "guilty plea." He may elect, at any time prior to discharge, to have his case heard through normal disciplinary procedures, rather than to be discharged under the program. He is so advised by his counsel.

Question. Does a returnee have any right to a hearing?

Answer. If he elects the Clemency program, no.

WAR RESISTANCE AS MITIGATING OR AGGRAVATING

Question. More on mitigating factors: It seems clear that war resistance is not only not a mitigating factor for a military returnee, but actually an aggravating factor. The following line of questions may help to bring this out. What is the breakdown of alternate service assignments? How many have gotten what sentences?

Answer. The characterization "sentence" is inappropriate. As of January 10, 1975, the following periods of alternate service have been assigned:

Months:	*Total number*
0	0
1 to 5	33
6 to 12	385
13 to 18	200
19 to 24	2, 280

Question. Of the light sentences, how many were combat veterans?

Answer. Unknown.

Question. How many were hardship cases? How many were war resisters?

Answer. Unknown. Elements of each of the above may have applied to any case.

Question. Of the heavy sentences, how many were combat veterans?

Answer. Unknown.

Question. How many were hardship cases? How many were war resisters?

Answer. Unknown. Elements of each of the above may have applied to any case.

Question. We know from feedback from Fort Benjamin Harrison that military lawyers have been advising returnees not to claim war resistance as a motive. Does this indicate that war resistance may in fact be an aggravating factor in sentencing?

Answer. We are unaware of the "feedback" mentioned in this question, but as was noted in Mr. Hoffmann's testimony on December 19, 1974, objection or resistance to the war is not a factor in making a determination of the length of alternate service.

ALTERNATE SERVICE (CASE)

Question. T.R. is in exile in Sweden having deserted the Army about 5 years ago from Germany. He was submitted to the clemency program, while at Fort Benjamin Harrison signed two oaths, one of allegiance and the other a promise to do alternate service. While doing so, military personnel, some of whom were JAG officers, told him specifically that as a practical matter it would be virtually impossible to prosecute him if he failed to do the alternate service, because it would be so difficult to prove his intention not to do it at the time he signed. In other words, the Army was overtly encouraging him to perjure himself.

He now has the stigma of an undesirable discharge which has less restrictions than a clemency discharge, but he is for the first time in 5 years free to come and go in this country, and to choose where he will ultimately live. He asked for an extension of time of up to 3 years within which to start the alternate service, so that he could return to Sweden to care for his two young children until his wife completes her graduate school professional training. This was denied, so he has probably returned to Sweden anyway.

Considerations to bear in mind:

1. He received almost the maximum alternate service with opposition to the Vietnam War not an allowable factor for mitigating circumstances.
2. He does not know, and cannot know, whether on January 31, the door will close forever on the chance for a restoration of his citizenship status.
3. Under our present law, if he becomes a Swedish citizen without submitting to the clemency program, he may not set foot in the United States again.

WHY DOD ADVICE NOT TO DO ALTERNATE SERVICE

Question. Why are military attorneys at Fort Benjamin Harrison telling deserters that they don't have to perform alternate service after agreement to do so, when there is no clear understanding of that in the rules and regulations of the earned reentry program?

Answer. Advice provided by an attorney—including a military attorney—to his client is privileged, and is assumed to be a frank and candid explanation of the legal consequences of any proposed course of action. If an individual elects to perjure himself to gain acceptance into this program, that is a decision for which he, alone, is responsible.

Question. What are the exact legal prerogatives available to the military and/or the Department of Justice for prosecuting men who fail to perform alternate service after agreeing with the military to do so? Is prosecution contemplated?

Answer. The following responds to both of the above questions:

If an individual makes a pledge to perform alternate service, and then refuses to perform that alternate service, a question may arise as to whether he falsely represented his intent at the time he made this pledge. If it could be established that his representation was willful and false, prosecution by court-martial could lie under 10 U.S.C. 883, or by the Department of Justice under 18 U.S.C. 1001. The possibility is slight that any such prosecution would be feasible or that it would be undertaken. However, it is legally possible, and in a flagrant case, could well be undertaken.

Question. Since the DOD is in essence granting a de facto amnesty with the only penalty an undesirable discharge, would it not be more honest, and therefore legal, to legislate a de jure amnesty instead of condoning illegal responses to inequitable laws?

Answer. The Department does not consider the issuance of an undesirable discharge to be any form of amnesty. The failure to take advantage of the clemency discharge would be an unfortunate decision.

Question. If a prosecution on the alternate service pledge is made impossible by the applicant's good faith at the time of the signing, is this program not an incentive to applicants to lie and to make a bad faith record of their good faith in obtaining the undesirable discharge?

Answer. Adherence to one's pledge, even though not legally enforceable, is a matter of conscience, and violation of one's pledge will ultimately reflect adversely on the individual involved.

NATURE OF CLEMENCY DISCHARGE

Question. What is the purpose of the "clemency discharge?"

Answer. To provide testimonial that an individual has fully met the requirements of the President's program.

Question. It appears to have no positive value to the individual whatever. Does it restrict the recipient from receiving veterans benefits?

Answer. This question should be addressed to the Veterans Administration. But see Presidential Proclamation 4313, paragraph 2.

Question. Does it allow for review?

Answer. Yes.

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Question. Does it typecast the recipient as a deserter when the form is shown to employers and officials? If the clemency discharge is not reviewable and does not entitle one to benefits, how does it constitute an act of clemency, especially when it is sure to stigmatize the veteran as a "deserter" (if not a "traitor") and what is the incentive that would make applicants do up to 2 years of alternate service to exchange their undesirable for a clemency discharge?

Answer. The testimonial of good-faith performance of service to one's country is intended as a positive affirmation in the individual's behalf and should be so regarded.

Question. Does it represent an upgrading of the returnee's discharge or is it another form of undesirable discharge?

Answer. It is a clemency discharge, reflecting satisfactory completion of alternate public service. It does not, however, change the unsatisfactory characterization of one's military service, or reflect a change in the characterization of one's military discharge from under conditions other than honorable to under honorable conditions.

Question. Why was it not decided simply to upgrade the man's discharge to honorable at the end of assigned service? (There are very good arguments for such a policy, not the least of which is equity with others who performed alternative service—conscientious objectors do not receive a discharge which stigmatizes. Nor do returning draft resisters who perform assigned alternative service—at least not in my reading of the regulatory materials, which are pretty ambiguous.

Answer. A military discharge is intended to characterize an individual's military service. It would be an affront to those millions of former service members who have rendered "honorable" service to our armed forces, to characterize the service of those absentees returning under this program as "honorable."

LESS-THAN-HONORABLE DISCHARGE

Question. Is it true that only men who received their less than honorable discharge after conviction of violating articles 85, 86, or 87 of the UCMJ, are entitled to apply for relief to the Clemency Board? What of the overwhelming number of men who received and continue to receive administrative, "chapter 10", undesirable discharges, for unspecified reasons, shortly after returning to military control from being AWOL? What avenue of relief do they have? What of the other thousands of men with bad discharges who didn't go AWOL? Must they be branded for the rest of their lives by the sometimes arbitrary UCMJ system?

Answer. This responds to the above four questions. The military discharge system is not arbitrary, as these questions imply. Where an individual is being considered for discharge under less-than-honorable conditions, a full range of due process rights are accorded to him. In those cases where discharge is affected by sentence of court martial, full rights of appellate review are provided. See Uniform Code of Military Justice, articles 59 through 76. In all other cases, DOD Directive 1332.14, Administrative Discharges, provides overall guidance. Where, in any of the above cases, an individual feels aggrieved by the nature of his discharge, he has available the review procedures provided by sections 1552 and 1553 of title 10, United States Code. Finally, the provisions of Pub. L. 89–690 are always available.

NEUTRAL DISCHARGE CLASS

Question. Would it not be more appropriate if all military discharges were simply changed to a single, nonevaluative discharge?

Answer. Such would not give credit to those who serve honestly and faithfully.

Question. In the absence of this, what is the value to an individual of applying to the Clemency Board for relief?

Answer. Please see discussion above on nature of clemency discharge.

Question. There has always been a question about whether, if offered, a "conditional amnesty" would be accepted by those in need of amnesty. The response so far seems to indicate a negative answer. Why do you feel they are not availing themselves of your part of the program?

Answer. The response to the DOD portion of the program has been encouraging. We hope that such will continue throughout the remaining time period.

Question. What could be done to change the structure of the clemency program to achieve more effectively the President's stated objective of healing the wounds of the war and of bringing about some national reconciliation?

Answer. In our view, the present program represents a balanced approach to the problem. It is necessary, of course, that those who are eligible for the program meet their country half-way. This, in our view, is as it should be.

APPENDIX

THE SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

SEP 17 1974

MEMORANDUM FOR The Secretaries of the Military Departments

SUBJECT: Implementation of Presidential Proclamation No. 4313 of September 16, 1974

For the purpose of implementing Presidential Proclamation No. 4313 of September 16, 1974, the following instructions are provided:

1. Return to Military Control

   a. Military absentees seeking the benefits of the President's program will be required to return to military control as a condition of participation.

   b. The Secretaries of the Military Departments will establish and announce procedures whereby absentees may make initial contact with military authorities by mail or telephone to establish their eligibility for the program and obtain reporting instructions.

2. Centralized Clemency Processing Center

   a. The Secretary of the Army shall designate a centralized Clemency Processing Center to be utilized by all Services. The Army will provide facilities, medical, communications and logistic support for all Services on a reimbursable basis.

   b. Each Military Service will establish a Clemency Processing Unit at the site designated by the Secretary of the Army which will be responsible for the administrative processing of its own returnees.

3. Returnee Processing

a. An enlisted member who meets the eligibility criteria established in the Proclamation (Enclosure 1) will be provided the opportunity to request discharge for the good of the service in accordance with the provisions of DoD Directive 1332.14 (Paragraphs VII.K. and VIII.D.5).

The minimum requirements for the issuance of such a discharge under this program will be in accordance with DoD Directive 1332.14, as follows:

(1) The member submits a resignation or a request for a discharge for the good of the service;

(2) The member's prior conduct, which is the basis of his eligibility for the program, renders him triable by court-martial under circumstances which could lead to a punitive discharge.

(3) No formal charges and specifications will be necessary, but the member must be advised that his prior conduct is characterized as a willful and persistent unauthorized absence;

(4) The member has been afforded an opportunity to consult counsel and certifies in writing his understanding that he will receive a discharge under other-than-honorable conditions and that he understands the adverse nature of such a discharge and the possible consequences thereof.

The request for discharge will specifically indicate that it is submitted pursuant to the Presidential Proclamation. All requests submitted by eligible members will be approved. The separation will be under conditions other than honorable unless otherwise directed. (See Paragraph V.A.5., DoD Directive 1332.14).

b. Officer and warrant officer personnel who meet the eligibility criteria established in the Proclamation will be provided the opportunity to tender a resignation in lieu of trial by court-martial. The letter of resignation will indicate that it is submitted pursuant to the Presidential Proclamation.

The minimum requirements for the acceptance of a resignation under this program will be as follows:

(1) The member's prior conduct, which is the basis of his eligibility for the program, renders him triable by court-martial under circumstances which could lead to a dismissal;

(2) No formal charges and specifications will be necessary, but the member must be advised that his prior conduct is characterized as a willful and persistent unauthorized absence;

(3) The member has been afforded an opportunity to consult counsel and certifies in writing his understanding that he will be separated under other-than-honorable conditions and that he understands the adverse nature of such a separation and the possible consequences thereof.

All resignations meeting the foregoing requirements which are submitted by eligible officers and warrant officers will be approved. The separation will be under conditions other than honorable unless otherwise directed by the Secretary concerned.

c. Members eligible for participation in this program who are currently awaiting trial will be provided the opportunity to request discharge or tender a resignation as appropriate. Any such member who is in confinement will be released therefrom.

d. Members returning to military control and who are eligible to participate in the program will not be placed in confinement.

4. Former members punitively discharged pursuant to sentence of a court-martial or separated with an undesirable discharge

Former members who:

- have been dismissed from the service or discharged with a dishonorable or bad conduct discharge pursuant to the sentence of a court-martial imposed upon conviction of an absentee offense (10 U. S. C. § 885, 886, and 887) or other purely military offense directly related thereto committed during the qualifying period, or

- were separated with an undesirable discharge based on an act or acts committed during the qualifying period which rendered the member subject to trial by court-martial for an absentee offense (10 U. S. C. § 885, 886, and 887) or other purely military offense directly related thereto

may apply to the Presidential Clemency Board prior to 31 January 1975 for an examination of their case. The Board will be empowered to recommend to the President that a Clemency Discharge be issued and to qualify such recommendation with a requirement for alternate service in appropriate cases. The Military Departments will not participate either in this review process or in monitoring performance of alternate service.

5. Members or former members serving a sentence to confinement

A member or a former member serving a sentence to confinement based upon conviction of an absentee offense (10 U. S. C. § 885, 886, and 887) committed during the qualifying period or other purely military offense directly related thereto may apply to the Presidential Clemency Board prior to 31 January 1975 for an examination of his case. The Board will be empowered to

recommend clemency in such cases. Where a member or former member makes such an application, and where his sentence to confinement is based solely on qualifying offenses, his sentence to confinement should be suspended pending the Board's review.

6. Alternate Service

a. The period of alternate service for military members who apply under the President's program will be determined in individual cases by the Secretary of the Military Department concerned or his designee. The period will be indicated in the agreement signed by the individual as a condition of eligibility for the President's program. The period of alternate service will normally be twenty-four (24) months, but may be reduced in appropriate cases. Factors which will be considered in determining the existence of an appropriate case are as follows:

(1) length of satisfactory service completed prior to absence

(2) length of service in Southeast Asia in hostile fire zone

(3) awards and decorations received

(4) wounds incurred in combat

(5) nature of employment during the period of absence

(6) such additional guidelines as experience indicates appropriate and which are promulgated by future memorandums

b. Members separated under this program will be notified that they must report to their State Director of Selective Service within 15 days of the date of receipt of discharge to arrange for performance of alternate service.

7. Members against whom other offenses are pending

Members who would otherwise be eligible for consideration under the Proclamation, but against whom other offenses under the

Uniform Code of Military Justice are pending, will not be eligible to participate in the foregoing programs until the final disposition of such other offenses in accordance with the law and Service regulations.

8. Members who fail to meet the eligibility criteria

Members who fail to meet the eligibility criteria or fail or refuse to execute the required documents, or decline to submit requests for discharge or letters of resignation, as appropriate, remain subject to trial by court-martial or administrative disposition in accordance with existing law and regulation.

9. Records and accounting

a. Statistical records accounting will be accomplished in accordance with the provisions of DoD Directive 5000.12M, Manual for Standard Data Elements, 1 March 1970, as changed. The appropriate computer designators for Separation Type and the specific Separation Reason as noted below will be entered on Service retained copies of DD Form 214. The reason for separation shall be "Separation for the good of the service by reason of a willful and persistent unauthorized absence, pursuant to Presidential Proclamation No. 4313 abbreviation SEP-PRES PROC, data code NL. The copy for Veterans Administration and the Selective Service System will contain only the narrative type of separation and reason for separation. All copies of the DD Form 214 will have entered in the remarks section the following statement: "Subject member has agreed to serve ____ months alternate service pursuant to Presidential Proclamation No. 4313." Those military services which have not implemented Change 10 to DoD Directive 5000.12M will establish appropriate documentation and accounting procedures consistent with the respective type of separation and the exact wording of the reason for separation.

b. Military Departments will establish procedures to recognize the alternate service by issuance of the Clemency Discharge certificate DD Form 1953 (Enclosure 2) which is established

by this memorandum pursuant to Presidential Proclamation No. 4313. Such certificates will be issued only upon receipt of certification of satisfactory completion of alternate service by the Selective Service System. Procedures should also include issuance of a DD Form 215, "Correction of DD Form 214, Armed Forces of the United States Report of Transfer or Discharge," reflecting the reason for separation as stated above and noting the issuance of the DD Form 1953 (Enclosure 2). The DD Form 215 should be included in the master military personnel record.

c. Service Secretaries will submit reports on a monthly basis at the end of each calendar month to OASD(M&RA)(MPP) by the 10th of the following month. Reports will include information specified in Enclosure 3.

10. Public Affairs Guidance

Because of the overriding national interest in the President's announcement on clemency procedures for draft evaders and military deserters, the Assistant Secretary of Defense (Public Affairs) is responsible for direction and coordination of all public affairs activities concerning deserters, discharges and clemency. Maximum information will be disseminated to the public while at the same time giving due consideration of the rights of the individual. The Clemency Processing Center (CPC) will be manned by representatives of all the Military Departments, and the CPC information chief will report directly to the ASD(PA) for all public affairs matters.

Public affairs guidance, recommendations and accompanying Service implementing instructions to all commands, will be coordinated in advance with OASD(PA).

James R. Schlesinger

Enclosures

Enclosure 1

Conditions of Eligibility Pursuant to Presidential Proclamation No. 4313

1. Unauthorized absence in violation of Article 85, 86, or 87, or other purely military offense directly related thereto under the Uniform Code of Military Justice, commenced during the period August 4, 1964, through March 28, 1973.

2. Other pending offenses under the Uniform Code of Military Justice have been finally disposed of in accordance with law.

3. The member reported to military authorities in a manner prescribed by the Military Department concerned not later than 31 January 1975.

4. The member has executed a statement or statements reaffirming his allegiance and pledging to perform a specified period of alternate service.

Attached to this enclosure are form statements for use by the Military Departments in securing the reaffirmation of allegiance, admission of absence, and pledge to perform alternate service. These forms may be modified or combined with other documents for ease of administration provided the substantive content is retained.

Attachment to Enclosure 1

PLEDGE TO COMPLETE ALTERNATE SERVICE

On or about _____, I voluntarily absented myself from my military unit without being properly authorized in contravention of the oath taken upon entering the nation's military service. Recognizing that my obligations as a citizen remain unfulfilled, I am ready to serve in whatever alternate service my country may prescribe for me, and pledge to faithfully complete a period of _____ months service.

_____

REAFFIRMATION OF ALLEGIANCE

I, _____, do hereby solemnly reaffirm my allegiance to the United States of America. I will support, protect and defend the Constitution of the United States against all enemies, foreign and domestic; and will hereafter bear true faith and allegiance to the same.

I take this obligation freely without any mental reservation or purpose of evasion.

_____

CLEMENCY DISCHARGE

FROM THE ARMED FORCES OF THE UNITED STATES OF AMERICA

THIS IS TO CERTIFY THAT

WAS DISCHARGED FROM THE
UNITED STATES
ON THE DAY OF

THIS CERTIFICATE IS ISSUED ON THE DAY OF
IN RECOGNITION OF SATISFACTORY COMPLETION OF ALTERNATE
SERVICE PURSUANT TO PRESIDENTIAL PROCLAMATION NO. 4313
SEPTEMBER , 1974.

_____

_____

AMENDED REPORTING REQUIREMENTS

September 20, 1974

1. Number of applicants for President's Program

   Members contacting CIP (mail/telephone/walk in's/installations)

   1. Number eligible of those who made contact
   2. Number referred to JPC
   3. Number reported in at JPC
   4. Number processed by JPC
      a. Type of Separation (Manual for Standard Data Elements)
      b. Character of discharge
      c. Length of Alternate Service
         (a) None
         (b) 1 - 5
         (c) 6 - 12
         (d) 13 - 18
         (e) 19 - 24
      d. Race (Manual for Standard Data Elements)
      e. Date of absence by year (year last absence began)
   5. Number not processed by JPC (Ineligible)
      a. Offense not within period
      b. Other offenses pending
      c. Failed to execute required statements
      d. Other

6. Disposition of those not processed by JPC (Ineligible)

   a. Referred to trial by court-martial (GCM, SPCM, Summary)

   b. Administrative separation

   c. Article 15 / returned to duty

   d. Reprimand / returned to duty

   e. No action/returned to duty

   f. Other

7. Processed through medical channels

8. Pending at JPC as of last working day of the month

9. Cases requiring more than 7 working days (number)

10. Cases requiring more than 14 working days (by name and reason)

II. Number of eligibles who return to military control but who do not apply for benefits of Presidential Proclamation. (Report disposition as in Item I. 6. a. -f.).

THE SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

SEP 17 1974

Honorable William B. Saxbe
Attorney General
Washington, D. C. 20530

Dear Mr. Attorney General:

This letter is written pursuant to the President's Proclamation announcing a program for the return of Vietnam-era draft evaders and military deserters. It is requested that you immediately instruct the Federal Bureau of Investigation, the Immigration and Naturalization Service, and the Federal Marshal's service to follow the following procedures at border control points in the United States, until January 31, 1975, regarding admittance to the United States of persons whose names appear on a "look out" list or NCIC list, for having committed an offense of absence or desertion under the Uniform Code of Military Justice (10 U.S.C. 885, 10 U.S.C. 886, and 10 U.S.C. 887) during the period from August 4, 1964, to March 28, 1973, inclusive.

1. The individual should be informed that there is an outstanding warrant for his arrest for violation of the Uniform Code of Military Justice.

2. He should be permitted to read the contents of the Presidential Proclamation and his attention directed specifically to that portion of the Proclamation describing those military offenses which may be the subject of clemency.

3. He should be advised that, if he returns to proper military control within fifteen days of the date of his entry into the United States, the warrant of arrest will not be executed against him. He should also be advised that, should he attempt to exit the United States during the fifteen day period, or should he not return to military control during that period, the warrant will be executed.

4. In the event the individual is wanted by the military department for other than a violation of 10 U.S.C. 885, 886, or 887, or is the subject of an arrest warrant or a fugitive felon warrant for a state or federal offense, in addition to the absence or desertion violation, the individual should be detained and the appropriate military department or the FBI immediately notified so that his apprehension may be effected in accordance with established procedures.

5. The names and dates of entry of all individuals entering the United States pursuant to the Proclamation should be promptly furnished to the local field office of the FBI. The names of military absentees should be forwarded to the Army, Navy, Marine Corps, or Air Force Clemency Information Point, United States Army, Fort Benjamin Harrison, Indiana 46249.

Sincerely,

James R. Schlesinger

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

September 20, 1974

MEMORANDUM FOR THE SECRETARIES OF THE MILITARY DEPARTMENTS

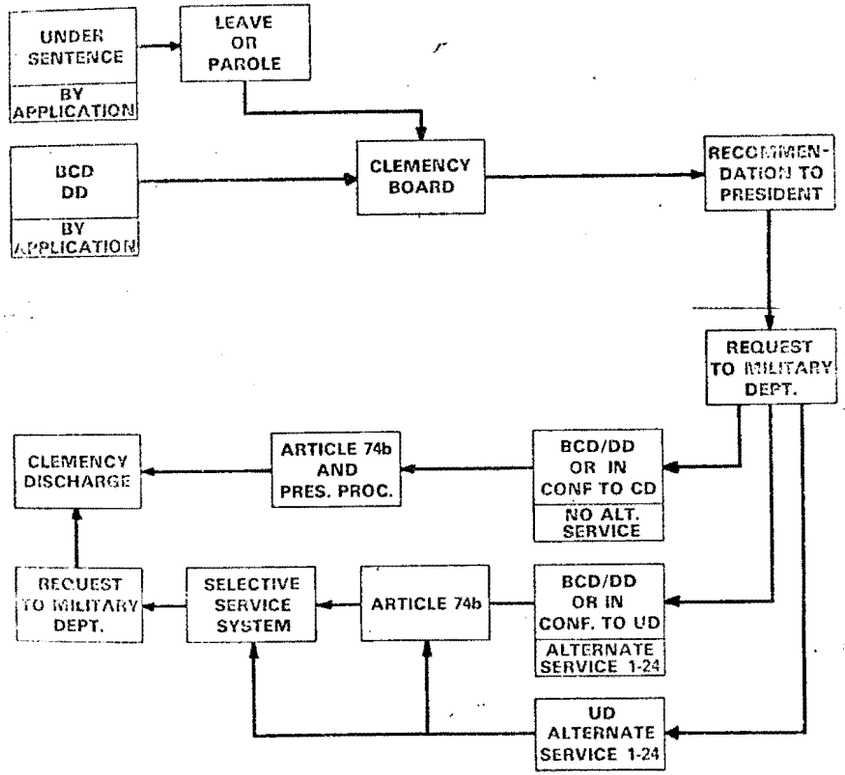
SUBJECT: President's Program for the Return of Vietnam-era Deserters

The Secretary of Defense has decided that information obtained from military absentees inquiring about the President's Program will be closely held by the Military Department concerned and will not be used, during the eligibility period set forth in Proclamation No. 4313, against either the absentee inquiring or other eligible absentees, to effect an apprehension for unauthorized absence. To do otherwise would not be in the spirit of the President's Program. It is desired that this policy be disseminated to all concerned without delay.

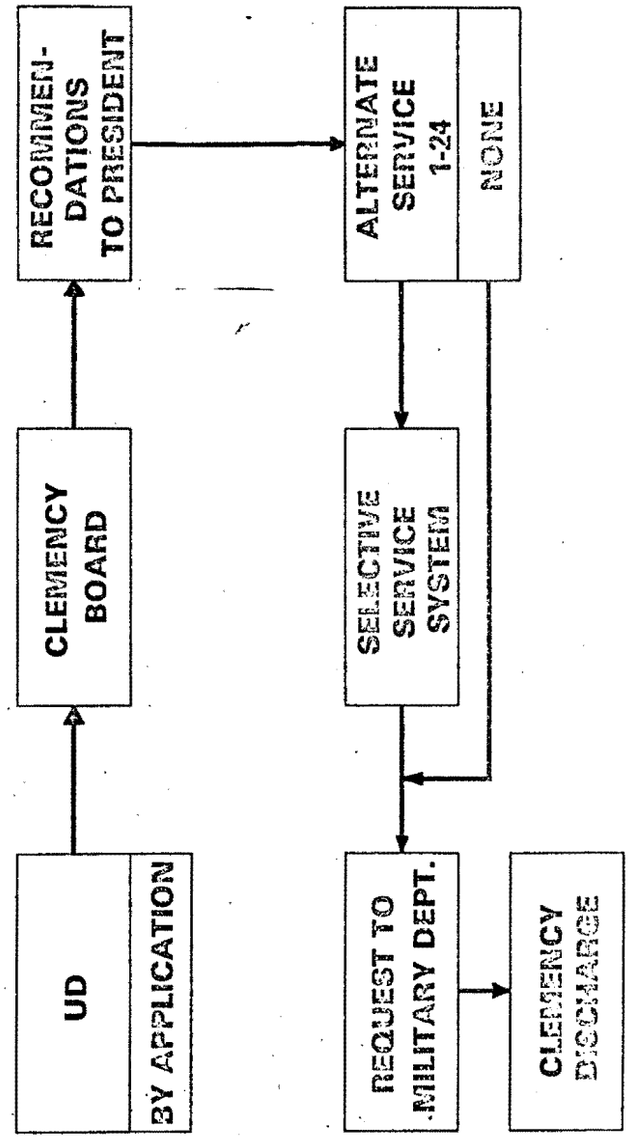
Martin R. Hoffmann

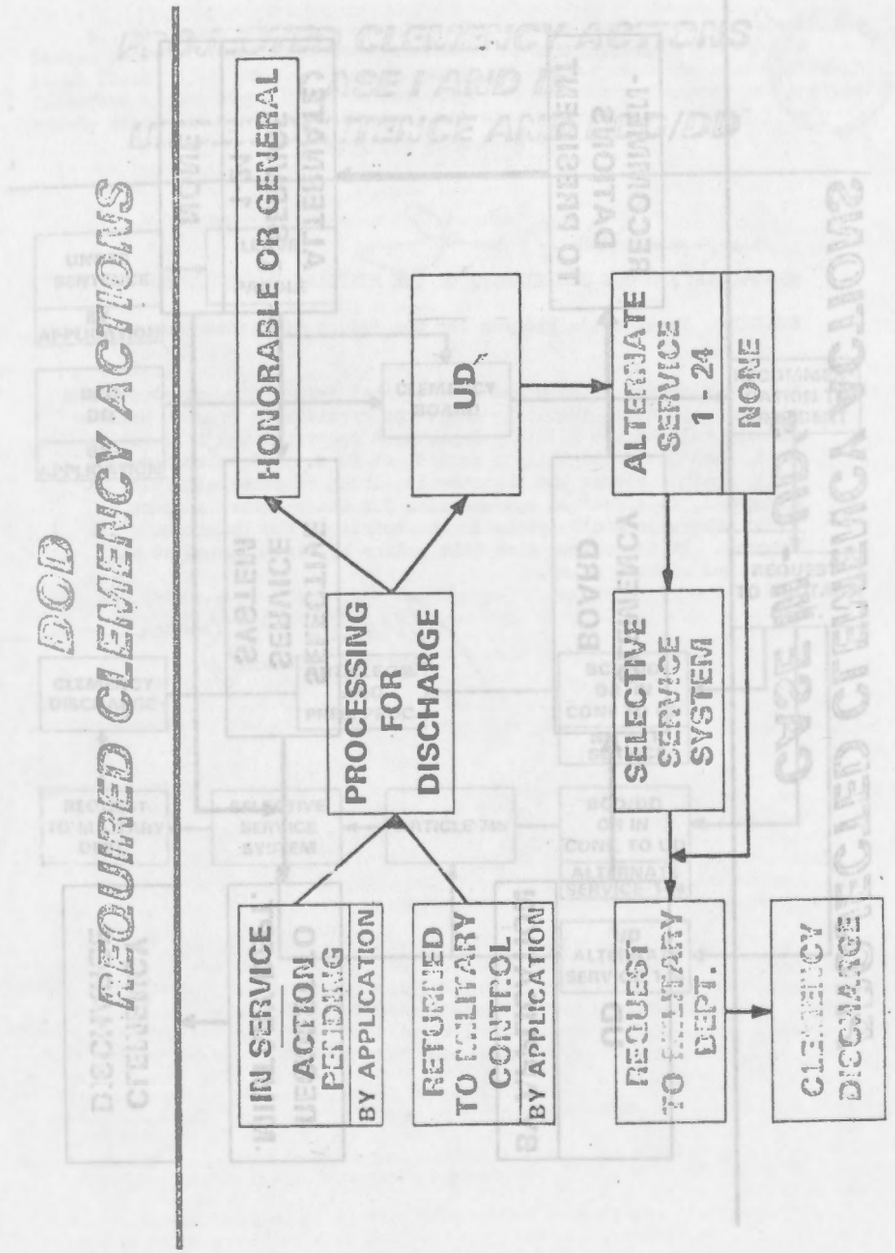
55-550 O - 75 - 12

PROJECTED CLEMENCY ACTIONS
CASE I AND II:
UNDER SENTENCE AND BCD/DD



PROJECTED CLEMENCY ACTIONS
CASE III - UD's





Senator KENNEDY. In the opening statement or comment I made some observations or recommendations. Do you have any reaction to any of those? One was with regard to records.

Mr. HOFFMANN. I can submit a reaction to you, Senator. I heard you read it, and I have not had an opportunity as I have sat here since to reflect upon it. We will be happy to submit in very short order some reactions to it.

Senator KENNEDY. Thank you very much.

[The response of the Department of Defense to Senator Kennedy follows:]

DEPARTMENT OF DEFENSE RESPONSE TO SENATOR EDWARD M. KENNEDY'S STATEMENT OF DECEMBER 19, 1974

First, I believe that the criminal records—either civilian or military—of those receiving pardons or clemency discharges should be ordered sealed by the President, the Attorney General, or the Secretary of Defense. This appears not only possible, but entirely desirable in light of our past traditions and in responses to the spirit of President Ford's call for national reconciliation. These files should not haunt the young men who complete the clemency process if our goal is to remove the barrier to their full re-entry into our national life.

Military personnel records are records of one's performance of military service. They are confidential and are not available to the public—and their public release can only be authorized by the service member of former member involved. However, since they are of importance in making determinations as to the nature of one's military service, it would be most inappropriate and undesirable to "seal" any portion of them. Such, of course, is not the result of a pardon, which does not operate retroactively to change an accomplished or existing fact, e.g., the fact that the individual was in a status of desertion or unauthorized absence for an extended period of time and that certain action was taken against him. These are significant matters in making a determination of the quality of one's military service, and they must continue to be available for that purpose.

Second, I think it imperative that the Justice Department, and/or the Selective Service System, compile final and definitive lists of those in jeopardy, of prosecution and of those whose files have been closed because of procedural errors or any other reason. This list should then be provided to some intermediary organization in confidence, where men can call or write without fear of self-incrimination. The Department also should make its own effort to notify individuals who are no longer liable to criminal action.

Inasmuch as the above question could pertain to the Department of Defense in a previous situation it was decided not to provide names and information to outside intermediary organizations because the information is definitively derogatory and would clearly and in an unwarranted manner invade the privacy of those whose personnel records were involved. A military absentee can receive authoritative information regarding his situation—completely without fear of self-incrimination—from the clemency information point of his military service.

Third, even while recognizing the limitations of the President's conditional approach, I believe it can be expanded to more closely approximate the goals of leniency and evenhandedness. Particularly for the soldier who received an undesirable discharge, perhaps after protesting the war by refusing to return to Vietnam, but who did not desert, the program seems unjust. If he had deserted he would be eligible for consideration for the program. But since he decided to stay and accept imprisonment for disobeying an order, then he is ineligible. Clearly, the program should be expanded to other recipients of dishonorable discharges where there is any indication of a Vietnam-motivated action that led to his discharge.

It is appropriate to note that the referenced program is a program for the return Vietnam era draft evaders and military deserters rather than a more general amnesty for all crimes, civil and military, against either institutions, persons, or property. There does not appear to be any need or justification for expansion of the President's program to cover such crimes.

Perhaps even more important, can a program that was ordered into effect on September 16; a program that on December 16 had not yet notified all eligible persons, can that program be ended on January 31 and be considered adequate?

Only the expansion and extension of the program beyond January 31 can begin to alleviate these particular inequities.

The program received wide publicity at the time of announcement and implementation, and throughout the period since that time. Additionally, the military departments have mailed notification and program information to the next of kin of those eligible absentees who have not already contacted us. There has been ample publicity and ample time for eligible absentees to take advantage of the program if it is their desire to do so.

Also, it seems unfair for a veteran, who came to the conclusion that he could not participate further in Vietnam, to find that the Defense Department does not count deep moral objection to Vietnam as a mitigating factor, although the Clemency Board has.

There were procedures—other than desertion—available through which a military member who was a conscientious objector could seek and be accorded relief from combatant duties or even complete discharge. We have undertaken a review of those cases where returning absentees claim their prior-to-absence request for conscientious objector status was improperly denied. The DOD does not consider an objection to the Vietnam war, however, as a factor which should reduce the period of alternate service which an individual should perform. It has never been so considered in the administration of the Selective Service System conscientious objection program.

Finally, I believe that each agency charged with administering portions of the clemency program must reform and adjust its practices and procedures to conform with the requirements of the Administrative Procedures Act—at the very least with the minimal procedural protections that were available under the Selective Service Act.

The President's program for the return of Vietnam era draft evaders and deserters is an exercise of the President's pardon power to which the provisions of the Administrative Procedures Act are not applicable. The DOD portion of the program, however, does accord the participant with free lawyer counsel, an opportunity to submit written data to be considered in his behalf, and full discretion to either accept or reject the President's program. Should the individual desire additional administrative or judicial due process rights, he need only elect not to participate in the program, and he will be processed through normal disciplinary procedures where such are provided.

Mr. HOFFMANN. We appreciate the subcommittee's looking at the program, and I appreciate the opportunity for appearing here this morning. Thank you.

[The prepared statement of Martin R. Hoffmann follows:]

PREPARED STATEMENT OF MARTIN R. HOFFMANN, GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. Chairman, distinguished members of the Subcommittee on Administrative Practice and Procedure, it is a pleasure to be here to respond to your request for a description of the procedures by which military absentees are returned to and separated from military service under the President's clemency program. I am accompanied by Captain William O. Miller, U.S. Navy of the Office of the Assistant Secretary of Defense for Manpower and Reserve Affairs.

The President's program is outlined in Presidential Proclamation 4313 and Executive orders 11803 and 11804 dated September 16, 1974. The implementing responsibility of the Department of Defense relates to those individuals who are subject to military jurisdiction—that is, members of the military services who have been dropped from the rolls as deserters by reason of an unauthorized absence of more than 30 days between the dates August 4, 1964 and March 28, 1973. It is estimated that 12,500 eligible absentees were at large. Also eligible were approximately 500 individuals who were in military custody at the time of the proclamation, but who for various reasons had not been separated from the military service or brought to trial for their offense.

On September 17, 1974, the Department of Defense provided extensive guidelines to the military departments on implementation of the program. A copy is attached to this statement. The controlling philosophy is that the program should provide an effective, expeditious procedure fully protective of the rights and options of the returnee whereby eligible military absentees may enter the program, become separated from the military service and undertake alternate service. Upon completion of the prescribed period of service, a clemency discharge would be issued in lieu of the undesirable discharge previously received upon separation from the military.

The specific requirements for eligibility are set forth in the Presidential proclamation. They are as follows:

The unauthorized absence is in violation of articles 85, 86 or 87 during the period August 4, 1974, through March 28, 1973.

Other pending offenses, if any, have been disposed of.

The member must report not later than January 31, 1975.

The member affirms his allegiance and pledges to perform the specified period of alternate service.

Certain aspects of the specific guidance issued by the Department of Defense should be highlighted:

The deserter must return to military control—just as the draft evader must present himself to the U.S. Attorney.

Eligibility may be determined by telephone or letter to the clemency information point. The information disclosed in these inquiries will not be used to apprehend the member for a desertion related offense during the eligibility period.

Absentees coming into the country will not be apprehended at the border and will be given 15 days to report to military authority.

All participants will be centrally processed by the respective military service at Fort Benjamin Harrison, Indiana.

Participation in the clemency program further rests on agreement by the individual to the following:

A request for discharge for the good of the service must be submitted.

The unauthorized absence would render him triable and could lead to a punitive discharge.

Issuance of formal legal charges is not required.

The individual electing to participate in the program must reaffirm his allegiance and execute a pledge to complete alternate service.

During the initial stages of processing, each individual is given a complete legal briefing by a military attorney assigned to represent him. This involves a group session, with opportunity for individual sessions at that time or any time during processing. The consequences of an undesirable discharge are fully explained to him, as well as the legal implications of all aspects of the program. Additionally, each member is advised that he is entitled to consult a civilian attorney of his choice He may have his own counsel if he has retained one. The local bar association in Indianapolis, at our request, has provided a referral service of attorneys who provide advice, free of charge, to any returning absentee. Office space at Fort Benjamin Harrison has been provided for private consultation between attorney and client.

After the individual has established his legal representation and been fully advised, the processing continues. His pay accounts are placed in order and he is given an opportunity to provide information to the Joint Alternate Service Board at Fort Benjamin Harrison for its consideration in determining the amount of alternate service he will be required to perform. He is also given a complete physical examination. As the proclamation requires, each case is reviewed for the assignment of alternate service; 24 months is the standard. The Board considers reductions on an individual basis in the length of alternate service from the maximum of 24 months, taking into account the following circumstances: previous satisfactory military service; combat service; awards and decorations; wounds and injuries; and nature of employment while absent.

The composition and procedures of the Joint Alternate Service Board may be of interest to you.

The Board was established jointly by the Secretaries of the Military Departments at the beginning of the program. All military absentees, under the jurisdiction of the military departments, have had their alternate service determinations made by the Joint Alternate Service Board. The Board is composed of one 0–6 grade officer; a Colonel or Captain of the Navy—from each of the military services—Army, Navy, Air Force, Marine Corps. All four officers consider the case of each returning absentee. The officer from the military service of the absentee presides during the consideration of his case. In the case of a tie vote, that officer's determination is controlling. As noted earlier, the individual has the opportunity to present a written statement to the Board. The Board will not consider his case until it determines that the individual either has taken advantage of the opportunity, or has specifically declined to do so. In the preparation of this statement the individual has complete access to his counsel.

Upon being advised as to the length of alternate service, the individual is given a further opportunity to consult with his attorney or attorneys. He must then

make his final determination as to whether or not he wishes to participate in the program.

In the great majority of cases processed through the Joint Processing Center, action is completed within a 24-hour period.

The individual is advised that after discharge he must report to the Director of the Selective Service System in the state in which he intends to reside. The Selective Service System thereafter works with him to provide a suitable alternate service job.

The details of the Alternate Service Program are to be addressed by the Director of the Selective System. One point bears mention, however. The Selective Service System notifies the individual's military service when he has satisfactorily completed his alternate service. When this notification is received, the military services will issue the individual a clemency discharge in lieu of the undesirable discharge.

A statistical summary of our implementation of the program, attached to this statement, reflects that as of 0800, December 16, 1974, we have received over 6,000 inquiries from all sources about the program. Also included are the numbers of cases completed and those still being processed. Also reported is a breakout of the disposition of cases in terms of the period of alternate service prescribed.

Let me deal, briefly, with certain aspects of the program that have been of particular interest.

The first is the nature of the clemency discharge. Military discharges are designed to describe the quality of an individual's military service. An honorable discharge is issued in recognition of honorable and faithful service during a committed period of military service. The general discharge is given for satisfactory military service, and the undesirable discharge is given for unsatisfactory service. The bad conduct discharge and the dishonorable discharge are punitive discharges, issued only by reason of an approved sentence of a special or general court-martial.

The usual eligible absentee is given an undesirable discharge. The Department of Defense guidelines, and those promulgated by each of the military departments, provide that an absentee must be fully counseled of the adverse nature of the undesirable discharge. He is informed that it is a military discharge under conditions other than honorable—and that generally he will not be eligible for veterans' benefits.

The clemency discharge is designed to be issued once a dischargee has satisfactorily performed his period of alternate service. It is, in effect, a testimonial to the fact that the individual has satisfied the obligation undertaken pursuant to the President's program. It is not intended, in any way to effect a change in the characterization of the individual's military service as unsatisfactory, or to effect a recharacterization of an other-than-honorable-conditions military discharge. It is intended, however, to indicate as public testimonial that the individual has accepted the offer of clemency, and complied with his undertakings pursuant to the President's program. For this he deserves recognition—which the President has sought to symbolize through the issuance of the clemency discharge.

With respect to Veterans Administration benefits, the fact that an individual serves his alternate service and is thereafter awarded a clemency discharge in lieu of an undesirable discharge is not intended to affect his entitlement to Veterans Administration benefits one way or another.

The second aspect of the program which deserves individual comment is the extent to which the Department has endeavored to protect the rights of every individual processed under the program.

The Department of Defense has insisted that every individual being processed should have full and complete legal advice available. Moreover, no information received from an individual inquiring as to his eligibility or during his processing will be used against him for prosecutive purposes. If there are legal defenses available to him which would indicate that he could not be successfully prosecuted for his unauthorized absence offense, it is the responsibility of his counsel—civilian or military—to make these facts known to the absentee himself or to the military discharge authority. The decision to request a discharge under this program—or or to elect to have his case processed under the normal military procedure—is a matter solely up to the individual himself and his counsel.

Finally, in an effort to ensure that all eligible military absentees receive notification of their eligibility if at all possible, the military departments recently sent letters to the next of kin of those eligible absentees who had not already contacted us. We sent about 7,000 of these letters. Over 2,200 of these have been returned as undeliverable, but we have had 375 telephone inquiries in response to these letters and about 68 individuals have returned to their military service with the letter in their possession.

That concludes my prepared statement, Mr. Chairman. I will be pleased to answer any questions which you may have.

Senator KENNEDY. Our next witness, the Deputy Assistant Attorney General, Kevin Maroney, testified at our Selective Service hearing on amnesty in 1972. He has been in the Department of Justice for over 25 years.

Glad to have you with us.

STATEMENT OF KEVIN MARONEY, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY BRUCE FEIN AND ROBERT VAYDA, OFFICE OF JUSTICE PLANNING AND POLICY

Mr. MARONEY. Thank you, Mr. Chairman.

Mr. Chairman, Senator Hart, I am pleased to appear today to discuss the implementation of the President's clemency program with respect to unconvicted alleged draft evaders by the Department of Justice.

I am accompanied by Mr. Robert Vayda and Bruce Fein, Office of Legal Counsel, presently assigned to the Office of the Attorney General.

My remarks will focus on the number of individuals eligible for the program, what participation in the program requires, measures taken to inform eligible draft evaders of the program's existence, the number who have participated, steps taken to insure uniform implementation, and a special review of draft evader cases undertaken by the Department.

An unconvicted draft evader is eligible for the clemency program if he committed his offense between August 4, 1964, and March 28, 1973, and if he is not barred from reentering the country by 8 U.S.C. 1182(a)(22). Generally speaking, that latter provision would exclude from the program any alien who has fled the country to avoid the draft or a U.S. citizen who has done the same and subsequently renounced his U.S. citizenship.

Senator KENNEDY. Why is renouncement of citizenship such a key factor? Perhaps an individual goes overseas and doesn't feel there is any possibility of getting back. He then becomes a citizen of another country and later makes a decision that he wants to come back. Why should that be set as a prohibition for any consideration?

Mr. MARONEY. Under the provisions of 1481(a) (1) or (2), an individual who has renounced his American citizenship is ineligible for reentry if he has left the country for the purpose of avoiding the selective service statutes.

Senator KENNEDY. As I understand, there was testimony yesterday that I am unclear on, called landed immigrants in Canada, and that is interpreted as a bar.

Mr. MARONEY. That is not true, Senator.

Senator KENNEDY. Shaking your head won't help us. Maybe you can clarify for the record.

Mr. MARONEY. Well, the only ones who are ineligible are those individuals who left the country to avoid the draft and who have renounced their American citizenship.

Now, of course, that can be accomplished in a variety of ways, by a formal renunciation to a representative of the State Department, I believe, under most circumstances, I am sure, becoming a citizen of a

foreign country. So that there are also other ways in which citizenship can be renounced, but I don't think that is a real problem with respect to the situation that we are talking about.

The situations we are talking about are those few people, and I understand there are only four or five who have become citizens of Canada or perhaps a Western European country. Those individuals are excludable under the immigration laws and therefore excluded under the amnesty program. But a person who is a landed immigrant from Canada is allowed to return.

Senator KENNEDY. OK, sir.

Mr. MARONEY. The department estimates that approximately 6,300 unconvicted draft evaders are eligible for the clemency program. Approximately 4,190 are currently under indictment, of whom some 3,950 are listed as fugitives. It is estimated that 2,090 of the fugitives are in Canada, and that an additional 560 are located elsewhere outside the United States.

Senator KENNEDY. Do you have a final list of unconvicted draft evaders that are eligible for the program?

Mr. MARONEY. We have a list of all those against whom indictments have been returned.

Senator KENNEDY. Is that list public?

Mr. MARONEY. We have made it available to the ACLU on a request they made under the Freedom of Information Act and also to the United Church of Christ.

Senator KENNEDY. That doesn't include any of those who are under investigation at the present time, does it?

Mr. MARONEY. We did prepare at the outset an initial list that did include both persons under indictment and person under investigation by the FBI whose cases were actively pending in the U.S. attorney's office. We purged that list to eliminate the latter group.

Senator KENNEDY. Is it a final list? Do you consider it to be a final list?

Mr. MARONEY. Well, absolutely final and accurate, I don't think we can represent it to be so, no.

Senator KENNEDY. Could someone rely on it?

Mr. MARONEY. No, and when we have furnished a list to these groups we have indicated that we can't vouch 100 percent for its reliability, and its a primary source, and that in addition, a direct inquiry should be made either to the Selective Service Board or to the U.S. attorney or to the Department of Justice here in Washington, and we will make a check and advise the individual or his representative as to his exact status. We have done that in a number of instances.

I myself have had a phone call from a man in Canada who wanted to know what his status was. He said he had been ordered to report for induction in 1967 or something. We checked with the U.S. attorney's office. He did not have an indictment. We therefore then asked the Selective Service Board to give us their information, and his file had been destroyed, I think, in 1972 and the case was closed and never proceeded to a prosecution.

We advised him of that; obviously he is perfectly free to come back. He has nothing hanging over his head.

Senator KENNEDY. If it was ended in 1972, why shouldn't he have been notified and allowed to come back before? Isn't there any

responsibility of the Department to inform these people that there isn't anything hanging over their heads?

Mr. MARONEY. I don't think so, any more than anybody else is ever notified that the Government is or isn't going to bring a criminal case. No, sir, he got the order to report for induction. He knows that he didn't obey the order and he was therefore in some jeopardy at that point. He certainly could have made an inquiry through an attorney or otherwise as to whether or not an indictment was returned or whether or not a case was dismissed.

Senator KENNEDY. Don't you think it would be valuable to at least have a final list of those individuals that are under investigation or liable for prosecution, so that everybody knows that? Why is that so difficult to assemble?

Mr. MARONEY. Well, it isn't so difficult to assemble.

The question would be the complete 100-percent accuracy of this. The only way we can guarantee that is on a case-by-case basis.

Senator KENNEDY. Why doesn't it make sense to say we will take 6 months or a year and review these cases and publish a final and complete list? Why can't you put an outside deadline on that and produce a list so that everybody knows about it? Then, if your name is on it, you are going to be either prosecuted, or if it is not, you can come back.

Mr. MARONEY. Well, even if we were to prepare a list based on complaints which have been furnished to us by the Selective Service Boards, it wouldn't necessarily include, for example, an individual who had failed to register, let's say in 1968, 1967, or 1966, and who were unaware of and the Selective Service Board was unaware of.

Senator KENNEDY. Let's eliminate nonregistrants. How about the rest?

Mr. MARONEY. Well, we could prepare——

Senator KENNEDY. Say this is it, these are the people. Take whatever time is necessary, 6 to 8 months.

Mr. MARONEY. Of course we only have until January 31 under this program.

Senator KENNEDY. Yes, but it may be sufficiently important and may very well be extended.

Why wouldn't this make sense in any circumstances, whether you have a program or not?

Mr. MARONEY. Senator, we can prepare a list, and we have as I indicated. The first one we did prepare contained all indictments and all cases under investigation. We could reproduce that list tomorrow, probably. We could undoubtedly make it available to legal services.

The problem would be in vouching for the 100 percent accuracy. Remember, these are reports collected from 96 districts in the United States. In some of the districts, the southern district of California, for example, they have a couple of thousand cases, I think, 1,500 cases in the selective service area. It would be a 99 percent accurate list.

I fail to see, frankly, the burden on an individual who has reason to believe he may be in some jeopardy under the selective service statute in making a direct inquiry. He will get a quick and immediate response, and if he doesn't want to make it himself, he can make it through an attorney.

Senator KENNEDY. As you well understand, there is a nature of distrust about it—among many of those making direct inquiries with

the Department—and it seems to me that the Department could take whatever period of time necessary and say this is final. You say that now it is 99 percent sure; can't you take another few weeks and make sure it is, at least as close as you can get to it? If you miss something and it falls through the cracks, at least making young people aware through a public list of their eligibility or ineligibility, would be a useful device. You certainly could understand by your saying that the list is 99 percent but it is not 100 percent correct, that everyone is going to feel that they might be the one that is the 1 percent and feel that they are not even going to bother making the inquiry.

Before announcing the President's program Mr. Saxbe himself talked about the various numbers—6,200 pending draft evaders. It seems to me that you could give it some consideration when we are only 99 percent sure of asking for leniency where there are many, not only those young people affected, but others lives, who would feel this is a constructive step in carrying through leniency.

Mr. MARONEY. Well, the Attorney General early in October, I think, directed all U.S. attorneys to review all their selective service cases, both indictments and files that were pending in their offices, and certainly most of the offices have reported by December 11. The balance of the offices who had more than 250 cases pending had until January 11. When they have completed their review, it will be fairly—you know, toward the middle—getting into the end of January, and at that point we will have a good, current list of all pending viable cases. We will also have a list of all cases which are being wiped out pursuant to this review. I assume those lists could be made available at that time.

Senator KENNEDY. Could we have that? Senator Hart, do you want to join me in requesting that we get a list, say by January 20? Could we have the list?

Senator HART. I think the trick isn't so much in our getting the list, but having Joe Potatoes out there know whether he is or isn't on it.

Mr. MARONEY. I understand, Senator, and that is why I am talking about the time frame that is involved, January 31 is our cutoff. Well, we will take back the request that such a list be compiled, if possible, by January 20.

Senator KENNEDY. This is what we are looking at, the request for the list in time with the understanding that we are making the request that the list be made public. It would not include the nonregistrants, but any of the others would know that it was the definitive list, and they would know that if their name were not on it, they wouldn't be subject to prosecution. If we could get that as a request——

Mr. MARONEY. I think we would have to represent it for what it is, and that is a list of pending indictments and pending complaints or investigations in the U.S. attorney's office.

Senator KENNEDY. If it is not final, then it doesn't do us a great deal of good. You can understand that.

Mr. MARONEY. Well, I understand it, but I must say——

Senator KENNEDY. How old are these young men?

Mr. MARONEY [continuing]. I don't know why this is a different situation than any other criminal violation. Regarding Internal Revenue Service laws, we don't advise everybody whether his income tax return is all right or not, and they are not subject to prosecution.

Senator KENNEDY. The President doesn't issue a clemency with regard to internal revenue violations, and certainly, this is a different circumstance. He has used very compassionate words, and he has indicated his sense of leniency and reconciliation and mercy on this issue. We are talking about a small percentage of 1 percent, and I am sure you can see both the desirability of getting a final determinant list, and why we can't get that.

You yourself said the other list is 99 percent sure. You will have a few more weeks to make sure it is as tight as it can be. I think it would be of very important public value to say this is it, this is the list. That is what we are requesting, the final list by that time, or the reasons why not. I would hope that you could get it, not just for us, but for Senator Hart as well.

Mr. MARONEY. We will try to prepare such a list, and I will certainly take back the chairman's request that the list be regarded by the Attorney General as a final list and be published at that time.

Senator KENNEDY. Fine.

[See appendix, pp. 267–269, for relevant correspondence between subcommittee and Department of Justice regarding the list.]

Mr. MARONEY. An estimated 2,130 individuals are under investigation for a draft evasion offense.

An unconvicted draft evader must report to the U.S. attorney in the district where his offense was committed by January 31, 1975. There he executes an agreement with the U.S. attorney in which he acknowledges his allegiance to the United States by agreeing to perform alternate service.

Senator KENNEDY. Were you present earlier when we reviewed with the DOD certain mitigating factors?

Mr. MARONEY. Yes, sir.

Senator KENNEDY. The Justice Department has different regulations as well on this.

I have expressed my view on this. I don't know whether you want to make any comments about it, about the criteria you use as compared to the Clemency Board or the DOD, and the differences for those factors. It does seem you have one Presidential order and three definitions of mitigating circumstances.

Mr. MARONEY. I think our factors are consistent with the criteria used by the Clemency Board. The principal difference, I suppose, is that the Clemency Board is handling cases of people who have been convicted and many of whom have served time for the conviction, which is a very substantial factor for them to take into consideration. Of course, we don't have that present in our consideration. We do try to take into consideration mitigating circumstances that deal with the mental state, I suppose, of the individual, the time of violation, the financial hardship that would be incurred by the individual and his immediate family dependent upon the length of alternate service that was required. We have made a special effort to ensure on a nationwide basis that the criteria set forth in the prosecutive guidelines have been adhered to by the U.S. attorney and applied on a consistent basis insofar as that is possible when you are dealing in this kind of thing.

Senator KENNEDY. Do you have any other guidelines besides this sheet, which is appendix B on Department of Justice item 4? You have just this one? That is all we have received. I don't know whether there is anything else.

Mr. MARONEY. They are the guidelines.

Senator KENNEDY. Do you have any other information on mitigating circumstance, any memorandums?

Mr. MARONEY. I could give you some representative illustrations of how some of these cases have been handled and the factors which led the U.S. attorneys to give differing periods of time, if that would be helpful.

Senator KENNEDY. Certainly their cases would be interesting, but I was interested more in some documents that you would have that would elaborate or spell out the criteria that should be used.

Mr. MARONEY. No.

Senator KENNEDY. Can I ask about the length of alternative service? The pages that were made available to the subcommittee indicate on page 2 and I will make this a part of the record acknowledgment of allegiance to the United States, signed by the violator as well as the U.S. attorney. It states: I agree to perform alternative service for a period of ——— months." This would indicate to us that it is an open factor. Is that the way you apply it? Do you know whether that is the form that is being used?

Mr. MARONEY. Yes, sir.

[The form referred to above follows, with a cover letter and prosecutive policy guidelines.]

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., September 16, 1974.

To: All United States Attorneys.
From: William B. Saxbe, Attorney General.
Subject: Clemency.

The attached documents are for use in implementing the President's Proclamation announcing a program for the return of Vietnam era draft evaders and military deserters. All reasonable attempts should be made to notify those who are eligible to participate in the program.

For specific problems, please call Kevin Maroney, Criminal Division, 202–739–2333.

Attachments.

PROSECUTIVE POLICY WITH RESPECT TO CERTAIN PERSONS ALLEGED TO HAVE VIOLATED SECTION 12 OF THE MILITARY SELECTIVE SERVICE ACT (50 APP. U.S.C. 462) PURSUANT TO THE PRESIDENT'S PROCLAMATION

I. This directive applies to all persons eligible to participate in the alternative service clemency program as provided in the President's Proclamation announcing a program for the return of Vietnam era draft evaders and military deserters. However, this directive is inapplicable to any person who has fled the country and is prevented from re-entry by virtue of 8 U.S.C. 1182 (a) (22) or other law. This directive alters the present Departmental policy to effectuate the President's declared policy of clemency to draft evaders and resisters.

II. Each eligible violator of Section 12 of the Military Selective Service Act who is willing to perform alternate service as an indication of his allegiance to the United States should report to the United States Attorney for the district in which he violated or is alleged to have violated the Act.

III. Any person presently under indictment or investigation who presents himself to the United States Attorney before January 31, 1975, and agrees to perform a period of alternate service, under the auspices of the Director of Selective Service, as an acknowledgment of his allegiance to the United States, will not be prosecuted if he satisfactorily performs such service. If no agreement is reached, the alleged violator may be prosecuted for the Section 12 violation.

IV. The length of alternate service shall normally be 24 months, but the United States Attorney may reduce the term in light of the following circumstances:

(1) whether the applicant, at the time he committed the acts allegedly constituting a violation of Section 12 of the Military Selective Service Act, was erroneously convinced by himself or by others that he was not violating the law;

(2) whether the applicant's immediate family is in desperate need of his personal presence for which no other substitute could be found, and such need was not of his own creation;

(3) whether the applicant lacked sufficient mental capacity to appreciate the gravity of his actions; and

(4) such other similar circumstances.

V. In the determination by the United States Attorney of the length of service as provided in IV, an applicant shall be permitted to:

(1) have counsel present;
(2) present written information on his behalf;
(3) make an oral presentation; and
(4) have counsel make an oral presentation.

An applicant shall not have access to investigatory records in the possession of the United States Attorney except as provided by 32 C.F.R. 160.32. The United States Attorney shall make his decision on the basis of all relevant information. No verbatim record of the proceedings shall be required.

VI. If the alleged violator fails to complete the period of alternate service to which he has agreed, the United States Attorney may proceed to prosecute the case.

VII. If the United States Attorney receives a certificate from the Director of Selective Service indicating that an alleged violator has satisfactorily completed his period of alternate service, then he will either move the court to dismiss the Section 12 indictment against the violator with prejudice, or terminate any Section 12 investigation of the alleged violator, whichever is appropriate.

VIII. If an alleged Section 12 violator is apprehended before January 31, 1975, the violator will be treated as if he voluntarily presented himself to the United States Attorney as provided in II, if the violator so desires.

IX. Upon request of any individual who thinks he may be under investigation for violating Section 12 of the Military Selective Service Act, the United States Attorney shall promptly review that individual's case file, if any exists, and in any event inform the individual whether or not Section 12 charges against him will be pursued if he does not report as provided in II.

X. An individual who is neither under indictment nor investigation for an offense covered by this directive but who reports as provided in II and admits to such an offense will be subject to prosecution unless he makes an agreement as provided in III.

XI. The U.S. attorney may delegate any function under this directive to an assistant U.S. attorney.

UNITED STATES OF AMERICA

VS.

_____ _____
Name File No.

_____ _____
Street Address Telephone No.

_____
City and State

AGREEMENT FOR ALTERNATE SERVICE

It appearing that you have committed an offense against the United States on or about _____ in violation of Title 50 App. United States Code, Section 462, in that

_____

_____

_____

Therefore, on the authority of the Attorney General of the United States, by _____, United States Attorney for the District of _____, prosecution in this District for this offense shall be deferred for the period of _____ months from this date, provided you sign the following agreement:

Agreement

I, _____ understand that the Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy trial. I understand that the Fifth Amendment prohibits double jeopardy for the same offense. I understand that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the Court may dismiss an indictment, information, or complaint for unnecessary delay in presenting a charge to the grand jury, filing an information or in bringing a defendant to trial. I understand that constitutional due process may require dismissal of an indictment that has been unfairly delayed.

As an acknowledgement of my allegiance to the United States of America, I agree to perform alternate service for a period of _____ months in a job acceptable to the Director of Selective Service as provided in President's Proclamation announcing a program for the return of Vietnam era draft evaders and military deserters. I will report to the Director within _____ days. I also knowingly and voluntarily agree to waive the constitutional right against double jeopardy and the right to use any delay during the period of my alternate service to establish a defense based upon Rule 48(b) of the Federal Rules of Criminal Procedure, the constitutional right to due process or a speedy trial, and the statute of limitations in a prosecution initiated because of my violation of this agreement. I understand that I may be prosecuted if I violate this agreement.

In exchange for the promises of _____, the United States will defer any prosecution of _____ for violation of Title _____, United States Code, Section 462 for a period of _____ months. The United States also agrees to drop any investigation or indictment of _____ for violation of the aforesaid offense with prejudice upon receipt by the United States Attorney for the District of _____ of a certificate from the Director of Selective Service indicating that _____ has satisfactorily completed his period of alternate service.

In the event _____ is prosecuted under 50 U.S.C. App. 462 if he violates this agreement, nothing stated herein shall be used against him during the trial of such offense.

_____ _____
Name of Alleged Violator Name of Attorney for Alleged Violator

_____ _____
Date Date

_____
Name of United States Attorney

_____
Date

55-550 O - 75 - 13

Re: United States v. _____

Criminal File No. _____

Dear _____:

This letter concerns reports received by this office that you have committed an offense against the United States on or about _____ in violation of Section 12 of the Military Selective Service Act.

In accord with the President's policy of granting leniency to certain individuals who are charged with violating Section 12 of the Military Selective Service Act, you are eligible for diversion to an alternate service program. Should you agree to undertake acceptable alternate service as an acknowledgement of your allegiance to the United States this office will refrain from prosecution. Note, however, that if no agreement is reached the United States will be free to prosecute you for the Section 12 charge. If the Director of Selective Service certifies to us that you have successfully completed your service, the pending charge against you will be dropped. However, failure satisfactorily to complete the alternate service will probably cause us to resume prosecution of the Section 12 charge.

A decision to seek acceptance into this program is one that must ultimately be made by you. Nevertheless, it is important that you immediately discuss this matter with your attorney inasmuch as your participation in this program will require a waiver of certain rights afforded to you by the Constitution. For example, you must waive your right to a speedy trial and right to have an indictment presented to the grand jury, if one has not already been obtained, within the prescribed statute of limitations. We suggest that you consult with your attorney who will explain the program to you and the nature of the waivers mentioned above.

Very truly yours,

_____
United States Attorney

By:

_____

DOJ-1974-09

Senator KENNEDY. Is that when you apply the mitigating factors, before filling in that blank?

Mr. MARONEY. Before this is executed and before the U.S. attorney advises the individual, based on all the circumstances, and based on the representations and showing that the individual applicant may make and his attorney may make in his behalf, the U.S. attorney would advise him on the length of service that would be required. He, of course, is free to reject that if he wishes.

Senator KENNEDY. I have another form that is apparently used in the U.S. Southern District of New York that has the 24 months written right on it, typed on the form itself. It also has the blank places underlined for the person's name, the number of days when they ought to report, and other information that is left blank. Do you know why in that particular area 24 months would be written in and, that evidently in New York the 13 that have been processed all received 24 months?

Mr. MARONEY. Well, of course, we had used 24 months as the norm in accordance with the clemency proclamation.

Senator KENNEDY. The thing I am trying to get out is our interest in the procedures being used here. The form that was supplied to us had a blank, and the one that evidently is being used in New York has 24 months printed on it, and furthermore, the 13 people processed have gotten 24 months, which would seem to support that particular observation. It would appear that you are using one procedure one place and another in other areas.

Mr. MARONEY. I think the procedure certainly is the same.

Senator KENNEDY. Do you know if the form is the same? Evidently it is not.

Mr. MARONEY. We sent all the U.S. attorneys a sample form. Now, they, of course, had to reproduce their own form for their office. But it is based in most instances, certainly, on the form that we sent each of them.

Senator KENNEDY. Do you make any review to determine whether mitigating circumstances are being uniformly applied? In the southern district of New York, they have processed 13 forms and 13 individuals have received 24 months of alternative service. If you look through the record of the other districts, you find again in California 10 out of 10, everyone has gotten exactly the same amount of time, 24 months.

In California the 10 young men there lacked sufficient mitigating circumstances for any 1 of them to make it less than 24 months. The same thing happens to be true in New York. I am wondering what procedures you are using in New York, and whether they are applying mitigating circumstances. In the eastern district no one got 24 months; 2 got 8 months, and 1 got 15 months. Yet, in the southern district, you had 13 cases and they all got 24 months.

Mr. MARONEY. The procedure we followed, when this first started, after we had sent out the prosecutive guidelines was to ask all the U.S. attorneys who were about to enter into an agreement with an applicant to first advise us so that we could ensure that it was being uniformly applied. The Deputy Attorney General personally reviewed the circumstances with respect to the first 26 agreements that were signed—for that very purpose. We then disseminated to all U.S. attorneys the circumstances which were present in those first 26 cases, which caused varying lengths of time, on the assumption that it would

certainly be used as a pretty good indicator of the kinds of circumstances that would lead to reductions of 6 months or 10 months or a year or whatnot.

With respect to the situation in New York where you have 13 out of 13 for a 24-month period, I will talk to the U.S. attorney to inquire as to the question you are raising as to whether or not there are any mitigating circumstances that should be taken into consideration and have not.

Senator KENNEDY. Would you do the same for California?

Mr. MARONEY. That is San Francisco? I know in one of the earlier ones the U.S. Attorney entered into a 24-month agreement with the understanding that he would consider a reduction.

Senator KENNEDY. Are you doing that in other places? Is that in your regulations? Can you start off with a 24-month agreement and reduce afterwards?

Mr. MARONEY. No; it isn't in the regs, but I see nothing wrong with it if it is freely entered into by the applicant and the U.S. attorney at the time.

Senator KENNEDY. I see one rule in one place and another rule in another. It seems to me you don't have anyplace where anyone can determine which rule will be applied to them.

Mr. MARONEY. It isn't a rule. It is judgment based upon mitigating circumstances.

Senator KENNEDY. Are you going to use mitigating circumstances or not? And if you are, how do you justify this kind of differentiation? You say you apply one thing to the subcommittee and suggest that mitigating circumstances are going to be considered. You have a blank on some applications, and you find other ones where it is stamped in. If you are going to use mitigating circumstances, then what are you doing, Mr. Assistant Attorney General, to make sure they are being applied?

Mr. MARONEY. I told you what we are doing.

Senator KENNEDY. Well, the facts show something else.

Mr. MARONEY. I just indicated I would talk to the U.S. attorney in the southern district.

Senator KENNEDY. We are asking for California as well.

Mr. MARONEY. I was explaining to you I had a number of conversations with the U.S. attorney with respect to mitigating factors. I was trying to illustrate one early case in which I think the young man indicated some interest in entering college next year. I think Mr. Browning indicated that if that came to pass he would consider a reduction based on that circumstance. I think it is a perfectly reasonable way to approach it.

Senator HART. Mr. Chairman, could I, just on this point, that is not in the sensitive area you were just talking to. What provision is there for a man to appeal the term given by the U.S. attorney for alternate service? Is there any recourse?

Mr. MARONEY. Well, not other than as is implicit in anything that is done by the Department of Justice or any representative of the Department of Justice. I suppose if any representative of the Department takes some action and the individual is dissatisfied with that action he can go up through the chain of command of the Department, either to the Assistant Attorney General or the Attorney General, possibly to ask for a review of the action.

Now, we have not built that into the program.

Senator HART. Well, I understand the answer. Again, if I were Joe Potatoes I wouldn't take much comfort that there is any appeal. I can write Washington.

I think it underscores the desirability of the point Senator Kennedy was making that Washington spends more time evaluating the raw data that shows the northern district of California is 10 and nothing and southern New York 13 and nothing, or whatever it is.

Mr. MARONEY. Well, I can certainly assure you, Senator——

Senator HART. That is my point, that there isn't any formal procedure for appeal.

Mr. MARONEY. Right.

Senator HART. That increases, I think, the obligation, if we are serious about this being a clemency action rather than a law enforcement action, that the Department itself evaluate these field decisions.

Mr. MARONEY. We have discussed these factors and criteria many times with the U.S. attorneys—I say we, myself and the Deputy Attorney General.

At the last U.S. attorney's conference, which was about 6 weeks ago, we had a seminar with all 96 U.S. attorneys in four different groups in which this was a substantial part of the presentation and discussion.

I know that Jim Browning in California is well aware and sensitive to the mitigating-factor criteria. I am giving you an illustration of an early occasion which he specifically discussed with us. Now the circumstances which might lead to a reduction are not presently in existence. If a year from now the individual is able to get into college and if he cannot pursue that effort because of the alternate service, the U.S. attorney will consider possible reduction.

Senator KENNEDY. I think that as far as I am concerned, I am sure what the U.S. Attorney is thinking about in northern California is a good idea, but do they know that down in the southern district of Alabama where they have three cases and they are all going for 24 months? Are you going to let the fellow up in northern California be able to go to school while the southern fellow in Alabama works in a hospital?

I think it is marvelous that they will be able to go to school, but if those are the cases, then that kind of information ought to be available to others as well; and if you are making that available, I would find a great deal of interest in having that type of information, so that we know what we are doing, are in touch, know what's happening in this district, and are sending that out to the other districts. In that way we have sort of a sense of how it is being run with some compassion and understanding. If some particular Attorney General or U.S. attorney is imaginative and creative, fine. But I think it is a question, Senator Hart, about the effort to make sure these mitigating circumstances are realized. Let's proceed.

Mr. MARONEY. We were talking about the requirements for participation in the program.

The normal term of alternate service is 24 months, but may be reduced by the U.S. attorney if certain mitigating factors are present. The alternate service is performed under the auspices of the Director of Selective Service and must be in the national health, safety, or

interest. The Director has promulgated regulations which define more specifically which types of jobs qualify for alternate service under the clemency program. Upon satisfactory completion of the alternate service, the United States will dismiss the draft-evasion charge. An unconvicted draft evader who participates in the clemency program is assured of avoiding a felony conviction and any term of incarceration.

The Department has taken several measures to inform those eligible for the clemency program of its existence. We have directed all U.S. attorneys to send letters to the last known address of individuals currently under indictment or investigation informing them of the program. We have publicly released a list of all individuals currently under indictment or investigation so that an individual reluctant to contact the Department may learn whether he is on the list from private sources. We have provided a phone number at the Department which can be called to ascertain whether a certain individual is on the list and, if so, the U.S. attorney he should report to. Inquiries can be made anonymously and the Department makes no attempt to learn the identity of those who call.

Additionally, the Department has publicly urged eligible individuals to seek counsel in connection with determining whether to participate in the clemency program. As a result of these measures, and others, I think that the large majority of unconvicted draft evaders eligible for the clemency program are aware of its existence and terms.

As of noon last Tuesday, December 17, 1974, 144 alternate service agreements had been signed. As of this morning that number is 147. Appendix A provides a breakdown with respect to the districts in which the agreements were signed and the length of alternate service received under the agreements.

Several steps have been taken to insure uniform implementation of the program by the 94 U.S. attorneys. All the U.S. attorneys have received for use in implementing the program prosecutive guidelines, a model alternate service agreement, and a model letter to send an eligible draft evader. These documents are attached as appendix B.

Uniform implementation is most difficult to assure in connection with determining the length of alternate service. Under the program, the normal length is 24 months, but may be reduced by the U.S. attorney for mitigating circumstances. Paragraph IV of the prosecutive guidelines sets forth appropriate mitigating circumstances which, of necessity, leave room for discretion. To ensure that this discretion was being fairly and properly exercised from the outset, the Deputy Attorney General personally reviewed the first 26 alternate service agreements before they were given approval. On the basis of that review, he was satisfied that the U.S. attorneys were appropriately following the guidelines in determining the length of alternate service. The Department has throughout the program received a weekly report from all U.S. attorneys indicating the number of alternate service agreements signed and the length of service assigned in connection with each agreement. Nothing in these weekly reports has indicated that U.S. attorneys are not assigning terms of alternate service under uniform standards and with a proper exercise of discretion pursuant to the prosecutive guidelines.

In furtherance of the spirit of the clemency program, the Department has directed all U.S. attorneys to review the files of unconvicted draft evaders and to dismiss charges against those whose cases lack

prosecutive merit. The review process will be completed by January 11, 1975. As of noon last Tuesday, December 17, 1974, 1,453 files had been reviewed and charges had been dismissed against 213 individuals.

Senator KENNEDY. What were the reasons for dismissals?

Mr. MARONEY. The reasons are varied but based on a thorough review of the files by the assistant U.S. attorneys. Some of these cases were filed many years ago, and were affected by intervening Supreme Court decisions. So that a review of a particular case file today would show that there is a good legal defense by virtue of intervening law, and would result in a dismissal of the case.

Senator KENNEDY. With some Selective Service errors?

Mr. MARONEY. Well, it is possible; yes. They should have certainly been screened out in the beginning before an indictment was returned. But if it was missed at the time, a procedural defect, and were discovered now in this current review, then that would be cause for dismissal at this point.

But I would say by and large most of the cases that will be screened out in this reviewing process are the older cases where the indictments were valid when returned under then existing law, but the charge is no longer valid by reason of intervening court decisions.

Senator KENNEDY. Do you notify these people?

Mr. MARONEY. These people will be notified, yes.

Senator KENNEDY. You intend to finish all the cases by the middle of January. Is that correct?

Mr. MARONEY. Yes; offices are required to have this completed by January 11. Yes, sir, under the Attorney General's guidelines. We have a slight update on those current——

Senator KENNEDY. Will this include the numbers that may be dropped on the basis of any legal representation. You have about 15 percent of all cases being dropped by the Department, and I suspect there will be another—at least a group—that may very well be dropped on the basis of representations made by challenges.

Mr. MARONEY. Well, I am not sure how that would come about.

Senator KENNEDY. What is the Department's record in terms of normal prosecution of these cases? I understand it is about 33–35 percent. Is that approximately right?

Mr. MARONEY. Well, I understand of those that have actually gone to trial there have been convictions of about 80–85 percent of the cases. A number of cases are dismissed in advance of trial.

Senator KENNEDY. Give me those numbers. Let's put those figures together.

Mr. MARONEY. In 1974 we had—I will round these off—2,700 reported violations, There were 879 cases initiated, 1,420 were concluded, 489 pleas of guilty, 63 acquittals, and 874 cases were dismissed. Some of the 1,400 cases—of the 800 cases—we dismissed 63 out of 879 brought, and 485 were convicted.

Senator KENNEDY. 874 were acquitted?

Mr. MARONEY. Yes; these figures are garbled here, Senator. What we have is a table——

Senator KENNEDY. Could we have the table? Do you want to submit it for the record?

Mr. MARONEY. We have to get it in a little better form. It covers the period 1964–74.

Senator KENNEDY. All right.

Mr. MARONEY. I might just update the figures on reviews. We have as of last night 1,690 cases reviewed and 297 dismissed or 16.9 percent of the cases that have been reviewed.

I believe that concludes our statement.

Senator KENNEDY. As you well remember, members of the subcommittee had requested reviews of these cases back in 1972 in light of court decisions. I am glad that has taken place and can be completed by the end of January. I think it is certainly important. A number of people, close to 20 percent, have had this hanging over their lives for a very considerable period of time. It seems to be that this is the least that could and should be done.

Senator HART. We are under notice that a rollcall is going on, so I will have to be very brief.

It is in a sense very tentative. It is an impression I get from listening yesterday and today of the guidelines with respect to the direction to the U.S. attorney which would suggest to me that the young man, now not so young, whose refusal to respond to the Selective Service law was based on a philosophical resistance to the war would have darned little reason to turn himself in to the U.S. attorney and would be much better off to get himself a lawyer, given the experiences of those who go to trial.

I say that for this reason. The only circumstance which would justify that U.S. attorney in San Francisco or New York giving less than 24 months would be: (1) if the fellow was erroneously convinced at the time that he was not violating the law. Now, that is not the case of the young man 5 years ago who was protesting the war, or (2) whether his family is in desperate need for him, and that does not describe the son from a family of affluence.

Mr. MARONEY. But he may have married in the interim and have a child——

Senator HART. Suppose he is still very comfortable through accidents of inheritance or otherwise, and he doesn't have that reason. The third circumstance justifying an alternative service agreement of less than 24 months would be whether he lacks sufficient mental capacity to understand the gravity of his offense, and clearly he did, or such other similar circumstance.

So hardship and ignorance would appear to be the only basis on which a U.S. attorney could give less than 24 months.

Mr. MARONEY. And financial hardship, which is a very important point.

Senator HART. Hardship and ignorance.

But I am describing the son of a family that can hire himself a good lawyer. It is just, to me, if I was out in that great cruel world, and lucky enough to be comfortably off, I would know that the odds are much better for me not to go to the U.S. attorney under the so-called clemency but to take my chances with the court system where even those that are sentenced are sentenced to substantially less than 24 months.

Mr. MARONEY. I don't think the odds for getting off completely are that good, Senator. Even if you get a sentence, let's say probation for a year, which is a common thing, you have still got that felony conviction.

Senator HART. Yes; that is right. That is so. You are right.

Mr. MARONEY. We recently had a case in West Virginia. Well, OK. I am sorry.

Senator KENNEDY. Finally, Mr. Schulz's appendix points out that with the indictments and complaints disposed of in 1974 were 2,070. The convictions are 686, which is 33 percent. That is the U.S. Administrative Office of the Courts figures on this.

Senator HART. May I submit some questions for the record?

Senator KENNEDY. Yes. We will recess briefly.

Mr. MARONEY. Yes, sir.

Senator KENNEDY. Thank you very much Mr. Maroney.

Mr. MARONEY. Thank you.

[The prepared statement of Kevin Maroney appears on page 281.]

[A short recess was taken.]

Senator HART [presiding]. The subcommittee will be in order.

Senator Kennedy may not be able to return. In any event, he asked me to resume the hearing in the interest of time, both of Mr. Pepitone and others.

Our last witness today is the Director of the Selective Service System, Mr. Byron V. Pepitone. Mr. Pepitone has been with the Selective Service since 1970, serving first as Deputy Director and later as Acting Director, was a former Air Force colonel, Military Executive Assistant Secretary of the Air Force for Manpower and Reserve Affairs.

I understand he is joined today by the General Counsel, Peter Straub and the legislative liaison officer, Mr. Shaw, and Mr. John Barber.

Proceed, sir.

STATEMENT OF BYRON V. PEPITONE, DIRECTOR, SELECTIVE SERVICE SYSTEM, ACCOMPANIED BY PETER STRAUB, GENERAL COUNSEL; SAMUEL R. SHAW, LEGISLATION AND LIAISON OFFICER; AND JOHN W. BARBER, RECONCILIATION SERVICE DIVISION MANAGER

Mr. PEPITONE. Thank you, Mr. Chairman.

In response to your letter of December 12, I have come to inform the subcommittee of the fashion in which the Selective Service System is performing the functions which have been delegated to it as an outgrowth of the proclamation made by President Ford on September 16 which announced a program for the return of Vietnam-era draft evaders and military deserters.

The subcommittee has already heard that the President's program for the return of Vietnam-era draft evaders and deserters involves several agencies of the Federal Government and prescribes certain actions to be taken in implementation of the program. The actions themselves differ depending upon which type of person is involved: evader, deserter, or convicted evader or deserter.

The Department of Defense acts initially with the individuals who are classified as deserters, the Department of Justice with those who are classified as evaders, and the Clemency Board with those who have been convicted of a draft evasion offense or those who received a punitive or undesirable discharge from the Armed Forces because of a military absentee offense, or were serving sentences of confinement for such violations. The Selective Service System, by contrast, and as a result of the provisions of Executive Order 11804, bears a responsibility for action in behalf of individuals identified under all three groups eligible for the program.

Executive Order 11804, which is entitled "Delegation of Certain Functions Vested in the President to the Director of Selective Service," is a short one. It reads as follows:

By virtue of the authority vested in me as President of the United States, pursuant to my powers under Article II, sections 1, 2, and 3 of the Constitution, and under section 301 of title 3 of the U.S. Code, it is hereby ordered as follows:

SECTION 1. The Director of Selective Service is designated and empowered without the approval, ratification or other action of the President, under such regulations as he may prescribe to establish, implement and administer the program of alternate service authorized in the Proclamation announcing a program for the return of Vietnam era draft evaders and military deserters.

SECTION 2. Departments and agencies in the Executive Branch shall, upon the request of the Director of Selective Service, cooperate and assist in the implementation or administration of the Director's duties under this order to the extent permitted by law.

Signed by Gerald R. Ford, The White House, September 16, 1974.

The alternate service referred to in the Executive Order is that decreed by the President in Proclamation 4313 dated September 16, 1974, wherein he pointed out:

* * * that in furtherance of the national commitments to justice and mercy, these young Americans should have the chance to contribute a share to the rebuilding of peace among ourselves and with all nations * * * and that they should be allowed the opportunity to earn return to their country, their communities and their families, upon their agreement to a period of alternate service in the national interest together with an acknowledgment of their allegiance to their country and its Constitution.

The alternate service program prescribed in the proclamation is for work which shall promote the national health, safety or interest. It is alternate service of the type described in section 6(j) of the Military Selective Service Act which prescribes that people who are conscientiously opposed to participation in military service will, in lieu of such induction, perform civilian work contributing to the maintenance of the national health, safety, or interest as the Director of Selective Service deems appropriate. The modifications to the Selective Service law in September 1971, of which I know this subcommittee has intimate knowledge, require that the Director of Selective Service shall be responsible for finding civilian work for persons who are exempted from training and service under the Military Selective Service Act under section 6(j) and for the placement of such persons in appropriate civilian work contributing to the maintenance of the national health, safety, or interest. The manner in which this program would be administered, Mr. Chairman, was the subject of considerable discussion when the Selective Service System made a presentation before this subcommittee on February 28, 1972.

The President chose the Selective Service System to establish, implement, and administer the alternate service work program because of its experience gained in the discharge of its responsibilities under section 6(j) of the Military Selective Service Act.

Actions to discharge the responsibilities delegated to the Director under Executive Order 11804 commenced immediately following the publication of the Executive Order on September 16, 1974, and have resulted in the publication of regulations for the establishment, implementation and administration of a suitable alternate service program.

On September 26, 1974, under title 2, chapter II, Selective Service System, part 200 C.F.R. entitled "Reconciliation Service" appeared in the Federal Register, volume 39, number 188. These basic regulations set forth the manner in which the Selective Service System establishes, implements, and administers the reconciliation work program. The regulations became effective on September 26, 1974, in order to immediately accommodate those individuals described in Proclamation No. 4313 who chose to avail themselves at an early date of the benefits of the President's program.

The regulations are complete in that they provide the definitions of the service to be performed; they identify the referring authority for each type of case; they prescribe the geographical area in which the returnee can expect to work and where he will commence his enrollment procedures for work with Selective Service; they delineate the levels of responsibility for the program establishing the functions of the National Headquarters of Selective Service and specifying the delegations of authority to the State Directors of Selective Service; and the type of employer who will be considered eligible to employ returnees who will be performing this alternate service. The regulations further identify the criteria for jobs for returnees and the responsibilities of the returnee and those of the State Directors for locating jobs, initial placement, and reassignment from one job to another if necessary. I know that the subcommittee has an interest in some of the specific details of the regulations, and I will describe them in greater detail as follows:

Eligible employers, which may be a subject of interest to the subcommittee, are important with respect to the fashion in which the program is being administered. Our regulations state that returnees may be employed by the following employers: the U.S. Government; a State territory or possession of the United States or a political subdivision thereof, or the District of Columbia; or an organization, association or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association or corporation, or for increasing the membership thereof, or for profit.

Of equal importance and interest are the criteria which have been established for the selection of jobs. Four elements are considered by the State director as a basis for determining whether a specific job offered by an eligible employer is acceptable as service for a returnee:

1. *National health, safety or interest.*—The job must promote the national health, safety or interest.

2. *Noninterference with the competitive labor market.*—The returnee cannot be assigned to a job for which there are more numerous qualified applic ants who are not returnees than there are space available.

3. *Compensation.*—The compensation will provide a standard of living to the returnee reasonably comparable to the standard of living the same person would have enjoyed had he gone into military service. This criterion may be waived by the State director when such action is determined to be in the national interest and would speed the placement of the returnee in service. As a practical matter, the pay is the pay of other employees on the same job with similar skills.

4. *Skill and talent utilization.*—Where possible, a returnee will be

permitted to utilize his special skills; in fact, we seek to assure this utilization where we can.

The administrative procedures and details of how the system operates the reconciliation service program are prescribed in great detail, and amplify the regulation which I have described to you, in a manual entitled "reconciliation service manual." I have a copy of it here; I will be pleased to provide one for the subcommittee, either for inclusion in the record or for study by the members at a later time if they choose.

I know that you will be interested in the specifics of how the program is working, and I think a brief recitation of some of the actual procedures we used and the experience we have gained, between September 19 when our first enrollee arrived, until today, would be in order.

There are in excess of 650 offices of the Selective Service System throughout the United States where individuals may enroll in the reconciliation service program. These offices are supervised by 56 State directors, located in each of the 50 States plus New York City, the District of Columbia, Puerto Rico, Guam, the Canal Zone, and the Virgin Islands.

A deserter who is processed by the military service at the Joint Clemency Processing Center in Indianapolis is furnished a factsheet which is given to him during his processing session and is instructed that he should report, within 15 days after discharge, to the Selective Service office nearest the place in which he intends to reside. When he reports to the nearest Selective Service office, he commences what we call an enrollment procedure. During this enrollment procedure we endeavor to procure sufficient information from him to permit, assignment to work in accordance with the regulations I have described. We also explain to him his obligations to perform the service assigned by the military department and how we intend to report his completion thereof to the military department concerned. We explain to him his opportunity to procure his own work and the degree to which we are able to assist him in the location of suitable employment. Finally, we counsel him with respect to our responsibility to find employment for him if he is unable to do so, and at what time his opportunity and our responsibility merge.

An evader who has been processed by one of the 96 U.S. attorneys, after having signed his agreement to work, is advised by the U.S. attorney to report in the same way and carry out the same enrollment procedures as I have just described for the deserter.

A convicted evader or a person already discharged who might have applied to the Clemency Board for action, if he has been given a period of alternate service as a condition to a pardon, will receive the same general instructions with respect to reporting to the Selective Service System as do the other two types of returnees. He then would be subject to the same type of enrollment procedure.

After enrollment with the program, a time period of 20 days commences, during which time the returnee is encouraged to find appropriate employment for himself as close to the place he chooses to live as he can. The employment he secures must match the job criteria that I have previously cited to you. In many cases he commences to seek employment using a series of leads provided to him from the office of the State director of Selective Service.

After 20 days has elapsed, if the enrollee has not found employment for himself, or any time prior if he is requests, it is the responsibility of the System and the State Director of the State concerned to assign the individual to an available job. During the period of the initial 30 days—20 days or less in which the man seeks employment and the subsequent balance of time wherein he works jointly with the State Director of Selective Service—it is often the case that the two have been working together almost continually to effect his assignment to a suitable alternate service job.

I know that the subcommittee will be interested in our experience with the program since its inception in September, and what the impact has been upon the job availability as a consequence of the worsening situation with respect to employment in the United States. As I mentioned earlier, the first individual who sought enrollment for alternate service with a Selective Service Office did so on September 19. Since that date, which was only 3 days after the President announced his program, until December 16, 2,310 deserters have been processed by the Department of Defense. Of this number, 1,569 have reported to the Selective Service System and are enrolled in the alternate service program. During the same period of time, 131 evaders who have been referred to the Selective Service System by a U.S. attorney have been enrolled in the alternate service porgram. Also, during this same period of time, and as a result of the meetings of the Clemency Board on November 29, 1 individual from a group of 10 to whom the President indicated an intention to grant a pardon, conditioned upon completion of alternate service, has reported to the Selective Service System for enrollment and work.

Statistics of the Department of Defense show that the numbers who have been processed at Camp Atterbury and Indianapolis, and statistics of the Department of Justice indicate that the number who have availed themselves of the program in both cases exceed the numbers of people who I have indicated to you here have enrolled with the Selective Service System. The fact that our statistics differ does not indicate an error, but rather relates to the fact that an individual, after having made his agreement with the U.S. attorney in the case of an evader, or having finished his processing in Indiana in the case of a deserter, has 15 days in which to report to a Selective Service Office and enroll for the alternate service program. This 15-day period accounts in many cases for the lesser numbers of people who are enrolled as compared to the numbers which the other agencies have processed.

Of the numbers who have enrolled with the System, as of December 16, 1974, 378 deserters and evaders are now at work. In addition to the number now at work, 653 deserters and evaders are in the process of finalizing employment as a result of a specific job referral by a State Director of Selective Service. Our records, as of December 16, 1974, reveal that of the 1,878 deserters who were processed through the Joint Clemency Processing Center on or before November 15, 1974, 410 have not enrolled in the reconciliation service program.

There is one other aspect of the program, which is an estimate based upon an evaluation of facts and circumstances to date, compiled as a result of reviewing individual cases, and it is this: Of those who do enroll, it appears some will not complete their alternate service

for many reasons, such as personal inability to perform, no desire to perform, incapacity to perform, and others. It is too early for us to know precisely what this number will be; however, we have established a rather comprehensive procedure whereby we intend to document the records of those who enroll and successfully perform as well as those who fail to perform, either for reasons beyond their control or for reasons over which they have full control. Of those who have enrolled, 143 have indicated they do not want to participate.

A word about job availability, in light of the general unemployment situation in the United States since the program was announced on September 16. We are experiencing the impact of the declining job market in that the jobs which we thought might be available for people in the reconciliation service program are now more attractive jobs to other individuals who, when we established this program in September, would not have considered them as suitable. By this, I mean that the low-paying jobs which many individuals in the reconciliation service program are willing to take, in order to discharge their responsibilities, are becoming more attractive to other people who had higher paying jobs at the time we established the program. The program is now more difficult for us insofar as locating suitable jobs than it was in September. My personal view of the program is that, although it is a more difficult task for us now, we merely have to work harder to find jobs which we thought would be available when we made our calculations in September. There have been individual contacts by the members of my staff and by myself with national agencies which have indicated a willingness to cooperate. We have been able to establish a series of regional coordinations which we believe will make jobs available to out State directors. National religious, social and charitable organizations are the types of agencies to which I refer. For instance, within the past week the staff member who has day-to-day cognizance of this program for me was in New York City and worked with the national head of the Salvation Army. He at the same time made contact with the executive secretary of personnel assignments of the United Methodist Church, and has as well been in contact with, and we anticipate successful results from, the Synagogue Council of America. In addition, a number of Federal agencies are assisting in locating jobs.

The President stressed, when he recited the aims of his program last fall, that he wished for this to be a crisp program with constant followup, good supervision, and the active participation of all Federal agencies toward its successful accomplishment and for the attainment of the aims which he set out for the program. We intend to continue to pursue the placement of these people, to monitor their performance during employment, and to ensure their treatment in a dignified and reasonable fashion. We believe that we can in most instances, place the people for work within reasonable distances from the place at which they desire to live and within reasonable enough circumstances.

If the enrollee considers alternate service in the context of work whereby he is earning his reacceptance into the American society and is determined to do so, we believe we can work with him and enable him to attain the benefits which the President provides under Proclamation 4313.

In closing, I would like to say that I have endeavored to describe for you the things we do and the experience we have gained to date in

our discharge of the responsibilities which President Ford delegated under Executive Order 11804 on September 16, 1974. I think it is too early to assess the program and to make predictions with respect to its ultimate success. There could well be widely different definitions of final success or failure in this venture. I think that the program is, up to now, working well, and it appears that it should continue to work well. For my part, and speaking for the Selective Service System, I believe that we can provide the jobs required for these people, and we can oversee their work. We are grateful for the cooperation we are receiving from the employers who make jobs available to us. I see no reason why the original numbers of people who were considered as potential participants cannot be accommodated within the program.

That ends my statement, Mr. Chairman, which you have recognized already.

Senator HART. We appreciate your summation.

Even that does not spare us from another recess, because that is the second and last call for another vote. I am embarrassed to ask you to wait, because I am going to submit most of the questions I have prepared to you for answers in writing, but there is one aspect.

I will ask this, if there is no objection. Let me ask staff counsel to raise with you the matter of files that are faulty and to what extent you have and what you could do to advise individuals that they are no longer under the gun. Other than that, I will submit these questions in writing.

So when counsel has finished this one line of inquiry we will be adjourned at the call of the Chair.

I think that will spare everyone's time.

Mr. PEPITONE. Thank you, Senator Hart.

Counsel, may I ask that my full statement appear in the record?

Mr. SNYDER. Your full statement will appear in the record.

We just had a statement from the Justice Department where we are still finding cases where there is procedural errors such as they could not prosecute or Supreme Court cases intervening where they could not prosecute. I believe 213 of the first 1,400 cases that various U.S. Attorneys were going through were dismissed for those reasons.

These individuals, therefore, presumably have been either in hiding or under the threat of prosecution for substantial amounts of time unnecessarily. The question is what the Selective Service System has done to go through its files to find errors and notify registrants that they are no longer liable for prosecution?

Mr. PEPITONE. Well, the question, and I don't know whose question it is, indicates some failure to understand where the records of people who would be under investigation or prosecution might rest at any given time. Those records, of course, rest with the U.S. Attorney, the review being made of them under the direction of the U.S. Attorney General and a review five times over of all those files caused Mr. Maroney during the course of his testimony to indicate only very few had procedural error, the procedural error having eliminated the case before indictment.

As to what I might do about records, I have no records in my possession of people upon whom complaints have been made where there has not been a resolution.

Mr. SNYDER. What generally occurs if the Justice Department were to return such a file to the Selective Service System indicating that

it does not intend to prosecute or that it intends to terminate the indictment?

Mr. PEPITONE. Well, as Mr. Shulz said in his statement yesterday and in our publication the registrant processing manual of 1973, the local board sends the man a letter saying he is no longer considered a violator.

Mr. SNYDER. A letter goes out that states that?

Mr. PEPITONE. That is right.

Mr. SNYDER. In all instances?

Mr. PEPITONE. Since 1973, at least by regulatory device, and prior to that time, by other devices.

I don't think there are all these people who are so abused by lack of information as perhaps some of the people who have testified before me have caused you to believe.

For instance, when an individual who might have been charged for failure to report and the case would have been returned as not prosecutable, even before August 1973, that individual would have received another notice to report had he still been in the range of liability or he would have received another classification card should he have been a person whose classification would have been changed.

Some action has taken place.

Mr. SNYDER. That presumably would mean, or could mean, something as minimal as that he would have received, or his family has received, in the mail a card with a different classification?

Mr. PEPITONE. That is right.

Mr. SNYDER. Without any explanation that the Justice Department has returned the file and you are no longer subject to immediate prosecution.

Mr. PEPITONE. You are right.

Mr. SNYDER. Am I correct?

Mr. PEPITONE. You are absolutely right.

Mr. SNYDER. Is that still the process or has this changed since——

Mr. PEPITONE. That has been changed by the recitation which I thank Mr. Shulz for from our registrant processing manual of August, 1973.

Mr. SNYDER. The other question relating to testimony that former Selective Service Director, Curtis Tarr, gave before this subcommittee in which he stated that, and I quote:

> We found many cases awaiting indictment or trial often contain procedural errors or involve actions by the registrant that had already been set aside by the courts.

He then indicated he was setting up attorneys in each region to check the files. We haven't received any information as to what then occurred. Were all the files pending submitted to this inquiry to determine whether or not there was an intervening Supreme Court case?

Mr. PEPITONE. To the best of my knowledge there has been no more exhaustive review of Governmental paper than has taken place subsequent to the February 28, 1972, testimony of Mr. Tarr before this subcommittee. We did literally employ teams of attorneys in regions in the United States and working with the U.S. Attorneys, reviewed the files.

Now, I should not mislead you. There were some files which we did not review, and those, as I understand it, will be reviewed by Attorney General Saxbe's direction at this very moment. But from the number

of cases as we sat here last time and talked, and the numbers were in the thousands, they were reviewed extensively by the Selective Service System and the Justice Department and a combination of both Departments.

Mr. SNYDER. And the process between 1972 and the 1973 date that you mentioned earlier for those in which you found error or some reason not to go forward with the prosecution, during that time period the individual would have been notified in all cases and probably, however, simply by a change in classification of the local board sending out a new——

Mr. PEPITONE. Essentially that is true.

Mr. SNYDER. Thank you very much.

Mr. PEPITONE. Thank you very much.

[The prepared statement of Byron V. Pepitone follows:]

PREPARED STATEMENT OF BYRON V. PEPITONE, DIRECTOR OF SELECTIVE SERVICE

Mr. Chairman, in response to your letter of December 12, I have come to inform the subcommittee of the fashion in which the Selective Service System is performing the functions which have been delegated to it as an outgrowth of the Proclamation made by President Ford on September 16 which announced a program for the return of Vietnam era draft evaders and military deserters.

The subcommittee has already heard that the President's program for the return of Vietnam era draft evaders and deserters involves several agencies of the Federal Government and prescribes certain actions to be taken in implementation of the program. The actions themselves differ depending upon which type of person is involved—evader, deserter, or convicted evader or deserter.

The Department of Defense acts initially with the individuals who are classified as deserters; the Department of Justice with those who are classified as evaders; and the Clemency Board with those who have been convicted of a draft evasion offense or those who received a punitive or undesirable discharge from the armed forces because of a military absentee offense, or were serving sentences of confinement for such violations. The Selective Service System by contrast, and as a result of the provisions of Executive Order 11804, bears a responsibility for action in behalf of individuals identified under all three groups eligible for the program.

Executive Order 11804, which is entitled "Delegation of Certain Functions Vested in the President to the Director of Selective Service," is a short one. It reads as follows:

"By virtue of the authority vested in me as President of the United States, pursuant to my powers under Article II, Sections 1, 2, and 3 of the Constitution, and under Section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

Section 1. The Director of Selective Service is designated and empowered, without the approval, ratification or other action of the President, under such regulations as he may prescribe, to establish, implement and administer the program of alternate service authorized in the Proclamation announcing a program for the return of Vietnam era draft evaders and military deserters.

Section 2. Departments and agencies in the Executive Branch shall, upon the request of the Director of Selective Service, cooperate and assist in the implementation or administration of the Director's duties under this order to the extent permitted by law."

Signed by Gerald R. Ford, The White House, September 16, 1974.

The alternate service referred to in the Executive Order is that decreed by the President in Proclamation 4313 dated September 16, 1974, wherein he pointed out: ". . . that in furtherance of the national commitments to justice and mercy, these young Americans should have the chance to contribute a share to the rebuilding of peace among ourselves and with all nations. . . . and that they should be allowed the opportunity to earn return to their country, their communities and their families, upon their agreement to a period of alternate service in the national interest together with an acknowledgment of their allegiance to their country and its Constitution."

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prescribes that people who are conscientiously opposed to participation in military service will, in lieu of such induction, perform civilian work contributing to the maintenance of the national health, safety or interest as the Director of Selective Service deems appropriate. The modifications to the Selective Service law in September 1971, of which I know this subcommittee has intimate knowledge, require that the Director of Selective Service shall be responsible for finding civilian work for persons who are exempted from training and service under the Military Selective Service Act under section 6(j) and for the placement of such persons in appropriate civilian work contributing to the maintenance of the national health, safety or interest. The manner in which this program would be administered, Mr. Chairman, was the subject of considerable discussion when the Selective Service System made a presentation before thie subcommittee on February 28, 1972.

The President chose the Selective Service System to establish, implement and administer the alternate service work program because of its experience gained in the discharge of its responsibilities under section 6(j) of the Military Selective Service Act.

Actions to discharge the responsibilities delegated to the Director under Executive Order 11804 commenced immediately following the publication of the Executive Order on September 16, 1974 and have resulted in the publication of regulations for the establishment, implementation and administration of a suitable alternate service program.

On September 26, 1974, under title 2, chapter II—Selective Service System, Part 200 of the Code of Federal Regulations entitled "Reconciliation Service" appeared in the Federal Register, volume 39, number 188. These basic regulations set forth the manner in which the Selective Service System establishes, implements and administers the reconciliation work program. The regulations became effective on September 26, 1974, in order to immediately accommodate those individuals described in Proclamation 4313 who chose to avail themselves at an early date of the benefits of the President's program.

The regulations are complete in that they provide the definitions of the service to be performed; they identify the referring authority for each type of case; they prescribe the geographical area in which the returnee can expect to work and where he will commence his enrollment procedures for work with Selective Service; they delineate the levels of responsibility for the program establishing the functions of the National Headquarters of Selective Service and specifying the delegations of authority to the State Directors of Selective Service; and the type of employer who will be considered eligible to employ returnees who will be performing this alternate service. The regulations further identify the criteria for jobs for returnees and the responsibilities of the returnee and those of the State Directors for locating jobs, initial placement and reassignment from one job to another if necessary. I know that the Committee has an interest in some of the specific detail of the regulations, and I will describe them in greater detail as follows:

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After 20 days has elapsed, if the enrollee has not found employment for himself, or any time prior if he so requests, it is the responsibility of the System and the State Director of the state concerned to assign the individual to an available job. During the period of the initial 30 days—20 days or less in which the man seeks employment and the subsequent balance of time wherein he works jointly with the State Director of Selective Service—it is often the case that the two have been working together almost continually to effect his assignment to a suitable alternate service job.

I know that the subcommittee will be interested in our experience with the program since its inception in September, and what the impact has been upon the job availability as a consequence of the worsening situation with respect to employment in the United States. As I mentioned earlier, the first individual who sought for alternate service with a Selective Service office did so on September 19. Since that date, which was only three days after the President announced his program, until December 16, 2,310 deserters have been processed by the Department of Defense. Of this number, 1,569 have reported to the Selective

Service System and are enrolled in the alternate service program. During the same period of time, 131 evaders who have been referred to the Selective Service System by a U.S. Attorney have been enrolled in the alternate service program. Also, during this same period of time, and as a result of the meetings of the Clemency Board on November 29, one individual from a group of ten to whom the President indicated an intention to grant a pardon, conditioned upon completion of alternate service, has reported to the Selective Service System for enrollment and work.

Statistics of the Department of Defense show that the numbers who have been processed at Camp Atterbury and Indianapolis, and statistics of the Department of Justice indicate that the number who have availed themselves of the program in both cases exceed the numbers of people who I have indicated to you here have enrolled with the Selective Service System. The fact that our statistics differ does not indicate an error, but rather relates to the fact that an individual, after having made his agreement with the U.S. Attorney in the case of an evader, or having finished his processing in Indiana in the case of a deserter, has 15 days in which to report to a Selective Service office and enroll for the alternate service program. This 15-day period accounts in many cases for the lesser numbers of people who are enrolled as compared to the numbers which the other agencies have processed.

Of the numbers who have enrolled with the System, as of December 16, 1974, 378 deserters and evaders are now at work. In addition to the number now at work, 653 deserters and evaders are in the process of finalizing employment as a result of a specific job referral by a State Director of Selective Service. Our records, as of December 16, 1974, reveal that of the 1,878 deserters who were processed through the Joint Clemency Processing Center on or before November 15, 1974, 410 have not enrolled in the reconciliation service program.

There is one other aspect of the program, which is an estimate based upon an evaluation of facts and circumstances to date, compiled as a result of reviewing individual cases, and it is this: of those who do enroll, it appears some will not complete their alternate service for many reasons—such as personal inability to perform, no desire to perform, incapacity to perform, and others. It is too early for us to know precisely what this number will be; however, we have established a rather comprehensive procedure whereby we intend to document the records of those who enroll and successfully perform as well as those who fail to perform, either for reasons beyond their control or for reasons over which they have full control. Of those who have enrolled, 143 have indicated they do not want to participate.

A word about job availability, in light of the general unemployment situation in the United States since the program was announced on September 16. We are experiencing the impact of the declining job market in that the jobs which we thought might be available for people in the reconciliation service program are now more attractive jobs to other individuals who, when we established this program in September, would not have considered them as suitable. By this I mean that the low-paying jobs which many individuals in the reconciliation service program are willing to take, in order to discharge their responsibilities, are becoming more attractive to other people who had higher paying jobs at the time we established the program. The program is now more difficult for us insofar as locating suitable jobs than it was in September. My personal view of the program is that although it is a more difficult task for us now, we merely have to work harder to find jobs which we thought would be available when we made our calculations in September. There have been individual contacts by the members of my staff and by myself with national agencies which have indicated a willingness to cooperate. We have been able to establish a series of regional coordinations which we believe will make jobs available to our State Directors. National religious, social and charitable organizations are the types of agencies to which I refer. For instance, within the past week the staff member who has day-to-day cognizance of this program for me was in New York City and worked with the national head of the Salvation Army. He at the same time made contact with the Executive Secretary of Personnel Assignments of the United Methodist Church, and has as well been in contact with—and we anticipate successful results from—the Synagogue Council of America. In addition, a number of Federal agencies are assisting in locating jobs.

The President stressed, when he recited the aims of his program last fall, that he wished for this to be a crisp program with constant followup, good supervision, and the active participation of all Federal agencies toward it successful accomplishment and for the attainment of the aims which he set out for the program. We

intend to continue to pursue the placement of these people, to monitor their performance, during employment, and to insure their treatment in a dignified and reasonable fashion. We believe that we can in most instances place the people for work within reasonable distances from the place at which they desire to live and within reasonable enough circumstances. If the enrollee considers alternate service in the context of work whereby he is earning his reacceptance into the American society and is determined to do so, we believe we can work with him and enable him to attain the benefits which the President provides under Proclamation 4313.

In closing, I would like to say that I have endeavored to describe for you the things we do and the experience we have gained to date in our discharge of the responsibilities which President Ford delegeated under Executive Order 11804 on September 16, 1974. I think it is too early to assess the program and to make predictions with respect to its ultimate success. There could well be widely different definitions of final success or failure in this venture. I think that the program is, up to now, working well, and it appears that it should continue to work well. For my part, and speaking for the Selective Service System, I believe that we can provide the jobs required for these people, and we can oversee their work. We are grateful for the cooperation we are receiving from the employers who make jobs available to us. I see no reason why the original numbers of people who were considered as potential participants cannot be accommodated within the program.

Mr. SNYDER. The subcommittee will stand in recess.

[Whereupon, at 1:20 p.m., the subcommittee was adjourned subject to the call of the Chair.]

APPENDIX

ADDITIONAL PREPARED STATEMENTS

Prepared Statement of Jerel W. Olsen, Director, National Campus Alliance for Amnesty

United States National Student Association,
National Campus Alliance for Amnesty Program,
Washington, D.C., December 17, 1974.

This submission is made on the basis of 500 men whom I have counselled over the past four years and who would qualify for the current presidential program of "earned reentry." This counselling has occurred in my present capacity with the National Campus Alliance for Amnesty, and in prior capacities. The submission also is made from information I currently have obtained in my role as consulting Counselling Coordinator of the War Resistor Information program in Canada, an "umbrella" organization composed of already existing counselling Aide Centres there. The program to date has spoken with resisters in excess of 4,000. My submission is derived from individual contact with several hundred men who have contacted that program, but does not necessarily represent policy of the program.

This presentation of necessity must be other than comprehensive, as I understand it must be submitted tomorrow. Nevertheless, I believe it accurately reflects feelings of men whom I have counselled regarding the current "earned reentry," or "clemency," program. It is divided into two portions: the general perspective into which most expatriated resisters place "clemency;" and specific concerns which they feel—and deeply—about the program.

Clemency in Perspective

Most expatriated resisters view "clemency" as demeaning penance: many have reacted to the very concept in total outrage. Certainly more than a handful of the expatriates point to years past in which fine religious leaders and Members of Congress advocated opposition to the war in Southeast Asia. The country on the whole now is opposed to our prior direct military intervention in Indochina, as well as our continued support of the ongoing war.[1] Some men took the lead offered seriously. The question is whether or not they took it too seriously.

A clear majority of those men with whom I have spoken had—before becoming expatriates—attempted to resolve their moral/religious dilemmas through legal means. They attempted, then, to become draft avoiders like so many of the rest of us more fortunate. But through the notorious inequities of the Selective Service System and the armed forces, they were made into draft, or military, resisters, made to pay severe penalties many times over for their beliefs and political views. They ask, must we still pay? At least 80 percent of the resisters with whom the Aide Centres in Canada have spoken have made new homes in lands which have accepted their beliefs. One-third of those who have contacted the centers (and surely a higher percentage who ignore such contact) already have acquired Canadian citizenship. Under present options available to them, many more will join these men as they become eligible, so long as we persist in vindictive treatment.

The 80 percent indicated ask but one thing, often at the persistent urging of loved ones in this country: to be able to freely travel to their former homeland. They ask to be able to do so without humiliating conditions, and without condi-

[1] The Administration requested $3.78 billion for Indochina during fiscal year 1975. $3.2 billion was spent there in fiscal year 1974. Foreign aid for the rest of the world combined, by contrast, in fiscal year 1974 was $3.542 billion. The Saigon government itself claims 340,297 military dead and wounded between the "ceasefire" in January 1973 and September 1974. The Senate Subcommittee on Refugees lists an official U.S. count of 43,166 wounded and admitted to hospitals in the first year of the "ceasefire," with an estimated 90,000 wounded or dead combined during that period. Both figures appear in its 27 January 1974 report. Estimates for this year are far higher.

tions which they often cannot possibly meet, which will be referenced below.

Surely the vast majority of the expatriates will not and cannot submit to the punishment of "earned reentry." Even the Government's own statistics, which I submit are distortions in order to justify the current program, reflect the futility of "earned reentry." Purportedly there are 12,500 "deserters-at-large," 7,000 unconvicted draft resisters, 8,700 convicted draft resisters and somewhere in excess of 100,000 veterans with bad discharges, who could qualify for the present program. It will not be necessary here to show that these figures are low. Even with their use, the current option for the expatriates is a failure. Less than 2,500 military absentees have opted for the program (including 800 resisters already incarcerated given the option of "clemency" instead of long stockade terms). Somewhere in excess of 100 unconvicted have signed agreements to perform alternate service under the program. The Presidential Clemency Board to date has an even poorer record. The remaining 45 days of the offer under the proclamation cannot save the already apparent failure.

Expatriates fall into three separable categories:

1. Resisters who demand full return to citizenship (not available under "clemency," which only bestows limited rights under the proclamation and subsequent directives), as well as acknowledgment by the American people and government that their "premature" acts of belief and resistance in fact were right and proper;
2. Those who merely want nonjudgmental rights to travel or reenter the mainstream of American society (which rightly could be called amnesty); and
3. By far the smallest category of all expatriates, those who for compelling personal reasons now say "let me return, but at a price I can pay."

But even for these few who must return, albeit with penalty, the current costs often are too high. (Note again the governmental figures on returnees.) For many, as we shall see, present costs are impossible.

I submit from my experience over recent months that the majority of those who do submit to "clemency" do so without a full understanding of the penalties which in fact they receive. You will note from governmental testimony before you that only a limited proportion of the returnees ultimately reported to the Reconciliation Service administered by the Selective Service System, and far fewer actually accepted job assignments and are now working.

Many of the expatriates with whom I have spoken who subsequently accepted initially the "clemency" program anticipated, for whatever reason, true leniency. A large proportion, regardless of possible future jeopardy for noncompliance, have returned to Canada in disgust. They, unfortunately too late, have learned that options to "clemency" in fact usually are better options. They have learned that most resisters can obtain discharge, acquittal or dismissal through judicial and administrative channels without many of the strings attached to "reentry" under the presidential program.

Expatriates, both those who attempt "earned reentry" and those who do not, raise the serious questions posed below about that program.

Some Specific Questions

The following are among the problem areas which expatriates have raised concerning the current presidential proclamation regarding resisters. It in no way is comprehensive.

How long would I serve?—The proclamation calls for 24 months, which may be reduced for "mitigating" reasons. Many men would at least consider a few months, but not under possibility of 24 months alternate service. Some who have opted for "clemency" have done so under severely false impressions. Apparently there are wide discrepancies under the Justice Department from district to district. The Department of Defense determines length of service required through a Joint Alternate Service Board, which meets in private deliberations, without ever meeting the returnee or his/her representative. It appears clear the military considers opposition to the war as an aggravating factor in sentencing, rather than a positive factor. Reduction of the 24-month proviso appears to be inversely proportional to the strength of a resistor's opposition. Both for the Department of Defense and for the Department of Justice no written reasons are given for the determination of the length of service. There are no appeal provisions. (Even the arbitrary decisions of the Selective Service under its Military Selective Service Act affords appeals.) Many additional problems could be enumerated under this section.

What work would I be doing?—Again, state-to-state incongruities exist here. A provision of the proclamation requiring work "in the national health, safety and interest" is anything but clear in implementation. Skills and interests—another provision—appears to be playing a small role in actual job assignment.

Could I be reassigned even after I have located my own work?—For unclear reasons, State Directors for Selective Service, upon order from the Director, *must* change the place of employment of a returnee. . . . and without justification or appeal![2] After relocating (often with an acquired family), and while working satisfactorily at subsistence pay (see next paragraph), a returnee could be relocated without warning. Is there to be no voice in such unilateral decisionmaking?

What about pay?—Working at humiliatingly low pay, often far below what he would have been making previously during his period of resistance, an expatriate must support himself, and perhaps his new family, as best he can. Will this provision, too, vary from state to state? Even if an expatriate is prepared to accept the low pay required, this is not enough. The provision can be waived![3] Essentially, the effective compensation level is left, then, to the discretion of the Selective Service System.

What about my citizenship?—More than one-third of expatriates who have obtained the security of Canadian citizenship (see above) are specifically barred from "earned reentry," a step far from the leniency purported by the President.[4]

How about my Landed Immigrant Status?—Lengthly alternate service well may disallow the expatriate who wishes to reside in Canada but serve his time in order that he freely could travel from country to country his right for permanent residency in Canada. Today far stricter immigration practices make readmission in that status highly unlikely. Particularly for an expatriate with a Canadian wife, this is a true dilemma.

Is their a "deserter's loophole?"—Men who have reported to the military indicate they have been assured they can ignore the alternate service requirement. But even should the military be sincere in their statements concerning nonprosecution for these men, in apparent violation of the proclamation, certainly the men are still subject to civilian law, e.g. 18 U.S.C. 1001, concerning false information provided to a federal officer or agency. Recent indications suggest possible prosecution.

Can I be sure I in fact should apply?—Perhaps for some men "clemency" is the best way to "reenter" the mainstream of our society, if for whatever reason they decide they must return. But they certainly should be allowed to know their legal circumstances with certainty *prior* to making their decision. There are at least two requirements required by the Government to assure this due process. The first is that men be allowed ready access, by themselves or their representatives, to their Selective Service or military files. The Marine Corps certainly has been less than cooperative in this regard. For unconvicted draft resisters, at least two states—Minnesota and Indiana—are denying access, even to legal counsel with clear Power-of-Attorney, in violation of law.[5] The second requirement is that the Government provide fully and finally a list of all men wanted for draft/military offenses. If 90 percent of those who went into hiding after receiving delinquency notices from their Local Boards of the Selective Service System later never were even indicted (and often never informed of this fact), and if two-thirds of the resisters eventually indicted either were acquitted or had charges dismissed, then it is only reasonable and just that those still in hiding know definitively whether or not they are sought. Could not some men unknowingly be induced into two years punitive service when they are not even criminals in the eyes of our laws? When the United Church of Christ, Office of Social Action, eventually obtained a list of men, though far from final and far from accurate by our experiences to date, inquiries doubled concerning return to this society. Many who had intended to return to local prosecutors for "clemency" to sign required papers either found that they likely were not even wanted (which later can be confirmed through court records), or found that counsellors could indeed discover whether the case against them, under current case law and regulations, could be successfully prosecuted.

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[2] 2 CFR 200.5(b).
[3] 2 CFR 200.4(a)(3).
[4] This is in apparent conformity with the outrageous Immigration and Nationality Act, sec. 212(a)(22), in which any draft/military resister obtaining the security of foreign citizenship, regardless of cause or reason, during a period of presidentially declared "national emergency," may be permanently excluded from ever again returning to live in the United States. Nothing short of superseding legislation can rectify this situation, not even presently proposed "amnesty" bills. The United States has been in a declared state of "national emergency" since 1950.
[5] Cf. 32 CFR 1608.3.

What about those papers?—A number of men, many of whom felt more strongly about America and wanting to by example correct its wrongs than some people in this country, are compelled to reject signing papers which in fact suggest that they acted in an un-American fashion. Still others reject provisions requiring them to waive constitutionally guaranteed rights. In doing so, they indeed are being treated in what rightly can be called an un-American manner.

"Clemency" must, when referring to the present situation, be left in quotation marks. It is neither lenient, nor merciful. We only will have clemency when we legislate or proclaim true amnesty, one without conditions, and one applying equally to all of those—in their own ways, to be sure—who resisted and resist our outrageous and ongoing aggressive involvement in Southeast Asia. On behalf of the National Campus Alliance for Amnesty, I call upon your conscience.

PREPARED STATEMENT OF THE AMERICAN VETERANS COMMITTEE

The American Veterans Committee hailed the Amnesty Program announced by President Gerald Ford at the V.F.W. Convention this August (see attached for Text of Telegram to the President). We looked forward to a meaningful program which would effect a reconciliation and heal the nation's wounds.

From this first statement, we have urged the President to include in the amnesty program those veterans, numbering approximately 350,000, who received less-than-honorable discharges. AVC has insisted that no attempt to heal the divisions and wounds left by the Vietnam war can be just and equitable unless this group is included in an amnesty program (see attached September 5 letter to the President). We have been very disappointed that the present program does not cover the majority of these young people who tried to fulfill their military obligation, but failed.

However, we have noted that under the present program, approximately 100,000 veterans who received punitive and administrative discharges are eligible to apply to the Presidential Clemency Board. We sent the attached letter dated November 21 to the President outlining our concerns about the practices and procedures of the Board and also recommendations for revising the program. Also, AVC carefully studied the Proposed Regulations for the President's Clemency Board published in the Federal Register on November 27, 1974 and sent comments and suggestions to the Board (see attached comments, December 13, 1974).

We would particularly urge that the January 31, 1975 deadline for application to the Board be extended for at least 1 year.

We will continue our review of the Clemency Board's program and operations and will send you our comments and suggestions as appropriate.

The American Veterans Committee is an organization of Veterans of World War I, World War II, the Korean conflict and Vietnam. Its program is built around its credo that ex-servicemen are "Citizens First, Veterans Second."

[Telegram]

AUGUST 20, 1974.

Hon. GERALD R. FORD,
The White House,
Washington, D.C.

The American Veterans Committee, a national veterans organization based in Washington, D.C. applauds and strongly commends your open attitude in your recent statement on the subject of amnesty for Vietnam Veterans.

Recognizing the urgent yet complex character of the problem, but the overriding need for action to overcome the continuing breach in our society left by the Vietnam conflict, AVC has long advocated a national convocation of representatives from veterans groups, Congress, the military, religious and civic organizations to debate, reconcile and present an acceptable means of resolving this open wound in the American society.

May your courageous statement be a first step in this process of national reconciliation and healing.

ARTHUR S. FREEMAN,
Chairman, American Veterans Committee.

AVC 1974 RESOLUTION ON AMNESTY

Resolved that the American Veterans Committee suport a general conditional amnesty for all persons who refused military service during the Vietnam conflict and for all persons who were separated from service with other than honorable discharge and persons who deserted from the Armed Services during said conflict.

Further resolved, that the American Veterans Committee explore the means to achieve the intent of this resolution and recommend to the membership action programs for this purpose.

AVC 1974 RESOLUTION ON CONFERENCE ON AMNESTY

The 1974 Convention of AVC, having debated the issue of amnesty and having adopted a position, asks the National Board to conduct a national conference on the subject, involving persons with a broad range of opinions, within the coming year.

AMERICAN VETERANS COMMITTEE,
Washington, D.C., September 5, 1974.

HON. GERALD R. FORD,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: As we wrote to you on August 20th, the American Veterans Committee welcomes your initiative in seeking to bind the nation's wounds resulting from the Vietnam War by seeking ways of bringing draft evaders and deserters back into American society. At this time when you are evolving a policy regarding amnesty for these groups, we respectfully request that you also review the situation of the veterans who received less-than-honorable discharges. No attempt to heal the divisions in our society caused by the Vietnam War can be considered just and equitable if this group of approximately 350,000 veterans is left out of any program in the spirit of "amnesty."

This large group of veterans who received less-than-honorable discharges during the Vietnam War were also young and immature, confused and unhappy. They tried to serve but were unable to fulfill their obligations successfully according to the rules and regulations of the armed services. Their situation is also grievous. Even though they are living within the borders of the continental United States, they are effectively blocked from access to almost every avenue of American society because of the stigma of their discharge.

We want to see this group of young people—like the group of those who either didn't serve or deserted—brought back into the mainstream of our national life. Under the present circumstances of their discharges, they cannot get jobs, enroll in apprenticeship and training programs, get unemployment insurance or receive veterans benefits. Many of them are filling our prisons, drug abuse centers and mental institutions—and many more are likely to sink into the sludge of human waste that this nation can ill afford.

The American Veterans Committee has been representing hundreds of these veterans before the discharge review boards as they seek to have their discharges upgraded. The rate of upgrading of discharges is very low; therefore, we have found that most of those who have received these "bad" discharges are burdened with them for life. There must be another way to bring these young people back as productive citizens with a stake in our society.

We cannot accept the premise that these individuals' situations have been resolved by the military justice system. The military justice system has resolved the problems of the armed services, in getting rid of the individuals they have deemed unsuitable or unfit to carry out the military mission. The punitive actions of the armed services have posed a very serious dilemma for the larger civilian society. How to reintegrate into its ranks in a useful, productive manner those young people who failed to "make it" in the military, although they tried. They are as much the victims of the Vietnam War as the wounded and the maimed. They are another group of casualities who should be considered during this period when a program is being evolved to reconcile society and some of its "lost" youth.

We urge you to include the veterans with less-than-honorable discharges in any "amnesty" plan so that they too can make the contributions that they are capable of making—to their families, their communities and their nation.

The American Veterans Committee stands ready to assist in any way in the devising of such a program or in convening a national conference to examine and explore the complex issues involved and how best to bring justice and healing to this searing problem. Enclosed are copies of Convention resolutions on this subject.

Although we know your time is heavily burdened, we respectfully and urgently request an opportunity to present our views to you in person before you fully determine your amnesty position.

Respectfully yours,

ARTHUR S. FREEMAN,
National Chairman.

AMERICAN VETERANS COMMITTEE,
Washington, D.C., November 21, 1974.

HON. GERALD FORD,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: The American Veterans Committee hailed your "amnesty" declaration and has looked forward toward a meaningful program which would effect a reconciliation and heal the nation's wounds. In our letters to you of August 20th and September 5, we recommended that all veterans with less-than-honorable discharges be included in the amnesty program. We are disappointed that it does not deal with the majority of the less-than-honorably discharged veterans.

After thorough study and analysis of the present program and its implications, in light of the hundreds of veterans who have consulted with us, the AVC has reluctantly concluded that the program does not really benefit the 100,000 veterans with undesirable and punitive discharges whom it purports to help.

The veteran who goes through the Clemency Discharge procedure, including serving the prescribed alternate service, will not receive an honorable discharge or a discharge under honorable conditions, pursuant to which he would receive veterans benefits. Instead he would receive a "clemency discharge" which bars veterans benefits and which is widely regarded as a discharge for wartime deserters. Thus, even though the veteran's military difficulties may have been the result of personal or family reasons that had little to do with opposition to the war, the clemency discharge will probably be more, rather than less, damning to him in the eyes of a prospective employer or the public than would be his original discharge.

Second, an applicant to the Clemency Board apparently loses two important rights: a) the right to have his discharge reviewed by the proper Discharge Review Board and Board for the Correction of Military Records, and b) the right to have his case individually considered by the Veterans Administration to determine if he should receive veterans benefits.

Third, it is unclear whether clemency means "forgiveness" for the offense and related conduct. If it does not, the veteran, in future dealings with the Department of Defense and the VA, would have no assurance that he has been, in fact, forgiven for that offense and that any review or adjudication of benefits would be based solely on his prior record.

Fourth, as indicated above, the clemency discharge will not aid him if he applies to the appropriate military boards or the VA. In fact, the Boards and the VA apparently take the view that he has already received relief and only perfunctorily consider his application. VA's lack of sympathy is already evident by Administrator Roudebush's recent statement that the VA will not provide any jobs for alternative service.

Fifth, the January 31, 1975 deadline is obviously too restrictive. In view of the deficiencies and ambiguities of the program and the evident need for counseling and careful consideration of the alternatives, it is most unfair to veterans to require them to decide on whether to apply under the program in the brief period allowed by this restrictive deadline.

Sixth, the program evidently lacks the elements of due process.

We therefore request that you revise the program in at least the following ways:

1. That the program be expanded to include all veterans with less-than-honorable discharges who were discharged between or because of conduct which occurred between August 4, 1964 and March 28, 1973, inclusive.

2. That the discharge recommended by the Clemency Board (and granted by the President) be an Honorable Discharge (not distinguishable from other honorable discharges) to be issued upon honorable completion of such alternative service as the Clemency Board, purusant to the Executive Order, has prescribed for the applicant to perform to assure that the applicant's service (both military and alternative) is comparable to that of a person who had complied with Selective Service or military service requirements.

3. That the Clemency Board establish and publish for comment procedures which provide due process.

4. That the recommendations made to the Board by its staff in each veteran's case be made available to the veteran prior to the Board's decision and, if unfavorable, that the veteran be allowed to appear before the Board with a representative to present evidence and arguments. If the Board's decision is unfavorable, the veteran must be given a written statement of reasons and be allowed a reasonable time in which to apply for a rehearing.

5. That the January 31, 1975 deadline be extended for at least one year.

6. That it be made clear that the clemency program does not preclude a veteran from seeking and obtaining an upgrading of his discharge through the appropriate Discharge Review Board or the Board for the Correction of Military Records.

7. That it be made clear that the veteran who complies with the program is indeed "forgiven" for the offense and related conduct that produced the punitive or undesirable discharge.

Only with these changes do we feel that the program could be viewed as providing "clemency" and genuine relief to the hundreds of thousands of veterans who served and received less-than-honorable discharges. In view of the January 31, 1975 deadline for expiration of the program, we hope you will adopt our recommendations soon and thereby make this a meaningful program.

Sincerely,

ARTHUR S. FREEMAN,
National Chairman.

AMERICAN VETERANS COMMITTEE,
Washington, D.C., December 13, 1974.

201.5 (*b*) After last sentence in paragraph, add the following sentence "However, the Board may not consider any aggravating circumstances revealed in such files unless the applicant or/and his representative are given the right to review the files." This addition is necessary to assure that the applicant receives due process.

201.6 (*d*) Change time for consideration of initial summary from 20 days to 90 days. This additional time is crucial. Almost all if not all applicants will be represented by volunteer counsel. AVC knows from its long experience with volunteer counsel that due to other demands on their time, they need adequate time in which to prepare. The review of the initial summary prepared by the Action Attorney is the most crucial part of the preparation of the applicant's case. This is the period during which counsel must examine various records and gather evidence. Hence, 20 days is a totally inadequate amount of time for this preparation. Another important fact is that these applicants are from all parts of the country and often do not have a fixed address. Therefore, the length of time for all contacts and questioning is considerably longer than under other circumstances. AVC's long experience in representing veterans with less-than-honorable discharges convinces us of the necessity for allowing at least 90 days in which to respond to the initial summary.

201.7 (*b*) Following the phrase in line 2 "consists of the initial summary" delete "appropriate." In the third line, after "amendments and additions," add the words "submitted by the applicant and his representative."

201.8 (*c*) Delete the first two lines of this paragraph. Substitute the following language for these lines: "An applicant and his representative have the right." Change the length of time for the oral presentation to twenty (20) instead of the ten (10) minutes indicated herein.

We believe that it is an essential element of due process for the applicant to have the right to an oral presentation, and that this right should not be discretionary. Furthermore, since this oral statement may be critical in the applicant's presentation of his case, he should be given adequate time to discuss all the circumstances and background that he wishes to. Twenty minutes is a more reasonable period than ten minutes.

201.10 (*b*) Change 30 days to 60 days. This change is suggested for the same reasons cited before for a change of deadline—use of volunteer counsel, length of time required to contact and question veterans.

201.10 (*d*) In line 2, change "may" to "must". Change 15 minutes to twenty minutes. We believe that the applicant has right to a hearing during the reconsideration process as well as during the initial ajudication, if this reconsideration process is to be meaningful. Otherwise, it could only be perfunctory and would not provide a genuine vehicle for relief. Again, the time should be extended so that it is adequate and reasonable to argue the case.

201.11 Delete the last two lines of this paragraph. Substitute the following language "decision to grant executive clemency to an applicant which has been accepted by the applicant." There is no justification for revealing negative determinations to other agencies, etc. Such decisions should not be revealed as they might create prejudice against the applicant in other proceedings.

201.12 (*a*) In the fifteenth line, following "existence of a," change "violation of law" to "serious crime." This is the language used in Appendix B of 201.14 (I). Other negative information revealed during the investigation of the Clemency Board irrelevant to the scope of the inquiry should not be considered except for the existence of a serious crime.

202.2(*a*) At end of paragraph as written, put a comma instead of a period after 202.4, and add the following phrase "or by the presence of any other mitigating circumstance which the Board deems appropriate in any particular case."

202.2(*b*) Insert on second line after "circumstance" the words "listed in 202.3."

202.3(*b*) After "will take notice of" add sentence "These are the only aggravating circumstances which may be considered by the Board."

Delete Subsection (1), (5), (6) and (7). These reasons as listed are irrelevant and not proper considerations for determining the character of an individual's discharge. *Harmon* v. *Bruckner*, 355 U.S. 579 (1958). (Additionally, subsection (5) is too vague.)

Change subsection (2) to read "Proof of an intentionally false statement made by applicant to mislead the Clemency Board."

Change subsection (3) to read "Evidence of the intentional use of agressive force (not mere resistance to arrest, etc.) collaterally to AWOL, desertion, missing movement, or civilian draft evasion offense."

Change subsection (4) to read "Desertion during combat conditions."

202.4(*a*) In second line after "circumstances listed herein," insert the following clause "or by the presence of any other mitigating circumstance which the board deems appropriate in any particular case."

202.4(*b*)(*3*) Insert after physical illness "including alcoholism and drug addiction."

202.4(*b*)(*6*) Put a comma after "zone" and add "and other periods of service which may be characterized as 'under honorable conditions.' " Any tour of honorable service, whatever the location, should be recognized as a mitigating factor.

202.4(*b*) Add new subsection (11). Voluntary enlistment and/or reenlisment.

202.5(*a*) New subsection (5) should be added stating: That starting point will be further reduced by the amount of time which the applicant has served in the military.

Renumber rest of subsections accordingly.

PREPARED STATEMENT OF REVEREND RICHARD L. KILLMER, DIRECTOR, SPECIAL MINISTRIES/VIETNAM GENERATION

When President Ford first announced his intentions to "bind up the nation's wounds" the religious community responded with great enthusiasm at that time. It also expressed its concern that the program that the President had hinted he would establish could not effect the kind of healing the President had hoped for and which this country so desperately needs. Heads of various religious communities in the U.S. wrote to the President urging that a genuine amnesty be granted rather than an "earned reentry," as the best way in which this healing can be achieved. Needless to say, their advice was not heeded, and thus the need for these hearings.

We were also concerned about those individuals who might be affected by the President's program. Special Ministries/Vietnam Generation, on behalf of its supporting denominations, has been involved in a pastoral ministry to those directly affected by the war in Indochina, both resisters, veterans and their families. It was realized before the President announced his program that whatever form that program took, people underground or in exile would have questions, and have to make hard decisions about their future and there was a great need for accurate information and competent counseling for these individuals. Prior to President Ford's official announcement we made the decision to establish counseling centers in the U.S., Canada, and Europe. The establishment of these centers should in no way be interpreted as our taking a position for or against the President's earned reentry program as Mr. Goodell's testimony would seem to imply.

Our objective has been to assist those persons affected in reaching their own decisions, not be apologists for the President's program. As a result, we have been able to be fairly objective in our evaluation of the program. I am aware of no church, at a national level, that has endorsed the earned reentry program. To the contrary, the one religious organization which has met since the program's conception, the governing board of the National Council of Churches, which consists of 31 Protestant and Orthodox denominations, has adopted a statement critical of the program and calling for a genuine amnesty. I have included a copy of that statement with this one for inclusion in the Congressional Record.

I am appreciative of this opportunity to present to you the response of the religious community, and specifically the National Council of Churches, to the earned reentry program.

RESOLUTION ON AMNESTY AND EARNED REENTRY

Soon after taking office, President Gerald R. Ford announced his intention to bind up the wounds of the nation caused by the war in Southeast Asia. Many church people and other Americans applauded that goal and watched in hope for him to announce his plans for "clemency."

The President subsequently proclaimed his "Earned Reentry" program for war resisters, which requires a maximum of 2 years of alternate service for unconvicted draft resisters and deserters, the granting of a "clemency" discharge to deserters upon completion of their alternate service, and a case-by-case review of those deserters and draft resisters convicted under military or civilian law.

We deeply appreciate the courage of the President in raising the amnesty issue and for his expressed intention to further the healing of the wounds of the Vietnam War.

We believe that this "Earned Reentry" program falls far short, however, for these reasons:

1. The program offers the war resisters little more redress than was already available. The number of acquittals in draft violation cases has been high in recent years. U.S. attorneys have decided not to prosecute in others. A number of options for discharge already existed for those in military which do not require alternate service. As a consequence, few persons have used the President's plan, and few are likely to use it in the future.

2. The plan adds further ordeals to the personal suffering many have already endured: not only alternate service but a renewed oath of allegiance that many consider odious, because they believe that their acts were a valid expression of their patriotism.

3. For military offenders, the plan merely substitutes one form of other-than-honorable discharge for another: employers will probably look upon a "clemency" discharge in the same way they now look upon other-than-honorable discharges.

4. The plan allows for continued inequalities based on race, class or regional differences. Several categories of persons in legal jeopardy because of the war in Southeast Asia are especially inadequately covered by the program. These include Vietnam era veterans with other-than-honorable discharges and deserters who have been convicted or are accused of other violations. These categories contain a large number of persons from minority and low income groups and from rural and inner-city pockets of poverty, because of the disproportionate number of such persons in the armed forces during the Vietnam era.

5. Rather than contribute substantially to a healing of the wounds of the Vietnam era, the President's proposed program may instead delay for 2 years or longer the healing of these wounds.

The churches of the National Council of Churches will continue to express pastoral concern for the war resisters, as they do for the returned veterans whose needs continue to be unmet. Because of the inadequacies of the "Earned Reentry" plan, a unit of the National Council of Churches, the Special Ministries Vietnam Generation, has been impelled to develop a more extensive program of legal and pastoral counseling. This does not mean approval and support of the President's plan, but an expression of concern for the persons affected by it who have already suffered so much.

The Governing Board of the National Council of Churches calls attention to the following portions of its policy statement "The Indochina War: Healing the Divisions of the Nation" adopted by the General Board, December 2, 1972:

> "Genuine reconciliation demands that amnesty be granted to all who are in legal jeopardy because of the war in Indochia. The only exception would

be for those who have committed acts of violence against persons, and even these cases should be reviewed individually to determine if amnesty is appropriate.

Such amnesty would include:

(a) draft resisters and deserters who have exiled themselves to other countries;

(b) those currently in prison or military stockades, those on probation, those who have served their sentences, and those who are subject to prosecution for violations of the draft or military law;

(c) draft resisters and deserters who have gone underground to avoid prosecution;

(d) Vietnam era veterans with less-than-honorable discharges;

(e) those who have committed civilian acts of resistance to the war or are being prosecuted upon allegations of the same. . . . .

By granting amnesty and providing opportunities for those hurt by the war in Indochina, we would begin to repair some of the damage to our nation inflicted by that war."

For the foregoing reasons, we believe that the President's "Earned Reentry" program will not significantly lessen the nation's suffering caused by the Vietnam War. That suffering is still going on. It will continue as long as some persons are still enmeshed in the administrative machinery of the government and as long as others do not feel that they have anything worthwhile to gain from its procedures. We commit ourselves to continue to work for full and genuine amnesty and we urge both the executive and legislative branches of the U.S. Government to grant such amnesty.

Adopted by the Governing Board, National Council of the Churches of Christ in the U.S.A., October 11, 1974.

PREPARED STATEMENT OF COMMITTEE FOR A HEALING REPATRIATION

CHAMPAIGN, ILLINOIS, *December 26, 1974.*

The following assessment of President Gerald R. Ford's clemency program was part of a report presented to the annual meeting of the Board of Directors of the Committee for a Healing Repatriation (a nonprofit corporation), in Peoria, Illinois, on December 26, 1974. The report was presented by the Rev. Robert Newton Barger, president of the corporation and a Catholic campus minister at the University of Illinois at Urbana-Champaign:

In assessing President Ford's clemency program as it stands now one month before its conclusion, I would like to review the program's genesis, its strengths, its weaknesses, its alternatives and then conclude with my own recommendations.

Genesis

On August 18, 1974, an article was published in The New York Times in which I made the following comment: "Granted that the situations of Mr. Nixon and the war resisters are different though containing many parallels, for all the alienation involved on both sides perhaps we should grant an amnesty in both cases and call it a draw." The next day, August 19, 1974, with pencilled-in remarks to the V.F.W. convention, President Ford first publicly indicated his intention to give clemency to the war resisters. Then on September 8, 1974, he proclaimed a full, free and unconditional pardon for Mr. Nixon, also recommending "transition" expenses for him of $850,000. Finally, on September 16,1974, he inaugurated the "earned reentry" program for resisters who would agree to serve 24 months in the "lowest paying jobs possible." (This denouement was obviously not what I had in mind in my Times article!).

Strengths

1. The clemency program represents a first-step away from the closed-mindedness and cold-heartedness of the Nixon administration's position on this issue. President Nixon had said, early on, that he would be very generous in the granting of amnesty after the Vietnam war was over. His position later hardened to the point where he said that for him to grant amnesty would be the most immoral thing I could think of.

2. The Ford plan makes it possible for most draft evaders and deserters who are in exile, underground in the U.S. or already convicted to be more or less fully reconciled with the U.S. through a more or less predictable administrative process

rather than through the more or less risky judicial process of trial (and all the above more or lesses are important!).

Weaknesses

Unfortunately, this section will constitute the longest portion of the assessment. In fairness to the President, I should first state that I believe that he acted in good faith in regard to both his pardon of Mr. Nixon and his clemency for the war resisters. While I agree with his basic intent in both instances. I question his method of implementation. His clemency program has been a failure from a practical standpoint. From a moral standpoint it is simply a miscarriage of mercy. Mr. Ford attempted to structure a plan which would serve the requirements of both justice and mercy. But his hastily-assembled plan, with its multiple administrative branches. has not served either value very well, as I will show below.

1. The program is seriously limited by time. The deadline for submission is January 31, 1975. Offenses covered must have occurred between August 4, 1964 and March 28, 1973.

2. The program is seriously limited in coverage. Many draft evasion offenses are covered, for instance, failure to register or failure to report for induction; but some are not, for instance, destruction of one's draft card or damaging draft files. Many military offenses are covered, for instance, desertion and being AWOL; but some are not, for instance protest-leafleting and other actions that would not be criminal in a civilian context. Many bad discharges are subject to review, for instance, those issued for desertion or being AWOL; but some are not, for instance, those issued for such vague reasons as inaptitude or unsuitability.

3. The program is fraught with objectionable conditions. The equivalent of a confession is explicitly required of deserters and implicitly required of draft evaders. The participants are required to do 24-months public service work at bottom-of-the-scale wages. This period of time may be reduced for mitigating circumstances. A suit is presently pending in a District of Columbia federal district court charging that the Defense Department is significantly more restrictive in deciding how much alternative service a person must perform than are other agencies. In addition, the suit objects to the required confession, to the lack of opportunity to appear before the military clemency board, to the lack of reasonings for the board's decisions, to the lack of appeal possibilities and to the lack of published rules and standards of conduct for the board.

4. Participants in the program are required to waive their constitutional rights to due process of law, to a speedy trial, to guarantee against double jeopardy and to guarantee against self-incrimination. It is only surprising that they are not also required to waive their guarantee against involuntary servitude, since the 13th Amendment to the Constitution states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

5. The response to the clemency program thus far has been underwhelming. Even according to the Government's figures, at least 126,500 persons are eligible for the program, but with one month remaining till its expiration only 3,200 have come forward. The breakdown is as follows: The Presidential Clemency Board has about 8,700 convicted draft evaders eligible for clemency hearings; so far, only about 220 have applied. Only about 550 of the conservatively estimated 110,000 veterans with bad discharges have applied to the board. There are 12,500 deserters eligible for clemency through the Defense Department. So far, 2,283 have applied. The Justice Department still has 6,300 cases open against draft evaders, although it is reviewing them and may throw some more out. Still, only 147 draft evaders have applied through the Justice Department for clemency. Testimony at last weeks Senate hearings before Senator Edward M. Kennedy's Subcommittee on Administrative Practice and Procedure (held in Washington on December 18 and 19, 1974) revealed that there are some 40,000 to 70,000 young men who are in limbo, suspecting they are in violation of draft law but not knowing of their innocence because of illegal practices in their regard by the Selective Service System. I mentioned earlier that the estimate of 126,500 people eligible for clemency was a government estimate. However, some 2,000,000 persons may never have registered for the draft (a Federal offense) and so may not be presently known to the government or included in its figures, but they are still subject to prosecution until their 31st birthday under the present statute of limitations. Additionally, there are 500,000 people with war-related bad discharges, but only one-fifth of them are eligible for clemency under the Ford

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program. Then, of course, there are the legal draft evaders and deserters who have no need of clemency: the more articulate in petitioning their boards, those rich enough to go to college, those with a high draft number, those with medical discharges, etc.

6. There is a lack of even-handedness in assignment of alternative service. As mentioned earlier, the guidelines for mitigating circumstances are different for each of the three clemency agencies (Justice Department, Defense Department, and Presidential Clemency Board). In the Justice Department the local U.S. district attorney fixes the length of service. At the senate hearings last week it was alleged that the New York and San Francisco district attorneys were imposing nothing less than the maximum 24 months of service, regardless of the circumstances. Senator Philip A. Hart said after reviewing the Justice Department guidelines: hardship and ignorance seem to be the only way to get less than 24 months. Deserters have loopholes to receive an undesirable discharge outside the clemency program or work through it but not perform the alternative service. Draft evaders have no such loopholes and remain subject to prosecution until completion of their assigned service. Even if deserters complete their alternative service and have their undesirable discharge upgraded to a clemency discharge, it may not be of much worth to them. It may carry with it a stigma as far as employers are concerned, it will certainly not make the person eligible for veterans' benefits and it may not be subject to a real upgrading.

Alternatives

1. *Judicial possibilities.*—Because of illegal procedures on the part of the Selective Service System, many evaders would be better off going through the courts. About 90 percent of those people referred by Selective Service for prosecution during the war were never indicted because of Selective Service errors. Of those who were indicted, almost two-thirds had their indictments dismissed or were acquitted. Last year, for instance, only a third of those prosecuted for draft violations were convicted and their average sentence was only 14.4 months before parole. In 1960 it was 37.3 months. Trial may be in a sense more risky, but at least it assures the person of due process. The A.C.L.U. has stated: "Most of those who fall under the provisions of the "clemency" have better legal options outside the program than within it." I agree.

2. *Legislative possibilities.*—Professor Harrop A. Freeman of Cornell University Law School has testified before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice (March 11, 1974): "It can be fairly readily ascertained that the power to pardon is only in the President. . . . It is submitted that the power of anmesty belongs only to the United States Congress." Congressman Robert W. Kasternmeier, chairman of the abovementioned House subcommittee, has indicated to me (in a letter of October 31, 1974) that he intends to hold hearings early in 1975 on the clemency program. Perhaps out of the recent Kennedy hearings, and the upcoming Kastenmeier hearings, will come the basis for a real amnesty through its proper executor, the Congress.

Recommendations

As I said last March in testimony before the House Judiciary subcommittee, grace cannot be conditional, forgetting cannot be partial and mercy cannot be strained. The only kind of clemency that can achieve the kind of healing repartriation that we all seek is a nonjudgmental and nonpunitive one, one that neither exonerates nor condemns. The only kind of clemency that meets these specifications is a universal and unconditional amnesty. Most people think that there has been an amnesty and that the problem is now solved. Such is not the case. I suggest that we not let the country—or the Congress—forget what amnesty really means.

CLEMENCY/AMNESTY LAW COORDINATING OFFICE,
Washington, D.C., November 25, 1974.

THE PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: The purpose of this letter, which is written on behalf of the Clemency/Amnesty Law Coordinating Office ("CALCO"), is to relate to you our views, recent experience, and deep concern with respect to the various clemency programs announced on September 16, 1974.

CALCO is an ad hoc group of concerned individuals which was formed shortly after your September 16 announcements. Individuals with the following organizational[1] affiliations sit on CALCO's Steering Committee: American Civil Liberties Union Foundation; Central Committee for Conscientious Objectors; Clemency Information Center of the National Council of Churches; Friends Committee on National Legislation; Lawyers Committee for Civil Rights Under Law; National Interreligious Service Board for Conscientious Objectors; National Legal Aid and Defender Association; Public Law Education Institute; United Church of Christ, Center for Social Action; Washington Council of Lawyers.

CALCO's purpose has been to coordinate the effort to provide legal counsel and representation to individuals who are eligible for one or more of the clemency programs.

To accomplish this purpose, money has been raised from several sources; an office with full-time help and a toll-free telephone number have been set up; an initial, limited solicitation of the private bar was made and a pool of volunteer lawyers has been established; a tentative program of educating the volunteer attorneys by publishing legal materials and conducting seminars has been undertaken; and numerous meetings with officials responsible for administering the clemency programs have been held. In short, CALCO has quickly responded to your clemency programs by attempting to establish the mechanism by which eligible individuals could be assured of adequate legal counseling and representation.

However, as time has passed and experience has been gained in counseling eligible individuals, it has become clear that there are certain fundamental flaws and shortcomings in the programs which are thwarting our efforts to provide effective counsel and representation. As a result, CALCO has decided to withdraw publicly our cooperation from the clemency programs. We will set forth in the remainder of this letter the specific defects in the programs which have compelled us to take this drastic action.

1. THE PRESIDENTIAL CLEMENCY BOARD

Representatives of CALCO have met on a number of occasions with representatives of the Clemency Board in order to arrive at some mutually satisfactory arrangement for the orderly, fair, and responsible processing of cases in a manner consistent with your avowed goal of national reconciliation. After careful analysis, we have decided that there are five minimum requirements which must be satisfied in order to make the activities of the Board meaningful:

(1) civilian and military applicants must be granted full and unconditional pardons for convictions related to war resistance;

(2) the discharge offered to deserters who "earn reentry" by fulfilling their alternate service requirement must be an Honorable Discharge instead of a "clemency discharge" which is in many respects the worst discharge any veteran could have;[2]

(3) opposition to the Vietnam war must be considered as a formal criterion for mitigation with respect to the length of alternate service;

(4) the standards applied by the Board in processing cases must be published and the Board must give a written statement of reasons explaining the disposition of each case; and

(5) the procedures of the Board must be published and conform to accepted standards of due process—including the right of the applicant or his representative to appear before the Board.

All of these points have been discussed with the General Counsel (and other staff members) of the Clemency Board. Not a single one of these suggestions has been accepted or acted upon. While we understand that some procedures may finally be published this week (after many cases have already been decided) and that a handful of pardons will be meted out in the near future, we view these

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[1] Several of these organizations are committed to the achievement of a universal and unconditional amnesty for all those who came into conflict with the law because of opposition to the Vietnam war. These groups, and a great many others in our country, were and are dissatisfied with the assumptions and conception of the clemency programs established on September 16. However, without yielding in their advocacy of what they believe to be in the best interest of American society, they are nonetheless assisting CALCO in its efforts so that the interests of the war resisters might be furthered where possible by the process of furnishing legal counsel and representation to those war resisters who might wish to examine their options within the clemency programs.

The views set forth in this letter are those of CALCO and do not necessarily reflect the policy of any other organization.

[2] There is no justification for requiring an applicant to sacrifice up to two years of his life in alternate service in order to procure a "clemency discharge." In addition to branding the holder a "war time traitor or coward" in the eyes of many, the clemency discharge, unlike other types of less than honorable discharges, may preclude any future chance of upgrading by the Discharge Review Board.

responses to be belated and of minimal importance in view of the grave defects which continue to go unremedied.

Our decision to withdraw cooperation from the clemency programs has not been reached easily. However, in view of the unwillingness or inability of the Board to respond satisfactorily to the five points discussed above, we are compelled to the conclusion that we cannot responsibly coordinate efforts to represent clients when neither the procedures nor remedies are known in advance of the ex parte decision by the Clemency Board. We refuse to grace what is basically a "role of the dice" with the appearance of legal process. In short, CALCO declines to play a role in fostering an unsound, unstructured, and unfair system which denies the most basic elements of due process.

Although our involvement has centered on the Clemency Board, we have, by necessity, also dealth with those portions of the clemency programs administered by the Department of Justice, the Department of Defense and the Selective Service. With respect to all these agencies, we have encountered practices and deficiencies which, in our view, contradict your announced objective of achieving national reconciliation and which preclude effective counseling and representation of many individuals eligible for one or more of the programs.

2. THE DEPARTMENT OF JUSTICE

In attempting to work with the Department of Justice we have found one inexplicable and insurmountable obstacle: the prosecutive guidlines issued to all U.S. Attorneys instructing them to use the clemency programs to elicit admissions on which to base prosecutions of men who, before September 16, were not the subject of investigation or indictment. In addition to posing a clear violation of the constitutional right against self-incrimination, this policy is at direct odds with your stated goals of reconciliation and putting the war behind America. It also signals to those who looked upon your proclamation as a magnanimous and open offer, that they cannot trust the Department of Justice to carry out your commitment. To those of us with the responsibility of providing legal representation under the program, it has another consequence—so long as this prosecutive directive stands, it is impossible to compile a complete and accurate list of those eligible for clemency under your programs. Without such a list, the status of literally thousands of potential returnees is not clear, and it becomes extremely difficult to induce or advise their return.[3] It is this uncertainty more than anything else that has kept men at bay who might otherwise be entitled to resume normal lives, either under your programs, or free of an unfounded fear of criminal liability.

The Attorney General has recently taken the commendable step of directing a critical review of every outstanding draft file. This process should result in a revised roster of those eligible for the programs by reason of being presently under investigation or indictment. It is nonetheless our opinion that this action will be insufficient to restore confidence in the program unless the Department of Justice now completes and closes the list of those eligible by expressly withdrawing its instruction to prosecute Vietnam-era draft violators who have not at this point been brought under investigation or indictment. If this is not done, it is probable that fewer than 15 percent of those eligible for the Department of Justice's program will enter it before January 31, 1975, leaving thousands subject to prosecution after that date. We cannot believe that you can wish or accept this result.

3. DEPARTMENT OF DEFENSE

Problems with the clemency program administered by the Department of Defense have arisen from two separate sources: first, on the "loyalty oath" required of unconvicted military applicants; and second, on the composition and procedures of the Joint Alternate Service Board.

The "reaffirmation of allegiance and pledge to do alternate service" that unconvicted military applicants must sign is deeply offensive to the sensibilities of the war resisters. The pledge requires a "reaffirmation of allegiance" from persons who have not and cannot be charged with disloyalty to their country, but rather—at the worst—with a different interpretation of what allegiance and loyalty demanded in the context of the Vietnam war. The pledge requires that they affirm their willingness to support, protect, and defend the Constitution of the United States, even though some of them may be conscientious objectors who will find the oath "to protect" violative of their deeply held moral and religious beliefs. Worst of all, the pledge requires an admission that the applicant's

[3] CALCO requested such a list and related documents from the Department of Justice under the provisions of the Freedom of Information Act of November 4, 1974. No response has been received as of this date.

"obligations as a citizen remain unfulfilled," while most of these individuals believed, at great risk and pain to themselves, that their obligation as citizens was to refuse to participate in what they believed to be an immoral and unlawful war. The pledge, in other words, forces many of these young men to lie to the government if they expect to participate in this clemency program.

The military Joint Alternate Service Board ("JASB") at Fort Benjamin Harrison is composed of four career field-grade officers, each representing one of the military services. Their sympathies are predictably not engaged by the concerns of deserters and war resisters. There is no enlisted person on the Board, nor is there nonmilitary participation in its deliberations. The proceedings of the JASB suffer many of the same defects outlined earlier with respect to the Clemency Board. For example, neither the applicant nor his counsel is given the right to appear before the Board. Similarly, the JASB gives no accounting of the reasons for its particular disposition of individual cases with respect to the length of alternate service imposed.

The Department of Defense has acknowledged publicly that the pledge to do "alternate service" by persons processed by the JASB is probably unenforceable, except in those rare instances where it might be possible to show fraudulent intent not to do the alternate service at the time the pledge was signed. Nevertheless, this threat of prosecution keeps people away from the clemency programs, and impels applicants to make a record of "good faith" intent to fulfill their pledge. In other words, the present system contains an open incentive for applicants to lie to the government.

4. SELECTIVE SERVICE

The aspect of the clemency program designated "Reconciliation Service," which is administered by the Selective Service System, is defective in several major respects. First, it is conducted by the Director of Selective Service under terms of a Presidential delegation of power by which you formally renounce any continuing authority over the alternate service program. This unusual abdication of influence is unwise in our judgment because the clemency program is conducted on behalf of the President and should reflect his oversight. This is especially the case because Selective Service, whatever its technical ability, has earned justifiable criticism in the past for arbitrary and inequitable practices in managing the Vietnam-era alternate service program. As evidence that this problem continues, it now appears that Selective Service is following standards regarding acceptable work assignments which have previously been held invalid by the Federal courts.

Another action by Selective Service which we consider to be particularly misguided is the failure to promulgate for public comment the regulations establishing the Reconciliation Service. This practice of barring the interested public from the rule making process has been a prime source of difficulty for Selective Service in the past. It conflicts with the express policy and terms of the draft statute, the Administrative Procedure Act and the Federal Register Act. By failing to permit comment on these regulations, Selective Service has rekindled doubts about its adequacy to the task of reconciliation, denied itself the benefit of constructive criticism, and increased the likelihood that the Reconciliation Service scheme will be successfully challenged in court on the grounds that it was invalidly promulgated.

The fact that only a miniscule percentage of the eligible individuals have so far applied under the clemency programs dramatically affirms the unsatisfactory and unacceptable nature of these programs. Without an immediate restructuring of the programs, your goals of reconciliation and healing will be completely frustrated. Furthermore, the present programs will be remembered as the greatest failure of any such clemency program in the history of this country.

CALCO has decided to take the drastic step of withdrawing our offer to coordinate the provision of legal counsel and representation before the Clemency Board, only after doing our very best to make these programs work in a fair, equitable and meaningful manner. By so withdrawing, we recognize that those programs are likely to be administered in an even more chaotic and unsatisfactory manner—if that is possible—than they have been administered to date. Nevertheless, faced with the grievous defects outlined in this letter, CALCO has no other responsible alternative. We do, however, stand willing to renew our offer of full cooperation and assistance in putting the bitterness and divisiveness caused by the Vietnam war behind America, if the flaws discussed in this letter are satisfactorily remedied.

Sincerely yours,

STUART J. LAND,
Chairperson, CALCO Steering Committee.

FINAL

AMNESTY:

A Position Paper

Prepared for the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York by the Committee's Task Force on Amnesty

David N. Brainin
Thomas M. Comerford
Joan E. Goldberg
Kenneth H. Hirsch
Peter Weiss, Chairman

INTRODUCTORY NOTE

The Committee gratefully acknowledges the major contribution made by John Kernodle, a second-year law student, in the preparation of this report. Three sources consulted in the course of the preparation deserve special mention. One was the unpublished background paper on amnesty prepared for the Committee on Federal Legislation of the Association of the Bar of the City of New York by a subcommittee consisting of Charles L. Knapp, chairman; Peter Fleming; Bruce Rabb; and Brenda Soloff. The other two were papers prepared as part of this effort for the Committee on Military Justice and Military Affairs under the supervision of Gregory Pressman of the Council of New York Law Associates. The two were incorporated in condensed form in this position paper. One was "History of Amnesty" by Alfred Litman, and the other was "Amnesty: A Blanket Amnesty or an Amnesty Review Board" by Alan B. Katz.

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The unresolved question of amnesty for Americans who violated the law in the course of their refusal to participate in the war in Viet Nam is one of the most troublesome legacies of that war. As a direct or indirect consequence of their opposition to the war, tens of thousands of Americans are living under the ever-present cloud of a less than honorable discharge, a criminal record, self-enforced exile, or the threat of criminal prosecution.

Amnesty is an emotionally laden issue. Feelings on all sides of the question run deep. It is the responsibility of those dedicated to the rule of law to undertake a dispassionate examination of the issues involved and to give perspective to the larger public debate.

The Meaning and Tradition of Amnesty

Amnesty is an old and hallowed legal concept. The word is derived from the Greek term "amnestia," meaning oblivion, forgetfulness, or an intentional overlooking.[1] It comes from the same root as the word "amnesia."

Amnesty is an act of the legal sovereign voluntarily extinguishing certain criminal acts against the state, and it almost always involves political offenses.[2] Amnesty refers to the remission of punishment with respect to a named class of offenders, without regard to their personal identities or individual circumstances.[3]

The first recorded act of amnesty appears to have been performed by the Athenian, Thrasybulus, in 403 B.C. After

expulsion of the Tyrants from Athens, Thrasybulus forbade any punishment of citizens for their past political acts and exacted an oath of amnesty to eliminate civil strife from legal memory.[4] In Biblical times, a form of amnesty occurred every seventh year. Old grudges were forgotten as part of a cyclical celebration.[5] And, in the days of the Roman Empire, numerous amnesties were granted to political and military opponents.[6]

In more recent times, many countries have seen fit to grant amnesties as means of reconciliation. France, Italy, Belgium, and Canada were among the states granting amnesty to political prisoners after World War I.[7] With the end of World War II, Belgium, France, Norway, Germany, Japan, the Netherlands, Bulgaria, Greece, India, Italy, the U.S.S.R., and Yugoslavia were among the nations that granted amnesties.[8]

During the occupation period following World War II, General Lucius Clay proclaimed amnesty for more than one million German political offenders, and General Douglas MacArthur similarly granted amnesty to almost a million political prisoners in Japan.[9]

More recently, the French, after resolution of the Algerian conflict, granted amnesty to most of those who had illegally resisted the government's policy.[10]

Amnesty and United States History

The United States stands within this tradition of nation states that have granted amnesty. Although the word amnesty is not used in the United States Constitution, that document does give the President power "to grant reprieves and pardons for offenses against the United States,

except in cases of impeachment."[11] From George Washington to Harry S. Truman, this authority has been used to grant amnesty--the words "pardon" and "amnesty" often being used together or interchangeably, although technically pardon refers to individual rather than collective grants of reprieve.[12]

During the Civil War period (1862-1869) Congress, as well as the President, participated in granting amnesties. Legislation was passed authorizing amnesties and then later, during the administration of Andrew Johnson, repealed.[13] The Supreme Court held that the President's authority to grant amnesty rested in Article II Section 2 of the Constitution and, therefore, could not be withheld by the Congress.[14]

It is currently the position of the Office of the Attorney General of the United States that the power to grant amnesties belongs exclusively to the President.[15] While the scope of Congress' pardoning power is less clear than that of the President's, two United States Supreme Court cases appear to confer an amnesty power upon the Congress.

In 1893, Congress enacted an amnesty that granted immunity from prosecution to all witnesses testifying before the Interstate Commerce Commission.[16] In Brown v. Walker,[17] the Supreme Court held that this act did have the full effect of an amnesty. The Court stated that although the Constitution vests the pardoning power in the President; "this power has never been held to take from the Congress the power to pass acts of general amnesty."

In addition, the Supreme Court has upheld, in The Laura,[18] the remission of a fine by the Secretary of the

Treasury pursuant to Congressional authorization. The Court held that the President's power to pardon offenses and remit penalties was not exclusive and that Congress had frequently, and properly, authorized subordinate officials to remit fines and penalties. "Since the remission of a fine is nearly equivalent to a pardon, if Congress can delegate government officials the power to remit fines, it seems to follow that Congress itself has the power to grant pardons."[19]

Amnesties granted in the United States have varied from broad, sweeping ones such as those after the Civil War to narrow, restrictive ones such as Calvin Coolidge's restoration of citizenship to some 100 men who deserted after the Armistice had been signed but before the fighting on the front had ceased in World War I. Most American amnesties have been conditional ones, with the conditions ranging from oaths of allegiance for participants in the Whiskey Rebellion of 1794 to return to active duty for deserters during the War of 1812. A summary of the dates and terms of United States amnesties is included as an appendix to this report. (Appendix A)

The Arguments For and Against Amnesty

Amnesty is now being urged for those who incurred or who remain in jeopardy of incurring criminal penalties or less than honorable military discharges because of their deep-seated, often morally based, opposition to the United States war effort in Indochina. During the decade of overt American military involvement, an increasingly large number of Americans came to oppose the role of the United States in Indochina. For thousands of young persons, especially

draft-age men, this opposition placed them in an extremely difficult position. They were called to serve in the military and fight, kill, and risk death in a war that they believed to be wrong. Often they were left with no alternative but to disobey the law or to disobey their own consciences. Some young Americans served honorably in the military, most were never called to serve, and some felt that they had no honorable alternative but to refuse to serve. This last category--those who, in conscience, refused--includes those at whom an amnesty is primarily directed. This includes persons who in conscience refuse to participate in all wars and also those who in conscience refused to be a part of this particular military effort (a position sometimes referred to as selective conscientious objection). It also includes both those with clearly articulated explanations of their positions and those who, although less skillful in expressing themselves, also came to deeply oppose participation in the war through their personal experiences with the Selective Service System or the military.

Pressure for granting amnesty to them has come from American religious bodies,[20] peace and civil liberties organizations,[21] members of Congress,[22] and former government officials who served in the Johnson and Nixon administrations during the war years.[23] Their arguments for amnesty, while diverse, contain several important common threads: the war caused great divisions among the American people, it is in the national interest to attempt to heal these divisions, and the nation has a special responsibility to the casualties of the war (to disabled veterans; to families of those who died; to the Indochinese who have suffered for so long; and

to the opponents of the war who remain in exile, carry prison records or less than honorable discharges with them, or face the risk of potential prosecution). Amnesty is, therefore, seen by its proponents as a necessary part of the whole process of reconciliation that is necessary after particularly divisive national conflicts, such as the United States war effort in Indochina.

The press for amnesty has met with strong resistance from established veterans' groups,[24] the Department of Defense, members of Congress,[25] and national government officials including President Nixon and former Vice President Agnew.[26]

The position of those opposed to amnesty is summed up in the remarks of President Nixon at a news conference in late 1972:

> Those who served paid their price. Those who deserted must pay their price, and the price is not a junket in the Peace Corps, or something like that, as some have suggested. The price is a criminal penalty for disobeying the laws of the United States. If they want to return to the United States, they must pay the penalty.[27]

Amnesty opponents are firm in their position that amnesty should not be granted because one must obey the law and, if one does not, then one should expect no relief from its sanctions at some later time. Those against amnesty assert that this is especially true in such a sensitive and important area as national defense.[28]

Curtis W. Tarr, former director of the Selective Service System, testified during the 1972 Senate hearings on amnesty that a grant of amnesty would place a major burden on any present or future draft. "If amnesty made possible the

return to the full rights of citizenship without any penalty," Tarr testified, "then it would be difficult to justify the continuation of inductions. Our youth could not understand such opposing policies."[29]

A similar threat to the military itself is seen by Major General Leo Benade, who represented the Department of Defense at the Senate hearings. He opposed amnesty for deserters, saying "the deserter's absence has a direct impact on the Armed Forces, and under certain circumstances such as combat, perhaps a critical impact....The deserter by his absence not only avoids his military obligations, he also violates the oath he took upon entry into military service, and he violates military law."[30]

These concerns about the impact of amnesty upon the raising and maintaining of the armed forces of the country, are coupled by most amnesty opponents with a concern for affording proper respect to those who served and to their families and loved ones. Presenting the position of the American Legion at the Senate hearings, John H. Geiger, then national commander of the legion, asked:

> "How can amnesty be explained to parents, wives, children--all those who have lost a son, a husband, or a father in their country's service? How can we excuse ourselves to the prisoners of war, the missing in action, or to their suffering families for offering amnesty? Futhermore, what would be the effect on the morale of our armed forces if amnesty were granted to those who have violated the law and their oath of service by turning their backs and fleeing their country? In our opinion, it could only badly undermine that morale and cheapen the value of honorable service to one's country--at the very moment these values are most in need of strengthening.[31]

Besides, amnesty opponents assert, justice can be done without a grant of amnesty since the courts, the military, and the governmental agencies involved can be

trusted to exercise considerable discretion in reviewing each case as it comes up, including requests for pardons by those who have already served prison sentences. "Americans are not a cruel or vindictive people," according to Representative John P. Murtha (R-Pa.), a Viet Nam veteran who opposes amnesty. "If the draft evaders and deserters turn themselves in for trial, they will find no eye-for-an-eye vengeance being inflicted upon them. They will find instead a system of justice that emphasizes, whenever it can, clemency."[32]

Amnesty opponents also note that no reprieve in the past, with the possible exception of the ones after the Civil War, has been as sweeping as the one now proposed.[33] It is impossible to assess, therefore, what the extent of the impact from such an action would be, and, amnesty opponents conclude, it would be unwise to take such a risk.

The anti-amnesty position raises serious questions about the consequences of a grant of amnesty both because of the importance of the issues raised and because these views are so deeply held by a significant number of Americans.

In response, those favoring amnesty note that both in this country and elsewhere grants of amnesty have not, by themselves, proven to be major obstacles to military preparedness nor to a nation's ability to raise or maintain a disciplined standing army.[34] Amnesty proponents also assert that an amnesty now should be only one part of a larger response to all of those whose lives have been affected by the U.S. war effort in Indochina.[35] Significantly, a number of Viet Nam veterans and gold star mothers have adopted this position.[36]

They have spoken out in favor of amnesty, insisting that their own suffering will not be lessened by forcing others to continue to suffer as well.

Amnesty proponents are firm in asserting that normal military and civilian justice procedures are insufficient to provide relief to those who would be covered by a grant of amnesty. They cite the uneven treatment that deserters who have returned have received,[37] and the widely documented inequities of the Selective Service System.[38]

In response to the concern being voiced over the size and scope of a Viet Nam-era amnesty, proponents note that each grant of amnesty must be designed to meet the needs of the specific situation to which it is a response. They further note that the Civil War was followed by the most comprehensive acts of amnesty in United States history, ending eventually with a universal and unconditional amnesty for all rebels except the most senior members of the Confederate government and military command. The dissension which has swirled around the United States war effort in Indochina, amnesty proponents assert, was also particularly deep-seated, probably the most intense ever generated by American military action abroad. Surely, they conclude, it was intense enough to justify a broad amnesty.[39]

The central anti-amnesty argument, that based on the rule of law, is challenged by the serious and persistent questions about the legality of the Viet Nam war and of its conduct that have been raised, to an extent not applicable to any previous amnesty situations in United States history.[40] Further, amnesty is itself a legal act sanctioned by centuries

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of legal tradition. It is an example of the magnanimity of which the law is capable.[41]

Legislative Proposals for Amnesty

As part of the controversy over amnesty a number of bills and resolutions have been introduced in the Congress and others are currently in preparation.[42] All of those which have been introduced are presently in committee. (For a listing of all of the bills and resolutions, along with the names of those sponsoring them and a brief description of the provisions of each, see Appendix B.)

In the House of Representatives, where the bulk of the proposals have originated, hearings were held in March, 1974, by the House Committee on the Judiciary's Subcommittee on Courts, Civil Liberties, and the Administration of Justice.[43] Because the full Judiciary Committee is now devoting its time to the consideration of the impeachment of the President of the United States, the subcommittee's report on amnesty has been postponed until after the committee finishes its consideration of the impeachment issue.

Only one amnesty measure is currently before the United States Senate. Although Senate hearings on a similar measure were held in 1972 by the Senate Committee on the Judiciary's Subcommittee on Administrative Practice and Procedure, no Senate hearings have been held during the current session of the Congress.[44]

The bills and resolutions that have been submitted fall into three categories. One set of bills provides for a general and unconditional amnesty.[45] Several other bills provide for

various forms of conditional and less-inclusive amnesty.[46] Resolutions introduced by three Representatives oppose amnesty altogether, expressing the sense of Congress that no amnesty, reprieve, or pardon should be granted to draft refusers and deserters.[47]

All of the legislation that has been proposed favoring amnesty, wheter broad or narrow in scope, has had to address two questions: (1) who should be included, and (2) what kind of amnesty should be granted?

Who Should Be Included?

The following groups would be covered by one or more of the bills currently pending in the Congress.

--Draft Refusers and Violators. According to the Selective Service System, 7,933 men have been convicted by the federal courts of draft violations during the Viet Nam era.[48] Department of Justice figures indicate that there are also 8,893 men who are currently deemed liable for prosecution.[49] The Selective Service System has referred to the Justice Department the cases of over 30,000 additional men that it lists as draft violators. In addition, the Selective Service System acknowledges that thousands never registered for the draft and, therefore, have no present record of delinquency, but would be subject to prosecution if their violations come to the government's attention. Further, there are an unknown number of individuals whose files lie unexamined in local draft board offices and who would be found in violation of the draft law if their files were reviewed. These violations range from conscious acts designed to avoid induction to technical violations such

as failure to inform the board of a change of address.[50]

--Deserters. According to the Department of Defense, there are some 30,000 deserters "at large."[51] They are either in exile abroad or they live underground in the United States. It has been the experience of groups offering counseling services to deserters that many of those who have fled the military did not have the benefits of an advanced education nor of much reading and discussion about the merits of the war in Indochina prior to their period of military service. It was not until after they were in the military that they found they could not participate in the war effort. Some saw active and honorable front-line service in Viet Nam only to begin, at a later stage, to question the war and their involvement in it.[52]

It should be noted that absence without leave does not become desertion unless certain other elements are present, such as intent to remain away permanently or intent to avoid hazardous duty or to shirk important service.[53] It is highly unlikely that any Viet Nam-era member of the armed forces absent without leave from his unit and living in exile or underground would not be subject if apprehended to a charge of desertion.

--Exiles. Unlike other categories of amnesty recipients, this one is by its very nature numerically hard to identify. It contains both draft refusers and deserters who are living abroad. General estimates of their numbers vary widely. After a detailed study of the statistics compiled by U.S. government agencies, other governments, religious groups working with exiles and their families, and the exiles

themselves, the American Civil Liberties Union Foundation's Project on Amnesty estimates that there are currently 30,000 to 40,000 resisters and deserters in exile (most of them in Canada, with a few hundred living in Sweden, England, France, and elsewhere).[54]

--Persons with Court-Martial Convictions. Almost 550,000 men and women were convicted by military courts of offenses that would not be crimes in a civilian context: over half of them for absence without leave, about one-tenth for disobedience, others for conduct bringing discredit upon the armed forces, and the like. The proportion of minority-group GI's and GI's from poorer and less educated segments of American society who were court martialed was especially high.[55]

--Persons with Other Than Honorable Discharges. Approximately 450,000 Viet Nam-era veterans have other than honorable discharges. Such discharges were given either "administratively"--"general" and "undesirable" discharges--or as the result of court martials--"bad conduct" and "dishonorable" discharges. In numbers greatly disproportionate to their presence in the general military population, men and women from minority communities and from the less well-educated and poorer segments of society received less than honorable discharges.[56]

--Civilian Protesters and Resisters. During the years of the war in Indochina, hundreds of thousands of Americans protested the war in demonstrations and other acts of resistance. Thousands were arrested on charges ranging from the minor, such as disturbance of the peace, to the serious, such as conspiracy and violation of the espionage acts.[57]

Once these categories have been identified, the task remains of considering whether all, some, or none should be included in a grant of amnesty. There are strong arguments for including each of these groups, with three of them--draft refusers and violators, deserters, and exiles--being closely interrelated.

Men who committed violations of the draft laws are included in all of the amnesty proposals currently before the Congress. Acts of conscience against the requirements of the Selective Service System were among the earliest expressions of opposition to the Viet Nam war.[58] With the shift to a "volunteer army" came the acknowledgement that the draft had been an inequitable, inflexible, and unjust means of military recruitment.[59] Throughout the 1960's, local draft boards re-classified registrants as a punitive measure for acts of protest against the war, a Selective Service practice that was ruled illegal after January 31, 1970, by the United States Supreme Court in Gutknecht v. United States.[60] Likewise, until the cases of Seeger v. United States[61] and Welsh v. United States[62] broadened the definition of conscientious objection as it was interpreted by the Selective Service System, many local draft boards refused to grant conscientious objector status except on the narrowest, most traditional grounds.[63] Proponents of amnesty assert that, as a result of these practices, it is possible that many of those who were found guilty of draft violations would never have had their futures placed in such jeopardy if the laws had been interpreted more broadly or if a lottery system had existed earlier. That uncertainty also persists for those who may have been in violation but

who have not yet been charged or brought to trial.

Deserters, those favoring amnesty argue, often reached the same conclusions about the war as draft violators. Once in the military, however, they faced even less favorable prospects for having their appeals for discharge or conscientious objector status heard. Some deserted without even knowing that such options were available to them.[64] Amnesty proponents assert that to deny deserters amnesty while granting it to draft violators would be clear discrimination on the basis of class and race. Just as the burdens of the draft and of combat fell disproportionately on the poor, less educated, and non-white segments of American society, so too is this imbalance represented among deserters.[65]

Exiles are, in reality, one sub-group within both the draft violators and deserter categories. They are mentioned specifically in some amnesty proposals because their acts of conscientious resistance are so obvious and because they, along with their families and loved ones here in the United States, live under especially strained circumstances since they cannot return home without risking prosecution and already suffer one of the most severe forms of punishment conceivable.[66] In addition, for the few hundred men who have renounced their U.S. citizenship, a special grant of amnesty would be necessary in order for them to regain it.[67]

Court-martial convictions and less than honorable discharges are also often grouped together. Again, the less educated and members of racial minorities constitute a disproportionately high percentage of the men in these categories.[68] In regard to court-martial convictions,

amnesty proponents note that they came about during a war that was widely opposed, that they were received by men who would not have been in the military in many cases except for the inequities of the draft, and that many were received for offenses that would not have been considered criminal if committed in a civilian context.[69] In the case of less than honorable discharges, men are left carrying severe disabilities for the rest of their lives, including loss of veteran's benefits, disqualification from civil service and other employment, and the inability to get licenses and other forms of government certification.[70]

Civilian protesters and resisters are also included in some amnesty proposals on the grounds that such principled, nonviolent disobedience and resistance to the war in Indochina should not carry criminal penalties and life-long disabilities.[71]

If a Viet Nam-era amnesty is truly to be an act of "intentional overlooking" of a "named class of offenders, without regard to their personal identities or individual circumstances," some amnesty proponents assert, it would be an arbitrary and an incomplete act of overlooking to include some of those who have resisted, who have been penalized, or who face possible prosecution while excluding others.

Some amnesty proponents disagree. While they would include draft violators and, usually, deserters in a grant of amnesty, they would not include military personnel who received less than honorable discharges and court-martial convictions for offenses that would not be crimes in a civilian context, nor would they include civilian

war protesters. They note that draft violators and deserters, including exiles, are those who were most directly and obviously damaged by the collision of conscience and the call to serve.[72]

Those who oppose amnesty altogether reject the claims of all of the groups and insist that it is in the national interest to continue to require that those who ran afoul of the law live with the consequences of their actions.[73] They assert that the law leaves adequate room for compassion and that acts of pardon are available, on an individual basis, to those true conscientious objectors who failed to convince the appropriate military or civilian authorities of the worthiness of their stands. Further, anti-amnesty advocates assert that many, perhaps most, of those included in the groupings above would fail to meet the traditional tests of conscientious objection and, therefore, should not even be considered for amnesty.

What Kind of Amnesty Should Be Granted?

In addition to the decision as to whom should be covered by a grant of amnesty, two further choices are required:

(1) Should the amnesty be general or selective?

(2) Should the amnesty be unconditional or granted only in return for some action by the recipient?

Each decision to grant amnesty is a unique act by a sovereign.[74] This is clearly evident in the varied types of amnesty that have been granted in the history of the United States.[75] Each time amnesty has been proclaimed

decisions as to whom it shall affect and how it shall be done have had to be made afresh, tailored to meet the needs of that particular time and place. Current proposals before the Congress for a Viet Nam-era amnesty reflect the variety of alternatives available.

Some of the measures support a general, inclusive amnesty,[76] while others authorize the granting of amnesty by a review board whose task it would be to determine eligibility on a case-by-case basis, much the same way draft boards determined the eligibility of conscientious objector applicants.[77]

Those who support a review procedure assert that such a process is necessary to screen out those who did not act out of reasons of conscience.[78] This requires the measurment of motive and, implicitly, suggests that only a limited number of persons will actually qualify for amnesty.[79] Proponents of the review board approach note that this was the process employed by President Truman in the aftermath of World War II.[80] As in that situation, only those who could meet traditional conscientious objector standards (morally based opposition to participation in all war) would be granted amnesty by a Viet Nam-era review board.

Those favoring a general amnesty insist that attempts

to screen applicants and evaluate motivation will simply perpetuate some of the inequities that created refusers and deserters in the first place, namely that the articulate and the well educated will be able to make the process work for them while the poorer and lesser educated will continue to be excluded from meaningful consideration.[81] Supporters of a general amnesty assert, further, that motivation, especially in times of stress, is seldom pure and unambiguous, and, in many cases, men will be reconstructing views and feelings upon which they acted as long as a decade ago.[82]

They also acknowledge that a general grant of amnesty would cover some persons who did not act out of conscience, including those who merely sought to avoid the hardship of military service or who actively supported the efforts of those fighting on the other side in Indochina. But, amnesty proponents assert, including such persons would be within the spirit of "forgetting" that amnesty connotes and would clearly be preferable to a procedure that would exclude some who did act conscientiously but who, for whatever reason, might fail to convince a review board of that fact.[83]

Conceptually, a case-by-case weighing of individual decisions runs counter to the very nature of amnesty as a blanket grant to an entire class of offenders.[84] Pragmatically, the experience with an amnesty review board after World War II suggests that such a course would be difficult under present circumstances. The Truman review board had only 15,805 cases with which to deal (of which only 10 percent received a recommendation for amnesty),[85] while

a Viet Nam-era amnesty would affect possibly fifty times that number.[86] Even if adequate funds and staff were made available, this could mean that the board would, in order to give a fair and impartial hearing to each applicant, be hearing and reviewing cases well into the next decade. This could force upon an applicant the difficult task of trying to convince a board in 1980 of the sincerity of his acts in 1964 and would leave many applicants without effective recourse for too long a period.

The other major area of disagreemnt among those advocating amnesty is over whether the grant of amnesty should be conditional or unconditional. Those favoring conditional amnesty predicate the granting of amnesty on an individual's willingness either to complete military service or to engage in some alternate form of public service, such as in VISTA or the Peace Corps, for a specified period of time, usually two years.[87] Such service is necessary, they argue, to provide some form of redress for the violations of law that have occurred.[88] Further, an alternative service requirement tests the sincerity of those eligible for amnesty and offers a "proof" of love of country.[89] Such a service requirement is necessary, they also insist, in order to make the whole matter of amnesty more palatable to many Americans who would otherwise oppose it, and it is in keeping with the pattern of most past U.S. amnesties.[90]

Those committed to an unconditional grant of amnesty assert that the persons who would be eligible have already "paid" a significant price for their decisions. They have lived underground or in exile for as long as a decade with

the daily fear that their pasts will catch up with them. Many have received and served prison sentences or possess less than honorable discharges that they have had to carry with them as they have sought employment and normal acceptance by society. Many more suffer permanent estrangement from parents, loved ones, and former friends and exist in circumstances that make it impossible for them to live normal lives.[91]

It is also necessary to remember, advocates of unconditional amnesty note, that unlike most previous wars, the Viet Nam war called only a relatively small percentage of young Americans to the colors.[92] As a result of student and occupational deferments, conscientious objector status for the more articulate and traditional in their views, and the lottery system during the last years of the war most young Americans never faced military service during the Viet Nam era.[93]

In response to the charge that the American public will not accept amnesty unless it is coupled with requirements for further service to the country, proponents of unconditional amnesty assert that since the signing of the Paris agreements and the return of U.S. soldiers and war prisoners there has been a steadily growing openness to amnesty for draft violators and deserters.[94] Although still not overwhelming, this growth suggests to the supporters of unconditional amnesty that what may be needed to win acceptance from the American public at large is not an amnesty with conditions attached but, rather, the strong advocacy of amnesty by the President or by a majority of the Congress.[95]

Questions of who should receive amnesty and on what

terms are placed in sharper relief when seen in the light of the debate which has raged over the legality of the United States war effort in Indochina.

The Legality of the War

From its very outset, the U.S. involvement in the war in Indochina evoked strong opposition from some segments of American society. As the war grew in size and scope, this opposition also expanded.[96] The conflict deeply divided the American people and forced millions of young men to choose either to participate in the war or to risk violation of the law.

Much of this opposition was based on legal arguments drawn from international law as well as from the Constitution.[97] From 1965 on, numerous suits were brought by servicemen (both enlisted and inducted), persons about to be inducted, persons subject to the draft, reservists, parents of draft-age youths, taxpayers, members of Congress, and ordinary citizens. In addition, at least two states sought to litigate the consitutionality of the war in the hope that a governmental suit might fare better than a private complaint.[98]

Until the decision of the Court of Appeals for the Second Circuit in Berk v. Lair,[99] on June 19, 1970, no court had treated the constitutionality of the war as a cognizable issue, and, to this day, no court has agreed to rule on the arguments based on international law. With the exception of an inconclusive summary affirmance in Atlee v. Laird,[100] of a district court decision holding

the legality of the war under the Constitution to be a non-justiciable political question, the Supreme Court has consistently refused to grant certiorari in at least sixteen cases raising this issue.[101]

Yet, at one time or another, at least five of the members of the Supreme Court indicated that they thought the court should address the issues on their merits.[102]

To recognize that there was, and that there remains, considerable disagreement within the legal community over the legality of the war is not to assert that only those who believe that the war was illegal favor amnesty. Indeed, prominent supporters of the war are among those now urging some form of amnesty, including former Secretary of Defense Melvin Laird[103] and former Assistant Secretary of Defense Robert Froehlke.[104]

The debate over the war's legality is significant, rather, because it raises, in a way unprecedented in American history, the question of how to judge the citizen who sincerely believes that his refusal to fight or to allow himself to be drafted is justified not only by moral scruples but by a deeply held belief that the performance rather than the refusal of military service makes him a law breaker. His dilemma, and the dilemma of his society in dealing with him, is only heightened by the refusal or unwillingness of the courts to state clearly whether his perception of the law is correct, or merely a self-serving distortion of legal principles.

Conclusion and Recommendations

In the view of this Committee, the potential benefits of granting amnesty clearly outweigh the potential costs, and a broad, unconditional amnesty is preferable to a case-by-case determination and to the imposition of alternative service, or some other form of atonement, as a condition for amnesty.

Specifically, we favor unconditional amnesty for all draft violators and deserters,[105] namely:

(1) All persons convicted of violating Article 85 (the desertion article) of the Uniform Code of Military Justice for a desertion which began after July 1, 1963, or ended before July 1, 1973; or convicted or charged with violating the Selective Service Act for a violation that occurred during this same period.

(2) All persons, at home or abroad, who if they were apprehended or turned themselves in, could be charged with violation of the Selective Service Act or of Article 85 of the Uniform Code of Military Justice for an alleged desertion beginning after July 1, 1963, and before July 1, 1973.

Although desertion is a graver offense than violating the draft laws, it would be highly inequitable to include draft violators and omit deserters from a blanket grant of amnesty, since, as has been argued earlier in this paper, this would in practice constitute discrimination against the underprivileged, the non-white, and the lesser educated.

It is true that such a blanket amnesty would include many who have not articulated a conscientious objection to participation in the U.S. war effort. It is important to note, however, that except after World War II earlier United States amnesties have not drawn a distinction between those who objected out of conscience and those who refused to serve or deserted for other reasons. The difficulty in weighing individual motives and the time that has elapsed

since many of the offenses were committed support a similar blanket grant today, even though this will mean that some who acted out of less than pure motives would reap the benefits. Such an approach would, ipso facto, dispense with the need for a review board, at least for draft violators and deserters.

With respect to court martial convictions and less than honorable discharges, it is necessary to distinguish between three types of offenses giving rise to such convictions or discharges:

(1) desertion;

(2) offenses other than desertion which would not be punishable in a civilian context, such as AWOL, malingering, failure to salute, or "conduct of a nature to bring discredit upon the armed services;" and

(3) all other offenses.

Category (1) offenders, i.e. deserters, would be subject to automatice amnesty under the preceding recommendation. As for categories (2) and (3), we recommend one of two courses of action: either a blanket amnesty for category (2), and amnesty upon application and review for category (3), or amnesty upon application and review for categories (2) and (3).[106]

The argument for a blanket amnesty for category (2) is that many "non-civilian" offenses, particularly AWOL, committed during the Viet Nam-era were, in fact, motivated by conscious or unconscious opposition to the war, or to fighting in general, and that it would be inequitable to amnesty deserters but not, for instance, AWOL's, who, in a sense, may be regarded as lesser deserters. The argument against such a blanket amnesty is that many offenses in category (2) had nothing to do with conscience or conviction,

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and that there are limits to which one can carry the notion of including the chaff with the wheat for the sake of administrative convenience.

With respect to category (3) which deals with "ordinary" offenses cognizable as such in a civilian context, it may be argued that there is no better reason to offer the possibility of amnesty upon review to a military than to a civilian burglar, rapist, or murderer. True enough, but the charge of selective enforcement against conscientious objectors and war resisters is frequently heard, as is the charge that many Viet Nam veterans would not be branded for life with court martial convictions or less than honorable discharges, if they had not been plucked from civilian life and compelled to fight in a war which, at best, they failed to understand and, at worst, they abhorred. A general amnesty should, therefore, include some machinery for an amnesty reviewing, according to standards to be defined more precisely, of Viet Nam-era court martial convictions and less than honorable discharges.

Amnesty for civilian protesters against the war would round out the process of post-war reconciliation. This subject, however, falls outside of the scope of this committee.

If these recommendations were adopted, tens, perhaps hundreds of thousands of young Americans would find their way "home," literally and figuratively. Unconditional amnesty, at this juncture, would be a signal act of national grace and, more importantly, a manifestation of national strength.

FOOTNOTES

1. 1 Encyclopedia of the Social Sciences, 36 (E. Seligman ed. 1937).
2. Law and Social Order, Arizona State University Law Journal Vol. 1971, No. 3, 1971, pp. 515-534, "An Historical Justification and Legal Basis of Amnesty Today," by Harrop A. Freedman.
3. 1 Encyclopedia of the Social Sciences, op. cit., 36.
4. Law and Social Order, op. cit., 518.
5. Id., 518.
6. Id., 519.
7. J. Etridge, "Amnesty: A Brief Historical Overview," 118 Cong. Rel. 7040, daily ed., March 6, 1972.
8. Id., 7040.
9. Law and Social Order, op. cit., 522.
10. J. Etridge, op. cit., 7040.
11. United States Constitution, Article II, Section 2.
12. Editorial Research Reports, Vol II, No. 6, August 9, 1972, pp. 609-614, "Amnesty Question," by Helen B. Shaffer.
13. Columbia Human Rights Law Review, Vol. 4, 1972, pp. 529-540, "A History and Discussion of Amnesty," by Norman Weissman.
14. Harvard International Law Journal, Vol. 13, 1972, pp. 115-116, "American Deserters and Draft Evaders: Exile; Punishment, or Amnesty?" by Douglas W. Jones and David L. Raish.
15. Statement of Leon Ulman, Deputy Assistant Attorney General, testifying before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, March 8, 1974.
16. Act of February 11, 1893, Ch. 83, 27 Stat. 443.
17. 161 U.S. 591 (1896).
18. 175 U.S. 411 (1885).
19. Harvard International Law Journal, op. cit., 120. On the topic of Congressional and Presidential power to grant amnesty see also Vanderbilt Law Review, Vol. 25, 1972, pp. 525-555, "Congressional Amnesty for War Resisters: Policy Considerations and Constitutional Problems," by Louis Lusky.

20. Twelve Protestant denominations, the National Conference of Catholic Bishops, the National Council of Churches of Christ in the U.S.A., the American Jewish Congress, the Union of American Hebrew Congregations, and eleven other national religious organizations have called for amnesty. See Religious Statements on Amnesty, 3rd ed., 1974, James E. Tomlonson, ed., published by the National Interreligious Service Board for Conscientious Objectors, Washington, D.C.

21. Including the Fellowship of Reconciliation, the War Resisters League, and the American Civil Liberties Union.

22. Four Senators and thirteen Representatives have sponsored amnesty legislation in the 93rd Congress.

23. Including former Attorney General Ramsey Clark and former Secretary of Defense Melvin Laird--Clark favoring general and unconditional amnesty, while Laird favoring a more limited and conditional amnesty.

24. Including the Veterans of Foreign Wars and the American Legion.

25. Three Congressmen have introduced sense of Congress resolutions opposing amnesty.

26. Although indicating that he might be open to amnesty after the end of the war, President Nixon spoke out adamently against it after the signing of the Paris agreements. Former Vice President Agnew spoke out against amnesty consistently during his time in office.

27. Amnesty? The Unsettled Question of Viet Nam, 1973, p. 58, "Amnesty: Never!" by William A. Rusher.

28. Id., p. 65.

29. Hearings on Amnesty, Feb. 28, 29, March 1, 1972, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, p. 46.

30. Id., p. 268.

31. Id., p. 240.

32. The American Legion Magazine, Vol. 97, No.1, July, 1974, "Draft Resisters and Deserters: Pardon Perhpas, But Amnesty No," by John P. Murtha, p. 19.

33. Amnesty? The Unsettled Question of Viet Nam, "Amnesty: Never!" op. cit., p. 79.

34. Columbia Human Rights Law Review, op. cit.

35. This is especially true of statements supporting amnesty that have been adopted by national religious bodies. Many of these statements stress the need for also assisting veterans and the families of those who died in Indochina.

36. Several veterans and gold star mothers testified in favor of amnesty before both the Senate and House subcommittees. July 4, 1974, saw several thousand members of Viet Nam Veterans Against the War and other veteran's groups demonstrating in Washington, D.C. both for better treatment for veterans and for universal and unconditional amnesty.

37. Guide for the AWOL G.I., published by the Central Committee for Conscientious Objectors, pp. 13-14.

38. See cases reported in the Selective Service Law Reporter during the years 1967-present.

39. Columbia Human Rights Law Review, op. cit.

40. The arguments in support of this position are presented in the section of this paper entitled "The Legality of the War," pp. 22-23 supra.

41. Journal of Family Life, University of Louisville Law School, Vol. 12, 1972-73, pp. 63-80, "Amnesty: An Historical Justification for its Continuing Viability," by Daniel M. Migliore.

42. S. 2832, H.R. 236, H.R. 674, H.R. 675, H.R. 2034, H.R. 2167, H. Con. Res. 86, H.R. 3100, H.R. 4238, H.R. 5195, H. Con. Res. 144, H.R. 10979, H.R. 10980, H. Con. Res. 385; additional legislation is currently being drafted by Senator Philip Hart (D-Mich.).

43. Transcripts of the hearings are currently being printed and should soon be available from the House Judiciary Committee and the Government Printing Office.

44. Hearings on Amnesty, op. cit.

45. Sponsors include Representatives Abzug (D-N.Y.), Conyers (D-Mich.), Dellums (D-Calif.), McCloskey (R-Calif.), and Mitchell (D-Md.).

46. Sponsors include Senators Taft (R-Ohio), Pell (D-R.I.), Packwood (R-Ore.), and Biden (D-Del.); and Representatives Koch (D-N.Y.), Roybal (D-Calif.), Brown (D-Calif.), Nix (D-Pa.), Conyers (D-Mich.), Hawkins (D-Calif.), Helstoski (D-N.J.), Rees (D-Calif.), McCloskey (R-Calif.), and Rosenthal (D-N.Y.).

47. The sponsoring Representatives are Bevill (D-Ala.), Hogan (R-Md.), and Bowen (D-Miss.).

48. Interview with Col. Greenleaf, Registrant Service Officer, National Headquarters, Selective Service System, June 13, 1974. The Viet Nam era is used as a designation by the Selective Service System and other federal agencies to cover the period FY1964-FY1973.

49. Id.

50. "Amnesty: Questions and Answers," American Civil Liberties Union, 1973, compiled by Henry Schwarzschild.

51. Interview with Henry Schwarzschild, director, Project on Amnesty, American Civil Liberties Union Foundation, June 6, 1974.

52. "Amnesty: Question and Answers," op. cit.

53. 10 U.S.C. 885.

54. "Amnesty: Questions and Answers," op. cit.

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55. Report of the Task Force on the Administration of Military Justice in the Armed Forces, Vol. I, 1972, pp. 30-32, Department of Defense.

56. Id., Vol. I, pp. 108-111; Vol. II, pp. 31-36; Vol. III, pp. 69-88, 143-280.

57. "Amnesty: Questions and Answers," op. cit.

58. Draft card burning and refusing induction were acts of protest against the war as early as 1964.

59. Amnesty? The Unsettled Question of Viet Nam, 1973, pp. 105-148, "Amnesty: If..." by Mark O. Hatfield.

60. 396 U.S. 295 (1969).

61. 380 U.S. 163 (1965).

62. 398 U.S. 333 (1970).

63. Yale Review, Vol. 57, June, 1968, pp. 481-494, "Conscience and Anarchy: The Prosecution of War Resisters," by J.L. Sax.

64. The Nation, April 16, 1973, pp. 1-10, "The truth About Deserters," by Robert K. Musil. Based upon statistics compiled by the Central Committee for Conscientious Objectors.

65. Id., and also "Amnesty: Questions and Answers," op. cit.

66. Harvard International Law Journal, op. cit.

67. 8 U.S.C. 1481.

68. Report of the Task Force on the Administration of Military Justice in the Armed Forces, op. cit.

69. "Amnesty: Questions and Answers," op. cit.

70. The Civil Liberties Review, Vol. I, No. 1, Fall, 1973, pp. 189-192, "The Amnesty Question," by Edward M. Kennedy.

71. Vanderbilt Law Review, op. cit., pp. 554-555.

72. Amnesty? The Unsettled Question of Viet Nam, "Amnesty: If..." op. cit.

73. Amnesty? The Unsettled Question of Viet Nam, "Amnesty: Never!" op. cit.

74. 1 Encyclopedia of the Social Sciences, op. cit., p. 36.

75. Editorial Research Reports, op. cit., p. 611.

76. H.R. 236, H.R. 3100, H.R. 5195, H.R. 10980 (93rd Congress).

77. S. 2832, H.R. 236, H.R. 10979 (93rd Congress).

78. Hearings on Amnesty, op. cit., pp. 255-263.

79. Vanderbilt Law Review, op. cit., note 12, p. 528.

80. Id.

81. Amnesty: The Record and the Need, 1973, by John Swomley, published by Clergy and Laity Concerned, New York City.

82. Id.

83. Interview with Henry Schwarzschild, op. cit.

84. Harvard International Law Journal, op. cit., pp. 88, 126.

85. Id., p. 124.

86. See section on "Who Should Be Included?" supra, pp. 11-17.

87. S. 2832, H.R. 675, H.R. 2034, H.R. 2167, H.R. 4238, H.R. 10979 (93rd Congress).

88. The Civil Liberties Review, op. cit., p. 192.

89. Id.

90. Amnesty? The Unsettled Question of Viet Nam, op. cit.

91. See In the Service of Their Country: War Resisters in Prison by Willard Gaylin, M.D.; The New Exiles: American War Resisters in Canada, by Roger Neville Williams; and The Amnesty of John David Herndon, by James Reston, Jr.

92. Interview with Henry Schwarzschild, op. cit.

93. Id.

94. A nationwide show "Duty Bound" presenting the amnesty issue on television in 1973 and requesting viewers to write giving their vote for or against amnesty drew a 67% "for vote out of 11,978 responses received. A March, 1973, Louis Harris poll showed 24% in favor of amnesty, 67% against, and 9% not sure.

95. Vanderbilt Law Review, op. cit. pp. 553-554.

96. Reaching a high in public opinion polls of 70% of those responding saying that they opposed U.S. military involvement in Indochina.

97. See The Viet Nam War and International Law, by Richard A. Falk, ed., 1968, and The Judiciary and Viet Nam, by Anthony A. D'Amato and Robert M. O'Neil, 1972.

98. The Judiciary and Viet Nam, op. cit., pp. 3, 11.

99. 429 F.2d 302 (2d Cir., 1970).

100. Atlee V. Laird reached the Supreme Court as Atlee v. Richardson, 93 S.Ct. 1545 (1972).

101. Perkins v. Laird, 405 U.S. 965 (1972); DaCosta v. Laird, 405 U.S. 979 (1972); United States v. Pratt, 401 U.S. 1012 (1972); Massachusetts v. Laird, 400 U.S. 886 (1970); Crocker v. United States, 397 U.S. 1011 (1970); Leavy v. United States, 397 U.S. 1076(1970); Battaglia v. United States, 396 U.S. 846 (19 Owens v. United States, 397 U.S. 997 (1970); Ashton v. United States, 394 U.S. 960 (1969); Prince v. United States, 393 U.S. 946 (1968); McArthur v. Clifford, 393 U.S. 1002 (1968); United States v. O'Brien, 391 U.S. 367 (1968); Hart v. United States, 391 U.S. 956 (1968); Holmes v. United States, 391 U.S. 936 (1968); Mora v. McNamara, 389 U.S. 934 (1967); Mitchell v. United States, 386 U.S. 972 (1967).

102. "There is a considerable body of opinion that our actions in Viet Nam constitute the waging of an aggressive war," (Douglas, J., dissenting from denial of certiorari in Mitchell v. U.S., 386 U.S. 972, 1967): "There exist in this case questions of great magnitude," (Stewart, J., dissenting from denial of certiorari in Mora v. McNamara, 389 U.S. 934, 1967): "As a matter of substantive constitutional law, it seems likely that the President may not wage war without some form of Congressional approval," (Marshall, J., sitting as Circuit Justice, on motion to vacate stay in Holtzman v. Schlesinger, 94 S.Ct. 1, 1973): Justices Harlan, Douglas, and Stewart dissented from the denial of motion by the Commonwealth of Mass. to file a bill of complaint in Mass. v. Laird, 400 U.S. 886 (1970): Brennan, J., joining Justices Douglas and Stewart, would have noted probable jurisdiction and set the case for oral argument in Atlee v. Richardson, 93 S.Ct. 1545 (1972), and he also joined Justice Douglas in favoring a grant of certiorari in Perkins v. Laird, 405 U.S. 965 (1972).

103. Former Secretary Laird voiced his position at a press conference shortly before stepping down as Secretary of Defense.

104. Mr. Froehlke testified in favor of conditional amnesty during the House subcommittee hearings in March, 1974.

105. See pages 11-13 supra.

106. A case can also be made for blanket amnesty for all "bad" discharges (but not court martial convictions), whether in categories (2) or (3). See "Amnesty and Bad Discharges" by Robert K. Musil, a former Army Captain, in the March 4, 1974, issue of American Report.

APPENDIX A

AMNESTIES IN AMERICAN HISTORY

DATE	ISSUED BY	PERSONS AFFECTED AND NATURE OF ACTION	TIME LAPSE FROM OFFENSE TO PROCLAMATION (IN MONTHS)
July 10, 1795	Washington	Whiskey insurrectionists (several hundred). General pardon to all who agreed to thereafter obey the law.	13
May 21, 1800	Adams	Pennsylvania insurrectionists. Prosecution of participants ended. Pardon not extended to those indicted or convicted.	14
Oct. 15, 1807	Jefferson	Deserters given full pardon if they surrendered within 4 months.	
Feb. 7, 1812 Oct. 8, 1812 June 14, 1814	Madison	Deserters—3 proclamations. Given full pardon if they surrendered within 4 months.	
Feb. 6, 1815	Madison	Pirates who fought in War of 1812 pardoned of all previous acts of piracy for which any suits, indictments or prosecutions were initiated.	60 from first offense; 5 from final offense
June 1, 1830	Jackson (War Dept.)	Deserters, with provisions: (1) those in confinement returned to duty, (2) those at large under sentence of death discharged, never again to be enlisted.	
Feb. 14, 1862	Lincoln (War Dept.)	Political prisoners paroled.	
July 17, 1862 (Confiscation Act)	Congress	President authorized to extend pardon and amnesty to rebels.	
March 10, 1863	Lincoln	Deserters restored to regiments without punishment, except forfeiture of pay during absence.	
Dec. 8, 1863	Lincoln	Full pardon to all implicated in or participating in the "existing rebellion" with exceptions and subject to oath.	24
Feb. 26, 1864	Lincoln (War Dept.)	Deserters' sentences mitigated, some restored to duty.	
March 26, 1864	Lincoln	Certain rebels (clarification of Dec. 8, 1863 proclamation).	
March 3, 1865	Congress	Desertion punished by forfeiture of citizenship. President to pardon all who return within 60 days.	
March 11, 1865	Lincoln	Deserters who returned to post in 60 days, as required by Congress.	
May 29, 1865	Johnson	Certain rebels of Confederate States (qualified).	36 from first offense
July 3, 1866	Johnson (War Dept.)	Deserters returned to duty without punishment except forfeiture of pay.	
Jan. 21, 1867	Congress	Section 13 of Confiscation Act (authority of President to grant pardon and amnesty) repealed.	
Sept. 7, 1867	Johnson	Rebels—additional amnesty including all but certain officers of the Confederacy on condition of an oath.	
July 4, 1868	Johnson	Full pardon to all participants in "the late rebellion" except those indicted for treason or felony.	84 from first offense
Dec. 25, 1868	Johnson	All rebels of Confederate States (universal and unconditional).	84 from first offense
May 23, 1872	Congress	General Amnesty Law reenfranchised many thousands of former rebels.	
May 24, 1884	Congress	Lifted restrictions on former rebels to allow jury duty and civil office.	
Jan. 4, 1893	Harrison	Mormons—liability for polygamy amnestied.	132 from first offense; 24 from last offense
Sept. 25, 1894	Cleveland	Mormons—in accord with above.	
March 1896	Congress	Lifted restrictions on former rebels to allow appointment to military commissions.	
June 8, 1898	Congress	Universal Amnesty Act removed all disabilities against all former rebels.	

(continued)

AMNESTIES IN AMERICAN HISTORY

(continued)

July 4, 1902	T. Roosevelt	Philippine insurrectionists. Full pardon and amnesty to all who took an oath recognizing "the supreme authority of the United States of America in the Philippine Islands."	
June 14, 1917	Wilson	5,000 persons under suspended sentence because of change in law (not war-related).	
Aug. 21, 1917	Wilson	Clarification of June 14, 1917 proclamation.	
March 5, 1924	Coolidge	More than 100 deserters—as to loss of citizenship for those deserting since W.W. I armistice.	Up to 72
Dec. 23, 1933	F. Roosevelt	1,500 convicted of having violated espionage or draft laws (W.W. I) who had completed their sentences.	Up to 192
Dec. 24, 1945	Truman	Several thousand ex-convicts who had served in W.W. II for at least one year. (Proclamation 2676, Federal Register, p. 15409.)	
Dec. 23, 1947	Truman	1,523 individual pardons for draft evasion in W.W. II, based on recommendations of President's Amnesty Board.	
Dec. 24, 1952	Truman	Ex-convicts who served in armed forces not less than 1 year after June 25, 1950.	
Dec. 24, 1952	Truman	All persons convicted for having deserted between Aug. 15, 1945 and June 25, 1950.	

This summary is taken from Editorial Research Reports, Vol. II, No. 6, August 9, 1972, p. 611, "Amnesty Question" by Helen B. Shaffer. Editorial Research Reports is a publication by Congressional Quarterly.

APPENDIX B

AMNESTY LEGISLATION
93rd Congress, 1st Session

SENATE

S 2832 "Earned Immunity Act of 1974." This bill provides for the creation of an Immunity Review Board which would examine every case of draft violation during the Viet Nam era. The Board would have the power to grant immunity from prosecution upon the person's agreeing to serve two years in either the military or a civilian alternate service program. Those already convicted and imprisoned could be released, with the time already served counted toward the required two years up to a maximum of one year. [Robert Taft (R-Ohio) and Claiborne Pell (D-R.I.) Dec. 19, 1973; Robert Packwood (R-Oregon) Feb. 6, 1974; Joseph Biden (D-Del.) Feb. 8, 1974]

HOUSE OF REPRESENTATIVES

HR 236 "War Resisters Exoneration Act of 1973." This bill calls for a general and unconditional amnesty for draft resisters and military resisters alike, to include: restoration of all civil and political rights, immunity from criminal prosecution, expunging of criminal records, granting of honorable discharges to those who received other than honorable discharges, and nullifying all other legal consequences of the violation. It would also create an Amnesty Commission to review all other criminal violations, with the power to grant amnesty upon finding that the crime was committed out of opposition to the war and did not result in substantial personal or property damage. Even in cases of such damage, the Commission could grant amnesty if it found that the act was justifiable on the basis of a deeply held ethical or moral belief. [Bella Abzug (D-N.Y.) Jan. 3, 1973]

HR 674 This bill authorizes and approves Presidential amnesty for draft and military resisters "...to the extent and on the conditions..." set forth by the President. [Edward Koch (D-N.Y.) Jan. 3, 1973]

HR 675 This bill seeks, by amending title 18 of the United States Code, to provide a conditional amnesty for draft resisters. Upon two years service in the military or a civilian alternate service job, any draft resister could have the charges against him dropped. [Edward Koch (D-N.Y.) Jan. 3, 1973]

HR 2034 This bill would amend the definition of conscientious objector in the Selective Service Act to include selective conscientious objection, i.e. objection to a particular war. The provision would apply retroactively and would allow any person, no matter what his current legal status, to claim conscientious objector status. Presumably, if conscientious objector status was then granted by the Selective Service System, the person would have to perform alternate service. [Edward Koch (D-N.Y.) Jan. 15, 1973]

HR 2167 "Amnesty Act of 1973." This bill is essentially identical to Rep. Koch's HR 675, with the difference of providing a conditional amnesty without the amendment of the United States Code. [Edward Roybal (D-Calif.) Jan. 15, 1974]

H Con Res 86 This resolution would express the sense of Congress that no amnesty, reprieve, or pardon be given to draft evaders or deserters. [Tom Bevill (D-Ala.), Jan. 22, 1973]

HR 3100 "War Resisters Exoneration Act of 1973." This bill is identical to Rep. Abzug's HR 236. [Ronald Dellums (D-Calif.) Jan. 29, 1973]

HR 4238 This bill is identical to Rep. Koch's HR 675. Its reintroduction simply reflects the addition of seven more sponsors. [Edward Koch (D-N.Y.), George Brown (D-Calif.), John Conyers (D-Mich.), Augustus Hawkins (D-Calif.), Henry Helstoski (D-N.J.), Robert Nix (D-Pa.), Thomas Rees (D-Calif.), and Benjamin Rosenthal (D-N.Y.) Feb. 8, 1973]

HR 5195 This bill is identical to Rep. Abzug's HR 236, with the addition of two more sponsors. [Bella Abzug (D-N.Y.), John Conyers (D-Mich.), and Parren Mitchell (D-Md.) March 6, 1973]

H Con Res 144 This resolution is essentially identical to H Con Res 86. [Lawrence Hogan (R-Md.) March 7, 1973]

HR 10979 "Amnesty Act of 1973." This bill would provide amnesty for draft resisters and deserters on the condition that they serve two years in the military or civilian alternate service. It provides for the establishment of an Amnesty Commission to serve as an administrative body. [Paul McCloskey (R-Calif.), Oct. 17, 1973]

HR 10980 "Amnesty Act of 1973." This bill provides for a complete and unconditional grant of amnesty for draft resisters and deserters. It would grant immunity from prosecution and punishment, release from prison with the remaining punishment waived, pardon for past convictions, and restoration of citizenship if renounced because of opposition to the Viet Nam war. [Paul McCloskey (R-Calif.) Oct. 17, 1973]

H Con Res 385 This resolution is essentially identical to H Con Res 86 and H Con Res 144. [David Bowen (D-Miss.) Nov. 28, 1973]

This summary of Amnesty legislation was compiled by the National Interreligious Service Board for Conscientious Objection, Washington, D.C. It is current through June 7, 1974.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,
New York, February 12, 1975.

Mr. MARK L. SCHNEIDER,
Office of Senator Edward M. Kennedy,
Washington, D.C.

DEAR MR. SCHNEIDER: In December, Peter Weiss sent you a copy of the Position Paper on Amnesty adopted by our committee last July. The enclosed dissent has just been received and out of fairness ought to be published along with the majority position. A new page showing the votes of the committee members is also enclosed.

Please feel free to contact the committee on matters concerning amnesty or military justice or military affairs.

Very truly yours,

GEORGE H. WELLER,
Chairman.

Enclosure.

Frank C. Bateman, III [1]
David N. Bottoms, Jr.[2]
Wallace J. Borker [3]
David N. Brainin
John Carro (Hon.)
James Carroll
Thomas M. Comerford [2]
Russell N. Fairbanks
S. Newton Feldman [2]
David L. Fox
Joel Gora
Joan E. Goldberg
Kenneth H. Hirsch
Edward Reese Hughes
Nancy R. Hunter [2]
Steven J. Hyman
Nathaniel Jones
Thomas B. Kingham [1]
David McLean
Leonard P. Novello
Theodore W. Volckhausen [2]
Peter Weiss
George H. Weller

DISSENTING REPORT

We regretfully must disagree with the amnesty proposals of the majority of the committee as expressed in this report, and certain unsound arguments and questionable statements on fact on which these proposals are based. An unconditional amnesty to all offenders against the draft laws, to all deserters, and possibly to all persons with court martial convictions for offenses with no civilian counterpart, or to all persons convicted by a court martial for any offenses during the period of the Vietnam war, is unjust, unfair, and historically unprecedented.

It is unjust because the rule of law, on which our government is based, means that constitutional laws duly enacted and published must be obeyed, both by public officials and private citizens. Citizenship has responsibilities as well as rights and one of these responsibilities, by law, is the responsibility to serve one's country when called, and no one is dispensed from the duty to obey this law. It is true that pardons and amnesties have been granted to those who have disobeyed laws, but amnesty is an act of grace on the part of the sovereign which should be granted sparingly, with a view towards the best interests of the public and not those to be covered by the amnesty. Viewed in that light, one cannot ignore the fact that the vast majority of the American public obeyed the law and that this majority will certainly perceive (quite accurately in our minds) an unconditional blanket amnesty to be unjust. No society can long survive when each member of that society is free to decide whether he chooses to obey its laws or not, solely by reference to his subjective determination of their justness.

It is unfair because an unconditional amnesty fails to distinguish between those who served honorably and those who evaded the draft or deserted. During the Vietnam war, millions of young men were compelled to enter the armed forces

[1] Messrs. Bateman and King abstain.
[2] Ms. Hunter & Messrs. Bottoms, Comerford, Feldman and Volckhausen dissent for the reasons set forth in the statement on pages 38–45 below.
[3] Mr. Borker personally concurs with the Report but feels that a Bar Association committee should not have set forth any recommendations on this matter.

and were subjected to hardship and danger. (Indeed some of them were compelled to serve only because others called to serve before them had evaded the draft or had deserted.) It is unfair to them to proclaim, in effect, that their obedience to the law makes no difference. It is also unfair to punish some draft evaders and deserters and forgive the rest solely because they successfully evaded apprehension until now.

It is historically unprecedented because, as the report has proved conclusively, there has never been an unconditional blanket amnesty for those who failed to heed their country's call.

We suggest that those who have violated the laws and who now wish to return home submit themselves to the ordinary judicial processes of this country and be prepared to accept any penalties for their conscious and deliberate violation of its laws. If they do, we believe they will find our processes to be among the fairest in the world.

Our position is not vindictive. We, like the majority of this Committee, have appealed to both history and to a sense of justice, a justice tempered with mercy, to reach our position, and we believe our position is more in keeping with the "hallowed American tradition" than that of the majority.

The report uses the following unsound arguments and questionable statements of fact to reach its conclusions:

(1) When it claims that amnesty is an old and hallowed legal concept and goes on to indicate that the United States stands within the tradition of granting amnesty, citing examples, one is led to conclude that amnesty is "as American as apple pie." In reality, since 1795, as the report notes, there have been only 35 instances of amnesty in this country (there were two clarifying proclamations) only 12 of which applied to draft evaders or deserters, and not one of the amnesties in these 12 cases was unconditional. (It is true that in several cases the condition was simply a loyalty oath but the majority of this committee is not disposed to accept even this condition.) It would be fairer to state that in the history of this country amnesty has hardly been a common occurrence and is definitely not a great part of the American tradition. It also seems relevant to note that although pure and simple forgiveness may have been the motive for the exercise of the amnesty power in some situations, there are many cases where the grant of amnesty appears to have been calculated more to secure possible military benefits than to justify national compassion, much less national admission of guilt. (For instance, Lincoln's initial amnesty in the Civil War was to deserters provided they returned to their regiments within a certain amount of time. He followed this with a promulgation of amnesty to all rebels who would take a loyalty oath to the Union. Shortly before his death, he once again granted amnesty to Union deserters who would return to their posts.)

(2) The report begins its arguments for an unconditional amnesty by showing that many opposed the war as an act of conscience, thereby appealing to the high value that our legal and social traditions assigned to conscience. Having established this, it next moves to encompass selective conscientious objectors and then those who may have felt an inarticulate but apparently morally based opposition. Finally, it moves to encompass those who it concedes may have had purely selfish motives. It argues that to screen applicants and evaluate motivation will simply perpetuate some of the inequities that led to the desertion and evasion, since motivation, especially in times of stress, is seldom pure and unambiguous. It concludes, therefore, that a general grant of amnesty in the spirit of forgiving and forgetting, even though it would cover some undeserving people, would be preferable to a conditional amnesty which would possibly exclude some who did act conscientiously but could not convince a review board or a court of this fact. To us, this seems to be "absolution by association."

We too acknowledge the value of conscience, but when one consciously decides that the laws of his society are too offensive for him to live with, he can violate these laws and take his chances that he will be disciplined for such violation, or he can flee that society. Those who take such actions should not complain if they are forced to live with the results of their decisions. Perhaps they can take solace in the thought that they have obeyed a higher law, but they are still subject to the processes of the laws of their society. While disobedience as an act of conscience might cause society to mitigate the punishment for the act, this does not change the fact that such disobedience violates the law. In fact any unconditional blanket amnesty would allow those who acted out of the worst possible motives, fear, self-

interest, lack of patriotism, even treason, to receive the same treatment as those who acted out of conscience

Moreover, the United States has long made it policy (as in the case of amnesty, by an act of grace) to excuse those who have severe moral scruples against fighting in wars. Thus, despite problems, especially before Welsh in 1970, conscientious objector status was easily obtainable. (Except for selective conscientious objectors. Since the Supreme Court has recently upheld the requirement that objections must be against all wars and not selective, we see no reason to grant selective conscientious objector status through an amnesty.) The fact that this act of grace has been unevenly granted does not prove that it has failed and must yield to a blanket amnesty.

A society which sets a high value on individual conscience can enlarge the sphere in which individuals are free to do what they please and it can avoid compelling people to do what they do not want to do, but it cannot devote itself to these goals to the exclusion of all others. The law will always have to set limits. Congress set them in the Selective Service Act and the Uniform Code of Military Justice, and it is not unfair to enforce those limits as it set them.

(3) An attempt is made to argue that because the lawfulness of the war was widely questioned, those who refused to take part in it deserve amnesty. In fact, the courts almost unanimously rejected legal challenges to the war, and with no exceptions, none cited at any rate, held, whatever their opinions about the war, that the refusal to enter the military was not justified because of the character of the war. It is hard to think of any legal question on which there was more general agreement. In view of the virtual unanimity of the lower courts, the failure of the Supreme Court to make a definite ruling hardly leaves the legal question open. Moreover, the feeling that the war was a mistake should not be confused with the feeling that the war was illegal. There are many Americans who grew to oppose the war because of the way it was fought, that is, with limited resources and an uncertain purpose. It is disingenuous to equate this general dislike of the war to a general feeling that the war was illegal. (This is why the results of opinion polls which asked a question along the following lines: "Do you favor the United States' role in or conduct of the Viet Nam war?" cannot be used to buttress opponents of the legality of the war.)

(4) The fact that the draft excused some and not others does not make it unjust. It is wrong to make no distinction between those who were excused as a result of previously debated public policy and those who excused themselves. Ironically, some of those now proposing unconditional amnesty on the grounds that too many were unjustly excused, were themselves proponents of the exemptions, arguing for instance, that the nation needed college educated youth or that a lottery was fair. Now they seek to base their arguments on amnesty on the very distortions which they themselves countenanced.

(5) It is claimed that the deserters and evaders have suffered enough. This is a highly subjective claim and we are uncertain as to its application. If it is taken seriously, it would call for a case by case examination to find out who has suffered, how and for what, and not for a general amnesty. Nor do the cloying arguments about the great loss of this nation's youth seem any more appealing. The nation seems to have survived for a number of years without them. In fact, other than those involved and their immediate relatives or friends, few seem to miss them at all. It can, on the contrary, be argued that the nation is better off without those who run away whenever their country needs them. Clearly they did not ask "What can I do for my country?"

(6) A suggestion is made that the proponents of amnesty are attempting to heal the divisions of the country, to bring about national reconciliation. (The report does not actually say amnesty will heal divisions; a statement like that might be difficult to prove.) As the report notes "Amnesty is an emotionally laden issue. Feelings on all sides of the question run deep." Therefore, it is improbable that granting an unconditional, blanket amnesty will produce reconciliation. More likely it will outrage the feelings of one side.

(7) Amnesty should not extend to convictions for offenses that would not be crimes in a civilian context. There are many military offenses that had nothing to do with opposition to the Vietnam war. We cannot agree with a position that would amnesty every private who decided he was not going to make reveille.

(8) The argument that amnesty will make it more difficult to raise and support armed forces cannot be simply dismissed as is done in the report. Precedent in our society is important. Anyone who is skeptical about that may consult the

report, which attempts to list every amnesty granted since the whiskey rebellion, arguing that at least some of them are analogous to its proposal. What will happen if the next war is like the last one, small but prolonged? There will certainly be opposition to it, no matter what the circumstances. We can confidently expect that the whole paraphernalia of draft counsellors, resistance committees and exile organizations, manned by the same type of people who manned them last time, will appear and make potential draft evaders and deserters aware of prior amnesties and the possibility of future amnesties. It has been suggested that soldiers are not motivated by fear of the consequences of their actions; rather, the primary motivation for sticking with, for example, a combat infantry platoon is group loyalty. It is probably true that group loyalty is primary, but the suggestion that sanctions against desertion are not needed does not follow.

The report argues that proponents of amnesty can meet these objections by two arguments: First, previous amnesties have not proven to be major obstacles to military preparedness, and secondly, an amnesty now should be only one part of a larger response to all of those lives were affected by the United States' war effort in Indochina. The first argument is specious because the unconditional blanket amnesty proposed by the report goes beyond any previous amnesty, and the expected draft counselling would encourage similar conduct on the part of potential draftees in the future; we fail to see how the second argument meets the objections in regard to the difficulty in maintaining an Army.

(9) The report uses some objectionable techniques in framing its arguments:

(a) The suggestion that the growing openness toward amnesty shows that what may be needed to win acceptance by the American public is a strong advocacy of amnesty (i.e. unconditional amnesty) by the President or by Congress is unworthy of the majority of this committee. As the war recedes sympathy for some kind of amnesty will increase, but as we understand this argument, the President and Congress should manipulate public opinion in much the same way that Presidents Johnson and Nixon were accused of doing during the war. Such manipulation is bound to cause a further deterioration of trust between government and people. It is more logical to argue that the amnesty which might win acceptance from the American public is amnesty only to those who deserve it, that is, a selective amnesty, so that the American public is not left with the feeling that while some served, openly flouted the draft and got away with it.

(b) It is inappropriate to equate the opponents of the war to those who suffered and died in it. Can we seriously regard equally as casualties the deserter and the man who was called up to replace him and then killed or maimed?

(c) The racial references are a "red herring." Whether men of different races were evaluated and disciplined in the same or different standards has nothing to do with whether there should be an amnesty for everyone.

(d) At the risk of stating the obvious, we would point out that the articulate and well educated generally do better than the poor and less educated under any proposals on any subject.

(10) The Report contains some questionable facts:

(a) The figure of 800,000 persons to be covered by an amnesty is vastly inflated, unless one counts everyone who received an Article 15 during the period in question. The figure of 30,000 deserters "at large" attributed to the Department of Defense includes desertions from July 1, 1966, to December 21, 1973, but clearly a great part of these occurred after the fighting stopped. (The September 1974 figure is approximately 12,000, of whom some also must be post war absences.) The figure for exiles attributed to Mr. Schwarzschild of the American Civil Liberties Union is likewise questionable, absent some indication of how the figures were compiled. (It does seem that the Report relies on a source whose interest lies in high figures. Perhaps we should consider this figure as the last body count of the war and have equal faith in it.)

(b) Footnote 94 does not support the fact that there is a growing openness toward amnesty. The poll referred to shows simply that 67 percent of the viewers of this program who wrote the network were in favor of some kind of amnesty, not necessarily unconditional. Moreover, to many viewers, this program was a "sob sister" approach to the problem. We as lawyers know that "hard cases make bad law." If this is so, then artificially selected cases make worse law. The resisters on the program were articulate and seemed to be basically good citizens of their new countries. If we produced a program with resisters who had become rapists and muggers and asked the audience: "Do you think we should give these creeps an unconditional blanket amnesty?" We suspect we would get a majority of "no" answers. Moreover, the Harris Survey, cited in the footnote, indicated

that in February 1973 only 24 percent of the public favored unconditional amnesty. This increased to only 36 percent by September 1974 after President Ford indicated that he was going to propose a conditional amnesty (Long Island press, September 19, 1974, page 12). As noted by Mr. Harris, amnesty without any service requirements for deserters or evaders of the Vietnam war has never received the support of anything close to a majority of the public (ibid).

Respectfully submitted.

DAVID N. BOTTOMS, Jr.
THOMAS M. COMERFORD.
S. NEWTON FELDMAN.
NANCY R. HUNTER.
THEODORE W. VOLCKHAUSEN

ADDITIONAL CORRESPONDENCE

U.S. SENATE,
January 13, 1975.

Hon. LAURENCE SILBERMAN,
Deputy Attorney General, Department of Justice,
Washington, D.C.

DEAR MR. SILBERMAN: Last month the Senate Subcommittee on Administrative Practice and Procedure held hearings on the operation of the President's Clemency Program. Mr. Kevin Maroney testified on behalf of the Department of Justice concerning its role in processing unconvicted draft evaders.

During our hearings, I raised two matters with Mr. Maroney which involve followup by the Department. Because of your central role in the administration of the program by the Justice Department, I am writing you to reemphasize my interest in these matters.

First, I believe it would be highly desirable to have a comprehensive, final list of those individuals remaining under investigation for Selective Service offenses (excluding nonregistration) and those under indictment. I understand that a preliminary list of this kind has already been made available to some counselling groups, and that a review is presently underway to finalize this list.

There may well be a small margin of error in any such list. I propose, however, that in the light of the principles of justice and leniency espoused in the President's announcement of the clemency program—and the experiences of a number of men who have had problems determining their precise status without risking self-incrimination—the Department should complete a final and definitive list, of those liable for prosecution under the Selective Service laws (for offenses other than nonregistration). This list should be made available to an independent third party who can inform individuals on request whether their names appear on the list.

Mr. Maroney testified that "We will try to prepare such a list, and I will certainly take back the request that the list be regarded by the Attorney General as a final list and be published at that time." I hope to hear from you on the 20th of this month the results of this request.

I also raised with Mr. Maroney the question of even-handed imposition by United States Attorneys of the alternate service agreement provided in the Clemency Program. The Subcommittee obtained a copy of a printed alternate service agreement apparently utilized by the U.S. Attorney for the Southern District of New York which, in lieu of a blank space, contains the notation "24 months" where the alternate service assignments is ordinarily to be filled on a case-by-case basis.

Statistics supplied by the Department on alternate service agreements concluded through early December reflect that all thirteen participants in the Clemency Program in the Southern District of New York were in fact assigned 24 months alternate service. A similar pattern appears in the agreements concluded in the Northern District of California.

These patterns appear to reflect the absence of any discretion being applied to the clemency cases processed in those districts, contrary to the President's and the Department's directions. I believe that the Department should reexamine the cases in both of those districts to determine whether there may have been mitigating circumstances which were overlooked by those making the alternate service assignment.

In light of the fact that the clemency program is slated to terminate at the end of this month, I hope that these matters can be followed through without

delay and that you will report back to the subcommittee on the results of your efforts early next week.

Sincerely,

EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure.

WASHINGTON, D.C., *January 21, 1975.*

Hon. EDWARD M. KENNEDY,
Subcommittee on Administrative Practice and Procedure,
Washington, D.C.

DEAR SENATOR KENNEDY: During your subcommittee's December 19 hearings on the clemency program, Deputy Assistant Attorney General Kevin Maroney, representing the Justice Department, agreed to provide lists of all those under indictment or investigation for Selective Service Act violations as of January 12, 1975. Mr. Maroney also agreed to convey your recommendation that the Department regard this compilation of names as the "final list" of those Vietnam-era draft violators who remain liable to prosecution, and hence eligible under the President's Clemency Program. The single exception to this declaration of finality would be the Department's reservation of the option to proceed criminally against those who did not register before March 28, 1973, and whose failure to register became known to the Selective Service System or the Department only after the beginning of the eligibility period under the program.

From our experience with individuals who would benefit most from an effective clemency program, we can say that the preparation of a "final list" of those eligible would be the single most important objective which legislative oversight hearings could achieve at this time. The one further step needed to confirm the value of this approach is to designate responsible and accessible nongovernmental agencies to make this information available in a manner consistent with the degree of confidentiality which we presume all those under criminal investigation would desire.

As the subcommittee knows, ten organizations have for three months been using an early and incomplete list of those under indictment or investigation, and we remain confident that these same groups would employ the final list with complete discretion. However, should the subcommittee have serious misgivings about broad distribution of the list, a smaller group of three or four organizations could be agreed upon, although with some loss of effectiveness in using the list over the next few days. To help make such a choice, if it becomes necessary, we have arrived at several criteria for determining the most suitable agencies to whom the lists should be entrusted, and have agreed upon four which seem to us to qualify best. The criteria are:

1. *Responsibility and experience.*—The organization or agency should be one of those which has received and employed the incomplete list of all indictments and investigations, which the Justice Department made available in October 1974.

2. *Reputation among the class potentially eligible for clemency.*—The organization or agency should be known as a reliable source of information concerning the clemency program, and should be trusted to maintain the confidentiality of inquiries made to it.

3. *Accessibility of information.*—The organization or agency should, if possible, maintain a toll-free or toll-collect phone and be adequately staffed to handle the expected volume of requests coming to it or referred to it from other cooperating organizations.

4. *Future operations.*—The organization or agency should be reasonably certain of continued operation into an extended election period under the clemency program, should one be approved. In addition, at least one of the agencies selected should be capable of responding to inquiries regarding criminal liability and eligibility after the conclusion of the current election period.

Although several organizations meet the above qualifications, in the interest of limiting distribution of the lists, we have arrived at four which we feel are particularly qualified and which would stand ready to maintain an information service based on these lists.

Center for Social Action, The United Churches of Christ, 1100 Maryland Avenue NE., Washington, D.C. 20002.
The Clemency Information Center, 110 West 42d Street, Indianapolis, Ind. 46208.
War Resister Information Program, 567 Broadway Avenue, Winnipeg, Manitoba R3C OW2.
The American Civil Liberties Union, 22 East 40th Street, New York, N.Y. 10016.

In utilizing the lists already provided, these organizations have been aware that, by confirming the fact that someone is under investigation, the source necessarily reveals the existence of a federal investigatory file. They also understand that under the recent Freedom of Information Act amendments, the Justice Department is directed to release such information only so long as it will not constitute an "unwarranted invasion of personal privacy." Although the immediate need to determine the clemency eligibility of thousands of young men clearly warrants disclosure of the sort proposed here, the organizations named above will convey information from the lists only to individuals, their families, or representatives, and will not generally publicize the names they contain. In this way we hope to assure the subcommittee that, in entrusting the lists to outside organizations, it will not indirectly be responsible for a broader use of the lists than would be authorized by the Freedom of Information Act.

We are informed that the requested lists are to be delivered to the subcommittee this week, leaving only a few days during which they can be fruitfully used before the expiration of the clemency program's enrollment period. We are anxious to plan now to make the most of the brief interval and to that end we are available to meet with you or the subcommittee staff at your earliest convenience to resolve any remaining matters concerning the use of these lists.

Sincerely yours,

PUBLIC LAW EDUCATION INSTITUTE.
CENTER FOR SOCIAL ACTION, UNITED CHURCHES OF CHRIST.
CLEMENCY INFORMATION CENTER.
WAR RESISTER INFORMATION PROGRAM.
CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS.
NATIONAL COUNCIL FOR UNIVERSAL AND UNCONDITIONAL AMNESTY.
AMERICAN CIVIL LIBERTIES UNION.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., January 24, 1975.

Hon. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: During Mr. Kevin Maroney's appearance on December 19, 1974, before the Subcommittee on Administrative Practice and Procedure concerning the President's clemency program, you requested that the Department submit a final listing of all draft evaders whose cases have been reviewed by U.S. Attorneys and found to have prosecutive merit.

There are enclosed three copies of a list which includes the names and selective service numbers, where available, of all individuals who are presently charged by indictment, information or complaint, and those who are under investigation for draft offenses during the Vietnam era, where the case is believed to have prosecutive merit. With the exception of those individuals who may be subject to criminal process for late or nonregistration occurring during the Vietnam era, this list is considered final by the Department of Justice, and those whose names appear may consider themselves eligible for the clemency program.

The Department has no objection to the subcommittee's release, to responsible counseling agencies, of the names of those individuals against whom process is outstanding. However, we believe that public disclosure of the names of the persons still under investigation would constitute an invasion of their right to privacy and would be violative of the spirit underlying the Privacy Act of 1974, Public Law 93–579, enacted December 31, 1974.

If I can be of any further assistance, please contact me.

Sincerely,

LAURENCE H. SILBERMAN,
Deputy Attorney General.

Enclosure.

JANUARY 27, 1975.

THE PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: On December 18 and 19, 1974, the Senate Judiciary Subcommittee on Administrative Practice and Procedure held hearings regarding the Presidential clemency program established September 16. These hearings were

designed to determine whether the program's procedures and practices are in keeping with the goals of leniency and reconciliation which you expressed in establishing it.

The hearings permitted us to compare the procedures of the Department of Justice, the Department of Defense, and the Presidential Clemency Board. We believe that certain of the concepts, procedures, and practices of the program should be changed to meet more fully the objectives you set forth. Since these findings may be of some help to you in your decision whether to extend the program beyond January 31, 1975, I would like to offer them along with certain specific recommendations for the improvement of the program.

I want initially to commend the Department of Justice for making available a definitive and final list of those who remain liable for prosecution for violation of the Selective Service laws. This will now allow men to determine their eligibility to participate in the clemency program without use of selfincrimination. The compilation of this list by the Department and its transmittal to the Senate Subcommittee on Administrative Practice and Procedure.

First, there is the question of the program's extension. It was clear even at the time of our hearings in mid-December that many eligible individuals still were in the process of learning about the program. Letters had not been sent to even the 8,000 men who had been convicted and completed their sentence. The January cutoff date would clearly deny some who might wish to participate in the clemency program of the opportunity to do so. In Massachusetts, for example, there are numerous persons whose indictments for offenses committed in 1970 and 1971 were not returned until late 1973 or 1974. Many of their cases will not be concluded until after the January 31 date. This means they would be denied the opportunity to participate in the program. Further, the regulations of the Board were not issued until late November, and the procedures of the Justice Department and the Defense Department also were not available until well into the program. Finally, the Justice Department has only last Friday made available to the subcommittee the final list of men liable for prosecution for Selective Service violations and thus eligible to participate in the clemency program. I thus believe the program should be extended beyond the present termination date.

Second, it should be emphasized that improvements in the program structure could encourage a more positive response from those who are eligible. Thus, the Presidential Clemency Board has established guidelines for "mitigating circumstances": which seem comprehensive and just, but the Department of Defense and the Department of Justice have guidelines that appear neither comprehensive nor consistent. Consistency in this important area would seem crucial to the fairness of the overall program. For instance, while hardship is a factor in the Clemency Board considerations, it is not considered by the Department of Defense. This would seem even to contradict the normal administrative discharge process in the military, where individual hardship is accorded major consideration.

In this regard, full procedural protections should be extended to participants including the right to make a personal presentation. At the least, this and other rights which were incorporated by the Congress in the Selective Service Reform Act of 1971 should be part of the Clemency program's procedural protections.

Third, the Presidential Clemency Board has announced a policy of review of military records to determine whether there are any offenses other than the "absentee" offense. If no such offense exists, a recommendation to upgrade the "clemency discharge" to a "general discharge" would be made. Also, "clemency discharges" granted by the Clemency Board are to be automatically reviewable by the military discharge review process without regard to the offense pardoned. The Department of Defense seems to differ on these sound policies. Again, consistency with the Board's position would seem appropriate and desirable.

Fourth, the hearings indicated that the pardon would not expunge the pardoned individual's record, but only be added to the conviction record. If we are to achieve reconciliation and encourage these young men to contribute fully to this society in the future, it would be appropriate to expunge or at least to seal the relevant records of men who complete the clemency program.

Fifth, the program now covers veterans with less than honorable discharges for "absentee" offenses, but does not cover veterans with SECH discharges for offenses less serious than desertion, who may be equally deserving of leniency. To exclude those men from the clemency program seems to be an oversight that inevitably produces inequities, especially since identical motivation may have led different men to different action which should not merit different treatment under the clemency program.

As I indicated to you last summer following your speech to the Veterans of Foreign Wars, I believe that the vast majority of Americans across the country agree with you that reconciliation is a precondition for national unity and progress. Your initiation of the clemency program in September reflected both courage and compassion. When you announced the program, you cited the example of President Lincoln's compassionate attitude of clemency after the Civil War. A continuation, expansion, and improvement of the present Clemency Program will move that program closer to this ideal.

Sincerely,

EDWARD M. KENNEDY,
Chairman, Senate Subcommittee of Administrative Practice and Procedure.

U.S. SENATE,
February 12, 1975.

Hon. EDWARD LEVI,
Department of Justice,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: On January 24 I received from the Department of Justice a list of all draft evaders whose cases have been reviewed by United States Attorneys and have been found to have prosecutive merit. In his cover letter transmitting this list, Deputy Attorney General Laurence Silberman indicated that this list would be treated by the Department as complete and final for the offenses and time period covered. I want to take this opportunity to again commend the Department and Mr. Silberman for the responsiveness and sensitivity to the principles underlying the President's clemency program which this action reflects.

As your staff is aware from discussions with Subcommittee staff, a number of questions have arisen concerning the apparent unwillingness of U.S. Attorneys to be bound by the finality of the list. I am in receipt of a copy of a telex of January 29, 1975 from Robert W. Vayda to all United States Attorneys, and while I interpret this as instructions to U.S. Attorneys, there seems to be a feeling among various counselling groups that the telex merely authorizes, but does not require, the dismissal of indictments and closing of investigations for individuals who do not appear on the list. It is also my understanding that United States Attorneys have refused to acknowledge that these individuals are free from any criminal liability for violating relevant Selective Service laws.

Specifically, the following names have been brought to my attention as falling within the category of those not on the list but also not able to get confirmation of nonliability from U.S. Attorneys:

Harry F. Clark, Southern District, Illinois.
Henry J. Ladd, Middle District, Georgia.
Alan Lopez, Denver, Colo.
Sam Lucas, Little Rock, Ark.
Michael Lennon, Eastern District, New York.
Carl L. Passen, Southern District, New York.
Simon Thomas Waters, Richmond, Va.
Mark Michael Wayne, New Jersey.

To clarify this matter I would appreciate confirmation from the Department 1) of the nonliability of the above listed individuals; 2) that the list provided to the subcommittee continues to be treated as closed and final for the offenses covered; and 3) that the necessary clarification of these two points will be brought to the attention of the U.S. Attorneys.

In view of the time limitation on the operation of the clemency program, I hope to receive your response by February 18. Finally, I believe it would be useful for the Department or U.S. Attorneys to provide written confirmation, to those requesting it, of their status in order to avoid possible problems that might arise in the future through computer error or the like.

If the names of any other individuals in this class are subsequently brought to my attention, I hope we can be assured that their cases will be disposed of in a similar manner.

Sincerely,

EDWARD M. KENNEDY, *Chairman,*
Subcommittee on Administrative Practice and Procedure.

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OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., February 27, 1975.

Hon. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of February 12, 1975 with respect to the finality of the list of Selective Service violators eligible for the clemency program which was furnished to your subcommittee on January 24, 1975.

The list is final except with respect to individuals subject to criminal prosecution for late or nonregistration.

Individuals who had executed clemency agreements before the list was delivered to you on January 24 and who were omitted from the list were not currently subject to prosecution when the final list was compiled. Thus, it is understandable why these individuals were omitted and the question of finality did not relate to them in any event.

Some individuals were inadvertently omitted by U.S. Attorneys because they were involved in on-going negotiations with the apparent intent of concluding agreements, or had contacted a U.S. Attorney and stated that they did not intend to participate in the clemency program.

The Department can understand the argument that such individuals should be subject to prosecution because of the fact that they knew of their criminal liability if they failed to execute an alternate service agreement and thus suffered no actual prejudice because of their inadvertent omission from the final list. However, the Department will not prosecute such individuals because it is our position that we shall adhere to the representations made in the Departmental letter of January 24 to you. All alternate service agreements made by individuals whose names were omitted from the final list and executed after January 24 are deemed null and void by the Department.

The eight individuals whom you named in your letter are not on the final list and are not subject to prosecution for draft evasion offenses covered by the clemency program.

If I may be of any further assistance in this matter, please contact me.

Sincerely,

EDWARD H. LEVI,
Attorney General.

U.S. SENATE,
March 11, 1975.

Hon. EDWARD LEVI,
Department of Justice,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: Thank you for your letter of February 27, 1975, which confirms the representations made by the Department of Justice concerning the completeness and finality of the list of alleged Selective Service law violators who are eligible for the Presidential clemency program. This list was furnished to the Subcommittee on Administrative Practice and Procedure on January 24, 1975. I am grateful for this renewed assurance; it conclusively resolves any remaining uncertainties that had arisen with respect to the legal status of a number of persons who reasonably believed that they were in jeopardy of prosecution.

On a related matter the subcommittee has received reports in recent days that the Immigration and Naturalization Service, relying upon 8 U.S.C. 1182(a)(22), excludes from admission into the United States such aliens (including former citizens of the United States) as it determines to have left this country or remained abroad in order to evade or avoid military training and service. INS apparently applies this provision to exclude persons who have neither been convicted of violating nor are charged with having violated the Selective Service laws or the military law against unauthorized absence or desertion.

Under our constitutional system, of course, a person is presumed innocent unless duly convicted by a court of law. Aliens, including former U.S. citizens, who have been neither convicted of nor charged with a violation of law, it seems to me, should enjoy the same presumption with respect to the very consequential determination by an agency of the Department of Justice regarding their admissibility to this country. Persons who have not been convicted for draft or military absence violations and are not on the Department's final list of January 24, 1975, cannot as a matter of law be held to have left the country in order wrongfully to avoid or evade military training or service. It thus seems to me indefensible and inequitable to exclude these persons from this country, even for a visit to their families, on the administrative determination that they are excludable under 8 U.S.C. 1182(a)(22). The thrust of the President's Clemency Program also supports a more lenient attitude towards those who had previously, but wrongfully, been accused of violating draft laws.

I would be interested in knowing the asserted legal basis for exclusion determinations in these instances. If you agree that present INS exclusion actions cannot be justified as to persons who were not convicted and are not charged with draft violations, it would be appropriate to require the Commissioner of the Immigration and Naturalization Service to conform his determinations of excludability with those of the Department on violations of the Selective Service and military law.

Sincerely,

EDWARD M. KENNEDY.

DEPARTMENT OF JUSTICE,
Washington, D.C., April 18, 1975.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: The Attorney General has asked me to reply to your letter of March 11, 1975 concerning the basis on which the Immigration and Naturalization Service enforces the exclusion statute concerning aliens who have departed from or remained outside the United States to avoid or evade training or service in the armed forces in time of war or national emergency, section 212(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(22)). You suggest that it is illegal for the immigration authorities to apply the statute to persons who have not been convicted of draft or military absence violations and are not presently charged with having violated Selective Service or military laws. You also suggest the relevance of the President's clemency program.

Taking the last and simpler point first, I must disagree that the clemency program has any bearing on the interpretation or application of the statute. It was expressly stated in Proclamation 4313 of September 16, 1974: "However, this program will not apply to an individual who is precluded from reentering the United States under 8 U.S.C. 1182(a)(22) or other law."

Section 212(a)(22) of the Act is derived from section 3 of the Immigration Act of 1917 (8 U.S.C. 136) as amended by the Act of September 27, 1944 (58 Stat. 746). The legislative history of the 1944 addition to the exclusion law reveals an intention to permit the immigration authorities to make their own determination of excludability, without dependence on the actions or advice of Selective Service or military authorities or criminal prosecutors. House Report No. 1229, March 3 1944, to accompany H.R. 4257, contained this statement:

"It was explained to the committee that . . . it would be the primary duty of either the United States Consular Service of the Department of State or the Immigration and Naturalization Service to determine the questions of fact . . . as to whether any aliens who had left the United States during the war had left for the purpose of evading the draft."

Nothing else in the legislative history of either the 1944 law or its reenactment in the 1952 Immigration and Nationality Act indicates a contrary legislative intent.

From the beginning, the Immigration and Naturalization Service has made independent determination in quasi-judicial exclusion proceedings whether an alien had departed or remained outside the United States for the primary purpose of evading his military obligations. Selective Service and military records, when relevant, are incorporated in the record of proceeding. Although the Act (section 315(b), 8 U.S.C. 1426(b)) prescribes that the records of the Selective Service System or of the National Military Establishment shall be conclusive regarding whether an alien was relieved from liability for training and service, on his application, because he was an alien, there is no corresponding prescription regarding the evidentiary value of such records where alleged excludability rests on departure or remaining outside for the proscribed purpose.

The case law confirms the authority of the Immigration and Naturalization Service to assume primary responsibility for fact finding. In *Holz* v. *Del Guercio*, 259 F.2d 84 (9th Cir. 1958), the Court said, at page 86:

"The court also upheld the order for deportation on the ground that Holz, an alien, had departed from the United States and gone to Mexico, in order to avoid or evade service in the armed forces in time of war. There was clear, satisfactory and convincing evidence to sustain this charge also. But it need not be reviewed. The interview of Holz with officers of the Immigration Service contains a direct and positive admission that this was his purpose in departing from the United States.

"The only point Holz makes is that certain proceedings before the Draft Board, which ended in an order to report for service should be reviewed. This is beside the point. The only question before the Special Examiner was whether the charge was proved as laid."

In *Ramasauskas* v. *Flagg*, 309 F. 2d 290 (7th Cir. 1962), after determining that the finding by the special inquiry officer of the Service was supported by substantial evidence and must be sustained, the Court remarked, at page 294:

"The fact that petitioner voluntarily served in the army after his return to the United States can have no legal effect upon his status at the time of his departure. The legal effect of his departure to avoid service in the Armed Forces is that he is excluded from admission to the United States and thereby becomes deportable."

In *Alarcon-Baylon* v. *Brownell*, 250 F. 2d 45 (5th Cir. 1957), the Court said, at page 47:

We agree . . . that the evidence on which the deportation order was based fully supports it, and that appellant's contention, that the visa and the draft board classification have precluded the inquiry here made, are (sic) untenable. No such effect is accorded by law to such administrative actions . . ."

See also *Riva* v. *Mitchell*, 460 F. 2d 1121, 1123 (3rd Cir. 1972); *Jolley* v. *Immigration and Naturalization Service*, 441 F. 2d 1245 (5th Cir. 1971), cert. denied, 404 U.S. 946 (1971).

In short, both the legislative history and the case law solidly support the application of the law whereby the Immigration and Naturalization Service adjudicates exclusion cases arising under section 212(a)(22) of the Act without regard to determinations not to prosecute and without regard to treatment signifying condonation by Selective Service or military authorities.

Sincerely,

A. MITCHELL MCCONNELL, Jr.,
Acting Assistant Attorney General.

DEPARTMENT OF JUSTICE,
Washington, D.C., January 28, 1975.

Hon. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reference to an article which appeared in the December 19, 1974, issue of the *Washington Star-News*, regarding testimony on December 18 by an attorney, John Schulz, who appeared before the Senate Subcommittee on Administrative Practices and Procedure. The article reported that Mr. Schulz testified that one of his clients, Alan K. Merkle (mistakenly identified in the article as Alan K. Markle), had been indicted for a draft law violation in September, 1971, in Detroit, and that the indictment had been dismissed in 1972, but because Mr. Merkle did not receive notice of the dismissal, he was forced to live as a fugitive for two additional years.

Mr. Schulz's testimony, according to the records of the U.S. Attorney, was in error. We have been informed by the U.S. Attorney for the Eastern District of Michigan that no indictment was ever returned, and no warrant was issued, against Mr. Merkle who had been declared delinquent by his local Selective Service Board for failure to report for induction on May 13, 1971. In August, 1972, the state headquarters, Selective Service System, advised that a procedural error had been found in Mr. Merkle's file and that prosecution would not be pursued. Consequently, on August 16, 1972, the Detroit Office of the FBI was advised that prosecution was not desired, and the matter was closed by the FBI with no further investigation conducted.

We wish to point out that Mr. Merkle, or his attorney or other representative, could have ascertained the status of this matter at any time by making an inquiry to the U.S. Attorney in Detroit.

I trust that this information will be of assistance to your subcommittee in its consideration of the clemency program.

Sincerely,

JOHN C. KEENEY,
Acting Assistant Attorney General.

PUBLIC LAW EDUCATION INSTITUTE,
Washington, D.C., April 4, 1975.

EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure, of the Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR KENNEDY: An account in the Washington Star-News of my December testimony before your subcommittee concerning the Justice Department element of the Presidential clemency program reported that my client, Alan K. Merkle, had been indicted for draft violations in Michigan. This prompted Acting Assistant Attorney General John Kenney to write you in January denying that an indictment was ever returned against Merkle.

Mr. Keeney's denial is open to two interpretations. He may mean to claim only that my client was not indicted. That is technically correct, for a criminal complaint, not an indictment, was used to charge Mr. Merkle. Mr. Merkle was, however, actually charged, or so I was told telephonically on Tuesday, December 17, 1974, by one John P. Conley, Assistant U.S. Attorney in Flint, Michigan, at (313)234–5208. Of course, only the fact, not the technical form, the manner, of charging, is pertinent to my criticism of Justice Department policy.

If, on the other hand, Mr. Keeney intends to deny that my client was ever charged at all, I again invite reference to my telephonic communication with Assistant U.S. Attorney Conley, supra. Not only did Mr. Conley tell me the date Mr. Merkle was charged (September 17, 1971), but also the criminal complaint number (71–3459), both of which, you may recall, I cited in my written statement (p. 7).

I trust that this explanation will set the record straight concerning Alan K. Merkle.

Sincerely yours,

JOHN E. SCHULZ,
Editor-in-Chief, Military Law Reporter.

ADDITIONAL MEMORANDUMS

DEPARTMENT OF JUSTICE,
Washington, D.C., March 6, 1975.

To: The United States Attorneys.
Re List of Selective Service Violators.

There is enclosed for your information, a copy of a list of names of individuals within your judicial district subject to prosecution for selective service offenses occurring during the Vietnam era and believed eligible for the Presidential Clemency Program. This list which is a reproduction of the list which you submitted in response to the Deputy Attorney General's request of December 20, 1974, was furnished to the Chairman of the Senate Subcommittee on Administrative Practice and Procedure on January 24, 1975. In providing this list to the Chairman, the Department represented it as a final list except for those individuals who may be subject to prosecution for late registration or non-registration offenses which occurred during that era. Thus, those individuals whose names have been inadvertently omitted from this list, should be treated in accordance with the procedures outlined in the Attorney General's teletype to all United States Attorneys on February 27, 1975.

Sincerely,

JOHN C. KEENEY,
Acting Assistant Attorney General.

To: All U.S. attorneys.
From: Edward H. Levi, Attorney General.
Subject: Final list of draft evaders eligible for the clemency program.

The following letter was sent on February 27, 1975, to Senator Kennedy, chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedure:

DEAR MR. CHAIRMAN: This is in reply to your letter of February 12, 1975 with respect to the finality of the list of selective service violators eligible for the clemency program which was furnished to your subcommittee on January 24, 1975.

The list is final except with respect to individuals subject to criminal prosecution for late or nonregistration.

Individuals who had executed clemency agreements before the list was delivered to you on January 24 and who were omitted from the list were not currently subject to prosecution when the final list was compiled. Thus, it is understandable why these individuals were omitted and the question of finality did not relate to them in any event.

Some individuals were inadvertently omitted by United States attorneys because they were involved in on-going negotiations with the apparent intent of concluding agreements, or had contacted a U.S. attorney and stated that they did not intend to participate in the clemency program.

The department can understand the argument that such individuals should be subject to prosecution because of the fact that they knew of their criminal liability if they failed to execute an alternate service agreement and thus suffered no actual prejudice because of their inadvertent omission from the final list. However, the department will not prosecute such individuals because it is our position that we shall adhere to the representations made in the departmental letter of January 24 to you. All alternate service agreements made by individuals whose names were omitted from the final list and executed after January 24 are deemed null and void by the department.

The eight individuals whom you named in your letter are not on the final list and are not subject to prosecution for draft evasion offenses covered by the clemency program.

If I may be of any further assistance in this matter, please contact me.

Sincerely,

EDWARD H. LEVI,
Attorney General.

In accord with the policy decisions embodied in this letter, all U.S. attorneys will undertake the following:

(1) Dismiss draft evasion indictments covered by the clemency program against all individuals whose names were not submitted to the department in accordance with the departmental instruction of December 20, 1974;

(2) Cancel alternate service agreements made by individuals whose names were omitted from the final list and who executed such agreements after January 24, 1975 and

(3) Respond in writing to written inquiries from individuals not on the list confirming that, except for the possibility of a prosecution for a late or non-registration offense, they are free from prosecution for an offense covered by the clemency program.

In the January 29, 1975 instruction, an error was made in referring to 8 U.S.C. 1402. The proper reference was 8 U.S.C. 1481.

DEPARTMENT OF JUSTICE,
Washington, D.C., November 21, 1974.

Unclassified.
Re Robert W. Vayda.
All U.S. Attorneys (including overseas).
Subject: Review of files of unconvicted draft evaders eligible for the amnesty program.

United States Attorneys are advised that the directions contained in my message of November 18, 1974, requiring a review of draft evaders files, does not negate the requirement of obtaining prior departmental approval for a dismissal. Therefore, if subsequent to the review of a file, it is determined that a factual, or legal basis exists which would preclude successful prosecution, a form U.S.A. 900, "Request and Authorization to Dismiss Criminal Case," should be completed and forwarded to the internal security section, criminal division pending receipt of departmental authority, United States Attorneys should take no action with regard to filing a motion to dismiss with the court, or notifying the individual of the requested authorization. Although procedures have been adopted by the department to insure expeditious processing of Forms 900, it is envisioned that time lags may occur between the time a request for dismissal is submitted and departmental authorization is received due to the holiday mailing season and the expected influx of Forms 900. In view of these factors, United States Attorneys should make every effort to complete their reviews as quickly as possible.

As in the past, when circumstances arise requiring immediate departmental

authorization for dismissal, United States Attorneys may contact criminal division attorneys Robert W. Vayda, telephone No. 202-739-4520 or Bernard J. Atchison, telephone No. 202-739-4524.

WILLIAM B. SAXBE,
Attorney General.

To: All U.S. attorneys (including overseas).
From: William B. Saxbe, Attorney General.
Subject: Review of files of unconvicted draft evaders eligible for the clemency program.

In furtherance of the spirit of President Ford's clemency program, I am directing all U.S. attorneys to commence reviewing all case files on unconvicted draft evaders who are eligible for the program. If after reviewing such a case file, the U.S. attorney determines that it lacks prosecutive merit, he should move to dismiss the indictment or terminate the investigation, whichever is appropriate. Once a decision has been made that a case lacks prosecutive merit, all reasonable steps should be taken to notify the individual, directly or indirectly, of that fact, and the individual should be informed that he will not be required to perform alternate service to escape a draft evasion prosecution.

All U.S. attorneys who have fewer than 250 case files to review should have the review process completed by December 11, 1974. All U.S. attorneys who have 250 or more case files should have the review process completed by January 11, 1975.

Upon completion of the review process, each U.S. attorney should notify Robert W. Vayda, Criminal Division, together with a statement indicating the number of cases determined to lack prosecutive merit, the total number of cases reviewed, and the number of active cases then remaining after completion of the review process.

DEPARTMENT OF JUSTICE,
Washington, D.C., December 16, 1974.

Unclassified.
Re Robert W. Vayda.
All U.S. attorneys (including overseas).

Prosecutive Policy With Respect to Certain Persons Alleged To Have Violated Section 12 of the Military Selective Service Act (50 U.S.C. App. Section 462) Pursuant to the President's Proclamation

In conjunction with my initial directions dealing with the procedures to be followed in implementing the President's clemency program for draft evaders, all U.S. attorneys were requested to make reasonable attempts to notify by letter all individuals who were eligible for clemency. Although most United States attorneys have substantially complied with this order, there have been some cases where no attempt has been made to contact those individuals who are fugitives. Therefore, at this time, and in connection with my order of November 13, 1974, requiring a review of all case files of unconvicted draft evaders, all United States attorneys are directed to communicate immediately with all evaders who are eligible for clemency, regardless of their states as fugitives, and advise them of the Presidential clemency offer. For your assistance, there is transmitted herewith a copy of a form letter which may be used for this purpose.

In regard to those fugitive evaders residing outside the United States, and those whose whereabouts are unknown, the letter should be directed by certified mail to the last known address, return receipt requested. A record of this notification should be maintained in the individual's case file. United States attorneys should not construe this order as relieving them of the obligation to notify those individuals whose cases have been reviewed, and found lacking in prosecutive merit, that they will not be required to perform alternate service to escape their draft evasion prosecution.

The following is the suggested form letter to be utilized in notifying draft evaders of the clemency program:

Re United States *v.* _____
Criminal File No. _____

DEAR _____: This letter concerns reports received by this office that you have committed an offense against the United States on or about _____ in violation of section 12 of the military selective service act.

In accordance with the President's policy of granting leniency to certain individuals who are charged with violating section 12 of the military selective service act, you are eligible for diversion to an alternative service program. Should you agree to undertake acceptable alternate service as an acknowledgement of your allegiance to the United States this office will refrain from prosecution. Note, however, that if no agreement is reached the United States will be free to prosecute you for the section 12 charges. If the Director of Selective Service certifies to us that you have successfully completed your service, the pending charge against you will be dropped. However, failure satisfactorily to complete the alternate service will probably cause us to resume prosecution of the section 12 charge.

A decision to seek acceptance into this program is one that must ultimately be made by you. Nevertheless, it is important that you immediately discuss this matter with your attorney inasmuch as your participation in this program will require a waiver of certain rights afforded to you by the Constitution. For example, you must waive your right to a speedy trial and right to have an indictment presented to the Grand Jury, if one has not already been obtained, within the prescribed statute of limitations. We suggest that you consult with your attorney who will explain the program to you and the nature of the waivers mentioned above.

Very truly yours,

(U.S. Attorney)

By: ---
WILLIAM B. SAXBE,
Attorney General.

DEPARTMENT OF JUSTICE,
Washington, D.C., December 29, 1974.

Unclassified.
Re Robert W. Vayda.
All U.S. attorneys (including overseas).

REPORTING THE NAMES OF INDIVIDUALS ELIGIBLE FOR THE PRESIDENTIAL CLEMENCY PROGRAM

In conjunction with my directions of November 18, 1974, requesting United States attorneys to report the results of the review undertaken with regard to draft evaders eligible for the clemency program, it is requested that a list containing the names and selective service numbers of all draft evaders whose cases have been reviewed and found not lacking in prosecutive merit be prepared and forwarded to the Department no later than close of business on January 13, 1974. United States attorneys with less than 250 cases are requested to provide this listing by January 8, 1975.

The listing should be prepared so that each draft evader may be identified by name and selective service number as falling within one of the following categories:

A. Indicted draft evaders whose cases retain prosecutive merit. (Do not include those individuals where a USA Form 900, "Request and Authorization to Dismiss Criminal Case," has been submitted).

B. Draft evaders against whom criminal complaints are outstanding and whose cases retain prosecutive merit on the basis of available information.

C. Individuals under investigation whose files appear to have prosecutive merit on the basis of available information.

These reports should be directed by mail to Robert W. Vayda, Criminal Division, Room 203, Federal Triangle Building, 315 9th Street, N.W. Washington, D.C., or by teletype to Mr. Vayda, Criminal Division, Department of Justice.

WILLIAM B. SAXBE,
Attorney General.

DEPARTMENT OF JUSTICE,
Washington, D.C., January 13, 1975.

Unclassified.
Re Robert W. Vayda.
All U.S. attorneys (including overseas).

REPORTING PROCEDURES TO BE FOLLOWED IMMEDIATELY WHICH DEAL WITH THE RESULTS OF THE REVIEW OF UNCONVICTED DRAFT EVADER FILES, AND LISTINGS OF INDIVIDUALS WHOSE FILES HAVE BEEN REVIEWED AND ARE ELIGIBLE FOR THE PRESIDENTIAL CLEMENCY PROGRAM

It is imperative that all United States attorneys who have not already done so, immediately report the results of the review of files of unconvicted draft evaders. The report should set forth the total number of cases reviewed, the number found lacking in prosecutive merit, and the number of active cases remaining after completion of the review. Additionally, United States attorneys should treat with utmost urgency the requirement that they forward by January 13, 1974, a listing of all draft evaders, identified by name and selective service number, whose files have been reviewed, found not lacking in prosecutive merit, and eligible for the President's clemency program. The listings should be submitted in the format set forth in the teletype of December 20, 1974. These reports should be directed by teletype to Robert W. Vayda, Criminal Division, Room 203, Federal Triangle Building, 315 9th Street, N.W., Washington, D.C.

WILLIAM B. SAXBE,
Attorney General.

DEPARTMENT OF JUSTICE,
Washington, D.C., January 29, 1975.

Unclassified.
Re Robert W. Vayda.

To all United States Attorneys (including overseas).
Subject: Procedures to be completed by United States attorneys no later than February 14, 1975 in those draft evader cases where declination or dismissal was warranted as a result of the recent review.

With respect to the recent review of draft evader files, and the submission to the Department of the names of all persons whose cases contain prosecutive merit and are eligible for the President's Clemency Program, a listing was prepared and submitted to the Senate Subcommittee on Administrative Practice and Procedure with the following cover letter.

Hon. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: During Mr. Kevin Maroney's appearance on December 19, 1974, before the Subcommittee on Administrative Practice and Procedure concerning the President's clemency program, you requested that the Department submit a final listing of all draft evaders whose cases have been reviewed by United States attorneys and found to have prosecutive merit.

There are enclosed three copies of a list which includes the names and Selective Service numbers, where available, of all individuals who are presently charged by indictment, information or complaint, and those who are under investigation for draft offenses during the Vietnam era, where the case is believed to have prosecutive merit. With the exception of those individuals who may be subject to criminal process for late or nonregistration occurring during the Vietnam era, this list is considered final by the Department of Justice, and those whose names appear may consider themselves eligible for the clemency program.

The Department has no objection to the subcommittee's release, to responsible counseling agencies, of the names of those individuals against whom process is

outstanding. However, we believe that public disclosure of the names of the persons still under investigation would constitute an invasion of their right to privacy and would be violative of the spirit underlying the Privacy Act of 1974, Public Law 93-579, enacted December 31, 1974.

If I can be of any further assistance, please contact me.

Sincerely,

LAURENCE H. SILBERMAN,
Deputy Attorney General.

In connection with the foregoing expression of departmental policy, United States attorneys may forego the earlier requirement that departmental authority to dismiss must be obtained prior to filing a motion to dismiss with the court. Thus, United States attorneys are authorized on this one-time basis to move immediately to dismiss indictments against those draft evaders whose cases were found devoid of prosecutive merit as a result of the review recently conducted pursuant to the Attorney General's order of November 13, 1974. Along with filing a motion to dismiss, United States attorneys should insure that outstanding warrants of arrest against persons affected by this order are dismissed and the names of these individuals purged from the N.C.I.C. list no later than February 14, 1975. In those cases where the United States attorney deems it impossible to insure that individuals who are no longer subject to criminal process may not be arrested after that date, the names of these individuals should be sent by Teletype to Mr. Robert W. Vayda, Criminal Division. In those cases where forms 900 have already been submitted to the Department, United States attorneys are authorized to forgo departmental approval and to follow the procedures outlined above.

For management purposes, however, United States attorneys are requested to prepare and forward to the Department forms 900, on each case where dismissal occurred noting the reasons for the dismissal. In addition, a copy of the form 900 should be included in the file to be closed.

In those cases where during the review it was determined that the draft evader, though no longer liable for his violation of the Military Selective Service Act, has renounced his American citizenship or become a foreign national in accordance with title 8 U.S.C. sec. 1401, or was an alien, his name should be forwarded to the Immigration and Naturalization Service in order that the provisions of title 8, U.S.C. sec. 1182(a)(22) may be invoked. In those cases where during the review it was determined that the case retained prosecutive merit and the individual was residing in a foreign nation, United States attorneys are requested to take immediate action to furnish the name of such an individual to the State Department in order that restrictive passport action may be taken. The names of those individuals falling in this category should be directed to Francis G. Rando, Chief, Foreign Operations Division, Passport Office, Department of State, Washington, D.C., 20520.

LAURENCE H. SILBERMAN,
Deputy Attorney General.

**PREPARED STATEMENT OF KEVIN T. MARONEY,
DEPUTY ASSISTANT ATTORNEY GENERAL,
CRIMINAL DIVISION, DEPARTMENT OF JUSTICE**

Dear Mr. Chairman:

Mr. Chairman and members of the Subcommittee, I am pleased to appear today to discuss the implementation of the President's Clemency Program with respect to unconvicted alleged draft evaders[1/] by the Department of Justice. My remarks will focus on the number of individuals eligible for the program, what participation in the program requires, measures taken to inform eligible draft evaders of the program's existence, the number who have participated, steps taken to insure uniform implementation, and a special review of draft evader cases undertaken by the Department.

Eligible Draft Evaders

An unconvicted draft evader is eligible for the Clemency Program if he committed his offense between August 4, 1964 and March 28, 1973 and if he is not barred from re-entering the country by 8 U.S.C. 1182(a)(22). Generally speaking, that latter provision would exclude from the program any alien who has fled the country to avoid the draft or a

1/ All unconvicted draft evaders, of course, are presumed innocent until proven guilty. The Clemency Program does not affect the right of an individual charged with a draft evasion offense to challenge that charge in court. The term "draft evader" in this statement is used for purposes of brevity and is not meant to prejudge the guilt or innocence of any individual charged with a draft evasion offense.

United States citizen who has done the same and subsequently renounced his U. S. citizenship. The Department estimates that approximately 6,300 unconvicted draft evaders are eligible for the Clemency Program. Approximately 4,190 are currently under indictment, of whom some 3,950 are listed as fugitives. It is estimated that 2,090 of the fugitives are in Canada, and that an additional 560 are located elsewhere outside the United States. An estimated 2,130 individuals are under investigation for a draft evasion offense.

Requirements for Participation in the Clemency Program

An unconvicted draft evader must report to the United States Attorney in the district where his offense was committed by January 31, 1975. There he executes an agreement with the United States Attorney in which he acknowledges his allegiance to the United States by agreeing to perform alternate service. The normal term of alternate service is 24 months, but may be reduced by the United States Attorney if certain mitigating factors are present. The alternate service is performed under the auspices of the Director of Selective Service and must be in the national health, safety, or interest. The Director has promulgated regulations which define more specifically which types of jobs

qualify for alternate service under the Clemency Program. Upon satisfactory completion of the alternate service, the United States will dismiss the draft evasion charge.

An unconvicted draft evader who participates in the Clemency Program is assured of avoiding a felony conviction and any term of incarceration.

Informing Unconvicted Draft Evaders of the Existence of the Clemency Program

The Department has taken several measures to inform those eligible for the Clemency Program of its existence. We have directed all United States Attorneys to send letters to the last known address of individuals currently under indictment or investigation informing them of the program. We have publicly released a list of all individuals currently under indictment or investigation so that an individual reluctant to contact the Department may learn whether he is on the list from private sources. We have provided a phone number at the Department which can be called to ascertain whether a certain individual is on the list and, if so, the U. S. Attorney he should report to. Inquiries can be made anonymously and the Department makes no attempt to learn the identity of those who call.

Additionally, the Department has publicly urged eligible individuals to seek counsel in connection with determining whether to participate in the Clemency Program. As a result of these measures, and others, I think that the large majority of unconvicted draft evaders eligible for the Clemency Program are aware of its existence and terms.

Number of Participants in the Clemency Program

As of noon last Tuesday, December 17, 1974 [144] alternate service agreements had been signed. Appendix A provides a breakdown with respect to the districts in which the agreements were signed and the length of alternate service received under the agreements.

Insuring Uniform Implementation of the Clemency Program

Several steps have been taken to insure uniform implementation of the program by the 94 United States Attorneys. All the U. S. Attorneys have received for use in implementing the program (prosecutive guidelines) a model alternate service agreement, and a model letter to send an eligible draft evader. These documents are attached as Appendix B.

Uniform implementation is most difficult to assure in connection with determining the length of alternate service. Under the program, the normal length is 24 months, but may be reduced by the U. S. Attorney for mitigating circumstances. Paragraph IV of the prosecutive guidelines sets forth appropriate mitigating circumstances which, of necessity, leave room for discretion. To insure that this discretion was being fairly and properly exercised from the outset, the Deputy Attorney General personally reviewed the first 26 alternate service agreements before they were given approval. On the basis of that review, he was satisfied that the U. S. Attorneys were appropriately following the guidelines in determining the length of alternate service. The Department has throughout the program received a weekly report from all U. S. Attorneys indicating the number of alternate service agreements signed and the length of service assigned in connection with each agreement. Nothing in these weekly reports has indicated that U. S. Attorneys are not assigning terms of alternate service under uniform standards and with a proper exercise of discretion pursuant to the prosecutive guidelines.

Review of Draft Evader Files to Determine Prosecutive Merit

In furtherance of the spirit of the Clemency Program, the Department has directed all U. S. Attorneys to review the files of unconvicted draft evaders and to dismiss charges against those whose cases lack prosecutive merit. The review process will be completed by January 11, 1975. As of noon last Tuesday, December 17, 1974 1,453 files had been reviewed and charges had been dismissed against 213 individuals. Attached at Appendix C is a district-by-district breakdown of these figures.

Conclusion

The Department of Justice has acted pursuant to the directives and in furtherance of the spirit of the Clemency Program in connection with its implementation. In my judgment, the program has been fairly and effectively administered.

Attachments

APPENDIX A

JUDICIAL DISTRICT	MONTHS OF SERVICE																		
	T	24	23	22	21	20	19	18	17	16	15	14	13	12	11	10	9	8	7	6
Alabama N.	0																			
Alabama M.	0																			
Alabama S.	3	3																		
Alaska	0																			
Arizona	3	2																		
Arkansas E.	0																			
Arkansas W.	0																			
California N.	10	10																		
California E.	2	2																		
California C.	12	6			1	3		2												
California S.	6	3												3						
Canal Zone	0																			
Colorado	1	1																		
Connecticut	2	2																		
Delaware	0																			
D.C.	0																			
Florida N.	1	1																		
Florida M.	5	2	1	2																
Florida S.	0																			
Georgia N.	1	1																		
Georgia M.	0																			
Georgia S.	1																			
Guam	0																			
Hawaii	0																			

55-550 O - 75 - 20

JUDICIAL DISTRICT	MONTHS OF SERVICE																								
		2																							
	T	24	23	22	21	20	19	18	17	16	15	14	13	12	11	10	9	8	7	6
Idaho	0																			
Illinois N.	2					1						1								
Illinois E.	0																			
Illinois S.	0																			
Indiana N.	0																			
Indiana S.	0																			
Iowa N.	0																			
Iowa S.	1	1																		
Kansas	0																			
Kentucky E.	0																			
Kentucky W.	1	1																		
Louisiana E.	0																			
Louisiana M.	0																			
Louisiana W.	0																			
Maine	0																			
Maryland	1															1				
Massachusetts	7	4						3												
Michigan E.	7	4						3												
Michigan W.	1	1																		
Minnesota	2	1						1												
Mississippi N.	2	2																		
Mississippi S.	2	2																		

JUDICIAL DISTRICT	MONTHS OF SERVICE																								
		3																							
	T	24	23	22	21	20	19	18	17	16	15	14	13	12	11	10	9	8	7	6
Missouri E.	1			1																
Missouri W.	0																			
Montana	0																			
Nebraska	1					1														
Nevada	1	1																		
New Hampshire	0																			
New Jersey	7	6				1														
New Mexico	0																			
New York N.	1	1																		
New York S.	13	13																		
New York E.	8							2				1				4			1	
New York W.	8	3										1				2				1	1
North Carolina E.	0																			
North Carolina M.	1	1																		
North Carolina W.	1	1																		
N. Dakota	2	1						1												
Ohio N.	2	1						1												
Ohio S.	3					1	1	1												
Oklahoma N.	0																			
Oklahoma E.	0																			
Oklahoma W.	0																			
Oregon	2	1																		1

JUDICIAL DISTRICT — MONTHS OF SERVICE

	T	4	24	23	22	21	20	19	18	17	16	15	14	13	12	11	10	9	8	7	6
Pennsylvania E.	0																				
Pennsylvania M.	0																				
Pennsylvania W.	4	4																			
Puerto Rico	0																				
Rhode Island	0																				
S. Carolina	0																				
S. Dakota	0																				
Tennessee E.	0																				
Tennessee M.	0																				
Tennessee W.	0																				
Texas N.	1	1																			
Texas S.	1	1																			
Texas E.	1	1																			
Texas W.	1	1																			
Utah	1	1																			
Vermont	0																				
Virgin Island	0																				
Virginia E.	3	1							1			1									
Virginia W,	1	1																			
Washington E.	1								1												
Washington W.	1	1																			
W. Virginia N.	0																				
W. Virginia S.	1							1													

JUDICIAL DISTRICT — MONTHS OF SERVICE

	T	5	24	23	22	21	20	19	18	17	16	15	14	13	12	11	10	9	8	7	6
Wisconsin E.	2								1			1									
Wisconsin W.	0																				
Wyoming	0																				
	14	4	9	1	1	3	1	7	2	18		5	1		10			2		1	2

(4) such other similar circumstances.

V. In the determination by the United States Attorney of the length of service as provided in IV, an applicant shall be permitted to:

(1) have counsel present;

(2) present written information on his behalf;

(3) make an oral presentation; and

(4) have counsel make an oral presentation.

An applicant shall not have access to investigatory records in the possession of the United States Attorney except as provided by 32 C.F.R. 160.32. The United States Attorney shall make his decision on the basis of all relevant information. No verbatim record of the proceedings shall be required.

VI. If the alleged violator fails to complete the period of alternate service to which he has agreed, the United States Attorney may proceed to prosecute the case.

VII. If the United States Attorney receives a certificate from the Director of Selective Service indicating that an alleged violator has satisfactorily completed his period of alternate service, then he will either move the court to dismiss the Section 12 indictment against the violator with prejudice, or terminate any Section 12 investigation of the alleged violator, whichever is appropriate.

VIII. If an alleged Section 12 violator is apprehended before January 31, 1975, the violator will be treated as if he voluntarily presented himself to the United States Attorney as provided in II, if the violator so desires.

IX. Upon request of any individual who thinks he may be under investigation for violating Section 12 of the Military Selective Service Act, the United States Attorney shall promptly review that individual's case file, if any exists, and in any event inform the individual whether or not Section 12 charges against him will be pursued if he does not report as provided in II.

X. An individual who is neither under indictment nor investigation for an offense covered by this directive but who reports as provided in II and admits to such an offense

will be subject to prosecution unless he makes an agreement as provided in III.

XI. The United States Attorney may delegate any function under this directive to an Assistant United States Attorney.

UNITED STATES OF AMERICA

VS.

_____ _____
Name File No.

_____ _____
Street Address Telephone No.

_____
City and State

AGREEMENT FOR ALTERNATE SERVICE

It appearing that you have committed an offense against the United States on or about _____ in violation of Title 50 App. United States Code, Section 462, in that

_____

_____

_____

Therefore, on the authority of the Attorney General of the United States, by _____, United States Attorney for the District of _____, prosecution in this District for this offense shall be deferred for the period of _____ months from this date, provided you sign the following agreement:

Agreement

I, _____ understand that the Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy trial. I understand that the Fifth Amendment prohibits double jeopardy for the same offense. I understand that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the Court may dismiss an indictment, information, or complaint for unnecessary delay in presenting a charge to the grand jury, filing an information or in bringing a defendant to trial. I understand that constitutional due process may require dismissal of an indictment that has been unfairly delayed.

Re: United States v. _____

Criminal File No. _____

Dear _____:

This letter concerns reports received by this office that you have committed an offense against the United States on or about _____ in violation of Section 12 of the Military Selective Service Act.

In accord with the President's policy of granting leniency to certain individuals who are charged with violating Section 12 of the Military Selective Service Act, you are eligible for diversion to an alternate service program. Should you agree to undertake acceptable alternate service as an acknowledgement of your allegiance to the United States this office will refrain from prosecution. Note, however, that if no agreement is reached the United States will be free to prosecute you for the Section 12 charge. If the Director of Selective Service certifies to us that you have successfully completed your service, the pending charge against you will be dropped. However, failure satisfactorily to complete the alternate service will probably cause us to resume prosecution of the Section 12 charge.

A decision to seek acceptance into this program is one that must ultimately be made by you. Nevertheless, it is important that you immediately discuss this matter with your attorney inasmuch as your participation in this program will require a waiver of certain rights afforded to you by the Constitution. For example, you must waive your right to a speedy trial and right to have an indictment presented to the grand jury, if one has not already been obtained, within the prescribed statute of limitations. We suggest that you consult with your attorney who will explain the program to you and the nature of the waivers mentioned above.

Very truly yours,

_____
United States Attorney

By:

_____

	UNCONVICTED CASES PENDING	DECLINED OR DISMISSED	UNCONVICTED CASES PENDING
Alabama N.	18	4	14
Alabama M.	2	0	2
Alabama S.			
Alaska			
Arizona	62	4	58
Arkansas E.	10	0	10
Arkansas W.			
California N.			
California E.			
California C.			
California S.			
Canal Zone	2	1	1
Colorado			
Connecticut	59	19	40
Delaware			
D.C.			
Florida N.	16	0	16
Florida M.	14	2	12
Florida S.			
Georgia N.			
Georgia M.			
Georgia S.			
Guam			
Hawaii			

Idaho	25	5	20
Illinois N.			
Illinois E.	20	0	20
Illinois S.			
Indiana N.			
Indiana S.			
Iowa N.	22	2	20
Iowa S.	23	0	23
Kansas	21	0	21
Kentucky E.			
Kentucky W.	17	4	13
Louisiana E.	9	0	9
Louisiana M.	0	0	0
Louisiana W.	11	0	11
Maine			
Maryland			
Massachusetts			
Michigan E.			
Michigan W.	84	15	69
Minnesota	70	8	62
Mississippi N.			
Mississippi S.	19	14	5

Missouri E.			
Missouri W.			
Montana			
Nebraska			
Nevada			
New Hampshire			
New Jersey	77	16	61
New Mexico			
New York N.	91	9	82
New York S.			
New York E.			
New York W.	204	41	163
North Carolina E.			
North Carolina M.			
North Carolina W.			
N. Dakota			
Ohio N.	180	10	170
Ohio S.			
Oklahoma N.			
Oklahoma E.	1	0	1
Oklahoma W.	16	0	16
Oregon			

Pennsylvania E.			
Pennsylvania M.			
Pennsylvania W.	67	0	67
Puerto Rico	2	1	1
Rhode Island			
S. Carolina			
S. Dakota	11	2	9
Tennessee E.			
Tennessee M.	8	0	8
Tennessee W.			
Texas N.	24	2	22
Texas S.	46	9	37
Texas E.			
Texas W.			
Utah			
Vermont	15	1	14
Virgin Island	0	0	0
Virginia E.	103	22	81
Virginia W,	8	0	8
Washington E.			
Washington W.	74	22	52
W. Virginia N.	7	0	7
W. Virginia S.	7	0	7

Wisconsin E.			
Wisconsin W.			
Wyoming	8	0	8
TOTALS	1,453	213	1,240

14.6% of unconvicted cases dismissed or declined Pursuant to Attorney General's Order of Nov. 13, 1974.

○