**The original documents are located in Box 6, folder "Final Report - Draft, 11/11/75 (2)" of the Charles E. Goodell Papers at the Gerald R. Ford Presidential Library.**

type involved separate but similar procedures. Understandably, military procedures put the burden of proof on the applicant. He was required to submit statements on six separate questions concerning the origin, nature, and implications of his conscientious objection. Military regulations required that the applicant "conspicuously demonstrate the consistency and depth of his beliefs."[28] Some of our applicants did not persuade authorities of their conscientious beliefs.

(Case 3-77) For a year-and-a-half after he was drafted, applicant tried to obtain CO status, because he did not believe in killing human beings. He talked to his Captain and the Red Cross, neither of whom found his aversion to taking human life to be persuasive. The applicant is minimally articulate, but states that even if someone was trying to kill him, he could not kill in return. When he had exhausted his application for CO status and was scheduled for Vietnam, he went AWOL.

After submitting an application for conscientious objector status, a soldier was interviewed by a chaplain and a military psychiatrist. The chaplain commented on the sincerity and depth of the applicant's belief, and the psychiatrist evaluated him for mental disorders. Some applicants claimed they were victims of irregularities, and they went AWOL rather than seek remedies within channels.

(Case 3-78) Three years after enlisting in the Navy, applicant made several attempts to be recognized as a conscientious objector. He spoke with chaplains, legal officers, doctors, and a psychiatrist. He told the psychiatrist of his opposition to the war in Vietnam and of his heavy drug use. Applicant claimed that the psychiatrist threw his records in his face and told him to get out of his office. He went AWOL after his experience with the psychiatrist.

The conscientious objector's next step was to present his case before a hearing officer, who in turn made a recommendation through the chain of command. The final authority rested either with the General Court-Martial Convening Authority or with the administrative affairs office in the appropriate service department headquarters.

<u>Assignment to Vietnam</u>



During the height of the Vietnam War, about one-third (34%) of the applicants were ordered to Vietnam, usually about six months after entering the service. Most complied with the orders, but many did not. Seven percent were discharged because they went AWOL when assigned to Vietnam.

(Case 3-79) Applicant received orders to report to Vietnam. While on leave before he had to report, he requested help from his Congressman so that he would not be sent overseas. He also applied for an extension of his departure date on the grounds that his wife was eight months pregnant and that he was an alien. His request was denied, and he went AWOL.

The other 27% did go to Vietnam, often on assignment to combat units. Once there, very few went AWOL. Roughly one in eight (three percent of all military applicants) went on extended AWOL while in Vietnam. Typically, AWOLs in Vietnam resulted from personal problems, often of a medical nature.

(Case 3-80) Applicant was assigned to an infantry unit in Vietnam. During his combat service, he sustained an injury which caused his vision to blur in one eye. His vision steadily worsened, and he was referred to an evacuation hospital in DaNang for testing. An eye doctor's assistant told him that the doctor was fully booked and that he would have to report back to his unit and come back to the hospital in a couple of weeks. Frustrated by this rejection and fearful of his inability to function in an infantry unit, applicant went AWOL.

Only about one percent of the military applicants went AWOL from a combat zone, and very few of those cases involved demonstrable cowardice. We estimate that only about one-tenth of one percent actually deserted under fire.

(Case 3-81) Applicant would not go into the field with his unit, because he felt the new commanding officer of his company was incompetent. Applicant was nervous about going out on an operation in which the probability of enemy contact was high. (His company was subsequently dropped onto a hill where it engaged the enemy in combat.) He asked to remain in the rear, but his request was denied. Consequently, he left the company area because, in the words of his chaplain, "the threat of death caused him to exercise his right of self preservation." Applicant was apprehended while traveling on a truck away from his unit without any of his combat gear.

Once a soldier arrived in Vietnam, he was less likely to go AWOL. However, he was permitted to return to the United States on emergency leave when appropriate. Also, he was offered several days of "R&R" (rest and relaxation) at a location removed from combat zones, and frequently outside of Vietnam. It was on these sojourns outside of Vietnam that applicants often went AWOL.

(Case 3-82) Applicant was granted emergency leave from Vietnam due to his father's impending death. Applicant failed to return from the leave.

Many military applicants served with distinction in Vietnam. They fought hard and well, often displaying true heroism in the service of their country. Of those who served in Vietnam, one in eight was wounded in action.

(Case 3-83) While a medic in Vietnam, applicant (an American Indian) received the Bronze Star for Heroism because of his actions during a night sweep operation. When his platoon came under intense enemy fire, he moved through a minefield under a hail of fire to aid his wounded comrades. While in Vietnam, he was made Squad Leader of nine men, seven of whom (including himself) were wounded in action. In addition to his Bronze Star, he received the Army Commendation Medal with Valor Device, the Vietnam Service Medal with devices, the Vietnam Campaign Medal, and the Combat Medic's Badge.

Others experienced severe psychological trauma as a result of their combat experiences; some applicants turned to drugs.

(Case 3-84) During his combat tour in Vietnam, applicant's platoon leader, with whom he shared a brotherly relationship, was killed while awakening applicant to start his guard duty. He was mistaken for a Viet Cong and shot by one of his own men. This event was extremely traumatic to applicant, who subsequently experienced nightmares. In an attempt to cope with this experience, he turned to the use of heroin. After becoming an addict, he went AWOL. During his AWOL, he overcame his drug addition only to become an alcoholic. After obtaining help and curing his alcoholism, he turned himself in.

Still other applicants indicated that combat experience was a source of personal fulfillment.

(Case 3-85) Applicant, who was drafted, was pleased by his assignment to Vietnam. He was proud of his training and membership in a cohesive, elite unit.

Of the military applicants who served in Vietnam, almost half had volunteered either for Vietnam service, for Combat action, or for an extended Vietnam tour. They enjoyed the close companionship of combat situations and felt a sense of accomplishment from doing a difficult job well. Some applicants went AWOL because of their inability to extend their tour in Vietnam.

(Case 3-86) While in Vietnam, applicant tried to extend his tour, but his request was never answered. He was told much later that he would have to wait until he returned stateside. After he did, he was told that he could not return, so he went AWOL. He had derived satisfaction from his work in Vietnam because he was respected and found the atmosphere close and friendly.

In contrast, combat experience for other applicants produced a sense of uneasiness about the cause for which they were fighting.

(Case 3-87) Applicant was successfully pursuing his military career until he served in Cambodia assisting the Khmer Armed Forces. He began to question the legality and morality of Army operations in Cambodia. This resulted in disillusionment and led to his AWOL offense.

Vietnam veteran applicants frequently experienced severe readjustment problems upon returning to the United States. Almost all of them (23% of all military applicants) went AWOL after returning from their Vietnam tour of duty. This "combat fatigue" or "post-Vietnam syndrome" was partly the result of the incessant stress of life in combat. The Clemency Board found that six percent of all military applicants suffered from mental stress caused by combat.

(Case 3-88) After returning from two years in Vietnam, applicant felt that he was on the brink of a nervous breakdown. He went AWOL from his duty station, telling his commander that he was going home and could be located there, if desired.

Two-fifths of the Vietnam veteran applicants (11% of all military applicants) claimed to have experienced severe personal problems as a result of their tour of duty. These problems were psychological, medical, legal, financial, or familial in nature. One-third of their psychological and medical problems were permanent disabilities of some kind. They often complained that they had sought help, received none, and went AWOL as a consequence.

(Case 3-89) (This is a continuation of the case of the American Indian who received a Bronze Star for Heroism). After applicant's return to the United States from Vietnam, he asked his commanding officer for permission to see a chaplain and a psychiatrist. He claimed that he was denied these rights, so he decided to see his own doctor. He was given a psychological examination and was referred to a Veterans Administration hospital. After a month of care, he was transferred back to camp. He again sought psychiatric care, but could find none. Later, he was admitted to an Army

hospital. One examining psychiatrist noted that he needed prompt and fairly intensive short-term psychiatric care to avert further psychological complications from his war experience. His many offenses of AWOL were due to the fact that he felt a need for psychiatric treatment but was not receiving it.

Vietnam veteran applicants frequently complained that they had difficulty adjusting to the routine of stateside duty which contrasted sharply with the more demanding combat environment. Some adjustment problems may have resulted from their injuries.

(Case 3-90) After his return from Vietnam, applicant was frustrated over his inability to perform his occupational specialty as a light vehicle driver due to his injuries. His work was limited to details and other menial and irregular activity. He began to feel "like the walls were closing in on (him)," so he went AWOL.

Unfortunately, other soldiers who had never seen combat experience were sometimes unfriendly, adding to the combat veteran's readjustment problems.

(Case 3-91) While in Vietnam, applicant saw much combat action and received numerous decorations. He was an infantryman and armor crewman who served as a squad and team leader. He participated in six combat campaigns, completed two tours in Vietnam, and received the Bronze Star for heroism. In one battle, he was wounded -- and all of his fellow soldiers were killed. His highest rank was staff sergeant. Upon his return from Vietnam, he went AWOL because of harassment from fellow servicemen that he was only a "rice paddy NCO" who would not have earned his rank if not for the war.

Veterans of other wars usually came home as national heroes. The Vietnam veteran, however, was sometimes greeted coolly. Some Vietnam veteran applicants were disappointed by the unfriendly reception they were given by their friends and neighbors. Many, deeply committed to the cause for which they had been fighting, were unprepared to return home to an America in the midst of divisive controversy over the war.

(Case 3-92) Applicant received a Bronze Star and Purple Heart in Vietnam. He wrote the following in his application for clemency: "While in Vietnam, I didn't notice much mental strain, but it was an entirely different story when I returned. I got depressed very easily, was very moody, and felt as if no one really cared that I

served their country for them. And this was very hard to cope with, mainly because while I was in Vietnam I gave it 100%. I saw enough action for this life and possibly two or three more. I hope that someone understands what I was going through when I returned."

(Case 3-93) On his return from combat in Vietnam, applicant found it difficult to readjust to stateside duty. He was shocked by the civilian population's reaction to the war and got the feeling he had been wasting his time.

Reasons for AWOL Offenses

By going AWOL, our military applicants committed at least one of three specific military offenses: desertion, AWOL, or missing movement. (See Chapter 2-B.) Of the three, desertion is the most serious offense. To commit desertion, a soldier had to be convicted of shirking important service (the most serious form of desertion), departing with the intent to avoid hazardous duty, or departing with the intent to remain away permanently. Although the military administratively classified most applicants as deserters, usually because they were gone for periods in excess of 30 days, only nine percent were convicted of the offense of desertion. Desertion convictions were infrequent because of the difficulty in proving intent.

A soldier could be convicted for missing movement when he failed to accompany his unit aboard a ship or aircraft for transport to a new position. Only one percent of the military applicants were convicted for missing movement.

The majority -- 90% -- were punished for AWOL. AWOL was the easiest form of authorized absence to prove. Where the evidence did not establish the intent element of desertion, a military court could still return a finding of AWOL.

Military applicants went AWOL from different assignments, for different reasons, and under a variety of circumstances. As described earlier, seven percent left from basic training, ten percent from advanced individual training, seven percent because of assignment to Vietnam, three percent from Vietnam, one percent from Vietnam leave, two percent went AWOL from overseas assignments in countries other than Vietnam, 23% from post-Vietnam stateside duty, and 47% from other stateside duty.

As a criminal offense, AWOL is peculiar to the military. If a student leaves his school, he might be expelled. If an employee leaves his job, he might be fired and suffer from a loss of income. But if a serviceman leaves his post, he might not only be "fired," but also criminally convicted, fined, or imprisoned. These extra sanctions are necessary -- especially in wartime -- to maintain the level of discipline vital to a well-functioning military. Desertion

in time of Congressionally-declared war carries a possible death penalty, and the offenses committed by many of our applicants could have brought them long periods of confinement. Such swift, certain, and severe penalties are necessary to deter military misconduct.

In light of this, why did all of the military applicants go AWOL? Almost 4,000 were Vietnam combat veterans, yet they risked -- and lost -- many privileges and veterans benefits as a result of their offenses.

Though the general public has frequently assumed that many unauthorized absences during the Vietnam era were motivated by conscientious opposition to the war, less than five percent of the military applicants went AWOL primarily because of an articulated opposition to the war.[29]

(Case 3-94) Applicant decided he could not conscientiously remain in the Army, and he went to Canada where he worked in a civilian hospital. Prior to his discharge, applicant stated: "In being part of the Army, I am filled with guilt. That guilt comes from the death we bring, the tremendous ecological damage we do, the destruction of nations, the uprooting of whole families, plus the millions of dollars wasted each year on scrapped projects and abuse of supplies. I am as guilty as the man who shoots the civilian in his village. My being part of the Army makes me as guilty of war crimes as the offender."

An additional two percent went AWOL to avoid serving in combat, and ten percent left because they did not like the military. In some cases, these reasons may have implied an unarticulated opposition to the war. Thus, anywhere from five percent to 17% of the military applicants offenses may have fit a very broad definition of opposition to the war or the military. However, few of the additional 12% offered any explicit evidence of conscientious objection to war.

(Case 3-95) Applicant left high school at age 16 due to poor grades and disinterest. He was inducted, but after one week of basic combat training, he went AWOL. Though he was not discharged until two years later, he only accumulated 18 days of creditable service.

A small but significant two percent of our applicants went AWOL because of post-combat psychological problems.

(Case 3-96) Applicant went AWOL because he was "disturbed and confused" upon returning from Vietnam. He described himself as "restless" and "really weird, enjoying killing and stuff life that." During his AWOL, he states that he was totally committed to Christ and the Ministry.

In some instances, an applicant's actions seemed beyond his reasonable control.

(Case 3-97) Applicant participated in seventeen combat operations in Vietnam. He was medically evacuated because of malaria and an acute drug-induced brain syndrome. He commenced his AWOL offenses shortly after he was released from the hospital. Since his discharge, applicant has either been institutionalized or under constant psychiatric supervision.

Approximately 13% of the military applicants left the military because of denied requests for hardship leave, broken promises for occupational assignments and improper enlistment practices, or other actions by their superiors which they did not like.

(Case 3-98) Applicant enlisted for the specific purpose of learning aircraft maintenance, but instead was ordered to artillery school. When he talked with his commanding officer about this, he was told that the Army needed him more as a fighting man. He later went AWOL.

(Case 3-99) Applicant, a Marine Corps Sergeant with almost ten years of creditable military service, several times requested an extension of his tour in Okinawa to permit him time to complete immigration paperwork for his Japanese wife and child. His requests were denied. Upon return to the United States, he requested leave for the same purpose. He was unable to obtain leave for five months; it was finally granted after he sought help from a Senator. Applicant relates that his superior officer warned him, before he went on leave, that "he was going to make it as hard for him as he could" when he returned, because he had sought the assistance of a Senator.

Some may have committed their offenses because of their basic unfitness for military service at the time of their enlistment.

(Case 3-100) Applicant had a Category IV AFQT score. He went AWOL because he was apparently unaware of the existence of the Army drug abuse program. The corrections officer at the civilian prison where he is incarcerated believes that applicant's retardation, while borderline, makes it impossible for him to obey rules and regulations.



Sixteen percent committed their offenses because of personal problems -- usually medical or psychological in

nature. Half of their problems were related to the use alcohol or drugs.

(Case 3-101) Applicant started drinking at age 13 and was an excessive user of alcohol. Awaiting court-martial for one AWOL offense, he escaped but soon returned voluntarily. He claimed that his escape was partly the result of his intoxication from liquor smuggled in by another detainee. A psychiatrist described him as emotionally unstable and unfit for military service.

The bulk of the military applicants (41%) committed their offenses because of family problems. Sometimes these problems were severe, and sometimes not.

(Case 3-102) Applicant commenced his absence from a leave status because of his father's failing health and his mother's poor economic prospects. He had applied twice for hardship discharges before his offense. While applicant was AWOL his father died of a stroke. His mother was left with a pension of $22 a month. In addition, she was a polio victim and unable to work.

(Case 3-103) Applicant had been granted leave so he could be with his wife and newborn child, but he remained home in AWOL status.

Finally, 12% of our sample of applicants went AWOL for reasons of immaturity, boredom, or just plain selfishness. These tended to be people who could not, or would not, adjust to military life.

(Case 3-104) As a youth, applicant experienced numerous conflicts with his parents and ran away from home on several occasions. He joined the Army because there was "nothing else to do" in the rural community in which he was raised. Applicant had difficulty adjusting to the regimentation of Army life, and he went AWOL four times.

Some applicants offered bizarre explanations for their offenses.

(Case 3-105) Applicant states he was traveling across the Vietnamese countryside with another soldier, when they were captured by the Viet Cong. He claimed that he was a prisoner-of-war for two months before he finally escaped and returned, 30 pounds lighter and in rags, to his unit. His unit commander did not believe his story, and his defense counsel advised him to plead guilty to AWOL at his court-martial.

Military applicants typically went AWOL three times. Over four-fifths went AWOL more than once. They were around nineteen or twenty when they committed their first offenses, and twenty or twenty-one when they committed their last offenses. Their first offenses usually occurred around 1968-1970, and their last around 1969-71. Typically, their last AWOLs were the longest, lasting seven months. One-fourth (25%) were AWOL for three months or less, and 27% were AWOL for over one year. Only three percent were AWOL for more than four years.

(Case 3-106) Applicant's military records reflect a series of unauthorized absences, the longest amounting to five years and five months, with only one month's creditable service.

At the time of their last AWOL offenses, military applicants had typically accumulated fourteen months of creditable military service time; 81% had six months or more of creditable service, enough to qualify them for veterans benefits. Only one percent used any force to effect their escape from the military.

## Experiences as Fugitives

Over three-quarters (76%) either returned to military control immediately or settled in their hometowns under their own names. Most carried on life just as they had before they joined the service. Another 13% settled openly in the United States, and six percent settled in the foreign country where they had been assigned (often Germany). Only five percent became fugitives: two percent in Canada, two percent in other foreign countries (often Sweden), and one percent in the United States.

(Case 3-107) Applicant went back to his old job after going AWOL. He never changed his name or tried to conceal his identity.

While AWOL, most applicants (81%) were employed full-time. Only 8% were unemployed. Often they worked in jobs in which they would have been fired, lost their union membership, or had their trade license revoked if their AWOL status had been known.

(Case 3-108) During his AWOL, applicant found employment as a tile and carpet installer. He became a union member in that trade.

During his AWOL period, applicant worked as a carpenter to support his sister's family. Later, he worked as a security guard.



Slightly over half (52%) of the military applicants were arrested for their last AWOL offenses. Some efforts were made to apprehend AWOL soldiers, but those efforts were startlingly ineffective. Normally, an AWOL offender's

commanding officer sent a letter to his address of record within ten days of his absence. In addition, he would complete a form, "Deserter Wanted by the Armed Forces," which went to the military police, the Federal Bureau of Investigation, and, eventually, to the police in the jurisdiction of the soldier's home of record.

Either the local police never received bulletins about AWOL offenders, or they were unwilling to act on them. Countless applicants lived openly at home for years until they surrendered or were apprehended by accident, such as through a routine police check after running a red light. In some cases, an applicant's family was not even notified of his AWOL status.

(Case 3-109) Applicant had a duty assignment at a military office in Germany. He experienced a great deal of tension, frustration, and restlessness, culminating in a feeling one day that he "couldn't face" going to work. He remained at his off-post home during his AWOL. His office made no effort to contact his wife during the entire period of his AWOL. He drank heavily, became anxiety-ridden, and concealed his AWOL status from his wife by feigning to go to work each morning. He was eventually apprehended when his wife, concerned over his strange behavior, called his office to ask his co-workers if they knew what was wrong with him. They had not seen him in months.

Return to Military Control

Upon returning to military control, military applicants had to face some form of disciplinary action. Some (14%) faced other charges in addition to AWOL or desertion. For all Clemency Board applicants, their last AWOL offenses resulted in discharges under other than honorable conditions. Other AWOL offenders who were not eligible for the clemency program were more fortunate. They received more lenient treatment and later were discharged under honorable conditions. About 22% of our applicants had records reflecting at least one prior period of unauthorized absence with no record of punishment.

Upon return to military control, most applicants who were AWOL for over thirty days were processed through Personnel Control Facilities. Life at these minimum-security facilities was not always easy for them.



(Case 3-110) Applicant voluntarily surrendered at an Army post near his home town. He found conditions in the Personnel Control Facility intolerable due to the absence of regular work, the prevalence of crime, and the continued lack of regular pay. He went AWOL again one week later.

While in the Personnel Control Facilities, applicants were processed for administrative or court-martial action. Some were transferred to more secure pre-trial confinement. At the outset, they were briefed by military attorneys who advised them about what disciplinary actions to expect. They were told about their opportunity to request a discharge in lieu of court-martial.

## Administrative Discharges

Some first offenders were quickly re-integrated into military life. Others faced more uncertainty about their fates. They had to decide, in most instances, whether to proceed to trial or accept an administrative discharge. The decision to go to trial usually carried the risks of conviction, a period of confinement, and perhaps a punitive discharge. Occasionally, a court-martial did not lead to discharge: a convicted soldier might be returned to active duty, thereby giving him an opportunity to complete his enlistment (extended by the amount of time he was AWOL and in confinement). Even if a punitive discharge was adjudged, a return to duty was frequently permitted if an individual demonstrated rehabilitative potential while confined. In fact, over half (54%) of the first courts-martial for AWOL faced by applicants resulted in their return to their units. They would have received a discharge under honorable conditions, with entitlement to veterans' benefits, if no further problems had developed. However, they were unable to make the most of their second chances.

(Case 3-111) Applicant was convicted for four periods of AWOL totaling one year and two months. He had an exemplary record for valor in Vietnam. The convening authority suspended the punitive discharge adjudged by his court-martial. The discharge was reimposed, however, after he failed to return from leave granted him following his court-martial.

Military applicants' decisions to accept administrative discharges in lieu of trial amounted to waivers of trial, virtual admissions of guilt, and discharges under less than honorable conditions. Recipients of administrative discharges also lost an opportunity to defend charges against them. However, the administrative process was speedier, permitting rapid return home to solve personal problems. It also involved no risk of imprisonment and no Federal criminal conviction. However, it did impose a stigmatized discharge. Thus, the choice between administrative discharge and court-martial was very difficult.[30]



If an AWOL offender had established what his commander felt was a pattern of misconduct, the commander might decide that he was no longer fit for active duty. This usually resulted in an Undesirable Discharge for Unfitness.[31]

Case 3-112) Applicant was discharged for unfitness due to repeated AWOL, frequent use of drugs, habitual shirking, and the inability to conform to acceptable standards of conduct.

The commander would then notify the soldier of his intention to discharge him. The soldier could then choose to fight the action by demanding a board of officers. If he asked for the board, the convening authority detailed at least three officers to hear the evidence presented by the government and rebutted by the soldier and his assigned military defense counsel. The board was then authorized to determine whether the soldier was either unfit or unsuitable for further military duty; if so, they recommended his discharge. The board could also recommend his retention in the Service. If the board found the soldier unsuitable, the normal recommendation would be discharge under honorable conditions. A discharge under honorable conditions was also possible if unfitness were found, but the usual result in such a case was to recommend an Undesirable Discharge. Once the board made its recommendations, the convening authority had to make a final decision.

The choice between a discharge for unsuitability (usually a General Discharge) and a discharge for unfitness (usually an Undesirable Discharge) affected an AWOL offender's reputation and eligibility for veterans' benefits for the rest of his life. The decision was based upon a serviceman's whole record. The rule-of-thumb often applied was that an unsuitability discharge went to a soldier "who would if he could, but he can't"--in other words, to someone with a psychological problem or lack of mental ability. An unfitness discharge went to a soldier with more than an attitude problem, "who could if he would, but he won't." However, each military base set its own criteria for administrative discharges.

(Case 3-113) Applicant was under consideration for an unsuitability discharge. A military psychiatrist indicated that he suffered from a character and behavior disorder characterized by "impulsive, escape-type behavior" and "unresolved emotional needs marked by evasion of responsibility." Because of this diagnosis of a severe character and behavior disorder, he expected a General Discharge. Shortly before his discharge, a racial disruption occurred in his company, in which applicant took no part. This disruption led to the rescission of a lenient discharge policy at his military base, and applicant was given an Undesirable Discharge for Unfitness.



The more common administrative procedure, accounting for the discharge of 45% of our applicants, was the "For the Good of the Service" discharge, given in lieu of court martial. This discharge was granted only at the request of a soldier facing trial for an offense for which a punitive

discharge could be adjudged. Until recently, it did not require an admission of guilt, but it did require that the AWOL offender waive his right to court-martial and acknowledge his willingness to accept the disabilities of a discharge under other than honorable conditions. Unlike our applicants, a few AWOL offenders received General Discharges through "Good of the Service" proceedings in lieu of court-martial, because their overall records were satisfactory.

AWOL offenders did not have a right to a discharge in lieu of court-martial; they could only make such a request. To qualify, the AWOL for which they were facing trial had to range between 30 days and a year and a half, depending on the standards set by the court-martial convening authorities at the bases where the AWOL offenders returned to military control.

(Case 3-114) Applicant was AWOL twice, for a total absence of almost one year and two months. He applied twice for a discharge in lieu of court-martial for his AWOLs, but both requests were denied.

Some applicants returned from their AWOLs with the expectation that they would receive "Good-of-the-Service" discharges, freeing them from further military responsibilities.

(Case 3-115) Applicant wrote that he "looked around" for ways to deal with his personal pressures and finally decided to go AWOL. After three months living in a commune, he returned with the expectation that he would be discharged. He received a discharge in lieu of court-martial.

A few indicated that they went AWOL specifically to qualify for an Undesirable Discharge in lieu of court-martial.

(Case 3-116) After his third AWOL, applicant requested a "Good-of-the-Service" discharge in lieu of court-martial. It was denied, and he then went AWOL three more times. He told an interviewing officer after his sixth AWOL that he had gone AWOL in order to qualify for a discharge in lieu of court-martial.

AWOL offenders who qualified for a discharge in lieu of court-martial rarely chose to face trial. The desire was often strong to leave the Personnel Control Facility or get out of pre-trial confinement. If a soldier was granted a discharge in lieu of court-martial, he was usually allowed to leave confinement within one week after his application. One to two months later, he was given his discharge. Occasionally, our applicants claimed that they went home expecting to receive a General Discharge, only to get an Undesirable Discharge. While it was a permissible practice in the Army prior to 1973 for an accused to condition his request for discharge in lieu of trial upon his being

granted a General Discharge under honorable conditions, this was rarely granted. In order to speed the discharge application, a soldier could request a discharge, acknowledged that he might be given an Undesirable Discharge, but requested that he be furnished a General Discharge in a separate statement. This may account for the misunderstanding by some applicants as to the discharge they would receive.

(Case 3-117) Applicant's last AWOL ended in a 30-day pre-discharge confinement, during which he refused to accept a nonjudicial punishment for his offense. He alleged that his sergeant told him that if he did not sign, he would be unable to see anyone about his problem. He further alleged that he was promised nothing more severe than a General Discharge, so he signed the papers. Later, he discovered that he was given an Undesirable Discharge. He unsuccessfully appealed his discharge before the Army Discharge Review Board.

Applicants who received discharges in lieu of trial generally were those whose last AWOL ended between 1971 and 1973. Their likelihood of receiving such discharges was greater if their AWOLs had been no more than one year in length.

Table 5 and Table 6 describe the relative effects of "year of discharge" and "length of AWOL" on the type of discharge received by our applicants.

TABLE 5: TYPE OF DISCHARGE BY YEAR OF DISCHARGE

| | 1966 | 1967 | 1968 | 1969 | 1970 | 1971 | 1972 | 1973 |
|---|---|---|---|---|---|---|---|---|
| UD-in lieu of court-martial: | 3% | 1% | 11% | 37% | 34% | 67% | 62% | 56% |
| UD-Unfitness: | 26% | 25% | 27% | 19% | 10% | 12% | 6% | 12% |
| Punitive Discharge via court-martial: | 71% | 74% | 62% | 54% | 56% | 21% | 32% | 32% |

TABLE 6: TYPE OF DISCHARGE BY LENGTH OF AWOL

| | 0-6 months | 7-12 months | Over 12 months |
|---|---|---|---|
| UD - In lieu of court-martial: | 50% | 45% | 36% |
| UD - Unfitness: | 21% | 10% | 7% |
| Punitive Discharge via court-martial: | 29% | 45% | 57% |

Over half (51%) of the AFQT Category IV applicants received discharges in lieu of court-martial, compared to 44% of Category II and III applicants and only 32% of Category I applicants. Blacks were about as likely as whites to receive discharges in lieu of court-martial (46% versus 44%), but Spanish-speaking soldiers were much more likely to receive them (66%).

## Trials By Court-Martial

Frequently, the military insisted that AWOL offenders face court-martial for their offenses. Less often, the applicants themselves chose to face trial instead of requesting administrative discharges, because of the threat of punitive discharge and imprisonment. In court-martial trials, they had greater opportunity to deny or explain all charges brought against them, with benefit of counsel and with full advance knowledge of the prosecution's case. Accused soldiers enjoyed at least as many rights in court-martial trials as accused persons in civilian trials. Usually, trials took place very promptly, with pre-trial delays (and confinement or residence at the Personnel Control Facility) limited to two or three months at most.

Military applicants experienced three forms of court-martial. The Summary Court-Martial consisted of a hearing officer who called witnesses for the prosecution and defense, rendered a verdict, and adjudged sentence. The Summary Court adjudges no sentence greater than confinement at hard labor for one month, hard labor without confinement for 45 days, reduction to the lowest enlisted pay grade, and forfeiture of two-thirds of one month's pay. After 1971, no confinement could be adjudged unless the accused were represented by counsel.[32] No transcript of the trial was kept, and there was no judicial review. However, a Summary Court-Martial was never convened without the express consent of the accused, who could refuse the court and leave to the convening authority the decision whether to refer the charges to a higher court. Altogether, 16% of the military applicants faced a Summary Court-Martial at least once.



The 54% of the military applicants who faced a Special Court-Martial were tried by a court of officers, unless the accused specifically requested that at least one-third of the court be from enlisted ranks. After 1969, a military

judge normally presided over the trial, and the accused was entitled to request that the military judge alone hear the case and adjudge sentence. In the absence of a military judge, the senior member of the court of officers (the President of the Court) presided over the trial. The Special Court could adjudge no sentence greater than confinement at hard labor for six months, two-thirds forfeiture of pay for six months, reduction to the lowest enlisted pay grade, and a Bad Conduct Discharge. Of applicants tried by a Special Court, 50% received a Bad Conduct Discharge. The other half were returned to their units.

The 13% who were tried by a General Court-Martial faced a possible sentence of up to 5 years imprisonment, a Dishonorable Discharge, and total forfeiture of pay and allowances. The composition and procedures of General Courts-Martial were similar to those of Special Courts-Martial. Of military applicants tried by a General Court, 99% were ordered discharged, almost all (85%) with a Bad Conduct Discharge.

After 1969, AWOL offenders facing Special or General Court-Martial were entitled to free military defense counsel, who could be requested by name. They also could secure civilian attorneys, but at their own expense. Official military rules of evidence were followed and a verbatim record of trial was required if a punitive discharge was adjudged. Those who were punitively discharged had their cases reviewed for errors of law by a military attorney responsible to the court-martial convening authority. Their cases were further reviewed for errors of fact or law through military legal channels.

Few of our applicants expressed objections to the fairness of their trials, but some complaints were heard.

(Case 3-118) Applicant, a Vietnam veteran, sustained an eye injury (probably in Vietnam) which caused his retina to become detached. He is now nearly blind in one eye. At his trial, his counsel attempted to introduce the testimony of his attending ophthalmologist to prove that he absented himself to obtain medical treatment, not to desert. The military judge refused to admit the ophthalmologist's testimony in the absence of independent evidence of its relevancy. The Judge's decision was upheld on appeal.

Altogether, 40% of the military applicants stood Special or General Court-Martial for their last AWOL offense. Of those, about 16% pled "not guilty." All were convicted, and all but a few received punitive discharges. They were further sentenced to pay forfeitures, reduction-in-rank, and imprisonment, typically for seven months. Their sentences were often reduced through the automatic review of a Court of Military Review. Court-martialed applicants' final sentences averaged five months, with only three percent having to serve more than one year in prison.

## Prison Experiences

Sentences under 30 days were usually served at the post stockade. Convicted but undischarged AWOL offenders sentenced to more than one month of imprisonment were transferred to such correctional facilities as the Army Retraining Brigade. Efforts were made to rehabilitate offenders and enable them to complete their military service successfully. However, many were habitual offenders. For others, military life became even more difficult after confinement.

(Case 3-119) As the result of a two-month AWOL, applicant was convicted by a summary court-martial and sentenced to confinement. After his release and return to his former unit, he was constantly harassed, ridiculed, and assigned to demeaning work. He found this intolerable, and he went AWOL again.

Those who were pending punitive discharges or had received lengthy sentences were sent to confinement facilities like the Disciplinary Barracks at Fort Leavenworth, Kansas. Approximately 170 military applicants were still serving their terms when the President's clemency program was announced. They were all released upon their application for clemency.

## Consequences of Bad Discharges

All military applicants had one experience in common: they all received bad discharges. Sixteen percent received Undesirable Discharges for Unfitness, and 45% received Undesirable Discharges in lieu of court-martial. Those who faced court-martial and were sentenced to punitive discharges received Bad Conduct Discharges (38%) or Dishonorable Discharges (2%). In some states, a court-martial conviction, particularly if it led to a discharge or confinement over one year, incurs the same legal disabilities as a felony conviction in the civilian courts. Thus, some applicants lost their voting and property rights and the opportunity to obtain certain licenses by virtue of their punitive discharge.[33]

Civilian courts have taken judicial notice of the less-than-honorable discharge, calling it "punitive in nature, since it stigmatizes a serviceman's reputation, impedes his ability to gain employment and is in life, if not in law, prima facie evidence against a serviceman's character, patriotism, or loyalty."[34]



What was more important to military applicants was the effect of a bad discharge on their ability to qualify for veterans' benefits. Former servicemen with less than honorable discharges are denied veterans' benefits such as educational assistance, hospital and home health care, pensions to widow and children, medical and dental care, prosthetic devices, burial benefits, preference in

purchasing defense housing, and home, farm, and business loans.

Perhaps the most important benefits lost are those affecting employment opportunities, such as vocational rehabilitation, Federal civil service preference, veterans' re-employment benefits, and unemployment insurance benefits. Most applicants were twenty to twenty-two years old when they received their discharges. Many were looking for their first full-time civilian job. Some were caught in downward spirals: they could not afford to train themselves for a skilled job without veterans' benefits; employers would not hire them for other jobs because of their discharges; they then could not receive unemployment compensation because of their discharges.

(Case 3-120) Applicant was unable to go to accountant's school without benefit of the GI Bill. Finally, he found employment as a truck driver for small trucking firms enabling him to earn $70 per week. He could have earned more with the larger trucking companies, but they refused to hire him because of his discharge.

(Case 3-121) Applicant, a Vietnam veteran, was unable to find work for his first month after discharge because everyone insisted upon knowing his discharge. He finally found work as a painter but was laid off five months later. Because of his discharge he was denied unemployment benefits.

A number of studies have shown that employers discriminate against former servicement who do not hold Honorable Discharges. About 40% discriminate against General Discharges, 60% against Undesirable Discharges and 70% against Bad Conduct or Dishonorable Discharges. Many employers will not even consider an application from anyone with less than an Honorable Discharge.[35]

The injury caused by the discharge under other than honorable conditions is particularly acute in the case of military applicants who served more than enough time to have earned veterans' benefits, and who obtained Honorable Discharges for the purpose of re-enlisting, but who received bad discharges terminating their last period of enlistment. In most cases, their bad discharges lost them the veterans' benefits they had previously earned. Thirteen percent of all military applicants had more than three years of creditable service, and four percent had more than five years.



(Case 3-122) Applicant enlisted in the Marine Corps in 1961 and received his first Honorable Discharge four months later, when he re-enlisted for four years. He received his second Honorable Discharge in 1965, and he again re-enlisted. He received a third Honorable Discharge in 1968 and again re-enlisted. He had good proficiency and

conduct ratings (4.5), and he had attained the rank of Sergeant E-5. He went AWOL for 4-1/2 months in 1970 before receiving a Bad Conduct Discharge in 1971. His total creditable service was 9 years, 10 months, and 15 days.

Unfortunately, many military applicants turned to crime. At the time of their applications, 12% of the military applicants had also been convicted of civilian felony offenses. Seven percent were incarcerated for civilian offenses. Sometimes, their civilian offenses resulted from their military experiences--a drug habit developed in Vietnam, for example.

(Case 3-123) Applicant served eight months in Vietnam as a supply specialist before his reassignment back to the United States. His conduct and proficiency scores had been uniformly excellent during his Vietnam service. However, while in Vietnam he became addicted to heroin. He could not break his habit after returning stateside, and he began a series of seven AWOL offenses as he "got into the local drug scene." Eventually, he "ran out of money" and "had a real bad habit," so he "tried to break into a store with another guy that was strung out." He was arrested, convicted for burglary, and given an Undesirable Discharge for AWOL while on bail.

Of military applicants who are not incarcerated and whose current employment status is known, six percent are in school, 17% are unemployed, four percent are working part-time, and the rest (73%) are working full time. Two-fifths of those working full-time are in low-skilled jobs.

## D. Non-Applicants

An estimated 113,300 persons could have applied for clemency. Of those, 21,725 did apply. Who were the 91,500 who did not? Why did they fail to apply? What happens to them next?

### Who Were They?

The following table identifies nonapplicants in a very general sense:

TABLE 7: CHARACTERISTICS OF NON-APPLICANTS

| Clemency Program | Type of Applicants | Percentage of Nonapplicants | Total Number of Nonapplicants |
|---|---|---|---|
| PCB | Military-UD | 87% | 57,000 |
| PCB | Military-BCD/DD | 78% | 19,400 |
| PCB | Convicted Civilians | 78% | 6,800 |
| DOD | Fugitive Servicemen | 47% | 4,500 |
| DOJ | Fugitive civilians | 84% | 3,800 |
| | Total---------- | 81% | 91,500 |

We know little more about their characteristics than what this table shows. Discharged servicemen with Undesirable Discharges were the least likely to apply, in terms of percentage and total numbers. This may be attributable to the fact that we mailed application materials to eligible persons with Bad Conduct or Dishonorable Discharges, but were unable to do so for those with Undesirable Discharges. (See Chapter 2-E.)

Throughout the Vietnam Era, there never had been any tally -- even a partial tally -- of the number of war-induced exiles. Some estimates were made, but they were based upon very imperfect counting methods. For example, figures of up to 100,000 were derived from the numbers of files on American emigrants at aid centers.[36] Many emigrants were not draft resisters or deserters, and many had files at more than one center.

The Department of Defense had access to the military records of its eligible nonapplicants. Using these records, it could make comparisons between applicants and eligible nonapplicants. In most ways, they were alike -- family background, AFQT score, education, type of offense, and circumstances of offense. Only a few clear differences could be found. Nonapplicants committed their offenses earlier in the war, they were older, and they were more likely to be married. This implies that many may not have applied because their lives are settled, with their discharges more a matter of past than present concern.



If the Department of Defense findings are correct -- in other words, if nonapplicants are not very different from applicants -- we can make some estimate as to how many draft resisters of deserters ever were Canadian exiles. In the Clemency Board program, two percent of the military applicants and six percent of the civilian applicants had at one time been Canadian exiles. In the Defense program, two percent had been Canadian exiles. Many of the Department of Justice applicants may have been Canadian exiles, but no official data exists. Extrapolating from this data, it appears that, at most, 7,000 persons eligible for clemency

had ever been Canadian exiles. This amounts to only five percent of all eligible individuals. However, there may have been thousands more who fled to avoid the draft, but for whom no indictments were ever issued.

At present, we estimate that about 4,000 persons are still fugitives in Canada. Most are those who declined to apply to the Department of Justice program. We assume that few of them misunderstood their eligibility for clemency.

## Why Did They Fail to Apply?

We can identify seven reasons why eligible persons did not apply for clemency. We have listed them below in order of the significance we attribute to each of them.

1. Unawareness of eligibility criteria. Despite our public information campaign, many eligible persons may never have realized that they could apply for clemency. Had we begun our public information campaign earlier, or if the program had been of longer duration, it is likely that more would have applied.

2. Settled status. Others may not have cared about the kind of discharge they had, or they may have succeeded in other endeavors since their convictions or discharges. They may have wanted to avoid the risk that their employers neighbors, or even families might find out about their past.

3. Misunderstanding about the offerings of the program. Many prospective applicants may have been concerned about the usefulness of a Clemency Discharge. Others may not have known about the Presidential pardons given clemency recipients who applied to the Clemency Board -- or they may not have realized that Clemency Board applicants were asked to perform an average of only three months of alternative service.

4. Opposition to the Program by Interest Groups. Interest groups on both sides of the clemency amnesty issue were not cooperative in making accurate information available to prospective applicants. Our media efforts were impaired by demands for equal time by pro-amnesty groups. Some groups discouraged eligible persons from applying.

5. Inability or unwillingness to perform alternative service. Some individuals might have feared that if they quit their jobs to perform alternative service, they would not get them back later. Many fugitives in Canada had jobs and homes there, with children in school, so they might have seen two years of alternative service as more of a disruption than they were willing to bear.



6. Personal opposition to the program. Some might have felt, for reasons of conscience, that only unconditional amnesty would be an acceptable basis for them to make peace with the government.

. General distrust of government. Unfortunately, some may not have applied because they were afraid that, somehow, they would only get in trouble by surfacing and applying for clemency. Some might have been unsuccessful in pursuing other appeals, despairing that a new appeal would be of little help.

What Happens to Them Next?

Civilians convicted of draft offenses and former servicemen discharged for AWOL offenses will have to live with the stigma of a bad record. They still have the same opportunities for appeal that existed before the President's program -- principally through the United States Pardon Attorney and the military discharge review boards -- but their prospects for relief are, realistically, remote.

Military absentees still in fugitive status can surrender themselves to civilian or military authorities. They still face the possibility of court-martial, but it is possible that many will quickly receive Undesirable Discharges and be sent home.

Fugitive draft offenders can first inquire to learn whether they are on the Department of Justice's list of 4522 indictments. If they are not, they are free from any further threat of prosecution, unless they never registered for the draft. If their names are on that list, they can surrender to the United States Attorney in the district where they committed their draft offenses. They will then probably stand trial for their offenses. Although there have been exceptions, convicted draft offenders have been recently sentenced to 24 months of alternative service and no imprisonment. Nonetheless, they will still have felony convictions, involving a stigma and a loss of civil rights.

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As the Clemency Board began receiving applications, we were confronted with the need to develop procedural and substantive rules for making clemency recommendations to the President. The Proclamation could not have been clearer in its instruction to act upon clemency applications on a case-by-case basis. However, it left to the Board the responsibility for determining the specific procedures and substantive standards which we were to use in reaching individual case dispositions.

We found ourselves in a situation similar to that of the allegorical King Rex in Lon Fuller's The Morality of Law.[1] King Rex wanted to reform the legal system of his country. Possessing the general power of law-maker, but lacking the tools to write a code, he decided to proceed on a case-by-case basis. He hoped that certain rules and regulations would become apparent with the passing of time:

> Under the stimulus of a variety of cases, he hoped that his latent powers of generalization might develop and, proceeding case by case, he would gradually work out a system of rules that could be incorporated in a code. Unfortunately, the defects in his education were more deep-seated than he had supposed. The venture failed completely. After he had handed down literally hundreds of decisions, neither he nor his subjects could detect in those decisions any pattern whatsoever. Such tentatives toward generalization as were to be found in his opinions only compounded the confusion, for they gave false leads to his subjects and threw his meager powers of judgment off balance in the decision of later cases.[2]

King Rex died "old before his time and deeply disillusioned with his subjects."[3]



To avoid the fate of King Rex, we had to understand the limitations as well as the advantages of a case-by-case approach. It facilitates protection of individual rights, but it threatens inconsistency and slowness of judgment. It also leads to higher stakes. Any error may lead to unfair treatment of the individual.

Therefore, we took a number of steps to insure the fairness, accuracy, consistency, and timeliness of our case dispositions. Essentially, we imposed rules upon ourselves. Unfortunately, the Board had no direct precedents as guides in setting up procedures. When we first met, we looked for guidance from past precedents of other clemency programs and the legal basis for Executive clemency sections. However, there has been very little written on the procedures used by Presidents in arriving at a decision to pardon. Articles and cases dealing with the pardon power usually talk only in terms of substance. Decisions of the United States Supreme Court are often couched in terms of "public policy" and "humanitarian considerations."[4] They refer to the general principle of American government that the President represents the people and that he must act on their behalf.

## A. Determination and Publication of Rules

These general instructions tell very little about the procedural obligations of a board such as ours. The panoply of rights accorded individuals under the due process clause do not apply to the clemency process. The rights to clemency review and to a clemency hearing are nowhere guaranteed in the Federal Constitution. A recent federal court decision disposed of arguments in the contrary by stating:

> ...we find plaintiff's argument that he was entitled to a due process hearing before the President could attach the challenged condition (to his pardon) to be clearly specious.[5]

Therefore, the Board did not face the same constitutional requirement of procedural due process as imposed upon more familiar administrative proceedings. In those other proceedings, the Supreme Court has generally found that the requirement of a fair hearing prior to the termination of various public benefits requires certain procedural elements peculiar to an adversary trial-type proceeding: timely and specific notice, opportunity to confront and cross-examine witnesses, opportunity to appear in person or through counsel, an impartial decision-maker, and a written decision stating the result and the reasons therefor.[6]

The more discretionary and personal nature of the President's pardoning power is not necessarily bound by these specific requirements. We considered ourselves not bound by the Administrative Procedures Act, for example, since we were an advisory body to the President, assisting him with recommendations as to how he should exercise his personal power under the pardon clause.



Although we considered ourselves sui generis and thereby free of any binding precedent in the devising of our procedures, we recognized the inherent value of adopting the general requirements of procedural due process. We did not

do this uncritically. We reviewed the various elements of procedural due process, assessing them in terms of the practical necessities of our operations and the realistic importance of these rights to the applicants. We wished our procedures to have real meaning. As we stated in our final regulations:

> Because it is a temporary organization within the White House Office, the sole function of which is to advise the President with respect to the exercise of his constitutional power of executive clemency, the Board does not consider itself formally bound by the Administrative Procedure Act. Nonetheless, within the time and resource constraints governing it, the Board wishes to adhere as closely as possible to the principles of procedural due process. The administrative procedures established in these regulations reflect this decision.[7] (See Appendix B.)

A provisional set of regulations was published in the Federal Register on November 27, 1974.[8] In keeping with our goal of simplicity, we drafted these rules in layman's words. Copies were sent to veterans' groups, civil liberties groups, pro-amnesty organizations, and every member of Congress. In all, the Board distributed approximately seven hundred copies of proposed rules; we received forty written responses and many other informal comments. For the most part, the rules were well received.

Having rules -- and following those rules -- only matters if those rules are reasonable and fair. We developed rules of procedure and substance to reflect, as best we could, the clement spirit of the President's program. In the first half of this chapter, we describe these procedures in more detail: what kinds of information we used, how case summaries were prepared, how the Board decided cases, and how we tried to protect the privacy of our applicants. In the second half, we focus on our substantive rules, our baseline formula, and our aggravating and mitigating factors.

## B. Procedural Rules

### Acquiring Information



To act upon applications on a case-by-case basis, we needed specific information about applicants. Board members could not review the complete files for each case. We relied on the legal staff to gather and summarize pertinent information. The quality, industry, and dedication of case attorneys played a key role in how cases came to us. While every Board member had the right to examine any file, this right was never actually exercised. We collected and used four different kinds of data: (1) application and intake information; (2) official records; (3) written

correspondence from applicants, their representatives, or other interested parties; and (4) oral statements by applicants or their representatives.

Our collection of information about applicants began with their first contact with us. Many letters from applicants explained the reasons for their offenses and described their present circumstances. The impact of a personal letter from an individual detailing the circumstances of his situation often made a dramatic difference in the kind of recommendation made by the Board. Our survey of applicants indicated that if an individual took the time and effort to write a letter to the Board, he had a 59% chance of the Board recommending an outright pardon in his case. The outright pardon rate for all applicants was 42%. Unfortunately, written personal statements were submitted with an application in only 21% of the cases. Other correspondence, not submitted with the original application, was submitted in 14% of our cases. (See Appendix D.) Whenever relevant, these letters were read verbatim to the Board.

For the most part, we placed a high reliance on official records. Lacking the time and resources to do much independent investigation, we had to assume the accuracy of the records, absent clear evidence of error. On occasion, case attorneys questioned the accuracy and completeness of the official records. When problems arose, staff attorneys resolved them on a case-by-case basis. They made extensive attempts to reach the applicant, his family, and other possible sources of information. Because the staff did not have the means to make investigative trips, these efforts were limited to phone calls and written correspondence. They were further limited by the fact that the applicants' rights to privacy precluded some contacts, such as employers, which might have proven useful.

A survey of case attorneys indicated that 32% of the official Military Personnel Files were perceived by them as not being adequate to understand military applicants and their circumstances. According to case attorneys, about 10% of the files were said to contain incorrect, contradictory or confusing information. (See Appendix D.) Specific instances of omission and neglect in file-keeping involved miscalculation of periods spent AWOL, dates of Summary and Special Courts-Martial, time spent in confinement, and the amount of creditable military service. In cases concerning individuals who were told to "go home and await assignment orders," the personnel file often revealed no record of any kind. The Official Military Personnel File was often not sufficient in detail to draft a case summary which would inform the Board of the "whole" individual and the specific reason for the offense.



In civilian cases, action attorneys normally used presentence reports as their primary source of information.[9] We used presentence reports in 81% of our cases, and we received probation officers' reports in 45% of our cases. (See Appendix D.) In this regard, the cooperation of the Federal Probation Officers was most beneficial to our program. We realized that the original function of the

presentence report was solely to aid the sentencing judge in deciding whether or not to assign probation or a particular length of incarceration.[10] Rule 32(c) of the Federal Rules of Civil Procedure provides that the sentencing court "may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation" (emphasis added). Because practice differed from one court to another, many defendants never saw the evidence upon which sentencing judges based their decisions. In these cases, there was a greater likelihood of inaccuracies, errors, and omissions. As American involvement in the Vietnam War drew to a close, some Federal judges began automatically giving probation rather than imprisonment for draft offenses. Consequently, no presentence reports were prepared in these cases. While this lenient treatment was welcomed by defendants, ironically it put them in a more difficult position before the Clemency Board, because we had little information upon which to evaluate their applications.

The Board's reliance on official presentence reports and Military Personnel Files had its drawbacks. In cases where an applicant did not take advantage of his opportunity to review and comment on his case summary, we may have made a recommendation on the basis of erroneous information. Additionally, in cases where an applicant had not previously seen his presentence report or Military Personnel File and did not exercise his right to see our files, his case summary may have conveyed information new to him -- such as his IQ score, history of mental difficulties, wife's statements, or parent's observations as to why he committed his offense. A terrific burden was placed on case attorneys to search for information, and on quality control attorneys to verify it. Case attorneys personally spoke with the applicants in about 22% of our cases. They also often talked with parents, probation officers, or prison officials. However, reliance on oral communications with applicants posed difficult problems. Locating applicants was never easy, since they were most likely at work or away during normal working hours. Considerations of privacy dictated not contacting them at their places of employment. Applicants, when contacted, were often surprised and tongue-tied by a call from a government attorney in Washington, D.C. Memory under such circumstances was sometimes hazy, and thoughts were sometimes poorly expressed.

Perhaps the most serious problem in orally communicating with applicants involved incriminating information. The case attorney's role was neither that of counsel for the applicant nor that of his adversary. His function was to elicit as much relevent information, good and bad, as he could. Yet case attorneys had a professional responsibility to inform the applicants that they need not submit any information, and especially not evidence detrimental to their applications. Balancing these considerations and insuring that applicants also understood them required a high degree of professional care. Written instructions on these matters were distributed to case attorneys and were reinforced by oral reminders. (See the Clemency Law Reporter excerpts in Appendix D.)

Reliance on oral communications had one important benefit. Applicants were greatly impressed with the individual attention their cases received. Many had never had such close and personal contact with a government office before, much less from an attorney on the staff of an activity in the Executive Office of the President. We believe that this personal contact convinced them and their families of the seriousness of the program and the importance attached to it by the President. We regret that we did not have greater personal contact with applicants.

## Case Summary Preparation

Staff preparation of the file for decision revolved around the case summary. This summary, generally about two pages in length, summarized all information possibly relevant to the Board's decision. We insisted that it be in narrative form to present the individual as a human being. Two models of civilian and military case summaries are included in Appendix D.

Our case attorneys received detailed instructions concerning the drafting of the case summary's four major parts: (1) Offense and Present Status: (2) Background; (3) Circumstances of Offense; and (4) Chronology. The following is paraphrased from instructions given to case attorneys and mailed to every applicant:

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

**Background.** This statement provided a narrative picture of the applicant as an individual: family background; race;[11] age; educational levels; intelligence; conscientious objector status, or conscientious nature of his beliefs; physical and mental health; marital status; number of dependents; present residence; employment history; custody level; and parole or probation status. Case attorneys were instructed to use only evidence taken from official files or information otherwise corroborated. Personal conclusions and opinions were excluded. Any unofficial comments or interpretations had to be labeled as such, and the sources from which they came were identified.



**Circumstances of Offense.** The basic circumstances surrounding the applicant's offense were also stated in specific but not legal language. The statement provided a narrative description of the applicant's offense. Information was included concerning any event in the life of the applicant which was pertinent to the particular offense. Whenever possible, the circumstances of the offense were

phrased in terms of the aggravating and mitigating circumstances utilized by the Board. The case attorney did not, however, draw conclusions concerning mitigating and aggravating circumstances. All derivative or conclusory judgments were always cited to the source.

**The Chronology.** The case attorney started with the date of the applicant's birth and proceeded through his last recorded date of involvement with civilian judicial systems or military authorities. This sometimes included such future events as the anticipated expiration date of incarceration or probation. Possible errors or contradictions were noted, and a brief explanation was given at the bottom of the page. (See Appendix D.)

Although the summary was designed to be as complete a statement as possible of relevant facts, the Board decided that some information was extremely prejudicial and should not be brought to its attention. Likewise, the case summary omitted identifying information such as names, specific addresses, college or high schools, and employers.

We relied heavily on the professionalism, knowledge, and experience of case attorneys in preparing summaries. However, the Board's legal staff of over three hundred was drawn from many different agencies, without initial screening on our part. To insure that Board rules were followed and that all cases were written in a consistent, complete, and accurate manner, quality control of case preparation was essential. Without it, the Board could have had no confidence that each summary was an accurate reflection of the information bearing on the case. We therefore created an unusual internal check on the preparation of the case summary to control staff error, omission, abuse of discretion, and inconsistency. This quality control consisted of a special group of attorneys which reviewed all summaries for improper, irrelevant, inaccurate, or prejudicial material. Corrections suggested by the quality control staff were conclusive unless the case attorney could convince quality control that they should not be made. This was a unique operation, for which we could find little parallel in government legal processing. For all its uniqueness, the process worked extremely well, and case attorneys did not regard this as a reflection on their professional competence.

We instituted a further check on accuracy by encouraging the applicant to participate in the drafting of his case summary. The following letter, pursuant to Section 101.8(b) of our Rules and Regulations,[12] was sent with the initial case summary to each applicant:



* * *

> Your application to the Clemency Board has been received. We are sending to you some additional information which will help you understand how we will review your case.
>
> The most important thing that you should look at is the Initial Case Summary. This is a brief statment

of the facts of your case and your personal background that has been made from your files. The summary has been enclosed so that you may see the main tool that the Board will use when we review your case. Like the Board, you and your attorney may also see your entire file.

Please read your summary very carefully. If anything in the summary is wrong or if there is anything you want to explain, please tell the Board. You may also tell the Board of any other information that you think we should consider. If we do not receive your comments twenty days from the date of this letter, we may have to go on with your case without them.

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

* * *

After the case summary was completed, reviewed by quality control, and mailed to the applicant, it was docketed for Board review. Originally, it was the Board's policy to wait thirty days before hearing the case to allow the applicant time to respond to the summary. Because case preparation never ran very far ahead of Board consideration, cases were usually heard prior to the expiration of this period. To accommodate this change, our rules provided that the submission of any fact which could possibly effect the preliminary result would cause the case to be referred to a new panel. To guard against penalizing an applicant from this double review, the second panel was barred from recommending a more severe result. The only exception to this was if the subsequent information disclosed a serious felony conviction which the Board could not properly ignore.

## Board Consideration

The preparation of the case summary was preliminary to the presentation and review of the case by the Board members. In the early, formative meetings, the Board briefly considered delegating some evaluative role to the staff. This suggestion was raised again when the large influx of cases required us to reconsider our procedures. From the start, however, the Board was unanimous in the view that the full responsibility for review and recommendation should lie with it alone. To ensure the integrity of this process, and to preserve the objectivity of the staff attorney presenting the case, the Board rejected the idea of having the staff make preliminary recommendations as to the proper case dispositions.



The Board did not consider clemency recommendations to be amenable to the adversary process, so our deliberations

were not conducted in that manner. An effective adversary proceeding demands vigorous representation on both sides, cross-examination, and strict requirements of proof and rebuttal. This was totally inappropriate to a clemency proceeding, since the applicants usually had no counsel and were almost never present during case hearings. By rejecting an adversary approach, the Clemency Board avoided the competitive nature of many ordinary trials. The purpose of the President's program was to heal wounds and to reconcile, and our process was consistent with that goal.

At first, each case was presented to the Board with the attorney giving a formal recitation of the facts of the case. This procedure proved impractical when the Board's docket expanded in April. Thereafter, with the increase in the Board from nine to eighteen and expansion of case attorneys from about a dozen to three hundred, we changed procedures. Board members sat in panels of three or four which were changed weekly, and sometimes more often. In advance of each panel meeting, case summaries were distributed to each panel member. During an average week, each panel was responsible for 100-125 cases per day, with a typical weekly total of 300-450. This usually meant two days of reading cases for every three days of decision. From June through August, the average Board member met in panels, met with the full Board, or read cases every weekday, and often over the weekend. Some members heard over 4000 cases, with the average member sitting on 2711 cases.

Because each panel member had read every case summary prior to panel deliberations, we dispensed with the formal oral presentation by the case attorney. He was available, however, to submit additional information gathered after the summary had been prepared, to read letters, and to answer questions pertaining to the full file. Panel members then compared their views on the applicable aggravating and mitigating factors. Once they were agreed upon, the panel discussed the proper recommendation to the President. (See Chapter 5.)

Originally, the Board was concerned that the change to a panel proceeding would seriously impair our work. However, the advance reading more than counter-balanced the absence of a full recitation. A careful balancing of panel membership resulted in a remarkable degree of consistency among panels. The various procedures we initiated for referrals to the full Board were also designed to insure a high degree of consistency.



Inevitably, fatigue from a large caseload caused problems for each of us. However, after we adjusted to deciding cases in panels and hearing them quickly, our consistency of case dispositions was not materially affected by these changes. Lengthy discussions did not always improve our understanding of a case. In most instances, the relevant factors were not in doubt, and the panel members were in substantial agreement on a recommendation. This left sufficient opportunity for more extended discussions about complicated cases. Where there were any irreconcilable differences in a panel on the treatment of a

case, it was presented anew before the full Board. While there is no question that we would have preferred a less hectic and exhausting pace than the continuous schedule from May through September, the heavy caseload did not impair the fairness of our case dispositions. (See Chapters 5 and 6.)

To achieve consistency in Board decision-making, several procedures were applied. Any Board member could freely refer a case from a panel to the full Board for reconsideration. No case was considered final until the President had signed a master warrant which included that case disposition. Any case attorney who felt that a disposition was inconsistent with past decisions could flag that case for determination by the Chairman as to whether it should be reconsidered by the full Board. Also, the Board relied on help from a computer to compare each result to the pattern of results for similar cases. (See Appendix E.) A legal analysis staff reviewed the attorney-flagged and computer-flagged cases, which included both harsh and lenient cases, before they were referred to the Chairman. In applying this reconsideration process, the Board was not delegating its referral function to the staff. Actual referrals could only be made by the Chairman or any other Board member. Altogether, the case attorneys, the computer, and the independent initiative of the Board members resulted in 500 cases being referred from panels for a full Board review.

Barely three percent of the cases produced disagreement in panels sufficient for a member to seek full Board review, and Board dissents were registered in only two percent more. (See Chapter 5.) All in all, the Board made thousands of recommendations to the President with a remarkable degree of consensus, considering the difficult and controversial nature of our responsibilities.

Applicants were not advised immediately of the Board's recommendations, since as an advisory body to the President, our advice had to be kept confidential until the President had made his own decisions. Once the President had acted, the result was relayed to the applicant, along with a list of the factors the Board had identified in his case. Obviously, the Board could not describe how each different member had weighed the various factors, and we made this clear to the applicant. But the listing of relevant factors plus the summary enabled the applicant to understand how his case was reviewed. It also gave him a basis upon which he could file a request for reconsideration. (See Appendix D.)



## Openness, Privacy, and Counseling

Three aspects of our procedures deserve special emphasis. Because we were concerned about giving the widest possible procedural rights to applicants, we stressed the openness of proceedings, the privacy of applicants, and their right to counseling.

The Board process was as open as possible, except for the actual deliberations on particular cases. It

established procedural and substantive rules, published them in the Federal Register, gave them wide public distribution, and mailed them to every applicant. Our major instructions to staff were also distributed to applicants, and supplementary decisions and precedents were published in the Clemency Law Reporter, which was made available to the public on request.

One of the major purposes of the Clemency Law Reporter was to keep case attorneys, Board members, and interested citizens aware of Board policy precedents. It provided precise definitions of the aggravating and mitigating factors, with illustrative case examples. The Reporter also served as a forum for debate on policy issues, analyzed legal issues, and enabled case attorneys with special expertise to share it with the staff and the Board. (For an index of Reporter articles and selected excerpts, see Appendix D.)

An individual's official files were available to him only at the Clemency Board offices. This required the applicant or his attorney to contact someone in the Washington, D.C., area to examine the records for him. Where possible, information was relayed by phone, and small portions were sometimes duplicated and sent to him. However, we received few requests for access to file materials other than the case summary.

We tried to reconcile the competing demands of an open process and the applicants' privacy. Applicants were guaranteed confidentiality, and great care was taken to avoid including identifying information on case summaries, since we had to assume that they might be made public. The summary itself was sent by registered mail to prevent anyone but the applicant from seeing it. The Board felt that its promise of confidentiality and the integrity of the clemency process required that no person be put in a worse position because he applied for clemency. As it turned out, there were less than a dozen inquiries from law enforcement agencies, and a good number of these were requests to see pre-existing official files.

The guarantees of confidentiality in the Board's regulations, and in all communications with applicants, imposed limitations on discovery and verification of information. The Board considered a proposal to seek the assistance of the FBI to learn more about applicants, primarily from existing law enforcement records. To have done so, however, would have violated our earlier pledge of confidentiality, since the FBI would have verified the identity of each applicant. Furthermore, the Board was concerned that requesting FBI checks would have seriously compromised the goal of reconciliation in the eyes of the applicants and the general public. The proposal was rejected unanimously.



The requirement of privacy meant that the Board was reluctant to publish case summaries with final dispositions to establish precedents for public guidance. For a brief period, short anonymous summaries were published, describing the decisive characteristics of each case. These proved

extremely difficult to prepare and were not helpful to anyone. They were discontinued after a few months in favor of the use of the Clemency Law Reporter to present discussion and illustrations of the factors as applied by the Board. (See Appendix D.)

Inevitably, the public was not very well-informed of our procedures. In only one case did an applicant waive his right to a closed hearing and request a public proceeding with the media present. Open hearings would have increased public understanding, but it was not within the Board's province to made deliberations public without an applicant's approval.

Despite the informality and simplicity of our process, we encouraged applicants to seek legal counseling. There is no question that the lesser educated could have profited by outside help. Unfortunately, only about two percent of the applicants had any legal assistance that we were aware of, although many more wrote to us asking for references of counsel that we were unable to give. This was because many legal assistance organizations proved either unwilling or unable to advise applicants. Although the Board tried to persuade these groups to allow us to include their names on the legal referral lists sent to each applicant, most declined. However, some groups ccoperated. The Los Angeles County Bar Association represented a large number of applicants. A number of veterans' groups which were publicly critical of the program did not let this stand in the way of their helping former servicemen earn a pardon and a Clemency Discharge through the President's program. Nevertheless, most applicants were left to proceed on their own resources, reinforcing our decision to make our procedures as flexible and as simple as possible.

The Board only granted a conditional right to appear, but very few requests were ever made. For the most part, personal appearances were made to clarify the reasons for the offense. Of about 25 requests, roughly half were granted. The Board denied some of the others because our decision to recommend an immediate pardon made the request moot. We denied the remaining requests when it was clear that personal statements would not contribute to those aspects of the cases we considered determinative.

## C. Substantive Rules

The Presidential Clemency Board confronted an extremely diverse array of motivations and situations for the 14,514 applicants whose cases we reviewed. There was an obvious need to regularize the decision-making process so that we would treat all individuals fairly and equally.



At the first meeting in which the Board began to examine cases, we developed a preliminary set of relevant substantive criteria which were later publicly announced. As we came upon new circumstances which we deemed important,

we added them to our list. The Board, however, tried to resist the temptation to change rules once formulated, since it would have been unfair to apply different rules to later cases. The use of published substantive rules was instrumental in guiding decisions-making, in insuring consistency, and in informing the applicants, the public, and the President of our criteria for making case dispositions. (See Appendix D.)

Our substantive rules consisted of a baseline formula and a specific list of aggravating and mitigating factors.[15] (See Appendix D.) They enabled us to achieve several legal objectives. First, we maintained a policy of openness toward prospective applicants by giving notice of the framework within which we considered each application; second, our use of aggravating and mitigating circumstances forced us to focus on all aspects of an applicant's case and, therefore, to treat him as an individual; third, the rules gave us the means to check the consistency of our recommendations; finally, since each applicant's baseline calculation and applicable factors were ultimately communicated to him, he could understand the basis for the decision in his case, giving him a foundation should he wish to appeal.

## Baseline Calculations

First, we calculated a baseline period of alternative service for each case. The use of this formula reflected the basic difference between clemency Board applicants and those eligible for the Justice and Defense programs. Clemency Board applicants had already paid a legal penalty for their offenses; they had received a civilian or military conviction, or a less-than-honorable administrative discharge. Also, a pardon could never be as beneficial a remedy as complete relief from prosecution or administrative punishment. For these reasons, our formula almost always resulted in a baseline or starting-point significantly less than the twenty-four month baseline which the other two programs used.

The baseline formula, once established, remained unchanged throughout Board deliberations. Like the Justice and Defense programs, we began our calculation with twenty-four months, the maximum period set forth in the President's Proclamation. This period represented the normal amount of military service which each draftee had been obliged to perform, and the period which conscientious objectors are expected to serve in lieu of military duty.



Because many applicants had suffered confinement for their offenses, we reduced the baseline by three months for every month's confinement. The baseline was further reduced one month for every month of court-ordered alternative service, probation, or parole previously served, provided the applicant had not been prematurely terminated because of lack of cooperation.

This final calculation was subject to three exceptions. First, if the calculated baseline was greater than either the sentence of the Federal judge or court-martial, that length of sentence became the baseline. Second, the baseline was never less than three months. Third, in all cases of Undesirable Discharges, the baseline automatically became three months. The Board adopted a three-month baseline for administrative discharge cases to reflect the fact that the military authorities had determined that these applicants' offenses did not warrant the more serious consequences of a court-martial. This approach, plus the three-to-one credit for confinement, established an equitable starting point for the different categories of Presidential Clemency Board applicants.[13]

This approach was possible because the starting point of twenty four months was not made mandatory for us. The Proclamation and the Executive Order gave the Board flexibility in determining appropriate lengths of alternative service. In comparison, both Department of Defense and Department of Justice used twenty-four month baselines. Both of these programs acted pursuant to the explicit dictates of the Presidential Proclamation 4613. For Justice Department applicants, the Proclamation stated:

> ...The period of service shall be twenty-four months, which may be reduced by the Attorney General because of mitigating circumstances.[14]

Concerning the Defense Department program, the Proclamation provided:

> ...The period of service shall be twenty-four months which may be reduced by the Secretary of the appropriate Military Department...because of mitigating circumstances.[15]

## Aggravating and Mitigating Factors

In the Clemency Board program, as in the Justice and Defense programs, the baseline did not necessarily represent the actual period of alternative service to be assigned the applicant. In accordance with the President's desire, all three programs created mitigating factors to reduce the baseline. Because of our reduced baseline, the Clemency Board also used aggravating factors to raise the baseline in certain cases.



All factors were established or amended by vote of the full Board. They were first formally published in the Federal Register on November 27, 1974.[16] Since November of 1974, our regulations were amended three times to reflect changes and additions to the factors.[17]

There was some expansion of the aggravating and mitigating circumstances over the course of our work. Almost all of these additions and modifications occurred with respect to military applicants. We discovered that the majority of our applicants were former servicemen whose

absences were not explicitly unrelated to the Vietnam War. It did not take us long to realize that a fair evaluation of these cases required additional aggravating and mitigating factors which took into account the applicant's entire military record. Therefore, we went from seven to twelve aggravating circumstances and from eleven to sixteen mitigating circumstances. All but one of these additions was exclusively applied to military cases. (See Appendix B.)

We examined our first cases in October 1974. At first, we applied the factors subjectively. However, it soon became clear that we were not evaluating the cases in a consistent manner, and each of us was not aware how other members were assessing the cases. After we had tentatively decided the first sixteen cases, we asked the staff to analyze our results. This exercise demonstrated to us that we had to be more consistent and controlled in our work. Consequently, we applied our factors more rigorously, making certain that Board members were in general agreement on the presence or absence of aggravating and mitigating factors before making case recommendations.

Once a Board panel had discussed and agreed on the factors present in each case, each member expressed a view on the appropriate result. We agreed to increase or decrease the baseline by three-month intervals. If the aggravating and mitigating factors were of equal weight, we left the baseline standing. If the weight came down more on one side, we changed the baseline by an increment of three months. Where the factors on one side were very dominant, we moved by six months. In unusual cases, we changed the baseline by nine months or more. A maximum period of 24 months could be recommended as an alternative to a "no clemency" disposition. In deserving cases, the baseline was reduced to zero and immediate clemency recommended.

In particularly meritorious military cases, tentative recommendations were made for immediate discharge upgrades to honorable conditions. (See Chapter 5.) These cases were referred to a special upgrade panel, consisting primarily of Vietnam veteran board members, who made final recommendations to the President.

The aggravating and mitigating factors fell into four major categories. First, we examined the reason for the offense. Second, we considered the circumstances surrounding the offense. Third, we examined the individual's overall record. Finally, we took into account some circumstances surrounding his application for clemency. We applied factors somewhat differently in civilian and military cases because of their contrasting fact circumstances.

## Reasons for the Offense

Probably the most important question we could ask about a civilian applicant was why he committed his offense. On the basis of his statements and official records, we considered whether or not his motivation for committing his draft offense was conscientious.

We were predisposed to be clement in cases where there was evidence the applicant acted for conscientious reasons or had been denied conscientious objector status, or any other classification, on narrow or improper grounds. We reasoned that had the applicant been granted his deferment or exemption, he would not have been convicted of a draft offense in the first place.

We also realized that a civilian applicant's offense might have been explained by lack of education or capacity to understand his obligations and available remedies, by personal or family problems, or by some mental or physical condition. Such explanations applied more often to lower-income, less articulate applicants.

When we did not find a reasonable justification for the offense, we tried to discern whether the applicant committed his offense for selfish or manipulative reasons. Usually, there was evidence to substantiate this conclusion. Where there was not, we looked at the inferences which could be drawn about his reasons, although we never gave such an inference the same weight as direct evidence.

**Evidence that Applicant Acted for Conscientious Reasons:** Mitigating Factor #10 (applied in 73% of the civilian cases). A great many civilian applicants committed their offenses because of sincere ethical or religious beliefs. Most conscientious objectors fall into this category.

(Case 4-1) While in college, applicant came under the influence of and actually worked with a group of Quakers. It was then that he developed conscientious objection to the war.

Our concern extended to applicants who had not previously filed for CO Status, but who demonstrated their opposition to the war in some other way.

(Case 4-2) Because of the applicant's beliefs that "peace among human beings is of the ultimate necessity," he became involved in anti-war demonstrations.



Some applicants did not know they could apply, and others who opposed only the Vietnam War did not bother to file CO claims since objection to a specific war did not qualify for CO status.[18]

Case 4-3) Applicant's claim for conscientious objector status was denied by his local board because he objected only to the Vietnam War, rather than all wars.

When we found this factor, an immediate pardon was generally recommended because this was the classic circumstance which the President had in mind when he created the clemency program.

**Denial of Conscientious Objector Status on Grounds Which are Technical, Procedural, Improper, or Subsequently Held Unlawful by the Judiciary:** Mitigating Factor #9 (applied in 8% of civilian cases). Some applicants had their CO claims denied on grounds which were subsequently held unlawful by the judiciary. Prior to Welsh v United States,[19] a CO was required to base his beliefs on religious grounds. In the Welsh case, the Supreme Court held that it was sufficient if CO claims were grounded on sincere ethical and moral beliefs. Although the court decision was not retroactive, we felt it only fair to give credit to applicants who received convictions simply because they were brought to trial before Welsh. We also looked favorably upon applicants whose CO request had been denied on purely technical or procedural grounds.

(Case 4-4) Applicant applied for conscientious objector status after his student deferment had expired. Applicant opposed the Vietnam War on ideological grounds, and he sincerely believed he was a conscientious objector. He did hospital work to support his beliefs, but he failed to comply with time requirements for status changes under the Selective Service Act. Applicant's request for CO status was denied; consequently, he refused induction.

When we found this factor, we normally recommended immediate clemency, since had the CO status been granted, no offense and thus no conviction would have occurred.

**Substantial Evidence of Procedural or Personal Unfairness:** Mitigating Factor #8 (applied in 6% of civilian cases). In civilian cases, this circumstance normally applied where an applicant failed to receive a Selective Service deferment or exemption for reasons which appeared to be arbitrary or unfair. We did not apply this factor unless it was evident that an applicant would have been deferred or exempted from the draft, except for the questionable decision by his local board. The denied deferment or exemption could have been for physical disability, hardship, or any other type of classification.



(Case 4-5) Applicant was denied a hardship deferment solely on the grounds that he had applied after receiving induction orders. His father had both brain damage and a drinking problem which might have

qualified applicant for a hardship discharge.

In these cases, we applied the spirit of the clemency process to discount technical bars to deferment which courts are not free to ignore. Originally, we did not distinguish between this factor and Mitigating Factor #10 -- improper denial of CO status. In our amended regulations of March 21, 1975,[20] the two factors were separated because we found the latter circumstance particularly significant in our determinations.

**Mental or Physical Condition:** Mitigating Factor #3 (applied 9% of civilian cases). Generally, persons with serious mental or physical disabilities received deferments or exemptions, so they did not often commit draft offenses. However, some civilian applicants did have serious disabilities.

(Case 4-6) Applicant refused to report for a physical examination. He claimed he had a disfiguring physical ailment which would subject him to embarrassment if he were required to submit to an examination before several other persons. Although applicant's attorney maintained that such ailment should qualify as a complete physical exemption, applicant's appeal for change of I-A status was denied.

**Lack of Sufficient Education or Ability to Understand Obligations or Remedies Available Under the Law:** Mitigating Factor #1 (applied in 3% of civilian cases). In civilian cases, we looked to an applicant's IQ scores and educational level as an indication of his ability to understand his obligations.

(Case 4-7) Applicant has a sixth grade education and a Beta IQ of 49.

Evidence of retardation or permanent learning disability created a presumption that an applicant had difficulties in coping with his environment. Likewise, we recognized the less severe but still significant problems faced by applicants with low education levels and cultural and language difficulties.

**Personal or Family Problems:** Mitigating Factor #2 (applied in 9% of civilian cases). Some civilian applicants had emotional, financial, marital, family, or other personal problems severe enough to have caused them to commit their draft offenses.

(Case 4-8) Applicant told the investigating FBI agent that he failed to report because his mother was suffering from arthritis, was unemployable, and was dependent upon him for her financial, physical, and emotional well-being.

**Evidence That Applicant Committed Offense for Obviously Manipulative and Selfish Reasons:** Aggravating Factor #5 (applied in 15% of civilian cases). Sometimes, a civilian applicant's reasons for his offense were neither conscientious, justifiable, nor excusable.

(Case 4-9) Applicant admits that he never gave much thought to his feelings about war until he received his induction notice. He was given the opportunity to serve as a noncombatant, but he admits that he procrastinated until he was no longer eligible.

Alledgedly conscientious motives sometimes, upon further investigation, were contradicted by an applicant's later behavior.

(Case 4-10) Applicant's parents reared their children in the Moorish faith. The Muslim faith was the basis of the applicant's refusal to be inducted. Following high school, applicant became associated with a group of other Muslims, who because of their delinquent ways, were known as Outlaw Muslims. While a part of this group, he participated in a bank robbery.

We did not necessarily recommend "no clemency" when this factor was present, preferring instead to give these individuals the chance to earn clemency. However, the presence of this factor generally resulted in increasing an applicant's baseline period. In rare civilian cases, where no evidence of reasons for an applicant's offense could be found or inferred, we applied a "weak" Aggravating Factor #5. This was only mildly aggravating to an applicant's case.

## Circumstances of the Offense

Because civilian offenses consisted basically of a failure to perform a specific act, the only pertinent circumstance of the offense was whether an applicant surrendered or was apprehended by the authorities before his trial. We did not weigh this factor heavily, and we ignored it altogether if there was no clear evidence about it in the record.

**Voluntary Submission to Authorities:** Mitigating Factor #11 (applied in 59% of civilian cases). If an applicant voluntarily surrendered to authorities before his trial, we interpreted this as an indication of good faith acceptance of the consequences of a draft offense. Since we looked at the applicant's ultimate intentions, it was immaterial whether the applicant was formally arrested.



(Case 4-11) Upon notification by his parents that a warrant for his arrest was about to be issued, applicant submitted himself to the

U.S. Marshal in the locale where he was employed.

Nor was it necessary for the applicant to have appeared personally at a police station. It was sufficient if the applicant himself notified the authorities of his whereabouts.

(Case 4-12) Applicant failed to keep the draft board informed of his address. After 16 months, he informed the draft board of his address and was arrested shortly thereafter without offering resistance.

**Apprehension by Authorities:** Aggravating Factor #12 (applied in 7% of civilian cases). If the applicant was apprehended by authorities, we inferred that he did not intend to cooperate with either Selective Service or the judiciary.

(Case 4-13) Applicant was arrested and transported to the induction center. He refused to be inducted and left the center. He was rearrested six months later.

This circumstance applied, although not as strongly, in cases where the applicant was arrested but did not willfully evade authorities.

(Case 4-14) Applicant was aware that he was being sought by authorities after his indictment but did not attempt to evade apprehension. He was arrested six months later.

**Overall Record**

We did not limit ourselves to a reexamination of an applicant's offense. We were additionally interested in conduct in his community prior, during, and after his draft offense would could reflect his desire to achieve a reconciliation with his community. For example, an applicant's previous public service demonstrated his intent to be a contributing member of the community and indicated that his offense did not necessarily reflect a lack of civic responsibility. Conversely, other adult convictions, any prior refusal to fulfill alternative service, or a violation of probation or parole reflected his disregard for the law, the rights of others, and the community in which he lived. These latter actions caused us to question an applicant's willingness to fulfill his obligations as a citizen and, hence, his good faith in applying to us.

**Employment and Other Activities of Service to the Public:** Mitigating Factor #4 (applied in 57% of civilian cases). We looked with favor upon any work of benefit to the community, whether performed as alternative service or as a condition of probation. Any work contributed voluntarily was particularly appealing whether performed before or after an applicant's draft offense.

(Case 4-15) As a condition of probation, applicant did volunteer work for a local church under the supervision of the pastor. He also volunteered his time to help impoverished potato farmers harvest their crops.

(Case 4-16) Applicant has spent the bulk of his time, in and out of school, teaching handicapped and impoverished children.

**Other Adult Convictions:** Aggravating Factor #1 (applied in 47% of civilian cases). If a civilian applicant had committed any non-draft-related offense for which he received a felony conviction, we questioned his basic worthiness for a Presidential grant of clemency. Whether occurring before or after his draft offense, other criminal behavior by the applicant hardly seemed consistent with his desire to earn clemency. Only a very small percentage of civilian applicants had been convicted of felonies involving bodily harm.

(Case 4-17) In addition to his draft offense, this civilian applicant had three other felony convictions: sale of drugs; possession of stolen property; and assault, abduction and rape.

These cases normally resulted in a "no clemency" recommendation absent any strong mitigating factors. (See Chapter 5.) Others had committed less serious offenses, and we considered recommending clemency in their cases.

(Case 4-18) This civilian applicant was arrested for possession of barbiturates. He was subsequently arrested for his draft offense, extradited, and convicted on the charge of possessing barbiturates.

Arrests, trials ending in acquittal, misdemeanors, juvenile convictions, and convictions later set aside were not considered by the Board. We directed the staff not to bring this kind of information to our attention.

**Prior Refusal to Fulfill Court-Ordered Alternative Service:** Aggravating Factor #6 (applied in 4% of civilian cases). To earn conditional clemency, applicants had to perform alternative service. Therefore, we were skeptical about the good faith of applicants who had not fulfilled an earlier promise to perform alternative service as a condition of CO status.

(Case 4-19) Applicant received a conscientious objector exemption in 1966 and was ordered to report to his local board for instructions on how to proceed to an alternative service job. He failed to appear at the local board and was convicted in 1973 on a guilty plea for failure to report for alternative service.

Occasionally, applicants failed to perform court-ordered alternative service imposed as a condition of probation or parole.

(Case 4-20) Applicant was ordered to report for induction. He failed to submit and was sentenced to five years probation, two years of which were to be in work of national importance. After working for one year in a hospital, the applicant resigned his job and notified the sentencing judge that he, could no longer cooperate in good conscience, and he requested revocation of his probation. The judge, therefore, revoked probation and gave the applicant a one-year jail sentence. He was released after serving 10 months in prison.

We did look differently at Quakers, Black Muslims, and Jehovah's Witnesses who refused on religious grounds to fulfill alternative service ordered by Selective Service, although they were willing to accept judicially-imposed alternative service. We did not wish to penalize them for their conscientious beliefs. We ignored their failure to perform alternative service at the direction of Selective Service, unless they refused on other than religious or conscientious grounds.

(Case 4-21) Applicant was classified as a conscientious objector because of his religious beliefs as a Jehovah's Witness. When offered alternative civilian employment, he engaged in dilatory tactics and made token appearances on the job.

**Violation of Probation or Parole:** Aggravating Factor #7 (applied in 4% of civilian cases). Similarly, we questioned an applicant's good faith in applying for clemency when he earlier had not cooperated with those who had shown leniency. However, we were only concerned about any violation of probation or parole serious enough to result in revocation.

(Case 4-22) Applicant was convicted for failure to report for induction and sentenced to five years probation. While on probation, he was arrested and pled guilty to state felony charges. His federal probation was revoked following his state conviction.



**Circumstances Surrounding the Application**

We were concerned about whether a civilian applicant had the ability to find and hold alternative service employment. If his present personal or family problems or his mental or physical condition would have impaired his ability to perform alternative service, we saw no purpose in imposing such extra burden on him which he could not realistically satisfy. The one exception to this general rule pertained

to applicants presently incarcerated for other offenses, who were expected to perform alternative service upon their release from confinement. Two of the Department of Justice's mitigating circumstances were closely related to this problem: "Whether the applicant's immediate family is in desperate need for his personal presence for which no other substitute could be found and such need was not of his own creation," and "whether the applicant lacked sufficient mental capacity to appreciate the gravity of his action."

While we did not have any specific mitigating factor to cover this point, it did arise several times. For example, we applied Mitigating Factor #3 (mental or physical condition) in the following case:

(Case 4-23) Applicant states that he started drinking when he was eleven years old, and he feels that he has a serious drinking problem. He attempted to secure assistance, but was not able to follow through. Most of his juvenile and adult offenses appear to be related to excessive drinking.

**False Statement by Applicant to the Board:** Aggravating Factor #2 (applied in 0.6% of civilian cases). We were deeply disturbed by any false statements made by an applicant to the Clemency Board, since this was a clear indication of his unwillingness to cooperate with us in a spirit of openness and honesty. Because we did not require any applicant to submit information to us under oath, and because we had few sources of corroborative evidence, we relied heavily on his good faith.

We looked only for a willful misrepresentation of a material fact; we were not concerned about an applicant's false statements to draft boards or courts, unless he repeated them to us. We specifically warned applicants about this in our application materials.[21]

## MILITARY CASES

### Reasons for the Offense

There were many reasons why servicemen went AWOL (See Chapter 3-C). Some committed their offenses for conscientious reasons or because their requests for in-service conscientious objector status had been denied. A greater number committed their offenses either because of military treatment they considered unfair or because of personal or family problems. Occasionally, a serviceman's mental or physical condition or his inability to comprehend his obligations made his offense understandable under the circumstances. We were especially concerned about cases where an offense appeared to be the result of mental stress caused by combat. If a military applicant offered no apparently justifiable reason for his offense, we inferred that he had selfish reasons.

**Evidence that Applicant Acted for Conscientious Reasons** Mitigating Factor #10 (applied by the Board in 27% of military cases). We applied this factor when a military applicant committed his offense out of sincere opposition to war. We did not require that an applicant have applied for in-service CO status or that he necessarily fit the traditional conscientious objector mold.

(Case 4-24) Applicant returned to the United States from Vietnam with orders to train armor crewmen going to Vietnam. He did not want this assignment because he had "come not to believe in what was going on over there." He said, "I was not exactly a conscientious objector because I had done my part in the war, but I had decided that I could not train others to go there to fight."

(Case 4-25) Applicant decided he could not conscientiously remain in the Army, and he went to Canada where he worked in a civilian hospital. In a statement prior to his discharge, applicated stated: "In being part of the Army, I am filled with guilt. That guilt comes from the death we bring, the tremendous ecological damage we do, the destruction of nations, the uprooting of whole families, plus the millions of dollars wasted each year on scrapped projects and abuse of supplies. I am as guilty as the man who shoots the civilian in his village. My being part of the Army makes me just as guilty of war crimes as the offender."

**Denial of Conscientious Objector Status on Grounds that Are Technical, Procedural, Improper, or Subsequently Held Unlawful by the Judiciary:** Mitigating Factor #9 (applied in 0.4% of military cases). The military has procedures for discharging or reassigning soldiers who come to hold conscientious objector beliefs. Sometimes, these procedures did not work to the benefit of some applicants. If an applicant had been unjustly or unfairly denied CO status, we considered this strongly mitigating, since had he been granted CO status, he would not have committed his offense.

(Case 4-26) For a year and a half after he was drafted, applicant tried to obtain C.O. status because he did not believe in killing human beings. He talked to his captain and the Red Cross. Neither found his aversion to taking human life to be persuasive. The applicant is minimally articulate but states that even if someone was trying to kill him, he could not kill in return. When he had exhausted his application for CO status and was scheduled for Vietnam, he went AWOL.

Case 4-27) Applicant was inducted in 1967. He applied for CO status in 1969 and was given orders for Vietnam before his application was reviewed. He complained to his commanding officer who ordered him to Vietnam nevertheless. Applicant then went AWOL to seek outside help. He was advised by civilian counselors that he should remain AWOL for at least 30 days so that he would be able to bring to the attention of a court-martial the illegality of ignoring the CO application. The court martial refused to enter copies of the CO application on the grounds that the applicant's copies could not be introduced into evidence because they were not certified.

**Substantial Evidence of Personal or Procedural Unfairness:** Mitigating Factor #8 (applied in 14% of military cases). Personal or procedural unfairness occasionally contributed to the reasons for an applicant's AWOL or disrespect for military regulations. Understandably, irregularities occur in a large organization like the military. The Board was careful in evaluating apparent procedural or personal unfairness, but we were also conscious that we were exercising a clemency function, and so could give more weight to evidence of procedural unfairness than the military authorities had. If the legitimate demands of the military outweighed the applicant's personal needs, we looked with less favor upon his unwillingness to accept some personal inconvenience. Altogether, there were eight different fact situations in which we identified personal or procedural unfairness.

(a) Irregularities resulting in the induction or enlistment of an applicant who should never have been in the military in the first place because of low mental capacity or serious physical or psychological infirmities:

(Case 4-28) Applicant was classified I-Y and then reclassified 4-F. Applicant states that he enlisted with the cooperation of his probation officer and the Army recruiter.

(Case 4-29) Applicant was inducted under Project 100,000. He had stated that he had previously been rejected by the Marines and had failed the Army's mental test, but claimed that his papers had been changed so that he would qualify.



(b) Attempts by the applicant to resort to legitimate remedies to solve his difficulties by applying for discharge, reassignment, or leave, followed by a denial of those remedies on technical, procedural, or improper grounds:

(Case 4-30) While in Vietnam, applicant submitted a request for compassionate reassignment, which was denied because his demand was

not substantiated by medical evidence. When the medical evidence was later submitted, the request was again denied because the problems were chronic in nature. However, a 30-day leave was granted. When home on leave, applicant discovered that his wife was mentally ill and unable to care for their child. His parents were also having serious emotional problems. Applicant tried again to arrange a transfer but was told he would have to return to Vietnam and resolve the problem from there. Applicant remained in Puerto Rico in an AWOL status.

(c) Improper denial of pay or other benefits:

(Case 4-31) Applicant was ordered to report to a new base for assignment to Europe. While he was waiting at Fort Dix, his records were shipped to Europe. He was not paid for 45 days. He reported that his family was having financial problems, and he requested Red Cross help and emergency leave to deal with the difficulty. His family was put out of its apartment, was forced to live in its automobile, and had no food. He traveled to the Pentagon and was reportedly told to go home to await the results of a telegram to Europe regarding his pay records. He called back twice, but reportedly no one knew of his situation or had heard of him. He was committed to his course of action, so he continued to stay at home, which resulted in his being AWOL.

(d) Failure to receive proper leadership, advice, or assistance:

(Case 4-32) Applicant was advised to apply for a hardship discharge and was provided assistance in filling out the necessary forms by the Red Cross. When applicant attempted to file the hardship discharge papers, the papers were thrown in the trash by his sergeant, who also reprimanded him for being a coward. As a result of such treatment, applicant became disillusioned with the Army and went AWOL.

(e) Unfair military policies, procedures, or actions sufficient to produce a reasonable loss of faith in or unwillingness to serve in the military:



(Case 4-33) Upon entering the Army, applicant complained of stomach pains, and it was subsequently discovered that he had a duodenal ulcer. Shortly thereafter, his condition worsened, and he was hospitalized for ten days. Applicant

wanted to remain on the same diet that he was on in the hospital, but this was not available at his post mess hall. He was advised by a doctor to eat in the post cafeteria, which he did not think was right. Applicant then went AWOL. Applicant recently suffered another bleeding ulcer attack, which required hospitalization.

(f) Racial or ethnic discrimination:

(Case 4-34) Applicant's version of his problems is that he could no longer get along in the Marine Corps. Other marines picked on him because he was Puerto Rican, would not permit him to speak Spanish to other Puerto Ricans, and finally tried to get him in trouble when he refused to let them push him around.

(g) Instructions by a superior to go home and await orders which never arrived:

(Case 4-35) Applicant contracted a rash and fever. He went to Fort MacArthur for medical treatment and was ordered to stay at home until he had recovered. He was told to expect orders following his recovery. No new orders were received, so he contacted his Congressman to find out what had happened. He received a reply that the Army had no information about his movement. He then contacted an Army Inspector General following that, but he again learned nothing about his orders. There is some evidence that applicant thought he would have been eligible for a medical discharge related to curvature of the spine.

(h) Inducing or misleading the applicant into requesting a discharge in lieu of court-martial, such as by promising him a General Discharge:

(Case 4-36) A summary statement in applicant's file indicates he signed a letter requesting discharge in lieu of court-martial and was advised of the implications of the discharge. Applicant states he did no such thing but that his commanding officer had told him to sign some papers. His records contain no copy of a letter requesting a discharge or a statement acknowledging that he had been advised of his rights and the implications of the discharge. Applicant submits that he would have demanded a trial instead. He appealed his Underdesirable Discharge within two days of receiving it.

The Board came across many instances in which an applicant had apparently assumed or had been led to believe that he would get a General Discharge if he waived his rights, or that his Undesirable Discharge would be converted automatically to a General Discharge after a period of time. The number of these instances, especially involving persons with lower IQs and education, suggests strongly that many servicemen do not always understand the consequences of an administrative discharge.

**Behavior which Reflects Mental Stress Caused by Combat:** Mitigating Factor #12 (applied in 5% of military cases). We looked with particular sympathy on the cases of Vietnam veterans whose combat experiences had been so taxing or traumatic that their subsequent absence offenses could be partially attributed to those experiences. We encountered some striking examples of this "post-Vietnam syndrome," with applicants turning to alcohol, drugs, or other erratic behavior to cope with the present or with memories of the past. We encountered a number of instances in which servicemen returning from combat were unable to adjust to stateside garrison duty with its emphasis on "spit-and-polish." In some cases, combat veterans felt they were being treated like recruits by superiors who had not been to Vietnam. In the absence of seriously aggravating factors, cases in this category usually were recommended for outright pardons, often with a special recommendation for veterans' benefits. (See Chapter 5.)

(Case 4-37) When applicant arrived in Vietnam, he was a sergeant, without combat experience. He was made a reconnaissance platoon leader, a job normally held by a commissioned officer. Applicant started going out on operations immediately, and he began to take methadrine to stay awake. He noticed the methadrine made a marked change in his personality. He began jumping on people and his nerves were on edge. He started to take opium tinctura to counteract this effect, "to mellow him out," and he became addicted. After being transferred to Germany, he kept his addiction secret, although the problem was beginning to grow out of control. Applicant was sent back to the U.S. with a 45-day leave authorized. He planned to enter a private German drug abuse clinic within 3 or 4 weeks, but the clinic could not accept him immediately. He made the decision to wait in an AWOL status rather than go back as an addict. He was continuously put off by the clinic until he was finally apprehended by German police.



(Case 4-38) Applicant participated in 17 combat operations in Vietnam. He was medically evacuated from Vietnam because of malaria and an "acute drug-induced brain syndrome." That his behavior reflects mental stress caused by combat can be

inferred from the fact that applicant commenced his AWOL offenses shortly after being released from hospitalization and that the fact that subsequent to his discharge he had either been institutionalized or under constant psychiatric supervision.

**Mental or Physical Condition:** Mitigating Factor #3 (applied in 19% of military cases). Any mental problem or physical disease, injury or disability serious enough to have caused personal hardship or incapacity may well have contributed to an applicant's offenses in the military. Serious alcoholism and drug addiction were included in this factor because they sometimes created problems beyond an applicant's control and contributed to his offense.

(Case 4-39) While applicant was on leave, he was hospitalized for treatment of infectious hepatitis. Diagnosis was made by a civilian doctor, who told him that "his resistance was low and that he would not live to be 30 years old." Applicant's shock and fear at this statement, coupled with the realization that, if true, he had only a relatively short time to live, precipitated his absence. Defense exhibits admitted at trial confirm applicant's contraction of viral hepatitis and the fact that he was treated at a veterans' hospital after his visit to the civilian doctor.

The physical or mental problems could have been related to the quality of medical treatment received by the applicant while in the military.

(Case 4-40) Applicant had a history of severe migraine headaches at times of tension and stress. He requested medical evaluation for his headaches during basic training and advanced infantry training. He did not receive medical attention. He then went AWOL.

**Lack of Sufficient Education or Ability to Understand Obligations or Remedies Available Under the Law:** Mitigating Factor #1 (applied in 32% of military cases). In some cases, the applicant's low intelligence was an important factor contributing to his offense.

(Case 4-41) Applicant has a Category IV AFQT score. Applicant went AWOL because he was apparently unaware of or did not understand the Army drug abuse program. The corrections officer at the civilian prison where he is incarcerated believes that applicant's retardation, while borderline, makes it impossible for him to obey rules and regulations.

In most cases, an applicant's lack of intelligence was not necessarily a cause of offense, but it did raise some doubt about his ability to understand his military obligations.

(Case 4-42) Applicant completed the 10th grade and quit school because he lost interest. His GT (IQ) score measures 68 and his AFQT score is 12 (Category IV).

**Personal or Family Problems:** Mitigating Factor #2 (applied in 49% of military cases). Rightly or wrongly, many applicants placed their families above the military. Recognizing this, we looked for significant emotional, psychological, financial, marital, or other personal difficulties faced by the applicant or his family which could reasonably explain his offense. We were mindful of the hundreds of thousands of other men who had left their homes and loved ones but who did not forget their duties. Most family or personal problems were not of such a nature as to warrant an outright pardon.

(Case 4-43) Applicant states that he received a letter from his family stating that his father's eyesight was failing and the family was having financial problems as a result of his father's inability to work. He applied for a hardship discharge, but it was denied. He was transferred back to his home base, where he learned by mail that his father's eye condition had worsened. Subsequently, he went home where he worked continuously for a construction company.

(Case 4-44) Applicant, an American Indian, was raised by his aunt and uncle in a small community in the south. During his AWOL he worked for his tribe, earning $2.00 an hour to support his aunt and uncle, the latter being crippled.

(Case 4-45) Applicant fathered a son born to a Vietnamese woman. He later sought permission to marry her, which was denied. Two days later he received orders to leave Vietnam when he thought he had four months left on his tour. After returning to the U.S. he applied to return to Vietnam but was not sent there. He attempted to have his Vietnamese fiancee and his son brought to the U.S., but was told this was impossible because he was not married to the woman. He stated that he went AWOL in despair.



**Evidence that Applicant Committed the Offense for Obviously Manipulative and Selfish Reasons:** Aggravating Factor #5 (applied in 31% of military cases). Many applicants left the military for unjustifiable, selfish reasons. These individuals had not looked upon their

military obligation with the seriousness it deserved. This factor weighed heavily against an applicant.

(Case 4-46) Applicant was an infantryman in Vietnam when he went AWOL. He was picked up in a rear area by the military police and ordered back to the field by two lieutenants. He refused to fly out to join his company.

(Case 4-47) Applicant stated that he went AWOL for approximately three months, knowing that after that period of time he could come back and request a discharge.

(Case 4-48) Applicant went AWOL the first time "just for something to do"; he left the second time because he "got involved with a woman." The third and fourth times he went AWOL, he returned home to support his family, as he was in no-pay status with the Marine Corps.

(Case 4-49) Applicant escaped from the stockade by fleeing a police detail. At the time of his escape, he was serving a sentence adjudged by a Special Court-Martial for a previous AWOL.

Sometimes an applicant went AWOL for apparently understandable reasons, but remained away after his problems had been resolved. While this might have reflected fear of punishment or simple inertia, we believed that a serviceman who recognized his military duty would return as soon as the original reason for his absence had disappeared.

(Case 4-50) A few days before applicant was due to report to an Army Overseas Replacement Station, his wife threatened to commit suicide unless he promised not to report, as she was positive he was going to Vietnam and would be killed. Applicant subsequently divorced his wife but did not then return to military control.

Occasionally, an applicant's subsequent actions contradicted or detracted from his initial, understandable motives:

(Case 4-51) Applicant met his wife, a Danish citizen, shortly after arriving in Germany. She became pregnant and he attempted to obtain permission to marry her. When he was unsuccessful, he went AWOL. After turning himself in, he was returned to Germany and placed in pre-trial confinement. Shortly thereafter, he escaped and went to Sweden, where he applied for asylum. While in Sweden, he had numerous arrests on thefts and narcotic charges, received a sentence

of 10 months imprisonment, and was deported back to the U.S.

We inferred selfish motives when the applicant stated that he had no reason for his offense or when there was no substantion for an asserted justification. Where no evidence was available to explain the offense, we applied a "weak" Aggravating Factor #5.

(Case 4-52) Applicant went AWOL for 4-1/2 years. He stated that he did not have any concrete reason for going AWOL.

(Case 4-53) Applicant's explanation for AWOL is that he thought he was being unjustly selected for an overseas assignment. The file does not contain information either supporting or denying this feeling.

**Circumstances of the Offense**

Military applicants went AWOL for different lengths of time, from diverse locations, and under a variety of conditions. (See Chapter 3-C.) An applicant who left a combat zone or failed to report for overseas assignment showed lack of concern for others who depended on his presence. If the applicant used force collateral to his AWOL, he showed that he was willing to risk injury to others in order to achieve his own ends. If the applicant committed several AWOLs or was gone for a long period of time, this was naturally more serious than a single, short-term AWOL. Voluntary surrender indicated cooperation, while apprehension did not. We took all of these circumstances into consideration.

**Desertion During Combat or Leaving the Combat Zone:** Aggravating Factor #4 (applied in 2% of military cases). When a soldier left his unit in a combat zone, he placed an increased burden on those who remained behind and possibly jeopardized their lives. We considered it very serious if the applicant commenced his AWOL from Vietnam. (See Chapter 5).

(Case 4-54) Applicant commenced the first of three AWOLs while in Vietnam. He flew back to California.

(Case 4-55) Applicant bought orders to return to the United States from Vietnam.



**Failure to Report for Overseas Assignment:** Aggravating Factor #10 (applied in 7% of military cases). Servicemen ordered to report to Vietnam fulfilled an extra obligation of military service. For every man who failed to go to combat when ordered, another had to go in his place. Occasionally, an applicant had clearly conscientious reasons for failing to report to Vietnam. We had to balance this with the inescapable fact that another soldier had to be assigned to Vietnam to replace him.

(Case 4-56) After entering the Army, applicant requested removal from the Officer Candidate School list, stating that he was opposed to killing and did not believe in the Vietnam war. Shortly thereafter, he formally applied for a conscientious objector separation from the service. He thereafter failed to report to a West Coast personnel center for movement to Vietnam.

We were concerned about servicemen who shirked combat obligations by failing to return while on leave outside of Vietnam.

(Case 4-57) Applicant was wounded in Vietnam and sent to a hospital in Japan and then to a hospital in the U.S. There he learned about his marital and financial problems. Having been told that he would be sent back to Vietnam after his release from the hospital, he went AWOL from the hospital.

Even when an applicant was AWOL from overseas service in a noncombat area, he still was avoiding what for many servicemen was an unpleasant duty, far away from family and friends. This was not as serious as an AWOL from Vietnam, however.

(Case 4-58) Applicant was stationed in Thailand when he went home on emergency leave because of his father's illness. After failing to obtain a hardship discharge or a compassionate reassignment, applicant went AWOL rather than report back to Thailand.

**Use of Force by Applicant Collaterally to AWOL, Desertion or Missing Movement:** Aggravating Factor #3 (applied in 0.3% of military cases). We could not condone any violence by which an applicant effected an escape.

(Case 4-59) On two occasions, applicant escaped from confinement by attacking a guard with either a razor or a knife.

**Multiple AWOL Offenses:** Aggravating Factor #8 (applied in 86% of military cases). Many military applicants went AWOL more than once, indicating an inability or unwillingness to solve their problems after the first offense and a persistently casual attitude toward their military duty.



(Case 4-60) Applicant received a Summary Court-Martial for two periods of AWOL (one day each) and one charge of missing movement. He then received a Non-Judicial Punishment (NJP) for one AWOL (one day); another NJP for three AWOLs (one, one, and ten days), and another NJP for two AWOLS (seven and one days). He then received a Special Court-Martial for two AWOLs (two months 17 days

and three months 19 days). He accepted an Undesirable Discharge in lieu of court martial for one period of desertion (two years, 10 months, and 20 days), and six periods of AWOL (eight days three months 28 days; one month two days, two months 13 days, six months 29 days, and three months 28 days). This is a total of 17 periods of AWOL. He had been AWOL for a total of five years.

**AWOL of Extended Length:** Aggravating Factor #9 (applied in 72% of military cases). We considered long AWOLs more serious, especially if over one year. AWOLs of less than six months were not marked as aggravating. In applying this factor, we looked only to the AWOLs immediately leading to the discharge.

**Voluntary Submission to Authorities:** Mitigating Factor #11 (applied in 37% of military cases). We looked at only the last qualifying offense. military authorities. We did not require that applicant physically turn himself in. It was sufficient if he informed civilian or military authorities of his whereabouts.

(Case 4-61) Applicant was a French Canadian who was drafted. He twice went AWOL to Canada. During his second AWOL, he wrote to request a discharge and was told he would have to return to the Army. He did so, was charged, and received an Undesirable Discharge in lieu of court-martial.

**Apprehension by Authorities:** Aggravating Factor #12 (applied in 37% of military cases). We only examined the last qualifying offense. It was not necessary that the applicant be apprehended specifically for AWOL. If evidence showed that he did not willfully evade authorities, this factor carried little weight. In the absence of any evidence at all, the Board did not apply either voluntary submission or apprehension.

## Overall Record in the Military

The biggest difference between civilian and military applicants was that the latter had assumed an obligation arising from taking the military oath.

We examined very closely the quality of the applicants' military service. Normally, they had satisfactorily fulfilled a portion of their obligation prior to their discharges for AWOL. Many had served well in Vietnam. Four of the Defense Department's program's mitigating circumstances were analogous to ours: "length of satisfactory service completed prior to absence," "awards and decorations received," "wounds in combat," and "length of service in Southeast Asia in hostile fire zone."



**Tours of Service in the War Zone:** Mitigating Factor #7 (applied in 26% of military cases). A surprising percentage

of our military applicants served in the war zone. (See Chapter 3-C.) Many served their country unusually well.

(Case 4-62) During his initial enlistment, applicant served as a military policeman and spent 13 months in that capacity in Korea. He then served two tours in duty in Vietnam, as an assistant squad leader during the first tour and as a squad leader and chief of an armored car section during the second.

We gave an applicant credit for Vietnam service if he served at least three months in Vietnam or was on a naval vessel off the coast of Vietnam. Likewise, we gave him credit if his Vietnam tour ended early because of injury.

(Case 4-63) Applicant served in Vietnam with the 101st Airborne as a light weapons infantryman. His tour lasted 4 months and 22 days. He returned to the United States on emergency leave for five months. Applicant stated that he went AWOL because he could not face going back due to the incompetence of his officers and the killing of civilians.

(Case 4-64) Applicant served on the USS Buchanan for seven months off the coast of Vietnam.

(Case 4-65) Applicant served in Vietnam for a period of 2 months, 13 days. He served as a combat medic. While in Vietnam, he broke his ankle. He was operated on and was evacuated for rehabilitation.

**Volunteering for Combat or Extension of Service while in Combat:** Mitigating Factor #13 (applied in 9% of military cases). Many military applicants volunterred for a first or subsequent Vietnam tour, extended a Vietnam tour, or volunteered for a combat assignment while in Vietnam.

(Case 4-66) Applicant received his second Honorable Discharge and immediately re-enlisted for the specific purpose of being transferred to Vietnam for three years.

**Personal Decorations for Valor:** Mitigating Factor #15 (applied in 2% of military cases). Numerous applicants served in Vietnam with sufficient merit that they earned such decorations as Bronze stars with "V" Devices, Commendation Medals with "V" Devices, or Silver Stars. We also recognized decorations awarded by the Vietnamese, such as the Vietnam Gallantry Cross with Palm.



(Case 4-67) Applicant received the Bronze Star with "V" device, the Oak leaf cluster, and the Vietnamese Gallentry Cross with Bronze Star.

**Service-Connected Disability:** Mitigating Factor #5 (applied in 2% of military cases). Some applicants suffered

permanent physical or mental injury resulting from military duty. Some were wounded in combat, and others were injured in training. Their sacrifices required that their AWOL offenses be viewed with a special measure of compassion.

(Case 4-68) Applicant was wounded in the leg and now has a permanent disability, with one leg three inches shorter than the other.

(Case 4-69) Applicant was injured while operating a 155 mm Howitzer during combat. He was admitted to an Army hospital for emergency surgery which resulted in the partial amputation of a right middle finger.

**Wounds in Combat:** Mitigating Factor #3 (applied in 3% of military cases). We gave credit if an applicant had been wounded in Vietnam.

(Case 4-70) Applicant served in Vietnam for one year as an infantryman and grenadier. Applicant was wounded when he found an enemy booby-trapped grenade. He told the men in his platoon to get down, but the grenade exploded in his hands as he attempted to destroy it. He was awarded the Purple Heart.

(Case 4-71) Applicant received fragment wounds to his face, right forearm, and thumb for an exploding shell while in combat. He was evacuated to Japan and then to the U.S. Upon his return to the U.S., he was restricted in the type of assignments he could perform: no handling of heavy equipment, no overhead work, and no pushing or pulling. He continues to complain of numbness and pain in his right forearm and thumb.

**Extended Period of Creditable Military Service:** Mitigating Factor #6 (applied in 84% of military cases). Many applicants had good military service to their country prior to their discharge. We measured the amount of applicant's military service, minus any time AWOL or in confinement, looking with greater favor upon applicants who had at least one year of creditable service. However, we recognized that an applicant who completed over six months of creditable service had completed his training, had begun his first duty assignment, and had tentatively earned eligibility for veterans' benefits. Therefore, we gave him some credit for his time in the service.



(Case 4-72) Applicant had two years, eleven months, and twenty-two days creditable service, including tours in Germany and Vietnam.

**Above Average Military Conduct and Proficiency or Unit Citations:** Mitigating Factor #14 (applied in 39% of military cases). We were concerned about the over-all quality of an applicant's military service. We considered

an applicant's conduct and proficiency ratings, excluding those poor ratings which resulted from applicant's AWOL offenses. However, we only gave credit for conduct and proficiency scores after six months of service, because the initial ratings given in basic training did not necessarily indicate the quality of an applicant's service. We gave him credit for serving with a unit which earned a unit citation. We also gave credit for letters of commendation, decorations other than for valor, and other indications that applicant served well prior to his AWOL offenses.

(Case 4-73) Every conduct and efficiency rating of the applicant while in the Army was excellent until his first AWOL.

**Other Military Convictions:** military aspect of Aggravating Factor #1 (applied in 41% of military cases). We were concerned about military offenses resulting in special or general court-martial convictions, other than the last punishment for an AWOL offense.

(Case 4-74) Applicant was discharged for unfitness. In addition to his AWOL offenses, he received a Special Court-Martial for assault, carrying a concealed weapon and threatening to kill.

**Violation of Probation:** military aspect of Aggravating Factor #2 (applied in 2% of military cases). Occasionally, an applicant's court-martial discharge was suspended, but his subsequent misconduct caused the suspension to be vacated. This reflected an applicant's failure to cooperate with military authorities, even when those authorities had been lenient with him.

(Case 4-75) Applicant received a Bad Conduct Discharge and six months confinement for an AWOL offense, but the sentence was suspended for six months. When applicant realized his sentence would return him to active duty, he went AWOL again, and the suspension was vacated. While such other offenses did not affect an applicant's eligibility for clemency, they did reflect badly on the quality of his military service.

**Other Offenses Contributing to Discharge for Unfitness:** Aggravating Factor #11 (applied in 5% of military cases). Some applicants committed a combination of AWOL and other AWOL offenses which led to an Undesirable Discharge for unfitness.

(Case 4-76) Applicant received an Undesirable Discharge for unfitness. In an addition to a Non-Judicial Punishment for leaving his duty post and Special Court-Martial for AWOL, he received a Non-Judicial Punishment for wrongful possession of four liberty cards and a Special Court-Martial for false claims against the government.

(Case 4-77) Applicant received an Undesirable Discharge for unfitness. He had one Non-Judicial Punishment for AWOL, one Special Court-Martial for three AWOLs, and one Summary Court-Martial for AWOL and stealing. He also had three Non-Judicial Punishments for failure to obey an order, one Non-Judicial Punishment for disrespect, one Summary Court-Martial for disrespect, and one Special Court-Martial for disrespect and assault.

**Overall Record in the Civilian Community**

The Board also examined an applicant's actions in to the civilian community. An adult civilian conviction represented a disregard for the rights of others just as much as a military court-martial for the same offense; public service activities indicated exactly the opposite. The Department of Defense program also considered the nature of employment during the period of absence as a mitigating circumstance.

**Employment or Other Activities of Service to the Public:** Mitigating Factor #4 (applied in 2% of military cases). This circumstance took into account any service to the public before, during, or after his military service.

(Case 4-78) While applicant was AWOL, he worked as the music director for a number of free concerts and shows which were designed to attract underprivileged, inter-city youths and to serve as a preventive measure against juvenile crime and drug absue. In addition, he contributed his talents to projects of his home town's youth musicians' association.

**Other Adult Convictions:** non-military aspect of Aggravating Factor #1 (applied in 12% of military cases). Generally, persons who were previously convicted of felonies were not eligible to enter the military. Servicemen who were convicted of civilian offenses while in the military were usually discharged for the conviction rather than for AWOL offenses. Consequently, most civilian convictions occured after discharge. A violent or heinous crime usually resulted in a "no clemency" disposition, regardless of the merits of the applicant's military service: (See Chapter 5.)



(Case 4-79) After receiving his Undesirable Discharge, applicant was arrested and convicted by civilian authorities of arson in the first degree and was sentenced to six months to three years in the state penitentiary.

(Case 4-80) Applicant is now serving a fifteen year sentence in a civilian penitentiary for selling heroin.

Other offenses were less serious and did not necessarily result in "no clemency" dispositions. Mere arrests, trials ending in acquittals, misdemeanors, and juvenile convictions were not considered by the Board.

**Violation of Probation or Parole:** non-military aspect of Aggravating Factor #7 (applied in 5% of military cases). We examined the applicant's prior experience with the criminal justice system. Revocation of probation and parole weighed heavily against him.

(Case 4-81) Applicant entered the Army while on parole from a sentence for several juvenile offenses. Shortly thereafter, he went AWOL for the first time. After another series of juvenile offenses, he was committed to a youth correction center for parole violation. The applicant was subsequently paroled and returned to military control. He then requested an Undesirable Discharge in lieu of court-martial but went AWOL again. Two months later, he was arrested for possession of stolen goods and possession of narcotics paraphernalia. However, after a period of time which the applicant spent in jail, the case was not prosecuted. He was again returned to the youth correction center for violation of parole stemming from his juvenile record. Once again he was paroled and returned to military control, and once again he went AWOL.

## Circumstances Surrounding the Application

By applying various mitigating factors, we took into account medical or psychological problems which affected a military applicant's ability to perform alternative service.

(Case 4-82) Prior to his enlistment, applicant attempted suicide by shooting himself in his left chest with a rifle. According to Army medical reports, he is emotionally unstable. One doctor stated that he was not mentally competent during his period of service. After his discharge, the applicant went home to his father, who was so concerned about the applicant's mental state that he had him committed to a state mental institution.

(Case 4-83) Applicant explains that he was sent to Korea shortly after enlisting and while there he contracted pneumonia and had a cold during his entire duty. Applicant was medically evacuated from Korea to the United States for lung surgery, which resulted in partial removal of one of his lungs.

(Case 4-84) After being discharged, the applicant worked several places, the latest being for a large industrial company. He was hospitalized for a nervous disorder and remains under out-patient psychiatric care. His emotional difficulties caused him to terminate his employment.

**False Statement by Applicant to the Board:** Aggravating Factor #2 (applied in 0.1% of military cases). We looked only for a willful misrepresentation of a material fact. We were not concerned about an applicant's false statements to military authorities, unless he repeated them to us.

(Case 4-85) In his letter to the Board, the applicant reports serving in Vietnam and also reports that he was confined one and a half years in the stockade without trial. There is nothing in his military file to substantiate these claims.

(Case 4-86) The applicant wrote the Clemency Board and indicated that he had a clean record with no prior courts-martial; however, his military personnel file indicated one prior court-martial and one non-judicial punishment for AWOL offenses.

We relied heavily on the good faith and honesty of military applicants. We were deeply disturbed when we learned that they had made false statements to us, but fortunately this occurred in an extremely small number of cases.[22]

* * *

In summary, we believe that we avoided the misfortune of King Rex. Through careful application of the baseline formula and the 28 factors, the Board evaluated all relevant aspects of each of the 14,514 cases we reviewed. Although this made our process more complicated and time-consuming, it enabled us to make fair and consistent case recommendations. Without careful adherence to our procedural and substantive rules, our case recommendations would have become arbitrary -- and the major justification for a case-by-case approach would have been negated.

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## A. Summary

The products of the year's work of the Clemency Board were the 14,514 case dispositions. Most Board members participated in thousands of these decisions, each one carefully determined through the baseline formula and designated factors. In hearing so many cases, some inconsistencies were bound to occur. However, the process we followed and the substantive rules we applied reduced these inconsistencies to a minimum. The different treatment of different kinds of individuals reflected the contrasting facts of their cases.

Case recommendations for civilian applicants contrasted with those for military applicants. The pardon rate for civilians was over twice that for discharged servicemen, while the civilian "no clemency" rate was less than one-fifth of that for discharged servicemen. Actual case dispositions are listed below:

TABLE 8: CLEMENCY BOARD RECOMMENDATIONS - CIVILIAN CASES

| | Number | Percent | Cumulative |
|---|---|---|---|
| Pardon | 1432 | 81.5% | 81.5% |
| 1-3 months AS | 140 | 8.0 | 89.5 |
| 4-6 months AS | 91 | 5.2 | 94.7 |
| 7-9 months AS | 24 | 1.4 | 96.1 |
| 10-12 months AS | 35 | 2.0 | 98.1 |
| 13 + months AS | 9 | 0.5 | 98.6 |
| No Clemency | 26 | 1.5 | 100.1 |
| Total | 1757 | | |

TABLE 9: CLEMENCY BOARD RECOMMENDATIONS - MILITARY CASES

| | Number | Percent | Cumulative |
|---|---|---|---|
| Pardon | 4620 | 36.2% | 36.2% |
| 1-3 months AS | 2555 | 20.0 | 56.2 |
| 4-6 months AS | 2941 | 23.1 | 79.3 |
| 7-9 months AS | 1295 | 10.2 | 89.5 |
| 10-12 months AS | 441 | 3.5 | 93.0 |
| 13 + months AS | 20 | 0.2 | 93.2 |
| No Clemency | 885 | 6.9 | 100.1 |
| Total | 12757 | | |

TABLE 10: CLEMENCY BOARD RECOMMENDATIONS - ALL CASES

| | Number | Percent | Cumulative |
|---|---|---|---|
| Pardon | 6052 | 41.7% | 41.7% |
| 1-3 months AS | 2695 | 18.6 | 60.3 |
| 4-6 months AS | 3032 | 20.9 | 81.2 |
| 7-9 months AS | 1319 | 9.1 | 90.3 |
| 10-12 months AS | 476 | 3.3 | 93.6 |
| 13 + months AS | 29 | 0.2 | 93.8 |
| No Clemency | 911 | 6.3 | 100.1 |
| Total | 14514 | | |

Case dispositions varied little from week to week, especially after basic policy decisions had been made. During the first six months, we reviewed 500 cases, recommending outright pardons (without alternative service) to 46% of all cases, denial of clemency to three percent, and conditional clemency (with alternative service) to the remainder. During the latter six months, we decided 14,000 cases, recommending outright pardons to 44%, denial of clemency to six percent, and conditional clemency to the remainder.

Almost all cases were decided unanimously. However, any Board member could refer any case to the full Board or register a formal dissent to a panel decision. (See Chapter 4.) This right was exercised in only about seven percent of our cases. Most Board members made referrals or registered dissents in less than three percent of the cases in which they participated, as shown in Table 11. If a case disposition was a pardon, the likelihood of dissent or full Board referral was 1.4%. If the disposition was no clemency, the likelihood was 2.3%.

Perhaps the best indication of the strong Board consensus is the similarity among individual Board members' voting patterns. No Board member voted for outright pardon recommendations less than 34% or more than 58% of the time. Likewise, no Board member voted for "no clemency" recommendations less than two percent or more than nine percent of the time. Recommendations for discharge upgrades to honorable conditions varied from two percent to six percent, and average alternative service assignments only varied from 5.5 months to 6.7 months. On the whole, case recommendations did not differ much from panel to panel.

The consistency of case recommendations was carefully monitored through a computer-aided consistency audit. This audit assured that the Board was evenhanded in the application of aggravating and mitigating factors. It was a unique tool for an adjudicative process, and it provided the basis for much of the discussion below. (See Appendix E.)

## B. Impact of Baseline Calculations

Case dispositions hinged greatly on baseline calculations. Almost all applicants' alternative service baselines were three months, and less than two percent had baselines of over six months.

TABLE 12: CLEMENCY BOARD BASELINE CALCULATIONS

| Baseline | Civilian | Military |
|---|---|---|
| 3 months | 94.6% | 87.8% |
| 4-6 months | 2.9 | 11.5 |
| 7-12 months | 0.7 | 0.6 |
| 13-24 months | 1.9 | 0.1 |

The baseline calculation did not affect the basic decision whether or not to grant clemency, but it was the single most important factor contributing to the overall 44% outright pardon rate and the short periods of alternative service assigned to most of the rest. In civilian and military cases, the pardon rate was roughly twice as great for applicants with three month baselines as for applicants with baselines of four months or more.

## C. Impact of Aggravating and Mitigating Factors

The Clemency Board's application of mitigating and aggravating factors affected the decision whether to recommend clemency -- and, if so, to go up or down from the alternative service baseline. We applied these factors with different frequencies and with different weights. Table 13 shows the relative frequencies of all factors. Note the difference between the factors most often applied in civilian and military cases. The typical civilian case had no aggravating factors, but had Mitigating Factors #4 (public service employment), #10 (conscientious motivation for offense), and #11 (voluntary submission to authorities). The typical military case had Aggravating Factors #1 (other court-martial convictions), #8 (multiple AWOL offenses), and #9 (extended AWOL offenses), along with Mitigating Factor #6 (extended military service).

The weight with which the Board applied all factors is difficult to assess, even in hindsight. We often designated factors as "weak" or "strong" when making case dispositions, and some factors were applied in a variety of ways. For example, Aggravating Factor #1 was applied if an applicant had received a prior court-martial for an AWOL offense before his discharge, but it was applied with much more significance if he had been convicted for a violent civilian felony offense. (See Chapter 3 and Appendix D.) The tables presented here do not distinguish between these two applications.

Nevertheless, some interpretation of the weights of our factors can be inferred from Table 14. This table shows the frequency with which the Board applied each factor in the three basic types of case dispositions -- outright pardons, alternative service, and no clemency. For example, we applied Aggravating Factor #5 in eight percent of the civilian pardon cases, 58% of civilian alternative service cases, and 63% of civilian "no clemency" cases. The large gap between eight percent and 58% indicates that the absence of Aggravating Factor #5 frequently had a relationship with the choice between an outright pardon and conditional clemency, whereas the small gap between 58% and 63% indicates that the presence of aggravating factor #5 had only an infrequent relationship with the choice between no clemency and conditional clemency. Table 15 is an extract from Table 14, indicating the factors whose presence or absence was most frequently related to outright pardon and "no clemency" case dispositions.

The association of Mitigating Factor #7 (Vietnam service) with "no clemency" decisions presents an apparent anomaly. The explanation is that the Board rarely recommended conditional clemency in their cases. They either received an outright pardon or were denied clemency because of serious civilian felony convictions.

Table 14 reflects the frequency with which we applied each factor, but it does not indicate the actual strengths we gave them. Table 16 below is a rough measure of the strength of each factor, no matter how frequently it was applied. It shows the likelihood of each type of case disposition, given the presence of a given factor. For example, a civilian case with Aggravating Factor #5 (selfish motivation for offense) resulted in an outright pardon 42% of the time, conditional clemency 53% of the time, and "no clemency" in the other five percent. This must be compared against the overall civilian disposition rates of 82% outright pardons, seventeen percent conditional clemency, and one percent "no clemency." Therefore, Aggravating Factor #5 apparently had a strong impact upon civilian case dispositions. Table 17 is an extract from Table 16, indicating the strength with which each factor was applied.



The preceding tables focus on factors separately, rather than in combination. Board decisions were based upon all factors present in each case; the majority consistently rejected proposals that a single factor be automatically determinative.

Often aggravating and mitigating factors meant much more when they were applied in particular combinations. For example, Mitigating Factor #6 indicated the length of an applicant's military service, while Mitigating Factor #14 indicated the quality of that service. The two together told a much different story about a person than did one without the other. Tables 18, 19, and 20 show how our range of dispositions varied depending on single-factor changes in the mix of mitigating and aggravating factors. The mean case disposition is underlined for each combination of factors. All factors listed in these tables contributed to our case recommendations. ("AS" refers to alternative service assignments, and "NC" refers to "no clemency" recommendations.)

TABLE 18: IMPACT OF SELECTED AGGRAVATING AND MITIGATING FACTORS ON CIVILIAN CASE DISPOSITIONS

| Agg # | Mit # | # of Cases | Pardons | 3 AS | 4-6 AS | 7+ AS | NC |
|---|---|---|---|---|---|---|---|
| - | 4,9,10 | 14 | 14 | - | - | - | - |
| - | 4,10 | 144 | 139 | 4 | 1 | - | - |
| - | 10 | 74 | 69 | 3 | 2 | - | - |
| - | - | 25 | 16 | 5 | 1 | 3 | - |
| 5 | - | 20 | 1 | 9 | 8 | 1 | 1 |
| 1,5 | - | 4 | 1 | - | - | 1 | 2 |
| 1,5,7 | - | 2 | - | - | - | - | 2 |

TABLE 19: IMPACT OF SELECTED AGGRAVATING FACTORS ON MILITARY CASE DISPOSITIONS

| Agg # | Mit # | # of Cases | Pardons | 3 AS | 4-6 AS | 7+ AS | NC |
|---|---|---|---|---|---|---|---|
| - | 6 | 2 | - | 1 | 1 | - | - |
| 8 | 6 | 11 | - | 5 | 5 | 1 | - |
| 5,8 | 6 | 17 | 1 | 2 | 7 | 7 | - |
| 1,5,8 | 6 | 34 | 2 | 2 | 14 | 6 | 10 |
| 1,5,8,9 | 6 | 38 | - | 2 | 9 | 16 | 11 |
| 1,5,8,9,11 | 6 | 3 | - | - | - | 1 | 2 |

TABLE 20: IMPACT OF SELECTED MITIGATING FACTORS ON MILITARY CASE DISPOSITIONS

| Agg # | Mit # | # of Cases | Pardons | 3 AS | 4-6 AS | 7+ AS | NC |
|---|---|---|---|---|---|---|---|
| 1,8,9,12 | 1,2,6,7,14 | 11 | 11 | - | - | - | - |
| 1,8,9,12 | 2,6,7,14 | 28 | 23 | 3 | 1 | - | 1 |
| 1,8,9,12 | 2,6,14 | 79 | 34 | 21 | 18 | 3 | 3 |
| 1,8,9,12 | 2,6 | 114 | 20 | 29 | 47 | 13 | 5 |
| 1,8,9,12 | 2 | 50 | 2 | 3 | 13 | 26 | 6 |
| 1,8,9,12 | - | 7 | - | - | 1 | 1 | 5 |

## D. Civilian Case Recommendations

The Board usually recommended civilian applicants for outright pardons (82%), with a much smaller proportion recommended for conditional clemency with an assignment of alternative service (17%), and very few denied clemency (1%). Table 21 shows the most frequent combinations of factors in civilian cases. (See Appendix E for a more complete list.) The cases represented in the table account for over half of all civilian cases. Aggravating factors were virtually absent in these cases, and mitigating factor #10 (conscientious reasons for offense) appeared in the six most frequent combinations of factors.

TABLE 21: MOST FREQUENT CIVILIAN CASES

| Agg Factors | Mit Factors | # Cases | Pardons | AS | No Clemency |
|---|---|---|---|---|---|
| - | 4,10,11 | 375 | 370 | 5 | 0 |
| - | 10,11 | 161 | 159 | 2 | 0 |
| - | 4,10 | 144 | 139 | 5 | 0 |
| - | 10 | 74 | 69 | 5 | 0 |
| - | 4,9,10,11 | 33 | 33 | 0 | 0 |
| - | 9,10,11 | 32 | 32 | 0 | 0 |
| - | 4 | 31 | 30 | 1 | 0 |
| 5 | 11 | 26 | 8 | 18 | 0 |
| - | - | 25 | 16 | 9 | 0 |

Civilian cases which received outright pardons typically had no aggravating factors (or just #12, apprehension), Mitigating Factor #10 (conscientious motivation for offense), and Mitigating Factor #4 (public service employment). Table 22 below lists the combinations of factors which had the greatest proportion of outright pardons.

TABLE 22: CIVILIAN PARDON CASES

| Agg Factors | Mit Factors | # of Cases | # of Pardons |
|---|---|---|---|
| - | 4,9,10,11 | 33 | 33 |
| - | 9,10,11 | 32 | 32 |
| 12 | 10 | 16 | 16 |
| - | 4,9,10 | 14 | 14 |
| - | 3,4,10,11 | 10 | 10 |
| - | 10,11 | 161 | 159 |
| - | 4,10,11 | 375 | 370 |
| - | 4,11 | 31 | 30 |
| 12 | 4,10 | 22 | 21 |
| - | 10 | 74 | 69 |
| - | 2,4,10,11 | 12 | 11 |



From our sample of 472 civilian applicants, it appears that those most likely to receive outright pardons were Jehovah's Witnesses (96%) who were granted CO status (92%), who failed to perform draft-board-ordered alternative

service (94%) because of membership in a religion opposed to war (92%), or who were sentenced to alternative service (84%), completing over two years of court-ordered alternative service work (90%).

Also likely to receive an outright pardon was a civilian applicant with a college education (82%) who had a CO application denied (82%), refused to submit to induction (81%) because of ethical or moral opposition to war (78%), who surrendered (80%), who served more than one year in prison (78%), who was in school at the time of his clemency application (85%), who submitted a letter in support of his application (79%), or whose Selective Service files were used by our case attorney in preparing his case summary (82%).

Much less likely to receive an outright pardon was a civilian applicant of a minority background other than black (55%) from a severely unstable family background (63%), who had only a grade school education (59%), an IQ under 90 (59%), who failed to register for the draft (58%) or failed to keep his draft board informed of his address (58%), whose offense was not related to opposition to war (65%) or involved specific opposition to the Vietnam War (62%), who fled to a foreign country (55%) before being apprehended (59%), who served one to twelve months in prison (59%), who had been convicted for another civilian felony offense (25%) who was not employed full-time (67%) or was incarcerated (11%) at the time of his application, or whose records were incomplete when our case attorney prepared his summary (60%).

The following case is a typical civilian applicant who received an outright pardon:

(Case 5-1) Applicant filed for a CO exemption on the basis of his ethical conviction that the preservation of life was a "fundamental point of my existence." The local board denied it, presumably because his convictions were ethical and not religious. Furthermore, he never received notice that his request was denied. When ordered to report for induction, he argued that he had not been informed of the denial and requested an appeal. His local board denied this request, because mailing the denial of applicant's request to his home constituted constructive notice of the contents, and his 30-day appeal period had expired. Applicant refused induction, voluntarily appeared at his trial, pled guilty, and received a sentence of three years probation. During his probation he worked as a pharmacist to satisfy an alternative service requirement, at the same time working as a volunteer on a drug abuse hotline and served on the Board of Directors of the town's Youth Commission.

The civilian cases resulting in **conditional clemency** generally fell into two categories. First, some civilian applicants apparently committed their offenses for conscientious reasons and were sentenced to prison, but who serviced only a portion of their sentences.

(Case 5-2) Applicant claimed that his refusal to report for induction was based on his philosophical convictions regarding life. He was sentenced to three years in prison; he had served only six months when he received a furlough because of the clemency program.

The second category of conditional clemency cases were those in which the applicant committed his offense for slightly selfish reasons, but without any other serious aggravating circumstances.

(Case 5-3) Applicant was convicted of failure to inform the local board of his current address. At the time, he was drifting around with no fixed address, so he did not bother to keep in touch with his local board.

Civilian cases which received **"no clemency"** dispositions almost always had Aggravating Factor #1 (other adult felony convictions), usually with Aggravating Factor #5 (selfish reasons for offense) and no mitigating factors. Table 23 below lists the only combinations of factors which accounted for two or more civilian no clemency cases:

TABLE 23: CIVILIAN "NO CLEMENCY" CASES

| Agg Factors | Mit Factors | # of Cases | # No Clemency |
|---|---|---|---|
| 1,5,7 | - | 2 | 2 |
| 1,5 | - | 4 | 2 |
| 1 | - | 5 | 2 |

From our sample, the civilian applicant most likely to be denied clemency was black (4.9%), with a grade school education (3.3%), with an IQ under 90 (5.9%), who failed to register for the draft (8.3%), who did not commit the offense because of opposition to war (12.6%), who was sentenced to probation (2.4%), who performed no alternative service (2.5%), who had been convicted for another civilian felony offense (20%) who was incarcerated at the time of his clemency application (33%), whose lawyer communicated with us while his clemency application was pending (5.5%), or whose records were incomplete at the time our case attorney prepared his summary (5.2%).



Two-thirds of the civilian "no clemency" dispositions were attributable to convictions for violent felony offenses. The following case is typical:

Case 5-3) This civilian applicant had three other felony convictions in addition to his draft offense. In 1970, he received a one-year sentence for sale of drugs. In 1971, he received one year of imprisonment and two years of probation for possession of stolen property. In 1972, he was convicted for a failure to notify his local board of his address. He was sentenced to three years' imprisonment, but his sentence was suspended, and he was put on probation. In 1974, he was convicted of assault, abduction, and rape, for which he received a 20-year sentence.

The other "no clemency" case dispositions went to applicants whose selfish attitude and uncooperativeness could not be ignored.

(Case 5-4) Applicant wrote his local board and asked for a postponement of his induction because he alleged he had received injuries in a car accident which disqualified him for military service. He did not submit a physician's statement. Therefore, his local board ordered him to report. He claimed that the board had ignored his earlier request, thereafter submitting a statement from his doctor showing that he had received some injuries in a car accident. However, another doctor examined the applicant and found him completely healed. Applicant refused induction and was convicted; he received a sentence of 30 days in jail and 2 years' probation. He admitted in an interview with the probation officer that his reason for refusing induction was that he did not want to go into the Army because he had recently married, and his wife was pregnant. His probation officer reports that applicant's adjustment to probation has been poor; he further reports that applicant has shown no initiative and has been out of work most of the time, relying on his wife for financial support.

Not all civilian cases fell clearly into the categories described above. In a very few cases, our Board was sharply divided -- especially where very strong mitigating and aggravating factors conflicted with one another. Consider the following case:



(Case 5-5) Applicant had a very unstable family background, with an alcoholic father who had a series of wives. Despite this, applicant graduated near the top of his class, was senior class president, and completed two years of college. He applied for and received conscientious objector status, but he failed to report

to his alternative service work at a local hospital. Instead, he traveled through Europe and the Middle East. He was arrested for smuggling hashish in Lebanon and served nine months in a Lebanese prison. Thereafter, he joined a religious cult which advocated trepanation (drilling a hole in one's head). He performed the operation on himself suffered an infection, and had to be hospitalized. He was convicted for his draft offense and was sentenced to two years imprisonment. He served seven months before being furloughed for his clemency application. A prison psychiatrist indicates that applicant suffers from paranoid schizophrenia, said to be caused by his belief in trepanation.

This case was debated by the full Board on four separate occasions. Originally, the Board was sharply split between outright pardon, because of the conscientious nature of his beliefs and his apparent mental problems, and "no clemency", because of his hashish smuggling conviction and his failure to perform his assigned alternative service. After much discussion, the Board decided to recommend clemency. The issue then became whether he should perform at least a minimal period of alternative service, but there was concern that he was psychologically unable to perform it. Finally, a divided recommendation was presented to the President, who approved the majority's recommendation of an outright pardon.

## E. Military Case Recommendations

Most of military applicants were recommended for conditional clemency with assignment to alternative service (56%), with a smaller proportion recommended for outright pardons (38%), and the others denied clemency (6%). Table 24 shows the most frequent combinations of factors in military cases. All had Aggravating Factor #8 (multiple AWOL offenses) Aggravating Factor #9 (extended AWOL offenses), and Mitigating Factor #6 (extended military service). All but one had Mitigating Factor #2 (personal or family problems). Because of the great variety of military cases, these most frequent factor combinations were found in only four percent of all military cases.

TABLE 24: MOST FREQUENT MILITARY CASES

| Agg Factors | Mit Factors | # Cases | Pardons | AS | No Clemency |
|---|---|---|---|---|---|
| 1,8,9,12 | 2,6 | 114 | 20 | 89 | 5 |
| 8,9,12 | 2,6 | 85 | 12 | 73 | 0 |
| 1,5,8,9,12 | 6 | 81 | 1 | 75 | 5 |
| 1,8,9 | 2,6,11 | 81 | 18 | 56 | 7 |
| 1,8,9,12 | 2,6,14 | 79 | 34 | 42 | 3 |
| 1,8,9,12 | 1,2,6 | 70 | 16 | 51 | 3 |

Military cases which received outright pardons typically had Mitigating Factors #2 (personal or family problems), #6 (extended military service), #7 (Vietnam service), and #14 (above-average military performance). Table 25 below lists the combinations of factors which had the greatest proportion of outright pardons.

TABLE 25: MILITARY PARDON CASES

| Agg Factors | Mit Factors | # of Cases | # of Pardons |
|---|---|---|---|
| 1,8,9,12 | 1,2,6,7,14 | 11 | 11 |
| 8,9,12 | 2,6,7,14 | 11 | 11 |
| 8,9 | 1,2,6,7,11,14 | 10 | 10 |
| 1,8,9 | 2,6,7,11,14 | 16 | 15 |
| 1,8,9 | 2,6,7,11,14 | 13 | 12 |
| 1,8,9,12 | 1,2,6,8,14 | 11 | 10 |
| 8,9 | 2,6,7,14 | 23 | 19 |
| 1,8,9,12 | 2,6,7,14 | 28 | 23 |
| 8,9.12 | 2,6,7,14 | 21 | 17 |
| 8,9 | 1,2,6,8,11 | 15 | 12 |

From our sample of 1009 military applicants, the individual most likely to receive an outright pardon was black (47%) or of another minority background (55%), born before 1945 (52%), with an AFQT score of Category IV (46%), who had over two years (62%) or over three years (78%) of creditable military service, including a partial Vietnam tour (61%) or a full Vietnam tour (83%) or multiple Vietnam tours (93%), whose last AWOL offense was after 1971 (46%), whose AWOLs were attributable to post-combat psychological problems (88%), who was unemployed at the time of his application (50%), or whose lawyer communicated with us while his clemency application was pending (78%).

Less likely to receive an outright pardon was a military applicant with a college education (25%), who had less than 12 months of creditable military service (22%), who never went to Vietnam (27%), who went AWOL because of conscientious oppostion to war (15%), who immediately returned after going AWOL (30%), who had been convicted for a civilian felony offense (28%), or whose records were incomplete at the time our case attorney prepared his summary (29%).



The most clear outright pardon cases among military applicants were those with truly outstanding service records

prior to their AWOL problems. These particularly meritorious cases (about 3%) were referred to a special Board panel for possible recommendation to the President that their discharges be upgraded and that they receive veterans benefits. At a minimum, applicants must have had creditable service and a tour in Vietnam to be considered, but wounds in combat, decorations for valor, and other mitigating factors were also important. About 80 cases (0.6%) were recommended by the special panel for discharge upgrades.

(Case 5-6) Applicant had four AWOLs totalling over eight months, but he did not begin his AWOLs until after returning from two tours of duty in Vietnam, when his beliefs concerning the war changed. He came to believe that the U.S. was wrong in getting involved in the war and that he "was wrong in killing people in Vietnam." He had over three years' creditable service with 14 excellent conduct and efficiency ratings. He re-enlisted to serve his second tour within three months of ending his first. He served as an infantry man in Vietnam, was wounded, and received the Bronze Star for Valor.

(Case 5-7) During applicant's combat tour in Vietnam, his platoon leader, with whom he shared a brotherly relationship, was killed while awakening applicant to start his guard duty. He was mistaken for a Viet Cong and shot by one of his own men. This event was extremely traumatic to applicant, who subsequently experienced nightmares. In an attempt to cope with this experience, he turned to the use of heroin. After becoming an addict, he went AWOL. During his AWOL, he overcame his drug addiction only to become an alcoholic. After obtaining help and curing his alcoholism, he turned himself in.

Other military pardon cases had understandable reasons for their offenses, or committed relatively minor AWOL offenses and had good service records.

(Case 5-8) Applicant enlisted in 1960 and had a good military record. In 1963 he married, but he began to have marital problems soon afterwards. He was in a car accident in 1964. The combination of these two influences drove him to drink, and he became an alcoholic. His frequent AWOLs were directly attributable to his alcoholism.



(Case 5-9) Applicant had four AWOLs totalling six days and surrendered after the last two. He had one year and nine months of creditable military service with above

average conduct and proficiency ratings. He served a full tour in a task force patrolling the waters off Vietnam.

The bulk of the military cases resulted in **conditional clemency** recommendations, with assignment to alternative service. As a general rule, these cases involved both aggravating and mitigating factors balancing one another. Where some factors outweighted others, the Board went up or down from the alternative service baseline, usually by three to six months.

(Case 5-10) Applicant commenced his first AWOL after he was assaulted by a cook while in KP. After his second AWOL, he was allegedly beaten by five military police while confined in the stockade. On the other hand, he committed four AWOLs, the last one lasting almost 3 1/2 years, and had less than one month of creditable service.

(Case 5-11) Applicant went AWOL because he was involved with a girl and was using drugs. He is presently incarcerated in a civilian prison for a minor breaking and entering offense. His two AWOLs were each of only a few days duration, and he has a very low category IV AFQT.

Military cases which received "no clemency" dispositions almost always had Aggravating Factor #1 (other adult convictions), and usually Aggravating Factor #5 (selfish motivation for offense) and no mitigating factors other than #6 (extended military service). Table 26 lists the combinations of factors most likely to result in "no clemency" dispositions.

TABLE 26: MILITARY "NO CLEMENCY" CASES

| Agg Factors | Mit Factors | # of Cases | # of No Clemency |
|---|---|---|---|
| 1,5,8 | - | 18 | 9 |
| 1,8 | 6 | 29 | 14 |
| 1,5,8,9 | 1 | 14 | 6 |
| 1,8 | - | 13 | 5 |
| 1,5,8,9 | 2,6 | 18 | 7 |
| 1,8 | 1,6,11 | 18 | 6 |
| 1,5,8 | 6 | 34 | 10 |
| 1,5,8,9 | 6 | 38 | 11 |



From our sample, the military applicant most likely to be denied clemency was black (14%) or of another minority background (11%), born after 1949 (11%), with an AFQT score in Category III (10%) or Category IV (9%), who had less than 12 months creditable service (11%), who served a partial tour in Vietnam (13%), whose AWOL resulted from post-combat psychological problems (12%) or some other reason unrelated to opposition to war, personal problems, or family problems (11%), who fled to a foreign country while AWOL (23%), who

was apprehended (10%), who faced non-AWOL charges at the time of discharge (14%), who had been convicted for a civilian felony offense (46%), who was incarcerated for that offense at the time of his clemency applications (61%) and whose records were incomplete when our case attorney prepared his summary (12%).

The military applicant relatively unlikely to be denied clemency was born before 1945 (4%), college-educated (0%), with an AFQT score of Category I (5%), who was drafted (6%), who had more than two years (4%) or three years creditable service (3%) with one full Vietnam tour (6%) or multiple Vietnam tours (0%), whose AWOL offense resulted from conscientious objection to war (3%), who lived openly at home while AWOL (3%) before surrendering (6%), who did not face non-AWOL charges at the time of his discharge (6%), who had not been convicted for any civilian felony offenses (3%), who was in school (0%) or unemployed (0%) at the time of his clemency application, or whose lawyer communicated with our case attorney while his clemency application was pending (0%).

The Board denied clemency if an applicant's military offenses were simply too serious and numerous to be excused.

(Case 5-12) Applicant received a Summary Court Martial for two periods of AWOL (one day each) and one charge of missing movement. He then received a Non-Judicial Punishment (NJP) for one AWOL (one day), another NJP for three AWOLs (one, one, and ten days), and one NJP for two AWOLs (seven and one days). He then received a Special Court-Martial for two AWOLs (two months 17 days and three months 19 days). He accepted an Undesirable Discharge in lieu of court-martial for one period of desertion (two years 10 months and 20 days) and six periods of AWOL (eight days, three months 28 days, one month two days, two months 13 days, six months 29 days, and three months 28 days). This is a total of 17 periods of AWOL. He had been AWOL for a total of five years.

Two-thirds of the military "no clemency" dispositions were attributable to applicants' convictions for life-threatening felony offenses. The following cases are typical:



(Case 5-13) While in the service, applicant received a General Court-Martial for robbery with force. After his discharge, he was arrested by civilian authorities and found guilty of armed robbery.

(Case 5-14) After his discharge, applicant was convicted for first degree murder and second degree robbery. He received a sentence of 25 years to life and will not be eligible for parole until 1997.

Perhaps the most difficult--and disputed--cases involved applicants who had been convicted of civilian felony offenses other than draft offenses, but who had strong mitigating factors applicable to their cases. Some Board members argued that we should disregard unrelated felony convictions, since we were not granting clemency for those offenses. Others argued that granting clemency to convicted felons would cheapen the clemency grants to others. The majority of the Board took the middle view--that a felony conviction would be viewed as a highly aggravating factor--but each case would be evaluated individually and decided on its total facts. Even so, 42% of the applicants with nondraft-related civilian felony convictions were denied clemency, either because of the nature of their felony offenses or because they did not have compensatingly strong mitigating factors.

In the remaining cases, less serious felony convictions did not overshadow an applicant's Vietnam service or other mitigating facts.

(Case 5-15) Applicant volunteered for the Special Forces after his first year in the Army. He re-enlisted to effect a transfer to Vietnam, where he served as a parachute rigger and earned excellent conduct and proficiency ratings. Altogether, he served for 18 months in Vietnam and over three years in the Army, with two Honorable Discharges for re-enlistment purposes. His AWOL offenses totaled 29 days, did not occur until after his return from Vietnam, and were attributed to his problems with alcohol. After his Undesirable Discharge in lieu of court-martial, he was convicted of stealing a television set and served six months in prison. He was recently paroled.

In a few cases, a clear connection existed between an applicant's Vietnam service and his felony conviction.

(Case 5-16) Applicant served eight months in Vietnam as a supply specialist before his reassignment back to the United States. His conduct and proficiency scores had been uniformly excellent during his Vietnam service. However, while in Vietnam he became addicted to heroin. He could not break his habit after returning stateside, and he began a series of seven AWOL offenses as he "got into the local drug scene." Eventually, he "ran out of money" and "had a real bad habit," so he "tried to break into a store with another guy that was strung out." He was arrested, convicted for burglary, and given an Undesirable Discharge for AWOL while on bail.

Others rehabilitated themselves after their felony offense, indicating their desire to be productive and law-abiding members of their communities.

(Case 5-17) Shortly after receiving a Bad Conduct Discharge from the Navy for his AWOL offenses, applicant was convicted for transporting stolen checks across state lines. He was sentenced to a ten-year term, but was paroled after one year and four months. During his confinement, he underwent psychiatric care. Since his parole, he has re-married and has recently established a successful subcontracting business. Currently, he is working with young people in his community in connection with church groups, trying to provide guidance for them. His parole officer stated that applicant has straightened out and is a responsible member of his community.

In each of the above three cases, the Board recommended that the President grant an outright pardon. Obviously, we had no jurisdiction to recommend clemency for the other felony offenses that the applicants had committed.

We denied clemency in a very small number of cases in which applicants went AWOL in direct combat situations, as in the following:

(Case 5-18) Applicant would not go into the field with his unit, because he felt that the new commanding officer of his company was incompetent. He was getting nervous about going out on an operation; there was evidence that everyone believed that there was a good likelihood of enemy contact. He asked to remain in the rear, but his request was denied. Consequently he left the company area because, in the words of his chaplain, "the threat of death caused him to exercise his right of self-preservation." His company was subsequently dropped onto a hill where it engaged the enemy in combat. Applicant was apprehended while travelling on a truck away from his unit without any of his combat gear.



Most cases of AWOL in Vietnam involved strong mitigating factors. Often, combat wounds or the psychological effects of combat led to AWOL offenses. For example, the Board recommended an outright pardon in the following case:

(Case 5-19) Applicant was assigned to an infantry unit in Vietnam. During his combat service, he sustained an injury which caused his vision to blur in one eye. His vision steadily worsened, and he was referred to an evacuation hospital in DaNang for

testing. A doctor's assistant told him that the eye doctor was fully booked and that he would have to report back to his unit and come back to the hospital in a couple of weeks. Frustrated by this rejection and fearful of his inability to function in an infantry unit, applicant went AWOL.

Not all military case recommendations were unanimous. Sharp disagreement occasionally arose over cases which had very strong mitigating and aggravating factors. Consider the following case:

(Case 5-20) Applicant's records were lost or destroyed and have been only partially reconstructed. The reconstructed records cover only the past several years, not describing the three years which applicant claimed that he spent in Viétnam as a rifleman and armored personnel carrier driver. They do not cover the period of his alleged leg wounds, Purple Heart, and Bronze Star. However, they do show that he was discharged in lieu of court-martial because of nine AWOL incidents in Vietnam, six of which were for durations of longer than one month. Neither applicant nor his records indicate the reasons or circumstances of his AWOL offenses, although almost all of them occurred after his alleged combat wounds. Applicant is now disabled and has required hospitalization for his leg wounds. He is presently unemployed.

In this case, the applicant went AWOL numerous times in Vietnam, possibly from combat zones. However, he claims to be disabled, and his AWOLs may have been related to his serious wounds. His records are incomplete through no fault of his own, so the full story cannot be known. The full Board was sharply split, some for an outright pardon and others for no clemency. By a close vote, the final recommendation to the President was for an outright pardon.

## F. Comparison with Other Clemency Programs



Clemency Board applicants -- military and civilian -- had already paid a price before they applied for clemency. Roughly half had been incarcerated, most for several months. Many had performed alternative service as a condition of probation. The baseline formula took this into account.

As a result, Clemency Board case dispositions were naturally different from those of the Justice and Defense Department programs. At the same time, we were the only part of the President's program to grant clemency

selectively. Neither the Justice Department nor the Defense Department denied clemency to any eligible applicant. Tables 27 and 28 show the alternative service assignments of the other two parts of the President's clemency program.

TABLE 27: COMPARISON OF CASE DISPOSITIONS FOR JUSTICE DEPARTMENT AND CLEMENCY BOARD CIVILIAN APPLICANTS

| | PCB | % | DOJ* | % |
|---|---|---|---|---|
| None/Pardon | 1432 | 81.5% | 0 | 0 |
| 1-3 Mos AS | 140 | 8.0 | 7 | 1.0% |
| 4-6 Mos AS | 91 | 5.2 | 32 | 4.7 |
| 7-9 Mos AS | 24 | 1.4 | 16 | 2.3 |
| 10-12 Mos AS | 35 | 2.0 | 45 | 6.5 |
| 13-24 Mos AS | 9 | 0.5 | 588 | 85.5 |
| No Clemency | 26 | 1.5 | 0 | 0 |
| | 1757 | | 688 | |

*This breakdown does not correspond with the total number of cases stated elsewhere in this report because of miscellaneous dispositions.

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TABLE 28: COMPARISON OF CASE DISPOSITIONS FOR DEFENSE DEPARTMENT AND CLEMENCY BOARD MILITARY APPLICANTS

| | PCB | % | DOD* | % |
|---|---|---|---|---|
| None/Pardon | 4634 | 36.3% | 48** | 0.8% |
| 1-3 AS | 2555 | 20.0 | 43 | 0.8 |
| 4-6 AS | 2941 | 23.0 | 172 | 3.1 |
| 7-9 AS | 1295 | 10.1 | 251 | 4.5 |
| 10-12 AS | 441 | 3.5 | 383 | 6.9 |
| 13-24 AS | 20 | 0.2 | 4630 | 83.8 |
| No Clemency | 885 | 6.9 | 0 | 0 |
| | 12,757 | | 5527 | |

*This breakdown does not correspond with the total number of cases stated elsewhere in this report because of miscellaneous dispositions.

**Of the 48 cases in which no alternative service was required, 46 were immediately granted honorable discharges because of superior records, and two were returned to active duty without prejudice.



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Comparing other programs' case dispositions to ours can be misleading, unless prior punishments are taken into account. Clemency Board civilian applicants have served an average of four months in jail and five months of prior alternative service. When our baseline calculations are applied, giving three months credit for every one month in

jail and one month credit for every month of alternative service, Clemency Board dispositions are shown to have been more severe than those of the Department of Justice. When our military applicants' time in jail (an average of 2 1/2 months) is taken into account. Clemency Board case dispositions are shown to be somewhat more generous than the Defense Department's. Table 29 illustrates these comparisons.

TABLE 29: ADJUSTED COMPARISON OF CASE DISPOSITIONS

| | PCB Civilian | DOJ | PCB Military | % |
|---|---|---|---|---|
| None/Pardon | 0% | 0% | 0% | 0.8% |
| 1-3 AS | 0 | 1.0 | 0 | 0.8 |
| 4-6 AS | 0 | 4.7 | 0 | 3.1 |
| 7-9 AS | 0 | 2.3 | 36.3 | 4.5 |
| 10-12 AS | 0 | 6.5 | 20.0 | 6.5 |
| 13-24 AS | 98.5 | 85.5 | 55.0 | 83.8 |
| No Clemency | 1.5 | 0 | 6.7 | 0 |

Therefore, the differences among case dispositions for the three clemency programs reflect the contrasting circumstances of applicants.