THE PRESIDENTIAL CLEMENCY PROGRAM

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

THE PRESIDENTIAL CLEMENCY PROGRAM
AND RELATED LEGISLATION

APRIL 14, 17, AND 18, 1975

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THE PRESIDENTIAL CLEMENCY PROGRAM

MONDAY, APRIL 14, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommitte met, pursuant to notice, at 10:10 a.m. in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, Pattison, Wiggins.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, legislative assistant; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order this morning.

As the eyes of the Nation once again turn to Southeast Asia, to the cities and to the ports, and to the villages in that troubled part of the world, to watch what may, indeed, be the last chapter in a long and sad war that has engulfed that region of the world, it is fitting that we at this time are considering one of the aspects of healing the wounds of this Nation caused by that conflict.

Two years ago, direct U.S. military involvement in the war, was terminated. Our POW's were being brought home, and a year ago on March 8, 11, and 13, this subcommittee had 3 days of hearings on the question of amnesty. We considered legislation. We opened the question of whether it is fitting that the Congress legislate in what has historically been thought of as an Executive function, the act of granting amnesty.

Since that time, and having said at that time that, perhaps, within a year we would be able to return more affirmatively to the subject, the President, on September 16 of last year, announced his own program for clemency. As a result of that program, there was a Presidential clemency program set up within the White House and three other units of the executive branch, the Selective Service, the Department of Justice, and the Department of Defense.

The program, in terms of applications for favorable treatment, was to have terminated January 31 of this year. In fact, it was twice extended and finally was terminated, as far as applications are concerned, on March 31.

The purpose of these hearings is to examine the President's program, to lay the groundwork for intelligent consideration of whether this committee and the Congress ought to make recommendations, or otherwise engage in whatever appropriate legislative response there ought to be to this unfulfilled issue.

The program has been labeled by some to be useless and punitive. Organization of the program among four separate agencies has, at best, been confusing, and the response to the program has been less than overwhelming. We would like to find out why.

We are very pleased to welcome as our first witness an old friend, a person who served in the House of Representatives and the Senate of the United States, and who, on many grounds, has been applauded as the Chairman of the Presidential Clemency Board. I should like to welcome our first witness this morning, Mr. Charles Goodell.

Mr. GOODELL. Thank you, Mr. Chairman. I appreciate this opportunity to testify before your committee, and, with your consent, I would like to summarize the written statement which I have submitted.

Mr. KASTENMEIER. Without objection, your statement in its entirety will be accepted for the record, and you may proceed as you wish.

[The prepared statement of Hon. Charles E. Goodell follows:]

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

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

I appreciate the Subcommittee's invitation to describe the operations of the Presidential Clemency Board. The program has suffered from insufficient public understanding, from confusion and misinformation about its operations. These hearings will clarify what the program is about. They will serve to dispel some myths and misconceptions about the Presidential Clemency Board.

With the Subcommittee's consent, I would like to submit my prepared statement for the record, read its highlights, and then answer your questions.

Let me first offer several observations and conclusions about the program, some of which I have come to appreciate only after having become immersed in it, and others which I have made after six months as Chairman.

From the first, I have been impressed with the importance that the President places in his clemency program and with the attention he gives to it. He took a personal hand in revising the original proposals presented to him and the formation of the Board occupied a significant amount of his attention during his first weeks in office.

At the Board's first meeting, he met with us in the Cabinet room for a lengthy discussion of his hopes for the clemency program. He met with us in the Cabinet room again for the signing of the first pardons and conditional clemencies under the Board's part of the program. He has spoken with me several times to give guidance to the Board as to how it should treat applicants coming before it. He has personally considered and resolved a number of subsidiary issues that have arisen since the program started.

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

Secondly, I think it is important to realize the diversity among the applicants to the Clemency Board.

Contrary to popular impressions, the overwhelming majority of the draft and military law violations we see were not explicitly related to opposition to the Vietnam War. We have applicants whose wives were leaving them, whose fathers had died leaving a family without any means of support, or whose mother, wife or child had become acutely ill. Personal problems overwhelmed them and led to violations of the law.

Over half of our applicants never completed high school. They are generally unsophisticated, unarticulate people, unable to pursue their remedies within the legal system. Had they been able to do so, many of these applicants would have received hardship deferments or conscientious objection deferments, or compassionate reassignments or hardship discharges from the military. They just did not know how to proceed.

This is not meant to belittle the fact that we also have many cases in which there has been genuine conscientious objection to killing. For the most part, however, even these people tend to be ones who did not understand how to pursue their rights properly. They are predominantly Jehovah's Witnesses, Muslims, and a few others whose religious or ethnical beliefs are evident from the letters which they write to us, from their probation records, and from other files predating even their conviction.

The vast preponderance of our applicants are the unfortunate orphans of an administrative system in which success was determined by being educated, clever, articulate, and sophisticated. Whether sincere or not, they got a better shake, often because they had expert assistance available to them. Those who believed deeply but couldn't express their feelings adequately wound up with conviction records and sometimes jail sentences.

I have attached to this statement the results of an analysis we have made of a sample of our cases. As the survey shows, only 3 percent of our applicants have completed college as compared with 55 percent who never finished high school. Insofar as the reasons for the offense can be gleaned from the information before us, only 16 percent expressed moral, religious, or ethical sentiments about the war, as opposed to evidence of hardship or personal problems in 57 percent of the samples. The attached breakdown gives much more detail about the social and personal characteristics of our applicants. It underlines the conclusion that the stereotype which we have had of the typical Vietnam-era offender is wrong, and is over-simplified.

We have been surprised and impressed, as well, by the public support which the President's clemency program receives, especially after its provisions are explained. Many church groups and veterans' counseling services established programs for potential applicants to the various parts of the clemency program. Other organizations which are not in total agreement with the clemency program nonetheless have helped eligible persons with the major personal decisions which they have to make about participating in the President's program.

We have learned that people in this country really do want to have a reconciliation which will bring former draft evaders and deserters back into full integration in their communities.

This reaction, however, stands in contrast to what many Americans may hear or perceive about the program. From the very vocal, be they advocates of unconditional amnesty or opponents of any clemency, we have heard a drum-fire of criticism about the program. It was pronounced as cynical and a failure on the very day it was started, and I hear very little different from some quarters even now.

The fact is that the President's program has been the victim most of confusion and ignorance. It came as a shock and a surprise to the Board, even as late as early January, after 4 months of the program and with only a few weeks remaining before the original January 31 deadline, that the press coverage from Washington was filled with error and confusion about the nature of the program and its provisions. It then became clear to us that if the Washington press corps, sophisticated and supposedly learned about the policies and activities of government, was confused, so must be the average citizen and especially those eligible for the program.

The Board then decided to conduct an information campaign, and the results were dramatic. Through press conferences, and interviews and public service announcements on radio and television, the Board got the word out. Applications which had been coming on an average of 60 a week jumped to 300, then to 1,000 and as high as 4,000 in the week ending March 17. From a total of 870 applications on January 6, the Board received 5,000 by February 1, and 9,800 by March 1. Quite clearly, lack of information on the part of the press and the public and most otherwise well-informed persons, was at the root of much of the criticism we heard. And it was also the major cause of the low participation level in the early months.

It surprised us to learn that even those who were adamantly opposed to the program based their disagreements in large part on misconceptions about the Presidential Clemency Board. Board members found in talking to peace-groups and amnesty groups, to store-front veterans counseling groups and to veterans service organizations, that their attitudes about the program changed dramatically once they heard and understood how the Board operated. I do not mean to say that we converted all opponents of the program to unqualified supporters. But, at the least, they realized that the program is not an unmitigated evil, that

it indeed is reasonable and has value to those who wish to participate. What began as strident opposition changed in many, many cases to an offer of cooperation—certainly cooperation in helping to spread accurate information about the program so that each individual could decide on an informed basis whether to apply.

Let me relate an incident which illustrates the extraordinary amount of misinformation about the program. General Walt, who was commander of U.S. Marines in Vietnam and Assistant Commandant of the Corps, received an anguished phone call early last month from the mother of a Vietnam veteran. She was concerned about a clemency program for draft-evaders while her son, who had a bad discharge, wasn't being recognized for his Vietnam service. She had inquired about the program but had been told her son wasn't eligible because he had been in Vietnam. General Walt explained to her, as we have tried to explain to the general public, that Vietnam veterans are also eligible for the program if they later went AWOL and were given bad discharges. In fact, we estimate that a good 18% of our applicants fall into this category.

Having now been part of the Presidential Clemency Board for 6 months, my own feelings about the President's program have strengthened. I have had an opportunity to review personally hundreds of cases that thus far have come before the Board. It is now even clearer to me that the President's policy of earned or conditional clemency is the proper approach. I do not favor universal, unconditional amnesty.

First, however much we may sympathize with and respect those who refused military service because of a deep and sincere moral opposition in Vietnam, it can not be denied that in doing so they violated the law. Civil disobedience has a long and honorable tradition in our society. It is used to protest bad laws by disobeying them. But disobedience of the law, however lofty the motive, bears with it the risk of having to pay the penalty imposed by law. Indeed, it is an important aspect of civil disobedience that a person bear witness to his cause by accepting the law's punishment.

The program administered by the Presidential Clemency Board is a means of relieving, as much as the law can, the legal consequences borne by those who were punished for their AWOL or draft-evasion. But irrespective of the law's punishment, the country imposes a duty of service upon each citizen, and that service remains unfulfilled by those who refused military duty. However, imperfect the draft system—and I make no spirited defense of how the government over the years, particularly the Vietnam years, has implemented the draft—alternative service is designed to provide a means of satisfying this obligation of citizenship. It is not punishment. It is not retribution. Alternative service under the Presidential Clemency program is the same service that thousands upon thousands of conscientious objectors have performed ever since the principle was incorporated into our law in World War I. Recognition of the moral content of their disobedience does not place those persons who acted in protest to the Vietnam war in a class better than the others who objected to war but who performed alternative service. Nor does it place them in a class better than those who served in Vietnam, even though they too may have had deep and profound feelings of opposition to the war.

Total and unconditional amnesty, in the guise of seeking to do justice, would create additional injustice. We should not be misled into thinking that every person who refused service did so out of the highest moral feelings. Many persons acted out of selfish or personal reasons having nothing to do with ethical considerations. Some may deserve no clemency at all. The circumstances of each person before the Presidential Clemency Board are different and any clemency program must recognize those differences.

Consider the case of the serviceman stationed in Germany who traffics in hard drugs. Faced with a threatened court-martial, he escapes to Sweden. There he joins an anti-war commune and turns informer and provocateur on his fellows. He pushes drugs, he robs and steals. He is tried, convicted and escorted to the Swedish border where he is returned to American authorities. He is court-martialed for AWOL and convicted. Now he applies to the Presidential Clemency Board.

This man does not deserve clemency and it would be an injustice to treat him in the same way as others whose reasons and conduct were, under all the circumstances, understandable. A program of total and indiscriminate amnesty would be wrong because it can not avoid equating this person with the Jehovah's Witness, son of a religious family. He applies for conscientious objector status

and is granted it, but he refuses to perform alternative service because his faith considers alternative service by order of the Selective Service System to be part of the military. He would, however, consistent with his faith, perform alternative service if so ordered by a judge. Instead he is tried for failing to perform, and serves 5 years in prison.

Compare yet another case. This individual enlists, serves for a few months, then wanders off for a few months. He is immature and can't adjust to service. He returns and goes AWOL again. Finally, he is discharged for a series of AWOLs and for failure to perform adequately.

This person has no good reason for his failure to perform satisfactorily except his immaturity. He is not a conscientious objector. He merely has failed to do his 2 years obligation. It is right and necessary, I think, to call upon him to perform some alternative service in the public interest, not as a penalty but as means of discharging the obligation to his country he failed to complete.

Any system of universal, unconditional amnesty by definition must treat these different individuals and their circumstances the same. It would do injustice by tretaing unlike cases alike, and that is an injustice no less than treating like cases in an unequal manner. The conditional program of President Ford enables the Board to consider recommending no clemency in the first case, an immediate pardon in the second, and a requirement of some period of alternative service in the third. It permits us to deal with applicants as individuals, not as an undifferentiated mass. That, it seems to me, is a goal every government program should aim towards.

Finally, I believe the President's program accomplishes for the Nation's well-being what unconditional clemency could not. One of the President's goals was to try to heal the division amongst our people on the amnesty/clemency issue. There are strong feelings on this question, to be sure, and no one can say that those on one side have all the merits of the argument. There are hundreds of thousands of people in this country with sons, husbands, brothers, or fathers who died or were seriously wounded in Vietnam, and those people have very, very profound feelings about the question of clemency. We owe those people respect for their feelings, and for the pain from which their feelings and their tears arise. For those who feel deeply about the sacrifices paid by those who served, those who died, and those who suffered grievous wounds, clemency means that those who did not serve are rewarded in place of those who went in their stead.

For others, who feel deeply about the moral questions of the war and of the sacrifices made by those whose conscience made them protest against what they saw was immoral and unjustified policy, anything less than full restitution and a confession of error by the President is unsatisfactory.

These two views, deeply held and certainly understandable, can not be completely reconciled. To deny any kind of clemency is to perpetuate the divisions in our country. To declare unconditional amnesty would create new ones. The President's goal of bringing the country to reconciliation by a conditional program is the proper approach, and I think it well on the way towards achieving that goal.

Let me now turn to a discussion of the Clemency Board's jurisdiction, the remedies we offer, the administrative procedures we have established, and the substantive criteria we apply in weighing applications for clemency.

JURISDICTION

The Presidential Clemency Board was created by Executive Order No. 11803 on September 16, 1974 to implement one part of President Ford's Proclamation on clemency issued that same day. The Board, organizationally within the White House, is presently composed of 9 part-time members. Each member is in private employment and is compensated by the Federal Government only for time spent on Board business.

The Proclamation covers three major categories of persons. First, there are those who are presently absent without authority from a military service, but who have not been convicted of an offense or discharged. They must return to their military service, which proceses them and issues them an Undesirable Discharge. At the completion of alternative service of up to 24 months, they are issued a Clemency Discharge to replace the Undesirable Discharge.

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

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

WHAT REMEDIES DOES THE BOARD OFFER TO APPLICANTS?

To the civilian applicant for clemency, the Board can offer, on behalf of the President, executive clemency in the form of a full pardon granted unconditionally, or conditioned upon a specified period of alternative service of up to 24 months.

A pardon restores to an applicant his Federal civil rights. Most states recognize a Presidential pardon as a matter of comity and it serves to remove the civil disabilities that the state may have imposed as a result of the federal conviction. Perhaps even more importantly, licensing restrictions which prevent ex-convicts from working in a variety of occupations are also removed. Without a pardon, the typical ex-offender cannot work in any professional occupation or, in many states, as an ambulance attendant, a watchmaker, a tourist camp operator, a garbage collector, a barber or beautician, a practical nurse, or a plumber.

While we cannot ignore or demean the symbolic importance of an act of personal grace by the President, we should also recognize that the receipt of a Presidential pardon also removes the social stigma that inevitably attaches to a draft-evader and a deserter and has the practical effect of making the ex-offender employable again.

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

To the former serviceman who applies, we offer a full pardon, plus an upgrading of his discharge to a Clemency Discharge, either unconditionally or conditioned upon a specified period of alternate service. Whatever one's feelings about the practical or symbolic importance of the Clemency Discharge, the pardon here too serves to remove the legal and social disabilities of the bad discharge. As of April 7, the Board has forwarded 114 recommendations, and the President has acted on 65. The breakdown of Presidential decisions is as follows:

A full and immediate pardon	20
A pardon conditioned on 3 months alternative service	21
A pardon conditioned on 6 months alternative service	12
A pardon conditioned on 12 months alternative service	12

While I cannot disclose to you the 114 latest recommendations which await his action, I can say that the breakdown of these cases, as well as the breakdown of the 300 additional cases reviewed by the Board but not yet forwarded to the President, is generally the same.

ADMINISTRATIVE PROCEDURES OF THE BOARD

Let me now turn to the Board's procedures, a copy of which is attached to my statement. In November we sent copies of the proposed rules for comment to every Member of Congress, to veterans' counseling and service organizations, to civil liberties groups, to anti-war organizations, to every State and major local bar association and to a number of private attorneys. We had over 40 comments and suggestions, most of which proved to be very helpful to the Board in revising its provisional rules. I am pleased to say that for the most part, the proposed rulemaking appears to have been well received. Suggestions and criticisms were carefully reviewed, and a final set of procedures was published on March 21, 1975.

It took some time to develop these regulations. In part this is explained by the fact that the Presidential Clemency Board has no precise historical model to follow and no clear precedents to guide it in the role of assisting the President

in what is a unique and personal executive function. We also wished to become very familiar with the types of cases before us prior to issuing any rules. Even now we find new aspects in the cases which will require further elaboration of our rules.

One main goal of the Board's rules was to make them as simple and easy to understand as possible. In particular, we tried to make applying to the Board as uncomplicated as we could.

First, when we received a communication from a possible applicant or a friend or relative expressing interest in any part of the President's program, we mailed out an instruction kit. This kit describes the Board's program, its procedures, and other aspects of the Board's operations. If the individual was not under the Board's jurisdiction, but fell within the jurisdiction of the Department of Justice or the Department of Defense, we told him how to pursue this case with them. If he was not under the jurisdiction of any part of the clemency program, we tried to suggest other avenues for the relief he sought. We informed him of private sources of counseling, including legal assistance, which he might pursue before applying.

Each applicant is not only informed of his right to counsel, but encouraged to secure one. For those who have no resources, the Board has endeavored to persuade groups with volunteer legal counseling to provide assistance, and we mail summaries are properly prepared.

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

This summary is then mailed to the applicant along with a copy of the Board regulations and the preparation instructions which we give to our attorneys. The applicant is encouraged to review the preparation instructions and Board rules. He is especially directed to review the summary, submit any additions or corrections, and to send the Board anything he believes it should consider when it reviews the case.

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

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

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

THE SUBSTANTIVE CRITERIA FOR EVALUATING APPLICATIONS

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

In deciding appropriate lengths of alternative service we give special weight to time already spent in prison, and to alternative service, probation and parole which has been satisfactorily completed.

Equity compels us to consider factors beyond simply time spent in prison. For this reason, for example, Jehovah's Witnesses and members of other religious communities who have served little time in prison, but whose violations of law were clearly motivated by deeply held religious beliefs, typically have been offered outright pardons, or have been asked to serve minimal amounts of time where aggravating circumstances have existed in particular cases. Individuals with similarly held moral or ethical beliefs but who are not members of traditional religious faiths are treated the same way. Any person whose conviction predated a change in the law of conscientious objection is considered in a similar category. On the other hand, persons who acted from no apparent sincerely held ethical or religious convictions about the war have received clemency contingent upon longer lengths of alternative service, even when those persons may have served more time in prison.

The other factors which the Board weighs appear in the regulations as Sections 102.3 and 102.4.

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

PROTECTION OF APPLICANTS

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

Since most evaders and deserters within our jurisdiction apparently do not read the Washington Post or watch Harry Reasoner frequently, we took pains to spread information as widely as possible to persons who might be eligible for the President's program. We mailed information about the program to the last known addresses of 7,000 persons convicted of draft evasion and eligible for Board consideration, thanks to the very fine cooperation of the Federal Probation Service and the Administrative Office of the U.S. Courts. We then arranged with the Department of Defense to review each court-martial record that occurred between 1964 and 1973. They retrieved from their storage and reviewed some 28,500 records. Over 20,000 appeared to have some possibility of eligibility and so they were each mailed information about the program.

In addition, the Board prepared Public Service Announcements in early January and mailed them to over 2,200 radio and 260 TV stations. A second set of Public Service Announcements was prepared in February and mailed to 6,500 commercial radio stations and 260 TV stations in the United States. We received fine cooperation from the media in helping us with this massive emergency effort. The electronic media contributed hundreds of thousands of dollars in air time.

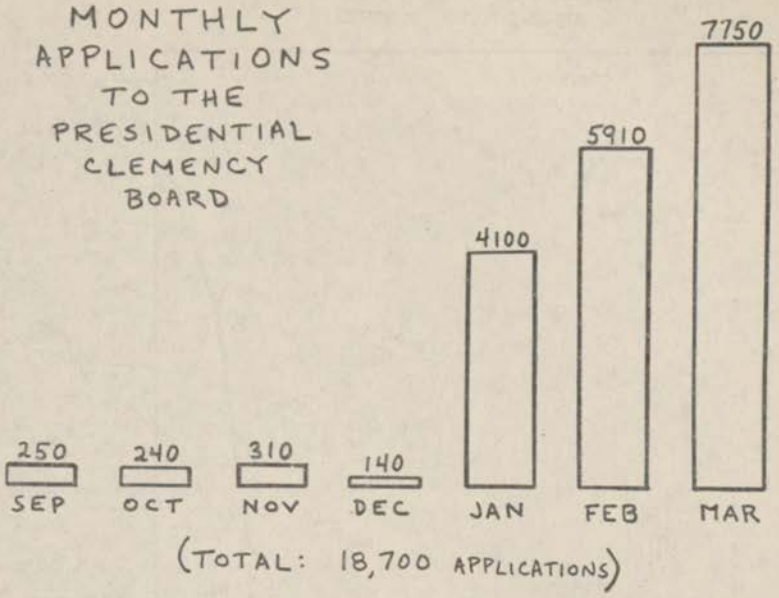
Board members visited nearly 25 major cities and metropolitan areas in an effort to inform the press and the public about the program and to encourage people to learn more about it. In one week in March, 9 staff members visited 33 cities, and held information conferences with a total of over 3,000 veterans counsellors attending.

Considering the short time available to inform the public of the program, and the fact that we have had a small staff and a limited budget, our efforts to inform, I believe, were extraordinarily successful. As the chart I attached to the testimony will show, our rate and number of applications jumped dramatically as a result. As a consequence, the Board must process over 18,000 cases between now and September 15, the anniversary date of the Proclamation. After that date, the emergency statutory authority which the President uses to provide the Board with funds, staff, and support is no longer available.

This large number of cases must be handled on a case-by-case basis, and we must give each applicant the same thorough review and deliberation as every other one receives. To do this in the limited time available, the President has ordered an expansion of the Board and its personnel. We will climb from 9 members and about 50 staff to 18 members and a staff of about 600. We must do this quickly—we must be fully staffed by May 1 and we do not have the luxury of dispensing with our work while we expand. We must locate lawyers in other government offices, train them, and get them to preparing cases in a matter of days, not weeks or months.

By September, we fully expect to have completed the recommendation process for all 18,900 cases.

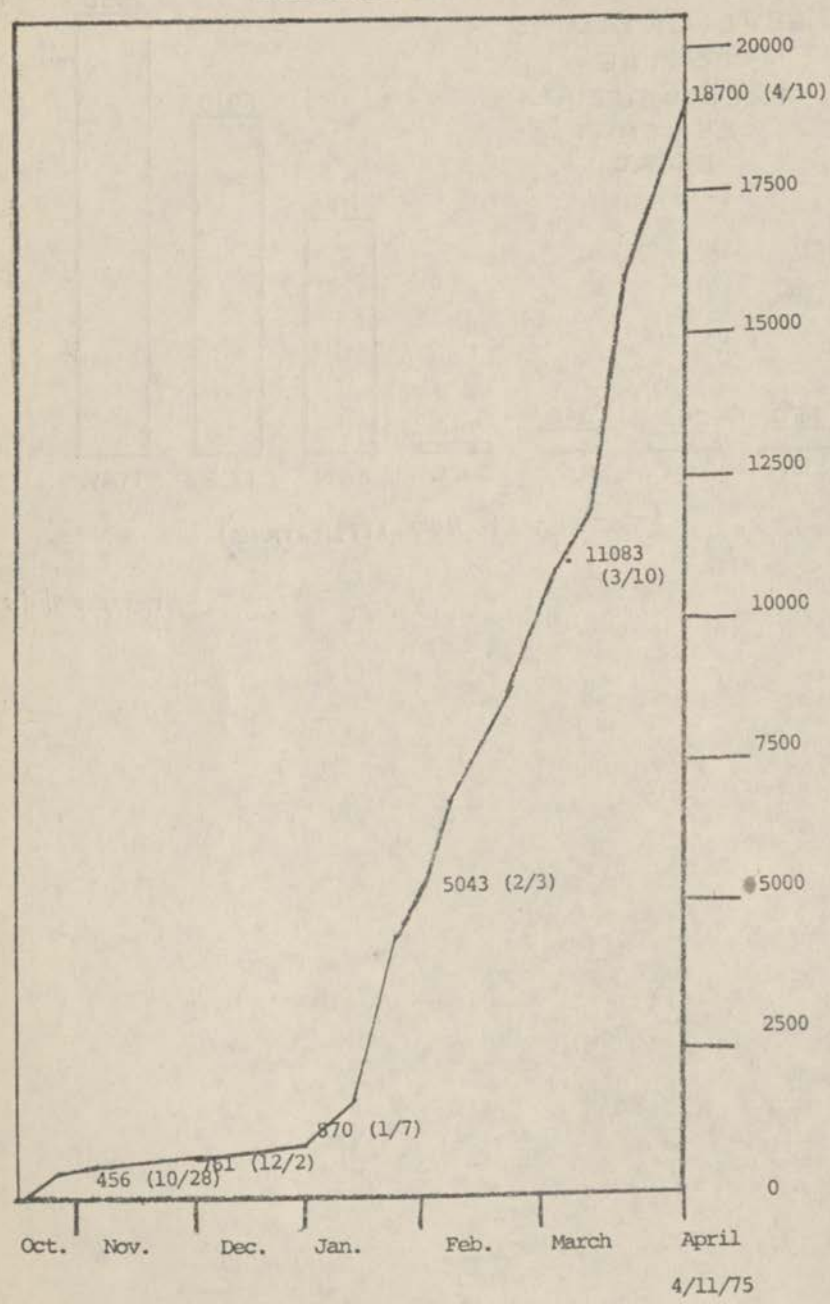
Let me conclude with the observation that I believe President Ford has acted in the tradition of Presidents Truman, Wilson, Lincoln, and Washington. I hope that this hearing today will help make more Americans aware of the deep historical roots of clemency and the country's need for it now. Perhaps,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



(TOTAL: 18,700 APPLICATIONS)

PREPARED 4/10/75

PRESIDENTIAL CLEMENCY BOARD
APPLICATIONS RECEIVED



CHRONOLOGICAL APPLICATION DATA AND OUTREACH EFFORTS

	Increase in applications	Total applications	Outreach efforts
Sept. 16	0	0	President Ford announces program.
Oct. 28	456	456	
Nov. 4	11	467	
Nov. 11	31	598	
Nov. 18	12	710	
Nov. 25	32	742	
Dec. 2	19	761	First 65 case dispositions announced.
Dec. 9	30	791	Senate hearings.
Dec. 16	31	822	
Dec. 23	9	831	
Dec. 30	9	840	
Jan. 7	50	890	7,000 letters sent to eligible civilians.
Jan. 14	357	1,247	Radio/TV spots sent to 2,500 radio and TV stations.
Jan. 21	299	1,546	26,000 notices mailed to public agencies.
Jan. 28	2,554	4,100	Board members visit 10 largest cities.
Feb. 3	943	[1] 5,043	First extension announced.
Feb. 10	1,804	6,847	Radio/TV spots sent to 6,500 stations.
Feb. 17	956	7,703	20,000 letters sent to eligible veterans.
Feb. 24	898	8,601	Board members visit 14 more cities.
Mar. 3	1,227	9,828	Second extension announced.
Mar. 10	1,255	[2] 11,083	Additional radio/TV spots mailed.
Mar. 17	738	11,825	Staff sees 3,000 counselors in 33 cities.
Mar. 24	4,006	15,831	
Mar. 31	998	16,829	Application deadline announced.
Apr. 10	1,871	18,700	Approximate final tally.

[1] Approximate count of applications postmarked by Jan. 31.
[2] Approximate count of applications postmarked by Feb. 28.

[From the Federal Register, Friday, Mar. 21, 1975]

TITLE 2—CLEMENCY

CHAPTER I—PRESIDENTIAL CLEMENCY BOARD

Administrative Procedures and Substantive Standards

The Presidential Clemency Board published its proposed administrative procedures and substantive standards on November 27, 1974 (39 FR 41351). Since that time, the Board has considered the first military cases before it, and has had the benefit of more than 40 comments on its proposed regulations. With the benefit of this additional experience and these comments, the Board publishes the final regulations setting out its procedures and standards.

It is the intent of the Board to provide notice to the pubic of the standards it uses to make recommendations to the President concerning individual application for clemency. The Board also wishes to ensure equity and consistency for applicants under the President's clemency program.

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

The Board may publish changes in individual sections as it deems necessary. The Board welcomes continuing comment on problems which may arise in the application of particular sections of these procedures and invites recommendations on how best these problems may be resolved.

Several dozen technical changes have been made in these regulations in response to new circumstances that were presented to the Board. Some clarify significantly the rights and procedures available to applicants. The following is an explanation of those changes which seem to the Board to be most significant:

Jurisdiction. Section 101.3 has been added in order to incorporate the criteria for determining whether or not a person is eligible for consideration by the Presidential Clemency Board. It restates the criteria established in Proclamation 4313 (Announcing a Program for the Return of Vietnam Era Draft Evaders and Military Deserters) and repeated in Executive Order 11803 (Established a Clemency Board * * *).

Remedies. Section 101.4 has been added to explain the remedies available from the Presidential Clemency Board. It states the authority with which the Board is vested by Executive Order 11803, issued pursuant to Proclamation 4313.

A Presidential pardon restores those federal civil rights lost as a result of a felony conviction. State law recognizes Presidential pardons as a matter of comity, usually restoring the right to vote in federal and state elections, to hold public office, and to obtain licenses for trades and professions from which convicted felons are barred under state law. Since conviction by military court-martial is treated as a felony conviction by many states, and since an Undesirable Discharge may have the same consqeuences as a court-martial conviction, the benefits of a pardon apply to former servicemen as well as to civilian draft evaders.

A Clemency Discharge neither entitles its recipient to veterans benefits nor bars his receiving those benefits to which he is otherwise entitled. The Veterans Administration and other agencies may extend veterans' benefits to some holders of a Clemency Discharge, but it is contemplated that most will not receive veterans benefits.

Availability of files to applicant and his representative. Section 101.7(c) clarifies which files an applicant and his representative have a right to see. At the offices of the Board, information collected by the Board independently of any other government agency is readily available to an applicant or his representative. All files obtained from other agencies are available to the extent not barred by the rules of the agency owning the file. For example, the Selective Service System file is available to him and his representative. Files from another agency are cited in a summary when they are used as the basis of statements in that summary. Reason for denial of access to any of these files is stated in writing upon request.

This subsection is in response to comments that §§ 201.5(b) and 201.6(c), read together, were either unclear or overbroad.

Completed case summary. The completed case summary consists of the initial case summary, amendments as described in the §§ 101.8(c) and (e), and the materials submitted by the applicant and his representative as described in § 101.8 (b). Where, in the opinion of the Board, there is a conflict of fact, false statement, or omission material to the Board's consideration of an aggravating or mitigating circumstance, as specified in §§ 102.3 and 102.4, the case is tabled. The action attorney is instructed to obtain additional facts.

This is in response to comments from the private bar.

Hearing before the Board. Subsection 101.9(c) provides for a personal appearance as a matter of right if an applicant can show that an oral presentation is necessary to the Board's understanding of a mitigating circumstance or an aggravating circumstance which applies to his case. The Board has provided a right to personal appearance in response to several comments.

Reconsideration. Subsection 101.11(b) has been amended in order to add standards which must be met if the Board is to consider an applicant's petition for reconsideration. In the proposed regulations, consideration of such petition by the Board was a matter of discretion. This amendment limits the circumstances under which reconsideration will be granted, but provides that when an applicant shows that any of those circumstances are present, reconsideration will be granted as a matter of right.

Transmittal to other agencies of Presidential decisions. Section 101.12 provides that grants of immediate pardon by the President are transmitted formally to other government agencies, as appropriate. Pending completion of the alternative service requirement, grants of conditional clemency are communicated to another federal agency only to the extent this information is necessary for the agency to perform its functions under the clemency program or for other necessary action respecting the applicant. Upon completion of alternative service, notification of the pardon is forwarded to all appropriate agencies. Denials of clemency by the President are held confidential by the Board.

The intent of this section, adopted here in response to several comments is that a person who applies for clemency should not be prejudiced in his pursuit of other remedies through the military services discharge review processes or elsewhere.

Other remedies available to applicant. Section 101.15(b) requires that Board staff inform both applicants to the Board and persons who inquire about the clemency program, but are clearly not under the Board's jurisdiction, of the remedies available to them under military discharge review processes and through the judiciary. Applicants to the Board or to one of the other agencies administering part of the clemency program may pursue such other remedies simultaneously or subsequently to, or instead of their remedies under the clemency program. The Board's staff informs them of their other options.

Aggravating and mitigating circumstances. Sections 102.3 and 102.4 contain new aggravating and mitigating circumstances which the Board deems material to its decisions.

The Board notes that it has seen a number of cases of persons who behaved with valor during combat, but then committed AWOL offenses because of mental stress caused by combat. The Board calls attention to this mitigating circumstance as one which it considers particularly important in some cases.

A number of comments from the private bar have suggested that the Board should add as a mitigating circumstance "evidence that an applicant would probably have obtained a Selective Service status or military discharge or reassignment beneficial to him, but failed to apply due to lack of knowledge or confusion." Mitigating circumstances No. 1, 8, and 9, in conjunction, are adequate to meet this problem.

Calculation of length of alternative service. Subsection 102.5(c) has been added in order to make clear the Board's decision that the initial baseline period of alternative service for applicants with Undesirable Discharges is three (3) months.

Eligibility of clemency recipients for military discharge review remedies. The Presidential Clemency Board notes, although the matter is not one for inclusion in its regulations, that it has received numerous comments which assume that a recipient of executive clemency under the President's clemency program is ineligible for consideration under the military services' discharge review processes.

This is incorrect. Any applicant to the Board for executive clemency may also seek review of his discharge through one of the military services' discharge review boards or boards for the correction of military records. Applying to the Board does not exclude a former serviceman from the jurisdiction of the military services' boards, nor does it preclude the remedies which are available from those boards.

The Presidential Clemency Board notes that a veteran who receives a Clemency Discharge through the Board may subsequently seek, according to the Department of Defense, an upgrading of that discharge through the military services' normal discharge review processes.

This chapter will become effective immediately.

Issued in Washington, D.C. on March 18, 1975.

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

1. Part 101 is added to read as follows:

PART 101—ADMINISTRATIVE PROCEDURES

AUTHORITY: Executive Order 11803, 39 FR 33297, as amended.

§ *101.1 Purpose and scope.*

This part establishes the procedures of the Presidential Clemency Board. Certain other matters are also treated, such as the assistance to be given to indi-

viduals requesting determinations of jurisdiction, or requesting information respecting those parts of the Presidential Clemency Program which are administered by the Department of Defense and the Department of Justice under Presidential Proclamation 4313 (39 FR 33293).

§ *101.2 General definitions.*

"Action attorney" means an attorney on the staff of the Board who is assigned an applicant's case.

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

"Board" means the Presidential Clemency Board as created by Executive Order 11803 (39 FR 33297) or any duly authorized panel of that Board.

§ *101.3 Jurisdiction.*

Jurisdiction lies with the Board with respect to a particular person if such person applies to the Board not later than March 31, 1975 and:

(a) He has been convicted for failure under the Military Selective Service Act (50 App. U.S.C. 462) or any rule or regulation promulgated thereunder to register or register on time, to keep the local board informed of his current address, to report for or submit to preinduction or induction examination, to report for or submit to induction itself, or to report for or submit to, or complete (alternative) service under section 6(j) of the Act for offenses committed during the period from August 4, 1964 to March 28, 1973, inclusive; or

(b) He has received a punitive or undesirable discharge as a consequence of offenses under Article 85 (desertion), 86 (AWOL), or 87 (missing movement) of the Uniform Code of Military Justice (10 U.S.C. 885, 886, 887) that occurred between August 4, 1964 and March 28, 1973, inclusive, or is serving a sentence of confinement for such violation.

(c) Jurisdiction will not lie with respect to an individual precluded from re-entering the United States under 3 U.S.C. 1182(a)(22) or other law.

§ *101.4 Remedies.*

(a) The Board is empowered only to make recommendations to the President on clemency applications. The Board has no final authority of its own. The Board may recommend to the President that he take one or more of the following actions:

(1) Grant an unconditional pardon without a requirement of alternative service;

(2) Grant an unconditional pardon upon the satisfactory completion of a specified period of alternative service not to exceed 24 months;

(3) Grant a clemency discharge in substitution for a Dishonorable, Bad Conduct, or Undesirable Discharge;

(4) Commute the sentence; or

(5) Deny clemency.

(b) In unusual circumstances and as authorized by Executive Order 11803, the Board may make other recommendations as to the form that clemency should take. This shall only be done in order to give full effect to the intent and purposes of the Presidential Clemency program.

§ *101.5 Initial filing.*

(a) In order to comply with the requirements of Executive Order 11803, as amended, an individual must make an initial filing to the Board not later than March 31, 1975. The Board considers sufficient as an initial filing any written communication postmarked not later than March 31, 1975, and received by the Board, the Department of Justice, the Department of Defense, the Department of Transportation, or the Selective Service System. In the communication an individual or his representative must request consideration of the individual's case or raise questions which evidence a serious interest in applying for the program. Oral applications made not later than March 31, 1975 are considered sufficient if reduced to writing, and postmarked not later than May 31, 1975.

(b) If an initial filing is made by a representative, the case is not considered by the Board unless and until the applicant submits a written confirmation of his clemency application. This confirmation by the applicant may be sent either directly or through a representative, but it must be mailed not later than May 31, 1975. A statement by an attorney that he is acting on behalf of an applicant is sufficient. Applications by a representative on behalf of an applicant may be considered by the Board where good cause is shown why the applicant is unable to apply.

§ 101.6 Application form.

(a) Upon receipt of an initial filing, a member of the Board's staff makes a determination of probable jurisdiction. Persons who are clearly beyond the Board's jurisdiction are so notified in writing. A person who questions this determination should promptly write the General Counsel, Presidential Clemency Board, The White House, Washington, D.C. 20500, stating his reasons for questioning the determination. The General Counsel of the Board makes the final determination of probable jurisdiction and so notifies the applicant or his representative in writing stating the reasons why. In doubtful cases, a final determination of jurisdiction is made by the Board.

(b) A person who has been notified that jurisdiction does not lie in his case is considered as having made a timely filing if the final determination is that the Board has jurisdiction over his case.

(c) A person who is within the jurisdiction of the Board is sent an application form, information about the Presidential clemency program, instructions for the preparation of the application form, a statement describing the Board's procedures and method of determining cases, and a list of volunteer counseling services.

(d) The person is urged to return the completed application form to the Board as soon as possible. Completed application forms must be postmarked within sixty (60) days of the time they were mailed by the Board, in order to qualify for the Board's consideration as a matter of right.

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

(a) Upon receipt by the Board of the completed application form or of information sufficient for the Board to request the records and files specified in paragraph (b) of this section, the applicant's case is reviewed for preliminary determination of the Board's jurisdiction. If it appears that the Board has jurisdiction over the case, a file is opened and a case number assigned. The Board will then request from all appropriate government agencies the relevant records and files pertaining to the applicant's case.

(b) In normal circumstances, the relevant records and files for civilian cases are the applicant's files from the Bureau of Prisons and information that he has sent to the Board. For military cases, they will include the applicant's military personnel records, military clemency folder, record of court martial, if any, and information that the applicant has sent to the Board. Applicants and their representatives have the right to request that the Board consider other pertinent files. The Board will attempt to comply with these requests.

(c) At the offices of the Board, information collected by the Board independently of any other agency is readily available to an applicant or his representative. All files obtained from other agencies are available to the extent not barred by the rules of the agency owning the file. Files from another agency are cited in a summary when they are used as the basis of statements in that summary. Reason for denial of access to any of these files is stated in writing upon request.

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

(e) If the Action Attorney determines that the Board does not have jurisdiction in a particular case, he promptly notifies the applicant or his representative in writing, stating the reasons for such a determination.

(f) An applicant or his representative who questions this adverse determination of jurisdiction should write the General Counsel of the Board in accordance with the provisions of § 101.6(a).

§ 101.8 Initial case summary.

(a) Upon receipt of the necessary records and files, the Action Attorney prepares an initial case summary of the applicant's case. The files, records, and any additional sources used in preparing the initial case summary are listed. No other material is used. The initial case summary includes the name and business telephone number of the Action Attorney who may be contacted by the applicant or his representative.

(b) The initial case summary is sent by certified mail to the applicant or his representative. The summary is accompanied by an instruction sheet describing the method by which the summary was prepared and by a copy of the guidelines used by the Board for the determination of cases. Applicants are encouraged to

review the initial case summary for accuracy and completeness and advised of their right to submit additional sworn or unsworn material. Additional material may be submitted in any length. Nothing over three (3) single-spaced, typewritten, letter-sized pages in length is read verbatim to the Board. Where necessary, therefore, an applicant should summarize his additional material to comply with this verbatim presentation requirement. If this is not done, the Action Attorney does so.

(c) At any time before Board consideration of his case, an applicant may submit evidence of inaccurate, incomplete, or misleading information in the complete Board file or other files. This information is incorporated in applicant's Board file.

(d) An applicant's case is ready for final consideration by the Board not sooner than thirty (30) days after the initial case summary is mailed to the applicant. Material which amends or supplements the applicant's initial case summary must be postmarked within this thirty (30) day period to ensure that it is considered. An applicant's request that this thirty (30) day period be extended is liberally granted by the Action Attorney, if the request is received prior to Board action and is reasonable.

(e) Upon receipt of the applicant's response to the initial summary, the Action Attorney notes all such amendments, supplements, or corrections on the initial summary submitted by the applicant or his representative. All such amendments are attached to the initial case summary with notation by the Action Attorney of any discrepancies of fact which in his opinion remain unresolved. The complete case summary consists of the initial summary, amendments as described in paragraph (c) and this section, and the materials submitted by the applicant and his representative as described in paragraph (b) of this section.

(f) Where, in the opinion of the Board, there is a conflict of fact, false statement, or omission material to the Board's consideration of an aggravating or mitigating circumstance, as specified in §§ 102.3 and 102.4, the case is tabled. The Action Attorney is then instructed to obtain additional facts.

§ *101.9 Consideration before the Board.*

(a) At a regularly scheduled meeting of the Board, an applicant's case is considered. The Board may provide by rule, however, that cases will be initially considered by panels of not less than three Board members. Any case may be brought before a majority of the full Board for consideration at the request of a panel member. Panel recommendations will be considered and approved by a majority of the full Board.

(b) The Action Attorney presents to the Board a brief statement of the completed case summary and, as provided in § 101.8(b), the material submitted by the applicant.

(c) The Board grants a personal appearance to an applicant and his representative if they can show in a written statement that such an appearance is necessary to the Board's understanding of the applicant's case. The Board considers each request for an oral presentation at a regular meeting and informs the applicant and his representative whether or not his request has been granted.

(d) Any oral presentation granted by the Board shall not exceed a reasonable period of time. Neither applicant nor his representative may be present when the Board begins deliberations, but should remain available for further consultation immediately thereafter.

(e) After due deliberation the Board decides upon its recommendation to the President listing the factors it considered in making its recommendation.

§ *101.10. Recommendations to the President.*

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

(b) Following action by the President, the Board sends notice of such action in writing to all applicants whose names were submitted to the President. Each applicant is sent a list of the mitigating and aggravating circumstances decided by the Board to be applicable in his case.

§ 101.11 Reconsideration.

(a) An applicant may ask the Board for reconsideration of his case. Petitions for reconsideration, including any supplementary material, must be postmarked within thirty (30) days of Board mailing specified in § 101.10(b).

(b) At a regularly scheduled Board meeting, a majority of the Board being present, it will reconsider the applicant's case if the applicant's petition shows one or more of the following:

(1) New fact, material to the disposition of his case, which the Board had not previously considered, provided that the applicant explains to the Board's satisfaction why such facts were not submitted earlier. New facts are, for purposes of this section, considered material only if they relate to presence or absence of an aggravating circumstance under § 102.3 or of a mitigating circumstance under § 102.4, or to calculation of length of alternative service under § 102.5.

(2) Factual error, in the complete case summary or other document considered by the Board that was material to the Board's disposition of his case and detrimental to him; or

(3) Procedural error that was material to the Board disposition of his case and detrimental to him.

(c) The Board may at its discretion permit an applicant or his representative a reasonable period of time to present before the Board an oral statement. The provisions of § 101.9 apply to any request for a personal appearance.

(d) After due deliberation, the Board may:

(1) Leave unchanged its original recommendation;

(2) Where executive clemency was not granted, recommend to the President that he grant it in accordance with such terms and conditions as may be appropriate;

(3) Where executive clemency was granted, recommend to the President that he diminish the length of alternative service on which the grant of clemency has been conditioned or immediately grant a full and unconditional pardon.

(e) Applicants requesting reconsideration are so notified in writing of the Board's decision, together with the reasons.

§ 101.12 Transmittal to other agencies of clemency decisions.

(a) The Chairman of the Board may forward for further action to the Secretaries of the Army, Navy, and Air Force, the Secretary of Transportation, the Director of the Selective Services System, and the Attorney General, as appropriate, only such information about the President's decision as is necessary in the Board's judgment for the agency to perform its functions under the President's clemency program or for other necessary action respecting the applicant.

(b) A decision by the President to deny executive clemency to a person who has fully discharged his obligations under the law for his offense is not transmitted by the Board to any other agency of the United States Government or to any other person, public or private, except the applicant or his representative.

§ 101.13 Confidentiality of communications.

(a) In order to have his case considered by the Board, an applicant need submit only information sufficient for a determination of jurisdiction and for the retrieval of necesary official records and files. The application form requires the applicant's name, date of birth, selective service number, military branch and service number, if applicable, information concerning the draft evasion offense or absence-related military offense, and the disposition thereof, and the mailing address and telephone number of either the applicant or his representative.

(b) The Board takes all steps in its power to protect the privacy of applicants and potential applicants to the Presidential clemency program. No personal information concerning an applicant or potential applicant is released by the Board unless disclosure is necessary for the proper functioning of the Board (e.g., to the Selective Service System so that alternative service may be performed) or unless required by law.

(1) Information which reveals commission of a serious crime, unrelated to any offense subject to the jurisdiction of the Presidential clemency program is forwarded to the appropriate authorities.

(2) As required by law, the name (but only the name) of a recipient of clemency is released to the public.

(c) All personal information obtained by the Board in the course of reviewing an applicant's case, except information obtained from other agencies, is sealed by the Board. This happens when the applicant has received his pardon from the President or when the Board's operations terminate, whichever is earlier.

(d) Upon announcement of the President's disposition of a case, the Board may publish a summary of that case after the removal of all information likely to identify the individual.

§ *101.14 Representation before the Board.*

(a) Although an applicant may bring his case before the Board without a representative, each applicant is advised of his right to representation and encouraged to seek counsel experienced in military or selective service law. A representative need not be an attorney, although legal counsel is recommended to applicants. The Board staff advises applicants of those private sources which are available to provide counseling.

§ *101.15 Requests for information about the Clemency Program.*

(a) Upon receipt by the Board of a request for information from an individual clearly not within the jurisdiction of the Board, the Board's staff attempts to determine his eligibility for any other part of the Presidential clemency program. If requested, the Board attorney preserves the confidentiality of the individual's location.

(b) A member of the Board's staff also informs any individual of other remedies available to him, including those from the Departments of Justice and Defense and through judicial processes.

§ *101.16 Postponement of Board consideration and of the start of alternative service.*

(a) An applicant may request that the Board defer consideration of his case for a reasonable period of time. Such deferments are liberally granted provided that they do not result in an undue disruption of the Board's operations or delay the final termination of the Board's operations.

(b) An applicant who has been granted executive clemency conditioned upon a period of alternative service may ask for the postponement of the beginning of his period of alternative service for a reasonable period of time. The reasons for which a postponement may be granted include personal hardship and conflicting obligations. The Board makes every effort, consistent with its own authority and that of the Selective Service System to accommodate postponement requests.

2. Part 102 is added to read as follows:

PART 102—SUBSTANTIVE STANDARDS

Sec.
102.1 Purpose and scope.
102.2 Board recommendations.
102.3 Aggravating circumstances.
102.4 Mitigating circumstances.
102.5 Calculation of length of alternative service.

AUTHORITY: Executive Order 11803, 39 FR 33297, as amended.

§ *102.1 Purpose and scope.*

This section contains the standards which the Board employs in deciding whether or not to recommend that the President grant executive clemency, whether or not clemency should be conditioned upon satisfactory completion of a period of alternative service, and, if so, what the length of this alternative service is.

§ *102.2 Board recommendations.*

In each case the Board decides first whether or not it will recommend to the President that the applicant be granted executive clemency. In reaching this decision, the Board considers the aggravating circumstances in § 102.3 and the mitigating circumstances in § 102.4.

§ *102.3 Aggravating circumstances.*

(a) Presence of any of the aggravating circumstances listed below may either disqualify an individual for executive clemency or cause the Board to recommend to the President a period of alternative service exceeding the applicant's "baseline period of alternative service," as determined under § 102.5.

(b) Aggravating circumstances of which the Board takes notice are:
(1) Other adult criminal convictions;
(2) False statement by applicant to the Presidential Clemency Board;
(3) Use of force by applicant collaterally to AWOL, desertion, or missing movement or civilian draft evasion offense;
(4) Desertion during combat;
(5) Evidence that applicant committed offense for obviously manipulative and selfish reasons;
(6) Prior refusal to fulfill court ordered alternative service;
(7) Violation of probation or parole;
(8) Multiple AWOL/UA offenses; and
(9) AWOL/UA of extended length.
(c) Whenever an additional aggravating circumstance not listed is considered by the Board in the discussion of a particular case, and is material to the disposition of that case, the Board postpones final decision of the case and immediately informs the applicant and his representative of their opportunity to submit evidence material to the additional circumstance.

§ *102.4 Mitigating circumstances.*

(a) Presence of any of the mitigating circumstances listed below or of any other appropriate mitigating circumstance is considered as cause for recommending that the President grant executive clemency to an applicant, and as cause for reducing the applicant's alternative service below the baseline period, as determined under § 102.5.
(b) Mitigating circumstances of which the Board takes notice are:
(1) Lack of sufficient education or ability to understand obligations or remedies available under the law;
(2) Personal and family problems either at the time of offense or if applicant were to perform alternative service;
(3) Mental or physical condition;
(4) Employment and other activities of service to the public;
(5) Service-connected disability, wounds in combat or decorations for valor in combat;
(6) Period of creditable military service;
(7) Tours of service in the war zone;
(8) Substantial evidence of personal or procedural unfairness;
(9) Denial of conscientious objector status, of other claim for Selective Service exemption or deferment, or of a claim for hardship discharge, compassionate reassignment, emergency leave, or other remedy available under military law, on procedural, technical, or improper grounds, or on grounds which have subsequently been held unlawful by the judiciary;
(10) Evidence that an applicant acted for conscientious, not manipulative or selfish reasons;
(11) Voluntary submission to authorities by applicant;
(12) Behavior which reflects mental stress caused by combat;
(13) Volunteering for combat, or extension of service while in combat;
(14) Above average military conduct and proficiency; and
(15) Personal decorations for valor.
(c) An applicant may bring to the Board's attention any other factor which he believes should be considered.

§ *102.5 Calculation of length of alternative service.*

(a) Having reached a decision to recommend that the President grant executive clemency to a particular applicant, the Board will then decide whether or not clemency should be conditioned upon a specified period of alternative service and, if so, what length that period should be:
(1) The starting point for calculation of length of alternative service will be 24 months.
(2) The starting point will be reduced by three times the amount of prison time served.
(3) The starting point will be further reduced by the amount of prior alternative service performed, provided that the prescribed period of alternative service has been satisfactorily completed or is being satisfactorily performed.
(4) The starting point will be further reduced by the amount of time served on probation or parole, provide that the prescribed period has been satisfactorily completed or is being satisfactorily performed.

(5) Subject to paragraphs (b) and (c) of this section, the baseline period of alternative service will be the remainder of these four subtractions or final sentence to imprisonment, whichever is less.

(b) In no case will the baseline period of alternative service be less than three (3) months.

(c) For applicants who have received an Undesirable Discharge from a military service, the baseline period of alternative service shall be three (3) months.

(d) The Board may consider mitigating circumstances as cause for recommending clemency upon satisfactory completion of a period of alternative service that is less than an applicant's baseline period of alternative service, or for recommending an immediate pardon.

(e) In cases in which aggravating circumstances are present and are not, in the Board's judgment balanced by mitigating circumstances, the Board may consider such aggravating circumstances as cause for recommending clemency upon satisfactory completion of a period of alternative service exceeding, by three (3), six (6), or nine (9) additional months, the applicant's baseline period of alternative service. In extraordinary cases, as an alternative to denying clemency, the Board may increase the baseline period to a maximum of not more than 24 months.

PART 201—[REVOKED]

3. Part 201 is revoked.

PART 202—[REVOKED]

4. Part 202 is revoked.

[FR Doc. 75-7464 Filed 3-20-75; 8:45 am]

TESTIMONY OF HON. CHARLES E. GOODELL, CHAIRMAN, PRESIDENTIAL CLEMENCY BOARD

Mr. GOODELL. Mr. Chairman, I am the Chairman of President Ford's Presidential Clemency Board, which is part of the White House Office.

The clemency program has, in my opinion, suffered from insufficient public understanding, from confusion, and from misinformation about its operations. I hope these hearings will help to clarify the current clemency program and dispel some of the myths about it.

Let me first offer some general observations.

From the first I have been impressed with the importance that President Ford places in his clemency program and with the attention which he gives to it. He took a personal hand in revising the original proposals. At the first Board meeting, he met with us in the Cabinet Room, and we had a lengthy discussion about his hopes for the clemency program.

He subsequently met with the Board in signing the first dispositions recommended by the Board. I have met with him several times to deal with particularly difficult issues that faced the Board.

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

Second, I would like to make some general comments about the nature of the applicants to the Clemency Board program.

Contrary to the popular impression, most of our applicants are not the stereotyped war resister. We have applicants who have all the variety of hardship problems that occur with reference to any war service, any service in the military in peacetime or in war.

Over half of our applicants never completed high school. They are generally unsophisticated, inarticulate people, unable to pursue their

remedies within the legal system. Had they been able to do so, many of these applicants would have received hardship deferments, conscientious objection deferments, compassionate reassignments, or hardship discharges from the military. In many cases they just did not know how to proceed properly within the law and the regulations.

This is not meant to belittle the fact that we also have many cases in which there have been genuine conscientious objection to killing. For the most part, however, even these people tend to be ones who did not understand how to pursue their rights properly. They are predominantly Jehovah's Witnesses, Muslims, and a few others whose religious or ethical beliefs are evident from the letters which they write to us, from their probation records, and from other files predating even their conviction.

The vast preponderance of our applicants are the unfortunate orphans of an administrative system in which success was determined by being educated, clever, articulate, and sophisticated. Whether sincere or not, they got a better shake often because they had expert assistance available to them. Those who believed deeply, but could not express their feelings adequately, wound up with conviction records and, sometimes, jail sentences.

We have been surprised and impressed as well by the public support which the President's clemency program receives, especially after its provisions are explained. Many church groups and veterans' counseling services established programs for potential applicants to the various parts of the clemency program. Other organizations, which are not in total agreement with the clemency program, nonetheless have helped eligible persons with the major personal decisions which they have to make about participating in the President's program. We have learned that people in this country really do want to have a reconciliation which will bring former draft evaders and deserters back into full integration in their communities.

This reaction, however, stands in contrast with what many Americans may hear or perceive about the program. From the very vocal, be they advocates of unconditional amnesty or opponents of any clemency, we have heard a drumfire of criticism about the program. It was pronounced as cynical and a failure on the very day it was started, and I hear very little different from some quarters, even now.

The fact is that the President's program has been the victim mostly of confusion and ignorance. It came as a shock and a surprise to the Board even as late as early January, after 4 months of the program, that the Washington press corps, itself, did not understand truly the nature of the program, particularly the Clemency Board phase of the program.

It was at that point that I ordered an information campaign to be carried out throughout the country. I canceled two Board meetings in January and February and asked the nine members of the Board to go to the major cities of the country, to stay there all day, make themselves available to the media, beginning with a press conference, go on talk shows, explain the program, not to recruit, not to urge or persuade, simply explain the Clemency Board phase of the program.

I must say to you that we found overwhelmingly when we took this program that everybody knew there was a clemency program, and everybody knew that those who went to Canada or went underground,

or went to Sweden and were still fugitives were eligible for the program. Very few understood that the bulk of the potential applicants were eligible, namely, those who were not fugitives, those who had either turned themselves in or had been picked up, and who had already been punished with bad discharges for their military desertion or Federal convictions in Federal court.

I might say to you that the statistics are rather dramatic in that those that are now at least acknowledged as eligible, something like 17,000 are fugitives who are eligible for the Defense Department or the Justice Department program, and about 110,000 to 120,000 are nonfugitives, eligible for the Clemency Board program.

I must say that I think as individuals understood this, the opposition diminished. We had cooperation from many of the veterans' groups in the Clemency Board phase of the program, in helping individuals, and in informing them. We sent our staff out to talk to the veterans' counselors around the country.

General Walt, a member of the Board, Father Hesburgh, a member of the Board, did public service announcements which were made available on radio and television around the country in January and February. The results were rather dramatic. In round numbers, in the first week in January we had about 800 applicants. As the information campaign got underway, in January we received about 4,000 applicants. In February we received another 5,000 to 6,000, and in March it appears we will have received about 7,500-plus applicants. The total number of applicants to date for the Clemency Board program is 18,867.

I might also note that General Walt, who was Commander of the U.S. Marines in Vietnam for 2 years, and Assistant Commandant of the Corps, recived an anguished phone call early last month from the mother of a Vietnam veteran. She was concerned about a clemency program for draft evaders, while her son, who had a bad discharge, was not being recognized for his service in Vietnam. She had inquired about the program, but had been told her son was not eligible because he had been in Vietnam. General Walt explained to her, as we have tried to explain to the general public, that Vietnam veterans are definitely eligible for the program if they later went AWOL and were given bad discharges. In fact, we estimate that a good 18 percent of our applicants fall into this category.

The Clemency Board program has now been in operation for approximately 6 months. My own feelings in support of this program have been strengthened from our experience. I do not favor universal, unconditional amnesty. Let us consider some of the factors in this whole issue.

First, much as we may sympathize with and respect those who refused military service because of a deep and sincere moral opposition to the war in Vietnam, it cannot be denied that in doing so they violated the law. Civil disobedience has a long and honorable tradition in our society. But disobedience to the law, however lofty the motive, bears with it the risk of having to pay the penalty imposed by the law. Indeed, for the most part, it is an important aspect of civil disobedience that a person be ready and willing to bear witness to his cause by expecting the law's punishment.

I could cite a number of examples historically, having done some work on this in the writing of my own book. There are exceptions to this rule, but as a general basis of civil disobedience, individuals step forward and are willing to accept their punishment as part of their demonstration of opposition to law or policy.

The program administered by the Presidential Clemency Board is a means of relieving, as much as the law can, the legal consequences borne by those who were punished for their AWOL or draft evasion. Irrespective of the law's punishment, however, the country imposes a duty of service upon each citizen, and that service remains unfulfilled by those who refused military duty.

However imperfect the draft system—and I make no spirited defense of how the Government over the years, particularly the Vietnam years, has implemented the draft—alternative service is designed to provide a means of satisfying this obligation of citizenship. It is not punishment. It is not retribution. Alternative service under the Presidential clemency program is the same service that thousands upon thousands of conscientious objectors have performed ever since the principles of conscientious objection were incorporated into our law in World War I.

Recognition of the moral content of their disobedience does not place those persons who acted in protest to the Vietnam war in a class better than the others who objected to war but who performed alternative service, nor does it place them in a class better than those who served in Vietnam even though they, too, may have had deep and profound feelings of opposition to the war. I must say that I do not know very many who went and fought in Vietnam who wanted to risk their lives or lose their lives, and we all must be profoundly aware as we consider what can be done in terms of amnesty or clemency in reconciling our country that 55,000 men died in Vietnam.

Total and unconditional amnesty in the guise of seeking to do justice, in my opinion, would create additional injustice. We should not be misled into thinking that every person who refused service did so out of the highest moral feelings. Many persons acted out of selfish or personal reasons, having nothing to do with ethical considerations. Some may deserve no clemency at all. The circumstances of each person before the Presidential Clemency Board are different, and any clemency program must recognize those differences.

Consider the case of the serviceman stationed in Germany who traffics in hard drugs. Faced with a threatened court-martial, he escapes to Sweden. There he joins an antiwar commune and turns informer and provocateur on his fellows. He pushes drugs; he robs and steals. He is tried, convicted, and escorted to the Swedish border where he is returned to American authorities. He is court-martialed for AWOL and convicted. Now he applies to the Presidential Clemency Board. That is an actual case of an application before the Clemency Board.

This man does not deserve clemency. The Clemency Board has recommended to the President that clemency be denied. It would be an injustice, in our opinion, to treat him the same way as others whose reasons and conduct were, under all the circumstances, understandable.

A program of total and indiscriminate amnesty would be wrong because it cannot avoid equating this person with the Jehovah's Witness, son of a religious family. He applies for conscientious objector status and is granted it, but he refuses to perform alternative service because his faith considers alternative service by order of the Selective Service System to be part of the military. He would, however, consistent with his faith, perform alternative service if so ordered by a judge. Instead he is tried for failing to perform and serves 5 years in prison. That also is an actual applicant to our Board.

Compare yet another case. This individual enlists, serves for a few months, then wanders off for a few months. He is immature and cannot adjust to service. He returns and goes AWOL again. Finally he is discharged for a series of AWOL's and for failure to perform adequately. This person has no good reason for his failure to perform satisfactorily except his immaturity. He is not a conscientious objector. He merely has failed to do his 2 years' obligation. It is right and necessary, in my opinion, to call upon him to perform some alternative service in the public interest, not as a penalty, but as a means of discharging the obligation to his country which he failed to fulfill.

Any system of universal, unconditional amnesty by definition must treat these different individuals and their circumstances the same. It would do injustice by treating unlike cases alike, and that is an injustice no less than treating alike cases in an unequal manner. The conditional program of President Ford enables the Board to consider recommending no clemency in the first case, an immediate pardon in the second case, and a requirement of some period of alternative service in the third. It permits us to deal with applicants as individuals, not as an undifferentiated mass. That, it seems to me, is a goal every Government program should aim to achieve.

Finally, I believe the President's program accomplishes for the Nation's well-being what unconditional amnesty could not. One of the President's goals was to try to heal the division amongst our people on the amnesty/clemency issue. There are strong feelings on this question on both sides. There are hundreds of thousands of people in this country with sons, husbands, other relatives, who were seriously wounded in Vietnam, or who did not return from Vietnam. We owe those people respect for their feelings and for the pain from which their feelings and their tears arise. For those who feel deeply about the sacrifices paid by those who served, those who died, and those who suffered grievous wounds, clemency means that those who did not serve are rewarded in place of those who went in their stead.

For others, who feel deeply about the moral questions of the war and of the sacrifices made by those whose conscience made them protest against what they saw was immoral and unjustified policy, anything less than full restitution and a confession of error by the President is unsatisfactory.

These two views, deeply held and certainly understandable, cannot be completely reconciled. To deny any kind of clemency is to perpetuate the divisions in our country. To declare unconditional amnesty would create new ones. The President's goal of bringing reconciliation by a conditional program is the proper approach, in my opinion. I think it is well on the way to achieving that goal.

Let me now turn quickly to a discussion of the Clemency Board's jurisdictions, the remedies we offer, the administrative procedures we have established.

First of all, the Clemency Board has nine members. The proclamation divided the program into three main parts, and they can be quite simply described.

The first part for those who are draft evaders, who are fugitives, and who had never been picked up, they could return and go through the Department of Justice and receive normally 2 years of alternative service. If they completed that alternative service successfully, all charges were dropped and they have no criminal records. They have a clean record.

The second phase is for those deserters who were fugitives and who had never been picked up. They could return to the Defense Department. They would be processed through a period of 2 to 3 days, receive an undesirable discharge, and then normally be assigned 2 years of alternative service, upon completion of which they would be given a clemency discharge.

The third phase of the program is that involving the Clemency Board itself. We deal with the same offenses, those who committed draft evasion offenses or deserted from the military. The distinction in the Clemency Board program is that our individuals are not fugitives. They have already been punished for their offenses. They have received a bad discharge from the military for AWOL or desertion, either after court-martial or through the administrative process, or they have been convicted in Federal court and have criminal records for draft evasion.

To the civilian applicant for clemency to the Clemency Board, the Board can offer a variety of things. We can offer an outright pardon without alternative service. We can offer a pardon after performance of a period of alternative service, or we can deny any clemency whatsoever.

A pardon is a very important help to the individuals who are under the clemency program. A pardon restores Federal civil rights. Most States recognize a Presidential pardon as a matter of comity, and it serves to remove the civil disabilities that the State may have imposed as a result of the Federal conviction.

Perhaps even more importantly, licensing restrictions which prevent ex-convicts from working in a variety of occupations, are also removed. Without a pardon, the typical ex-offender cannot work in any professional occupation or, in many States, as an ambulance attendant, a watchmaker, a tourist camp operator, a garbage collector, a barber or beautician, a practical nurse, or a plumber.

While we cannot ignore or demean the symbolic importance of an act of personal grace by the President, we should also recognize that the receipt of a Presidential pardon also removes the social stigma that inevitably attaches to a draft evader and a deserter and has the practical effect of making the ex-offender employable again.

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

To the former serviceman who applies, we offer a full pardon, plus an upgrading of his discharge to a clemency discharge, either uncondi-

tionally or conditioned upon alternative service. Whatever one's feelings about the practical or symbolic importance of the clemency discharge, the pardon here, too, serves to remove the legal and social disabilities of the bad discharge.

As of April 7, the President had acted on 65 cases. An additional 114 have been recommended to the President and further will be recommended on a further basis from this point on. In the first 65 cases, 20 received a full and immediate pardon without alternative service; 20 received 3 months alternative service; 12 were asked to do 6 months alternative service; 12 were asked to do 1 year of alternative service.

Although I cannot disclose the recommendations of the 114 additional cases, the breakdown is very much as in the first 65, and that is also true of the subsequent cases the Board has heard and is about to recommend to the President.

Let me turn quickly to our procedures. We asked for and received many suggestions and criticisms from appropriate groups who were interested in the clemency program. It took some time to develop our regulations, partly because we had no historical model upon which to proceed and no clear precedents. We also wished to become very familiar with the cases before we made dispositions.

In the early weeks, a month and a half to 2 months, we withheld any recommendations because obviously we did not want to proceed on the basis of rules that were tentative at the beginning and would be changed so that later applicants would be considered under different rules than the early applicants. Our main goal was to make the Board's rules as simple and easy to understand as possible. In particular, we tried to make applying to the Board as uncomplicated as we could.

An individual who wrote a letter, called on the telephone was considered an applicant, and we would send him an instruction sheet and, if he gave us sufficient information to find his files, either his criminal files in the Federal court system, or his military files, that was an application. We sent him instructions, urged him to get counsel of one nature or another and referred him to private sources of counseling where possible. Each applicant was not only informed of his right to counsel, but encouraged to get counsel, either legal or otherwise. For those who had no resources, we urged the volunteer groups to provide us assistance, and we mailed a list of these agencies to every person who applied.

Once the necessary information is obtained from an applicant and his files are obtained, we have an elaborate internal procedure. A summary is prepared on each case. This summary is then mailed to the applicant along with a copy of our regulations and simplified instructions. The applicant is urged to give us whatever information he desires, correcting the information that may be wrong in the summary or supplementing. Once this process is completed, the case is presented to the Board.

After the Board examines the case and makes a recommendation, the President reviews that recommendation and issues his decision. Thereafter the applicant has 30 days to ask for reconsideration, 30 days after he is informed of the President's decision.

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

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

In deciding appropriate lengths of alternative service, we give special weight to time already spent in prison and to alternative service, probation and parole which has been satisfactorily completed.

Equity compels us to consider factors beyond simply time spent in prison. For this reason, for example, Jehovah's Witnesses and members of other special religious communities who have served little time in prison, but whose violations of law were clearly motivated by deeply held religious beliefs, typically have been offered outright pardons, or have been asked to serve minimal amounts of time where aggravating circumstances have also existed.

Individuals with similarly held moral or ethical beliefs, but who are not members of any religious faith, are treated in the same way. On the other hand, persons who acted from no apparent sincerely-held ethical or religious convictions about the war have normally received clemency contingent upon longer lengths of alternative service, even when they have served some time in prison.

The other factors which the Board weighs appear in the regulations as are before you.

The Board has been diligent in creating procedural and substantive rules which can be readily understood by a layman. We have tried to use simple and clear language. We have tried to bring the greatest practical degree of due process to a procedure which is constitutionally, inherently discretionary on the part of the President.

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

Since most evaders and deserters within our jurisdiction apparently do not read the Washington Post or watch Harry Reasoner frequently, we took pains to spread information as widely as possible to persons who might be eligible for the President's program. We mailed information about the program to the last known addresses of 7,000 persons convicted of draft evasion and eligible for Board consideration, thanks to the very fine cooperation of the Federal Probation Service and the Administrative Office of the U.S. Courts. We then arranged with the Defense Department to review each court-martial record between 1964 and 1973. They retrieved some 28,500 records. Over 20,000 appeared to have some possibility of eligibility, and they received a mailing from the Board.

In addition, the Board prepared public service announcements, which I have referred to earlier in my testimony.

Considering the short time available to inform the public of the program, the fact that we have had a small staff and a limited budget, our efforts to inform, I believe, were extraordinarily successful. As the

chart I attached to the testimony will show, our rate and number of applications jumped dramatically as a result.

This large number of cases we now have must be now handled on a case-by-case basis, and we must give each applicant the same thorough review and deliberation as every other receives.

To do this in the limited time available, the President has ordered an expansion of the Board and its personnel. We will climb from 9 members and about 50 staff to 18 members and a staff of about 600. We must do this quickly; we must be fully staffed by May 1, and we do not have the luxury of dispensing with our work while we expand. We must locate lawyers in other Government offices, train them, and get them to preparing cases in a matter of days, not weeks or months.

By September, we fully expect to have completed the recommendation process for all 18,000 cases.

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

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Goodell, for your full statement. Of course, one function which these hearings will not serve is to alert any of the hundreds of thousands of people who might have participated in the President's program but, for one reason or another, declined to do so. They can no longer be applicants under your program. Is that not correct?

Mr. GOODELL. That is correct.

Mr. KASTENMEIER. I appreciate why you have suggested that you will need to expand your staff enormously because presently the Board has acted on only 114 cases out of the 18,000. This suggests that your goal of acting finally within 1 year of the Executive order is almost unobtainable at the rate you have been proceeding. Somewhat over 6 months have transpired since the Executive order.

Of course, everyone understands it takes a while to comprise a board; it takes a while to bring a staff into being and to act on petitions, but the fact that over 6 months have transpired and only 114 cases are disposed of does suggest that the outlook is not very good for your completing your task on time.

Mr. GOODELL. Mr. Chairman, based on the statistics which you cite, that would appear to be the case. We, however, are very confident that we will be able to dispose of these cases. The one major problem that we have in so doing would be to put together an adequate number of staff people in the short period of time in order to process the cases.

I think the Board, without question, can dispose of the cases. We have had two test runs now with the Board breaking into panels of three, and the Board members reading the summaries in advance and working out the mitigating and aggravating factors in advance that they see in those summaries. We have found that, for instance, in the cases of those where there is general agreement there should a pardon without alternative service, we can run through very quickly in those

cases and there is no reason to discuss them further if they are going to get the very best result from their viewpoint from the Board.

We have guaranteed that any member of the Board may bring a case from a panel to the full Board for deliberation. In our two test runs, working with three-person panels, we have found that we can expedite rather substantially the consideration by the Board and, by increasing the Board to 18, it would be my anticipation that in June, July, and August we would have four, 3-person panels operating virtually every day.

So, the whole question is whether we can get enough staff to process these cases to the point where they are ready for disposition by the Board.

I might also say that by that expedited procedure we guarantee that the cases that are difficult, where they are marginal, where there are factors that have to be discussed by the Board, have ample time to be discussed by the Board.

Mr. KASTENMEIER. For purposes of organization and hearing of cases and for purposes of evolving regulations and guidelines, have you found anything else concurrent in government or historically to use as a model for your organization or for your guidelines and regulations?

Mr. GOODELL. We looked for models and found none, literally. There were no precedents.

Mr. KASTENMEIER. For example, this subcommittee tomorrow will present in this room for Judiciary Committee approval a piece of legislation for the complete reorganization of the Federal Parole Board System. They have similar tasks to you; they review cases of people who are to return to society. They have many thousands in their jurisdiction, they act on a case-by-case basis, and they have a Board of eight members. So, they have a similar task, and I am interested in how your own organization has evolved its methods of proceeding.

I take it, up to the present time, that all members of the Clemency Board have examined each case on a case-by-case method; at least they see the file or they, one or more of them, interview the applicant. Is that correct?

Mr. GOODELL. That is correct up to now. It will not be the case in the future.

Mr. Chairman, I am uncomfortable with the parole model. I know you are aware that I testified on that legislation and have rather strong feelings on the subject that would not be appropriate for me to go into at this point.

Mr. KASTENMEIER. Nonetheless, there are analogies.

Mr. GOODELL. There are analogies that I can see. We are dealing with a similar kind of situation. Let me say that we acted immediately to set out as explicitly as possible all factors that would be considered as aggravating, all factors that would be considered as mitigating, give weight to those factors. For instance, a very clear factor is the length of time an individual has served in prison. Can the Clemency Board determine to give 3 days' credit of alternative service for every day that was served in prison. That does not mean arbitrarily that it ends up with a mathematical computation, because all of the other aggravating and mitigating factors are taken into consideration thereafter.

I think our Clemency Board has no precedent. I do not believe the way we have proceeded has been the case in the parole procedures in the past, and I am very proud of the procedures and substantive rules that the Clemency Board has established.

Mr. KASTENMEIER. On a different subject, you refer to recommendations of the Board to the President. To date the President has acted on 65 cases. Has the President in any case not taken the recommendation of the Clemency Board? Does the President, in fact, or someone acting more directly in his behalf, actually review your recommendations?

Mr. GOODELL. The procedure thus far has involved the President personally. I met with the President in each case to present the initial recommendation of the Board. I know, as a matter of my own knowledge, that he had read those summaries; he had marked them up; he asked me questions about them, a number of the cases.

On these 65, the first 65 cases, the President ultimately went along with the recommendation of the Clemency Board in every case. We have presented to him, or will be presenting to him, cases where we feel he should make the judgment, because there is a matter of policy that has not been presented to the Board before, and it is an interpretation of what the President conceives his program to be.

The President has contributed in several instances to a case disposition by my talking to him and saying: What did you have in mind? The Board would like your guidance; here is a case; it will be a precedent for a large number of other cases before the Board. So the President has participated in that evolution of our program where we felt we needed guidance from him.

I would say to you, however, that I do not anticipate that, now that we have reached the stage where most of the major substantive and procedure decisions have been made, that the President is going to go through every one of these cases. I think I can guarantee to you that he is not going to take the time or have the time to go through 18,867 cases.

Having established the procedures and the substantive policies, I think we have reached a point now where, unless the Board specifically calls a case to the President's attention, he will follow our recommendations. We do have several, as I mentioned, that we are going to call to his attention and where the Board is divided. We have one case, one of the few cases, in which the Board is divided five to four, and we agreed we would take it to the President and let him decide it.

It is a matter of great consequence and great division on our Board.

I should also emphasize to you, however, that although our Board started out with many different opinions, a nine-member Board with three Vietnam veterans and three individuals who actively opposed the war, including myself, in those first 2 months there was an interesting, rather dramatic dynamics that took place in our Board. We all were in favor of conditional clemency. Each had a somewhat different view as to how it ought to be implemented, and I say say to you that, in terms of the substantive procedural issues, the Board came out unanimous. We have no difference on these substantive procedural policies.

Mr. KASTENMEIER. I am going to ask you just one more question and yield to my colleagues. I have a number of questions I would like to ask, but I want them to have an opportunity to ask you their questions shortly.

In your March 27 press conference, I believe you stated that any further extension of clemency would require congressional action, the President having decided not to extend the program. Is that correct?

Mr. GOODELL. Yes, that is correct.

Mr. KASTENMEIER. I ask you that because I wonder whether you concede that the Congress does have jurisdiction legislatively to act in this field concurrent with that of the President under his constitutional powers?

Mr. GOODELL. No, I do not concede that. I think with reference to the constitutional authority of the Congress, I would defer to the Justice Department in their testimony, which I think, they will direct themselves to that point.

What I had reference to in that statement, Mr. Chairman, was that the President was limited in setting up the administrative structure to 1 year's period without authorization and appropriation by Congress. That authority, clearly, Congress has. The President could not continue to support the Clemency Board out of unanticipated funds beyond 1 year. I think that is a very proper restriction that Congress has placed upon the use of unanticipated-needs funds, and, in order for us, as you pointed out earlier, to process the 18,000 cases we are going to have to extend ourselves tremendously to complete the job by September. Had he extended another month, I believe it would have made that processing task impossible, and he would have presented Congress then with an incomplete program.

Mr. KASTENMEIER. Just a clarification of that. You then feel that Congress may be involved through the appropriations process and could authorize extension of a program, that program being essentially what the President has already initiated under his constitutional clemency powers. Is that correct?

Mr. GOODELL. Yes; I believe Congress would have the authority to authorize and appropriate money for the extension of the President's clemency program. The President then, of course, is not directed how he exercises his discretionary authority and constitutional authority to pardon.

Mr. KASTENMEIER. I yield to the gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

Mr. Goodell, on page 13 of your statement you characterize the jurisdiction of the Clemency Board and differentiate between that jurisdiction and the jurisdiction of the military and U.S. attorneys in handling different kinds of cases. First, do the figures presented to us, of 18,600, encompass only those that fall within the jurisdiction of the Clemency Board, or is that every case in all three categories of jurisdiction?

Mr. GOODELL. The 18,867 is only the Clemency Board cases. I believe we can get it for you exactly. The Justice Department program concluded at about 550, or about 600, and the Defense Department program concluded at 5,500.

Mr. KASTENMEIER. If the gentleman will yield. Out of the number of actual applicants the Justice Department has received, 550 out of 4,000 eligible; Department of Defense, 5,300 out of 12,500 eligible.

Mr. GOODELL. That is roughly correct. I think they will have the precise figures. That is about what my recollection was, and the staff may have some updating on it. I am not sure.

Mr. WIGGINS. Then, roughly, 23,000 or 24,000 people have, in one form or another, availed themselves of some clemency mechanism. Your agency has published rules and regulations which govern the processing of applicants, and I take it that there is a certain unity, a certain consistency in the treatment of offenders since they are all treated by the same agency.

Are you aware of whether or not the Justice Department or the Department of Defense has promulgated regulations of their own, so that their cases are treated with some sense of consistency?

Mr. GOODELL. They have internal standards and regulations which have evolved over a period of time. I know that the so-called Clemency Board, the Military Board, that met on the military cases had specific factors that they considered mitigating and aggravating; the Justice Department also. I do not believe they have been promulgated formally the way ours have. No; they have not.

Mr. WIGGINS. Do you know whether or not your agency treats those individuals within your jurisdiction in a significantly different way than the military or the Department of Justice treats individuals within ther jurisdictions?

Mr. GOODELL. They are treated differently, and they are in a different category, since our applicants have already been punished for their offenses. So, we do take a different approach, and as a general rule, since they have already been punished, our applicants end up with a great deal less requirement of alternative service.

Mr. WIGGINS. What is the nature of some of the alternative service which you order?

Mr. GOODELL. The alternative service, itself?

Mr. WIGGINS. Yes.

Mr. GOODELL. Well, I would defer an answer to that in detail to the Selective Service System which has been handling that problem and, I think, handling it superbly under difficult circumstances with the job market as it is, but it ranges across the board in public or nonprofit employment in the public interest, public health, public safety. It can be hospital jobs, jobs at libraries, with various types of programs to help in charitable causes, some types of church programs. As long as the job is not in the competitive job market and serves the public interest, it can be approved for alternative service, and the Selective Service System has a very long list of the types of employment that are eligible.

Mr. WIGGINS. In the cases within your jurisdiction, is the recommendation to the President for a pardon or not made at the completion of the alternative service?

Mr. GOODELL. The recommendation for a pardon is made at the time we have concluded our determination as to what period of alternative service should be required. There is a second process. The President signs a warrant which, in effect, is an offer to the individual that if he completes that alternative service that he will give him a pardon. Upon our certification, based upon the report from Selective Service, we then automatically certify to the Attorney General completion of the alternative service as proscribed by the President, and it is an automatic pardon at that point.

Mr. WIGGINS. Then the penalty for failure to complete alternative service is simply that the pardon will not be issued?

Mr. GOODELL. That is correct. I might say that that point is an important one; that for individuals who apply to the Clemency Board, most of them having already been punished, are out with jobs in the community. If, for instance, the Clemency Board says you can get a pardon if you do 12 months of alternative service and the individual does not want to do the alternative service, there is no prosecution, there is no pursuit by the Clemency Board. He stays right where he is; he just does not get that pardon.

Mr. WIGGINS. Are you prepared to comment on how successful the program of alternative service has been in terms of the adherence by the applicants to the terms and conditions of the offered pardon?

Mr. GOODELL. Well, it is too early for me to comment with reference to the Clemency Board applicants, because they are just beginning to start their alternative service in the Selective Service System. As far as the other programs are concerned, I have really not been a student of that, and I would prefer to have the Selective Service System give you the breakdown and discuss it directly.

Mr. WIGGINS. Then your answer is that with respect to your own program, you do not have sufficient experience at the moment to make a judgment?

Mr. GOODELL. I believe that of the 65 first applicants, the latest report I had were 19 of ours have been referred for alternative service at this point, and I do not know—it is 9 of 10 of those have started alternative service, so it is very early for us to judge in our program.

Mr. WIGGINS. Mr. Goodell, what, if anything, do you think Congress should do at the present time?

Mr. GOODELL. Well, let me say that as far as the administration is concerned, we have no recommendation. The President has implemented his clemency program. He feels that it was a fair program which has had good results toward his objectives, and he has now indicated he is not going to extend it further. That is for the reasons I indicated, he cannot carry it further without authorization appropriation.

I must say to you, personally, that my view is a matter of public record. The Clemency Board originally wanted the program extended for a 6-month period for our phase of the program, and I, personally, feel that there are individuals out there who did not find out about the program, the Clemency Broad program, and who would be eligible.

I was informed this morning by my staff that we have, since the first of April, received roughly 200 applications from individuals who are, on the face of it, eligible, but who have applied too late so they are not eligible.

Mr. WIGGINS. Thank you, Mr. Goodell.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. Mr. Goodell, on page 8 of your testimony, in your arguments relating to whether there should be unconditional amnesty, you state that "The country imposes the duty of service upon each citizen and that service remains unfulfilled by those who refused military duty."

I am curious about that statement. Is that just a general statement? Sort of a duty of service upon everybody? It is certainly not military

service. Women are excluded from that. People who are disabled are excluded from that. My son was 18 in May of 1970. He was eligible for the draft and had applied for a conscientious objector status for which he had been turned down, but it did not make any difference since he was going to go to college anyway. He was deferred because of his college attendance, he was not required to perform any service to the country.

If what you said was true, I think I would understand it better. But I just do not understand why you say that "The country imposes the duty of service upon each citizen."

Mr. GOODELL. The statement has reference to the fact that the Supreme Court has held general military conscription in time of war or in time of peace to be constitutional.

The Congress and the President have, over the years, passed a law setting up the requirements for service, whatever that might be—2 years, 1 year, 3 years—Congress has that authority to pass the law, and of course, with the President's approval or overriding of his disapproval, and the law in this period was quite explicit that individuals under certain circumstances had an obligation, in simplest terms it is for those who were physically and mentally qualified, who did not comply with requirements then for conscientious objector status, and who did not fulfill any other reason for deferment, had an obligation to fulfill to their country.

If they had a deferment under the law, that was a legal deferment so decided by the constituted authorities to make that determination. For those who had no legal basis for deferment, they had an obligation. And, failure to fulfill that obligation was a violation of law.

Mr. PATTISON. My point is that there were so many exceptions to the obligation of service that they far exceeded the number of people who were subject to it. The exceptions far exceeded the number who served. For instance, the women who are eligible by age and every other standard, the only thing that excluded them was their sex.

So that is 50 percent of the people. And then there is all of the people who went to college who could afford that, regardless of what their motivation was, who went to seminaries, were in the National Guard, a variety of other things? So is it not true that the exceptions far exceeded the number of people who were actually eligible? So that service, by any means, could not be said to be something that was universally imposed?

Mr. GOODELL. There is no question about that. I believe the figure is 89 percent of those males who were in the age group did not serve, were not conscripted.

Mr. PATTISON. Let me ask you about the exiles, the people who have left the country, who have given up their American citizenship and do not intend to apply for clemency and do not intend to come back, in any sense, to work in this country or to make their homes in this country, and who have made a life somewhere else; and, who left without going AWOL or violating any law except possibly the selective service law, depending on whether, in fact, they were eligible.

Many of them were eligible for, or would have been eligible for, I assume, deferments or for exceptions to the general rule. Have you made any recommendations to the President regarding those people, as to whether they could perhaps have a status where they could come

and visit, on visitors' visas, their relatives in this country, just like any other citizen who had left?

For instance if I had left for no particular reason, just to go and live in Canada, I could come back and visit my relatives. These people, as I understand, are precluded from doing that. Or, I guess they are under some sort of fear that they may be arrested, if they come back.

Mr. GOODELL. Well, those individuals, if they are subject to indictment or are already indicted, will be picked up and convicted, presumably, if they come back—if they have not participated in the clemency program.

The answer to your question of have I made a recommendation to the President, is no.

Mr. PATTISON. Do you have any feelings about that particular status of those particular people? What kinds of things, based upon your experience, that we should recommend?

Mr. GOODELL. I think at this stage the President feels that his clemency program has fulfilled his objectives, and he would be in favor of extending it in that manner, those who have determined that they want to come back to this country and have had that opportunity.

Now, there must be some finality to the program, and that opportunity is ended.

Mr. PATTISON. Following up Mr. Wiggins' question, do you feel it would be better if a program was administered in some sort of a centralized way, as opposed to having the three agencies administer the program, so that we can get some sort of uniform treatment, regardless of where you apply?

Mr. GOODELL. No, I do not, particularly at this stage. I think having received roughly 25,000 total applications in the three separate programs, it would create tremendous confusion and chaos if we suddenly now changed the jurisdiction and put them all under one board.

I think, in retrospect, we could all make suggestions as to how the program might have been administered differently, but I think on the whole the program has been administered fairly, and each of these agencies has had a jurisdiction peculiar to itself.

The Defense Department dealt with deserters and fugitives. The Justice Department dealt with the fugitives from criminal justice. And we, dealing with the new phase of those who had already been punished, in either category.

Mr. PATTISON. Can a person who has already left the country determine whether or not he is subject to indictment? Is it possible for him to communicate in some way, keeping in mind that there are many cases, particularly after the Supreme Court changed the rule of conscientious objector, based upon sincerity of belief rather than religious background, is there any way that a person can determine that without coming here and subjecting himself to indictment?

Mr. GOODELL. Yes. You may wish to pursue the matter with the Department of Justice, but they did prepare a list of those who were indicted, or they considered indictable, and that list was made available to a variety of groups.

And anybody could write to the Justice Department, or, if they wished, write to any one of a variety of other groups—Senator Kennedy had the list—and find out if his name was on the list.

Mr. PATTISON. And, if you were not on the list, you could feel confident in coming back?

Mr. GOODELL. Presumably, yes. That is a question that you must direct to the Justice Department. I believe that the answer is yes, if they were not on the list. I know when the list first came out there was some question because they had to get that list from all their U.S. attorneys all over the country, and they were double checking to be sure they had all of those who were considered by the U.S. attorneys indictable.

And I have not inquired into that situation recently, so I think the only place you can get any reliable answer is from the Justice Department.

Mr. PATTISON. I have just one other question, and that is in the area of alternative service. Do the people who are engaged in alternative service, do they receive compensation?

Let me ask a series of questions. Do they receive compensation? Is it up to them to get the job? Suppose they lose their job halfway through, for no particular reason, just being laid off by some agency or perhaps their service is unsatisfactory—they have a personality conflict or something like that—what happens then? How does that get followed up?

Mr. GOODELL. I would prefer that you ask Mr. Pepitone, who is following me, those questions because they are matters of detail with which the Clemency Board has not dealt, and he is here and is going to testify very shortly.

Mr. PATTISON. Fine. Thank you very much.

Mr. KASTENMEIER. To continue, first of all I think we should recognize the fact that notwithstanding that there are more than 18,000 applications, only 45 persons are in alternative service programs now, by virtue of the disposition of their case before the Board? Is that not correct?

Mr. GOODELL. I think it is fewer than that, Mr. Chairman. I think it is only 9 or 10 of ours that are actually in alternative service.

Mr. KASTENMEIER. Furthermore, we are advised that if 65 cases are disposed of, it would suggest that of the 870 that have applied in September, October, and November and December, that only 65 of those cases are disposed of.

In the intervening 3 or 4 months, all of these other people—a great majority of them—90 percent, plus, are still waiting for a determination. They still do not know what disposition will be made of their case.

Is that not correct?

Mr. GOODELL. Yes; it is correct. The Clemency Board itself has disposed of between 400 and 500 cases, at this point. They are in the pipeline to be sent to the President for his signature.

But, the answer to your question is that that is correct. I made the determination in early January that the highest priority was to get the information to potential applicants, rather than to dispose of cases we had before us at that point.

Mr. KASTENMEIER. On page 2, you indicated—and I quote you—"The overwhelming majority of the draft and military violations we see were not explicitly related to opposition to the Vietnam war."

I would conclude, therefore, that those who opposed the war, you are not reaching for one reason or another. Is that correct?

Mr. GOODELL. Well, who we are not reaching is a matter of speculation. I just do not know whether that group would break down into a different kind of proportion than those who have applied. But on the basis of those who have applied, roughly half are involved in some way with some feeling against "war," or this war.

Now, that half would by no means qualify under what we see at least, for a CO status, if they applied for it. We find that many of those who are in the lower educational and economic scale find it more difficult to qualify for a CO status. They do not articulate their views in the same way, and they may just simply say I do not want to go over there and kill. And, that would not qualify them for CO status.

Mr. KASTENMEIER. The reason I ask you this is because you are Chairman of the Board. Notwithstanding the fact that your Board has received over 18,000 applications, the vast majority of those eligible for the relief of the program are unreached.

The question is, why? How do you comprehend why you are not able to reach the majority of those eligible—apart from public relations and communications? What do you perceive as the basis of resistance to the President's program?

Mr. GOODELL. Well, let me say that it is a matter of some concern to me, and I do not have any simple answer to it. I am convinced that of the 110,000 potential applicants to the Clemency Board, there are a large number of them who still do not know they are eligible, who just never found out about it.

This is reaffirmed, in my view, by the fact that quite a few of ours are not that well educated and are not that much involved in the system. It is much more difficult to communicate with them. I do not believe that that is true for, for instance, the Department of Justice's program for the draft evaders. Since most of the attention of the press and the public was on that group, I think most of them understood there was a program, and they made a conscious choice. They did not find the term of the program acceptable.

You referred earlier to a group that went to Canada, and I think Mr. Pattison did, too. I think a large number of them have settled in Canada. They have married, have jobs, and do not want to come back except to visit.

They would like to come back on holidays, special occasions, vacation, but they do not want to stay here—at least at this point. They find, apparently, 2 years of alternative service not acceptable in order to have that privilege, which is the choice they have made.

I might say that in terms of the application to the Clemency Board, it might be interesting to the committee—and I do no present this in any way as a rationale or an excuse—but it is very difficult to communicate with large numbers of people who are eligible for the program.

I would cite the example of the supplementary security income program, under the Social Security System, that was a Federal replacement for a supplement to State-financed welfare programs for indigent elderly persons.

All they had to do was apply. The Social Security Administration has been striving for 1½ years to inform these people. All they have to do is apply to get these supplemental benefits.

Mr. KASTENMEIER. May I interrupt, to ask you a different question along the same lines?

Mr. GOODELL. If I might only conclude, they have gotten just a small percentage, by writing directly, an all-out campaign to communicate. It is a difficult thing to do even when you are asking nothing of them but to receive money.

Mr. KASTENMEIER. I was going to ask you how the President justifies, rather than you personally, the termination of the program, based on just what you have said?

You have given the public and this committee statistics showing that there has been, as a result of your renewed attempt to communicate with potential applicants, a rise in the rate on the graph line, almost straight up. So that during January, February, and March, there were increasing numbers of people who were applying, even right up to the shutoff date of March 31.

That being the case, and with the eloquent suggestion you have just made that there are many who are ignorant of the program even to this day, and have not been reached, how can the President justify terminating the program arbitrarily on March 31 rather than continuing it for an additional period of time? Would not a further extension be consistent with attempting to reach the many thousands who were not reached?

Mr. GOODELL. Well, may I preface my statement to say that my comments are limited to the Clemency Board program? The other two programs, the graph did not go the way it did in the clemency program. In the last months it trailed off, the number of applications, significantly. They can give you the information on that. Ours did go up almost vertically in the last few weeks.

As far as the President's action is concerned, he has extended the program as far as he can, under his sole power and authority. If he extended it just 1 additional month, we would be unable to process the cases with any due process before the Clemency Board by September.

So, any further extension will have to be a joint decision by the Congress and the President. He went as far as he could go on his sole authority.

Mr. KASTENMEIER. Only if one were to consider the logistics of processing claims—this has nothing to do with whether or not people on other grounds ought to be reached or not reached?

Mr. GOODELL. That is right. It is an administrative decision.

Mr. KASTENMEIER. Well, may I say I am not impressed by that particular response on the part of the President. But nonetheless, I do give him credit for initiating this limited program in the area.

How do you personally react to a bill introduced in the Senate by Senator Javits of New York and Senator Nelson of Wisconsin, which at least treats a number of items that the gentleman from New York, Mr. Pattison, mentioned? It is S. 1290. It statutorily recognizes the Presidential Clemency Board. It transfers all responsibility now exercised by the Department of Justice and Defense and the President's amnesty program, to that Board.

It grants temporary immunity to exiles who wish to return to the United States to apply for clemency. And after the determination, the exile is free to leave the country within 30 days if he does not wish to accept the Board's finding.

The exiles not participating in the amnesty program are authorized a 30-day visa to enter the United States each year under this proposal. All records involving the applicants are sealed, and the proposal extends the Board's authority until December 31, 1976.

Is that not a reasonable formulation for an extension of the program designed to reach more people? It does not really go into your guidelines or your rules or regulations, particularly.

Mr. GOODELL. Well, I think I would defer any comment on the authority of Congress to the testimony from the Department of Justice.

As far as the specific provisions of that bill is concerned, the administration opposes any alteration of the clemency program beyond what the President has already implemented. So, to the degree that bill would specifically change the standards, or change the provisions of the clemency program, the administration would oppose it.

I have indicated to you earlier, not the administration's view but my personal view, which is a matter of public record, that I favor extension of the program as it now exists. That is a matter that is now under the complete jurisdiction of the Congress.

Mr. KASTENMEIER. I want to ask you about other bills such as Senator Hart's National Reconciliation Act of 1973, and other bills by Members of the House. I assume that those are beyond reconciling with your or the administration's views.

But the Nelson-Javits bill, I must say, does seem plausible, in terms of the importance you have placed on reaching additional applicants.

The gentleman from California? The gentleman from New York? Any additional questions? The gentleman from Massachusetts?

Mr. DRINAN. Thank you very much, Mr. Chairman. Mr. Goodell, I apologize for being late. The airlines will be seeking clemency or amnesty for their faults. I followed with the keenest interest the administration that you have finished, or terminated. And, as you may understand from letters that I have sent, I have serious questions about it.

But one specific question I would like to ask is this. That in many of the cases that you have administered in the Amnesty Review Board, you have given short 3-month to 6-month alternative service terms. These people have difficulty in obtaining jobs because of their record and because of the shortness of the term.

What is your conclusion? Is that worth while to give alternative service, especially in an era when we have mass unemployment?

Mr. GOODELL. Yes; I think it is reasonable, and I think, in terms of how it will work out, the alternative service for those who are under the Clemency Board's jurisdiction, it is too early for us to tell.

I indicated earlier that I believe only 9 of our individuals have reached the stage of reporting and are now working under alternative service, under the Selective Service, and I believe 19 have actually sent their names—I can tell you in broad terms and leave it to the Selective Service to go into the details—but basically, as I understand it, the individual strives to find his own job.

He is free to find his own job, as long as it qualifies for the first 30 days. Selective Service undertakes to find jobs in the broad areas in which they have some interest. It is a difficult job atmosphere right now. Selective Service is very careful not to put people in jobs that are in the competitive job market. And that makes it even more difficult.

And thus far, I think, they have done a very fine job doing that. But it is under very difficult circumstances.

They can give you greater detail about the nature of the jobs and how it is handled, if somebody cannot get a job for 3 or 4 months, when he only has 3 months' alternative service requirement.

Mr. DRINAN. Going to another question which, pardon me if it has been covered in part—will the administration be opposed to any action by the Congress by which we would seek to give amnesty?

Mr. GOODELL. Would the administration be opposed to any action by the Congress to grant amnesty?

Mr. DRINAN. Yes.

Mr. GOODELL. I believe the answer to that is yes.

Mr. DRINAN. Under all circumstances and on what basis?

Mr. GOODELL. I believe, first of all, that the Justice Department will indicate that it is their view that there are constitutional barriers, that this is the authority granted to the President under the Constitution and not to the Congress. That is a matter that I will leave for them to deal with. I think the precedents are somewhat mixed on the subject.

Mr. DRINAN. The Department of Justice is going to rely on a very mixed precedent to say to the Congress that you have no jurisdiction. Conceding that it is mixed, they will say that we are adamant and under no circumstances will they ever allow Congress or the President to sign a bill for amnesty because of mixed precedents.

Is that what you are telling us?

Mr. GOODELL. I would not seek to speak for the Department of Justice. Our inquiries to them with reference to this question, you know, and our own preliminary research on the question brings a mixed precedent. The administration, and I think previous administrations, have consistently said they feel that the Congress does not have authority to implement the pardons, the President's pardon authority under the Constitution.

As to other things that Congress can do, as I indicated earlier, the President cannot even carry on this program with a clemency board more than 1 year without congressional authorization and appropriation of the funds to implement the program, just as Congress could presumably deny the appropriation for the office of the pardon attorney and the Justice Department, which is a way that the President institutes his pardon authority absent a clemency program.

With that exception, I believe it is the administration's position that the Congress has no authority in this area.

Mr. DRINAN. A related question, and pardon me if you have mentioned this before, but 15 Presidents in all of American history have given amnesty in one form or another, usually unconditional, usually general, usually covering all the cases.

Would you predict that President Ford will ever come to the position that he, after this war like all of his predecessors, will give amnesty?

Mr. GOODELL. To answer the question, no, I do not think he will come to that.

Mr. DRINAN. All right, that is the answer. Thank you very much.

Mr. GOODELL. As a matter of record, Mr. Chairman, I would dispute the historical aspect of the preliminary to that question. I believe this is the most generous amnesty program ever implemented by any President, including the Civil War and Abraham Lincoln. There is much confusion about what Abraham Lincoln did. Abraham Lincoln gave amnesty to the Confederate soldiers. It was a blanket amnesty. He was mighty tough on the deserters and the draft evaders from the Union armies. And there was no general amnesty given by President Lincoln to those individuals.

Mr. KASTENMEIER. I have just one quick question. That is, in the recent Senate hearings you mentioned a plan to have the Defense Department review all clemency discharges.

To your knowledge, have they followed up on that? I think you recommended that they do review clemency discharges.

Mr. GOODELL. I believe you are probably referring to the matter that is still in dispute between the Clemency Board and the Defense Department. We are having discussions about it. There has been some misleading publicity with reference to it. One pamphlet I saw 3 or 4 weeks ago. There was a headline—"Goodell's goodies"—which indicated that I was preparing to try to get the Clemency Board to convince the President to give veterans benefits to all of the people applying before the Clemency Board.

I would say to you that the three veterans, Vietnam veterans, on the Clemency Board has moved in some cases that we urge the President and the Defense Department to upgrade the discharges to, under honorable conditions, to qualify the individuals for veterans benefits.

Those cases were individuals who, in simplest terms, went to Vietnam, volunteered for extra hazardous duty, fought with valor, and cracked up and received bad discharges.

It was the view of General Walt, who was the commanding general of the Marines there, Jim May, who suffered serious disabilities from wounds in Vietnam, and Jim Dougovito, who was an Army captain decorated in Vietnam many times, that these individuals should have veterans benefits. That matter is still at issue.

But I can say to you that the overwhelming number of applicants to the Board do not fall into that category and do not qualify for veterans benefits.

Mr. KASTENMEIER. I am glad to give you the opportunity to clarify that for the committee.

Mr. GOODELL. I appreciate it, Mr. Chairman.

Mr. KASTENMEIER. On behalf of the committee I would like to thank you for an able presentation before us today, and we appreciate your appearance.

Mr. GOODELL. Thank you very much, Mr. Chairman, and members of the committee.

Mr. KASTENMEIER. Following Mr. Goodell, the Chair would like to call Mr. Byron V. Pepitone, who is the Director of the Selective Service.

Mr. Pepitone, you are most welcome. We are pleased to have you here.

Your statement, as the Chair has it, is a brief statement and you may proceed from it, sir, however you wish.

TESTIMONY OF BYRON V. PEPITONE, DIRECTOR OF THE SELECTIVE SERVICE

Mr. PEPITONE. Thank you, Mr. Chairman, members of the committee. I am pleased to be here and to speak on our portion of the President's program.

I wish to highlight my statement, if I may.

Mr. KASTENMEIER. In which case your statement in its entirety will be received and without objection made a part of the record.

[The prepared statement of Mr. Pepitone follows:]

STATEMENT OF BYRON V. PEPITONE, DIRECTOR OF SELECTIVE SERVICE

Mr. Chairman, members of the Committee, in response to Chairman Rodino's letter of March 19, 1975, I have come to inform the Committee of the manner in which the Selective Service System is performing the functions which have been delegated to it as an outgrowth of the Proclamation made by President Ford on September 16 which announced a program for the return of Vietnam era draft evaders and military deserters. As you know, the opportunity for individuals to apply for this program terminated on March 31, 1975.

The President's program for the return of Vietnam era draft evaders and deserters involves several agencies of the Federal Government each with different actions to be taken in implementation of the program. The actions themselves differed depending upon the type of person involved—evader, deserter, or convicted evader or deserter.

The Department of Defense acted initially with the individuals who were classified as deserters with exception of a few from the Coast Guard which is under the Department of Transportation; the Department of Justice with those who were classified as evaders; and the Clemency Board with those who have been convicted of a draft evasion offense or those who received a punitive or undesirable discharge from the armed forces because of a military absentee offense, or who were serving sentences of confinement for such violations. The Selective Service System, by contrast, and as a result of the provisions of Executive Order 11804, bears a responsibility for action in behalf of individuals within all three groups who were eligible for the program. Although the period to apply has expired the Selective Service System has the continuing responsibility to enroll those individuals who have been processed and to assign them to alternate service.

Executive Order 11804, which is entitled "Delegation of Certain Functions Vested in the President to the Director of Selective Service," is a short one. It reads as follows:

"By virtue of the authority vested in me as President of the United States, pursuant to my powers under Article II, Sections 1, 2 and 3 of the Constitution, and under Section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

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

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

Signed by Gerald R. Ford, The White House, September 16, 1974.

The alternate service referred to in the Executive Order is that decreed by the President in Proclamation 4313 dated September 16, 1974, wherein he pointed out: ". . . that in furtherance of the national commitments to justice and mercy, these young Americans should have the chance to contribute a share to the rebuilding of peace among ourselves and with all nations. . . . and that they should be allowed the opportunity to earn return to their country, their communities and their families, upon their agreement to a period of alternative service in the national interest together with an acknowledgment of their allegiance to their country and its Constitution."

The alternate service program prescribed in the Proclamation is for work which prescribes that people who are conscientiously opposed to participation in military service will, in lieu of such induction, perform civilian work contributing to the maintenance of the national health, safety or interest as the Director of Selective Service deems appropriate. The modifications to the Selective Service law in September 1971, require that the Director of Selective Service shall be responsible for finding civilian work for persons who are exempted from training and service under the Military Selective Service Act under Section 6(j) and for the placement of such persons in appropriate civilian work contributing to the maintenance of the national health, safety or interest.

The President chose the Selective Service System to establish, implement and administer the alternate service work program because of the experience the System gained in the discharge of its responsibilities under Section 6(j) of the Military Selective Service Act.

Actions to discharge the responsibilities delegated to the Director under Executive Order 11804 commenced immediately following the publication of the Executive Order on September 16, 1974 and have resulted in the publication of regulations for the establishment, implementation and administration of a suitable Alternate Service Program.

On September 26, 1974, under Title 2, Chapter II—Selective Service System, Part 200 of the Code of Federal Regulations entitled "Reconciliation Service" appeared in the Federal Register, Volume 39 Number 188. These basic regulations set forth the manner in which the Selective Service System establishes, implements and administers the Reconciliation Work Program. The regulations became effective on September 26, 1974, in order to immediately accommodate those individuals described in Proclamation 4313 who chose to avail themselves at an early date of the benefits of the President's program.

The regulations are complete in that they provide the definitions of the service to be performed; they identify the referring authority for each type of case; they prescribe the geographical area in which the returnee can expect to work and where he will commence his enrollment procedures for work with Selective Service; they delineate the levels of responsibility for the program establishing the functions of the National Headquarters of Selective Service and specifying the delegations of authority to the State Directors of Selective Service; and the type of employer who will be considered eligible to employ returnees who will be performing this alternate service. The regulations further identify the criteria for jobs for returnees and the responsibilities of the returnee and those of the State Directors for locating jobs, initial placement and reassignment from one job to another if necessary. I know that the Committee has an interest in some of the specific provisions of the regulations, and I will describe them in greater detail as follows:

Eligible employers, which may be a subject of interest to the Committee, are important with respect to the fashion in which the program is being administered. Our regulations state that returnees may be employed by the following employers: the United States Government; a state, territory or possession of the United States or a political subdivision thereof, or the District of Columbia; or an organization, association or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association or corporation, or for increasing the membership thereof, or for profit.

Of equal importance and interest are the criteria which have been established for the selection of jobs. Four elements are considered by the State Director as a basis for determining whether a specific job offered by an eligible employer is acceptable as service for a returnee:

1. National health, safety or interest—the job must promote the national health, safety or interest.

2. Noninterference with the competitive labor market—the returnee cannot be assigned to a job for which there are more numerous qualified applicants who are not returnees than there are spaces available.

3. Compensation—the compensation will provide a standard of living to the returnee reasonably comparable to the standard of living the same person would have enjoyed had he gone into military service. This criterion may be waived by the State Director when such action is determined to be in the national inter-

est and would speed the placement of the returnee in service. As a practical matter, the pay is the pay of other employees on the same job with similar skills.

4. Skill and talent utilization—where possible, a returnee will be permitted to utilize his special skills; in fact, we seek to assure this utilization where we can.

The administrative procedures and details of how the System operates the Reconciliation Service Program are prescribed in great detail, and amplify the regulations which I have described to you, in a manual entitled "Reconciliation Service Manual." I have a copy of it here; I will be pleased to provide one for the Committee, either for inclusion in the record or for study by the members at a later time if they choose.

I know that you will be interested in the specifics of how the program is working, and I think a brief recitation of some of the actual procedures we use and the experience we have gained, between September 19 when our first enrollee arrived, until today, would be in order.

There are in excess of 650 offices of the Selective Service System throughout the United States where individuals may enroll in the Reconciliation Service Program. These offices are supervised by 56 State Directors, located in each of the 50 states plus New York City, the District of Columbia, Puerto Rico, Guam, the Panama Canal Zone, and the Virgin Islands.

A deserter who was processed by the military service at the Joint Clemency Processing Center in Indianapolis was furnished a fact sheet which was given to him during his processing session and was instructed that he should report, within 15 days after discharge, to the Selective Service office nearest the place in which he intends to reside. Upon reporting to the nearest Selective Service office, he commences what we call an enrollment procedure. During this enrollment procedure, we endeavor to procure sufficient information from him to permit assignment to work in accordance with the regulations I have described. We also explain to him his obligations to perform the service assigned by the military department and how we intend to report his completion thereof to the military department concerned. We explain to him his opportunity to procure his own work and assist him in the location of suitable employment by furnishing leads to eligible employers where job opportunities may be available. Finally, we counsel him with respect to our responsibility to find employment for him if he is unable to do so, and at what time his opportunity and our responsibility merge.

An evader who has been processed by one of the 96 United States Attorneys, after having signed his agreement to work, is advised by the U.S. Attorney to report in the same way and carry out the same enrollment procedures as I have just described for the deserter.

A convicted evader or a person already discharged who might have applied to the Clemency Board for action, if he has been given a period of alternate service as a condition to a pardon, receives the same general instructions with respect to reporting to the Selective Service System as the other two types of returnees except the Clemency Board allows 30 days to report for enrollment. He then is subject to the same type of enrollment procedure.

After enrollment with the program, the returnee has the opportunity and is encouraged to find appropriate employment for himself as close to the place he chooses to live as he can. The employment he secures must match the job criteria that I have previously cited to you. In most cases he commences to seek employment using a series of leads provided to him from the office of the State Director of Selective Service.

If the enrollee does not find employment for himself, or chooses not to propose a job, it is the responsibility of the System and the State Director of the state concerned to assign the individual to an available job. For those enrollees who are sincerely interested in performing their alternate service obligation it is often the case that the State Director and the enrollee have been working together almost continually to effect his assignment to a suitable alternate service job.

I know that the Committee will be interested in our experience with the program since its inception in September, and what the impact has been upon the job availability as a consequence of the worsening situation with respect to employment in the United States. As I mentioned earlier, the first individual who sought enrollment for alternate service with a Selective Service office did so on September 19. Since that date, which was only three days after the President announced his program, until April 7, 1975, 5,454 deserters have been

processed by the Department of Defense. Of this number, 4,218 have reported to the Selective Service System and enrolled in the alternate service program. During the same period of time, 596 evaders who have been referred to the Selective Service System by a United States Attorney have been enrolled in the alternate service program. Also, during this same period of time, and as a result of the deliberations of the Clemency Board 18 individuals from a group of 45 to whom the President indicated an intention to grant a pardon, conditioned upon completion of alternate service, have reported to the Selective Service System for enrollment and work.

Of the numbers who have enrolled with the System, as of April 7, 1975, over 1,600 placements have been made where the individuals reported and commenced work. In addition, 1,516 enrollees are in the process of finalizing employment as a result of a specific job referral by a State Director of Selective Service.

There is one other aspect of the program, which is an estimate based upon an evaluation of facts and circumstances to date, compiled as a result of reviewing individual cases, and it is this: of those who do enroll, it appears some will not complete their alternate service for many reasons—such as personal inability to perform, no desire to perform, incapacity to perform and others. It is too early for us to know precisely what this number will be; however, we have established a rather comprehensive procedure whereby we intend to document the records of those who enroll and successfully perform as well as those who fail to perform, either for reasons beyond their control or for reasons over which they have full control. Of those who have enrolled, 971 have indicated they do not want to participate or have demonstrated they do not want to cooperate and have been terminated from the program. Although it is too early in the program to expect many completions there are five enrollees who have completed their required alternate service and for whom the Director of Selective Service has sent Certificates of Completion to the referring authority.

A word about job availability, in light of the general employment situation in the United States since the program was announced on September 16. We are experiencing the impact of the employment situation in that the jobs which we thought might be available for people in the reconciliation service program are now more attractive to other individuals who, when we established this program in September, would not have considered them as suitable. By this I mean that the low-paying jobs which many individuals in the reconciliation program are willing to take, in order to discharge their responsibilities, are becoming more attractive to other people who had higher paying jobs at the time we established the program. The program is now more difficult for us insofar as locating suitable jobs than it was in September. My personal view of the program is that although it is a more difficult task for us now, we merely have to work harder to find jobs which we thought would be available when we made our calculations in September. There have been many individual contacts by the members of my staff and by myself with national agencies which have indicated a willingness to cooperate. The assistance and cooperation we have received from many Federal agencies has been outstanding.

The President stressed, when he recited the aims of his program last fall, that he wished for this to be a crisp program with constant follow-up, good supervision, and the active participation of all Federal agencies toward its successful accomplishment and for the attainment of the aims which he set out for the program. We intend to continue our efforts to place these people, to monitor their performance, during employment, and to insure their treatment in a dignified and reasonable fashion. We believe that we can in most instances place the people for work within reasonable distances from the place at which they desire to live and within reasonable enough circumstances. If the enrollee considers alternate service in the context of work whereby he is earning his return to American society and is determined to do so, we believe we can work with him and enable him to attain the benefits which the President provides under Proclamation 4313.

In closing, I would like to say that I have endeavored to describe for you the things we do and the experience we have gained to date in our discharge of the responsibilities which President Ford delegated under Executive Order 11804 on September 16, 1974. There could well be widely different definitions of final success or failure in this venture. I think that considering the employment picture the program is, up to now, working well, and it appears that it should continue to work well. For my part, and speaking for the Selective Service System, I believe that we can provide the jobs required for the enrollees who sin-

cerely desire to complete their obligation. We are grateful for the cooperation we are receiving from the employers who make jobs available to us. I see no reason why the original numbers of people who were considered as potential participants cannot be accommodated in the program within a reasonable length of time.

Mr. KASTENMEIER. You may proceed, sir.

Mr. PEPITONE. Thank you.

I have come to the committee this morning in response to Chairman Rodino's letter to me of March 19 to inform the committee of the manner in which the Selective Service System is performing the functions which have been delegated to it as an outgrowth of the proclamation made by President Ford on September 16 last, which announced a program for the return of Vietnam era draft evaders and military deserters.

As you know, the opportunity for individuals to apply for the program terminated on March 31. The President's program for the return of Vietnam era draft evaders and deserters involves several agencies of the Federal Government, each with different actions to be taken in implementation of a specific part of the program. The actions themselves depended upon the type of person involved, evader, deserter, or convicted evader or deserter.

The Department of Defense acted with the individuals who were classified as deserters; the Department of Justice with those classified as evaders; and the Clemency Board with those convicted of a draft evasion offense or those who received a punitive or undesirable discharge from the armed forces because of military absentee offenses or who were serving sentences of confinement for such violations.

The Selective Service System, by contrast and as a result of the provisions of Executive Order 11804, bears a responsibility for action in behalf of individuals within all three groups who were eligible for the program. Executive Order 11804, entitled "Delegation of Certain Functions Vested in the President to the Director of Selective Service," is a short one. I wish to read it, if I may. It is as follows:

> By virtue of the authority vested in me as President of the United States, pursuant to my powers under article II, section 1, 2, and 3 of the Constitution, and under section 301 of title 3 of the United States Code, it is hereby ordered as follows:
>
> Section 1. The Director of Selective Service is designated and empowered, without the approval, ratification or other action of the President, under such regulations as he may prescribe, to establish, implement and administer the program of alternative service authorized in the proclamation announcing a program for the return of Vietnam era draft evaders and military deserters.
>
> Section 2. Departments and agencies in the executive branch shall, upon the request of the Director of Selective Service, cooperate and assist in the implementation or administration of the Director's duties under this Order to the extent permitted by law.

That is the end of the order. It was signed by the President at the White House on September 16, 1974.

The alternate service referred to is that decreed by the President in his Proclamation 4313 of the same date, wherein he pointed out that:

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

The alternate service program prescribed is for work which shall promote the national health, safety, or interest. It is alternate service of the type described in section 6(j) of the Military Selective Service Act which prescribes that people who are conscientiously opposed to participation in military service will, in lieu of such induction, perform civilian work contributing to the maintenance of the national health, safety, or interest as the Director of Selective Service deems appropriate.

The President chose the Selective Service System to establish, implement, and administer the alternate service work program because of the experience which this system had gained in the discharge of its responsibilities under section 6(j) of the Military Selective Service Act.

Actions to discharge the responsibilities delegated under Executive Order 11804 commenced immediately following the publication of the Executive order on September 16. They have resulted in the publications of regulations for the establishment, implementation, and administration of a suitable alternate service program.

On September 26, regulations entitled "Reconciliation Service" appeared in the Federal Register. These basic regulations set forth the manner in which the Selective Service System establishes, implements, and administers the reconciliation work program. The regulations became effective on September 26, 1974.

The regulations are complete in that they provide the definitions of the service to be performed; they identify the referring authority for each type of case; they prescribe the geographical area in which the returnee can expect to work and where he will commence his enrollment procedures for work with the Selective Service; they delineate the levels of responsibility for the program establishing the functions of the national headquarters of Selective Service and specifying the delegations of authority to the State Directors of Selective Service; and the type of employer who will be considered eligible to employ returnees who will be performing this alternative service. The regulations further identify the criteria for jobs for returnees and the responsibilities of the returnee and those of the State Directors for locating jobs, initial placement, and reassignment from one job to another if necessary. I know that the committee has an interest in some of the specific provisions of the regulations, and I will describe them in greater detail as follows:

Eligible employers, which may be a subject of interest to the committee, are important with respect to the fashion in which the program is being administered. Our regulations state that returnees may be employed by the following employers: The U.S. Government; a State, territory or possession of the United States or a political subdivision thereof, or the District of Columbia; or an organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof, or for profit.

The criteria for the selection of jobs; four elements are considered by the Director of the Selective Service as the basis for determining

whether a specific job offered by an eligible employer is acceptable as service for a returnee:

One, national health, safety, or interest. The job must promote the national health, safety, or interest.

Two, noninterference with the competitive labor market—the returnee cannot be assigned to a job for which there are more numerous qualified applicants who are not returnees than there are jobs available.

Three, compensation. The compensation will provide a standard of living to the returnee reasonably comparable to the standard of living the same person would have enjoyed had he gone into the military service. As a practical matter, the pay is the pay of other employees on the same job with similar skills.

Four, skill and talent utilization. Where possible, a returnee will be permitted to utilize his special skills. In fact, we seek to assure this utilization where we can.

The administrative procedures and details of how the system operates are prescribed in great detail, and amplify the regulations in a manual entitled "Reconciliation Service Manual." I think a brief recitation of some of the actual procedures we use in the experience we have gained between September 19, when our first enrollee arrived, until today might be in order.

There are in excess of 650 offices of the Selective Service System throughout the United States where individuals may enroll in the reconciliation service program. A deserter who was processed by the military services at the Joint Clemency Processing Center in Indianapolis was furnished a fact sheet which was given to him during his processing session and he was instructed that he should report within 15 days after discharge to the Selective Service office nearest the place in which he intends to reside. Upon reporting he commences what we call an enrollment procedure. During this procedure we endeavor to procure sufficient information from him to permit assignment to work in accordance with the regulations I have just described. We explain to him his obligations to perform the service assigned by the military department and how we intend to report his completion thereof to the military department concerned. We explain his opportunity to procure his own work and assist him in the location of suitable employment by furnishing leads to eligible employers where job opportunities may be available.

Finally, we counsel him with respect to our responsibility to find employment for him if he is unable to do so, and at what time his opportunity and our responsibility merge.

An evader processed by 1 of the 96 U.S. attorneys, after having signed his agreement, is advised by the U.S. attorney to report in the same way and to carry out the same enrollment procedures as I have just described for the deserter.

A convicted evader or a person already discharged who might have applied to the Clemency Board for action, if given a period of alternative service, as a condition to a pardon, receives the same general instructions with respect to reporting to the Selective Service System as the other two types of returnees. The one exception—the Clemency Board permits the individual 30 days to report for enrollment.

After enrollment with the program the returnee has the opportunity and is encouraged to find appropriate employment for himself as close to the place he chooses to live as he can. The employment must match the job criteria that I have cited to you. In most cases he commences using a series of leads provided to him from the office of the State director of Selective Service concerned.

If the enrollee does not find employment for himself or chooses not to propose a job, it is the responsibility of the Selective Service System and the State director of the State concerned to assign the individual to an available job. For those enrollees who are sincerely interested in performing their obligation, it is often the case that the State director and the enrollee have been working together continually to effect the assignment to a suitable job from the day he starts.

I know that the committee will be interested in our experience with the program since its inception in September, and what the impact has been upon the job availability as a consequence of the worsening with respect to employment in the United States. The first individual who sought enrollment for alternate service with the selective service office did so on September 19. Since that date, which was only 3 days after the President announced his program, and until April 11, 5,492 deserters have been processed by the Department of Defense. And of this number, 4,349 have reported to the Selective Service System and have enrolled in the alternate service program. During that same period of time 631 evaders referred to the Selective Service System by a U.S. attorney have been enrolled in the alternate service program.

Also, during this period of time, and as a result of the deliberations of the Clemency Board, 19 individuals from the original group of 45 to whom the President indicated an intention to grant a pardon, conditioned upon a period of alternate service, have reported to the Selective Service System for enrollment and for work.

Of the numbers who have enrolled with the System as of the 7th of April, 1,600 placements have been made where individuals have reported and commenced work. In addition, another 1,500 enrollees are in the process of finalizing employment as a result of a specific job referral by a State director of Selective Service.

There is an aspect of the program which is an estimate based upon the evaluation of facts and circumstances to date, compiled as a result of reviewing individual cases, which I think I might make.

Of those who do enroll it appears that some will not complete their service for many reasons, such as personal inability to perform, no desire to do so, incapacity to do so, and others. It is too early to know what this number might be. However, we have established a rather comprehensive procedure whereby we intend to document the records of those who enroll and successfully perform, as well as those who failed to perform.

Of those who have enrolled, 971 have already indicated they do not wish to participate or have demonstrated that they do not want to cooperate and have been terminated from the program. Although it is too early to expect many completions, there have been five enrollees who have completed their required alternate service and for whom we have sent certificates of completion to the referring authority.

A word about job availability, in light of the general employment situation in the United States since the program was announced:

We are experiencing the impact of the employment situation and the jobs which we thought might be available last September are now more attractive to other individuals who, when we established the program in September, would not have considered them suitable for themselves. The program is now more difficult for us in locating jobs than it was when we started.

My personal view is that although it is more difficult we will merely have to work harder to find jobs which we thought would be available when we made our initial calculations. There have been many individual contacts by members of my staff with national agencies who have indicated willingness to cooperate. The assistance and the cooperation we have received from many Federal agencies as well as private agencies has been outstanding.

The President stressed, when he recited the aims of his program last fall, that he wished for this to be a crisp program with constant follow-up, good supervision, and the active participation of all Federal agencies towards its successful accomplishment and for the attainment of the aims which he set out for the program. We intend to continue our efforts to place these people, to monitor their performance during employment, and to ensure their treatment in a dignified and reasonable fashion.

We believe that we can in most instances place the people for work within reasonable distances from the place at which they desire to live and within reasonable enough circumstances. If the enrollee considers alternate service in the context of work whereby he is earning his return to American society and is determined to do so, we believe we can work with him and enable him to attain the benefits which the President provides under Proclamation 4313.

May I say in closing that I have endeavored to describe for you the thing we do and the experience we have gained to date in our discharge of the responsibilities which President Ford delegated under Executive Order 11804. There could well be widely different definitions of final success or failure in this venture. I think, considering the employment picture, the program is, up to now, working well and it appears that it should continue to work well. For my part, and speaking for the Selective Service System, I believe that we can provide the jobs required for the enrollees who sincerely desire to complete this obligation. We are grateful for the cooperation we are receiving from the employers who make jobs available to us. And I see no reason why the original numbers of people who were considered as potential participants cannot be accommodated in the program within a reasonable length of time.

Mr. Chairman, this concludes my statement and I would be pleased to answer questions for the committee as they wish.

Mr. KASTENMEIER. Thank you very much, Mr. Pepitone. From what you have described, I gather that in no instance is the Selective Service the first contact for any of the so-called returnees. They either go to one of the U.S. attorneys, the Department of Defense, or the Clemency Board, depending upon the nature of their case. Then, in the event that it is determined that they shall be assigned a program requiring alternative service, they are sent over to the Selective Service for pur-

poses of obtaining a job, either through their own efforts or yours and for monitoring during the period of the alternate service. Is that correct?

Mr. PEPITONE. That is exactly right, sir.

Mr. KASTENMEIER. I am curious why the Selective Service was chosen for this particular job, as opposed to the U.S. Employment Service or the Labor Department or some other agency of Government. I say that because this is a very particular function, that I assume the Selective Service has not had to serve in its history.

Is that not correct?

Mr. PEPITONE. No, sir. Let me give you a little background, if I may. Under the Military Selective Service Act, in its last modification in September of 1971, in section 6(j) of the act, the Director of the Selective Service was specifically charged with finding work, civilian work, for those people who were classified as conscientious objectors, and who were directed to perform such work in lieu of induction. Subsequent to that amendment to the law, we actually had as many as 9,000 at work in the United States, working for slightly over 5,000 employers. The regulations which I just described briefly to you are almost a direct lift from the regulations which govern the work employment and supervision of the people who performed alternate service in lieu of induction in the armed services.

This was a most strong consideration of the Attorney General last August when he worked with the Secretary of Defense and they made their initial recommendations to the President of the United States. As a matter of fact, the Attorney General called me at the time, and we talked about whether or not we might transfer on short notice, the experience we had in this program to a program which the President was interested in starting on short notice.

Mr. KASTENMEIER. What are the typical jobs that you assign to people? Are they the same sore of jobs that you had heretofore assigned to others?

Mr. PEPITONE. Yes, sir; almost directly. I have a few numbers here before us. Of the 1,600 people that we have so far put at work, 35 percent of them are at work in hospital and hospital-related types of activities. They run the gamut of hospital labor force people to hospital mess attendants to laboratory assistants and the like. For the social service organization, we have a sizable number at work—Goodwill Industries, St. Vincent de Paul, the YMCA; in governments, primarily county and city type of governments, working in nursing homes and hospitals, and the nature of employment runs everywhere from being orderlies and attendants to being maintenance people in county hospital buildings.

Mr. KASTENMEIER. How many participants in your program have lost their job; that is, the job that they may have had at the time that they decided to come into the program? I assume that many of these people were gainfully employed and had to take a job of alternative service under your program and would not be able, necessarily, to return to the job previously held.

Mr. PEPITONE. The answer to this may get a little involved, but I have no precise number. However, there are many people who are at work in gainful employment of their own choosing who have indicated willingness to participate in the alternate service program, for whom

we have not been able to find jobs; either they have not found one or we have not found one; but they have not quit their jobs in order to start right now. Other than for the people who are under a precise contract for deferment of prosecution, the evader types with the Department of Justice, there is no terminal period whereby these people have to finish this alternate service. In the case of the deserter, he could take as long as would be necessary to do this obligation and do it right. In the case of the evader, where the U.S. attorney has made an agreement with him that he will only defer prosecution for a certain period of time, that is a different case. As a matter of fact, the people who come to us through the program are different people, characteristically, we find. The deserter, for instance, is an individual we have much greater difficulty in placing than we do in the case of the evader. Most of the evaders come in and start right now looking for a job because they have a terminal date whereby the U.S. attorney has said he will no longer put off this prosecution.

Very few people, I would think, in direct answer to your question, have had to give up meaningful gainful employment to seek alternate service which they could not abide.

Mr. KASTENMEIER. I note you have changed your regulations dealing with when alternate service begins. Was this because you were having difficulty finding jobs, or what was the purpose of that?

Mr. PEPITONE. No, Mr. Chairman. I think this is a matter of misunderstanding. The basic regulations which were published last September have not been changed. They remain the same. What was changed was the manual which we had published for the use of our people who administer the program. Within that manual it shows the forms they use and the numbers they mark and the actual working details at the start, and in order to be clear to them, that they should commence work with the people when they immediately arrive and should not wait.

We pointed out to them that a provision in the regulation could easily be read that a man could expect the Director of Selective Service to provide him with work after he had been enrolled for 30 days. Almost in a precautionary way we said you should note that failure upon your part to do this could cause an individual to be accruing creditable time, when in fact no good effort had been made to provide employment. That change in the manual has been made and it has been corrected.

I have corresponded with Chairman Goodell on the matter, who was upset about it. I have corresponded during the course of last week with several other agencies who have raised the question. I do not think there has been a change.

Mr. KASTENMEIER. I yield now to the gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

What supervision do you maintain over these people during the period of their alternative service?

Mr. PEPITONE. We literally check with the employers, Congressman Wiggins, on the fact that they continue to be employed, and check with them on a periodic basis as frequently as monthly for their employment.

We, of course, will have the problem which we have already recognized, that these employers are in no way controlled by us. These are agencies with controls from many other places. We find that on occasion they would fail to notify us of termination, this type of thing, unless we kept up a constant supervision of what is going on.

Mr. WIGGINS. Does the employer submit any certificate or letter or some evidence of satisfactory completion of employment to you?

Mr. PEPITONE. Well, only that the individual continues to work satisfactorily for whatever period of time is concerned. Then we render the certificate of adequate completion of the term of service, so long as the man is employed in the job, and it is unlikely that he would stay in the job if he was not satisfactory because the employer is paying him.

Mr. WIGGINS. I understand that, but I want to be sure I understand your answer, which is that the employer gives you some evidence that the employee has served the requisite period of employment with him.

Mr. PEPITONE. That is right.

Mr. WIGGINS. Written evidence?

Mr. PEPITONE. That is right.

Mr. WIGGINS. I want you now to focus in on that category which is referred to you from the U.S. attorneys. Are you familiar with what is the status of their employment with the U.S. attorney when they come to you?

Mr. PEPITONE. At the time they come to us they have, and they bring with them, a contract which they have executed with the U.S. attorney wherein they have agreed to perform a given amount of alternate service; and wherein the U.S. attorney has by precise date indicated how long it is that he will defer prosecution of that individual so that he might perform the service.

Mr. WIGGINS. Then the prosecution pending is deferred until the successful completion of the alternative service?

Mr. PEPITONE. That is correct.

Mr. WIGGINS. That is all, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I have no questions at this point.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you very much, sir, for your testimony.

What is the entire budget of the Selective Service now across the country?

Mr. PEPITONE. In fiscal year 1975, the budget of the Selective Service System was $45 million.

Mr. DRINAN. Will the agency be asking for additional funds because of this new assignment?

Mr. PEPITONE. The agency will not be asking for additional funds because of the assignment; but the language of the request made to the Congress for the budget for the forthcoming year has specifically pointed out to the Appropriations Committee, what portion of the funds be devoted to this assignment in two ways—informative to the committee and limiting unto me insofar as how much I might spend.

Mr. DRINAN. Will more than $45 million be requested?

Mr. PEPITONE. For the agency itself, yes; approximately the same amount as last year, $47 million plus.

Mr. DRINAN. On page 6 of your testimony, I seem to see really a basic contradiction. If these people are largely unskilled, how can you really find jobs for them if you follow the policy of noninterference with competitive labor markets and with 7 or 8 million people unemployed? How really can you say that you are not interfering with the labor market?

Mr. PEPITONE. Up to this point in time, Mr. Drinan, I have no indication of interference, although I have seen specific cases wherein agencies and organizations have protested the work of some people. I can give you an example of what I am talking about.

Yesterday I was talking with one of the State directors of Selective Service. He told me he knew of 70 jobs which would be available in one of the large cities of the United States working for Goodwill Industries, in which we think we can place the people. Goodwill Industries does not seem to have been able to find employees in the city.

Mr. DRINAN. Have they advertised with the other competing organizations such as the U.S. Employment Service?

Mr. PEPITONE. I cannot answer the question, but I assume they would.

Mr. DRINAN. You have not resolved the contradiction in my mind, sir, that these people are taking jobs at normal pay that other rather low-skilled people could take.

Now, on the actual numbers, you say on page 9 that 4,218 have reported. You tell us on the next page that 1,600 have been placed; then at the bottom of that page, that 971 have dropped out. So do I take it that of the 4,200, 971 have already dropped out and do not want to participate, and that 1,600 are employed and the others are pending?

Mr. PEPITONE. That is right, sir. There are about 1,200 who are with us approximately 60 days that we have not placed.

Mr. DRINAN. Your language on the bottom of page 10 sounds a bit ominous. You are telling us that there are a lot of people in this program who are not going to cooperate, and you already have 971, which is roughly one-fourth of the 4,200, almost that. Do you expect that it will be one-fourth or more? What happens to these people who drop out? Are they going to be criminally prosecuted or what?

Mr. PEPITONE. The people, for the purposes of answering your question, fall into different categories. Those who are evaders, if they fail to participate, they are reported back to the U.S. attorney and the action upon them is his. For the people who are deserters, they are reported back to the Department of Defense as nonperformers on the program. I would just say that many of those will be able to keep the undesirable discharge they have, and that is the last anyone will hear from them.

The reason, in my judgment, for the number already identified as nonperformers so early in the game stems from the fact that there were several hundred people already at hand in September when the program was announced—principally military types who immediately flocked to the program and then just declined to participate. The numbers processed and the numbers enrolled differ considerably. It is pretty much generally the numbers that were already in the hands of the military in September.

Mr. DRINAN. Do you think that the people who drop out have some hope that amnesty might come about in the full sense in that they would not have to go through this alternative service?

Mr. PEPITONE. I would doubt, Mr. Drinan, that that is the reason.

Mr. DRINAN. Well, you are making a comprehensive survey. What are you finding out? You say you have this vast study going, that we have established a rather comprehensive procedure whereby we intend to document the records of those who enroll and those who drop out. Can you tell us anything about why they drop out?

Mr. PEPITONE. Yes, we can. It is beginning to appear that the people who are dropping out of the program are much like the people that Senator Goodell talked about a little bit ago. They are not, as he said, as I recall in his testimony, not part of the system. They are just happy to go away with their undesirable discharge. They just do not care about it.

Mr. DRINAN. Except that they applied for this program, did they not?

Mr. PEPITONE. Yes.

Mr. DRINAN. So how can you say they are not a part of the program. They had initiative enough to write to Washington to get themselves involved in this thing. Then when they find out what it is, they just drop out again.

Mr. PEPITONE. Well, they got a benefit before they dropped out, in the case of many of them. They got an undesirable discharge and they ceased having to look over their shoulders to see if anybody was going to pick them up as a deserter. They have already gained in some cases what many of them sought.

Mr. DRINAN. What a way to waste thousands of dollars, trying to make them work for 2 years, when we know ahead of time that one-fourth of them is going to drop out.

Mr. PEPITONE. I do not think we waste thousands of dollars trying to make them work. This is a voluntary program in the fullest sense of the word. If the man will come in and tell me he does not want to work, that is the last time we will spend a nickel on him.

Mr. DRINAN. I wonder, sir, among the Federal agencies that you mention at the bottom of page 11, are congressional offices involved in that? Have you ever tried to place some of these people in the offices of Members of Congress?

Mr. PEPITONE. I have not; but some congressional offices have offered their help in suggesting placing to which we might put the people, none of them in their offices, but in connections that the congressional offices have had around the country.

Mr. DRINAN. I think it might be a good idea if some Members of Congress learned what these people are thinking.

One last question.

When you say that you seek, and your board seeks, to develop the skills that a returnee has, does that ever include the possibility that he can go to graduate school?

Mr. PEPITONE. Not as part of his alternate service. We have deferred alternate service for people so they could continue their education in some cases. A good example of the utilization of the skills that comes immediately to my mind is a case which made the press on the east coast of Florida, where a young engineer, a masters level engineer took employment with a county down there. He lost his job ultimately because of the furor within the local community. It is too bad he did because he was willing to work for that county in a posi-

tion that they had been unable to fill for some long period of time, even though they advertised at considerably less money than they were willing to pay at the outset. In my judgment it would have been a good place and it would have been a good program for the man and the county.

We do try to us their skills and we do use them.

Mr. DRINAN. What do you mean when you say at the bottom of page 6, a returnee will be permitted to utilize his special skills? In fact we seek to assure this utilization where we can. Does that mean that he can use all the skills except that he cannot go to college or finish high school?

Mr. PEPITONE. Well he cannot work in the national health and interest while going to college and high school.

Mr. DRINAN. That is not in the national health or interest if he wants to do it?

Mr. PEPITONE. No; that is right.

Mr. KASTENMEIER. Just a followup question on the dialog you were pursuing with Mr. Drinan on compensation. The compensation will provide a reasonably comparable standard of living that the returnee would have enjoyed had he gone into the military service.

In a hypothetical situation, if you are dealing with a hospital, and the individual happens to be, we will say, an X-ray technician, and the hospital says we can make him an X-ray technician at $15,000 a year or he can be an orderly at $6,000; your determination is that he would have enjoyed a standard of living and pay comparable to the orderly, of course. What do you do in that case? Do you let him earn $15,000 as an X-ray technician, which he is qualified to do, or do you follow literally the mandate and compensation you suggest to us?

Mr. PEPITONE. If he could have been employed in the military service as an X-ray technician, we would let him work as an X-ray technician in the hospital.

Mr. KASTENMEIER. If he could not have?

Mr. PEPITONE. If he could not have, we would not.

I will give you an example of why this is put together the way it is. In the conscientious objector program and the employment of alternate service, it was not beyond the realm of possibility for a man to work in civilian service in lieu of induction as a doctor in a remote area of the United States, working with the Indians or working with the impoverished in this country. It is not beyond the realm of possibility. In fact it is a case. Here in northern Virginia there is a man from this program who is working as a teaching assistant. He is well qualified to do it. They badly needed the service, and he is now performing it for them.

Mr. KASTENMEIER. The difficulty is, if the individual who violates is 18 years old, unskilled, and later as the intervening years go by, at age 24 or 25 he is skilled and could work using that skill, but under the mandate of your program you prefer to return him to the situation in which he would have found himself at age 18.

Mr. PEPITONE. I do not think that is the case, Mr. Chairman. Perhaps we are confused a little bit on the thing.

The people very readily sort themselves for our purposes in this program, and those that come back with the higher skills are rarely the ones who were confused youngsters who at the age of 18 avoided

service. By and large they are people who were in their 20's when it came time for, perhaps after college, to be drafted, or something like this; they had already acquired a skill and a level of education, which at that time, had they gone into the service, would have permitted the use of the skill at a higher level.

Mr. KASTENMEIER. That concludes the questions of the subcommittee.

Thank you very much, Mr. Pepitone, for your contribution this morning. The Chair will announce that we will hear representatives of the Department of Justice and the Department of Defense this afternoon. The subcommittee will stand in recess until 2 o'clock.

[Whereupon, at 12:20 p.m., the subcommittee recessed, to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION

Mr. KASTENMEIER. The subcommittee will come to order and resume its hearings on the question of amnesty, both in terms of oversight and in terms of potential legislation dealing with the question.

We are most pleased to welcome this afternoon the distinguished General Counsel of the Department of Defense, who once honorably served with this subcommittee many years ago, the Honorable Martin R. Hoffmann. Perhaps I should ask Mr. Hoffmann to identify the gentlemen with him.

TESTIMONY OF MARTIN R. HOFFMANN, GENERAL COUNSEL, DEPARTMENT OF DEFENSE, ACCOMPANIED BY VICE ADM. JOHN FINNERAN, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR MILITARY PERSONNEL POLICY

Mr. HOFFMANN. This is Vice Adm. John Finneran, who is Deputy Assistant Secretary of Defense for Military Personnel Policy, that office having the line responsibility, as it were, for providing guidance from the President's program to the services.

Let me say, Mr. Chairman, this is a great pleasure for me. This is my first appearance before the committee after 2 years as Minority Counsel. My time with the committee, my associations with committee members have been always very highly valued by me, and I am delighted to be back.

The Department of Defense has been responsible for implementing the clemency program as it relates to individuals subject to military jurisdiction, that is, members of the military service who, by reason of an unauthorized absence of more than 30 days during the period from August 4, 1964 to March 28, 1973, were administratively classified as deserters.

The basic principle in the DOD implementation of the President's program was to retain the framework of existing law into administrative directives as much as possible and, yet, provide clemency to those who met the program qualifications in an expeditious, minimally complicated procedure, which was fully protective of the rights and options of the returnee.

As you probably know, all procedural aspects of the Defense portion of the program was subjected to a comprehensive challenge in the U.S. District Court for the District of Columbia. The program was

not found deficient, and Judge Robinson dismissed the petition. That was *Vincent* v. *Schlesinger*, Civil Action 74–1847, dated January 29, 1975. As of last Friday, an appeal was noted in the Circuit Court of Appeals for the District of Columbia.

The specific requirements for eligibility for the Department's part of the President's program are set forth in the Presidential Proclamation of September 16, 1974. They are as follows: The unauthorized absence in violation of article 85, 86 or 87, Uniform Code of Military Justice, commenced during the period August 4, 1964, through March 28, 1973. Other pending offenses, if any, must be disposed of. The member must report not later than January 31, 1975. This deadline was later extended until March 31, 1975.

It should be noted that the individual's motivation for his unauthorized absence is not a factor in determining his eligibility. All absentees meeting the above criteria were eligible for the program regardless of the motivation of their absence.

Certain aspects of the operation of the program will be of interest. The deserter was required to return to military control, just as the draft evader was required to present himself to a U.S. attorney. This meant that the deserter must physically return to a military installation in order to participate in the program. Absentees returning to the country from abroad were not apprehended at the border. They were given 15 days to report to military authorities.

Eligibility could be determined first by telephone or letter to the clemency information point, which was established. The information disclosed in these inquiries was not used to apprehend absentees for desertion-related offenses.

The principal benefits of the program for the military absentee included the guarantee that prosecution would be dropped, and the opportunity to assure the quality of his discharge. The maximum penalty for desertion, article 85, under the circumstances include a dishonorable discharge, forfeiture of all pay and allowances, reduction to the lowest enlisted grade and confinement at hard labor for 5 years. Consequently, the military returnee was relieved of the burden of fugitive status and eventual arrest, and the possibilities of Federal felony conviction, punitive discharge and period of incarceration. Moreover, he was assured that the character of his discharge would reflect the clemency action of the President and his acceptance of that clemency.

All participants in the DOD portion of the program were centrally processed at the Joint Clemency Processing Center established at Fort Benjamin Harrison, Ind.

During the initial stage of processing, each individual was given a thorough legal briefing by a military attorney assigned to represent him. This involved a group session, with opportunity for individual sessions at that time or any time during processing. The individual's service record was available for review to assure that if other relief than the President's program was available and was preferred by the individual, he might elect not to pursue the program. The consequences of an undesirable discharge were fully explained, as well as the legal implications of all aspects of the program. Additionally, each returnee was advised that he could consult a civilian attorney of his choice.

The Bar Association in Indianapolis established a referral service of attorneys who provided advice, free of charge, to any returning absentee who requested it. Office space at Fort Benjamin Harrison was provided for private consultation between attorney and client.

After the individual had been provided counsel and fully advised of his rights, the processing continued. A request for discharge for the good of the service initiates the separation process. His pay accounts were placed in order, and he was given a complete physical examination. The military absentee was required to reaffirm his allegiance and execute a pledge to complete alternate service.

In addition, and most importantly, he was provided an opportunity to supply to the Joint Alternate Service Board at Fort Benjamin Harrison any information which he believed warranted reduction in the normally required period of 24 months. The Board considered reductions in the length of alternate service, taking into account the following: Previous satisfactory military service, combat service, awards and decorations, wounds and injuries, nature of employment while absent, and such other information or materials which the individual or his counsel believed might be relevant.

The Joint Alternate Service Board was established by a joint agreement of the Secretaries of the military departments. The agreement designated the members of the Board collectively as the Secretaries' delegees for the purpose of considering mitigating circumstances and establishing the period of alternate service in each case.

It should be stressed that the Board did not determine whether or not the individual would receive the clemency discharge. Eligibility for clemency discharge was established by the proclamation, and conditioned upon the completion of alternate service by the individual.

The Board was composed of one O–6 grade officer, colonel or captain of the Navy, from each of the military services, Army, Navy, Air Force, and Marine Corps. All four officers considered the case of each returning absentee. The officer from the military service of the absentee presided during the consideration of his case. In the case of a tie vote, that officer's determination was controlling.

As noted earlier, the individual and his counsel had the opportunity to present written representations, other documents and any other material to the Board. The Board did not consider a case until it was determined that the individual either had taken advantage of this opportunity, or had specifically declined to do so, in writing. In the preparation of this statement the individual had complete access and assistance from his counsel or counsels.

Upon being advised as to the Board's determination of the length of alternate service, the individual was given a further opportunity to consult with his attorney or attorneys. He was then required to make his final determination as to whether or not to participate in the program.

In the great majority of cases processed through the Joint Processing Center the individual was separated with an undesirable discharge certificate within 24 hours after his arrival.

The individual was advised that after discharge he must report to the Director of the Selective Service System in the State in which he intended to reside. The Selective Service System thereafter works with him to provide a suitable alternate service job. Upon satisfactorily

completing alternate service the Selective Service System notifies the individual's military service. Thereupon, the military service issues the individual a clemency discharge in lieu of the undesirable discharge.

Several weeks ago the first military absentee, a former soldier from Kansas, completed his alternate service and was issued a clemency discharge under the program.

On more than one occasion, the Processing Center staff representing all four military services and assembled from all over the country, was commended for its efficiency and professionalism. There were no confirmed reports of untoward incidents at the Processing Center and the returnees were uniformly treated with dignity. We are convinced that the degree of participation was significantly enhanced by the reports of those returning early in the program that the processing was carried out with dispatch, without rancor and with fairness to the returnees.

Military discharges are characterized to describe the quality of an individual's military service. An honorable discharge is issued in recognition of honorable and faithful service. The general discharge is given for satisfactory military service, and the undesirable discharge is given for unsatisfactory service. The bad conduct discharge and the dishonorable discharge are punitive discharges, issued only as the result of an approved sentence of a special or general court-martial, and I might add, Mr. Chairman, court-martial convictions are considered convictions for Federal offenses.

Under this program the absentee is intially issued an undesirable discharge. The Department of Defense guidelines require that an absentee be fully counseled concerning the adverse nature of the undesirable discharge. He is informed that it is a military discharge under conditions other than honorable, and that, generally, he will not be eligible for veterans' benefits.

The clemency discharge was created by the President for this program. It is issued once a dischargee has satisfactorily performed his period of alternate service. It is, in effect, a testimonial to the fact that the individual has satisfied the requirements of the President's program. It does not represent a change in the characterization of the individual's military service as other-than-honorable. It does reflect and is public testimonial to the individual's status as one who is absolved by Government action of the effects of that service.

To paraphrase the words of the President, the individual has fully earned his return to the mainstream of American society and for this he deserves recognition, which has been symbolized through the issuance of the clemency discharge.

With respect ot Veterans Administration benefits, the fact that an individual performs alternate service and is issued a clemency discharge in lieu of an undesirable discharge is not intended to affect his entitlement to Veterans Administration benefits one way or the other.

Another aspect of the program which deserves note is the extent to which the Department has endeavored to protect the rights of every individual processed under the program.

The Department of Defense required that every individual being processed should have full and complete legal advice available. Moreover, no information received from an individual inquiring as to his

eligibility or during his processing will be used against him for prosecutive purposes. If there are legal defenses available to him which would indicate that he could not be successfully prosecuted for his unauthorized absence, it is the responsibility of his counsel, civilian or military, to make these facts known to the absentee himself and to the military discharge authority. The decision to request a discharge under this program, or to elect to have his case processed under the regular military procedure, is a matter solely up to the individual himself upon the advice of his counsel.

There were 46 individuals who began processing under the clemency program but ultimately received better than an undesirable discharge under regular procedures. For example, some individuals' records revealed that they should have been discharged for minority, hardship, or as a conscientious objector, but for various reasons, separation had not occurred prior to the individual's departure.

In an effort to provide personal notification to all eligible military absentees who had not contacted their military service by last December, the military departments sent letters to their next of kin. Some 7,000 letters were dispatched, but over 2,000 of these were returned undelivered. The Department did receive numerous telephone inquiries in response to these letters, and many individuals returned to their military service with the letter in their possession.

The Department of Defense also identified and conducted a mail notification effort on behalf of the Presidential Clemency Board to former servicemen who had been previously separated with bad conduct or dishonorable discharges for qualifying absentee offenses and who were believed eligible for consideration by the Clemency Board. Over 21,000 such letters and application forms were mailed with a resulting increase in application for the Clemency Board's portion of the program.

Our initial estimate was that approximately 12,500 absentees were potentially eligible for the President's program at the time of issuance of the proclamation, plus an additional 600 already under military control awaiting disposition of their cases. During the ensuing months, close screening of records resulted in a reduction in the total number of absentees who were, in fact, eligible. There were many who had been charged with additional unrelated offenses under the Uniform Code of Military Justice, for which no grant of clemency applied. Consequently, they were not eligible.

Likewise, a significant number of alien absentees had returned to their native country and, thus, were not eligible to reenter the United States.

The revised figure on potential eligibles was 10,115. When processing was completed and the Joint Clemency Processing Center terminated operations last Friday, April 11, 1975, 5,495 absentees had returned and been processed under the Presidential clemency program. This represents 54 percent of the total eligibles. As of March 14, an additional 765 Army personnel had returned to military control and elected not to participate in the program. Most of those men have now been separated at their own request in lieu of trial by court-martial with undesirable discharge certificates. These men have resolved their fugitive status and no longer face prosecution. They will not, however, have the opportunity to obtain a clemency discharge.

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Although research accomplished on the records of the returnees is still incomplete, preliminary indications are that a relatively small proportion of the absentees, under 15 percent, claim to have been motivated by antiwar sentiments. Many others readily admit to being absent for a number of the same reasons that soldiers have deserted throughout our history.

It is a fact that absenteeism was not a phenomenon peculiar to the Vietnam era. For example, there are currently more individuals absent in desertion status who departed from the peacetime force subsequent to March 28, 1973, than remain absent from the prior period covered by clemency.

The Department of Defense is, of course, conscious of the fact that there are also large numbers of recent veterans who have less than honorable discharges. We believe that the existing system of reviews established by 10 U.S.C. 1552 and 1553 constitutes the most effective and equitable way to correct errors or injustices in individual cases. Now, 1552 provides for corrections boards composed of five civilians appointed by the service Secretaries whose function is to correct any errors or remove any injustices in military records, which may be brought to their attention by a proper claimant. And 1553 provides for discharge review boards of five military officers appointed by the service Secretaries whose function is to change, correct, or modify any discharge in accordance with facts presented to the Board, either on its own motion or on request of a former member of an Armed Force.

We are presently reviewing the system to determine whether increased demand for review warrants the creation of regional or traveling discharge review boards. We believe the Department has authority under present law to do so. Plans to accomplish this have been staffed with the military departments with a view to expanding the operation of the discharge review boards should conditions warrant.

The current program, the President's clemency program, is the most sweeping act of mercy for wartime deserters in our Nation's history. I believe it is essential to clearly restate the opposition of the Department of Defense to any form of general and unconditional amnesty. The views of the Department of Defense in this regard were presented to this subcommittee during hearings in March 1974 by Lt. Gen. Leo E. Benade. Our basic position and the reasons therefor remain. In this connection, it is noted that four of the five bills which are presently before the subcommittee are identical to proposals which were considered at the previous hearings. A fifth bill contains some additional features, but is essentially an unconditional amnesty proposal and is opposed by the Department of Defense.

The position of the Department is based on the conviction that an amnesty for deserters and other offenders would be detrimental to the Armed Forces and would adversely impact upon our national security, by reason of its impact on any future conscription in time of war. Furthermore, such an action would be fundamentally unfair to the millions who served honorably and carried the burden of the Nation's commitment.

As President Ford stated in the proclamation which established his program for the return of Vietnam-era draft evaders and military deserters, "Desertion in time of war is a major, serious offense; failure

to repond to the country's call for duty is also a serious offense. Reconciliation among our people does not require that these acts be condoned. Yet, reconciliation calls for an act of mercy to bind the Nation's wounds and heal the scar of divisiveness."

It was in this spirit that the Department of Defense participated in the conduct of the President's program, which is one of clemency rather than amnesty; one which tempers justice with mercy; one which provides individual consideration for the offender consistent with due process, and one which preserves our military capabilities and readiness.

This concludes my prepared remarks. Should you have any questions, Vice Admiral Finneran and I will attempt to answer them or supply answers for the record.

Mr. KASTENMEIER. Thank you, Mr. Hoffmann.

To your knowledge, was the Defense Department consulted by the President before he made his announcement on September 16 last?

Mr. HOFFMANN. We were consulted; yes, sir.

Mr. KASTENMEIER. Did the Defense Department before that time approve of a clemency program?

Mr. HOFFMANN. We had taken positions before this committee and other committees in opposition to complete amnesty, and I think that would include opposition to all the pending congressional amnesty programs that were extant at that time. We have not, insofar as I know, although this is gratuitous, taken a position with respect to a Presidential amnesty. As it worked out, we supported the clemency program.

Mr. KASTENMEIER. If an applicant has his case considered by the Joint Alternate Service Board, he is then required to present himself to the Selective Service System for assignment to alternative service for a stipulated period of time. Is that not correct?

Mr. HOFFMANN. That is correct, sir.

Mr. KASTENMEIER. One of the reasons that I raise this issue is that in prior testimony it was the position of your predecessor, Mr. Neiderlehner, who was Acting General Counsel at the time, that the substitution of military service or service in alternative civilian activity is inappropriate. Mr. Neiderlehner stated this position in a letter to the committee.

Now, there are some other words that condition that, but I think conceptually at that time the military, the Defense Department did oppose what presently it accepts as a program, at least in part.

Mr. HOFFMANN. I do not remember the exact text of the letter. If the proposition is one, with respect to programs that substitute nonmilitary service for military service under the rules of conscription and under a draft law, I believe we would still be opposed, and I think it is that to which Mr. Neiderlehner refers.

Mr. KASTENMEIER. Yes, in all all fairness he said, "It is our view that the substitution of military service or service in an alternative civilian activity for penal sentence or worse, unconditional amnesty, as proposed under a certain bill, H.R. 236, is inappropriate," but he is referring to all these different alternatives as being inappropriate, and I appreciate the position the military takes with respect to the rationale for it.

For this reason I am wondering if the Defense Department agreed reluctantly to the President's program, or under what circumstances does it now find itself pursuing activities which it originally opposed?

Mr. HOFFMANN. We, of course, worked with the Justice Department and with the selective service and other agencies of government and the White House staff on the formulation of the program. At no time did we detect, once the decision was made to go forward, in the formulation of the program, any reticence to go along with the program that in any way would have impacted the operation of the program.

The individuals who ran the center, at first Camp Atterbury and then Fort Benjamin Harrison, were handpicked. A number of them were Vietnam veterans. The members of the Joint Alternate Service Board were very carefully picked and briefed on the President's program, not only on the letter, but on the spirit, and the entire program was carried out under those circumstances.

I might say that—and I believe I am correct in saying this—there was not a single complaint from any member who went through that installation of any untoward treatment, no demeaning experiences, and that aspect of the program was carried out very smoothly. In general, again, I think it is a fine tribute to the military and their administrative ability. The central location gave them the ability to pull the records on these individuals and to screen the records. A number of adjustments were made to the records by the staff there when they reviewed the records. A number of those 46 who received other than undesirable discharge under the program were in fact picked up by our people.

So that as soon as the Commander in Chief had made his decision he wanted a program, there was no question about the compliance of the military.

Mr. KASTENMEIER. I appreciate the Defense Department did its duty and presumably administered its part of the program.

Through this experience have you found that the President's clemency program in any respect establishes an undesirable precedent which would encourage people to avoid service in the future? This is the fear that I think traditionally has been associated with any affirmative program in this field.

Mr. HOFFMANN. Mr. Chairman, we have not to date, and I can be very emphatic about that. Now, I think the committee should realize that we are in, to a great extent, a different era than a conscriptive era, that we now have in fact an all-volunteer force, and it is a very different sort of a group than one would expect to find under circumstances of conscription.

I know—if I may digress to a personal experience—I went down to Fort Benning, Ga., at about the time the program was to be announced, and I talked with several company-grade officers, individuals, and commanding officers who were Vietnam veterans about what their reaction would be to such a program. Their feeling was that this was a problem of another era, one that they could not relate to in terms of the current all-volunteer force.

To date I do not believe there has been adverse effect. Now, what it would be under periods of conscription, if it should come fairly soon—which none of us hope it will—I do not know. What the answer will be when more time has passed remains to be seen. Again, I think it would be speculative to give an opinion.

Mr. KASTENMEIER. Going on to a different question, and these are statistics, and your updated statistics are even more striking than the earlier statistics which were based on 12,500 eligible and 5,300 more or less being processed—the latest statistics you gave the committee in which you exclude for understandable purposes certain classes of people, aliens and others out of a potential pool of 10,115 to be affected, 5,495 had applied or come into contact with your program directly. Is that not correct?

Mr. HOFFMANN. That is the number who have participated in the program. Now, to that one should add the 765 that I mentioned who came back, were aware of the program, and elected not to be processed thereunder, plus the 46 who came back under the program, but found they did not need it, which gives you roughly 6,200 out of the 10,115.

Now, let me be very quick, if I may, to say that we would rather not play a numbers game to determine the success or nonsuccess of the program. We have had, for instance, better than 14,491 inquiries.

Our notion of success is the number of people that we believe were fully aware of the options available under the program, were aware the President had made this gesture on the part of the American people, and the number who had the opportunity to consider whether or not they would participate. A man has received the benefit of the program if he considers it, and if he elects for his own purposes not to pursue it, he has nevertheless been given the President's option and is a beneficiary thereof.

Mr. KASTENMEIER. Yes, Mr. Hoffmann, I was going to invite you to distinguish your program, or at least the statistics associated with it that indicate that more than 50 percent participation from either that or the Department of Justice or the Presidential Clemency Board, in which only a small fraction of the potential that participated, and I know that you would do so fairly, but I was wondering in rough terms why was this percentage in the case of the Department of Defense so high, at least in comparison to the other two departments of Government?

Mr. HOFFMANN. Mr. Chairman, it would be speculation on my part to try to come up with reasons why more did not participate in these programs. As we have indicated, we do not know how many have participated in terms of having considered it and decided not to do so, so that I would not have any idea. The Department of Defense attempted to contact as many individuals as we could that fall within the jurisdiction of the Presidential program, those that have already been convicted for an offense, and I think that had we had a better turnout from them, we might know more about the reason for the turnout or lack of it.

Mr. KASTENMEIER. Well, of course, we are interested from the standpoint of what types and what categories of persons and what their motivation was. Is there some way the programs can be administered to reach more people than others? All of these questions come into play.

Let me ask you a different type of question, and that is, one of the legislative proposals would extend the Presidential Clemency Board until the end of 1976. The time is not so important, but another aspect of it is to combine the activities and the programs of the Department of Defense and the Justice Department into the Presidential Clemency Board, giving them jurisdiction for those other two classes of indi-

viduals, those in a state of desertion or AWOL, which you would normally treat and those who had never responded to the Selective Service call, who are liable to the Justice Department presumably.

What would be your reaction or the Department of Defense reaction to such a proposal, if otherwise conducted more or less under the President's direction under the mandate he has already given the Clemency Board and indeed the Defense Department and the Department of Justice?

Mr. HOFFMANN. Well, this is what is known in the Department of Defense as an uncoordinated position, to the extent that I would state a position at all. I have not seen such a bill. I have heard that there was such a proposal and I do not know how we would react to that.

Basically, we support the President's program. We were in favor of it and we were also in favor of the limits which he put on it, which would militate against support of the sort of proposition you have suggested.

Now, proceeding further, I think we would feel that we would like to keep jurisdiction of those individuals that are spelled out in our program. Again, we have the ability to deal with them quickly and fairly. We know what the law is; we can read their records and we see no reason why those should go somewhere else.

Certainly to the extent that it constituted some sort of a commentary on the job we had done, I would be very strongly against it, and the Department would be strongly against it.

Now, over and beyond that, this rather quick judgment is given without consideration of the constitutional aspects of such a question in respect to which I would defer to the Justice Department. Again the position that we might take there on the constitutionality would be guided by that.

Mr. KASTENMEIER. I cannot speak for the proponents, but I think probably it is in response to some criticisms mentioned of the program generally this morning. There does tend to be some confusion as to who is participating in what program and whether the programs as administered separately are in fact equal and are as fair to one individual as to another, and whether the Presidential Clemency Board in a case-by-case method metes out the same level of justice as might be meted out by the Department of Justice or the Department of Defense.

I have a number of other questions, but the gentleman to my right has been waiting faithfully, and I want to yield to him for some questions.

The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you very much, Mr. Chairman.

Mr. Hoffmann, you indicated in your testimony, pages 3 and 4, that these people are briefed when they come into the place in Indiana and that they may, if they so desire, at the top of page 4: "He might elect not to pursue the program."

How many after the briefing left without pursuing the program? If you do not have that number now, I would be very interested.

Mr. HOFFMANN. I can get that for you, yes, sir.

[The material referred to follows:]

At the specific point following the legal briefing 9 individuals elected to be processed outside the program. However, at Fort Benjamin Harrison prior to the legal briefing an additional 25 elected to be processed outside the program under

normal military procedures. There were also 5 individuals who reported to Fort Benjamin Harrison but who immediately absented themselves again. In addition to these individuals, 848 (765 as of March 14, 1973) individuals reported to military control at other installations and elected to be processed under normal military procedures rather than participate in any part of the program. I should add that all of these individuals had access to military lawyers at these installations.

Mr. DRINAN. Furthermore, you indicated that a vast majority were in and out of that center within 24 hours after their arrival. It seems to me that is a little bit contradictory with what you are saying that they were fully briefed. They can talk to the military lawyers. They can get their own lawyers and that type of thing.

How many people were there for less than 24 hours, that came in in the morning and then left in the afternoon?

Mr. HOFFMANN. We can get you the figures on the time to the extent that we have them.

Now, let me enlarge the dissertation on the timing factor.

Mr. DRINAN. Well, you see the impression that I get——

Mr. HOFFMANN. I see the impression you get, and I also can see where that impression was generated.

Mr. DRINAN. And I have that from constituents and hundreds of people who were processed through that center. They may have been treated with decency, but they did not know what was going on. They forfeited a lot of their rights, and now they are beginning to realize that, but go ahead.

Mr. HOFFMANN. We would certainly be glad to hear of any such complaints. We have not received them.

Mr. DRINAN. They are not likely to give it to you. They are not likely to write to the General Counsel of the DOD about this matter, but they do write to their Representative. Go ahead.

Mr. HOFFMANN. Every effort was made to handle the processing as expeditiously as possible to the extent that the individual so desired.

Now, there was a good bit of pressure exerted by these individuals as they came through to get through the process with dispatch. However, in the event an individual wanted more time, and they were all fully briefed on this, they were given as long as they needed, some up to periods of 3 and 4 weeks, and this opportunity was made clear to them when they came in.

Now, many of them came in—some had their own lawyers; others had read about the program. Our effort was to accommodate them.

Mr. DRINAN. All right, Mr. Hoffmann, but you have no specific facts. I would like some facts. You have not told us really very much about the center, how many people had their own lawyers, and I am not impressed unless you say that so many hundreds came in, so many hundreds had their own lawyers, so many spent more than 24 hours. All I read is that a great majority were processed through there in 24 hours.

On page 5 you mentioned the criteria, and you do not mention conscientious objection to the war. Why is that so?

Mr. HOFFMANN. As I indicated in my statement, the motivation for the man's absence played no part in our program. If he was a conscientious objector, if he was not a conscientious objector, but was opposed to the war in Vietnam on other grounds, this made no difference, and

he was treated the same way if his reason was a personal reason such as various family difficulties.

[The information follows:]

No record was maintained of the number of individuals who were processed in less than 24 hours. However, the vast majority of absentees were processed through the Clemency Center in less than two days spending one night at the Center. Absentees who arrived prior to 0700 hours could, if processing flowed smoothly and there were no legal or medical questions, be separated by approximately 2100 hours the same day. We also note that 32 individuals required between 7 and 13 days and 84 individuals required over 14 days. Also approximately 10 individuals were represented by civilian counsel while processing.

Mr. DRINAN. Do you think the President excluded that consideration? Do you think the President said that those who are deserters should not have this taken into consideration?

Mr. HOFFMANN. I believe that was manifest from the proclamations, yes, sir.

Mr. DRINAN. When the Board met—and you suggest that they met very carefully, and they had rules as to a tie vote—is there any written record as to how they decided things, how many tie votes there were? Were there any written opinions?

Mr. HOFFMANN. I believe there is a written record of the votes. I can have the results compiled and forwarded to the committee, sir.

[The information follows:]

There is a written record of the information that was submitted to the Alternate Service Board. However, there is no verbatim record of the deliberation of the Board members. The entire master military personnel record was also available. Each Board member considered all available information and made an independent judgment to determine if there was appropriate justification for reducing required alternate service below 24 months. Each Board member then recorded the number of months he considered appropriate for the individual to serve. When all Board members had reviewed a case and made an independent determination of alternate service, Board members recommendations were compared. In the event of nonconcurrence the case was openly discussed by the Board members to resolve differences. If necessary the President of the Board voted to break a tie. This decision on the number of months of alternate service was considered the final decision of the full Board and was recorded on the Board Summary Sheet for inclusion in the individual's permanent military personnel files. Record was not kept of the number of tie votes.

Mr. DRINAN. Any decisions, any written decisions?

Mr. HOFFMANN. I do not believe so, no sir.

Mr. DRINAN. And the person was never able to appear personally, with or without his attorney, before the Board?

Mr. HOFFMANN. That is correct.

Mr. DRINAN. And the decision which was never written was unappealable, is that right?

Mr. HOFFMANN. Well, it was appealable through the chain of command.

Mr. DRINAN. How many have appealed?

Mr. HOFFMANN. I am not sure. I do not know that there were any.

[The following information was furnished for the record:]

No appeals were made by individuals through the chain of command requesting reduction of alternate service. Approximately 150 appeals were made through the chain of command requesting better than an Undesirable Discharge. Of those appeals, 67 were granted either under or outside the Program.

Mr. DRINAN. Well, it is pretty essential. You leave out all the things I want to know, Mr. Hoffmann, I am sorry to say, all the key things

I want to know: Whether these kids were treated fairly or whether they will be alienated from the system.

Mr. HOFFMANN. We are perfectly willing to compile any statistics.

Mr. DRINAN. Well, you have your testimony, and this is the hearing, and I am not getting what I really want.

Now, on page 8 you have what appears to be a contradiction: "The clemency discharge does not represent a change in the characterization of the individual's military service as other than honorable."

And then it says, "It does reflect and is public testimony to the individual's status as one who is absolved by the Government action of the effects of that service."

Well, what is he absolved from? What can a person with a clemency discharge do that a person with a dishonorable discharge cannot do?

Mr. HOFFMANN. There is a significant difference between a dishonorable discharge and an undesirable discharge, in terms of veteran's benefits, in terms of the conviction for a Federal offense. These are all rather substantive as far as the individual is concerned.

Mr. DRINAN. Well, I know that, but——

Mr. HOFFMANN. The distinction to which this section in my testimony goes is the following: A discharge from the service is not so much an award, as a medal is an award, for any particular set of circumstances. It is the characterization of a period of employment in its common usage in the United States, and our feeling is that it should be retained to so reflect.

Mr. DRINAN. Would you answer the question? What can a person with a clemency discharge do that somebody with a dishonorable or a honorable discharge cannot do?

Mr. HOFFMANN. He is eligible for those veteran's benefits that would be eligible for in his particular circumstances had he received an undesirable discharge. He does not have a Federal offense conviction. He receives from those to whom the discharge is presented immediate awareness of his status of having received clemency from the President and having accepted that.

Mr. DRINAN. Can he become a police officer or a firefighter or a member of the bar?

Mr. HOFFMANN. I do not know that it would add any more to his status than, say, a general discharge or an undesirable discharge.

Mr. DRINAN. So it is a fancy name for something that truly does not give any more rights than a general or an undesirable. So you are telling me that a clemency discharge, as far as you can see, gives him no rights.

Mr. HOFFMANN. Congressman, it is a question of perceptions.

Mr. DRINAN. I want facts. It is not a question of perceptions. I am an attorney, and I want to know what rights he gains by going to Indiana and processing through this thing and getting a clemency on his paper rather than something else.

Mr. HOFFMANN. He has a right to have a record without an undesirable discharge on it.

Mr. DRINAN. But he gets no further rights, though. There is nothing different.

Mr. HOFFMANN. He gets no further veterans benefits. The President's proclamation and the program says that. That is absolutely accurate, when you are talking about legal rights that flow therefrom, you are correct. He does not get any.

Mr. DRINAN. Well, if he did not consider conscientious objection to the war, how do you know, on page 11, that 15 percent claim to have been motivated by antiwar sentiments?

Mr. HOFFMANN. We know the kind to be motivated by antiwar sentiments because they claim they were motivated by antiwar sentiments when they were asked the reasons for their absence.

Mr. DRINAN. Well it is not even relevant. Is there a form where they put this down and then you consider it?

Mr. HOFFMANN. No.

This is taken from the material submitted voluntarily by them to the Review Board there at Fort Benjamin Harrison.

Now your question is, do we take conscientious objection into account? And the answer is, yes.

If an individual claims to be an conscientious objector and wishes his status as such reviewed, and had filed an application, that is reviewed to see whether withholding a discharge on that basis was improvident, and if it was, he is given a discharge. That happened in several cases.

Mr. DRINAN. What kind of a discharge?

Mr. HOFFMANN. I can look that up for you.

[The information follows:]

There were nine individuals who received honorable discharges by reason of conscientious objection.

Mr. HOFFMANN [continuing]. In one or two cases I believe they were given general discharges which fully stated, is a general discharge under honorable conditions.

Mr. DRINAN. If he had gone back through the courts and was able to represent himself, or get an attorney, he would have gotten a fully honorable discharge because he was illegally, invalidly admitted to the military.

Is that not proper?

Mr. HOFFMANN. I am not sure of that. I can look up that answer for you.

[The information follows:]

However, if he were declared a conscientious objector by the Selective Service System, other than as a non-combatant, he would not enter the military. The individuals discussed here have applied with an in-service declaration of conscientious objection.

Mr. DRINAN. I am certain of the answer. That he would have, if he had been invalidly, illegally admitted to the service when he was claiming conscientious objection, the Draft Board should have, in fact, given him the CO status.

Well, on page 12 you talk about the large number of people with less than honorable discharges. And large, I guess, is 300,000, 500,000, from my information. But you go on and praise the system that you have, and you say that the system that we have under 10 U.S.C. "constitutes the most effective and most equitable way to correct errors or injustices in individual cases".

Well, with all due respect, Mr. Hoffmann, I, and other Members of Congress, have been down that road trying to help people, and if that is the most effective and equitable way, I would hate to see the least effective way.

How many people now have asked to have a correction and upgrading of their discharge from the military, other than the Indiana situation? Other than this?

Mr. HOFFMANN. During the entire period that these Boards have been constituted? We can get you that answer.

Mr. DRINAN. Well, you say it is the most effective and equitable way. You ought to have a ball park figure.

Mr. HOFFMANN. It is about 10,000 a year. I would have to go back and see how long the program has been running, and take into account the fluctuations from year to year in those numbers.

[For the record, enclosed are the statistics of each military department regarding Discharge Review Boards:]

U.S. NAVY DISCHARGE REVIEW BOARD (INCLUDES USMC)

	Applications processed	Approved [1]	Percent of applications approved
Fiscal year:			
1967	1,285	202	16
1968	1,144	194	17
1969	1,033	189	18
1970	1,042	219	21
1971	1,343	264	20
1972	2,053	1,046	51
1973	3,652	1,135	37
1974	3,013	651	22
Total	14,565	4,102	28

[1] Approval indicates upgrade of the subject discharge, e.g., an undesirable discharge may be upgraded to a general or an honorable discharge.

U.S. AIR FORCE DISCHARGE REVIEW BOARD

	Applications processed	Approved [1]	Percent of applications approved
Fiscal year:			
1967	1,488	491	33
1968	1,488	584	39
1969	1,094	495	45
1970	943	405	43
1971	999	418	42
1972	1,283	528	41
1973	1,270	314	25
1974	1,294	394	30
Total	9,859	3,629	37

[1] Approval indicates upgrade of the subject discharge, e.g., an undesirable discharge may be upgraded to a general or an honorable discharge.

U.S. ARMY DISCHARGE REVIEW BOARD

	Applications processed	Approved [1]	Percent of applications approved
Fiscal year:			
1967	2,057	305	15
1968	2,162	305	14
1969	1,813	227	13
1970	1,801	184	10
1971	1,685	264	16
1972	2,755	413	15
1973	4,474	478	11
1974	8,462	1,052	12
Total	25,209	3,228	13

[1] Approval indicates upgrade of the subject discharge, e.g., an undesirable discharge may be upgraded to a general or an honorable discharge.

Mr. DRINAN. Well, on that, what evidence do you have for this gratuitous statement that this constitutes the most effective and equitable way?

Mr. HOFFMANN. We believe it does.

Mr. DRINAN. What are the other ways?

Well, this is not directly relevant to clemency, but that statement hit me as so gratuitous that I just cannot understand how you would say it.

Well, at any rate, my last point, on pages 13 and 14 you just beg the question, and you say once again, without evidence, that it is the most sweeping act of mercy for wartime deserters in the Nation's history. My difficulty is that I am not certain that there is any mercy here. It is certainly not amnesty. And you have the good candor to say that on your last page—"this is one of celemency and not amnesty"—which the other witnesses have not said. But I am not really certain that mercy was given to these people, and they will wake up some day—and some already have—saying, well, what have I done? And they have accepted this under these conditions, and I am not certain that entire justice was done.

In any event, I am sorry if I am quite critical, but as you know, people come to Members of Congress before and after this, and we have to make some judgment as to what they should do. And, as you know, thousands have not been processed through the system, and right now we have these bills before us.

How should we give amnesty? And amnesty means, not forgiveness, but forgetfulness. And that, you, yourself, allege that these people have been absolved. And I deny that they have been absolved. You have not given even forgiveness, much less forgetfulness.

Thank you, very much.

Mr. HOFFMANN. Congressman, Let me just say that to the extent that you get complaints or charges that the program was maladministered, or someone within the framework of the program has not received what he considers to be his just desserts, we would be happy to——

Mr. DRINAN. Sir, I go through a congressional liaison here, and with all due respect to them, I do not get a satisfactory answer. And their papers get lost and cases go on for months and for years, and to try to get the upgrading of a dishonorable, or less than honorable discharge, it takes years. And I have to hound them, and the poor people out there in the congressional districts, they just lose heart. That is the state of the question, and I will be happy to document that: Where we have written time and time again, and nothing ever happens. And then a form letter eventually comes back saying, well, we are not going to upgrade it, we are not giving—we are given all types of reasons. It is just incomprehensible.

Mr. KASTENMEIER. In terms of the program, the Defense Department does maintain a program—under General Forrester, I believe—which upgrades discharges to general or honorable. What distinguishes those eligible for this program from those eligible for the clemency program through the Board, through the Presidential Clemency Board—which, as a matter of fact, absolutely requires alternate service as a precondition to upgrade. There are distinctions between your program and their program, I believe, in that respect, are there not?

Mr. HOFFMANN. Are you referring to those cases that were handled at Benjamin Harrison outside of the clemency program?

Those are the 46 cases that I referred to where the individual, after a review of his record, elected to pursue other remedies than the program. Now some were conscientious objectors whose declaration had been improvidently withheld; there were several who were minority enlistees, who, in fact, may have had a discharge at the time they went AWOL.

Mr. KASTENMEIER. Actually, I was referring to the issuance of upgraded discharges in certain cases.

Mr. HOFFMANN. Well the rules are the same in that regard under both programs. As I indicate in my statement, we give an undesirable discharge at Fort Benjamin Harrison, which is upgraded to the clemency discharge when we have received indications from the selective service that the individual has completed his alternate service.

So, as I indicate in here with respect to an individual who leaves, who does not report and does not perform the alternate service, he has an undesirable discharge.

Mr. KASTENMEIER. I am referring to a military absentee who may have less-than-honorable discharge, and may get this discharge upgraded administratively without the performance of alternate service.

Is that not correct?

Mr. HOFFMANN. I am not sure I understand the question. The individual never gets a clemency discharge until he has performed the alternate service.

Now there was a suggestion, as you mentioned, that once he leaves military jurisdiction and fails to perform alternate service, that he cannot be prosecuted, or we can take no further action with respect thereto.

Well, that is accurate, but as of that time he has an undesirable discharge, not a clemency discharge. Only if he received from the Board zero alternate service would he get a clemency discharge at that point. If he received zero alternate service, he would not have to do the alternate service to get the clemency discharge.

Mr. DRINAN. Would the gentleman yield for a moment?

Mr. KASTENMEIER. Yes, I yield.

Mr. DRINAN. Mr. Hoffmann, could you tell us how many people have accepted the absolution, as you call it, and then have failed to do the alternative service, and then they can no longer be prosecuted for the crime of desertion but they do not go on and get the clemency discharge?

Mr. HOFFMANN. As of the present, they have 30 days or so to report to the Selective Service.

[The following information was furnished for the record:]

According to the Selective Service System, as of April 21, 1975, there had been 4432 enrolled of the 5508 who had completed processing. It also appeared that 859 of these had not pursued the alternative service job or were not available after enrolling. The numbers will continue to change, however, as individuals initiate participation or drop out of the program.

Mr. DRINAN. Well what are they told in Indiana? Because I have read the papers and from my information, there is a major conflict that some people say they can be prosecuted—the Defense Department—I do not know what the Defense Department says, but does anybody tell them very clearly at the fort in Indiana that if they fail to carry out their alternative service they cannot be prosecuted?

Mr. HOFFMANN. The law is explained to them, and I might elaborate just a little bit since I have been quoted on both sides of the controversy to which you refer.

A prosecution is possible under Article 83 of the Uniform Code of Military Justice for what amounts to fraudulent procurement of a discharge. In other words, for stating facts or stating requirements qualifying for a discharge when those facts or qualifications are not there.

Now as you can see, it depends upon the state of mind of the individual at the time he makes the pledge to do the alternate service. So that while it is technically possible, and we have continuing jurisdiction over the individual—notwithstanding the Toth case—to prosecute him for fraudulent procurement, we could only do so if we could prove his state of mind at the time he signed the case.

Now when the controversy came up, there was an individual in Sweden I believe, who had announced that he was going to come back and test the program. He stated publicly he had no intention of performing the alternate service, and he was going to come back and take the pledge anyway. And this was what sparked the controversy at the time.

Our position is that we have been very candid with the individuals at Camp Atterbury and at Fort Ben Harrison about this; that they can technically be prosecuted, but unless we have the facts, we are not, and obviously could not do so.

Mr. DRINAN. But do you tell them, or intimate to them, that if they do not fulfill the alternate service, even though you cannot prosecute them, this will be held against them and that they probably will never get an upgrading of their discharge.

Mr. HOFFMANN. Nothing such as that is told to them that I am aware of. They are told their undesirable discharge will not be changed to a clemency discharge.

Mr. DRINAN. I yield back, Mr. Chairman.

Mr. KASTENMEIER. I have just one or two other questions.

As I recall, for a clemency application process, a loyalty oath is required of the applicant. And, in addition, language appears therein calling for a reaffirmation of allegience and the pledge to do alternate service and recognizing that "my obligations as a citizen remain unfulfilled, I am ready to serve at whatever alternate service my country may proscribe for me."

I assume for many that is acceptable. However, why are these assertions necessary in terms of the processing of all these applicants?

Mr. HOFFMANN. The rationale behind the inclusion of the oath to which you have referred—we have avoided calling them loyalty oaths in the pejorative sense that that term is sometimes used, looking back at previous eras in American history—is this. The individual, were he drafted or did he volunteer, took an oath, and he swore to uphold the Constitution of the United States against its enemies, foreign and domestic, to bear faith and allegience to the same, and to obey the orders of the President of the United States and other officers and authorities appointed over him, according to the Uniform Code of Military Justice. So the rationale was that in order to mend what was the breaking of his prior oath, this should be inserted into the program.

Mr. KASTENMEIER. I do not know whether it is your experience, maybe it is not, that there are a number of applicants—particularly those

who were absent for reasons of conscience—that resent such language. On the basis, I assume, to state their position, that they did what they thought was appropriate, and that what they were asked to do was not in the best interests of the country.

I think there are some of those who are war resisters, the 15 percent of the applicants that you refer to, who would resent this, feeling morally they did no wrong. And indeed, with such language, it calls for a recantation that they would find it very bitter to accept.

Do you find any sort of resistance along that line to this sort of thing?

Mr. HOFFMANN. Certainly not widespread resistance.

Our feeling was that this was a very straightforward oath, and it involved—it had none of the pejorative sort of context that would call forth these sorts of emotions. To the individual who felt he had done no wrong, he would have no objection to swearing an oath of allegience to the United States.

Mr. KASTENMEIER. Am I informed reliably that the Joint Alternate Service Board consists only of field grade career officers?

Mr. HOFFMANN. That is correct.

Mr. KASTENMEIER. Why is that?

Just for my own information, why would not company grade, or generals and admirals, or indeed, enlisted personnel, appropriately constitute such a Board?

Mr. HOFFMANN. Well, it was patterned on the delegation of the general court-martial authority as well as the—and I think this generalization is accurate—that invariably, military individuals who review the character of discharges and that sort of thing are field grade officers.

Now, of course, that is for experience, background, and breadth, as well as fitting in with the usual career patterns of those individuals who sit on those Boards.

Mr. KASTENMEIER. Mr. Drinan has one more question.

Mr. DRINAN. If I may, Mr. Chairman, one more question, in that Mr. Goodell, this morning said that over half of the applicants never completed high school and that they are not really articulate.

Now I wonder, in view of that, how the program tried to make certain that other defenses—other than clemency—were not present. For example, were these people of such limited educational background that they never should have been admitted in the original instance?

How diligent were the people at Fort Harrison to ferret out an event, so to speak, like that for someone who comes there looking for a clemency?

Mr. HOFFMANN. Very diligent. Very diligent.

Mr. DRINAN. Well, how often did it happen?

Mr. HOFFMANN. Successful defenses, if it be termed that, were ferreted out in 46 cases. There were, I know, a number of such cases raised.

Now again, I would point out sir, that these individuals who counseled the returning military members were lawyers, and this individual was their client, and there was no less interest on the part of those lawyers in discharging their responsibilities as lawyers than there would have been, in my judgment, wherever they were procured.

Mr. DRINAN. Well, on a hardship deferment, can they second-judge the Draft Board?

I mean, how do they go about this?

Mr. HOFFMANN. On questions of deferment, again, the opportunity exists following induction, or enlistment, to procure a hardship discharge, and there were several of those. There were a number that were reviewed and a number that were successfully prosecuted by the attorneys there at Camp Atterbury.

Mr. DRINAN. When will a final report with statistics—hard information—be coming out about this program?

Mr. HOFFMANN. As to that information, that is available, the specific question that you asked. And we will be happy to have any more that do not appear that you care to submit to us. Where the information is available, we can have it here in 3 or 4 days.

With respect to the question in terms of a final wrapup, that may take, I would say, at least 30 days. Probably mid-June, since the last individuals left the program last weekend. But we will supply that to the committee.

Mr. DRINAN. One last question, Mr. Hoffmann.

Is it possible that you people have a list of all of the people outstanding, and the persons in jeopardy of military prosecution under articles 85, 86, and 87, so that persons not on that list know that they are not in jeopardy and they need not apply for clemency?

And can that list be made available to the various agencies that are counseling these military deserters?

Mr. HOFFMANN. I can look into that and see if those can be made available within the Government. We have been asked before to publish the list, and we have declined to do so.

Mr. DRINAN. Why do you not?

Mr. HOFFMANN. Based on the privacy of the individuals involved in terms of publishing an inclusive list of the 10,000.

Mr. DRINAN. Have they been indicted or not?

Mr. HOFFMANN. No, indictment is a civilian term. These individuals have, however, been charged with military offenses of absenteeism.

Mr. DRINAN. Thank you.

Mr. KASTENMEIER. On behalf of the committee, I would like to thank you, Mr. Hoffmann and Admiral Finneran, for your contribution to the committee today. And in due course, if you can make the additional requests available to the committee, and if in the course of our deliberations we should require your further comments on legislation, or on any other aspect of this program, we will be in touch with you.

Thank you very much.

Mr. HOFFMANN. Mr. Chairman, thank you.

Mr. KASTENMEIER. The Chair recognizes that Mr. Hoffmann and Admiral Finneran have other responsibilities because of urgent matters today, and we desire to express to our next witness our thanks for his deferring his appearance so that the Department of Defense could be accommodated.

Now I would like to greet the Deputy Assistant Attorney General, Kevin T. Maroney, as our next witness.

Mr. Maroney, you have a relatively short statement. Would you care to proceed from it and identify your colleagues for the committee. We would appreciate it.

PREPARED STATEMENT OF KEVIN T. MARONEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and members of the Subcommittee, I am pleased to appear today to testify concerning the Department's views on four bills which have been introduced in the Congress dealing with the subject of amnesty for Vietnam-era draft resisters, as well as to discuss generally our experience in administering the Presidential Clemency Program in the cases of unconvicted draft law violators.

THE AUTHORITY OF CONGRESS TO ENACT STATUTES GRANTING AMNESTIES

It is not my intention at this time to dwell extensively on the four proposals before the Subcommittee for the reason that the Department's position with respect to the concept of Congress legislating amnesty, as expressed before this Subcommittee by Deputy Assistant Attorney General Leon Ulman in March, 1974, is essentially unchanged. As you may recall during Mr. Ulman's appearance last year, he expressed the view that although the power of Congress to legislate amnesty was an issue that was laden with serious constitutional difficulties, our opposition to the bills under consideration was based specifically on the constitutional impediments found in the proposals themselves.

With respect to the four bills presently being considered by the Subcommittee, it is the Department's view that any possible good that Congress may hope to achieve by enacting any one of these proposals is far outweighed by the constitutional difficulty underlying a concept that Congress may legislate amnesty.

With respect to the specific proposals, the Department is strongly opposed to the enactment of H.R. 1229 and 353, which are almost identical in content to H.R. 236 and 3100 introduced during the 93rd Congress. Our opposition to these bills is grounded not only on their questionable constitutionality, but also because they would represent unjustifiably that the national conscience was now disposed to grant total forgiveness not only to those who refused to serve during the Vietnam era, without regard to the sacrifices of those who did, but also these proposals would abrogate basic individual and property rights of innocent persons who were injured or killed by the perpetrators of indiscriminate acts of violence as long as their conduct could be justified on "deeply held" moral or ethical beliefs against the Vietnam war. Thus, these proposals might even exonerate those terrorist bombers who, for example, in 1970 bombed the Mathematics Research Center at the University of Wisconsin and killed an innocent teaching fellow working in the building, or the defendant, presently a fugitive, who was indicted in the District of Idaho for fire bombing and destroying 29 military vehicles.

Although it may be claimed that these proposals are not so broad, I respectfully call the attention of the Subcommittee to Section 6 of each bill. Also, while providing in Section 3 that amnesty would restore all civil, political, citizenship and property rights to the violator, at the same time subsection 5 would relieve these violators from civil liability for the personal injury or property damage resulting from their offenses of violence. Such a provision would seem to be clearly unfair to the victims of such acts of terrorism.

Further, it is submitted that the proviso in Section 6 that a grant of amnesty would extend to violations of state and local law would violate the Tenth Amendment. As stated in the case of *In Re Bocchiaro*, 49 F. Supp. 37 (D.C. W.D. N.Y.

1953) "where the crime charged was not an offense against the United States, the President has not the power of pardon." In my opinion, neither does the Congress.

Although H.R. 2230 proposes general amnesty for unconvicted violators of the Draft Act, there is implicit both in its provisions and terminology, a recognition that Congress constitutionally cannot grant amnesty. Thus, in attempting to obviate this problem, the bill characterizes a portion of the program as immunity, but with regard to convicted offenders includes a "sense of Congress" provision, leaving the pardoning power to the President. H.R. 2852 merely establishes an Amnesty Commission for a protracted period with powers not unlike those of the existing Presidential Clemency Board established by President Ford. The bill neither proposes nor suggests the form of clemency to be granted in any individual case, but leaves such matters to the President, who, in making his decision, may rely on its recommendations. But, unlike the President's Clemency Program which accords the opportunity to apply for clemency to any applicant, regardless of the reason for the offense, Section 4(b) of this bill restricts its scope only to those whose offenses were based on their dissent from United States policy in Vietnam.

Although the Department opposes the enactment of H.R. 2230 and 2852, our opposition should not be misconstrued by the Subcommittee. Putting aside the difficult concept of congressionally legislated amnesty, found in H.R. 2230, most of the ends proposed in this bill, as well as in H.R. 2852, have been achieved already during the 29 weeks of President Ford's Clemency Program. Thus, all unconvicted draft evaders have been given an opportunity to come out of hiding, free from fear of arrest, to execute agreements for alternate service with the assurance that upon completion of the service they can look forward to a future, uncomplicated by the stigma of a felony conviction. Six hundred and eighty out of about 4,400 eligibles under the Program have chosen to accept that opportunity. On the other hand, those individuals whose convictions have become final have been offered the opportunity to apply for a Presidential Pardon through the auspices of the Presidential Clemency Board. Individuals in this latter category who were incarcerated for draft law violations have been furloughed from prison. Moreover, clemency has been extended not only to non or late registrants or individuals who evaded or refused induction as proposed in H.R. 2230, but to those who failed or refused to perform alternate civilian work, submit to physical examinations, or keep their local boards advised of their whereabouts or change in circumstances.

ADMINISTRATION OF THE PRESIDENT'S CLEMENCY PROGRAM BY THE DEPARTMENT OF JUSTICE

With respect to the results of the recently expired "197-Days" period of clemency, there have been 680 agreements for clemency executed with unconvicted draft law violators. However, it is believed that this number ultimately will range in the neighborhood of 700 when those individuals who have been prevented from doing so earlier report to the various United States Attorneys' offices. In this latter category are those who prior to, or on March 31, 1975, contacted the United States Attorney, the Selective Service System or an overseas embassy and expressed their desire to seek clemency but were precluded from doing so earlier due to unusual circumstances. For the convenience of the Subcommittee, I have attached to my prepared statement a current listing of the number of enrollees in each judicial district who have taken advantage of clemency, along with the respective periods of alternate service.

As the members of the Subcommittee undoubtedly know, the Attorney General was charged by President Ford with administering the clemency program solely with respect to individuals who were indicted or under investigation for violations of the Draft Act during the Vietnam era. On September 16, 1974, the date of the President's Proclamation, there were estimated to be 6,300 such individuals

of whom 4,190 were indicted. However, these numbers were substantially reduced as a result of the Attorney General's order of November 18, 1974, which directed United States Attorneys to undertake a review of all unconvicted draft evaders files, with the authority to dismiss or decline prosecution in those cases where intervening case law and loss or destruction of evidence precluded successful prosecution. There were approximately 1,700 cases affected by this order. Thereafter, on January 24, 1975, as the Chairman may recall, the Department made available to both him and the Chairman of the Senate Subcommittee on Administrative Practice and Procedure a list of the names of approximately 4,500 individuals who were believed eligible for clemency. Moreover, with respect to this list, the Attorney General certified its finality except as to those individuals who are still liable for Vietnam-era registration offenses. It should be noted that since the issuance of this list, ongoing investigations and reviews of case files by United States Attorneys have resulted in further dismissals and declinations, particularly with regards to those individuals whose names were listed as being under investigation for registration offenses.

With respect to our experience in administering the clemency program, every effort has been exerted by both the Department and United States Attorneys to be fair and flexible. Thus, individuals who may have been located outside the country when the President announced the program were given a 15-day opportunity to reenter and report to United States Attorneys without fear of arrest. Moreover, upon reporting to the United States Attorneys, no prospective enrollee was expected to execute an agreement immediately. On the contrary, the usual procedure was to bring the individual before a United States Magistrate and have him released on his own recognizance with the understanding that he would return at a later date, accompanied by counsel, to execute an agreement. Also, in those instances where the individual was without financial resources, the United States Attorney assisted in making arrangements for legal representation.

As a further demonstration of flexibility, not every prospective enrollee has been required to execute an agreement in the judicial district where he was charged. In those cases where compelling reasons were evident, such as an ensuing family or financial hardship, exceptions were made and individuals permitted to sign agreements in other geographical areas. Likewise, with respect to those individuals who were pursuing educational endeavors either in or outside the country, arrangements were made permitting them to execute agreements with the understanding that the actual performance of work would be delayed, pending the completion of their studies. Thus, there are some individuals whose work will not commence until September of this year. In other cases, we have permitted enrollees who have begun work to return to Canada or elsewhere for short periods of time to take care of personal problems which require their presence.

CONCLUSION

In sum, Mr. Chairman, it is believed that the Department of Justice has administered the President's Clemency Program for earned reentry, with respect to Vietnam-era unconvicted Draft Law violators, in a fair, flexible, and effective manner.

	Total number of cases	Number of months alternate service assigned																							
		24	23	22	21	20	19	18	17	16	15	14	13	12	11	10	9	8	7	6	5	4	3	2	1
Alabama:																									
North	3	1						1															1		
Middle	0																								
South	5	5																							
Alaska	0																								
Arizona	13	6									2			2			1			2					
Arkansas:																									
East	3	3																							
West	1							1																	
California:																									
North	25	23						1						1											
East	7	6				1																			
Central	95	22	1	7	1	24	2	17		9	1	5		2	1		2						1		
South	8	3															4			1					
Canal Zone	0																								
Colorado	7	5		1							1														
Connecticut	16	11			1	1				3															
Delaware	1																			1					
District of Columbia	1	1																							
Florida:																									
North	3	3																							
Middle	11	6	1	3				1																	
South	29	29																							
Georgia:																									
North	12	12																							
Middle	2	1												1											
South	1													1											
Guam	0																								
Hawaii	4	2										2													
Idaho	1	1																							
Illinois:																									
North	9	3				2		1		1		1		1											
East	1					1																			
South	0																								
Indiana:																									
North	1										1														
South	0																								

Iowa:																									
North	0																								
South	3	1						1				1													
Kansas	0																								
Kentucky:																									
East	2	2																							
West	1	1																							
Louisiana:																									
East	2																			2					
Middle	0																								
West	1	1																							
Maine	0																								
Maryland	5	2				1		1								1									
Massachusetts	52	13				4	1	12			6			10			4				1	1			
Michigan:																									
East	21	6				2		6		3	1	2		1											
West	9	8						1																	
Minnesota	13	1		1		1		1		2		2		1		1	1			2					
Mississippi:																									
North	3	2						1																	
South	2	2																							
Missouri:																									
East	4			1									1	2											
West	4	1	2		1																				
Montana	1				1																				
Nebraska	4	2				2																			
Nevada	6	5						1																	
New Hampshire	0																								
New Jersey	28	10				4		11						3											
New Mexico	5	1				1		1	1					1											
New York:																									
North	2	2																							
South	83	83																							
East	34	2						4			3			11		1		1		6			3		
West	30	8				8		3		1	1	1		2		1		3		1				1	
North Carolina:																									
East	3	1								1	1														
North	4	4																							
West	4	3			1																				
North Dakota	2	1						1																	
Ohio:																									3
North	10	6		1				3																	
South	10	3				4	1	1	1																
Oklahoma:																									
North	2	1						1																	
East	0																								
West	1	1																							

	Total number of cases	Number of months alternate service assigned																						
		24	23	22	21	20	19	18	17	16	15	14	13	12	11	10	9	8	7	6	5	4	3	2	1
Oregon		2						2												2					
Pennsylvania:																									
East	2							2																	
Middle	3	3																							
West	14	10				3		1																	
Puerto Rico	4	4																							
Rhode Island	0																								
South Carolina	1					1																			
South Dakota	0																								
Tennessee:																									
East	1	1																							
Middle	0																								
West	0																								
Texas:																									
North	2	2																							
South	3	1				1		1																	
East	1	1																							
West	3	1						2																	
Utah	1	1																							
Vermont	1																				1				
Virgin Islands	0																								
Virginia:																									
East	8	1						3		1	2	1													
West	2	1																			1				
Washington:																									
East	5							2			1	2													
West	4	4																							
West Virginia:																									
North	2	2																							
South	1						1																		
Wisconsin																									
East	3							1			1														
West	4									1		2		1						1					
Wyoming	0																								
Totals	680	350	4	14	5	61	5	84	2	22	21	17	3	40	1	4	12	4	0	20	1	1	5	1	3

TESTIMONY OF KEVIN T. MARONEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY ROBERT W. VAYDA, STAFF ATTORNEY, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE; AND DAVID W. BUSHONG, STAFF ATTORNEY, OFFICE OF LEGISLATIVE AFFAIRS

Mr. MARONEY. Thank you, Mr. Chairman.

Mr. Chairman and Congressman Drinan. I am pleased to appear today to testify concerning the Department's views on four bills which have been introduced in the Congress dealing with the subject of amnesty for Vietnam-era draft resisters, as well as to discuss generally our experience in administering the Presidential clemency program in cases of unconvicted draft law violators.

I am accompanied this afternoon on my right by Mr. Robert W. Vayda, staff attorney in the Criminal Division of the Department, and on my left by Mr. David Bushong, a staff attorney in the Department's Office of Legislative Affairs.

I will first take up the question of the authority of Congress to enact statutes granting amnesties.

It is not my intention at this time to dwell extensively on the four proposals before the subcommittee for the reason that the Department's position with respect to the concept of Congress legislating amnesty, as expressed before this subcommittee by Deputy Assistant Attorney General Leon Ulman in March 1974, is essentially unchanged.

As you may recall during Mr. Ulman's appearance last year, he expressed the view that although the power of Congress to legislate amnesty was an issue that was laden with serious constitutional difficulties, our opposition to the bills under consideration was based specifically on the constitutional impediments found in the proposals themselves.

I have with me a copy of Mr. Ulman's statement last year, and I would like to submit it for the record if it would be helpful to the committee.

Mr. KASTENMEIER. The committee will receive it. Of course, Mr. Ulman's statement is already in our hearings published last year, and we can later determine whether it is necessary to republish it in this hearing document.

Mr. MARONEY. Very well, sir. I just merely make reference to it, because I would like to incorporate it by reference as part of this statement.

Mr. KASTENMEIER. Of course.

Mr. MARONEY. With respect to the four bills presently being considered by the subcommittee, it is the Department's view that any possible good that Congress may hope to achieve by enacting any one of these proposals is far outweighed by the constitutional difficulty underlying a concept that Congress may legislate amnesty.

With respect to the specific proposals, the Department is strongly opposed to the enactment of H.R. 1229 and 353, which are almost identical in content to H.R. 236 and 3100 introduced during the 93d Congress. Our opposition to these bills is grounded, not only on their questionable constitutionality, but also because they would represent unjustifiably that the national conscience was now disposed to grant

total forgiveness, not only to those who refused to serve during the Vietnam era, without regard to the sacrifices of those who did, but also these proposals would abrogate basic individual and property rights of innocent persons who were injured or killed by the perpetrators of indiscriminate acts of violence as long as their conduct could be justified on deeply held moral or ethical beliefs against the Vietnam war. Thus, these proposals might even exonerate those terrorist bombers who, for example, in 1970 bombed the Mathematics Research Center at the University of Wisconsin and killed an innocent teaching fellow working in the building, or the defendant, presently a fugitive, who was indicted in the District of Idaho for fire bombing and totally destroying 29 military vehicles.

Although it may be claimed that these proposals are not so broad, I respectfully call the attention of the subcommittee to section 6 of each bill. Also, while providing in section 3 that amnesty would restore all civil, political, citizenship, and property rights to the violator, at the same time subsection 5 would relieve these violators from civil liability for the personal injury or property damage resulting from their offenses of violence. Such a provision would seem to be clearly unfair to the victims of such acts of terrorism.

Further, it is submitted that the proviso in section 6 that a grant of amnesty would extend to violations of State and local law would violate the 10th amendment. As stated in the case of *In Re Bocchiaro*, "where the crime charged was not an offense against the United States, the President has not the power of pardon." In my opinion, neither does the Congress.

Although H.R. 2230 proposes general amnesty for unconvicted violators of the Draft Act, there is implicit, both in its provisions and terminology, a recognition that Congress constitutionally cannot grant amnesty. Thus, in attempting to obviate this problem, the bill characterizes a portion of the program as immunity, but with regard to convicted offenders includes a sense of Congress provision, leaving the pardoning power to the President.

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Although the Department opposes the enactment of H.R. 2230 and 2852, our opposition should not be misconstrued by the subcommittee. Putting aside the difficult concept of congressionally legislated amnesty, found in H.R. 2230, most of the ends proposed in this bill, as well as in H.R. 2852, have been achieved already during the 29 weeks of President Ford's clemency program. Thus, all unconvicted draft evaders have been given an opportunity to come out of hiding, free from fear of arrest, to execute agreements for alternate service with the assurance that, upon completion of the service, they can look forward to a future uncomplicated by the stigma of a felony

conviction; 680 out of about 4,400 eligibles under the program have chosen to accept that opportunity.

On the other hand, those individuals whose convictions have become final have been offered the opportunity to apply for a Presidential pardon through the auspices of the Presidential Clemency Board. Individuals in this latter category who were incarcerated for draft law violations have been furloughed from prison. Moreover, clemency has been extended, not only to nonregistrants or late registrants or individuals who evaded or refused induction as proposed in H.R. 2230, but to those who failed or refused to perform alternate civilian work, submit to physical examinations, or keep their local boards advised of their whereabouts or change in circumstances.

Next, to move to the question of the administration of the President's clemency program by the Department of Justice.

With respect to the results of the recently expired "197 days" period of clemency, there have been 680 agreements for clemency executed with unconvicted draft law violators. As to this morning, that figure is 686. However, it is believed that this number ultimately will range in the neighborhood of 700 when those individuals, who have been prevented from doing so earlier, report to the various U.S. attorneys' offices.

In this latter category are those who prior to or on March 31, 1975, contacted the U.S. attorney, the Selective Service System, or an overseas embassy and expressed their desire to seek clemency but were precluded from doing so earlier due to unusual circumstances. For the convenience of the subcommittee, I have attached to my prepared statement a current listing of the number of enrollees in each judicial district who have taken advantage of clemency, along with the respective periods of alternate service.

As the members of the subcommitte undoubtedly know, the Attorney General was charged by President Ford with administering the clemency program solely with respect to individuals who were indicted or under investigation for violations of the Draft Act during the Vietnam era. On September 16, 1974, the date of the President's proclamation, there were estimated to be 6,300 such individuals of whom 4,190 were indicted. However, these numbers were substantially reduced as a result of the Attorney General's order of November 18, 1974, which directed U.S. attorneys to undertake a review of all unconvicted draft evaders' files, with the authority to dismiss or decline prosecution in those cases where intervening case law and loss or destruction of evidence precluded successful prosecution. There were approximately 1,700 cases affected by this order.

Thereafter, on January 24, 1975, as the chairman may recall, the Department made available to both him and the chairman of the Senate Subcommittee on Administrative Practice and Procedure, a list of the names of approximately 4,500 individuals who were believed eligible for clemency. Moreover, with respect to this list, the Attorney General certified its finality except as to those individuals who are still liable for Vietnam era registration offenses.

It should be noted that since the issuance of this list, ongoing investigations and reviews of case files by U.S. attorneys have resulted in still further dismissals and declinations, particularly with regards to those individuals whose names were listed as being under investigation for registration offenses.

With respect to our experience in administering the clemency program, every effort has been exerted by both the Department and U.S. attorneys to be fair and flexible. Thus, individuals who may have been located outside the country when the President announced the program were given a 15-day opportunity to reenter and report to U.S. attorneys without fear of arrest. Moreover, upon reporting to the U.S. attorneys, no prospective enrollee was expected to execute an agreement immediately.

On the contrary, the usual procedure was to bring the individual before a U.S. magistrate and have him released on his own recognizance with the understanding that he would return at a later date, accompanied by counsel, to execute an agreement.

Also, in those instances, where the individual was without financial resources, the U.S. attorney assisted in making arrangements for legal representation.

As a further demonstration of flexibility, not every prospective enrollee has been required to execute an agrement in the judicial district where he was charged. In those cases where compelling reasons were evident, such as an ensuing family or financial hardship, exceptions were made and individuals were permitted to sign agreements in other geographical areas.

Likewise, with respect to those individuals who were pursuing educational endeavors, either in or outside the country, arrangements were made permitting them to execute agreements with the understanding that the actual performance of work would be delayed, pending the completion of their studies. Thus, there are some individuals whose work will not commence until September of this year.

In other cases, we have permitted enrollees who have begun work to return to Canada or elsewhere for short periods of time to take care of personal problems which require their presence.

In sum, Mr. Chairman, it is believed that the Department of Justice has administered the President's clemency program for earned reentry, with respect to Vietnam era unconvicted draft law violators, in a fair, flexible, and effective manner.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Maroney.

I will not cover old ground respecting Mr. Ulman's thesis on whether or not Congress has concurrent clemency authority or jurisdiction, except to say I think we all agree that the Congress could not limit the affirmative exercise of clemency ordinarily on the part of a President. Whether it has the ability to legislatively forward a program which constituted clemency or amnesty is, I concede, still an unresolved question, and I appreciate that the Justice Department's position is in the negative.

There are, however, two questions which I will put to you which were not present a year ago, when Mr. Ulman was here. One is articulated by the chairman of the Presidential Clemency Board, who stated that he must by all means conclude his work on September 15 of this year, because indeed the President had no authority to proceed beyond the course of 1 year. And so, all efforts on the part of the Board were to complete its work by that time, which was an absolute deadline; which seems to be at some odds with the doctrine that the President is without any restraint whatsoever in the exercise of the clem-

ency program. Indeed, I was somewhat surprised to hear him say that. Does the Justice Department have a position on that, whether or not Mr. Goodell can operate after 1 year's expiration of the Executive order, in terms of the exercise of his Board and the clemency function?

Mr. MARONEY. I do not believe, at least to my knowledge—I do not believe we have been asked to look at that question of financing. I was present at a meeting the other day at which Senator Goodell indicated that they were under that constriction. But I simply took it as a fact that he was satisfied with, and he did not ask for any advice, or for the Department of Justice to look at the legal question that may be involved in that interpretation of expenditures.

Mr. KASTENMEIER. I am rather constrained to advise Mr. Goodell and yourself to consider that question; because, very candidly, from the fact that he has been able to dispose of some 65 cases out of 18,000 to date, well over 6 months since the order, leads one to believe that he could not possibly dispose, at least very effectively or fairly, the balance of those 18,000 cases in the next 5½ months, unless something extraordinary takes place. So that question does go to whether the President can keep this program going, whether Congress grants him funds or not.

A second question, somewhat related to that, is—of course, I understand your position on these several pieces of legislation you cited. How about, however, the legislation put forward by Senator Javits and Senator Nelson, which is in effect an extension of the President's clemency program in time to December 31, 1976? And, while there may be some modifications, they are not limitations or restrictions on the program—I guess would have to be read as legislative confirmation of the program, extension of it. Is that, in your view, a constitutionally appropriate thing for Congress to legislate on?

Mr. MARONEY. Well, I did not understand that bill was part of the subject matter of the hearings today.

Mr. KASTENMEIER. As a matter of fact, both Senator Nelson and Senator Javits will appear before the committee this week. It is—and I am not contesting you on the question of whether you are aware that we would be considering it, but—we are only having three congressional witnesses: Senator Hart on one of the bills you did address yourself to, or the House component thereof, and the two Senate bills. We are doing this rather prospectively, looking at what I think are possibly certain real options, and this is one of them.

Mr. MARONEY. Well, if it is a question of funding, let us say, or a staff to handle a program that has been ordered by the President, by Presidential proclamation, of course I do not see any constitutional impediment to Congress providing that funding. I mean, it seems to me, it does so now with respect to the pardon attorney in the Department of Justice, and obviously the funding is necessary to get any activity of government done.

Mr. KASTENMEIER. The bill is not limited to funding. The bill is an extension of the President's program, and mandates certain other changes which probably are not a limitation of the program, but are an extension of it. In a nutshell, that particular bill recognizes the Presidential Clemency Board. It reorganizes it to the following extent: It transfers all responsibilities now exercised under President Ford's clemency program by the Department of Justice or the Department

of Defense to the Clemency Board. It extends the program to December 31, 1976, and it grants a temporary immunity to certain exiles, whether or not participating in these programs. Those are the essential ingredients of it.

Mr. MARONEY. Well, the legal distinction I would draw on that kind of approach—that is, that if Congress, through legislation, mandates a program for the granting of a pardon or other form of clemency, it would be unconstitutional. If Congress were to do as I believe was done during President Lincoln's administration, pass a sense-of-the-Congress resolution requesting the President to do that, or suggesting the continuation of such a program, obviously I think that is within the constitutional power of the Congress to do so, and to fund whatever might be necessary. But I do not think that a bill requiring the President to continue a program which has been stopped, or which would be in existence at the time of the legislation in the area of clemency would be constitutional.

Mr. KASTENMEIER. In other words, you read it as a wholly personal thing, as with a king; that the President does this arbitrarily, and the limitation of whatever arbitrariness comes into effect is the President's own limitation. And furthermore, I think you suggest that the Congress really has no role. I would suggest to you, if you are following this closely, that we do not even have a limitation in funding role under your formulation, because I think it is rather idle to either provide funds or not to provide funds if there is a constitutional right of the President. I rather think that the Justice Department point of view is quite narrow on this, and I would take strong exception myself.

I would yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you very much, Mr. Chairman.

Has there been any high-level discussion of this, Mr. Maroney, at the Department of Justice?

Mr. MARONEY. Of what, Congressman?

Mr. DRINAN. On this question of clemency, you purport that this represents the position of the Department of Justice, and you say that it is essentially unchanged from a year ago. We had difficulty with the testimony of Mr. Ulman, but a few Attorneys General have come and gone since that time. Has any discussion taken place? I mean, did you discuss this with anybody before you gave this testimony?

Mr. MARONEY. I raised the legal problems involved at a staff conference of the Attorney General last week. The Attorney General, as a result of that discussion, directed Solicitor General Bork to look into the question. He did, and he and I, after he looked into it, had a discussion concerning the legal propositions involved. And the way we come out, based on the expressed constitutional provision in article 2, granting the power of pardon to the President, the lack of any precedent of Congress ever having legislated general amnesty, is that the President has the sole responsibility in the area of pardon.

Mr. DRINAN. Well, we heard that a year ago from Mr. Ulman, and I reviewed it. I said at that time, and I say again, that that is disputed by very serious constitutional scholars, and Mr. Ulman could not name a constitutional expert who said that. Can you?

Mr. MARONEY. Well, Mr. Ulman cites cases for his proposition.

Mr. DRINAN. I said constitutional experts. Do you know of one constitutional expert in the country today who would agree with that proposition? He could not name one last year, and I am asking you—someone outside the Department of Justice, someone like Paul Freund?

Mr. MARONEY. I do not know the position that he holds.

Mr. DRINAN. Well, he does hold that, and I think you would have to buttress your case. And I agree with the chairman that you are being too arbitrary about that.

Mr. MARONEY. Well, article 2 says, the President has the power of pardon.

Mr. DRINAN. I read the Constitution. I am just asking for people who have written about this, and there is a whole body of literature, and you never seem to go to what the experts are saying.

Mr. MARONEY. Well, I am using Supreme Court decisions, not writers of law review articles. I think the Supreme Court is a better authority than a law review writer.

Mr. DRINAN. Well, I would have to agree with you on that. 19,000 people had been indicted during the war years for draft violation, and only about one-third of them were convicted. The others had their cases dismissed, or they were acquitted. There are now 7,000 cases pending in draft matters. Is there any reason to think that the ratio of dismissals and acquittals would be smaller with these 7,000, and does that mean that some 4,000 or 5,000 men might be doing alternate service under the clemency program, when in fact if they went through the ordinary processes, they would have a good defense, and that they would be found not guilty?

Mr. MARONEY. Well, as I indicated in the statement last year, the Attorney General directed all U.S. attorneys to review all of their case files on pending cases, for the purpose of determining whether or not any intervening law—such as *Gutknecht*, for example—which may have come down from the Supreme Court after an indictment had been returned, precluded a prosecution. As a result of a review of 6,500-odd cases that were then pending, 1,700 were dismissed because of the determination of the U.S. attorneys that intervening case law and other circumstances present, or shown by the file, precluded a successful prosecution, which left us with a balance of about 4,400 or 4,500 cases which are now pending; and that is the sum total of all indictments, plus all investigations or complaints referred to the U.S. attorney's offices by the Selective Service Boards.

Mr. DRINAN. Have you initiated any new prosecutions since the termination of the President's proclamation 2 weeks ago, and do you intend to initiate new prosecutions of old cases?

Mr. MARONEY. Well, where we had an investigation pending, and the individual's name was put on the list of viable cases in January, I think it was; and if that individual has not signed up for the program, then we will proceed with the case to prosecution; yes.

Mr. DRINAN. Well, when the people sign up with the program, as you put it—like with the Boy Scouts, I guess—a lot depends upon the mood of the U.S. attorney on that day, or where he lives. And in south Florida, 29 out of 29 got 2 years, and in the northern district of California, 23 out of 25 got 24 months; and in New York, the southern district, 83 out of 83 got the maximum. Does anybody supervise this, and try to bring them out equity?

Mr. MARONEY. Yes; we do. We have sent out guidelines.

Mr. DRINAN. Yes; but after the fact, what are you going to do about those people that went to the wrong district, from their point of view?

Mr. MARONEY. If they think that the 24 months that they have signed up for is unreasonable under the circumstances, as compared

to other individuals similarly situated, they can go to the U.S. attorney.

Mr. DRINAN. But he is the one that has given it.

Mr. MARONEY. If there are new circumstances, or circumstances which have not been brought to his attention——

Mr. DRINAN. There are not any new circumstances. They just do not think they should get it, and they say that if I went to the northern district of New York rather than the southern district of New York, I would have got 6 months instead of 24 months.

Mr. MARONEY. I would doubt it. I would hope not.

Mr. DRINAN. Well, just look at the facts. I mean, you have given them to us.

Mr. MARONEY. In the same circumstances? I mean, how do we know they are the same circumstances?

Mr. DRINAN. Well, what are you going to do about the unusual severity of some of these people here? You can analogize, and say that some Federal judges are tough sentencers. But that does not justify a program here where there is no appeal, and the prosecutor is also the person who hands out the sentence.

Mr. MARONEY. Well, southern New York is the principal complaint you are addressing yourself to, where it is 83 out of 83. I talked to the U.S. attorney, Mr. Paul Curran, this morning on this very point. And he indicated that, as the President's proclamation indicates, 24 months is the norm; that the practice he has been following is signing them up for that period, and then they can request a reduction of the time, based on specific circumstances in their case. He says, he tells me he has not had any such requests, so I assume that none of the other 83 people who are committed to 24 months feel that they are aggrieved, or feel that they have special circumstances which would warrant a reduction.

Mr. DRINAN. Well, they never heard about the possibility, and they never heard what happens in other districts, because I never heard it until this afternoon. But suppose they do not do this 2 years of alternate service. What happens then?

Mr. MARONEY. Suppose they do not do it, due to their own fault? They would be prosecuted.

Mr. DRINAN. Everything revised? There is no statute of limitations for anything like that?

Mr. MARONEY. Well, there is a statute of limitations, but they have waived their rights to an immediate trial at the time of signing the agreement, as part of the agreement.

Mr. DRINAN. You can say here that you tried to make certain that they do that knowingly and willingly, and all that type of thing. But how many of them actually have their own attorneys? You say that the U.S. attorney makes some effort to get them an attorney, if they cannot afford an attorney?

Mr. MARONEY. Well, I think he makes more than some effort. I think considerable efforts have been made. After all, these people are all defendants in criminal cases that are pending, except the few who are only under investigation as the result of a complaint.

Mr. DRINAN. And if those cases went forward, only one-third would be convicted?

Mr. MARONEY. I do not agree with that, Congressman.

Mr. DRINAN. Well, by prior record.

Mr. MARONEY. I do not think that is the case.

Mr. DRINAN. I just cited you the statistics.

Mr. MARONEY. Well, the statistics are premised on a policy which was of long-standing duration in the Department during this entire enforcement procedure, in which any individual—this is now up to the pullout in Vietnam—any individual under indictment for draft law violation up to that time who chose at the last minute, so to speak, or after he was under indictment, to submit himself to the induction process, could do so, and his indictment would be dismissed. And that is where the figures indicate a fairly small percentage of cases that went to successful conclusions, as far as convictions are concerned. Most of them were disposed of because the individual chose to go into the service.

Mr. DRINAN. Since the termination of the draft, however, the one-third has remained constant. It is my understanding that the two-thirds were dismissed, or they got an acquittal. So I do not think that you can say that that goes back to the draft days. The draft has been gone for at least 2 years now, and the fact of the matter is that people are coming in and being asked—pressured, if you will, in a certain sense—they are being asked at least to submit to 2 years of alternate service, for which they waive all of their rights. I would wager, from what you are telling us, that more people who waive their rights this way will, in fact, do time, do the alternate service, than if they had got a lawyer and gone through the trial, and hoped for an acquittal.

Mr. MARONEY. Well, let me first indicate that practically all of these people, before signing an agreement, had the opportunity—not only the opportunity, but did in fact—consult their private attorney, or an attorney provided by the legal aid group.

Mr. DRINAN. Is it better or worse than plea bargaining?

Mr. MARONEY. Well, plea bargaining, of course, is not always bad, from the standpoint of the defendant.

Mr. DRINAN. I appreciate your testimony, but I wish that you would give us more facts, actually; because as Members of Congress, people come to us and ask: Should I submit to the jurisdiction of the court? Should I go forward into this clemency program? And until today, I had no idea of the disparity of the sentences, and I call it a sentence. It is involuntary that they get. What ordinarily do these people do? Do you have the facts on that? Do they work in hospitals, or what?

Mr. MARONEY. The Selective Service would have that knowledge.

Mr. DRINAN. Thank you very much.

Mr. KASTENMEIER. Counsel, do you have some questions?

Mr. LEHMAN. Mr. Maroney, you indicated that, as a result of Attorney General Saxbe's November 13, 1974, order, some 1,700 cases which had been considered eligible for prosecution were declined. I wonder if it would be possible for you to supply this subcommittee with a list, judicial district by judicial district, of those cases.

Mr. MARONEY. I am sure we can do it later, and Mr. Vayda may have a copy of the chart that has those figures on it with him. But if not—well, here it is here. It is in somewhat rough form, but we would be glad to submit it for the record. [See p. 80.]

Mr. LEHMAN. Second, during the period of the President's clemency program, were cases processed through normal criminal justice channels, or did you simply suspend the processing of all criminal cases? If an individual came to you and said, I do not want to be a part of the clemency program, a Selective Service violator——

Mr. MARONEY. We would proceed with the criminal case.

Mr. LEHMAN. Were there such cases?

Mr. MARONEY. Yes; there were a few.

Mr. LEHMAN. I wonder if you could supply us with the statistics as to how many of those cases continued to be processed; and second, what was the disposition of those cases? How many convictions were obtained, how many criminal trials initiated from those cases?

Mr. MARONEY. Well, I have here a list of five.

Mr. LEHMAN. Only five throughout the United States?

Mr. MARONEY. Five situations in which an individual who is eligible for the program came in and decided he did not want to participate, but instead wished to go forward with the defense of the criminal case. And that was done.

Now, two cases have been tried, convictions obtained, and jail sentences imposed. Three of the cases are still in a pretrial stage. They have been set for future trial. Then we had a situation a week or 10 days ago—and it may have been one of these two that was convicted—I believe it was in Texas.

Mr. LEHMAN. So there were no acquittals?

Mr. MARONEY. No acquittals that I know of. The individual in Texas chose to go to trial. He was convicted. He was given 3 years in prison by the court, and after he was remanded—and the Court of Appeals, incidentally, refused bail pending appeal—and when he was taken into——

Mr. LEHMAN. I think that answers my question with respect to——

Mr. MARONEY. But the significant part that I wanted to get across was that after he became part of the prison population, then he applied for clemency to the Clemency Board, as a result of which he was ordered furloughed by the Attorney General, released from jail, pending a decision by the Clemency Board.

Mr. LEHMAN. With respect to those individuals who came to the Department of Justice that you did not know about beforehand, somebody who thought he might have been a violator, but you did not know about him, the Prosecutive Policy Memorandum of the Attorney General dated September 16, 1974 states that:

> An individual who is neither under indictment nor investigation for an offense covered by this Directive, but who reports, as provided in section 2 of that Directive, to the U.S. attorney and admits to such an offense will be subject to prosecution unless he makes the Clemency Agreement.

Do you make any kind of an attempt to investigate these cases to determine whether, indeed, he has actually committed a violation before making him sign the clemency agreement that he, in fact, has been a violator?

Mr. MARONEY. Absolutely not.

Mr. LEHMAN. You make no investigation?

Mr. MARONEY. We do make an investigation. As a matter of fact the cases that you are referring to—and there have been a number of them—and they are normally—and I cannot think of any other situa-

tions—an individual who never registered for the draft, and he comes in now and says I should have registered in 1968 and I did not; I would like to sign up under the clemency program. In those situations the U.S. attorney sends him to the Selective Service Board. The Selective Service Board reviews the facts and, if they determine that it is an appropriate case for prosecution, they send the file over to the U.S. attorney for prosecutive opinion.

Mr. LEHMAN. OK, thank you. That answers my question. I have one further question and that relates to aliens.

The President's Executive Order 11803 eliminates from consideration for clemency individuals who would be precluded from entering the United States under title VIII, United States Code, section 1182. These are people who departed from, or remained out of, the United States to avoid or evade training or service in the Armed Serives.

Now, I assume that classified among those people are some who left the United States prior to ever being indicted, for example, for a Selective Service offense. They have left the United States; they have taken up citizenship abroad and renounced their American citizenship.

Could you explain how you make the determination as to whether an individual left the United States to avoid training or service in the Armed Forces?

Mr. MARONEY. We do not make such a determination. You are talking about expatriation.

Mr. LEHMAN. A person who left the United States, say, prior to being actually indicted for a Selective Service offense but who, in so doing, actually ended up avoiding training and service in the Armed Forces. As I understand it, they cannot come back into the country, even for a visit.

Mr. MARONEY. That is not my understanding. My understanding is that the provision of the immigration laws that I think you are referring to was held unconstitutional a number of years ago.

Mr. LEHMAN. So, such people are not excluded from coming into the United States?

Mr. MARONEY. Except that your fact situation brings in some com plicating factors. You assumed an individual who renounces his American citizenship and became a citizen of a foreign country.

Mr. LEHMAN. That is right.

Mr. MARONEY. That is different. That is a different provision of law. Now, of course, he is an alien, and under the immigration laws he is inadmissible and will be stopped at the border and given a hearing by the Immigration Service on the question as to whether he is eligible for readmission to the United States.

With respect to somebody who left under those circumstances, or even someone who was indicted and left but just went up to Canada and stayed there 3 or 4 years but did not renounce his American citizenship, or did not become a Canadian citizen, he is not inadmissible, as I understand it.

Mr. LEHMAN. But the people who did renounce American citizenship are inadmissible.

Mr. MARONEY. That is right.

Mr. LEHMAN. And, as I understand it, also, am I correct in saying that they are also ineligible for the clemency program, should they decide to change their mind and return to this country?

Mr. MARONEY. That is right. The proclamation carves them out as an exception, and that is because of the inadmissibility requirements of Congress.

Mr. LEHMAN. So if Congress would like to change that policy, you think they could do so by changing the immigration laws, rather than by any grant, say, of amnesty?

Mr. MARONEY. I am sure they could.

Mr. LEHMAN. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts has another question.

Mr. DRINAN. One last question, Mr. Maroney. What is the position of the Immigration officials? I do not think this was taken up by Mr. Lehman. What do the Immigration officials do with regard to war-resisting aliens who are not charged with violation of the draft law?

Mr. MARONEY. When they come back to the United States?

Mr. DRINAN. Yes.

Mr. MARONEY. They admit them, I assume. War-resister aliens?

Mr. DRINAN. Yes.

Mr. MARONEY. I really do not know. I suppose they admit him if he comes within the certain classes that are admissible.

Mr. DRINAN. Well, it is my understanding that Immigration is not admitting them.

Mr. MARONEY. Just on the basis that he is a war resister?

Mr. DRINAN. Yes.

Mr. MARONEY. I would doubt it, Congressman.

Mr. DRINAN. Well I have information. I would be interested if you would arrange for the Immigration and Naturalization Service to furnish for the record a full statement how they handle this matter.

Mr. MARONEY. I will discuss it with the General Counsel.

Mr. DRINAN. Thank you.

Mr. MARONEY. Might I also, if you would just give me one minute, on the constitutional issue which we discussed earlier, and the chairman, I think, indicated we had a wholly negative attitude, and actually I hope it was not, and it is not a dogmatic attitude either; but with respect to pardoning an individual who has been convicted, we think it is indisputably clear that such a situation comes solely within the President's powers under the Constitution. With respect to an individual who has not been convicted, I think that the legal situation is less clear, and it is so by virtue of dictum in the case of *Brown* v. *Walker*, the Supreme Court case, in which the Supreme Court indicated that some——

Mr. DRINAN. Mr. Maroney, if I may intervene on that, your guy said to Mr. Ulman, why does he say that in *Brown* v. *Walker* that is dictum. He could not give me an answer then. Why do you say that we, whoever we is, it is like the royal we, why do you say that it is dictum when very important scholars say it is not dictum?

Mr. MARONEY. It is a statement that the Court did not have to make to arrive at the decision it made.

Mr. DRINAN. Well, that is what dictum is, but does it prove it is dictum?

Mr. MARONEY. What was involved in *Brown* v. *Walker* was on immunity provision and, of course, *Brown* v. *Walker* does not involve the only statute that has immunity provisions. We have many other im-

munity provisions. We have immunities that we use now; we also have an immunity provision which Congress can use through the mechanism of going to a court to get an order requiring the testimony, but most of the immunity situations give a voice in the process to the executive branch and, of course, they are matters that are dealt with on a case-by-case basis. As to whether or not an immunity is given to a particular witness——

Mr. DRINAN. Well, I do not want to press this point too much, but many serious constitutional scholars, Professor Freeman of Cornell Law School, and many, many others, say that at least Congress has a concurrent jurisdiction on amnesty and that you people take the very doctrinaire view that we have absolutely no power, and I do not think you can justify that. I yield back to the chairman.

Mr. KASTENMEIER. Well, in any event, I think that question cannot be decided here today; nonetheless, the committee appreciates the appearance of Mr. Maroney and his help today, and this concludes today's testimony on the question of amnesty and the Presidential clemency program.

The subcommittee will resume hearings on Thursday next at 10 o'clock in the morning, I believe, in this room, at which time we will hear from Senators Nelson, Javits, and Hart, and on the following day, Friday, we will hear from a number of other individuals and organizations who are interested in this question.

Until next Thursday, the subcommittee stands adjourned.

[Whereupon, at 4:10 p.m., the subcommittee adjourned, to reconvene at 10 a.m. on Thursday, April 17, 1975.]

THE PRESIDENTIAL CLEMENCY PROGRAM

THURSDAY, APRIL 17, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE, OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Pattison, and Railsback.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, legislative assistant; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order this morning for the purpose of continuing our hearings on the question of amnesty, including the administration of the President's clemency program, and also the question of legislation affecting amnesty.

This morning we are very privileged to have from the Senate two old friends of many members of this committee and this body, Senator Gaylord Nelson of my home State, and Senator Jacob Javits, of the State of New York, both of whom are most welcome.

Senators, would either—Senator Nelson, would you like to proceed, and you may do so as you wish. If you have a prepared statement, or if you care to submit a statement for the record and then summarize your point of view.

[The joint prepared statement of Hon. Gaylord Nelson and Hon. Jacob Javits follows:]

JOINT STATEMENT OF HON. GAYLORD NELSON AND HON. JACOB JAVITS

The time has come for Congress to take further steps to heal the deep wounds inflicted on our nation by the long and bitter war in Vietnam. Specifically, Congress should support and extend the President's amnesty program for the thousands of young men who evaded the draft or deserted the military during the Vietnam conflict. We have therefore introduced legislation for that purpose.

The need for immediate action on this legislation is clear. Last September, President Ford took the constructive step of establishing a program to provide amnesty for thousands of young men who, for one reason or another, felt compelled to refuse the draft or desert the military during the Vietnam War. In creating that program, the President recognized, as we all should, that the interests of society are served best when its system of justice reflects a good measure of understanding and mercy. The President spoke of this national need last summer when he announced his intention to issue an amnesty program:

> All of us who served in one war or another know very well that all wars are the glory and agony of the young. In my judgment, these young Americans should have a second chance to contribute their fair share to the rebuilding of peace among ourselves and with all nations.

> So I am throwing the weight of my Presidency into the scales of justice on the side of leniency * * *.
>
> * * * I ask all Americans who ever asked for goodness and mercy in their lives, who ever sought forgiveness for their tresspass, to join in rehabilitating all the casualties of the tragic conflict of the past.

The program promulgated one month later incorporated the spirit of the President's promise. That program insured that every Vietnam draft evader or military deserter would be given a hearing to determine whether or not he should be granted clemency for his offense. The President's program also provided that, under certain circumstances, clemency would be granted only if the offender agreed to perform some alternate public service for a period of two years or less.

Already there is enough evidence with individual cases to demonstrate the wisdom and justice of an amnesty program. The Clemency Board created by the President, for example, has reviewed a large number of cases in which clemency was necessary as a matter of simple justice. Some representative cases reviewed by the Board include the following:

One individual served valiantly with the Army in Vietnam for almost a year. He was wounded three times and was awarded three Purple Hearts, the Vietnam Service Medal, and the Bronze Star for valor. After being reassigned to the United States, his father went bankrupt because of a drinking problem and his family generally fell upon hard times. He therefore returned home without authorization from the Army to earn some money to help his parents and his seven brothers and sisters. Despite these circumstances, the individual was fined, sentenced to six months at hard labor, and given a Bad Conduct Discharge.

Another individual also served valiantly with the Army in Vietnam for a year and earned the Republic of Vietnam Campaign and Vietnam Service Medals. After his return to the United States, he requested an administrative discharge from the Army so that he could return home to help his mother, who had become extremely ill and was in desperate financial straits. When the Army refused the request for an administrative discharge, he returned home and went immediately to work. He, too, was fined and given a Bad Conduct Discharge.

Another individual was a Jehovah's Witness whose religion forbade him from participation in war. He applied for conscientious objector status, but that was denied because the application was made after he had received his induction notice. The individual reported for induction but failed to step forward and take the oath. He turned himself in and stated he would do alternate service. However, he was convicted as a draft evader and given a three and a half year sentence, of which he served almost a year.

These and many similar cases underscore the need to continue the amnesty program. No one should condone violations of the law. But respect for the law does not preclude mercy in the dispensation of punishment. Nor should it blind one to injustices in the administration of the law.

Under the most recent Executive Order, every eligible draft evader or military deserter had to apply for clemency by March 31, 1975. Today, there is no institutionalized opportunity for an eligible individual to seek the clemency he may deserve. This is unfortunate. Of the approximately 125,000 men eligible to apply for clemency, fewer than 24,000 have taken advantage of the opportunity. At this point we do not know all the reasons which may account for the unwillingness or inability of eligible individuals to apply. But we do know that the spirit of reconciliation will not be served—and will in fact be undermined—if the opportunity for those individuals to receive mercy is not restored.

Congress, however, should not expect the President alone to continue to bear the burdens of the amnesty program. Congress, after all, repeatedly voted billions of dollars of public funds—over the dissents of ourselves and others—for the Vietnam War. Congress thus assumed some responsibility for the conduct of American policies in Vietnam. Congress should now accept some responsibility for ending the divisiveness which the war created.

This bill would enable Congress to fulfill that responsibility. In essence, the bill provides for the continuation of the President's program with certain modifications. These modifications account for some problems which have been exposed by the program's implementation over the past few months.

The first problem which the bill tries to correct concerns the administration of the program. The President's program actually consists of four separate operations. The Justice Department handles all cases of draft evasion where the individual has not yet been convicted. According to the Justice Department, this involves approximately 4,400 men. The Department of Defense handles all cases

of military desertion from the Army, the Navy, the Marines, and the Air Force where the individual has not yet been discharged. The Department of Transportation independently handles all cases of military desertion from the Coast Guard where the individual has not yet been discharged. Together, the Defense and Transportation Departments estimate that there are 12,500 eligible men under their jurisdictions. Finally, the Clemency Board handles all cases where the individual has been convicted of draft evasion or already discharged from the Armed Forces. The Board estimates that 110,000 eligible men are within its jurisdiction.

The problem here is that there are different agencies which are applying different criteria to people in similar situations. Someone who was discharged from the Army for being absent without leave, for example, may receive better treatment at the hands of the Clemency Board than someone who went AWOL for similar reasons but has not yet been discharged and is therefore subject to the Defense Department's jurisdiction. Or, conversely, the Board may recommend that a military deserter do alternate service to obtain some form of clemency; the Defense Department, on the other hand, cannot require someone to do such alternate service outside the armed services since it loses jurisdiction over the individual as soon as he is discharged.

To prevent these kinds of inequitable situations, the bill would vest the Clemency Board with jurisdiction over *all* cases of draft evasion and military desertion. In this way, the same criteria and recommendations will be applied to people in similar situations. As a practical matter, this will increase the Board's workload by only 10 percent.

Another problem which the bill attempts to remedy concerns the arrest, prosecution and punishment of men who have applied for clemency. Under the President's program, a draft evader living in Canada may return to the United States and apply for clemency. After conducting its examination, the Board may recommend a period of alternate service which the individual may decline to accept because he believes it is inequitable. If the offer of clemency is rejected, the individual immediately becomes subject to arrest, prosecution, and punishment.

This is clearly unjust. An individual should not have to risk prosecution in order to apply for clemency. The bill consequently provides that an individual who rejects any clemency offer may return to any foreign country in which he may have been living before he made the application for clemency.

Another problem concerns the right of draft evaders and military deserters living abroad to visit their families. To the rich family, of course, this is not a problem; they can afford the travel costs to visit their son wherever he may be. But to the vast majority of families, the cost of their son's draft evasion or military desertion means that they may never see him again because they cannot afford the travel expenses involved. The Vietnam War has already caused enough heartache and divisiveness. We should not compound the problem by prohibiting families from seeing their son, especially when his offense may be based on moral principle or some compelling reason.

To correct this situation, the bill provides that any draft evader or military deserter living abroad shall be given a 30-day non-immigrant visa each year. The bill provides further that anyone holding such a visa will be immune from arrest, prosecution or punishment for draft evasion or military desertion.

Finally, the bill does away with all deadlines for making a clemency application. Draft evasion and military desertion during the Vietnam War often involved agonizing choices by men who ultimately felt a greater obligation to their families or their conscience than to the laws and regulations governing military service. Such a person may need considerable time to decide whether or not to apply for clemency under the President's program—not only to understand fully how the program works but also to determine whether he wants to take advantage of it.

In any event, there is no sense in making this process a race to beat the clock. This is especially so since some individual may have committed an offense ten years ago and have had a long time to consider their fate, while others may have committed an offense only two or three years ago. Accordingly, the bill provides that the Clemency Board will entertain applications until its demise on December 31, 1976; thereafter, its functions will be assumed by the Justice Department. This should not pose any administrative burden since the vast majority of eligible men who want to apply will probably do so within the year.

The bill we have offered does not pose any constitutional problems. The legislation makes clear that the President will have the sole responsibility and dis-

cretion to determine whether clemency should be granted and, if so, under what conditions. Therefore, the bill does not in any way restrict the pardon power or any power granted to the President under Article II of the Constitution.

Many decades ago, Supreme Court Justice Benjamin Cardozo wrote that "the final cause of law is the welfare of society." That observation underlies the importance of the legislation we have offered. For there is no question but that this bill, if enacted, would do much to further the welfare of our society. It would enable thousands of young men to redeem their mistakes of the past; and in giving them this chance, the bill will further the spirit of national reconciliation which the President paid tribute to in announcing the amnesty program.

In offering this bill, we recognize that there are broad disagreements among people as to the merits of that program. Senator Nelson, for example, has co-sponsored the bill offered by Senator Philip Hart to grant unconditional amnesty to all Vietnam draft evaders and military deserters. At some point in the near future the Congress is going to have to face the question of whether we should grant unconditional amnesty to the Vietnam draft evaders and military deserters. But in the meantime we should not allow thousands of young men to become the unintended victims of our disagreements. Time is running out for them. For this reason, we trust and hope that our measure will be given fair and speedy consideration.

Mr. Chairman, we would also like to insert in the Record some newspaper articles urging Congressional action on this matter.

TESTIMONY OF HON. GAYLORD NELSON, A SENATOR FROM THE STATE OF WISCONSIN, AND HON. JACOB K. JAVITS, A SENATOR FROM THE STATE OF NEW YORK, ACCOMPANIED BY LEWIS PAPER, COUNSEL TO SENATOR NELSON, AND BRIAN CONBOY, COUNSEL TO SENATOR JAVITS

Mr. NELSON. I understand the invitation, Mr. Chairman. Would you really prefer that I read the words in it, or submit it for the record?

Mr. Chairman, members of the committee, Senator Javits and I have joined in a bill which has been introduced on the Senate side, not here, so far as I know, to extend the President's amnesty program and to make some additions to it. We have a joint statement which we would ask be printed in the record as though delivered in full.

Mr. KASTENMEIER. Without objection, that will be done, although your joint statement is rather brief, I note, scarcely more than three pages.

Mr. NELSON. Well, it is 11 pages, but I think that we could probably easily summarize for the committee what it does.

We are accompanied this morning by Brian Conboy, who is counsel to Senator Javits, and Lew Paper, who is counsel on my staff.

Let me say for myself that I have also cosponsored on the Senate side Senator Hart's bill for general amnesty. I happen to think that with all the problems that can be raised about that, that we are really some day going to have to get around to general amnesty and I would wish we could do it this year, but I don't think we can. In the meantime, this bill, I think, takes some important steps that we ought to take right now.

One, it continues the President's program and consolidates them all under one board, instead of having Departments of Transportation, Justice, Army, and Clemency Board. It puts them all under the Clemency Board.

Two, it simply provides that any—it continues the program indefinitely. I don't think it should be terminated. There are all kinds of young men who took advantage of it and have had their cases disposed

of, and those who haven't yet taken advantage of it ought to have the opportunity, it seems to me, too. It makes an additional provision which Senator Javits and I think is very important and that is, it provides that anybody who would like to come and negotiate his case with the new Clemency Board may do so, and if he is not satisfied with the recommendation of the Clemency Board, he is entitled to reject it and leave without being subject to indictment for any crime allegedly committed, that is to say, if he were in Canada, he would come down, negotiate his case, go back, and under that circumstance he is allowed to come into the country. If he elects not to participate in the proceedings, he is allowed to come into the country for 30 days a year to see his family.

The equity of that is perfectly obvious. I happen to know of a case in our own State, Mr. Chairman, where the family is of substantial means, and every Thanksgiving and Christmas they fly to Canada to see their son and their daughter-in-law and their grandson because they can afford it, but how about all those poor people all over the country who can't afford it, and can't ever see their brother or sister or son, and I think that we ought to make provision for that.

That, in essence, is what the bill does, and I defer now to Senator Javits.

Mr. KASTENMEIER. Senator Javits.

Mr. JAVITS. Thank you, Mr. Chairman, and I want to thank the committee for putting us on as rapidly and expeditiously as you have.

I have joined with Senator Nelson in this bill, because I believe the time has come to liquidate the deep strains, divisions, and misery which this war created and which is certainly not enhanced in our recollection by the dread events which are taking place right now with the fall of Phnom Penh, and the grave peril which Americans are involved in, in and around Saigon.

We have simply got to deal with Americans who were caught in the squeeze between their conscience and the law and policy of the country at this time.

Now, I believe the President's program was a fair measure considering the situation, and with the decent respect for those who fell and their families, and those who fought, and so I have not joined in Senator Hart's bill, but certainly Senator Nelson and I are completely united on this bill, which I think is very sensible, and makes the necessary revisions in the President's program.

Four points I would like to call to the committee's attention, our statement being of record.

First, the fact that there should be a consolidation of all of the responsibilities for this matter in the hands of one agency, and we have chosen in our bill the Clemency Board. As it stands now, Justice is handling the cases of about 4,400. Those are the so-called draft evasion cases. Defense is handling the cases with Transportation, because they handle the Coast Guard, or about 12,500 where there has not been a discharge, and the Clemency Board handles cases where the individuals have already been convicted, or already discharged from the armed services. Respectively, those categories are estimated at 4,400 for Justice, 12,500 for Defense and Transportation, only again, because they handle Coast Guard, and 110,000 for the Clemency Board.

Our bill calls for a consolidation of the jurisdiction in the Clemency Board, giving them jurisdiction over all cases of draft evasion and military desertion, and the question of less than honorable discharge.

The second point has already been made by Senator Nelson. I simply wish to buttress it. I think every American should feel a sense of outrage if a fellow comes down here in good faith to see what will happen to him respecting his qualifications to meet the test which the Clemency Board would set, and then because, again, he can not agree with the Clemency Board, he is scooped up into the criminal justice system.

In addition, we feel that it is healthy for our country in terms of the confidence of young people in the justice of the United States to give them an opportunity to apply for clemency, even if it doesn't work out, and so our bill—without fear of being arrested or detained. We know as members of the Congress that nothing is ever black or white. Our bill does give that opportunity and grant immunity for that 30-day period, so that the man can come and go if he doesn't make his peace with the Clemency Board.

The third point, which again Senator Nelson has emphasized, is simply humane, and in the great tradition of the reuniting of families, that is, giving the family an opportunity to have an influence. I consider it more than just a visit, you know, of familial character, but I think when a fellow gets down here and has a look around and sees his family, and so forth, I think we, "the United States" have a good chance that he will be reconciled to the idea of fighting it out here instead of going back there.

So I think from the point of view of public policy, it is a very good idea.

And, finally, we do away with statutes of limitations or other time deadlines for making the clemency application, but, of course, the deadline is automatic so long as the law is in effect and the Board is in effect. We think that this is important, since we have an important national interest in reconciling as many as possible to this program.

In summary, I feel with Senator Nelson, and it is in our joint statement, that the program which we by our bill seek to improve, would enable young men, thousands of them, to redeem their mistakes of the past, and further the spirit of national reconciliation to which the President paid tribute in announcing the amnesty program. Our statement concludes with an observation that this bill does not pretend to go all the way with unconditional amnesty, but it does deal with the program as it is, and makes some desirable changes and some desirable administrative consolidation, and again I repeat, as I don't wish to have any false ideas as to the reason for my presence here, I believe in the President's program. I think it is a fair measure of justice between those who served and those who did not, and I also respect greatly Senator Nelson, Senator Hart, and those in the House who feel that there ought to be unconditional amnesty, but I cannot bring myself to that point.

Mr. Chairman, I would like to add only one observation as a lawyer. We have tried in this bill to deal with constitutional questions by impairing in no way the fundamental pardon power of the President. What we have done is to grant limited immunity, limit the right of entry into the United States, all matters which are encompassed in the

powers of the Congress relating to Immigration, relating to Interstate Commerce, relating to temporary or permanent immunity from the criminal laws, either partial or entire, and we do not believe that we have in any way impaired the pardoning power in the final analysis under our bill when that power is exercised by the President. It is complete and final. We do nothing whatever to condition it, delay it, or in any way change its nature or form. The President has laid down the conditions upon which he is willing to grant pardon, and those conditions are unimpaired by anything we have done. We have simply facilitated the way in which the President's pardoning power may be applied and, therefore, we consider the measure entirely constitutional.

We will take the precaution of having a legal memorandum available which we will offer for the record in due course. If the chairman will advise us how long the record will remain open, we will supply it in time.

Mr. KASTENMEIER. I will advise that the record will be open 10 days following tomorrow, which is the last scheduled day of hearings on the matter, and we would be most pleased to receive that memorandum.

Senator JAVITS. I thank the Chairman.

[The material referred to follows:]

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THE POWER OF CONGRESS TO ENACT AMNESTY LEGISLATION

The Constitution does not contain the word "amnesty." The President's power, as provided in the Constitution, is limited to granting "Reprieves and Pardons." [1] The uncertainty which has resulted from the exact meaning of both "pardon" and "amnesty" and the distinction, if any, between them, has confronted courts in the past. The result has been that the distinction between amnesty and pardon is of no practical importance.[2] ". . . [E]xcept that the term [amnesty] is generally employed where pardon is extended to whole classes or communities, instead of individuals, the distinction between them [amnesty and pardon] is one rather of philological interest than of legal importance." [3] More specifically,

> "Amnesty is defined by the lexicographers to be an act of the sovereign power granting oblivion, or a general pardon for a past offence, and is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes of persons who are subject to trial, but have not yet been convicted." [4]

Further, "Pardon includes Amnesty." [5]

While the precise question of whether the Congress possesses the power to enact amnesty legislation has never been directly raised before the Supreme Court, there have been cases wherein the Court chose to indicate a possible position by way of comment.

In 1884, the Court was asked to declare unconstitutional a congressional act which authorized the Secretary of the Treasury to "mitigate or remit any fine,

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[1] "The President shall . . . have power to grant Reprieves and Pardons for offences against the United States, except in cases of Impeachment." Art. II, § 2.

[2] *Brown* v. *Walker*, 161 U.S. 591, 601 (1895).

[3] *Knote* v. *U.S.*, 95 U.S. 149, 153 (1877). But see *Burdick* v. *U.S.*, 236 U.S. 79, 94–95 (1914), where the Court cites *Knote* with qualification: "They [amnesty and pardon] are of different character and have different purposes. The one overlooks offense; the other remits punishment. The first is usually addressed to crimes against the sovereignty of the State, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the State." See also, Russ, *Does The President Still Have Amnestying Power*, 16 Mississippi Law Journal 127, 128 (1944).

[4] *Brown*, *supra*, at 601–02. See also *U.S.* v. *Hughes*, 1975 F. 238, 242 (D.C. Pa. 1892): "Pardons are granted to individual criminals by name: Amnesty to classes of offenders or communities. They differ, not in kind, but solely in the number they severally affect."

[5] *U.S.* v. *Klein*, 80 U.S. (13 wall) 128, 147 (1871).

penalty, forfeiture, or disability" arising from the violation of revenue laws.[6] The appellant argued that:

> ". . . the power of the President to grant pardons includes the power to remit fines, penalties, and forfeitures imposed for the commission of offences against, or for the violation of the laws of, the United States; *that such power is in its nature exclusive;* and that its exercise, in whatever form, by any subordinate officer of the government, is an encroachment upon the Constitutional prerogatives of the President."[7] (emphasis added).

The Court acknowledged that the President indeed, "under the general unqualified grant of power to pardon offences, may remit fines, penalties and forfeitures of every description under the laws of Congress."[8] But the Court continued:

> "But is that power exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States?"[9]

The Court, noting that Congress, from the adoption of the Constitution, had asserted its right to invest the Secretary of the Treasury with such power as was being tested in the case,[10] affirmed the lower court decision. The Court, in so deciding, appears to have affirmed the proposition that the grant of pardoning power to the President by the Constitution, is not so exclusive as to preclude the Congress from authorizing the Secretary of Treasury to remit fines and penalties.

The Supreme Court commented more directly on the matter in an 1896 case, *Brown* v. *Walker*.[11] The facts of *Brown* involved a railway employee, called to testify before a grand jury which was investigating the activities of the Allegheny Valley Railway Company. In response to direct questions, the employee, Brown, refused to answer, on the ground that the answer would tend to incriminate him. He was fined and placed in custody until he was willing to testify. On dismissal of a subsequent writ of *habeas corpus*. Brown appealed to the Supreme Court.

The issue before the Court was whether a Federal statute in effect, granting immunity from prosecution for those willing to testify, was sufficiently protective so as to remove from Brown the protective cloak of the 5th Amendment right to remain silent. Analogizing the protection offered by the Act to that of an "act of general amnesty" the Court thus engaged in a general discussion of Congressional power:

> "The act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England, (2 Taylor on Evidence, § 1455, where a large number of similar acts are collated), or in this country. Although the Constitution vests in the President 'power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,' *this power has never been held to take from Congress the power to pass acts of general amnesty*, and is ordinarily exercised only in cases of individuals after conviction, although, as was said by this Court in *Ex parte Garland*, 4 Wall. 333, 380, 'it extends to every offense known to law, and may be exercised at any time after its Commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.' " (emphasis added)[12]

The Court ultimately found the Statute sufficiently protective and agreed with the lower court that Brown was deprived of the otherwise operable Fifth Amendment right to silence.

While the facts of *Brown* are readily distinguishable from those which may be expected to attain to the issue of Congressional Amnesty and contemporary dissidents of the Vietnam War, the case has been referred to by several authorities

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[6] *The Laura*, 114 U.S. 411, 414 (1884).
[7] *The Laura*, *supra* at 413.
[8] *The Laura*, *supra*, at 413–414.
[9] *The Laura*, *supra*, at 414.
[10] *The Laura*, *supra*, at 414, 415.
[11] 161 U.S. 591,601.
[12] *Brown*, *supra*., at 601. The Court cited *The Laura*, at 601. See also *Burdick* v. *U.S.*, 236 U.S. 79, 95 where, without citing *Brown*, the Court, *per obiter* asserts: "Amnesty is usually general, addressed to classes or even communities, *a legislative act* . . ." (emphasis added)

as support for the contention that Congress does have the authority to enact amnesty legislation.[12]

Only one subsequent[14] federal, majority opinion[15] case, has cited *Brown* v. *Walker* for the proposition that Congress has the authority to enact amnesty legislation. In 1925, the Circuit Court of Appeals for the Ninth Circuit, in holding that the Probation Act of 1925 did not infringe the President's pardoning power, cited *Brown* to the effect that:

> "It is also held that Congress may grant amnesty to offenders of a certain class."[16]

While occasional, unrelated references to the amnesty discussion in *Brown* occur,[17] the substantive issue of congressional authority in relation to amnesty, has not arisen in any case which has required a definitive determination of the question.

In addition to Court decisions on the question of congressional authority, it should be borne in mind that Congress, itself, has, on several prior occassions, *in fact* enacted amnesty legislation. None of the Acts resulted in litigation on the precise issue of congressional authority. On July 17, 1862, Congress authorized the President to extend pardon and amnesty to persons participating in the rebellion.[18] When President Lincoln granted the amnesty of December 8, 1863, he disclaimed necessity for the authorization.[19] He began his proclamation by saying:

> "Whereas in and by the Constitution of the United States it is provided that the President shall have power to grant reprieves and pardons . . ."

and very plainly showed that he based his authority to grant the proclamation upon the provisions of the Constitution and not upon the act of Congress.[20] Congress later repealed its authorization.[21]

In 1872, Congress enacted its first public law granting an amnesty.[22] The General Amnesty Law of 1872 removed all political disabilities imposed by the third section of the Fourteenth Amendment from all persons except certain Senators and Representatives and civil and military personnel. A similar but more comprehensive measure was enacted in 1898.[23] While these two acts may stand as examples of the Congress having already engaged in amnesty legislation, it should be noted that the authority for both bills derived from section three of the Fourteenth Amendment itself.[24] This fact could negate any reference to the acts as

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[12] 59 Am. Jur. 2d Pardon and Parole § 20 (1971): "although the power to grant reprieves and pardons may be vested in the chief executive, this has never been held to take from the legislature the power to pass acts of general amnesty."; Humpert, *The Pardoning Powers of the President* 30 (1941): "The Pardoning Power is not vested exclusively in the executive. Both the National Congress and the State legislature grant amnesties." At 43: ". . . the Supreme Court later decided that Congress might grant amnesties prior to conviction, notwithstanding the authority of the President to exercise, free of legislative restraint, his pardoning power in the form of amnesty."; W. W. Willoughby, *The Constitutional Law of the United States* (2nd ed. 1929), III 1429: "Though Congress has thus no power to limit in any way the exercise of the pardoning power by the President, it may itself exercise that power to a certain extent, if exercised prior to conviction. Thus acts of Amnesty have been held valid." Note, 34 Lawyers Reports Annotated 254 (1905): "While the special Acts of Congress granting pardon or amnesty have not been brought into the Courts for an adjudication of their constitutionality, there is a declaration in favor of the Power of Congress to pass Acts of general amnesty . . ."

[14] Prior to *Brown* a district court in Illinois discussed the same statute at issue in *Brown* and flatly declared "It is a statute of pardon." *U.S.* v. *James*, 60 F. 257, 265 (D.C.N.D. Ill. 1894). The Court so decided without discussing Congressional power to enact such a statute in light of the constitutional grant of pardoning power to the President.

[15] A dissenting opinion of Justices Holmes and Brandeis in *Springer* v. *Philippine Islands*, 277 U.S. 189, 211 (1928) cited *Brown* as follows: "It [Congress] has granted an amnesty, notwithstanding the grant to the President of the power to pardon."

[16] *Nix* v. *James*, 7 F. 2d 590, 593 (9th Cir. 1925). See also *U.S.* v. *Price*, 96 F. 960 (D.C. Ky. 1899) where the exact statute involved in *Brown* was at issue and the Court consistently referred to the immunity provision thereof as granting "amnesty," with a citation to *Brown*. Likewise see *U.S.* v. *Moore*, 15 F. 2d 593 (D.C. Ore. 1926) analogizing Congressional grant of immunity to "Amnesty."

[17] *In Re Shead*, 302 F. Supp. 560, 563 (D.C.N.D. Calif. 1969); *U.S.* v. *Reina*, 273 F. 2d 234, 235 (2d Cir. 1959); *U.S.* v. *Swift*, 186 F. 1002, 1010 (D.C.N.D. Ill. 1911).

[18] 12 Stat. 592 (1862).

[19] Humpert, *The Pardoning Power of the President* 40 (1941).

[20] Note, 34 Lawyers Reports Annotated 251, 253 (1905).

[21] 14 Stat. 377. See 40th Cong., 3d session, S. Rept. No. 239 for the Senate Judiciary Committee's opinion that President was without power to grant amnesty absent Congressional authorization.

[22] 17 Stat. 142 (1872).

[23] 30 Stat. 432 (1898).

[24] ". . . But Congress may by a vote of two thirds of each house, remove such disability."

precedent for the proposition that it is within the inherent power of Congress to enact amnesty legislation.

It can be seen that the indirect nature of the Supreme Court's Comments in *Brown* together with a dearth of case law subsequent thereto, causes at least a question as to the weight which a contemporary court would attach to *Brown*.

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American Law Division.

Mr. KASTENMEIER. Addressing a question to you both, and I appreciate the testimony—it is concise, to the point, and edifying for the committee.

In terms of the constitutional issue, the last question touched by Senator Javits, Senator Javits was careful to say that whatever one might say about the constitutional issue of powers of the Presidency, and the Presidential pardon, that even taking the view that this is exclusively a Presidential power, it is your point of view that your legislation is constitutional because it in no way limits Presidental authority to exercise clemency and recognizes this Presidential authority. Your bill is a mere extension, or statutory expression, of the power exercised by the President. Is that more or less correct?

Mr. JAVITS. Well, Mr. Chairman, if I may—my answer to that is flatly "Yes," but I would also like to draw an analogy with the war powers resolution, with which I had something to do which is now completely recognized by the President, and he is actually complying with it.

The analogy is that we cannot impair, for example, his authority as Commander-In-Chief to rescue Americans from a war zone, but we can require certain notification to us. We can determine essentially the management of the armed services, the expenditure of money for the armed services. In other words, we can determine the methodology but we cannot deprive him of his fundamental authority as Commander-In-Chief, and so we haven't. And, as I say, the President has not challenged its constitutionality. He is complying with it. And I think this is an analogy.

We are proposing a methodology by which the clemency power may be availed of, period, just as the President, for example, couldn't have set up this Clemency Board unless we gave him the money so he could do what is his constitutional right to do but which still we can facilitate if we choose.

It is always an open question. Suppose we deny him the money, and he says he needs it for his partisan purposes. I think that would represent a constitutional struggle, and again an analogy with the war powers resolution in the present situation. I believe that when the President uses, say, a company of Marines, or thereabouts to bring out people out of Phnom Penh, even though there are statutes which say he may not use money for any armed services purpose in Cambodia, I believe the courts would sustain him because somehow or other he has to have the way in which to exercise the authority that the Constitution gives him. But if he is going to get us into a military operation involving—I am just going to make it extreme, because there are many fine shadings in between—a division in combat with air cover, and so forth, obviously, the law saying you don't have the money, or you may not use the money for that purpose would absolutely control, and so would the war powers resolution saying that unless we give him new authority, he has only a very limited authority to lead those troops in combat.

So I think it is reconcilable under the Constitution in very much the same way that we are doing in this bill.

Mr. KASTENMEIER. I would like to reach a little broader issue, that is, whether you believe that Congress has coexistent constitutional authority to grant any affirmative act of amnesty or clemency. Does Congress, in and of itself, have, in your view, authority to enact another bill, which might be outside the parameters of what the President has entered into?

Mr. JAVITS. Yes, but it would, of course, have to be law, either signed by the President, or enacted by the Congress with the necessary two-thirds over a veto. But that would involve the power of the Congress to grant immunity from prosecution which is a very different power but in its impact upon the individual comes to the same thing.

Now, many things, however, might follow en train and that is if someone has been convicted, a loss, for example, of various rights as a citizen might ensue and the immunity statutes, that is, the immunity from prosecution, would not necessarily relieve the individual of that unless specifically so provided. But Congress could act using its power to grant immunity from prosecution, to restore the rights of citizenship, and otherwise, in effect, attain the same results.

Mr. KASTENMEIER. Precisely.

Mr. NELSON. Mr. Chairman, may I——

Mr. KASTENMEIER. Senator Nelson.

Mr. NELSON. I would like to ask, Mr. Chairman, to have printed in the record a legal note from the Library of Congress on the power of the Congress to enact amnesty legislation which involved a criminal case, but in any event, the Court in that case back in 1890, said:

> Although the Constitution vests in the President power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, this power has never been held to take from the Congress the power to pass acts of general amnesty, and is ordinarily exercised only in the case of the individual after conviction.

I would ask that this be printed at the appropriate place.

Mr. KASTENMEIER. Without objection. The legal note referred to by Senator Nelson will be received.

I would like to ask, as far as S. 1290, your Senate bill, are there House cosponsors of that approach as far as you know at this time?

Mr. NELSON. We have talked to some Members, but so far as I know it has not been introduced on the House side.

Mr. KASTENMEIER. There is no House counterpart at this time?

Mr. NELSON. No. I understand there will be, but as of now, no.

Mr. KASTENMEIER. Yes. What is your view with respect to the termination of the President's program? Why do you feel the program ought to be extended? Do you have an expectation that there will be considerable additional participation if the program were to be reopened? What was the purpose in extending the program as you see it?

Mr. NELSON. Well, one, I don't think—if the program has merit, which I believe it did have and does have, I don't know what the matter of a calendar date has to do with its merits. If it has merit, it has merit, and it ought to continue giving those who want to take advantage of it the opportunity to do so. I think the Clemency Board—Mr. Goodell is satisfied that there are a whole lot of people yet in this country who don't understand the provisions, haven't been informed about them,

and in fact we will submit for the record, if it isn't already in the record, the statistics on the number of applicants as the program went on, and they rapidly increased—we have those.

Mr. KASTENMEIER. We do have that. Mr. Goodell testified on that.

Mr. NELSON. All right. I don't see there is any timeliness question that runs to the merits of the question. Either they are entitled to be considered for clemency, or they aren't, and it isn't based upon 1 year or 1 month, or 10 years. So this bill provides—there is no termination date at all.

I would like to point out, and I don't need to point it out to this committee because every one of you is familiar with all kinds of cases, but I think that there is some law of understanding around the country among some, anyway, about the—some of the kinds of hard cases involved.

I received a letter from a member of the VFW, of which I have been a member for 27 or 28 years, attacking this proposal. I happen to know this man, who never got beyond Hawaii. I wrote him back, and recited a case to him. Here is the case.

Here is a young man who went to Vietnam, served there a year. He was wounded three times, awarded three Purple Hearts, the Vietnam Service Medal, the Bronze Star for valor.

Now, after being reassigned to the United States, his father went bankrupt because of a drinking problem. His family fell into hard times. He returned home, without authorization from the Army because they refused it, to earn some money to help his parents and seven brothers and sisters.

Then he was charged by the Army, he was fined, sentenced to 6 months at hard labor and given a bad conduct discharge.

Now, I said to this VFW member, he did a whole lot more than you did and should he have to live the rest of his life after being wounded three times with a bad conduct discharge? He hasn't answered yet.

There are a lot of these cases, and this is part of what it is all about, to give these people a chance.

As I know the chairman knows, I know of a case in which two young men went through high school together. Both of them asserted that they were conscientious objectors on general grounds to all violence. One of them ran off to Canada because he—the Board wouldn't grant him conscientious objector status because at that time it had to be religious-based. The other one's number came up after the Supreme Court decision. One of them has been in Canada for a long, long time, and the other one never left the country because they recognized his status.

Well, what about all those young men who left at seventeen and eighteen because the law didn't recognize the conscientious objector status on general grounds, and then they changed the law after they left? Shouldn't they have the opportunity to come before a Board? I would give them all clemency of that kind without any question whatsoever.

So these are the kinds of hard cases we are dealing with, and I think there is among many people in the country—they don't recognize what these cases are.

Mr. KASTENMEIER. I notice that the testimony is to the effect that one-sixth of those eligible have actually applied for clemency. What is your view as to why the other five-sixth have not applied? Is it because they don't understand the program? Do you think that answers it adequately?

Mr. JAVITS. Well, I think it takes time to percolate through. I think this fear that once you get down here you are hooked, you are finished, no matter what they decide, no matter how you feel about it, and after all, most of these young people went where they went out of a deep sense of conviction. There are some who may just be goldbricking, but most of them went out of a very deep sense of conviction, deep trauma in their lives, and it takes a while to get accustomed to the idea that you are going to pursue some other philosophy, some other course of action. As Senator Nelson says, we are dealing with a lifetime proposition for these young people. It has been only a few years that have elapsed since 1973 when our troops were actually pulled out of Vietnam. It is very hard to expect as immediate a response to the program as perhaps I and others had hoped.

Mr. KASTENMEIER. Senator Javits, you indicated there was no statute of limitations, but in effect, section 12 provides that the Board shall submit its final recommendations to the President not later than December 31, 1976, at which time it shall cease to exist, other functions of the Board—being assumed by the Department of Justice. It does assume that at the end of next year the program, in terms of its major character, would terminate; would it not?

Mr. JAVITS. Mr. Chairman, I said that, I believe. I said that the only statute is the termination of the Board, and that what Senator Nelson and I feel is that it should be openended, shouldn't even have that limitation, but it does have. I said that when I testified.

Mr. NELSON. Actually, let me say, Mr. Chairman, the Board would terminate unless extended, but the Justice Department would continue, the program wouldn't end. Justice would take it over after this date under this bill.

Mr. KASTENMEIER. Presumably your program would continue alternate service. Alternate services is managed by the Selective Service System. Would you also centralize that function in the Board rather than have Selective Service make the work assignments for the alternate service program?

Mr. NELSON. Everything would go under the Clemency Board.

Mr. KASTENMEIER. Do you think that the President, having consciously decided that the application period should terminate March 31, would sign this bill, your bill, if the Congress should enact it?

Mr. NELSON. Well, I am not prepared to speculate on what the President would do, but all we are really doing is extending the President's own bill with some modifications on the question of allowing them to come back into the country 30 days a year. I don't know that, but I think it would be fair for the President to take the position that the Congress has some responsibility in this area. He proceeded on his own, and established the program. Congress participated in the whole events that caused the problem, the old Vietnam war, and I would think that he would give very fair and serious consideration to any legislation passed by the Congress itself extending the program. If I had to speculate on it, I think, he would sign it; but I don't know.

Mr. JAVITS. Well, my own opinion is that after the refining process which will occur as we consider administration testimony on the bill itself, and the debate, there may be some changes. We will have a pretty clear idea how the White House feels about it. I would doubt, and I join Senator Nelson in this, that there will simply be a dug-in opposition to any bill. I really doubt that very much. I think we will get a pretty clear idea as to what they are willing to see done, and, hopefully, we will be able to work out our problems before there is a crash on this matter.

Mr. KASTENMEIER. I would like at this point to yield to the gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you very much, Mr. Chairman. Thank you Senators for testifying.

I have a lot of difficulty with your bill, and particularly with your testimony, that you use the word "amnesty" where actually you mean "clemency" and that the bill is misnamed, that Mr. Goodell here stated categorically that he gives no amnesty. He can't give amnesty. And I don't think really in your bill you should mention amnesty and in your testimony. It is clemency at most, and in some cases, it is not even clemency. It is not even absolution that this is allegedly equal punishment for everybody.

So, I would ask this central question to both of you, that you admit here on page 2 that it was the Congress that terminates the law, and you said therefore Congress assumed some responsibility for the conduct. I think it follows if the Congress said the war was a bad war, and the President never did, then why isn't the Congress, logically, inexorably saying we should give amnesty. That is forgetfulness and not forgiveness to everybody who was involved in that war, a war that for the first time in American history was terminated by the Congress.

Mr. NELSON. Well, Congressman Drinan, the moment you get a bill with your name on it passed through the House doing all you want to do on this issue, I will move in the Senate to take it from the table immediately and pass it, and join you on it. Since we can't quite do that yet, we are trying to take a modest step forward.

Mr. DRINAN. Well, Senator, would you agree that amnesty is going to be like the war itself, that we are going to go to the floor, get 100 votes in the House, and it will gradually go up, and it is going to tear the Nation apart, and so long as you equivocate, so long as you say we will go this way and that way, and pretend that we are giving amnesty when you are not really even giving clemency in some cases, isn't that really going to tear the country apart again, and wouldn't it be better to bring the full package, the real amnesty, the nondelusive thing to the floor of both chambers, and let the chips fall where they may?

Mr. NELSON. I am on that bill, too, and I will be very happy with it. As I said, as soon as you get that one passed over here, I will join you on that. Meantime, we are just moving with all the guns we have got; you can't pass the general amnesty one that you would like to have, and so would I. I think there are young men up there who deserve some consideration about their problems while you and I are lathering about the other problem.

Mr. DRINAN. Senator, what kind of consideration are you giving? Are you assuming that under Mr. Goodell's board that a majority of them get a better deal than they would get otherwise?

Mr. NELSON. The bill provides quite clearly that the young man can come down here, negotiate his case, and if he is not satisfied with it, he can leave without being subject to being charged with the crime that he presumably came down here to resolve. If he doesn't like the result, as a matter of conscience, he doesn't believe that he ought to have to do any alternative service, because he was in fact a conscientious objector before the law was changed, or as a matter of conscience cannot support this law, he can leave the country, and he is not subject to indictment.

However, if that is his decision, he can come into this country every single year for 30 days to see his family. As a matter of justice, he ought to be able to do that.

Now, I agree with you. I would go much farther than most people in this Congress, but if you put the proposal that you and I would like to see passed on the floor of the Senate or the House today, you know and I know it wouldn't receive a majority vote. So what we are trying to do, so far as I am concerned, what they are trying to do with this bill is to improve the proposal of the President, and——

Mr. DRINAN. How do you improve it?

Mr. NELSON. We improve it by allowing him to come down here and negotiate, and No. 2, we allow him if he rejects the whole concept—you know there are young men up there who just decided they are going to live in Canada the rest of their lives. Should they suffer the penalty of never seeing their mother and father and sister and brother? They ought to be able to come into the country and see them. Under the present situation, they are subject to indictment and trial. So those are modest steps, but it is an improvement over the current program of the President.

Mr. DRINAN. Well, it is an improvement in that one respect, but it is not an improvement in the sense that everybody is told by the Government and by the Congress to come before a board which will really give them punishment, in addition to the punishment they have already received, and all I say is——

Mr. NELSON. Well, now, that is not so, Congressman. I recited for you some cases, and in those cases where the young man was wounded three times and sentenced and got a bad conduct discharge, which I think was a bad result, they went to the Amnesty Board and had that removed from the record. All kinds of those cases, and they are here now in the United States. They walk around, and every time they want to get a job, there it is, their bad conduct discharge. How would you feel if you were shot three times, knowing that most of the people who went into the Army with you never got near a gun or a wound, and then every time you apply for a job, the employer says let's see your discharge. Shouldn't that man have the opportunity to go before the board and have that record removed?

Mr. DRINAN. If the Department of Defense had any care about these people, they would be doing it. You don't need clemency.

Mr. NELSON. Oh, yes, but the problem is they are not.

Mr. DRINAN. Well, why don't we force them to do what they are supposed to do? They are the ones that gave out the dirty papers in all these cases. They are outrageously adamant, and they say they are not going to change.

Mr. NELSON. As I said to you, Congressman, the moment you pass that bill requiring the Army to do it, I will move to take it off the

table in the Senate, and pass it, but don't give me this nonsense about why we don't do all these marvelous things you and I stand for. Do it. Pass the bill. Send it over.

Mr. DRINAN. I am just a little junior Member over here, and all I can say is I am afraid I don't know whether I would vote for this bill or not, because you institutionalize something that pretends to be amnesty and that somehow would quiet these people, and you know as well as I, you know better than I, that the people who really need amnesty have not applied under this bill, and under Mr. Goodell's plan, and I am afraid they wouldn't under the other, and that we really deepen their antagonism. We perpetuate the war. We don't have amnesty or forgetfulness.

But I appreciate your testimony, and I will look forward to what happens to this bill, and I hope the other bill, Senator Hart's bill, can get more than a few votes in the Senate, and if enough people, Senators, have a dialog just like we did, maybe Senator Hart's bill would have a bigger chance.

Thank you very much.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

Thank you, gentlemen, for your presentation here this morning. I tend to be sort of a half loaf man myself. I have a couple of questions, though, that I would like to ask you.

I think you have done a reasonably good job of getting around the constitutional hazards that are inherent in this subject. I am not sure you can't get around them entirely, but this is an attempt, I think, that is worth real serious consideration.

I would like to ask you in that context, suppose we are to pass this bill through the Congress. Do you suppose the President would sign it? And I ask—I will give you my reason for my question.

It was my recollection that President Lincoln, long ago, declined to sign a bill that Congress passed relative to the subject of clemency simply because by recognizing that Congress had a right to legislate even in an acceptable manner, he would, likewise, be recognizing they could legislate in a restrictive manner. With that as the context of the question, do you think the President would sign such a bill?

Mr. NELSON. Well, if he thought it interfered with his compromise in any way, his constitutional authority, he wouldn't sign it and I wouldn't propose such a bill, and I don't think we have, although it is always difficult to draft one. Under the current situation where he sets up the Clemency Board, and all these provisions, not a single soldier or draft evader gets anything out of the President's approval. All the Amnesty Board or any of them do is really recommend. So we preview that. The Amnesty Board may look over a situation and say, well, he got a dishonorable discharge and it is unfair, it ought to be an honorable discharge. They can't grant that discharge, and the bill doesn't give them that authority. They, in effect, are recommending it, and the President decides, so as carefully as we could, we drafted not to interfere with any authority the President has at all.

Now, maybe it can be improved upon, but we don't intend to——

Mr. DANIELSON. I think you have done a pretty good job here, as I say. As I read this bill, even though it would create the Clemency

Board, it would not deprive the President of the power to act without regard to the Clemency Board.

Mr. NELSON. Or turn down anything they suggest.

Mr. DANIELSON. That is right, and he can ignore it completely and go ahead and exercise what clemency he saw fit because that is his constitutional power to do.

I note on—apparently this bill creates a new form of discharge known as a clemency discharge. I am not familiar with that terminology, except for this bill. Is that the intent of the proposed legislation? You refer to a clemency discharge on line 2, page 4, and then back in section 14, subsection (c)—excuse me.

Mr. NELSON. We——

Mr. DANIELSON. Page 10, subsection (f). You define a clemency discharge.

Mr. NELSON. What we did there, the President himself made this definition. We adopted it.

Mr. DANIELSON. I see, I was not previously aware.

Mr. NELSON. I wasn't either, until our staff drafted it, but the President created the phrase "clemency discharge," and we were trying to adopt every single thing he proposed, and with a few modifications, on the immigration side.

Mr. DANIELSON. Thanks for the explanation there, and my compliments to your staff for looking up that term.

One other fairly minor thing, on page 4, at about line 17, and line 18, you state that the alternate service shall be completed in accordance with such regulations the Board may prescribe. I would assume that the Board again is really recommending to the President because the President could prescribe the terms.

Mr. NELSON. Correct.

Mr. DANIELSON. And the Board can simply recommend, is that not basically correct?

Mr. NELSON. Yes.

Mr. DANIELSON. And I really don't want to bother you with this, but a couple of technical things on page 5.

On line 14, you have the trigger date, 30 days after the applicant receives notice. Suppose the applicant, for whatever reason, makes himself unavailable and therefore cannot receive notice? Would it probably not be better to have it from the time the notice is promulgated and sent to his last known address, or some such thing? A small thing, but——

Mr. NELSON. Yes.

Mr. DANIELSON. If we take this up seriously, I would suggest such an amendment.

Mr. NELSON. I think you could have a return receipt.

Mr. DANIELSON. Something like that.

Mr. NELSON. Something like that.

Mr. DANIELSON. Attorney of record, or home of——

Mr. JAVITS. It is boilerplate.

Mr. DANIELSON. And the last one of these little points, page 5, line 24, we talk about authorizing the applicant to return to that other country, point of entry. Since I really personally wouldn't care where he went, I think it would probably be better to just let him depart from the United States.

Mr. NELSON. Good point. I think that is a good point.

Mr. DANIELSON. I think you have got a good bill here, and I am going to let it sink in and I might very well be in the spirit——

Mr. NELSON. On your last point, we do not let anybody leave the country for a country that is not ready to receive him.

Mr. DANIELSON. But on importation matters, we frequently don't force a person to go back to the country from which he fled. He goes wherever they are willing to accept him.

Mr. NELSON. Willing to accept him. So we have to be sure we cover that.

Mr. DANIELSON. So long as we let him leave the United States, I couldn't care less where he goes. If he is happy to go there and the land is willing to——

Mr. NELSON. We must include if that country is ready and willing to receive him. Otherwise, we get a yo-yo.

Mr. DANIELSON. Thank you very much. I understand.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. Thank you, Mr. Chairman.

I would like to address this to both Senators Javits and Nelson, and ask for their comments on it. I guess what bothers me the most about the whole problem is the essential inequality arising out of the basic unevenness of the draft system. The difference between the treatment of those who were required to go, and those who were not required to go for a variety of reasons—for instance, to go to college, to join the National Guard. Frequently, there was, as I recall, kind of a scandal in that situation, that all the people who were running for the NFL joined the National Guard with political influence, and they were able to get into the National Guard because of that political influence.

A lot of them because of Quaker families before the Supreme Court changed their rules. Sympathetic draft boards in some cases as opposed to very unsympathetic draft boards in other cases. There was a real difference depending on where you came from. If you came from a college town, sometimes you did all right. But if you came from some other town, you did very poorly with your conscientious objector application. Sometimes you could afford a lawyer, sometimes you had a physical disability, basically a bad knee, but once again, you were quarterback for somebody, and that exempted you from the draft. That whole basic inequality.

I am concerned about the problem of people like my son, who went to college and was never subjected to the draft, but who probably would not have gone had he been subjected to the draft, but he never had to reach that decision to go to Canada. He could afford to go to college. He had a father who could afford to send him to college. He had grown up in an upper middle class family. And I am really concerned about the fact of that and the basic respect for law in this country, and I would like to have your comments on how we can patch up that terrible Selective Service System, with another piece of patchwork that I think the clemency program essentially is.

Mr. JAVITS. Well, of course——

Mr. NELSON. Just one sentence. I don't think there is any way in the world that you can rectify the injustices that came out of the whole war.

Mr. JAVITS. Well, I think that is very accurate, and government, at best, is the best we can do in human circumstances, but the analogy is often made in respect of the answer to your question with those who have committed crimes and are not caught. There are many people who argue, therefore, that no one should be punished for a crime. Well, obviously, that may be true in the laws of God, but in the laws of man, you can't run a society that way, and that is our problem here.

We have contrived the best we can to meet the injustices which we see at hand, without in any way dismantling the fundamental system which wouldn't know what to do with all the people you could have drafted. Our situation as a Nation would have been so much worse if we had 10 million instead of 500,000, nor is it possible to do absolute justice in a situation like that, no matter what you do. Indeed, I believe that what you are mentioning is one of the reasons that we have the Clemency Board. We do have a sympathy with these young people, not only because of their own consciences, but because of the inequality which is involved.

Of course, from the public policy point of view, too, the young person affected now doesn't compare it with an ongoing injustice, to-wit, the various discriminations of the draft, and I am speaking now quite apart from general policy. I happen to have preferred the draft over a voluntary Army for very different reasons, but the juxtaposition is no longer present, because you do have a voluntary Army. Those who wish to serve, contract to serve. But, really, I wish we could think of a better way, but I can't, and yet I consider, speaking now strictly for myself, because Senator Nelson does not join me in this, I consider we all have a collective responsibility.

For example, Father Drinan spoke of the fact that we were against the war. Well, we weren't against the war. We may have voted nay, but when our body, the House and Senate voted the money and whatever authority went with it, we were it. We were as much identified with it as the President, no matter how we voted. Otherwise, we better resign. And the country was at war, and therefore we had, in my judgment, in a sense of nationhood, we have to decide that the responsibility to follow the collective judgment in this matter is greater than the individual freedom we wish to give the young man or young woman in terms of serving his own conscience.

One thing that I don't subscribe to is the right to refuse to serve in a given war because you don't agree with the war, or the right to refuse to pay taxes because you don't agree with the purposes of which a certain amount of your taxes is given. I believe with Martin Luther King that if you want to express that kind of a protest, bring your people and be heard, and be ready for what ensues, because society simply cannot be asked to accept that, or you have anarchy.

Mr. PATTISON. If I may just follow that, I understand the problem of not perfect justice. I mean, I am a lawyer, and I know that one JP will give you a $20 fine, and the other will let you go. That is part of our system, and we have a goal of perfect justice, and we never achieve it. But, aren't there times when we find that the very basic law which, never mind the war, never mind whether it was a good or bad war, just the very basic law we started off with, it was such a disaster in terms of equity as to who was chosen to go. Aren't there times when we discover that the law has been so bad to start with, that the only way we can

remedy that is to throw out the baby with the bath water in a way, and start from scratch?

Mr. JAVITS. But, Congressman, if you will forgive me, you are forgetting about all those who were drafted, and all those who died and all those who were wounded, and all those who risked their lives, and all those who found their lives broken up. What about some decent respect for them?

Mr. PATTISON. I have respect for them. I have decent respect for them. I don't think it is their fault. I don't think they are really concerned with this. I think that the question is one of how can we remedy in the context of basic goals toward equal treatment under the law, when we have such a law that began with such an inequity.

Mr. JAVITS. Well, I think for me the balance tips on the side of those who went and served, and who were wounded and died. For me an honorable respect for their sacrifice, no matter how wrong I think the war was, would require some effort to give an equality of treatment as what they endured to those who were called and did not serve. That balance slightly for me weighs over on that side.

Mr. PATTISON. Might not we respect their sacrifice by now doing what is right and respect it in that way?

Mr. JAVITS. Well, I would not—I could find no moral fault with you if you felt that it is the greatest respect to them to right the basic inequities that existed by wiping the slate clean for everybody. I don't think so.

Mr. PATTISON. Thank you very much.

Mr. KASTENMEIER. I have just one or two questions. How do you respond to the question: Why aren't we seeking to extend the program which administratively—notwithstanding the fact that it has received 18,000 cases, it has only disposed of finally 65 in just over 7 months since the President's order, with about 5 months to go? You are aware of the fact that the Presidential Clemency Board has recommended and accepted by the President in terms of disposition only 65 cases in all this time, out of 18,000 applications. Doesn't that trouble you somewhat?

Mr. NELSON. I am trying to see if we can find the figures.

Mr. KASTENMEIER. The question isn't a question about the morality or anything.

Mr. NELSON. Is this on the Clemency Board's applications?

Mr. KASTENMEIER. Yes. I think the evidence given on Monday by Mr. Goodell was that the Board had disposed of, to date, 114 cases on which the President had finally acted, on which 65 the President had finally acted, notwithstanding the fact that they have received 18,000 applications.

Mr. NELSON. There was—I don't have the figures with me. As the chairman knows, there was a very rapid buildup in applicants in the latter 2 or 3 months, and there was no way they could handle those thousands, but I don't happen to—we, unfortunately left the figures in the office, although you may have them, the committee may have them. But in any event, we talked to Mr. Goodell about it from an administrative standpoint. He wasn't expressing his view as to whether we ought to pass this legislation or not, but on the question of being able to administer it, he was of the opinion they could.

Mr. KASTENMEIER. Well, it seems—what I am suggesting by implication is they are having difficulty administering whatever responsibility

they apparently have, notwithstanding the abnegation of all the other departments' responsibilities, Justice and Defense, and Selective Service System. At the rate they have proceeded in the past, it would take several decades at least for them to dispose of the pending cases.

Mr. NELSON. One of their problems is staff and money, and our bill would provide more adequate staff than they have got. In any event, I would agree with the chairman, that they ought to be given the tools from an administrative standpoint to manage these cases more quickly, that, of course, that doesn't run to the heart of whether or not there ought to be continuation of the program.

Mr. KASTENMEIER. I suggest that because it is one factor, both in oversight and in considering legislation, which I think this subcommittee would be disposed to confront.

The last question I have is: Is it your perception that most of the individuals and organizations that have advocated amnesty and in most cases unconditional amnesty, would be in opposition to your bill?

Mr. NELSON. I have talked to a number of people including a long distance phone call from Wisconsin 30 minutes before I came over here, with a very distinguished citizen who is for general amnesty arguing against this bill. We concluded our conversation, and he agreed the bill ought to be passed. I think those who oppose—who are for a broader amnesty are for it, because they believe in it, and they think, somehow or another that is what we ought to accomplish. I personally think we ought to accomplish it, but I don't think we are going to. I think given the circumstance, taking the President's program, and in effect just extending it with a couple of modifications is something that Congress may very well be prepared to do, because we are already doing it, excepting for the permission of the young man to come into the country to see his family 30 days a year. So I conclude, and I think Senator Javits too, that this was a modest proposal which does some considerable justice and equity and it is feasible to deal with it in the Congress.

Mr. KASTENMEIER. Well, I appreciate your point of view. I would only make one observation, I think that we are—this addresses everybody—in a moment of crisis with respect to the future consideration of this question. The President's short-lived initiative in the field has come to an end.

Mr. JAVITS. Right.

Mr. KASTENMEIER. And unless something is done, and presumably there will always be some agitation, this will—this may be it. It will just go into the history books as a tentative, highly conditional effort to achieve a form of clemency, and we may have—if we are witnessing the last chapter in Vietnam, we might be witnessing the last chapter in at least Presidential initiative in the field, and it may be incumbent on the Congress to act in some form or another; would you not agree?

Mr. JAVITS. I would agree.

Mr. NELSON. Yes.

Mr. KASTENMEIER. I would like to thank both Senator Nelson and——

Mr. DANIELSON. Mr. Chairman——

Mr. KASTENMEIER. I yield to the gentleman.

Mr. DANIELSON. May I have two more questions, please? One, I think I can answer myself, but I want to be sure I understand the bill, and that is under your section 8, the incidence of clemencies discharged, the clemency discharged is not statutorily defined, as I understand it, to prescribe exactly what benefits are granted or not granted under the clemency discharge. But in section 8, you say that the clemency discharge shall not automatically confer rights.

I assume that if the President under that language, wishes to do so, under your first three words, he may grant all the rights he feels like up to and—the equivalent of an honorable discharge.

Mr. NELSON. Correct.

Mr. DANIELSON. But if he fails to, then, and I think this is proper, we would be empowering the Veterans Administration and the Department of Defense to detail what benefits the applicant is to receive.

Mr. JAVITS. That is correct.

Mr. DANIELSON. Which the President might not bother to spell out.

Mr. JAVITS. That is correct.

Mr. DANIELSON. That settles that in my mind.

The other one, in your section 6, reacquisition of U.S. citizenship, that language, I think, is constitutionally possible, that the Congress could do that in legislation, no discretion of the Preisdent, but it calls for an absolute, it confers an absolute right on any applicant to reacquire U.S. citizenship—on any applicant. I stress the word "any." Even if the applicant had been turned down, even if the facts establish he was guilty of the most outrageous conduct, he might even have practically committed treason, could have led a battalion against our troops, for example, he still has the right under section 6 to reacquire U.S. citizenship. I would think and I don't know how to state it at this time, but I think we should allow that some condition in there, some kind of a burden of proof or at least some kind of a threshold that would have to be crossed. I would think out of our draft evaders and military deserters, were probably 99 and 44/100's percent are not guilty of any conduct of that type, but there is probably a Benedict Arnold here and there in the crowd, and I am loath to give him back his U.S. citizenship.

Mr. JAVITS. I think the word "may" in line 18, indicates certain discretion of the courts but I believe it could be buttressed—I might have to examine the law—by merely establishing the jurisdiction of the court upon the same criteria which would have determined that court allowing—granting citizenship. We will have to check it out, but that would be the simplest definition.

Mr. DANIELSON. OK. I have raised my point, and I am sure you do understand it, and—well, if we, as I say, should take this—I am going to try to tailor that a little bit. I am always reluctant, I criticize the courts as often as anybody, but I feel that we contribute to their error by sometimes not spelling out our legislation well enough.

Mr. JAVITS. Criteria. That is correct. I agree.

Mr. DANIELSON. Thank you.

Mr. KASTENMEIER. In behalf of the committee, I would like to express our thanks to both Senator Jacob Javits of New York, and Senator Gaylord Nelson of Wisconsin. The Chair would also like to announce that Senator Philip Hart of Michigan was not able to be here this morning because of an urgent executive session of his com-

mittee. Senator Hart, I think, will be here tomorrow morning, Friday, April 18, at 10 o'clock for our hearings, together with Mr. Henry Schwarzchild, who is director of the ACLU's project on amnesty; Rev. Barry Lynn, United Church of Chirst; Mr. Gerry Condon; Colonel Ed Miller; and also Mr. Thomas Alder, publisher of the Selective Service Law Reporter; as witnesses on this question tomorrow morning.

Until that time, this committee stands adjourned.

[Whereupon the subcommittee recessed, to reconvene at 10 a.m. on Friday, April 18, 1975.]

THE PRESIDENTIAL CLEMENCY PROGRAM

FRIDAY, APRIL 18, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, and Pattison.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, legislative assistant; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order this morning for the purpose of continuing our hearings on the subject of amnesty and the Presidential clemency program.

We are here for the purpose of considering the President's program, its efficacy, or its failures, and for the purpose of ascertaining whether any legislation is appropriate or what response the Congress ought to make to this question.

We are pleased to have as our first witness an old friend, a gentleman who was not able to be here yesterday because of very urgent committee business on the other side, and I am very pleased to greet this morning Senator Phil Hart, of Michigan.

Senator Hart?

TESTIMONY OF HON. PHILIP A. HART, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Mr. HART. Mr. Chairman, members of the committee, my thanks for the welcome and my apologies for yesterday.

I have—it really is a brief statement if I may read it.

Mr. KASTENMEIER. Please do.

Mr. HART. I am delighted that you provided the opportunity to discuss the amnesty issue. There are a good many thousand young men who continue to suffer because of a principled objection to the Vietnam war, and I believe the Congress has an obligation to respond definitively and promptly to their situation.

Last month, I introduced a bill that has a rather pompous but I hope accurate title, the National Reconciliation Act of 1975. It would grant general immunity from prosecution to those charged with draft resistance or desertion during the Vietnam period. In brief the bill grants immunity on a general basis, thereby avoiding the problems of an administratively burdensome and unnecessarily arbitrary case-by-

case review, requires no alternative service. It would not give immunity to charges arising from offenses involving violence or charges not related to draft evasion or desertion, but provides an honorable discharge for all servicemen who receive immunity.

It wipes out from the individual's record references in official files to any charge for which immunity has been granted, and where necessary, restores citizenship.

Now, from our beginning as a country, we recognized that respect for the individual's conscience was basic to our concept of freedom. Those constitutional guarantees of freedom of speech, religion, and press are based upon that respect, and we have recognized also that the right to follow one's conscience carries with it certain responsibilities.

My decision to introduce legislation which would grant a general and unconditional amnesty is, I believe, grounded in a deep respect for the exercise of the responsibility which freedom of individual conscience requires. In the past, I had argued that amnesty ought to be granted on a case-by-case basis, but I have switched. I have come to reject that approach because it would create an unworkable administrative task, and it is bound to foster an arbitrariness which would favor the better educated, more affluent among those seeking and needing amnesty.

And further, the difficulty inherent in reaching back into the past, in some cases up to 12 years, reaching back and trying to figure out a given individual's motive or the mix of motives, and in measuring these against some standard of behavior persuades me that a general approach is the only way we can affect a true amnesty.

Among the other questions which often come up in any amnesty discussion is that of alternative service. Now, as I am sure we have been told time and time again, amnesty means to forget, not necessarily forgive. An unconditional amnesty admits no right or wrong on anyone's part and dishonors no one who fought honorably, but it can serve to close, as world events are now closing a deeply troubled, tragic period in our history by a determination that suffering which can be eliminated by a human act be eliminated, and to require that those who have exercised a responsibility of conscience to accept terms which imply an admission of guilt, I think does not add up.

And also, if we consider how few men out of the number available were called and how many were not called for reasons other than the luck of the draw, how long the disruption of so many lives has lasted, and how difficult it would be for men to find jobs of any kind, I think the case for requiring alternate service is undercut.

In closing, Mr. Chairman, I would emphasize that the bill I have introduced is but one response to the plight of the objectors to the Vietnam war. Hearings such as yours are a means of bringing the many competing claims to light, of correcting where the evidence is persuasive, and finally acting.

If, as an interim measure, the subcommittee and the committee should decide to recommend enactment of a program similar to the President's Clemency Board, so that those who such a program does help may avail themselves of it while Congress debates the larger issue, I would not construe this as inconsistent with our objective of relieving suffering.

But if we do just that, we ought not pin a medal on ourselves and go home. We need a clear decision after the fullest kind of debate on the question of general and unconditional amnesty.

I do appreciate the opportunity of visiting.

Mr. KASTENMEIER. Thank you very much, Senator Hart.

Do I infer from your last comment that realistically you anticipate that either this subcommittee or any other congressional-legislative group might well decide to recommend a program far less sweeping than yours, and while you would not look with disfavor on that, you would not want it to be construed as any final and conclusive action on the subject?

Mr. HART. You have put it exactly right, yes.

Mr. KASTENMEIER. The committee has before it your bill, S. 1145, as introduced in the Senate. Are there House sponsors of this as a similar measure?

Mr. HART. It is my understanding, Mr. Chairman, whether word for word, that there are House bills. May I introduce to you and for the record Miss Kitty Schirmer from our office. I do not know if it is true on the House side, but there is always somebody in the office who knows more than the Senator.

Mr. KASTENMEIER. I think it is certainly true in the House as well.

Mr. HART. My answer happened to be correct. There are bills that address general amnesty proposed, but not word for word with this, and I would be glad to provide for the record the bill numbers.

Mr. KASTENMEIER. I think we have them, but my question was whether there was a companion measure over here precisely alike, and there is not?

Mr. HART. There is not.

Mr. KASTENMEIER. Your bill grants honorable discharge to all members of the military eligible for amnesty. How would you respond to the Department of Defense's objection voiced at our hearing on Monday that this would result in many individuals obtaining an honorable discharge, including full VA benefits, who had committed the crime of desertion in conjunction with other more serious offenses?

Mr. HART. We have attempted to—and apparently not satisfactorily to the Defense Department—provide for you, Mr. Chairman—we limit the legislative grant of forgiveness or forgetfulness only to the desertion alone, but if the Defense Department alleges that he took the company funds as he left, the grant does not extend to that offense, and proceedings to discipline him for that would continue to be available to the Department.

Mr. KASTENMEIER. In other words, then, in your view, it does not forgive other crimes?

Mr. HART. It does not.

Mr. KASTENMEIER. To what extent does the philosophic motivation for the bill derive out of the uniqueness of Vietnam—that is to say, do you think in another time in the year 1947–48 you would have been disposed to grant amnesty for those similarly failing to serve or who voiced objections in World War II?

Mr. HART. Well, I do not know what I would have thought in 1947. I have an uncomfortable feeling I would not have felt the same, and yet I think the logic is applicable to that situation, a popular war, as to this, an unpopular war.

Mr. KASTENMEIER. Part of the reason for the question is to see what implications can be drawn from the passage of this measure at this time. Part of the implication is that national leaders need be wary of the future about involving this country in conflicts which are later not justified, at least historically, and that there might thus be distinctive treatment for people, as opposed to some other time and some other cause and some other war.

Mr. HART. I think that makes this approach more salable, but how do you respond to the problem that if a fellow really believed—he meant it when he said he was not going to die for Danzig and felt that we had no obligation and did not show up for the war.

Mr. KASTENMEIER. Well, I cannot answer that either.

One last question: One of the issues raised in conjunction surely with your bill and with many other proposals is, Are they constitutional? That is to say, is the constitutionally granted Executive Presidential power of clemency or pardon unique, or does there coexist, unexpressed though it may be, an equal authority on the part of the Congress to exercise the power of amnesty and that the limitation constitutionally is solely in the ability of the Congress to limit the power of the President in granting clemency?

On that point, have you received any legal opinion as to the constitutionality of S. 1145?

Mr. HART. Mr. Chairman, what I have is a very short memorandum here which I can read. It is not, I believe, from the Library of Congress.

Ms. SCHIRMER. The reference to that is taken from a Harvard International Law Journal article which addresses that question and also from a Yale Legislative Services article, both of which I believe are printed in past hearing records on this matter.

Mr. HART. Our short answer, Mr. Chairman, goes this way: Yes, Congress has the constitutional authority to grant an amnesty. We cite Brown against Walker, a Supreme Court case back in the 1890's holding that although the Constitution vested pardon power in the President—and I am now using the language of the opinion—"this power has never been held to take from the Congress the power to pass acts of general amnesty."

And Congress on four occasions in the past enacted, though admittedly less sweeping, grants of amnesty, and each was upheld through various court challenges.

The Justice Department recently takes the position that in all of those court holdings, it was dicta, and by most of the literature this position of the Department is disputed, so the judgment on which I rely is that the *Brown* case and those following established the proposition that we have authority to enact amnesty.

Mr. KASTENMEIER. Thank you.

The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

Thank you, Senator Hart. I have a philosophic problem here, which I am sure from your presentation you have been struggling with yourself, so what I am trying to do in these hearings is to expose myself to and absorb as much information as I can so I can assimilate it and find out where I come out. But for example, in the caption of the bill, it says the bill is to provide amnesty to people who because of their principled objection to service, failed and refused to register, et cetera.

Now, that, of course, assumes that all failure to serve or to register was principled. I would like to believe that. I am not yet able to believe that. I feel that probably the bulk of those who refused to serve may have done so for principled reasons. I am not yet able to believe that it was anywhere near unanimous, however.

Could you comment on that?

Mr. HART. Yes; I can comment first by saying that I wish you had not raised it because I happen to believe as you do. I do not know how many of them took off for the more traditional reasons, did not like the food, or hated to have to get up in the morning.

Mr. DANIELSON. Or they just preferred to do something else.

Mr. HART. And it was because of this belief that for a long time I hung onto the notion that we ought to do it serial number by serial number by serial number, but then I concluded that the inequities, the inconsistencies, and just the raw redtape itself should turn me the other way, this way.

Here I am now explaining that. Yes, there would be some people who were just eight balls who would get all cleaned up, but that that is less troublesome than the prospect confronting whatever the percentage of principled objectors, the prospect of going through the mill on that case-by-case business.

That is the best I can do with that one.

Mr. DANIELSON. Well, sir, all I can say in response to that is that knowing not personally, but knowing you very well by reputation and being an admirer of your philosophical approach, my next comment obviously does not apply to you, but if the witness were someone other than you, I would say that perhaps the influence was pragmatic.

In fact, even on page 2 of your statement about the middle of the page, "I have come to reject that approach because it would create an unworkable administrative task," with which I agree. I detect there the approach of a pragmatic politician who knows that you cannot move a mountain with a wheelbarrow, and really that is what we are talking about here, I think. For heaven sakes, we have so much to do, we just cannot do it, so let us forget about it and go on to something more constructive, and that is not entirely an unjustified approach to things.

Mr. HART. I would not be sensitive if you included me in the group that wears the label.

Mr. DANIELSON. I always believed that people should put on the shoe that fits, so——

Mr. HART. Well, you are right. Ideally, you would have done it another way.

Mr. DANIELSON. Sir, could that have been an influence in your changing your mind in accepting the other approach?

Mr. HART. Certainly, certainly.

Mr. DANIELSON. It would be in mine if I came to the same conclusion.

I have another problem here, equity. Let us assume that we were to adopt this approach. There are many people who have already been charged, tried, convicted, and have served their time for these offenses. They do have a criminal record. They have had the burden of that prosecution and confinement and so forth. How do we equate their situation with the person in exactly the same circumstances who now would get off scot-free?

I know I will get that question from my district, and I need a little help with the answer.

Mr. HART. I am embarrassed to confess I had not thought of it. I have a hunch that the person who has already gone through the mill and paid the price would not quarrel with you and me if we were to make it less burdensome for the other fellow. That is my first reaction.

Mr. DANIELSON. Well, there is comfort to be derived from precedent. There has been in our history, even in our recent history, a number of situations where conduct has been deemed criminal and has been punished, and then we decide it is not going to be criminal any more, and we are not going to punish it any more. I suppose you can get by on that, but I will have to confess I feel uneasy about it.

I do not know some of these answers. They are kind of tough.

On the constitutionality, I think you, as yesterday two of your colleagues, Senators Javits and Nelson, have come up with a very able and clever solution to a very difficult constitutional problem of clemency here. This approach is a little different.

Frankly, I will confess I have thought about this approach myself, though I never put it down in words. You are really not invading, you are not challenging or qualifying the President's exclusive power in clemency here because what you are doing is not granting clemency. What you do in this bill is you would be achieving the result of amnesty by going around the problem and simply repealing, terminating the legal remedies, the criminal legal remedies which now permit prosecution and trial and confinement for these offenses.

I question that we could actually enact an amnesty because that is clemency, but you achieve the same purpose here. As an erstwhile, practicing criminal lawyer, I always admired the ability to come to these solutions in what are otherwise very sticky situations. I thank you for that.

Mr. HART. I will have to find somebody that figured it out and thank them.

Mr. DANIELSON. Well, then pass my thanks on. I got my basic training under a very able lawyer who said if you cannot find some way to show that you are not troubled with a lawyer, for heaven sakes get around it some way or another, and I think you have done that very well.

Thank you. Your comments and your testimony and your bill are very useful. I do not know where I am going to wind up on this, but I think the more information I can get and put it into my mental stew here, the better product I am going to have.

Thank you very much.

Mr. HART. Thank you, sir.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. Thank you Senator Hart for coming before us. I have no great problems with your concept at all, except I have a question about section 8, which is on page 7, where it becomes—you make it a misdemeanor, punishable by fine, for a person to discriminate in employment for any crime or offense that was forgiven.

It seems to me that that section kind of violates the concept of the neutrality of amnesty, that we are creating sort of a new remedy for people who would, had they not had amnesty, that employers could

have made certain judgments about them with impugnity. I am wondering what your comments would be about that.

Mr. HART. I think I understand the problem, and it is a real one. If, in fact, we seek to end the divisions in this country that result from this Vietnam business, I am game to argue that one would nonetheless bar employment because of a washed-out Selective Service nonappearance, should be made accountable and disciplined and sanctions like this applied.

Mr. PATTISON. I guess my point is this, that an employer, under current law, if he wants to make a judgment that his applicant, let us say, lacks personal courage, can fail to hire that person on that basis. I mean, that is perfectly legal. It may be wise or unwise, but it is perfectly legal. It would seem to me that this kind of bars that same employer from making that same judgment, and I think that maybe this would be—also, I think this section, this penalty, I have an idea would be kind of unenforceable or difficult to enforce, and perhaps very emotion-creating and division-creating. I just question whether it does much good, whether the harm it does or the potential harm it may do in terms of public opinion about the bill is worth it.

Mr. HART. If the resistance generated as a result of this was as broad as you suggest it might be, and you could retain the balance of the bill by striking this, I would join with you in striking it. But I still think that the judgment of an employer that this man lacks courage because he refused to register for the draft, the records of which are washed out, is something that I would like to see removed from the option of that employer, because he may be looking at the most courageous job applicant that will ever come through the line.

Mr. PATTISON. I understand that.

I just think that it is a kind of thing the opposition will probably focus on in statements, "Do you realize that if this is passed, an employer who might otherwise not have employed the person anyway, based upon personal judgment, now must hire him, because if he does not he is subject to a fine of $5,000," et cetera.

I think it is the kind of thing that would not be overwhelming; but also I think it is the kind of thing that if I thought it really would do any good, I might feel differently about it. I just have an idea that employers are going to make those judgments anyway, and you are not going to be able to enforce it, and it will just cause more problems than it will cure.

Mr. HART. I can understand that.

Mr. PATTISON. Thank you.

Mr. KASTENMEIER. May I say I rather agree with the gentleman from New York. To impose fines and a year imprisonment tends to be not in the spirit of reconciliation that otherwise the bill is directed to. But nonetheless I compliment you for your work.

Mr. DANIELSON. Will the gentleman yield?

Mr. KASTENMEIER. Yes; I yield to the gentleman.

Mr. DANIELSON. If I could try out two more points.

On the honorable discharges, sir, I am on the Veterans Affairs Committee here, and I am rather sensitive to the incidental benefits of an honorable discharge, veteran benefits which are considerable. I would have a problem saying that a person who would fall within the benefits of your bill should be entitled to all of the extension benefits of the

GI bill and the like. It is one thing to forget, which is the meaning of amnesty; and then you say even though that does not mean forgiveness, we are going to wipe it off the books.

But it is quite another thing to convey a reward, a benefit, you know, a reward that goes with long, honorable, or even short, honorable service which is reflected in the GI bill, I think being the most common thing. I would have a problem with it.

Could you give me some justification for conferring all of these benefits on someone who really did not serve?

Mr. HART. Mr. Danielson, I had a problem with this too, and I had it in and out, and in and out. The reach of it, first of all, sometimes is thought to be more inclusive in terms of how many would benefit, and in fact is the case as you know. But as hurried reading of the bill might not suggest to an outsider, the person whose offense is failure to register or failure to report after registering is not one of those who would benefit from this. But there are substantial numbers, and these are the ones you were talking about who would, provided they met the minimum days of service, 90 or 180 days, I think.

Mr. DANIELSON. I am aware that there is a phasing in period. That is why I qualified long service to even short service. I do not know how much it is, but there is a qualifying period.

But there are some other benefits—insurance privileges and the like. That bothers me.

Mr. HART. Well, I confess it bothers me, too.

But again, perhaps because of the, I believe, practical impossibility of a case-by-case review, I am inclined to provide benefits for the principled deserter, the deserter who because of principle, after he got in and saw what was really involved, he could not accept it and left. I conclude that I want him to have those benefits because I respect what he did and feel that he has earned them, having been placed in those circumstances by us. Acknowledging that a man whose service was bad on all counts and took off, will nonetheless be able to go to college, maybe that is a good thing for other reasons.

Mr. DANIELSON. Well, it sort of tends to take the sting out of it, but, I think, we might be deceiving ourselves a little. My guess is that a person who has such high principles, he could not stand to be in the war and left, would also be of such high principles he would not take advantage of anything he had not earned. So, he probably would not take the benefit under the GI bill. But the rascal who wore the clothes of the conscientious person but who simply just did not want to do his part, would be very willing to continue to wear those clothes and take the benefits.

I have a very deep problem here, and maybe we could reach it this way. Instead of giving an honorable discharge, we could create—we have that right here in Congress—we could create a new form called an amnesty discharge, for Heaven's sake. It would not carry with it any of the penalties of a dishonorable discharge, but at the same time it would not bring with it the benefits of an honorable discharge. I think that the bulk of those who fled would be adequately compensated in this situation by simply having all possibility of prosecution removed. Being immune from prosecution, they would have a right to come back, have a right to acquire citizenship, have a right to take part, to pick up where they left off without getting an added benefit for a service they did not really render. I do not think the stigma at-

tached to an amnesty discharge would be so bad. It is not dishonorable or anything of that nature. But I realize that is the kind of problem we have to work out in markup and discussion. But I am just voicing it because I want you to know it is a problem I have in my mind.

I think to close some of this multitude of cases—I agree with you. I think alternate service, the idea is understandable, and it may be a good idea, but it is not a workable idea. We are drawing on the analogy of penance, doing penance, and penance never works. The person rendering it is going to do a shabby job of work usually, and the person for whom it is rendered is going to resent it. It is going to exacerbate rather than improve the situation. So as an alternate to alternate service, here is a suggestion. Why cannot a person who requires amnesty now, who needs it, just simply report in, either personally or by mail and say here, Uncle Sam, here I am. I have been missing. I am serial number 12345. I take advantage of Senator Hart's bill and close the books on me. But now you can also close the file; I have showed up. And then, that is the end of it; do not worry about him any more. He gets his amnesty discharge, and we can go about the serious part of our lives.

I am not going to ask you for comment.

Mr. HART. Well, I am not going to subscribe to the amnesty discharge by my answer, which was included in your question. If we could get a bill like that included, drop me a line and tell me where you are, then sure.

Mr. DANIELSON. All right.

This is not unfair, though I guess it may be a little beside the point. But I think it is useful for you to know at least how one member of this committee thinks on it.

Mr. KASTENMEIER. Senator Hart, on behalf of the committee, we are very pleased to have you in this morning.

Mr. HART. Thank you very much.

Mr. KASTENMEIER. Next the Chair would like to call—we have six other witnesses today. The next witness is Henry Schwarzschild, who is Director of the Project on Amnesty, A.C.L.U., and has devoted an extraordinary amount of time to this subject. With him is the Reverend Barry Lynn, of the United Church of Christ, Center for Social Action.

Gentlemen, you are most welcome. You have appeared before, so we do not need to greet you for the first time.

Mr. Schwarzschild, if you would proceed, if you will, in either reading your statement or however you care to, and then Reverend Lynn.

TESTIMONY OF HENRY SCHWARZSCHILD, DIRECTOR, PROJECT ON AMNESTY OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, ACCOMPANIED BY REVEREND BARRY W. LYNN, CENTER FOR SOCIAL ACTION, UNITED CHURCH OF CHRIST; AND EDWIN J. OPPENHEIMER, JR., CLEMENCY LITIGATION DIRECTOR, AMERICAN CIVIL LIBERTIES UNION AMNESTY PROJECT

Mr. SCHWARZSCHILD. Thank you, Mr. Chairman and members of the committee.

We have submitted a rather extensive document for the record which reviews not only the general issue of amnesty for the war re-

sisters in the Vietnam era, but also attempts to analyze some of the results of the Presidential clemency program.

With your permission I shall very radically reduce the amount of time it would take to read the entire statement and condense the comments that this committee has heard from us before extensively about the general need for amnesty, and then largely confine my reading of the document to an abbreviated version of my comments about the Presidential clemency program instituted by President Ford last September.

I am accompanied this morning on my left by Edwin J. Oppenheimer, Jr., the clemency litigation director of the American Civil Liberties Union, who is a specialist in Selective Service and military law, together with Mr. Lynn, who you have already been kind enough to introduce.

Mr. KASTENMEIER. Fine. Without objection those documents and the statement you are offering will be accepted by the committee and made a part of the record.

[The material referred to follows:]

STATEMENT BY HENRY SCHWARZSCHILD, DIRECTOR, PROJECT ON AMNESTY, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman, members of the subcommittee, my name is Henry Schwarzschild. I am the Director of the Project on Amnesty of the American Civil Liberties Union Foundation. I am accompanied today by Mr. Edwin J. Oppenheimer Jr., who is the Clemency Litigation Director of the ACLU's Amnesty Project and a specialist in selective-service and military law.

I am grateful to the Committee for having invited the American Civil Liberties Union to present its views on amnesty for the war resisters of the Vietnam era and on the effects and implications of the Presidential Clemency Program. We have spoken to these issues on many occasions in the past few years—in print, on the public platform, in the information media, and before three earlier Congressional hearings, in 1972, 1974 and 1975. Two circumstances, however, make the present moment specially appropriate for one more close look at what this country needs to do in order to end the continuing war against those Americans who are war casualties not by enemy action but by the effect of laws, regulations, policies and proclamations of our own government. First, the expiration two weeks ago of the application period under the Clemency Program instituted by President Ford on September 16, 1974, and, secondly, the fact that the last melancholy scenes of war in Southeast Asia are being played out in these very days.

It is essential that this country begin expressly to confront the implications of the war for its own sense of itself and for the world's vision of it. There is hardly anyone left who does not share the deep sense of horror and fright about what we were willing and able to do in Southeast Asia. Yet we are evidently only too eager to forgive those who cost this country 55,000 lives of our own sons and $150 billion dollars of our resources. Those leaders who involved us in the war without consulting the Congress and by lying to it and to the people of America have gone off to teach at universities and write books, to head up banks and law firms. They have assumed other power positions in public life without any punishment, without the stigma of criminality, without reaffirming their allegiance to the country, without serving for two years in a job that would be for once truly in their national interest. And we talk and act as though young men in their teens and early twenties who came into conflict with the draft and the military must be punished lest we weaken America, lest we encourage disrespect for the law, lest we dishonor those who served and fought and were injured and died. It is a pathetic irony indeed.

THE NEED FOR AMNESTY

The United States Government's war in Southeast Asia tore up the countries and peoples of Indochina for an entire decade. It wreaked enormous havoc also

in our own country. The war divided our society, deepened our bitterness, aggravated our violence-prone disposition, diverted our attention and resources into destructive channels, and forced millions of young men to choose between either obedience to the law or their own sense that this was a useless and immoral war in which to kill others or be killed.

The war imposed its hurt and tragedy very broadly, if not equitably, on the young generation of Americans, the millions of men of draft age during that terrible decade. The primary victims were, of course, the men who died or were wounded in the war. To them and to their families, and indeed to the eight million veterans of the Vietnam era this society owes far more redress than it has even attempted to provide.

But what is often ignored is that the overwhelming majority of men who were of military age during the Vietnam era did not serve in the military. It is simply factual poppycock to suggest that everyone gave two years of his life to the country in that troubled period of our history and that therefore the war resisters should not get off scot-free. Only about 11% of the draftable manpower pool ever saw military service. Millions of men found quasi-legal avenues of escape from the draft, the military and the war, a war in which hardly anyone wanted to fight. Almost every young man whose parents were rich enough to send him to college and get him a 2–S deferment escaped the draft; the lottery protected many of the others. Men by the tens of thousands hid out from the war in medical and psychiatric deferments, in technical and athletic excuses, in the ministry, the Peace Corps, in the teaching and other professional enclaves. Indeed, the very ROTC and the National Guard were havens from the battlefields of Vietnam for thousands. By and large, it was left to the ill-informed and the luckless to fight this dirty war for us.

The men who served in the military in the Vietnam era really fell into four classes: (1) career military men and women, (2) men in the Reserves who miscalculated their chances of escaping the draft and the war by their Reserve connection, (3) involuntary draftees, impressed by means of the Selective Service System, and (4) enlistees who hoped to get a better assignment by voluntarily joining up before they got drafted. The vast majority of the military manpower came from the last two categories, and these were in greatly disproportionate numbers from among the poor, the ill-educated, and the minority communities. It is men from the "lower status" elements of our society (to use Dr. Kenneth B. Clark's phrase) who were drafted in greater numbers, were assigned in greater numbers to the front-line fighting units and to unskilled and dead-end military jobs; they were wounded and killed in greater number, abused by the system of military discipline and justice, and finally ejected from the military machinery in greater numbers with less-than-honorable discharges and other "bad paper" that blight the rest of their lives. This country owes redress to them as well as to the war resisters.

CONSTITUTIONAL AND LEGAL CONSIDERATIONS

The Constitutional power of the President to grant amnesties by executive proclamation is founded on the clause in Article II, Section 2, that entitles the President "to grant reprieves and pardons for offences against the United States, except in cases of impeachment." It has been used repeatedly by Presidents throughout our history, from President George Washington to President Harry Truman. The Library of Congress, Legislative Reference Service, has compiled the particulars of the 17-or-so amnesties that have been granted in our troubled history. Our historical experience and the United States Supreme Court agree that the Congress of the United States also has a concurrent power to enact amnesty legislatively. In *Brown* v. *Walker* (161 U.S. 591 (1896)), the United States Supreme Court declared that although the Constitution vests the pardoning power in the President, "this power has never been held to take from Congress the power to pass acts of general amnesty" (at 601). These very hearings reconfirm the Congress' conviction that amnesty is within its province, and there is ample legal authority indeed for that assertion.

Amnesty may be defined as "a discretionary decision by a sovereign government not to raise the issue of whether a class of its citizens has violated the laws in a political conflict." Amnesty, then is discretionary—i.e., there is no constitutional right or legal entitlement to amnesty. Amnesty is similar in that respect to pardon, but pardon relates to a single individual while amnesty affects whole classes of people; and pardon mitigates further punishment for someone who

stands convicted of an offense, whereas amnesty means a decision not even to raise the question of criminal culpability on the part of that class of citizens. Amnesty is, in its nature, not forgiveness nor approval or ratification of the acts being amnestied; it simply is the means, hallowed by our law and tradition, by which the society decides to wipe out its formal, legal memory of the acts. It is a measure of social reconciliation after severe political conflict. Amnesty today would not necessarily be a ratification of war resistance or draft refusal or desertion, any more than a pardon for a convicted felon suggests approval of the crime of which he stands convicted. It is a way of ending conflict and pain and hurt where there has been enough of that already.

CATEGORIES AND NUMBERS OF PEOPLE AFFECTED

The ACLU urges that all penalties, whether criminal or administrative in nature, that arise from non-violent acts of resistance to the draft, the military, and the war be extinguished by a universal and unconditional amnesty, including at least the following:

(1) *Draft violators.*—Over 7,500 men were convicted of draft violations committed during the Vietnam era. In many instances they were harshly sentenced by federal courts as though they represented a danger to the society more acute than criminals of violent disposition and self-seeking criminal conduct. The number of indictments still pending for such draft violations is about 4,400. The maximum punishment for draft violations, we must also remember, is five years in the penitentiary and a $10,000 fine on each count. 200,000 or more young men in their teens and twenties continue to be in jeopardy of prosecution under the draft law (and will be until the statute of limitations runs out for them) for failure to register when they turned 18.

(2) *Deserters.*—The Department of Defense reported 495,089 cases of desertion from Fiscal Year 1965 through early Fiscal 1973. Half a million men! In one year alone (1971), the Defense Department reported just short of 100,000 men as deserters. What testimony to a demoralized military in a divided country. Obviously, most of those deserters returned voluntarily or by apprehension; the number of deserters who remain at large is far smaller. The number of deserters at large, according to Defense Department figures, hovered around the 30,000 mark for several years. The latest deserter body count of the Defense Department is about 10,000, of whom about half returned under the Clemency Program. But these official figures are themselves subject to considerable doubt.

Draft violators tend to be men—most often white, middle class, and well educated—who decided in good time that they could not serve the war. Deserters are men who had less opportunity to formulate ahead of time their personal or moral or ideological attitude, and who learned from the real-life experience of the military and the war that they would not give their bodies and their lives to that war. The myth that deserters are men who leave their buddies under fire is, of course, false. A striking number of deserters are men who served honorably in Vietnam, and many of them have medals for their heroism in battle. They are men upon whom the realization dawned precisely from their combat experience that the killing made no sense, that the American people did not know what it was good for, and they could not figure out to what end they were destroying several countries and their populations with whom we had no quarrel and who represented no conceivable threat to the security of our country. A good many others found the racism and dehumanization of the military so oppressive, especially in the context of the war, that they left, finding all the enormous difficulties and risks of desertion, underground or exile life more bearable and moral than their continuing involvement in the military and the war.

(3) *Exiles.*—Whatever their number, exiles are men who, being draft resisters or deserters, live abroad because they do not believe that war resistance in the Vietnam era was a criminal act which this country is entitled to punish. They refuse to acknowledge a "guilt" for acts of humanity that would land them in the stockade or penitentiary if they returned to this country. There are an estimated 20,000 American war-resister exiles abroad, the overwhelming majority of them in Canada, with small groups of them in France, England, Sweden and other countries around the globe. Far from "deserting the country," they are men so profoundly troubled by what the country has been doing to the world and to itself and by what it proposed to do to them, that they felt expelled from their own society under threat of severe punishment for their stand against the war. Exiles are not men who wanted to avoid the consequences of their acts of war resistance.

They have already spent many years of their lives away from their family, their friends, their education, their careers, the culture, their country. They have suffered the legal, economic, and psychic burdens of exile, of not knowing whether they could ever return to their own country without draconian punishment for acts which do not warrant punishment. Socrates, it will be remembered, had the choice between exile and death, and preferred the cup of hemlock to the bitterness of exile! Without a universal and unconditional amnesty, the United States will create a large class of American political refugees abroad—for the first time in our history since we expelled the Tories from New England at the time of the American Revolution.

(4) *Persons with court-martial convictions.*—During the Vietnam era, some 550,000 G.I.s were court-martialed for purely military offenses that are not crimes in a civilian context. About half of all the court-martial trials were for absence offenses, about another tenth for obedience offenses, others for those peculiarly vague charges (such as conduct tending to bring discredit upon the armed forces, and the like) that are the hallmark of military justice. The proportion of minority-group G.I.s court martialed was many times the ratio of white G.I.s. Court-martial convictions are the equivalent of felonies in civilian life.

Here, then, are hundreds of thousands of men, involuntarily drafted into the service, discriminatorily punished for offenses which have no standing under the Constitution or in our ordinary criminal code, who will carry with them for the rest of their lives the stigma and disabilities of being convicted felons. We believe that this stigma is unwarranted and intolerable. Note that we do not here advocate amnesty for offenses tried by military courts that are ordinary crimes—no one is talking about amnesty for murder or assault or embezzlement or rape. We are talking about purely military offenses.

(5) *Veterans with less-than-honorable discharges.*—About 600,000 Vietnam era veterans have "bad paper," less-than-honorable discharges from the military, almost all of them "administrative" discharges given not as a consequence of court-martial sentence but in effect arbitrarily imposed by military command decision. In extraordinarily disproportionate numbers, they were given to men from the "lower status" elements of our society, the poor, the ill-educated, and the minority communities. "Bad paper" was given in flagrantly discriminatory numbers to minority and poor G.I.s, so discriminatory indeed that a United States Court of Appeals and the Equal Employment Opportunity Commission have made formal findings that public employers may not discriminate against veterans holding a less-than-honorable discharge and that the refusal to hire for that reason is an act of racial discrimination. (*Thompson* v. *Gallagher*, 489 F.2d 443, 5th Circuit, 1973; EEOC Decision 74-25, Sept. 10, 1973). The disabilities created by these "bad" discharges include deprivation of veterans benefits, lack of access to veterans' hospitals, disqualifications for federal, state and local civil service jobs, inability to receive various kinds of licenses and professional accredization, and severe employment discrimination in private business and industry. These men, almost half a million of them, served their country in compliance with the law. Their reward is life-long dual punishment—the years of their lives taken by the military with all the hardships involved, plus the bad discharge, which will haunt them in many ways throughout their careers. An amnesty for them means veterans' benefits and a greatly increased and decent level of educational, medical, and other social services, and a uniform, single-type certificate of military service, so that the arbitrary command decisions will not hamper the development of their lives as citizen-veterans. There can be no justification for "administrative discharges" and for Separation Processing Numbers on discharges that visit life-long punishment, without due process, on the men who served their country. One uniform Certificate of Service, testifying to the mere fact of military service, is in order. If there are criminal charges to be preferred against a member of the military, let those be adjudicated, but let there not be double punishment (court martial sentence *and* a life-long bad discharge) or arbitrary punishment (administrative discharge) for those from whom we have already demanded years of their lives.

(6) *Civilian resisters and protesters.*—In increasing numbers during the long years of the war, citizens by the thousands registered their dissent, frustration and outrage at the continuing slaughter in Southeast Asia. Thousands, indeed tens of thousands, were arrested in protest demonstrations and other acts whose sole purpose was to demand the end of the killing. Citizens were arrested in the course of lawful and constitutionally protected demonstrations, even if they were

not themselves participants in the demonstrations; they were arrested for other acts which gave symbolic expression to their desperation about the endless war. The charges ranged from petty misdemeanors (trespass, disorderly conduct, and the like) all the way to allegations of espionage and conspiracy. Justice demands that a full amnesty, including expungement of criminal records, be given also to those men and women who spoke to the conscience of the nation in ways infinitely less destructive and brutal than was the conduct of that tragic war.

UNIVERSAL AMNESTY

All the categories of resisters to the draft, the military, and the war must be amnestied. That is to say: the amnesty must be universal, without distinction as to category of war and draft resistance. The amnesty must be granted to all of them as a class, not on a case-by-case examination of the subjective motivations for their acts of war resistance. Amnesty means a class pardon and means voiding the tragic, wasteful, and discriminatory process of case-by-case review. The 1947/8 Truman Amnesty Board examined some 15,000 cases and recommended pardons for 10% of that number with results blatantly discriminatory on grounds of race, class and religion. The Presidential Clemency Board headed by former Senator Charles E. Goodell has some 18,000 applicants before it and, in seven months has disposed of 65 of them (or ⅓ of 1 per cent); at that rate its task will be finished in the year 2150. If all those eligible for President Ford's clemency had actually applied to the Board, the last man to be processed at this rate would get his clemency in about 1,100 years!

UNCONDITIONAL AMNESTY

The amnesty must be unconditional, i.e., not contingent upon the performance by these amnestees of some other "service" to the government. All these men have already spent years of their lives in jail, in underground life in our own country, in exile abroad, or in the military services themselves. Their lives have been profoundly disarranged and distorted by the war, and their suffering has been as great as the service they have rendered our nation. No purpose can possibly be served by demanding that these young men spend time in some supervised form of allegedly socially constructive labor. Alternative service is punishment—punishment for humane and self-sacrificing service to the highest ideals of the nation. The best thing this country can do for its young sons after the traumas of the war is to let them return to their own lives, unhindered by the heavy hand of government. Conditional amnesty is in conflict with the very nature of amnesty, which is the society's deciding to set aside the divisive and conflicted history of the past. The war resisters have served this country; additional demands made of them and their lives are mere vindictiveness.

THE PRESIDENTIAL CLEMENCY PROGRAM

The Clemency Program instituted by President Ford by his Proclamation of September 16, 1974, is not an amnesty and was not intended to be an amnesty. It is, to the very contrary, an expression of the war policies of this and the prior Republican and Democratic administrations. With its punitive and demeaning provisions, its exclusion of most of those who need amnesty, its morass of conflicting standards and procedures, its administration by four governmental agencies that are hostile to the fundamental moral commitments of the war resisters, the Presidential Clemency Program is designed to reaffirm that the war in Southeast Asia was right and that those who refused to participate in it are the criminals of the Vietnam era. The Clemency Program says that the government, in its generous humanity, will lessen the punishment due to the war resisters below what the law otherwise might have imposed, but it insists upon punishment so that the horrible past shall stand validated. It permits the government that inflicted the horrors of that war upon Asians and Americans alike the self-satisfaction of claiming to be generous and humane. The Clemency Program is rather like the spectacle of the Vietnamese children, who were made into orphans by us, being virtually kidnapped to the United States in a demonstration of the benign humanity of the American government.

The Clemency Program offers its peculiar remedies only to a very small proportion of those in need of amnesty: to some of the draft violators, to some of the military deserters, to some few of those with less-than-honorable discharges, and to none of the other categories of people at all. Of the estimated 750,000 people

in need of a post-Vietnam amnesty, perhaps 130,000 were declared eligible for the Presidential Clemency. Of those who were eligible, 80% chose not even to apply for clemency, despite massive publicity and persuasion. Of the 23,000 that did apply, most stand to gain absolutely nothing whatever from the Program, as we shall show in a moment.

The Clemency Program is a failure, not only in terms of statistics. Its failure lies fundamentally in the moral and political assumptions that gave birth to it, and its failure lies in the unresolved problem of war resistance and the lives of thousands of men and women who had the courage to defy the might and power of the United States by saying NO to what they saw then—as we all see now—to be a monumental national and international disaster.

No extension, no tinkering with the Clemency Program's mechanism, no self-serving statements from its administrators about their fairness will change that failure into success. A universal and unconditional amnesty would not accomplish much. Such a true amnesty would not end poverty or racial bigotry or war. It would not even restore to GI's their lives or their limbs or the years they gave to that war nor would it give back to the war resisters the years spent in prison or exile or underground, the pain of separation from family and friends. But amnesty would be doing what we can do—and therefore must do—to end hurt and victimization arising from the war among ourselves and it would say that this country will live in peace with those who wanted it to live in peace with the world. That would be a noble act. We have not had many noble acts from our government in a long time. We would be well served by such an amnesty.

THE PRESIDENTIAL CLEMENCY BOARD

The Board has jurisdiction over clemency for 8,700 persons who have been convicted of certain draft violations by the federal courts, over some 20,000 persons convicted of absence violations in the military courts and over about 90,000 veterans who were administratively given less-than-honorable discharges from the military because of unauthorized absence. Those eligible to apply, therefore, number about 120,000. The Board has received about 18,000 clemency applications, i.e., 15% of those eligible have applied. Remember, if you will, that all those eligible to apply for clemency to the Board have been convicted and have served their sentence or have been otherwise punished. Society has no further claim on them whatever; they are in no jeopardy from the law because they have already done what the law required of them.

The Board is authorized to recommend to the President clemency for these men in the form of (a) a pardon and (b) a Clemency discharge in exchange for up-to-two-years of alternate civilian service.

About 4/5 of the Board's 18,000 applications have come from Vietnam-era veterans with administrative Undesirable Discharges from the military. The Board can offer them (a) a pardon, which they do not need since they were never convicted of a crime, not even by a court martial for a military offense, and it can offer (b) a Clemency Discharge, which gives them neither greater dignity nor any veterans' benefits whatever, only a life-time stigma. And for these dubious advantages, the Board will require up to two years of alternate service from these veterans. For 80% of the Board's applicants, the clemency is a hoax.

For the remaining applicants, the Board offers a Presidential pardon that may be of some limited value, since those men indeed do have civilian or military felony records. But a pardon does not expunge a criminal record, nor does it overcome civil disabilities, except to the extent to which any jurisdiction and any public or private agency chooses to give it that effect.

And for those limited benefits the Board imposes the condition of up-to-two years of alternate civilian service. Mind you, these are men who owe society nothing more; they have already served their penalty after trial and sentence, yet the Board imposes further punishment upon them as a pre-condition for the clemency.

The clemency, in other words, is not given at all—it is traded, it is exchanged as a quid pro quo for a species of forced labor under the control of the United States Government. Yet Mr. Goodell and the Board pride themselves on the generosity of their sentencing practice, with none of the 65 men so far processed having received the maximum 2-year term of alternate service and no one having received a term longer than 12 months. But in fact the Board merely trades its inferior merchandise—a pardon more often useless than not and a discharge no better than the one already held—for a higher or lower price as it sees fit.

That is not generosity and it is not amnesty, and no pride can attach to this mean process.

Is it any wonder then that men have stayed away from the Presidential Clemency Board in a proportion of 4 to 1? Moreover, the disappointment of those who have applied will yet make itself felt. The disadvantaged and ill-educated will not give up their present jobs in this economy to find ill-paid alternate service work for 3 or 6 or 12 months in order to get a pardon they don't need and a Clemency Discharge which gives them no benefits and does them no good.

Mr. Goodell makes much of his judgment that most of those who have applied for clemency to the Board seem to come from disadvantaged circumstances and do not fit his stereotype of the "war resister". These men do not seem to have run afoul of the draft or military law for ideological anti-war reasons. What he does not say is that the disadvantaged and ill-educated do not give high-sounding reasons, they do not quote St. Thomas Aquinas or Thoreau or Martin Luther King, but they know a useless and immoral war when they see one; and they will let their personal problems take priority over what they cannot agree to be the country's need for their services, their lives. And the well educated may have been too wary to give ideological anti-war reasons for their conflict with the law at a time when the expression of anti-war sentiments brought fierce reprisal from the authorities. Even Mr. Goodell conceded in his testimony the other day that half his applicants expressed some opposition to the war, and his own case summaries reflect an astounding proportion of dissenting religious and political objectors to the Vietnam war. Mr. Goodell's solicitude for the poor and underprivileged among his Vietnam-veteran clemency applicants would be more convincing if he demanded that they now be given Honorable Discharges so that they could perhaps find a decent job. But he offers them the stone of a Clemency Discharge for the high price of a possibly non-existent job on which they cannot support a family.

The Presidential Clemency Board, in sum, is acquiring a staff of about 600 government lawyers and employees in order to impose additional punishment upon men already legally punished for their conflict with the draft and the military and in order to offer them useless remedies in exchange.

SELECTIVE SERVICE SYSTEM

The Selective Service System was charged by the Presidential Proclamation and Executive Order of September 16, 1974, with administering the alternate service required as a condition for clemency by the three agencies to which war resisters apply—the Presidential Clemency Board, the Department of Justice, and the Department of Defense. The Selective Service System has called the clemency alternate service "Reconciliation Service", a neat touch of Orwellian Newspeak.

The SSS receives referrals from the three agencies of persons who have accepted the conditions of clemency. It sets standards for the kinds of jobs that qualify as being in the national interest, and it assigns returnees to such jobs if they cannot find them on their own. It certifies the satisfactory completion of alternate service by clemency applicants to the referral agency, which then gives effect to the clemency.

We have no major quarrels with the Selective Service System as such over the Reconciliation Service. We would comment that (a) it is a characteristic part of the bizarre and vindictive Clemency Program that a major share of its administration is vested in an agency with which the war resisters had their conflicts and which is not known for its loving or tolerant attitude toward war resisters; and (b) that the Reconciliation Service has given a new function, a new lease on life to a virtually defunct and purposeless agency of the government, which manages nonetheless to consume $45,000,000 of the taxpayers money. We have complaints about the Reconciliation Service of a lesser order of significance, such as the absence of any right of appeal by Reconciliation Service enrollees from determinations made by the Selective Service System, about the predictable inequitable and discriminatory fashion in which the State Selective Service Directors will interpret the regulations, guidelines and directives (the history of the draft is a compelling basis for this fear), and about the danger that in the midst of a national job crisis, with millions unemployed, the requirement that Reconciliation Service jobs not compete in the general labor market may impel compulsory job assignments to notorious para-miltiary agencies such as the California Ecology Corps.

The Selective Service System speaks of the Reconciliation Service as being entirely voluntary. It is voluntary only in the very special sense that no criminal penalty attaches to the non-performance of the alternate service itself. But returnees referred by the Department of Justice, for example, will have their criminal prosecutions for draft violation revived and face five years in the penitentiary if they fail to complete their Reconciliation Service; returnees under the Board's program do not get their pardons; those referred by the Defense Department face the risk, however slight, that the government might try to charge them with having fraudulently obtained the Undesirable Discharge they were given at the first stage of the clemency processing. It is a peculiar notion of voluntariness.

It should be added that the military-deserter enrollees will very likely be the largest number of those who default on the Reconciliation Service. Their risk of prosecution is very small, they have their Undesirable Discharges, the Clemency Discharge and the pardon are negligible incentives for another investment of two years of one's life after the years spent in the military and in exile or underground.

Another witness before these hearings, Mr. Thomas Adler of the Public Law Education Institute, will later analyze some of the problems arising from the failure of the Selective Service System to publish in the Federal Register the directives and guidelines that govern the Reconciliation Service.

Ultimately, it is not the administration of the clemency alternate service that troubles those who advocate an unconditional amnesty. It is the institution of alternate service, its existence, its compulsoriness. The war has been massively dislocating for millions of Americans. No requirement of the war, no national emergency exists to justify further disruption of the lives of these men. No system of alternate service can be constitutionally or morally justified in the circumstances that gave rise to war resistance.

PROPOSED LEGISLATION

The power of Congress to legislate amnesty is generally recognized by the United States Supreme Court, by constitutional analysts, and by historians. It appears that the only people who argue an exclusive presidential prerogative are the spokesmen for the Nixon-Ford administrations, whose passion for Congressional power has never been overwhelming.

The bill offered by Senators Gaylord Nelson and Jacob Javits would extend and modify the Presidential Clemency Program. Senator Nelson, in offering the bill, spoke feelingly about his support for universal and unconditional amnesty and about his co-sponsorship of the far broader amnesty legislation proposed by Senator Philip Hart. He declared his own sense that the Congress should face up to the need and desirability of a broad and unconditional amnesty. We emphatically share that view.

Accordingly, to the extent to which the Nelson-Javits bill extends the Presidential Clemency Program, we find the bill quite unacceptable. A bad solution is not improved by prolonging it, rather the extension would compound and aggravate the deceptive mockery of the Clemency Program.

At the same time, the Nelson bill contains certain provisions, relating for example to the regaining of American citizenship by war resisters who have surrendered it and to immunity from arrest and prosecution for exiles on temporary visitations to this country, that we believe to be valid and essential components of any future universal and unconditional amnesty. Their enactment, without the extension of the Clemency Program, might be a welcome step.

The amnesty bills offered by Congresswoman Abzug in the House and by Senator Hart of Michigan in the Senate makes immense strides in the direction of universal and unconditional amnesty. They are courageous and welcome first efforts. Neither of them meets all the requirements and needs of a true amnesty, but they could rather easily be amplified and amended so as to bring a true and just end to the tragic divisions in our country over the Vietnam war. The American Civil Liberties Union and other organizations will gladly lend their expertise to the work of drafting appropriate legislation.

AMERICAN PUBLIC LEADERS, THE WAR, AND AMNESTY

Fifteen terrible years of direct United States involvement in the southeast Asian conflict are not coming to a melancholy and tawdry end. The waste of our national substance has been appalling, in lives lost and ruined, in bodies broken,

in families separated, in wealth and natural resources vainly and destructively squandered, in national purpose and determination to solve the human problems of our society. The insistence of some few upon continuing the waste of human resources is a repellent spectacle. The demand for these quarters of a billion dollars more for the hallucination of an American settlement in Vietnam is of one piece with the Presidential Clemency Program. Both play out to the last, mad end the obsessive self-justification by some of our national leaders about the catastrophic policies of the past decade.

Mr. Goodell's tirade here the other day about the dire ends that would befall this country if we had a universal and unconditional amnesty comes from a man who had once understood the needless and murderous insanity of the Vietnam war. Can he—can this Congress—really believe that this country would be damaged by an amnesty for those who wanted this country to end that war five and ten years ago? Can Mr. Goodell's friendship with the new President and his political ambition really blind him to the damage that has been inflicted upon this nation and the world by those who supported the war? Can he or this Congress really mean to punish only the young for that long and divisive series of tragedies?

If America means to confront its own past and deal with it in political justice and humane decency, then a universal and unconditional amnesty will be a solemn and productive start. We urge that course upon this Committee, upon the Congress, and upon the nation.

Thank you, Mr. Chairman and Members of the Committee.

Mr. KASTENMEIER. The Chair at this point, before Mr. Schwarzschild proceeds, observes that in 3 short days of hearings—and it is necessary for us to confine hearings to a relatively short period of time if we are to treat not only this subject but many others pressing upon us. By necessity, many, many organizations, many individuals, indeed, many Members of Congress, are unable to appear so that we could comprehensively treat the subject by having Government, certain congressional witnesses, and other organizations and individuals who, in a representative capacity, could contribute to the spirit of these hearings without making it a rather prolonged and unending set of hearings. I think Mr. Schwarzschild and his colleagues are uniquely qualified to appear.

Many others are also qualified to appear, but I think will forgive us for not perhaps having invited them.

Mr. Schwarzschild?

Mr. SCHWARZSCHILD. Thank you, Mr. Chairman. We are grateful to the committee for having requested the American Civil Liberties Union to present our views on amnesty for the war resisters of the Vietnam era and on the effects and implications of the Presidential clemency program.

We have, as you have indicated, spoken to these issues on many occasions in the past—in print, on the public platform, in the information media, and indeed before three earlier congressional hearings, in 1972, 1974, and early this year. But two circumstances, it seems to us, make the present moment especially appropriate for one more close look at what this country needs to do in order to end the continuing war against those Americans who are war casualties not by enemy action but by the effect of laws, regulations, policies, and proclamations of our own Government. One is the expiration 2 weeks ago of the application period under the clemency program instituted by President Ford last September, and the other is the fact that the last melancholy scenes of the war in Southeast Asia are being played out in these very days.

The Government's war in Southeast Asia tore up the countries and the peoples of Indochina for an entire decade. But it wreaked enormous

havoc also in our own country. The war divided our society, it deepened our bitterness, it aggravated our violence-prone disposition, and it diverted our attention and resources into destructive channels, and it forced millions of young men to choose between either obedience to the law or their own sense that this was a useless and immoral war in which to kill others or to be killed.

The war imposed its hurt and its tragedy very broadly, if not equitably, on the young generation of Americans, the millions of men of draft age during that terrible decade. The primary victims were, of course, the men who died or were wounded in the war. To them and to their families, and indeed to the 8 million veterans of the Vietnam era this society owes far more redress than it has even attempted to provide.

But what is often ignored is that the overwhelming majority of men who were of military age during the Vietnam era did not serve in the military. It is simply factually wrong to suggest that everyone gave 2 years of his life to the country in that troubled period and that therefore the war resisters should not get off scot-free. Only about 12 percent of the draftable manpower pool ever saw military service. Millions of men found quasi-legal avenues of escape from the draft, the military and the war, a war in which hardly anyone wanted to fight. Almost every young man whose parents were rich enough to send him to college and get him a 2–S deferment escaped the draft. The lottery protected many of the others. Men by the tens of thousands hid out from the war in medical and psychiatric deferments, in technical and athletic excuses, in the ministry, the Peace Corps, in the teaching and other professional enclaves. Indeed, the very ROTC and the National Guard were havens from the battlefields of Vietnam for thousands. By and large, it was left to the ill-informed and to the luckless to fight this dirty war for us.

This committee has already heard and examined the troubling issue of the constitutional power of the Congress to act in this area, and all I would do is repeat, perhaps, Senator Hart's allusion this morning to the Supreme Court case of *Brown* v. *Walker*, 161, U.S. 591, decided in 1896, in which the Supreme Court declared that while the Constitution vests the pardoning power in the President in article II, section 2, it said, "this power has never been held to take from the Congress the power to pass acts of general amnesty;" to take from the Congress, mind you. It does not vest that power, but that power vests inherently in the Congress to do; and these hearings, as previous hearings have reconfirmed Congress sense that amnesty is within its province, and there is indeed ample legal authority for that assertion.

The American Civil Liberties Union, together with broad elements of American society urges that all penalties, whether criminal or administrative in nature that have resulted or might result from conflict with the law arising from the draft, the military, and the war be extinguished by a universal and unconditional amnesty, including at least the following categories of people affected: The draft violators of the Vietnam era; those who deserted from the military; those who went into exile abroad who were by and large either draft violators, who thought they might be draft violators or deserters from the military, of whom there are still perhaps 20,000 or 30,000 in political exile abroad; men who were in service but convicted by courts-martial of purely military offenses which have no equivalent in civil law under the Constitution—it must be remembered that of the over half million

courts-martial, better than 50 percent related to absence offenses which do not normally exist in civilian life, and another 12 or 15 percent are related to obedience offense. Again, disobedience is not a criminal offense and ought not to be under our Constitution. Fifthly, we believe the amnesty ought to extend to those 600,000 or more Vietnam era veterans who have less than honorable discharges from the service which blight the entire rest of their careers and lives; and finally, the category of civilian resisters and protesters against the war who found themselves charged because of their activity of protest resistance, with offenses ranging from minor misdemeanors, such as disorderly conduct and trespass, to very substantial felonies such as conspiracy and espionage.

Indeed, we believe that all of these categories of resisters to the draft, the military, and the war must be amnestied. That is to say, the amnesty must be universal, without distinction as to category of war and draft resistance. It must be granted to all of them as a class, not on a case-by-case basis, not only because of the prudential reasons which Mr. Danielson this morning rightly observed were in part Senator Hart's concern in his own proposed bill; though that is certainly a very severe consideration.

It must be remembered that in 1947–48 the Truman Amnesty Board examined individually some 15,000 cases. It took them the better part of a year, and they finally made recommendations of Executive clemency for 10 percent of that number, leaving 90 percent of them unpardoned. This time around, to give you an idea of what case-by-case examination in the clemency program terms means, as Senator Goodell on Monday, the first day of your hearings reported, they have about 18,000 applications before them, and in 7 months of their proceedings have disposed of 65 of those 18,000 cases, which is one-third of 1 percent. At that rate, the Clemency Board's task will be finished in the year 2150. Indeed, if all of those eligible to apply to the Clemency Board, all those 120,000 who are eligible to apply under the earned reentry program, had applied, at the present rate of disposition, the last person to have applied for clemency to Mr. Goodell's board would receive his clemency in 1,100 years from now. That is patently absurd.

The amnesty, it seems to us, must be unconditional; that is to say, it must not be contingent upon the performance by these amnestees of some other service to the Government. These men have already spent years of their lives in jail, in underground life in our own country, in exile abroad, or in the military services themselves. Their lives have been profoundly disarranged and distorted by the war, and their suffering has been as great as the service that they have rendered our Nation. No purpose can possibly be served by demanding that these young men spend additional time in some supervised form of allegedly socially constructive labor. Alternative service, you must remember, is punishment, and is seen as punishment in the Presidential clemency program that is operating today. It is punishment of a lesser severity than otherwise the law might have imposed; but it is intended to be punishment indeed, and thus it is viewed and experienced by the war resisters themselves.

Let me turn then very briefly to the Presidential clemency program. The program instituted by President Ford by his proclamation and Executive order of September 16 of last year, is not an amnesty and

was intended to be an amnesty. It is, to the very contrary, an expression of the war policies of this and the prior Republican and Democratic administrations. With its punitive and demeaning provisions, its exclusion of most of those who need amnesty, its morass of conflicting standards and procedures, its administration by four governmental agencies that are hostile to the fundamental moral commitments of the war resisters, the Presidential clemency program is designed to reaffirm that the war in Southeast Asia was right and that those who refused to participate in it are the criminals of the Vietnam era.

The clemency program says that the Government, in its generous humanity, will lessen the punishment due to the war resisters below what the law otherwise might have imposed, but it insists upon punishment so that the horrible past shall stand validated. It permits the Government that inflicted the horrors of that war upon Asians and Americans alike the self-satisfaction of claiming to be generous and humane. The clemency program is rather like the spectacle of the Vietnamese children, who were made into orphans by us, being virtually kidnaped to the United States in a demonstration of the benign humanity of the American Government.

The clemency program offers its peculiar remedies only to a very small proportion of those in need of amnesty: To some of the draft violators, to some of the military deserters, to some few of those with less than honorable discharges, and to none of the other categories of people at all. Of the estimated 750,000 people in need of a post-Vietnam amnesty, perhaps 130,000 were declared eligible for the Presidential clemency. Of those who were eligible, 80 percent chose not even to apply for clemency, despite massive publicity and persuasion. Of the 23,000 that did apply, most stand to gain absolutely nothing whatever from the program, as we shall show in a moment.

The clemency program, then, Mr. Chairman, is a failure, not only in terms of statistics. Its failure lies fundamentally in the moral and political assumptions that gave birth to it, and its failure lies in the unresolved problem of war resistance and the lives of thousands of men and women who had the courage to defy the might and power of the United States by saying no to what they saw then, and what we all see now, to be a monumental national and international disaster.

No extension, no tinkering with the clemency program's mechanism, no self-serving statements from its administrators about their fairness will change that failure into success. A universal and unconditional amnesty would not accomplish much. Such a true amnesty would not end poverty or racial bigotry or end war. It would not even restore to GI's their lives or their limbs or the years they gave to that war, nor would it give back to the war resisters the years spent in prison or exile or underground, the pain of separation from family and friends. But amnesty would be doing what we can do, and therefore must do, to end hurt and victimization arising from the war among ourselves, and it would say that this country will live in peace with those who wanted it to live in peace with the world.

That would be a noble act. We have not had many noble acts from our Government in a long time. We would be well served by such an amnesty.

Mr. Chairman, with your permission, I would now ask that you invite the Reverend Mr. Barry Lynn to discuss very briefly the func-

tioning of the parts of the clemency program that are under the jurisdiction of the Department of Justice and the Department of Defense.

And then I will briefly allude to some of the details of what has been going on in the Clemency Board and selective services which are also involved, and that will finish our presentation this morning.

Mr. KASTENMEIER. Fine. Reverend Lynn?

TESTIMONY OF REV. BARRY W. LYNN, CENTER FOR SOCIAL ACTION, UNITED CHURCH OF CHRIST

Reverend LYNN. Thank you. My name is Barry Lynn, and I coordinate amnesty activity in the United Church of Christ. Although I do not speak for all the members of that denomination, I have been carefully monitoring the Presidential clemency programs for the past 7 months.

In my view, Mr. Ford's program did not fail merely because of technical irregularities, but because of some fundamental conditions attached to it, the principal one being the alternate service requirement.

It seems difficult to expect men now to perform the kind of alternate service so many of them had requested 5 or 7 or 10 years ago, but were denied at that time.

Local draft boards, in the days of the induction authority, did have the duty of making judgment on the sincerity of conscientious objectors' claims. In the 1 year that such statistics were kept, in 1970, Assistant Defense Secretary Roger Kelly reported to the Senate that 19,000—only 19,000—of the 100,000 CO applications in that year were actually granted.

I think it needs to be recalled that had the initial test of conscience been more honestly done, we would not have so many men in legal jeopardy today. Outside of that broad difficulty, though, implementation of the Justice and Defense Department policies and procedures was not, in fact, quite as smooth or as humane as the Government witnesses Monday might have one believe.

And, although I do not have the time to respond to the several hours of Defense and Justice testimony, I would like to point to just a few problems which Justice and Defense did not mention in their testimony on Monday.

The Department of Justice considered certain factors to be mitigating in the determination of the length of alternate service, such as lack of sufficient mental capacity to understand the gravity of one's actions. Numerous individuals, however, were not aware of these limited factors of mitigation before their arrival to turn themselves in to local U.S. attorney's offices.

Conspicuously absent from the list of mitigating factors was opposition to the war in Indochina. It is interesting, too, that in some judicial districts all applicants received the full 24-month term, and that overall, five out of seven applicants received 18 to 24 months.

Now it seems to me, that either "mitigating circumstances" are very hard to come by, or in fact the U.S. attorneys did not look very hard to find them.

The second major problem is that legal counsel was not provided for these men, although many men were told to obtain a lawyer. This

would have been very difficult, in many cases, unless they had been in touch with the amnesty movement, or counseling movements across the country.

Legal assistance could have been provided, across the country, under the Criminal Justice Act of 1964, but only in Oregon was this in fact done, and thoroughly explored. Some have questioned how important legal assistance is in these cases, but I think it is important that this committee be clear about the extreme difficulty U.S. attorneys have had within the past few years in successfully prosecuting alleged "draft evasion" cases.

The vast majority of cases taken through the courts in the last years have been dismissed, usually before a trial. In fiscal 1973, only 28 percent resulted in convictions. The Department of Justice has been somewhat obtusely arguing for years that the reason for the high rate of dismissal is because men accepted military induction in lieu of prosecution.

However, such was not possible in fiscal 1974. But, even there in that year, there was only a 33 percent conviction rate. Under the President's program, of course, a man was guaranteed of a 24-month sentence.

Awareness by the Justice Department of the lack of prosecutive merit in so many of its cases led William Saxbe to order last November a review of all of those cases of men in legal jeopardy in each judicial district. Regrettably, there appears there, too, to have been an incredible discrepancy in the seriousness with which U.S. attorneys undertook their task. For example, in the southern district of Mississippi, 14 of the 19 pending cases were declined prosecution—74 percent dismissed.

However, the western district of Pennsylvania had 67 pending cases and dismissed not a single one. I found it very difficult to believe that the practices of Selective Service in that area of Pennsylvania were so perfect as to lead to no dismissable errors in all of those cases.

Clearly many of the remaining 4,400 draft evaders known to the Justice Department have perfectly valid defenses to their indictments as well. These remaining 4,400 men constitute a final list of registered persons still in jeopardy.

Although my office does not handle the bulk of informational requests about this list any longer, while it did, some 60 percent of the persons calling to find out if they were still in jeopardy in fact were not. And, often, this meant that for 5 or 7 years people have been under the mistaken assumption that there were charges outstanding against them. The Justice Department made no effort, in all of these years, to tell men that investigations had not led to criminal charges.

It is unfortunate, too, that the President's program did not permit the period of time for non-registrants to register without punishment. President Ford's own son failed to register for the draft on time because it "slipped his mind." And he was not, and he should not have been, prosecuted for that action.

But, unfortunately, many of his contemporaries, or near contemporaries still face 5 years in prison for that offense. And I would like to illustrate, if I could, the human cost of not having such a registration provision.

In one case with which I am familiar, a man from innercity New York was having difficulties with drug abuse during his teenage years. He spent 1½ years in prison for drug use. And, needless to say, registering for the draft was not one of his prime considerations.

After participating in a Federal drug rehabilitation program, he finally stopped using drugs and got a steady job. Feeling that he should now register for the Selective Service, to fulfill an old obligation, he did so. One month later he received a letter indicating that unless he signed up for 24 months of alternate service, he could expect to find himself back in prison.

His new drug-free life is now over, perhaps. He did sign up for alternate service, but in my view, that man, in rebuilding his own life, contributed already to the national health, safety and interest, which presumably is what alternate service is all about.

One final note on Justice relates to the Immigration and Naturalization Service. The Presidential clemency program excluded participation by individuals precluded from re-entering the United States under a provision of the U.S. Immigration and Nationality Act.

That section provides a permanent bar to returning to the United States for any former Americans who left the United States or remained abroad to "avoid training or service in the Armed Forces." Immigration Officials are now determining, as a matter of fact, that many former Americans who have recently become citizens of Canada, Sweden, and elsewhere, must have left to avoid military service.

They are making such a determination on their own, even if no charges are currently pending here in the United States. To me it seems particularly inhumane to use such a bar as a punishment, because legal culpability cannot be maintained through normal judicial channels.

Briefly now, if I might turn to Defense Department problems, there is one fundamental reason why the Defense Department program has been a relatively greater success than the other phases of the President's program. This is because of the so-called "deserter's loophole" through which a returnee is seemingly able to avoid the requirement of actually doing even 1 day of alternate service.

Once he is processed out, with an undesirable discharge, the military loses jurisdiction unless they can prove that he fraudulently obtained his discharge. And this is something that military authorities have already admitted would be virtually impossible to prove.

There is, of course, very little impetus to do the alternate service, on practical grounds, since the most the work can do is to allow a man to exchange his undesirable discharge for a so-called "clemency" discharge. Such a discharge is of very dubious value because it will not grant VA benefits, and will, in the view of most people, make a man no more employable than before.

Congressman Seiberling released a study last year of the 100 largest corporations in America. And, even there, 41 percent of the respondents admitted that they discriminate in hiring against men who have "general discharges under honorable conditions."

And I fail to see how a clemency discharge, which Mr. Hoffmann the other day said would not recharacterize a man's service, would be anything but a greater stigma on that man's employability.

I have a particular problem with the very simple answers given by the Defense Department as to the due process protections afforded at

Fort Benjamin Harrison. They acted as if they were sure that there were only 12,500 men eligible for the program. But, in fact, many of the counselors working for the National Council of Churches' Clemency Information Center out in Indianapolis found that as many as 50 percent of the returning deserters were not, in fact, listed on the "inactive" lists. It took some people weeks, and even months, to find out where these records were.

It seems possible, then, that some persons over whom the Defense Department had very questionable jurisdiction may have needlessly participated in the President's program.

A greater problem arises with those men, though, who were clearly eligible for the program, but who did not realize that they may have had better options outside of the program. The starkest admission of this problem was reported to the New York Times as early as last October.

One military lawyer said that he felt that about half of the returnees could successfully defend against their charges through normal court-martial proceedings. My most significant problem is with the legal counsel employed by the Government to determine exactly what those defenses might have been.

In many cases, counsel did not, on its own initiative, even look at the records available. If a man felt something might be indicated therein, then they went and searched out the records.

And, second, to my knowledge only one person actually accepted court-martial in lieu of discharge because of the noxious circumstances surrounding that process which often meant a man would have to spend many months incarcerated.

These men were frustrated, distraught, and they wanted to get out. And I am sure that the Defense Department was aware on Monday and throughout this program, of the enormous psychological pressures that would push a man into clemency instead of allowing him to fully explore his legal options.

And if I might just give two examples of the kinds of cases that we ran into, consistently, all around the country? One man who we are calling a Mr. Davis, was a member of the Ohio National Guard during the time of the Kent State tragedy. After being told by a Guard colonel that the Guard had acted properly, but that next time they should "get 40 instead of 4" this man decided that participation even in the Guard was an immoral act.

He left for Canada. Shortly thereafter he was, probably illegally, activated to the Regular Army. He received 21 months of alternate service.

An even more unbelievable case involves a man whom we are calling Mr. Jones, who should never have had been inducted into the Army in the first place, because of a severe asthma problem. Moreover, his request for conscientious objector status had been denied in the Army, even though a chaplain and two officers recommended it, because the Army psychiatrist said he did not feel the man was sincere.

At the processing at Fort Benjamin Harrison, a discharge under honorable conditions was refused because Jones had technically applied for the wrong type of C.O. discharge several years ago. His clemency service, however, because of all of these mitigating circumstances, was re-

duced from 24 to 23 months. He was assigned, now, to work in the California Ecology Corps.

However, he is unable to begin his work because, in addition to his asthma, he has a slipped disc. When he gets to California, he will be asked to fight forest fires.

Adjudication of this length of alternate service term was done by the Joint Alternate Service Board. They need not consider any factors as mitigating except length of satisfactory service prior to absence, length of service in Southeast Asia in hostile fire zones, awards and decorations, and wounds received in combat.

This means that conscientious objection to war, wrongful denial of claims for hardship and the like, are not reviewed. Other due process protections which are not afforded were the right to a personal appearance, the right to refute documentation improperly included in files, the right of witnesses to appear, and a ready appealability of the decision rendered.

The fact that this program was created through Executive discretion does not mean that every constitutional safeguard at the heart of the American legal system can be so blatantly subverted.

I am sure we can all answer questions on some of these specific details in the future. I would like to turn things back to Mr. Schwarzschild for some comments on the Board.

[The prepared statement of Reverend Lynn follows:]

STATEMENT OF REV. BARRY W. LYNN, CENTER FOR SOCIAL ACTION, UNITED CHURCH OF CHRIST

Mr. Chairman, I appreciate the opportunity to appear here this morning. My name is Barry Lynn and I co-ordinate amnesty activity in the United Church of Christ through a priority program called "To Heal a Nation." I have been carefully monitoring the Presidential Clemency Program for the past seven months, and have been concerned not only with policy pronouncements made in Washington, but also with the practical implementation of those policies around the country by the four agencies involved.

My statement is really in two sections. The first deals with the broad question of why the Presidential Clemency Program failed both morally and statistically to accomplish its goal of healing some of the continuing wounds of Vietnam. I believe fundamentally that no amnesty with strings, no clemency with conditions will ever succeed. The inherently inaccurate assumptions upon which such a conditional program would be based make it impossible to implement successfully.

President Ford's program rested, of course, on his particular view of what type of people constituted the class of war resisters. In his speech of August 19, 1974, before the Veterans of Foreign Wars convention in Chicago, he made it clear that he felt that war resisters "committed the supreme folly of shirking their duty at the expense of others." That presumption of cowardice and ignorance went a long way in shaping the final dimensions of his "earned re-entry" programs.

The first condition attached to all three phases of the program, Department of Justice, Department of Defense, and Presidential Clemency Board—was an alternate service requirement, presumably to afford men the opportunity to do the duty they allegedly shirked earlier in their lives. In my mind, though, the question remains unaswered as to where that alleged duty originates.

It is surely not derived from the Constitution, as noted rhetorically when Daniel Webster asked: "Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, even life itself, not when the safety of this country and its liberties demand the sacrifice, but whenever the purposes of an ambitious and mischievous government may require it?"[1] Although no Constitutional demand for service is to be found, some have argued that the Military Selective Service Acts provided that

[1] 1814 letter written to oppose national conscription.

statutory duty to serve. Although there is no doubt that these acts provided for some service, their actual implementation was so wantonly discriminatory and filled with loopholes that they present a gossamer-thin base for exacting alternate punishment-service today. 88.9% of Vietnam-era men eligible for the draft were never even called to serve.[2] Likewise, no "duty" existed for 100% of that generation's women. Persons wealthy enough to stay a perpetual student, well connected enough to join the Reserves, educated and articulate enough to understand the rules for conscientious objector application and to philosophize within their parameters, or frightened enough to find a physician or psychiatrist willing to attest to rare or non-existent illness, escaped the draft and the military. All of these persons also escaped the ultimate moral choice of disobeying the law and facing the penalties or exile to follow or commiting the abomination of helping to kill those who only the government claimed were "enemies."

Some who admit to the discriminatory nature of the Selective Service operation claim that the general principle of law and order nevertheless demands that all citizens obey all the laws, and that they have no right as Americans to break any law at all. This, too, is built upon unsound logic. Who can honestly believe that the return of war resisters from abroad or underground, or the granting of honorable discharges which will make 450,000 veterans employable again, will lead to anarchy here? Rapes and the running of red lights will not increase after an amnesty. The amnesty, in fact, would not even exonerate every act of resistance. What it could do, however, is to recognize as a principle in this country that Americans have a right to refuse to participate in those wars they consider unjust and immoral. This is no more than the principle of Nuremburg—that one reaches a point in his or her confrontation with the authorities managing a war that forces a decision to refuse to go along with them.

Aside from these more metaphysical considerations, on purely pragmatic grounds a conditional approach cannot succeed either. There is, for example, an economic setback which will face the United States in the years ahead and which has already had catastrophic effects on employment in some areas with as much as 12–14% of the work force out of a job. How can one even establish a noncompetitive alternate service program in times like this? Virtually every job which provides a salary on which one can exist is desirable. I should note here that one of the reasons many of the church groups and other private service organizations have refused to assist the Selective Service System in placing "returnees" is precisely because they believe a person ought to be hired on his or her own merit; not for ancillary political views. If a day-care center is opened, the director ought to be the person most qualified to do the work, not a person hired simply because he refused the draft.

Similarly, it seems difficult to believe that any alternate service program would not be so disruptive of a person's life that he could not participate in it even if he wanted to. It is a great misconception that people who resisted the draft or military, for example, have had it easy in their new lives. They have had great adjustment problems in many cases, and have often been barely able to find jobs in their new homes or while living in the American underground. If anything, the problem is more severe for those who are already saddled with a bad discharge or a felony record which often makes them nearly unemployable. There is very little likelihood that such an individual would quit a job it may have taken him years to find just to rush off and serve some alternate service, no matter how short the sentence.

Before leaving the question of one's duty to his country, it is important to consider what role the war dissenters played in the ultimate turn around of American foreign policy in Southeast Asia. A Harris poll released on April 10 of this year indicated that nearly three-quarters of the sample polled were not in favor of any continued military assistance to South Vietnam. This is certainly a dramatic change in the thinking of Americans since say, the early sixties. Certainly one reason for this change is the fact that so many people vociferously protested an intervention there—and that so many tens of thousands voted with their feet to leave the draft/military system which permitted that war to continue. Those who made this moral and political witness were responsible, in my opinion, for squarely forcing the American people to take a look at the real nature of that war and ultimately to respond to it themselves.

The alternate service condition is, of course, not the only one which has been suggested. Another "condition" is the willingness to participate in a review

[2] William O'Rourke, "Notes on the Question of Amnesty," Rights XX, No. 3 and 4, p. 6.

of one's case to determine the motives for one's actions. This case-by-case adjudication of conscience was only exhibited in the President's program by the Clemency Board. One of the factors of mitigation in their procedures is "evidence that an applicant acted for conscientious, not manipulative, or selfish reasons." I have, however, never been able to find out in my conversations with former Senator Goodell how one measures the sincerity of a man's motivation or explores the deep recesses of his conscience. Frankly, most people, I know, including myself, have some difficulty in determining precisely why we acted as we did yesterday with any absolute assurance that no unconscious or preconscious motives are creeping in. To judge the motives of another person seems even more difficult.

This adjudication is of course complicated by the fact that most of the acts under scrutiny occurred as long as 5 or 7 or 10 years ago. When there was an induction authority, of course, local draft boards were given the duty of determining the sincerity of a man's claim to conscientious objector status. Their success rate, however, was open to some serious doubt. Assistant Defense Secretary Roger Kelly told the Senate Armed Services Committee in February of 1971, that, of the 100,000 C.O. claimants in 1970, only 19,000 were given the requested status. This 81% rejection rate was far in excess of the rejection rates in World War I (where it was 13%) or World War II (where only 28% of the applicants were denied these exemptions)[3] Serious questions can be raised about the quality of that initial review of conscience, which, of course, is responsible for large numbers of men being in legal jeopardy today. Within the military, c.o. claims were consistently and inappropriately (if not illegally) denied as well.

At previous hearings before this committee and in similar hearings before the Senate, the question of "conditional amnesty" was constantly raised. Would it work? Most of us said it would not. Now there is the starkest evidence of all to indicate the validity of that answer. President Ford's "conditional clemency" has not worked. Only *20%* of the limited categories of people eligible have actually even applied in the past seven months. Given the problems Mr. Schwarzschild and I will discuss in relation to the specifics of the program, it is highly doubtful that even a third of these applicants will ultimately achieve any redress at all.

Implementation of Department of Justice Procedures

Given that the Department of Justice's program, which covered all draft evaders, registered or not registered, who were unconvicted but committed offenses between August 4, 1964 and March 28, 1973, faced all of the inherent problems of any "conditional amnesty," there is little wonder that it failed to achieve more than 686 agreements out of, conservatively, 100,000 non-registrants and 4,400 known draft resisters. However, cutting even deeper were the problems in the implementation of the program around the country, problems which raise severe doubt about how "lenient" its administrators really were in many cases.

Under a Department of Justice document, not actually made public until the appearance of Mr. Kevin Maroney on December 19, 1974 before Senator Kennedy's Subcommittee on Administrative Practice and Procedures, certain factors were considered to be "mitigating" in the determination of the length of the alternative service term. The U.S. Attorney was given discretion to reduce the 24 month term if it approved that the applicant had 1) "been erroneously convinced by himself or by others that he was not violating the law, 2) was in desperate need to help his immediate family," 3) lacked sufficient mental capacity to appreciate the gravity of his actions, or 4) "such other similar circumstances."[4] Numerous individuals were not aware of these limited factors of mitigation before their arrival to turn themselves in at the U.S. Attorney's office. Conspicuously absent from the list is, of course, opposition to the war in Indochina. This is again indicative of the President's desire to act as if the war were somehow unconnected to the whole clemency program and the needs which helped create it. It is interesting that, in some judicial districts, all applicants received the maximum term, and that overall 5 out of 7 persons received 19–24 months.

A second major problem is that U.S. Attorneys did not provide for free legal counsel, for those in jeopardy. Although many men were told to obtain a lawyer, this would have been difficult in many cases if they had not been

[3] Congressional Quarterly, April 2, 1971.
[4] Memorandum to all U.S. Attorneys from William Saxbe, September 16, 1974.

in touch with the amnesty movement or counseling network prior to this decision. It has been persuasively argued that legal assistance could have been provided across the United States for this program under the Criminal Justice Act of 1964, 18 U.S.C. 3006 A. Only in Oregon, however, has this provision been thoroughly explored. There, the U.S. District Court under Judge Robert Belloni, in conjunction with U.S. Attorney general Sidney Lezak ordered the Federal Defender Section appointed as attorney to each indicted alleged defendant in Oregon for the purpose of determining whether the defendant wanted assistance in a file review and whether he qualified financially for CJA funds.[5]

Some have questioned how important legal assistance is for these charges. However, it is important that this committee be clear about the extreme difficulty the U.S. Attorneys have had within the past few years in successfully prosecuting alleged draft evaders. The vast majority of cases taken through the courts recently have been dismissed before trial. Of course, others are successfully defended in the trial stage. In fiscal 1973, for instance, 3495 indictments or complaints were issued while only 977 or 28% resulted in convictions. The Department of Justice has somewhat obtusely argued for years that most of the non-convictions were because of agreements to accept induction in lieu of prosecution. However, under directives issued by the Department of Defense to be implemented beginning in fiscal 1974 such inductions were no longer possible. In 1974 the preliminary figures from the Administrative Office of the U.S. Courts indicate that of 2,070 cases taken through the courts only 686 were successfully prosecuted. This constitutes a 33.1% conviction rate and means that the draft evader has a 2:1 chance of avoiding any sentences by taking the normal judicial route.[6]

Awareness by the Justice Department of the lack of prosecutive merit in many cases led to an order by the Attorney General William Saxbe to all U.S. Attorneys on November 13, 1974, to review the cases of those men indicted under complaint, or under investigation in their districts to determine whether the case should be dismissed. Regrettably, however, there appears to be an incredible discrepancy in the seriousness with which U.S. Attorneys undertook this task. For example, in the Southern district of Mississippi 14 of the 19 pending cases were declined prosecution or were dismissed, that is a 74% dismissal rate. However, the Western district of Pennsylvania had 67 pending cases and dismissed not a single one. It is difficult to believe that the practices of Selective Service in that area of Pennsylvania were so perfect as to lead to no dismissable errors. Alternatively, I suspect that such attorneys were lax in seriously studying the possible errors and defenses in those cases.

Clearly, many of the remaining 4,400 draft evaders known to the Justice Department have perfectly valid defenses to their indictments. Unfortunately, in many judicial districts persons in fugitive status are not permitted to have a pretrial motion to dismiss presented in their physical absence even though they have granted power of attorney to a legal representative.

These remaining 4,400 men constitute a "final" list of draft registered persons still in jeopardy for draft evasion offenses from August 4, 1964 to March 28, 1973. The list was completed after Senator Edward M. Kennedy requested of the Justice Department that they update and complete the list of men in jeopardy initially released to the Center for Social Action, United Church of Christ, pursuant to a Freedom of Information Act request. Although my office does not handle the bulk of informational requests any longer, some 60% of the callers there discovered they were no longer on the list. In fact, many had to go into exile or underground as long as 5 years ago because of F.B.I. investigation, but charges were never actually filed. They were not informed, though, that they were no longer considered in possible jeopardy. In the years 1964–1973, approximately 209,204 cases were initially referred to the Justice Department by Selective Service officials. The 4400 list is not, however, final in regard to those persons who did not register for the draft. The Justice Department is quite unlikely to even find these individuals, yet they theoretically face a sentence of 5 years in prison and a $10,000 fine. It is certainly unfortunate that the President's program did not include a provision for unpunished registration of those non-registrants now in this kind of limbo. President Ford's own son failed to register for the draft on time because it "slipped

[5] Court Order, Appendix A.
[6] New York Times, September 21, 1974.

his mind." He was not, of course, prosecuted—and should not have been. Unfortunately, some of his contemporaries are not so lucky. In fact, in the Western District of Pennsylvania several men who had similar mind slippage now have felony records forever.[7]

I would like to illustrate the human cost of the lack of such a registration program. In one case with which I am familiar, a man from inner-city New York was having difficulties with drug abuse during his teenage years. He spent time in prison for drug abuse offenses. Needless to say, registering for the draft was not a high priority in his life and he did not register. After participating in a federal drug rehabilitation program, he stopped using drugs and got a steady job in New York City. Feeling that he should now register with Selective Service to fulfill an old obligation, he did so. Shortly thereafter, he was informed that unless he signed up for 24 months of alternate service, he would likely end up back in prison. He signed up. His new drug free life is now disrupted again. (Full statement appended).[8]

It is difficult to express the relief many parents felt when I could tell them their son was no longer in legal jeopardy. For most, this was the end of a long, arduous separation which had appeared to be virtually permanent. Unfortunately, however, this was not a final resolution for a sizeable number of persons because of an outrageous practice of the Immigration and Naturalization Service.

The Presidential Clemency Program precluded participation from individuals who are "precluded from reentering the United States under 8 U.S.C. 1182(a)(22) or other law. This section provides for a permanent bar to returning to the U.S. for any former Americans who left the U.S. or remained abroad "to avoid or evade training or service in the armed forces . . ." In general, of course, the American system of jurisprudence demands proof for charges which stigmatize the person involved or which prevents anyone, American or foreign national, from receiving all the rights and privileges to which he is entitled. In the above "violations" of 8 U.S.C. 1182(a)(22), however, such proof of intent is not being required. Immigration officials are determining as a matter of fact that former Americans who have recently become citizens of Canada, Sweden, or elsewhere, *must* have left to avoid military service. They are making such a determination on their own, ignoring the fact that many thousands of alleged draft evasion cases have been dropped and investigations ended because the charges could not be proven as a matter of law. We have the shocking situation now that the Immigration and Naturalization Service has decided in many cases to ignore the findings of the Federal prosecutors or the F.B.I. that a man is not a draft evader and to determine on its own, without seeking any further evidence, that the motivations for a man's acceptance of a new citizenship were always the avoidance of military service.

This is becoming a problem of much greater magnitude than we had initially expected. In the past four years, in increasing numbers each year, some 7500 Americans have become naturalized Canadian citizens, for example. Due to the five year waiting period there where one has the status of "landed immigrant," many former Americans—including some who did not leave for any anti-war reasons—are now considering what to do in light of this practice. A permanent bar to visitation is certainly a serious human problem, but it is particularly inhumane to use such a bar as a punishment imposed because legal culpability cannot be maintained or proven through normal judicial channels.

I would like to point out one final administrative procedure which has left many of those potentially eligible dismayed or at least confused. In order to participate in the clemency program, a resister was required to sign a document in which he pledged allegiance to the country (as if he had not been acting always in the best interests of the nation and its people) and waived certain protections. Waived are the "constitutional right to double jeopardy and the right to use any delay during the period of my alternate service to establish a defense based upon Rule 48(b) of the Federal Rules of Criminal Procedure, the constitutional right to due process or a speedy trial, and the statute of limitations in a prosecution initiated because of a violation of this agreement." The ramifications of such waivers are not all yet apparent.

[7] Statement of Malcolm Nash, Appendix B.
[8] Congressional Record, Nov. 28, 1973, page E7547.

Implementation of Department of Defense Procedures

Although the Defense Department began its role in the clemency program in significantly appalling ways, and although major problems persist, there is one fundamental reason why the Defense program has been a relatively greater success than the other parts of the program. The reason is the so-called "deserter's loop hole" through which a returnee is seemingly able to avoid the requirement of actually performing any alternate service. When a man is processed through Fort Benjamin Harrison in Indianapolis, he is required to sign a pledge in which he promises, in the most offensive language possible, to "hereafter bear truth, faith and allegiance (to the Constitution)," admit that he violated the Uniform Code of Military Justice, and pledge to do "whatever alternate service my country may prescribe," recognizing that "my obligations as a citizen remain unfulfilled." However, once he is processed out with an undesirable discharge, the military loses jurisdiction over him unless they can prove that he fraudulently obtained his discharge (a violation of Article 83 of the U.C.M.J.) To prove such a violation, they must show his intent to defraud, something military authorities have admitted will be virtually impossible. If a person goes through the formal routine of applying for a job with his state Selective Service officials, the difficulty of proving any contrary intent is much greater.

Many deserters, however, do not feel that they could, in conscience, use such a "loophole" and that, in fact, has prevented many more from returning. There is, of course, very little impetus to do the alternate service on practical grounds as well, since the most the work can do is to allow a man to exchange his undesirable discharge for a so-called "clemency discharge." Such a discharge is of dubious value since it will not grant Veterans Administration benefits, (even though in the majority of cases it would take 24 months work to get it) and will, in the view of many experts, make a man no more employable than before.

Last year, Congressman John Seiberling released a study of America's 100 largest corporations, a study designed to test whether they in fact discriminate against veterans with other than honorable discharges. Of the 74 which responded, 73% admitted discrimination in regard to hiring men with Dishonorable Discharges, 62% with "Bad Conduct" discharges, 61% with Undesirable ones, and an amazing 41% with general discharges under honorable conditions." It is very difficult to see how a "clemency discharge", which General Counsel Martin Hoffmann has admitted does not even recharacterize one's military service as under honorable conditions, will do more than further stigmatize its recipient. For this reason, former Senator Goodell has coupled with the clemency discharge he suggests pardons as well. I am in full agreement with Mr. Schwarzschild that the addition is not very worthwhile, but the motive, a recognition of the relative uselessness of the clemency discharge, is quite clear.

I do have some serious problems as well with the whole notion of the President's power to simply "create" new types of discharge by fiat. An exhaustive article in the *Harvard Civil Rights/Civil Liberties Law Review* discusses the legal implications and authority for the creation of all administrative discharges at great lengths.[9] I am sure that the Congress will need to deal with this problem in the years ahead.

Outside of these overriding difficulties with the remedy offered, four other areas need to be examined. First is the refusal of the Defense Department to provide counseling agencies with a list of "deserters-at-large." Second are procedural problems relating to "legal briefings" for returnees. Third are deficiencies in the administration of the Joint Alternate Service Board. Finally, some procedures followed smack of "entrapment," serving in the armed forces.

A group of lawyers and counselors, principally in the Washington, D.C. area, had formally requested a list of such deserters from the Secretaries of the Army, Navy, and Air Force. In a letter from John Finneran, a Deputy Assistant Secretary of Defense, that request was denied because it "would constitute . . . a clearly unwarranted invasion of personal privacy." The underlying assumption was, as well, that if a person is in fact a deserter, he knows it and therefore the problem is not there which existed in regard to the Justice Department list. Although this is an intriguing analysis, there is some doubt as to the validity of the list being used to determine eligibility for the President's program. Many counselors were surprised to learn that there were only 12,500 at large deserters and 600 in prison

[9] 9 Harv. Civ. Lib. L.R. 227.

on September 16, 1974 when the President executed his program. We are afraid that the technique used to determine that figure was not as accurate as purported. Joseph Kellerman, a military counselor with the Friends Military Project at Fort Dix, New Jersey, who spent five weeks at the National Council of Churches Clemency Information Center, reports that of the roughly 500 cases he handled, nearly 50% were not found on the inactive lists, but were eventually discovered in the alpha, or active, file, or in St. Louis (as already discharged), or were never found at all. It seems likely then, that the initial figure of 13,000 may well be inaccurate and that some persons over whom the Defense Department had questionable jurisdiction may have needlessly participated in the President's program.

A greater problem, though, arises with those men who were clearly eligible but who did not realize that they may have had better options outside the program. The starkest admission of this problem was reported to the *N.Y. Times* as early as October 8, 1974. A military lawyer assigned to work with the returnees, Captain Russell Fontenat, said he felt that about half the returnees could successfully defend against their charges in a court martial proceeding. He noted, however, that "all they want to do is to be left alone and get out of the service the quickest way possible." Honorable discharges could be the result of such court martials, he continued, if charges could not be proven because of missing records (particularly the "morning report" which indicates persons missing from duty), dead company commanders, or other factors.

My greatest problem with the legal counsel employed by the government was how seriously they explored these various options with the returning personnel. Non-military sources in Indianapolis admitted that many of these JAG officers became much better advocates toward the end of the program, but this does little for the many thousands of men processed earlier. Mr. Hoffmann, in earlier testimony before this committee, expressed the sense that legal options were carefully laid out to the returnee. However, this is simply not a reflection of what consistently occurred at Fort Benjamin Harrison.

In general, counselors at the N.C.C.'s Clemency Information Center reported the following kinds of experiences. First, there was great disparity in the care taken by military counsel to evaluate records. In fact, counsel generally did not on its own initiative even look at the records available. If a man felt something might be indicated therein, then records were retrieved. Second, there was a high degree of irregularity in the consideration of claims for separation under honorable conditions. Only 44 returnees were actually given better than an undesirable discharge, and most of these were claims originated at the C.I.C. Third, to my knowledge only one person actually accepted court martial in lieu of discharge because of the noxious circumstances surrounding this process. Men would have been confined for lengthy periods and probably sent to Ft. Knox for trial. These men were frustrated, distraught, and in a hurry to get out. The Defense Department, I am sure, was and is aware of the enormous psychological pressures which would push a man into "clemency" rather than explore fully his other options. Various counseling and legal organizations are already planning to take many cases to the Discharge Review Boards in Washington to try to have gross errors corrected.

Ms. Dorie Budlow of Boston's Legal In-Service Project has supplied me over these months with many case histories which illustrate this lack of serious evaluation of defenses. One man, whom we are calling Mr. Davis, was a member of the Ohio National Guard during the time that the Kent State tragedy occurred. After being told by a colonel that the Guard had acted properly but that next time they "should get forty instead of four," he decided that participation in the Guard was morally wrong. He left for Canada, shortly thereafter being activated, seemingly improperly, to the regular Army. He received 21 months alternate service, but will appeal his discharge in Washington.

A man we have labeled Mr. Jones should never have been inducted into the Army in the first place because of a severe asthma problem. However, his request for conscientious objector status had been denied even though a chaplain and two officers recommended it because the Army psychiatrist felt he was not sincere. At processing at Fort Benjamin Harrison, a discharge under honorable conditions was refused because there is no provision for discharging a man who applied only for 1-A-O status (non-combatant in the military) instead of 1-O status (civilian outside military). His clemency service, however, was reduced to 23 months because of the "mitigating factors" in his case. Although assigned to duty in the California Ecology Corps he cannot begin because of his asthma and a slipped disc. At the Ecology Corps he will be asked to fight forest fires. (The full text of this and other cases is appended.)

One of the more interesting alternatives available during the "clemency period" was the use by close to 700 men of an option called the "chapter 10 discharge." Under an Army regulation long-term AWOL's can return to a base and request discharge in lieu of a court martial "for the good of the service." At two eastern bases this request, resulting in a U.S., was routinely processed. Returnees did not have to pledge to do alternate service, did not have to admit any loss of allegiance, and did not swell the success of the Fort Benjamin Harrison program. This option, better than the clemency program by far, existed before it and may continue still.

Again, the program offered a kind of false leniency—for many men it was no better an option than normal routes. When the armed forces were themselves at fault, this program offered little opportunity to remedy the errors of the government itself. Similarly, the Indianapolis processors did not relay data about the "chapter 10" opportunity. I have heard from dozens of men who say they wish they had known about "Chapter 10" before processing. The fact that 48.8% of Army personnel who contacted the Clemency Information Center chose this route seems persuasive.

Adjudication of the length of alternate service and type of discharge granted was done by the Joint Alternate Service Board, consisting of four field grade officers. They need not consider any factors as mitigating except length of satisfactory service prior to unauthorized absence, length of service in Southeast Asia in hostile fire zones, awards and decorations received, and wounds received in combat. This means that conscientious objection to war, wrongful denial of claims for hardship, and the like are not reviewed. Other due process protections which were not afforded were the right to a personal appearance, the right to refute documentation or information improperly included in files (such as unverified police reports and newspaper clippings), the right of witnesses to appear, and a ready appealability of the decision rendered. The fact that this program was created through executive discretion does not mean that Constitutional safeguards at the heart of the American legal system can be so blatantly subverted. (The case of Vincent V. Schlesinger, a comprehensive challenge to this system, we note, is still on appeal.)

Throughout the clemency period, the Defense Department has tried numerous dubious methods to ensnare potential recipients. Less than one week after the implementation of the program, the Department was rushing literally planeloads of "deserters" to Indianapolis. It appeared that the program was what war resisters really wanted. However, it soon became clear that those men had already been incarcerated in military prisons on the day of the Presidential announcement. Jail or "clemency" did not present a very viable choice making situation. After that initial media barrage, all inquiring "deserters" who gave an address were sent "orders to report" to Fort Benjamin Harrison. This practice was stopped after exposure by CBS news because the Defense Department admitted that deserters might be unduly pressured by such letters.

A comment is perhaps finally in order about the motives in desertion. Certainly everyone who left the military did not do so because of opposition to the war. However, the small 15% figure for that category aided by the Defense Department is strangely determined. First, since conscientious objection was not a motivating factor in the sentence length most men were advised not to discuss their anti-war views. Second, the men most ideologically opposed to an Indochina involvement were the very ones least likely to take this "clemency" option because of its repugnant loyalty oaths. Finally, in terms of hard data, the Clemency Information Center reported that 31.5% of its 569 cases were conscientious objection ones. It appears that anti-war G.I.'s were reluctant to discuss their real reasons for desertion with armed forces officials.

Congress certainly has the power to grant an amnesty if it so chooses.[10] Now that polls indicate that 41% of all Americans would vote for an unconditional amnesty,[11] and that 3 out of 4 persons reject further interaction in Indochina, I would hope that the American Congress is willing to take the moral leap to amnesty. History will consider what our involvement in Southeast Asia was really about, and what, if anything, it actually accomplished. Hopefully, it will not uncover that America was ultimately unwilling to bring home its own sons who rejected that war.

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[10] Statements, Appendix C.
[11] Memorandum, "Congressional Authority to Grant Amnesty," Appendix D.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

In the Matter of the

FEDERAL PUBLIC DEFENDER AND TENTATIVE ASSIGNMENT TO CERTAIN CASES

ORDER

This Court has a duty to implement the provisions of the Criminal Justice Act of 1964, 18 U.S.C. 3006A by promulgating a Plan to furnish representation for indigent defendants. This Court also has a duty to implement the Rule 50(b) of the Federal Rules of Criminal Procedure by adopting a Plan for the Prompt Disposition of Criminal Cases. Such Plan becomes operational after approval by the Judicial Council of the Ninth Circuit. And this Court has a duty to monitor the operation of each of these plans to insure that the purposes of CJA and Rule 50(b) are met.

In connection with these duties, it has been brought to the attention of the Court, through informal discussion with the United States Attorney and the Federal Defender Section (established by virtue of the CJA Plan) that additional steps ought to be taken in connection with a number of pending criminal cases in which indictments charge violations of the Military Selective Service Act of 1967. It appears that there are 76 such indictments pending against individual defendants, each of whom is presently in fugitive status.

And this Court is not unaware of the present national interest in resolving the problems arising from the existence of significant numbers of young American citizens who stand charged with these violations.

It has also been brought to our attention that a number of these cases should be studied by lawyers to determine if the indictments are still valid in light of case law which has been developed over the past several years. Such study necessarily involves a detailed examination of the Selective Service file of the registrant. Selective Service regulations forbid the turning over to an attorney of the file without the written consent of the registrant. The purpose of this order is to afford these absent defendants the opportunity to have their cases studied by an attorney for the purposes described above. Under other circumstances, this Court has authorized the making of tentative advance appointment of the Federal Defender to certain cases, subject to later determination by the Court of the defendant's eligibility under CJA: Therefore, it is hereby

Ordered, That the Federal Defender is hereby tentatively appointed, pursuant to 18 U.S.C. 3006A and the CJA Plan, as attorney for each of the defendants named on the list attached hereto; this tentative appointment is for a limited purpose of determining:

(*a*) Whether defendant consents to have Federal Defender represent him in this case; and

(*b*) Whether defendant qualifies as an indigent within the meaning of CJA and the CJA Plan.

It is further

Ordered, That the Federal Defender is authorized to communicate with such defendants to seek to ascertain the existence or non-existence of such consent to representation and eligibility; it is the intent of the Court that these communications between the Federal Defender Section and defendants are confidential; when sufficient information has been received so that a determination can be made, the Federal Defender shall then report to the Court as to the question of consent to representation and eligibility, at which time an appropriate order will be entered in an individual case, either ratifying or revoking the appointment which is made hereby.

Dated this 7th day of October, 1974.

ROBERT C. DELLONI,
Chief Judge.
OTTO R. SKOPIL, JR.
JAMES M. BURNS.

APPENDIX B

NATIONAL COUNCIL FOR UNIVERSAL AND UNCONDITIONAL AMNESTY,
New York, N.Y., April 14, 1975.

TO THE 94TH CONGRESS: On May 30, 1968, I, Malcolm Nash, failed to register for the armed services. The reasons for this was of no political or conscientious posi-

tion. There was a chain of circumstantial experiences that have befallen me from the year 1966 up to the present. You see, at the time it was required of me to register, I had already began a life as a runaway, an alcoholic, and a junkie, living in hallways, wrecked cars, and purely in the sub-human conditions of the ghetto. I had not this kind of social responsibility, for I later graduated to become a drug addict, and eventually was incarcerated. The period of incarceration was for one to three years which (19 months served; 17 months parole) ended when I finally approached the parole board, with the promise that I would live the way society wanted me to live, I was released.

I began life in the society equipped only with the desire to be a better person. I came to realize that I needed psychological help and later enrolled in a rehabilitation program, called "The Door". There, I spent a period of approximately two (2) years, from late 1972 to 1975. In this environment, I was made aware of internal and external responsibilities, and in the beginning of 1974, I realized my failure to register for a draft card. I can honestly say I refused to deal with this momentarily, for fear of retaliation, but on April 22, 1974, I made the move to register. Nine months later, on December 24, 1974, I was presented with a letter from the U.S. Attorney stating that I was a violator of the military selective service act.

Since then, I was invited to attend my own prosecution (go to trial) or divert into an alternate service (clemency program) where ultimately there would be a waiver of certain rights afforded to me under the constitution, I am at present serving a period of twenty-four months alternate service.

Too many years I've been plagued by the law, legitimately or otherwise, and now when I have finally lifted myself from the mud, I'm submerged once again. Even during the best times, it is difficult to choke back deep feelings and emotional responses that override my own normally rational approach to life. This is not a singular reaction, but affects others even more so.

In my opinion, I feel at this point I've paid my dues. I ask you now, is there a new caliber of human beings to exist or is there just a change in shift of the "Gate Keepers" for the status quo?

Very truly yours,

Mr. MALCOLM NASH.

APPENDIX C

Mr. Smith enlisted in the Army in 1966 with a guarantee of Airborne training. He subsequently served in Vietnam for one year and 27 days, 101st Airborne Division at Phan Rang. While in Vietnam, Mr. Smith started using marijuana and suffered from various degrees of paranoid reactions with its use.

After returning from Vietnam, Mr. Smith went AWOL for 16 months. He was given a general court-martial and sentenced to one years confinement at hard labor and forfeiture of pay. Mr. Smith was not present during the court-martial having gone AWOL a second time. His defense counsel argued that Mr. Smith was not mentally capable to stand trial for the offense. This was substantiated by several civilian psychiatric evaluations. Mr. Smith subsequently returned to military control and was evaluated by a psychiatrist at Ft. Devons, Mass., who recommended administrative discharge. Mr. Smith's drug use was mentioned in all of these evaluations as causing his present state of psychiatric dispairment.

Mr. Smith again went AWOL but his general court-martial conviction was overturned due to his absence at trial and the fact that he could not sufficiently adhere to the right to control his actions.

Mr. Smith's drug use in Vietnam led to a heroin habit in the U.S. Mr. Smith did turn himself into the hospital at Ft. Devons seeking help for his heroin addiction, but he states that the doctor there did not believe in a gradual detoxification from heroin, but rather felt that his patients should quit "cold turkey." Mr. Smith stayed at the hospital for one week and finally left seeking help at a Boston area methadone maintainance program. Mr. Smith states that the Army was informed of his civilian treatment, but failed to respond in any way.

Mr. Smith returned to military control at Ft. Benjamin Harrison in March of 1975. A request was put in for him to be discharged with a better than undesirable discharge. He was evaluated by an Army psychiatrist who diagnosed Mr. Smith as having anxiety neurosis, exhibiting dysocial behavior, and being a drug rehabilitative failure.

The Army turned down Mr. Smith's request on the basis that he was never in military control long enough to be processed for discharge for drug addiction. The Army also used the psychiatric evaluation at Ft. Benjamin Harrison (which claimed post facto that the previous evaluations were wrong) as a basis for their denial.

Mr. Smith has since been ordered to report for an alternative service job through the Massachusetts Selective Service. It should be noted that Mr. Smith is still in the methadone maintainance program and is currently using about 75mg of methadone a day (which is a very high dosage). He has also been prescribed tranquilizers and is taking medication for allergies. This combination of treatment has reduced Mr. Smith to little more than a nonfunctional human being. He is almost incapable of following directions, needs guidance in anything more than the most menial tasks, and spends a great deal of time waiting for his daily dose of methadone and "nodding off."

Mr. Jones was inducted into the Army in March 1966. He applied for a conscientious objector status (1–A–O) in April 1966. Following Army regulations, Mr. Jones was interviewed by a chaplain, and two Army officers. He was also given a psychiatric evaluation; the psychiatrist stated in his report that he didn't think Mr. Jones was a sincere objector.

The Chaplain and the two officers all recommended approval of Mr. Jones' request for 1–A–O classification. The application was disapproved by a higher authority and by the Department of the Army in June of 1966. The disapprovals were based on the psychiatrist's report.

Because of the disapproval, feeling that he could not in good conscience bear or handle weapons, Mr. Jones went AWOL.

Before going AWOL, Mr. Jones suffered a severe asthmatic attack and had to be carried to the hospital at Ft. Ord, California. Mr. Jones was examined by a doctor there who was surprised that Mr. Jones had been inducted in the first place due to his physical conditions (asthma, allergies, recurrent pnuemonia). The doctor was about to recommend discharge for medical reasons when he asked Mr. Jones how long he had been in the service. Mr. Jones replied "four months" and the doctor responded by saying that that was too long to be discharged for medical reasons.

Mr. Jones returned to military control at Ft. Benjamin Harrison where it was recommended that he be discharged for the convenience of the government due to an improper denial of his 1–A–O application in 1966. This request was based on the following errors:

1. That Mr. Jones' sincerity had been established when he submitted his 1–A–O claim (by the recommendations for approval he had received)
2. That the psychiatric report was made in violation of regulations governing such examinations
3. That the reasons used for disapproval of the claim were invalid
4. That Mr. Jones was not given the right to rebut information in his files adverse to his claim
5. That there was no basis in fact for denial of the claim
6. Mr. Jones was also illegally confined as a result of a summary court-martial (he did not have the benefit of a lawyer)

The request was denied on the grounds that there are no provisions for discharging an individual who applied for 1–A–O status (as opposed to the discharge of 1–O conscientious objectors). The Army would not accept considering a better than undesirable discharge even in the face of Mr. Jones totally improper denial of the 1–A–O application.

The Joint Alternate Service Board gave Mr. Jones 23 months of alternate service. Although they stated that conscientious objection would be considered a "mitigating" circumstance, the reality of his alternate service obligation does not reflect the Board's claim.

Mr. Jones has continued to have severe physical problems which have been complicated by a slipped disk in his back. He has been ordered to work in the California Ecology Corps but cannot immediately fulfill this obligation due to his physical condition.

Mr. Davis joined the National Guard in Ohio in 1968. At the time, this was a purely expedient decision since Mr. Davis did not want to be drafted. Mr. Davis had vague feelings of conscientious objection at the time, at least he was morally and politically opposed to the war in Indochina. He felt that by joining the Guard, he would have very little contact with the Vietnam war as a potential participant, and would also have a minimum commitment to the military.

Mr. Davis joined the National Guard and participated in meetings in Dayton, Ohio. A year after joining, he moved to Akron, Ohio having notified the Guard of the move and of his address as required. The Guard unit in Akron had accepted him and no problems in this regard were anticipated by Mr. Davis.

Mr. Davis attended meetings as required. In the spring of 1970, four students were killed at Kent State by members of the National Guard. Mr. Davis was very shocked and disillusioned by the event, although he did not participate directly in it. At his next regularly scheduled meeting, his unit was told by a Colonel that the Guard had done the right thing, but that next time "they should get 40 instead of four." (This is a direct quote). Mr. Davis was totally appalled by the entire incident and realized that his being a member of the National Guard was equal to any participation in the Army in Vietnam. Mr. Davis decided that "it was morally wrong to be a member of this (N.G.) service" and moved to Canada.

Mr. Davis participated in the clemency program at Ft. Benjamin Harrison. It was discovered that he was improperly activated from the National Guard to the Regular Army. Mr. Davis intends to have this improper activation reviewed in Washington. He received 21 months of alternate service after relating the above incidents to the Joint Alternate Service Board.

Appendix D

United Church of Christ,
Center for Social Action,
Washington, D.C.

Congressional Authority to Grant Amnesty to War Resisters

On March 8, 1974 Deputy Assistant Attorney General Leon Ulman presented testimony to the subcommittee of the House Judiciary Committee investigating the issue of amnesty for resisters of the Vietnam War. His conclusion, since adopted by some members of Congress, was that only the President has the clear authority to grant amnesty; that Congress has, at best, an advisory role.

We find serious omissions, however, in his analysis and have strong disagreements about several conclusions drawn in the testimony. The following is a summary of the Justice Department analysis, with our comments following the CAPITAL LETTERS below.

1. Article II, section 2 of the Constitution states that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." This clause includes the right to grant amnesty because U.S. law makes no formal distinction between the concept of "pardon" and that of "amnesty." [*Knote* v. *United States*, 95 U.S. 149 (1877)].

A. We agree that the differences are minimal, but one later Supreme Court decision did draw some distinctions. [*Burdick* v. *United States* 236 U.S. 79 (1915)], stating that "one [amnesty] overlooks offense; the other [pardon] remits punishment," while attesting to the view that amnesty, "usually general, addressed to classes or even communities" could be a legislative act or the act of a supreme magistrate.

We do not deny the right of the President to grant amnesty; we dispute that he has the sole authority to do so. In regard to the above-cited Constitutional clause, it has been pointed out that: "The language of the constitutional provisions dealing with pardons is not, in terms, an exclusive grant; it does not vest *the* pardoning power in the President, but only confers on him 'power to grant reprieves and pardons . . .'"[1]

Further, a Federal district court in Pennsylvania has even ruled that pardon/amnesty powers are inherent in legislatures: "From the very nature of government, it requires no reasoning to prove the self-evident proposition that in Pennsylvania the power of pardon was vested in the legislative branch by the inherent power of the supreme lawmaking power and in the executive by constitutional provision."[2] [*U.S.* v. *Hughes* 175 F. 238 (W.D. Pa. 1892)]. We hold to a similar conception of the Federal legislative function.

2. "Amnesty has been granted by our Presidents on several occasions in the past as a matter of grace."

[1] Jeffrey Roth and Mitchell Rothman, "The Authority of Congress to Grant Amnesty," (Yale Legislative Services) in *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary*, (United States Senate, 92nd Congress) "Selective Service System Procedures and Administrative Possibilities For Amnesty," (Feb. 28, 29, March 1, 1972) p. 492.

[2] For more on the case see Julian C. Carey, "Amnesty: An Act of Grace," St. Louis University Law Journal, XVII (1972-3), pp. 501-524.

B. Amnesty may be an "act of grace" in a figurative sense, but the Supreme Court has specifically repudiated the motion that even pardon is purely a matter of personal goodwill: "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme." [*Biddle* v. *Petrovich* 274 U.S. 480 (1972)]. As pointed out above, this scheme includes Congressional participation.

Further, although the historical record supports the validity of Presidential amnesties, it similarly supports amnesty grants by Congress in 1872, 1884, 1896, and 1898, the last being a general amnesty removing all remaining civil disabilities facing former Confederate armed forces personnel. No court judgments ever denied the validity of these legislative actions.[3]

3. The decision of *United States v. Klein* [80 U.S. (13 Wall) 128 (1871)] shows that, in regard to amnesty, Congress cannot interfere with the exercise of a Presidential pardon by limiting its affects or by excluding persons from its operation. The conclusion is then drawn that since Congress can't intervene with a Presidential pardon, it probably can't enact an amnesty on its own if the President decides against it.

C. We find this conclusion dubious by purely logical analysis. Not permitting reduction of the effects of an action simply does not equate with not permitting separate action of a similar kind. Additionally, such a conclusion is not consistent with later judicial decisions we refer to below.

4. The Justice Department holds that the only relevant Constitutional provision is the pardon passage previously cited.

D. We find a strong case that Article 1, section 8—the "war powers clauses"—supports Congressional action in regard to amnesty.[4] Congress has virtually unlimited power to deal with war-related affairs and "carries with it inherently the power to . . . remedy the evils which have arisen from its [a war's] rise and progress" [*Stewart v. Kahn*, 78 U.S. 493, 507 (1870)]. Likewise, it is Congress which has sole responsibility for the maintenance of the Selective Service System and which makes the rules for governing the military. Given its broad powers in these regards and the reasonable assumption that amnesty would not be an issue if the Vietnam War had not occurred, Congress has a great deal of latitude in handling post-war affairs like amnesty.

Of importance also is the fact that if Congress would decide to forego its prerogative to grant amnesty outright, it could accomplish the same thing by altering legislation relative to the selective service and military governance: "For Congress does have the power to abate prosecutions by means of legislations subsequent to the performance of unlawful acts. In *Hamm v. Rock Hill*, 379 U.S. 306 (1964), for example, the Supreme Court held that after the enactment of Title II of the Civil Rights Act of 1964 . . . states could not prosecute participants in sit-ins even though the sit-ins preceded the enactment of the Civil Rights Act and were at the time unlawful under state law." [5] With similar action—repealing portions of the U.S. Code dealing with certain military offenses or altering the still existent Selective Service Act, prosecutions could be abated for the legal offenses now included in amnesty discussions.

Clearly, Congress has much greater authority than the Justice Department would have us assume.

5. The two cases cited by Columbia Law School Professor Louis Lusky as evidence of Congressional authority to grant amnesty [*The Laura*, 114 U.S. 411 (1885) and *Brown* v. *Walker*, 161 U.S. 591 (1896)] cannot be read broadly enough to include the kind of general amnesty which would affect whole classes of Vietnam War resisters.

E. The Lusky argument is hardly his alone. In fact, virtually all law review articles on amnesty support his contentions.[6] In brief summary, *The Laura* was a case whereby an act of Congress granting the Secretary of the Treasury authority to remit fines for violations of certain Federal tax laws was questioned because it allegedly conflicted with the Presidential pardon power. The Court ruled that no conflict existed. Mr. Ulman states that the statute "left the exercise

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[3] Norman Weisman, "A History and Discussion of Amnesty," *Columbia Human Rights Law Review*, IV (1972), pp. 529–540.

[4] Roth, pp. 494–496 for a more detailed legal analysis.

[5] Douglas Jones and David Raish, "American Deserters and Draft Evaders: Exile, Punishment, or Amnesty?" *Harvard International Law Journal*, XII (1972), p. 119.

[6] Louis Lusky, "Congressional Amnesty for War Resisters: Policy Considerations and Constitutional Problems," Vanderbilt Law Review, XXV (1972), pp. 525–555; Harron A. Freeman, "An Historic Justification and Legal Basis for Amnesty Today," Arizona *State University Law and Social Order Journal* (1971), No. 3, pp. 515–534; and others.

of the power of remission wholely within the discretion of the Secretary of the Treasury. The penalty therefore was not remitted by operation of the statute but as the direct result of a discretionary act . . ."

Perhaps the strongest case for Congressional amnesty cannot be built on this decision. However, it is misleading to neglect the broader question concerning the pardon/amnesty power of the President posed by the Court: It asked: "But is that power exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for violation of the laws of the United States?" By its decision it rested on the view that such exclusivity was not present. If the Congress can authorize and delegate such power of penalty remission, regardless of whose discretion implements it directly, it seems safe to assume that it can keep and use that power itself.

Brown v. *Walker* involved a Congressional statute which granted immunity to persons who would be testifying about alleged violations of the Interstate Commerce Act and which also prohibited these witnesses from refusing to answer questions on the basis of possible self-incrimination. The Court upheld the validity of such Congressional legislation. Mr. Ulman suggests, though, that this is not an amnesty because "a true pardon or amnesty" can't be granted before an offense is committed and because the reciprocity (testimony in exchange for immunity from prosecution) involved here is not consistent with the "grace concept intrinsic in amnesty."

According to the court decision: "The act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty . . . Although the Constitution vests in the President 'power to grant reprieves and pardons for offenses against the United States . . .' this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction, although, it was found by this court in *Ex Parte Garland* . . . it extends to every offense known to the law, and may be exercised at any time after its commission . . ."

Mr. Ulman stresses that a real amnesty can't be granted before the offense. All *Brown* v. *Walker* says is that a Presidential pardon can't be granted before the offense. In specifically calling this Congressional act an "amnesty" it clearly recognized that an amnesty from Congress might be granted even when there is reasonable concern that an offense was committed. (Otherwise, why bother with immunity at all?) The Justice Department's further contention that a "true" amnesty cannot be granted on a *quid pro quo* basis seems to contradict *U.S.* v. *Burdick* which upheld the right to grant conditional amnesties.

One simply cannot, through some semantic juggling, lightly ignore the statement that Congress can grant general amnesties. The amnesty in *Brown* is certainly a genuine one. A clear conclusion of this case was to invalidate the erroneous belief that amnesty power lay exclusively in the Executive branch.

In summary, then, although we agree with the Justice Department that Federal courts never dealt specifically with the Constitutional question of war-resister amnesty, we find the evidence overwhelming that the power of amnesty lies within the purview of any Congress which finds such action desirable.

Mr. SCHWARZSCHILD. Mr. Chairman, as you know, the Presidential Clemency Board has jurisdiction over those applying who have been convicted and who have served their sentences or who have been otherwise punished for violation of the draft or military law.

It has jurisdiction over approximately 8,700 persons who have been convicted of draft violations, of about 20,000 persons convicted of absence offenses in the military courts, and over about 90,000 veterans who were administratively given less than honorable discharges.

The Board is authorized to recommend to the President clemency for these men in the form of (1) pardon; and (2) a clemency discharge, where appropriate; in exchange for up to 2 years of alternate civilian service.

About four-fifths of the Board's 18,000 applications have come from Vietnam era veterans with administrative undesirable discharges. The Board can offer them a pardon, which they do not need since they were never convicted of a crime—not even by a court martial for a mili-

tary offense—having been given an administrative discharge. And, they can offer them a clemency discharge, which as the Reverend Mr. Lynn has already said, gives them neither greater dignity nor any veterans benefits whatever, only a lifetime stigma.

And, for these dubious advantages, the Board will require up to 2 years of alternate service from these veterans. For 80 percent of the Board's applicants, the clemency is a hoax. For the remaining applicants, the Board offers a Presidential pardon that may be of some limited value, since those men indeed do have civilian or military felony records.

But a pardon does not expunge a criminal record, nor does it overcome civil disabilities, except to the extent to which any jurisdiction and any public or private agency chooses to give it that effect.

And, for those limited benefits—as we say—the Board imposes the condition of up to 2 years of alternate civilian service. Mind you, these are men who owe society nothing more. They have already served their penalty after trial and sentence. Yet, the Board imposes further punishment upon them as a precondition for the clemency.

The clemency, in other words, Mr. Chairman, is not "given" at all. It is traded. It is exchanged as a "quid pro quo" for a species of forced labor under the control of the U.S. Government.

Yet, Mr. Goodell and the Board pride themselves on the generosity of their sentencing practice, with none of the 65 men so far processed having received the maximum 2-year term of alternate service, and no one having received a term longer than 12 months.

But, in fact, the Board merely trades its inferior merchandise—a pardon more often useless than not, and a discharge no better than the one already held—for a higher or lower price as it sees fit. That is not generosity, and it is not amnesty, and no pride can attach to this mean process.

Is it any wonder, then, that men have stayed away from the Presidential Clemency Board in a proportion of 4 to 1? Moreover, the disappointment of those who have applied will yet make itself felt.

The disadvantaged and ill-educated will not give up their present jobs in this economy to find ill-paid alternate service work for 3 or 6 or 12 months, in order to get a "pardon" they do not need, and a clemency discharge which gives them no benefits and does them no good.

The Presidential Clemency Board is acquiring a staff of about 600 Government lawyers and employees, as Mr. Goodell reported the other day, in order to impose additional punishment upon men already legally punished for their conflict with the draft and the military, and in order to offer them useless remedies in exchange.

The Selective Service System, as you know, was charged by the Presidential proclamation and Executive order of September 16, 1974, with administering the alternate service required as a condition for clemency by the three agencies to which war resisters apply—the Presidential Clemency Board, the Department of Justice, and the Department of Defense.

The Selective Service System has called the clemency alternate service "reconciliation service," which I think is a neat touch of Orwellian Newspeak.

We have no major quarrels with the Selective Service System, as such, over the reconciliation service. We would comment that (a) it is

a characteristic part of the bizarre and vindictive clemency program that a major share of its administration is vested in an agency with which the war resisters had their conflicts and which is not known for its loving or tolerant attitude toward war resisters.

And, second, that the reconciliation service has given a new function, a new lease on life, to a virtually defunct and purposeless agency of the Government, which manages nonetheless to consume $45 million of the taxpayers' money—the Selective Service System.

We have complaints about the reconciliation service of a lesser order of significance, such as the absence of any right of appeal by reconciliation service enrollees from determinations made by the Selective Service System, about the predictable inequitable and discriminatory fashion in which the State Selective Service Directors will interpret the regulations, guidelines, and directives—the history of the draft is a compelling basis for this fear—and about the danger that in the midst of a national job crisis, with millions of unemployed, the requirement that reconciliation service jobs not compete in the general labor market may impel compulsory job assignments to notorious paramilitary agencies such as the California Ecology Corps of which Mr. Lynn spoke before.

Ultimately, it is not the "administration" of the clemency alternate service that troubles those who advocate an unconditional amnesty. It is the institution of alternate service, its existence, its compulsoriness. The war has been massively dislocating for millions of Americans. No requirement of the war, no national emergency exists to justify further disruption of the lives of these men. No system of alternate service can be constitutionally or morally justified in the circumstances that gave rise to war resistance.

May I end, Mr. Chairman, by alluding briefly to the amnesty legislation that is before both Houses of Congress, and to which this committee has also addressed itself.

The bill offered by Senators Gaylord Nelson and Jacob Javits, who testified here yesterday morning, would extend and modify the Presidential clemency program. Senator Nelson, in offering the bill, spoke feelingly about his support for universal and unconditional amnesty and about his cosponsorship of the far broader amnesty legislation proposed by Senator Philip Hart. He declared his own sense that the Congress should face up to the need and the desirability of a broad and unconditional amnesty, and we emphatically share that view.

But, accordingly, to the extent to which the Nelson-Javits bill extends the Presidential clemency program, we find the bill quite unacceptable. A bad solution, sir, is not improved by prolonging it. Rather, the extension would compound and aggravate the deceptive mockery of the clemency program.

At the same time, it is true to say that the Nelson bill contains certain provisions relating, for example, to the regaining of American citizenship by war resisters who have surrendered it and to immunity from arrest and prosecution for exiles on temporary visitations to this country, that we believe to be valid and essential components of any future universal and unconditional amnesty. Their enactment, without the extension of the clemency program, might be a welcome step.

The amnesty bills offered by Congresswoman Abzug in the House and by Senator Hart of Michigan in the Senate make immense strides in the direction of universal and unconditional amnesty.

They are courageous and welcome first efforts. Neither of them meets all the requirements and needs of a true amnesty, but they could rather easily be amplified and amended so as to bring a true and just end to the tragic divisions in our country over the Vietnam war. The American Civil Liberties Union and other organizations concerned with amnesty will gladly lend their expertise to the work of drafting appropriate legislation.

Finally, Mr. Chairman, let me end by saying that if this Congress and if this country means to confront its own past and deal with that past in political justice, and in humane decency, then universal and unconditional amnesty will be a solemn and productive start. We urge that course upon this committee, upon the Congress, and upon the Nation.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Mr. Schwarzschild, Mr. Lynn, I compliment you on an eloquent and full statement of the various aspects that the subcommittee is concerned with.

In terms of the failure of the Presidential Clemency Board and the Presidential clemency program, and your opposition to it, how do you speak to the thousands that have applied, and in the last months particularly of the Board's existence, came to apply? Is it your position that they are all victims of a hoax, and that no persons under the Presidential proclamation of September 16 are indeed, in their personal circumstances, aided by the program?

Mr. SCHWARZSCHILD. No, sir; we would not contend that. Certainly, in the light of the so-called deserter's label, to which Mr. Lynn spoke—namely, the fact that alternate service, for example, for the deserters, who are under the jurisdiction of the Defense Department as part of the clemency program. I think it is fair to say, they have gained a kind of benefit from the clemency program. I think it is a mean bargain. They are asked to reaffirm their allegiance to a country which they never denied. They have the technical obligation of alternate service, but it is fair to say that they have at least been able to get out from under exile and the threat of military prosecution for desertion, and the possibility of years of their lives in the stockdale.

It is also fair to say that for those under the jurisdiction of the Justice Department, who were threatened with continuing criminal prosecution for draft violation, again in what seems to us a mean and narrowminded bargain, are out from under the threat of that criminal prosecution; again, with demeaning and vindictive penalties attached to that bargain. The point is, Mr. Chairman, that this is not an amnesty. Even those who believe that in their very dire circumstances, having committed years of their life for their refusal to participate in the war, and felt compelled then to straighten out their lives in the best way that this Government now offered—namely under the clemency program—that even these men are entitled to a greater act of humaneness and justice at the hands of our country. Most of the men, indeed—and in that sense, perhaps, your question is quite justified—and the great numbers of men who applied have gone to the Presidential Clemency Board.

For them, the bargain is indeed, it seems to us, intolerable. And they will indeed find that, after the program was sold very aggressively, I think it is fair to say misrepresented, to those who qualified. It was

presented to them that the clemency board would upgrade their discharges when it cannot do that, and so forth.

Now, it is not that no one has, in his own mind, sought to benefit from this program. And some men, indeed, may derive a limited benefit from it. The point that we make is that for most of those who need an amnesty, the program was irrelevant. For those few that have applied, the benefits are so limited and given in such a niggardly and punitive fashion, that after the tragedy of the Vietnam war, we believe a far greater and more wholesale step is required.

Mr. KASTENMEIER. I appreciate that.

This point is made time and time again, and it is easy for some to assume that all really share the same view of war, the same moral indignation that is represented in American exile literature and the like, and it is very compelling indeed. But really, to what extent are you really sanguine that all individuals share this terrible feeling of indignation, and that the process of coming back is demeaning and the like?

Mr. SCHWARZSCHILD. No, sir; I would not say that. I would hardly be in a position to represent, with any authority, the feelings and the judgments of all of the war resisters. Nor, I dare say, is anyone really technically authorized to speak on their behalf. I think the claims that we make, and the claims that the representatives of the war resisters themselves make, really speak not so much to their mind as to what it is our judgment this country owes to itself, much more than what is owes to the war resisters. It owes to itself some kind of restoration of decency, after the divisiveness and the tragedies of that war. The only factual testimony to the general accuracy of our perception of their response to the clemency program is the express judgment of the organizations of American war resisters who, from its very inception, called for a boycott of it, and their lack of response to an invitation to participate in it. As we have said, even the narrow eligibility criteria leave over 80 percent of the men as not having applied for the program; and that, as we used to say, constitutes in effect voting with your feet. It is voting with your life, indeed; and if the clemency program offered these men a decent, nonpunitive return—not the welcome home of heroes; they have never said to anyone, to themselves, to me, or to this country, that they expect to be welcomed home as heroes—they did what they thought they needed to do in that ghastly experience of the Vietnam war. But merely a nonpunitive and decent return as American citizens who did what much of the moral and political leadership of our country said for years during the war, and that the war ought to be ended—they ended it in the only way they could, as young men in their late teens and early twenties.

So that it is both the expressed judgment of the spokesmen of that community and our judgment, and the experience of the clemency program, which made it clear that this does not constitute an amnesty. And indeed, the President in announcing the program expressed his explicit rejection of the notion of amnesty, so that I am not really charging this program with any failures that the President himself did not build into it quite openly.

Mr. KASTENMEIER. I appreciate your answer, and as one who generally subscribes to your statement, I have a feeling or a concern that we tend to, by rhetoric, overdescribe a situation where there are many

who are not motivated by the same feelings, or have the same perception, even of the effect of what they have done. And so, we have different categories of people. And then, the question may evolve to the point—well, if we cannot help all, particularly those who strongly oppose the program for what I consider sufficient reason, how about helping those who are not opposed to the program on those grounds they might feel benefited. And to that extent, it may be difficult to oppose even a very partial step toward some form of reconciliation in this regard.

May I ask you one other question? You expressed some reservations about Senator Hart's bill. What reservations do you have about Senator Hart's bill?

Mr. SCHWARZSCHILD. Mr. Chairman, may I ask Mr. Lynn to respond to it? His expertise on the legislation offered is greater than my own, I believe.

Reverend LYNN. Essentially, Senator Hart's bill covers unconditionally all of those categories of people covered by the President's own clemency program. It does not include all of the other categories of people. The largest percentage of those individuals are veterans with other than honorable discharges for reasons other than desertion.

The President's program seems to be saying, if you protested the war and then you deserted, we will give you some clemency; but if you protested the war and spent years in prison instead of deserting, we will not really give you any redress at all. And Senator Hart's bill omits some of those same categories of people.

There are, in the Senate, certain jurisdictional problems about the all-inclusive type of bill that Congresswoman Abzug has introduced into this House.

Mr. KASTENMEIER. I would like to yield to the gentleman from California.

Mr. DANIELSON. Thank you, Mr. Chairman.

I would comment only on one point made by Mr. Schwarzschild, that a pardon has no value since some of these people have never been charged, tried, convicted, and so on. Only I wish to remind the gentleman that it has now been established that a pardon can be granted prior to trial and conviction. As of last September 9, that is part of our constitutional law.

I want to thank you for your presentation; you covered a lot of points here. Reverend Lynn, your testimony has simply reinforced my belief that although the idea of alternate service has an appeal about it, I think we hark back to the idea of penance, and I think it is useless. Anyone who wants to do some kind of community service because of conscience is not prohibited from doing so; he can go out and spend the rest of his life, if he wants, to do community service.

So I think a person who is truly conscientious can do that, and thereby salve his own conscience if it bothers him. And if it does not bother him, he is not going to do a good job at any rate.

Thank you very much.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison

Mr. PATTISON. I just have, really one comment.

I have the sense that one of the major areas of resistance to any program of universal and unconditional amnesty is the feeling that this word "resist"—people who truly need the punishment, cowards,

malingerers, the standard kind of deserter, that the person who does not face up to his responsibilities, et cetera, in the military that we have had in other wars, and that somehow, if we could really determine who resisted for reasons of conscience and could really identify those people, that that area of resistance would be gone.

But I also have a feeling that the President's clemency program, as it has actually developed to the extent that there are people who are malingerers, deserters, and so forth, cowards, has essentially addressed itself to those people. I mean, if it has helped anybody it has helped the very people that the great bulk of people who resist amnesty do not want to help.

Do you find that to be accurate?

Mr. SCHWARZSCHILD. I am not sure I quite understand the last point you made. The fundamental point you make, though, I think is quite important.

To begin with, one might say that—I do not know any civilized society in which cowardice is a criminal offense that needs to be pardoned. It is, in any case—you know, to be remembered that young men, on their own when they are 17, 18, or 19 years old, who take what they know to be the very significant step for the rest of their lives of defying the might and power of the United States—to punish their act of war resistance when they do that, they can hardly be called cowards—you might disagree with the act.

Mr. PATTISON. I was not referring to those people. I was referring to people who—just universally, in every army, you have—who for one reason or another, because they get angry, drunk, whatever, just take off, perhaps as a result of their immaturity, and evade their——

Mr. SCHWARZSCHILD. Of course those do exist, Mr. Pattison. Perhaps it may be important to recall that the desertion rate from the military during the Vietnam era was unprecedentedly high in American history. The morale of the military service, of course, has never been lower than during that period, and the problem that arises—what agency of goverment, what tribunal, would be competent to make judgments about the personal, subjective, religious, ideological, moral, political motivations that go into an act that will, by then, lie 6 or 7 or 8 or 10 years in the past?

If something terribly important were at stake in making those discriminations, perhaps that effort might be defensible. But a test of conscience for those acts, it seems to us, is as dangerous and as futile as were the very crude determinations which I know you are aware of that were made by the Selective Service with respect to conscientious objection. And since this will not suffer any harm to the country, it would earn a great benefit from a broad amnesty which does not attempt to discriminate on the grounds of human motivation which is inevitably mixed, which is enormously complicated to analyze.

I do not think that effort is ever justified in this context.

Mr. PATTISON. Pardon me. I understand all of that. What I am saying is, let us, for the purposes of our discussion here, assume that there are a certain number of people who simply decided that they did not like the first lieutenant or the first sergeant, or they were lazy, or for any reason, they had no anti-war motivations whatsoever. Let us just assume that you could determine that.

Is it not true that the people who did, in fact, leave for those reasons—and there had to be some—are the ones who are the most helped by the President's clemency program as opposed to those who did, in fact, leave for conscience reasons, because there is no conscientious test, is there?

Mr. SCHWARZSCHILD. Quite so. In large part because, as you suggest, they will not be as reluctant as the committed war resisters to accepting the conditions—both tentative and debasing—which it seems to us are built into the clemency program.

Mr. PATTISON. That was precisely my point.

Mr. SCHWARZSCHILD. I understand. And if the universal amnesty would eliminate that problem, of course it would benefit—those men that you have now characterized would benefit from such an amnesty. And in light of the impossibility of making those discriminations intelligently and validly, all perhaps one ought to say is that this country ought to rely on the classical and traditionally hallowed principle that it is better that 10 guilty men go unpunished than that 1 innocent man be punished.

Mr. PATTISON. What I am trying to say is—what I hear is, if you do an unconditional amnesty and let all those bad guys go, then the clemency program should then be continued.

But is it not the truth that the clemency program basically benefits the people who, in fact, were malingerers a lot more than it is liable to benefit people who, in fact, were conscientious?

Mr. SCHWARZSCHILD. It is likely to attract in greater numbers, if at all.

Mr. PATTISON. In fact, it has. If you take the Goodell statistics, if you accept these statistics that only 16 percent of the people who have applied expressed any feelings at all of antiwar. But in fact, it is helping the very people who the public is least happy about helping.

Mr. SCHWARZSCHILD. Sir, I would be reluctant to characterize them in that way. Mr. Goodell claims they are men who left the military by reason of family complications, of personal difficulties, of ignorance, of bad counseling, and the like. And I would hesitate very much to characterize anyone who, for whatever reason, came in conflict with the law in the context of the war as someone who is self-regarding or selfish or cowardly.

The point was, that this war was—as we are all aware—not accepted by the American people, and that, therefore, men who knew that, who knew a bad war when they saw one, let their own personal problems take precedence over what they could not concede was an urgent need of the Government to have them fight the war in Southeast Asia. But it is true—and there I quite agree with the implications of your question—that it is precisely the principled war resisters who will come to this clemency program, or who have come to this clemency program, in lesser numbers than those whose objection to the war, or those who, at least in their own mind, for whatever reasons.

Mr. PATTISON. Thank you.

Mr. KASTENMEIER. On behalf of the committee, I would like to extend our gratitude to both of you and to your third colleague for coming this morning, Mr. Schwarzschild and Mr. Lynn, and testifying before this committee.

While I appreciate your position, it seems to me, this subcommittee is confronted with looking down the line, and attempting to comprehend what is not only desirable to achieve in terms of legislation—if legislation is indicated—but what can be accepted by the American people through the Congress in both the House and the Senate, and presumably be passed into law by the President of the United States, if we are talking about real achievement. And that is a very great part of the difficulty confronting us as we examine the problem here this morning.

In any event, we are grateful to you.

Mr. SCHWARZSCHILD. Thank you, Mr. Chairman.

Reverend LYNN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Next, the chairman would like to call Col. Ed Miller, U.S. Marine Corps, Retired, and Mr. Gerry Condon.

Gentlemen, if you would both come forward, we would appreciate your testimony. Colonel Miller, you have a very brief statement; I would be pleased if you would read it.

TESTIMONY OF COL. EDISON W. MILLER, U.S. MARINE CORPS, RETIRED

Colonel MILLER. Thank you, Mr. Chairman. I appreciate you allowing me to attend this committee hearing.

I was a prisoner of war in Vietnam from October 13, 1967 until February 12, 1973—5 years and 4 months. I have spent 24 years in the military service, and retired as a colonel from the U.S. Marine Corps. I am presently residing in Anaheim, Calif.

I was born in western Iowa on July 6, 1931, and placed in an orphanage until I was 5, raised by a young woman lawyer in Clinton, Iowa with several other children. I completed high school in 1949 and enlisted in the Navy.

While in the service, I was selected for flight training and commissioned a Marine Corps second lieutenant in 1951. I served in combat in Korea and Vietnam, and spent almost 9 of my 24 years of service outside of the United States.

I entered Vietnam in August 1967 as a lieutenant colonel, commanding a Marine F4B fighter-attack squadron. I was shot down and captured in North Vietnam on Friday the 13th, October 1967 while on my 70th mission. I sustained several injuries, including a broken back and a severely fractured ankle. Because of these injuries and various illnesses suffered while in prison, I was retired from the Marine Corps on 60 percent medical disability. Prior to my retirement I was promoted to full colonel.

After 2½ years in prison, I spoke out in opposition to President Nixon's policy of continued war. As a result, I was censored by the Secretary of the Navy upon my return for alleged disobedience of orders and misconduct.

Although aware of the illegality and immorality of our actions in Vietnam, even before serving there, it took me several years of agonizing thought to find the courage to speak out. The Americans who clearly saw the wrongs and harmful nature of the Vietnam war, and refused to serve in or support it, are citizens to be respected, not persecuted.

Many of these young men who refused to serve in Vietnam or our Armed Forces during those years have been separated for long periods from their families, court-martialed, imprisoned, given dishonorable or bad conduct discharges, and generally victimized because of their beliefs. True, not all of these young men made mature decisions or took responsible actions based on sincere moral, ethical or religious convictions, but to deny them their feelings of frustration in confronting the insensibility of a bureaucratic system is to ignore reality.

It is doubtful that any procedure could be devised to separate the sincere men of principle from the insincere, the opportunists, or the cowards. This is an imperfect reality we should be strong enough to accept, and any inability to cope with our imperfection does not negate our necessity to act.

We dare not forget that a basic concept of Anglo-American law and justice recognized that to insure individual liberties, it is better that the guilty escape conviction than the innocent be unjustly punished. In addition, our brand of democracy demands that we accord a decent respect for the political and religious views of our fellow citizens.

If we persist in demanding a pound of flesh from those who could not, in good conscience, comply with a policy which to them demanded support of an undeclared, brutal war against the Indochinese people, then we have surely forsaken our country's traditional ideals of political and religious tolerance, and we are, at best, hypocrites.

Conditional amnesty or clemency is a contradiction, for it is essentially a demand for retribution; a punishment imposed by one faction on another. Therefore, far from being a sincere effort to forget and to heal the wounds of division, it is a deliberate attempt to remember while continuing to justify a specific point of view.

You know better than I the divisive bitterness that the Vietnam war imposed on our society. It continues to divide us, and cries for a solution. President Ford's clemency program is not a solution—unconditional amnesty is. Amnesty is not one-sided; it must, and does, apply to all Americans.

A Vietnam amnesty would apply equally to those Americans who opposed or supported the war and who may have committed crimes against our society or on humanity: Lieutenant Calley and many others; Presidents Johnson and Nixon; the 90 percent of the eligible young Americans who cleverly avoided service; the millions of Americans who actively protested our involvement in Vietnam in quasi-legal or illegal acts and demonstrations; political, social and religious leaders; relatives and friends who encouraged and supported our young men in their refusal to serve, and who may now find it expedient to advocate political compromise to a moral dilemma; the many Americans who did not know what was happening and did not want to become involved; Americans who did know, and refused to serve, and whose futures are still in jeopardy; and, of course, those Americans who trustingly served and gave their lives and limbs, and whose sacrifices and/or those of their families are quietly ignored.

Amnesty cannot grant justice, but amnesty can put an end to injustice and help to reunite our people.

For the last 2 years, I have been speaking before groups of fellow Americans, young and old, liberal and conservative, military and civilian; they overwhelmingly recognize a need for a broad-based un-

conditional amnesty program. The myths espoused by those who oppose amnesty are seldom accepted today.

Most Americans I have talked to recognize the error of our involvement in Vietnam. Based on this fact alone, they see no justice in persecuting those who refused on moral, legal, or ethical grounds to support a Vietnam war policy. They see no threat in amnesty to our prestige in the world, to the military discipline or future of our Armed Forces, or to American patriotism. They see no threat to law and order in our society by a granting of amnesty. They are fed up with the emotional rhetoric of a few which tries to justify the continuance of our involvement in Vietnam, Indochina.

I am sure you know better than I that most Americans refuse to support continued military aid to Indochina. Americans overwhelmingly look to, and ask for, President Ford and the Congress to put an end to the fingerpointing, faultfinding, and name calling which divides our people. It is legislative action, not political sidestepping, which will help to resolve this conflict amongst us. There will always be some dissatisfaction from dissident groups, but in a democracy, it is the will of the majority which should govern—not the voice of the few.

Amnesty will bring home our sons whose words and actions brought home the war—and the POW's. It will help to restore confidence in our institutions and our country's sense of righteousness and duty to its citizens. It will help to bring about social order out of political and moral decay. And it will help to restore our self-confidence and pride. Thank you.

Mr. KASTENMEIER. Thank you, Colonel Miller. And now Mr. Condon, we have your statement. You may proceed, sir.

TESTIMONY OF GERRY CONDON ON BEHALF OF THE TORONTO AMERICAN EXILES ASSOCIATION

Mr. CONDON. Thank you. My name is Gerry Condon. It is my privilege to represent war resisters here today. I was not born or raised a war resister. I come from a conservative, Irish Catholic family. My father, both his brothers, and their fathers before them were all policemen, and veterans of the two World Wars. I was taught to respect God's law and man's. I was taught to love America, cherish its affluence, its freedoms, and its democracy. I was taught to hate and fear communism, the antithesis of America and all that was good.

I was troubled with doubts about the Vietnam war from fairly early on. But what did I know? Not enough to resist a war that was supported by my family, my church, and the Government to which I had learned to be loyal. I enlisted in the Army under pressure from the draft and eventually studied to be a Green Beret medic.

My worst suspicions about the war were confirmed by my experience in the U.S. Army. One day we were running around in formation with our rifles and bayonets, yelling, "Kill the gooks; kill the gooks," and not much later I was reading letters from Vietnam in which fellow trainees told about atrocities they had perpetrated. From returned veterans I learned of the napalming and murder of unarmed civilians, the torture and murder of prisoners of war, the forcible use of civilians and POW's to clear minefields in front of the troops, and the policy of free fire zones and search-and-destroy missions. Somehow or other,

the commonplace commission of war crimes had become part and parcel of U.S. military policy in Indochina.

After 16 months in the Army, I announced publicly that because of my opposition to the war and the draft and to the limtied criteria allowed in granting conscientious objector status, I would refuse to do any further military service. The Army's response was to issue me five consecutive orders to begin preparing for Vietnam shipment. I refused. In February 1969, I took an unauthorized leave of absence from the Army in order to avoid a general court-martial and probable imprisonment. The trial was held in my absence, though; not even my lawyers were notified. I was convicted to 10 years at hard labor and a dishonorable discharge.

In Europe and Sweden, where I spent the first 3 out of my 6 years in exile, I talked to many people about the conflict in Indochina, and I studied its origins. I came to the inescapable conclusion that the Indochina war was an aggressive war being waged by a neocolonial power, America, against third world people who were tired of being dominated and exploited by other countries, and had organized themselves into strong popular movements for national liberation.

I read former President Dwight D. Eisenhower's own memoirs in which he quite openly stated that the United States would not allow democratic elections to be held in Vietnam in 1956, as was prescribed by the Geneva Accords of 1954. The reason, said the President, was that 80 percent of the Vietnamese people would have voted for unification of the country under a government headed by Ho Chi Minh, a Communist. In a speech while President, Eisenhower also mentioned the importance of the rubber, tin, and tungsten of Indochina; evidently it was easy access to these and other natural resources that justified America's stubborn refusal to allow another country to determine its own future.

But our national leaders have rarely spoken so candidly since; we have been told only of the domino theory and that we are fighting for democracy. But it is the corrupt dictator Thieu that the U.S. President and Congress have been supporting. And democracy has been sabotaged in the United States, as is documented in the Pentagon Papers, by consecutive U.S. Presidents who routinely deceived the American people about the nature of the Indochina conflict, and used the poor and the racial minorities of this country as cannon fodder in a rich man's war.

This appalling truth has compelled me to work against the continuing U.S. war in Indochina, and also for my right and the right of all war resisters to have their full civil liberties restored in the United States. During the last 6 years, I have worked with the American Deserters' Committee and the Center for American Exiles in Stockholm, Sweden, the Vancouver American Exiles' Association, and I am currently a member of the Toronto American Exiles' Association, and editor of AMEX/Canada, the publication of American war resisters in Canada.

At the risk of arrest, I returned to the United States at the beginning of February, and have been on a national speaking tour sponsored by the National Council for Universal and Unconditional Amnesty, a coalition which includes about 100 organizations nationwide, many of them national in scope.

Because I have so much support, the U.S. authorities have apparently decided not to arrest me yet, not wanting to risk the bad publicity of a highly visible example of punishment, when they are trying to convince people that their policy toward war resisters is one of clemency.

I have traveled around much of the United States and have talked to thousands of Americans. Virtually all of them have rejected the Vietnam war policy. Nobody thought I should go to jail. I feel I have received unconditional amnesty from the American people. The question now is whether or not this will be recognized by the President or the Congress.

I continue to be in touch with exiles and exile groups, as well as former draft and military prisoners, resisters underground in the United States, and many antiwar Vietnam veterans around the country, including some with punitive less than honorable discharges. Because of my experience and contacts, I can speak for the great majority of war resisters who have boycotted President Ford's so-called clemency program.

We believe that all persons who are being punished for their resistance to the Indochina war should have an unconditional amnesty. We believe that it is our unalienable right to resist unjust wars; that no draft or military laws can contravene the Nuremberg principles or the generally accepted principles of human morality.

The Presidential clemency program provided neither amnesty nor clemency. Those eligible for the program were further punished with stigmatizing clemency discharges, which allow for no veterans benefits, and alternative punishment sentences. Charles Goodell, the head of the Presidential Clemency Board, maintains that alternative service is not really punishment, but rather war resisters' "opportunity to serve their unfulfilled obligation to their country." War resisters cannot accept this line of reasoning. We know that the vast majority of draft-eligible males legally evaded the draft and had to do no service, military or otherwise, to their country. Very often this was the case because their families had enough money to keep them in colleges and graduate schools; the burden of the war fell primarily on the poor. Besides, many war resisters applied 6 or 8 years ago to do alternative service, were flatly denied the opportunity, and were told they had no legal alternative to fighting in Vietnam.

It is too late now to offer us that alternative. We find it not only repugnant in principle, but extremely impractical in our already disrupted lives.

The President's earned reentry program was not only a deceptive and punitive program which tried to justify America's Indochina policy; it excluded the vast majority of nearly 1 million Americans who need amnesty. It excluded civilians who have felony records because of antiwar civil disobedience, and it made no provisions whatever for over half a million Vietnam-era veterans with less than honorable discharges, for other offenses than unauthorized absence. My own offense, for instance, refusing orders to Vietnam, was not covered under the so-called clemency program. Almost all these bad discharges went to poor and black Americans, the same people who bore the brunt of fighting in Indochina. Most often dissenting soldiers were not even given trials, but were administratively or arbitrarily given undesir-

able discharges for offenses which would not be considered crimes in civilian life. Yet, they constitute lifetime sentences to discrimination on the job market, as well as a denial of veterans benefits, including medical care for vets who were wounded in Vietnam. Any real amnesty must upgrade all of these discharges to honorable discharges. And the discharge classification system itself, a repressive and discriminatory weapon in the hands of the military, should be totally scrapped and replaced by the institution of a single type discharge.

There is currently a bill before the Senate which would in essence reinstitute the clemency program with minor changes, and extend it indefinitely. I am told it was written by Charles Goodell and other members and staff of the Clemency Board and it has been introduced by Senators Nelson and Javits. War resisters vehemently oppose the passage of this bill as being unjust and foolish. Unjust because it also would exclude most who need amnesty and punish those who would be eligible. And most certainly it would be foolish to create a program with the same fundamental flaws which caused about 85 percent of eligible war resisters to boycott the President's earned reentry program.

There are several unconditional amnesty bills in Congress, most notably the Abzug bill in the House and the Hart bill in the Senate. But they are not universal, covering all categories of persons who need amnesty. Senator Hart's bill would provide unconditional amnesty only for those categories of resisters who were eligible for the Presidential clemency. It would leave primarily veterans in the lurch. The Abzug bill deals with veterans with bad discharges, but makes the serious mistake of putting many military offenses up for a case-by-case review, a procedure which would tend to discriminate against the less formally educated and the inarticulate, and give credence to the present discharge system.

War resisters would welcome the presence of a bill in Congress which we could support. But we will support no bill that does not amount to a universal and unconditional amnesty—that is, total amnesty for all war resisters.

In closing, it is important for me to point out our call for a universal and unconditional amnesty cannot possibly be separated from our demand that the U.S. Government stop supporting the isolated and unpopular Thieu regime in Saigon. Every significant sector of the people in South Vietnam, from the provisional revolutionary government to the Buddhists and the Catholics, have called for Thieu's removal, denouncing him as the one largest obstacle to peace and reconciliation in their war-torn country. Yet, President Ford has cynically twisted the truth again, calling for $1 billion for Thieu as the only hope for peace in Vietnam.

Congress has rubberstamped the maneuvers in Indochina of a string of U.S. presidents. It is high time that Congress separated itself from this criminal policy once and for all. By voting against the billion dollar supplemental, you will be voting for a halt to the daily bloodbaths in Vietnam.

Also, in order that we avoid another Tonkin Gulf type incident, it is extremely important that Congress call for an immediate evacuation of American citizens from Saigon. In this way it will be unnecessary for that inevitable evacuation to become a major military maneuver.

War resisters demand also an immediate halt to the gross irony of the criminal and ineffective babylift, and all similar attempts on the part of the U.S. Government at such cynical manipulation of public opinion.

To sum up the position of war resisters is easy: We demand real amnesty and real peace.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Condon.

I notice in your testimony you really criticize all of the extant bills before the House and the Senate. Do you yourself have a model bill which would achieve what you think should be achieved in terms of amnesty?

Mr. CONDON. No; I do not. I think it would not be terribly difficult for such a bill to be devised, a bill that would cover all categories of people who are being punished for their resistance to the war and a bill which would deal with these people on a class basis rather than a case-by-case basis and would have no punitive aspects whatsoever.

Mr. KASTENMEIER. In that regard I take it you are in agreement with the preceding witnesses, Mr. Schwarzschild and Mr. Lynn, to the extent that you heard their statement.

Mr. CONDON. They said many things. You would have be more specific.

Mr. KASTENMEIER. In terms of their reservations about the Hart bill.

Mr. CONDON. Yes; definitely.

Mr. KASTENMEIER. Mr. Condon, I think you are probably in a very good position to judge this. It has been speculated that notwithstanding whatever change there is, but even assuming some sort of acceptable amnesty bill that could become law, that because of the years that have passed many of our exiles in Canada and in Sweden really are no longer interested in amnesty. They have made new homes and presumably would stay where they are in the present situation.

Do you think that is true, that they really do not have much interest in what this country does with respect to this question?

Mr. CONDON. No; I do not think that is true at all. It is true that of approximately 20,000 American exiles in Canada, perhaps half or better than half intend to remain residents of that country and intend to take out citizenship when they have that opportunity. Some of them already have. Even these people, however, believe they do have the right and they should have the right to visit their families and friends in the United States.

I think also that many of them came to their decision to remain in Canada because they sometime in the past gave up hope of being able to return to this country under honorable conditions, and of course they had to get about the business of their lives.

As far as people in Sweden, where I also lived, I think that the majority of the people there are interested in returning to live in the United States.

Mr. KASTENMEIER. While you strongly oppose the Nelson-Javits bill, do you support that provision in it which would allow exiles to return to this country no matter what charges are pending for 30 days each year to visit their families, as a sanctuary, being fully permitted to return to their location of exile?

Mr. CONDON. No; I do not support that provision. I do not support any move, any legislative move short of a total, universal and uncon-

ditional amnesty, not only because in principle I believe that is what we should have, but also because I think half measures may well discourage Congress from acting further.

Mr. KASTENMEIER. Thank you.

Colonel Miller, you have come all the way across the country. Both of you have been engaged in speaking programs. I gather after you speak to audiences they seem to be in general agreement with the thrust of your statement. Do you think generally they are before you speak to them? Polls do not indicate that sort of support for amnesty.

Colonel MILLER. Yes, sir. I find that quite often before I start speaking some of the audience appears somewhat hostile but afterwards many of them will come up and talk to me personally about my views and the biggest hangup which we all have is how far, how broad, should an amnesty program go?

And as I have said in my statement, it just seems impossible for us to try to find some way for a case-by-case study, and it just seems to me, I think we all are in agreement with President Ford in that what we really want is an end to the divisive situation in the country over Vietnam. And it seems the only way that we can really accomplish that to the good of our country is a very broad and unconditional amnesty program.

Mr. KASTENMEIER. There have been other views expressed. Colonel Miller, in your view what would a broad, very broad and unconditional amnesty do now to the morale of those serving in the military today?

Colonel MILLER. Well, I have many friends still in the military and I have gone to the University of California, Irvine campus, and now in Western State University Law School and I speak to many of the veterans there. We get together for drinks and talking. And most of the veterans who served in Vietnam really feel that they were misused, that the war was wrong, and they see no harm in an amnesty program for all of the people in these categories.

Now, not all of them are firmly convinced yet that it should be that broad, but I do not run into any veteran that would really be antagonistic toward an amnesty program. Most of them feel it is an inevitable result anyway, one of these days. It is just a matter of time. And I think most of them feel that it certainly is warranted in many people's categories and they recognize the difficulty in trying to resolve those that it might not be correct for.

Mr. KASTENMEIER. One final question and then I will yield to my colleagues.

Do you feel that matters other than those associated with resistance to the war or conscientious objection, maybe draft evasion, desertion, other things, other offenses, such as violence, assaults, fraggings—should they all be forgiven too, or forgotten, as the case may be?

Colonel MILLER. I am with you. This is a very hard hurdle to overcome. And again, I can only say it seems that the Congress here itself has done away with the draft. We forced these young men into a situation and then our own population, or a large majority of it, was very anti-Vietnam war in the last few years. We encouraged these people—if not right out, counseled them—on avoiding the war or taking some type of action.

I feel that to a great extent all of us have a responsibility in this field and to hold these people guilty separately at this point is not correct.

Mr. KASTENMEIER. That is to say in the case where an individual in Canada has also committed a murder.

Colonel MILLER. No. I believe that crimes of this nature—murder, rape, totally unassociated with the Vietnam war—certainly are crimes that stand by themselves.

Mr. KASTENMEIER. I yield to the gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

I am more and more convinced that the concept of alternative service is a myth and would not do any good here. I am glad, Colonel, that you recognize, as indicated by the answer to the last question, everything that we are dealing with here is not just absence from service. There are other cases and that is what makes them sticky.

I do not really know how to solve some of these problems. I am satisfied of one thing. If we are going to do anything here, it is pointless, unless we do something which will effectively put an end to a real problem and a real problem is how this, oh, 118,000 people, more or less, can be reintegrated into our society and our economy. And we have got to find something pretty general to fit that or nothing.

The word "amnesty" means to forget. You know if we keep this up long enough, we will have forgotten. And as a practical matter I favor the case-by-case approach, and yet I do not think it is a realistic solution. I do not think we would ever get it done.

The figures from Mr. Goodell's committee, I asked counsel and I understand that they have reviewed some 175 cases and they have got the same number already for review. They have acted on 65. Well, if you increased that tenfold, the remedy, the methodology, is not good enough to end the problem.

Thanks for your contribution. I do not know what I am going to do with it but I will think about it.

Colonel MILLER. Mr. Danielson, if I could just respond to some questions you asked previously.

Mr. DANIELSON. Certainly.

Colonel MILLER. These people that we are talking about that we want to integrate back into our society, I agree with you; I do not believe they are looking for rewards.

Mr. DANIELSON. I do not think they are.

Colonel MILLER. From the GI bill, or as I understand from military papers and publications that I read now, the Department of Defense is requesting that the GI bill be canceled in a peacetime era here.

Mr. DANIELSON. Let me corect you on that in case you have not gotten the word. The benefits of the GI bill have never flown to anyone except those who have rendered service during a time of conflict. The peacetime army or military service never did carry with it the benefits of the so-called GI bill. And now that the war in Vietnam is deemed to have been over since, I think, 2 years ago—you ought to know. You remember quite well—some arbitrary date has been selected subsequent to that marking the termination of hostilities. And that also marks the termination of GI bill benefits. I cannot tell you what the date is.

Colonel MILLER. OK. The only other point—throughout my career the undesirable discharge was very seldom used. Until the Vietnam war era it was primarily a way of getting rid of known homosexuals from the service.

Mr. DANIELSON. I was in the Navy and I remember that as basically what we used it for.

Colonel MILLER. Yes. So it seems to me it is not too hard to draw a conclusion that the undesirable discharge was used for political expediency, administrative expediency, to get rid of those that were voicing objection to the Vietnam war and the military during those years.

Mr. DANIELSON. In connection with the amnesty, how would you react to this? I am just groping for ideas here.

One of the many hangups along here is what kind of a discharge are you going to use? Maybe a better way to solve that is to have no discharge at all, just call the case closed. You know that is really what we are talking about anyway. I cannot think of the word that we would use but we are just calling the case closed. They do not get any discharge; they do not need one. The time has expired.

I do not know what we would call it. I am groping for something here. But what do you think of the concept anyway?

Colonel MILLER. I agree with that, that either a single type discharge or no discharge. It really seems to me that it is the poor or the blue-collar worker type segment of our society who are the only ones who are ever asked for their discharge anyway.

Mr. DANIELSON. Suppose we were to let them resign. You know there are a lot of officers that can resign a commission. There is nothing dishonorable about that.

Colonel MILLER. And many do under threat of court-martial.

Mr. DANIELSON. That is right, but at the same time you can do it without there being the connotation of something bad connected with it.

Colonel MILLER. Yes.

Mr. DANIELSON. Well, it is a thought. Thank you so much.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I think that in "Alice in Wonderland" they used to have un-birthday parties. We could have an un-discharge.

Colonel Miller, I am interested in your feeling about how other people with long military service feel. I am curious about how you perhaps feel, and you may not be able to respond to this at all.

The organized veterans groups like the Disabled American Veterans and the VFW and the American Legion I think pretty generally take an official position that they are opposed to any kind of amnesty or any amnesty that they are in favor of would be very limited. And I am curious as to what your feeling is about to what extent those groups actually represent the feeling of the veteran, not just their members.

Colonel MILLER. Well, I am a member of the VFW and I am a life member of the Disabled American Veterans and the Marine Corps League Association, and I support these organizations to the best of my time and ability, so I do associate with these people. They are friends of mine.

Most of them at first have a hard time accepting my views on the subject, but after we discuss it they do come around, and it is a matter of degree, when they stop to think about what brought about this war, the history, and not a selective history about our involvement in Vietnam but an actual history of our involvement in Vietnam. And it is hard for them, the older ones that served in World War II

and very little past that, to realize that our country became involved in a war such as Vietnam. To them war in this country and our military revolves entirely around a patriotic war, World War II, and they have not kept up or did not through the years. And now that they have, there is no difficulty. I have never had any problem talking to any of my friends or associates in the military about this matter. And they certainly have always given me the courtesy of respecting my opinion, as I have given to their opinion. And we get some real good discussions on it quite often. But I do not feel that any of these groups—you are right, they take a group position, and I do not think it is a clear reflection of their membership.

Unfortunately, when you attend meetings, if they have a 100-man detachment, very few show up for the meeting. Very few are actually running the meeting. And they pass these resolutions rather indiscriminately and there is not really a vote taken of the membership. And I do not think it is truly reflective of the membership when they make these things.

Now the VFW, particularly, and the American Legion are having a difficult time. They are recruiting the Vietnam generation men into their organization. They have had quite extensive campaigns to do it. It has been quite a hurdle for them to accept these men in strange clothes and long hair and beards into the organization, but it is coming about. And I think this is good. But I am not sure that the present generation, the Vietnam veterans, are really interested at this time, at least in large numbers, of joining veterans organizations, which may mean that the veterans organizations are going to lose in membership through the years more and more. And it is probably because of the attitude about the Vietnam war. There are not that many veterans that are proud of their service in Vietnam as there was in World War II.

Mr. CONDON. If I might add to the Colonel's response. I have found in traveling around the country that some of our most enthusiastic and active support for universal and unconditional amnesty comes from young Vietnam veterans; people who were actually over in Vietnam. And that by and large, the people that were there and saw—of course, many interpret their experience differently, but a very large percentage of them are totally disenchanted with the Vietnam war, and are very strongly in favor of amnesty.

I was speaking at a meeting recently where a young former green beret came up to me after the meeting, and we had just shown a film about landmines, and he felt pretty bad because he and some of his buddies used to throw them all over the place. But he was talking about the fact that he has been in touch with people in his unit that he was in Vietnam with—these are special forces people—and every single one of them is against the war and for amnesty. And we find that to be not an exceptional instance at all.

Mr. DANIELSON. I just wanted to ask Mr. Condon a question in that connection. I read your statement, as well as listened to it. You never were in Vietnam as I recall.

Mr. CONDON. That is correct.

Mr. DANIELSON. How long was it that you were in the service before you left the service?

Mr. CONDON. I was in the service for about 22 months before I left. The last 6 months of that I was kind of under house arrest.

Mr. DANIELSON. So you would have had about 16 months, roughly, before you came under a clouded circumstance.

Mr. CONDON. That is correct.

Mr. DANIELSON. I am still thinking of how we can resolve this discharge problem.

Thank you very much. I do not know any answers to it.

Mr. CONDON. I think the answer to the discharge question, not only in terms of the problem with resistance to the war, but in terms of just the larger question of discharges, is the institution of a single type discharge. There is really no reason for a classification system of discharges.

Mr. DANIELSON. Well, I think, Mr. Condon, if I may, the person who put in his service—I am not quarreling; I want to assume—I will stipulate that you had the greatest of conscientious motivations, and I am only speaking in that context. But a person who actually did put in his service—take Colonel Miller who put in his service; he might have found it onerous at times, but he put it in. And there were thousands and thousands; I think they are entitled to some kind of a certificate, a diploma, a discharge, showing that they have done so. I think it is a matter that they might feel is an honor.

Whether they ever want to go to war again or not is one thing, but I think they are entitled to the recognition that they did fulfill the terms of service. Now in your situation, you were dissatisfied with the service, and that is why I want to ask these questions. You are a person with firsthand knowledge.

Would you have not felt better if you could have withdrawn, if you could have resigned, if you could have voluntarily left the service after you had completed, let us say, that 16 months? It was impossible for you to do so, but suppose there were laws—and that is what we are concerned with here; we pass laws—suppose the laws of the land would have made a provision which would have enabled you to withdraw voluntarily from the service without the stigma of a dishonorable, under less than honorable, and so forth, circumstances. You do not have to be classified, you could just say, I resign.

Mr. CONDON. Right.

I would most certainly have welcomed such an opportunity. I think in that regard that it is important that the laws of this land recognize what has been called selective conscientious objection, if you will. The fact that people can have very, very serious conscientious opposition to a war without being absolute pacifists, as the present conscientious objector laws require.

Mr. DANIELSON. Well I do not know whether I can buy that. I think you either are or are not a conscientious objector. However, I will recognize—now I have had enough military service, not a great deal, but enough to know that if I had a person in my company that did not want to be there, who was really, therefore, not psychologically reliable as a 100-percent member of my company, I would rather they be in some other company, someplace. In fact, I would rather they go home.

I would want the people in my outfit who were gung-ho on the thing, because I cannot think of a more unsatisfactory thing to morale if

there are one, two, or three members of the unit who really are not—so I think we have been remiss in passing our laws, and do not provide the means for people to get out after they have gotten in and they find that they are emotionally, psychologically, or whatever, unsuited. We do have a provision if they are physically unsuited; they can get out. But if they are psychologically unsuited—and what the heck is part of your physique than part of your brain, your psyche, if you are not suited for it, by intellectual interests, or whatever. Get out; leave it to those who can stay in.

I am kind of preaching here, but I think maybe we are touching on something of value. We would not have 118,000 people in this problem if there were a way out, rather than just walking away.

Mr. KASTENMEIER. The Chair would like to thank Mr. Gerry Condon and Col. Ed Miller for their appearance before the committee today, and I would say, if you do develop a model bill for universal unconditional amnesty, the committee would be happy to have it and your continuing views on the question.

Thank you both, very much.

Colonel MILLER. Thank you, sir.

Mr. CONDON. Thank you, sir.

Mr. KASTENMEIER. At this late hour, nonetheless, we want to apologize to our next witness, Mr. Thomas Alder, who is president of the Public Law Institute and is accompanied today by Mr. John Schulz and Ms. Susan Hewman.

We did add an extra witness today, Mr. Alder. The Senator from Michigan who could not come yesterday. I think it has delayed us somewhat in reaching you. We are grateful for your dedication, and we appreciate your appearance here this morning.

[The prepared statement of Thomas P. Alder follows:]

STATEMENT OF THOMAS P. ALDER, PRESIDENT, PUBLIC LAW EDUCATION INSTITUTE

Mr. Chairman and members of the subcommittee, I am Thomas P. Alder, and attorney and President of the Public Law Education Institute, 1346 Connecticut Avenue, N.W., Washington, D.C. 20036. The Institute is a public interest legal research and information center, founded in 1968. From that year until the spring of 1974 it published the *Selective Service Law Reporter*. Since mid-1973 the Institute has also published the *Military Law Reporter*, covering a wide range of military law and individual rights developments. Each of these periodicals has issued between 1,000 and 1,500 pages a year, and constitutes the specialized journal of record in its field.

I am pleased to respond to your invitation to testify concerning the President's clemency program, the alternatives presently available outside the program, and to comment on specific features of the two Senate-sponsored bills now under your consideration. In view of the short time available for the preparation of my testimony, and to give you the best possible description of the situation as it exists outside the scope of the Clemency program, I have asked two attorneys with very special expertise in draft and military law to join me at the witness table. Their prepared statements are included with mine.

Miss Susan Hewman is staff attorney with the Military Rights Project of the ACLU Foundation, and a co-author of the Manual on Discharge Upgrading and Review. The Military Rights Project has a present caseload of 200 veterans whose petitions are pending before Discharge Review and Correction Boards, of which approximately half are hers. She also conducts seminars and training courses in the practice of discharge upgrade law throughout the country.

John E. Schulz has been a senior Editor with the Public Law Education Institute since joining the staff in 1970. He was Editor-in-Chief of the *Selective Service Law Reporter* for three years, and helped form the *Military Law Reporter*, which he has edited since its inception in 1973. He has had day-to-day contact with

draft law issues during this entire five-year period, and has previously testified to Senate Committees on the practices of the Selective Service System and the Justice Department during the Vietnam era.

OUTLINE OF TESTIMONY

Mr. Chairman, this final segment of today's testimony covers several subjects which have also been touched on by previous witnesses. So that you will know how we are proceeding, let me briefly outline our intended course. I will first provide further clarification of the Justice Department's role in the Clemency program, including a discussion of the "final list", how it was arrived at, and what we have learned from its use by private organizations since its release. Then Mr. Schulz will discuss the options open to those currently under indictment, and, importantly, he will describe the urgent need to deal specially with the thousands of alleged violators who have never been told that they are free of legal jeopardy. He will also provide additional information on the non-registration and late registration cases which are not covered by the final list. Miss Hewman will, in turn, discuss alternative remedies for in-service offenders, including those who have received administrative discharges, and those who have participated in the President's program to the point of being separated with an undesirable discharge. This discussion will also extend to those who have already applied to the Clemency Board, and who have remaining options in other forums. Following this, I will relate a persistent and important problem in the Selective Service System's conduct of the Reconciliation Service Program, and conclude with a critique of the two Senate bills.

JUSTICE DEPARTMENT'S INTEREST AND ROLE IN CLEMENCY PROGRAM

Mr. Chairman, although the enrollment period for the Justice Department's Clemency program has ended, this component deserves a further retrospective at this point in the hearings for two reasons. First, it is the only part of the President's program in which the threat of resumed criminal prosecution hangs over those who have signed alternate service agreements. This contingency means that directives issued by the Selective Service System, and the actions taken under them, are reinforced by penal sanctions for non-compliance in the case of all those participants referred to the Reconciliation Program by Justice. As a consequence, very real issues of due process and procedural safeguards have arisen and will arise within the alternate service program as long as men are enrolled in it who risk a felony conviction if they are found to be out of compliance. Since most Justice Department agreements are for terms of 19 to 24 months, this class of enrollees will be in the program for the greater portion of its duration. The Selective Service System has not been adequately responsive to this consideration in the way it has set out and amended the rules governing the alternate service program, a point I will return to in greater detail toward the end of my presentation.

The second reason to examine the Justice Department's record of the past few months is to assess what its role would be under S. 1290. As you know, that measure as presently drafted would remove jurisdiction over pending draft cases until December 31, 1976, the termination date for the Board prescribed by the original executive order. If this bill were to be enacted with the original termination date intact, many cases would eventually fall within the residual jurisdiction of Justice. Before this prospect is either endorsed or dismissed out of hand, some attention should be paid to Justice's past record and to an appreciation of its basic interest in participating in any variant of the current clemency program.

The first thing to be said about the Justice Department's record over the past six months is that both the Department and those eligible under its program have understood very well that this "clemency" has been a species of prosecution and punishment, not of amnesty. It was frankly characterized as a pretrial diversion program at the beginning by the Deputy Attorney General who announced it, and this characterization has been widely, even instinctively, understood by the men who declined to participate in it, as well as a growing segment of the public. I think that many of us who were initially alarmed at the risk of entrapment and lack of due process contained in the unpublicized directive guiding this program missed the real point: Thousands of men made their own clear and probably thoughtful decisions against enrolling without knowing more than they saw in newspapers or heard from friends.

As the final figures show, few men were tempted to approach the Justice Department under this program. On the record of the early 1970's I think it is entirely possible that more than the 686 who enrolled would rather have volunteered for induction into the Army if that had been open to them.

To understand why the Department has had an active interest in this program, and further why its record was not altogether one of prosecutorial fervor, it is important to note how the advent of the program solved a genuine problem for the Department. Prior to July 1, 1973, when induction authority expired, prosecutors had a powerful device for resolving draft cases without the expense and exposure of trial: they could offer an indicted defendant the option of accepting induction in lieu of prosecution. This option was frequently exercised, a point the Department has stressed in last year's hearings and again here on Monday in an effort to show that its conviction rate is an inadequate measure of its prosecutorial success. Through the use of this induction offer the Department cleared many cases which would have added to its backlog, and of these a significant fraction would have been difficult to try. By resolving these cases without judicial scrutiny, the Department was able in some measure to bury its failures and simultaneously to note in successive annual reports that its main achievement under the draft law had been to provide men for the military manpower pool.

When the induction authority expired on June 30, 1973, the Department lost its principal pretrial diversion option in draft cases. Two or three thousand men under indictment at that time who might earlier have been candidates for induction instead of trial no longer could be offered this election. The Defense Department declined a Justice Department request to establish a follow-on enlistment program, and within seven months it also barred the enlistment of men who were under investigation but not yet indicted. Thus, in the second quarter of 1974 the Department had a draft caseload of around 6,000 and no real alternative to trial or dismissal to cope with it. Firm directives from Washington to prosecute these cases with dispatch did little to reduce the balance. What the Department needed most was another pretrial diversion program; the planning for the President's Clemency Program offered that opportunity, and it was quickly exploited.

Against this background of the Department's earlier practice, the public record should note that officials of the Department, particularly the Internal Security section of the Criminal Division, were often receptive during the last six months to reasoned approaches from those of us on the outside. In particular, Rev. Lynn and I found the Division actively receptive to our three major recommendations. The first was that the Department order a nationwide review of all pending draft cases instead of woodenly resisting court directed file inspections in the few districts where these had been ordered. This was formally directed by the Attorney General on November 13th and resulted in the closing of approximately 1,700 pending cases, or 27% of the outstanding total.

The second recommendation, following logically from the first, was that a final list be prepared after this review, and if possible conveyed to responsible counselling groups which already had used an earlier but inaccurate list released in October on the request of Rev. Lynn and the ACLU. The expectation on the government's side was that distribution of this list to non-official agencies would result in an increase in participation in the President's program. This expectation was founded on the experience with the October list, which showed that potentially eligible men, many thinking they were fugitives, would not contact any government agency about their status, but would make calls to known counselling organizations.

Our third recommendation was that the Department either abolish the infamous "section 10" procedure or amend it to provide *Miranda* warnings and to eliminate the patent risk of uncounselled self-incrimination. This provision, buried in the Department's directive covering the clemency program, was apparently aimed at getting agreement from those who were not subject to investigation but who admitted to a violation in the course of an inquiry about the program. This was understood by the counselling and legal community to be a dragnet device to trap the unwary and actually commence new cases—an anxiety reinforced by the Attorney General who stated publicly that he would not abandon the provision.

Section 10 was used as we had feared in a small number of cases. However, the operating branch of the Department did meet our complaint by first assuring us that the provision was intended only for previously unknown nonregistration cases, and by later going beyond this assurance to essentially override the section by routinely referring all non-registration cases to Selective Service for an

initial determination of prosecutive merit. In short, the lower echelons of the Department had substantially complied with a request which the Attorney General felt he had to openly decline.

The lesson I draw from these three episodes is that the Justice Department demonstrated laudable flexibility on those occasions when the nature of the request was consistent with the Department's interest in closing cases without losing them. Only in the case of Attorney General Levi's commitment to abandon cases inadvertently left off the final list by clerical error did the Department make a major concession against prosecutorial interest. Had not Senator Kennedy been the godfather and guarantor of this effort to have this list treated as final I have some doubt that any such commitment would have been kept in the hard cases of inadvertent omission.

The implication of these events for S. 1290 are mixed. On the one hand, this bill is obviously an improvement in vesting the Board with jurisdiction over cases of alleged violators, thereby taking refuge in the earlier and wiser design of Senator Taft's proposal. It is a comment on the limits within which a President may be able to use his constitutional pardoning power that the Ford program sacrificed this design to the narrower and non-clement needs of the Justice Department. I for one feel this aspect of the President's program erodes the strength and the legitimacy of Senator Goodell's argument that the President's constitutional power precludes Congress from granting broad amnesty.

On the other hand, where S. 1290 is most defective and puzzling is in the provision remanding all outstanding business of the Board to the Justice Department. This entails a long catalogue of detailed problems, including the fate of records now solicited by the Clemency Board on assurances of confidentiality. On a more general level, it is simply inconsistent to lift the Department's jurisdiction over pre-trial cases until 1977, because of a critical assessment of its performance, and then suddenly to turn all pre and post conviction cases back to the Department. There will be instances of uncompleted alternate service agreements among the remanded matters. Some will be treated as pretrial diversion cases and others as analogous to conditional pardons for convicted offenders.

In both instances it is unlikely that the Department would abandon its basic perception of the clemency issue: that the most compelling consideration of equity is to see that the punished are not defamed by too-lenient treatment of the yet-unpunished. In this frame of reference the important factors are the penal sanctions of the past, not the motives underlying individual actions or the considerations of even a rhetorical policy of national reconciliation. This unimaginative provision of S. 1290 is the prescription for a retrogressive final stage in the program; it would also be a potential deception of those who enter alternate service thinking they would be under the ultimate auspices of the Clemency Board, but whose satisfactory completion would be determined by the Justice Department.

THE FINAL LIST OF THOSE SUBJECT TO PROSECUTION FOR CLEMENCY-ELIGIBLE OFFENSES

One important measure of the scope of the Amnesty problem has been the reaction to the release in late January of the so-called "final list". This 400 page document was actually three series of lists, setting out those respectively under indictment, complaint, or investigation for clemency-eligible offenses on January 20, 1975. The lists were prepared in Washington on the basis of submissions by local U.S. Attorneys. These, in turn, came only after the 60 day review period at the end of the year in which 1,700 cases were dropped. The most significant omissions from the offenses covered were: 1) those occurring outside the clemency period, meaning for practical purposes after March 28, 1973; 2) all cases of late or non-registration not then the subject of an indictment or investigation; 3) offenses such as draft card destruction not covered by the Proclamation; and 4) those subject to exclusion under 8 U.S.C. § 1182(a)(22).

Unintentionally, or through error of judgment, a number of names were omitted from the list. In one case the error was very substantial—over 20 names dropped in transcription. In several other instances the local Assistant U.S. Attorney omitted from his submission the name of someone who had an alternate service agreement under advisement, even though this was technically an erroneous decision since indictments remain pending during alternate service. Despite opposition in the Department and by U.S. Attorneys in the field, the Attorney General after some delay ruled unambiguously that the Department would stand

by its offer of finality, and would accordingly move to dismiss all cases not noted in the list.

Mr. Chairman, this entire episode was an important landmark in the course of the Clemency Program. Because it is so well documented in the short series of letters between the Department, Senator Kennedy and others, and in the Department's telex directives to the field, I believe this correspondence would be a valuable addition to the printed record of these hearings, with your permission I would like to include it as an exhibit in the record at this point in my testimony.

WASHINGTON, D.C., *January 21, 1975.*

Hon. EDWARD M. KENNEDY,
Chairman, Subcommitee on Administrative Practice and Procedure, Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR KENNEDY: During your subcommittee's December 19th hearings on the clemency program, Deputy Assistant Attorney General Kevin Maroney, representing the Justice Department, agreed to provide lists of all those under indictment or investigation for Selective Service Act violations as of January 12, 1975. Mr. Maroney also agreed to convey your recommendation that the Department regard this compilation of names as the "final list" of those Vietnam-era draft violators who remain liable to prosecution, and hence eligible under the President's Clemency Program. The single exception to this declaration of finality would be the Department's reservation of the option to proceed criminally against those who did not register before March 28, 1973, and whose failure to register became known to the Selective Service System or the Department only after the beginning of the eligibility period under the program.

From our experience with individuals who would benefit most from an effective clemency program, we can say that the preparation of a "final list" of those eligible would be the single most important objective which legislative oversight hearings could achieve at this time. The one further step needed to confirm the value of this approach is to designate responsible and accessible non-government agencies to make this information available in a manner consistent with the degree of confidentiality which we presume all those under criminal investigation would desire.

As the subcommittee knows, ten organizations have for three months been using an early and incomplete list of those under indictment or investigation, and we remain confident that these same groups would employ the final list with complete discretion. However, should the subcommittee have serious misgivings about broad distribution of the list, a smaller group of three or four organizations could be agreed upon, although with some loss of effectiveness in using the list over the next few days. To help make such a choice, if it becomes necessary, we have arrived at several criteria for determining the most suitable agencies to whom the lists should be entrusted, and have agreed upon four which seem to us to qualify best. The criteria are:

1. *Responsibility and experience.*—The organization or agency should be one of those which has received and employed the incomplete list of all indictments and investigations, which the Justice Department made available in October 1974.

2. *Reputation among the class potentially eligible for clemency.*—The organization or agency should be known as a reliable source of information concerning the clemency program, and should be trusted to maintain the confidentiality of inquiries made to it.

3. *Accessibility of information.*—The organization or agency should, if possible, maintain a toll-free or toll-collect phone and be adequately staffed to handle the expected volume of requests coming to it or referred to it from other cooperating organizations.

4. *Future operations.*—The organization or agency should be reasonably certain of continued operation into an extended election period under the clemency program, should one be approved. In addition, at least one of the agencies selected should be capable of responding to inquiries regarding criminal liability and eligibility after the conclusion of the current election period.

Although several organizations meet the above qualifications, in the interest of limiting distribution of the lists, we have arrived at four which we feel are particularly qualified and which would stand ready to maintain an information service based on these lists.

Center for Social Action, The United Churches of Christ, 1100 Maryland Avenue, N.E., Washington, D.C.

The Clemency Information Center, 110 West 42nd Street, Indianapolis, Ind.
War Resister Information Program, 567 Broadway Avenue, Winnipeg, Manitoba.
The American Civil Liberties Union, 22 East 40th Street, New York, N.Y.

In utilizing the lists already provided, these organizations have been aware that, by confirming the fact that someone is under investigation, the source necessarily reveals the existence of a federal investigatory file. They also understand that under the recent Freedom of Information Act amendments, the Justice Department is directed to release such information only so long as it will not constitute an "unwarranted invasion of personal privacy." Although the immediate need to determine the clemency eligibility of thousands of young men clearly warrants disclosure of the sort proposed here, the organizations named above will convey information from the lists only to individuals, their families, or representatives, and will not generally publicize the names they contain. In this way we hope to assure the subcommittee that, in entrusting the lists to outside organizations, it will not indirectly be responsible for a broader use of the lists than would be authorized by the Freedom of Information Act.

We are informed that the requested lists are to be delivered to the subcommittee this week, leaving only a few days during which they can be fruitfully used before the expiration of the clemency program's enrollment period. We are anxious to plan now to make the most of this brief interval and to that end we are available to meet with you or the subcommittee staff at your earliest convenience to resolve any remaining matters concerning the use of these lists.

Sincerely yours,

The Public Law Education Institute; The Center for Social Action, United Churches of Christ; The Clemency Information Center; The War Resister Information Program; The Central Committee for Conscientious Objectors; The National Council for Universal and Unconditional Amnesty; The American Civil Liberties Union.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., January 24, 1975.

Hon. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: During Mr. Kevin Maroney's appearance on December 19, 1974, before the Subcommittee on Administrative Practice and Procedure concerning the President's Clemency Program, you requested that the Department submit a final listing of all draft evaders whose cases have been reviewed by United States Attorneys and found to have prosecutive merit.

There are enclosed three copies of a list which includes the names and selective service numbers, where available, of all individuals who are presently charged by indictment, information or complaint, and those who are under investigation for draft offenses during the Vietnam era, where the case is believed to have prosecutive merit. With the exception of those individuals who may be subject to criminal process for late or non-registration occurring during the Vietnam era, this list is considered final by the Department of Justice, and those whose names appear may consider themselves eligible for the Clemency Program.

The Department has no objection to the Subcommittee's release, to responsible counseling agencies, of the names of those individuals against whom process is outstanding. However, we believe that public disclosure of the names of the persons still under investigation would constitute an invasion of their right to privacy and would be violative of the spirit underlying the Privacy Act of 1974, Public Law 93-579, enacted December 31, 1974.

If I can be of any further assistance, please contact me.

Sincerely,

LAURENCE H. SILBERMAN,
Deputy Attorney General.

Enclosure.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., January 24, 1975.

THE CLEMENCY INFORMATION CENTER,
1100 West 42nd Street, Indianapolis, Ind.

GENTLEMEN: The attached list contains the names of individuals who are presently charged by indictment, information or complaint, and those who are under investigation for draft offenses (other than non- or late registration) during the Vietnam era. This list is being provided to your organization, pursuant to your letter to me of January 21, 1975, for the sole purpose of conveying information from the list only to individuals, their families, or represenatives. It is understood that you will not generally publicize the names on this list.

I appreciate your cooperation in this effort.

Sincerely,

EDWARD M. KENNEDY, *Chairman.*

Enclosure.

DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, WASHINGTON, D.C.

January 29, 1975.

ROBERT W. VAYDA

To: All U.S. Attorneys (including overseas).

Subject: Procedures to be Completed by U.S. Attorneys No Later Than February 14, 1975, In Those Draft Evader Cases Where Reclamation or Dismissal was warranted as a Result of the Recent Review.

With respect to the recent review of draft evader files, and the submission to the Department of the names of all persons whose cases contain prosecutive merit and are eligible for the President's clemency program, a listing was prepared and submitted to the Senate Subcommittee on Administrative practice and Procedure with the following cover letter:

Hon. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: During Mr. Kevin Maroney's appearance on December 19, 1974, before the Subcommittee on Administrative Practice and Procedure concerning the President's clemency program, you requested that the Department submit a final listing of all draft evaders whose cases have been reviewed by United States attorneys and found to have prosecutive merit.

There are enclosed three copies of a list which includes the names and selective service numbers, where available, of all individuals who are presently charged by indictment, information or complaint, and those who are under investigation for draft offenses during the Vietnam era, where the case is believed to have prosecutive merit. With the exception of those individuals who may be subject to criminal process for late or nonregistration occuring during the Vietnam era, this list is considered final by the Department of Justice, and those whose names appear may consider themselves eligible for the clemency program.

The Department has no objection to the subcommittee's release, to responsible counseling agencies, of the names of those individuals against whom process is outstanding. However, we believe that public disclosure of the names of the persons still under investigation would constitute an invasion of their right to privacy and would be violative of the spirit underlying the Privacy Act of 1974, Public Law 93-579, enacted December 31, 1974.

If I can be of any further assistance, please contact me.

Sincerely,

LAURENCE H. SILBERMAN,
Deputy Attorney General.

FEBRUARY 12, 1975.

HON. EDWARD LEVI,
Department of Justice, Constitution Avenue and 10th Street NW., Washington, D.C.

DEAR MR. ATTORNEY GENERAL: On January 24 I received from the Department of Justice a list of all draft evaders whose cases have been reviewed by United States Attorneys and have been found to have prosecutive merit. In his cover letter transmitting this list, Deputy Attorney General Laurence Silberman indicated that this list would be treated by the Department as complete and final for the offenses and time period covered. I want to take this opportunity to again commend the Department and Mr. Silberman for the responsiveness and sensitivity to the principles underlying the President's clemency program which this action reflects.

As your staff is aware from discussions with Subcommittee staff, a number of questions have arisen concerning the apparent unwillingness of United States Attorneys to be bound by the finality of the list. I am in receipt of a copy of a telex of January 29, 1975 from Robert W. Vayda to all United States Attorneys, and while I interpret this as *instructions* to United States Attorneys, there seems to be feeling among various counselling groups that the telex merely *authorizes*, but does not require, the dismissal of indictments and closing of investigations for individuals who do not appear on the list. It is also my understanding that United States Attorneys have refused to acknowledge that these individuals are free from any criminal liability for violating relevant Selective Service laws.

Specifically, the following names have been brought to my attention as falling within the category of those not on the list but also not able to get confirmation of nonliability from United States Attorneys:

Harry F. Clark, Southern District, Illinois.
Henry J. Ladd, Middle District, Georgia.
Alan Lopez, Denver, Colorado.
Sam Lucas, Little Rock, Arkansas.
Michael Lennon, Eastern District, New York.
Carl L. Passen, Southern District, New York.
Simon Thomas Waters, Richmond, Virginia.
Mark Michael Wayne, New Jersey.

To clarify this matter I would appreciate confirmation from the Department (1) of the non-liability of the above listed individuals; (2) that the list provided to the Subcommittee continues to be treated as closed and final for the offenses covered; and (3) that the necessary clarification of these two points will be brought to the attention of the United States Attorneys.

In view of the time limitation on the operation of the Clemency Program, I hope to receive your response by February 18. Finally, I believe it would be useful for the Department or United States Attorneys to provide written confirmation, to those requesting it, of their status in order to avoid possible problems that might arise in the future through computer error or the like.

If the names of any other individuals in this class are subsequently brought to my attention, I hope we can be assured that their cases will be disposed of in a similar manner.

Sincerely,

EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., February 27, 1975.

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

DEAR MR. CHAIRMAN: This is in reply to your letter of February 12, 1975 with respect to the finality of the list of Selective Service violators eligible for the Clemency Program which was furnished to your Subcommittee on January 24, 1975.

The list is final except with respect to individuals subject to criminal prosecution for late or non-registration.

Individuals who had executed clemency agreements before the list was delivered to you on January 24 and who were omitted from the list were not currently subject to prosecution when the final list was compiled. Thus, it is understandable why these individuals were omitted and the question of finality did not relate to them in any event.

Some individuals were inadvertently omitted by U.S. Attorneys because they were involved in on-going negotiations with the apparent intent of concluding agreements, or had contacted a U.S. Attorney and stated that they did not intend to participate in the Clemency Program.

The Department can understand the argument that such individuals should be subject to prosecution because of the fact that they knew of their criminal liability if they failed to execute an alternate service agreement and thus suffered no actual prejudice because of their inadvertent omission for the final list. However, the Department will not prosecute such individuals because it is our position that we shall adhere to the representations made in the Departmental letter of January 24 to you. All alternate service agreements made by individuals whose names were omitted from the final list and executed after January 24 are deemed null and void by the Department.

The eight individuals whom you named in your letter are not on the final list and are not subject to prosecution for draft evasion offenses covered by the Clemency Program.

If I may be of any further assistance in this matter, please contact me.

Sincerely,

EDWARD H. LEVI, *Attorney General.*

To: All U.S. Attorneys.

From: Edward H. Levi, Attorney General, Department of Justice, Washington, D.C.

Subject: Final List of Draft Evaders Eligible for the Clemency Program.

The following letter was sent on February 27, 1975 to Senator Kennedy, Chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedure:

DEAR MR. CHAIRMAN: This is in reply to your letter of February 12, 1975, with respect to the finality of the list of selective service violators eligible for the clemency program which was furnished to your subcommittee on January 24, 1975.

The list is final except with respect to individuals subject to criminal prosecution for late or non-registration.

Individuals who had executed clemency agreements before the list was delivered to you on January 24 and who were omitted from the list were not currently subject to prosecution when the final list was compiled. Thus, it is understandable why these individuals were omitted and the question of finality did not relate to them in any event.

Some individuals were inadvertently omitted by United States Attorneys because they were involved in on-going negotiations with the apparent intent of concluding agreements, or had contacted a U.S. Attorney and stated that they did not intend to participate in the clemency program.

The Department can understand the argument that such individuals should be subject to prosecution because of the fact that they knew of their criminal liability if they failed to execute an alternate service agreement and thus suffered no actual prejudice because of their inadvertent omission from the final list. However, the Department will not prosecute such individuals because it is our position that we shall adhere to the representations made in the departmental letter of January 24 to you. All alternate service agreements made by individuals whose names were omitted from the final list and executed after January 24 are deemed null and void by the department.

The eight individuals whom you named in your letter are not on the final list and are not subject to prosecution for draft evasion offenses covered by the clemency program.

If I may be of any further assistance in this matter, please contact me.

Sincerely,

EDWARD H. LEVI, *Attorney General.*

In accord with the policy decisions embodied in this letter, all U.S. Attorneys will undertake the following:

(1) Dismiss draft evasion indictments covered by the Clemency Program against all individuals whose names were not submitted to the Department in accordance with the departmental instruction of December 20, 1974;

(2) Cancel alternate service agreements made by individuals whose names were omitted from the final list and who executed such agreements after January 24, 1975 and

(3) Respond in writing to written inquiries from individuals not on the list confirming that, except for the possibility of prosecution for a late or non-registration offense, they are free from prosecution for an offense covered by the clemency program.

In the January 29, 1975 instruction, an error was made in referring to 8 U.S.C. 1402. The proper reference was 8 USC 1481.

Although the final list was originally released to only five organizations, the distribution eventually extended to 11 other groups who made convincing cases of need and who agreed to protect the confidentiality of those under investigation. Once finality was established, the main difficulty in relying on the lists stemmed from such considerations as the possibility that one was indicted in a different district than first thought, or that an offense had actually been charged on a date falling outside the program. Through the efforts of a group of Los Angeles lawyers and counsellors, these irreducible shortcomings were largely identified and eliminated by March 1st. By that time it was also possible to tell groups using the list that any caller needing counsel to appear on his behalf could have one if he could send an authorization letter to one of the four offices of the Central Committee on Conscientious Objectors. This appointment would be adequate to entitle a file review on behalf of a fugitive defendant in every District Court which would allow appearances by authorized counsel on behalf of fugitives who had not resubmitted to court jurisdiction.

When the list was put into use at the 16 centers, it provided an important opportunity to learn more about the size of the group of men who went underground as alleged violators and who essentially remain there even though charges against them were either dismissed or never brought. On April 11th, after receiving your request to testify, I mailed a short questionnaire to all groups asking for information. Mr. Schulz will discuss these results since they bear more on his testimony, but I will anticipate his analysis only to say that the questionnaire results broadly confirm the severity of the problem. I would recommend strongly that the Committee ask the Justice Department and the Selective Service System to spell out the steps they have taken to notify those whose cases were dropped in the review process initiated on November 13, 1974. Unless there is a serious non-financial obstacle to taking the same measures with respect to all cases in which Selective Service once issued violation notices, it is difficult to see why this is not a minimal requirement of the just administration of the laws. Since August, 1973 the Selective Service System has provided a directive and a form letter to deal with just this situation, RPM 642.12. No comparable provision existed prior to that date, which was two months after the end of induction authority. Since all evidence indicates that the lives of many men are now being constrained by the unfounded fear of prosecution, it is callous to argue over how many thousands they may actually be, and ludicrous not to use retroactively the notification provision which was added to the regulations only after the draft had ended.

Mr. Chairman, at this point I would like to introduce Mr. John E. Schulz, Editor-in-Chief of the *Military Law Reporter*.

Mr. Chairman, following the outline of our presentation, I would like to introduce Ms. Susan Hewman who will discuss alternatives available to the in-service offender and treat one provision of S. 1209 which appears to have been ill-drafted.

SELECTIVE SERVICE RULEMAKING AND PUBLIC INFORMATION POLICY UNDER THE CLEMENCY PROGRAM

It is difficult to fully appraise the Selective Service System's performance under the present program, and thus its ostensible role under S. 1290, because the Reconciliation Service program has not begun to reach its capacity. With that very minor qualification, I want to make a single point which suggests that

Selective Service still functions as an unnecessarily secretive agency, in search of new missions which it is not uniquely or demonstrably qualified to undertake.

In establishing the Clemency Program on September 16, 1974, the President signed an executive order delegating functions to the Director of Selective Service. The terms of this order are unusually sweeping and I will quote the pertinent part.

"*Section 1.* The Director of Selective Service is designated and empowered, *without approval ratification or other action of the President*, under such regulations as he may prescribe, to establish, implement, and administer the program of alternate service authorized in the Proclamation. . . ." (emphasis added).

The literal significance of this language is that the so-called President's Clemency Program is not the President's at all for those who enter alternate service. In practical effect it has presented the Clemency Board and others speaking in the President's name with a mixed blessing. In the main, this broad and exclusive delegation permits these others to avoid unwanted responsibilities. But it also has real risks for the harmonious administration of the program. The most recent and best example is a matter which was raised here Monday: the unpublished alteration on January 30th of the one Selective Service directive which dealt in detail with the treatment of time spent by enrollees looking for their first job under the program.

You will recall that the consequence of this change was to reverse the rule in effect since the beginning of the program, which gave a man credit for the time he spent looking for his first job. By directing that this time be no longer credited, regardless of good faith employment efforts, the Service in one small step converted the alternate service of many men into an indefinite sentence. For Clemency Board applicants, who might have expected to leave their present lives for a definite term of service as short as three months, this change would be unusually severe. Yet, when I described the change to a senior staff associate of Senator Goodell in mid-March, he had not learned of it and thought the Chairman had not either. If this is so, it means that the President's chosen deputy to coordinate the entire program was kept unaware for six weeks of the most radical possible change at the core of the program.

The Director of Selective Service on the eve of these hearings has rescinded this change under mounting criticism. But he has left untouched, and indeed has restated, the basic claim by Selective Service to be exempt from the public information requirements imposed by statute, with minor exceptions, on all agencies. In taking the position he did here on Monday, that the entire series of directives designated the Reconciliation Service Manual is an internal document solely for the guidance of the agency, he is perpetuating an abuse to which Selective Service clings, almost alone among federal agencies. The justification for this posture is his agency's practice of issuing, as published regulations, very broad provisions, but distributing as manual changes materials which other agencies designate as regulatory.

This issue now goes to the very question of whether the Reconciliation Service Program can work without substantial injustices. Under present policy an enrollee or a potential employer can have access to the Manual only by going to a state director's office. Even local boards do not receive them. The suggested alternative—an $18.00 purchase of the Manual from GPO doesn't work; GPO is out of stock and indicates that no reprinting is planned. Yet the Manual contains normative matter which is critical to both applicants and employees, and should be published in the *Federal Register*. The creditable time provision is only one example. Another is the listing of the 60 job descriptions which qualify for alternate service designation. (RSM § 2206, attachment 3). Still another is an outline of supervisory responsibilities which employers in the program must accept. (RSM § 2209. The published regulations contain scarcely a clue of these Manual sections, and such a clue as they may provide is almost worthless unless the applicant or employer is near to location of the state director.

A very serious question exists whether this is legal. Specifically, some of the manual material referred to here is presumptively invalid as applied to anyone who does not personally know its terms. Provisions of the Federal Register Act and the Administrative Procedure Act are designed to require publication of all documents having general applicability and legal effect, of which several manual provisions are examples. I have addressed this issue to the Director of the *Federal Register* in more detail than the Committee may need in oral testimony, and I would like to submit the three letters making up this filing for the record at this point, with the understanding that the Director's reply, which is due within three days, will be submitted to be incorporated as soon as it is received.

THE PUBLIC EDUCATION INSTITUTE,
Washington, D.C., March 18, 1975.

MR. FRED EMERY,
Director, The Federal Register, General Services Administration, National Archives and Record Service, Washington, D.C.

DEAR MR. EMERY: I am writing to direct your attention formally to an apparent disregard by the Selective Service System of the publication requirements contained in 44 U.S.C. §§ 1505(a)(2), 1507 and 5 U.S.C. § 552(a)(1).

On or about October 23, 1974 the Selective Service System issued to elements of the System a document entitled the "Reconciliation Service Manual" containing the substance of most or all administrative rules bearing on the course of conduct to be followed by those performing alternate (reconciliation) service under the President's Clemency Program. Individuals covered by this program include the group or class of those under indictment for alleged Selective Service Act violations, who have agreed in writing to perform alternate service in exchange for the written promise of the United States to dismiss with prejudice the indictment upon completion of a fixed term of reconciliation service. This written agreement provides that the failure to pursue or complete the term of service will result in the resumption of prosecution for one or more felonies, each punishable by up to 5 years in prison.

Exhibit 1, attached, is a facsimile copy of a portion of § 2209(5) of the RSM as issued to the System on or about October 23, 1974. The bracketed provisions set forth a standard by which the commencement and accumulation of creditable time toward completion of alternate service is to be determined. This provision, although included in the RSM, was not published to the best of my knowledge in any other form, nor in the *Federal Register* at any time before or after October 23, 1974. Instead, on January 16, 1975, the Director of Selective Service caused to be published in the *Federal Register* a "Notice of Availability" concerning the RSM, here attached as Exhibit 2. The language of this "Notice of Availability" does not indicate that the RSM is judged by the agency to be exempt from the publication requirements of either the Administrative Procedure Act or the Federal Register Act. It does, however, quote a substantial price for which the entire RSM may be obtained from the GPO, and does state that an inspection copy is available, but only in one office within each state, i.e. the office of the State Director of Selective Service.

The last known action by the agency in relation to § 2209(5) of the RSM has been the mailing of "Change Notice 2," included here as Exhibit 3, to a distribution list described as "All holders of the complete RSM." The substance of this change is to reverse entirely, and adversely to the affected participant, the previous standard for the determination of creditable time served in reconciliation service. At this date, Change #2 has not been published in the *Federal Register*.

If the facts recited here are substantially complete and correct, they raise several questions concerning the validity of the October 23rd and January 30th issuances by Selective Service.

1. Are either or both issuances within the class of documents required under 1 CFR § 1.1 and 1 CFR § 5.2 to be published in the *Federal Register*?

2. Does the failure to publish the original version of § 2209(5) RSM render unacceptable for publication in the *Federal Register* any purported amendment to that provision, including Change #2, until all related provisions of RSM falling within 1 CFR § 1.1 are also submitted for publication?

3. Does the publication requirement of 5 U.S.C. § 522 apply to the Selective Service System in view of the provision of the draft statute exempting "all functions performed under this title [citing sections of 50 U.S.C. App.] . . . from the operation of the Administrative Procedure Act except as to the requirements of Section 3 of such Act [Section 552 of Title 5]. 50 U.S.C.A. Appendix § 463(b)"?

4. Does the publication requirement of 44 U.S.C.A. §§ 1505(a)(2) and 1507 apply to the Selective Service System in the exercise of its delegated functions under the Presidential Clemency Program, E.O. 11804 (September 16, 1974), irrespective of the answer to question 3?

Although this correspondence is a third party inquiry, the agency's actions, and the confusion they have introduced into the deliberations of those subject to or eligible for the Clemency Program, suggest, at a minimum, that the agency should be required to publish its "creditable time" regulation in the *Federal Register* as a notice of proposed rule making. Only in this way can the intended

effect of this rule be elicited from the agency and established with clarity as a matter of notice to the affected public.

Thank you for your consideration.

Sincerely yours,

THOMAS P. ALDER, *President.*

Enclosures.

THE PUBLIC LAW EDUCATION INSTITUTE,
Washington, D.C., March 25, 1975.

MR. FRED EMERY,
Director, The Federal Register, General Services Administration, National Archives and Records Service, Washington, D.C.

DEAR MR. EMERY: Since my letter of March 18th I have discovered three additional facts which reinforce the conclusion that the Selective Service System has yet to publish lawfully major provisions of its Reconciliation Service Manual. I will describe them briefly.

1. The "Notice of Availability" of the RSM, published by the Selective Service System in the January 16, 1975 *Federal Register* states that the RSM is available by subscription from GPO, and for inspection at the offices of each of the State Directors of Selective Service. See Exhibit 2 of my March 18th letter.

On January 28, 1975 this Institute placed a subscription order for the RSM, chargeable to its deposit account with the GPO. Sometime in March the attached order blank was returned bearing a "received" date of January 30th. The returned order form has a letter notation on which is explained on the reverse side as follows:

"Indicates that our stock of the publication is exhausted and it is no longer available. Perhaps you can refer to a copy at your local library."

Significantly, the explanation immediately preceding this one, and not circled as applicable to our order, covers those cases where the stock exhaustion is temporary and GPO indicates that the order will be filled when new stock is received. I think the reader, casual or otherwise, of this form would fairly conclude that the RSM was permanently out of print. I have no information to the contrary, and I would point out that the consequences of this unavailability are potentially long-lasting; the Clemency Board has, for example, processed and forwarded warrants for fewer than 200 of the over 4,000 applications it says have clemency eligibility. It is clear from this deliberate pace of decisions that the RSM will be a document of major and general effect for a growing class of individuals over a period of months or years to come; yet, on the only evidence we have, it has been unavailable by subscription since shortly after the date on which the Selective Service System announced that this would be the principal means by which the public could have access to it.

2. The "Notice of Availability" offers, as the only alternative to subscription purchase, the examination of the RSM at any State Director's office, which I believe means only one location in each state. By contrast, the Registrant's Processing Manual, the analog of, and formal model for, the RSM, is available at local boards, now designated "area administrative offices." Because these boards have frequently been consolidated I am not able to give the exact number now in operation, but it is certainly in the high hundreds or low thousands. Remarkably, the RSM is distributed to all boards or area administrative offices according to the terms of the RSM itself, and there is, therefore, no physical or precedential basis for limiting its availability at these locations as the "Notice of Availability" does.

3. I have read the RSM in connection with the parent regulations codified in 2 CFR Part 200, and find several instances in which the RSM provision states normative rules of general applicability without corresponding provisions in the regulations themselves. I will simply list what I believe to be the discrepancies or irregularities which this reading reveals.

(*a*) § 2200.1 of the RSM purports to terminate a Temporary Instruction, TI-200.1. This instruction, when originally issued, was published in the *Register* as FR Doc. 74-23667, filed on October 9, 1974. TI-200.1 was designated as a "Reconciliation Instruction" and carried the indication that it was to terminate "when this information is included in a Reconciliation Service Manual or . . . is provided in other directives."

Since the purported function of the RSM is to amend and replace a prior directive which was published in the *Register*, the most orderly presumption to be made is that Selective Service conceded that the subject matter was "required to be published" in submitting TI–200.1 for the *Register*, and that it can treat the RSM as properly promulgated without publication only by opposing and overcoming this presumption in an affirmative demonstration that the RSM is exempt. For the reasons stated in my March 18th letter, and those added here, it is doubtful that Selective Service can make this showing.

(*b*) RSM § 2203 gives instructions on where an enrollee in the Reconciliation Service Program is to report. There is no corresponding detail in the regulation in 2 CFR Part 200. § 2203 also states that a file on an enrollee is to be opened at the appropriate area administrative office. The CFR provisions do not reveal this to the public or the participant.

(*c*) RSM §§ 2204 and 2205 state standards for eligible employers of returnees and criteria for job types which qualify under the program. These provisions follow closely the published terms of 2 CFR § 200.3 and § 200.4. Incongruously, though, § 2206, attachment 3, lists approximately 60 eligible job descriptions which are nowhere mentioned in 2 CFR. Knowledge of these job titles is of immediate significance to potential employers under the program and to enrollees, who have the express obligation to find their own job within a short time period. The consequence of failure to secure a job placement is intended to be severe: the loss of creditable time allowance under the purported amendment contained in Change # 2 of January 30, 1975. For those diverted into the Reconciliation Service from a pending criminal proceeding, failure to find a job means continued criminal liability and possibly resumed prosecution.

(*d*) RSM § 2209, covering broadly the administration of the Reconciliation Service contains the most conspicuous examples of normative rules governing enrollees and employers, which are not published in 2 CFR. This section outlines the supervisory responsibilities of employers participating under the program, states the procedures governing failure of a returnee to report for or complete service, spells out the right of a returnee to request reassignment, and outlines what a request for reassignment should contain. There are no corresponding provisions in 2 CFR for any of these matters.

§ 2209 also contains the creditable time provisions which are the principal focus of this correspondence. Interestingly, 2 CFR § 200.6 states in detail the rule that an enrollee earns creditable time when he is between jobs through no fault of his own, and the corollary that he loses good time when he is at fault. Yet nothing in the CFR provisions states with corresponding exactness either the original rule that a good faith search for the first job earns creditable time, or the totally contradictory rule purported in Change #2 sent to RPM subscribers on January 30th.

On the basis of this information and that developed in my letter of March 18, 1975, it seems highly probable that major provisions of the Reconciliation Service Manual, and all purported changes, have been illegally placed into operation. Since the preliminary finding of illegality would appear to fall to your agency under its statutory authority rather than to the courts, I would like to make a formal proposal that the Director of the Federal Register find the Reconciliation Service Manual improperly issued because:

1. It was not proposed and published in compliance with 5 U.S.C. § 522 or, in the alternative, that:

2. It was not published in compliance with the provisions of 44 U.S.C. § 1505(a)(2) and § 1507.

Once again, I want to thank you for your consideration of this matter.

Sincerely yours,

THOMAS P. ALDER, *President.*

THE PUBLIC LAW EDUCATION INSTITUTE,
Washington, D.C., April 8, 1975.

MR. FRED EMERY,
Director, The Federal Register, General Services Administration, National Archives and Records Service, Washington, D.C.

DEAR MR. EMERY: I would like to amend, and possibly narrow, the request for an advisory ruling made by my letters of March 18th and 25th, 1975. If, as these letters state, the Reconciliation Service Manual issued by the Selective Service System has been noted in the *Federal Register* only to the extent

of the "Notice of Availability" published on January 16, 1975, is such notice adequate to give legal force and effect to those portions of the RSM which have general applicability and legal effect? In particular, does the "Notice of Availability" suffice under the requirements of 1 CFR §§ 1.1 and 5.2, and the provisions of 5 USC § 552 and 44 USC §§ 1505(a)(2) and 1507?

For the purpose of this inquiry it is granted that the provisions of the RSM having general applicability and legal effect, and all amendments thereto, bind individuals personally served with its provisions. Excluding this mode of publication, does the *Register* find the "Notice of Availability" (annexed to and discussed in my March 18th letter, and further discussed in point two of my March 25th letter) as a proper form of Incorporation by Reference, or as any other form of legally sufficient publication?

I hope this clarification will assist you in reaching a determination of the issue presented in this request.

Sincerely yours,

THOMAS P. ALDER, *President.*

On the evidence to date, committees having legislative oversight functions should be alerted to the dangers of maladministration in the Reconciliation Service Program. While these may appear rooted in the September 16 delegation to the agency, the senselessly tight public information policy has more distant and deeper origins, and would not vanish solely because the executive order was rescinded or amended. In reviewing legislation involving an alternate service requirement, the subcommittee might consider a reporting system for enrollees and employers involving less agency intrusion altogether, whether Selective Service or the Employment Service was the designated operating authority.

COMMENTS AND ANALYSIS OF S. 1290 AND THE NATIONAL RECONCILIATION ACT OF 1975

Mr. Chairman, in the time remaining I would like to respond to your request for comments on the Senate-sponsored bills before the subcommittee. These remarks will be selective, brief, and possibly too exacting of the draftsmen. Nonetheless, I think the points raised represent either important problems of clarity or serious deficiencies with possibly adverse legal consequences.

S. 1290.

Section 2. In its conception this bill represents a potentially larger breach of the separation of powers than any of the Congressional measures resisted here by government witnesses on the grounds of this doctrine. These problems are not solved legally by securing White House agreement not to raise them, although such acquiescence may make the problem seem temporarily insubstantial. Before passing over the issue as moot the subcommittee might consider that the effect of this bill is to convert a Presidential Advisory Committee established to assist the President in the exercise of his pardoning power, into a hybrid creature of Congress and the President. Moreover, while the bill leaves the Board's term of duration intact, it considerably alters the substantive provisions of the Board's mandate. This is incongruous, since one arguable reason for giving the Board the sanction of public law would be to lengthen its term.

Section 3 (b). This section is presumably intended to reach draft cases under the authority of the civil courts, i.e. indicted cases and those on court supervised release. The language used can technically be read to reach only those cases in which the Justice Department has not obtained an indictment. To go farther, the provision might either directly address the jurisdiction of the U.S. Courts, or provide direction to the Justice Department to reacquire jurisdiction by seeking dismissal of pending indictments.

Section 4(a). As a matter of policy and clarity it should be stated here or elsewhere that the Administrative Procedure Act provisions on promulgation of regulations either apply or do not. In view of the Board's mixed origins, a failure to provide a term covering this issue will guarantee later dispute.

Section 4(b). See the prepared statement of Ms. Susan Hewman.

Section 4(d). By limiting the auspices under which alternate service would be conducted to departments or agencies, the bill may suggest that the Board cannot become, wholly or in part, its own operating organization. Use of a broader term, such as governmental unit or organization would avoid this ambiguity.

Section 5(c). The provision: "if he otherwise qualifies for such a visa" appears to allow the application of 8 USC Section 1182(a)(22) to exclude members of the class who are intended to benefit from this provision.

Section 6. Renunciation of U.S. Citizenship does not always accompany the acquisition of citizenship in another country. If the provision read "renounced his United States citizenship *or* acquired the citizenship of another country," the intent of the statute would be preserved and would extend to the desired scope of coverage.

Section 8. See the prepared statement of Ms. Susan Hewman.

Section 12. This section in its brevity raises many policy questions which call for its expansion and clarification. Another is the propriety of remanding to the Justice Department men who have not been discharged from the armed services. If it is intended that the discharge occur when the case is first transferred to the Board under Section 3, this should be clarified.

Section 14(a)(b). The terms "draft evader" and "military deserter" are employed here to cover both the convicted and unconvicted. This is a breach of propriety regarding unconvicted defendants which no statute, least of all a clemency law, should perpetuate.

Section 14(d). The bill uses the term "create" to describe its operative effect on the existing Clemency Board. In contrast, Section 2 states that the Board was created by the executive order, and is "established by law."

THE NATIONAL RECONCILIATION ACT OF 1975

As presently drafted, this bill has one provision which will cause inordinate difficulty with only modest compensating gain. Section 3(b) provides that in any future court martial the prosecution must establish as an element of the crime that the act was not related to the individual's principled objection and was not a crime against person or property. The second of these two elements is readily proved by direct evidence. The question of an Act's relation to principled objection is, however, a more elaborate matter to prove in the negative. This problem is enormously compounded by the right of the defendant to remain silent. Recognizing the burden that the change I suggest would impose on the defendant, I think it would be preferable to require the element of principled objection to be raised as an affirmative defense rather than to insist the prosecutor negative in every case the presumption that the alleged crime sprung from a principled opposition to service.

Mr. Chairman, this concludes our testimony. We thank you for your attention and hope that our contribution has added in some measurable way to the value of these very timely hearings.

TESTIMONY OF THOMAS P. ALDER, PRESIDENT, PUBLIC LAW EDUCATION INSTITUTE, ACCOMPANIED BY SUSAN HEWMAN AND JOHN E. SCHULZ

Mr. ALDER. Thank you, Mr. Chairman.

I want to thank you especially for this opportunity to appear.

As you have indicated to the subcommittee, I am Thomas Alder, president of the Public Law Education Institute, which publishes the "Selective Service Law Reporter," and the "Military Law Reporter."

To give you the best possible description of the situation as it exists outside the scope of the clemency program, I have asked two attorneys with very special expertise in draft and military law to join me at the witness table. We will submit our prepared statements for inclusion following our testimony in the record.

Ms. Susan Hewman is staff attorney with the military rights project of the ACLU Foundation, and a coauthor of the "Manual on Discharge Upgrading and Review." Her project has a present caseload of 200 veterans, of which approximately half are hers.

Mr. Schulz, to my left, has been a senior editor with the Public Law Education Institute since joining the staff in 1970. He was editor-in-chief of the "Selective Service Law Reporter" for 3 years and helped form the "Military Law Reporter," which he edits.

Mr. KASTENMEIER. Was he a successor to Mr. Tiger, Michael Tiger?

Mr. ALDER. There were two intervening editors. He was a remote successor to Mr. Tiger, yes.

Mr. Chairman, we are going to proceed roughly following this outline. I will try to clarify the Justice Department's role in the clemency program a little further, and then Mr. Schulz will discuss the options open to those currently under indictment, and, I think importantly, he will describe the urgent need to deal especially with the thousands of alleged violators who have never been told that they are free of legal jeopardy. This is a very large class and one that is frequently overlooked in discussions of clemency and amnesty.

Ms. Hewman's statement, which we will submit for the record, is in some respects the most important of the written statements because it deals for the first time in a really expert analysis in these hearings with the largest class of those subject to the clemency program, the military absence offenders. I particularly hope that if we do not have a chance to go on with it, you will at least have a chance to read it. She is here to respond to questions. Perhaps Mr. Danielson might want to direct some to her because she has particular expertise in the field to which his more recent questions have been directed.

Mr. Chairman, although the enrollment period for the Justice Department's clemency program has ended, this component deserves further attention at this point in the hearings for two reasons. First, it is the only part of the President's program in which the threat of resumed criminal prosecution hangs over those who have signed alternate service agreements. This contingency means that directives issued by the Selective Service System, and the actions taken under them, are reinforced by penal sanctions for noncompliance in the case of all of those participants referred to the reconcilation program by the Department of Justice.

As a consequence, very real issues of due process and procedural safeguards have arisen, and will continue to arise, within the alternate service program as long as men are enrolled in it who risk a felony conviction if they are found to be out of compliance. Since most Justice Department agreements are for terms of 19 to 24 months, this class of enrollees will be in the program for the greater portion of its duration. The Selective Service System has not been adequately responsive to this consideration in the way it has set out and amended the rules governing the alternate service program. I will return to that later, if we have a chance, in some detail. I note that the matter which was before this subcommittee on Monday, the question of the revocation of the provision regarding creditable time served by those in alternate service, which the director, Mr. Pepitone discussed, raises this issue once again.

In a letter of April 11 to Mr. Schwarzschild noting that this revocation has occurred, he comments in passing, "as you know, participation in the Reconciliation Service program is voluntary." It simply is not true. I think that is an oversight, perhaps unintentional on the

part of Selective Service. But in fact there are criminal sanctions undergirding participation in the program, because if someone fails to complete or fails to comply, the consequence for him is a resumption of the criminal prosecution, a felony charge which could result in up to 5 years of imprisonment.

Another reason to examine the Justice Department's record in the past few months during this program is to assess what role it would play under S. 1290, the Nelson-Javits bill. As you know, that measure as presently drafted, would remove jurisdiction over pending draft cases until December 31, 1976, from Justice, the termination date for the Board prescribed by the original Executive order issued last September by the President.

If this bill were to be enacted with the original termination date intact, many cases would eventually fall within the residual jurisdiction of Justice. Before this prospect is either endorsed or dismissed out of hand, I think some attention should be paid to Justice's past record and to an appreciation of its basic interest in participating in any variant of the current clemency program.

The first thing to be said about the Justice Department's record over the past 6 months is that both the Department and those eligible under its program have understood very well that this particular clemency has been a species of prosecution and punishment, not of amnesty. It was frankly characterized as a pretrial diversion program at the beginning by the Deputy Attorney General who announced it, and this characterization has been widely, even instinctively, understood by the men who have declined to participate in it, as well as a growing segment of the public.

I think that many of us who were initially alarmed at the risk of entrapment and lack of due process contained in the unpublicized directive guiding this program missed the real point. Thousands of men made their own clear, and probably thoughtful, decisions against enrolling without knowing more than they saw in newspapers or heard from friends. As the final figures show, few men were tempted to approach the Justice Department under this program. On the record of the early 1970's, I think it is entirely possible that more than the 686 who enrolled in the clemency program would rather have volunteered for induction into the Army if that election had been open to them after October of this last year.

To understand why the Department has had an active interest in this program, and further why its record was not altogether one of prosecutorial fervor, it is important to note how the advent of the program solved a genuine problem for the Department. Prior to July 1, 1973, when induction authority expired, prosecutors had a powerful device for resolving draft cases without the expense and exposure of trial. They could offer an indicted defendant the option of accepting induction in lieu of prosecution. This option was frequently exercised, a point the Department has stressed in last year's hearings and again here on Monday in an effort to show that its conviction rate is an inadequate measure of its prosecutorial success.

Through the use of this induction offer, the Department cleared many cases which would have added to its backlog, and of these a significant fraction would have been difficult to try. By resolving these cases without judicial scrutiny, the Department was able in some meas-

ure to bury its failures and simultaneously to note in successive annual reports that its main mission and achievement under the draft law had been to provide men for the military manpower pool.

When the induction authority expired on June 30, 1973, the Department lost its principal pretrial diversion option in draft cases. And 2,000 or 3,000 men under indictment at that time who might earlier have been candidates for induction instead of trial, no longer could be offered this election. The Defense Department declined a Justice Department request to establish a follow-on enlistment program, and further, within 7 months it also barred the enlistment of men who were under investigation but not yet indicted.

Thus, in the second quarter of 1974, the Department had a draft caseload of around 6,000, and no real alternative to trial or dismissal as devices to cope with it. Firm directives from Washington to prosecute these cases with dispatch did little to reduce the balance. What the Department concluded it needed most was another pretrial diversion program. The planning for the President's clemency program offered that opportunity, and it was quickly exploited.

Against this background of the Department's earlier practice, the public record should note that officials of the Department, particularly the internal security section of the Criminal Division, were often receptive during the last 6 months to reasoned approaches from those of us on the outside. In particular, Reverend Lynn and I found the Division actively receptive to our three major recommendations. The first was that the Department order a nationwide review of all pending draft cases instead of solely resisting court-directed file inspections in the few districts where these had been ordered. This was formally directed by the Attorney General on November 13, and resulted in the closing of approximately 1,700 pending cases, or 27 percent of the outstanding total.

The second recommendation, following logically but slowly, I might add, from the first, was that a final list be prepared after this review, and if possible conveyed to responsible counseling groups which already had used an earlier but inaccurate list released in October on the request of Reverend Lynn and the ACLU. The expectation on the Government's side was that distribution of this list to nonofficial agencies would result in an increase in participation in the President's program. This expectation was founded on the experience with the October list, which showed that potentially eligible men, many thinking they were fugitives, would not contact any Government agency about their status, but would make calls to known counseling organizations.

Our third recommendation was that the Department either abolish the infamous section 10 procedure or amend it to provide *Miranda* warnings and to eliminate the patent risk of uncounseled self-incrimination by applicants to the program. The Department did meet this complaint, finally, first by assuring us that the provision was intended only for previously unknown nonregistration cases, and by later going beyond this assurance to essentially override the section by routinely referring all nonregistration cases to Selective Service for an initial determination of prosecutive merit. In short, the lower echelons of the Department had substantially complied with a request which the Attorney General felt he had to openly decline.

The lesson I draw from these three episodes is that the Justice Department demonstrated laudable flexibility on those occasions when the nature of the request was consistent with the Department's interest in closing cases without losing them. Only in the case of Attorney General Levi's commitment to abandon cases inadvertently left off the final list by clerical error did the Department make a major concession against prosecutorial interest. Had not Senator Kennedy been the godfather and guarantor of this effort to have this list treated as final, I have some doubt that any such commitment would have been kept in the hard cases of inadvertent omission.

In addressing myself to the provisions of section 1290 as it would involve the Justice Department, I think the most defective and puzzling provision is that it would, as I understand it, remand to the Justice Department at the end of 1976, all of the outstanding business of the Clemency Board. This move would entail a long catalog of detailed problems, including the fate of records now solicited by the Clemency Board on assurances of confidentiality, to those who provide the information.

On a more general level, it is simply inconsistent to lift the Department's jurisdiction over pretrial cases until 1977, because of a critical assessment of its performance, and then suddenly to turn all pre- and post-conviction cases from the armed services as well as Justice back to the Department. There will be instances of uncompleted alternate service agreements among the remanded matters. Some will be treated as pretrial diversion cases and others as analogous to conditional pardons for convicted offenders. In both instances, it is very unlikely that the Department would abandon its basic perception of the clemency issue: that the most compelling consideration of equity is to see that the punished are not defamed by too lenient treatment of the yet unpunished.

In this frame of reference, the important factors are the penal sanctions of the past, not the motives underlying individual actions or the considerations of even a rhetorical policy of national reconciliation. This unimaginative provision of S. 1290 is the prescription for a retrogressive final stage in the program; it would also be a potential deception of those who enter alternate service thinking they would be under the ultimate auspices of the Clemency Board, but whose satisfactory completion would actually be determined later by the Justice Department.

One important measure of the scope of the amnesty problem as we have discovered in living with it at the Law Reporters these last 5 years, has been the reaction to the release in late January of the so-called final list of the Justice Department, material pertaining to which we can submit for the record. When this list was put to use in the 16 centers to which it was released, it provided an important opportunity to learn more about the size of the group of men who went underground as alleged violators and who essentially remain there even though charges against them were either dismissed or never pursued.

On April 11, after receiving your request to testify, I mailed a short questionnaire to all groups who had the list asking for information. Mr. Schulz will discuss these results since they bear more on his testimony, but I will anticipate his analysis only to say that the ques-

tionnaire results broadly confirm the severity of the problem. I would recommend strongly that the committee ask the Justice Department and the Selective Service System to spell out the steps they have taken to notify those whose cases were dropped in the review process initiated on November 13, 1974. That, as I indicated before, is a number of around 1,700. Then, unless there is a serious nonfinancial obstacle to taking the same measures with respect to all cases in which Selective Service once issued violation notices, it is difficult to see why this should not be done as a minimal requirement of the just administration of the laws.

Since August 1973, the Selective Service System has provided a directive and a form letter to deal with just this situation. It is contained in RPM 742.12. No comparable provision existed prior to that date, which was 2 months after the end of induction authority. Since all evidence indicates that the lives of many men are now being constrained by the unfounded fear of prosecution, it is callous to argue over how many thousands they may actually be, and additionally ludicrous not to use retroactively the notification provision which was added to the regulations only after the draft had ended and would do no good unless used at this point.

Mr. Chairman and members of the subcommittee, at this juncture I would like to introduce John Schulz, editor-in-chief of the "Military Law Reporter."

Mr. KASTENMEIER. Mr. Schulz, do you have a prepared statement?

Mr. SCHULZ. I do have a prepared statement.

Mr. Chairman and members of the subcommittee, I am pleased to respond to your invitation to appear here this morning—I should say this afternoon.

As Mr. Alder has already mentioned, I am a lawyer, and for 5 years I have been studying the functioning of the Selective Service System and its interactions with its clients, with the courts, and with the Congress.

To save time I will here only briefly lay out the major points in my written statement which I would like to submit for the record.

Mr. KASTENMEIER. Yes; and your whole statement, which is a rather lengthy one I note—22 pages together with an additional appendix.

Mr. SCHULZ. I would like to submit that for the record.

Mr. KASTENMEIER. Yes; that will be received and made a part of the record.

[The prepared statement of Mr. Schulz follows:]

STATEMENT OF JOHN E. SCHULZ

Mr. Chairman, members of the subcommittee, I appreciate the opportunity to present this statement. My name is John Schulz. As Mr. Alder mentioned, I am a lawyer; for five years I have been a student of the operation of the Selective Service System (SSS) and its interactions with Congress, the courts and the public. Complaints about this most powerful and least regular of federal agencies have proliferated since 1966, but only in the last year has conclusive evidence come to light of the vast illegality of SSS performance throughout the Vietnam era.

It has been nearly a decade since heavy use[1] of the induction machinery to provide manpower for the Vietnam conflict first revealed serious shortcomings

[1] The first great bulge in inductions occurred in fiscal 1966 when over 340,000 men were inducted, more than three times as many as the previous year. *January–June 1973 Semiannual Report of the Director of Selective Service 5.* All in all about 1.8 million men were inducted between July 1964 and December 1972. *Id.*

in the Selective Service System. As early as 1967, as you may remember, the Marshall Commission, appointed by President Johnson in 1966, documented widespread ignorance, arbitrariness, and lack of uniformity in the classification and induction decisions of its 4,100 local boards.

Such inadequacies were the natural consequences of structural and operational weaknesses which plagued the system at the time. Although it still gave lip service to the myth that these boards, the heart of the system, functioned as "little groups of neighbors," in truth, 103 urban boards were responsible for more than 25,000 registrants each,[2] and few members lived in the community they served or reflected its professional and racial composition.[3] Further, board members were untrained [4] part-time volunteers, averaging 58 years of age, most of whom had served in World War II.[5]

Given this multiple generation gap, it is hardly surprising that many boards handled registrants unevenly, unsympathetically, even with hostility.

SELECTIVE SERVICE OPERATION: THE RECORDS OF ERRORS

Although a number of reform bills were proposed in 1967, none was enacted in the face of a strong congressional and agency defense of the continued viability of the system.[6]

But the deficiencies of SSS operations continued. In 1969, witnesses before Senator Kennedy's Administrative Practice and Procedure Subcommittee updated and corroborated the Marshall Commission's findings from personal experience:

The late Marvin Karpatkin, then General Counsel for the American Civil Liberties Union, reported that a majority of the Selective Service personnel with whom he had come into contact in representing some 500 draft registrants had never even *heard* of the landmark *Seeger*[7] case of 1965, in which the Supreme Court had broadened the qualifications for conscientious objector status to include persons who did not have an unorthodox religious belief in a "Supreme Being."[8]

Kingman Brewster, President of Yale University and member of the Marshall Commission, stressed the lack of uniformity in processing decisions:

[T]he draft does not mean the same thing in all parts of the country. Deferment eligibility and induction probability depend . . . on where a registrant lives rather than on his actual circumstances.[9]

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[2] "The Selective Service System: Its Operation, Practices and Procedures," Hearings before the Senate Administrative Practice and Procedure Subcomm., 91st Cong., 1st Sess. 82 (1969) [hereinafter *1969 Kennedy Hearings*].

[3] In 1966, only 1.3% of the 16,632 local board members were black, 0.8% Puerto Rican, 0.7% Spanish-American, 0.2% Oriental, 0.1% native Americans. Moreover, "[c]raftsmen, *In Pursuit of Equity: Who Serves When Not All Serve?* Report of the National Advisory smaller proportions (less than 25%) than their representation in the general population." *In Pursuit of Equity: Who Serves When Not All Serve?* Report of the National Advisory Commission on Selective Service 19 (1967) [hereinafter *Marshall Commission Report*].

[4] General Lewis Hershey, Director of Selective Service from 1940 to 1970, believed in leaving a great amount of discretion in boards, treating deferments as matters of Congressional grace, although they were mandated by statute or regulation. *1969 Kennedy Hearings* 90–91.

[5] *Marshall Commission Report* at 19. More specifically, in 1967, one-fifth of local board members were over 70, 400 over 80, 12 between 90 and 99! Sixty-seven percent had done active duty, of which 41% served in World War II and 17% in World War I. *Id.* Moreover, the low-paid (non-civil Service) full-time female clerks who necessarily did much of the actual work of boards had themselves often been on the job since World War II. *Id.* at 21. Finally, higher echelon offices of this supposedly civilian agency were staffed mainly with National Guard and Reserve officers. *1969 Kennedy Hearings* 328.

[6] The so-called Clark Panel, appointed by the House Armed Services Committee, produced a report strongly supportive of the System following publication of the critical Marshall Commission report.

[7] Seeger v. United States, 380 U.S. 163 (1965).

[8] *1969 Kennedy Hearings* 66. The Marshall Commission had found one state in which more than half of all local board members were of the belief that no conscientious objectors should be exempt. *Marshall Commission Report* at 29.

[9] *1969 Kennedy Hearings* at 225. Dr. Brewster went on to attribute this lack of uniformity to the organizational philosophy which has prevailed in the Selective Service System since it creation in 1940. According to that philosophy, whch undergirds the administration and to some extent, the legislation:

First, it is important to the general acceptance of conscription that induction decisions be made by local draft boards—"little groups of neighbors" in General Hershey's phrase—instead of by—as the contrast is usually drawn—some distant Federal bureaucrat or computer, and

Inasmuch as community needs and circumstances do vary widely across the country, and local draft boards are most familiar with—and the best judges of—the competing military and civilian claims on local manpower, it follows that there will be, and should be, variations from one draft board to the next in deciding who will serve and who will be excused. *Id.*

Morris Janowitz, a well-known sociologist who specializes in military organization, noted that in recent years the Selective Service System has become an aging organization, rigid and arbitrary in its procedures. The unequal impact of the system, in terms of social and educational background, has been repeatedly documented. *However, the sheer nastiness, the difficulty of access and the lack of humane treatment of registrants warrants repeated emphasis and disclosure.* Selecting men for military service is indeed a burdensome and difficult task. But it is needlessly complicated by an impersonal bureaucracy, and it is ironic that older female clerks manage the machinery and display little sympathy or ability to communicate with the young people of this nation.[10]

Ramsey Clark, former Attorney General, criticized the practice of "punitive reclassification," by which local boards, encouraged by General Hershey, asserted the power to declare registrants "delinquent" for acts such as participating in an antiwar demonstration, and then strip them of legitimate deferments and order them prematurely for induction or induct them without physical exams.[11]

In assessing the harshness of local board "nastiness," Mr. Chairman, it is important to bear in mind both the extreme complexity of Selective Service rules and procedures, and the unusually limited remedies available to a young man wronged by board action. Few registrants were informed either of the standards for deferments or of the limited right to administrative appeal in the system, and registrants were and are refused the right of representation by counsel in SS proceedings.[12]

Moreover, judicial review, normally the remedy for administrative arbitrariness, was (and is) sharply restricted in draft cases. In effect, a young man who thought his induction order improper had to play Russian roulette to get his day in court. That is, his options were limited to (1) refusing induction and asserting his claim as a *defense* to felony charge for refusal (facing up to 5 years and a $10,000 fine if he guessed wrong), or (2) submitting to induction and suing for habeas corpus during basic training (facing military service if wrong).

The 1969 effort to document abuses again fell mostly on deaf ears, and despite strong campaign promises, President Nixon did little to reform the system.[13]

It was actually the courts which took the first steps to subject the Selective Service System to the rule of law. In a single year's time, the Supreme Court struck down three arbitrary System practices and interpretations. The Court

Held punitive reclassification "blatantly lawless;"[14]

Threw out on due process grounds a procedure by which local boards routinely denied deferment claims on the merits without permitting even an administrative appeal;[15]

Further broadened the conscientious objector category, ruling that strongly held conscience-based pacifist beliefs qualify even if considered nonreligious by the applicant.[16]

Lower courts rapidly followed the Supreme Court's lead, subjecting the System to rudimentary constitutional standards of fairness and rationality.[17] Indeed, it was judges—expert in legal analysis—who expressed some of the most intense concern over the obscure or confusing technicality of the administrative process. For example, as early as 1969, the D.C. Circuit observed that the Selective Service

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[10] *1969 Kennedy Hearings* at 292 (emphasis supplied).

[11] *Id.* at 142–43.

[12] 32 C.F.R. §§ 1226.4(e) (local board), 1626.4(d) (appeal board), 1627.4(d) (Presidential appeal board) (1972). The System maintains that boards had government appeal agents and advisers to registrants to assist ignorant registrants. The Marshall Commission found, however, these to be the "most elusive elements of the entire System." *Marshall Commission Report* at 28.

[13] The President did issue Executive Orders to remove some inequities, particularly those in the range of available deferments which discriminated in favor of the affluent and well-educated. *E.g.*, graduate student deferments were phased out in 1967, occupational, agricultural and paternity in 1970. In addition in 1969 President Nixon substituted a random selection or lottery system for choosing registrants for induction to replace the oldest-first rule which had been criticized for exposing young men to many years of potential liability.

[14] Gutknecht v. United States, 396 U.S. 295 (1969).

[15] Mulloy v. United States, 398 U.S. 410 (1970).

[16] Welsh v. United States, 398 U.S. 333 (1970).

[17] It would be physically impossible to attempt to summarize the exponential growth in judge-made selective service law between 1968 and 1972—the six volumes of the *Selective Service Law Review* ran to more than 5,000 pages. Some idea of major trends and the quality of Selective Service response may be found in this witness' statement in "Selective Service and Amnesty," Hearings before the Senate Administrative Practice and Procedure Subcommittee, 92d Cong. 2d Sess. 79–104 (1972) [hereinafter *1972 Kennedy Hearings*].

law had developed into an intricate maze through which the uninitiated lawyer, let alone a man subject to the law's provisions, cannot easily find his way.[18]

Unfortunately, the System responded poorly to binding court rulings, exhibiting the rigidity noted earlier by Janowitz. In particular, National Headquarters was sluggish and grudging at best in shouldering its responsibility to alert System employees (and registrants) of new legal requirements. For example, National Headquarters' use of informal directives to disseminate guidance on *Welsh* and *Mulloy* was inadequate.[19] And Headquarters never paid attention to the Judge-made rule, established by 1970 in *every* state, that local boards are bound to give cogent reasons in writing for denying claims.[20]

When, in 1971, Congress finally heeded judicial developments and moved to enact further procedural reforms (although without touching the local board system), the System was even slow to implement these.[21]

Despite a massive, documented record of error and failure throughout the Vietnam era,[22] SSS has had its defenders. By 1970, however even Curtis W. Tarr, the new Director of SS, was willing to concede that all was not well.[23] Moreover, in the last five years, strong statistical evidence has accumulated to reinforce the anecdotal and sociological accounts of registrants, draft counselors, lawyers, judges and scholars. In short, the number of successful draft prosecutions has dropped to a fraction of the normal federal court conviction rate.

SELECTIVE SERVICE ERRORS: THE IMPACT ON CONVICTION RATE

It is a matter of public, although not well-publicized, record that the vast majority of alleged Vietnam-era draft evaders whose cases have been disposed of—over 96% to be exact—were not convicted. To be exact, of the 203,922 persons whom the Selective Service System referred to the Justice Department for

[18] Nestor v. Hershey, 425 F. 2d 504, 508 (D.C. Cir. 1969).

[19] See *1972 Kennedy Hearings* at 87–89.

[20] *Id.* at 91.

[21] *Id.* at 100–04, 111–16, 135–42, 173–75.

[22] In addition to the congressional testimony and judicial decisions already referred to, a rash of books and law review articles which appeared between 1966 and 1971 documented the abuses of Selective Service in abundant detail.

Books: S. Tax (ed.), *The Draft: A Handbook of Facts and Alternatives* (1967); J. Willenz (ed.), *Dialogue on the Draft* (1967); G. Walton, *Let's End the Draft Mess* (1967); J. Davis and K. Dolbeare, *Little Groups of Neighbors: The Selective Service System* (1968); AFSC, *The Draft?* (1968); D. Prasad and T. Smythe (eds.), *Conscription: A World Survey* (1968); Marmion, *Selective Service: Conflict and Compromise* (1968); Leinwand, *The Draft* (1970); T. Reeves and K. Hess, *The End of the Draft* (1970); Graham, *The Draft: By What Authority?* (1971).

Articles: See the collections in *1969 Kennedy Hearings* and in "Amnesty," Hearings before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, 93d Cong. 2d Sess. (1974) [hereinafter *1974 Kastenmeier Hearings*].

[23] In 1970, soon after his appointment, Dr. Tarr told the House Armed Services Committee: It seemed to me that when I first came into this office that [sic] there was no government agency that did such a poor job of educating its clientele as did Selective Service. Hearings by the Special Subcommittee on The Draft of The House Armed Services Committee, 91st Cong. 2d Sess. 12553 (1970).

In the *1972 Kennedy Hearings*, Dr. Tarr acknowledged that the decentralized local board system was seriously out of kilter when he came on board, and that the part-time board members were not current on changes and had no awareness of the problems that daily involve the clerks in metropolitan boards. Misunderstandings caused procedural errors which led to erroneous inductions and prosecutions, both of which were unfortunate, costly to correct if they could be found, and grossly unfair to registrants. *1972 Kennedy Hearings* 21.

prosecution as violators between 1964 and 1973, U.S. Attorneys chose to prosecute only 19,272 (9.45%), despite elaborate screening by SSS prior to referral.[24] And the federal courts convicted decreasing fractions of these indicted draft evaders over the years, the rate dropping from 75% in fiscal 1964 to 28% in fiscal 1973,[25] a strikingly low figure in federal criminal law. (By contrast, the conviction rate over the same period in all federal narcotics offences was 75.8%,[26] in all federal bank robbery prosecutions, 82%.[27]

SELECTIVE SERVICE ERRORS: THE COVER UP

Both SSS and DoJ have consistently misinterpreted these statistics in an attempt to cover up the fact that they stand for myriad flawed cases, *i.e.* cases in which draft "refusers" committed *no Selective Service violation at all*, because the induction orders they refused were *illegal*, as determined authoritatively by federal courts and U.S. Attorneys.

SSS and DoJ have consistently attributed the low draft indictment and con-

[24] The detailed figures are given as totals and by fiscal year in the following table. The second total figure, covering 1964–1973, most nearly covers the period of President Ford's clemency program.

(a)	(b)	(c)		(d)		
		Indictments and complaints		Convictions		
Fiscal year	Cases referred by SSS to DOD for prosecution	Number	Prosecutions as percent of referrals	Number	Percent prosecutions	Convictions as percent of referrals
Total	209,204	21,342	10.20	8,619	40.58	4.11
Total, 1964–73	203,922	19,272	9.45	7,933	41.16	3.89
1964	13,589	276	2.03	206	74.64	1.51
1965	13,661	341	2.49	242	70.97	1.77
1966	13,835	516	3.72	371	71.90	2.68
1967	19,714	996	5.05	748	75.10	3.79
1968	21,331	1,192	5.59	784	65.77	3.68
1969	27,444	1,744	6.35	900	51.60	3.28
1970	26,475	2,833	10.70	1,027	36.25	3.88
1971	25,504	2,973	11.66	1,036	34.85	4.06
1972	29,091	4,906	16.86	1,642	33.46	5.64
1973	13,278	3,495	26.32	977	27.95	7.35
1974	5,282	2,070	39.18	686	33.14	12.99

Sources: (1) Letter from Assistant Attorney General Henry E. Peterson to Representative Robert Kastenmeier, Mar. 1, 1974, reprinted in "Amnesty," hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, 93d Cong., 2d sess. 36 (1974) (all figures in col. (a) except 1974, which was supplied by Selective Service System national headquarters), (2) 1974 semiannual report of the Director, Administrative Office of the U.S. Courts 62, fig. 32 (as supplemented for fiscal 1974 by preliminary figures from 1974 annual report).

[25] *Id.*

[26] Author's calculation from absolute figures in Fig. 30, 1964 Semi-annual Report of Administrator of U.S. Courts.

[27] *Id.*, Fig. 34.

viction rates mainly to delinquent registrants' willingness to accept induction in exchange for nonprosecution or dismissal of indictment. As you may remember, Mr. Chairman, in this Committee's hearings last year, former SSS General Counsel Walter Morse acknowledged that 10,153 of the 19,271 registrants indicted between August 4, 1964 and December 29, 1972 had their indictments dismissed before trial; this, he said, was "for the most part for the reason that they . . . submitted to induction or upon an FBI investigation it was found that their violation was not willful." [28] Likewise, he said, the reason all but 19,000 of the 200,000-odd young men referred for prosecution were never indicted was that they purged their offenses by submitting to induction or as the result of FBI investigation.[29]

In 1972, Assistant Attorney General Robert Mardian, then responsible for draft prosecutions, gave the same explanation to Senator Kennedy's subcommittee; eighty percent of all registrants who refuse induction eventually submit, he said.[30]

This view gains superficial strength from the fact that the great majority of nonconvictions have taken the form of dismissals rather than acquittals. That formal matter has no substantive significance, however, since it is both routine DoJ administrative practice and the usual judicial approach to dispose of bad draft cases on the merits by dismissing charges.[31]

THE MOMENT OF TRUTH: FISCAL 1974

Of course, it is true that a number of young men did accept induction in lieu of prosecution, as Mr. Alder observed earlier. But until fiscal 1974, it was impossible (absent a very detailed comparison between total induction orders issued and total inductions) to know conclusively whether Selective Service and the Justice Department were in error in attributing the high dismissal rate almost exclusively to voluntary induction by violators.

Induction authority lapsed, however, at the end of fiscal 1973 (July 1, 1973); since that date nobody has been drafted, and, significantly, nobody under indictment has been permitted to enlist.[32] This, of course, simply means that *no part of the fiscal 1974 dismissal rate can be attributed to acceptance of military service.* Yet, the conviction rate for fiscal 1974 was only 33%,[33]—only five percent higher than in 1973. In other words, all 67% of the cases concluded in 1974 were bad.

Likewise, *declined indictments* decreased by only 15% between 1973 and 1974.[34] This suggests that only about 17.5% of declined prosecutions were due to acceptance of induction. If so, more than 80% of all cases of declined prosecution in 1974 and prior years were attributable to invalid induction orders. Extrapolating these figures to prior years suggests that some four-fifths of the 200,000 cases referred were bad, or more than 150,000.

Even if one accepts the more conservative estimates derived from Department of Justice submissions to Senator Kennedy's subcommittee in 1972,[35] one-third of all referrals were rejected by DoJ for legal flaws. That is, about 68,000 persons (⅓ of 203,922) were found not to be violators after being so declared by SSS and, in some cases, after being indicted. In fact, even on the unsupported DoJ figure referred to earlier, 20% of all these cases, or over 40,000 individuals, are involved.

EXPERIENCE WITH THE FINAL OFFENDER LIST

This statistical analysis is borne out, I believe, not only by the empirical record previously rehearsed, but also by clemency counseling centers' experience since January 1975, with the Justice Department's "final" list of unconvicted draft offenders.

At the urging of Senator Kennedy, Mr. Goodell, Mr. Alder, myself and others, the Justice Department agreed in December to prepare a final list of all persons

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[28] *1974 Kastenmeier Hearings* 158.
[29] *Id.*
[30] *1972 Kennedy Hearings* 400.
[31] *See, e.g.*, Cox v. United States, 332 U.S. 422, 432 (1947); United States v. Boardman, 419 F. 2d 110, 114 (1st Cir. 1969), *cert. denied*, 90 S. Ct. 1124 (1970); United States v. Seeley, 301 F. Supp. 811 (D.R.I. 1969).
[32] See the exchange of letters between Senator Taft, Assistant Attorney General Henry Petersen, and Deputy Assistant Secretary of Defense Leo E. Benade concerning the Defense Department's firm policy barring enlistment of anyone considered a draft violator, whether or not under indictment. *1974 Kastenmeier Hearings* 344–46.
[33] See note 24, *supra.*
[34] *Id.*
[35] *1972 Kennedy Hearings* 396.

(excluding non- or late registration cases) it still considers to have violated the law. Although, as mentioned earlier, over 200,000 persons were forwarded for prosecution in the Vietnam era, and only about 9,000 of these were convicted, the final DoJ list numbered only around 4500.

At the end of January, this list was placed in the custody of sixteen independent counseling centers in the United States and Canada, each of which had agreed to hold the list on a quasi-confidential basis, in order to tell registrants who called in whether their names appeared on it or not. According to a survey just concluded by our office, a total of some 4400 calls were received by these centers between the end of January and the end of March. Significantly, only about one-half were from individuals whose names were on the list.

The remaining 50% of the callers thus learned for the first time in February or March of 1975 that what they reasonably took to have been a serious draft violation back in 1973, or 1971, or 1968, or before, was in fact *no crime at all.*[36] According to Steven Pither, Director of the Clemency Information Center in Indianapolis, some young men actually broke into tears when they learned of their innocence—tears of joy at realizing that they could at least come out of hiding or home from Canada, and tears of rage, too, at comprehending that they had wasted the last two, or four, or seven or more years underground or in exile because of Selective Service processing errors and failure to inform registrants of their rights, and to both Justice Department and Selective Service failure to let them know of their innocence once it was concluded that they had committed no crime.

CONSEQUENCES FOR EVADERS NOW

What are the implications of all this for draft evaders of the Vietnam era?

As to one of the 4,500 on the final list, there is a very good chance—probably at least 2 out of 3 that he is innocent, despite an uneven[37] file review ordered by the Attorney General last November. This is based on the statistics cited earlier, which show that fewer than one-third of all indicted registrants tried since the induction option ceased to be available on July 1, 1973, have been convicted, and on the natural tendency of prosecutors to overestimate the strength of their cases.[38]

As for the specific defenses which might be available to these persons, the most likely are those which flow from the problems referred to earlier, *i.e.*,

Wrongful denial of conscientious objector claims.

Punitive reclassification.

Failure to give cogent reasons for denial of claims.

Failure to permit administrative appeal from denial of claims.

Lack of basis in fact (i.e., any objective grounds) for denial of claims.

Giving of misleading or erroneous advice to registrants.

For the 20,000 to 80,000 innocent men who may still think themselves violators: I maintain, Mr. Chafrman, that a very substantial problem persists as regards informing this large but unidentifiable group of their innocence. The existence of a final list has helped some, as noted above, but it has received far too little publicity.

Indeed, at the end of January, when the existence of the list was made public, this fact was reported almost nowhere in the United States in any medium, according to the Director of the Indianapolis Clemency Information Center, who at the time took an extended automobile tour from coast to coast to investigate the question.

What is needed, at a minimum, is a large-scale multimedia campaign, aimed both at Canada and the U.S., of the kind the Presidential Clemency Board recently mounted to try to reach convicted evaders.

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[36] It is worth underscoring the fact that these were concrete determinations of innocence in the judicial sense, not subjective or ideological notions of any kind. Indeed the many cases never indicted must have been particularly weak, for they were dropped by prosecutors (U.S. Attorneys), who normally insist on trying even borderline cases.

[37] About 25% of cases were dismissed overall, but in many districts *no* cases were dismissed, *e.g.*, Middle Alabama (0 of 2), E. Arkansas (0 of 10), N. Florida (0 of 16), E. Illinois (0 of 20), S. Iowa (0 of 23), Kansas (0 of 21), E. and W. Louisiana (0 of 20), Oklahoma (0 of 17), W. Pennsylvania (0 of 67), M. Tennessee (0 of 8), W.D. Virginia (0 of 8), N. and S. West Virginia (0 of 14), and Wyoming (0 of 8). By contrast, 19 of 59 (33%) were dismissed in Connecticut, 14 of 19 (75%) in Southern Mississippi, 16 of 77 (21%) in New Jersey, and 22 of 74 (30%) in Western Washington.

[38] See note 36.

Even this may not be enough, given many fugitives' distrust of the American government. For these, perhaps, only a blanket amnesty (which they theoretically don't need because they are innocent—only unaware of it) will convince them that it is safe to come home again.

For the long term, the Selective Service Act should be amended to require either the SSS or DoJ, or both, to inform the families of delinquent registrants when their cases are dropped.

For the large number of "violators" who succumbed to U.S. Attorney pressure and accepted induction in lieu of standing trial: Given registrants' ignorance of their rights, and DoJ failure to screen files thoroughly throughout the Vietnam era [39] it is reasonable to conclude that a number of threatened prosecutions used to pressure men into accepting induction were no good. In other words, some part of the many unwilling young draft evaders who finally went in were illegally inducted; their induction orders were flawed by Selective Service errors.

Obviously, these men must be considered unwilling soldiers, for they had refused induction many times before they finally went.[40] Thus it is important to learn how many of these men went on to have disciplinary problems in the military, by reason of unauthorized absence or otherwise.

The Presidential Clemency Board should, I think, look into this question, at least as regards the convicted or discharged veterans within its current jurisdiction. It could start by obtaining the names of all violators who submitted to induction from DoJ or SSS files. Then a small random sample could be evaluated. Should relevant files be found *not* to exist due to routine destruction, this would have some implications for blanket amnesty, a matter to which I will return later.

For the 686 who have already signed alternative service agreements: Mr. Chairman, as incredible as it may sound, there is also some chance that U.S. Attorneys have signed up some young men whose files contain viable defenses but who don't know it, i.e., who are innocent and so do not need to "earn" reentry involuntarily or otherwise. The likelihood of this stems from what appears to have been continued DoJ use of "prosecutorial" pressure in this clemency period.

Nor was my concern lessened by the Department's extending the right to counsel to those considering alternative service. Not only have few lawyers been made available to those who cannot afford one of their own, but more importantly few youths and probably even fewer lawyers are (1) aware that many files contain errors, or (2) able to discover them in any event. There are just not enough skilled draft lawyers and counselors around any longer.

NONREGISTRATION CASES

Mr. Chairman, as the cases of young men who failed to register during the clemency period or did so belatedly pose rather special and difficult problems, they merit separate discussion. For one thing, most of these offenses have not come to the attention of the authorities, so, as noted, they are excluded from the DoJ's final list, but the statute of limitations will not run out on them for 13 years (at age 31).

Too, the numbers involved may be unusually large. As you may remember, Mr. Chairman, in your hearings last year it was reported that in 1973 Byron Pepitone, the current director of Selective Service, estimated that some 10% of the 2 million young men who turned 18 in 1972 failed to register.[41] Mr. Glenn Bowles, SS Operations Manager, reported that 1973 registrations again fell short by about 10%.[42] Thus, for these two years alone, we are talking about 400,000 non- or late registrants. And, technically many of these offenses occurred outside the clemency eligibility period, which ended March 28, 1973.

Third, a rather high percentage of these are probably nonwillful, especially for 1973. That year, as you remember, nobody was inducted and induction authority ceased on July 1. So it is easy to understand that many youths thought they no longer had any obligation to register.

Finally, nonregistration cases pose unique prosecutive problems for the government. As noted, many are undetected altogether. And some federal courts hold

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[39] This is the experience of counselors and lawyers throughout the period in question. It is also implicit in the results of the November 1974 file screening mentioned above, in which more than a quarter of remaining cases were dropped.

[40] Selective Service normally did not forward an individual for prosecution until he had been given three or four opportunities to submit. Comment, *American Deserters and Draft Evaders*, 13 *Harv. Int'l L. Rev.* 88 (1972).

[41] 1974 *Kastenmeier Hearings* 283.

[42] *Id.* at 163.

the government to a stringent standard of proof indeed. For example, in *United States v. Klotz*,[43] the Eighth Circuit recently threw out a nonregistration prosecution for failure to prove willfulness where the government had proved that Selective Service posters publicizing the continuing duty to register had been posted in prominent places in the defendant's home town, but had put on nothing to show that Klotz was personally aware of his obligation.

Moreover, with nonregistration cases, the U.S. Attorney cannot rely on an air-tight file case, as with induction refusal and other draft offenses. With nonregistration, there really can be a problem in providing a willful omission. Nonetheless, prosecutions for failure to register have recently seen a sharp rise, from 856 in calendar 1972 to 3,492 in calendar 1973.[44]

Because of the difficulty of prosecution, young men with registration problems may have better alternatives *outside* of the clemency program. Under the *Klotz* case, many probably can successfully defend against prosecution if they do not admit knowing violation. Admittedly, this may require a full-dress trial, not the sort of paper file review which generally suffices in other draft cases; but if a nonregistrant can convince the General Counsel of Selective Service (to whom the U.S. Attorney will refer his case) that his violation was not knowing, prosecution may be avoided under current policy.[45]

In contrast, by contacting U.S. Attorneys about participating in the clemency program, many young men may have incriminated themselves by implicity revealing knowledge of their offenses, thus supplying a crucial element in what, would otherwise be an inadequate government case.

Just three weeks ago, Mr. Chairman, the President issued a proclamation cancelling young men's obligation to register within 30 days of their 18th birthday; in order to reevaluate the system.[46] This will soon be replaced with a nationwide, once a year system, but meanwhile no one currently turning 18 has *any* obligation to register. The significance of this for amnestying registration violators will be addressed later.

CLEMENCY OR AMNESTY?

Mr. Chairman, I have tried in this statement to give a balanced but full account of both the quantity and quality of Selective Service System and Justice Department misbehavior during the Vietnam war era, and to draw out its consequences for the thousands of individuals directly affected.

Frankly, though, I do not think I can fairly stop there. The draft mess affected not only those who actually made claims and were arbitrarily refused proper treatment. Its influence also extended to those who never attempted to work within SSS, whether because they were ignorant of their "rights," or because they knew they could not get a fair shake, or because they were incapable of prosecuting a claim without expert assistance they could not afford, or because the bad example set by Selective Service lawlessness bred in them a like disregard of the law, for some other reason.

I subscribe to the theory that amnesty should not properly be discussed as a matter of right and wrong, but rather of oblivion in the public interest. Still, all that Americans seem to be willing to consider as regards draft violators is what is fair.

So, Mr. Chairman, I submit that in view of the abject record of wholesale law violation and trampling on individual rights which Selective Service complied throughout the Vietnam era, blanket amnesty for alleged draft evaders is not only sensible but the only fair approach.

In theoretical terms, how could a case-by-case evaluation be conducted of the finely graded degrees of justification available to hundreds of thousands of individuals more or less directly affected by millions of arbitrary, uneven, decentralized, unexplained local board actions concerning them, their friends, and others?

In practical terms, how can files be reviewed when they have been destroyed?[47] And where can sufficient skilled person power be found to sift remaining files for legal errors?

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[43] 500 F. 2d 580, 2 MLR 2567 (8th Cir. July 19, 1974).

[44] *1974 Kastenmeier Hearings* 37.

[45] The most recent Justice Department memo on prosecution policy with respect to registration violations is attached as an appendix to this statement. Selective Service policy was summarized in *1974 Kastenmeier Hearings* at 165 by Walter Morse, former General Counsel of Selective Service.

[46] Proclamation 4360, Terminating Registration Procedures Under the Military Selective Service Act, as Amended, 46 Fed. Reg. 14567 (April 1, 1975).

[47] Since 1971, the routine practice of SSS has been to destroy the great bulk of draft files from the Vietnam era, preserving only those of the handful of remaining violators.

In conclusion, Mr. Chairman, let me suggest that two actions of the Selective Service System itself belie its opposition to blanket amnesty. First, it lies ill in the mouth of SSS officials to decry amnesty's lack of case-by-case evaluation, when the Selective Service System failed throughout the Vietnam era to make individualized decisions in its own operation, although these are mandated by law.

Second, as Director of Selective Service, Dr. Curtis Tarr opposed amnesty on the speculative ground that it would seriously disrupt future inductions.[45] Frankly, Mr. Chairman, such a notion smacks of crude irony coming from the Director of an agency whose record was so bad that its very operation disrupted inductions, by contributing to public rejection of the process, as Morris Janowitz has noted, as well as to widespread judicial invalidation of its illegal orders.

The secret to smooth inductions, I suspect, lies not in refusing amnesty but in guaranteeing a uniform, responsive administrative procedure and, I might add, popular support for the military venture in question.

FOR NONREGISTRANTS?

As mentioned earlier, many nonregistrants have a strong case for equity even without amnesty. Moreover, for these, too, the practical difficulty of evaluating individual cases would be exacerbated by lack of files. But most important, the System has so thoroughly reformed the registration system in the last year that it seems inequitable to refuse relief to the large numbers who turned eighteen as the war was winding down.

SELECTIVE SERVICE CASES

PROSPECTIVE POLICY WITH RESPECT TO PERSONS WHO FAIL TO REGISTER TIMELY UNDER THE PROVISIONS OF THE MILITARY SELECTIVE SERVICE ACT

It has come to my attention that the Department's prosecution policy dealing with late registrants which was set forth in my letter of April 27, 1973, has been interpreted by some United States Attorneys to mean that every late registrant must be indicted without regard to the presence of evidence in the file indicating that the offense resulted from willful, knowing conduct, or gross indifference. Since such an interpretation does not accurately reflect the Department's policy, I believe it is desirable to restate the guidelines governing the policy regarding individuals who refuse to register or who fail to register within the prescribed time period.

As a result of discussions between this Department and the General Counsel, Selective Service System, procedures have been initiated by Selective Service whereby the files of all delinquent registrants will be reviewed by the General Counsel's office prior to their referral to United States Attorneys. It is believed that this screening process, will obviate any situation whereby United States Attorneys' offices will be inundated with the referral of cases in which there exists nothing more than technical violations and otherwise are devoid of prosecutive potential. The General Counsel's pre-referral screening process has been designed to forward only those files to United States Attorneys where there is some evidence of willful, knowing, or deliberate misconduct, or in its absence, that the unexplained period of the delinquency was of an unconscionable duration.

Although I am certain that this screening process will alleviate to a great degree the burden that might otherwise face United States Attorneys; by the same token, it is expected that those cases which are referred will receive expeditious processing as well as a most thorough prosecutive review. Moreover, United States Attorneys are cautioned that the pre-referral screening does not relieve them of making the final prosecutive determination in a particular case.

While the President recently expressed his intention to consider a grant of conditional amnesty for pre-July, 1973 draft law violators, until a definite policy is established, the following guidelines are provided for your assistance:

Failure or refusals to register prior to July 1, 1973

When a file reveals that a delinquent's obligation to register occurred prior to July 1, 1973, and the individual has failed to meet the obligation or complied

[45] *1972 Kennedy Hearings* 79.

only after the draft ended, he should be considered for indictment, absent *compelling* reasons to excuse his delinquency. All individuals who *refused* to register prior to July 1, 1973, should be indicted.

Failures or refusals to register subsequent to July 1, 1973

All cases involving deliberate refusals to register occurring subsequent to July 1, 1973, should be considered for prosecution, absent *compelling* reasons which may mitigate the offense. Thus, it may be appropriate to forgo prosecution in a case where the refusal was neither open and notorious, nor of a prolonged duration, and while under preliminary investigation the delinquent demonstrates contriteness and registers. On the other hand, if the individual's late refusal was open and notorious and calculated to induce others to flount the draft law, serious consideration should be given to indictment despite eventual compliance.

Late registration cases normally will not be considered for prosecution, unless the period of the delinquency is prolonged, i.e., one year or more and unexplained. If in the judgment of the United States Attorney the circumstances may warrant prosecution, an FBI investigation should be requested to determine if the prolonged delinquency was the result of the delinquent's misunderstanding of his obligation to register, or the result of knowing omission or willful neglect. Thus, if an investigation reveals the likelihood of the delinquent's claim that he did not timely register because he believed that he had no obligation to do so after July 1, 1973, prosecution usually would not be warranted. However, if the investigation reveals that the delinquent knew or should have known of his obligation, either directly by notice from his draft board or as a matter of general knowledge within his circle of friends and acquaintances, a willful neglect could be presumed and, absent a plausible explanation from the delinquent, prosecution should be considered.

Failures to register should be treated in the same manner as late registrations. Normally, failures to register would not be prosecuted unless the period of the delinquency is prolonged and unexplained, and after an FBI investigation which should include an interview of the delinquent, he persists in his refusal to register. Prosecution would not be warranted in a case where the investigation reveals that the delinquency was probably the outgrowth of the individual's ignorance of his duty, and subsequent to the initiation of the investigation, he demonstrates contriteness and registers.

HENRY E. PETERSEN,
Assistant Attorney General.

Mr. SCHULZ. Briefly, the thrust of my remarks is this.

First of all, complaints about this agency, the most powerful and least regular of Federal agencies have proliferated over nearly a decade now. At least since 1966, when the Marshall Commission went to work, there has been developed a substantial, growing, and indeed now overwhelming body of evidence that the administration of the draft was pervasively flawed throughout the Vietnam era. Much of the evidence is collected in this subcommittee's hearing record from last year, as well as in the earlier hearings in the Senate.

Number two, inescapably, the draft mess came to the attention of the courts, including the Supreme Court, which responded by throwing out almost two-thirds of the prosecutions, the draft prosecutions brought over the last few years. To make matters worse, Selective Service routinely ignored or failed adequately to give notice to its System employees of the requirements of court decisions; this further compounded the erroneous processing that was going on.

Number three, the striking statistical confirmation of Selective Service errors through precipitously dropping conviction rates has been, I think, covered up by both Justice and Selective Service. As Mr. Alder said, and Reverend Lynn said before him, Justice and Selective Service have taken the position that the great bulk of cases dropped or dismissed after indictment were cases in which men agreed to go for induction.

On the contrary, draft counselors, lawyers and others have thought that most of those cases were dropped because they were bad cases. The moment of truth came in fiscal 1974; in prior years there was the option, as Mr. Alder has said, for a man to go for induction and have his charges dropped. In fiscal 1974 the draft authority had ended, and the Defense Department absolutely barred anyone with a draft charge from entering by enlistment.

In other words, in fiscal 1974, the conviction rate is an accurate measure of the quality of the cases. What is the conviction rate in fiscal 1974? According to the administrative office of the U.S. courts, 33 percent. So that means that 67 percent of the cases were bad. If a like percentage of prior years' cases were bad, which I think is a reasonable extrapolation, that means we are talking about 150,000 of 200,000-odd men who received induction orders, did not obey them, were told by the FBI and Selective Service that they were violators, but who committed no crime. I mean crime in the concrete sense—I am not talking about international law, I am talking about the courts, the law of the United States—these men did not commit draft violations. They are innocent in the most specific, concrete sense.

The magnitude of Selective Service's lack of uniformity, arbitrariness, injustice, error, and negligence—lawlessness in short, I think, has two implications.

In the first place, Selective Service processing was so bad that the options for most young men outside the Presidential clemency program were quite good. An unconvicted draft evader's chances of no punishment were roughly two out of three. I think that they have good defenses.

Second, I think the scale of Selective Service illegality itself provides a thrust toward some notion of broader amnesty. In short, I do not think the clemency program should be extended, but I do think some thought should be given to universal amnesty.

Let me briefly flesh out a couple of these points.

Concerning the final list, which Mr. Alder mentioned, according to a survey concluded by our office just this week, a total of some 4,000 calls were received by the 16 counseling centers about the final list between the end of January and the end of March. Significantly, only about half of the young men who were called found that their names were on the list, that is, that they were still considered violators by the Justice Department.

In other words, the remaining 50 percent of the callers learned for the first time in February or March 1975, that what they had reasonably taken to have been a serious draft violation back in 1973, 1971, 1968, 1966, or 1964, had, in fact, never been a crime.

According to Steven Pither, director of the Clemency Information Center in Indianapolis, some young men actually broke into tears when they learned of their innocence—tears, I suspect of joy at realizing that they could at least come out of hiding or home from Canada, and probably also tears of rage at comprehending that they had wasted the last 2, 4, or 7, or more years underground or in exile because of Selective Service processing errors, because of Selective Service failure to routinely inform registrants of their rights, and because of both Justice Department and Selective Service failure to let them

know once it was later determined conclusively, authoritatively, that they had not committed a crime after all.

This has some implications, I think for the potentially large number of men who are still out there, who are "sure" they committed a draft offense, but who in fact have not.

I maintain, Mr. Chairman, that there is a very substantial problem regarding informing this large but unidentifiable group of their innocence. The existence of a final list has helped some, but it has not been adequately publicized.

Mr. Alder has laid out a suggestion imposing an obligation on the Justice Department and Selective Service System to contact these people. In addition, I think it would be worthwhile for the Clemency Board or some other organization to mount a large-scale multimedia campaign to reach them, on the order of the one that the Clemency Board itself used in publicizing its part of the program a couple of months ago. Even this may not be enough, given many fugitives' distrust of the American Government. For these, perhaps, only a blanket amnesty, which they theoretically do not need because they are innocent (but unaware of it), will convince them that it is safe to come home again.

Now, Mr. Chairman, I am riding a hobbyhorse here of a sort. But I think I have been objective. For years I have been complaining because I have seen the case-by-case analysis of selective service law. I have seen the 5,000 pages of court decisions that have been published over the last 8 years in the *Selective Service Law Reporter*, and I think it is finally time for me to try to draw some conclusions about amnesty from all of this.

I have tried in my written statement to give a balanced but full account of both the quantity and quality of Selective Service System and Justice Department misbehavior during the Vietnam war era. Frankly, though, I do not think I can fairly stop at sketching the dilemma if the specific "offenders" who have defenses.

The draft mess affected not only those who actually made claims and were arbitrarily refused proper treatment by selective service; its influence also extended to those who never attempted to work within the Selective Service System, whether because they were ignorant of their rights, or because they knew they could not get a fair shake, or because they were incapable of prosecuting a claim without expert assistance they could not afford, or because the bad example set by selective service lawlessness bred in them a like disregard of the law, or for some other reason.

Generally I subscribe to the theory that amnesty is properly a matter not of right and wrong, but rather of oblivion. Still, it seems that all Americans are willing to consider as regards unconvicted draft violators is what is fair.

So, Mr. Chairman, I would submit that in view of the abject record of wholesale law violation and trampling on individual rights which Selective Service compiled throughout the Vietnam era, abetted by the Justice Department, blanket amnesty for alleged draft evaders is not only sensible, but the only fair approach.

In theoretical terms, how could a case-by-case evaluation be made of the finely-graded degrees of justification properly available to

hundreds of thousands of individuals more or less directly affected by the millions of arbitrary, uneven, decentralized, unexplained local boards actions concerning them directly, or their friends or acquaintances or others that they just heard of?

In practical terms, how can files be reviewed when they have been destroyed? And the great bulk of selective service files from the Vietnam era have been destroyed.

As regards those that have not been destroyed, let me tell you that there is not the manpower in this Nation that could review draft files for 100,000 or 75,000 men. Indeed, the relative few who have applied to the Clemency Board are having trouble getting an adequate review. I learned this week that arms are being twisted in an attempt to get 641 Government lawyers to go to work for the relatively few Clemency Board cases there now are. There are very few really skilled draft lawyers around any more, and to handle even a few thousand cases would take millions of man-hours.

Mr. KASTENMEIER. On that point you are referring to the balance of the 18,000 cases that the Clemency Board has in terms of applications? I am referring to applications. I do not know how many of those would be cases requiring some sort of legal determination by the Board.

Mr. SCHULZ. Frankly, Mr. Chairman, there is a difficult rhetoric about case-by-case evaluation. I think if we are going to give a case-by-case evaluation, it ought to be a thorough one. If people are talking about the needs and justice of a case by case evaluation, it ought to be a complete evaluation of files, especially with respect to these selective service errors which nobody knew about, nobody understood. The District of Columbia Circuit Court of Appeals itself said that it could not follow the selective service law back in 1969, it had grown so complex; and it wondered how a registrant with whom the System had never communicated could understand it any better.

In conclusion, Mr. Chairman, let me say that some actions of the selective service seem to speak louder than its words in its opposition to amnesty. First, it appears to lie ill in the mouth of selective service officials to decry amnesty's lack of case-by-case evaluation, when the Selective Service System failed throughout the Vietnam era to make individualized case-by-case decisions in its own operation, which processing it is mandated by law and regulation to provide.

Second, as Director of the Selective Service, Dr. Curtis Tarr opposed amnesty on the ground that it would seriously disrupt future inductions. Frankly, Mr. Chairman, such a notion smacks of crude irony coming from the Director of an agency whose record was so bad that its very operation disrupted inductions, both by contributing to public rejection of the process—and this has been documented—and by permitting widespread issuance of illegal induction orders which were invalidated judicially.

In short, I believe the record, the detailed case-by-case record of the performance of the Selective Service System (abetted, as I said, by the Justice Department, which during all of these years never seems to have reviewed its files very thoroughly, so that it threatened with induction men who had good defenses), is one of rampant illegality. We do not have many people, if there were a blanket amnesty, who would be escaping—guilty people, in short—at least among the un-

convicted draft evaders. The whole thrust of this unfairness is that any violations of the law that might remain pale by comparison with the violations of law committed by the Selective Service System and the Justice Department.

Thank you.

Mr. ALDER. Mr. Chairman, I would like for a moment to turn to Ms. Hewman, whose prepared statement is, as I said, in the record, who I think could fruitfully detail in brief for this subcommittee the alternatives available to the in-service offender, and to comment on one provision of S. 1290, which appears to have been particularly ill-drafted.

Ms. Hewman?

Ms. HEWMAN. Thank you.

I am pleased to be here this morning, Mr. Chairman and members of the committee to talk briefly with you about the problems about Vietnam era veterans with less than honorable discharges, as these problems relate to the present and proposed clemency programs.

In fact, the vast majority of individuals who are in need of an amnesty are those individuals with less than honorable discharges. The present clemency program, as Mr. Schwarzschild indicated this morning, simply provides no relief for these people. The clemency discharge itself will only perpetuate a system of discrimination that has long been rampant against those individuals with less than honorable discharges from the military. A pardon, of course, also solves no problems. For those with administrative discharges there is no conviction which has caused a loss of civil rights, thus no civil rights which need to be restored. Even in terms of the type of pardon Mr. Danielson referred to earlier, involving immunity from prosecution, none of these individuals, of course, presently have any outstanding charges, and none of them is subject to prosecution. But not only will the present Clemency Board not provide any relief for those individuals who are eligible to apply—and I might add that the Clemency Board has not decided one case as yet involving an administrative discharge—but also the present program is far too restrictive in that it only includes those approximately 100,000 veterans whose discharges resulted from absence-related offenses. However, there are over 400,000 additional Vietnam era veterans who hold less than fully honorable administrative discharges, both general discharges and undesirable discharges for reasons other than absence.

These discharges, too, are related to the Vietnam war, either directly or indirectly, resulting from such reasons as drug use, opposition to the war on grounds of conscience which were expressed in ways other than by deserting the Armed Forces, or simply an inability to adapt to military life having been inducted under Project 100,000, which, in order to beef up U.S. Forces, permitted induction of those who did not meet eligibility criteria for entrance into the Armed Forces. In other words, it was pretty clear that they would not be able to make it because absent the war, they would not have met the standards to be inducted. When they did not make it, they were punished with bad discharges, and now, of course, are suffering from the stigma that has resulted. No amnesty program can even begin to be adequate when 80 percent of the veterans in need of amnesty are by definition excluded from an amnesty program.

The same restrictions appear in S. 1290, and also in Senator Hart's bill. That is, the veterans who would be included in those programs again are the veterans with less than honorable discharges, only for absence-related offenses.

I would also point out to the committee that the discharge system, particularly during the Vietnam war, as members of the committee have recognized, was subject to great abuse. It was a way to get rid of people easily by circumventing the Uniform Code of Military Justice, which requires, of course, more procedural safeguards. If you want to get rid of somebody and you want to do it quickly, you do it through the administrative discharge system. The system, by the Defense Department's own study, the DOD Task Force on the Administration of Military Justice, which was published in 1972, showed that the discharge system is blatantly racist. There was a far higher proportion of less than honorable discharges issued to minority groups than to whites with the same educational background and the same standards coming into the service. the system is quite arbitrary as well. The same kind of behavior will get you a bad discharge in one service, or even in one unit, and a different type of discharge in another service or another unit.

The only way that veterans with less than honorable discharges can receive any justice is for there to be a universal and unconditional amnesty that would include those half million veterans with less than honorable discharges and would give them honorable discharges.

Now there has been some question about the propriety of giving honorable discharges. Should these veterans be entitled to VA benefits?

First, I would remind the committee that one is not entitled to VA benefits, even with an honorable discharge, unless there has been service of at least 180 days, that is, 6 months.

Second, vast numbers of these people served not only 6 months, but 2, 3, and 4 or more years; and great numbers of them actually served in Vietnam, in combat or in other capacities.

The ultimate solution beyond the amnesty, of course, is a single type discharge. There is no other employer besides the military in this country that labels people adversely as the military does, and none of the military services in European countries, in fact, have graded discharge systems such as we have in our country.

But, until and unless there is a universal and unconditional amnesty that is legislated by the Congress, I would also suggest that the committee look at the legislation that has been introduced that would improve the procedures and processes and standards of the discharge review boards which presently exist. At the present time those boards provide the only real remedy for any veterans with less than honorable discharges.

The problem, of course, is that it is a case by case review, and it is going to be impossible to review one half million discharges. But at the same time, at least, reviews before those boards do produce both general and honorable discharges. There have been several bills introduced so far in this Congress which I have enumerated in my written statement, that would provide for regionalization of these boards. That is a very first step, and it is a terribly significant step.

Mr. Martin Hoffmann from the Defense Department told you on Monday that the Defense Department itself is thinking about region-

alizing the boards if, in fact, business becomes pressing. But I would submit to you that business is pressing now. It can take up to 10 months to get any results from these boards at the present time. And second, one of the reasons that business is not pressing is that there is only one board for each service and the boards sit only in Washington. Veterans cannot afford to come to Washington for personal hearings. If the boards were regionalized, there would be far more business because there would be access to the boards for Vietnam-era veterans who, because of their bad discharges and the subsequent job discrimination they suffer simply do not have the financial resources to come to Washington.

DOD's own statistics indicate that for a veteran who makes a personal appearance before these boards, the chances for upgrade are over 100 percent greater than if that same veteran were to submit his case simply on documentary evidence.

There are other improvements, of course, that are needed in the boards, too. It is our position that the boards should be civilianized so that a broader perspective is given to the problems of veterans. I would suggest also that standards could be written that would make the boards more sensitive to the problems and issues that particularly relate to the Vietnam-era veteran.

Thank you.

[The prepared statement of Ms. Hewman follows:]

STATEMENT OF SUSAN H. HEWMAN

My name is Susan H. Hewman. I am staff attorney with the Military Rights Project of the American Civil Liberties Union Foundation.

Mr. Chairman, members of the Committee, I am pleased to be here today to discuss with you the clemency program as it relates to Vietnam era veterans with less than honorable discharges.

The vast majority of individuals eligible for clemency under the President's program were those with undesirable discharges from the military for absence related offenses. Of the approximately 120,000 people estimated to fall under the jurisdiction of the Clemency Board, approximately 100,000 or 80% fall into this category. Yet, the Clemency Board offers them no relief.

The military discharge system, not generally well understood by the public, is composed of five categories of discharges: honorable, general under honorable conditions, undesirable, bad conduct and dishonorable. Only the last two are issued as a result of a sentence pursuant to a court-martial conviction. The first three categories are issued pursuant to an administrative process.[1] Although not punitive in origin, general and undesirable discharges are severely punitive in their effect upon the individual when he or she returns to civilian life.

The bad discharge becomes a lifetime stigma, a life-sentence imposed on individuals in their late teens or early twenties. These veterans find themselves virtually unemployable. Congressman John Seiberling conducted a survey in 1973 of the 100 largest U.S. corporations to determine the extent of discrimination against veterans with other than honorable discharges in the hiring process. He reported that 41% of those who responded admit to discrimination against vets with general discharges and 61% against vets with undesirables. (Bad conduct—62%; dishonorable—73%)[2] In addition, all but approximately 1% of veterans with undesirables are denied V.A. benefits.

The Clemency Board offers no real help to these veterans. The Board holds out as relief a clemency discharge and a pardon. The public believes that any dis-

[1] Such discharges are often arbitrarily given and disproportionately issued to members of minority groups. *Report of the Task Force on the Administration of Military Justice in the Armed Forces* (1972).

[2] Military authorities have made similar findings. "The Gravity of Administrative Discharges: A Legal and Empirical Evaluation," 59 Military Law Review 1 (Winter, 1973).

charge that is not honorable is dishonorable and that the recipient is a criminal. Thus the clemency program, by adding yet another type of less than honorable discharge, the clemency discharge, will simply perpetuate a system of discrimination. As Mr. Martin Hoffmann of the Department of Defense stated before this Committee (Prepared Statement, p. 8), the clemency discharge does not represent a change in the characterization of an individual's service—it is simply an undesirable discharge by another name. Further, a pardon for the absence offense which led to the discharge is useless. A pardon restores civil rights lost due to a conviction. Since a vet with an administrative discharge has not been convicted of anything, the pardon makes no change in his/her status.

In addition, the clemency discharge does not bestow entitlement to V.A. benefits. And, finally, an individual is required to perform alternate service in order to receive the program's nonrelief. It is not surprising that only a small percentage of those eligible have in fact applied to the Clemency Board. And even many of these were solicited falsely by the Board which advertised that it was upgrading discharges.

Not only does the Clemency Board fail to offer any meaningful relief to those veterans eligible to apply, but also the present program is far too restricted in that it includes only those approximately 100,000 veterans whose discharges resulted from absence related offenses. However, over 400,000 additional Viet Nam era veterans hold less than fully honorable administrative discharges, both general and undesirable, for reasons other than absence. Most of these discharges are also related to the Viet Nam war either directly or indirectly, resulting from such reasons as drug use, opposition to the war on grounds of conscience, or simply being unable to adapt to military life having been inducted under "Project 100,000" which, in order to beef up U.S. forces, permitted induction of those who did not meet eligibility criteria for entrance into the Armed Forces. No amnesty program can even begin to be adequate when 80% of the veterans in need of amnesty are excluded from its provisions by definition.

In fact, the avenues for relief for Viet Nam era veterans with bad discharges which long predated the Clemency program, that is, the military Discharge Review and Correction Boards, have the potential for providing for greater relief than does the clemency program. Favorable action by these boards consists of an ungrade of a discharge either to general or honorable. And both these categories have automatic entitlement to V.A. benefits. And, of course, no alternative service is required. The ACLU Military Rights Project has achieved such upgrades in over 80% of its cases and those handled by its volunteers before these boards thus far. I cannot fully endorse these boards in their present structure and procedures. But, even with their failings, they hold out at present the only real hope for relief for the veteran with a bad discharge. Thus the individual who receives a clemency discharge will still have to apply to the discharge review boards for an actual upgrade of the discharge. It is far simpler and quicker for the veteran to go directly to the Discharge Review Board in the first instance and bypass the Clemency Program. To get results from both boards would take up to two years. Further, the Clemency Board has been given priority in getting the veterans' records, so that a discharge review will be held up until the Clemency Board completes a case.

S. 1290, introduced by Senators Nelson and Javits, to extend and modify the present clemency program also fails to give the relief needed to veterans with less than honorable discharges.

First, the bill retains the category of "clemency discharge," as something between a general and an undesirable discharge. Even though the bill defines the clemency discharge as being under honorable conditions, confusion by the public is inevitable and the result will be stigmatization and punishment. Second, from inquiries directed to the Clemency Board, it seems that under the present program the Board will recommend a limited number of honorable and general discharges to the President. However, it appears to be their intention to do so only in cases of highly decorated Viet Nam veterans.[3] There is no reason to believe that given the authority by S. 1290 to give clemency, honorable or general discharges, that without further guidance, the Board wouldn't continue to pursue a policy of so limiting honorables and generals. Third, the bill would create a senseless review procedure by the Veterans Administration (Sec. 8). The bill provides that the V.A. may review each case of an applicant with a clemency discharge for a determination as to eligibility for benefits; such determination

[3] In fact, 90% of actual Viet Nam veterans saw no combat.

is to be without consideration of any act pardoned by the President. The standard for review for eligibility for benefits in the V.A. statute, 38 USC 1652(a)(1), provides that a veteran is eligible for benefits ". . . who was discharged . . . under conditions other than dishonorable." This is not the same as a dishonorable discharge. It is a non-military determination under the V.A. organic statute. Since the pardoned offense is in fact the condition upon which the discharge was based, and since the V.A. could not consider that offense under the bill, it could not by definition find that any veteran holding a clemency discharge was discharged under "dishonorable conditions." Thus, an adverse determination never could be made and the veteran would be forced to go through a useless procedure and more delay. And the danger is that if an adverse determination is unlawfully made, V.A. decisions by statute are not reviewable.

In sum, the clemency discharge under S. 1290 will be punitive in effect; the lack of standards governing the issuance of clemency; honorable and general discharges may lead to the inequitable award of clemency discharges, and the V.A. procedure established is meaningless. The clemency discharge must be abolished.

Both the present and proposed clemency program offer too little to too few too slowly. The only way to insure clemency for all veterans with "bad" discharges is for Congress to legislate a universal and unconditional amnesty which would provide honorable discharges to all Viet Nam era veterans with less than honorable discharges. A case by case review of over one half million cases is impossible. This concept should also be legislatively extended to establish a single type discharge. There is no valid justification for graded discharges. The labelling of individuals can serve no purpose, but to stigmatize those labelled adversely. Civilian employers certainly do not label those who leave their employ. Nor do the militaries of the European nations label their veterans. Such legislation could require retroactive application.

Absent such a broad approach to the problem, the Congress should enact legislation that instead of institutionalizing the clemency program, would improve the structure, policies and procedures of the Discharge Review Boards by making those boards more accessible to the veterans and more sensitive to the Viet Nam era veteran. At this time each service has one such board which meets only in D.C. The veteran in California, for example, must travel at his own expense to D.C. to make a personal appearance before the review board—a financial impossibility for most. Yet, the Defense Department's own statistics demonstrate that the rate of upgrade is more than 100% higher in personal appearance cases than in those in which individuals submit their cases on a documentary record. It is imperative that these boards be regionalized. H.R. 2455 (Cong. John McFall), H.R. 262 (Cong. Edward Boland) H.R. 5305, 5306, 5307 (Cong. Louis Stokes) and H.R. 867 (Cong. Melvin Price) all would create such regionalized Discharge Review Boards. H.R. 2455 also makes provisions for reasonable travel expenses for the applicant.

Mr. Hoffmann told you Monday (prepared statement, p. 12) that DOD may consider regionalizing the boards if business becomes pressing. First, business is pressing now. It can take up to ten months to get results at present. Second, keeping only one board here, in fact, limits the business of the boards by limiting access to the boards and thus cutting down on the number of hearings held since most veterans cannot afford the trip to D.C. The bills I have cited should be supported and such legislation must be enacted into law in this term of the Congress.

The review boards, which are now comprised of active duty officers, should also be civilianized so that a broader perspective will be applied to the decision making process.

Finally, standards for review should be set giving special attention to those issues and problems which relate specifically to the Viet Nam era veteran.

We, as a nation, can no longer tolerate the victimization of Viet Nam era veterans with other than honorable discharges. Neither the present Clemency Program nor that proposed by S. 1290 provide the needed relief. This Congress must take action.

Once again, I thank you for the opportunity to appear before you today.

Mr. ALDER. Mr. Chairman, I have 5 minutes or so on the Selective Service System's performance under the clemency program which I would gladly defer if you think the time is such that, at this hour you

would rather pose questions first, and then, if time remains take this up. Or, if you would prefer that I would proceed, I will proceed.

Mr. KASTENMEIER. Well, perhaps you can summarize the points that you wanted to make on page 17.

Mr. ALDER. Part of the tip of this iceberg that has surfaced in these hearings on Monday when the issue was raised—I am not sure which witness first raised it; it did enter Mr. Pepitone's questioning—is the matter of the creditable time regulation presently applied to the reconciliation service program. Underlying that is a very serious problem which has carried over from the Selective Service System as long as any of us at this table have known it, or taking the unusual position that regulations and directives of material in normative effect can be implemented by inclusion in documents which are not published and are very narrowly distributed.

We have that problem again in the reconciliation service program as we had it previously in the Selective Service System. It has been, I think, a fair contention on the part of myself and others for some years that this is a practice which has brought on the wrath of the courts more than any other practice of the Selective Service System. They made their regulations in secrecy. They have often misshapen them because they are done without public exposure. And as a result they get the kind of contentious resistance to the regulations in court that they might expect under those circumstances.

What has happened here is in some way more legally vulnerable than anything that has been done in the past. The reconciliation service manual is distributed only to State directors and to those who were fortunate enough to have an $18 GPO subscription early in January. This manual contains a great deal of normative material. For instance, if you want to find out what jobs you can hold in an alternate service program, you had better have this manual near at hand or live near a State director's office because 60 jobs are listed there and nowhere else. It is the only directive which tells you whether the time that you are spending in the program seeking your first job is to be credited to your job or not. The change in this provision occurred in January. I will give you some idea of how disruptive it was.

Although it was rumored, that the change had occurred in January nobody had seen it. It was finally brought to my attention by Mr. Schwarzschild on the day that he first learned about it in March because we had discussed it before. I immediately called the Clemency Board and spoke to one of the principal deputies of the Chairman of the Board, who had not heard of this change and doubted seriously if the chairman had. And this was 6 weeks after the change had gone into effect.

The consequence of the change for the Clemency Board, its applicants and the representations it makes to its applicants are extremely severe. Many people who have had Clemency Board applications are likely to receive 3-month alternate service sentences and have established lives now. They are told that they could essentially anticipate accepting the President's pardon offer, go into alternate service for 3 months, which means 30 days plus 3 months if they are seeking a job, and then return to their lives. These people were totally frustrated by this change.

The Clemency Board, you would have thought, would have been further apprised of this by Selective Service when they made the change. Of course we are happy to say that the regulation has now been reversed. It was reversed under a mounting tide of pressure from a number of sources, not solely those who have testified here today. And it leaves in its wake a very serious question which will continue, I believe, to plague the Selective Service System's participation in any program of clemency or alternate service job monitoring. And that is simply this—the regulations they issue as manual orders, although they defend them as being for the use of the system, in many cases traverse the Administrative Procedure Act and the Federal Register Act which provide that any document having general applicability and legal effect must be published in order to be effective as to any person who does not have personal knowledge of it.

It is my belief that this would become a matter for court jurisdiction and not a matter for this committee except for the fact that these matters, even when they do reach courts, have never really bent the system to the more consistent practice of other agencies in publishing its regulations fully and in the open, and in making the occasion of their promulgation a matter of public notice so that the public may comment.

The Administrative Conference of the United States several years ago urged this on all agencies, particularly Selective Service. Selective Service has complied only as required by a very narrow and easily misinterpreted amendment to its law, and as I say, I think my prepared statement here will show that this issue has emerged in particularly distressing form in the reconciliation service program.

My recommendation is simply this: In contemplating alternate service of any sort, if the decision is made to consider legislation which entails alternate service, very serious consideration should also be given to having, as you suggested, Mr. Chairman, the other day, another agency, perhaps the U.S. Employment Service, conduct the essentially unique responsibility of achieving or attempting to achieve job placement for individuals. Thereafter, the matter of monitoring performance of these agreements, it seems to me, need not be left to the Selective Service System. Despite its vast size as a bureaucracy, it could as well be left, it seems to me again, to the Clemency Board or whatever apparatus is arrived at to make these alternate service awards which can or could, by devices not dissimilar from those used by Selective Service today, monitor people's performance. They collect reports from employers and they collect reports, as best we can tell, from employees. Why cannot the Clemency Board do that?

The larger issue of oversight through the rest of the term of the Clemency Board's, as it is now constituted, I think is serious because the decision to do this, to make this radical creditible time change in the program essentially in the dark, is the bellwether of what may be additional changes of similar order.

The statement, goes into details. Some documents that I add to the statement, I think, will clarify the legality or the illegality of the Service's present practice.

Carrying forward this one point to the Nelson-Javits bill, I would note that to assure that the Clemency Board under that law, be able to conduct its own alternate service program, if that is a part of such

a law, the language should be changed to allow that to be conducted by a governmental unit or organization rather than agency. I believe the term now used is agency and that is a term of particular substantive effect. It may require an operating statutory agency of the Government to conduct the program. I do not think that is the intent of the draftsman or need not be.

With that, I think I will conclude my remarks. If questions would be directed to any one of us, I am sure we would be happy to answer.

Mr. KASTENMEIER. The gentleman from New York. I will yield to Mr. Pattison first.

Mr. PATTISON. Mr. Chairman, thank you very much. I thank you all for coming here. I really do not have any questions. You have covered the subject very comprehensively and I thank you very much for doing that.

Mr. KASTENMEIER. I just have a question or two.

We have had two principal bills before us. They happen to be Senate bills. They represent two wholly different concepts. One is a congressionally mandated amnesty program with no alternate service or case-by-case review. The other is essentially an extension of the President's clemency program.

I think that Mr. Schulz indicated that based on certain difficulties as he had foreseen in reviewing the program, in essence an amnesty approach would be simpler from an administrative standpoint, quite apart from other considerations.

Is that your general conclusion?

Mr. SCHULZ. Mr. Chairman, I think that is correct as far as it goes, but I certainly also think other considerations point in the direction of general amnesty too. The basic notion of fairness is, I think, the highest consideration; administrative workability was my second ground of thinking.

Mr. KASTENMEIER. Do you give any credibility to Defense Department reservations about the effect of a general and unconditional amnesty program on raising forces for the United States or on other morale aspects of the implications of such a program?

Mr. SCHULZ. Frankly, Mr. Chairman, I am not an expert on that. It does seem to me from my limited study of the historical record that some blanket amnesties granted to deserters in the past occurred at times and in situations where a disruptive effect on morale or inability to raise armies would seem far more likely than at this time. I am thinking, for example, of President Lincoln's amnesty of deserters *during* the Civil War.

It seems to me very, very unlikely that anything that occurs now will influence manpower accessions or morale a few years in the future.

Mr. KASTENMEIER. Do you individually or collectively support one particular piece of legislation before the Congress as opposed to any other?

Mr. ALDER. Mr. Chairman, I have to address that in a legal way. We are all 501–C–3 organizations, every one of us here. I think we may have personal preferences, but I think there has been an effort by and large to disassociate personal from institutional positions and I would hate to group us as a collectivity here unless we were somehow immunized from any consequences that might flow from it.

I do think the nature of our assignment here has been in some respects technical but that our feelings, obviously, are reflected from the work we have been doing and from the length of time that we have. The combined years we have spent at this must now run to very nearly 20.

Mr. KASTENMEIER. In all fairness to you, you do on pages 21 through 25 analyze technically two of the bills.

Mr. ALDER. Yes, I do. If I may speak to one of those, if you would like to turn to that for a moment because it is something that might warrant a question.

One thing about S. 1290 is, I think unsettling, at least in principle. We had discussion here on Monday about the inability of Congress constitutionally to legislate general amnesty and an appeal from the Chairman of the Clemency Board for Congress essentially to do one of two things: The first, to dedicate its efforts through appropriating for the program as it now exists so that it should not fail in the period established by the President. I think to exhaust congressional energies in that direction would be a tragic waste, not a small tragedy at that. The second suggestion made, if I may attempt a gloss on Mr. Goodell's testimony, was that the outer limit of this committee's or Congress' jurisdiction in the matter of amnesty was essentially to support the President in his prefigured determination of how he was going to exercise the pardon power. And that would seem to indicate that S. 1290 was not only the bill of choice but the outer limitation of Congress' power.

On that point I think there are two things that are very important to note. First of all, in the formation of the President's clemency program it was very clearly the intent of the original workers to somehow draw heavily on Senator Taft's and Congressman Koch's Earned Immunity Act, which they did by and large. But because those bills did not react to the problem of the deserter in any way which was politically acceptable, there was an effort to alter their operation substantially in the course of constructing the administration's program. And in so doing, they allowed the Justice Department to intervene, or to advance, at least, its interest in having a revived diversion program. So that what you ended up with on September 16 was the Taft bill plus deserters minus, from the Clemency Board's jurisdiction, the draft cases.

Now that just seemed to me to rebuke the wisdom of all the work, and it had been substantial, that had gone into, all the reams of commentary and testimony, about the Taft bill—about the desirability of lifting preconviction cases from Justice Department jurisdiction and treating them in a separate way.

If the President of the United States—granted that it was a very fresh Presidency then, and there are a number of things in connection with this program that went through without being carefully examined by those new to the White House—if the President of the United States in the exercise of his pardon power cannot carry off a transplant to administrative auspices of the Taft bill in such a way as to carry with it the wisdom of the work that had gone into that, it seems to me that the exercise, in fact, of the President's pardoning power was not as substantial as might have been. In other words, it was subject to what we would call, I suppose, bureaucratic attrition. It is not an im-

pressive justification of that power's exclusivity to have achieved only what was achieved on September 16, even granting the assumptions of alternate service and granting the assumptions of essential confession of responsibility which the Taft bill also entailed in addition to that program.

The other point to make about S. 1290, in my judgment, is its sweeping incursion on the principle of separation of powers—and I have yet to hear it described to me convincingly as less than that. What the bill proposes to do in its own language is to establish that which the President has created and it uses that juxtaposition in two sections in the act. It, in effect, is taking a Presidential advisory committee established by the President under the Advisory Committee Act to serve as his auxiliary counsel in the exercise of his pardon power, and converting that to a statutory body of congressional creation imposing on it, oddly enough, additional substantive latitude and responsibility but giving it the same termination date.

One reason for enacting something into public law which has stood as less than permanent is, as I understand it, to give it a longer duration. It would certainly begin to solve the budgetary problems that the chairman has had with OMB and the White House. Why the bill as now drafted leaves the term of life of the Commission, the Board, as of December 31, 1976, which, I will concede, is too short a time to deal with this caseload, and at the same time without addressing the issue of separation of powers presumes to capture a White House council, is a mystery to me. Perhaps one of those who is closely involved with this bill can come in and describe why this is not an occasion for the separation of powers complaint to be raised in the highest by the administration. I do not think the problem is answered just by being told in confidence that the White House does not object to this bill and for that reason will not raise the issue of separation of powers.

That seems to me to be a very poor precedent. I do not think that is an entirely legalistic objection.

The main difficulty, if I may go on to one point, and the only one I will make about the Hart bill that you have before you, is that there is a position here which was discussed by a number of people who were consulted about the bill, myself included. And I would like to lay on the record the question I raise about it. It is the matter of providing that in any future the UCMJ court-martial prosecution that the prosecution must establish certain new facts as an element of the crime. This is all UCMJ cases, criminal justice cases, now constitute fully one-half of all cases, criminal cases tried in the combined civil and military courts in this country. During times of war that has run to a ratio of two to one, twice as many UCMJ cases as civilian cases. So we are talking about an immense caseload.

The provision in the act now, if I may pick up where I left off, says that in all future court martial prosecutions, the prosecution has to establish as an element of the crime that the act was not related to the individual's principled objection, and then it adds a provision that it was not a crime against person or property.

Well, OK. As to those two branches, it is not difficult to prove by extrinsic evidence that it was or was not a crime against person or property, I would think. But the first of these elements, the question of whether the crime is related to principled objection, is a very diffi-

cult matter of proof to prove in the negative. And that, if it were not bad enough, is compounded, in my judgment, by the constitutional right of the defendant to remain silent and not have to testify to that question of whether his objection was principled or not.

Without really being experienced in any deep way in matters of how a prosecutor brings about proof of a negative in a military court, I can imagine that it would be extremely difficult to operate that section, and I think that although there is a loss obviously in reversing the burden of proof, it would be a great improvement of the bill in terms of its general acceptability since this provision is so vulnerable, if the question of principled objection were to be made an affirmative defense, where I think it would more fairly rest.

I mean, after all, how many UCMJ cases of all those that have started are going to raise the issue of a principled objection? Not that many. If all cases required the prosecutor to prove that the act in question was not on a principled objection, he is going to have an awful time. A canny defense counsel is not going to waive the issue; he is not going to stipulate it was not a matter of principled objection. I just think that is a provision which is needlessly and tenaciously adhered to in this bill which would cause people who are not sympathetic to it and for other reasons to find something, I think quite rightly, that is very questionable and perhaps innocent of the facts of, you know, UCMJ life in one sense.

That is the last comment I will make on the Hart bill.

Mr. KASTENMEIER. Thank you, Mr. Alder.

We have certain other questions but I think it might be more useful to put them to you in letter form and we can append them to the hearings, given the lateness of the hour.

I wish to convey the gratitude of the committee for your appearance this morning, Mr. Alder, Ms. Hewman, Mr. Schulz, and for your contributions to our deliberations.

And with your testimony the hearings on the question of the President's clemency program and amnesty conclude.

[Whereupon, at 1:35 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

ADDITIONAL MATERIAL

SENATE BILL 1290, THE CLEMENCY BOARD REORGANIZATION ACT OF 1975, BY HON. GAYLORD NELSON AND HON. JACOB JAVITS

94TH CONGRESS
1ST SESSION

S. 1290

IN THE SENATE OF THE UNITED STATES

MARCH 21 (legislative day, MARCH 12), 1975

Mr. NELSON (for himself and Mr. JAVITS) introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To reorganize the Clemency Board, the Department of Defense, the Department of Justice, and the Department of Transportation to provide fair and efficient consideration of all individuals eligible for amnesty relating to military service in the war in Southeast Asia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Clemency Board Reorganization Act of 1975".

REORGANIZATION OF THE PRESIDENTIAL CLEMENCY BOARD

SEC. 2. The Presidential Clemency Board created by Executive Order 11803, dated September 16, 1974, is hereby established by law and reorganized to assume such

responsibilities and powers granted to it by this Act and is directed to execute such responsibilities and powers in a manner consistent with the provisions of this Act. The Board shall be composed of nine members to be appointed by the President, one of whom shall be designated by the President to serve as Chairman.

REORGANIZATION OF EXECUTIVE DEPARTMENTS AND AGENCIES AND TRANSFER OF POWERS

SEC. 3. (a) Any jurisdiction, responsibility, or function which the Department of Defense has with respect to any draft evader or military deserter, as defined by this Act, under any law, regulation, Presidential proclamation, or Executive order, shall be transferred to the Presidential Clemency Board. The Department of Defense shall thereafter be relieved of all such jurisdiction, responsibility, or function, except as may otherwise be provided for by this Act.

(b) Any jurisdiction, responsibility, or function which the Department of Justice has with respect to any draft evader or military deserter, as defined by this Act, under any law, regulation, Presidential proclamation, or Executive order shall be transferred to the Presidential Clemency Board. The Department of Justice shall thereafter be relieved of all such jurisdiction, responsibility, or function, except as may otherwise be provided for by this Act.

(c) Any jurisdiction, responsibility, or function which the Department of Transportation has with respect to any draft evader or military deserter, as defined by this Act, under any law, regulation, Presidential proclamation, or Executive order shall be transferred to the Presidential Clemency Board. The Department of Transportation shall thereafter be relieved of all such jurisdiction, responsibility, or function, except as may otherwise be provided for by this Act.

THE FUNCTIONS OF THE PRESIDENTIAL CLEMENCY BOARD

SEC. 4. (a) The Board, under such regulations as it may prescribe, shall examine the cases of all draft evaders and military deserters who apply for Executive clemency.

(b) The Board shall report to the President its findings and recommendations as to whether Executive clemency should be granted or denied in any case. If clemency is recommended, the Board shall also recommend the form that such clemency should take, including clemency conditioned upon a period of alternate service in the national interest. In recommending any period of alternate service, the Board shall consider, among any other factors it deems appropriate, any prison term, or part thereof, or other punishment which the individual has served or endured for any offense specified in subsection (a) or (b) of section 14 of this Act. In the case of an individual discharged from the Armed Forces with

a punitive or undesirable discharge, the Board may recommend to the President that a clemency, general or honorable discharge be substituted for a punitive or undesirable discharge. The President shall make the final determinations as to whether Executive clemency should be offered and, if so, under what conditions.

(c) The Board shall give priority consideration to those applicants who are presently confined and have been convicted only of an offense specified in subsection (a) or (b) or section 14 of this Act, and who have no other outstanding criminal charges pending against them.

(d) Any alternate service recommended by the Board under subsection (b) of this section shall not be longer than two years and shall promote the national health, safety, or interest. No applicant shall be permitted to complete all or any part of such alternate service by service in the Armed Forces. The alternate service shall be completed in accordance with such regulations as the Board may prescribe and under the auspices of any department or agency of the United States which the Board deems appropriate. Any applicant who satisfactorily completes the period of any alternate service proposed by the President will be relieved of arrest, prosecution, and punishment for any offense specified in subsection (a) or (b) of section 14 of this Act.

RIGHTS OF APPLICANTS

SEC. 5. (a) Notwithstanding any other law or regulation, any draft evader or military deserter residing in a foreign country may return to the United States for purposes of applying for Executive clemency under the provisions of this Act. Such individual shall be required to make an application with the Board for Executive clemency within thirty days after the date of entry into the United States and shall not be arrested, prosecuted, or punished for any offense specified in subsection (a) or (b) of section 14 of this Act until the expiration of that thirty-day period.

(b) No applicant shall be arrested, prosecuted, or punished for any offense specified in subsection (a) or (b) or section 14 of this Act until thirty days after he receives notice of the President's disposition of the recommendation made by the Board with respect to that applicant, or until thirty days after he receives notice of the President's disposition of any appeal made to the Board, whichever is later, and then only if Executive clemency is not offered or if offered, is not accepted. Any applicant who entered the United States from another country under the limited immunity granted by subsection (a) of this section and who rejects any offer of Executive clemency by the President may return to that other country at the point of entry.

(c) Notwithstanding any other law or regulation, any

draft evader or military deserter, whether or not a United States citizen, who resides in a foreign country and has not been indicted or convicted of any offense other than those specified in subsection (a) or (b) of section 14 of this Act, shall, upon application, be given a thirty-day nonimmigrant visa at least once each year if he otherwise qualifies for such visa. No draft evader or military deserter holding such a nonimmigrant visa shall be arrested, prosecuted, or punished for any offense specified in subsection (a) or (b) of section 14 of this Act.

(d) Any regulations adopted by the Board pursuant to section 4(a) of this Act shall account for and preserve any and all legal and constitutional rights which a draft evader or military deserter may have.

REACQUISITION OF UNITED STATES CITIZENSHIP

SEC. 6. Notwithstanding any other law or regulation, any applicant who has renounced his United States citizenship and acquired the citizenship of another country may have his United States' citizenship restored by appearing before a United States district court judge and renouncing citizenship of that country and pledging allegiance to the United States.

SEALING OF RECORDS

SEC. 7. Any and all records of an offense for which a

Presidential pardon has been granted under this Act shall be sealed and shall not be disclosed except—

(a) in response to an order of a court of competent jurisdiction;

(b) at the request of the pardoned applicant;

(c) at the request of a department or agency of the United States which is conducting a lawful investigation necessary for a security clearance or presidential appointment; or

(d) at the request of a department or agency of the United States which is conducting a lawful investigation of fraud in the application for or the granting of Executive clemency under the provisions of this Act.

VETERANS BENEFITS

SEC. 8. Unless otherwise granted by the President, the issuance of a clemency discharge shall not automatically confer rights to veterans benefits: *Provided,* That the Veterans' Administration or the Department of Defense may review each case of an applicant receiving a clemency discharge for the purpose of determining whether or not veterans benefits should be granted; such review shall be without regard to any acts for which a Presidential pardon has been granted.

ADMINISTRATION

SEC. 9. Each member of the Board, other than an officer or employee of the United States, shall be entitled to com-

pensation for each day he is engaged in the work of the Board at a rate not to exceed the daily rate prescribed by law for persons and positions in GS–18 and shall also be entitled to receive travel expenses, including per diem in lieu of subsistence, as authorized by law for persons in Government service employed intermittently.

ADMINISTRATIVE SERVICES

SEC. 10. Necessary administrative services and support may be provided to the Board by the General Services Administration on a reimbursable basis.

COOPERATION OF OTHER DEPARTMENTS AND AGENCIES

SEC. 11. All departments and agencies in the executive branch are authorized and directed to cooperate with the Board in the conduct of its work and to furnish the Board, to the extent permitted by law, all appropriate information and assistance.

FINAL RECOMMENDATIONS; TERMINATION OF BOARD

SEC. 12. The Board shall submit its final recommendations to the President not later than December 31, 1976, at which time it shall cease to exist. Any functions assigned to the Board under this Act shall thereafter be assumed by the Department of Justice.

AUTHORIZATION

SEC. 13. There are authorized to be appropriated such

sums as may be necessary to carry out the provisions of this Act.

DEFINITIONS

SEC. 14. As used in this Act—

(a) The term "draft evader" means any individual who has been or may be indicted or convicted of any offense committed on or after August 4, 1964, and prior to March 29, 1973, in violation of section 6(j) or 12 of the Military Selective Service Act (50 App. U.S.C. 462) or of any rule or regulation promulgated under such sections, or of any related law, rule, or regulation.

(b) The term "military deserter" means (A) any individual who has received or may receive a punitive or undesirable discharge for one or more violations of article 85, 86, or 87 of the Uniform Code of Military Justice (10 U.S.C. 885, 886, 887), or any related article, committed on or after August 4, 1964, and prior to March 29, 1973, or (B) any individual who is serving a sentence for one or more such violations.

(c) "Executive clemency" means a pardon or other act of mercy or forgiveness by the President, under such terms and conditions as the President may prescribe, pursuant to powers granted to the President by article II of the United States Constitution.

(d) "Presidential Clemency Board" or "Board" means

the body created by this Act to consider the cases of draft evaders and military deserters and to recommend to the President whether such evaders or deserters should receive executive clemency and, if so, under what conditions.

(e) "Clemency applicant" or "applicant" means any draft evader or military deserter who applies for clemency under the provisions of this Act.

(f) "Clemency discharge" means a military discharge granted by the President pursuant to the provisions of this Act to signify that the applicant left the military service under honorable conditions.

(g) The term "Military Selective Service Act" means the Military Selective Service Act or any prior corresponding Act.

SENATE BILL 1145, NATIONAL REORGANIZATION ACT OF 1975, BY HON. PHILIP HART, HON. MIKE GRAVEL, HON. GEORGE S. MCGOVERN, AND HON. GAYLORD NELSON

94TH CONGRESS
1ST SESSION

S. 1145

IN THE SENATE OF THE UNITED STATES

MARCH 11, 1975

Mr. PHILIP A. HART (for himself, Mr. GRAVEL, Mr. MCGOVERN, and Mr. NELSON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide amnesty to persons who, because of their principled objection to service in the Armed Forces of the United States, failed or refused to register for the draft or who refused induction or failed to be inducted into the Armed Forces or who were absent without official leave from the Armed Forces during the period from August 4, 1964, to March 28, 1973, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Reconciliation Act of 1975".

SECTION 1. Notwithstanding any other provision of law, any person who failed or refused to register under the Military Selective Service Act subsequent to August 4, 1964,

and prior to March 28, 1973, or failed to accept or refused induction into the Armed Forces of the United States under such Act between such dates, or who, while liable for military service under such Act, otherwise violated such Act or regulations promulgated under authority of such Act, between such dates, is hereby granted immunity from prosecution and punishment under such Act for such evasion or failure to register under such Act, or refusal to be inducted under such Act, or other violation of such Act, as the case may be.

SEC. 2. (a) Notwithstanding any other provision of law, any member or former member of the Armed Forces of the United States who is alleged to have been absent from the Armed Forces in violation of the Uniform Code of Military Justice during the period subsequent to August 4, 1964, and prior to March 28, 1973, is hereby granted immunity from prosecution and punishment under the Uniform Code of Military Justice for such absence.

(b) This Act does not grant immunity from prosecution for other alleged violations of the Uniform Code of Military Justice, except that if any branch of the Armed Forces of the United States seeks to prosecute an individual for any alleged offense other than an absence without official leave offense, the prosecution must establish at trial that the alleged crime was:

(1) not reasonably related to the individual's principled objection to service in the Armed Forces of the United States, or

(2) a crime of violence against another person or a crime against property.

SEC. 3. (a) Any person who has been convicted and is serving, or has served, a prison sentence or other punishment for failing or refusing to register under the Military Selective Service Act between August 4, 1964, and March 28, 1973, or for failing to accept or refusing induction into the Armed Forces of the United States under such Act between such dates, or while liable for military service under such Act has otherwise violated such Act or regulations promulgated under such Act between such dates shall be released from prison or other terms of his sentence and any remaining portion of punishment shall be waived.

(b) Any person who has been convicted and is serving, or has served, a prison sentence or other punishment for absence from the Armed Forces in violation of the Uniform Code of Military Justice between August 4, 1964, and March 28, 1973, shall be released from prison or other punishment and the remaining portion of punishment shall be deemed to have been served.

(c) Any person otherwise eligible for the benefits of the provisions of subsection (a) or (b) of this section and

who is also serving a prison sentence for an offense not described in either such subsection shall—

(1) be released only from that portion of his sentence specifically applied to the offense described in subsection (a) or (b) of this section, as the case may be, or

(2) upon petition to a United States district court be released only from that portion of his sentence that the court deems applicable to the offense described in subsection (a) or (b), as the case may be, if the sentence which he is serving is not specifically applied to either offense described in subsection (a) or (b), or

(3) upon petition to a United States district court, in any case, other than a crime of violence against another person or a crime against property, be released from his entire sentence if he shows the court that the offense, other than one described in subsection (a) or (b) of this section, was reasonably related to the petitioner's principled objection to service in the Armed Forces of the United States.

(d) In the case of consecutive sentences, the punishment imposed for offenses described in subsections (a) and (b) of this section shall be deemed to be the last in order to be served.

SEC. 4. Any person presently serving a term of reconciliation service or preparing to perform reconciliation service, pursuant to the Presidential Proclamation 8313, of September 16, 1974, may, at his election,

(1) be released from such service and the remaining portion of service shall be waived by the United States, and

(2) be entitled to all rights and privileges under this Act.

SEC. 5. (a) Any pending legal proceedings brought against any person as a result of his evading or failing to register under the Military Selective Service Act between August 4, 1964, and March 28, 1973, or for evading or refusing induction in the Armed Forces of the United States under such Act between such dates, or while subject to induction into military service under such Act for any other alleged violation of such Act or regulations issued under such Act between such dates shall be dismissed by the United States, and all records and information relating thereto shall be expunged from all Government agency files.

(b) Any pending legal proceedings, statutory or administrative, brought against any person as a result of his absence from the Armed Forces of the United States in violation of the Uniform Code of Military Justice between Au-

gust 4, 1964, and March 28, 1973, shall be dismissed by the United States, and all records relating thereto shall be expunged from all Government agency files.

(c) Any person eligible for the benefits of the provisions of subsection (a) or (b) of this section who has pending against him criminal charges by the United States for an offense not described in subsection (a) or (b) of this section and such charges were brought against him concurrently with charges described in subsection (a) or (b) of this subsection, as the case may be, may petition to a United States district court to order dismissal of such other charges, and such charges shall be dismissed, if he shows the court that such criminal charges (other than ones described in subsection (a) or (b) of this section) were—

(1) reasonably related to such person's principled objection to service in the Armed Forces of the United States, and

(2) not the result of an alleged crime of violence against another person or an alleged crime against property.

SEC. 6. Any testimony, affidavit, or other evidence or any argument used by any individual that is presented to a United States district court pursuant to sections 3(c) (2) and (3), and 5(c) shall be privileged and may not be used at any trial, hearing, or other proceeding, except in the event

of alleged perjury, without the written consent of such individual.

SEC. 7. Any person who has served in the Armed Forces of the United States and who is granted relief under section 2(a), 3(b), 3(c)(3), or 5 (b) or (c) of this Act shall be granted an honorable discharge by the Secretary of Defense from the Armed Forces of the United States. In addition, any person who has been administratively discharged from the Armed Forces with an other than honorable discharge for reasons of absense from the Armed Forces in violation of the Uniform Code of Military Justice between August 4, 1964, and March 28, 1973, shall be granted an honorable discharge by the Secretary of Defense from the Armed Forces of the United States. Such honorable discharge shall not be coded or otherwise qualified to reveal the reasons for its issuance.

SEC. 8. (a) No person shall be denied any civil right or employment opportunity because of any crime for which such person was charged, convicted, or alleged to have committed and for which relief was granted under this Act.

(b) It shall be a misdemeanor punishable by a fine of not to exceed $5,000 or imprisonment not to exceed one year, or both, to deny any person employment or any civil right because of any crime for which such person was

charged, convicted, or alleged to have committed and for which relief has been granted under this Act.

(c) Any person who believes he has been denied any civil right or employment opportunity because of any crime for which such person was charged, convicted, or alleged to have committed and for which relief was granted under this Act shall have a civil cause of action in district court of the United States, for damages in the amount of:

(1) actual damages,

(2) exemplary damages in an amount treble the actual damages,

(3) actual legal fees and court costs, and

(4) 9 per centum interest from the date of filing the cause of action.

SEC. 9. Any person who has been convicted of, charged with, alleged to have committed, or who is under indictment for any crime for which relief is granted under this Act shall have expunged from all Government agencies any reference to such conviction, arrest, allegations, charges, or indictment. Regulations to accomplish this end shall be promulgated by the appropriate agencies.

SEC. 10. All reference in this Act to the Military Selective Service Act shall be deemed to include a reference to any previous corresponding law.

SEC. 11. (a) The United States citizenship of any former citizen who states under oath that he or she renounced

such citizenship or who became a naturalized citizen of a foreign country between August 4, 1965, and March 28, 1973, solely or partly because of disapproval of military involvement of the United States in Indochina shall be fully and unconditionally restored upon petition by such individual to any district court of the United States: *Provided,* That he or she renounces citizenship in such foreign country.

(b) Any former citizen of the United States who makes a sworn statement to an appropriate official of the Immigration and Naturalization Service, Department of Justice, to the effect that he renounced his citizenship or became a naturalized citizen of a foreign country between August 4, 1965, and March 28, 1973, solely or partly because of disapproval of military involvement of the United States in Indochina shall be exempted from the provisions of section 212 (a) (22) of the Immigration and Naturalization Act (8 U.S.C. 1182 (a) (23)).

SEC. 12. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

SEC. 13. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or to other circumstances shall not be affected thereby.

Newspaper Editorials in Support of Senate Bill 1290

[From the New York Times, Mar. 31, 1975]

For Further Amnesty

(By Gaylord Nelson)

Washington—The time has come for Congress to take further steps to heal the deep wounds inflicted on our nation by the Vietnam war. Specifically, Congress should support and extend the President's amnesty program—which ends at midnight tonight—for the thousands of young men who evaded the draft or deserted the military during the conflict.

The need for Congressional action is clear. Last September, President Ford took the constructive step of establishing a program to provide amnesty for thousands of young men who, for one reason or another, felt the need to refuse the draft or desert the military during the war. In creating that program, the President recognized, as we all should, that the interests of society were served best when its system of justice reflected a good measure of understanding and mercy.

Already there is enough experience under the President's program to demonstrate that point. One representative case considered by the Clemency Board created by the President, for example, involved an individual who had served valiantly with the Army in Vietnam for almost a year.

He was wounded three times and was awarded three Purple Hearts, the Vietnam Service Medal and the Bronze Star for Valor. After he was reassigned to the United States, his father went bankrupt because of a drinking problem and his family generally fell upon hard times. He consequently returned home without Army authorization to earn money to help his parents and seven brothers and sisters. Despite these circumstances, the man was fined, sentenced to six months at hard labor, and given a bad-conduct discharge by the Army.

The problem here is that under the most recent executive order every eligible draft evader and military deserter must apply for clemency by tonight. After that, there will be no institutionalized opportunity for an eligible individual to seek the clemency he may deserve. This would be most unfortunate.

Of the approximately 125,000 men eligible to apply for clemency, fewer than 20,000 have taken advantage of the opportunity. We do not know all the reasons that may account for the unwillingness or inability of eligible individuals to apply. But we do know that the spirit of reconciliation will be undermined if the opportunity for those individuals to receive mercy is withdrawn.

Congress, however, should not expect the President alone to continue to bear the burdens of the amnesty program. Congress, after all, repeatedly voted billions of dollars of public funds for the war. Congress thus assumed some responsibility for the conduct of American policies in Vietnam. Congress should now accept some responsibility for ending the divisiveness that the war created.

A bill has been introduced to continue the amnesty program, with certain modifications, including the following:

The Clemency Board would have jurisdiction over all cases of draft evasion and military desertion during the war. The President's program is now operated by four separate departments, with the result that different agencies are applying different criteria to people in similar situations.

Any individual who returns from a foreign country would be allowed to return there if any offer of clemency was rejected. An individual should not have to risk prosecution to apply for clemency.

Any Vietnam draft evader or military deserter living abroad would be given a 30-day nonimmigrant visa at least once a year to allow for family visits. We should not compound the heartaches of the war by prohibiting a family from seeing their son, especially when his alleged offense may be based on moral principle or some other compelling reason.

All deadlines for application would be eliminated. There is no sense in making this process a race to beat the clock.

There are indeed broad disagreements among people about the merits of the President's amnesty program. At some point Congress is going to have to resolve the question of unconditional amnesty. But in the meantime we should not allow thousands of young men to become the unintended victims of our disagreements. Time is running out for them.

[From the Detroit Free Press, Apr. 7, 1975]

AS WE SEE IT—CONGRESS SHOULD INITIATE EXTENDED CLEMENCY PLAN

No matter what the final figure on the number of persons who took advantage of President Ford's now-expired clemency program, there remains a need for Congress to take the initative in extending and simplifying the program.

Despite its detractors and its internal complexities, the Ford program has gone a long way toward clearing the decks on the deserters and draft resisters. By the time the totals are run on the last-minute flurry, more than a quarter of those eligible will have responded. That is an important step toward ending the festering wound left by the war.

And as Father Theodore Hesburgh, the president of Notre Dame University and a member of the clemency board, said recently, the numbers have long since surpassed the percentage of eligible persons granted amnesty under President Harry Truman's case-by-case review after World War II.

So the Ford program—limited and maligned though it has been—may be of more enduring importance than its critics imagine now.

This could be especially so if the Congress were to accept the suggestion of several of its members, including Sen. Gaylord Nelson, D-Wis., who has suggested a *congressional* clemency program, which would set up simplified machinery to replace the four separate facets of the Ford program and would remove the deadlines. Sen. Nelson also would provide for a 30-day non-immigrant visa for any deserter or draft evader living abroad to visit his family at least once a year.

As Sen. Nelson expressed it, "Congress should not expect the president alone to continue to bear the burdens of the amnesty program. Congress, after all, repeatedly voted billions of dollars of public funds for the war. Congress thus assumed some responsibility for the conduct of American policies in Vietnam. Congress should now accept some responsibility for ending the divisiveness that the war created."

The question of unconditional amnesty is still much in the hearts of many opponents of the war. They see the war as having been such a moral outrage that it is unconscionable to continue to prosecute or persecute those who opposed it.

But the case-by-case approach, whatever its limitations, is now more clearly an acceptable course to the American public. It is, moreover, more in keeping with panhandling of clemency that many of its critics have conceded. Congress should accept Sen. Nelson's suggestion and provide machinery for a continuing clemency opportunity.

[From the Evening Bulletin, Apr. 1975]

TOO FEW TAKERS—CONGRESS AND CLEMENCY

As disappointment over the results of America's long, costly involvement in Vietnam grows deeper, it is regrettable that President Ford has allowed his Vietnam clemency program to expire.

Certainly at this time, the nation should not be withdrawing a reconciling gesture to thousands of young Americans who are, in a sense, refugees from their own country.

The Presidential Clemency Board and related federal agencies stopped accepting applications for clemency from war resisters, draft evaders and deserters when their authority to do so ended on March 31.

That means there are still more than 100,000 young men who are eligible for conditional clemency but, for a variety of reasons, did not choose to seek it in time. President Ford gave his well-intentioned program two brief extensions, but it remained open for only six months.

The President has seemed reluctant to involve Congress in a continuing clemency initiative. Congress ought to enter the picture now. Senators Gaylord Nelson (D-Wis) and Jacob Javits (R-NY) have submitted a bill to place the entire clemency program under the clemency board, rather than parcelling it out to the board and the defense and justice departments. They would also avoid a set deadline on clemency.

The three-part nature of the President's program opened it to appearances of confusion and conflicting criteria for clemency. More uniform administration of clemency cases seems in order.

The failing economy has dried up jobs for war resisters in alternative civilian service. This, too, is a hurdle for Congress to reckon with, perhaps by apportioning federally funded public service jobs for clemency applicants.

President Ford's conditional clemency offer attracted only about 22,500 of 136,900 eligible young men. Congress should explore the reasons for its limited appeal, with a view toward removing unduly onerous or conflicting requirements.

[From the Los Angeles Times, Apr. 11, 1975]

MERCY FOR OUR OWN

The words compassion and humanitarianism are being heard more often in this country as the horror mounts in South Vietnam and Cambodia. But that same spirit of mercy is being denied American casualties of the conflict in Southeast Asia.

We support, then, a bipartisan effort in the U.S. Senate to revive the prospect of amnesty for young Americans guilty of violating military and draft laws during the Vietnam era.

Only 24,000 of the 125,000 eligible for clemency had taken advantage of it when President Ford's deadline for applications ran out March 31. But that was no reason for closing the door on the 101,000 who had not yet come forward.

In fact, the President chose not to extend the deadline exactly when violators were responding in ever-greater numbers.

Sens. Gaylord Nelson (D-Wis.) and Jacob K. Javits (R-N.Y.) are coauthors of legislation that would remove all time limits for clemency applications. They argue, and we agree, that there are huge numbers of offenders who will apply once it becomes evident to them that the rulings of the clemency board have been just and compassionate.

Those who oppose the extension of amnesty continue to base their case on false grounds—that most violators are military deserters or draft dodgers who fled the country to avoid war service. But only one in seven falls into that category. The rest are veterans who left the service with less-than-honorable discharges, or civilians who already have paid the penalty for draft offenses. For them, clemency is no more than an opportunity to clear their records.

The Nelson-Javits legislation contains two other recommendations, both affecting violators living abroad. One would let them come back and submit themselves to clemency procedures, but return to their countries of refuge if they found the clemency board's decisions unacceptable. Another recommendation is that draft evaders and military deserters living abroad should be given 30-day non-immigrant visas once a year to visit their families in this country.

Those proposals probably will encounter stiff opposition in Congress. But logic and compassion clearly argue for passage of the main feature of the legislation. There should be no arbitrary time limit for those willing to step forward and accept whatever penalties may be imposed.

[From the New York Post, Mar. 26, 1975]

UNFINISHED RECONCILIATION

As most of its members now agree, Congress has no obligation to furnish funds indefinitely for Cambodia and South Vietnam to wage unending war. It might, however, undertake another kind of open-ended commitment that could help restore peace at home.

The enabling legislation has been introduced by Sen. Nelson (D-Wis.), with the objective of extending the Presidential amnesty plan for Vietnam deserters and draft avoiders which, after two extensions by the White House, is now due to expire early next week. The bill would also liberalize the program's present terms.

Sen. Nelson believes a number of applicants "may need considerable time" to make a decision on seeking clemency, principally those who were forced to make "agonizing choices" between law and their consciences. Moreover, whatever the merit of the President's decision to offer a clemency plan, there is no question that its provisions remain unacceptable to men whose conscientious objection to Vietnam service was most principled.

Another bill, offered by Sen. Hart (D-Mich.), would unequivocally confer unconditional amnesty on all men—105,000 of about 125,000—who have not yet applied to the clemency board. Its prospects (although Nelson supports it) may be less promising at the moment. In the long run, however, the country must come to terms with the basic issue: will there be no homecoming for those who refuse to abdicate conviction?

[From the Philadelphia Inquirer, April 7, 1975]

A Clear Failure Demands a New Clemency Program

Last Monday, the conditional clemency program which President Ford had established for military deserters and draft evaders ran out of time. It cannot be called a success. On numbers alone, with only 22,000 of an estimated 120,000 potential participants having signed up, the program clearly did not achieve the wide acceptance that Mr. Ford and its administrators had hoped for.

Events in Indochina are moving with lightning swiftness toward a grim and bloody resolution of that ill-starred peninsula's torments. Americans and their leaders soon will face a potentially bitter reconsideration of the entire debate of U.S. motives and failures in more than 10 years of deep involvement in Southeast Asia.

With that prospect in sight, it seems a poor time—close to an impossible time—to try to resolve the questions left pending by the clemency program. Mr. Ford, who had extended the scheme once already, was wise, we believe, to recognize that another extension would serve little purpose.

But the more than 100,000 Americans who did not come forward to offer themselves for public service jobs in return for conditional forgiveness of their desertion or evasion will not go away. And so long as they remain, a band of men with reason of their own to believe they have been unjustly treated, they will constitute an unhealed wound in America's side.

A sense of fairness and justice, especially in connection with the dreadful American experience in Southeast Asia, is vitally necessary for this nation's moral well-being. To achieve it for the deserters and draft evaders without destroying it for those who fought in good faith, or who lost members of their families in the same good faith, is a ponderously difficult problem.

But it is one which must be faced, and which has not been solved. Mr. Ford will do well to reach out once again for the best and most humane available counsel, and to work out a new program built on the understandings to be derived from the last six months.

[From the Boston Globe, Apr. 3, 1975]

The Case For Amnesty

It seems appropriate, somehow, that President Gerald Ford's clemency program for draft evaders and deserters during our military involvement in the Vietnam War should have expired just at the start of April Fool's Day. For it has fooled both those it was intended to benefit and the rest of the nation as well.

Mr. Ford established it last September by using his pardon power to set up a nine-member Presidential Clemency Board and three smaller operations at the Coast Guard and the Departments of Justice and Defense. When it expired March 31 after two one-month extensions, it had attracted only 18 percent of the estimated 134,000 young men eligible to take part in the program.

Of these, some 18,000 were processed by the Clemency Board, 5400 by the Defense Department, 589 by the Justice Department and 12 by the Coast Guard, for a total of some 24,000. That leaves another 110,000 young men, many of them self-exiled abroad, who wanted no part of the program. And it seems worth explaining why they felt this way, and why the program didn't work for many of those who asked clemency.

It didn't work for the latter because they had to accept a dishonorable discharge or serve a period of alternative service for a clemency discharge; in both cases this involved an admission of wrongdoing and a harsh penalty. A dishonorable discharge can ruin employment opportunities for a lifetime; alternative service jobs are scarce in a declining economy, and many agencies dislike the idea of conscripted labor.

And most of all, those who wanted no part of the program felt they took the only possible course to oppose a war which, by now, most Americans agree was an unjust and immoral one. (It is indicative of this feeling that even the Justice Department decided to drop all charges against William Meis, the first draft resister to face prosecution publicly and risk a five-year jail term rather than accept the strings attached to Mr. Ford's "earned re-entry." The U.S. attorney said the government was "not willing to publicly prosecute a case which they might not win.")

There seems no prospect that President Ford will now grant unconditional amnesty to deserters and draft evaders, though we strongly feel he should do so and follow the example in generosity of Presidents Washington, John Adams, Lincoln and Andrew Johnson.

Yet Congress can and should take this action. Bills for unconditional amnesty have been filed in the Senate by Sens. Philip Hart (D-Mich.), Gaylord Nelson (D-Wis.) and George McGovern (D-S.D.); another from Rep. Bella Abzug (D-N.Y.) is pending in the House. Also pending, as a stopgap, are measures to revive the clemency program.

Not merely for cleaning the slate and binding up the wounds but for reasons of justice and morality and a sounder sleep at night, we urge the Congress strongly to vote for a total amnesty.

RENEW AMNESTY PROGRAM

President Ford's conditional amnesty program for Vietnam deserters and draft evaders, which expired at the end of March, satisfied few fully. Emotions ran strongly either in favor of or against amnesty. Ford's program sought the middle, and that is where the President found himself politically. The White House, after two short extensions, allowed the program to expire.

Having once offered amnesty in the spirit of reconciliation, there really is no good reason why it should be subject to a time limit. Only about 22,500 out of 126,900 eligible for the Ford program took advantage of it. Inducing more to come back to the mainstream of U.S. life ought to be reason enough for renewing the program.

It would seem proper for Congress to take up where the President left off. The conditional aspects of the Ford program—compensatory national service—should be left intact. As former Army Secretary Froehlke, a supporter of amnesty, put it recently: "The vast majority of Americans do not and will not support unconditional amnesty."

Congress ought to streamline the Ford program administratively, eliminating the divided jurisdictions between the Justice and Defense Departments and a clemency board, each with its own criteria and regulations. Uniformity is needed.

Congress also could offer further inducements to overcome the lingering suspicions that exist among those remaining outside the law. For instance, both Sen. Nelson and Rep. Kastenmeier have proposed that some form of limited immunity be given, allowing deserters and evaders the opportunity to leave the country again if initial clemency negotiations prove unacceptable.

Our primary goal should be to hold open the door to reconciliation while upholding the primary rule of law. The conditional amnesty program should be renewed.

[From the Philadelphia Bulletin, Apr. 2, 1975]

LET'S EXTEND AMNESTY

WASHINGTON.—The time has come for Congress to take further steps to heal the deep wounds inflicted on our nation by the Vietnam war. Specifically, Congress should extend the President's amnesty program—which ended at midnight March 31—for the thousands of young men who evaded the draft or deserted the military during the conflict.

The need for congressional action is clear. Last September, President Ford took the constructive step of establishing a program to provide amnesty for thousands of young men who, for one reason or another, felt the need to refuse the draft or desert the military during the war. In creating that program, the President recognized, as we all should, that the interests of society were served

best when its system of justice reflected a good measure of understanding and mercy.

Already there is enough experience under the President's program to demonstrate that point. One representative case considered by the Clemency Board created by the President, for example, involved an individual who had served valiantly with the Army in Vietnam for almost a year.

He was wounded three times and was awarded three Purple Hearts, the Vietnam Service Medal and the Bronze Star for Valor. After he was reassigned to the United States, his father went bankrupt because of a drinking problem and his family generally fell upon hard times.

He consequently returned home without Army authorization to earn money to help his parents and seven brothers and sisters. Despite these circumstances, the man was fined, sentenced to six months at hard labor, and given a bad-conduct discharge by the Army.

The problem here is that under the most recent executive order every eligible draft evader and military deserter had to apply for clemency before April 1. After that, there is no institutionalized opportunity for an eligible individual to seek the clemency he may deserve. This is most unfortunate.

Of the approximately 125,000 men eligible to apply for clemency, fewer than 20,000 took advantage of the opportunity. We do not know all the reasons that may account for the unwillingness or inability of eligible individuals to apply. But we do know that the spirit of reconciliation will be undermined if the opportunity for those individuals to receive mercy is withdrawn forever.

Congress should not expect the President alone to continue to bear the burdens of the amnesty program. Congress, after all, repeatedly voted billions of dollars of public funds for the war. Congress thus assumed some responsibility for the conduct of American policies in Vietnam. Congress should now accept some responsibility for ending the divisiveness that the war created.

A bill has been introduced to continue the amnesty program, with certain modifications, including the following:

The Clemency Board would have jurisdiction over all cases of draft evasion and military desertion during the war. The President's program was operated by four separate departments, with the result that different agencies were applying different criteria to people in similar situations.

Any Vietnam draft evader or military deserter living abroad should be given a 30-day nonimmigrant visa at least once a year to allow for family visits. We should not compound the heartaches of the war by prohibiting a family from seeing a son, especially when his alleged offense may be based on moral principle or some other compelling reason.

All deadlines for application would be eliminated. There is no sense in making this process a continuous race to beat the clock.

There are indeed broad disagreements among people about the merits of the President's amnesty program. At some point Congress is going to have to resolve the question of unconditional amnesty. But in the meantime we should not allow thousands of youg men to become the unintended victims of our disagreements. Time is running out for them.

STATEMENT OF C. A. MCKINNEY, DIRECTOR OF LEGISLATIVE AFFAIRS, NON-COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES OF AMERICA

Mr. Chairman and distinguished members of the Subcommittee: On behalf of more than 170,000 members of the NON COMMISSIONED OFFICERS ASSOCIATION of the USA (NCOA), of which nearly 145,000 are active Non-commissioned and Petty Officers of the U.S. Armed Forces, I appreciate the opportunity to submit the following statement relative to pending legislative proposals before the Subcommittee on amnesty and/or clemency for Vietnam-era draft evaders and military deserters.

In March, 1974 the NCO Association's representative appeared before this very same Subcommittee on an identical issue. Our position then remains the same. We continue to oppose the granting of unconditional or general amnesty or clemency to those who shirked their lawful duty during the Vietnam hostilities. Our position has been mandated by the Association's membership assembled in International Convention in 1973, and reiterated by succeeding assemblies in April, 1974 and April, 1975.

First of all, the NCOA believes that Congress has no right under the Constitution to assume the power granted to the Chief Executive of the United

States. Article II, Section 2, clearly defines the right of the President to "grant reprieves and pardons for offenses against the United States."

Congress defines and makes the rules, Congress changes the rules, but, except for impeachment proceedings, Congress we believe does not have the authority to stand in judgment of those who break the rules.

Secondly, the NCOA believes that Congress must support its previous mandates under law. Persons refusing to submit to, or violating those laws must be processed through the judiciary system as defined in Article III of the Constitution.

At this point, it is only fair to state that the Association's membership has very strong feelings concerning the future status of draft evaders and military deserters; however, we recognize the validity of the judicial system as established by the Constitution—and that no man is guilty until that guilt is proven under due process of law. Therefore, we make no overtures as to the alleged offenders' guilt or innocence. This is the exclusive property of our federal courts. Additionally, the NCOA does not intend to even remotely suggest that the offenders must be punished. Here again, this is the exclusive jurisdiction of the federal courts.

Finally, the NCOA cannot sympathize with the violent and bleeding heart attitudes of many Americans who support amnesty or clemency in any degree. The Vietnam conflict, as any war, was a nasty experience. Those who participated died, bled, and suffered as their brothers, fathers, and ancestors before them. And as their brothers, fathers, and ancestors, went to war because their government decreed that they do so. Most of them were not heroic. They were not interested in seeing the horrors of war, or in having to possibly kill their earthly brethren. But they served nevertheless, and those that served did so to keep this Nation free and unencumbered so that their fellow citizens could voice their objections to further wars.

Unfortunately, the objections failed to materialize earlier in World War II and the Korean conflict. It was only after Americans grew tired of a no-win policy in Vietnam, and of having the war and its horrors brought into their homes that they finally protested.

Perhaps Congress is now feeling the twinges of conscience and now wishes to forgive those who did not want to fight in what some call "an unpopular war." But how can Congress forgive those who did participate? Were our GIs guilty and the others innocent? It appears that the pro-amnesty (or pro-clemency) group believes the Vietnam war was so terribly wrong that those who shirked their duty were on the side of right. What a sad commentary for those who believe in their Country and respect its laws—the very same laws defined and enacted by this legislative body.

Can we afford to perpetrate a mockery of Congress, of our laws, of our system of government? Can we in good conscience and belief in democracy cancel the sins of those who literally spat upon this body, our laws, and the system? We say, "No!"

The laws must be enforced. The system of checks and balances written into our Constitution must stand resolute—and it is the duty of every American to insure that our government stands firm in treating all men equal.

The granting of amnesty or clemency, as defined in the legislative proposals before this panel, would be a ridicule of justice for all. We sincerely hope that Congress in its wisdom will not permit such a mockery to persist or exist in "the home of the brave."

Thank you.

STATEMENT OF JAMES M. WAGONSELLER, NATIONAL COMMANDER, THE AMERICAN LEGION

Mr. Chairman, and members of the subcommittee: The American Legion upon learning that subcommittee #3 would hold hearings to discuss the results of President Ford's clemency program which expired on March 31, 1975, requested the opportunity to offer testimony in person. Had the hearings been limited to Government witnesses, we would not have requested to appear. However, we feel that the selection of "public witnesses" was not balanced by opposing views such as those represented by our organization. We truly regret that those organizations and individuals who have demanded nothing less than a sweeping program of general amnesty are afforded the opportunity to appear, while organizations who oppose this plan are deferred until "later in the session". The American Legion sincerely hopes that no substantive recommendations on the amnesty or clemency programs are made by the subcommittee until all responsible spokes-

men from the private sector have been given the opportunity to personally appear and present their views.

As the largest of all veterans organizations, whose membership numbers more than 2,700,000 honorably discharged men and women, we are deeply concerned with the present and long-range effect of legislation being considered. The more than half-a-million Vietnam veterans who belong to the American Legion have more than a passing interest in the treatment of men who chose to cut and run rather than to obey the existing law of the land enacted by the Congress of the United States.

As the subcommittee is aware, the American Legion consistently opposed general amnesty for draft evaders and deserters, and has recommended that the handling of the cases of deserters and draft evaders should be by existing judicial systems. While we did not agree with the program which President Ford established, the American Legion did not advise young men not to enter the program nor did we place roadblocks in its path. We still believe, however, that the national interest will best be served by an individual review of each case by the existing judicial process.

On September 16, 1974, in his remarks announcing Presidential Proclamation 4313, Mr. Ford said the purpose of the clemency program was "to give those young people a chance to earn their return to the mainstream of American society". We feel the President's program has indeed provided an ample opportunity to those young men desiring to avail themselves of its provisions. We emphatically oppose the liberalization or reopening of the Presidential clemency program which terminated on March 31, 1975, after 197 days of operation.

The American Legion acknowledges the oversight responsibility of this subcommittee on the clemency program, but we question claims that there is a massive public outcry for immediate executive or presidential action on amnesty. Of far greater national concern is the depressing unemployment among the Vietnam-era veterans, and this requires immediate national attention and action. The plight of 537,000 unemployed Vietnam-era veterans is certainly disconcerting. But, the 17.5% unemployment rate among these veterans in the 20–24 age group certainly demands immediate action. This rate of unemployment is 3% higher than the rate for non-veterans. The American Legion is proud that more than 500,000 of its members based their eligibility on service in the Vietnam era. In correspondence and conversations with many of them throughout the country, I can attest that their concern is for the serious problems facing them, and not for the reinstatement of those who chose not to serve.

Our position of individual disposition of each case by existing judicial authority asks that each person be given "his day in court". Many of those who propose unconditional amnesty suggest that those who did not participate in the President's clemency program are now "left out in the cold" and unable to productively reenter American society and without any legal redress. This is patently false, for just the opposite is true. Of the 99,000 young people who did not formally accept or reject the program, and the additional 20,000 possible eligibles identified by the Department of Defense, over 108,000 of this 119,000 (more than 90%) have the right to immediate or eventual appeal (in the cases of the 3,855 deserters still at large) to the existing system of reviews established by 10 USC 1552 and 1553. Moreover, a vastly larger number of veterans of the Vietnam era who received less than honorable discharges have these same rights. The jurisdictions of the Respective Boards Empowers them to correct any errors or remove any injustices in a claimant's military records in the case of the corrections boards, and to change, correct or modify any discharge based upon the facts presented to them in the case of the discharge review boards. Obviously, the draft evaders are afforded their "day in court" upon apprehension or surrender and have the traditional appeal rights afforded by our judicial system. As a matter of information, only 33% of those prosecuted in FY 1974 for selective service violations were convicted, and only 7% of those were sentenced to prison terms. One point should be reemphasized in regard to both the military deserters and draft evaders—they broke the law. Irrespective of the loftiness or baseness of their individual motives, each of these young people bears the risk of paying the penalty for the law which he violated.

Since the scope of this subcommittee's review has been expanded to include the legislation pending before it, we wish to comment on H.R. 353, H.R. 1229, H.R. 2230, H.R. 2568 and H.R. 2852. Each of these proposals would establish unconditional amnesty in one form or another and we oppose their enactment. In addition to our very deep ideological opposition to these proposals, we feel

that any amnesty program would seriously impair our future ability to raise and maintain military forces in time of war or serious national emergency. While the all-volunteer force has fulfilled its quotas at the currently low force levels, even its strongest advocates realize that conscription would be necessary to raise and sustain the levels required for wartime. We also oppose S. 1290 which would liberalize and extend the clemency board. Of particular concern is section 8 of S.1290 which would create entitlement to veterans benefits for those who participate in the program. Presidential Proclamation 4313 specifically states that the "clemency discharge shall not bestow entitlement to benefits administered by the Veterans Administration." We, therefore, strongly oppose the possible impact of Section 8 of S.1290 on entitlement to veterans benefits.

In summary, the American Legion believes that the overwhelming majority of young people to whom President Ford offered the chance to earn their way back into American society were aware of the clemency program. Many did not participate because of personal reasons; others, the draft evaders in particular, feel that it is not enough. However, they still have available equitable and individual reviews of their respective situations within the existing judicial systems and before the discharge review boards and the boards for the correction of military records.

We oppose any liberalization and extension of the clemency program in any form, and any legislation or executive action which would establish general or unconditional amnesty.

STATEMENT OF F. P. JONES, DIRECTOR, NATIONAL SECURITY AND FOREIGN AFFAIRS, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. Chairman: 1a. On behalf of Mr. John J. Stang, National Commander-in-Chief of the 1.8 million members of the Veterans of Foreign Wars of the United States, whose continuing mandate to oppose "amnesty" is, I would judge, well known to you and to other members of the Subcommittee, I appreciate this opportunity to place the relevant views of the V.F.W. into the record.

b. As to your wide consideration of the notion of "amnesty"—as opposed to "clemency" or "leniency"—the views of the V.F.W. opposing "amnesty" can be summarized as follows:

"Unconditional amnesty" would constitute class action legislation (by a Congress) or a decree (by a President) which would equal mass burial of due process of the law. Judicial findings in light of individual circumstances would never see the light of day. A general "amnesty" would define the word "prejudicial."

"Amnesty" on its merits breaks down badly in terms of (1) equity; (2) precedent, and, (3) faith in the efficacy of our home-grown system of justice —and whatever else may or may not be wrong with the United States, American justice (properly prodded by a free press) is doing just fine.

I have had the opportunity to argue against "amnesty" before a variety of audiences, both local and national. During these debates with hard-core pro-"amnesty" proponents, my conviction has grown that for many in these groups (ACLU, Clergy and Laity Concerned, Pacem in Terris, Am-Ex, etc.), the name of their game is to force America into an act of collective contribution for our country's manifold "sins." The people concerned—draft dodgers, deserters, "bad" paper discharges, and jailed resisters—are but ideologically convenient and congenial props for pulling off multiple (and media-conscious) happenings designed to challenge and dilute values that most non-vocal citizens hold dear beyond the telling of it.

c. As to "clemency," some have claimed that President Ford's recently ended "clemency" program is faulty in that it has been tested in the marketplace and found wanting. I suggest this is not the point.

If numbers on this issue could be equated to sales goals or recruiting objectives, this view would be unarguably correct. I suggest, rather, that "success," or lack of it, on the "clemency" (ne "amnesty") issue turns on other criteria: (1) the integrity of our on-going systems of civil and military justice; and, (2) the persistent conviction that no American need expect more, nor settle for less, than his fair day in court.

I have argued the case against "amnesty" widely in this country and in Canada. In so doing, I have never speculated about the motivation of those who dodged or deserted. In my travels and debates, however, one aspect of this issue has

been constant; i.e., the ideologically-motivated near paranoia of some proponent groups calling for general "amnesty."

The public taunting by an ACLU spokesman of Clemency Board Chairman Charles Goodell—once a folk hero to the ACLU—was as close to a blood sport as I have observed on this bitter issue.

While the V.F.W. has disagreed with certain aspects of the President's "clemency" proposal, we have not, nor will we, impugn either his or Chairman Goodell's motivation or sincerity. They did not fail those eligible to come forward; these unhappy people, and more particularly their proponent groups, need the "amnesty" issue. The rest of us don't.

This country has a plateful of real problems to work on; the self-preening and divisive issue of "amnesty" has been center stage for far too long. *Again, no American should expect more, nor settle for less, than his fair day in court.*

2a. I understand that your Subcommittee will consider, *inter alia*, S. 1290, introduced in the other body on March 21, 1975 by Senator Nelson, for himself and for his colleague, Senator Javits.

b. This draft legislation entitled "Clemency Board Reorganization Act of 1975" contains a number of distressing and unwise features.

c. These features, and the V.F.W.'s sharp objections to them, follow:

(1) *S. 1290 Stated Purpose:*

To reorganize the Clemency Board, the Department of Defense, the Department of Justice, and the Department of Transportation to provide fair and efficient consideration of all individuals eligible for amnesty relating to military service in the war in Southeast Asia, and for other purposes.

V.F.W. OBJECTION

The title of the proposed act is the "Clemency Board Reorganization Act of 1975," yet the purpose, cited above, introduces the unexamined and objectionable notion that certain individuals are "eligible for amnesty." The proposed act then goes far beyond its unexceptional title, stressing "reorganization," and accepts the germinal issue of "amnesty" *a priori*.

This, I would term, legislation by indirection; scarcely meeting the proper criterion of "the peoples' right to know."

(2) *S. 1290 Feature:*

Remove (see sec. 3 (a)) the Department of Defense from any further role in the processing of eligible military deserters.

V.F.W. OBJECTION

The number of military deserters who entered the now ended Clemency Program was far higher than either the number of convicted or unconvicted draft dodgers. The military processed these returnees at either Camp Atterbury or Fort Benjamin Harrison with professionalism and admirable restraint. No "hassles" were reported. The thanks, then, that the only "successful" component of the just ended program receives is to be eliminated from the proposed successor program.

(To assure no misunderstanding here, the V.F.W. is *not* applauding any component of the Clemency Program, but facts are facts. The military did its part of the overall job with far greater "success" than did Justice, Transportation, or the Clemency Board.)

(3) *S. 1290 Feature:*

The envisioned Clemency Board (sec. 4(b)) may recommend to upgrade punitive and undesirable discharges all the way to "honorable."

V.F.W. OBJECTION

There is a mechanism efficiently meeting this problem area called the "Discharge Review Board." Related problems are considered by the Service Secretaries' "Boards for the Correction of Military Records." Giving a highly political board this power would undercut a professional mechanism that is doing the needed job without divisive, ideologically-motivated pyrotechnics.

(4) *S. 1290 Feature:*

Section 5 (a) gives draft dodgers and military deserters living abroad extended immunity while the indvidual decides whether or not he decides to enter the program. If he decides not to sign up he is free to return to Canada or elsewhere without prosecution.

V. F. W. OBJECTION

Shatters the integrity of the law. Substitute the words "possible income tax evasion" for "possible draft evasion" and see where that leads one. *This objection applies with even more force to the "freebie" 30-day annual non-immigrant visa issued to these individuals whether or not they evince even the slightest interest in the envisioned program.*

(5) *S. 1290 Feature:*

Section 6 permits people who have renounced U.S. citizenship to regain U.S. citizenship by renouncing citizenship of the foreign nation concerned and pledging allegiance to the United States.

V. F. W. OBJECTION

This feature makes our most priceless possession—our American citizenship—the result of a cynical, revolving-door, shell game.

(6) *S. 1290 "Veterans Benefits"*

Section 8 envisions DOD or VA to review to determine whether "clemency" dischargees should be eligible for VA benefits.

V. F. W. OBJECTION

A sickening inference that VA benefits, the honorably achieved result of honorable military service ("For Those Who Have Borne the Battle; Their Widows and Orphans") become nothing more than a welfare handout to those who in the vast majority of cases *did not* "bear the battle;" rather avoided it.

3. In sum:

"Amnesty" is an artificially-inflated issue in that our on-going systems of civil and military justice have inherently those qualities of equity, perception and compassion easily adequate to weigh the legal disabilities draft dodgers and military deserters brought on themselves.

The "amnesty" issue has been embarrassed by the near paranoid quality of many of its proponent groups.

This Subcommittee has a unique opportunity to return the artificially-inflated "amnesty" question to its proper proportion by moving on to other issues which far more directly touch the lives of millions of Americans.

One final throught placed to the Subcommittee in question form.

Was S. 1290 either conceived and/or drafted by a person or persons connected with President Ford's Clemency Board?

(This point must be honestly aired.)

Thank you.

STATEMENT OF REVEREND ROBERT NEWTON BARGER, PRESIDENT, COMMITTEE FOR A HEALING REPATRIATION, CHAMPAIGN, ILL.

FORD'S CLEMENCY—A MISCARRIAGE OF MERCY

STATEMENT TO THE HOUSE JUDICIARY COMMITTEE, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE, FOR THE RECORD OF ITS ADMINISTRATIVE HEARINGS ON THE RECENTLY EXPIRED EXECUTIVE CLEMENCY PROGRAM—WEEK OF APRIL 14, 1975.

Mr. Chairman and members of the subcommittee. Having been invited to testify before your legislative hearings on amnesty in the last Congress, I would like to take this opportunity to make several observations on the executive clemency program offered subsequent to those hearings. I do this from the background of a University of Illinois ethics course instructor, author of a book on amnesty (*Amnesty: What Does It Really Mean?*) and president of a non-profit amnesty-education organization.

Genesis. On August 18, 1974, an op-ed piece was published in the Sunday *New York Times* in which I made the following comment: "Granted that the situation of Mr. Nixon and the war resisters are different though containing many parallels, for all the alienation involved on both sides perhaps we should grant an amnesty in both cases and call it a draw." On the next day, with pencilled-in remarks to the V.F.W. convention, President Gerald R. Ford first publicly indicated his intention to give clemency to the war resisters. Later, on September 8,

1974, he proclaimed a full, free and unconditional pardon for Mr. Nixon, recommending transition expenses for him of $850,000.00. Finally, on September 16, 1974, he inaugurated the "earned re-entry" program for resisters who would acknowledge their error and agree to serve twenty-four months in the "lowest paying jobs possible."

Evaluation. The executive clemency program was apparently intended to serve two values which are in the public interest: justice and mercy. But the hastily-assembled plan with its multiple administrative agencies was, from a practical viewpoint, a failure, and from a moral viewpoint, a miscarriage of mercy.

1. The response to the clemency program was "underwhelming." Vernon E. Jordon, member of the Pesidential Clemency Board, is reported to have stated that the program was not a success because at least a fifty percent response would be needed to have made it a success, and the response was far short of that.

2. The program was fraught with objectionable conditions. The equivalent of a confession was explicitly required of deserters and implicitly required of draft evaders. Participants were required to do twenty-four months public service work at bottom-of-the-scale wages, with time reduced for mitigating circumstances. It has been contended that the Department of Defense was significantly more restrictive as regards these circumstances than the other agencies involved.

3. Participants were required to waive certain constitutional rights, e.g., due process, double-jeopardy, self-incrimination, etc. It is surprising to me that they were not also required to waive their constitutional guarantee against involuntary servitude, since the Thirteenth Amendment to the United States Constitution clearly states: "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."

4. There was a lack of parity in assignment of alternative service. It has been contended that U.S. Attorneys in certain Districts imposed nothing less than the maximum twenty-four months of service, at least in the first part of the program, while Attorneys in other Districts were more discretionary. Deserters had the advantage of "the loophole" as a means of avoiding alternative service without fear of prosecution.

5. The program was seriously limited in coverage. War-related protest such as destruction of one's draft card or draft files, protest leafletting by service personnel, and other activities that would not be crimes in a civilian context are not covered by the program. Many discharges, such as those issued for reasons of "inaptitude" or "unsuitability" are not subject to review under the clemency program. In a number of areas of the program appeal procedures are inadequate or totally lacking.

6. The program was seriously limited by time. Opportunity for application extended for only six and one half months. Offenses must have occurred during the time period August 4, 1964 to March 28, 1973.

Recommendation: As I told this honorable subcommittee last year, forgetting cannot be partial, grace cannot be conditional, mercy cannot be strained. The only kind of clemency that can achieve the reconciliation that our nation needs is a non-judgmental and non-punitive one, one that neither exonerates nor condemns. And the only kind of clemency that meets these specifications is a universal and unconditional amnesty. Amnesty (in contradistinction to pardon) is, by constitutional foundation and legal precedent, a congressional prerogative. Now that the executive program has been tried and found wanting, I pray the Congress to do its part to bring our country a healing repatriation.

REV. ROBERT NEWTON BARGER.

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