

AMNESTY FOR DRAFT EVADERS?

THE PROPOSED LEGISLATION OF SENATOR ROBERT TAFT, JR.
AND CONGRESSMAN EDWARD KOCH

I. INTRODUCTION

Just as the pentagon has formulated contingency plans for the return of the POW's, Congress must give thought to preparing the structure by which amnesty will be granted. I can only hope that such a plan will not seek punishment or retribution, but has as its guide compassion. Valerie M. Kushner, wife of a prisoner of war.¹

A dilemma confronting the United States as the war in Vietnam de-escalates is what is to be done with those young American men who, for reasons of conscience, bad advice, or whatever, chose illegal alternatives to military service in that war.² To resolve this dilemma, legislation has been introduced into both houses of Congress which would grant amnesty to those men who evaded the Selective Service law during the course of the Vietnam war.³

The motivation upon which the legislation is founded entails a compassionate desire to reunite these young men with their families, communities, and country. The legislators who support the

1. *Amnesty: Repatriation for Draft Evaders, Deserters*, 30 CONG. Q. WKLY. REP. 506, 508 (March 4, 1972) (remarks of Mrs. Kushner).

2. Draft evasion, as an illegal alternative to military service, primarily entails either failure to register with the Selective Service System or failure to accept induction into the armed forces when called. The offense subjects the evader to a maximum sentence of five years in federal prison and/or a fine of \$10,000. 50 U.S.C. App. § 462(a) (1970). The maximum sentence has been held not to be cruel and unusual punishment and many courts have not hesitated to invoke it. *Quaid v. United States*, 386 F.2d 25, 27 (10th Cir. 1967); *United States v. Weissman*, 434 F.2d 175, 180 (8th Cir. 1970), *cert. denied* 401 U.S. 982 (1971); *United States v. Shunk*, 438 F.2d 1204, 1205 (9th Cir. 1971). Draft evasion cases are determined within the jurisdiction of the civil, as opposed to military, courts. *Billings v. Truesdell*, 321 U.S. 542, 558 (1944); *United States v. Farinas*, 448 F.2d 1334, 1339 (2d Cir. 1971).

3. Amnesty proposes a full pardon to a class of offenders without regard to personal identities or particular circumstances. D. Jones & D. Raish, *American Deserters and Draft Evaders: Punishment or Amnesty?* 13 HARV. INT'L L.J. 88, 113 (1972). The distinction between amnesty and pardon is of no practical significance. *Brown v. Walker*, 161 U.S. 591, 601 (1896).

amnesty proposals challenge the nation to be "strong enough to be compassionate and understanding"⁴ They argue that the means for displaying this compassion is amnesty. The amnesty need not, however, be proposed out of "remorse or of sympathy. It would simply be offering a practical solution to what is or should be a national concern . . . ,"⁵ the healing of our national wounds. It is a means of restoring "harmony to our society and unity to our nation"⁶ by returning potentially valuable citizens to work toward its progress and development⁷ while offering to the nation's youth a demonstration of humanity by the government.⁸

The questions which must be answered affirmatively following this most divisive war are whether the nation will offer the draft evader the "opportunity to be reunified with our American society"⁹ and whether the nation "wants to offer reconciliation to a generation of young Americans."¹⁰

II. THE EXTENT OF THE PROBLEM

On March 6, 1972, Senator Taft demonstrated the extent of the draft resistance movement in this country by presenting fig-

4. 118 CONG. REC. 33,3341 (daily ed. March 6, 1972) (remarks of Senator Taft).

5. *Id.*

6. See note 1 *supra* at 507 (remarks of Mr. Henry Steele Commanger).

7. 117 CONG. REC. 18,21589 (daily ed. December 14, 1971) (remarks of Senator Taft).

8. The reasons for amnesty are further reinforced by the fact that such would be responsive to the public will. A recent public opinion survey showed 71% of those polled favored the return of the draft evaders through some form of amnesty. *A Poll; How the U.S. Feels About Amnesty*, NEWSWEEK, January 17, 1972, at 20. Senator Taft has pointed to widespread editorial support by the nation's press for some form of amnesty. 118 CONG. REC. 2,50-59 (daily ed. January 19, 1972) (remarks of Senator Taft). Amnesty also appears compatible with the views of national leaders. In a recent CBS television interview President Nixon stated, "I, for one, would be very liberal with regard to amnesty, but not when there are Americans in Vietnam . . . and not while POW's are held in North Vietnam." Having voiced this support, the President did go on in apparent contradiction to state that "[I]t would have to be on the basis of their paying the price, of course, that anyone should pay for violating the law." 118 CONG. REC. 33,3344 (daily ed. March 6, 1972) (text of the CBS interview). The democratic presidential nominee, Senator George McGovern, has supported amnesty unequivocally. 117 CONG. REC. 164,17375 (daily ed. November 2, 1971).

9. See note 7 *supra* at 21588.

10. See note 1 *supra* at 507 (remarks of Senator Kennedy).

ures to Congress showing five hundred draft "resisters" in federal prisons, an additional 3900 under federal indictment, and perhaps 70,000 young Americans living abroad to avoid the draft.¹¹ Others have placed the number of "resisters" living abroad as high as 100,000 but have failed to distinguish between draft evaders and deserters from the armed forces.¹² More conservative estimates discount those figures as being far too excessive, even if deserters are included.¹³

There is simply no accurate guide to the number of draft evaders. This is partially due to two factors: the nature of the problem of determining exactly how many men have failed to perform a positive duty of registration with the Selective Service and a lack of precision in the use of the term "draft evader" which is here defined as one who has refused to register with the Selective Service System or has refused induction into the armed forces.¹⁴ But the figures used by many when discussing "draft resisters" also include deserters from the armed forces as well as men who have duly registered with the Selective Service System, but then fearing the draft, have fled the country or gone into hiding while in fact they have never been called for induction and have not committed the offense of refusing induction.

While it is apparent that the class of draft evaders numbers in the thousands, many more of our citizens are affected than any estimate of the number of evaders alone can reveal. Any realistic measurement of the division and alienation created by the problem must include the number of wives, relatives, and friends who have been separated from the men or who have followed them into exile.¹⁵ Indeed, the dilemma is a "major phenomenon-and a deeply tragic one."¹⁶

In a real sense the actual numbers become immaterial when it is fully realized that a great many Americans chose prison or exile rather than involvement in a long and divisive war. Many more who wish to see their return and an end to the alienation have been left behind. The evader has thus become a symbol to many of the divisions in this country; his return is seen as a chance for reconciliation. In direct contradiction to this need and desire

11. See note 4 *supra*.

12. See note 1 *supra*; *Pardon for Draft Dodgers, Deserters*, U.S. NEWS AND WORLD REP., March 13, 1972, at 68.

13. *They Can't Go Home Again*, NEWSWEEK, July 20, 1970, at 88.

14. 50 U.S.C. App. § 462(a) (1970).

15. See note 13 *supra*.

16. *Id.*

for reunification is the fact that the present impact of the law constitutes an effective bar to the return of the evader.¹⁷

III. CONGRESSIONAL ACTION ON AMNESTY?

If amnesty is to be granted to the draft evaders of the Vietnam war, the question remains from what authority should the amnesty come? There can be no doubt that the President has the power to grant amnesty.¹⁸ The precedents for presidential action are numerous.¹⁹ Presidential action is indeed possible as President Nixon has indicated that he favors some form of amnesty;²⁰ however, accepting the rationale for amnesty as being a desire to reunify the country, congressional action is more desirable. The debate concerning the war in Vietnam has often involved charges of over use and misuse of presidential power coupled with a failure to consult with Congress. This opinion among many has added to the divisions in the country and has resulted in much bitter criticism directed at the personality in the White House.

17. The evader who fled the country will face criminal charges no matter when he returns if the effect of the law remains unchanged. 18 U.S.C. § 3290 (1970) (there is no Statute of Limitations for persons fleeing from justice); *Fogel v. United States*, 162 F.2d 54 (5th Cir. 1947), *cert. granted*, reversed on other grounds, 335 U.S. 865 (1948); *McGregor v. United States*, 206 F.2d 583 (4th Cir. 1953) (both holding that continuing failure to register with the draft is a continuing offense); but see *United States v. Toussie*, 280 F. Supp. 473 (E.D.N.Y. 1967) (here holding that a five year limitation does apply). It is highly unlikely that the expatriate evader would voluntarily return to confront such continuing charges. Additionally, extradition from either Canada or Sweden does not appear feasible. D. Jones & D. Raish, *American Deserters and Draft Evaders: Exile, Punishment or Amnesty?*, 13 HARV. INT'L L.J. 88, 106 (1972) (Neither the Swedish nor Canadian extradition treaties with the United States requires extradition . . . thus . . . the status of the deserter or the draft evader who wish to take refuge . . . turns on the discretion of the asylum state); and in any extradition proceeding the evader could plead that the offense for which he is wanted is political in nature and therefore non-extraditable. Tate, *Draft Evasion and the Problem of Extradition*, 32 ALBANY L. REV. 337, 357 (1968).

18. U.S. CONST. art. II, § 2, states "[H]e shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

19. Many recent legal and non-legal publications have discussed the many precedents for presidential amnesty. For easy reference, a list of the precedents compiled by John C. Etridge of the Congressional Research Service, the Library of Congress, as been included in the Appendix.

20. See note 8 *supra* (text of CBS interview).

The reunification of the nation would be better served by congressional action which would be a more broadly based demonstration of a bi-partisan effort to heal the society's wounds. The power of Congress to so act is, however, less apparent than the presidential authority because there are fewer precedents; but precedents supporting amnesty legislation by Congress do exist, and the courts have affirmed the existence of such power.

In *Brown v. Walker* the Supreme Court held that "although the Constitution vests in the President power to grant reprieves and pardons . . . (that) power has never been held to take from Congress the power to pass acts of general amnesty."²¹ It is admitted that the Constitutional power of the President cannot be "limited" by legislative action, but neither is that power exclusive on the subject of amnesty. It is a power which is concurrent with Congress.²²

The Congress has exercised this power on occasion and has thereby established sufficient precedents. In 1865 Congress passed a conditional amnesty wherein it permitted deserters from the military during the Civil War to return to service within sixty days without punishment, or thereafter face the usual penalties for desertion.²³ In 1872 the legislature again acted with amnesty for many former rebels of the Civil War by lifting the political restrictions imposed on them by the Fourteenth Article of Amendments of the Constitution.²⁴ That amnesty, by excluding certain persons,²⁵ narrowed the class affected, but it nevertheless granted a general amnesty to many former rebels.

In 1884 Congress granted further amnesty to more former confederates by allowing their service on juries and in civil offices.²⁶ It again acted in 1896 to repeal the sanctions against former rebels which had denied them appointments to military commissions.²⁷ The last of the Civil War related congressional amnesties was enacted in 1898 by the *Universal Amnesty Act of June 6*, which removed *all* sanctions against *all* former rebels, returning them

21. 161 U.S. 591, 601 (1896).

22. *The Laura*, 114 U.S. 411, 414 (1885); *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 285 (1825).

23. Act of March 3, 1865, ch. 79, § 21, 13 Stat. 487, 490.

24. Act of May 22, 1872, ch. 193, 17 Stat. 142.

25. "[E]xcept Senators and Representatives of the thirty-sixth and thirty-seventh Congress, officers in the judicial, military, and naval service of the United States, heads of departments and foreign ministers of the United States." *Id.*

26. Act of May 13, 1884, ch. 46, 23 Stat. 21, 22.

27. Act of March 31, 1896, ch. 84, 29 Stat. 84.

to complete status as citizens.²⁸

It is significant to emphasize that Congress took an eminent role in the granting of amnesties in the post Civil War era when national divisions were most severe.²⁹ Those amnesties were intended to heal the social wounds and reunify the country. Although the congressional precedents are not so numerous as those involving the presidential power to grant amnesty, clearly Congress does have the power to act when the circumstances warrant.³⁰ The need at this time for an amnesty to be granted in a unifying, bi-partisan manner, requires congressional action.

IV. THE PROPOSED LEGISLATION

The Conditional Amnesty of Senator Taft

On December 14, 1971, Senator Robert Taft, Jr. (R. Ohio) introduced S. 3011, entitled *The Amnesty Act of 1972*, as a bill to offer conditional amnesty to those "[W]ho have failed or refused to register for the draft or who have failed or refused induction"³¹ The senator prefaced the introduction of the legislation with remarks reminding his colleagues that:

America is a strong country. America is a good country. And I believe that America is the type of country which will give these young men an opportunity to be reunited to the land of their birth by making valuable and positive contributions to our national life.³²

The Amnesty Act of 1972 would apply to those who have evaded the draft after August 4, 1964,³³ and would specifically exclude deserters whom Senator Taft believes must be dealt with in other

28. Act of June 6, 1898, ch. 389, 30 Stat. 432 (emphasis added).

29. An additional act of congressional pardon unrelated to the Civil war was enacted in 1893 when Congress granted amnesty to the class of persons required to testify before the Interstate Commerce Commission. The legislation stated that "no person shall be prosecuted . . . on account of any transaction, matter or thing, concerning which he may testify . . . before said commission." Act of February 11, 1893, ch. 83, 27 Stat. 443.

30. Some deny that the search for supporting precedents is relevant. This view sees the Vietnam war as "[U]nlike any in the nation's history" and therefore "perhaps no precedent should be sought." *The Pros and Cons of Granting Amnesty*, TIME, January 10, 1972, at 16.

31. S. 3011, 92d Cong., 1st Sess. (1971).

32. See note 7 *supra*.

33. See note 31 *supra*.

ways because they have broken a formal oath to the United States and because to pardon them would greatly disrupt the armed forces.³⁴

S. 3011 proposes amnesty for those who meet certain conditions.³⁵ The conditions would require that the evader present himself within one year of enactment to the administrative control of the Attorney General, or other presidentially designated official, for *three* years of alternate service to the United States either in the military or in a civilian pursuit such as Volunteers in Service to America (VISTA), a Public Health Service or Veterans' Administration hospital, or "other Federal service."³⁶ The choice between military or civilian service would be made by the evader who presumably would be allowed some discretion as to his specific field of endeavor and location of service subject to administrative direction based on national needs and the applicant's particular skills. He would serve at the lowest pay scale.³⁷

S. 3011 would also release from prison any person serving a sentence for evasion subject to his meeting the conditions of amnesty, with the provision that his time of alternate service would be reduced by the amount of time already served in prison, with a maximum reduction of two years.³⁸

This proposal would not, however, grant amnesty in the same manner in which Congress acted in the post Civil War era. The actual act of pardon would remain a function of the President, with S. 3011 serving technically only to express the "sense of the Congress."³⁹ It would be the sense of the Congress that the President grant amnesty to those members of the class evaders who within one year of enactment agree to serve their nation in some form of alternate service *and* then complete that service.⁴⁰ The proposal is thus an exercise of congressional authority coupled with a recognition of presidential power and seeks to involve both branches of government in any grant of amnesty.

Although no specific provision is included in the bill which would require that the amnesty be granted only after the cessation of the war in Vietnam, it is inherent in the proposal that the amnesty would not be granted until the completion of the al-

34. See note 4 *supra* at 3342.

35. See note 31 *supra* at 2.

36. *Id.*

37. *Id.*

38. *Id.* at 3.

39. *Id.* at 4.

40. *Id.*

ternate service and the meeting of all conditions. Thus, for the vast majority of evaders, the amnesty would not be granted for a minimum of three years after enactment, and for those relatively few who have served in prison for two or more years, amnesty would follow no earlier than one year after enactment.⁴¹ Given these time elements, and the announced policy of the Nixon administration to disengage from the war, it would appear unlikely that amnesty would be granted before the end of significant American involvement in Vietnam.⁴²

The Conditional Amnesty of Congressman Koch

On January 18, 1972, Congressman Edward Koch (D.-N.Y.) displayed bi-partisan support for conditional amnesty for draft evaders by introducing H.R. 12417.⁴³ The Congressman summarized his position by stating that:

It is time that our country put aside its differences and lay to rest the acrimony that has consumed us. Instituting this conditional amnesty that demands some compromise from everyone would be a step in this direction.⁴⁴

H.R. 12417 is essentially identical to S. 3011 in that it calls for alternate service for draft evaders as a condition for receiving amnesty from the President.⁴⁵ A significant difference is that Congressman Koch proposes only *two* years of alternate service believing this to be appropriate because two years is the length of service presently required of conscientious objectors.⁴⁶

An evader who has served time in prison could have his alternate service time reduced by up to one year,⁴⁷ leaving him a minimum of one year of service as is required under S. 3011.⁴⁸

41. Practical considerations involving the establishment of the amnesty program would undoubtedly delay the beginning of the alternate service for some time after enactment. This would further delay the *actual* date of amnesty.

42. At present no hearings have been held on S. 3011. Letter from Senator Taft to author, June 20, 1972.

43. 118 CONG. REC. H 68 (daily ed. January 18, 1972) (remarks of Congressman Koch).

44. *Id.*

45. H.R. 12417, 92d Cong., 2d Sess. (1972).

46. See note 43 *supra*.

47. See note 45 *supra*.

48. On January 26, 1972, Congressman Koch introduced additional legislation. This bill would state the approval of the Congress for any am-

V. OPPOSITION TO THE PROPOSED AMNESTY

Although at present there have been no hearings directed specifically to the proposed legislation, the Senate Subcommittee on Administrative Practices and Procedures of the Judiciary Committee, Senator Edward Kennedy, chairman, has recently held wide ranging hearings on the Selective Service System in which testimony concerning amnesty was introduced.⁴⁹ That testimony reflected the potential objections to the Taft and Koch bills.

Arguments from Those Opposed to Amnesty

Timeliness: A universal objection from those testifying in opposition to amnesty was that any such proposal cannot be entertained until the end of hostilities and the return of our prisoners of war. This political reality was expressed by President Nixon when he stated:

As long as there are Americans who chose to serve their country rather than desert their country . . . and they are there in Vietnam, there will be no amnesty for those who deserted their country.⁵⁰

Such an objection is well founded. A granting of amnesty while a substantial number of American combat soldiers risk their lives in Vietnam and American prisoners of war remain in captivity would undoubtedly offend the basic sense of equity of the American people. It does not follow, however, that as the American involvement in the war diminishes, and as the consensus is reached that this war is truly unlike previous wars in that a definitive resolution occurring on a specific date may never come, that legislation cannot be enacted which begins the process today of reconciliation for tomorrow.

This is exactly what the proposed legislation would accomplish. It is explicit in H.R. 12664 where Congressman Koch refers to the "cessation of hostilities."⁵¹ It is implicit in S. 3011 and H.R. 12417 when the authorization for the President to grant amnesty is made contingent upon the *completion* of the alternate service which

nesty the President would wish to grant to any person who had suffered "legal disadvantages" as a result of illegal opposition to the Vietnam war. Congressman Koch is in effect stating that if the President should grant an amnesty, then Congress should sanction such amnesty. An important aspect of the bill is that it specifically supports amnesty only upon the "cessation of hostilities," a determination to be made by the President. H.R. 12664, 92d Cong., 2d Sess. (1972).

49. See note 1 *supra* (hereafter referred to as the subcommittee).

50. See note 8 *supra* (text of CBS Nixon interview).

51. See note 48 *supra*.

could not be done by the vast majority of the draft evaders in less than two years under the Koch proposal and three years under the Taft bill.⁵²

Therefore, although the objections concerning the timeliness of amnesty are valid, the present proposals answer these objections by presenting a compromise which would begin the reconciliation process upon enactment but withhold amnesty for a sufficient time to allow the total disengagement from the war. At the same time another reason to hasten the end of the war is provided.

Military Objections:

1. Deserters: On March 1, 1972, Maj. Gen. Leo E. Benade presented the position of the Department of Defense to the subcommittee concerning amnesty. "[A]ny amnesty to deserters at this time, whether general or particular . . . would have a serious detrimental impact on our armed forces."⁵³ This objection, directed at deserters only, does not affect the proposed legislation which deals with draft evaders only, and the military's position did not eliminate possible amnesty for deserters at the end of hostilities.

2. Danger to further inductions: A more immediate objection concerning the military came from Curtis W. Tarr who argued that amnesty for the evader would make it "difficult to justify the continuation of induction."⁵⁴ The argument is not impressive, however, when recent moves toward an all volunteer army and the decision by President Nixon to halt the use of draftees in Vietnam are considered.⁵⁵

Mr. Tarr was also concerned with the potential for the establishment of a dangerous precedent which would encourage future evaders of future drafts.⁵⁶ A precedent thus established might become an "unwelcome tradition" which would deny the United States necessary forces in future times of conflict.⁵⁷ But the historical precedents which show that it is indeed the tradition of

52. See notes 41 and 54, *supra*.

53. See note 1 *supra* at 509 (remarks of Gen. Benade) (emphasis added).

54. *Id.* at 507 (remarks of Mr. Tarr).

55. *The War: Giving and Getting*, *TIME*, July 10, 1972, at 18.

56. See note 1 *supra* at 507 (remarks of Mr. Tarr).

57. *Id.*

the United States to grant amnesty in post war periods refute this position. These past precedents have not hindered our ability to induct the necessary manpower for subsequent wars.

The more fundamental reason that these precedents have not been a hindrance to later inductions is the fact that the ultimate ability of the United States to fulfill its manpower requirements in times of war has not rested on the ability to enforce mandatory selective service laws, but rather in the basic willingness of the nation's young men to serve when the necessity has arisen. The manpower needs of the country have not been satisfied in the final analysis by a system of forced servitude, but by a voluntary acceptance of duty when the patriotic need has been evident. An amnesty today with the goal of national reunification will not be the reason future American armies are understaffed. If that is to occur, it will be because the government has failed to convince the citizens that the cause is just and necessary, or indeed, because the cause is not just and necessary and the young men so perceive it.

3. Damage to military and veteran morale: The military establishment⁵⁸ also believes that an amnesty for those who avoided military service would detrimentally affect the morale of those who are doing and have done their service.⁵⁹ The serious morale problem now confronting the army could worsen if bad feelings were engendered in those presently serving by seeing others who evaded service absolved of any duty. Under the proposed legislation, however, the soldier now serving would see the evader also serving his country. Of course, the alternate service does not carry with it the risk to life and limb which faces the soldier, but the conditions placed upon any amnesty by the proposed legislation do require valuable and potentially difficult service. This fact should lessen any possible resentment by those now serving and subsequently diminish the morale damaging aspects of amnesty.

A more solemn objection which affects the military is the highly emotional charge that "[A]ny amnesty . . . would make a

58. It should be noted that many veterans of the Vietnam war do not share the views of the Department of Defense in its opposition to amnesty. Many Vietnam veterans are now at the forefront of the amnesty movement. *Universal Amnesty*, THE NEW REPUBLIC, February 5, 1972, at 15, 16.

59. One could perhaps doubt that the present state of morale in the military, and in the army in particular, could sink below its present nadir. *The Outpost is a Shambles*, LIFE, March 31, 1972, at 28-33; *Armed Forces: Disorder in the Ranks*, TIME, August 9, 1971, at 21.

mockery of the sacrifices of those men who did their duty.”⁶⁰ It is the view that an amnesty for those who did not serve would be unjust to those who did, and particularly those who died. This position was most poignantly presented to the subcommittee by a Mr. Kelley, the father of a soldier killed in Vietnam. Mr. Kelley showed great bitterness toward the very fact that such an idea was being considered in the Senate while the fighting and dying continued and stated “[T]his committee would be better engaged in building a memorial to the 50,000 Americans who gave their lives in Vietnam.”⁶¹

This position perhaps cannot be reconciled by the supporters of amnesty. The relatives and friends of those who died in Vietnam may never believe that had a certain evader served as was his duty, their loved one might still be alive. This argument demonstrates that in an effort to heal the nation's wounds and to bring reconciliation to the country, others may be hurt and alienated.

It is this dilemma which the Taft and Koch proposals attempt to resolve. Most certainly no action can end the anguish of a Mr. Kelley. But the proposed conditional amnesty seeks the same goal for which men believed they died in Vietnam in that its motivation is the betterment of the American society through the ending of the deep divisions within this country. Already some of those deeply hurt by the Vietnam tragedy see the compatibility of the goals. Mr. Robert Ransom, another parent of a soldier killed in Vietnam, disagrees with Mr. Kelley. He believes that amnesty would bring “no dishonor” to his son for such a generous act would be compatible with the type of nation for which his son was willing to fight.⁶²

Law Breakers should be punished: A final objection to amnesty presented to the subcommittee is that the basic foundation of any government is compliance with the laws of the nation and a granting of amnesty to those who so knowingly and wilfully broke the law would be an affront to law abiding citizens.⁶³ “Obligations

60. See note 1 *supra* (remarks of Mr. Geiger, national commander of the American Legion).

61. *Id.* (remarks of Mr. Martin Kelley).

62. *Id.* (remarks of Mr. Robert Ransom).

63. *Amnesty, the Availability of Existing Procedures*, VITAL SPEECHES OF THE DAY, April 15, 1972, at 402.

of citizenship cannot be applied to some and evaded by others.”⁶⁴

This argument contradicts the very principle so long established in our body of laws which permits the granting of pardons for offenders when circumstances warrant. The best interests of this country are served by reunifying the society and benefiting from the alternate service of the lawbreakers. Those interests should not be sacrificed to a never yielding principle of punishment. Of course, a balance between generosity on one hand and upholding the sovereignty of the law on the other must be sought. This is the goal of the proposed legislation which attempts compromise by excusing certain violations of the law in exchange for service to the country.

Objections from Those in Favor of Unconditional Amnesty

The subcommittee also heard opposition to conditional amnesty from those who favor universal, unqualified amnesty for those who acted in opposition to the war in Vietnam. This opposition is based on the premise that attaching conditions to the amnesty is no amnesty at all. Some see the alternate service as a “punitive string”⁶⁵ which would entail some moral judgment by the country upon those who refused to serve when in fact it should be the right of the evader or deserter, who refused to take part in an “immoral” war, to pass judgment upon the country.⁶⁶ By this view the present proposals do not meet the “moral requirement.”⁶⁷ As a result, many of the men it would be hoped would be returned to this country by the conditional amnesty simply will not come.⁶⁸ This reasoning concludes that the proposed amnesty would thereby fail at its principle objective.

This view again demonstrates the intensity of the divisions on this issue and lends further importance to an attempt at reconciliation. But the attempt at unification cannot be made at the price of creating more divisions within the society; unconditional amnesty holds the great potential for creating even more wounds among those who have served but who would see others escape without any service at all.

The call for unconditional amnesty simply does not accept the political and social reality that there are many in this nation who

64. *Id.*

65. See note 1 *supra* at 508 (remarks of Mr. Timothy Maloney).

66. *Amnesty for the War Exiles?*, NEWSWEEK, January 17, 1972, at 19.

67. See note 58 *supra*.

68. See note 1 *supra* at 507 (remarks of Mr. Arlo Tatum); and see note 66 *supra* at 24, 25.

are adamantly opposed to a return of the evaders without some service to the country. The advocates of unconditional amnesty would accept a return of the evader at the expense of deep and understandable alienation of another segment of society.

What is needed is a commitment to the worthy goal of amnesty by the supporters of both sides. Those opposed to amnesty must realize that the alternate service is a non-punitive means of re-introducing into the American society those who have been separated. The evader himself must realize that the political reality of the day will not accept, and the goals of amnesty will not be served, by a rather pompous demand on his part to pass moral judgment upon the country as a condition for his return.

A final objection by some supporters of amnesty concerns the exclusion of the deserter from the class to be granted amnesty under the proposed legislation. This argument does not agree with Senator Taft that the distinction between the draft evader and the deserter, the fact that the latter has taken an oath, is of such significance as to require that the deserter be omitted from the proposed amnesty. Rather, the true distinction is seen as one of social class and father's income.⁶⁹ The evader is seen as generally from a higher economic strata with a more advanced education than the deserter.⁷⁰ The evader is one who was more attuned to his opportunities to flee the draft before induction, while the generally less educated deserter from the lower economic sector accepted induction without question or consultation with the campus draft counseling service and only later sought refuge from the war through desertion. This argument holds that the exclusion of the deserter from those affected by amnesty would be a discrimination in favor of the middle class, college educated draft evader.

This position has validity in light of the stated goals of reunification and compassion. While attempting to heal the nation's wounds, should we not attempt to heal them all? Would not the deserter also be capable of either returning to military service, as was permitted by congressional action in 1865,⁷¹ or to undertake al-

69. See note 1 *supra* at 508 (remarks of Mr. Mike Hendricks).

70. A. TATUM & J. TUCHINSKY, *GUIDE TO THE DRAFT* (1969), at 229.

71. See note 23 *supra*.

ternate civilian service for the betterment of the nation? There are sufficient precedents for granting amnesty to deserters as well as draft evaders, and the objections of the military which would be most vehement while the war is in progress need not discourage amnesty for the deserters at the end of the hostilities. Inclusion of the deserters in an amnesty proposal would best serve the stated goals of such legislation.

VI. CONCLUSIONS

It is apparent that the interests of national harmony and social reunification could well be served by the granting of amnesty to those young Americans who chose illegal alternatives to service in the war in Vietnam. Legislation which would establish the framework in which amnesty could be granted has been introduced into Congress. It would provide the means for Congress to accept responsibility for amnesty in a bi-partisan display of support.

The amnesty should pardon the class of individuals defined as draft evaders and military deserters. While the class deserters may be distinguished from the draft evaders in that the former have broken an oath to their country, the practical distinction may well be based more upon economic and educational differences which should not prevent one group from being given the opportunity to be reunited with their country. The determining factor for those who must decide whether to include deserters in any amnesty should be the realization that the goals of the amnesty would be best served by the inclusion of the deserters.

While it is evident that an amnesty can serve the interests of the country, it is imperative that the form of amnesty heal the wounds in the national fabric without creating new ones. There are sufficient precedents to support either conditional or unconditional amnesty with the final decision concerning the type to be granted dependent upon the particular circumstances. Today, amnesty conditioned upon service to the nation is the most practical means of returning the offenders to the American society⁷² while upholding the integrity of the law and avoiding the alienation of other important groups. The requirement of two years of alter-

72. This is not to deny that the establishment of programs for alternate service may encounter practical difficulties. These may range from bookkeeping problems to the type of motivational problem often encountered in low paying jobs. But this country has solved similar problems in past programs such as the Civilian Conservation Corps (C.C.C.) and the Works Progress Administration (W.P.A.). The potential value of alternate service should offset any initial drawbacks.

nate service as would be a prerequisite under the Koch proposal is founded upon a reasonable comparison, the length of service required of conscientious objectors, and avoids the stigma of service as punishment.

It is also evident that in order to avoid injustice to those presently serving in Vietnam or being held as prisoners of war, the conditional amnesty should become final only upon the cessation of hostilities.⁷³ The presently proposed legislation would hopefully have this effect by postponing the final grant of amnesty until the completion of the alternate service, but to insure clarity the final legislation should state that in no case would the amnesty be effective before Americans stop dying and serving prison terms in Vietnam.

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73. The term "cessation of hostilities" may be ambiguous because of the nature of the war in which a definitive resolution may never be reached. It has been defined by Congressman Koch as "the date on which the President shall declare by public proclamation, either that armed hostilities in Southeast Asia have ended, or that the level of United States involvement therein has been reduced to such a level as to justify the effectuation" of the amnesty. See note 48 *supra*.

APPENDIX*

COMPILED BY JOHN C. ETRIDGE, CONGRESSIONAL RESEARCH SERVICE

LIST OF AMNESTIES IN AMERICAN HISTORY, 1790, TO DATE
Date, Issued By, Persons Affected and Nature of Action:

July 10, 1795, Washington, Whiskey Insurrectionists (several hundred). General pardon to all who agreed to thereafter obey the law.

May 21, 1800, Adams, Pennsylvania Insurrectionists. Prosecution of participants ended. Pardon not extended to those indicted or convicted.

October 15, 1807, Jefferson, Deserters given full pardon if they surrendered within 4 months.

February 7, 1812, October 8, 1812, June 14, 1814, Madison, Deserters—3 proclamations. Given full pardon if they surrendered within 4 months.

February 6, 1815, Madison, Pirates who fought in War of 1812 pardoned of all previous acts of piracy for which any suits, indictments or prosecutions were initiated.

June 1, 1830, Jackson (War Department), Deserters, with provisions; (1) those in confinement returned to duty (2) those at large under sentence of death discharged, never again to be enlisted.

February 14, 1862, Lincoln (War Department), Political prisoners paroled.

July 17, 1862 (Confiscation Act), Congress, President authorized to extend pardon and amnesty to rebels.

March 10, 1863, Lincoln, Deserters restored to regiments without punishment, except forfeiture of pay during absence.

December 8, 1863, Lincoln, Full pardon to all implicated in or participating in the "existing rebellion" with exceptions and subject to oath.

February 26, 1864, Lincoln (War Department), Deserters' Sentences mitigated, some restored to duty.

March 26, 1864, Lincoln, Certain rebels (clarification of December 8, 1863 proclamation).

March 3, 1865, Congress, Desertion punished by forfeiture of citizenship; President to pardon all who return within 60 days.

March 11, 1865, Lincoln, Deserters who returned to post in sixty days, as required by Congress.

May 29, 1865, Johnson, Certain rebels of Confederate States (qualified).

* 118 CONG. REC. 33,336 (daily ed. March 6, 1972).

July 3, 1866, Johnson (War Department), Deserters returned to duty without punishment except forfeiture of pay.

January 21, 1867, Congress, Section 13 of Confiscation Act (authority of President to grant pardon and amnesty) repealed.

September 7, 1867, Johnson, Rebels—additional amnesty including all but certain officers of the Confederacy on condition of an oath.

July 4, 1868, Johnson, Full pardon to all participants in "the late rebellion" except those indicted for treason or felony.

December 25, 1868, Johnson, All rebels of Confederate States (universal and unconditional).

May 23, 1872, Congress, General Amnesty Law reenfranchised many thousands of former rebels.

May 24, 1884, Congress, Lifted restrictions on former rebels to allow jury duty and civil office.

January 4, 1893, Harrison, Mormons—liability for polygamy annulled.

September 25, 1894, Cleveland, Mormons—in accord with above.

March 1896, Congress, Lifted restrictions on former rebels to allow appointment to military commissions.

June 8, 1898, Congress, Universal Amnesty Act removed all disabilities against all former rebels.

July 4, 1902, T. Roosevelt, Philippine insurrectionists. Full pardon and amnesty to all who took an oath recognizing "the supreme authority of the United States of America in the Philippine Islands."

June 14, 1917, Wilson, 5,000 persons under suspended sentence because of change in law (not war-related).

August 21, 1917, Wilson, Clarification of June 14, 1917, proclamation.

March 5, 1924, Coolidge, more than 100 deserters—as to loss of citizenship for those deserting since W.W. I armistice.

December 23, 1933, F. Roosevelt, 1,500 convicted of having violated espionage or draft laws (W.W. I) who had completed their sentences.

December 24, 1945, Truman, Several thousand ex-convicts who had served in W.W. II for at least one year. (Proclamation 2676, Fed. Register p. 15409.)

December 23, 1947, Truman, 1,523 individual pardons for draft evasion in W.W. II based on recommendations of President's Amnesty Board.

December 24, 1952, Truman, Ex-convicts who served in armed forces not less than 1 year after June 25, 1950.

December 24, 1952, Truman, All persons convicted for having deserted between August 15, 1945 and June 25, 1950.