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Amnesty

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While amnesty advocates can cite numerous instances in history in which amnesty has been granted, in each instance it was more than likely a highly volatile political issue. The current problem is no different, and strong feelings will continue to persist even in the aftermath of the Vietnam war and the post-draft environment. Forgiveness is inherent in the American character, and it seems reasonable to expect that some sort of Presidential or legislative action will be taken. Whether the final result will favor limited amnesty, with violators paying a price, or complete absolution may depend on how soon the issue is settled.

AMNESTY: AN OLD GIFT IN NEW WRAPPINGS

A research paper prepared

by

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Historical Background. Late in the fifth century B.C., the Athenian defeat in the Battle of Aegospotami led to the final siege of Athens and her ultimate surrender to Sparta. Contrary to the wishes of several of her allies, Sparta decided to grant a reasonable peace, mainly on the basis that Athens had contributed considerably to the Greek general welfare during the Persian invasions which had preceded the Peloponnesian War.¹ The Athenians were thus permitted to maintain a form of self-government, though it was changed from the previous democratic format to one oligarchic in nature. The ruling oligarchy then purged those supporting a return to democratic rule, either by extermination or exile, and confiscated their property. One of those exiled, a former Athenian general, Thrasybulus, was able to lead a movement successful

in overthrowing the oligarchy. Thrasybulus then proclaimed: "... a complete amnesty for all that had happened during the suspension of democratic government, except in the case of the Thirty, . . . who were, however, to enjoy it too provided they gave an accounting for their acts before courts empanelled from property owners . . ."²

Not all amnesties are explicit. Following the Franco-Prussian War, extended negotiations over a treaty were further prolonged by French insistence of incorporation of an amnesty clause favoring French citizens who might otherwise have been subject to conviction for commission of offenses against the Germans during the German occupation.³ Bismarck, impatient at the delay this portended, insisted that any question of amnesty must remain "... a matter for imperial clemency volun-

tarily extended."⁴ Bismarck won his point, and the French agreed to come to terms without a specific amnesty provision, relying on a collateral "... request for the favor of the emperor."⁵

The amnesty granted by Thrasybulus in favor of the Thirty Tyrants was general in that it encompassed an entire class of offenders. The amnesty was also conditional in that it could be enjoyed only after the Thirty had fulfilled the conditions laid down by Sparta. Even though it may not be set out in a written contract, some form of amnesty or pardon is inherent in any peace agreement. Bismarck's refusal to incorporate a specific amnesty provision in the Treaty of Frankfort, instead implied the existence of a case-by-case approach to the pardon question, dependent upon "imperial clemency."

The subject of amnesty, or pardon, began to develop early in our domestic history. The Constitution of the United States provides: "The President . . . shall have Power to grant Reprieves and Pardons for offenses against the United States, except in cases of impeachment."⁶

Our first President had occasion to exercise the power. In 1790 the economy of several western Pennsylvania counties was based mainly on the production and sale of alcoholic spirits. Our young Government, in escaping from the evils of one form of taxation, had nevertheless remembered the benefits to be derived therefrom, and legislation designed to provide Federal excise revenues, at the expense of the Pennsylvania brewers, was soon forthcoming. This legislation produced a rash of violent reaction, directed mainly at the Federal excise tax collectors.⁷ President Washington sent a group of commissioners into the area to resolve the problem and, on the basis of their recommendations, proclaimed:

... I, George Washington, . . . do grant a full, free, and entire pardon

committed during the rebellion |
 . . . excluding therefrom,
 . . . every person who refused . . .
 to give . . . the said assurances
 . . . and now standeth indicted or
 convicted of any treason, mis-
 prision of treason, or other of-
 fense against the said United
 States, . . ."⁸

This proclamation, issued on 10 July 1795, was the first general pardon in U.S. history. There followed, between Washington's initial proclamation and the Civil War, five more pardons, ranging from the Pennsylvania insurrectionists to Caribbean pirates.

Our modern understanding of the ability of the executive and legislative branches of government to grant amnesty or pardon stems, to a large degree, from the considerable activity in this area which evolved from the Civil War. Twenty different instances of amnesty or pardon were recorded as a result of the Civil War, the first occurring in 1862 and the last not until 1898.

In 1862, Lincoln believed, evidently prematurely, that the insurrection was declining. In order to assuage mounting political pressure in the North, the President thought it would be prudent for the Government to somehow manifest this belief that the war was winding down. Accordingly, he directed:

... the release of all political prisoners and other persons held in military custody "on their subscribing to a parole engaging themselves to render no aid or comfort to the enemies of the United States" . . . such person [keeping] their parole should be granted "an amnesty for any past offenses of treason or disloyalty which they may have committed."⁹

The conditional pardon of 1862 was just the beginning. There was a certain political flavor to be found in Lincoln's first act of clemency, and the pattern

It was undoubtedly Lincoln's intention all along to proclaim an amnesty when conditions made it appear that it would have the desired effect. Most assuredly the second year of the war was not the time for such action; . . . a more effective blow [than the victory at Antietam] was required to give unmistakable evidence that the confederacy was doomed to destruction.¹⁰

Accordingly, prior to delivering a proclamation of general pardon to Congress, in his address of 8 December 1863, Lincoln first called attention to affirmative developments which tended to reflect Union success in the prosecution of the war. The proclamation itself extended a full pardon to all persons who had participated in the rebellion, whether by direct involvement or implication. However, several classes of individuals were excepted from its application: officers of the Confederate government; persons who left "judicial stations" to aid the Confederacy; Confederate military officers above the rank of colonel in the army or lieutenant in the Navy; those who left Congress to aid the South; those who resigned U.S. military commissions to aid the South; and those who treated blacks or their supervisors as other than prisoners of war.¹¹

The responsibility of dealing with questions of amnesty and pardon after the war fell to Lincoln's successor, Andrew Johnson. The radical Republicans in Congress had been dismayed with Lincoln's approach to clemency, which they viewed as far too liberal. Thus, they were delighted when President Johnson appeared to adopt a more rigid approach to the problem, particularly as concerned the need for retribution. In a proclamation of amnesty and pardon issued on 29 May 1865, 14 classes of persons were excepted from its application. Included in these exceptions were "all persons absent from the

United States for the purpose of aiding the rebellion."¹²

Radical Republican Congressmen became alarmed, however, as President Johnson's instincts toward retribution lessened and pardoning policies began to become more lenient. In an attempt to discredit the claim that the executive branch possessed full pardoning powers, the radicals alleged that the President was restricted to granting reprieves or pardons which had been cleared by prior legislative fiat. The motive behind this was to prevent the rehabilitation of Southern Congressmen who, the radicals feared, would join with Northern Democrats to gain control of Congress.¹³

The House of Representatives, in December of 1866, acted in an attempt to curb President Johnson's pardoning powers. The House referred to the Senate a bill designed to repeal section 13 of the Confiscation Act of 1862. This specific provision had commented on the power of the President to effect pardons by proclamation. The rationale was that the clemency clause of the Confiscation Act was the sole basis for the President's power to proclaim general pardons. Thus, if it were repealed he would be limited to considering pardons or remissions strictly on an individual, case-by-case basis. The bill to repeal section 13 of the Confiscation Act was passed, over Presidential veto, becoming law on 7 January 1867.

Still concerned over the power that "rehabilitated" Southern Congressmen might wield and not convinced of the success of their attempt to thwart the President's pardoning activities, Johnson's enemies sought to safeguard their continued domination of the Government by passing the 14th amendment to the Constitution. Section 3 of the 14th amendment provided, in part:

No Person shall . . . hold any office, civil or military, under the United States, . . . who, having previously taken an oath . . . to support the Constitution of the

United States . . . shall have engaged in insurrection or rebellion against the same . . . But Congress may by a vote of two-thirds of each House, remove such disability.¹⁴

The President and radicals remained at direct odds, and there was considerable confusion as to the validity of clemency activities on the part of either. Congress had repealed the President's "legislative" pardoning power contained in the Confiscation Act. The legislative branch then passed its own Reconstruction Act which had the effect of annulling previous pardoning gestures contained in executive reconstruction attempts. Even though Johnson finally proclaimed a general amnesty,¹⁵ the net practical result was that effective amnesty from Civil War involvements remained a matter for determination by two-thirds of both houses of Congress.¹⁶ This very unworkable situation became more and more apparent and more and more unpalatable as years passed and the worst memories of the conflict dimmed. The disability provision of section 3 of the 14th amendment was finally repealed, on 6 June 1898, under President McKinley.¹⁷

Amnesty and the Courts. Neither the executive nor the legislative branches of our Government ultimately determine the legality of their own acts. Although the pardoning prerogative has not been the weightiest issue of constitutional import to face the Supreme Court, it has received both early and continuing consideration.

The first case to be heard by the Court involving the pardoning power was decided in 1833. The Court held that a pardon must be delivered and that the person for whose benefit it is intended may refuse clemency and cannot be forced to accept it. They defined the term:

. . . A pardon is an act of grace,

proceeding from the power on

trusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private . . . act of the executive magistrate, delivered to the individual for whose benefit it is intended, . . .¹⁸

A similar decision was reached in 1915 when President Wilson extended a full pardon to a newspaper editor who had refused to reveal to a grand jury the sources of fraud disclosures reported in the editor's publication. The Government argued that since the editor had been granted a full pardon, he could not be prosecuted and thus could be forced to testify in spite of his privilege against self-incrimination. The Court affirmed that a pardon could, in fact, be refused, so that the defendant was able to retain his right to refuse to offer testimony against himself.¹⁹ The Court has made a contrary determination in a case involving partial commutation of a sentence.²⁰ The probable result of the diverging opinions is that in cases of pardon the Executive will probably accomplish the desired purpose, as long as "the substituted penalty is authorized by law and does not in common understanding exceed the original penalty."²¹

The long dispute over Civil War pardoning policies between the executive and legislative branches of Government received considerable judicial attention and resulted in the establishment of the great bulk of Supreme Court rulings on the pardoning prerogative.

A major decision going directly to the scope of the Executive pardoning power was rendered in 1867. A former Confederate sympathizer, Garland, was unable to take an oath which had been prescribed by Congress in 1865 as a prerequisite to the practice of law in a Federal Court. Garland had been granted a full pardon the same year by President Johnson, and the Court said

that this entitled Garland to practice law, notwithstanding his inability to take the prescribed oath. The Court declared the President's power to pardon: "is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."²²

A further indication of Congress' inability to limit the Executive prerogative was given in 1872, at which time an attempt had been made to legislatively modify Court of Claims procedures which had been established pursuant to an Executive pardon. "Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change the law."²³ An important distinction exists, however, between congressional action which interferes with the Executive pardoning prerogative and that which acts independently to effect amnesty. The Court has upheld the legislative right to remit penalties, stating that such an independent act did not infringe improperly on the Executive power.²⁴

There is a limit to the scope or effect of the Presidential power. The Court, faced with the question of whether the pardon and amnesty granted by President Johnson on 25 December 1868 would entitle a claimant to recoup the proceeds from the sale of his confiscated property, stated:

A pardon . . . releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. . . . But it does not make amends for the past. . . . it does not give compensation for what has been done or suffered, nor does it impose upon the Government any obligation to give it.²⁵

This decision was based on the premise that monies paid into the Treasury had become vested in the United States. The Court distinguished the situation where

Government, stating that they were capable of return to a claimant following his pardon.²⁶ Finally, the Court rejected the proposition that a pardon must be absolute and could not be conditional.²⁷

Amnesty in the World Wars. Four significant instances of pardon have been recorded following World War I, and one void is apparent. In 1917 President Wilson granted full amnesty and pardon to nearly 5,000 persons then serving Federal sentences for some form of conscription violation. The Supreme Court held that the various Federal judges did not have the power to suspend sentences they had previously awarded and which were being served. The pardon was granted just prior to the date on which the Court had determined most of the persons affected would have had to return to custody. The pardoning was conditional in the sense that the subjects had either served the preponderance of their sentences or were subject to a case-by-case study.²⁸

In 1924 President Coolidge acted to correct a situation whereby persons who deserted from the Armed Forces after World War I hostilities ceased, but before the war was declared formally over, might lose their citizenship. "With the exception of those sentenced by court-martial, President Coolidge . . . restored . . . citizenship to all . . . who deserted . . . during the . . . period between the armistice and the . . . ending of the war."²⁹

Subsequent to World War I a large number of persons had been convicted and sentenced for violations of the Espionage and Selective Service Acts. President Roosevelt, "at the urging of several liberal groups," granted: ". . . a full pardon to all persons who have heretofore been convicted of a violation of any of the foregoing statutory provisions . . . and who have complied with the sentence imposed on them, . . ."³⁰

The final act of Executive clemency pertinent to this discussion occurred in 1946, when President Truman established the President's Amnesty Board. This Board was tasked with examining the cases: "... of all persons convicted of violation of the Selective Training and Service Act of 1940... In any case in which it deems it desirable to do so... [the Board] shall include... its recommendations as to whether Executive clemency should be granted..."³¹ Approximately 15,000 cases were considered, resulting in grants of full pardon to 1,523 persons.

As we move from World Wars I and II to a consideration of the Vietnam situation, a void becomes apparent. No grants of amnesty or pardon were granted to draft evaders or deserters following the Korean conflict.

Amnesty—1972. The U.S. involvement in yet another armed conflict, and attendant crises related to compulsory military service laws, has resulted in further consideration of the amnesty problem. On 14 December 1971, Senator Robert Taft of Ohio introduced a bill: "... which relates to the matter of providing amnesty for draft resisters within this country and outside, on condition that they undertake 3 years of service in the Armed Forces, or in the alternative, other Government service under regulations prescribed by the Attorney General and various other Federal agencies."³² Senator Taft's bill, it should be noted, applies only to draft evaders and does not include deserters from the Armed Forces. Companion legislation, differing in that it calls for 2 years' Federal Service, as opposed to Taft's 3, was introduced in the House by Representative Edward Koch of New York.³³

Senator Kennedy's Senate Subcommittee on Administrative Practice and Procedure received personal testimony over a 3 day period, from 28 February through 1 March 1972. The transcript

of these hearings was first released on 1 December 1972 and totals, with exhibits, 671 pages.³⁴ While all this testimony cannot be adequately analyzed here, several significant areas will be reviewed.

The views of the incumbent administration were obtained from representatives of the Department of Defense, Department of Justice, and the Selective Service System. Needless to say, the testimony of these witnesses was consistent with the view expressed by President Nixon, on national television, on 2 January 1972.

We always... provide amnesty. ... I... would be very liberal with regard to amnesty, but not while there are Americans in Vietnam fighting to serve their country and defend their country, and not when POW's are held by North Vietnam. After that, we will consider it, but it would have to be on the basis of their paying the price... that anyone should pay for violating the law.³⁵

Selective Service Director Curtis Tarr suggested that a widespread program of amnesty "would be incompatible with the continuation of inductions."³⁶

Deputy Assistant Secretary of Defense Maj. Gen. Leo Benade testified for the Defense Department and spoke on the question of amnesty only as it would apply to deserters from the Armed Forces. General Benade stated, in part, that: "the granting of any amnesty to deserters at this time, whether general or particular, or whether conditional or unconditional, would have a serious, detrimental impact on our Armed Forces."³⁷ General Benade further testified that there were currently 30,000 deserters from the Armed Forces. He stated that of the 2,323 of these known to have fled to other countries, "less than 4.1 percent were motivated by anti-Vietnam or political protest,..."³⁸ The basis for this latter figure was taken from a study of

approximately 600 of the original 2,300 odd deserters who returned to military control. General Benade also made the point that desertion should be distinguished from draft evasion, in that the former has a more serious adverse impact on the Armed Forces.³⁹

Mr. Kevin Maroney, Deputy Assistant Attorney General, gave the views of the Department of Justice. He confirmed that there is no historical precedent for granting amnesty to "males who have refused to serve their country during a period of time when the country was engaged in actual hostilities . . ." ⁴⁰ He went on to show, statistically, that there were roughly 22,000 persons subject either to outstanding arrest warrants or to some earlier stage of draft-delinquency processing.⁴¹

In addition to the three witnesses whose testimony was briefly reviewed above, the subcommittee heard from 27 other persons. The majority of these were in favor of general, unconditional amnesty.

Mr. Robert Ransom, a lawyer with IBM whose son was killed in Vietnam favored unconditional general amnesty upon cessation of hostilities. Mr. Ransom was asked a crucial question by Senator Kennedy:

Q: . . . as a lawyer, how are we going to live in an orderly society, . . . if we are going to expect that . . . [people] . . . are going to take upon themselves the responsibility to violate a law and then the country is prepared to grant them amnesty?

A: . . . I simply think we have to make an exception in this war. I think this has been an extraordinary and unique situation in destroying the confidence of an entire generation in what their country stands for; . . . the only way to get that entire generation back, . . . is . . . to grant amnesty to those who did have the moral

convictions to live by their consciences in spite of the law.⁴²

Mr. Henry Steele Commager, Professor of History at Amherst College, testified at length in support of universal amnesty. Mr. Commager cited a Vietnam desertion rate of almost 74 men per thousand in 1971 and termed this a commentary on the war.

. . . after all, there was neither large-scale desertion nor draft evasion in World War II, and the national character does not change in a single generation.

. . . The Vietnam war is regarded by a large part of our population—particularly the young—as unnecessary in inception, immoral in conduct, and futile in objective.⁴³

Mr. Commager identified a deep division in American society and analogized the present situation to that faced by Presidents Lincoln and Andrew Johnson, faced with the problem of reuniting the Nation during and after the Civil War.

In making a moral case for amnesty, Commager laid a foundation of three basic points. First, that those deserting either the Army or the draft were acting sincerely, on the basis of conscience and principle, as opposed to reckless irresponsibility or cowardice. He cited the size of the resisting group as support for this and argued that the legal rightness or wrongness of a moral decision, sincerely made, is irrelevant.

His second point was that of "premature decision"; that these young men merely made the same decision, earlier, that the majority of Americans now make. This argument for forgiveness was supported by the assertion that a war fought "primarily to 'contain' China looks absurd when our President has gone to China to arrange closer relations . . ." ⁴⁴ Mr. Commager's third point is that of "premature morality."

Clearly if those whose opposition to war is based not on formal religious beliefs but on moral and ethical principles are now ex-

empted from service, then those with the same beliefs who were denied CO exemption in the past have an almost irresistible claim on us for pardon or amnesty.⁴⁵

Mr. Commager concluded with the point that the war was a mistake, and that only by admitting and learning from this mistake, including putting aside all will for vindictiveness or punishment, may harmony be restored to our society. He again recalls the Civil War, stating that while the Nation's material wounds are not as grievous, our "psychological and moral wounds are deeper, and more pervasive."⁴⁶

Former Representative from Oregon Charles Porter, a supporter of universal, or unconditional, amnesty, would offer such a program to both draft evaders and deserters. In his testimony before Senator Kennedy's subcommittee, Porter commented that contrary to defense estimates of 30,000 deserters, he understood the figure might be as high as 70,000. Mr. Porter acknowledged that this number might have been reached by adding draft evaders and went on to say:

... some ask, is amnesty fair to the 3 million men who served in Southeast Asia, ... I have found that almost always these veterans favor general amnesty ... America needs these young men. Their courage of conviction places all in their debt. It will be a glorious day for us ... when their full legal rights are restored by Congress ...⁴⁷

Prior to the hearings, Mr. Porter had echoed a theme popular among amnesty supporters by pointing out that clemency legislation for draft resisters but not for deserters would be class oriented. The argument usually put forth is that draft resisters are generally more intelligent and economically better suited to take the steps necessary to avoid military service. On the other hand, less affluent, poorer educated

men are caught up in military service, either as a result of their not understanding the full implications of conscription or because they are not able to take alternative action. Porter quoted one exile on the question of conditional amnesty and alternative service: "We left the states because we did not want to become criminals of the heart and now feel that a Government which has the stain of Indo-China on its conscience has no business passing judgment on our 'crimes.'"⁴⁸

This theme was further developed for the committee by Mr. Henry Schwarzschild, American Civil Liberties Union project director for amnesty, who testified:

It would be outrageous if amnesty, too, were to become an instrument of class and race discrimination, as are in effect so many other institutions and actions of our society. . . . All acts and failure to act, we urge, that arose out of the war, that would not have occurred but for the war, and that might be subject to criminal penalties, should be included in amnesty. . . . Equally important is the need to avoid putting these young men through an investigation of their conscience, their religious training or beliefs, their bona fides, and demanding that young men who are not yet or barely out of their teens be able to articulate a system of beliefs, . . . that will satisfy administrative or judicial bodies of the Government.⁴⁹

The subcommittee also considered, in the form of appended articles, the advice of Professor Louis Lusky of Columbia University Law School and a noted commentator on constitutional law matters. Professor Lusky, who favors amnesty, points out that joint action by the President and Congress may be necessary since there may be situations where unilateral action will

not have the desired restorative effect.⁵⁰

As testimony was taken, the problem of amnesty was debated outside of the committee room. On 26 and 27 March 1972, an Interreligious Conference on Amnesty was convened in Washington, D.C., by the National Council of Churches. After commenting that any conditional pardon, i.e., serving out of enlistments or substitution of some other form of public service would merely be to provide an alternate form of punishment, a spokesman commented: "Considerable apprehension was expressed by a number of speakers that President Nixon or members of Congress might put through a form of amnesty that would not clearly express the guilt of the American people in the 'tragic and insane war.'"⁵¹

Supporters of an absolute and unqualified amnesty, for all offenders, suggest that the Government erred in its Vietnam policy and that legitimate reaction to this error is draft avoidance or desertion.

The immediate issue, however, is restitution to a generation that has both fought the war abroad and led the vanguard of protest at home. This must come in some form of major concessions to the dissident young, concessions which should in no way demean the sacrifices of those who fought in Vietnam. . . . What is needed is a program of universal amnesty for all who are or have been subject to prosecution by the United States Government for crimes relating to opposition to the war in Vietnam. . . . The way amnesty is declared is nearly as important as the proclamation itself. A sanctimonious tone taken toward misguided, errant young will miss the point. The country has erred; the instinct of the exiles and the prisoners has been right.

Amnesty must come as an honest

and courageous attempt at national expiation.⁵²

In a later article supporting universal amnesty, the same writer criticizes pending legislation which would effect conditional amnesty by requiring some form of public service as a substitute for military performance. Two assumptions are identified which are alleged to support a philosophy of retribution on which it is stated conditional amnesty is based. The first is that universal amnesty would be unfair to those who have served in Vietnam, and the second that it would wreck the draft. The commentator declares that it is governmental policy that has made victims of both the returnees and the refugees, on an equal basis. On the second point, he comments: "The memory of Vietnam might say to another generation that it is a duty of citizenship to decide conscientiously beforehand if the way it is asked to fight is just and consistent with basic American principles, and if it is not, to refuse to participate."⁵³

On 29 March 1972, Representative Abzug introduced for herself and Congressmen Conyers, Dellums, and Ryan the War Resisters Exoneration Act of 1972. In support of this, by far the most liberal approach to the question of universal amnesty, she stated:

I feel that amnesty should extend not just to draft evaders but to deserters and antiwar demonstrators as well. Under my bill amnesty would be granted automatically to anyone who refused or evaded induction under the draft laws, to anyone who absented himself from the armed forces, and to violators of associated statutes when such violations occurred or will occur during the war years. . . . my bill proposes amnesty to violators of any other Federal, State or local laws when . . . the violation was motivated substantially by opposition to the war . . . [and] . . . although the

violation did result in damage it was nevertheless justifiable on the basis of a deeply held ethical or moral belief.^{5 4}

Conclusion. That the President may grant amnesty to a deserter or draft evader has been established. Similarly, should Congress desire, legislation accomplishing the same result could be passed. Though Professor Lusky found some possible areas of conflict between Federal, State and local powers of forgiveness, he doubted that this would ultimately pose a problem.

The view stated by President Nixon starts one end of the amnesty spectrum. In other words, a clearing of individual records, following routine judicial determinations of criminal offenses, presumably including the serving of sentences where appropriate, might be possible. The Taft/Koch approach is in the middle, recognizing a problem in present, although changing, draft procedures, and endorsing a substitute. At the other end of the spectrum is found Representative Abzug's proposal, which may be interpreted as an endorsement of practically any type of civil disorder or military disobedience directed at existing defense and selective service policies.

Lincoln's lesson must be remembered: that any act of clemency, whether Executive or legislative, will have considerable political impact. Will the subjects of Senator Kennedy's subcommittee hearings continue to receive the attention they did before the election now that 7 November is past? This is not to insinuate that the proponents of amnesty are insincere. To the contrary, their credentials for the most part are impeccable. But the realities of the situation force the argument. The draft, which provided the test tube for the Vietnam catalyst, is scheduled to end in July. U.S. participation in the war will end before then. And the third factor, the availability of a hot election year

issue, is no longer potent. The potential recipients of amnesty have a cause, but a weakened lobby.

Granted, the major obstacle to amnesty, the continuing war, will soon be removed. It is nevertheless doubtful that the President will set historical precedent, either by initiating clemency procedures before a complete Southeast Asian resolution or by approaching anything resembling unconditional amnesty. He has clearly expressed the belief that justice will best be meted out by our judicial bodies, both civil and courts-martial, which have the ability not only to convict, but to sentence as the circumstances of each individual case dictate. Finally, it must be remembered that he is not only the President, but also the Commander in Chief. Certainly we have not proceeded far enough with volunteer Army concepts to be able to say that universal, unconditional amnesty could have other than a deleterious effect on an armed force whose very existence depends on reliability, both in discipline and leadership.

In Congress, universal amnesty faces great obstacles, if only because of the problem of recruiting sufficient support for such a sensitive issue. Alexander Hamilton, writing on the Executive pardoning power in 1788, put it this way:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. . . . as men generally derive confidence from their numbers, they might

often encourage each other in an act of obduracy, . . . On these accounts, one man appears to be a more eligible dispenser of the mercy of government, than a body of men.^{5 5}

Yet, there is support in Hamilton's thought for those who would see amnesty as a unifying tool in times of insurrection. ". . . the principal argument for reposing the power of pardoning in the . . . [executive] is this: . . . there are often critical moments, when a well-timed offer of pardon . . . may restore the tranquility of the commonwealth; and which, if suffered to pass . . . may never be possible afterwards to recall."^{5 6}

Recent polls indicate that 63 percent of the American public favor some form of conditional amnesty. The ultimate issues are twofold. Does an individual in our democratic society have the right to ignore the law; and if he does, can that society survive?

. . . there are some laws, even in a democratic society, that are so unjust that any man of conscience and determination cannot obey them. . . . the conflict between the two arguments is in a sense insoluble, and the answer is not at all satisfactory: the law must be disobeyed, but the law's penalty must be accepted . . . The country

can appreciate their courage and their convictions, but cannot excuse them from the consequences of breaking the law.^{5 7}

The closer in proximity the implementation of an amnesty policy is to the resolution of the Vietnam war, the better the chances are that it will mirror the policy enunciated by President Nixon. Regardless, it is not foreseeable that a startlingly more liberal policy will ever be effected. Forgiveness is inherent in the American character; hopefully, a decision, that these types of moral and legal determinations must be divergent rather than complementary, is not.

BIOGRAPHIC SUMMARY



Comdr. Jack W. Howay, U.S. Navy, did his undergraduate work at Whitman College and holds an LL.B from Willamette University. As an officer of the Judge Advocate General Corps, he has had

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FOOTNOTES

1. *The Cambridge Ancient History* (London: Cambridge University Press, 1964), v. I, p. 364.

2. *Ibid.*

3. Robert I. Giesberg, *The Treaty of Frankfort* (Philadelphia: University of Pennsylvania Press, 1966), p. 203.

4. *Ibid.*

5. *Ibid.*

6. U.S., *Constitution*, art. III, sec. 3.

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