

Contemporary Public Affairs

AMNESTY

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AMNESTY

The question of amnesty and the Vietnam war is unusual in at least one respect; that is, the issue was being debated even before the war was concluded. In fact, legislation (HR 832 and S 3011) to grant amnesty was proposed to the 92nd Congress in early 1971 even though the signing of the Vietnam peace did not occur until January 27, 1973.

Several reasons led to this early discussion of the question of amnesty. One of these was the divisive nature of the war. Amherst historian Henry Steele Commager commented in February, 1972 hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary that:

What is by now inescapably clear is that the Vietnam war is regarded by substantial elements of our population--particularly the young--as unnecessary in inception, immoral in conduct, and futile in objective; what is clear, too, is that more than any war since that of 1861-65 it has caused deep division and bitter dissention in our society.¹

It seems to follow from this division of opinion about the war itself that the question of amnesty for those who refused to serve in the Vietnam war is a highly controversial one. Many people have taken sides with vehemence. However, as James Finn points out:

Although a crude distinction between being for or against amnesty is common and useful, it carries us only a limited way as we try to answer the following questions: What is amnesty? To whom should it apply? When should it become effective? What conditions, if any should there be?²

Let us look at each of these questions briefly.

Meaning of Amnesty

In a certain sense amnesty is a vague term. Its Greek root is the same as that of the English word amnesia, which would relate it to forgetting. However, it is most often used to mean forgiveness of some sort. In most instances in this

¹Selective Service and Amnesty, Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary of the United States Senate, 92nd Congress, 2nd Session (Washington: Government Printing Office, 1972), p. 183.

²James Finn, "The Issue of Amnesty," Current, January, 1973, p. 34.

country when amnesty has been granted, it has involved forgiveness for the act under question. This has apparently been sufficient to satisfy those for whom it was an issue. In the present situation regarding amnesty for resisters to the Vietnam war, there are those who argue that any effective amnesty should include amnesia relative to the act involved. That is, they argue, it is not sufficient merely to forgive; the law should also forget. This would mean that any legal trace of the charges and proceedings against those granted amnesty would have to be destroyed. As implied, this has not usually been an element of amnesties in the past.

Amnesty for Whom

When most persons consider to whom amnesty should apply, they immediately think of deserters and draft evaders who are at present outside of the country. However, Amnesty International in a November, 1970, document entitled "Categories of Prisoners and Deserters" listed six groups of people who could be considered for amnesty:

1. Men within the military who have made unsuccessful applications for conscientious objector status and have refused military duty.
2. Men who have refused to go to Vietnam or to train for Vietnam; often charged, as in Dr. Howard Levy's case, with disobedience.
3. Men charged with desertion or AWOL who have acted on the grounds of their objection to the war or the military.
4. Soldiers who have publicly been critical of the war policy; the charges may be sedition, encouraging sedition, insubordination, or sometimes drug charges, some of which have been found spurious on investigation; editors of antiwar G.I. newspapers are included in this category.
5. Men who protest against general or specific conditions within the military, and not always directly related to the war in Vietnam: in some of these cases the men have been charged with mutiny.
6. . . . civilian sympathizers with resisters and deserters. Some have been indicted for their part in organizing antiwar demonstrations, others for destroying or defiling draft files.³

³Quoted by Murray Polner, When Can I Come Home? A Debate on Amnesty for Exiles, Antiwar Prisoners and Others (Anchor ed.; Garden City, N.Y.: Doubleday and Company, 1972), p. 3.

Of these six groups only the last are non-military personnel. To this last category must be added those who objected to the war or the military and who chose to flee the country or enter the domestic underground in order to avoid military service and, in some cases, even to avoid alternative service under military auspices.

Perhaps it is because of the numbers of persons that are estimated to be in these categories that the focus of attention is usually on those persons who have avoided the draft by illegal means or who have deserted from the military. One such estimate of numbers of deserters and draft evaders was given by U.S. News and World Report⁴ in March of 1973:

1. 423,422 Americans deserted the armed forces since mid-1966. 90 per cent of these had come back under military control.

32,557 deserters were still at large. The majority of these, more than 30,000 were believed to be underground somewhere in the United States, while 2,533 were in foreign countries.

2. 14,000 men are considered to be "true" draft evaders. Of these, 6,800 are convicted, 5,851 are under indictment, and 1,000 are expected to be indicted after investigation. The vast majority of those under indictment, about 4,500, are fugitives. 2,100 are estimated to be underground in the United States, 1,950 are in Canada, and 450 are in Sweden.

As indicated above there are a number of groups to whom amnesty might be applied. Any person who has been, or could be, legally affected adversely by his acts of resistance to the war, the military, or the draft is potentially able to be affected by an amnesty.* If an amnesty were granted, the determination of exactly where the lines would be drawn and what groups would receive amnesty is a matter that would be resolved in the process of political compromise as the issue works itself out in either the executive or the legislative branch of government.

⁴"Amnesty--Latest in a Hot Debate," U.S. News and World Report, LXXIV (March 12, 1973), p. 34.

*Amnesty would not affect those who have conducted their objection to war or participation in the military in a legal manner, such as those who have sought and obtained classification as conscientious objectors.

Timing and Conditions

The question of the timing of amnesty was more crucial before the end of American involvement in Vietnam than it is now. Discussion of the issue at that time questioned whether any amnesty could be granted before the troops and prisoners had come home. According to a poll in the January 17, 1972 issue of Newsweek, 71 per cent of those interviewed were willing to accept amnesty under some conditions. Of these, 37 per cent favored immediate action, 13 per cent would have waited until military involvement in Vietnam was over, and 10 per cent wanted to wait until the draft had ended. One returning Iowa prisoner of war did suggest that the amnesty be timed to begin at the end of a period of time equal to the longest imprisonment of an American POW. On the whole, however, very little is now said about a delayed amnesty. Most persons are either willing to accept it now without further delay, or they are not willing to accept it at all.

Another aspect of the timing relates to the length of the Vietnam war. Because it has been the longest in the nation's history, almost a decade of very active involvement, many of those who would be affected by an amnesty have already been at odds with the law for a lengthy period of time. This causes some who favor an amnesty to feel an urgency about having it take effect.

Representative Bella Abzug (D. New York) has proposed legislation granting exoneration and universal amnesty. However, some form of conditioned amnesty is probably more realistic politically. Different sets of conditions have been proposed by two members of Congress. The best known is that which is attached to Senator Robert Taft's (R. Ohio) bill. It would provide amnesty for draft evaders, but not deserters. The condition would be that they either enlist for three years in the military or that they perform some sort of alternative service through various governmental agencies.

This would involve a year more than the typical draft obligation. Previous to Senator Taft's bill, Representative Edward Koch (D. New York) had introduced legislation which would have granted amnesty to both evaders and deserters, providing they were willing to return to the United States and obtain conscientious objector status retroactively under expanded C.O. standards. At the same time Koch submitted another bill which would have broadened those standards to allow selective conscientious objection.*

*Selective conscientious objection would recognize the right to refuse to participate in a particular war, because that specific war was considered unjustified. At present the law requires the C.O. to object to all war as immoral.

The question of expanded standards for the C.O. is relevant since several court decisions during the course of the war had the effect of allowing a broader interpretation of the category, even though the courts never went as far as accepting selective objection.

For example, at the beginning of the war it was a widely accepted policy to grant C.O. status only to members of certain recognized religious groups, e.g. Seventh Day Adventists, Quakers, Jehovah's Witnesses, etc. Later, such status was more often granted to members of the more mainline religious groups who could satisfy their local board that they objected to war on truly religious grounds. By 1970, however, the Supreme Court held that an objection to war rooted in one's philosophy of life, rather than in formal religious training, was sufficient grounds for receiving C.O. status. The effect of these rulings was that certain individuals who became fugitives early in the course of the war and under a narrower interpretation of conscientious objection, would surely have been able to achieve that status legally by the latter years of the conflict.

Possible types and conditions of amnesty which could be granted can be summarized in this way:

- A general amnesty would have the broadest possible coverage;

- a limited amnesty would apply to only certain specified groups;

- a conditional amnesty would apply to all or certain groups provided they fulfilled stipulated obligations;

- a broadened interpretation of amnesty would include not only exoneration but also expunging from the files any record of charges or convictions pertaining to the exoneration.

Precedents - Past and Future

Opening the Congressional hearings, Curtis W. Tarr, director of selective service, made the statement that in amnesty "the Nation would accept a precedent for permitting the evasion of selective service law which might someday be an unwelcome tradition."⁵ This raises the question of whether there are historical precedents in this country for amnesty. Amnesty has been granted in 37 separate instances starting

⁵Selective Service and Amnesty, p. 47.

with the presidency of George Washington, whose own army was plagued with a desertion problem. As President, Washington made no effort to punish those war-time deserters, and he also granted formal amnesty to those who took part in the Whisky Rebellion of 1794. John Adams granted an amnesty to insurrectionists. Thomas Jefferson granted one to army deserters. James Madison granted three separate amnesties for deserters of the War of 1812 and one additional amnesty for previous criminal acts to the pirates who fought in that war. Andrew Jackson granted one amnesty for army deserters. The Civil War involved several amnesties to both rebels in the South and the deserters in the North. Most of these amnesties offered to deserters required that they fulfill their term of military service, though President Jackson required just the opposite, i.e. that the deserters never again serve in the military.

Perhaps one of the reasons that the current amnesty debate seems to some to have such precedent making potential is that relatively few amnesties have been granted in this century, and no general ones. Following World War I there were two amnesty actions. In 1924 President Coolidge granted amnesty to 100 men who deserted their units after the armistice. President Roosevelt, in 1933, pardoned 1,500 World War I Draft and Espionage Act violators who had already served their sentences. The effect of this amnesty was to restore full civil rights to these persons after their punishment, without which they would have continued with only the restricted voting and civil rights of a convicted felon.

The most notable amnesty procedure of this century followed World War II. It applied to draft evaders, but excluded deserters. The need for amnesty following that war was limited because of the high level of public support which our involvement had received. Following the advice of a special presidential committee, President Truman set up a three-man amnesty board to make individual judgments in the 15,000 cases which the country faced. About one in ten received a pardon. Michael K. Wyatt, however, has pointed out one major difficulty with this approach:

True, the Truman Board was assisted by 16 staff attorneys . . . but since the three-man board met only on weekends and holidays, a quick calculation reveals that each case was dealt with in slightly less than five minutes on an average. Surely a decision which can so profoundly affect the lives of so many should not be made without some form of hearing, or in such a short time, or on the basis of unpublished . . . standards, and by individuals who, no matter how well meaning, are responsible to no court or other appellate authority.⁶

⁶Michael K. Wyatt, "Making the Case for Congressional Amnesty," The New Republic, CLXVI (June 10, 1972), p. 20.

No Amnesty followed the Korean war; however, on December 24, 1952, six months after the Korean war began, President Truman granted amnesty to those who had deserted their units in the peacetime years between August 15, 1945, and June 25, 1950. He also granted amnesty for previous offenses to ex-convicts who served in the armed forces during the Korean war.

Although the Congressional hearings on the amnesty issue were held by the Senate Subcommittee on Administrative Practice and Procedure, the executive branch of the government is not the only power which can grant an amnesty. Congress can grant one as well, although that power has been little used. After citing the constitutional source of the presidential power to grant amnesty Wyatt observed:

Congress can exercise a parallel power simply by repealing the desertion and evasion offenses or the punishments attached to them. This power has been used sparingly in the past, however, and apparently never to effect an unconditional amnesty for an entire class of offenders such as Vietnam draft evaders or deserters.⁷

Wyatt goes on to note that while a presidential amnesty might be quicker, one which arose from the give and take of congressional compromise might be more acceptable to those who do not favor such a move.

A question which is asked by some persons today is: What are amnesty's implications regarding the morality of the Vietnam war? Could the granting of amnesty be construed as an admission, after the fact, that the war in Vietnam was less than fully justified? Beyond that, would it set a legal precedent giving rights to those who object to the justice of a particular war? Again Curtis Tarr has warned of this danger when he noted that if amnesty is granted, even if it provides for the requirement of doing alternative non-military service, "This really would be an acceptance of selective conscientious objection, but it would be offered only to those who had evaded the law."⁸ It may well be that in the end strong resistance toward any amnesty will come from its legal implication for selective conscientious objection and its psychological implication that the war was never a justified one. It is one of those strange paradoxes of human behavior that the granting of amnesty after a war such as World War II about which the country felt fully justified probably created less controversy than after a war such as Vietnam about which it had very deep doubts.

Arguments Pro and Con

The major arguments on either side of the issue may find

⁷Wyatt, "Making the Case for Congressional Amnesty," p. 19. op. cit., p. 19.

⁸Selective Service and Amnesty, p. 46.

many forms of expression, but in general they boil down to the following.

The arguments in favor of amnesty:

1. The country as a whole has come to the point of realizing that the war in Vietnam was a mistake, politically if not morally. Why should we punish those among us who came to this realization sooner than most.
2. Not to grant amnesty is discriminatory because many eminent Americans said publically during the course of the war that they could not take an active part in the prosecution of this war. However, because of factors such as age, sex, etc., these Americans did not have to back their words with their lives and careers, as draft-age males did.
3. Amnesty would heal the wounds which still exist in America over the war.
4. The war has left large numbers of American youth cynical about the self-interest of the political system. Amnesty would go a long way in the direction of persuading them of the basic humanity of our government.
5. Many people who would be affected by any amnesty were not acting in a reckless, irresponsible or cowardly manner, but were making a highly principled and responsible decision, perhaps the most profound decision of their lives.
6. Some people who deserted during the war were not prosecuted, but were simply discharged from the service, presumably dishonorably.* Others were prosecuted, and some are serving sentences for desertion. Others who are still at large may or may not be prosecuted if and when they are apprehended. A broad amnesty which would include all of these consequences of desertion would tend to equalize the various treatments which have been given deserters.
7. Those who sought but did not secure the legal position of conscientious objector during the early years and who then selected an illegal route rather than join

*A person receiving a dishonorable discharge has roughly the same restricted voting and civil rights as a convicted felon, but the person would not necessarily have been imprisoned for any length of time.

the military now face consequences that those who were granted C.O. status in the later years under less stringent standards do not face. Again, an amnesty could retroactively serve as an equalizer for that earlier group who sought but did not obtain C.O. status and who subsequently acted illegally.

8. To grant amnesty to those who resisted the Vietnam war would put future government leaders on notice that they are not free to commit the nation to war unless there is undeniably well accepted cause for doing so. History would seem to indicate that this must include a much more direct attack on United States territory, personnel or interests than was evident in Southeast Asia.

The arguments against amnesty:

1. The most frequently voiced argument is that it would not be fair to those who fought and died in Vietnam to forgive those who refused to serve. It would both devalue the service which they gave their country while in Vietnam and call into question the whole notion of honorable service to one's country through the military.
2. Amnesty would endanger the ability of the country to raise an army through conscription in the future. Amnesty, particularly a blanket amnesty, would suggest to future young people that there was little ultimate risk in avoiding military service.
3. Amnesty would further divide the country on the issue of Vietnam. It would embitter a great many people who loyally supported a very difficult war.
4. It is not our tradition to grant large scale amnesties, especially unconditional ones. Almost all the amnesties which have been granted in our history have affected only a portion of the total population of offenders and have had certain well specified conditions attached to them.
5. Granting an amnesty would set a dangerous legal precedent in the direction of allowing selective conscientious objection. This would have the added danger of creating a legal precedent for making the individual conscience superior to the law of the country. Many argue that such a state of affairs would be a strong step in the direction of anarchy.

6. If amnesty is not granted then all cases of resistance, evasion and desertion will have to be handled separately in the courts. This will insure that each person is treated fairly on the merits of his individual case.
7. Amnesty would imply that the war was an unjust one.
8. Amnesty would lower the morale of the army and therefore weaken the quality of our national defense. In addition it could affect the caliber of person volunteering for the armed forces as we move toward an all-volunteer military.
9. Those who went outside of the law in order to avoid military service should not now come back to the legal structure seeking personal benefits.

A Basic Issue

There is at least one important ethical issue near the heart of the amnesty question. Finn calls it to our attention:

The question of amnesty runs through our entire society, revealing once again the divisive, the shattering force of the war. Revealing also the sorry state of moral/political discussion in this country. For in the debate that divides people when amnesty is at issue little consideration is given to the complex demands of the political community or to the kinds of decisions the individual is called upon to make when he finds himself at odds with the directives of that community.⁹

Indeed a society does make complex demands on its members. It expresses those demands in many forms, the most visible of which is the law. But what happens when the law, which is the conscience of the whole society, conflicts with the individual conscience?

From time to time historical circumstances will cause us to become more conscious of basic ethical issues. The amnesty question is such a historical circumstance for America. In a unique way it can cause the country to confront the issue of the individual's rights of conscience. One reason why this dilemma is so deeply felt is that Americans are predisposed to favor the needs of the individual conscience. Much of our earliest history centers around persons seeking a religious or political freedom for their consciences. Many immigrants to this country had come here to escape conscription into unjust or unwise wars. Then, unexpectedly, we found "the shoe on the other foot." America had apparently become a

⁹Finn, "The Issue of Amnesty," pp. 36-37.

stifler of conscience, and she was reminded of that fact by the rhetoric of many older persons and the illegal actions of many younger ones.

So far the country has not faced this deeper issue squarely. There has been a great deal of discomfort, but little clear discussion. One piece of legislation which could have stimulated such discussion was the bill introduced into the 92nd congress by Representative Koch. His bill would have allowed selective conscientious objection as a legitimate reason for refusing military service. The bill received little notice and this is probably unfortunate since the underlying issue of the relation between the collective conscience and the individual conscience went largely undiscussed and therefore unresolved. The challenge remains for the persons discussing amnesty to probe this underlying ethical consideration.

DISCUSSION QUESTIONS

1. The figures on deserters and draft evaders given by News-week (which the editors indicate are official figures) estimate that out of about 37,000 fugitives 32,000 are underground within the United States, and only about 5,000 are in foreign countries. Do you feel that this statistic should be considered in a discussion of the amnesty issue? What are the implications, if any, for amnesty that six out of seven of these violators are still within the states?
2. How do you feel the historical precedents cited should affect the amnesty decision, if they should affect it at all? If not, why not?
3. Making the assumption that an amnesty of some sort were to be granted, answer the following questions:

Who should receive the amnesty? In other words, set a priority among the various groups mentioned and draw whatever cutoff line you might think appropriate. What are the reasons for your decision?

What sort of amnesty should be given? One that eliminates any punishment or condition and restores all civil and voting rights? One that provides some sort of punishment or condition, but grants full rights as a citizen? One which does not punish, but continues to limit civil rights?

What other conditions might you attach, if any?

When should the amnesty begin?

4. Do you think that the granting of an amnesty would imply anything about the justifiability of our involvement in Vietnam? If so, what?
5. Would an amnesty move us in the direction of allowing selective conscientious objection? Apart from the amnesty issue, what should we do about selective conscientious objection following the experience of Vietnam?
6. Discuss the merits of the various arguments listed as pros and cons on the amnesty issue. Are there any other major points you would make on either side?
7. Spend some time discussing the issue of the individual conscience and the law.

Is the issue insoluble? Why? Why not?

If you decide we cannot solve the issue, can we continue to ignore it? Why? Why not?

What solution or compromise would you propose?

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