Vanderbilt Law Review

Volume 25
Issue 3 *Issue 3 - April 1972*

Article 3

4-1972

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I. INTRODUCTION

As the war in Southeast Asia grinds jerkily toward a halt,[1] we must turn to the task of binding our internal wounds. One of the knottiest problems we confront is whether amnesty should be granted to those who have resisted the war, or evaded participation in it, by illegal means. Public debate on amnesty for those who illegally have opposed American participation in the war has already started. The formulation of positions began more than a year ago when the American Civil Liberties Union recommended broad amnesty for draft violators, exiles, and military offenders.[2] A number of bills are in the congressional hopper;[3] the broadest—and, at this writing, the most recent—is H.R.

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1. The winding down of the Indochina war has not proceeded smoothly. To some persons, in fact, the winding down process may seem illusory because in recent months bombing has been intensified as ground troops are removed from Southeast Asia. Moreover, on March 23, 1972, President Richard M. Nixon suspended the Paris peace talks and reinstituted them on April 27, 1972, only to suspend them again. N.Y. Times, Mar. 24, 1972, at 1, col. 1; N.Y. Times, Apr. 28, 1972, at 1, col. 8; N.Y. Times, May 5, 1972, at 1, col. 8. It should be noted, however, that these measures are not necessarily inconsistent with disengagement, especially since the imperatives of domestic politics appear to demand that the war be terminated or reduced to minimal proportions before the November 7 election.

2. Resolution of the American Civil Liberties Union, Jan. 18, 1971, New York, New York; Sobol, *Amnesty Legislators: Evading the Issue*, Village Voice, Feb. 24, 1972, at 1, col. 1.

3. *E.g.*, H.R. 14175, 92d Cong., 2d Sess. (1972) (introduced by Congresswoman Abzug, providing for a general, unconditional amnesty for persons who have committed specified violations of federal law and establishing a commission to consider granting amnesty to persons who have violated state or federal law while protesting the war in Southeast Asia); H.R. 12822, 92d Cong., 2d Sess. (1972) (introduced by Congressman Edward Koch, providing amnesty to state and federal offenders at times and under conditions established by the President); H.R. 12417, 92d Cong., 2d Sess. (1972) (introduced by Congressman Edward Koch, providing amnesty to persons

14175, introduced by Congresswoman Bella S. Abzug on March 29, 1972.[4]

The protean term "amnesty" is not mentioned in the Constitution, but it has been used elsewhere in many different senses: clemency for convicted criminals, clemency for offenders not yet apprehended or prosecuted, and immunity from punishment for acts not yet committed that ordinarily would be criminal.[5] The term has been employed whether the offenders were listed by name or specified by general classification, and it has sometimes been used as a synonym for the constitutional term "pardon."[6] On occasion the substance of amnesty has been granted without use of the term at all.[7] In this article, the term "amnesty" is

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who have refused or evaded service in the armed forces if such persons serve 2 years in specified public service organizations); S. 3011, 92d Cong., 1st Sess. (1971) (introduced by Senator Taft, providing amnesty to persons who have refused or evaded service in the armed forces if such persons serve 3 years in specified public service organizations); H.R. 5690, 92d Cong., 1st Sess. (1971) (introduced by Congressman Edward Koch, defining conscientious objector to include a person who objects to a particular war).

4. The Abzug bill provides for a general unconditional amnesty on the cessation of hostilities, but no later than July 1, 1972, to be granted automatically to anyone who has 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. *See, e.g.*, Military Selective Service Act § 12, 50 U.S.C. 462 (1970); Uniform Code of Military Justice, 10 U.S.C. §§ 882, 885-88 (1970); Act of June 25, 1948, 18 U.S.C. § 1381 (1970); Act of June 25, 1948, 18 U.S.C. § 2387 (1970). In addition, H.R. 14175 proposes the establishment of an Amnesty Commission appointed by the Congress and the President to grant amnesty to violators of any other federal, state, or local law when the Commission finds that the violation was motivated substantially by opposition to the war and that it did not result in significant property damage or personal injury. The bill gives the Commission leeway further to grant amnesty when it finds that although the violation did result in damage it was nevertheless justifiable on the basis of a deeply held ethical or moral belief. H.R. 14175, 92d Cong., 2d Sess. (1972).

5. Amnesty has been defined as "an act of the legal sovereign conceding, from grace, a voluntary extinction from memory of certain crimes committed against the state." 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 36 (1937). Amnesty, according to that authority, usually is granted to political offenders, often before trial or punishment. Amnesties may be said to be "first, general or particular, that is, they may cover all classes of political offenders or may be limited to special groups, with specific exceptions; and second, absolute or conditional, that is, they may impose no conditions or they may demand the performance of certain conditions before their provisions enter into legal effect." *Id.* at 36-39. *See* Duscha, *Amnesty?*, SATURDAY REV. 51 (May 6, 1972). *See also* Comment, *American Deserters and Draft Evaders: Exile, Punishment or Amnesty?*, 13 HARV. INT'L L.J. 88 (1972).

6. Brown v. Walker, 161 U.S. 591, 601 (1896). "The distinction between amnesty and pardon is of no practical importance . . . . 'The Constitution does not use the word "amnesty," and, except that the term is generally applied where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance.'" *Id.*

7. For example, near the end of the Second World War, Secretary of War Patterson created a top-level War Department Clemency Board to eliminate excessive sentences that had been adjudged under the stress of combat. Royall, *Revision of the Military Justice Process As Proposed by the War Department*, 33 VA. L. REV. 269, 279 (1947). At the same time, art. 50½ of the Articles

used in its broadest sense: the softening of punishment for a large number of offenders, for reasons of public policy.

From our earliest days government has granted amnesty after divisive conflicts at home or abroad. From the Shays[8] and Whiskey[9] Rebellions in the eighteenth century, through the Civil War,[10] down through

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of War of the 1920 Code, providing automatic, high-level review in certain types of cases, was activated. *Id.* at 280; *see* Act of June 4, 1920, ch. 227, § 1, 41 Stat. 797 (repealed and replaced by the UCMJ in 1948).

8. In June 1787, the Massachusetts General Court repealed the Disqualifying Act, which had imposed certain civil disabilitites on the rebels, and (except for 9 rebel leaders) proclaimed unconditional pardon for all who would take an oath of allegiance by September 15, 1787. R. TAYLOR, WESTERN MASSACHUSETTS IN THE REVOLUTION 165 (1954). Eventually even Daniel Shays received a formal pardon. Hampshire Gazette, Sept. 19, 1787.

9. By pardoning participants in the 1795 Whiskey Rebellion, President Washington set a precedent for a succession of presidential amnesties. On July 10, 1795, Washington proclaimed "A full, free and entire pardon to all persons . . . of all treasons . . . and other indictable offenses against the United States committed within the fourth survey of Pennsylvania before the said 22nd day of August last past . . . ." 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 173 (J. Richardson ed. 1897) [hereinafter cited as J. Richardson]. Exceptions were made of those who "refused or neglected to give assurance of submission to laws of the United States; violated such assurances after they were given; or willfully obstructed or attempted to obstruct the execution of the acts for raising a revenue on distilled spirits and stills, or by aiding or abetting therein . . . ." *Id.* In his explanation to Congress, the President said: "[M]y personal feeling is to mingle in the operations of the Government every degree of moderation and tenderness which the national justice, dignity and safety may permit." Swomby, *Amnesty: The Record and the Need,* NAT'L CATHOLIC REP. 2 (Jan. 1, 1969).

Other amnesties were granted before the Civil War. In 1799 a band of over 100 Pennsylvanians, rebelling against the laws for the valuation of lands and dwellings, freed the prisoners of a United States marshal and prevented him from carrying out his duties. On May 21, 1800, President Adams granted a full, free, and absolute pardon to all these persons. J. Richardson, *supra* at 276-77.

By the Proclamation of October 15, 1807, President Jefferson granted a full pardon to all deserters from the Army of the United States who would surrender themselves within a period of 4 months. *Id.* at 413. During the War of 1812, proclamations offering "a full pardon" to deserters who surrendered within 4 months were issued by President Madison on February 7, 1812, October 8, 1812, and June 17, 1814. No exceptions were listed. *Id.* at 497, 499, 528. President Madison also proclaimed an amnesty for the pirates and smugglers in the vicinity of New Orleans who had helped fight the British. 10 DICTIONARY OF AMERICAN BIOGRAPHY 540 (1933).

The last of the pre-Civil War amnesties came in 1830 when President Jackson approved a War Department General Order that extended a free and full pardon to deserters, subject to the following provisions: those in confinement were to be released and returned to duty; those at large and under sentence of death were to be discharged and never again enlisted in the service of the country. J. Richardson, *supra* at 1062-63.

10. During the Civil War President Lincoln granted several amnesties. By presidential proclamation on March 10, 1863, deserters from the Union Army who reported on or before April 1, 1863, were restored to their regiments without punishment except for forfeiture of pay and allowances during their absence. Proclamation of Mar. 10, 1863, 13 Stat. 775. On December 8, 1863, a general amnesty was extended to rebels if they took an oath of loyalty to the United States. The pardon included full restoration of property rights except property rights in slaves and when rights of third parties had intervened. Proclamation of Dec. 8, 1863, 13 Stat. 737. Officers of the Confederate Government, certain other classes of rebels, and former officers of the United States who

World War I[11] and World War II,[12] the ending of hostilities usually has been followed by amnesty in one form or another. President Nixon, in a January 2, 1972, television interview, said—though with a later qualification[13]—that "we always, under our system, provide amnesty. You remember Abraham Lincoln in the last year—the last days, as a matter of fact—of the Civil War, just before his death, decided to give amnesty to anyone who had deserted, if he would come back and rejoin his unit and serve out his period of time." President Nixon added that he "would be very liberal with regard to amnesty."[14]

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joined the rebellion were excepted. On March 26, 1864, Lincoln found it necessary to issue an additional proclamation defining the cases in which insurgent enemies were entitled to the benefits of the Proclamation of December 8, 1863. Proclamation of Mar. 26, 1864, 13 Stat. 741. Finally, on December 25, 1868, President Andrew Johnson granted a full, unconditional pardon and amnesty to "all persons engaged in the late rebellion." Proclamation of Dec. 25, 1868, 15 Stat. 711. President Johnson's unqualified amnesty followed a series of limited, conditional amnesties. *See generally* 5 J. Richardson, *supra* note 9, at 3906.

11. Two presidential proclamations were issued regarding the grant of amnesty following World War I. The first, issued by President Coolidge on March 5, 1924, granted amnesty to those persons convicted of desertion in time of war who had deserted between the signing of the Armistice in November 1918, and the formal termination of the war by actions of the President and Congress in November 1921. Proclamation of Mar. 5, 1924, 43 Stat. 1940. The second proclamation was issued by President Franklin D. Roosevelt on December 23, 1933, and covered persons convicted of various wartime crimes who had complied with the sentence imposed on them. Proclamation of Dec. 23, 1933, 48 Stat. 1725.

12. President Truman on December 23, 1946, created a 3-man President's Amnesty Board to decide on a case-by-case basis whether amnesty should be granted to persons accused of violating the Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885 (1940). Proclamation of Dec. 23, 1947, 62 Stat. 1441. Out of 15,805 cases reviewed, clemency was granted in 1,523 pursuant to recommendations by the Board; President Truman had already pardoned another 1,518, making a total of 3,041. Knight, *The Amnesty Question for Draft Evaders: Are They All the Same?*, THE AMERICAN LEGION MAGAZINE 4 (May, 1972). Following the Korean War there was no general amnesty, but some administrative leniency was demonstrated. North Korea held 4,428 American soldiers as prisoners of war, many of whom allegedly had collaborated with the enemy. By September 6, 1953, all of the POW's who desired to return were repatriated, and the army released its official policy on prosecuting those soldiers who had collaborated with the enemy. The Department of the Army stated that it would prosecute only when there appeared to be the most compelling and convincing evidence that the accused was guilty of a serious offense, and that no returned prisoner eligible for discharge should be retained for the purpose of trial in the absence of that kind of evidence. Prugh, *Justice for all Recap-K's*, THE ARMY COMBAT FORCES J., 15, 16 (Nov. 1955). *See also* Note, *Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 COLUM. L. REV. 709 (1956). In 1959, the remaining 210 prosecutions were dropped. E. KINKEAD, IN EVERY WAR BUT ONE 75 (1959).

13. *See* note 30 *infra*.

14. N.Y. Times, Jan. 3, 1972, at 20, col. 8. The American Legion's position is that amnesty should be granted, after the conflict ends, on a case-by-case basis as was done after World War II, see note 12 *supra*, but not on a blanket basis. Knight, *supra* note 12, at 37.

II. Policy Considerations

It seems fair to say that the question is not whether there is to be amnesty or no amnesty. Rather, the questions are: *to whom* should amnesty be granted, and *how much,* and *when,* and *how?* Nevertheless, to start at the heart of the matter, let us consider a question that is asked whenever amnesty for war resisters is debated: "Why should we forgive these traitors and cowards, pardon their crimes, and welcome them back from Canada and Sweden? "There are myriad variations on this theme; sometimes the bluntness is softened, sometimes the rightness or wrongness of the war is acknowledged to be relevant, and sometimes distinctions are recognized between those who have fled and those who have submitted to punishment. But the core of the question is constant. It always starts with "why," and it always is premised on the following assumptions:

(1) That those who have broken the law to show their opposition to the war in Southeast Asia are "traitors"—meaning "disloyal" rather than actually guilty of treason as defined by article III, section 3 of the United States Constitution.

(2) That those who have broken or evaded the law in order to avoid service in the war are also cowards.

(3) That the society can well do without these people if they choose to leave or stay away, and can afford to relegate them to the status of fugitives, convicts, or ex-convicts if they elect to return or remain.

(4) That the only real problem is how to be fair to these law violators and their families, and that the remaining 200,000,000 or so of us have nothing to worry about except the general ethical responsibility to let the punishment fit the crime.

(5) That there is no longer any bond of common citizenship between the law violators and the great law-abiding majority who have made the laws and have at least acquiesced in the war.

Believing that each of these assumptions is fallacious, I shall try to show that the dominant concern for amnesty is a concern for the welfare of society as a whole, and that preoccupation with the problem of fairness to the violators involves a sad distraction from the main point. I shall mention also a few undisputed facts which, in my opinion, cast serious doubt upon the accuracy of the first three of the five listed assumptions—facts which suggest that amnesty may be called for even if we disregard the needs of the larger society and seek nothing but fairness to the law violators. In the concluding section of the article, I shall very briefly describe the legal tools that are available to do what-

ever the American people ultimately say they want done—as they may say at the polls this November.

First let us examine the root question, the starting point for appraisal of any proposal for public action: whose ox is being gored? The fourth and fifth of the five propositions both say, in different ways, that fairness to the lawbreakers is our only concern. Although it is by no means unimportant, I submit that it should not be even our primary concern. Rather, our primary concern should be to thrust this long and divisive war into history as completely and rapidly as we can, to let time get on with its healing, to cleanse our society of a continuing legal fallout whose half-life is measurable in decades, and—without denying ourselves the honor of mourning the dead, supporting the crippled, and comforting the bereaved—to turn our minds and hearts to the future.

Dirty and frightful as the war experience has been, lessons can be learned from it that may help us deal with future challenges in a manner more humane, more effective, and less expensive. The war has demonstrated that a society such as ours, in which the people have the ultimate power of decision (however long it may take them to bring their power to bear through the electoral process),[15] will tear itself apart if led into a war whose necessity cannot be made clear to all or nearly all of the people. Moreover, the war has done much to liberate us from the fiction, so carefully nurtured by Senator Joseph McCarthy and his latter-day disciples, that communism is a unitary, monolithic phenomenon comparable to a killing disease which we are honor bound to fight wherever we find it, and which we can effectively handle with the same remedies wherever and whenever it shows itself. The war also has helped to dispel the dangerous dogmas (a) that our nation—militarily encumbered, as it is, by its dependence on consent and its humanitarian ideals—can lick anyone we elect to fight, and (b) that a "white" nation can lick a "nonwhite" nation in any fair and equal combat. Finally, the war has reminded us, as we have not been reminded since the Great Depression, that our liberties are too fragile to survive when any substantial minority loses confidence in the Government's desire for justice; therefore, our society can remain open only if the ethical qualities of our Government's major undertakings command the support, or at least the acquiescence, of nearly everyone.

All these lessons, and others too, will serve us well when we grapple with the problems of today and tomorrow, if only we can allow ourselves to learn. But our ability to understand and profit from the dearly bought

15. See p. 534 *infra*.

experience is, and will continue to be, gravely impaired so long as the legal debris of the war in Southeast Asia remains to distract us, so long as our eyes are blinded by the ashes of dead issues.

What is this legal debris? Let us suppose that tomorrow morning the fighting ends and all war prisoners are sent home.[16] What, then, will our situation be? At that time we shall have terminated the war in its international aspect only. On the domestic side, these quite substantial vestiges will remain, and, barring amnesty, they will remain for years and decades to come:

(1) Tens of thousands of objectors to the war have broken the federal and/or state criminal law and, if not already prosecuted, are subject to prosecution. Numerically, the largest groups are draft refusers or evaders, and participants in illegal demonstrations. The great majority have engaged in no act that has involved or threatened injury to any person, or substantial damage to, or theft of any property; but some few have committed assault, arson, burglary, and perhaps worse crimes.

(2) Some of these people have exiled themselves in Canada, Sweden, and other foreign countries. Others, who have not fled, either (a) have been convicted, or (b) are presently being prosecuted or serving prison sentences, or (c) are subject to prosecution.[17] The last group is by far the largest. The war's end may lead most prosecutors to ignore them in favor of more dangerous offenders. Even so, however, each of them, along with his spouse and close associates, will know that if anything is said, published, or done that awakens the prosecutor's unfavorable attention, prosecution may ensue at any time before the applicable statute of limitations has run.[18] The violator, in effect, will be a probationer and as such he will have reason to keep his mouth shut on controversial issues. His one venture in political expression—opposition

16. It is a good bet that the war will in fact end, or practically end, no more than a few weeks before the November election. Prisoner repatriation may take a while longer, but it is most unlikely to be long delayed, once the fighting ends. The alternatives to ending the war would seem to be (1) a sudden movement in the direction of World War III or (2) renunciation by President Nixon of his chances for re-election.

17. *See* NEWSWEEK, Jan. 17, 1972, at 19, col. 1; Village Voice, Feb. 24, 1972, at 1, col. 1.

18. *E.g.*, Act of Aug. 10, 1956, 10 U.S.C. § 843 (1970), provides that a person charged with desertion or absence without leave in time of war may be tried and punished at any time without limitation. A person charged with desertion in time of peace is not liable to be tried by court-martial if the offense was committed more than 3 years before the receipt of sworn charges and specifications. In addition, any person who refuses or evades registration or service in the armed forces in violation of § 3 of the Universal Military Training and Service Act, 50 U.S.C. (App.) § 453 (1970), is subject to a 5-year statute of limitations. Toussie v. United States, 397 U.S. 112 (1970); Act of Sept. 1, 1954, 18 U.S.C. § 3282 (1970).

to the war by illegal means—may prove to be his last.

(3) Almost without exception, these violators believe—perhaps rightly, perhaps not—that they have served rather than harmed the United States by revealing, through their law-breaking or self-exile, the depth of their own conviction that the war has been wrong, thereby helping to speed the general realization that the war must be ended. Millions of others share and cling passionately to this conviction,[19] and will go on proclaiming the injustice of continued punishment, prosecution, or de facto probation. Thus the divisive effect of the war will be prolonged, perhaps for decades.

(4) The rankle will persist long after prosecutions are ended and sentences served. The stigma of criminal status—the plight of the ex-convict—will still remain. This status carries with it various political and civil disabilities, heavier in some states than in others. These include disability to vote,[20] to hold public office,[21] and to obtain public employment;[22] ineligibility for admission to professions such as law, medicine, and teaching, or for admission to other licensed callings such as taxi driving and liquor retailing;[23] and other less obvious legal impediments.[24]

(5) The law violators are numerous enough, and are sufficiently dispersed geographically, to spread these effects throughout the land. The problem is thus a national one, arising from a national war and involving our national political health, and it can only be dealt with effectively and uniformly through federal action.

Notice should be taken not only of the foregoing considerations but also of two additional arguments against soft treatment for those who have defied the law in the name of a higher duty. These less frequently articulated arguments, which very probably underlie the superficial question posed at the beginning of this discussion, have been raised by thoughtful scholars and statesmen and therefore deserve attention.

First, it is asked how we can expect any future military conscription

19. Blau, *Amnesty for Dissenters on War Is Backed by Religious Leaders*, N.Y. Times, Mar. 28, 1972, at 16, col. 3.

20. "The state constitutional and statutory provisions disfranchising persons convicted of criminal offenses are so diverse that they are difficult to categorize. Despite this diversity, the result in the overwhelming majority of states is that citizens convicted of serious crimes, usually felonies, lose their right to vote until their civil rights are restored in accordance with the appropriate state laws." Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 975 (1970).

21. *Id.* at 987.

22. *Id.* at 1013.

23. *Id.* at 1002-13.

24. *See id., passim.*

to succeed if we now grant unconditional and complete pardon to those who have defied the draft for the war in Southeast Asia. The answer, I think, is to be found in a point already mentioned. This war has demonstrated not that the American people are outright pacifists, but that we draw the line at wars whose necessity cannot be made clear to all or nearly all of the people. The experience with the present war provides no basis for believing that our young people would lag back if our borders were invaded or if some neo-Hitler were to engage in atrocities, aggressions, and threats of world domination similar to those that led to World War II.

The second and broader question is whether civil disobedience in *any* form is not to be feared and deplored as an attack upon the rule of law itself. Can public order survive if we do not insist upon at least some punishment for those who have denied their obligation to comply with duly enacted laws, channeling their opposition to effect change into the regular corrective processes of opinion formation and electoral action? The general answer to this question is to be found in our system's long standing recognition that civil disobedience can serve a useful public function. For centuries, religious leaders have insisted that although Caesar must be rendered his due, the individual rightly reserves to himself the right and duty to decide *what belongs* to Caesar. If he decides that Caesar has transgressed a higher law, he is duty-bound to resist. Moreover, although it is not to be expected that Caesar will immediately countenance such resistance in all cases—as Caesar does in the case of our law respecting conscientious objection to military service—civil disobedience still serves a useful function by appealing to what the late Chief Justice Stone called "the sober second thought of the community."[25] If history proves that the objectors were right, as in the case of John Brown's murderous attack at Harper's Ferry and in the more recent example of the thousands who engaged in illegal "sit-ins" to protest racial discrimination, their crimes will be viewed as having brought about long-run gains outweighing any temporary losses in respect for legal authority. The risk they run is that their crimes may be found to disserve the long-term needs of society, contrary to their own deeply felt convictions and hopes. Such has been the fate of those who, like certain governors and lesser officials of the deep South,[26] defied the Supreme Court's determination that racial segregation is unconstitutional. Whether formally convicted or not, their sincerely motivated

25. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936).

26. Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1174 n.49 (1963); *see* United States v. Barnett, 376 U.S. 681 (1964).

violations of the criminal law will not be redeemed by the judgment of history. In the case of resisters to the present war, history promises a more generous appraisal.

A more specific answer, pertinent in the particular circumstances of the present war, will serve to introduce a discussion of the nature and scope of amnesty that the public interest demands for resisters to this war. Two accepted axioms of constitutional government are (1) that the rule of law binds the rulers as well as the ruled and (2) that ultimate sovereignty resides in the electorate. If Caesar himself has ignored the expressed will of the people, is it the resisters who bear the real blame for denigration of the law, or is it Caesar?

A strong case can be made for the proposition that Americans passed adverse judgment on the war no later than the 1968 presidential election. President Lyndon B. Johnson won the 1964 election on a platform containing a no-war plank. Four years later, in my opinion, a clear mandate was given when both major candidates won nomination on an end-the-war program, after President Johnson had declined to run for the stated reason that he feared his candidacy would hamper his peacemaking efforts. This November the people will have another opportunity to express their condemnation of the war if the issue is adequately framed in the presidential and congressional races. Should the people reaffirm what I think they said in 1968, it logically follows that those who opposed the war sooner and more vigorously than the rest of us will tend to be regarded as having performed a service by helping to hasten public awareness of the war's true character and presumptively should be relieved of all legal disadvantages resulting from their opposition to the war, or at least any such disadvantage that they incurred after the 1968 election. This conclusion not only involves remission of criminal penalties but also implies the complete erasure of criminal status.

It is desirable that amnesty, if premised on the wrongness of the war, be granted openly and officially and not bit by bit in the form of quiet military discharges given to deserters, or through case-by-case leniency accorded by clemency commissions or parole boards.[27] The candid admission of error is beneficial not only to the individual soul, as the churchmen tell us, but also to the body politic. The French, for example, benefited from their painful recognition of the wrong done to Captain Dreyfus. The Germans benefited from their even more painful recognition of Nazi wickedness under the rule of Adolf Hitler. We Americans, if we truly believe that the war in Southeast Asia has been

27. This, for example, was the practice adopted after World War II. *See* note 12 *supra*.

a bad mistake, also would benefit, both in self-esteem and in our relations with the rest of the world, by making express and official acknowledgment of the error, and by doing so sooner rather than later.

Full amnesty might not, however, be thought appropriate in all cases. It would not be illogical, though it would be administratively difficult, to limit clemency to those whose offenses were motivated wholly or partly by conscientious opposition to the war. To be sure, such a limitation would discriminate in favor of articulate young men who are capable of explaining their feelings in religio-philosophical lingo; and relatively few of them come from Appalachia or Harlem. It also would not be illogical, though again administratively difficult, to deny full clemency to those whose offenses have been "violent."[28] Even with these limitations, however, most acts of criminal opposition to the war would be pardoned.

If, on the other hand, it turns out that most Americans can agree only that fairness should be accorded to war resisters, so that their acts or omissions will be reappraised in the calmer atmosphere of peacetime, amnesty will be narrower. There may be liberation of prisoners, but no erasure of the stigma of conviction or restoration of political and civil rights. There may be amnesty for federal offenders (most of whom are draft refusers) but not for state law violators—most of whom have been prosecuted for some form of violence or near-violence, though the great majority have done no more than block the transport of draftees or engage in other illegal demonstrations.

In appraising the desirability of limitations upon amnesty, however, one somber fact must not be ignored. Attica stands as a reminder of the difficulty and human waste involved in punishment of people who believe they have been unjustly convicted. It also has brought to light the primitive crudity of the methods that our penologists have thus far devised for dealing with them. The execution or continuing punishment of persons whose innocence is maintained not only by themselves but by great numbers of sympathizers provides the latter with a devastatingly effective means of perpetuating destructive social discord. This is not to say that the guilty and the incorrigible should go free whenever noisy mobs persist in demanding their release. But it is clear that when a considerable segment of society believes that a real question exists about moral or legal culpability of the incarcerated—as is true in the case both of the black militants at Attica and of the draft resisters

28. The term "violent" is not easy to define. Does it include, for example, the act of scrambling draft board records or participating in sit-in demonstrations?

imprisoned now or in the future by reason of their disapproval of the war in Southeast Asia—there is a price to be paid in the coin of persisting social discord.

Finally, in deciding whether clemency is due such offenders as the Berrigans, we should ask ourselves this question: had John Brown's body *not* lain a-mouldering in the grave when the Civil War ended—if, instead, he had been serving a prison term—would he have been accorded less generosity than Jefferson Davis and Robert E. Lee?

Only a crystal ball could tell us how the amnesty problem will be resolved. Its timing, especially, may depend on how the war ends. Should it cease at a defined moment,[29] amnesty is likely to be granted soon thereafter. Should the war trail off as gradually as it began, amnesty may be slower in coming.

But should we postpone our consideration of the problem until hostilities are over? I do recognize the accuracy of President Nixon's prediction that amnesty will be delayed until our prisoners are back home and American servicemen, except perhaps for volunteers, no longer fight in Southeast Asia.[30] It does not follow, however, that the political groundwork for an amnesty must be delayed until then. It is not too soon to initiate public debate on the scope and timing of the amnesty. Unless public opinion crystallizes and the candidates commit themselves on this issue, the November 1972 election cannot serve as a meaningful expression of the popular will. Nor is it too soon to lay the necessary *legal* groundwork. Thus in the remainder of this article, I shall consider the possibilities for presidential and congressional action to develop the means for carrying out the expression of public sentiment that may well emerge when Americans next go to the polls.

III. Presidential and Congressional Power To Grant Amnesty to Federal and State Offenders

The constitutional authority for a presidential or congressional grant of amnesty must be examined on two levels. Since the Constitution contains an express provision regarding clemency for federal offenses, presidential and congressional power in this area is considered first. The question of amnesty for state offenders is then discussed separately

29. Recent events may have increased the probability for a rapid termination of the war in Southeast Asia. A quick settlement may be spurred by President Nixon's trips to Peking and Moscow, by congressional action, or by the United Nations, whose competency in this area has been increased by the admission of Mainland China. *Cf.* N.Y. Times, Apr. 14, 1972, at 1, col. 4.

30. N.Y. Times, Jan. 3, 1972, at 20, col. 8; Newsweek, Jan. 17, 1972, at 19, col. 2.

because the Constitution contains no express provision regarding clemency for these persons.

A. Federal Offenders

It is true, as President Nixon has reminded us, that clemency for federal offenses is an executive function. Article II, section 2 of the Constitution gives pardoning power to the President.[31] Such clemency can take the form of full pardon—with erasure of guilt, as is done in cases of mistaken identity—or remission or reduction of punishment. Moreover, the President's power to grant amnesties as well as individual pardons was not seriously challenged until congressional radicals mounted a constitutional attack against President Andrew Johnson's unconditional grant of amnesty on Christmas Day, 1868, to all Confederates who had participated in the Civil War.[32] In 1869 the Senate Judiciary Committee concluded that the President under article II, section 2 of the Constitution did not have the power to grant amnesty. The Committee reasoned that there is a distinction between the terms pardon and amnesty and that the framers, being aware of the distinction, deliberately omitted amnesty from the authority "to grant Reprieves and Pardons."[33]

The presidential power to grant amnesties under article II, section 2 was confirmed, however, by the Supreme Court's decisions in *United States v. Klein*[34] and *Armstrong v. United States*,[35] that upheld the amnesty order of December 25, 1868. In later decisions, the Court has gone on to hold that the President's pardoning power includes the power to grant not only outright amnesty, but also amnesty conditioned on the

31. U.S. CONST. art. II, § 2. The section gives the President "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."

32. Proclamation of Dec. 25, 1868, 15 Stat. 711.

33. "The committee, after a careful examination of the subject, have no hesitation in coming to the conclusion that the proclamation in question was wholly beyond the constitutional power of the President, and that it can have no efficacy to the ends sought to be reached by it." S. REP. No. 239, 40th Cong., 3d Sess. 22 (1869). The logic of the Senate report apparently ignores a statement by Alexander Hamilton in *Federalist Paper No. 74*, in which he indicated that the pardoning power should extend to the granting of an amnesty. The principal argument for reposing the power of pardoning in the Chief Executive, he said, is that "in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth . . . . The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity." THE FEDERALIST No. 74, at 484 (E. Earle ed. 1937) (A. Hamilton).

34. 80 U.S. (13 Wall.) 128 (1872).

35. 80 U.S. (13 Wall.) 154 (1872).

occurrence or nonoccurrence of a specified event.[36] Reasonable conditions—perhaps an oath of allegiance, as after the Civil War[37] or perhaps alternative public service as proposed by Senator Taft and others[38]—can be attached.

Although the President has plenary power to grant clemency to federal offenders, both military and civilian, there are certain things that he lacks power to do without congressional authorization. He probably lacks power to restore the citizenship of those who have relinquished it in protest against the war, since Congress alone possesses the naturalization power.[39] Moreover, the Supreme Court in *United States v. Burdick*[40] held that the President cannot give a pardon granting a general personal immunity from punishment for unspecified offenses. Although there is some language in the opinion that could be cited against presidential power to grant pre-conviction pardons, this should be disregarded as unconsidered dictum both because the exercise of this power has been upheld by the Court on a number of occasions[41] and because the case involved a wholly different problem.[42]

The Supreme Court never has been called upon to adjudicate the constitutionality of an amnesty granted by Congress alone, without the affirmative concurrence of the President or some member of his cabinet. As a matter of fact, so far as I can discover, Congress has never passed an act labeled as an amnesty. Legislation having the same effect, however, has been passed on several occasions. After the Civil War, for example, Congress, pursuant to section three of the fourteenth amendment,[43] removed political disabilities[44] that had been imposed

36. United States v. Burdick, 236 U.S. 79 (1915); Knote v. United States, 95 U.S. 149, 153 (1877); *see* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

37. *See* note 10 *supra* and accompanying text.

38. H.R. 12417, 92d Cong., 2d Sess. (1972); S. 3011, 92d Cong., 1st Sess. (1971).

39. The Constitution expressly delegates to Congress the power "To establish an uniform Rule of Naturalization . . . ." U.S. CONST. art. I, § 8, cl. 4.

40. 236 U.S. 79 (1915).

41. Armstrong v. United States, 80 U.S. (13 Wall.) 154 (1872); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872). *See also* notes 9 & 10 *supra* (presidential preconviction amnesty for *specified* offenses had repeatedly been granted, apparently without challenge).

42. The decision turned on whether acceptance of a pardon is necessary for its effectiveness. 236 U.S. at 87.

43. Section 3 of the fourteenth amendment provides: "No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each House, remove such disability." U.S. CONST. amend. XIV, § 3. The first sentence legitimized Congress' attempts

This action was never challenged in the courts, because it was expressly authorized by the fourteenth amendment,[45] and, therefore does not constitute persuasive authority for the existence of a general congressional amnesty power. On the other hand, at least two Supreme Court cases[46] have indicated that Congress may have an amnesty power, although it is clear that Congress may not limit or restrict the presidential pardoning power.[47]

In *Pollock v. Bridgeport,*[48] commonly referred to as *The Laura,* the Court upheld an act of Congress granting the Secretary of the Treasury the authority to remit fines for violation of federal revenue laws. It was contended that this constituted an encroachment upon the President's exclusive right to grant pardons,[49] but the Court held otherwise, noting that remission of fines had been standard practice for nearly a century. It will be observed that, in this case, the remission of fines could not have taken place without the concurrence of a high executive official. For that reason it does not squarely hold that Congress could independently grant amnesty, although it does provide some support for that view.

The same is true of *Brown v. Walker,*[50] decided in 1896. The plaintiff, Brown, had been subpoenaed to testify before a federal grand jury investigating alleged violations of the Interstate Commerce Act. He asserted the fifth amendment privilege against self-incrimination in refusing to answer certain questions, even though Congress previously had authorized immunity for witnesses such as he, and immunity had been granted to him. Having been jailed for disobeying a court order to answer the questions, Brown petitioned for a writ of habeas corpus on the theory that despite immunity, compulsion to answer was an unconstitutional infringement upon his privilege against self-incrimination.

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to refuse to seat members-elect who had southern sympathies. *See generally* R. CURRENT, T. WILLIAMS, & F. FREIDEL, AMERICAN HISTORY 433-35 (1963).

44. Congress exercised the right to remove the disabilities imposed by § 3 of the fourteenth amendment at various times and usually to benefit limited classes of persons. In 1872, for example, by a blanket act, disabilities were removed from all persons except Senators and Representatives of the 36th and 37th Congress, officers of the judiciary, military and naval service of the United States, and a few others. Act of May 22, 1872, 17 Stat. 142. Finally, on June 6, 1893, Congress removed all of the disabilities that had been imposed under § 3 of the fourteenth amendment. Act of June 6, 1893, 30 Stat. 432.

45. U.S. CONST. amend. XIV, § 3.

46. Brown v. Walker, 161 U.S. 591 (1896); Pollock v. Bridgeport, 114 U.S. 411 (1885).

47. *Ex parte* Garland, 71 U.S. 333 (1866).

48. 114 U.S. 411 (1885).

49. *Id.* at 413.

50. 161 U.S. 591 (1896).

The Supreme Court rejected Brown's fifth amendment claim[51] and addressed the separation of powers argument, the possible conflict between the immunity statute and the executive pardoning power:

> The act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England . . . or in this country. Although the Constitution vests in the President "power to grant reprieves and pardons for offences against the United States, except in cases of impeachment," this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction, although, as was said by this court in *Ex Parte Garland* . . . "it extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."[52]

As already noted, the issue in *Brown v. Walker* was whether the legislature has power to forbid prosecution of a lawbreaker in exchange for otherwise unavailable testimony against other lawbreakers.[53] The case of the war resisters is not quite parallel, because no *quid pro quo* is involved.[54] Nevertheless, the above-quoted language seems to recognize the amnesty power as one that belongs to Congress despite the absence of express constitutional delegation, because the Court says that the President's clemency power does not "*take from Congress* the power to pass acts of general amnesty."

B. State Offenders

The President surely lacks power to grant amnesty to the many violators of state law—a category that includes most of the illegal demonstrators—because his constitutional pardoning power is expressly confined to federal offenses. Moreover, the Constitution does not indicate whether Congress has any power in this area. Consequently, some constitutional lawyers may say that state law violators cannot be granted clemency even by Congress and the President acting in concert. They may argue that this power resides only in the respective states.

Each of the 50 state governments does possess this power. In most of them, the governor has authority under the state constitution to

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51. *Id.* at 600.

52. *Id.* at 601.

53. *See* text accompanying notes 51 & 52 *supra.*

54. It is true that Senator Taft's bill, S. 3011, paralleled in the House by H.R. 12417, introduced by Congressman Edward I. Koch, would grant amnesty on condition that the violator work in some public service job for a stipulated period. Unlike the immunity statute involved in *Brown v. Walker,* however, the objective of the Taft-Koch bill is not to obtain the years of public service as a stipulated consideration; the purpose, rather, is to avoid discrimination against those who responded to the draft as required by law.

extend clemency to those who have been convicted,[55] and in the remaining states this authority resides in either a board of pardons[56] or the legislature.[57] Moreover, although only a minority of state constitutions contain a clemency provision whose scope is not expressly limited to post-conviction pardons,[58] it may well be that each state legislature has the power to withdraw the authority of police and prosecutors to proceed against lawbreakers not yet convicted.

Reliance on state clemency for war resisters, however, would inevitably negate the possibility of national uniformity, since there would be a broad spectrum of clemency policies. Illegal demonstrators, for example, convicted of obstructing the entrance to draft offices by linking arms to form a cordon, might be granted a full pardon in some states, reduction or remission of sentence in others, and no relief at all in the remainder. Such diversity, of course, would leave much to be desired on the score of fair and equal treatment for those who have responded in identical fashion to the challenge presented by the foreign policies and military ventures of the same federal government. Furthermore, the national interest in healing the societal wounds that the war has inflicted

55. ALAS. CONST. art. III, § 21; ARIZ. CONST. art. 5, § 5; ARK. CONST. art. 6, § 18; CAL. CONST. art. 7, § 1; COLO. CONST. art. IV, § 7; CONN. CONST. art. IV, § 13; DEL. CONST. art. 7, § 1 (on recommendation in writing of majority of board); HAWAII CONST. art. IV, § 5; ILL. CONST. art. 5, § 13; IND. CONST. art. 5, § 17 (may be limited by board appointed by legislature); IOWA CONST. art. 4, § 16; KAN. CONST. art. I, § 7; KY. CONST. § 77; LA. CONST. art. 5, § 10 (on recommendation in writing of majority of board); ME. CONST. art. VII, § 9 (in conjunction with council); MD. CONST. art. II, § 20; MASS. CONST. art. VIII, § 64 (with advice of council); MINN. CONST. art. 5, § 4 (in conjunction with board); MICH. CONST. art. VI, § 9; MISS. CONST. art. 5, § 124; MONT. CONST. art. VII, § 9 (governor's action must be approved by board); MO. CONST. art. 4, § 7; N.H. CONST. art. 2, § 52 (governor may grant with advice of council); N.J. CONST. art. 5, § 1; N.M. CONST. art. 5, § 6; N.Y. CONST. art. IV, § 4; N.C. CONST. art III, § 6; N.D. CONST. art. III, § 76 (1900) (in conjunction with board); OHIO CONST. art. III, § 1; OKLA. CONST. art. 6, § 10 (upon favorable recommendation of pardons and parole board); ORE. CONST. art. V, § 14; PA. CONST. art. 4, § 9 (on recommendation in writing of majority of board); R.I. CONST. amend. 2 (governor may grant with advice and consent of Senate); S.D. CONST. art. IV, § 5; TENN. CONST. art. III, § 6; TEX. CONST. ART. 4, § 11 (governor may grant on written recommendation and advice of board majority); VA. CONST. art. V, § 73 (power taken away if legislature creates pardons board); VT. CONST. art. 2, § 20; WASH. CONST. art. 3, § 9; W. VA. CONST. art. 7, § 11; WIS. CONST. art. 5, § 6; WYO. CONST. art. 4, § 5.

56. FLA. CONST. art. 4, § 12; GA. CONST. art. V, § I, ch. 21-3011; IDAHO CONST. art. 4, § 7; NEB. CONST. art. 4, § 13; NEV. CONST. art. V, § 14; S.C. CONST. art. 4, § 11; UTAH CONST. art. VII, § 12.

57. ALA. CONST. art. 5, § 124.

58. ALA. CONST. amend. XXXVIII; CONN. CONST. art. IV, § 13; DEL. CONST. art. 7, § 1; HAWAII CONST. art. IV, § 5; IDAHO CONST. art. 4, § 7; KAN. CONST. art. I, § 7; KY. CONST. § 77; LA. CONST. art. 5, § 10; ME. CONST. art. V, § 11; MD. CONST. art. II, § 20; N.J. CONST. art. 5, § 2, ¶ 1; ORE. CONST. art. V, § 14; PA. CONST. art. 4, § 9; R.I. CONST. amend. 2; S.C. CONST. art. 4, § 11; TEX. CONST. art. 4, § 11; VT. CONST. art. 2, § 20; WASH. CONST. art. 3, § 9.

would be lost in a welter of parochial party politics. Thus it would seem that federal action is needed, and since the President lacks the power to pardon state law violators, this raises the question whether any provision in the Constitution delegates sufficient power to Congress to grant amnesty to state offenders.

Despite the tremendous reach accorded to the commerce power during the past 35 years,[59] it would be hard to construct an argument that it extends to the pardoning of all state law violators; even if an argument to this effect were somehow contrived, it would rightly be subject to criticism as a subterfuge.[60] For example, it is difficult to explain how the pardoning of one convicted of criminal trespass for conducting a sit-in at a university ROTC office can be viewed as a protection of "Commerce with foreign Nations, [or] among the several states, [or] with the Indian Tribes."[61]

The war power provides a more solid basis for granting amnesty to state law violators. It has been held to authorize Congress to deal with the economic consequences of foreign wars.[62] By parity of reasoning, the war power should be held to include the authority to deal with war's *social* consequences—specifically, disrespect for law on a scale not seen since Prohibition days, and a devastating polarization of political opinion. Given these facts, congressional amnesty for state offenders might well pass muster under the war power.[63]

It does not follow, however, that primary reliance *should* be placed on the war power.[64] There is a certain incongruity in using the war power

59. Since 1937, the Supreme Court has accorded virtually complete deference to congressional exercise of the power. *See, e.g.*, Daniel v. Paul, 395 U.S. 298 (1969); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In the 100 years preceding 1937, the commerce clause was interpreted more strictly. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935); Hammer v. Dagenhart, 247 U.S. 251 (1918); United States v. E.C. Knight Co., 156 U.S. 1 (1895); The Trade-Mark Cases, 100 U.S. 82 (1879); *cf.* United States v. Butler, 297 U.S. 1 (1936).

60. Reliance on the commerce power to support the Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975a-d, 2000a to h-6 (1970), occasioned much adverse comment on this account. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (Douglas & Goldberg, J.J., concurring).

61. U.S. CONST. art. I, § 8, cl. 3.

62. Bowles v. Willingham, 321 U.S. 503 (1944) (rents); Yakus v. United States, 321 U.S. 414 (1944) (prices).

63. In addition, the Supreme Court has held that congressional power to mitigate the consequences of a war does not end with the termination of hostilities, so timing of the amnesty would seem to be no problem. Woods v. Miller Co., 333 U.S. 138 (1948) (postwar rent-control).

64. The fact that Congress has not declared this war might be thought to preclude reliance on the war power, but such an objection almost certainly would fail. *See* Mora v. McNamara, 389 U.S. 934 (1967) (the Court refused to review denial of injunction sought by army privates who attacked legality of undeclared Vietnam war and resultant orders shipping them to Vietnam).

to pardon those who have illegally *resisted* the war, and this might make an amnesty inexplicable to the electorate if based upon the war power alone. In my opinion, congressional action can and should be predicated not only upon the war power but also—and more appropriately—upon a constitutional provision that was adopted for the very purpose of empowering Congress to override state action that is inconsistent with federal policy: the privileges or immunities clause of the fourteenth amendment.

Some constitutional lawyers may well lift an eyebrow at this suggestion. They know that the clause was emasculated almost a century ago by the decision in the *Slaughter-House Cases,*[65] and that a 1935 judicial effort to reactivate it as a self-executing limitation on state power[66] was quashed five years later.[67] They know too that it was a watershed decision which has shaped the whole course of federal-state relations during the past 99 years. Even during the past ten years, when we have seen constitutional precedents that limited equality, free expression, and the rights of accused persons repudiated wholesale, this 1873 decision has stood firm as Gibraltar, virtually untouched by recent criticism.[68]

Yet, in my opinion, the decision in the *Slaughter-House Cases* was a disaster—a product of well-motivated judicial arrogance, comparable in destructive effect to the three "self-inflicted wounds" listed by Charles Evans Hughes in his Blumenthal Lectures at Columbia University in 1927:[69] the *Dred Scott* case,[70] *Hepburn v. Griswold,*[71] and *Pollock v. Farmers' Loan & Trust Co.*[72] As in each of those cases, the Court in the *Slaughter-House Cases* overstepped the bounds of judicial power to rewrite the Constitution. As in each of those cases, the Court was impelled to usurpation by a felt need to save the Nation—from rebellion in *Dred Scott,* from fiscal irresponsibility in *Hepburn,* from socialism in *Pollock,* and from replacement of federalism by centralized government in the *Slaughter-House Cases.* And, as in each of those cases, the

65. 83 U.S. (16 Wall.) 36 (1873).

66. Colgate v. Harvey, 296 U.S. 404 (1935); *see* Hague v. CIO, 307 U.S. 496, 500 (1939) (Roberts & Black, J.J., concurring).

67. Madden v. Kentucky, 309 U.S. 83 (1940).

68. The most notable exception is L. MILLER, THE PETITIONERS ch. 7 (1966).

69. C.E. HUGHES, THE SUPREME COURT OF THE UNITED STATES 50-54 (1928).

70. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *overruled* by U.S. CONST. Amend. XIV.

71. 75 U.S. (8 Wall.) 603 (1870) (the first Legal Tender Case), *overruled,* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871).

72. 157 U.S. 429 (1895) (invalidating the federal income tax), *overruled,* U.S. CONST. amend. XVI.

well-intentioned decision was a national catastrophe.

These are serious charges to level at a constitutional decision that has been so universally accepted by great judges.[73] Therefore, although this is not the place for a full disquisition, it is necessary to state the gravamen of the indictment.[74]

First, we must understand precisely what Justice Miller's majority opinion held. In 1869 the Louisiana legislature had enacted a statute giving to a certain corporation a monopoly on the operation of slaughter houses in three parishes, including New Orleans. A number of butchers, being thus forbidden to continue their businesses as independent enterprises, attacked the statute as violative of the thirteenth and fourteenth amendments. The Supreme Court rejected these contentions, affirming the judgment of the Supreme Court of Louisiana that upheld the statute.

What concerns us here, with regard to the amnesty question, is the *rationale* of Justice Miller's opinion, insofar as it interprets the privileges or immunities clause of the fourteenth amendment. Section 1 of the amendment, after providing that all persons born or naturalized in the United States and subject to its jurisdiction are its citizens, goes on to provide: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[75] The complaining butchers claimed that the right to pursue a lawful common calling is a privilege inherent in citizenship, and that, being citizens of the United States, they enjoyed immunity from abridgment of that

73. Hague v. CIO, 307 U.S. 496, 519-20 & n.1 (1939) (Stone, J., concurring); Colgate v. Harvey, 296 U.S. 404, 443, 445-46 (1935) (Stone, Brandeis, & Cardozo, J.J., dissenting).

74. It could be contended that even if the *Slaughter-House Cases* were not overruled, Congress, under the privileges or immunities clause and § 5 of the fourteenth amendment, has the power to grant amnesty to persons who have violated state statutes in their acts of protest against the war in Southeast Asia. Although § 5 historically has been restrictively construed (*see* the Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882); United States v. Cruikshank, 92 U.S. 542 (1875)), recent decisions seem to indicate that the Supreme Court is willing to give Congress some latitude in defining the phrases of the first section of the fourteenth amendment. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966). *See also* United States v. Guest, 383 U.S. 745 (1966). It would seem that under the Civil Rights Act of 1866, as interpreted by Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), Congress has the power under the analogous § 2 of the thirteenth amendment to grant to an individual an affirmative privilege against private racial discrimination. Since the fourteenth amendment was designed in part to legitimate the Civil Rights Act of 1866, it is arguable that the fourteenth amendment's privileges or immunities clause was intended to have wider scope than has heretofore been recognized. If the fourteenth amendment was designed to give to Congress the power to define a privilege against private racial discrimination, then the fourteenth amendment also might confer on Congress the power to grant amnesty as an immunity of United States citizenship and to forbid even private discrimination against an individual because of his dissent from the war in Southeast Asia. To the contrary it could be argued that the fourteenth amendment granted to Congress expansive power only to prevent racial discrimination. *See* Oregon v. Mitchell, 400 U.S. 112, 129 (1970).

75. U.S. CONST. amend. XIV, § 1.

privilege. Their case was the first that required the Supreme Court to interpret and apply the fourteenth amendment, and, as one commentator aptly wrote 40 years afterward: "Thus the Supreme Court of the United States began its series of adjudications under the Fourteenth Amendment by substantially repudiating it."[76]

Justice Miller's reasoning rejecting the plaintiffs' claim under the privileges or immunities clause of the fourteenth amendment was founded on seven propositions, of which the second, third, sixth and seventh, it is submitted, do violence to the Constitution:

(1) Federal citizenship is a status distinct from state citizenship, as the very wording of the first sentence of the fourteenth amendment shows.

(2) Each type of citizenship, federal and state, carries with it a distinct set of privileges and immunities *and the two sets do not overlap;* thus whatever is a privilege or immunity of state citizenship cannot be a privilege or immunity of federal citizenship.

(3) It is state and not federal citizenship that carries with it "those privileges and immunities which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign."[77]

(4) The privilege of pursuing a common calling is a privilege of *state* citizenship because it is a fundamental right that had existed, subject to the regulatory power of the several statutes, since before the ratification of the Constitution in 1789—*i.e.,* from the time when the colonies became free states.

(5) The second sentence of the amendment protects only the privileges and immunities of federal citizenship.

(6) Therefore, the right to pursue a common calling is not a privilege of federal citizenship and so is not protected by the privileges or immunities clause of the fourteenth amendment.

(7) It follows that the privileges or immunities clause of the fourteenth amendment is very restricted in its scope: it protects only those privileges and immunities that "owe their existence to the Federal gov-

76. E. ABBOTT, JUSTICE AND THE MODERN LAW 75 (1913).

77. 83 U.S. (16 Wall.) at 76, quoting with approval from Justice Washington's opinion in Corfield v. Coryell, 6 F. Cas. 546 (C.C. E.D. Pa. 1823) (emphasis as in original). The *Corfield* case, interpreting the privileges and immunities clause of art. IV, § 2, held that the privilege of digging for oysters in New Jersey waters was not a privilege or immunity of citizenship which had to be extended to Pennsylvanians, because enjoyment of the state's public domain was not so "fundamental" a right as to be a privilege inherent in citizenship.

ernment, its National character, its Constitution, or its laws,"[78] such as the right to go to the seat of government, the right of access to seaports, the right to petition the federal government for redress of grievances, the right to freedom of the high seas and protection while in foreign lands, and the right to use navigable streams. The great residue of rights—including nearly all of those that really matter to the common man—are privileges and immunities of state citizenship only, the fourteenth amendment not having been intended to alter the basic character of our federal system by "bring[ing] within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States."[79]

The notion that there could be no overlap between the perquisites of state and of federal citizenship was made from the whole cloth, a sheer invention by Justice Miller. Certainly the idea was not implicit in Justice Washington's *Corfield v. Coryell*[80] opinion, which interpreted the privileges and immunities clause of article IV, section 2, because that 1823 case was decided long before the fourteenth amendment imported into the Constitution, for the first time, the term "citizen of the United States." To be sure, the duality of citizenship had been expounded by Chief Justice Taney in the *Dred Scott* case[81] but *not* for the purpose of showing that the perquisities appurtenant to the respective citizenships were mutually exclusive; his point, rather, was that one might be a "citizen" within the meaning of the Missouri Constitution and laws, and yet not be a "citizen" as that term is used in article III, section 2,[82] and article IV, section 2,[83] of the *federal* constitution. Furthermore, as Justice Miller himself recognized, it was universally agreed that the purpose of the first sentence of the fourteenth amendment was to repudiate the *Dred Scott* ruling that Negroes, whether slave or free, were not and could not become members of the "political community

78. 83 U.S. (16 Wall.) at 79.

79. 83 U.S. (16 Wall.) at 77.

80. 6 F. Cas. 546 (C.C. E.D. Pa. 1823).

81. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

82. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies . . . between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2.

83. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

created by the Constitution of the United States"—*i.e.*, "citizens of the United States."[84]

A full exploration of the catastrophic results that have flowed from the Miller interpretation of the fourteenth amendment privileges or immunities clause must be reserved for another occasion. For present purposes it is enough to point out that it limited almost to zero the power of *Congress*, under the three Civil War amendments, to intervene in the relations of a state with its citizens in order to prevent a national interest from being subverted as a result of hostility or indifference on the part of state and local officials. It is true that, as Justice Miller pointed out, a drastic shift of power from the states to the federal government would have resulted from a decision that the privileges and immunities of federal citizenship include the "fundamental" rights; he seems to have assumed—quite understandably, and indeed correctly—that the *legislature* has power to define and redefine the perquisites of citizenship. As he said, this power would have enabled Congress to assume centralized control of the whole country, if—and it is an important "if"—the voters had been willing to stand for it.[85] Granting *arguendo* that the possibility of such centralization at the date of the *Slaughter-House* decision was as dangerous as Justice Miller believed, there would have been compensating advantages. Had the Court confirmed the privileges or immunities clause as a source of plenary congressional power to root out the vestiges of slavery, we might now, a century later, be much farther on the road to a nonracial society.[86] Since the fourteenth amendment—though begotten by the need to protect the newly freed slaves from the erstwhile rebel state governments—is by no means limited to protection of the freedmen, the only thing that prevents resort to its privileges or immunities clause as a source of congressional *amnesty power* is the restrictive *Slaughter-House* interpretation of that

84. 60 U.S. (19 How.) at 406.

85. *See* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

86. Of course, the Court in the *Slaughter-House Cases* conceded that Congress possessed the power, provided by the final section of each of the amendments, to enforce the 3 Civil War amendments by appropriate legislation. But the Court initially construed these enforcement clauses with almost unbelievable strictness. *See* note 74 *supra*. Not until a few years ago did the Court begin to permit congressional use of the enforcement clauses to broaden the self-executing coverage of the amendments—though the Court stopped short of making them into a general charter to preempt state jurisdiction whenever Congress believes the national interest so demands. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Cardona v. Power, 384 U.S. 672 (l1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); United States v. Price, 383 U.S. 787 (1966); United States v. Guest, 383 U.S. 745 (1966).

clause. Therefore, let us examine the soundness of that interpretation.

Although Justice Miller's interpretation is supported neither by precedent nor by the words of the Constitution, this might not be a ground for criticism if, in the judgment of history, it had served the public welfare. Other such usurpations, perhaps including *Marbury v. Madison*[87] itself, have survived that test. For reasons already stated, however, I think it has seriously *disserved* the public welfare by allocating to the Court rather than to Congress the primary responsibility and authority for rooting out the vestiges of slavery. Other unhappy consequences could be cited as well. But let us assume that the Court was justified, in the short view at least, in recoiling from an interpretation that would have aggrandized the power of a Congress, which, for corruption and faction, has been unexcelled by any of its forebears or successors. There is still the matter of intellectual honesty.

Incredible as it may seem, Justice Miller's opinion (1) deliberately misquotes the Constitution in a material respect; (2) trims a quotation from *Corfield v. Coryell* in a manner which obscures the fact that, from his viewpoint, it was harmful rather than helpful authority; and (3) denies, erroneously, that Congress had ever undertaken to define the privileges and immunities of federal citizenship. Let us examine these points in order.

(1) At page 75 of 16 Wallace, Justice Miller declared: "In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision [defining "privileges and immunitites" of state citizenship] is found in section two of the fourth article, in the following words: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens *of* the several States.' "[88] This purported quotation, which substitutes the word "of" for "in," is set forth as part of the argument for dual citizenship and against the dissenting view that the framers of the fourteenth amendment, who had regarded certain fundamental privileges and immunities as implicit in the status of free citizen *simpliciter,* intended to add federal protection to those same fundamental privileges and immunities already accorded protection by the several states. It would be reasonable to assume that Justice Miller's pen had merely slipped in this purported quotation from article IV, section 2, until one discovered that the error remained uncorrected despite the following observation in Justice Bradley's dissent: "It is pertinent to observe that both the clause of the Constitution referred to, and Justice Washington in his comment on it,

87. 5 U.S. (1 Cranch) 137 (1803).

88. 83 U.S. (16 Wall.) at 75 (emphasis added).

speak of the privileges and immunities of citizens *in* a State; not of citizens *of* a State. It is the privileges and immunities of citizens, that is, of citizens as such, that are to be accorded to citizens of other States when they are found in any State; or, as Justice Washington says, 'privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.' "[89]

(2) At page 76 of 16 Wallace, Justice Miller quotes from Justice Washington's opinion in *Corfield v. Coryell:*

> The inquiry is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.[90]

This quotation appears to be consistent with Justice Miller's conception that state rather than federal citizenship carries with it the fundamental rights that antedated the Constitution. In his dissent, however, Justice Bradley blasts this notion by the simple process of continuing the enumeration of fundamental privileges and immunities from the *Corfield* opinion at the point where Justice Miller stopped: "*the right of a citizen of one State to pass through, or to reside in, any other State* for purposes of trade, agriculture, professional pursuits, or otherwise . . . ."[91] This right certainly owed its existence to the federal constitution rather than to state citizenship; the Court had so held only five years before in *Crandall v. Nevada.*[92] Indeed, Justice Miller brazenly cited and quoted from that very case in another connection.[93]

(3) At page 72 of 16 Wallace, Justice Miller asserted: "The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress."[94] This is a remarkable assertion, be-

89. *Id.* at 117-18.
90. *Id.* at 76.
91. *Id.* at 117 (emphasis added).
92. 73 U.S. (6 Wall.) 315 (1867) (majority opinion by Miller, J.).
93. 83 U.S. (16 Wall.) at 79.
94. *Id.* at 72.

cause the 1866 Civil Rights Act was on its face an attempt by Congress to guarantee certain privileges of United States citizenship to the recently freed slaves.[95]

Disputes have arisen over the exact purposes that the fourteenth amendment was intended to serve. At least one great Justice of the Supreme Court has entertained doubts about whether the framers intended to create substantive due process.[96] Others have doubted whether corporations are "persons" within the meaning of the amendment's due process and equal protection clauses.[97] Moreover, the Court has divided almost evenly on the question whether the fourteenth amendment "incorporates" the first ten, commonly known as the Bill of Rights.[98] In addition, despite the explicit request of the Court in its order for reargument of *Brown v. Board of Education*, counsel were unable to find conclusive evidence one way or the other on the question whether the framers regarded racial segregation as a form of racial discrimination.[99] On one point, however, there has been no disagreement at all. The fourteenth amendment had its genesis in congressional doubts whether the thirteenth amendment provided a sufficient constitutional basis for the 1866 Civil Rights Act—doubts that had led President Andrew Johnson to veto the bill, which was thereupon enacted over his veto. Thus the desire of Congress to legitimate the 1866 Act may be regarded as the "first cause" of the fourteenth amendment, which was designed to eliminate any question as to the power of Congress to enact it. Yet only seven years later we see Justice Miller denying that such a statute was ever enacted.

The purpose of revealing the shabbiness of the Court's reasoning

95. The 1866 Civil Rights Act provided in pertinent part: "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, or ordinance, regulation, or custom, to the contrary notwithstanding." Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified in scattered sections of 42 U.S.C.).

96. *E.g.*, Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); *cf.* Munn v. Illinois, 94 U.S. 113 (1877).

97. *E.g.*, Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85 (1938) (Black, J., dissenting); *see* Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371; 48 YALE L.J. 171 (1938) (2-part article).

98. *E.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Adamson v. California, 332 U.S. 46 (1947).

99. 347 U.S. 483, 489-90 (1954).

in the *Slaughter-House Cases* is not to blacken the memory of Justice Miller and his four assenting brothers. We may assume that their decapitation of the fourteenth amendment—by stripping it of nearly all its efficacy as a source of congressional power—was motivated by the highest patriotism. By 1873 the abolitionist crusade had nearly petered out, and the abuses committed in the states of the *quondam* Confederacy by federal troops and carpetbaggers was a festering national scandal.[100] Full and fair effectuation of the fourteenth amendment, initiated by radical Republican abolitionists and ratified only under duress,[101] would have meant legitimation of any legal advantages with which a corrupt Congress and a weak President might elect to embellish federal citizenship—*e.g.*, immunity from state and local taxes or immunity from arrest by state and local peace officers. This was doubtless the reason why the *Slaughter-House Cases*, unlike the three other "self-inflicted wounds" listed by Charles Evans Hughes,[102] provoked no storm of public protest. Yet the enormity of what the Court did in 1873 was publicly acknowledged even by a Richmond, Virginia, lawyer, one William L. Royall, whose struggle to reconcile his satisfaction at the result with his knowledge as a lawyer that violence had been wreaked on the Constitution was expressed in an 1878 article appearing in the *Southern Law Review*.[103]

The need for a congressional amnesty provides an appropriate oc-

100. C.V. WOODWARD, REUNION AND REACTION 15 (1951).

101. 2 J. DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 621-22 (1881); L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 71,73-74 (1942); Holifield, *Secession . . . a Right Reserved by the States!*, 18 Ky. S.B.J. 160, 171-73 (1954).

102. *See* note 69 *supra* and accompanying text.

103. "The truth is, when this amendment first came before the Supreme Court for construction, the minds of patriotic men were filled with alarm at the centralizing tendency of the government. The president of the United States was holding a half-dozen states under the armed heel of military despotism; the Congress of the United States was indicating its disposition, strongly and more strongly at each successive session, to encroach upon the reserved rights of the states; and those who wished well to their country looked with sorrowing eyes upon the prospect that the ancient landmarks of the states were to yield before the advancing strides of an imperial despotism. No one can deny that the disposition of the majority of the court to put some construction upon this amendment which would curb the progress of Federal power was a most patriotic one. But was it wise? Can it ever be wise for the court to force a meaning upon the language of the Constitution, to avert a fancied or threatened danger? It is the glory and pride of the institutions of this government that they have successfully withstood every strain to which they have been subjected; and the belief that they are equal to whatever strain may be imposed upon them in the future is the hope and comfort of those who cherish them. Would it not, therefore, have been the part of wisdom, whatever fancied danger might have flowed from giving this amendment a literal construction, to give it that construction, and leave it to the institutions themselves to cure the evils which flowed from it at the ballot-box?" Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 SOUTHERN L. REV. (new series) 558, 576-77 (1878).

casion for the effort to induce reconsideration of the *Slaughter-House* interpretation of the privileges or immunities clause of the fourteenth amendment. It is submitted that the time has now come to repudiate the *Slaughter-House* doctrine and to recognize the fourteenth amendment's privileges or immunities clause as the source of congressional power it was intended to be.

IV. Proposals for Congressional Action

Having concluded that the President has full clemency power with respect to federal offenses and that Congress probably is empowered to grant amnesty to state as well as federal law violators if a national interest will thereby be served, let us turn from problems of the existence of the amnesty power to problems of how the existing amnesty power should be exercised. My own view is that the public interest will be served better by broad rather than narrow amnesty, by early rather than delayed amnesty, and by amnesty granted without conditions designed to humiliate or punish, or to equalize the burden of national service.[104] Such an amnesty will require political courage of a high order. Therefore, I believe that Congress, at a minimum, can and should shoulder part of the political responsibility by a concurrent resolution affirming its approval and support of whatever amnesty the President thinks the public interest demands. This is the least that Congress can do, or at any rate it is the least that I think Congress *should* do.

An amnesty *statute* would constitute an assumption of full political responsibility by Congress. It also would constitute the most authoritative expression of the will of the American people, a consideration whose value we have previously noted.[105]

To avoid any lingering constitutional doubt, and to avoid the type of wrangling by constitutional experts that delayed enactment of the 1964 Civil Rights Act, the effectiveness of a congressional amnesty might be made conditional upon affirmative presidential action. The bill might stipulate, for example, that it would not become law unless the President signed it, or approved it by later public proclamation.[106] Politi-

104. As to punishment in the case of arsonists and other serious offenders, I see no objection to imposition of conditions designed for society's protection—that is, conditions comparable to those ordinarily stipulated by probation and parole boards. As to equalization of burden, *see* note 54 *supra*.

105. *See* text following note 27 *supra*.

106. This express limitation would modify the normal procedure prescribed by article I, § 7, clause 2 of the Constitution, which allows a bill to become law without the President's signature *if he does not return it with his objections* within 10 days—Sundays excepted—after it has been presented to him *and if Congress does not prevent its return by their adjournment*. *See* Miller,

cally, such a condition would be of limited importance in view of the unlikelihood that the bill would pass at all without support from the White House.

It may be said that a concurrent resolution approving a presidential amnesty or a statute expressly granting amnesty would be premature at the present time because the war is still being fought. Perhaps this is so, although the objection might be at least partially obviated by a provision delaying the effective date of the amnesty until the President proclaims that hostilities have ended or have been reduced to such a level as to justify the effectuation of amnesty. Even if immediate clemency is deemed premature, however, there is still grist for the congressional mill. It is certainly not too soon to provide the President with all the authority he needs for a full and effective amnesty covering both state and federal offenses, even though he may decide not to exercise it immediately. Congress has followed this course before. For example, the President was vested with authority to fix prices, wages, and rents long before he saw fit to do so.[107] Consequently, when the time did come, he was in a position to act without delay for congressional action. Similar advantages of prompt executive action could flow from legislation authorizing a comprehensive amnesty capable of removing all federal and state political and civil disabilities incurred because of opposition to the war in Southeast Asia.[108]

As of April 1972, most political observers believe that action during the current session of Congress is unlikely. They are probably right, unless an early end to the war and a repatriation of prisoners produces a drastic swing in public opinion within months or weeks. On a subject so complex, however, any action by Congress may need time for public opinion to crystalize—for the polls, official and unofficial, to take the pulse of the nation. Whether or not the present Congress can rightly

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Congressional Power To define the Presidential Pocket Veto Power, 25 VAND. L. REV. 557 (1972); Note, *The Presidential Veto Power: A Shallow Pocket*, 70 MICH. L. REV. 148 (1971). Moreover, even if one President refused to sign the bill or expressly vetoed it, his successor could still activate it by a later public proclamation.

107. Economic Stabilization Act of 1970, 12 U.S.C. § 1904 (1970).

108. The foregoing objectives could be accomplished by congressional adoption of the following amnesty bill, which was developed by the author in collaboration with his seminar in drafting at the Columbia Law School. There is no claim that it is superior to some of the bills now pending, particularly the Abzug bill, but it does embody some ideas not yet reflected in any of the bills thus far introduced.

A BILL

To provide amnesty for certain persons who have illegally manifested their opposition to participation in the Southeast Asia War; to approve and authorize amnesty or mitigation of

claim that the amnesty issue is unripe, the next one ought to be made ready for action by being told in unmistakable terms exactly what action the electorate desires. Therefore, every American should consider carefully what the national interest demands and make his views known. This is no time for evasion, procrastination, or silence. Whatever we do, let us do it because we believe it is right—not because we lack the energy, the intelligence, and the courage to think and to speak out.

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punishment for certain additional classes of such persons; and to provide for restoration of civil and political rights that have been lost or impaired by reason of such illegal acts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

§ 1. **Definitions.**

(a) The term "cessation of hostilities" means 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 the United States involvement therein has been reduced to such a level as to justify the effectuation of Section 2 of this Act.

(b) The term "person" means any natural or artificial person, including the United States, the several states, and other corporations public, municipal, charitable, or private.

(c) The term "offender" means a natural person who has violated federal or state law solely or partly because of his disapproval of United States participation in the Southeast Asia war.

(d) The term "non-violent offender" means an offender whose offense has involved neither injury to another person nor substantial damage to or theft of the property of another person, nor the threat thereof nor attempt thereat.

(e) The term "federal offender" means an offender whose offense has been a violation of the law of the United States or any territory or possession thereof, or the District of Columbia, including the military law, and including offenders whose punishment has already been completed.

(f) The term "state offender" means an offender whose offense has been a violation of the law of any state or subdivision or municipality thereof, including offenders whose punishment has already been completed.

(g) The term "during the Southeast Asia War" means the period beginning August 10, 1964, and ending with the cessation of hostilities.

§ 2. **Amnesty for draft resisters and certain military offenders.**

(a) Any non-violent offender whose offense has consisted of violation of the Selective Service Act or any regulation thereunder, and whose offense has occurred during the Southeast Asia War, is hereby pardoned.

(b) Any non-violent offender whose offense has consisted of violation of the military law of the United States of America, and whose offense has occurred during the Southeast Asia War (whether or not it has occurred in Southeast Asia), is hereby pardoned unless such violation has consisted of desertion under such circumstances as to endanger directly the life of another member of the armed services of the United States or its allies.

(c) This section 2 shall be ineffective unless the President of the United States shall have declared his affirmative approval, by signing this bill or by public proclamation, and in any event shall be effective only upon the cessation of hostilities.

§ 3. **Approval and authorization of amnesty for other offenders.**

(a) The Congress declares that the interests of the United States require the restoration of domestic harmony at the earliest time; that such interests will be served by the annulment of all legal disadvantages that have been incurred or suffered by reason of opposition to the Southeast Asia War, to the greatest extent consistent with national security and the preservation of internal order; and that it is an immunity of citizens of the United States (within the meaning of Section 1 of the Fourteenth Amendment to the Constitution of the United States) to enjoy such annulment,

to the extent and on the conditions, if any, that may be authorized or imposed by the President of the United States.

(b) The Congress expresses its approval of such amnesty or mitigation of punishment for federal offenders other than those described in Section 2 (and also for those described in Section 2, unless and until that section shall become effective) as the President of the United States may, from time to time, grant by public proclamation, unconditionally or on such conditions as he may prescribe.

(c) The President of the United States is authorized to restore the United States citizenship of any or all persons who have relinquished such citizenship for the sole or partial reason that they have opposed the Southeast Asia War.

(d) The President of the United States is further authorized to grant, by public proclamation, amnesty or mitigation of punishment to state offenders whose offenses have occurred during the Southeast Asia War.

(e) Any grant of amnesty pursuant to this Act shall have the effect of restoring all civil and political rights that have been lost or impaired by reason of the violation for which amnesty is granted, unless the President of the United States shall otherwise declare in his public proclamation granting such amnesty.

§ 4. **Short title.** This Act shall be known as "The Southeast Asia War Amnesty Act."

§ 5. **Effective date.** Except as provided in Section 2(c), this Act shall be effective immediately.