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MILITARY LAW REVIEW

THE COMMON APPLICATION OF THE LAWS OF WAR WITHIN THE NATO-FORCES*

BY DR. GUNTHER MORITZ**

I. INTRODUCTION

The obligations of the alliance of the fifteen nations of the free world in the North Atlantic Treaty Organization (NATO),[1] in some respects, exceed the obligations of states within the framework of former military alliances. For example, the member states of the NATO-treaty have committed themselves, in peacetime, to assist each other in order to "maintain and develop their individual and collective capacity to resist armed attack."[2] Moreover the member states decided, in order to prepare an effective defense, to commence with the "establishment of ample integrated forces under unified command" for the defense of Western Europe.[3] Therefore, the Supreme Allied Commander Europe (SACEUR) commands forces of those West European countries which are members of NATO. These forces are under operational NATO-command as so-called "assigned forces." There are also other areas of command where integrated staffs have been established as well.

The close cooperation necessarily resulting from these obligations has raised many legal problems, problems which partly have been dealt with in the treaty itself, as well as in supplementary

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

** Legal Instructor and Legal Adviser to the "Command and General Staff College" of the German Army, Hamburg, Germany; Legal Assistant, International Law Section, Ministry of Defence, Federal Republic of Germany, 1956–59; LL.D., 1953, University of Tübingen Law School.

[1] North Atlantic Treaty, April 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 United Nations Treaty Series (U.N.T.S.) 243.

[2] North Atlantic Treaty, *supra* note 1, art. 3.

[3] Communiqué Regarding the Creation of An Integrated Military Force for the Defense of Freedom in Europe, NATO Council, 1st Pt. of 5th Sess., September 18, 1950, in New York; Communiqué on An Integrated Force under Centralized Command for Western Europe, NATO Council, 5th Sess., September 26, 1950; Resolution to Implement Section IV of The Final Act of The London Nine-Power Conference (October 3, 1954), NATO Council, October 22, 1954. For texts of the above communiqués and resolutions, see U.S. Dep't of State, American Foreign Policy, 1950–1955, Basic Documents—I, at 1474, 1493–96, 1606, 1607, 1609–12 (1957).

treaties.[4] Great consideration has been given to the national law and the legal obligations of the member states within these treaty provisions, thus preventing any conflicts between the treaty obligations of the member states towards the NATO treaty and their respective national law in time of peace. But the North Atlantic Treaty is also in accord with international law respecting those nations of the world community that are outside of the Treaty Organization, since the treaty is based on Chapter VII, Article 51 of the Charter of the United Nations, which article expressly reserves the right of collective self-defense to each UN member state.[5]

A military alliance, developed through close peacetime cooperation, necessarily faces the task of preparing and planning for the eventuality of armed conflict. It is precisely within this field of planning that many factual and legal problems arise, mainly because of the inevitable influence of such planning on the national conditions and the national law of the member states, conditions and legal structures which differ in many ways within the NATO countries. Some of the difficulties may be overcome by conferring on ministries of defense the authority to conclude binding agreements in the form of so-called administrative agreements. This, for instance, is the task of the Military Agency for Standardization (MAS), which prepares agreements on the unification of equipment, as well as agreements in the operational and administrative fields. These are the so-called Standardization-Agreements (STANAGs).[6] The STANAGs, being merely administrative agreements, are not subject to consideration by the legislative bodies of the respective member-states. It is sufficient that the consent of the ministry of defense or of another authorized administrative agency is obtained. However, the constitutional, national, and municipal law of the member-states cannot be influenced by measures within the administrative field. Whenever national law is in question, this will be subject to a decision of the legislative bodies. NATO, as an alliance of sovereign states, therefore, can only recommend that the member-states adapt their

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[4] See, *e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951 [1953] 4 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 667; and Agreement on the Status of the North Atlantic Treaty Organization, National Representatives, and International Staff, September 20, 1951 [1954] 5 U.S.T. & O.I.A. 1087, T.I.A.S. No. 2992, 200 U.N.T.S. 3.

[5] See North Atlantic Treaty, *supra* note 1, arts. 1, 12, where express reference is made to the purposes and principles of the United Nations.

[6] A STANAG is a written agreement concerning the adoption of similar military equipment, ammunition, or supplies (material standardization), as well as the adoption of similar operational, logistic, and administrative procedures (non-material standardization).

national law to meet the exigencies of the treaty and the organization. For the military field in its narrow sense, these recommendations, as a rule, are prepared by the Military-Committee. Questions other than of a strictly military nature are dealt with by several Council Committees, Working-groups, and Planning-boards. So far, important work has been done in these agencies in planning for the possibility of war, especially in the field of "Civil Defense."[7] As all the decisions of the Military Committees as well as the decisions of the Council Committees have to be unanimous, a member-state, as a rule, will only give consent where it is certain that the decision will not be contrary to the national law or that a necessary amendment of the national law will meet no difficulties. The present legal position of the Federal Republic of Germany is somewhat different, in that the "Three Powers" (The United States of America, The United Kingdom of Great Britain and Northern Ireland, and the French Republic), according to the "Convention of the Relations between the Three Powers and the Federal Republic of Germany,"[8] still retain certain powers and rights for the protection and security of their forces in case of emergency.[9] These powers and rights will be retained until German emergency legislation (*Notstandsgesetzgebung*) is introduced.

In spite of all the difficulties, the initial planning of NATO for the possibility of an armed conflict has to cover all the fields which are essential for the common defense against armed attack and for the support of the defense effort. In regard to armed defense, this will mean that in the narrower field of actual warfare, there is involved not only the problem of the common employment of forces with their equipment and supplies but also the problems of the scope of integration[10] of NATO-forces and the common application of the rule of law. It is to be expected that integrated forces in some areas cannot be subjected to their respective national law, but will be required to be subjected to unified legal provisions. This will, of course—as will be further explained in greater detail[11]—depend largely on the nature and on the extent

[7] By 1952, there had already been set up a Committee on "Civil Organization in Time of War." Committees on "Civil Defense" and on "Refugees and Evacuees" commenced work in February, 1953, and a "Medical Committee" was set up in September, 1954. Since 1956 these activities have been coordinated under the supervision of a high level group called the "Senior Civil Emergency Planning Committee." A "Planning Board for Ocean Shipping" has also been set up.

[8] May 26, 1952 [1952] 6 U.S.T. & O.I.A. 4251, T.I.A.S. No. 3425.

[9] Convention on Relations, *supra* note 8, arts. 2, 5.

[10] Integration means the subordination of forces of different sovereign states under a unified command.

[11] See text accompanying note 40 *infra*.

of the integration. Most of these legal questions will be problems of only internal importance to the member-states and the alliance itself, but one field of the application of law within the NATO-forces has a considerable external effect and therefore has to be regarded as of special importance. This is the field of the laws of war.[12] This complex of problems has—as far as could be ascertained—hardly been discussed at all and has remained unknown to a great extent.[13]

It is the object of this study to point out the problem and to make proposals for its solution. In part II, therefore, the problem itself will be discussed. In part III it will be shown that the present laws of war are handled differently within the NATO-states. Finally, in part IV an attempt will be made to find a solution to the problem.

II. THE PROBLEM

At a superficial glance, the common application of the laws of war within the NATO-forces may not appear to be a problem at all, since this question could be solved on the basis of international law and could be answered alone by international law which is binding uniformly on all nations in case of war. Moreover, it could be argued that this problem, if it really exists, has been solved without major difficulties in many former alliances. However, in response to these arguments, it should be pointed out (1) that the codified law of conventions and treaties is only binding on those nations which have ratified the respective conventions, (2) that the opinions of various countries on the laws of war are in wide dispute, and (3) that the close cooperation and integration of the NATO forces, in contrast to former alliances, has raised new problems with respect to the application of the laws of war. These new problems may result in a complete re-evaluation of the laws of war.

Moreover, there will be many problems in applying the laws of war that were unknown to former alliances. This has had its

[12] In the following discussion the expression, "laws of war," shall mean all the laws that govern relations between states engaged in an armed conflict with each other and all the laws that govern relations between these states and neutral states.

[13] See Baxter, *Constitutional Forms and Some Legal Problems of International Military Command*, 29 Brit. Yb. Int'l L. 325 (1952), for one of the few attempts to treat this new and complex problem. The Director of the Legal Services of the British Foreign Office, Sir Gerald Fitzmaurice, has pointed out, in connection with a draft resolution of the Institut de Droit International, that there are gaps in the laws of war and that close international cooperation in military matters and the existence of unified commands with regard to forces of different states has not been taken into account. See 47 Annuaire de l'Institut de Droit International—1, at 546 (1957).

origin in the peculiar characteristics of the NATO-alliance. Is, for instance, a subordinate soldier who is a member of a NATO-force obliged to carry out an order of a superior which, according to the national law of the soldiers' country, is contrary to the laws of war, inasmuch as his country ratified a convention prohibiting such an order, while the superior is justified in giving that order, inasmuch as his country never ratified that convention? Which country is responsible for acts of the integrated forces, according to the laws of war? Which nation is the "detaining power," according to the laws governing the treatment of the prisoners of war? Which nation is the "occupying power," according to the laws governing the treatment of protected civilian persons? Can reprisals be made against all NATO-forces in case one member-state violates the laws of war? To which nation do prizes fall which have been captured by naval forces under NATO-command?

Upon a closer examination, all these problems could rather easily be solved, if NATO was regarded as a unit, according to the existing rules of international law, or, at least, according to the existing laws of war, and is regarded as having international personality. In this case, the common application of the laws of war could be imperative, on the ground that NATO is a subject of international law. It would then only be necessary to state that international law requires NATO to agree on the common application, and to have the internal relations of the member-states governed by the same legal principles, in order to be able to act as a subject of international law in relation to the community of nations and, therefore, in relation to an eventual enemy or neutral state. Under this theory, NATO would have to act as an independent subject of international law, and would have to accede separately to agreements on the laws of war. If NATO is not to be regarded as having international personality, however, then it has to be determined whether on other legal grounds, such as the structure of the NATO or command-dependencies, the common application of the laws of war is imperative with regard to the internal relations of the member-states.

A. *DOES NATO REPRESENT A COMMUNITY OF STATES?*

1. *Is NATO A Subject of International Law?*

It is sometimes stated that NATO is a subject of international law and therefore is competent to perform legal acts of its own

responsibility.[14] Originally, only sovereign states were subjects of international law. According to later opinions, international law recognized certain communities of states as so-called composite international persons having an international personality. Not long ago, this capacity was, as a rule, inferred from the transfer of sovereignty-rights from the sovereign states to the community or organization in question. Not until recently were communities and organizations accepted as international persons without the presupposition of a renunciation of the sovereignty of their members. It has, therefore, to be determined whether NATO is a community of states or an organization which is able to act independently with regard to other subjects of international law, and, in case of armed conflict, has to be regarded as an independent subject of the laws of war.

Without much difficulty, this question can be answered in the negative. It is generally accepted that, according to international law, the conditions that must obtain for the existence of a state require a people, a country, and a sovereign government. As a rule, such state is independent from other governments and therefore sovereign. NATO, however, is without a people, without a country, and it is not an organization exercising governmental powers according to international law. NATO, therefore, cannot be regarded as a state.

But it has also to be determined whether NATO has become a subject of international law as a community of states. As there are many forms of communities of states, *i.e.*, associations of states for many purposes, it has to be ascertained what structure of a community of states is suitable to give such a community the character of an international person. This question formerly was decided on the basis of sovereignty. Was sovereignty, *i.e.*, the capability of independent relations with other subjects of international law, wholly or partly transferred from the states to the superior community, insofar as the community assumed the international status of the individual states? The transfer of

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[14] A treaty was actually entered into on November 5, 1953, between the French Republic and the Supreme Allied Commander Europe regarding the establishment and operation in France of his Supreme Headquarters. The Supreme Allied Commander was authorized to enter into such an agreement by Article 10 of the Protocol on the Status of International Military Headquarters, August 28, 1952, 5 U.S.T. & O.I.A. 870, T.I.A.S. No. 2978, 200 U.N.T.S. 340. This provision gave the Supreme Headquarters juridical personality for certain limited purposes. Without such authorization it is extremely doubtful if the Supreme Heaquarters would have had international personality sufficient to enable its commander to enter into treaty obligations with sovereign states. Thus, Soviet Prime Minister Khrushchev's recent suggestion that a nonaggression pact be concluded between NATO and the Warsaw Pact Organization presupposed a greater independent treaty-making power on the part of NATO than actually exists.

sovereignty rights, as a rule, included the transfer of sovereignty in the field of foreign-policy, thus making foreign-policy, and with this, defense-policy, a community function. As an example of a community of this kind, the Federal State (Bundesstaat) is an independent international person, according to international law.

In a Federal State or a community with federal character, the member-states of the Federation have, at least, surrendered their independent foreign policy to the Federation, so that they are no longer competent to perform legal acts in this field within the community of nations, as far as these sovereignty rights were transferred. For this reason, the member-states of a Federation are no longer capable of exercising the rights of independent warfare[15] and of concluding alliances and other political treaties. It is obvious, for instance, that within the United States of America, or with the Federal Republic of Germany, the Federation, to the exclusion of the member-states, is competent to have foreign-policy relations with other sovereign states. On the other hand, in Confederated States (Staatenbund), which is a far looser association of states—the individual states remain sovereign, although in exceptional cases the Confederacy, on the basis of internal regulations between the Confederated States, is partly able to gain the character of a subject of international law. This, however, depends upon the internal structure of the Confederacy.

Today, frequently international organizations are attributed with the character of an international person, not by transfer of sovereignty-rights of states, but by agreement of states, in order to enable that organization to fulfill its special tasks as a subject of international law. Thus, the United Nations Organization (UN) is recognized as an international person, and attributes this legal position to itself,[16] without the member-states of the UN

[15] The right of warfare is the right of a sovereign state, as an international person, to take part in an armed conflict of an international character, according to the rules of international law (*facultas bellandi*). It is not the right of states to settle their disputes by military actions (*ius ad bellum*).

[16] U.N. Charter art. 43; art. 63, para. 1; art. 83, para. 1; art. 85, para. 1. See also Convention on Privileges and Immunities of The United Nations, U.N. Gen. Ass. Off. Rec. 1st Sess., Resolutions 25–30 (A/64) (1946). The United States has not ratified this Convention. The privileges and immunities of the United Nations in the United States are governed by the International Organizations Immunities Act of 29 December 1945, 59 Stat. 669–73, 22 U.S.C. § 288 (1958). See also Sohn, Basic Documents of The United Nations 274 (1956). The international personality of the United Nations was given further recognition by the International Court of Justice in its advisory opinion of April 11, 1949. Reparation for Injuries Suffered in the Service of The United Nations, [1949] I.C.J. Rep. 174. The court held that the United Nations as an organization has the capacity to bring an international claim against a responsible government for damage caused to the United Nations.

having surrendered their sovereignty-rights to this organization.[17] The question of whether this implies the right to take part in actions of war as an independent subject of international law will have to be left unanswered because of the tasks and purposes of the UN.[18]

As a rule, military alliances are not associations of states which are able to claim international personality with respect to any of the qualifications hithertofore mentioned. Even the fact that the cooperation within NATO far exceeds the obligations of states in previous alliances does not suffice to grant NATO the status of an international person. NATO has not become a community of states such as a federal state or a community with federal character, as the NATO-alliance does not constitute a renunciation of sovereignty in foreign policy matters of the member-states. NATO itself has no self-will; it only gives recommendations to its member-states. The NATO-council consists of representatives of the member-states, who may bind their respective countries only in the event of unanimity. No member-state, moreover, is automatically bound by the agreement of its representative, but it remains free to decide the issue according to its own national law. Even if a few sovereign attributes have been delegated within the SACEUR-command-area to NATO-staffs[19]—this is true, at the moment, only in the field of military command authorities—there still is no independent foreign policy of NATO, in spite of close cooperation between the NATO-members in this field. On the contrary, NATO-members pursue their own foreign policy,[20]

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[17] U.N. Charter art. 2, para. 1.

[18] In the Korean War no further experience was gained in regard to this field of study. Although UN forces were fighting under United Nations command, the United States took over all the responsibilities under the laws of war then in existence. See, *e.g.*, concerning the question of the "Detaining Power" in regard to POW's, 33 Dep't State Bull. 887 (1955). See also Tauberfeld, *International Armed Forces and the Rules of War*, 45 Am. J. Int'l L. 671 (1951). The United Nations Command prepared and promulgated some documents on the treatment of prisoners of war, and there is no doubt but that some of the problems outlined here also emerged within the UN forces. See Milrod, Prisoners of War in Korea: The Impact of Communist Practice Upon International Law 156 (1959).

[19] Command staffs are, at present, integrated only down to army groups.

[20] Some of the member-states, such as the United States, Great Britain, Greece, and Turkey, have concluded military alliances with nations outside NATO.

and they still possess the right of independent measures in the fields of defense [21] and warfare.[22]

An independent foreign policy of NATO, moreover, is out of the question, as this would contradict the principles of the alliance to be a community of sovereign and free countries. Moreover, it was not recognized in the structure of the alliance that the member-states intended to transfer any powers to NATO enabling the Organization to take part in international relations independently as an international person according to international law.[23] NATO, therefore, is not an international person by itself,[24] and the necessity for a common application of the laws of war cannot be based on the theory that NATO is a subject of international law.[25]

2. *Is NATO A Subject of the Laws of Warfare?*

It could be argued that, in the event of armed conflict, NATO would be a subject of international law with respect to the laws of war only, as NATO would participate in such a conflict as a community of member-states. NATO-forces will, indeed, at least in Europe, be fighting as an integrated force under a unified command under the provisions of article 5 of the treaty. It has already been stated that NATO-integration, as it is hitherto known, is not sufficient to establish NATO as a subject of international law. However, in the field of the international law of war, *i.e.*, the laws of war, a different view could be taken. As a rule, only an armed conflict of an international character, *i.e.*, an armed conflict between international persons, is subject to the provisions of the laws of war.[26] But some important exceptions to this rule have developed recently. Thus the laws of war accept as legitimate combatants members of regular armed forces who profess allegiance to a government or an authority not recognized by the

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[21] Not all the military forces of the member-states are under NATO command. In the European countries, for instance, the forces of the territorial defense organizations and the forces employed in non-European territories have been released temporarily from NATO command for national employment in emergency cases, such as the engagement of French forces in the Algerian conflict.

[22] For example, the Franco-British action against Egypt in November, 1956.

[23] However, NATO is authorized, within limited fields, to make contracts. See NATO Status Agreement, *supra* note 4, arts. 4, 25.

[24] See Cahier, Etude des accords de siége conclus entre les organisations internationales et les etats où elles résident 177 (1959).

[25] The preliminary question of the status of NATO under the provisions of international law requires thorough examination, and could only be dealt with briefly in this study.

[26] See Kunz, Kriegsrecht und Neutralitatsrecht 4 (1935).

enemy power.[27] Moreover, even in former times, parties to a civil war, *i.e.*, an armed conflict not of an international character, recognized each other, without conferring the legal status of an international person to the respective party.[28] However, alliances consisting of sovereign states jointly engaged in an armed conflict have not been regarded previously as units by the laws of war. The consequence was that the war had to be declared by the individual sovereign state itself, that a state of war did not occur for all members of an alliance automatically when a partner of an alliance became engaged in an armed conflict,[29] and that the member states of an alliance remained responsible for the actions of their individual forces during the war, so that reprisals against allied states for the sole reason that they were allies, were illegitimate.[30]

Until now, the laws of war were based on sovereign states without regard to the existence of alliances. The problem of the application of the laws of war to alliances has been subject to an express regulation in only one instance. Nearly all of the conventions on the laws of war concluded prior to the First World War included the so-called "general participation clause," *i.e.*, a clause which stated that the provisions of the convention in question were only binding on the contracting powers and then only in a war in which the belligerent states engaged were parties to

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[27] See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, art. 13, para. 3 [1956] 6 U.S.T. & O.I.A. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (cited hereinafter as GWS); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, art. 13, para. 3 [1956] 6 U.S.T. & O.I.A. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (cited hereinafter as GWS Sea); Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 4, para. 3 [1956] 6 U.S.T. & O.I.A. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (cited hereinafter as GPW).

[28] In the U.S. civil war (1861–1865), the seceding states were recognized as being entitled to wage legitimate warfare by the Union states. See Fenwick, International Law 148 (3d ed. 1948).

[29] See Kunz, *op. cit. supra* note 26, at 6 n.27. Italy, for instance, did not enter the war against France and Great Britain on September 3, 1939, in spite of her military alliance with Germany. No state of war existed between the Soviet Union and Bulgaria until September 5, 1944, although Bulgaria had declared war upon Great Britain and the United States on December 12, 1941. Also no state of war prevailed between Japan and the Soviet Union until the USSR declared war upon Japan on August 8, 1945. There is an exception in the case of the Italian declaration of war upon Austria-Hungary on May 23, 1915, which resulted in an automatic state of war with Germany, the ally of Austria-Hungary. See 2 Oppenheim-Lauterpacht, International Law 294 n.2 (1955).

[30] *Id.* at 33.

the convention in question.[31] This clause was not applied in either of the world wars and was not included in all the conventions of the laws of war which were ratified after the First and the Second World War. In the Four Geneva Conventions of 1949 it is set forth that, although one of the powers in conflict may not be party to the convention, "the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power if the latter accepts and applies the provisions thereof."[32] Both of the solutions are based on the assumption that more than two states or allied states are engaged in armed conflict, but they nevertheless stress the independence of the parties under the laws of war. Occasional references to allied powers, such as the provisions governing the escape of a prisoner of war,[33] do not indicate that allies represent a common sphere for the application of the laws of war. On the contrary, the provisions of the Geneva Conventions on the transfer of prisoners of war[34] and protected civilian persons[35] to another power within an alliance and on the responsibilities connected with these transfers clearly point out that the laws of war still imply separate responsibilities of the partners of the alliances and therefore separate obligations of the states to the laws of war. *De lege lata* alliances are not independent subjects of the law of warfare and of the laws of war. As NATO remains an alliance of sovereign states according to international law, it does not become a subject of the laws of war. The common application of the laws of war cannot be based on the assumption that NATO is such an independent subject.

B. *NECESSITY OF THE COMMON APPLICATION OF THE LAWS OF WAR ON OTHER LEGAL GROUNDS*

The statement been made so far that NATO is not an independent subject of international law and of the laws of war, but, on the other hand, does represent a very close alliance hitherto unknown in the history of alliances. Therefore, it is desirable to

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[31] See, *e.g.*, Convention Respecting the Laws and Customs of War on Land, October 18, 1907, art. 2, 36 Stat. 2277, T.S. No. 539; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, October 18, 1907, art. 20, 36 Stat. 2310, T.S. No. 540.

[32] GWS, art. 2, para. 3; GWS Sea, art. 2, para. 3; GPW, art. 2, para. 3; Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 2, para. 3 [1956] 6 U.S.T. & O.I.A. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (hereinafter cited as GC).

[33] GPW, art. 91.

[34] GPW, art. 12.

[35] GC, art. 45.

examine whether the peculiarities of this alliance necessitate a common application of the laws of war. Even alliances of conventional character raise many legal questions if the parties fight in close cooperation.[36] In coordinating a common war effort there has often been the problem of handling questions of international law in the field. In the Crimean War, France and Great Britain made a compromise, as allies, on the issue of maritime warfare against trade, in which both of the parties discontinued their formerly held legal opinions on the question of neutral rights and interests.[37] During the course of two world wars, the allied and associated powers in the war against Germany reconciled their opinions on legal questions regarding naval warfare in order to secure common action.[38] Mutual action among allies is pointed out rather clearly by Article 2 of the United Kingdom agreement of Quebec signed August 19, 1943, in which it was agreed that atomic weapons should not be used against the enemy without mutual agreement. Such a consent was given by Great Britain on July 4, 1945.[39]

The problem also is apparent in the field of the law of belligerent occupation, where it frequently happened that allied forces jointly occupied enemy territory. Questions of this kind arose in the First World War in territories that were under German and Austro-Hungarian occupation. Thus, in Poland, there were established a northern occupation-zone under German control, and a southern occupation-zone under Austro-Hungarian occupation. Within these occupation zones, the Kingdom of Poland was proclaimed by a joint declaration of November 5, 1916, which resulted in a coordination of the occupation policies by the two occupying powers.

After July 1917, the territory of Upper-Italy, which had been occupied by German and Austro-Hungarian forces, was placed

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[36] This is not the case if allies fight independently in different theaters of war, such as Germany and Japan did in the Second World War.

[37] See Colombos, The International Law of the Sea 417 (4th ed. 1959).

[38] For instance, in issuing the so-called "black-lists" and in cooperating by use of the "Contraband and blockade Committees." See Colombos, *op. cit. supra* note 37, at 518 and 627. To suggest the difficulties involved in such cooperation, the "Bainbridge Incident" should be mentioned. The U.S.S. Bainbridge was dispatched from Gibraltar on March 6, 1918, by order of the commanding British naval officer, to search the Spanish ship, Reina Victoria Maria, for a German passenger, to arrest him if found, and to bring him to Gibraltar. This order was revoked after a protest by the U.S. Patrol Squadron Commander. The protest was based on the view of the U.S. Navy that such action would be illegal. Accordingly, the British Admiralty gave instructions that U.S. vessels would not be employed in removing persons from neutral vessels. See 6 Hackworth, Digest of International Law 633 (1943).

[39] 4 Churchill, The Second World War: The Hinge of Fate 333 (1950).

under a joint occupation administration. Later, the occupation of the Rhineland after the First World War as well as the occupation of Germany at the close of the Second World War were intended to be joint occupations by the allied powers, but the difficulties of exercising joint occupation finally resulted in the establishment of separate zones of occupation.

The expediency of common action—as will be discussed later in this study[40]—can hardly be denied, but the question remains whether such action is necessitated on legal grounds. Because of the sovereignty of the individual state and its right of warfare with duties and responsibilities separate from those of the allies, the question apparently has to be answered in the negative. But do integrated forces permit separate duties and responsibilities to be exercised according to the different laws of the various member-states of the alliance? Are the ties of international law towards the individual to be distinguished as far as the integrated forces are concerned?

In this field, the present structure of international law, based on the coexistence of sovereign states, will begin to undergo a changing process without detriment to the previous rules of international law.[41] The answer will mainly depend on the extent of integration. The closer integration is exercised, the less possible it will be to regard the separate relations. For this reason, a number of states, in concluding international conventions, have expressed a desire to deal uniformly with allies in applying the laws of war. Thus, several states[42] in ratifying the "Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases, and of Bacteriological Methods of Warfare," signed on June 17, 1925, have reserved the right not to apply the Protocol in case the armed forces of the enemy or their allies fail to respect the prohibitions. From this the conclusion could be drawn that allies are considered as having a legal unity under certain conditions. But this conclusion would be incorrect. The reservations have only been made for reasons of expediency. Moreover, this rule applies only to this particular protocol and it does not, therefore, represent a common principle of the laws of war. As a matter of fact, these reservations have to be interpreted as an attempt to restore the "general participation clause," which has been omitted in all agreements on the laws of war concluded after the First World War. They have been made

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[40] See Section II–C, *infra*.

[41] 1 Dahm, Volkerrecht 378 (1958).

[42] Australia, Belgium, Chile, Bulgaria, Esthonia, France, Great Britain, India, Iraq, Ireland, Canada, New Zealand, The Netherlands, Portugal, Rumania, The Soviet Union, The Union of South Africa, and Czechoslovakia.

to establish clear legal relations, but they have to be construed in a narrow sense, according to the change of the meaning of the "general participation clause" in the laws of war.[43] Therefore, it is incorrect to assume that one nation can be held responsible for acts or omissions of any kind of ally.

The problem of reprisals against allies is closely connected with this theory. According to the existing international law, reprisals against an ally of an enemy-state for acts of the enemy-state are not permissible as they are not directed against the state responsible for the act. Reprisals, therefore, may, according to the existing rules of the laws of war, only be employed against the responsible state.[44] This principle has to be applied with respect to integrated forces as well, as long as these forces are to be distinguished according to their individual national links. This will remain true, however, only as long as this distinction can be upheld by corresponding command-orders, *i.e.*, as long as the different treaty obligations, even in the integrated force, are to be observed separately by the forces of the various member-states. However, in case command orders are uniformly given for all military sectors which are of importance, and in case these command orders necessarily cover questions relating to the laws of war, a common application of the laws of war is imperative on legal grounds.[45] This implies that the power of deciding questions within the field of the laws of war has been delegated to a NATO-authority which is capable of giving uniform orders in the military field. The member-states, therefore, have to transfer sovereignty-rights insofar as it is necessary to exercise this authority at NATO-level.

Quite an interesting solution to this problem was outlined in the Treaty on the Foundation of the European Defense Community (EDC-Treaty) signed on May 27, 1952, which did not come into being because of its rejection by the French National Assembly on August 30, 1954. According to the provisions of this treaty, integration was provided for down to the battalion and

[43] See text accompanying note 31 *supra*.

[44] As far as it can be ascertained, there were no cases of reprisals against an ally during the Second World War, but there were instances of reprisals in favor of an ally against a common enemy violating the laws of war within the territory of an ally. Thus, Great Britain stated on May 10, 1940, that His Majesty's Government "now publicly proclaim that they reserve themselves the right to take any action which they consider appropriate in the event of bombing by the enemy of civil population, whether in the United Kingdom, France, or in countries assisted by the United Kingdom." See Spaight, Air Power and War Rights 266 (3d ed. 1947).

[45] It is not even necessary that command authority be changed from "operational command" to "full command," as the problem discussed has arisen in the field of "operational command."

regimental level.[46] These forces were to wear like uniforms[47] and were not to be subject to their country's national law. Consequently, it was expressly provided in the treaty that the European Defense Community (EDC) was subject to the same rights and obligations as the states from which the EDC was constituted and, therefore, EDC was to apply the laws of war uniformly.[48] However, the EDC-Treaty would not have meant complete renunciation of an independent foreign policy of the member-states as such. Moreover, the treaty only announced the intention of further cooperation of the European states "within the framework of a federal or confederated structure."[49] The common application of the laws of war, therefore, resulted only from integration, but not from the fact that EDC was considered a subject of international law.

As far as NATO is concerned, it cannot be concluded that, simply because of the integration of the NATO-forces, the common application of the laws of war will be the inevitable consequence. The answer to this question remains dependent on the nature and extent of the integration. The present integration of the NATO-forces does not in any way reach the extent of the proposed EDC-integration. If NATO-integration—as proposed[50]—is extended in such a way that a commanding officer can no longer take into consideration the national legislation and laws of the units under his command, then the member-states will have to pay attention to the fact that, in consenting to such a far-reaching integration, independent or at least uniform legal provisions will be necessitated. The question of when this necessity will arise cannot be answered accurately. It is important, however, that these problems are known and will be duly considered in the course of further military cooperation within NATO.

C. *NECESSITY OF THE COMMON APPLICATION OF THE LAWS OF WAR ON EXTRA-LEGAL GROUNDS*

Although a common application of the laws of war may be necessitated on legal grounds, this does not imply that without

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[46] The European Defense Community Treaty, May 27, 1952, tit. III, ch. 1, art. 68, para. 2, in U.S. Dep't of State, *op. cit. supra* note 3, at 1107–50 (hereinafter cited as EDC Treaty). The treaty was ratified by Belgium, the Federal Republic of Germany, Luxembourg, and The Netherlands, but did not enter into force because of France's subsequent rejection.

[47] EDC Treaty, tit. I, ch. 2, art. 15, para. 2.

[48] EDC Treaty, tit. III, ch. 3, arts. 80 and 81.

[49] EDC Treaty, tit. II, ch. 2, art. 38, para. 1.

[50] Apparently, it is the opinion of the Supreme Headquarters Allied Powers Europe (SHAPE) that only an integration, such as the one planned for the European Defense Community, will be sufficient to enable a logical and economical defense. See Handbuch der NATO 36 (Supp. No. 1, 1960).

such legal grounds a common application of the laws of war would not be expedient.[51] There are many reasons, other than strictly legal ones, that necessitate the common application. Such reasons result from the external relations of the NATO-states with other states of the community of nations, and from the internal relations of the member-states among themselves. Both the external and the internal relations are to some extent interdependent.

1. *Relations with Other Nations and Alliances*

Rather often the interests of individual sovereign states can hardly be distinguished from those of an alliance, and the interests of the latter frequently will dominate. Whenever a subject or a question of international law is relevant to the common defense, this is of concern for the individual member-states of the alliance as well as for the alliance itself.[52] It is necessary that these subjects or questions be discussed and agreed upon among the member-states, and that a common front is presented in international conferences, in concluding agreements, etc.

While the NATO-states do not always show a common approach in these matters, the states of the so-called Eastern Block, within the framework of the Warsaw-treaty, always act jointly on questions of international law, because of previous agreement and because of the ideological consent with the leading state, the Soviet Union. Thus, the Soviet Union and her satellites jointly acceded to the Geneva Conventions of August 12, 1949, and jointly made reservations to the same effect and virtually in the same wording.[53] At a conference on collective security in Europe convened by the Polish Academy of Sciences in 1955, men of learning from the Eastern Block expressed their opinions on an alleged existing prohibition of the use of atomic weapons so unanimously that the assumption is well taken that these statements were based

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[51] The absence now of such uniformity presents problems to individual national commanders serving in a unified command. U.S. Dep't of Army, Field Manual No. 41–10, Civil Affairs Military Government Operations, para. 27*b* (1957), gives guidance to United States officers in such a situation: "A United States officer commanding a combined or allied command complies with CAMG operational instructions, formulated at inter-allied governmental or command levels, which are transmitted to him through normal command channels. . . . In addition, he brings to the attention of appropriate authority those policies or actions in the field of CAMG operations which are believed to be contrary or prejudicial to international law, United States law, United States national interest, United States war objectives, or the post war international position of the United States."

[52] Of such concern would be conventions on the territorial sea, on legal control over air space, or on the international law of the air.

[53] Reservations were made to Article 10 of the GWS Convention, to Articles 10, 12 and 85 of the GPW Convention, and to Articles 11 and 57 of the GC Convention.

on a "coordination of language." At the Sea Conference held in Geneva in 1958, the Eastern Block again jointly demanded the extension of the territorial sea to 12 nautical miles. This procedure was repeated at the Geneva Sea Conference in 1960, when again the states of the Eastern Block acted and voted jointly.

But the NATO-states also consult together on all questions relating to international law, as far as these questions infringe on the interests of NATO and are of direct importance to NATO. An obligation for such a consultation is imperatively laid down in Article 4 of the treaty, in case there is a subject relevant to international law threatening "the territorial integrity, political independence or security of any of the parties." Consultations thus were held before and after the summit conferences of Geneva in 1955 and Paris in 1960, but questions of international law have gained some importance in other NATO conferences as well. Naturally, these questions have so far been problems relating to the preservation of peace.

Such a coordination is still more urgently required in questions relating to the international law of war, *i.e.*, the laws of war, than to questions of peace. NATO-forces will be employed under a unified command and without a clear cut territorial separation. Thus, a commander could exercise his command authority much easier if he did not have to consider the national interests and laws of the respective countries. With regard to the enemy, a common handling of these problems could also be secured. On the other hand, the enemy himself will often not be in the position to distinguish the different national contingents and to take into consideration their different legal commitments and practices. The laws of war recognized this difficulty even with alliances of far less integration, in the "general participation clause."[54] This fact has induced, as already mentioned,[55] many states to make a reservation to that effect in signing the Geneva Protocol of June 17, 1925. If the enemy is no longer in a position to distinguish national contingents within integrated forces, then sanctions of the laws of war, such as reprisals, cannot be directed exclusively against the forces of the sovereign state which is alleged to have violated the laws of war. Moreover, hardly any distinction could be made in the case of actions which are legally permissible for one state which is not bound by treaty obligations, while they are not permissible for an ally because of an express treaty obligation. In many instances it may not even be recognized which states within an alliance can be held responsible for a cer-

[54] See text accompanying note 31 *supra*.

[55] See text accompanying note 40 *supra*.

tain action done by integrated forces. Only the common application of the laws of war will clarify these confusing situations.

Vice versa, for factual reasons, sanctions against the enemy will not always be carried out within the national sphere of the state violated by enemy actions, as the national contingents in question may not necessarily have the means of coercion at their disposal. A decision in this field will then have to be reached at NATO-level, a decision that would face no difficulties if a common application of the laws of war was assured.

Agreement within this field has to be reached in times of peace in order to clarify the legal situation and the practice to be expected with regard to eventual enemies or eventual neutrals. For this purpose, it would be advisable to disclose those common principles which the NATO-states regard as binding in their attitude towards the laws of war to the world at large.

2. *Relations between NATO-Members*

It is also necessary to clarify the situation in respect to the laws of war with regard to the internal relations between the NATO-members. This results not only from the already discussed dependence on the enemy actions, which is underlined especially by the reservation to the Geneva Protocol of June 17, 1925, but also from obligations under the laws of war such as are contained in the provisions on the transfer of protected persons. According to the provisions of the Geneva Conventions of August 12, 1949, prisoners of war and protected civilian persons[56] may only be transferred by an enemy state to another state, *i.e.*, an ally, which also is a party to the respective convention "and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention."

A like treatment of these persons, under the provisions of the laws of war, would eliminate all legal difficulties arising out of transfers necessarily arising out of military exigency. Furthermore, it has to be decided which state is to take over the responsibility of the "Detaining Power" and of the "Occupying Power" in the case of integrated forces. As NATO is not an international person, and, as the laws of war only recognize the individual member states of NATO as detaining or occupying powers, NATO itself is not qualified to take over such responsibilities. It is in the field of the laws of belligerent occupation where, in case of a transfer of the occupation power and its functions from one member state to another member state, there will be problems which can only be solved if the common application of the legal

[56] GPW, art. 12, para. 2; GC, art. 45.

provisions and a common practice in the field of the laws of war are secured.

All agreements on the common application of the laws of war within NATO have to designate clearly the member state responsible for a certain commitment or action, as there is no independent responsibility on the part of NATO, as long as NATO is not a subject of international law. As far as preparatory planning in this field is concerned, it is only of internal importance and is executed in close connection with military planning. Therefore, there is no necessity of previous disclosure such as in the case of measures with external importance. A unification, however, should be reached.

D. *THE NEED FOR COMMON APPLICATION—SUMMARY*

NATO, in its present structure, is neither a subject of international law nor of the laws of warfare. A common application of the laws of war within the NATO-forces, therefore, is not necessitated by the legal qualification of NATO as an international person.

A common application of the laws of war will be required on legal grounds if the integration of the NATO-forces results in a transfer of sovereign rights in the field of military command-authority to NATO. In such a case, the laws of the various countries within the NATO-forces will have to yield to independent NATO provisions.

Even in so far as a common application is not required on legal grounds, a unification of the laws of war is necessitated by reasons of expediency, as in applying the laws of war in case of an armed conflict, where, for factual reasons, the national spheres are not to be distinguished and a different application would cause disadvantages for the member states and the alliance.

The unified provisions which NATO-forces are to be subjected to should be disclosed to the world at large, as far as they are not of internal nature only, in order to make known to the other states the application to be expected.

Rights and responsibilities under the laws of war remain with the sovereign states of the alliance as long as the alliance itself is not transformed into a subject of international law or the laws of warfare. If the latter occurs, the accession of NATO as an independent partner to the written laws of war would be required.

III. THE DIFFERENCES CONFRONTING THE COMMON APPLICATION AT PRESENT

In part, the question of whether the common application of the

laws of war within the NATO-forces is necessitated either on legal grounds or on factual grounds has been discussed. Before the question of how this can be achieved can be answered, some of the existing differences in the application of the laws of war must be pointed out, thus emphasizing the difficulties which confront such a common application. Naturally, only some of the extreme and obvious difficulties shall be brought out in order to outline the problem and the task of this study in a clear light. It is impossible to discuss all the differences in the legal provisions as well as in practice, for this would be a task equal to a thorough exposition of the laws of war and, therefore, would go well beyond the scope of this study. Part III will be limited primarily to some of the differences in the legal provisions binding on the United States, Great Britain, and the Federal Republic of Germany, as well as to report the practice in these countries, without any claim to completeness. A comparative survey of all the NATO-states and of all parts of the laws of war would show that the differences are far more complex than it can be revealed by the contents of this study.

A. DIVERSE OBLIGATIONS ACCORDING TO THE WRITTEN LAW OF WAR (TREATY LAW)

1. *The Geneva Protocol for the Prohibition of Gas and Bacteriological Warfare*

The "Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare" signed on June 17, 1925, declared that the employment of gas and bacteriological weapons in warfare was not permissible and imposed a prohibition on one of the most important means of mass-destruction and most effective means of warfare apart from the use of nuclear weapons. This Protocol was preceded by former treaty provisions for the prohibition of gas-warfare. The principles of the prohibitive provisions of the Geneva Protocol were observed by all parties during the Second World War, and there is known no occasion in which these means of warfare were resorted to during the Second World War. With the exception of the United States of America and Iceland, all of the NATO-partners are bound by this protocol, and all of the treaty partners of the Eastern Block are bound, with the exception of Albania. While the absence of a commitment of Iceland to provisions of the written laws of war is not important because of the non-existence of military forces of her own,[57] the non-participation

[57] Iceland, therefore, will be left out in connection with the subsequent discussions.

of the United States breaks the otherwise existing uniform cohesion of the NATO-members to these existing prohibitions of the laws of war. The U.S. "Law of Land Warfare"[58] comments under the heading "Gases, Chemicals and Bacteriological Warfare:"

> The United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or nontoxic gases, of smoke or incendiary materials, or of bacteriological warfare . . . . [T]he United States Senate has refrained from giving its advice and consent to the ratification of the Protocol by the United States and it is accordingly not binding on this country.[59]

It could be argued that the wording of the Geneva Protocol shows that, at least, the prohibition of chemical warfare was part of the then existing customary law[60] and that this prohibition, therefore, was only of declaratory character.[61] The U.S. "Law of Naval Warfare,"[62] however, states:

> Although the use of such weapons frequently has been condemned by states, including the United States, it remains doubtful that, in the absence of a specific restriction established by treaty, a state legally is prohibited at present from resorting to their use.[63]

These official doubts regarding the existence of such a prohibition are substantial enough to clarify the question of the binding effect of the said prohibition and its common application within NATO. Moreover, as already mentioned,[64] many states, among which is the Soviet Union, have made reservations to the effect that they will not regard the Geneva Protocol as binding towards "any Power whose armed forces or the forces of whose allies fail to respect the prohibitions."

The difference of opinion is still more clearly recognized with regard to the prohibition against bacteriological warfare. As

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[58] U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare (1956).

[59] *Id.* para. 38.

[60] The Geneva Protocol states that it is based on the consideration that the use of chemical weapons "has been justly condemned by the general opinion of the civilized world."

[61] See Brit. War Office, S.O. Code No. 57-206-3, The Law of War on Land para. 111 n.1b (1958). See also 2 Oppenheim-Lauterpacht, *op. cit. supra* note 29, at 344.

[62] U.S. Dep't of Navy, Law of Naval Warfare Manual (1955), set forth in Appendix to Tucker, *The Law of War and Neutrality at Sea*, 50 International Law Studies, U.S. Naval War College, at 359–422 (1957).

[63] *Id.* para. 612 (b).

[64] See text accompanying note 42 *supra*. Of equal importance to the uniform application of the Geneva Protocol in wars involving the NATO alliance is the Soviet reservation not to be bound in its relations with other states not a party to the Protocol. The United States, a leading member of NATO, is not a signatory to this treaty. Therefore, whether the U.S. uses chemical weapons or not, the U.S.S.R. is not prohibited by the 1925 Protocol from employing them against the United States.

bacteriological warfare has not been employed so far, and, in contrast to chemical weapons there have been no previous agreements on the prohibition of bacteriological weapons, there is no customary law under which the use of bacteriological weapons can be said to be prohibited for all states. For these reasons, it has to be stated that within NATO there is no conformity with respect to the prohibition of chemical and bacteriological warfare by treaty law. This fact has to be regarded as of eminent importance, especially in view of the fact that the forces of the most potent military power, the United States, are not bound by the Geneva Protocol.

2. *The Convention for the Protection of Cultural Property*

The latest agreement in the field of the laws of war is the "Convention for the Protection of Cultural Property in the Event of Armed Conflict" signed on May 14, 1954, which was drawn up at a conference summoned by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and held in The Hague from April 21 until May 14, 1954. This convention restricts warfare in order to protect cultural property and takes precautions for securing cultural property against the effects of armed conflict. These restrictions are more important now, at a time in which military actions are getting more and more spacious and the extent of destruction to be expected will become larger and larger.

Even though ratification has not yet been completed and it is expected that more states will accede to this convention, the present state of this convention already points up the lack of uniformity of the actions of the NATO-partners.[65] Until now, only three NATO-countries, France, Italy and the Netherlands, have ratified this convention. The Federal Republic of Germany has not finished the preparations for ratification, but this can be expected in the foreseeable future. However, all of the partner-states of the Warsaw Treaty, with exception of Albania, have already acceded to this convention by ratification. There is no reference whatsoever to this convention in the U.S. Manual, "The Law of Land Warfare," nor in the U.S. "Law of Naval Warfare," while the full text of the convention has been incorporated in the British Manual, "The Law of War on Land." This convention has also been mentioned in the service regulations of the forces of the Federal Republic of Germany,[66] and has been incorporated

[65] The following information on the state of ratification of this treaty is taken from German Central Service Regulation (Zentrale Dienstvorschrift) 15/3, The Laws of War: Collection of Treaties in Force (1959).

[66] German Central Service Regulation ZDv 15/1, para. 17; ZDv 15/5–8, appendix 1.

in the collection of treaties for the forces.[67] As this convention creates new distinctive emblems for protected cultural property as well as for personnel engaged in the protection of cultural property,[68] a common dissemination of the text would be desirable. Within NATO, moreover, those states which are already bound by the convention desire the convention to be accepted on a common basis, as non-acceptance by certain NATO-countries would, at least in Europe, endanger the proposed protection of cultural property to the disadvantage of those partners who ratified the convention.

Moreover, there are some other later conventions which all the NATO-states have not yet ratified. Thus, the "Four Geneva Conventions" signed on August 12, 1949,[69] have not been ratified by Portugal.

In addition to these latter conventions of the laws of war, there are several other agreements on the laws of war which are not ratified by all the NATO-states. Only a few examples shall be mentioned. The convention on the law of neutrality,[70] signed on October 18, 1907, was not ratified by Great Britain, Canada, Italy, Greece, and Turkey. The "Convention Relative to the Status of Enemy Merchantmen at the Outbreak of Hostilities," signed on October 17, 1907, is not binding on Great Britain and Canada because of their denunciation of November 14, 1925, and on France because of her denunciation of July 13, 1939. Furthermore, this convention is not binding on the United States, Greece, and Turkey because of the non-accession of these countries. Finally, the United States, Greece, and Turkey, have not acceded to the "Convention Relative to the Conversion of Merchant Ships into Warships" of October 18, 1907.

By way of illustrating further differences in the treaty-law, certain reservations which NATO states have made to some of the treaty provisions have to be mentioned. While reservations made to previous agreements have no further importance,[71] some of the

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[67] German Central Service Regulation ZDv 15/3, at p. 235.

[68] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, arts. 16 and 17. For a summary of the provisions of this convention, see 6 UNESCO Bull. 120–21 (April, 1954).

[69] See notes 27 and 32 *supra*.

[70] Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, October 18, 1907, 36 Stat. 2310, T.S. No. 540; Convention Concerning the Rights and Duties of Neutral Powers in Naval War, October 18, 1907, 36 Stat. 2415, T.S. No. 545.

[71] *E.g.*, the reservations of Germany and France regarding Article 2 of the Convention Relative to the Laying of Automatic Submarine Contact Mines, October 18, 1907, 36 Stat. 2332, T.S. No. 541; and the reservations of France, Germany, Great Britain, and Canada regarding the Convention Concerning Bombardment by Naval Forces in Time of War, October 18, 1907, 36 Stat. 2351, T.S. No. 542.

NATO-countries have made reservations to the already mentioned "Four Geneva Conventions," signed on August 12, 1949. These reservations are very likely to raise problems within the NATO-forces. Thus, Great Britain, the Netherlands, and the United States have reserved the right, with regard to the fourth convention, to apply the death penalty in areas under belligerent occupation of their forces, in case this would be prohibited by Article 68, Section 2 of the said convention which provides that it is illegal to impose the death penalty if such a penalty could not be imposed under the law of the occupied territory in force before the occupation began. If NATO-states exercised powers of occupation and that power was transferred from one member-state to another one, this might result in the application of different legal provisions of occupation law. This fact would be contrary to the necessary common exercise of occupation powers by NATO-forces.

B. *DIFFERENT OPINIONS ON OTHER SUBJECTS OF THE LAWS OF WAR*

1. *Legality of the Use of Nuclear Weapons*

Very seldom have so many different opinions been held within the field of the laws of war as regards the question whether and to what extent the use of nuclear weapons is prohibited by the laws of war. The question of a possible employment of these weapons is widely discussed. What are the official opinions? The U.S. "Law of Land Warfare" states:

> The use of explosive "atomic weapons," whether by air, sea or land forces, cannot as such be regarded as violative of international law in the absence of any convention restricting their employment.[72]

Somewhat more restrictive is the U.S. "Law of Naval Warfare" which points out that:

> There is at present no rule of international law expressly prohibiting states from the use of nuclear weapons in warfare. In the absence of express prohibition, the use of such weapons against enemy combatants and other military objectives is permitted.[73]

That there may be restrictions against unlimited use, even though the use as such is declared to be permissible, is pointed out in the British Manual, "The Law of War on Land," which states:

> There is no rule of international law dealing specifically with the use of nuclear weapons. Their use, therefore, is governed by the general principles laid down in this chapter.[74]

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[72] U.S. Dep't of Army, Field Manual No. 27–10, The Law of Land Warfare para. 35 (1956).

[73] U.S. Dep't of Navy, *op. cit. supra* note 62, para. 613.

[74] Brit. War Office, *op. cit. supra* note 61, para. 113.

This wording apparently states that the use of nuclear weapons has to be in accord with the generally accepted principles of the laws of war,[75] but the wording utilized is too generalized to lend much support to this proposition.[76] There is no binding official statement in Germany as of yet. It has to be added that the restrictions deriving from the Geneva Protocol of June 17, 1925, as already mentioned,[77] are not binding on the United States.[78]

The solution of this problem is rendered more difficult by the fact that, before limits can be recognized, it has to be decided which principles of the laws of war restrict the use of nuclear weapons. Even as to this preliminary question there is no agreement. To what extent can the means of warfare (weapons and methods) legally be used in aerial warfare? Is it in accord with the laws of war to declare war-zones in the high seas in which the use of nuclear weapons is permitted without restriction? What is the definition of military objectives in modern warfare? All these preliminary questions have to be answered according to a common opinion on the application of the laws of war, before the main questions can be considered. Moreover, there are many unofficial opinions, based on different arguments, which hold that the use of nuclear weapons is absolutely prohibited by the existing laws of war.[79] Within the free world, many learned writers, however, hold the opinion that a general prohibition cannot be deduced from the existing laws of war.[80] The writers within the Eastern Block, on the other hand, jointly hold the opinion, very probably by direction, that any use of nuclear weapons is contrary to the existing laws of war.[81]

In absence of an express agreement which would be binding on all the nations of the world-community, there are many questions open to solution. If such a solution cannot be found in the world at large, it is still necessary to agree on a common opinion within

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[75] *Id.* paras. 107, 113 n.1.

[76] See 14 Year Book of World Affairs 372–76 (1960).

[77] See text accompanying note 58 *supra*.

[78] Thus, the Secretary-General of the International Law Association declared at a conference in Edinburgh in 1954: "Nuclear weapons are contrary to the Geneva Convention of 1925, prohibiting the use of asphyxiating poisons or other gases, and of all analogous liquids, materials, and devices." Quoted in Singh, Nuclear Weapons and International Law 252 (1959).

[79] Sack, *ABC—Atomic, Biological, Chemical Warfare in International Law*, 10 Lawyer's Guild Review 161 (1950); Menzel, *Atomwaffen*, in Worterbuch des Volkerrechts 104 (Schlochauer ed. 1960).

[80] See 2 Oppenheim-Lauterpacht, *op. cit. supra* note 29, at 347; Scheuner, *Krieg und Kriegswaffen im heutigen Volkerrecht*, in Atomzeitalter, Krieg und Frieden 96 (1959); Euler, Die Atomwaffe im Luftkriegsrecht (1960).

[81] See the statements of the leading Eastern Block international lawyers at the conference of the Polish Academy of Sciences in 1955. See also Durdenewski and Schewtschenko, Die Unve reinbarkeit der Ansendung von Atomwaffen mit den Normen des Volkerrechts 216 (1956).

NATO, as different actions in employing nuclear weapons within NATO would lead to great difficulties at the very least.

2. *The Law of Naval Warfare*

In two world wars different opinions were held both by the Anglo-American nations and by the continental states in the field of naval warfare. In the course of the wars these differences of opinions gradually developed between Germany and her allies on the one hand and her enemies on the other hand.

This contrast has its origin primarily in the continental conception of war, which is based on the Rousseau-doctrine. According to the opinion of this French writer, which was laid down in his book "Contrat Social," [82] war is only a contest between states and not between private individuals. Under this view, all actions of war which were directed against the enemy population as a whole were declared to be illegal, and only those measures which were employed to overthrow the military strength of the enemy were declared to be legal. For this reason, economic warfare is considered illegal under the continental theories of war, while this view is not shared within the Anglo-American sphere, probably because of the favorable position of the Anglo-American countries as naval powers. This difference of opinion is pointed out quite clearly by the controversy surrounding the meaning of Article 23(h) of the Hague Rules of Land Warfare.[83] Article 23(h) provides that it is forbidden:

> [T]o declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

This provision, which was included at the Second Peace Conference of The Hague in 1907, as a result of a German motion, was intended to prevent measures of economic warfare. Contrary to this intention, it has been regarded ever since by the Anglo-American states as being applicable only in the area of actual combat.[84] During two world wars, this view was subscribed to by many of the continental allies of the two great naval powers. Even if one agrees that this view is correct for the purpose of a solution within NATO, the difficulties within the field of the law of naval warfare are not easily dealt with.

In 1909, an agreement was nearly reached on these problems by the Declaration of London at the London Naval Conference, but the rules established finally failed, due to non-ratification by some

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[82] 1 Rousseau, Contrat Social, ch. 4 (1762).

[83] Annex to the Convention Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, T.S. No. 539.

[84] Davis, *The Amelioration of the Rules of War on Land*, 2 Am. J. Int'l L. 70 (1907); 3 Hyde, International Law Chiefly as Interpreted and Applied by the United States 1714 n.7 (2d ed. 1945), and authorities cited therein.

states, among which was Great Britain, and due to controversial practice during the First World War. Germany, on the other hand, had based her "Prize Orders" entirely on the provisions of the Declaration of London. This is still of some importance, as the German "Prize Order" of August 28, 1939, which, after abolition of the amendments made during the Second World War, is still in force in substance and still utilizes as its basis the Declaration of London. This situation, however, is no longer regarded as realistic by many NATO countries. This is underlined by the following example. While the German "Prize Order" is based on the distinction between "absolute contraband" and "conditional contraband" pursuant to Articles 22–26 of the Declaration of London, this distinction has been widely abandoned in practice by many NATO states and the conception of contraband has been expanded. In spite of the distinction formally being maintained in the U.S. "Law of Naval Warfare,"[85] it has been questioned whether it is still justified,[86] and this distinction sometimes is considered as being obsolete.[87]

In modern wars, because of the total character of the general war-effort, far more categories of goods are used for war purposes than in former wars. Another example of different opinions within this field is the question of the destruction of neutral prizes. Article 73 of the German "Prize Order" provides, in accordance with Article 49 of the Declaration of London, that captured neutral vessels are to be destroyed if "their capture would endanger the captor's vessel or would likely impair the success of the mission the captor is engaged in." Quite to the contrary, Great Britain has always held the opinion that neutral prizes are not to be destroyed.[88]

A survey of all the differences of opinion within the field of naval warfare would far exceed the scope of this study. Some of the main differences, therefore, shall only be indicated here. No agreement has been reached in the law of naval warfare on the question whether the conversion of merchant ships into warships is permissible on the high seas, or only in the national ports or territorial waters of the converting nation, or of an ally. The latter theory is supported by Great Britain and other states.[89] There are also different opinions on the question whether the use of false colors is to be considered as a legitimate ruse of war. The legality of such a ruse has been increasingly contradicted by

[85] U.S. Dep't of Navy, *op. cit. supra* note 62, para. 631.
[86] See Tucker, *The Law of War and Neutrality at Sea*, 50 International Law Studies, U.S. Naval War College, at 264 (1957).
[87] Colombos, *op. cit. supra* note 37, at 618.
[88] *Id.* at 726.
[89] *Id.* at 452.

Anglo-American writers.[90] Moreover, there is wide disagreement on the question whether the conveyance of soldiers or reservists of the parties engaged in armed conflict constitutes an unneutral service. Disagreement prevails, furthermore, with regard to the question at what time a breach of blockade is to be claimed. Anglo-American law is based on the concept that a breach of blockade prevails as long as the ship has not completed her voyage even if this voyage is interrupted by a stay in a neutral port. Contrary to this opinion, the German "Prize Order"[91] provides that a vessel, in case of a breach of blockade, is only to be captured "within the blockaded area and after hot pursuit out of the blockaded area." But even the concept of blockade is not uniformly accepted as there are divergent views concerning the circumstances under which a blockade is to be called "effective" and consequently legal according to the laws of war.[92]

Moreover, many problems originated from the two world wars which have not been solved by the learned writers. These are questions concerning the extent of legal action against neutral shipping, the legality of the declaration of war zones and long-range blockades, the arming of merchant ships, and the exercise of unlimited submarine warfare. Upon closer examination, it becomes evident that all these problems originated from different interests which led to different legal opinions. These problems now have to be dealt with uniformly within NATO because of the corresponding interests of the NATO members. It is inconceivable that within NATO integrated naval forces would be subject to different prize orders based on different legal terms.

3. *The Absence of A Law of Air Warfare*

In conection with the employment of modern means of warfare, as previously discussed,[93] there is the further question of to what extent air warfare is permissible. It is not the difference of opinion which causes uneasiness but the absence of binding rules and of official statements with regard to the legal situation of the laws of war in this field. The anxiety is well justified, since air warfare during the Second World War resulted in more destruction than any other means of warfare. Moreover, the existing laws of war have been questioned because of this type of warfare.

There is no written law of air warfare and there are only very

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[90] See Tucker, *op. cit. supra* note 86, at 140; Smith, The Law and Custom of the Sea 116 (3d ed. 1959).

[91] German Prize Orders, August 28, 1939, as amended, art. 50.

[92] See Kunz, *op. cit. supra* note 26, at 139.

[93] See text accompanying nn.58 and 72, *supra*.

few official statements on existing customary law.[94] Military manuals on questions of the law of air warfare have, as far as it can be ascertained, not been published at all. The Air Warfare Rules laid down in The Hague in 1923, which were never ratified, may resemble the essence of the then existing customary law, but they do not give sufficient answers to questions which had their origin in the Second World War. Even if there is wide consent among the learned writers that indiscriminate bombardment of towns and other localities is prohibited,[95] and that air attacks are only permissible against military objectives, we still face an anarchy of practice in air warfare[96] that originated during the Second World War and that has not been abolished by a new order of the laws of war so far. Even if we have reason to assume that certain customary rules will find general acceptance, there are many special problems, such as the definition of military objectives, so insufficiently solved that agreement on these questions should be reached among the NATO partners.

IV. A PROPOSAL FOR SOLUTION OF THE PROBLEM

Finally, the question of how the common application of the laws of war within the NATO forces is to be achieved, in spite of the existing differences and against all the difficulties pointed out in the previous discussion, arises. The easiest way to solve this problem for NATO would be a new general codification of the now antiquated and imperfect laws of war and an agreement or a common practice within all states of the community of nations at the level of the United Nations, following a proposal to this effect by the NATO states.[97] Such a suggestion, however, at present, would hardly have a chance of success, as the problems of the laws of war at the international level are set aside, apparently in favor of more urgent discussion of the questions on the prevention of war, such as disarmament, control of nuclear weapons,

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[94] The League of Nations condemned the application of illegal methods of air warfare on two occasions, during the Spanish Civil War in 1939 and during the Sino-Japanese conflict in the years prior to the outbreak of the Second World War. During these debates some statements were made by various governments regarding air warfare from which some conclusions as to the customary law of air warfare may be drawn. See Spaight, *op. cit. supra* note 44, at 254; Spetzler, Luftkrieg u. Menschlichkeit 200 (1956).

[95] Spaight, *op. cit. supra* note 44, at 277; 2 Oppenheim-Lauterpacht, *op. cit. supra* note 29, at 530; 3 Hyde, International Law, Chiefly As Interpreted and Applied by the United States 1829 n.32 (2d rev. ed. 1951); Spetzler, *op. cit. supra* note 94, at 191. A different view is taken in Taylor, Final Report to the Secretary of the Army on the Nuremberg Trials under Control Council Law No. 10, 65 (1949).

[96] See Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision*, 45 Am. J. Int'l L. 37–61 (1951).

[97] *Ibid.*

etc.[98] Moreover, such a proposal, at the present time, would more likely result in a propaganda battle instead of real success. It can be expected that the Eastern Block, at such a conference, would propose restrictions of the means of warfare to such an extent that the NATO states, in consenting, would have to renounce important means for the defense of freedom. The solution to the problem of this study is, therefore, limited to the sphere of NATO and remains a NATO matter, but it is clear that the effects will go well beyond NATO. Furthermore, it is necessary that developments in the laws of war outside of NATO would have to be taken into thorough consideration.

A. *INVENTORY OF THE EXISTING LAWS OF WAR WITHIN NATO*

Before any serious proposals can be made for the unification of the laws of war within NATO, it will be necessary to enumerate the differences in this field within the NATO states. Moreover, consideration will have to be given to the differences among states and alliances outside NATO. In other words, at the beginning there is the task of preparing an inventory of the laws of war. There will be little difficulty in listing the differences in the field of treaty-law as these differences appear clearly. On the other hand, the inventory of existing customary law will meet with many difficulties as controversies have steadily increased during the last decades. Furthermore, it will not be easy to collect information on the practical application of the laws of war within the NATO states because of the lack of official statements on the practice to be carried out in the event of armed conflict.[99] Therefore, it becomes necessary, for the purposes of this inventory, that the NATO countries officially state their views on the laws of war, as far as statements to this effect have not been made previously.

B. *RECOMMENDATIONS TO THE NATO STATES ON UNIFICATION*

After completion of the inventory, it then will become necessary to agree at NATO level on one uniform opinion acceptable to all

[98] The question of revision of the laws of war was disposed of at the first session of the International Law Commission in 1949 with the remark that such a discussion might be interpreted as a lack of confidence in the efficiency of the United Nations in maintaining peace. See Kunz, *op. cit. supra* note 96, at 47.

[99] There is, for instance, no manual on the laws of air warfare in the United States. In Great Britain there are no manuals on either the laws of naval warfare or air warfare. In Germany, similar manuals (Central Service Regulations) are still in preparation and no official statements are currently available.

the NATO partners and the alliance in order to recommend unification to the NATO states. A close examination and consideration of the different opinions and practices will be essential before agreement can be reached on the content of the recommendation. The unification must aim at:

1. Unification of the binding treaty law.
2. Consent in the field of customary law.
3. Common agreement in all fields not covered by legal rules.
4. Unification of national procedures with respect to the laws of war by publication of common regulations.

As soon as agreement is reached on unification, recommendations will have to be made to the governments of the NATO states to proceed according to the proposals. This process will be the most difficult, inasmuch as many subjects of the recommendation will interfere with the existing legal structure of the NATO states and will require modifications. Thus, some of the NATO members will have to accede to international conventions, some may have to renounce agreements, and some may have to make certain reservations or to disclaim them. Furthermore, some NATO states will have to change opinions on customary law and fields not regulated by legal provisions, and, in doing so, possibly contradict their own practice previously applied. There will be a renunciation of national procedures with regard to the field of the laws of war and a unification of all regulations in this respect.

The legal and factual difficulties of such a unification should not be underestimated. Attempts at coordination have failed so far, even though they were not directed at so complex a target as outlined in this study. In 1953, for example, the Director of Army Legal Services of the British War Office and The Judge Advocate General of the United States Army tried to coordinate the rules of land warfare by cooperation in the preparation of the military manuals on the rules of land warfare at a conference of their representatives held in Cambridge. In spite of a significant degree of agreement reached, the participants listed twelve subjects upon which there was no agreement or which they considerd needed further study.[100] Consequently, a unification of these particular

[100] These topics included, among others, the distinction between civil affairs administration and military government; the juridical nature of espionage; the bombardment of undefended localities; the violation of armistices and surrenders; the applicability of the law relating to property in occupied territory, to the battlefield, and to general destruction; the power of the belligerent occupant to obtain real property; and other economic aspects of the law of belligerent occupation.

manuals[101] could not be accomplished.[102] Furthermore, the problem of the transfer of prisoners of war within NATO forces has been discussed in the juridical literature without any reasonable solution having been recognized.[103] The difficulties, therefore, as the above mentioned examples underline, should not be minimized, but it has to be stated, on the other hand, that the idea of cooperation and unification in all fields has steadily gained weight within NATO and the renunciation of individual national interests has increasingly become necessitated for many reasons. The more common action is stressed, the more agreement must be reached on the application of common legal principles. The task of the unification of the laws of war is not faced by insurmountable difficulties.

C. *THE PROCEDURE OF UNIFICATION*

In which way is the task of unification to be achieved in practice? As in preparing the inventory and as in the procedure of preparing the recommendation on unification, the national experts in the field of international law who have direct influence on the application of the laws of war within their national forces, or who are responsible for this field, will have to work together. Thus, the NATO countries would have to nominate representatives who are exponents of the official opinions of their respective countries. As this task is executed within the field of planning for armed conflict, it will be expedient to establish a council-committee. This committee, moreover, because of the expert authority of its members, could deal with all questions of international law that have resulted from the work of all committees previously established, such as the committee on "Civil Organization in Time of War" or the "Planning Board for Ocean Shipping." The activity of this new committee would finally result in the presentation of recommendations to the governments of the NATO countries to bring their law and practice into conformity with the proposals of the committee with regard to the unification of the laws of war. Very few of the measures suggested can be effected by way of administrative standardization; however, the

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[101] These were the aforementioned British Manual, The Law of War on Land, *supra* note 61, and the United States Army Manual, The Law of Land Warfare, *supra* note 58.

[102] Baxter, *Cambridge Conference for the Revision of the Law of War*, 47 Am. J. Int'l L. 702 (1954).

[103] In regard to this problem, see Osterheld, *Eine Lucke des Genfer Abkommens uber die Behandlung der Kriegsgefangenen*, 6 Arciv des Volkerrechts 190 (1957). Osterheld suggests that all NATO states be regarded jointly as a "Detaining Power." This solution, however, cannot be accepted for legal reasons in absence of the condition that NATO itself is a subject of the laws of warfare. See also 47 Annuaire de l'Institut de Droit International—1, at 546 (1957) (article by Sir Gerald Fitzmaurice).

importance of the committee and of the task to be done cannot be overemphasized.

D. *A PROPOSAL*

It is suggested that a council-committee of the NATO council be established with the task of preparing an agreement on the common application of the laws of war within the NATO forces and to work out appropriate recommendations. The council-committee should be composed of those experts in the field of the laws of war, or their deputies, who are responsible for matters concerning the laws of war within their respective national contingents of the NATO forces.

SELECTIVE SERVICE: A SOURCE OF MILITARY MANPOWER*

BY LIEUTENANT COLONEL WILLIAM L. SHAW**

Between the years 1940–1947, 50 million men were registered for military or civilian service, 36 million of these registrants were classified, and 10 million were inducted into the Armed Forces of the United States.[1]

I. INTRODUCTION

The above summarization of a period of almost seven years of unprecedented military urgency in American history indicates several factors of major interest. By a lawfully constituted process, ten million men were ultimately obtained for the purpose of military manpower. This does not take into consideration that some millions of other registrants were retained in civilian activities contributing to the national interest in time of war or emergency. In addition, for a greater or lesser period of time, millions of others were allowed by law to remain at home in order to avoid undue family hardship upon dependents if the bread-winner should be called to the colors. Further, after physical examination, several million men were rejected for military service because of physical, mental, or moral defects. This entire process of selective acceptance and rejection was accomplished by uncompensated civilians who were residents of the registrant's own county. Subsequently, the same system which had selected men for military duty assisted them after demobilization to find reemployment. The purpose of this article is to review the evolution of compulsory military service with particular emphasis upon the Selective Service System in the United States since 1940. Judicial review will be considered. The discussion will not attempt to set forth every federal case which has arisen, but will indicate certain broad topics or subjects which are to be found in court cases linked to Selective Service.

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* The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School, nor any other governmental agency.

**CAL ARNG; Deputy Attorney General of California; member of the California State Bar; LL.B., 1933, Stanford University Law School.

[1] Selective Service System, Monograph No. 17 (The Operation of Selective Service), p. 4 (1955) (hereinafter referred to as Selective Service Operation).

A. *TERMINOLOGY*

1. *Selective Service System.* This is the sifting and testing process by which individual eligibility, exemption and deferment are determined within Congressional blueprints and enunciated legislative policy.[2]

2. *Draft.* The enforcement by the government of its constitutional right to require all citizens of requisite age and capacity to enter the military service of the country.[3]

3. *Conscript.* One taken by lot from the conscription or enrollment list and compelled to serve as a soldier or sailor.[4]

In this article, *conscription* refers to the compulsory *enrollment by the military* authorities leading to enforced placement in the military ranks. It will be stressed that *Selective Service* is the *civilian* (1) registration, (2) classification, and (3) forwarding for induction of registrants by local boards composed by the neighbors of the registrants.

B. *ANCIENT PRECEDENTS*

Enforced military service was practiced by the ancient Israelites. After Moses led his people from Egyptian bondage, it was written in the Bible:

> Take ye the sum of all the congregation of the children of Israel, after their families, by the house of their fathers, with the number of their names, every male by their polls; from 20 years old and upward, all that are able to go forth to war in Israel, thou and Aaron shall number them by their armies.[5]

This is a clear example of an enrollment, a call, a levy and the resulting military service. Israel raised an army numbering 603,550 by this method.[6]

A nearly universal military obligation affecting all able-bodied males was recognized in the ancient Greek states.[7] In Sparta, circa 776 B.C., military training began for males at the age of seven and continued until age sixty.[8] "Periclean Athens was a

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[2] United States v. Greene, 220 F.2d 792, 794 (7th Cir. 1955); 38 Words & Phrases 148 (1951, Supp. 1960).

[3] Lanahan v. Birge, 30 Conn. 438, 443 (1862); Ballentine, Law Dictionary with Pronunciations 408 (1st ed. 1930).

[4] Kneedler v. Lane, 45 Pa. (9 Wr. Pa.) 238, 267 (1863); 8A Words & Phrases 182 (1951).

[5] Numbers 1:2, 3 (King James).

[6] *Id.* at 1:46.

[7] Selective Service System, Monograph No. 1 (Backgrounds of Selective Service), pp. 5–7 (1947) (hereinafter referred to as Selective Service Backgrounds).

[8] Smith & Brownson, Smaller History of Greece 31–2 (1897).

city of but 36,000 males of military age, yet it possessed a citizen army of 28,000." [9]

In Rome, in the time of King Tarquinius Priscus, every able-bodied man between the ages of 17 and 47 was required to render active duty service for ten to sixteen years. Males from age 48 to age 60 were liable for garrison duty.[10] Subsequently, however, under the Empire, the wealthy citizens of Rome could escape performance of their military obligation by hiring substitutes.[11]

The Crusades were spread over two hundred years and led to the creation of great volunteer armies. However, the Crusades revealed the extravagant waste of a volunteer system in sending men to war.[12] Beginning in 1096[13] and concluding about 1270,[14] the Crusades represented the greatest era in the history of volunteering for military service.[15] Parenthetically, it should be noted that the Crusades cost several million lives.[16]

C. MILITARY SERVICE IN ENGLAND

The Anglo-Saxon "fyrd" or general levy was a localized defense force which included the entire free male population.[17] The individual supplied his own arms, and control of the "fyrd" was local. This military obligation was considered universal. In A.D. 894, the "fyrd" force was divided and rotated so that one-half always remained at home to till the fields while the other half fought. After the Norman Conquest, the "fyrd" was neglected in favor of a feudal levy based upon land tenure and a varying personal obligation to an overlord.[18] Henry II (1133–1189), however, used the "fyrd" to put down a great feudal uprising in his realm. This "fyrd" was a mobilization of freemen between the ages of 16 and 60, each family marching together in a township

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[9] Crowder, The Spirit of Selective Service 27 (1920).

[10] Selective Service Backgrounds 7.

[11] *Id.* at 8.

[12] *Id.* at 13.

[13] Montgomery, Leading Facts of French History 65 (1895). Even thousands of children were permitted to march without arms or accouterments to die in pursuit of an exalted ideal. See, Lamb, The Crusades, The Flame of Islam 277–8 (1931), as to The Children's Crusade (1212 A.D.).

[14] Montgomery, *op. cit. supra* note 13, at 77.

[15] Montgomery, *op. cit. supra note 13, at 78. It is interesting to note that* "the idea that religious wars were particularly pleasing to God was fostered by these campaigns." *Id.* at 79. Compare this concept with the fact that some sects seek to justify conscientious objection to military service because of alleged biblical injunctions against war.

[16] Selective Service Backgrounds 13. As to the Crusades generally, see Lamb, The Crusades, Iron Men and Saints (1930), and Ludlow, The Age of the Crusades (1910).

[17] 15 Ency. Britannica 484 (1958 ed.).

[18] *Ibid.*

fighting unit.[19] By the Assize of Arms, decreed in 1181, Henry II restrengthened the "fyrd" by requiring every freeman to arm himself and to be in readiness for military duty whenever called.[20]

The Statute of Winchester of Edward I in 1285 required that "every man have in his house harness (equipment) for *to keep the peace.*"[21] This statute has been termed the origin of the use of militia in England and the forerunner of the militia concept in the American Colonies.[22] An excellent example of the use of militia in England occurred in 1588. At that time, Philip II of Spain embarked with the Armada to conquer England. At Tillbury, a determined militia (fyrd) gathered to meet the 19,000 Spanish Marines who were prepared to land en masse if the debarkation had ever taken place.[23] From the time of the Armada, England relied upon dominant sea power to defend her home shores, and, as a consequence, the militia declined in importance.[24]

A significant feature in the study of military service in England is the Mutiny Act of 1689.[25] After the accession of William and Mary in February, 1689, a mutinous movement in the Army occurred in March, 1689.[26] The mutiny was put down, and Parliament adopted a device to maintain a standing army in time of peace without endangering popular freedom. Martial law and courts-martial, necessary to discipline, were authorized for a period of one year only, subject to annual renewal. This was motivated in part by the desire of the House of Commons that Parliament be summoned at least once yearly.[27]

In the Eighteenth Century, Parliament authorized levies upon able-bodied men to serve as soldiers and sailors. At least five such statutes were enacted in a span of 75 years.[28] These statutes were designed to recruit individuals for the land forces and marines. Commissioners under the Acts levied upon able-bodied individuals who were not, upon examination, following a lawful trade or em-

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[19] Selective Service Backgrounds 24.
[20] Larned, History of England 120 (1900).
[21] 15 Ency. Britannica 484 (1958 ed.).
[22] *Ibid.*
[23] Selective Service Backgrounds 27.
[24] *Ibid.*
[25] 1 W. & M., c. 5.
[26] Larned, *op. cit. supra* note 20, at 487.
[27] *Ibid.* The Mutiny Act would seem to be primarily an attempt by Parliament to prevent the King from seeking to rule without the participation of the Commons. This was effected through control of the purse strings by Commons. In Reid v. Covert, 354 U.S. 1, 23–9 (1957), the majority opinion reviews in part the background of the Mutiny Act. The opinion seems to err in attributing to Parliament (1) a fear of the Army and (2) a distrust of military courts-martial.
[28] 19 Geo. 3, c. 10 (1779); 18 Geo. 3, c. 53 (1778); 30 Geo. 2, c. 8 (1757); 29 Geo. 2, c. 4 (1756); 4 Anne, c. 10 (1704).

ployment or did not have sufficient means for their support and maintenance. No one under 16 years of age or over the age of 50 could be impressed. Additionally, anyone who voted in the elections for members of Parliament was exempt from the draft.[29] These statutes erred in that they created a system of impressment of only a portion of the population, namely, unemployed, able-bodied men.

The relatively small British Army, which mainly performed overseas garrison duties, consisted primarily of volunteers.[30] The outbreak of World War I proved that England was without an effective system of rapidly converting civilian manpower into military manpower. The Regular Army numbered only 234,000 men (of whom half were scattered throughout the Empire) and it was severely mauled in the initial conflict in 1914–1915.[31] The "Old Contemptibles" proved to be a magnificent and highly professional holding force, but their numbers were too few to stem the German advance.[32] In this situation, it can be seen how costly a volunteer system is which permitted the elite professional soldiers of officer caliber to be wiped out in the early months of a titanic struggle.[33] From 1907 to 1910, the entire British military machine had been reassembled with a view towards creating an adequate reserve force capable of expanding a small standing army into an effective defensive force.[34] In May 1916, the Military Service Act was enacted.[35] This act sought an equal distribution of the burdens of an all-out war. At the conclusion of World War I, voluntary recruitment was resumed. In 1939, after Munich and Prague, the Military Training Act[36] was enacted. This act was the first peacetime instance of conscription in England.[37] Following the outbreak of hostilities, the National Services (Armed Forces) Act[38] was adopted.

[29] See Kneedler v. Lane, 45 Pa. (9 Wr. Pa.) 238, at 278 and 290 (1863), where the 1757 statute, enacted under the administration of William Pitt, is cited to establish that every able-bodied man capable of bearing arms owes a personal military service to the government which protects him.

[30] Selective Service Backgrounds 28.

[31] Crowder, *op. cit. supra* note 9, at 177–8.

[32] Birdsall, Versailles Twenty Years After 123 (1941).

[33] Selective Service Backgrounds 29.

[34] Crowder, *op. cit. supra* note 9, at 177.

[35] 5 & 6 Geo. 5, c. 104 (1916) (amended by 6 & 7 Geo. 5, c. 15 (1916)).

[36] 2 & 3 Geo. 6, c. 25 (1939). Marshal Foch stated that the real backbone of Germany's mighty pre-war Army of 1914 was the *cadre* of 120,000 professional *non-commissioned* officers. Birdsall, *op. cit. supra* note 32, at 160–1.

[37] Schapiro, Modern and Contemporary European History 806 (1942).

[38] 2 & 3 Geo. 6, c. 81 (1939). Since the end of World War II, the British Commonwealth of Nations has been held together, not on the basis of military force, but on common issues of allegiance, advantage and sentiment. Contrast this system with that of Imperial Rome in which the provinces of Rome were dominated by great garrisons and by fear and force. See Munro, The Governments of Europe 374 (1926).

On the continent (exclusive of the British Isles) writers of military history date the modern system of nationwide military training and service back to the time of the French Revolution.[39] The term "conscription" relating to military service was first used when the Conscription Law of 1798 was enacted by the National Assembly in France in the face of all-out-war.[40] The law required five years' service for all able-bodied men aged 20–25.[41] The statute was based upon compulsory *enrollment enforced by the military authorities* upon all men. Selection was by the military and call to the colors was immediate and "on the spot".[42]

D. *MILITARY SERVICE IN THE AMERICAN COLONIES*

One of the most distinguished American authorities on the subject of the procurement of military manpower in the United States is Lieutenant General Lewis B. Hershey, the Director of Selective Service. General Hershey has stated:

> These early Colonies and others to be established later could not rely upon their professionals in case of dire emergencies and it was taken as a matter of course that every able-bodied man must be prepared to fight with the 'regulars' when occasion demanded. That was selective service reduced to its most primitive form, for there was a 'selecting' process. . . . Analyzed, the militia system, administered ideally, in a very real sense is the ancestor of the Selective Service System and the direct descendant bears a very close resemblance to its illustrious forefather. In the first place, the militia system assumed at the outset that everyone was liable for military duty, that everyone owed an obligation to bear arms for the protection of his country. That is one of the cardinal principles of Selective Service and Selective Service has only broadened the application of the principle and made the application fit a modern nation, whose social, economic, and political aspects are thousands of times more complex than they were in colonial days.[43]

Typical of the American colonies was Virginia. The early colonists brought with them the tradition that liability for military defense service would be required of every man on call.[44] An Act of the General Assembly of Virginia on March 5, 1623, re-

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[39] Graham, *Universal Military Training in Modern History*, 241 Annals 8 (1945).

[40] The idea of universal military service has been said to begin during the French Revolution when all men were subject to call to repel actual or threatened invasion. Schapiro, *op. cit. supra* note 37, at 696.

[41] Graham, *supra* note 39, at 8. The rapidly changing historical scene in France from 1789 to 1800 is discussed in Brier, Western World 100–6 (1946).

[42] *Id.* at 8. For a discussion of the growth of militarism in Germany, linked to the rise and fall of the Hohenzollern Empire, see Munro, *op. cit. supra* note 38, at 587–612.

[43] Hershey, *Procurement of Manpower in American Wars*, 241 Annals 15–6 (1945).

[44] Selective Service Backgrounds 32.

quired all "inhabitants" to go "under arms".[45] An Act of 1629 gave the "commander of plantations . . . power to levy parties of men (and) employ (them) against the Indians".[46] By 1631, the Assembly had amended the basic law to require the "inhabitants . . . to go under arms . . . be mustered and exercised by commanders . . . conduct inventories".[47] In 1736, an Act required compulsory service in a *militia* of "free males above age 21" with severe punishment for failure to comply.[48] During the Revolution, a law enacted in 1778 was intended "to fill quotas by draughts".[49] While Virginia could issue quotas for drafts during the Revolution, the colony did not call men to arms, but relied mainly upon volunteers without a system of centralized control. It is significant, however, that there were 65 separate and distinct military enactments in the colony of Virginia. Fifty-one of these were laws definitely applying the principle of compulsory military training and service.[50]

In Massachusetts, one of the earliest records is that of the General Court for January 2, 1633, which provided: "that all and every person within the colony be subject to such military order for training and exercise or arms as shall be thought meet, agreed on and prescribed by the Governor and Assistants".[51] In Connecticut, in 1638, a comprehensive law required the bearing of arms and training of "all persons that are above the age of 16 years . . . the continual readiness of a good musket or other gun fit for service".[52]

George Washington perhaps best summed up the traditional American colonial viewpoint and policy in the matter of general military training and service when he declared:

> It may be laid down as a primary position . . . that every citizen who enjoys the protection of a free government, owes not only a portion of his property, but even of his personal services to the defense of it.[53]

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[45] Selective Service System, Monograph No. 1, vol. II, pt. 14, Vollmer, *Military Obligation: The American Tradition*, No. 369, Virginia (1947) (hereinafter referred to as Vollmer).

[46] Vollmer, No. 371, Virginia.

[47] *Ibid.*

[48] Vollmer, No. 393, Virginia.

[49] Vollmer, No. 624, Virginia.

[50] Selective Service Backgrounds 34. For an analysis of compulsory military service in the American colonies, see Arver v. United States, 245 U.S. 366, 379–81 (1918), in which the Selective Service Act of 1917, discussed in Pt. III, *infra*, is interpreted.

[51] Vollmer, pt. 6, No. 534, Massachusetts.

[52] Vollmer, No. 24, Connecticut.

[53] Graham, *supra* note 39, at 8.

II. THE CIVIL WAR ERA

A. *THE UNION DRAFT*

At the close of the year 1860, the Regular Army numbered only 16,367 officers and men comprising 198 companies of which 183 were stationed on the frontier.[54] On March 6, 1861, President Davis of the CSA called for 100,000 men to serve for one year.[55] So prompt was the response to the Confederate call that by mid-April, 35,000 adequately trained men were in the field.[56] President Lincoln on April 15, 1861, after the fall of Fort Sumter, called for 75,000 militia for a period of three months service.[57]

Because of the attrition resulting from a prolonged war, President Lincoln in August, 1862, asked for 300,000 volunteers to serve for nine months. Only 87,000 men throughout the nation volunteered.[58] Clearly, the method of raising men through volunteers broke down seriously in the North.[58] On January 28, 1863, the first draft bill of what was to become the Federal Enrollment Act was introduced by Senator Henry Wilson who declared:

> Volunteers we cannot obtain. . . . [T]he needs of the nation demand that we should rely not upon volunteering, but . . . [upon] enrolling and drafting the population of the country.[60]

The resulting law [61] provided that all able-bodied male citizens aged 20–45 years should be enrolled and thereafter called when needed. Draftees could send substitutes in their place or could avoid the draft altogether through the payment of $300. The United States was divided into enrollment districts with a provost marshal for each district. Additionally, assistants were placed in charge of the various States. Persons who violated the act were subject to Army courts-martial proceedings.[62] However, the act provided that the draft provisions were only applicable as a last resort whenever a State's quota could not be filled by voluntary recruitment.

Out of a total of 2,690,401 men in the Union forces from 1861–1865, only 255,373 were actually drafted.[63] The Union Army at its

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[54] Upton, Military Policy of the U.S. 225 (2d ed. 1907).
[55] *Id.* at 226.
[56] *Ibid.*
[57] *Id.* at 227.
[58] Hamm, From Colony to World Power 335 (1947).
[59] 1 Shannon, Organization & Administration of the Union Army 268, 271 (1928).
[60] Selective Service Backgrounds 65.
[61] 12 Stat. 731 (1863). For a summary of the provisions of the act, see 1 Shannon, *op. cit. supra* note 59, at 305–7.
[62] Selective Service Backgrounds 65; Selective Service System, Monograph No. 16 (Problems of Selective Service), pp. 5–7 (1952) (hereinafter referred to as Selective Service Problems).
[63] Selective Service Problems 45.

peak on May 1, 1865, numbered 1,000,576.[64] While the number of men drafted numbered only a quarter million, countless thousands of the volunteers acted under the coercion of the Enrollment Act.[65]

The Federal Enrollment Act of 1863 was unpopular and unsatisfactory.[66] The draft aroused great hostility and reduced its effectiveness in producing manpower.[67] Substitutions flourished and the way was open for most draftees of financial means to find replacements for hire.[68] Among its other faults, the Act provided for enforcement of its provisions by the military. All offenders became subject to military courts-martial proceedings. There was little or no civilian participation at any level in the draft system. As a consequence, the military enrolling officer loomed as a sinister, menacing figure.

The constitutionality of the Enrollment Act of 1863 was upheld in *Kneedler* v. *Lane.*[69] In a divided vote, the Supreme Court of Pennsylvania determined that the 1863 Act was within the Congressional powers. The court held that there was a two-fold power: first, to raise national forces under the clause "to raise and support armies";[70] second, to call forth the state militia "to execute the laws of the Union, suppress insurrections and repel invasions."[71] The court concluded that the national army could be raised or recruited by "draft". The power to carry on war and to call a force into service was held to carry with it the authority to draft the members of the force. The court held that authority to draft may belong to the States, but this does not mean that the Union may not likewise raise armies by draft. "The whole affair is national, not state".[72]

In *Lanahan* v. *Birge,*[73] habeas corpus was sought on behalf of a minor who had enlisted in a Connecticut regiment of volunteers

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[64] *Ibid.*

[65] *Ibid.* See also 1 Shannon, *op. cit. supra* note 59, at 311–12.

[66] Crowder, *op. cit. supra* note 9, at 86–91.

[67] Leech, Reveille in Washington 230 (1941).

[68] *Id.* at 271. For example, the first quota of the District of Columbia in the draft was 3,863 men. By October, 1863, the draft had procured only 960, of whom 675 were substitutes.

[69] 45 Pa. (9 Wr. Pa.) 238 (1863).

[70] U.S. Const. art. I, § 8, cl. 12.

[71] *Id.* cl. 15.

[72] 45 Pa. (9 Wr. Pa.) 238, 314. By a 3–2 vote, the same court initially had granted an injunction to stop the proceedings of military officers of the United States in "coercing" the plaintiffs to enter the Army as drafted soldiers. Subsequently, also by a 3–2 vote, the court rescinded the order for a preliminary injunction and denied a request for a permanent injunction. The opinion states that due notice of the hearing was given to the *United States District Attorney but that he did not appear despite the notice.* The defendants were officers of the district enrolling board.

[73] 30 Conn. 438 (1862); *accord,* United States v. Williams, 302 U.S. 46 (1937), permitting a minor sailor to cancel his war risk insurance policy without the consent of his mother, the beneficiary.

which had been mustered into United States service. The court held that a minor may be lawfully enlisted without the consent of his parents. The court reasoned that every citizen of the requisite age and capacity is under an obligation to render military service to the nation when required and is subject to being drafted for such service. Enlistment was considered only another method of securing military service and any person subject to the draft may enlist. The court further stated that the right of a parent to the services and control of a child is subordinate to the right of the government to his services.

B. *THE CONFEDERATE DRAFT*

Previously, we have noted that President Davis on March 6, 1861, called for 100,000 volunteers to serve for one year and that by mid-April, 35,000 well-equipped, trained men were in the field.[74] However, voluntary recruitment proved to be inadequate, and on April 16, 1862, a conscription law was enacted.[75] The statute required all men presently in the army to serve for an additional two years. All white men 18–35 years were to be called to military service for three years. Enlistment of men was to be by the Governors of the States or by Confederate officers. Substitutes were allowed. Certain exemptions from military service were recognized.

Upton described the Act of 1862 as giving the Confederacy an "immense power for resistance" and as the reason why the resulting military policy of the Confederate Congress was so "strong".[76] He went on to declare that the 1862 Act enabled the "Confederate armies again to take the field to battle and resist the onset of the Union hosts".[77]

In September, 1862, the age of military service was extended to 45 years.[78] Substitution was abolished in December, 1863.[79]

On February 17, 1864, the CSA enacted a statute demonstrating keen military wisdom although its passage came too late in the

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[74] See nn. 55 and 56 *supra*.

[75] Const. & Stats., Confederate States of America, 1st Cong., 1st Sess., c. 31 (1862).

[76] Upton, *op. cit. supra* note 54, at 469.

[77] *Ibid.*

[78] Const. & Stats., Confederate States of America, 1st Cong., 1st Sess., c. 15 (1862).

[79] Const. & Stats., Confederate States of America, 1st Cong., 4th Sess., c. 3 (1863–64). President Davis told the Mississippi Legislature that there was no more reason to expect voluntary service in the Army than voluntary labor upon the public roads or the voluntary payment of taxes. Savannah (Ga.) Republican, Jan. 14, 1863. This was one of the most realistic and sound pronouncements during the war.

struggle to affect the outcome. The Act[80] provided that all white men aged 17–50 should be in the "military service of the Confederate States for the war". This did away with term enlistments and made a reservoir of manpower comprising all men within the age brackets. The law went on to state that those between the ages 17 and 18 and between 45 and 50 should be *enrolled* and thereafter "constitute a *reserve* for State defense and detail duty".

What were the numerical results of the draft? In addition to retaining in service a trained army of 100,000 veterans,[81] the draft resulted in the acquisition of 300,000 additional men and obtained the enrollment of 850,000 males, including the State reserves.[82]

Each of the Union and the Confederate Draft Acts was replete with exemptions from military service. One factor in the weakness of the Confederate Act was the very broad basis allowed for exclusion from military duty. The following exceptions show the extent to which legislative largesse may extend by way of release from a military obligation:[83] all in the service or employ of the Confederate States; all judicial and executive officers of the State governments and the members of Congress and the Legislatures; mail men; ferry men, pilots and all in the marine service and railroads; telegraph operators; ministers of religion; all in iron mines, furnaces and foundries; journeymen printers; presidents and professors of colleges and academies; teachers of more than 20 students; superintendents of all hospitals; nurses; apothecaries; operatives in wool and cotton factories.

In *Parker* v. *Kaughman*,[84] the validity of a State Draft Act passed pursuant to the Confederate Constitution of 1861 was upheld. In *Burroughs* v. *Peyton*,[85] another Draft Act was likewise

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[80] Const. & Stats., Confederate States of America, 1st Cong., 4th Sess., c. 65 (1864). If the Reserve had been created in 1861 and had been adequately trained and equipped, it is conceivable that such a Reserve would greatly have aided the shattered Confederate forces in 1864 and 1865 by offering additional men and by removing the pressure from the regular forces. Furthermore, there would have resulted an *inventory* of manpower through the enrollment. There was no Union equivalent of such a Reserve.

[81] See note 77 *supra*.

[82] Moore, Conscription & Conflict in the Confederacy 356–58 (1924). Moore concludes that the draft was chiefly responsible for most of the volunteering after April, 1862.

[83] Const. & Stats., Confederate States of America, 1st Cong., 1st Sess., c. 74 (1862).

[84] 34 Ga. 136 (1865).

[85] 57 Va. (16 Gratt.) 470 (1864); *accord*, Jeffers v. Fair, 33 Ga. 347 (1862), where the court determined that the Confederate Constitution, identical in terms to the U.S. Constitution, did not restrict the power of the Congress to raise armies to the method of voluntary enlistments; Barber v. Irwin, 34 Ga. 27 (1864); Walton v. Gatlin, 60 N.C. 310 (1865).

upheld. In *Parker*,[86] the court enunciated the salutary rule that the power to raise armies includes the authority to compel a citizen who has been found incapable of field military service to perform duties of a noncombative nature for the army such as being a baker of bread in a hospital department. In *Ex Parte Coupland*,[87] and in *Ex Parte Hill*,[88] it was held that the State's power to call out the militia did not restrict or limit the power in the central Confederate government to raise or support armies.

C. *THE OAKES REPORT*

Much was learned from the errors of the draft in the Civil War. A great contribution to our present knowledge may be found in the Report of Brig. General James Oakes, Acting Assistant Provost Marshal General in the State of Illinois who headed the Union Draft in that State. The Report of General Oakes, dated August 9, 1865, submitted recommendations based upon his experience with the Federal Enrollment Act in his state. The suggestions of General Oakes proved of vital aid in drafting the legislation in 1917 and in 1940.[89] The highlights of the Oakes' report are:[90]

1. The draft machinery should be controlled by a civilian agency rather than the military.
2. Selection of men for military service or for deferment should be done by local boards functioning within the local communities where the inductees reside.
3. The State should be the major subdivision of draft administration.
4. Each citizen should register at a designated place rather than be enrolled by the military in a house-to-house canvass.
5. Bounties, substitution or commutation for service should not be allowed.
6. The obligation of citizenship gives rise to the need for duty with the armed forces.
7. The period of military service should be for the duration of the emergency and not for a fixed period of time. Quotas should be definite and credits should be allowed to the State for enlistments.
8. A competent medical officer should be assigned to duties in each headquarters to advise in connection with all medical examinations and reports.
9. A Government attorney should be at each of the headquarters to whom legal questions should be referred for advice.

III. THE SELECTIVE SERVICE ACT OF WORLD WAR I

On the day following the Declaration of War by the United

[86] See note 84 *supra*.
[87] 26 Tex. 386 (1862).
[88] 38 Ala. 429 (1863).
[89] 40 Stat. 76 (1917); 54 Stat. 885 (1940).
[90] Selective Service Backgrounds 154 (Appendices, No. 24). The Report was made to the Provost Marshal General and appears to have been pigeonholed for some years.

States against Imperial Germany (April 6, 1917), Congress began to debate compulsory military manpower procurement.[91] On May 18, 1917, there was enacted "an Act to Authorize the President to Increase Temporarily the Military Establishment of the United States" which became known as the Selective Service Act of 1917.[92]

Unlike the Civil War legislation, the 1917 statute was not designed to stimulate volunteering. The Act established an obligation for military service from the very beginning of the war as an effective means of raising an army, and, incidentally, a navy.[93] The 1917 Act did not contain detailed provisions as to the operation of the draft system. Operational details were to be promulgated by the President.[94] There was to be one Local Board of three civilians in each county; if the population of the county exceeded 30,000, there might be additional boards. *No board member was to be connected with the military establishment.* Local boards were responsible for registration, classification, deferment, physical examination, induction and transportation of the registrants. A district board was provided for each federal judicial district, numbering 155 in all. Each district board consisted of five members chosen on the basis of their knowledge of occupational problems. Claims for *deferment because of occupation* were resolved by the district board rather than by the local board. The district board also had *appeal functions* when a registrant was dissatisfied with his board classification. Bounties and substitutes were prohibited. Exempted from the Act were certain legislative, executive and judicial officers of the United States and of the States; regular or duly ordained ministers of religion and students preparing for the ministry in recognized divinity schools; members of any well-recognized religious sect, whose principles forbade its members to participate in war in any form. Males between the ages of 21 and 30 were required to register. Penalties were prescribed for false registration or for giving false information. The President could provide for the discharge of enlisted men whose status with respect to dependents rendered their discharge advisable.

During World War I, civilian draft boards were located in 4,600 communities and registered nearly 24 million men between the ages of 18 and 45. 2,810,296 of the registrants were inducted into military service.[95] The initial draft call in 1917 was for 687,000

[91] Selective Service Operation 12.

[92] 40 Stat. 76 (1917).

[93] Selective Service Problems 46.

[94] See note 92 *supra.*

[95] Selective Service Backgrounds 81.

men.[96] On the basis of information advanced by the registrant, classification resulted in one of five groups which were:

Class I, men immediately available for military service.
Classes II, III and IV, men temporarily deferred.
Class V, men exempt from service under the Act.[97]

About 67% of the men serving in the Army during World War I were brought in under the Selective Service Act. Over 2,800,000 were registered, selected, and delivered to the Army in less than 18 months.[98] The vital impact of Selective Service in furnishing a majority of the Army's personnel is apparent. The total number of men in the Army in 1918 was 4,057,101 of whom 2,086,000 went overseas.[99]

On December 15, 1917, regulations were issued forbidding enlistment in the Army except in specialized branches.[100] On July 27, 1918, enlistments of Class I registrants in the Navy and the Marine Corps were prohibited. On August 9, 1918, *all volunteering was suspended for the duration.*[101] General March, Army Chief of Staff during the War, states:

> It would have been impossible for the United States to have played its part in the war without the Draft Act. It is not only the best military way of raising men, but it is the fairest to the individual citizen. It is no more an invasion of the rights of the individual than it is for him to be drawn for jury duty from a list of available citizens. It is as mandatory for the individual citizen to defend his country in time of war as it is that he should pay taxes in time of peace or to support his Government in any of the other ways which he does daily. . . . After the declaration of war . . . after 10 days hard work we raised less than 5,000 men. As the end of April, 1917 neared, only some 30,000 had been obtained. It was the poorest showing America has made in all her history, and marked the beginning of the downfall of the volunteer method of raising armies in a martial war in this country.[102]

A weakness in the 1917–1918 operation was that an individual who was selected for military duty was considered to be in the service from the time that he was mailed a notice by his local board to report for duty. If the registrant failed to receive his notice, he unknowingly became a *deserter* from the Army or Navy and was subject to courts-martial proceedings under military

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[96] Selective Service Operation 14. Warned by British and French experience, the War Department in 1917–18 earmarked a large proportion of regulars for training draftees. Falls, The Great War 262 (1959).

[97] Selective Service Operation 14.

[98] Dept. of Army, ROTC Manual 145–20, American Military History, 1607–1953, p. 339 (1956).

[99] Bernardo and Bacon, American Military Policy, Its Development Since 1775, at 433 (1955).

[100] Selective Service Problems 48.

[101] *Ibid.*

[102] March, The Nation at War 241–42 (1932).

law.[103] At the conclusion of the war, official Army figures from the Second Report of the Provost Marshal General indicated a total of 362,022 deserters.[104]

In *Franke* v. *Murray*,[105] the court held that under the 1917 statute, one called into service became subject to the laws and regulations governing the Army, including the Articles of War, from the date of the order. The laws governing voluntary enlistments, under which it was necessary to take an oath, were not considered to be applicable to the draft. The case was a habeas corpus proceeding by a service member who had been denied exemption as a member of a religious sect whose principles forbade members to participate in war. Following arrest as a deserter, conviction was affirmed.

The 1917 statute was upheld as constitutional in all litigation. In *Arver* v. *United States*,[106] the Court concluded that the power to exact military duty at home or abroad by citizens was conferred upon Congress in the exercise of its power to declare war and to raise and support armies[107] and by virtue of the necessary and proper clause.[108] The Court held there was no illegal delegation of federal power to state officials and that there was no illegal vesting of legislative discretion or judicial power in administrative offices. The exemption allowed to the members of certain religious sects was held not to violate the prohibition of the first amendment against the establishment of a religion or an interference with the free exercise thereof. Military duty was not considered repugnant to the involuntary servitude provisions of the 13th Amendment.

In other cases, the Act was held not to be an unlawful delegation of legislative power to the Secretary of War[109] nor to violate due process.[110] Additionally, it was held that there was no discrimination between classes of persons nor did the Act constitute class legislation.[111] The statute was held not to deprive the federal courts

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[103] Selective Service Problems 8.

[104] Ekirch, The Civilian and the Military 118 (1956).

[105] 248 Fed. 865 (8th Cir. 1918). This objectionable feature of prosecuting as a deserter one who may be a mere delinquent under the Selective Service law has been eliminated entirely in the 1940 and the 1948 Acts, as amended. A difficulty in the matter of evidence in a desertion prosecution was that the offense required a highly specific intent which seemed absent in a registrant who may never have received in the mail, through postal inadvertence, an order to report for induction.

[106] 245 U.S. 366 (1918), involving six cases consolidated on appeal called the Selective Draft Law Cases.

[107] U.S. Const. art. I, § 8, cl. 12. See also note 70 *supra* and accompanying text concerning the Act of 1863.

[108] *Id.* cl. 18.

[109] United States v. Casey, 247 Fed. 362 (S.D. Ohio 1918).

[110] Angelus v. Sullivan, 246 Fed. 54 (2d Cir. 1917).

[111] United States v. Sugar, 243 Fed. 423 (E.D. Mich. 1917).

of power to pass upon exemptions because local draft boards were not exercising judicial functions.[112] The Draft Boards possessed discretionary or quasi-judicial powers, but were not considered to be courts.[113] The law was not considered to be an infringement of states' rights as an interference with the police power of the State or an invasion of the reserved powers of the State.[114] The Act was not *ex post facto* as to an alien who had taken out his first papers, but had not become a citizen.[115] The requirement that a registrant exhibit his registration card did not compel him to be a witness against himself.[116]

Convictions of offenders for making false statements in connection with the Act,[117] for failure to register,[118] for circulating pamphlets with intent to interfere with the military service,[119] for conspiracy to induce others not to register,[120] and for conspiring to obstruct recruitment and enlistment,[121] were consistently upheld.

Cox v. *Wood*[122] held that a draftee could not resort to a petition for habeas corpus to test the merits of whether he should be inducted into the Army.

IV. THE HAMILTON CASE

A significant decision which was handed down in 1934 was concerned with the obligation of a student to enroll in military science courses upon a compulsory basis. In *Hamilton* v. *Regents of the University of California*,[123] the Supreme Court, in a unanimous decision, held that an order of the Board of Regents of a state university making military instruction compulsory, was not repugnant to the privilege and immunities clause[124] or the due process clause,[125] and did not contravene the Briand-Kellogg Peace Pact. The court concluded that every state has the authority to train its able-bodied male citizens to serve in the United States Army, in the State Militia or as members of local constabulary

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[112] *Ibid.*

[113] United States v. Stephens, 245 Fed. 956 (D. Del. 1917), *aff'd*, 247 U.S. 504 (1918).

[114] United States v. Casey, 247 Fed. 362 (S.D. Ohio 1918).

[115] United States *ex rel.* Pfefer v. Bell, 248 Fed. 992 (E.D.N.Y. 1918).

[116] United States v. Olson, 253 Fed. 233 (D. Wash. 1917).

[117] O'Connell v. United States, 253 U.S. 142 (1920).

[118] Jones v. Perkins, 245 U.S. 390 (1918).

[119] Pierce v. United States, 252 U.S. 239 (1920).

[120] Goldman v. United States, 245 U.S. 474 (1918).

[121] Schemck v. United States, 249 U.S. 47 (1919). See Frohwerk v. United States, 249 U.S. 204 (1919), a conspiracy prosecution under the Espionage Act, 40 Stat. 217 (1917).

[122] 247 U.S. 3 (1918). See Pt. VI–H, Judicial Review, *infra*.

[123] 293 U.S. 245 (1935), *rehearing denied*, 293 U.S. 633 (1935).

[124] U.S. Const. amend. XIV, § 1.

[125] *Ibid.*

forces. To this end, the State may avail itself of the services of officers and equipment belonging to the military establishment of the United States. It was declared that every citizen owes the duty, according to his capacity, to support and defend the Government, federal and state, against all enemies. The plaintiffs, therefore, were denied a writ of mandamus to compel the admission of the petitioners as students without requiring them to receive military training.[126] The plaintiffs were members of a particular sect and their fathers were ordained ministers of that church, which at a 1931 session, had adopted a resolution to the effect that participation in war is a denial of their supreme allegiance to God. In a concurring opinion (in which Justices Brandeis and Stone joined), Mr. Justice Cardozo stated:[127]

> The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

The court in *Hamilton*, relied upon *Arver* v. *United States*.[128] The court further cited *United States* v. *Macintosh*,[129] where an application for naturalization was denied to one who expressed an unwillingness to promise to bear arms in defense of the United States unless he should believe the war to be morally justified. The court in that case had concluded that, under the war power,[130] armed service may be required of any citizen without regard to his objections in respect to the justice or morality of the particular war.

V. THE SELECTIVE TRAINING AND SERVICE ACT OF 1940

Commonly called the Burke-Wadsworth Bill, the Selective Training and Service Act became effective on September 16,

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[126] For the opinion of the California Supreme Court in this same case prior to appeal, see 219 Cal. 663, 28 P.2d 355 (1934).

[127] 293 U.S. 245, 268 (1934); *accord*, University of Maryland v. Coale, 165 Md. 224, 167 Atl. 54 (1933), *appeal dismissed for lack of substantial federal question*, 290 U.S. 597 (1933).

[128] 245 U.S. 366 (1918). See note 106 *supra* and accompanying text.

[129] 283 U.S. 605 (1931). The court may have overlooked the additional authority of *In re* Grimley, 137 U.S. 147, 153 (1890), where the court stated: "The government has the right to the military service of all its able-bodied citizens; and may, when emergency arises, justly exact that service from all." This was a habeas corpus petition by an overage (40 years) recruit at the time of enlistment to gain discharge (35 years being the maximum age). The writ was denied.

[130] U.S. Const. art. I, § 8, cl. 11.

1940.[131] The 1940 Act was in effect from September 16, 1940 through March 31, 1947, or approximately 6½ years. Previously, we have noted that during the lifetime of the 1940 statute, 50 million men were registered for military or civilian service, 36 million of these registrants were classified and ten million were inducted into the armed forces of the United States.[132] The purposes of the Act were four-fold.[133] They were:

1. Selection of men for service in the Armed Forces.
2. Selection of registrants for deferment if engaged in an activity essential to the national health, safety or interest.
3. Conduct of work of national importance under civilian direction for conscientious objectors opposed to duty in the Armed Forces.
4. Assistance to veterans in securing reinstatement to the jobs they held before entering the military, or in finding employment for them in new fields.

An excellent summary of the operation of the Selective Service System under the 1940 statute is set forth in *Falbo* v. *United States*.[134] The court affirmed a conviction in the District Court of a conscientious objector who wilfully failed to observe a board's order to report for assignment to work of national importance. The court, through Mr. Justice Black, stated:

> The selective service process begins with registration with a local board composed of local citizens. The registrant then supplies certain information on a questionnaire furnished by the board. On the basis of that information and, where appropriate, a physical examination, the board classifies him in accordance with standards contained in the Act and the Selective Service Regulations. It then notifies him of his classification. The registrant may contest his classification by a personal appearance before the local board, and if that board refuses to alter the classification, by carrying his case to a board of appeal, and thence, in certain circumstances, to the President.
>
> Only after he has exhausted this procedure is a protesting registrant ordered to report for service. If he has been classified for military service, his local board orders him to report for induction into the armed forces. If he has been classified a conscientious objector opposed to noncombatant military service, as was petitioner, he ultimately is ordered by the local board to report for work of national importance. In each case the registrant is under the same obligation to obey the order.[135]

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[131] 54 Stat. 885 (1940). The Burke-Wadsworth Bill was adopted in the Senate by a 47–25 vote and in the House by a 233–124 vote. 86 Cong. Rec. 12161 (1940).

[132] See note 1 *supra*. The strength of the armed services in 1939 was as follows: Army—187,886; NG—199,491; AR—139,074; Navy—120,784; NR—56,003; Marines—19,344; MCR—16,025; or a total strength of 738,784. U.S. Bureau of Census, Statistical Abstract of U.S. 162–63 (1944). The strength had increased to 1,024,000 by September, 1940. Selective Service Operation 17.

[133] Selective Service Operation 16.

[134] 320 U.S. 549 (1944).

[135] *Id.* at 552.

The Act declared that in a free society the obligations and privileges of military training and service should be shared generally under a system of selective training and service. When Congress determined it to be necessary, the National Guard could be ordered to active federal service.[136] All male citizens and aliens residing in the United States between the ages of 21–36 had to register.[137] Any man aged 18–36 was afforded an opportunity to volunteer for induction into the land or naval forces. There were not to be in active training in the land forces at any one time more than 900,000 men inducted under the Act. A trainee was required to serve for a period of twelve months unless sooner discharged except when Congress declared that the national interest was imperiled. After completion of service, a selectee was transferred to a reserve component of the land or naval forces until he became 45 or until ten years elapsed after being transferred. Inductees received the same pay, allowances, pensions, and other benefits provided for enlisted men of like grades.[138] Quotas were determined for each state, territory and the District of Columbia.[139] Certain men were excluded from the requirement to register. There were exempted regular or duly ordained ministers of religion and students preparing for the ministry in divinity schools recognized as such for more than one year prior to the enactment of the Act. Deferments were authorized for men whose employment in industry, agriculture or other occupations was considered necessary to the national health, safety or interest. Students likewise were deferred on a conditional basis. Those who by reason of religious training and belief were conscientiously opposed to participation in war in any form were excluded from combatant training. In an appeal from the Local Board to the Appeal Board in the case of an alleged conscientious objector, the matter is referred to the Department of Justice for inquiry and hearing and returned to the Local Board with a recommendation by the Department.[140] No bounty to induce enlistment or induction was permitted.[141]

If a registrant was employed, he was entitled to be restored to such employment if he applied within 40 days after being relieved from training.[142] The President was authorized to prescribe the necessary rules and regulations to carry out the provisions of the Act and to create and establish a selective service system.[143] In-

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[136] Selective Training and Service Act of 1940 (Burke-Wadsworth Act), ch. 720, § 1, 54 Stat. 885.
[137] *Id.* §2.
[138] *Id.* § 3.
[139] *Id.* § 4.
[140] *Id.* § 5.
[141] *Id.* § 7.
[142] *Ibid.*
[143] *Id.* § 10.

ductees were allowed the benefits of the Soldiers & Sailors Civil Relief Act.[144]

The significance of the *regulations* adopted by the Director of Employment to carry out the purposes of the Act cannot be overstressed. The President in the autumn of 1940 delegated to the Director the authority to issue rules and regulations governing the operation of the System's activities.[145] The regulations were of tremendous assistance in keeping the statute in harmony with changing peace and war time conditions.

In the autumn of 1941, the Service Extension Act continued the training obligation of the National Guard and the Reserves in service.[146] After Pearl Harbor, the Act was amended to extend generally for the duration the liability for military service and for registration of manpower. The age limits for registration were broadened from 18 to 65 years.[147] In December 1942, all volunteering within the 18–38 age group was prohibited.[148] After the cessation of hostilities, the Act was extended to May 15, 1946,[149] and then to July 1, 1946,[150] and finally through March 31, 1947,[151] when the Act expired.

Concurrently with the expiration of Selective Service, the Office of Selective Service Records was created and authorized to liquidate the Selective System following the termination of its functions and to preserve and service the records.[152] A records depot was established in each state, territory and in the District of Columbia to receive and store the voluminous records.

VI. THE SELECTIVE SERVICE ACT OF 1948 AND THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT OF 1951

Selective Service was restored by Congress' enactment of the Selective Service Act of 1948.[153] Essentially, the 1948 Act followed the pattern and framework of the prior 1940 Act. All male citizens

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[144] 54 Stat. 1178 (1940), 50 U.S.C. App. §§ 501–590 (1958).

[145] Exec. Order No. 8553, 5 Fed. Reg. 3887 (1940); Exec. Order No. 8559, 5 Fed. Reg. 3923 (1940); Selective Service Operation 25.

[146] 55 Stat. 627 (1941).

[147] 55 Stat. 844 (1941). The total number of Army casualties from Pearl Harbor through 30 June 1945 were: 201,367 killed; 570,783 wounded; 56,867 missing; 114,205 prisoners of war. Bernardo and Bacon, *op. cit. supra* note 99, at 433.

[148] Exec. Order No. 9279, 7 Fed. Reg. 10177 (1942).

[149] 59 Stat. 166 (1945).

[150] 60 Stat. 181 (1946).

[151] 60 Stat. 341 (1946).

[152] 61 Stat. 31 (1947).

[153] 62 Stat. 604 (1948), as amended, 50 U.S.C. App. §§ 451–473 (1958).

and aliens residing in the United States between the ages of 18 and 26 had to register.[154] The age of induction was 19 through 25.[155] The period of service was for 21 consecutive months unless sooner discharged.[156] A Selective Service System was established with a National Headquarters and a District Headquarters in each state, territory and possession of the United States.[157]

The regulations promulgated pursuant to the 1948 Act did not differ substantially from the earlier regulations under the 1940 Act. In *Sterrett* v. *United States*,[158] the court concluded that when Congress substantially reenacted the provisions of the 1940 law, the regulations adopted pursuant to the law must be deemed to have received congressional approval where they have remained in effect for a long period of time without substantial change.

In 1951, the statute was amended in various particulars. The title of the act became the Universal Military Training and Service Act. Reference was made to a National Security Training Corps. The age of induction was lowered to 18 years and 6 months while the period of service was 24 consecutive months unless sooner released.[159] The UMTSA is the existing statute, and it has been extended until July 1, 1963.[160]

The constitutionality of the various Selective Service acts from 1940 to date has been sustained consistently. In *United States* v. *Waggoner*,[161] the court held that the 1940 Act was a completely integrated statutory project for the registration, classification, and induction into the armed services of all male citizens and residents, within prescribed age limits, with certain narrow exceptions and exemptions. In *United States* v. *Bethlehem Steel Corp.*,[162] the Supreme Court ruled that Congress can draft men for battle service and can also draft business organizations to support the fighting men under the power to raise and support armies and the necessary and proper clause. The Universal Military

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[154] Universal Military Training and Service Act of 1941, ch. 625, § 3, 62 Stat. 605, as amended, 50 U.S.C. App. § 453 (1958).

[155] *Id.* § 4(a), 62 Stat. 608, as amended, 50 U.S.C. App. § 455 (1958).

[156] *Id.* § 4(b).

[157] *Id.* § 10(a), 62 Stat. 618, as amended, 50 U.S.C. App. § 460 (1958).

[158] 216 F.2d 659 (9th Cir. 1954).

[159] Universal Military Training and Service Act of 1951, 65 Stat. 75 (1951), as amended, 50 U.S.C. App. § 451–473 (1958).

[160] 73 Stat. 13 (1959), 50 U.S.C. App. § 454 (Supp. I, 1959). The favorable vote in 1959 upon the extension of the statute was 34–1 in the House Armed Services Committee and 381–20 in the House of Representatives. *Hearings on H.R. 2260 Before the House Committee on Armed Services*, 86th Cong., 1st Sess. 176 (1959).

[161] 143 F.2d 1 (7th Cir. 1944), *cert. denied*, 323 U.S. 730 (1944). The defendant was convicted following trial by jury for failing to register.

[162] 315 U.S. 289, 305 (1941).

Training and Service Act, in the words of Chief Justice Vinson, "is a comprehensive statute designed to provide an orderly, efficient and fair procedure to marshal the available manpower of the country, to impose a common obligation of military service on all physically fit young men. It is a valid exercise of the war power. It is calculated to function—it functions today—in times of peril."[163]

In *Warren* v. *United States*,[164] a conviction of one who knowingly counseled another to fail to register under the statute was upheld. The court declared that judicial notice would be taken of the fact that when the 1948 Act was passed, the balance between peace and war was so delicate that no one could forecast the future and that our national security required the maintenance of adequate military, air, and naval establishments. The court went on to point out that freedom of religion and freedom of speech are qualified freedoms which do not permit one to obstruct the workings of the Selective Service law.

A. *THE IMPACT OF KOREA*

Calls for inductees had ceased by mid-1949 and the armed forces relied entirely upon volunteer recruitment. After the outbreak of hostilities in Korea, however, calls were resumed in August, 1950, and thereafter the following number of men were inducted by the Selective Service System during the remainder of 1950:[165]

August	1,646
September	51,124
October	56,808
November	73,742
December	43,347
Total	226,667 men

Thereafter in 1951, 579,576 individuals were delivered for induction. In 1952, 466,169 were delivered. In 1953, 497,424 were drafted, and by the end of June 1954, 125,595 had been inducted.

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[163] United States v. Nugent, 346 U.S. 1, 9 (1953). See Klubnikin v. United States, 227 F.2d 87 (9th Cir. 1955), *cert. denied*, 350 U.S. 975 (1956); Pomorski v. United States, 222 F.2d 106 (6th Cir. 1955), *cert. denied*, 350 U.S. 841 (1955); Rumsa v. Hershey, 212 F.2d 927 (7th Cir. 1954), *cert. denied*, 348 U.S. 838 (1954); Kramer v. United States, 147 F.2d 756 (6th Cir. 1945), *cert. denied*, 324 U.S. 878 (1945); and Roodenko v. United States, 147 F.2d 752 (10th Cir. 1944), *cert. denied*, 324 U.S. 860 (1945).

[164] 177 F.2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950). See Billings v. Truesdale, 321 U.S. 542 (1944); George v. United States, 196 F.2d 445 (9th Cir. 1952), *cert. denied*, 344 U.S. 843 (1952); Richter v. United States, 181 F.2d 591 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950), and United States v. Henderson, 180 F.2d 711 (7th Cir. 1950), *cert. denied*, 339 U.S. 963 (1950).

[165] Annual Report of the Director of Selective Service, 1954, p. 84 (1955).

A total of 1,895,431 men were received from August 1950 through June 1954.[166]

A so-called Doctors' Draft was also enacted. The 1948 statute was amended to authorize the President to require the special registration of and special calls for males in needed medical, dental, and allied special categories who had not passed the age of 50 at the time of registration.[167] Induction was for 21 months of service. The same statute declared that the President should provide for annual *deferment* of optometry students and pre-medical, pre-dental, pre-veterinary, and pre-osteopathic and pre-optometry *students* in attendance at colleges in the United States. The President was directed to establish a National Advisory Committee to advise the Selective Service System with respect to the selection of needed medical personnel and other specialists.[168]

In *Orloff* v. *Willoughby*,[169] a doctor who had been inducted sought to force the issuance of a commission or a release from enlisted service. He had been trained at government expense during World War II, was tendered a commission as Captain, Medical Corps, Air Force Reserve, but refused to state whether he had ever been a member of the Communist Party. Therefore, he was not commissioned. The court refused to allow a petition for habeas corpus to be used to enable the petitioner to compel a reassignment of duties within the military system. Congress in 1953 provided that physicians and dentists should be appointed or promoted to a rank commensurate with their professional education, experience, or ability,[170] but one who failed to accept a commission could be used in an enlisted grade.[171]

B. *REGISTRATION AND CLASSIFICATION*

Registration is a continuing obligation of the registrant.[172]

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[166] *Ibid.*

[167] 64 Stat. 826 (1950), as amended, 50 U.S.C. App. § 454 (a–e) (Supp. I, 1959). By February, 1951, 90,832 physicians, 33,982 dentists, and 6,925 veterinarians, or a total of 131,739 doctors, had been registered. Annual Report of the Director of Selective Service 31 (1951).

[168] Doctors Draft Act, *supra*. The Doctors' Draft was upheld in Bertelsen v. Cooney, 213 F.2d 275 (5th Cir. 1954), *cert. denied*, 348 U.S. 856 (1954). A typical example of the application of this draft was in April, 1954, when the Dept. of Defense placed a requisition with Sel. Ser. for 480 doctors for assignment to the Navy; in Feb. 1954, the Dept. of Defense requisitioned 70 dentists for the Navy. Annual Report of the Director of Selective Service 56 (1954).

[169] 345 U.S. 83 (1953).

[170] 67 Stat. 88 (1953), 50 U.S.C. App. § 454(a) (1958). See Nelson v. Peckham, 210 F.2d 574 (4th Cir. 1954), which involved a dentist with an alleged Communist background.

[171] 68 Stat. 254 (1954), 50 U.S.C. App. § 454(a) (1958).

[172] Fogel v. United States, 162 F.2d 54 (5th Cir. 1947), *cert. denied*, 332 U.S. 791 (1947).

Letters written to the local board or to the Director of Selective Service do not constitute registration.[173] A registrant must have his registration certificate in his personal possession at all times.[174] An American Indian must register and be classified.[175]

Exemption from military service is dependent upon the will of Congress carried out through the local board and is not based upon the individual scruples of the registrant.[176]

No man has a constitutional right to be free from call to military service. Congress may, in its discretion, provide a complete exemption for some and a partial exemption for others. A IV–F classification is not for the registrant's benefit, but, rather, for that of the armed forces. Even after conviction of a felony, exemption is not required.[177]

The local board is charged, in the first instance, with the duty of making the proper classification.[178] An exemption from military training rests entirely upon the grace of the government.[179]

Local and appeal boards are required to consider each registrant as available until his eligibility for deferment or exemption is clearly established.[180] A deferment (like an exemption) is not a matter of right.[181] Evasiveness on the part of the registrant or his refusal to answer questions will justify board in not granting an exemption.[182]

Deferment may be claimed, *inter alia*, if the facts warrant it, because of vital industrial occupation,[183] for agricultural activity,[184]

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[173] Cannon v. United States, 181 F.2d 354 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950).

[174] United States v. Kime, 188 F.2d 677 (7th Cir. 1951), *cert. denied*, 342 U.S. 823 (1951).

[175] *Ex Parte* Green, 123 F.2d 862 (2d Cir. 1941), *cert. denied*, 316 U.S. 668 (1942).

[176] United States *ex rel.* Beers v. Sel. Trng. & Sel. Local Bd., No. 1, Rock County, Wis., 50 F. Supp. 39 (W.D. Wis. 1943).

[177] Korte v. United States, 260 F.2d 633 (9th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959).

[178] Falbo v. United States, 320 U.S. 549 (1944).

[179] Clark v. United States, 236 F.2d 13 (9th Cir. 1956), *cert. denied*, 352 U.S. 882 (1956).

[180] Tyrrell v. United States, 200 F.2d 8 (9th Cir. 1952), *cert. denied*, 345 U.S. 910 (1953).

[181] Richter v. United States, 181 F.2d 591 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950).

[182] United States v. Hill, 221 F.2d 437 (7th Cir. 1955), *cert. denied*, 349 U.S. 964 (1955).

[183] United States *ex rel.* Coltman v. Bullock, 110 F. Supp. 126 (N.D. Ill. 1953).

[184] Iamboden v. United States, 194 F.2d 508 (6th Cir. 1952), *cert. denied*, 343 U.S. 957 (1952).

as a student,[185] and for family dependency.[186] Deferment on the grounds of family considerations tended to disappear as World War II reduced available manpower.[187]

Under the 1940 Act, 6,443 Selective Service Local Boards staffed by uncompensated board members and 243 additional Appeal Boards made an estimated 250 million classification actions for the 36 million registrants subject to military service.[188]

Considerable publicity has resulted from Class IV–F deferments for persons with mental, moral or physical defects. There were 4,828,000 rejections through July 1945, broken down as follows:[189]

Physical defects	2,708,700
Mental diseases	856,200
Manifestly disqualifying defects	510,500
Nonmedical causes	76,300

C. *INDUCTION*

In late 1942, the calls for men through Selective Service in behalf of the armed forces were as large as 450,000 per month.[190] During the course of World War II, ten million men were inducted. Approximately 8,300,000 of these individuals served in the Army, including the Air Corps, and the other 1,700,000 served in the Navy.[191] There was a total of 4,564,513 enlistments for the same 6½-year period. Many enlistments, of course, stemmed from the impact of Selective Service.[192]

An individual is actually "enlisted" in the military or naval service whether or not he volunteered or was drafted by the Selective Service.[193]

Furthermore, a draftee was not inducted until he underwent the ceremony or requirements of admission prescribed by the armed forces.[194] There was no forcible induction into the armed forces.[195] One who objected to induction, however, was required to exhaust

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[185] United States *ex rel.* McCarthy v. Cook, 225 F.2d 71 (3d Cir. 1955).

[186] Klubnikin v. United States, 227 F.2d 87 (9th Cir. 1955), *cert. denied*, 350 U.S. 975 (1956).

[187] Selective Service Operation 77–82.

[188] *Id.* at 32.

[189] Bernardo and Bacon, *op. cit. supra* note 99, at 430.

[190] Selective Service Operation 69.

[191] *Id.* at 97.

[192] *Id.* at 100.

[193] United States v. Prieth, 251 Fed. 946 (D.N.J. 1918). *But see* United States v. Jenkins, 7 USCMA 261, 22 CMR 51 (1956), where the United States Court of Military Appeals held that for the purposes of prosecuting a service member under Article 83, Uniform Code of Military Justice, for fraudulent enlistment, the Code (UCMJ) provision was not intended to cover inductees but only enlistees.

[194] Billings v. Truesdale, 321 U.S. 542 (1944).

[195] United States v. Kuwabara, 56 F. Supp. 716 (N.D. Cal. 1944).

all administrative remedies.[196] The registrant was required to report to the induction station when ordered for any required physical examination whether or not he planned to accept final induction.[197] An induction order is invalid, however, where the order is issued before the registrant had a full opportunity to pursue all available administrative remedies.[198]

Where the draftee undergoes the induction ceremony prescribed by the military, he is fully inducted.[199] The presumption is that all requisite legal steps have been taken at the induction center.[200]

D. *CONSCIENTIOUS OBJECTORS: MINISTERS OF RELIGION*[201]

The statutory exemption for conscientious objectors and for ministers has led to extensive litigation since 1940. The 1948 Act exempts regular or duly ordained ministers of religion and students preparing for the ministry under the direction of recognized churches or religious organizations who are satisfactorily pursuing full time courses of instruction in recognized theological or divinity schools or pursuing full time courses leading to the entrance in recognized schools in which they have been preenrolled.[202] The term "minister of religion" must be interpreted in accordance with the intent of Congress.[203] The duty rests upon the local board to determine whether a registrant is in reality a minister of religion.[204] The registrant's status is adjudged with reference to the individual as the facts are presented to the local

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[196] Billings v. Truesdale, *supra* note 194; Williams v. United States, 203 F.2d 85 (9th Cir. 1953), *cert. denied*, 345 U.S. 1003 (1953).

[197] Marshall v. United States, 140 F.2d 261 (5th Cir. 1944).

[198] Chih Chung Tung v. United States, 142 F.2d 919 (1st Cir. 1944).

[199] Mayborn v. Heflebower, 145 F.2d 864 (5th Cir. 1944), *cert. denied*, 325 U.S. 854 (1945).

[200] Kaline v. United States, 235 F.2d 54 (9th Cir. 1956). Note discussion in Pt. H, *infra*, concerning the taking of the oath as being the vital fact which changes the status of the registrant to soldier from civilian. Court-martial jurisdiction attaches *after* the oath has been subscribed and not before that time.

[201] This broad topic received excellent detailed treatment in Legal Aspects of Selective Service (Sel. Ser. System, 2d ed. 1957) pp. 9–13, 19–23, prepared under the capable direction of Col. Daniel O. Omer, JAGC, the General Counsel and the Deputy Director of the Selective Service System.

[202] Universal Military Training and Service Act of 1951, ch. 625 §§ 6(g) and 16(g), 62 Stat. 609, 62 Stat. 624, as amended, 50 U.S.C. App. §§ 456 and 466 (1958).

[203] Neal v. United States, 203 F.2d 111 (5th Cir. 1953), *cert. denied*, 345 U.S. 996 (1953); Martin v. United States, 190 F.2d 775 (4th Cir. 1951), *cert. denied*, 342 U.S. 872 (1951); Swaczyk v. United States, 156 F.2d 17 (1st Cir. 1946), *cert. denied*, 329 U.S. 726 (1946).

[204] Martin v. United States, *supra* note 203.

board.[205] In general, where there is a minimum of evidence to support the local board's findings, it will be sustained on appeal.[206] The exemption granted to a minister is a narrow one and the terms "regular or duly ordained ministers of religion" are defined with particularity in Section 16(g) of the 1948 Act.[207] The burden is upon the registrant to establish that he is entitled to the ministerial classification.[208] The exemption, however, is not denied merely because the practices of the sect are unconventional[209] or because the individual has not attended college[210] or a theological seminary[211] or because he is ineligible to serve as an Army chaplain.[212]

The minister may engage in secular employment of a limited nature.[213] The amount of such secular work is a factor to be considered by the board as it bears upon whether the ministry is a mere incidental avocation. Part-time preaching may be insufficient to gain the exemption.[214]

The divinity student's exemption depends on such facts as the character of the seminary and whether the registrant's studies are directed towards his becoming a clergyman.[215] The student must be satisfactorily pursuing a full-time course in a recognized school.[216] The burden is upon the student-registrant and the board may consider and weigh the available facts.[217]

In the case of a conscientious objector, Congress has deemed it more essential to respect his religious beliefs than to compel him to serve in the armed forces, and the local board is required to carry out the legislative policy.[218] As an alternative to military service, the conscientious objector is subject to directed service in civilian

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[205] Cox v. United States, 332 U.S. 442 (1947).

[206] Dickinson v. United States, 346 U.S. 389 (1953).

[207] See note 202 *supra*.

[208] Dickinson v. United States, *supra* note 206.

[209] *Ibid.*

[210] United States v. Kezmes, 125 F. Supp. 300 (W.D. Pa. 1954).

[211] United States v. Burnett, 115 F. Supp. 141 (W.D. Mo. 1953).

[212] *Ibid.*

[213] Dickinson v. United States, *supra* note 206.

[214] *Ibid;* United States v. Hill, 221 F.2d 437 (7th Cir. 1955), *cert. denied*, 349 U.S. 964 (1955).

[215] United States *ex rel.* Levy v. Cain, 149 F.2d 338 (2d Cir. 1945).

[216] United States v. Bartelt, 200 F.2d 385 (7th Cir. 1952).

[217] United States *ex rel.* Yaroslawitz v. Fales, 61 F. Supp. 960 (S.D. Fla. 1945).

[218] United States v. Riles, 223 F.2d 786 (5th Cir. 1955). Note the conclusion of author Paul Blanshard: "Congress has become more and more tolerant in recent years towards religious opponents of war and military service. Perhaps that tolerance is a measure of the weakness of the anti-military forces in these days of the cold war." Blanshard, God & Man in Washington 117 (1960).

work contributing to the maintenance of the national health, safety or interest.[219] The Act provides that a person shall not be required to be subject to combatant training and service, who by reason or religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief means the individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation; it does not include political, sociological, or philosophical views or a merely personal moral code.[220]

As the beliefs of a conscientious objector may not be proved easily by evidence, the board may consider his demeanor and his credibility.[221] The burden is upon the registrant to prove that he is a conscientious objector.[222] Facts which bear upon the registrant's sincerity may include such items as membership in military organizations,[223] time spent in religious activities,[224] family background,[225] derelictions as a youth,[226] willingness to hunt wild game[227] or the testimony of the minister of his church.[228] A belief in vegetarianism is not equated to a belief in a Supreme Being.[229]

In an appeal from the local board to the appeal board in the case of an alleged conscientious objector, the matter is referred to the Department of Justice. The Department of Justice holds a hearing and returns recommendations to the local board.[230] In *Sicurella* v. *United States*,[231] a conviction of a registrant was set aside because of an error of law by the Department of Justice. The Department had reported unfavorably concerning the regis-

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[219] Roodenko v. United States, 147 F.2d 752 (10th Cir. 1944), *cert. denied*, 324 U.S. 860 (1945).

[220] Universal Military Training and Service Act of 1951, ch. 625, § 6(j), 62 Stat. 609, as amended, 50 U.S.C. App. § 456 (1958).

[221] Witmer v. United States, 348 U.S. 375 (1955); White v. United States, 215 F.2d 782 (9th Cir. 1955), *cert. denied*, 348 U.S. 970 (1955).

[222] United States v. Palmer, 223 F.2d 893 (3rd Cir. 1955), *cert. denied*, 350 U.S. 873 (1955).

[223] United States v. Borisuk, 206 F.2d 338 (3rd Cir. 1953); *accord*, United States v. Corliss, 280 F.2d 808 (2d Cir. 1960), *cert. denied*, 364 U.S. 884 (1961), where the registrant had sought to join the Naval Reserve and to enroll in military college.

[224] Jeffries v. United States, 169 F.2d 86 (10th Cir. 1948).

[225] Annett v. United States, 205 F.2d 689 (10th Cir. 1953).

[226] Rempel v. United States, 220 F.2d 949 (10th Cir. 1955).

[227] *Ibid.*

[228] Head v. United States, 199 F.2d 337 (10th Cir. 1952), *cert. denied*, 345 U.S. 910 (1953).

[229] Tamarkin v. United States, 260 F.2d 436 (5th Cir. 1958), *cert. denied*, 359 U.S. 925 (1959).

[230] Universal Military Training and Service Act of 1951, ch. 625, § 6(g), 62 Stat. 609, as amended, 50 U.S.C. App. § 456 (1958).

[231] 348 U.S. 385 (1955); Compare with Gonzales v. United States, 364 U.S. 59 (1960), where the registrant expressed to the board a willingness to kill in defense of his church and his home.

trant's contention that he was opposed to war in any form. The court held that a registrant could not be disqualified because he believed in theocratic or religious war which is not involved under the statute. In *Simmons* v. *United States*,[232] the failure of the Department to furnish the registrant a fair résume of all adverse information in the FBI report in the Department files was held to constitute reversible error.

E. *ALIENS*

Aliens as such are not exempt from military service. The Universal Military Training and Service Act subjects all aliens in permanent residence in the United States to training and service.[233] Aliens, however, cannot be required to take part in a war against their own nation.[234] Under the 1940 statute, neutral aliens were subject to military service until they requested an exemption.[235] An alien who receives exemption from military service because of his alien status is thereafter barred from becoming a citizen of the United States.[236]

Under various treaties, nationals of particular countries are relieved from military service under certain circumstances. Treaties of this type, however, were suspended by the 1917 Selective Service law[237] and by the 1940 Act.[238] This assumes that Congress has the right to suspend or abrogate a treaty in the same manner that Congress may supersede a statute.[239] The 1948 Act authorizes the President to exempt aliens from liability for service.[240]

F. *DELINQUENCY*

Of 36 million persons liable for service, about 375,000 were reported by the Selective Service System to the FBI during 1940–1947. This led to 25,000 indictments and 16,000 criminal con-

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[232] 348 U.S. 397 (1955); see Gonzales v. United States, 348 U.S. 407 (1955); United States v. Nugent, 346 U.S. 1 (1953).

[233] United States v. Gredzens, 125 F. Supp. 867 (D. Minn. 1954).

[234] Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

[235] United States v. Rubinstein, 166 F.2d 249 (2d Cir. 1948), *cert. denied*, 333 U.S. 868 (1948).

[236] Immigration and Nationality Act, 66 Stat. 242 (1952), 8 U.S.C. § 1426 (1958); Machado v. McGrath, 193 F.2d 706 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 948 (1952).

[237] *Ex parte* Balezkovic, 248 F.2d 327 (E.D. Mich. 1918).

[238] Totus v. United States, 39 F. Supp. 7 (E.D. Wash. 1941).

[239] Ballester v. United States, 220 F.2d 399 (1st Cir. 1955), *cert. denied sub nom.*, Pons v. United States, 350 U.S. 830 (1955); Albany v. United States, 152 F.2d 266 (6th Cir. 1945).

[240] Universal Military Training and Service Act of 1951, ch. 625, § 6(a), 62 Stat. 609, as amended, 50 U.S.C. App. § 456 (1958).

victions.[241] This compares favorably with the number of violations in World War I, a period of less than 18 months' time.[242]

Of the investigations (375,000) conducted by the FBI, the following infractions of the law were found:[243]

Failed to return classification questionnaire—157,000
Failure to report for examination—77,000
Failure to report for induction—74,000
Miscellaneous other reasons—Balance

The convictions break down into the following categories:[244]

Did not report for induction—6,200
Failed to return questionnaire—2,800
Failed to report for examination—1,700
Conscientious objectors failed to report or cooperate in work of national importance—1,600

The burden is upon the individual to present himself for registration.[245] It is not the responsibility of Selective Service authorities to ferret out necessary information concerning a registrant.[246]

A soldier who has been honorably discharged is not necessarily exempt from further military service.[247] A convicted felon pardoned by the Governor is subject to military service.[248] The statute of limitations does not prevent prosecution for failure to register because this is a continuing offense.[249] Failure to keep a local board advised of a current address is also a continuing offense.[250] A registrant must exhaust all administrative remedies before he may go into court.[251] Failure to appeal from his last classification by the board will prevent the registrant from challenging the classification subsequently.[252]

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[241] Selective Service Operation 24.

[242] *Id.* at 88.

[243] *Ibid.*

[244] *Id.* at 88–89.

[245] Richter v. United States, 181 F.2d 591 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950).

[246] *Ibid;* Cannon v. United States, 181 F.2d 354 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950).

[247] *Ex parte* Cohen, 245 F.2d 667 (D. Mass. 1917).

[248] United States *ex. rel.* Schwartz v. Commanding Officer, 252 Fed. 314 (D.N.J. 1918).

[249] Fogel v. United States, 167 F.2d 763 (5th Cir. 1948), *rev'd on other grounds*, 335 U.S. 865 (1948).

[250] United States v. Guertler, 147 F.2d 796 (2d Cir. 1945), *cert. denied*, 325 U.S. 879 (1945).

[251] Williams v. United States, 203 F.2d 85 (9th Cir. 1953), *cert. denied*, 345 U.S. 1003 (1953); Swaczyk v. United States, 156 F.2d 17 (1st Cir. 1946), *cert. denied*, 329 U.S. 726 (1946).

[252] Skinner v. United States, 215 F.2d 767 (9th Cir. 1944), *cert. denied*, 348 U.S. 981 (1955).

G. *JUDICIAL REVIEW*

The rights of a registrant under the 1940 Act were determined under the civil law until he was actually inducted into the Army.[253] This is likewise true under the 1948 Act as amended by the Universal Military Training and Service Act.[254]

There is no judicial review of a local board's classification of 1–A until the failure of the registrant to report for induction has lead to a criminal prosecution. If the registrant reports and is inducted, then the federal courts will entertain a petition for habeas corpus.[255] Prior to induction, the registrant cannot utilize habeas corpus to test the Board's classification.[256] If, at the proper time, a court concludes that there has been an incorrect classification, the court remands the case to the local board as the court itself does not have the right to reclassify.[257] There is no right to a direct judicial review of the orders of local boards and injunctive relief against the board will be denied.[258]

The judicial process may not be invoked by a registrant until he has exhausted all administrative remedies.[259] This means that the registrant must have filed a claim for exemption and taken an appeal in the administrative process from a denial of exemption by the local board.[260] Even after induction, the selectee must request a release under appropriate Army Regulations before invoking habeas corpus proceedings.[261]

In *Billings* v. *Truesdale,*[262] Billings, a university teacher claiming to be a conscientious objector, was ordered by his local board to report for induction. Billings reported, was found physically and mentally qualified, but refused to take the oath of induction or submit to fingerprinting. Thereafter, he was tried and convicted by a *court-martial* for willful disobedience of a lawful order.

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[253] Billings v. Truesdale, 321 U.S. 542 (1944).

[254] 62 Stat. 605 (1948), as amended, 50 U.S.C. App. § 454(a) (1958).

[255] Witman v. United States, 348 U.S. 375 (1955).

[256] *Ex parte* Stanizile, 138 F.2d 312 (3d Cir. 1943), *cert. denied,* 320 U.S. 797 (1943).

[257] *Ibid;* see, *e.g.,* Eagles v. United States *ex rel.* Samuels, 329 U.S. 304 (1946); Lynch v. Hershey, 208 F.2d 523 (D.C. Cir. 1953), *cert. denied,* 347 U.S. 917 (1954).

[258] Tamarkin v. Sel. Ser. System, L. Bd. 47, Miami, Fla., 243 F.2d 108 (5th Cir. 1957), *cert. denied,* 355 U.S. 825 (1957). See also Drumheller v. Board, 130 F.2d 610 (3d Cir. 1942), where a writ of certiorari was held not to be an available remedy.

[259] United States *ex rel.* Lauritsen v. Allen, 154 F.2d 959 (8th Cir. 1946); Bagley v. United States, 144 F.2d 788 (9th Cir. 1946).

[260] Wyman v. La Rose, 223 F.2d 849 (9th Cir. 1955), *cert. denied,* 350 U.S. 884 (1955).

[261] United States *ex rel.* Coltman v. Bullock, 110 F. Supp. 126 (N.D. Ill. 1953).

[262] 321 U.S. 542 (1944).

Upon a petition for habeas corpus, the Supreme Court held that the court-martial was without jurisdiction as Billings had not been "actually inducted" into the Army. The court noted that Billings was subject to criminal prosecution in a federal district court for a violation of the 1940 Act in refusing to be inducted. The decision in *Billings* v. *Truesdale* is in accord with an 1890 decision, *In re Grimley*,[263] in which the court had stated "that the taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier."[264]

The *oath test* has been applied by the Court of Military Appeals in *United States* v. *Ornelas*,[265] which held that a court-martial lacked jurisdiction to convict an accused of desertion. At trial, Ornelas testified that he did not at any time participate in an induction ceremony and that he never served with the Army. He contended that he merely took a physical examination and then departed to his home in Mexico. In a companion case, *Rodriguez*,[266] the accused merely omitted to take the oath of allegiance, but thereafter entered upon Army duty and travelled to a military installation for basic training where he remained in a military status without objection for ten days. The Court of Military Appeals sustained the conviction and concluded that the induction was lawful.

In *McCord* v. *Page*,[267] the petitioner urged unsuccessfully that after voluntarily enlisting, he became an ordained minister and his religious tenets were not in accord with his military duty to salute the flag and his superiors.

Under the Selective Service law, the jurisdiction of the courts to review board orders has not been entirely clear. Congress seemed to intend for the administrative remedies to be exclusive by providing that all questions or claims were to be determined by the local boards except where an appeal is authorized.[268] The Act itself is silent on the issue of judicial review. In *Falbo* v. *United States*,[269] the Court recognized that there was no provision for judicial review of a classification until the registrant had been *accepted* by the armed services. The court declared that it saw "no support to a view which would allow litigious interruptions of the process of selection which Congress created."[270] In *Estep* v.

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[263] 137 U.S. 147 (1890).
[264] *Id.* at 156–57.
[265] 2 USCMA 96, 6 CMR 96 (1952).
[266] United States v. Rodriguez, 2 USCMA 101, 6 CMR 101 (1952), decided the same day as *Ornelas*, *supra*.
[267] 124 F.2d 68 (5th Cir. 1941).
[268] 32 C.F.R. § 1622.1(c) (1959).
[269] 320 U.S. 549 (1944).
[270] *Id.* at 554.

United States,[271] the registrant reported for induction, but refused to take the oath. Estep was indicted and defended on the ground that he was a minister. The court refused to convict on the grounds that it would not permit a citizen to go to jail for not obeying an unlawful order of an administrative agency. The court went on to observe that the *courts are not to weigh the evidence* to determine whether the clasification by the board is justified. Only if there is *no basis in fact* for the classification, may the court intervene. Thereafter in *Cox* v. *United States,*[272] it is enunciated that whether there is a basis in fact for the board's classification is a question for the determination of the trial judge, and review by a trial court is limited to the evidence upon which the board acted.

In recent years, numerous court decisions have turned on claims for ministerial exemption or a conscientious objector deferment. In *Niznick* v. *United States,*[273] the court held that it was arbitrary and capricious for a board to refuse to grant a ministerial exemption on the ground that the registrant was a member of a particular sect and had not attended a seminary or been ordained. In *Dickinson* v. *United States,*[274] the Supreme Court established that a claim for exemption is met where the registrant, as a vocation, engages regularly in religious activity and devotes sufficient time to his ministry. In *Wiggins* v. *United States,*[275] it was declared that a "final" decision by a local board does not mean finality in the sense of a congressional grant of exclusive jurisdiction. The court may require that when a local board denies a claimed exemption, there must be some proof before the board incompatible with the registrant's proof of exemption. A local board loses jurisdiction if there are insufficient facts in the record before the board to support its order affecting the registrant.

We may conclude that a limited judicial review of a disputed classification is now allowed by means of habeas corpus proceeding where there has been actual induction. The lower federal courts have allowed the writ to an inductee claiming exemption or deferment as a medical student,[276] or as an alien free from military

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[271] 327 U.S. 114, 122 (1946).

[272] 332 U.S. 442 (1947).

[273] 184 F.2d 972 (6th Cir. 1950).

[274] 346 U.S. 389 (1953).

[275] 261 F.2d 113 (5th Cir. 1958), *cert. denied,* 359 U.S. 942 (1959). See Sicurella v. United States, 348 U.S. 385 (1955).

[276] *Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952).

service,[277] or as a prospective father, [278] or as a theological student,[279] or as a conscientious objector inducted in error into the Marine Corps.[280] Apparently, judicial review is restricted to ascertaining whether the record from the board contains any evidence to support the classification.[281] The difficulty with this test is that, in effect, the local board is compelled to *build a record* to satisfy any possible subsequent litigation and it is doubtful whether Congress ever intended such a restraint to be placed on a local board. This was pointed out in the minority opinion in *Dickinson* v. *United States.*[282] The Supreme Court, however, has departed from the result in *Falbo* v. *United States,* decided in 1944,[283] where the court would not "allow litigious interruption of the process of selection which Congress created."[284]

VII. CONCLUSION

The Selective Service System has met successfully a gigantic task of registering, classifying and delivering for military induction, millions of American men. For over 20 years the United States has utilized Selective Service to augment our armed forces in time of peace or to expand rapidly our Army, Navy, and Air Force in periods of war. We have learned from the years 1861–1865 that we cannot rely upon conscription and experience has demonstrated that we can succeed in our national defense by employing an effective Selective Service system to register, classify and deliver for induction civilians through the means of local boards composed of uncompensated civilians working in close cooperation with the military.

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[277] Commanding Officer v. Bumanis, 207 F.2d 499 (6th Cir. 1953), involving a Latvian.

[278] Mintz v. Howlett, 207 F.2d 758 (2d Cir. 1953); *In re* Abramson, 196 F.2d 261 (3d Cir. 1952). Note that United States v. Bulock, 110 F. Supp. 698 (N.D. Ill. 1953) is not in accord on technical grounds.

[279] United States *ex rel.* Berman v. Craig, 107 F. Supp. 529, 532 (D.N.J. 1952), *aff'd,* 207 F.2d 888 (3d Cir. 1953).

[280] United States *ex rel.* Weidman v. Sweeney, 117 F. Supp. 739 (E.D. Pa. 1953).

[281] Wiggins v. United States, 261 F.2d 113 (5th Cir. 1958), *cert. denied,* 359 U.S. 942 (1959).

[282] 346 U.S. 389 at 399.

[283] 320 U.S. 549 (1944).

[284] *Id.* at 554.

CANADIAN MILITARY LAW*

BY GROUP CAPTAIN J. H. HOLLIES**

I. INTRODUCTION

In an article of this length, it will not be possible to give more than a very succinct account of the essential features of the military law system as it now exists in Canada. References to statutory and other authorities have been kept to a minimum, since such references would add little, if anything, to the value of an article designed primarily for non-Canadian readers. While certain differences in basic concept between the United States system and the Canadian system will no doubt appear from this article, no attempt will be made to draw a studied comparison between the two systems. To do so might be presumptuous, but in any event would require a much more detailed knowledge of the United States system than is possessed by the author. A note of warning may not, however, be amiss. The constitutional background quite obviously differs as between the United States and Canada. For example, the due process clause of the Constitution of the United States has no counterpart in Canadian constitutional law, in the sense that such a clause is not a part of any statute or written constitution.

II. SOURCES OF CANADIAN MILITARY LAW

In 1867 Canada became a Dominion with its own parliament, and in the following year the Canadian Army was organized under the Militia Act[1] passed by the Parliament of Canada. It must not be thought, however, that this Act was in any way one that initiated a peculiarly Canadian body of military law. On the contrary, it made the Army Act of the United Kingdom applicable to Canada, with only minor variations. Similarly, the Royal Canadian Navy, organized in 1910, was administered pursuant to the provisions of the Naval Discipline Act of the United Kingdom.[2] When the Royal Canadian Air Force came into being it, too, was

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** Chief Judge Advocate, Office of The Judge Advocate General of the Canadian Forces; member of the Bar of the Province of Manitoba; graduate of the Manitoba Law School.

[1] Stat. Canada 1868, c. 40.

[2] 29 & 30 Vict., c. 109.

governed by the law applicable in the United Kingdom to the Royal Air Force, subject to certain specific modifications prescribed by the Parliament of Canada. All three services continued to be governed by the adapted British legislation until 1944. In that year the Royal Canadian Navy adopted a Canadian disciplinary code passed by the Parliament of Canada,[3] but the other two services remained subject to the modified United Kingdom Acts until after the end of the war.

After the Second World War, the United Kingdom and the United States set up commissions to investigate and report upon the existing state of military law and its administration in the armed forces. Canada set up no such commission, but the Department of National Defence made a careful study of the existing legislation and watched with a great deal of interest and benefit the changes which were being proposed in the United Kingdom and the United States. As a result, new Canadian legislation was devised and enacted by the Parliament of Canada in 1950. This legislation is known as the "National Defence Act,"[4] and it brought within its ambit all three Canadian services. It provides for a single code of service discipline so that all three services are subject basically to the same law, terminates the application of the United Kingdom acts, extends the powers of summary punishment of commanding officers, and provides a right of appeal from the findings and sentences of courts-martial—among many other changes not relevant to this article.

III. JURISDICTION OVER PERSONS

The National Defence Act sets out the disciplinary jurisdiction of the services, service offenses and punishments, powers of arrest, the composition and jurisdiction of service tribunals, post-trial dealings with findings and sentences, and appeal, review, and petition procedures. These provisions are referred to collectively as the "Code of Service Discipline."

The Code of Service Discipline is applicable to all officers and men of the Regular Forces and of any force specially constituted for the purpose of meeting an emergency.[5] Those officers and men serving in the Reserves are subject to the Code only in certain prescribed circumstances, the most important of which are when the officer or man is undergoing drill or training, on duty, in uniform, called out on service, or present at any unit or

[3] Stat. Canada 1944-45, c. 23.

[4] Rev. Stat. Canada 1952, c. 184. (Hereinafter cited as National Defense Act, § ____.)

[5] National Defence Act, §§ 56(1)(a) & (b).

on any defense establishment. Certain civilians are also made subject to the Code of Service Discipline.[6] These include persons serving with the Canadian Forces under an agreement by which they have consented to subject themselves to the Code, alleged spies for the enemy, and persons who accompany any unit or other element of the Canadian Forces that is on service or on active service in any place. This last category has been further defined in such a way as to be inapplicable within the confines of Canada.[7] It does, however, cover all dependents resident outside of Canada when the officer or man concerned is also serving beyond Canada.

Provision is also made by the Code of Service Discipline to enable offenders to be dealt with, although, between the commission of the offense and the time of trial, they have otherwise ceased to be subject to the Code. This will occur, for example, by reason of the release from the forces of an offender or by the return to Canada of a dependent. So long as the trial is held within the period within which the trial must be commenced for the offense in question, the alleged offender is deemed to have the status and rank that he held immediately before his change of status, *i.e.*, immediately before his release or return to Canada.

There are certain special provisions governing the trial of civilians but these may more conveniently be dealt with when examining the powers of punishment of commanding officers and of courts-martial.

IV. JURISDICTION OVER OFFENSES

The offenses specified in the Code fall into three main categories. The first of these comprises specific service offenses, including such matters as misconduct in the presence of the enemy, insubordination, desertion, absence without leave, offenses in relation to service arrest and custody, offenses in relation to aircraft and vehicles, offenses in relation to property, negligent performance of duties, and sundry other offenses. The second category consists of that omnibus provision that is to be found in so many of the world's military discipline codes—"an act, conduct, disorder or neglect to the prejudice of good order and discipline." The third category might be described as comprising the offenses punishable by ordinary law. Anything that is contrary to the Criminal Code of Canada or any other Act of the Parliament of Canada is constituted an offense under the Code of Service Dis-

[6] *Id.* §§ 56(1)(f), (g), (h), (i) & (j).

[7] *Id.* § 56(7) (a).

cipline.[8] Further, when an officer or man is serving outside of Canada, an act or omission that would be an offense if committed by a person subject to the foreign law in the place where the officer or man is serving, is an offense under the Code of Service Discipline when committed by the officer or man.[9]

It might seem to follow that service tribunals are invested with jurisdiction over offenses to a somewhat greater extent than are the ordinary courts of the land, since the latter cannot be concerned with such purely military offenses as absence without leave, nor with offenses committed against the laws of a foreign state which are not also offenses under the Canadian Criminal Code. There are however two principles which cut down the jurisdiction of service tribunals. The first of these is that no alleged commission within Canada of murder, rape, or manslaughter may be tried by a service tribunal.[10] The second restriction is that the paramount and primary jurisdiction over any offense committed in Canada involving the Criminal Code or other Act of the Parliament of Canada remains in the civil courts.[11] A trial and acquittal or conviction by a civil court in Canada will bar a trial for the same offense under the Code of Service Discipline, but an acquittal or conviction by a military tribunal will not bar a subsequent trial for the same offense by a civil tribunal. The civil court is however enjoined, if it convicts, to have regard to any sentence imposed by a service tribunal for the same offense.[12] In actual practice, conflict between service and civilian tribunals never occurs. When the matter is one in which the civil courts may be interested, it has been the custom for the service to ascertain from the local Crown prosecutor, or if need be from the attorney general of the province, whether it is desired to have the case tried in the civil courts. Amicable arrangements as to whether it should be a military or civil trial invariably follow. The jurisdiction of civil courts and of service tribunals in places outside of Canada is governed by international arrangements in the same general fashion as is the jurisdiction in respect to forces of the United States. For example, the NATO Status of Forces Agreement is applicable when Canadian forces are stationed abroad in NATO countries, other than in Germany where special arrangements prevail. Similarly, the jurisdiction over Canadian forces serving as part of the United Nations contingent

[8] *Id.* § 119.
[9] *Id.* § 119A.
[10] *Id.* § 61.
[11] *Id.* § 62(1).
[12] *Id.* §§ 57(1) & 62(2).

in Egypt is determined in accordance with the agreement between the United Nations and Egypt.

For all service offenses there is a time limit within which the trial must be commenced. This period is, generally speaking, three years from the day upon which the service offense is alleged to have been committed, excluding from such period any time during which the person was a prisoner of war, absent without leave, in a state of desertion, or serving a sentence of incarceration imposed by a court other than a service tribunal.[13] The period of three years is not applicable when the person is alleged to have committed mutiny, desertion, absence without leave, or a service offense for which the highest punishment that may be imposed is death. For all these offenses, there is a continuing liability to be charged, dealt with and tried at any time under the Code of Service Discipline.

V. SUMMARY TRIALS

A person who commits an offense against the Code of Service Discipline will be tried either summarily or by court-martial depending upon the gravity of the offense and the rank and status of the offender. Trial by court-martial may also arise in some cases because of the election by an accused person to be so tried rather than to be tried summarily by his commanding officer or superior authority.

The lowest level at which a man may be tried is the unit or a detachment thereof. All powers of punishment at this level stem from the powers of punishment conferred upon the commanding officer by the National Defence Act.[14] These powers were markedly increased by the National Defence Act, at least for commanding officers of the army and air force. Officers in command in the army and air force had, before the National Defence Act came into force in 1951, power to sentence an offender to a maximum of 28 days detention. This power was further circumscribed by a list of offenses with which the commanding officer could not deal, and there were further offenses with which the commanding officer could deal only after having secured permission to do so from higher authority. Naval captains on the other hand, because of the special requirements of that service, had, even prior to 1951, power to award up to 90 days detention to persons under their command, subject to certain restrictions as to the rank of the person with whom they were dealing, and subject also to certain safeguards requiring them to obtain the approval of higher au-

[13] *Id.* § 60.
[14] *Id.* §§ 133(1) & 136.

thority before putting certain sentences into effect. When the National Defence Act was being drafted, it was concluded that commanding officers in the army and the air force should be given powers similar to those already possessed by captains in the Royal Canadian Navy. As a result, commanding officers of or above the rank of major or equivalent are now empowered to award a sentence of up to 90 days detention.[15] (Commanding officers below the rank of major may award up to 14 days detention, but only to men below non-commissioned rank.)

The jurisdiction of a commanding officer is, however, limited as to the offenses that he may try without the consent of the accused, the persons subject to summary punishment by him, or the length of sentence that he may impose without the approval of higher authority. No commanding officer may try a civilian except that, in the case of a person who was in the services and who was subsequently released, a commanding officer may try a civilian for offenses committed during his service. Under the National Defence Act, such a person is, for the purposes of trial, deemed to have the rank and status that he held during his service.[16] Over service personnel, the jurisdiction of the commanding officer is limited to men below the rank of warrant officer. Officers are not liable to trial by commanding officers, except that a commanding officer who is of or above the rank of major has certain limited powers of punishment, including forfeiture of seniority and a fine, which he may award to an officer of cadet status.

Commanding officers are precluded from awarding punishment that will affect the rank of the offender unless they have first extended to him the right to elect to be tried by court-martial and the offender has thereafter elected to be tried summarily.[17] Even after a non-commissioned officer has elected to be tried by the commanding officer rather than to undergo trial by court-martial, there is a further safeguard for him. When the commanding officer decides to award detention (which carries with it automatic reduction to the ranks) or reduction in rank, he does not pronounce the sentence to the accused until he has submitted a resume of the circumstances, together with his proposed punishment, to higher authority and has obtained the approval of that higher authority for the imposition of the punishment. Similarly, when dealing with men below non-commissioned rank, a commanding officer of or above the rank of major may award detention up to 90 days, but the portion in excess of 30 days is not

[15] *Id.* § 136(2)(a).
[16] *Id.* § 56(3).
[17] *Id.* § 136(1)(c). See also Queen's Regulations, arts. 108.29(1)(b) & 108.31.

carried into effect until approved by higher authority and then only to the extent approved.

A commanding officer may delegate his powers in writing to any officer not below the rank of captain who is serving under his command. However, not all powers may be delegated. For example, a delegated officer may not award detention or reduction in rank to any non-commissioned officer, and may not impose punishment in excess of 14 days detention, upon any man below the rank of corporal. Further, the commanding officer is, by regulations, made responsible for all punishments awarded in his unit.[18] He must, therefore, review all punishments awarded by delegated officers and where he considers that they are in any way excessive or unwarranted, he will commute or reduce the punishment. He cannot increase them.

While, as a general rule, only those officers who are delegated in writing to exercise the commanding officer's powers have any powers of trial and punishment, a special provision is made for the commander of a detachment. Whether a portion of a unit is a detachment or not will normally depend upon the existence of a purely factual situation. For example, if a portion of the unit is serving in circumstances where it is physically removed from its headquarters and the commanding officer of the unit is unable to exercise his disciplinary functions over that portion of the unit, the senior officer present with it will become in fact a detachment commander, and have such powers of trial and punishment as are appropriate to commanding officers and consistent with the rank of the officer concerned.

A commanding officer has powers of trial and punishment not only over persons belonging to his unit but also over any person present in the unit who would be subject to the jurisdiction of the commanding officer if he belonged to the same unit as the commanding officer.[19] This enables a commanding officer of relatively low rank to ensure that offenders are dealt with by a service tribunal having adequate powers of punishment by the simple device of not trying the man himself but having the man brought before a commanding officer of senior rank who automatically has greater powers of punishment. In practice it is rarely necessary to resort to this expedient, but the occasion does arise from time to time.

Powers of summary trial and punishment are also possessed by

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[18] Queen's Regulations, art. 108.02. This form of trial is not applicable in the Royal Canadian Navy.

[19] Queen's Regulations, art. 101.01(1)(b)(i).

superior commanders,[20] who may roughly be defined as officers commanding commands and areas, and officers of or above the rank of brigadier. These authorites have no power to deal with the ordinary private soldier or non-commissioned officer, who is dealt with either by his commanding officer or by a court-martial. The superior commander has, however, powers of trial and punishment over commissioned officers below the rank of major and over warrant officers. The maximum punishment that may be awarded is a servere reprimand, coupled with a fine not exceeding $200 for commissioned officers and of $150 for warrant officers. Officers of the rank of major and above may be tried only by court-martial.

Summary trials are not governed by rules of evidence as rigidly as those which govern trials by court-martial. The accused has the right to demand that the evidence against him be taken on oath, and if he does not exercise this right the commanding officer or superior commander may nevertheless direct that the evidence should be taken on oath. The accused is not represented by counsel, but at a trial before a commanding officer may have an assisting officer assigned to him. This assisting officer is in no sense counsel for the accused. His duties are limited to informing the commanding officer of any fact in favor of the accused that does not seem to have been brought out at the trial, such as previous acts of gallantry, or mitigating circumstances arising from the personal affairs of the accused. The accused is not asked to plead guilty or not guilty, but after the evidence against him has been heard he is asked whether he has anything to say in answer to the charge and whether he wishes to call any witnesses on his own behalf. No notes need be kept of the evidence at the trial, but if the commanding officer is required to apply to higher authority for approval of the punishment that he wishes to have imposed a resume of the case is submitted at the same time that approval is sought.

Under the National Defence Act, as passed, there was no restriction on the type of offense that might be dealt with by summary trial, except for the fact, previously noted, that offenses of murder, rape and manslaughter could not be tried by a service tribunal when the offense was alleged to have been committed in Canada. In practice however there are certain offenses with which officers having power of summary trial will not deal, since their jurisdiction is limited to offenses in respect of which their maximum powers of punishment are likely to prove adequate. In effect, the jurisdiction of the commanding officer or of a superior

[20] National Defence Act, § 137.

commander to try an accused summarily is, in many cases, dependent upon the state of mind of the person who proposes to do the trying. If he concludes that his maximum powers of punishment are inadequate, he is likely not to assume jurisdiction in the case. In 1959, the offenses that might be disposed of at a summary trial were further restricted. It was considered that, because the accused was not represented at a summary trial, the trial of a criminal matter should in all cases be by court-martial if the accused so desired. Accordingly, the regulations now provide that a commanding officer or superior commander may not try certain offenses unless the accused has agreed to be tried summarily.[21] These offenses include all those charged under the Criminal Code of Canada or under foreign law, and also those service offenses which may be said to be of a criminal nature—for example, theft from a comrade or treason.

VI. TRIAL BY COURT-MARTIAL

A. *PRE-TRIAL PROCEDURE*

An accused person may be tried by court-martial because his rank or status precludes him from being tried summarily, because his offense is too serious to be dealt with adequately by way of summary trial, or because he has elected to be tried by court-martial rather than to be tried summarily. In every case the action to initiate the convening of a court is taken by the commanding officer of the accused.[22] When a commanding officer decides to apply to higher authority for the disposal of a charge, he will detail an officer to prepare what is known as a "synopsis." A synopsis is designed to inform the convening authority of the evidence available to substantiate the charge and so enable him to determine the seriousness of the offense, whether a court should be convened, and, if so, the type of court. It includes a brief report of statements describing circumstances relating to the charge together with the names of the persons by whom each of those statements may be substantiated in evidence. No reference is to be made to the previous bad conduct of the accused or to any facts prejudicial to the accused other than those bearing directly on the charge. The synopsis, when completed, is furnished to the accused together with a copy of the charge sheet.

Not less than twenty-four hours after the synopsis and charge sheet have been delivered to the accused, he is brought before the commanding officer. He is then asked whether he wishes to

[21] Queen's Regulations, arts. 108.31(2) & 110.055.

[22] Queen's Regulations, arts. 109.01 & 109.05.

make a statement respecting the circumstances disclosed in the synopsis and is informed that he is not obliged to do so, but that if he does the statement will be taken down in writing and will be forwarded to higher authority with other material pertaining to the charge. The accused is further informed that any such written statement made by him will not be admissible as evidence at any trial. If the accused decides to make a statement, it will be a separate document, not forming part of the synopsis. Where the accused is an officer below the rank of major or is a warrant officer, and so is liable to be tried summarily by a superior commander, he is, in addition to being given an opportunity to make a statement to accompany the synopsis, asked whether, if higher authority decides to try him summarily, he is willing to have the synopsis read at the summary trial instead of the witnesses being called to give evidence. Almost invariably the accused does in fact consent to the synopsis being read at a summary trial by higher authority rather than having the witnesses actually called against him. The synopsis is not admissible, even with the consent of the accused, at a trial by court-martial.[23]

An application to higher authority for disposal of the charge is made by way of letter. The letter is accompanied by the synopsis and charge sheet, the conduct sheet, if any, of the accused, any statement made by the accused for the purpose of accompanying the synopsis, and the record of service of the accused if this is available. In his letter to higher authority the commanding officer must include information as to whether or not the accused has elected trial by court-martial, his recommendation as to whether the accused should be tried by superior commander or by court-martial, and, if such in fact is the case, confirmation that the accused did not wish to make a statement to accompany the synopsis.

The authority who normally convenes a court-martial is the officer commanding a command or an area commander. When a convening authority receives an application from the commanding officer, he may decide to dismiss the charge either because there does not appear to be sufficient evidence to justify the accused being tried or for any other reason.[24] The accused is, in such a case, informed of the dismissal. (Once a charge is dismissed by competent authority, the effect is the same as if the accused had been acquitted thereon by a service tribunal.) The convening authority may also decide that the case is not serious enough to warrant trial by court-martial, but that the man is liable to trial by the commanding officer and summary disposition would be

[23] Military Rules of Evidence, art. 55(a) (1959).
[24] Queen's Regulations, arts. 108.29(2) & 107.04(2)(b)(ii).

appropriate. In such a case he may return the matter to the commanding officer with directions to proceed with the summary trial, unless the accused has elected to be tried by court-martial. Where however the convening authority decides that the officer or man should be tried by court-martial, the next question to be determined is whether it should be a general court-martial or a disciplinary court-martial.

B. *TYPES OF COURTS*

A general court-martial has power to try any person who is subject to the Code of Service Discipline. If the court is to try an officer or serviceman it must be composed of not less than five officers with an officer of at least the rank of colonel or equivalent acting as president. Where a civilian is the accused person, a specially constituted general court-martial known as a "special general court-martial" may be used for his trial, and where the accused is a civilian who is a dependent stationed outside of Canada a special general court-martial must be used.[25] This consists of one person only, designated by the Minister of National Defence, who is or was a judge of a superior court in Canada, or is a barrister or advocate of at least ten years standing at the bar.

A general court-martial may impose any of the service punishments that are appropriate for the offenses before it and thus is the type of court-martial that is convened to try the most serious cases. A general court-martial must always have appointed to officiate at the trial an officer known as a "judge advocate,"[26] a position corresponding roughly to the law officer of an American court. The duties of the judge advocate are very limited in the case of a special general court-martial, but at all other courts-martial he functions much as does the judge in a jury trial on a criminal charge before a civil court.

If the case does not warrant a general court-martial, a "disciplinary court-martial" is convened. A disciplinary court-martial consists of not less than three officers and is presided over by an officer not below the rank of major. Its powers of punishment do not exceed imprisonment for more than two years and it may not try a commissioned officer of or above the rank of major. The law does not require a judge advocate to be appointed for disciplinary courts-martial, but in practice a judge advocate is almost invariably appointed. His duties at a disciplinary court-martial are the same as they would be had a general court-martial been convened.

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[25] National Defence Act, § 56(7b).
[26] *Id.* § 141.

A prosecutor is appointed for every court-martial, usually a commissioned officer named by the convening authority or by some officer designated by him. In special cases, with the concurrence of The Judge Advocate General, the convening authority may appoint civil counsel to act as prosecutor in lieu of a commissioned officer. In practice this has not been done, since a legally trained officer has always been available to act as prosecutor.

C. *RIGHTS OF ACCUSED—PRE-TRIAL*

Once a court-martial has been convened the accused is furnished with the convening order, a copy of the charge sheet, a copy of the synopsis, and a written notification as to whether the prosecutor is a person having legal qualifications. The accused is then, and not before, entitled to a legal representative.[27] The legal representative may be either a defending officer or civilian counsel. There is no requirement that the prosecutor and defending officer have the same legal qualifications. A defending officer may be any commissioned officer of Her Majesty's forces, and in practice an accused sometimes chooses a regimental officer rather than a legally qualified officer to represent him. He is always furnished with a list of legally qualified officers among whom he may choose. If he intends to retain civilian counsel he normally does so at his expense, although in a very serious case where no legally trained officer on full time service is available to represent him the accused may apply for counsel at public expense to be selected from among legally qualified officers of the Reserves of any of the forces. In addition to counsel, the accused is entitled to have any person act as an adviser. An adviser is not entitled to represent the accused at the court, except to make a speech in mitigation of punishment if the accused is convicted. Rather he acts as an expert upon any service matters involved. For example, if the accused has retained a civilian counsel to defend him upon a charge of improper operation of a vehicle, counsel may well not be familiar with the rules and regulations peculiar to the service concerning the operation of vehicles. The adviser to the accused would assist counsel in this respect. There are, in addition, many things that a military officer may more conveniently do by way of preparation for a trial than can a civilian counsel, including knowing where certain documents may be found and the most expeditious channels through which prospective witnesses may be obtained for interview.

Where the accused has elected to be tried by court-martial, he may withdraw that election at any time prior to the convening

[27] Queen's Regulations, art. 111.60.

authority convening the court.[28] After the court has been convened, the accused may withdraw his election only with the consent of the convening authority.

The accused is informed by the prosecutor before trial of the name of any witness whom he proposes to call, the nature of whose evidence is not indicated in the synopsis or who is not named in the synopsis, and the accused is furnished with a written statement of the substance of the proposed evidence of that witness. If the prosecutor fails to do this, the accused has the right at trial to postpone his cross-examination after the examination-in-chief of the witness has been completed. The prosecutor is not bound to call every witness against the accused whose evidence is contained in the synopsis, or any other witness even though the accused has been notified that such other witness will likely be called. If the prosecutor does not call one of these witnesses and does not give the accused reasonable notice before trial that he does not intend to call him, the accused has the right to require the prosecutor to call the witness and make him available for cross-examination.

D. *PROCEDURE*

Before the court is sworn to try the accused, the accused is asked whether he objects to being tried by any of the officers whom it is proposed shall constitute the court. He may object for any reasonable cause[29] and he may produce any statement that is pertinent to his objection. After such statement, if any, has been received, the court closes to deal with the objection and all members except the member objected to vote on the objection. Successful objections to the president result in a new president being appointed by the convening authority. Objections to other members, if successful, result in the president designating from among alternate members named by the convening authority a new member to take the place of the person objected to, subject to any further objection by the accused.

At a trial by court-martial, after the court is sworn, the accused is first given an opportunity to apply for an adjournment on the ground that he is unable to properly prepare his defense because the particulars of the charge are inadequate or are not set out with sufficient clarity.[30] He may also object to the trial proceeding on the ground that the court has no jurisdiction, that the charge was previously dismissed or that he was previously found guilty or not guilty of that charge, that he is unfit to stand trial by

[28] Queen's Regulations, art. 111.65.
[29] Queen's Regulations, arts. 112.05(3)(b) & 112.14.
[30] Queen's Regulations, art. 112.05(5)(b).

reason of insanity, or that the charge does not disclose a service offense.[31] Where the charge sheet contains more than one charge, he may apply to be tried separately in respect of any of the charges on the ground that he will be embarrassed in his defense if all charges are tried together.[32] The court has power, if it considers the interests of justice so require, to allow the application of the accused for separate trials.

E. *APPOINTMENT AND DUTIES OF JUDGE ADVOCATES*

The judge advocate at the trial may be an officer of any of the three services, as the Judge Advocate General's Office is of a tri-service nature. The Judge Advocate General is not The Judge Advocate General of any one of the Canadian services, but rather is The Judge Advocate General of the Canadian Forces.[33] He holds a unique position since, although he is in fact a member of one of the Canadian Forces, he is not responsible for the performance of his duties to any particular Chief of Staff but rather reports on the administration of service justice to the Minister of National Defence and on other matters to the Deputy Minister. His staff consists of officers and other ranks drawn from all three services, and of members of the civil service. All major field headquarters, as for example army commands, have a representative of The Judge Advocate General on their staff to serve as legal adviser to the commander of that headquarters. He and his officers deal with a great number of legal matters affecting the services and the Department of National Defence generally. The supervision of the administration of military law is his responsibility, and constitutes one of the most important parts of the work of his office.

A judge advocate functions very much in the same fashion as does a judge in a jury trial on a criminal charge before a civil court, except that he has no power to vote on the sentence. His power to deal with questions of law arising during the course of the trial is dependent upon the president directing that the judge advocate shall deal with such questions.[34] This direction may not extend beyond the questions of law prescribed in regulations as being matters that may properly be left to the judge advocate to determine. They include the determination of applications for adjournments on the ground that the particulars of the charge are deficient or lacking in clarity, pleas in bar of trial, applications for separate trials where there is more than one charge, and all matters respecting the admissibility and exclusion of evidence.

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[31] Queen's Regulations, arts. 112.05(5)(c) & 112.24.

[32] Queen's Regulations, art. 112.05(5)(d).

[33] National Defence Act, § 10.

[34] *Id.* § 162(4). See also Queen's Regulations, art. 112.06.

Power is given to the president to direct that questions of law shall be heard and determined by the judge advocate in the absence of the members of the court-martial, a device that is particularly useful where the admissibility or otherwise of a pre-trial confession is in issue.

The judge advocate throughout the trial is responsible to the president for seeing that the rights of the accused are safeguarded, that counsel or defending or prosecuting officers conduct themselves in a proper professional manner, and that the rules of evidence are followed. He must, at the end of the case, advise the members of the court as to the law that is applicable,[35] and in order to relate the law to the evidence and to ensure that all the theories of the defense are adequately brought to the attention of the court he will review the evidence.

F. *RULES OF EVIDENCE*

When the National Defence Act was being drafted, one of the questions that arose was what rules of evidence should be followed. It was then decided that the best approach was to have the rules of evidence of the province in which the trial took place (or in the case of a trial overseas, the rules of evidence of the accused's home province) followed except so far as those rules might be modified by regulations made by the Governor in Council.[36] There were in fact very few evidentiary rules made by the Governor in Council during the early years of the operation of the Act. Judge advocates had therefore a most difficult task in determining whether contested matters were admissible or not. This was particularly true in the case of judge advocates sitting beyond Canada with few or no reference books available on the particular point in issue. To meet this situation and to achieve uniformity and certainty in evidentiary rules, The Judge Advocate General had prepared a codification of the law of evidence as applicable to trials by court-martial. Parliament authorized the Governor in Council to establish rules of evidence for courts-martial and the rules were approved to take effect from October, 1959.[37] They are known as the "Military Rules of Evidence" and they replace all other rules of evidence, except so far as they are silent upon any particular point.

Only in very few cases has there been any change made from the ordinary rules of evidence applicable to trials of criminal cases before a civilian tribunal. One of the major changes made

[35] Queen's Regulations, art. 112.05(18)(e).
[36] National Defence Act, § 152.
[37] *Ibid.* See also Order in Council 1959–1027 of 13 August, 1959.

was to protect an accused who took the stand in his own defense from having the prosecutor adduce against him evidence of previous convictions under the guise of attacking his credibility. Under the Military Rules of Evidence the general bad character or reputation of the accused, or evidence of another act or acts similar in essential respects to the act charged, may be tendered by the prosecutor only where the accused has himself put his good character or reputation in issue or where the evidence of similar facts is admissible to show the state of mind or identity of the person who committed the offense.[38] Evidence of similar facts cannot be introduced until the prosecutor has by other means established a real suspicion of the guilt of the accused on the issue of state of mind or identity. Even then, the judge advocate is required to exclude the evidence of similar facts if he decides that the probative weight thereof is slight, or that it would have an undue tendency to arouse prejudice against the accused and thereby impair the fairness of the trial.

Another important change made by the Military Rules of Evidence is in connection with the determination of whether a pretrial confession or admission of the accused is a voluntary one. Under the new rules of evidence, it is still for the prosecutor to prove that an incriminating statement was voluntary, in the sense that it was not made by the accused when he was or might have been significantly under the influence of fear induced by threats or hope of advantage induced by promises by a person in authority. The task of the prosecution is made somewhat easier, however, by a new provision that the only inducements by way of threats or promises significant for the purpose of excluding a statement of the accused are those that a reasonable man would think might have a tendency to cause an innocent accused person to make a false confession.[39] This provision may well shock some legal theorists who have argued that it is not only the possible falsity of the confession that is involved, but also that the courts must be jealous to see that the police are duly restrained from improper conduct. This paper is not of sufficient length to enable the author to indulge in a defense of this provision in the new Military Rules of Evidence. Perhaps it will be sufficient to say that the rule in question was not adopted without the most careful and prolonged consideration. It will be interesting, however, to see whether the appeal courts will eventually saddle courts-martial with all the previous jurisprudence on this matter by holding, for example, that the mere fact that a police officer says to the accused "it will

[38] Military Rules of Evidence, art. 22 (1959).
[39] Military Rules of Evidence, art. 42 (1959).

be better for you if you tell the truth" is an inducement which might have a tendency to make the accused give a false confession.

A further provision of the Military Rules of Evidence enables the prosecutor or the defending officer to make admissions of fact relative to the charge at the outset or during the course of the trial.[40] Such a procedure is allowed in trials by the civil courts of an indictable offense under the provisions of the Criminal Code of Canada, but there was no authority for it in a trial by court-martial until the Military Rules of Evidence were introduced.

G. *APPEAL*

Any person who is convicted by court-martial and who disputes the legality of the finding or the legality of the sentence may, as of right, appeal to the Court Martial Appeal Court.[41] A convicted person must be given, free of charge, a transcript of the minutes of the proceedings of his court-martial and he has fourteen days from the date of being given this transcript in which to file an appeal. If his sentence has been altered by a military reviewing authority,[42] or if a finding of guilty has been quashed or the findings otherwise varied, there is a further period of fourteen days from the time of notification to him of such change. The Court Martial Appeal Court is composed of civilian judges drawn from the Exchequer Court of Canada and from the judges of courts of appeal for the provinces. The court has no power to deal with the sentence except so far as it may be illegal; nor has it any power to deal with an appeal upon a question of fact alone. The grounds of appeal must be on questions of law or of mixed fact and law. At the hearing of the appeal, the case for the appellant may be presented by the appellant in person or by a barrister or advocate on his behalf, and the case for the respondent may be presented by a legally qualified military officer detailed by The Judge Advocate General or by a civilian barrister or advocate. The appellant may retain and pay counsel of his own choice or, with the approval of the president of the Court Martial Appeal Court, he may be provided at public expense with counsel appointed by the Minister of Justice. If the appellant applies for the appointment of counsel by the Minister of Justice, he is required to disclose to the president of the Court Martial Appeal Court information as to his pay and allowances, the effect upon them of his conviction, and any other means possessed by him.

[40] Military Rules of Evidence, arts. 8 & 37 (1959).

[41] National Defence Act, §§ 186 & 190.

[42] These authorities are normally concerned with quantum of punishment only, and not with legality.

The Court Martial Appeal Court may dismiss the appeal, quash the conviction, substitute a conviction on a lesser included offense, or direct a new trial.[42] When a new trial has been ordered by the court the Minister of National Defence has power to dispense with that trial being held and, in most instances, particularly in the case of offenses overseas where the witnesses have dispersed, he will exercise his discretion. If a new trial is dispensed with, the offender is not subject to any further disciplinary action by the services.

Where an appellant has been successful in whole or in part upon his appeal, the court may direct that all or part of the fees and costs of counsel shall be paid by the Crown.

An appeal lies from the decision of the Court Martial Appeal Court by either the Crown or the appellant. This appeal is to the Supreme Court of Canada and is of right when there has been dissent in the judgment of the Court Martial Appeal Court. If there is no dissent, an appeal may be taken to the Supreme Court of Canada only when leave to appeal is granted by a judge of that Court. The Supreme Court may deal with the appeal in any of the ways which were open to the Court Martial Appeal Court.[44]

H. *STATUTORY REVIEW*

After the time limited for an appeal has passed, The Judge Advocate General is responsible[45] for reviewing the proceedings in order that he may be satisfied that the finding of the court and the punishment imposed are legal. This review includes a detailed examination of the transcript of the trial and consideration of all the questions of law arising therefrom.[46] If The Judge Advocate General is of the opinion that any finding or punishment is illegal, he is required to refer the minutes of proceedings of the court-martial to the appropriate Chief of Staff for such action as the Chief of Staff may deem fit.[47] In referring the minutes to the Chief of Staff, The Judge Advocate General will recommend quashing of the finding or of the punishment as appropriate, or, if possible, the substitution of a conviction of a lesser included offense.

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[43] National Defence Act, § 191.

[44] *Id.* § 196.

[45] *Id.* § 197.

[46] This is not an adversary proceeding nor is the opinion of the officer conducting the review available to the convicted person.

[47] National Defence Act, § 198.

VII. CONCLUSION

The disciplinary system in the Canadian Forces is not a static system; details are changed from time to time as experience delineates the areas in which improvements may be effected. Nevertheless, the general concepts upon which the system is founded have remained unaltered since the introduction of the National Defence Act in 1950. Since that time, the powers of punishment possessed by commanding officers have been increasingly relied upon, and this, coupled with an increasingly high standard of discipline, has resulted in a marked reduction in the number of courts-martial. Although the size of the Canadian Forces has increased by more than 65% since 1951, the number of courts-martial for all three services has in the same period decreased so that it is now some 11% of the figure that it was ten years ago. For the calendar year 1960, one court-martial was held for every 2,500 officers and men in the Regular Forces of Canada. A further indication of the efficacy of the Code of Service Discipline may be found in the fact that for the year 1960, although all persons convicted by court-martial may appeal as of right to the Court Martial Appeal Court, only four persons perfected their appeal, and of these four appeals three were disallowed. No doubt further refinements in the Canadian system of military justice will take place over the ensuing years, but on the basis of the past ten years it seems most unlikely that the system will be drastically changed.

A LEGAL ANALYSIS OF THE CHANGES IN WAR*

BY MAJOR JOSEPH B. KELLY**

I. INTRODUCTION

In February 1958, the Department of the Army published a pamphlet entitled, "Bibliography on Limited War."[1] In the foreword to this bibliography General Maxwell Taylor raised the following questions:

> I hope that studies of limited wars, prompted and supported by this Bibliography, will clarify our thinking in several respects. For instance, answers are urgently required to questions like these:
>
> What is the nature of limited war in the nuclear age, and how does it differ from those of the recent and distant past? . . . .

There is no short-cut to a single answer to these questions. The solution lies, rather, in a historical analysis of both the phenomenon of war and the laws by which states have sought to control it. A legal approach to this analysis, with its basic distinctions between law and fact, can be particularly useful in answering General Taylor's questions.[2] Therefore, it is the purpose of this article to attempt a partial description of the difference between limited war today and the wars of the recent and distant past by contrasting the continual changing facts of war with the slower development of the legal rules applicable to these facts. The ineffectiveness of many of the laws of war furnishes

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School nor any other governmental agency.

** JAGC, U.S. Army; Member of the Faculty, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; Member of the Ohio State Bar; LL.B., University of Cincinnati College of Law.

[1] U.S. Dep't of Army, Pamphlet No. 20–60, Bibliography on Limited War (1958).

[2] A distinction at the outset between the law of war and the war itself avoids the unnecessary complexities which arise when war is considered as a legal condition in itself. For example, Quincy Wright's familiar definition of war as "the *legal condition* which *equally* permits two or more hostile groups to carry on a *conflict* by *armed* force," 1 Wright, A Study of War 8 (1942), tends to make more difficult an understanding of the distinction between law and fact. In an earlier article, Professor Wright reasoned that where both belligerents disclaim an intention to make "war," "a state of war does not exist until such time as third states recognize that it does." Wright, *When Does War Exist?*, 26 Am. J. Int'l L. 362 at 366 (1932). John Bassett Moore, on the other hand, was critical of any attempt to place war "in a special legal category of its own." See Moore, *The New Neutrality Defined*, 16 Army Ordnance 230 (1936), reprinted in 7 Moore, Collected Papers 43 (1944). See Green, *The Nature of the "War" in Korea*, 4 Int'l L. Q. 462 (1951), and Pye, *The Legal Status of the Korean Hostilities*, 45 Geo. L. J. 48 (1956), for problems that are encountered in viewing war as a legal rather than a factual condition.

a valuable clue to the changing nature of war. This very ineffectiveness is often but a reflection of a change in the facts which the particular rule assumed to exist. The contrast of law to facts will also assist in separating the meaningful from the irrelevant facts of war.

II. THE FACT OF WAR

The historical analysis necessary to understand the drift of things today need not go back to ancient history. It is only necessary to go back as far as the year 1648 and the Treaty of Westphalia, the birth of the modern state system, because war has become primarily a contest between states in this system. To understand the changes in war since 1648, a working factual definition of war must be obtained which will describe it as it was first employed by the new states. The Oxford-English Dictionary[3] contains a definition of war which admirably describes it as it was first used. The definition has three elements. War is defined as:

1. A hostile contention
2. By means of armed forces
3. Carried on between states.[4]

A. *FIRST ELEMENT—A HOSTILE CONTENTION*

"Hostile contention" applies to the atmosphere in which war is waged. Von Clausewitz, in speaking of this element, terms it "conflict" and sees a hostile intention as its base.[5] He further observes that since the Napoleonic Wars, hostile feeling has accompanied this intention, the feeling varying with the importance and duration of the hostile interest involved.[6] This century has furnished many examples of the presence of a hostile contention with the absence of actual hostilities. Active resistence by one side is not essential to the creation of a state of war. The absence of resistance on the part of Denmark did not alter the fact that Germany had made war on Denmark.[7]

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[3] 12 Oxford-English Dictionary 79 (1933).

[4] Intra-state civil wars have been omitted from this definition because this article will be confined to war as part of the international politics between states.

[5] Von Clausewitz, On War (Jolles transl. 1943).

[6] Since Clausewitz's period, ideologies, particularly nationalism, have become important factors in the growth of the hostile feelings engendered during wars.

[7] During the war crimes trials following World War II, various German leaders were found guilty of waging aggressive war against Denmark, Luxembourg and Czechoslovakia, despite the absence of any resistance by those countries. 1 Trial of The Major War Criminals Before the International Military Tribunal at Nuremberg 194–98, 204–88 (1947).

B. *SECOND ELEMENT—BY MEANS OF ARMED FORCES*

This element has two distinct aspects, the individuals who comprise the forces and the arms used by them. Legal definitions of "armed forces" generally tend to restrict the term to the formal organized forces of the state as distinguished from the civilian population. The first three Geneva Conventions of 1949 contain the classic requirements for any armed force on land. They require that the members be organized, wear a distinctive sign, carry arms openly, and fight in accordance with the laws of war.[8] Therefore, the "armed force" must have an open, recognizable characteristic about it. However, the armed forces actually used by the states do not always fit this definition. Guerrilla and partisan armies are changing the recognizable characteristic previously possessed by the armed forces.[9]

The second aspect of this second element concerns the weapons which inflict injury upon the enemy. The infliction of injury is profoundly influenced by the advancement of science. Hostilities become more frightful as new arms are developed. Here in this aspect of war has occurred the revolution which, more than any other single factor, has raised the question in General Taylor's mind.[10]

C. *THIRD ELEMENT—CARRIED ON BETWEEN STATES*

It is this third element which most concerns the practitioner of international law. The hostile contention by means of armed forces is carried on *between states*. The ancient phenomenon of

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[8] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, art. 13 [1956] 6 U.S.T. & O.I.A. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (hereinafter cited as GWS); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, art. 13 [1956] 6 U.S.T. & O.I.A. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (hereinafter cited as GWS Sea); Geneva Convention Relative to the Protection of Prisoners of War, August 12, 1949, art. 4 [1956] 6 U.S.T. & O.I.A. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (hereinafter cited as GPW).

[9] The difficulty of identification has also raised problems in sea warfare. In justifying unrestricted submarine warfare in the Pacific in World War II, the U.S. Navy Department made the following announcement: "[T]he conditions under which Japan employed her so-called merchant shipping were such that it would be impossible to distinguish between 'merchant ships' and Japanese Army and Navy auxiliaries." Quoted in the Washington Sunday Star, Feb. 3, 1946, § A, p. 7. See Tucker, *The Law of War and Neutrality at Sea*, 50 International Law Studies, U.S. Naval War College, at 41–43 (1957), for a further discussion of this problem.

[10] "This massive revolution wrought by nuclear weapons seems to have overwhelmed the thinking of strategists and statesmen alike, scattering in its wake traditional concepts of international behavior." Bjelajoc, *Unconventional Warfare in the Nuclear Era*, Orbis, Fall, 1960, p. 323.

war has been adopted by the modern states. It is within the framework of the nation-state system that war must now be studied and its underlying nature understood.[11]

1. *War and Politics*

Hoffman Nickerson defines war as "the use of organized force between two *human groups* pursuing contradictory policies, each group seeking to impose its policy upon the other."[12] Such a definition is broader than war as it will here be analyzed because the "human groups" may not be states. However, Mr. Nickerson's definition is important in one aspect. It makes war a technique for furthering a policy. Karl von Clausewitz was closer to the nature of war in the state system when he wrote, "War is nothing but a continuation of political intercourse by other means."[13] In this descriptive definition is the heart of the nature of war. It is the logical continuation of other forms of political intercourse that have preceded it in time.

2. *War and the Struggle for Power*

It is necessary to look at these states in their relations with one another to see the proper position of war in that relationship. States in the state system are engaged in a constant struggle for power.[14] The power each state seeks is the ability to determine the behavior of other states.[15] The methods of influencing these other states are persuasion, compromise, barter, and coercion. Persuasion is commonly exemplified by propaganda. Diplomacy is a form of compromise. Barter is essentially economic pressure. War is the application of force in coercion.

Because of the absence of a higher authority, the power struggle is the very life of states. Their survival rests upon their

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[11] The present nation-state system is a society of independent sovereign states acknowledging no higher temporal authority than themselves. It is a primitive society ruled by a primitive law. The idea of a community is just now unfolding. Philip Jessup, in A Modern Law of Nations (1952), points to the lack of an international community as one of the two basic impediments to the development of international law.

[12] 23 Encyc. Brit. 321 (1941).

[13] Von Clausewitz, *op. cit. supra* note 5, at 16. Justice John C. Young, in United States v. von Leeb, 11 Trials of War Criminals Before the Nuernberg Military Tribunals 485 (1950), expressed this same thought when he defined war as "an implementation of a political policy by means of violence."

[14] Morgenthau, Politics Among Nations 30 (2d ed. 1954); Palmer and Perkins, International Relations 30–36 (1957). Exceptions to this power approach to international politics are taken by Friedman, Introduction to World Politics 29 (2d ed. 1953), and Organski, International Politics 184 (1958).

[15] Organski, *op. cit. supra* note 14, at 95.

attainment of at least the minimum power to remain separate from other states. The state must seek power because the state has been the only effective guardian of the legitimate rights of its citizens. It must have power in order to exist. No sharp line separates the will-to-live from the will-to-power.[16]

The foreign policy objective of the state is that object which it considers desirable or necessary to attain in the power struggle. If the techniques of persuasion, compromise, or barter fail to attain the objective, war might be resorted to if the objective desired is considered by the state to be imperative to its needs. Despite the urgent requirement of the objective, war will not be resorted to if the state feels it lacks the ability to influence another state by war.

3. *All Power as Ultimately War Power?*

It has been contended that all power of a state is ultimately war power.[17] This does not mean that states always seek to achieve their ends in foreign policy by military force, nor does it imply that they must always be ready with the maximum of their military potential. They may be able to achieve their objectives through diplomatic or economic measures, but they must be ever mindful of the possibility of eventual recourse to arms.[18] As the ultimate measure of power, war is always lurking in the background of international politics.[19] Persuasion and compromise lose some of their strength in vital issues if the use of war power is discounted.[20] War power, to underscore effectively persuasion and compromise, must be accompanied by more than the ability to use force to influence others. Most states have this ability by their mere existence. There must also be present the underlying probability that such power might be used if no alternative presents itself. Attempts to outlaw war are significant because they strike directly at the probability of a state resorting to war.

Since 1648, war has been part and parcel of international politics in the state system. The significance of war's position in

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[16] Niebuhr, Moral Mean and Immoral Society 42 (1933).

[17] Spykman, America's Strategy in World Politics 18–19 (1942); Palmer and Perkins, *op. cit. supra* note 14, at 39; Ball and Killough, International Relations 86 (1956).

[18] Palmer and Perkins, *op. cit. supra* note 14, at 35.

[19] *Id.* at 211.

[20] Stalin's cynical evaluation of the post war policy of Pope Pius XII in Eastern Europe, "How many divisions has he?" is illustrative of this point. Hatch and Walshe, Crown of Glory, The Life of Pope Pius XII 184 (1957), reporting a conversation between Churchill and Stalin at the Yalta Conference in February 1945.

this power struggle cannot be fully appreciated unless its relationship to persuasion, compromise, and barter is also considered. In the past four hundred years not only has war changed, but also its relationship to the other three techniques of influencing other states. This relationship has undergone a blurring. No longer is war in a clearly defined frame. All four techniques have become a complicated mural wherein it is sometimes difficult to see where one technique of influence blends with another. Nevertheless the three essential factual elements of war previously defined have not changed. The hostile contention only changes in degree, not in kind. The arms change, but the fact that arms are used remains. The state may evolve from a weak, laissez-faire monarchy to a powerful socialistic dictatorship, but it is a state nevertheless.

"Police actions," "armed reprisals," "limited war," and "total war" are nonetheless war. They are merely different aspects of a familiar technique in interstate relations which has never ceased to change since states first started using it. These changes in war and in the legal rules governing war will now be analyzed within the framework of the three essential elements previously defined.

III. THE LAW AND THE CHANGING FACTS OF WAR

By tracing fundamental changes in the character of war in the past four hundred years, four distinct periods can be discerned, the three elements of war undergoing distinctive changes in each. The laws, fashioned in one period, lose much of their force when applied to the next.

A. *FIRST PERIOD—1648–1792 (LIMITED WAR)* [21]

During this period, wars were primarily dynastic jousting matches, played for the benefit of ambitious monarchs.[22] Clausewitz contemptuously labels them *"Kriegsspiel"* (play war).[23] This *Kriegsspiel* was a limited war, limited in many ways. *First,* the

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[21] Hoffman Nickerson, in The Armed Horde, 1793–1939 (1940), uses the same period, but in a different sense. He calls it the period of Pre-Democratic War, which served merely as an introduction to his principal period 1793–1939, in which the Armed Horde was to dominate warfare. He considered The Armed Horde to be on the decline after 1939. Warfare in Russia and Korea might cause him not to adjust the dates of his latter period.

[22] One of the early reasons for mercantilism was to insure that the king had money to finance his wars. Noted in Kant, Perpetual Peace, Third Preliminary Article (1795).

[23] Von Clausewitz, Vom Kriege, III, 90–93, quoted in a translation in Andler, Frightfulness in Theory and Practice as Compared with Franco-British War Usages 68–69 (1916).

means of destruction were limited by the absence of industrial might in each state. *Second,* the combatants were limited to a small number of professional soldiers. The vast bulk of the populations of belligerent states were affected by a war only when a battle was fought in their own neighborhood or troops billeted near them. *Third,* the conduct of hostilities was limited by rules. Hugo Grotius wrote the first rules in his *De Jure Belli ac Pacis* in 1642. He wrote with a background of the ruthless 30 Years War where ideology sought to destroy ideology. These rules were obeyed by the new states partly for ethical reasons, and partly because the remnants of the code of chivalry were still influential among aristocratic officers who spoke several languages. These officers traditionally looked upon soldiering as one of the three time-honored professions, ranking alongside the clergy and the law. In addition, the soldier in the ranks had every reason to make the practice of his dangerous trade as safe and as reasonable as possible, as a professional wrestler does today. He was often a mercenary hired by one king to fight in a second country against a third king. His stake in the struggle was not personal. *Fourth,* the objective of the war was limited. There was no overriding reason to deal harshly with the enemy. Most of the wars were fought for glory, territorial acquisitions, and the advancement of dynastic political intrigues. In most cases, if war were lost, the dynasty merely lost some provinces or some prestige. Any real clash of ideologies was absent. Even in the American Revolutionary War, General Burgoyne could toast the King with his captors.[24] Contrast such conduct with the refusal of Allied officers to shake hands or even to return the salute of captured German officers in World War II, many of whom were arrested rather than captured.[25] *Fifth,* the state itself was limited. It had not yet become "popular." The lives, welfare, and daily existence of the citizens of each state were not bound closely to the state. They relied upon the state for the maintenance of order, but demands for freedom within that order followed by the almost total reliance of the individual on the "welfare state," were things that the future held.

In this period, the hostile contention was limited, the armed force was limited, and the state itself was limited. The rules for the conduct of hostilities grew during this one hundred and fifty year period in a favorable climate. But could any rules of limitation stand up where there was more at stake in the war?

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[24] Fuller, Decisive Battles of the U.S.A. 62 (1953).

[25] Enock, This War Business 143, plate 23 (1951).

B. *SECOND PERIOD—1792–1914 (TRANSITION)* [26]

1. *The Vanishing Limits on War*

The French Revolution and the Napoleonic wars introduced the citizen army. The tiny professional army was on its way out. The second element of the definition of war, "by means of armed forces," was undergoing a profound change. This citizen-soldier must have something personal for which to fight. An ideology and a state to which he was personally bound would spur him on to make the personal sacrifices which war required of him. The troops now had a dash that permitted them to sweep the old professional from the field. In addition, the armed forces were directly supported by those who remained at home. The distinction between the combatants and the noncombatants was no longer clear-cut. The hostile contention was beginning to be conducted by all the people, not simply by the armed forces. This participation by the majority of the citizens was first clearly noticeable in the South during the American Civil War.[27] Since war had become an instrument involving more persons than the soldiers of the enemy, why not strike at the home-front civilian population as well? General Sherman did just that in his march through the Southern states where he was unopposed by main components of the Confederate Army. A major turn in war was taken.

Vattel praised the mildness of his Eighteenth Century by declaring, "At the present day, war is carried on by regular armies; the people, the peasantry, the towns-folk, take no part in it, and as a rule, have nothing to fear from the sword of the enemy." [28] Such a statement was no longer applicable to the Nineteenth Century. The words of Clausewitz are more descriptive of the changing times: "Invasion is the occupation of the enemy's territory, not with a view to keep it, but in order to levy contributions upon it or even to devastate it. The immediate object here is neither the conquest of the enemy's territory, nor the defeat of

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[26] Quincy Wright used this same period as the third of four periods in warfare. They are: (1) 1450–1648—adaptation of firearms; (2) 1648–1789—professionalization of armies; (3) 1789–1914—capitalization of war; (4) 1914–?—totalitarianization of war. See Wright, *op. cit. supra* note 2. A broader approach that combines Wright's third and fourth periods is that taken by John V. Nef in War and Human Progress (1950). Confining himself principally to effect of industry on war, Mr. Nef uses only three periods: (1) 1494–1640; (2) 1640–1740; (3) 1740–1950.

[27] Coulter, The Confederate States of America, 1861–1865, chs. 7–13 (1950).

[28] Quoted in Nickerson, *op. cit. supra* note 21, at 38.

his armed forces, but merely to *do him damage in a general way.*" [29]

The means of destruction possessed by armies were also moving from a limited to an unlimited assortment. By 1865, the might of the industrial revolution had been reflected on the battlefield. Many efficient weapons had appeared or were in embryo.

The state itself had increased its power and grown in strength as a consequence of the industrial revolution. It was now called upon more and more by its citizens for aid and regulation. In addition, an ideology had entered the picture that not only strengthened the state and gave the citizen something to fight for, but also increased the hostility in which war was fought. That ideology was liberal nationalism.[30] It pervaded all three elements of the definition of war.

It is evident during this second period that the *first element,* "hostile contention," had been aggravated by a deeper personal animosity between the belligerents. However, the animosity was not so great that the loser could expect too harsh a treatment. In 1865, Jeff Davis was not "hung from a sour apple tree" as the song would have led its singers to believe.

The *second element,* "conducted by armed forces," had passed from the small professional army to the citizen army backed by the industrial and noncombatant might of the "home front." Still, armies generally conducted their operations against the opposing armies and not against noncombatants. Rousseau's famous doctrine that "war is not a relation of man to man, but of state to state, in which individuals are enemies accidentally, and not as men or citizens, but as soldiers," [31] had not entirely disappeared. This Rousseauesque conception of war can clearly be seen in the Prussian King's Proclamation at Saarbrucken on 11 August 1870; "I make war against French soldiers, not against French citizens." [32]

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[29] Von Clausewitz, *op. cit. supra* note 5, at 22.

[30] It was based solidly on the support of the middle classes, whose power was growing with expanding industrialization. Liberal nationalism "could not realize its ideal of basing the state system of Europe on the principle of nationality without sacrificing its ideal of pacifism. . . . So fighting became the practical means of transforming cultural into political nationalism." Hayes, Nationalism, 11 Encyc. Soc. Sci. 245 (1937). Liberal nationalism transformed the state system into a nation-state system. Japan, Greece, Belgium, the Latin American Republics, Germany and Italy emerged as states. The Hapsburg and Turkish Empires began to decline. Palmer and Perkins, *op. cit. supra* note 14, at 18.

[31] Rousseau, Le Contrat Social (Watkins transl. 1953).

[32] Quoted in Spaight, War Rights on Land 35 (1911).

The *third element*, the state itself, was changing, becoming more closely tied to the welfare and conduct of its citizens and their enterprises. As a result, the states' duties, rights, and power had increased.

Limitations on war still appeared. The customary rules of warfare as developed since Grotius were probably respected more often than not. It was still possible to talk of such things as military objectives and the rights of noncombatants. There still remained some feeling of an international community. Most important, the object of war had remained limited. The policy objectives which the state wished to accomplish by the instrument of war were limited. France continued to exist after 1815 and was soon a respected powerful member of the European community. Loss of war meant loss of prestige, perhaps of territory as was the case of France in 1871, but no real tragedy as far as the territorial, political or moral integrity of the core of the nation was concerned. "Unconditional Surrender," first imposed by Grant at Fort Donelson,[33] was to become state policy in the next century. However, it was evident that effective limits were disappearing. For example, Clausewitz's evaluation of the customary limits on war was as follows: "Force, to meet force, arms itself with the inventions of art and science. It is accompanied by insignificant restrictions, hardly worth mentioning, which it imposes on itself under the name of international law and usage, but which do not really weaken its power."[34]

2. *Attempts at Reimposition of Limits on War*

There was naturally a reaction against the vanishing limits on war. After the Crimean War, a great surge of humanitarian concern for the sick and wounded resulted in the formation of the Red Cross and a consequent unparalleled attempt to mitigate the sufferings of combatants. In 1863, the United States attempted to regulate its armies by written rules. Dr. Hans Lieber set the prevailing customs down in General Order 100, which was issued as a guide to the Northern Armies in 1863.[35]

The Geneva Conventions of 1864 and 1868 went far to aid the sick and wounded. The St. Petersburg Convention of 1868 and the Brussels Conference of 1874 were concerned with the conduct of military operations and the use of weapons.

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[33] Bradford, Battles and Leaders of the Civil War 81 (1956). Such terms were summarily rejected by Burgoyne in 1778. See Fuller, *op. cit. supra* note 24, at 60.

[34] Von Clausewitz, *op. cit. supra* note 5, at 3.

[35] U.S. War Dep't, Instructions for the Government of Armies of the United States in the Field, Gen. Orders No. 100 (April 24, 1863), contained in Moore, Digest of International Law 219 (1906).

In 1899 and 1907, the Hague Conventions[36] codified customary international law in an effort to limit as much as possible the unnecessary suffering and destruction which huge armies with new weapons were capable of inflicting on each other and on their respective countries. It remained to be seen whether this reaction would be sufficient to restore or to retain any limits on war.

3. *The Stumbling Block of "Necessity"*

Any such limits that are to the disadvantage of a state in maintaining its existence and in protecting the way of life of its population, would run counter to a state system composed of independent sovereign states.

The German *Kriegsraison* theory, developed during the latter part of this transition period, touched the central problem of limiting a state while it is in hostile contention with another state.[37] This theory contains essentially the idea that the method is permitted if it is necessary for success, laws to the contrary notwithstanding.[38] This concept of necessity is not limited to strict military necessity as determined by commanders in the field. It also has another higher connotation, linking it with *raison d'etat.* Bismarck put the problem in his characteristically blunt fashion when he asked, "what head of government would allow his state and its citizenry to be conquered by another state just because of international law?"

A practical application of the *Kriegsraison* doctrine can be seen in a manual on the usages of land warfare published after

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[36] Five of the conventions are important. They are: (1) Convention Relative to the Opening of Hostilities, October 18, 1907, 36 Stat. 2259, T.S. No. 538; (2) Convention Respecting the Laws and Customs of War on Land, and Annex, October 18, 1907, 36 Stat. 2277, 2295, T.S. No. 539; (3) Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, October 18, 1907, 36 Stat. 2310, T.S. No. 540; (4) Convention Concerning Bombardment by Naval Forces in Time of War, October 18, 1907, 36 Stat. 2351, T.S. No. 542; and (5) Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of July 6, 1906, October 18, 1907, 36 Stat. 2371, T.S. No. 543.

[37] This theory developed between 1871 and 1900, and is almost exclusively associated with German writers, particularly Hartmann, Lueder, Ullmann, and Von Liszt. See O'Brien, *The Meaning of Military Necessity in International Law,* 1 Institute of World Polity Yearbook 109 (1957), for an analysis of this doctrine.

[38] See Root, "Presidential Address at the Fifteenth Annual Meeting of the American Society of International Law, April 27, 1921," *Proceedings of the Society of International Law* 1–2 (1921), where Mr. Root, after defining it, noted that this doctrine of *Kriegsraison* was very much in evidence in World War I.

the first Hague Convention by the German General Staff in 1909.[39] It reads in pertinent part as follows:

> A war conducted with energy cannot be directed merely against the combatants of the Enemy State and the positions they occupy, but it will and must in like manner seek to destroy the total intellectual and material resources of the latter. Humanitarian claims such as the protection of men and their goods can only be taken into consideration insofar as the nature of the war permit.[40]

The United States officially adopted a different view of permissible warfare. The American view was originally formulated by Dr. Hans Lieber in 1863. It is set forth in the current United States Army Field Manual on the laws of war as follows:

> Military necessity . . . justifies those measures which are indispensable for securing the complete submission of the enemy as soon as possible *and* which are not forbidden by international law.[41]

The difference between the two is the limit imposed by international law.

By the end of the Transition Period, the composition of the armed forces had changed radically. The conduct of hostilities had widened in scope and intensity. A reaction to these widening limits had resulted in several international treaties and in the formation of the International Red Cross. The next period would tell whether war was to remain "limited" or whether Clausewitz was correct in his evaluation of the limits imposed by the international law of war.

C. *THIRD PERIOD—1914–1945 (TOTAL WAR)*[42]

World War I ushered in the period of total war, a type of war consisting of the combination of many allies, enormous cost, unlimited use of highly destructive weapons, and unlimited war aims.[43] Hostilities were conducted over greater territory and with

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[39] *The German War Book* (Morgan transl. 1915). After the war, a German commission investigated the publication. The author said he never knew of the rules of Hague Convention of 1899. Book was also unknown among German military forces, and was out of print by 1910. See von Glahn, The Occupation of Enemy Territory 12–15 (1957), for the background of the German War Books.

[40] *Id.* at 52–53.

[41] U.S. Dep't of Army, Field Manual No. 27–10, The Law of Land Warfare, p. 4 (1956). (Emphasis added.) This definition, with its requirement of "complete submission," has a total-war overtone lacking in Lieber's original definition.

[42] Raymond Aron, in The Century of Total War (1954), describes this same period as one of total war. However, he is reluctant to extend the period beyond 1945 because he is not sure if the years after Hiroshima are a preparation or substitute for total war.

[43] "Total war" is defined in this same manner by J. L. Kunz, in *The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision*, 45 Am. J. Int'l L. 37 (1951).

more devastating weapons than ever before. More troops were employed, supported by the home front population. All able-bodied men were drafted and in some cases, noncombatants were drafted for war work. However, World War I was not fought for great ideological reasons. In this one respect, it may be said to be limited.

1. *Inadequate Restraints on Conduct of World War I*

a. *Positive International Law*

The impact of modern science, technology, and economics upon the conduct of war was first demonstrated in 1914 and confirmed in 1939. Under this impact, many of the rules and basic principles developed since the time of Grotius and codified in the Hague Conventions, broke down. Heavy artillery, aerial bombardment, gas, and the submarine knew neither combatant nor noncombatant, military nor private property. The economic side of warfare knew neither belligerent nor neutral.

The effect of economic warfare, and the nature of new weapons will now be considered.

(1) *Economic Warfare*—Economic warfare had its origin in the Napoleonic Wars, but it did not become paramount until World War I. By 1914, the degree of economic mobilization required to wage war and the extent of the routine state control of economics had increased tremendously. Economic warfare, to be effective, must be waged not only against enemy combatants and noncombatants, but against neutrals as well. The effect upon the protected status of noncombatants and neutrals will be examined more thoroughly before the consequences of new weapons are discussed.

(a) *Distinction Between Combatants and Noncombatants.* The age-old distinction between the enemy combatant and noncombatant began to lose some of its validity when the noncombatant assumed a vital role in the war economy of his country.[44] That economy was absolutely necessary if modern war was to be waged effectively. If the noncombatant was well-fed, if his morale was high, and if he was free from direct attack, he could perform his essential wartime mission. England struck at him in three ways. First, the list of conditional contraband was extended to include food and materials of almost every kind. Previously, conditional contraband included only items which could be utilized by the enemy army or state. It was based on the

[44] Hall, International Law 397 n.1 (5th ed. 1904), contains an interesting history of the development of the legal distinction between combatants and noncombatants.

outmoded idea that only states and armies entered the framework of war.[45] But now almost any item that entered a port was controlled as to distribution by the state. It was impossible to say that it was for the civilian economy alone. The result of the extension of the list of contraband was to deprive the civilian economy of needed food and supplies. Second, the manner of blockade was changed from one of "close" blockade to one of "long distance" blockade. The close blockade was dangerous because of mine fields, submarines, planes, and modern communication methods. The long distance blockade stopped ships in previously designated wide areas on the high seas, and subjected them to treatment similar to that accorded blockade runners. In this way, the commercial life of the enemy could be strangled.[46] Third, the concept of "ultimate destination" affected not only ships going to the enemy, but also ships going to a neutral who might transship the cargo overland to the enemy. "Ultimate destination" tainted the widened list of conditional contraband items sufficiently to permit their seizure as contraband of war.

The intended effect of all three methods was not only to injure the state and its army, but also the civilian population. England engaged upon such practices under the legal excuse of "reprisal" for prior German submarine tactics. Conceding their illegality, the fact is still evident that the civilian economy of a nation had its place in the waging of war and was vulnerable to attack. England managed to avoid the 19th Century prohibitions by way of the loophole of reprisal.

At sea, two factors have tended to abolish the distinction between the peaceful enemy merchantman and the enemy warship; the extensive practice of converting merchantmen into warships to supplement the navy, and the arming of all merchantmen.

(b) *Distinction Between Neutrals and Belligerents.* With the economic interdependence of states, it became apparent that a complex enemy economy not only helps the enemy war effort, but requires neutral trade to remain at top efficiency. The distinction between the neutral and enemy trader as possible targets began to be broached for several reasons. *First*, the neutrals

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[45] The obsolescence of the contraband list as contained in the London Declaration of 1909 is dramatically illustrated by observing Art. 28. It lists the following items as goods neither of absolute nor conditional contraband: (1) raw cotton, wool, silk, etc.; (2) oil, seeds, nuts, copra; (3) rubber, resins, gums; (4) raw hides; (5) metallic ores; and (6) precious and semi-precious stones. By the end of the Second World War, all of them were on the contraband lists. See Rowson, *Prize Law During the Second World War*, 24 Brit. Yb. Int'l L. 160 at 186 (1947).

[46] See Stone, Legal Controls of International Conflict 508–10 (1954), for a discussion of the factual need in warfare for such a new type blockade.

themselves were weak compared to the belligerents in World Wars I and II. The old champions of neutrality had become belligerents themselves.[47] Therefore, the force back of the laws of neutrality had almost vanished. *Second,* the Nineteenth Century idea that states did not engage in or control commerce, but left that sphere to private citizens, was no longer true. Therefore, the conclusion that contraband carried by a neutral ship could not be imputed to the neutral state was based on a factually incorrect hypothesis.[48] *Third,* no belligerent is entirely self-sufficient. It needs neutral trade for its war economy. *Fourth,* neutrals themselves began to assume all sorts of positions ranging from strict neutrality to nonbelligerency.[49]

The neutral was attacked in two ways. *First,* the ultimate destination rule, the long distance blockade, and the extension of the contraband list cut deeply into his freedom of commerce not only with both belligerents, but even with other neutrals. *Second,* the blacklisting of certain neutral firms and corporations had the effect of making these organizations "enemies."

International law did not permit many of these acts against neutrals.[50] However, the unfortunate neutral was caught between reprisals from both sides. By means of reprisal and counter-reprisal, England and Germany were able to upset the rules of sea warfare in World War I. Neutral shipping lost its protection as a consequence.

(2) *Weapons of Warfare*—The limits that were attempted to be imposed upon the use of weapons by the First and Second Hague Conventions proved to be inadequate in the first war in which they were tested. The reason for this lay with the rules themselves. They could not easily be extended to cover new weapons. Therefore, such weapons were employed largely in a

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[47] See Morrissey, The American Defense of Neutrality Rights, 1914–1917, at 78–104, 154–207 (1939), for account of a major power's struggle to protect the laws of neutrality. The United States also considered for a short time prior to World War II, the possibility of forming a neutral bloc of resistence with the Scandinavian states. Stone, *op. cit. supra* note 46, at 364.

[48] Nineteenth Century laissez-faire was no longer the order of business. The state had entered the economic field.

[49] Professor C. Eagleton, in *The Duty of Impartiality on the Part of a Neutral,* 34 Am. J. Int'l L. 99 at 104 (1940), concludes that "The neutral is not forbidden to go to war; why should he be forbidden to take measures less than war?" However, such a coin has its other side. The belligerent is not forbidden to go to war against the neutral; why should he be forbidden to take measures less than war? Between the two, the laws pertaining to neutrality are considerably narrowed.

[50] For a condemnation of such encroachments upon neutral rights, see the Swiss writer, 2 Guggenheim, Traite de Droit International Public 386–387 (1954). For contra-arguments, see the Australian writer, Stone, *op. cit. supra* note 46, at 402–413.

legal vacuum.[51] In addition, the rules were the vaguest where the interests of states were the most vital. Items such as lances with barbed heads, glass filled shells, and poison were interpreted as being absolutely forbidden. However, atomic weapons, flamethrowers, napalm, and chemical and biological weapons were not.[52] War had long since outgrown the specifically prohibited weapons. The more modern instruments were only forbidden *if* military necessity did not require their use.[53]

Considering the limits on arms imposed by the laws of war, it was difficult to discern a substantial difference in the first analysis between the German *Kriegsraison* theory and the Anglo-American concept of permissible warfare. Only those methods and weapons which experience had shown were not actually necessary were outlawed. The boundary between the legitimate pursuit of victory, and the unlawful infliction of suffering and destruction was still largely marked by the movable line of necessity.

(a) *Distinction Between Combatant and Noncombatant.* Two elements have tended to blur this distinction as far as weapons are concerned. The first is the nature of the weapon, the second is the nature of the noncombatant. A visit to Gettysburg battlefield will impress the student of warfare with the fact that all the weapons were sighted. The gunner, by looking down the barrel, could see his target. Under such circumstances, the distinction between the combatant and noncombatant could be readily observed. However, with long range artillery, high altitude bombing, guided missiles, nuclear bombs, and poison gases, a certain control is lost over the direction of the weapon. Add to this the fact that the noncombatant lives near and works in legitimate military targets where little protection can be offered him.

A more direct argument for injuring noncombatants as well as combatants has been advanced by Julius Stone. He reasons that even if the weapon can be aimed, there is no reason why it should not be aimed at that class of noncombatants who are engaged in the economic war effort. The object would be either to destroy them or to destroy their morale. In either event, the economic war effort would be hindered.[54] However, such a proposition is not now an accepted rule of international law. It may be academic

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[51] For example, see Royse, Aerial Bombardment (1928), for an interesting analysis of the inadequacies of the laws of war, particularly in regulating aerial warfare.

[52] U.S. Dep't of Army, *op. cit. supra* note 41, at p. 34.

[53] "History proves that an effective implement of war has never been discarded until it becomes obsolete." Sibert, Foreword to Fries and West, Chemical Warfare at x (1921).

[54] Stone, *op. cit. supra* note 46, at 627–31.

because lives and morale of the enemy workforce are in fact destroyed as a by-product of target area bombing.

(b) *Distinction Between Belligerent and Neutral.* The submarine and the airplane were by their very nature incapable of observing all the rules of maritime warfare. They could not stop and search a vessel or take it to a port without great danger to themselves. They could not provide for survivors after the ship was sunk. Many times a warning before opening fire would also be dangerous. Therefore, the "sink on sight" rule, followed by Germany in the Atlantic, and the United States in the Pacific, made it as hazardous for a neutral ship as for an enemy ship to sail upon the high seas. This hazard was increased by the laying of vast mine fields by both sides. Customary neutral rights were violated.[55] The fact that Admiral Doenitz was not sentenced for his conduct of submarine warfare because of the Allied conduct in the same field, challenges the validity of the law applicable to the submarine.[56]

b. *General Principles of International Law*

If little more than the use of poison darts, glass, and the use of dumdum bullets separate the German and American doctrines on weapons in positive international law, then the limits on this aspect must be found elsewhere. General principles of international law are a possibility. The de Martens phrase, inserted in most treaties on war, is characteristic of the generality of such principles of international law.[57] Such a phrase is difficult to apply in practice. Specific obligations resulting from "the laws of humanity and the dictates of the public conscience"[58] are extremely difficult to agree upon.[59] For example, many believed that gas warfare as it was first conducted violated the laws of hu-

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[55] 2 Guggenheim, *op. cit. supra* note 50, at 347–48. The present problem of radiological fallout on neutral territory in the event of all-out war raises the fundamental question of the real extent of neutral rights where weapons are involved.

[56] Smith, Law and Custom of the Sea 87 (2d ed. 1950); Stone, *op. cit. supra* note 46, at 606–07.

[57] Named for George Frederick de Martens, a French international law writer of the mid-nineteenth century.

[58] All four Geneva Conventions of 1949 contain this traditional phrase. GWS, art. 63; GWS Sea, art. 62; GPW, art. 142; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 158 [1956] 6 U.S.T. & O.I.A. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (hereinafter cited as GC).

[59] See Tucker, *op. cit. supra* note 9, at 45–50, for a discussion of the difficulty of applying general principles in a decentralized international society.

manity.[60] However, city saturation bombings and dumping tactics of allied aircraft in World War II[61] left the public conscience relatively undisturbed. Such broad phases in international law are in reality a reliance upon moral law[62] and public opinion.[63]

c. *Chivalry*

Chivalrous conduct, a personal rather than a state deterrent, died with the passing of the aristocratic officer and his replacement during the transition period by the business man in uniform For a brief period in World War I it appeared that chivalrous conduct would form a basis for a new law of air warfare. However, such expectations were not fulfilled.

Despite its demise, the noble ideal of chivalry continues to attract the military professional. The United States Army field manual on the laws of war still contains the following phrase, "The law of war . . . requires that belligerents . . . conduct hostilities with regard for the principles of humanity and chivalry."[64] Its principles are clearly evident in General MacArthur's confirmation of the death sentence of General Yamashita:

> The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits, sacrifice. This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard. . . .[65]

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[60] A graphic description of the revulsion felt when poison gas was first used is the eyewitness account of G. Winthrop Young, quoted in Baker, The Arms Race 320 (1950): "This horror was too monstrous to believe at first . . . for then we still thought all men were human."

[61] "Dumping" refers to the practice in World War II of aircraft never returning with a bombload. In World War I it was often customary to drop no bombs if a target did not present itself. Stone, *op. cit. supra* note 46, at 610.

[62] Moral values are difficult to ascribe to a state. If a state is looked upon as nothing more than a group of individuals, then the moral approach is easy. See St. Korowicz, *The Problem of the International Personality of Individuals*, 50 Am. J. Int'l L. 533 at 539 (1956), for a list of writers who maintain that individuals and not states are the sole subjects of international law, that international societies are collectivities composed of individuals subject to law. Unfortunately states do not act and are not treated like individuals. States, though held to moral values, have not been held to the same moral values as individuals. See Carr, Twenty Years Crisis, 1919–1939, ch. 9 (1946), for a discussion of the applicability of moral principles to state actions.

[63] Stone refers to the ability of a government, which controls communication media, to mold public opinion as "the nationalization of truth." Stone, *op. cit. supra* note 46, at 321. Such ability on the part of states would tend to weaken public opinion as an effective check on state actions.

[64] U.S. Dep't of Army, *op. cit. supra* note 41, at p. 3.

[65] Action of the confirming authority, General Headquarters, United States Army Forces, Pacific, 7 February 1946.

2. *New Efforts to Limit War*

Four new efforts to change war occurred after the First World War. They may be classified as codification, disarmament, collective security, and the prohibition of aggressive war.

a. *Codification*

The first effort was a more detailed codification of rules for the conduct of war itself. The Geneva Convention of 27 July 1929 Relative to the Treatment of Prisoners of War[66] and the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick[67] were designed to protect two classes of helpless combatants.

The London Naval Treaty of 1930 and the London Submarine Protocol of 1936 sought to control the use of submarines by requiring them to conform to the established rules of international law to which surface vessels were subject.[68]

The use of poison gas in World War I resulted in two major attempts to outlaw it as a weapon. The first was a treaty signed at Washington, 6 February 1922, on behalf of the United States, British Empire, France, Italy, and Japan.[69] Art. V contained a provision prohibiting "The use in war of asphyxiating poisonous or other gases, and all analogous liquids, materials or devices." It was not ratified by all the signatories and has never become effective. On 17 June 1925, a second attempt to outlaw gas was made in the Geneva Protocol.[70] It prohibited the use in war of asphyxiating, poisonous or other gases. Bacteriological warfare was also included in the prohibition. This Protocol is now effective between a considerable number of states. However, the United States has refrained from giving its advice and consent to the ratification of the Protocol, and it is accordingly not binding on this country.[71]

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[66] Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846, 118 L.N.T.S. 343.

[67] Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, T.S. No. 847, 118 L.N.T.S. 303.

[68] Treaty for the Limitation and Reduction of Naval Armament, April 22, 1930, pt. IV, art. 22, 46 Stat. 2858, T.S. No. 830, 112 L.N.T.S. 65, which was incorporated verbatim into the London Naval Protocol, 6 November 1936.

[69] Treaty Relative to the Protection of the Lives of Neutrals and Noncombatants at Sea in Time of War and To Prevent the Use in War of Noxious Gases and Chemicals, February 6, 1922, art. 5, in 3 Malloy T.S. 3116–19 (1923).

[70] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 65.

[71] 68 Cong. Rec. 141–54, 226–29, 363–68 (1926).

Codification had not limited the destruction and hardships of World War I. However, the governments were faced with the spectacle of the awesome power reflected in industrial states at war. Some step to control future wars had to be made. The resulting codifications of the laws of war went beyond a restatement of customary rules. An attempt was made to make new laws. By relying principally upon custom, international law had in the past reflected accepted state practice. The effort now to direct beforehand the actions of states was the principal innovation of the codifiers in the Transition Period.

b. *Disarmament and Collective Security*

If the world society of sovereign states could be reorganized into a true community of nations, then the third element of the definition of war would be fundamentally changed. With the interests of the community paramount over the interests of the individual states, states would be truly sovereign no longer. The League of Nations was the mechanism devised to alter the nation-state system. War would be treated under the League as an act against the community, not merely against the individual state attacked. Community action would be taken against the aggressor. A state need no longer worry about its own security because there would be collective security. Balance of power and armaments as security measures would no longer be necessary.[72]

A series of treaties entered into under League auspices were designed to strengthen the collective security system of the League. They were the "Draft Treaty of Mutual Assistance" (1923),[73] the "Protocol for the Pacific Settlement of International Disputes." (1924), the seven Locarno Treaties of 1925, the "General Act of 1928,"[74] and most important, the "General Treaty for the Renunciation of War" (1928), also termed the Pact of Paris and the Kellogg-Briand Pact.

The efforts at collective security, represented by the League and the treaties entered into under it, were more or less failures as far as the ideal of collective security was concerned. However, they had an effect which radically altered the use of war as an instrument of foreign policy. The outlawing of aggressive war

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[72] President Wilson in the second of his Four Principles of Feb. 11, 1918, expressed the conviction that the great game of balance of power is now forever discredited. Quincy Wright, 2 *op. cit. supra* note 2, at 781, remarks that the fundamental assumptions of the balance of power and collective security are opposite.

[73] Discussed in 2 Kellor, Security Against War 737-38 (1924).

[74] The General Act attempted to develop treaties similar to Locarno containing nonaggression and mutual assistance pledges. Myers, Handbook of the League of Nations 288 (1935).

was later interpreted to have become a rule of international law during this period.

c. *The Prohibition of Aggressive War*

The Pact of Paris, though not looked upon favorably by some writers at the time,[75] played a leading role at the end of World War II. International law had sought before 1918 to control the hostile contention between states, not to forbid it. Therefore, the idea of the crime of aggressive war advanced by the allies in World War II and reflected in the War Crimes convictions was revolutionary. It is debatable if aggressive war was really a crime before 1945.[76] In 1937, Professor Clyde Eagleton wrote:

> International lawyers are unable to find in the Treaty (Pact of Paris) any binding rule against war . . . the Pact of Paris admits all wars of self-defense as legal, and then makes it possible to call any war a war of self-defense.[77]

Such cynicism is justified, not by the lack of moral values in the world, but simply by the lack of any real change in a system comprised of sovereign, independent states. Arnold Brecht expressed this thought when he said:

> There is a cause of wars between sovereign states that stands above all others—the fact that there are sovereign states and a great many of them.[78]

In 1939, John Foster Dulles made the following comment on the Pact of Paris:

> So long as force is the only mechanism for assuring international changes then a purported renunciation of force is a nullity. . . . The Pact of Paris would realize a desirable result without taking any of the steps essential to achieve it.[79]

These three quotations pointed to the realities of international life in the inter-war period. An outlawing of aggressive war would deny the state the final expression of its power, of its ability to influence other states. Persuasion, diplomacy, and barter would take on new meaning without war power lurking in the background. Actual change in the relative power of states would have few means of exerting itself. The status quo would become

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[75] "The outlawing of war is a red herring, the best meaning red herring that ever navigated the waters of international thought and politics, but a red herring for all that. . . ." de Madariaga, Disarmament 281 (1929).

[76] For a detailed argument that aggressive war was outlawed by the Pact of Paris, see the judgment rendered by the International Military Tribunal in 1 Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg 218–24 (1947). See also Nejhoff, Aggressive War: An International Crime (1953). *Contra*, 2 Guggenheim, *op. cit. supra* note 50, at 302, and Stone, *op. cit. supra* note 46, at 324.

[77] Eagleton, Analysis of the Problem of War 84–85 (1937).

[78] Brecht, *Sovereignty*, in War in Our Times 58 (Speier & Kohler eds. 1939).

[79] Dulles, War, Peace and Change 81 (1939).

frozen. A workable method of peaceful change would require an alteration of this present nation-state system.

3. *Inadequate Restraints on the Conduct of World War II*

While the codifiers of the laws of war were at work, while the League was meeting, while states were talking about disarmament, and while international law was starting to look with disfavor upon aggressive war, another force was at work which was strengthening the complexion of some states, and thereby aggravating the first and third elements of the definition of war. That force was integral nationalism.[80] Under it, the national characteristics and the way of life of the people of a state became an ideology which the state not only sought to protect, but to impose upon other states.[81]

This type of nationalism, particularly evident in the totalitarian states, made war an all-out struggle for existence between states representing conflicting "ways of life." A classic example of the effect such a conflict would have on the object and manner of war is found in the statement made by Adolph Hitler to his generals assembled in Berlin on 30 March 1941:

> Communism is an enormous danger for our future. We must forget the concept of comradeship between soldiers. A communist is no comrade before nor after the battle. This is a war of extermination. . . . We do not wage war to preserve the enemy. . . . The individual troop commander must know the issues at stake. They must be leaders in the fight. The troops must fight back with the methods with which they are attacked. Commissars and GPU men are criminals and must be dealt with as such.[82]

This policy was partly implemented by the Commissar Order requiring all political commissars, whether in or out of uniform, to be shot upon capture. The order formed one of the bases for the trial of the German High Command after the close of World War II.[83]

World War II, therefore, provided one element of total war missing in World War I. There was now a true clash of ideologies

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[80] The most often quoted definition of integral nationalism is that of Charles Maurras. He characterized it as "the exclusive pursuit of national policies, the absolute maintenance of national integrity, and the steady increase of national power—for a nation declines when it loses military might." Quoted in Hayes, The Historical Evolution of Modern Nationalism 165 (1931).

[81] Morgenthau, *op. cit. supra* note 14, at 313. The author distinguishes this type of nationalism from the liberal nationalism of the 19th Century which was not expansive in nature.

[82] Extract from General Halder's diary, introduced in the war crimes trial of Field Marshal Von Leeb, et al. 11 Trials of War Criminals Before the Nuerenberg Military Tribunals 516 (1950).

[83] *Id.* at 515.

in communism vs. fascism, in democracy vs. totalitarianism, and in the new order vs. the old order. There was nothing comparable to it in its ideological significance since the Thirty Years War which ushered in the modern state system. "Unconditional Surrender" were the terms offered. This factor is pointed out by Field Marshall Von Leeb when he defined the war on the Eastern Front as "a bitter life and death struggle between two nations."[54]

The conduct of World War II resembled more closely a display of *Kriegsraison* in action than a demonstration of the behavior of civilized nations as conceived by the Hague Conferences. Now the stakes were higher. The policy objectives which required the state to use war as an instrument to influence the behavior of other states were enormous. It was no longer a matter of territory or the possession of islands in the Caribbean. The existence of the state, the lives of the officials of the losing state, and a way of life of a nation were put in jeopardy by a recourse to war. Neither the League of Nations nor the Hague Conventions could halt its ferocity.

All elements of the definition of war were twisted by the impact of World War II. The atom bomb introduced a new dimension into the second element which would have its effect in the next period that was soon to start.

The civilian population, which entered the framework of war in the transition period as active backers of the armed forces in the field, have now gone one step further, that is to engage in actual combat against the enemy. Partisan warfare in Russia and Yugoslavia reached enormous proportions. Undergrounds were everywhere. The distinction between the combatant and noncombatant was a matter of time, not of the person.[55]

War was no longer impersonally carried on between states, but rather between the individual rulers of the states concerned. It was not only Germany's war, but also Hitler's war. War became again as personal as were the wars of Louis XIV. But now the rulers fought them not with hired, ill-equipped armies, but with all the people and might the modern state could muster.

In 1945, war could more accurately be defined as an extremely hostile contention, by means of armed forces and civilian populations, carried on between rulers of powerful organizations called

[54] The definition was given by Von Leeb at his trial in an attempt to justify certain actions by the German Army in Russia. *Id.* at 459.

[55] For a concise treatment of the causes and development of present-day partisan warfare, see Falls, A Hundred Years of War (1850–1950), ch. 19 (1953); see also Stone, *op. cit. supra* note 46, at 562–64, on the reasons for present-day guerrilla warfare and the legal problems involved in fighting it.

states in their struggle for power; permissible only in self-defense, or when acting in accord with collective security obligations.

1945 ended the era of total war. War today seems to have developed an internal safety mechanism of its own, not imposed by disarmament, collective security, or international law. War in this new period will now be analyzed.

D. *WAR IN THE CONTEMPORARY PERIOD—1945–? (LIMITED WAR AND TOTAL CONFLICT)*

1. *Collective Security, Aggressive War, and Codification*

The years immediately following World War II repeated many of the formulas that had been tried after World War I. Some form of collective security was again attempted, this time under the United Nations, rather than under the League of Nations.[86] Aggressive war was now clearly unlawful. The 1929 Geneva Conventions were rewritten to provide for the numerous situations where they were found inadequate in World War II.[87] A convention on the protection of civilians was added to those already covering injured and captive combatants.[88] Need was seen for further protection of historic and cultural treasures.[89] War was to test some of these new efforts quickly in Korea.

2. *The Korean War*

a. *Collective Security*

The Korean War displayed again the difficulties of collective security despite the fact that the United Nations came very close to implementing the collective security provisions of its Charter. However, its most powerful members were not in agreement on the identity of the aggressor. As a consequence, member states helped both sides, and some member states helped neither. Had the collective security system worked, it would have constituted a radical break with the past.[90]

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[86] U.N. Charter, arts. 39–54.

[87] GWS, GWS Sea, and GPW. See note 8 *supra*.

[88] GC. See note 58 *supra*.

[89] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954. For a summary of the provisions of this convention, see 6 UNESCO Bull. 120–21 (April 1954). Only five states have ratified this treaty as of September 1960. World War II illustrated its need: St. Stephens Church and Opera House in Vienna were almost gutted in 1945. The Sacre Coeur in Paris was attacked by an allied bomber. In Italy, Monte Casino was destroyed. One bombing raid was carried out on the excavated city of Pompeii in 1943 because of the mistaken belief a German division was hidden in the ruins. See Ceram, The March of Archaeology 11 (1958).

[90] Wolfs, *Collective Security and the War in Korea*, 43 Yale Rev. (June 1954).

b. *Neutrality and the Illegality of Aggressive War*

Three of the four "neutral" states overseeing the Korean armistice were members of the United Nations. The Korean War therefore underlined the fact that neutrality was far from dead. It had been considered by some to have become of historic value only under the impact of collective security and the outlawing of aggressive war.[91] The argument was that neutrality was founded on the legal equality of the two belligerents. Since the aggressor was now an outlaw, this basis for neutrality had vanished.[92] The old Grotian concept of just and unjust wars had returned after its eclipse since Vattel. Therefore, neutrals could no longer rely upon the proposition that their neutrality was entirely justified by the legal equality of both participants.

Such reasoning is theoretically intriguing. However, its historical soundness would require further research beyond the scope of this study. It is sufficient here to state that the institution of neutrality appears to have been affected more by new weapons and by the economic aspects of war than by the illegality of war. It has also been affected by the deep differences of opinion in the world community by which most states are involved with one side or with the other. It is these factors, directly affecting the interests of neutrals, which will determine their conduct in future conflicts, rather than the legality or illegality of one of the belligerents.[93]

c. *Codification*

Three basic assumptions of the 1949 Geneva Prisoner of War Convention were questioned within one year of its publication. The first and most significant was the assumption that a prisoner of war is considered *hors de combat.* Both the Chinese and North Korean authorities attempted to keep their soldiers captured by the Allies very much in the fight by riots and protests against the treatment received. Conversely, prisoners of war held by the

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[91] Discussed in Americano, The New Foundation of International Law 22–26 (1947); Borchard, *War, Neutrality and Non-Belligerency*, 35 Am. J. Int'l L. 618 (1941); 2 Guggenheim, *op. cit. supra* note 50, at 495–96; Schwarzenberger, A Manual of International Law 75 (1947).

[92] Lauterpacht, *The Limits of the Operation of the Law of War*, 30 Brit. Yb. Int'l L. 237 (1953); criticized in Tucker, *op. cit. supra* note 9 at 165–66.

[93] See U.S. Naval War College, *International Law Situations*, 1939, at 54 (Wild ed. 1940), for the position that a strong neutrality concept is based upon a strong community feeling, the neutral literally being unaffected by which side wins or loses. But if the international community is split deeply, then the neutral is concerned with the outcome. Tucker, *op. cit. supra* note 9, at 174, lists the various poses neutrals assume in attempting to influence the outcome of the wars: nonbelligerency, qualified neutrality, differential neutrality, and discriminating neutrality.

communists were not negative elements to be cared for and protected. They became useful propaganda tools and subjects for sociological studies. The United States Code of Conduct is one symptom of the growing awareness of the positive side of the prisoner of war. Secondly, the supervision of the execution of the convention rests upon the shoulders of the protecting powers. States acceptable to both sides were difficult to find.[94] Even the impartiality of the International Red Cross was questioned by the Communists. Thirdly, the assumption that prisoners of war would not willingly renounce the rights guaranteed them by the Convention was incorrect. Right of repatriation and right to remain a POW were rights which many prisoners were more than willing to renounce.

Despite the failure of the collective security system and the recent codifications to measure up to expectations, the Korean War was indicative of a new rather than a repetition of an old period in warfare between states.[95] This new period, which had its beginnings in 1945, displayed changes in the techniques of war which required a new approach. "Total war" no longer accurately described the technique. The states were still there, as powerful and as sovereign as ever. Weapons were highly developed and their use practically unlimited by specific rules. But the technique of war had changed. Why?

IV. CONCLUSIONS

The changes in war since 1945 have been studied by means of two distinct approaches. The first is the relative approach which draws no line between war and peace. The second approach is characterized by the term "limited war."

A. *RELATIVITY OF WAR AND PEACE*

Difficulties encountered in finding a legal rather than a factual definition for war and in analyzing the nature of the Cold War have given rise to the relative approach to war and peace. Philip Jessup has suggested that there should be recognized an intermediary state between war and peace.[96] John Foster Dulles

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[94] 2 Guggenheim, *op. cit. supra* note 50, at ch. 5, § 5(d), points out that small states, accustomed to playing the neutral role in wars will be reluctant to accept the position of protecting power if the good faith of its acts are constantly challenged.

[95] "It [Korean War] may loom as one of the truly decisive events that shaped the pattern of war and politics in our era." Osgood, Limited War 163 (1957).

[96] Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?*, 48 Am. J. Int'l L. 98 (1954).

earlier made this same observation when commenting on the existence of great military establishments:

> Thus the creation of vast armament in itself calls for a condition mediary between war and peace. Mass emotion on a substantial scale is a prerequisite. The willingness to sacrifice must be engendered. A sense of peril from abroad must be cultivated. Once these conditions exist, we have gone a long way on the path toward war.[97]

However, Myers S. McDougal contends that more than three states are needed to describe the relations that may exist between nations. He sees a whole spectrum ranging from friendliness to armed hostility.[98] To McDougal, war and peace are extremely relevant. The two principal reasons for the relative approach will now be examined.

1. *War as a Legal Concept*

War as a legal concept is difficult to define, particularly if certain conditions are required before war may be said to exist legally. These required conditions are usually the expressed intent of a state to wage war, the serious utilization of the power of the state in waging the war, and the recognition by third states that a war exists.[99] An interesting cartoon, characteristic of the difficulty of such legal categorization, appeared in the Philadelphia *Inquirer* in 1937.[100] China and Japan are shown knifing each other and Uncle Sam is asking, "Are you fellows at war?" Clyde Eagleton, in an attempt to avoid rather than to solve the difficulties encountered in the legal concept of war, was compelled to the following conclusion: "It is desirable to eliminate the word [war] with all its unpleasant psychology from the vocabulary of international affairs."[101] Following advice such as that given by

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[97] Dulles, *op. cit. supra* note 79, at 90. This idea is not new. In 1651, Thomas Hobbes expressed generally the same thought: "The nature of war consists not in actual fighting, but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is Peace." Hobbes, Leviathan, ch. 13 (1651).

[98] McDougal, *The Initiation of Coercion: A Multi-Temporal Analysis*, 52 Am. J. Int'l L. 241 at 248 (1958).

[99] Sir Arnold McNair, writing in 1926, set out two circumstances where war would exist, both of which would leave the existence up to the parties concerned. They were *first*, a declaration of war by one party; and *second*, if no declaration, then war would exist if the nation against whom force is applied treats such act of force as an act of war. McNair, *The Legal Meaning of War and Relation of War to Reprisals*, 11 Transact. Grot. Soc'y 29, at 45 (1927). This definition was quoted with approval of Joyce Gutteridge in 1949 when reporting on the scope of the Geneva Conventions of 1949. However, she was quick to add a realistic modification stating that the Geneva Conventions would also apply to "undeclared wars." Gutteridge, *Geneva Conventions of 1949*, 26 Brit. Yb. Int'l L. 294, 298 (1949).

[100] Reproduced in Grob, The Relativity of War and Peace 155 (1949).

[101] Eagleton, *The Attempt to Define War*, 1933 International Conciliation 237–87.

Eagleton, the drafters of the United Nations Charter have eliminated the word "war" from the Charter. However, if war is considered as a factual condition, little has been accomplished by a change of labels.

Any attempt to place "war" within a frame bounded only by some of the legal manifestations of war is bound to leave a great deal of the subject unlabeled.[102] "War" as a word would disappear from the vocabulary of international affairs because it would cease to represent reality. However, some other word would have to take its place. For instance, Article 1 of the United Nations Charter proclaims the first and overriding purpose of the United Nations is "to maintain international peace and security, and to that end, to take effective measures for the prevention and removal of *threats to the peace* and for the suppression of *acts of aggression or other breaches of the peace* . . . ." (Emphasis added.) Grob declares that the word "war" has been avoided here and elsewhere in the Charter because the word has caused so much trouble and controversy in the past.[103]

Part of this trouble and controversy is caused by a natural reluctance on the part of states to admit to the existence of a war if such an admission would force some sort of action on their part in the way of embargoes, participation, blockades, the severence of diplomatic relations, etc. It is often simply convenient for all concerned for one state to apply force against another without anyone calling it war. The possible legal effects of war have become identified with war itself. Examples are numerous where both sides refused to use the term war; the American naval operations against France in 1798–1800, and against Germany and Italy in 1941, the Boxer Expedition, the Manchurian Conflict of 1931–1933, and the Sino-Japanese Incident, 1937–1941.[104] From 1951 to 1953, large Chinese and American forces were locked in battle without either state declaring war on the other.

2. *The Cold War*

A second reason for looking upon the war and peace in a relative sense is the existence of the Cold War.

The Cold War, interrupted periodically by small "hot wars," so characterizes the years since 1945, that this period could be called

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[102] Armed intervention with or without the consent of the government in power, armed reprisals, limited campaigns, pacific blockades, punitive expeditions, police actions, incidents, brush fires, and "volunteer" armies, might well abide in the limbo between peace and war, legally defined.

[103] Grob, *op. cit. supra* note 100, at 325.

[104] Grob devotes over 100 pages to various incidents between states that escaped the label of "war." *Id.* chs. 3 and 4.

the period of "total conflict" rather than "total war." This is partly the result of the international political situation with its conflicting ideologies, and partly the result of modern nuclear arms development. The conflict of ideologies gives occasion for provocation at any level of interstate relations. However, "total war" is not utilized by either as a means of redress for the provocations partly because of fear of mutual nuclear destruction.

The Cold War is not war as originally defined at the beginning of this article because the second element [by means of armed forces] has been replaced. It is a hostile contention, by means of everything but physical force, between two or more states. It is not war because of the absence of one nation physically forcing the other. It is not peace because of the hostility existing in relations that used to be peaceful. A basketball game in South America between East and West is no longer just a basketball game. The Olympics are a contest of national honor. Wheat is grown in Central Asia, not only to feed the Russians, but to grow more wheat than the U.S.A. The International Geophysical Year is a race for outer space. A *hostile* competition permeates the most inocuous relationships.[105]

The difficulty with the relative approach is that it tends to destroy the very concept of war either by avoiding the word when describing hostilities or by applying the term to hostile relations, such as the Cold War, which are not wars. To consider war as a legal condition is to confine the concept too narrowly. However, the answer is not the opposite extreme advocated by the relativists. The former is too narrow, the latter too broad. A better approach for an analysis of the period since 1945 is that of "limited war."

B. *LIMITED WAR*

There is no uniformly accepted definition of limited war at the present time.[106] It is difficult to define because it is usually used to describe three different situations. The *first situation* is the Cold War itself. Raymond Aron uses interchangeably the terms cold war and limited war.[107] However, they can only be so interchanged if it is understood that each term includes both threats short of force, and actual hostilities where the political objectives sought do not require an all out military effort. Using the terms inter-

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[105] One Chinese worker stayed at his furnace throughout his wife's labor and named their new child "Surpass Britain." A 13-year-old Chinese girl, winner of a swimming race, said she was inspired to "fight against the crests of the Yellow River with the thought that she was striking against U.S. imperialism." Incidents Reported by Robert Elegant and Calvin Tomkins in *China Builds an Anthill*, Newsweek, Dec. 1, 1958.

[106] U.S. Dep't of Army, *op. cit. supra* note 1, at p. 3.

[107] Aron, *op. cit. supra* note 42, pt. 3.

changeably, the U.S.S.R. could be said to be at limited war with the Western Powers by constantly seeking to undermine them by methods short of actual war. Red China could also be said to be at limited war with the U.S.A. in Korea because the U.S. did not apply its maximum force against her. The latter situation is war. The former is not war in the real sense of the term. "Total conflict" describes both situations more accurately than does "limited war."

The *second situation* is the inequality of states themselves. Only two superpowers, the Soviet Union and the United States, emerged after World War II.[108] Except in a direct clash of power between these two giants, each could go to war against most other states and win without being forced to extend itself. Wars between smaller nations take on the appearance of limited wars because small states cannot afford the enormous cost entailed in conducting modern full scale warfare.[109]

The *third situation* tending to create a condition of limited war is the arsenal of atomic and hydrogen bombs possessed by the Eastern and Western blocks. These arsenals are looked upon as deterrents to a total war in the future.[110] General Maxwell Taylor has used this situation to define limited war as "a war initiated under the protective cover of mutual nuclear deterrence."[111] The key assumption in looking upon nuclear weapons as a deterrent to total war is that their use would be so destructive that neither side would be foolish enough to start a war large enough to require their use. George G. Kennon expressed this thought when he stated:

> People have become accustomed to saying that the day of limited wars is over. I would submit that the truth is exactly the opposite; that the day of total wars has passed, and that from now on, limited military operations are the only ones that could conceivably serve any coherent purpose.[112]

A hopeful but cautious approach is advisable to such reasoning.

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[108] Ball and Killough, *op. cit. supra* note 17, at 388–89, discuss the international implications of this inequality.

[109] Kissinger, Nuclear Weapons and Foreign Policy 137 (1957). The author cites two illustrations of limited war based on the inequality of states. (a) Egypt vs. Lybia, (b) U.S.A. vs. Nicaragua.

[110] Slessor, *The Great Deterrent and Its Limitations*, 12 Bull. Atomic Scientists 140–46 (May 1956); Wisehart, *No Big War, But Stalemate, Lies Ahead*, 61 Town Journal 26 (November 1954). Sailendra North Dhar, in Atomic Weapons in World Politics (1957), stated the effect of atomic power on international wars in a poetic style: "The institution of war, however dangerous and double-edged and unpredictable be its methods, has, nevertheless, flourished through the ages, and is in current practice. Beating swords into ploughshares, however, has never before been felt to be a more urgent necessity than now. Man has now in his grasp the primal energy that causes the stars to glow." *Id.* at 222.

[111] U.S. Dep't of Army, *op. cit. supra* note 1, at p. 1.

[112] Kennon, Realities of American Foreign Policy 120 (1954).

A comparison of Mr. Kennon's statement with that of James T. Shotwell made in 1929, is indicative of the caution required.

> It [war] is no longer a safe instrument for statesmanship . . .: it is too dangerous to employ. . . .[113]

Nevertheless, it may well be that war has at last found an internal safety mechanism that may prevent it from keeping pace with the latest scientific discoveries, an accomplishment which external attempts in the form of laws have failed to achieve.

Classifying limited war solely on the basis of the use or nonuse of atomic weapons is not completely satisfactory. For instance, there may be limited atomic wars, as Hans Morgenthau has suggested.[114] There may also be wars without the use of nuclear weapons, but with the use of new chemical and bacteriological instruments. In such a war, the absence of atomic bombs would limit little the intensity of the conflict.[115]

From these three situations, some conclusions may be drawn as to the essential nature of limited war. Limited war is war as it has traditionally been utilized by states in their relationships with each other. However, it is principally limited as to the political objectives sought.[116] This political limitation is imposed either by the nature of nuclear weapons or by the present international situation, featuring as it does more forms of hostile relations than war. The international scene will change.[117] The very destructive nature of nuclear weapons will not. It is the existence of such weapons that challenges a commentator to place a time limit on this present period of limited war. Nuclear weapons by their very existence would always seem to impose a limitation on the political objectives of a war between major powers. "Unconditional surrender" would have no place in such a contest. George Kennon may be right when he said "the day of total wars has passed."[118]

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[113] Shotwell, War as an Instrument of National Policy 36 (1929).

[114] Morgenthau, *Has Atomic War Really Become Impossible?*, 12 Bull. Atomic Scientists 7–9 (January 1956).

[115] ". . . [T]here exists no way to define a limited war in purely military terms." Kissinger, *op. cit. supra* note 109, at 139.

[116] "It [limited war] reflects an attempt to *affect* the opponent's will, not to *crush* it. Limited war is essentially a political act." *Id.* at 140–41.

[117] Robert W. Tucker in the *Foreword* to *The Law of War and Neutrality at Sea*, note 9 *supra*, links total as well as limited war to a changing international political scene: "the recurrence of total war in the twentieth century is not primarily the result of technological advance—though this advance has contributed greatly to the ease by which total war may be waged—but rather of social and political developments. The latter are the product of human interests and as such are rarely—if indeed, ever—irreversible. It is for this reason that the possibility cannot be excluded that men might once again find it in their common interests to return to a form of limited warfare, to wars that are limited, not only in the number of their participants, and in the purposes for which they are fought, but also in the weapons and methods that are employed against an opponent."

[118] Kennon, *op. cit. supra* note 112, at 120.

EFFECT OF CHARACTER OF DISCHARGE AND LENGTH OF SERVICE ON ELIGIBILITY TO VETERANS' BENEFITS*

BY HARRY V. LERNER**

I. INTRODUCTION

When a person enters the military, naval or air service on active duty, it is well known that he or his dependents may become entitled to veterans' benefits after his discharge or release, or on his death. Not so well known, however, are: (1) the circumstances under which benefits may be denied due to the character of the discharge or release, (2) the role of the respective government agencies concerned, and (3) the possible effect of length of service on entitlements.

It is estimated that about 45 percent of the Nation's population consists of men, women and children who are present or potential beneficiaries of the Veterans' Administration under title 38 of the United States Code, "Veterans' Benefits." There are over 23,000,000 veterans, and there is a constant source of newcomers.[1] The discharge requirement in relation to veterans' benefits and the effect of length of service may, therefore, be of considerable interest.

Benefits affected include monthly payment for disability or death; hospitalization, medial care and outpatient treatment; burial allowance and flag; loan guaranty for home, farm or business; educational benefits; unemployment assistance; and others. The vast extent of these benefits is indicated by the statistics. In the fiscal year ending June 30, 1960, more than $3,000,000,000 was paid to veterans and their dependents in disability or death benefits, and $365,000,000 was paid in insurance benefits. The Veterans' Administration has eight percent of the hospital bed capacity of the nation, and care was provided to 114,000 patients each day on the average. About 178,000 loans for home, farm, or business were guaranteed or insured during the year, totaling almost $2,400,000,000. In addition, 28,000 direct

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

** Attorney and Member of Staff, Office of The General Counsel, Veterans' Administration; Member of the Bars of Nebraska, the District of Columbia, and Maryland; LL.B., 1940, University of Omaha Law School; Captain, U.S. Air Force Reserve.

[1] These statistics and those in the subsequent paragraph are taken from the 1961 Annual Report of the Administrator of Veterans Affairs 1–6, 64, 69, transmitted to the Congress January 9, 1961.

loans were made. An average of 228,351 veterans of the Korean conflict were enrolled per month in educational training for readjustment, and 7,497 disabled Korean veterans were enrolled each month in vocational rehabilitation training. More than 10,000,000 veterans had received readjustment training by the end of the fiscal year, of whom about 2,300,000 were Korean conflict veterans. By 1975, it is estimated that about one person of every two aged 45 or more will be a veteran, the wife of a veteran, or the widow of a veteran.

Title 38 of the United States Code was recodified and enacted into positive law, effective generally on January 1, 1959.[2] Section 101(2) thereof reads as follows:

> The term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom *under conditions other than dishonorable.* (Emphasis supplied.)

This definition summarizes various criteria of the former title 38, which contained no generally applicable definition of the word "veteran."[3]

It will be observed from this definition that not every exserviceman is a veteran under the law. There must be a discharge or release of the serviceman "under conditions other than dishonorable." This is true regardless of the length of service, and is now a *sine qua non* for entitlement[4] except for intervening insurance rights.[5] The words "discharge or release" include retirement[6] and death.[7] The discretion of the Veterans' Administrator to decide whether a discharge or release was under conditions other than dishonorable is limited by the provisions of section 3103 of title 38 of the United States Code[8] in certain situations, including cases of discharge by sentence of general court-martial.

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[2] 72 Stat. 1105 (1958).

[3] It was taken from § 101(2) of the Veterans' Benefits Act of 1957, Public Law 85-56, 71 Stat. 83, 88 (1957). Public Law 85-86 was primarily an interim recodification of some parts of title 38. A definition of "veteran" in § 2, World War Adjusted Compensation Act, ch. 157, 43 Stat. 121 (1924), sometimes called the "bonus act," applied only to claimants under that act.

[4] Under some prior laws, if a disability was incurred in line of duty, a discharge under dishonorable conditions was not a bar to pension. See text accompanying note 10 *infra.*

[5] Such rights are largely statutory. See 38 U.S.C. § 3103(d) (1958), note 8 *infra.*

[6] 38 U.S.C. § 101(18) (1958). In such cases, no question usually rises as to character of discharge, but duplication of benefits is prohibited. See 38 U.S.C. § 3104 (1958).

[7] 38 U.S.C. § 301 (1958); Administrator's Decision No. 823, August 31, 1949, and No. 861, October 16, 1950.

[8] Section 3103, as amended by 73 Stat. 262 (1959), reads as follows: "(a) The discharge or dismissal by reason of the sentence of general court-martial of any person from the Armed Forces, or the discharge of any such person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to

II. HISTORY OF VETERANS' BENEFITS

In the early history of our Federal Government, the Congress itself approved applications for pension, but it abandoned attempts to participate in each claim in 1819.[9] Section 4 of the act of 1819 gave the Secretary of War the power to take final action. This power related to several prior acts, including the act of April 10, 1806,[10] under which "any commissioned or non-commissioned officer, musician, soldier, marine or seaman, disabled in the actual service of the United States, while in the line of his duty, by known wounds received during the Revolutionary War, and who did not desert the service" could be awarded pension. It will be noted here that desertion was a bar to benefits. It will be further noted that the Secretary of War had final authority as to claims by persons who had naval service in the Revolutionary War, as well as those who had Army service. However, under the provisions of section 11 of the act of July 1, 1797,[11] and subsequent enactments relating to pension payable for disability incurred in the Navy in line of duty, final authority to make an award was in the Navy Department.[12] These acts are silent as to the effect of the character of a discharge. In the Appropriation Act of March 2, 1833,[13] in response to a recommendation by the

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comply wth lawful orders of competent military authority, or as a deserter, or of an officer by the acceptance of his resignation for the good of the service, or (except as provided in subsection (c)) the discharge of any individual during a period of hostilities as an alien, shall bar all rights of such person under laws administered by the Veterans' Administration based upon the period of service from which discharged or dismissed.

"(b) Notwithstanding subsection (a), if it is established to the satisfaction of the Administrator that, at the time of the commission of an offense leading to his court-martial, discharge, or resignation, any person was insane, such person shall not be precluded from benefits under laws administered by the Veterans' Administration based upon the period of service from which he was separated.

"(c) Subsection (a) shall not apply to any alien whose service was honest and faithful, and who was not discharged on his own application or solicitation as an alien. No individual shall be considered as having been discharged on his own application or solicitation as an alien in the absence of affirmative evidence establishing that he was so discharged.

"(d) This section shall not apply to any war-risk insurance, Government (converted) or National Service Life Insurance policy."

Predecessor but not identical provisions appeared in § 308 of the War Risk Insurance Act, ch. 105, 40 Stat. 398, 407 (1917); section 29 thereof as added by Public Law 175, 65th Congress, ch. 104, 40 Stat. 609 (1918); section 23 of the World War Veterans' Act, ch. 320, 43 Stat. 607 (1924); and section 300 of the Servicemen's Readjustment Act, ch. 268, 58 Stat. 284, 286 (1944).

[9] Act of March 3, 1819, ch. 99, 3 Stat. 526.

[10] Ch. 25, 2 Stat. 376 (1806).

[11] Ch. 7, 1 Stat. 523, 525 (1797).

[12] Pursuant to the act of March 26, 1804, ch. 48, 2 Stat. 293; the act of April 16, 1816, ch. 56, 3 Stat. 287; and the act of July 10, 1832, ch. 194, 4 Stat. 572.

[13] Ch. 54, 4 Stat. 619, 622 (1833).

Secretary of War, there was created in his department a Pension Office under a Commissioner of Pensions. A subsequent statute[14] transferred to the Commissioner of Pensions "the pension business heretofore transacted in the Navy Department" and made the Commissioner responsible for executing the various pension laws "under the direction of the Secretary of War and the Secretary of the Navy."

The Department of Interior was created by statute in 1849,[15] and the new Department received the responsibility for the administration of pensions. There were then two categories of pensions for persons who served: "invalid pension," which related to a disability which was service-connected, *i.e.*, incurred in the line of duty in the active service; and "service pension" which related to disability, age or length of service without regard to service connection.[16]

The Assistant Secretary of the Interior discussed discharge requirements at length in a decision dated August 17, 1889.[17] This ruling resulted from an appeal from the denial of a claim for invalid pension by an exserviceman of the Civil War. The denial was based on a ruling given September 4, 1885, by an earlier Commissioner of Pensions barring invalid pension in the event of dishonorable discharge. The claim was under the act of July 14, 1862,[18] which developed into the "General Law" relating to pension. It authorized invalid pension for disability incurred in line of duty, and was silent as to the character of discharge. In this respect, the General Law was the same as acts relating to

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[14] Act of March 4, 1840, 5 Stat. 369.

[15] Act of March 3, 1849, ch. 109, 9 Stat. 395.

[16] This distinction is apt today, although the terminology is no longer prevalent. "Invalid pension" is now equivalent to "disability compensation" payable under 38 U.S.C. §§ 310–358 (1958). "Service pension" based on length of service and proper discharge was last granted to veterans of the Spanish-American War. 38 U.S.C. § 512 (1958). "Service pension" in its most common form today is often referred to as "non-service-connected pension." It is payable to war veterans with certain length of service and proper discharge if they have a non-service-connected permanent and total disability, provided their income is below a certain level. Widows and children of such veterans may also qualify. 38 U.S.C. §§ 521–543 (1958).

[17] 3 Pension Decisions 137 (1889). Decisions of the Department of the Interior relating to pension claims were published from 1886 through 1930 and are cited hereinafter as P. D.

[18] Rev. Stat. §§ 4692, 4693 (1875). It became known as the "General Law" because it was enacted for an indefinite duration; embraced army and navy, regular and non-regular; related to service in peacetime and wartime; and included the exserviceman and his surviving dependents. It remained generaly applicable until October 6, 1917, when the War Risk Insurance Act, note 8 *supra*, was enacted with reference to World War I service. The General Law was repealed by § 17 of title I of the act of March 20, 1933, ch. 3, 48 Stat. 8, except as to retired regulars and as to persons who served prior to the Spanish-American War and their dependents. This repeal was later modified as to veterans of the Spanish-American War.

the Revolutionary War.[19] The 1889 decision observed, however, that in other provisions of law[20] it was stipulated an honorable discharge was required in order to receive an invalid pension. There was a like stipulation in the sections of the statute dealing with veterans, widows and children of veterans of the War of 1812 and various Indian Wars.[21] Moreover, the act of March 3, 1855, relating to bounty land,[22] provided that a warrant therefor was not to be delivered in the case of a person who "deserted or was dishonorably discharged." It was held on the appeal that the dishonorable discharge was not a bar to the pension. This restored what had been "the immemorial practice of the Department" until September 8, 1885. Shortly after this decision, the act of June 27, 1890 [23] granted service pensions to exservicemen or their widows of the Civil War under certain conditions, one of which was an honorable discharge. An honorable discharge was thus a prerequisite to some benefits, but not to others, depending somewhat on the period of service.

III. EARLY INTERPRETATIONS OF CHARACTER OF DISCHARGE

Where laws respecting benefits specified a type of discharge as a requisite or a bar, they did so as a rule by describing the discharge as honorable or dishonorable.[24] The service departments, however, did not issue all discharges as either honorable or dishonorable. For example, there was an ordinary discharge. Where a discharge was not simply honorable or dishonorable, the agency responsible for administering the pension laws was confronted with the question of whether the discharge was nevertheless honorable or dishonorable for pension purposes.

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[19] These acts were not cited in the decision. See act of March 23, 1792, ch. 11, 1 Stat. 243; act of March 23, 1796, ch. 8, 1 Stat. 450; act of March 3, 1803, ch. 37, 2 Stat. 242; and act of April 10, 1806, ch. 25, 2 Stat. 376.

[20] *E.g.*, act of May 13, 1846, Rev. Stat. § 4730 (1875) (pertaining to the War with Mexico).

[21] Act of February 14, 1871, Rev. Stat. §§ 4732 & 4736 (1875).

[22] Rev. Stat. § 2438 (1875). This benefit is now obsolete, see Rev. Stat. § 2418, 43 U.S.C. § 791 *et seq.* (1958), but it is similar to homestead or desert land preferences currently administered by the Department of Interior. See 41 Stat. 1202 (1921), as amended, 58 Stat. 747 (1944), as amended, and 42 Stat. 348 (1921), as amended, 43 U.S.C. §§ 238, 279, and 331 (1958).

[23] Ch. 634, 26 Stat. 182 (1890).

[24] *E.g.*, the laws cited in 3 P. D. 137, *supra* note 17. However, § 3 of the act of April 16, 1816, ch. 55, 3 Stat. 285, limited the grant of bounty land to soldiers who, *inter alia*, "have faithfully served during the late war, and have been regularly discharged." And § 6 of the act of March 2, 1867, ch. 174, 14 Stat. 515, 516, allowed payment from the Navy pension fund to "every person" under certain conditions "who has . . . not been discharged for misconduct."

This situation was considered by the Attorney General in 1909,[25] who noted that the War Department then authorized three types of discharge: honorable, dishonorable, and without honor. As to the Navy, he remarked that "there long has been (and are now) four kinds of discharge, namely, expressly honorable; dishonorable after court-martial; for 'bad conduct' (also after court-martial); and ordinary, familiarly called 'small' discharge." The Attorney General, in discussing the function of the pension agency with respect to discharges, advised the Secretary of the Interior as follows:

> If you find that a discharge, when given, belonged to a class then commonly accepted among military men and at the War or Navy departments (according to whether it is a naval or army discharge) as constituting a man an 'honorably discharged' person . . . I think Congress intended to treat that as an honorable discharge. . . . The War and Navy departments are parts of the executive branch of the Government having to do with a man's discharge from the service as an executive matter and having special care and executive charge of the man's service and of his military honor and standing. This charge they have while the man is in the service and until the moment he leaves it. Whether he should go with or without honor, these departments determine when they part from him. When they do so determine, they become at least in the absence of fraud or gross mistake, functus officio. . . . On the other hand, when Congress passes [pension] laws, it imposes upon a quasi-judicial bureau the determination of the question whether what was formerly done as an executive act did or did not constitute the individual a person 'honorably discharged'. In determining that question, your department . . . is concluded, in my opinion, from the moment it ascertains whether or not a discharge was, when given, granted as an honorable discharge. In other words, it is not a question now of what should have been granted, but what was granted.[26]

The statements of the Attorney General related to the following question from the Secretary of the Interior:

> Is this Department, in determining pensionable status, concluded by the terms of a discharge granted by the Navy Department as honorable?

In response, the Attorney General said:

> . . . . Your department is concluded by the terms of a discharge granted by the Navy Department as honorable.

This decision was cited by the Assistant Secretary of the Interior in an opinion of February 23, 1910, to the Commissioner of Pensions,[27] concerning an appeal by an exserviceman of the Civil War from the rejection of his claim for service pension. He had received a surgeon's certificate of disability for discharge. The rejection was on the ground that this was "not an honorable discharge such as was required," the War Department having advised that the disability was due to syphilis and that the discharge was not honorable. On the appeal, it was indicated that although

[25] 28 Ops. Att'y Gen. 83 (1909).
[26] *Ibid.*
[27] 18 P. D. 197 (1910).

this was the present view of the War Department, such was not its view when the discharge was given. The opinion noted also that the current views of the War and Navy Departments were at variance as to whether service in these circumstances should be regarded as honorable. The Assistant Secretary of the Interior said:

> . . . . At the time this appellant was discharged [1863] but two kinds of discharges from the military service were known, used, or authorized, honorable and dishonorable. If, for any cause, it was desired to qualify the nature of a discharge, on its face honorable, or if the discharge was for cause prior to the expiration of the term of enlistment, a notation to that effect was made on the discharge certificate. As shown in the foregoing opinion of the Attorney-General, discharges without honor were not known to military practice prior to the order of May 11, 1898, when they were, for the first time, authorized to be granted in cases, among others, when a soldier was discharged without trial on account of having become disqualified for service, physically or in character, through his own fault. Prior to that time no distinction appears to have been made between a discharge granted to a soldier under such circumstances, and one granted on account of disability resulting from any other cause; discharges for disability seem to have been granted as honorable discharges, and considered by the military authorities as honorable discharges in both instances. There would, therefore, seem to be no ground or reason whatever for holding, in the present case, that the discharge granted this appellant was not, when given, granted as an honorable discharge. . . .[28]

As to the variations between the services, or changes of policy within a service, he said:

> . . . [T]he question of the character of the discharge from the service of a soldier or sailor, whether honorable, dishonorable, or without honor, is to be determined by the facts shown by the record at the time such discharge was granted, and not by any recent or subsequent opinions of the War or Navy Departments as to the character of such discharge. If the record shows, on its face, that a discharge was, when given, granted as an honorable discharge; was so considered at the time by the Department granting it, and there is nothing in the evidence indicating that it was not then so held and considered, it shall be accepted as an honorable discharge within the meaning and intent of the provisions of the acts of June 27, 1890, and February 6, 1907, for pensionable purposes under said acts, irrespective of any present views or opinions of the authorities of the Department granting it as to whether it was or was not an honorable discharge. . . .[29]

Under the decision of the Attorney General and the foregoing opinion of the Assistant Secretary of the Interior, the Pension Bureau followed the practice of regarding a discharge as honorable if it was under honorable conditions, even though the word "honorable" was not used on the discharge.[30]

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[28] *Ibid.*

[29] *Ibid.*

[30] 21 P. D. 316 (1923).

IV. ESTABLISHMENT OF THE VETERANS' ADMINISTRATION

New legislation was occasioned by World War I,[31] and a new agency, the United States Veterans' Bureau, was established in 1921.[32] Laws relating to benefits for persons who served in World War I, however, did not contain uniform criteria with respect to discharge requirements.[33] The Pension Bureau of the Department of the Interior, moreover, administered other laws allowing benefits under varying discharge criteria to persons who served in peacetime or wartime under certain conditions.[34] This left an exserviceman or his survivors in the position of not knowing where to turn to have a claim adjudicated.

In 1930 Congress authorized the consolidation of various agencies, including the Pension Bureau and the United States Veterans' Bureau, "into an establishment to be known as the Veterans' Administration."[35] The new agency continued to interpret "honorable discharge" in pension legislation as meaning under honorable conditions, even though the discharge certificate did not use the word "honorable."[36] In 1933 an attempt was made to standardize discharge requirements for benefit purposes.[37] Section 17 of title I of this act read in part:

> All public laws granting medical or hospital treatment, domiciliary care, compensation and other allowances, pension, disability allowance, or retirement pay to veterans and the dependents of veterans . . . (except as far as they relate to persons who served prior to the Spanish-American War and to the dependents of such persons, and the retirement of officers and enlisted men of the Regular Army, Navy, Marine Corps or Coast Guard) are hereby repealed.

Section 7 of Public Law 2, however, saved from repeal section 23 of the World War Veterans' Act of 1924,[38] which contained lan-

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[31] Principally the War Risk Insurance Act and World War Veterans Act, *supra* note 8.

[32] Act of August 9, 1921, ch. 57, 42 Stat. 147.

[33] Under § 200 of the World War Veterans' Act, an honorable discharge was a prerequisite as to service pension, but not so under § 23 as to disability pension. The Adjusted Compensation Act provided that a discharge "under other than honorable conditions" was a bar.

[34] The General Law remained applicable. As to service pensions for exservicemen of the Mexican, Civil, or Spanish-American Wars, an honorable discharge was essential. See act of January 29, 1887, ch. 70, 24 Stat. 371; act of June 27, 1890, ch. 634, 26 Stat. 182; act of June 5, 1920, ch. 245, 41 Stat. 982.

[35] Act of July 3, 1930, ch. 863, 46 Stat. 1016.

[36] Administrator's Decision No. 47, April 21, 1931. The status of decisions of the Administrator of Veterans Affairs is analogous to decisions in former days of the Secretary or Assistant Secretary of the Interior.

[37] Act of March 20, 1933, ch. 3, 48 Stat. 8 (hereinafter referred to and cited as Public Law 2).

[38] Act of June 7, 1924, ch. 320, 43 Stat. 607, 613, as amended.

guage similar to that now found in section 3103 of title 38 of the United States Code.

Under this new legislation, the President was authorized to establish by regulation such "requirements as to entitlement as he shall deem equitable and just," such authority to expire in two years, after which there was to be no "change or modification" in these regulations except by the Congress.[39] The first regulation issued pursuant thereto, barred the payment of pension[40] unless the person who served was "honorably discharged."[41] With respect to domiciliary or hospital care or medical treatment, an honorable discharge was also a prerequisite to entitlement.[42] The words "honorably discharged" continued to be taken as meaning discharged under honorable conditions.[43]

The board repeals accomplished by Public Law 2 were modified by later legislation, including Public Law 269, passed in 1935, which provided that "all laws in effect on March 19, 1933, granting pensions to veterans of the Spanish-American War . . . their widows and dependents, are hereby re-enacted into law. . . ."[44] In the case of a person who was dishonorably discharged from the Spanish-American War, there could be entitlement to invalid or death pension (compensation) under these re-enacted laws,[45] but not under Public Law 2, which required an honorable discharge.

V. INTERPRETATION OF "CONDITIONS OTHER THAN DISHONORABLE"

A. *THE STATUTORY LANGUAGE*

The first statutory usage of the expression "conditions other than dishonorable," now in section 101(2) of title 38 of the

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[39] Public Law 2, *supra* note 37, §§ 4 and 19.

[40] Section 33 of the act of March 28, 1934, ch. 102, 48 Stat. 509, 526, provided that *service-connected* money benefits for World War I veterans were to be known as "compensation," not "pension." The act of July 9, 1946, ch. 545, 60 Stat. 524, made this distinction generally applicable to money benefits paid by the Veterans' Administration other than retirement pay. Distinguishing definitions of these terms now appear in 38 U.S.C. §§ 101(13) and (15). A further expression denoting service-connected death benefits, and giving consideration to the rank of the veteran, "dependency and indemnity compensation," was established by title II of Public Law 881, 84th Congress, ch. 837, 70 Stat. 857, 862 (1956), now codified in 38 U.S.C. §§ 410–423 (1958).

[41] VA Reg. No. 1, Exec. Order No. 6089 (1933).

[42] VA Reg. No. 6, Exec. Order No. 6094 (1933).

[43] Administrator's Decision No. 163, August 30, 1933.

[44] Act of August 13, 1935, ch. 521, 49 Stat. 614.

[45] The General Law, *supra* note 18.

United States Code, *supra*, appears to have been in section 1503 of the Servicemen's Readjustment Act.[46] That section reads as follows:

> A discharge or release from active service under conditions other than dishonorable shall be a prerequisite to entitlement to veterans' benefits provided by this Act or Public Law numbered 2, Seventy-third Congress, as amended.

The expression "conditions other than dishonorable" was suggested by the Veterans' Administration.[47] It was in the Senate version of what became Public Law 346, and with respect thereto Senate Report No. 755 states the following:

> Further, the amendment will correct hardships under existing law requiring honorable discharge as prerequisite to entitlement. Many persons who have served faithfully and even with distinction are released from the service for relatively minor offenses, receiving a so-called blue discharge if in the Army or a similar discharge without honor if in the Navy. It is the opinion of the committee that such discharge should not bar entitlement to benefits otherwise bestowed unless the offense was such, as for example those mentioned in section 300[48] of the bill, as to constitute dishonorable conditions.[49]

In establishing a requirement of a discharge "under conditions other than dishonorable," the Congress recognized the fact that the service departments were not limiting their discharges to simply honorable or dishonorable. The expression "under conditions other than dishonorable," however, does not appear to have been in common usage in these departments, and representatives of both the Army and the Navy testified against adoption of the expression in favor of the phrase "discharge under honorable conditions."[50] However, the Congress was of the opinion that

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[46] Ch. 268, 58 Stat. 284, 301 (1944) (also known as Public Law 346).

[47] 90 Cong. Rec. 3077 (1944).

[48] This became § 300 of the act. It contained provisions derived from § 23 of the World War Veterans Act, as amended, now embodied in 38 U.S.C. § 3103, *supra* note 8.

[49] S. Rep. No. 755, 78th Cong., 2d Sess. (1944). Similar views were given in H.R. Rep. No. 1418, 78th Cong., 2d Sess. (1944): ". . . [i]t was shown by testimony of representatives of the service departments, veterans' organizations, and of the Veterans' Administration that instances occur where after long and faithful or otherwise extremely meritorious service a person may receive a discharge other than honorable because of some infraction of the regulations or rules, perhaps in a period of furlough immediately prior to discharge—perhaps a civil offense rather than military. If such offense occasions dishonorable discharge, or the equivalent, it is not believed benefits should be payable. Except upon dishonorable discharge, it is the view of the committee that recognition should be given of meritorious, honest, and faithful service."

[50] Hearings on H. R. 3917 and S. 1767 Before the House Committee on World War Veterans Legislation, 78th Cong., 2d Sess. 415–16 (1944).

adoption of this phrase under prevailing service department practices would unjustly deprive persons of benefits.[51]

B. *THE POLICY OF THE SERVICE DEPARTMENTS*

Before Public Law 346 was enacted, steps were being taken among the services to standardize discharges and their criteria.[52] A common policy for the Army, Navy, Air Force, Marine Corps, and Coast Guard was established as to punitive discharges by the Uniform Code of Military Justice.[53] A common policy for these services was established with respect to administrative discharges by the Department of Defense.[54] There are now the following types of discharge, in use by all the services:[55]

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[51] Staff Report No. 12 of the President's Committee on Veterans Pensions, established by Exec. Order No. 10588, 14 January 1955, sometimes known as the Bradley Commission after its chairman, General Omar N. Bradley, issued September 12, 1956, states in part: "Proponents of the phrase, both in and out of Congress, apparently believed that the services were issuing the so-called blue discharges (without honor), undesirable discharges, and bad-conduct discharges in some cases to persons who could not be deprived of veterans' benefits. Several examples were cited, among which are: (1) Persons were administratively discharged on admission of desertion when evidence only establishes absence without leave. (2) Bedwetters issued blue discharges. (3) Navy issuing unfavorable discharges to persons tried and convicted by civil authorities, unfitness, fraudulent enlistment, or by reason of conviction by a special court-martial. (4) Wounded combat veterans issued blue discharges because of violation of regulations, absence without leave, and drunkenness after return to the United States. (5) Army issues blue discharge to persons who falsify their age and are subsequently discharged on request of parents. (6) Army issues blue discharge to persons who have not shown sufficient aptitude toward military service. (7) Undesirable discharges are at times issued through error because it is an easy way of reducing personnel. (8) Blue discharges given to physical misfits such as to a man with two right legs.

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"The Congress did not want to use the words 'honorably discharged' or 'discharged under honorable conditions,' because it was felt that such an eligibility requirement was too restrictive. Neither did Congress want to use the words 'not dishonorably discharged' because such words would have been too broad and opened the door to persons who were administratively discharged for conduct that was in fact dishonorable. The controversy was finally resolved by adopting the words 'conditions other than dishonorable.'" *Id.* at 11–16.

[52] Hearings on H.R. 3917 and S. 1767, *supra* note 50, at 302.

[53] Act of May 5, 1950, ch. 169, 64 Stat. 107, now codified in 10 U.S.C. §§ 801–935 (1958).

[54] DOD Directive No. 1332.14 (Jan. 14, 1959).

[55] Within the limits set by the Uniform Code of Military Justice and the Department of Defense Directive, there remains some diversity. The Uniform Code provides that a bad conduct discharge may be given only by special or general court-martial. The Army has decided, however, to allow only a general court-martial to do this. See Army Regs. No. 22–145 (1957). This is accomplished by providing as a rule that there shall be no court reporter for special courts-martial. Article 19 of the Uniform Code requires that there be a complete record of the proceedings before a bad conduct discharge may be validly adjudged. For a discussion of the unusual situation in which a dishonorable discharge was given administratively, see Pasley, *Sentence First-Verdict Afterwards: Dishonorable Discharges Without Trial by Court-Martial?*, 41 Cornell L. Q. 545 (1956).

Honorable—given only administratively
General—given only administratively
Undesirable—given only administratively
Bad Conduct—given only by special or general court-martial
Dishonorable—given only by general court-martial

Previously there was variation between the services as to the type of discharge which would be given in the same circumstances.

The cited Department of Defense Directive provides for honorable discharge where there is proper military behavior, including "proficient and industrious performance of duty." Eligibility thereto otherwise depends upon existence of one of the following reasons: expiration of enlistment or fulfillment of service obligation; convenience of the Government; hardship or dependency; minority; disability; unsuitability; security;[56] when directed by the Secretary of the Department concerned; resignation for one's own convenience. A general discharge may be granted where the military record is not sufficiently meritorious to warrant an honorable discharge. The Directive further provides:

> An undesirable Discharge is an administrative separation from the service 'Under Conditions Other than Honorable.' It is issued for unfitness, misconduct or for security reasons. It will not be issued in lieu of trial by court-martial except upon the determination by an officer exercising General Court-Martial jurisdiction or by higher authority that the interests of the service as well as the individual will best be served by administrative discharge.

The Directive distinguishes unsuitability from unfitness and misconduct. Unsuitability calls for an honorable or a general discharge, while unfitness or misconduct calls for an undesirable discharge. This distinction appears to be based on the premise that unsuitability is a matter beyond the serviceman's control, but unfitness or misconduct is more or less voluntary. Unsuitability includes inaptitude; character and behavior disorders; apathy, defective attitudes, and inability to expend effort constructively; enuresis; chronic alcoholism; homosexual tendencies; and other good and sufficient reasons when determined by the Secretary of the Department concerned. Examples of unfitness, for which an undesirable discharge is generally prescribed, are frequent involvement of a discreditable nature with civil or military authorities; sexual perversion; drug addiction; an established pattern for shirking; an established pattern showing dishonorable failure to pay just debts; and other good and sufficient reasons when determined by the Secretary concerned. As to misconduct,

[56] Unconcealed pre-service activities or associations which may reflect on a person's loyalty are not grounds for a lesser discharge. See Harmon v. Brucker, 355 U.S. 579 (1958). Whether such post-service activities or associations of a reservist may be considered in determining the character of discharge from the reserves is undecided. Olenick v. Brucker, 173 F. Supp. 493 (D.D.C. 1959), *rev'd and remanded*, 273 F.2d 819 (D.C. Cir. 1959).

the Directive provides for undesirable discharge (except in unusually meritorious cases) where one or more of the following conditions exist:

1. Conviction by civil authorities (foreign or domestic) or action taken which is tantamount to a finding of guilty of an offense for which the maximum penalty under the UCMJ is death or confinement in excess of one year; or which involves moral turpitude; or where the offender is adjudged a juvenile delinquent, wayward minor, or youthful offender as a result of an offense involving moral turpitude . . . .
2. Procurement of a fraudulent enlistment, induction or period of obligated service through any deliberate material misrepresentation or concealment which, except for such misrepresentation or concealment, may have resulted in rejection.[57]
3. Prolonged unauthorized absence. When unauthorized continuous absence of one year or more has been established but punitive discharge has not been authorized by competent authority.

From the foregoing definitions, it is clear that an honorable discharge and a general discharge are under conditions other than dishonorable. It is likewise clear, from the words alone, that a dishonorable discharge is not under conditions other than dishonorable. This narrows any question of character of discharge for veterans' benefits purposes to the undesirable discharge, given administratively, and the bad conduct discharge of a special court-martial.[58]

C. *THE VA REGULATIONS*

Section 211(a) of title 38 of the United States Code provides in part:

> . . . [T]he decisions of the Administrator on any question of law or fact concerning a claim from benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.

Under section 210(c) of title 38 of the United States Codes, moreover, the Administrator of Veterans Affairs has authority to make regulations "with respect to the nature and extent of proofs and evidence and the method of taking and furnishing them in order

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[57] The directive in section VII–E states explicitly that this provision does not include misrepresentation of age. In such event, honorable or general discharge is called for, unless the enlistment was void.

[58] A discharge by general court-martial, dishonorable or bad conduct, is a bar to benefits in view of 38 U.S.C. § 3103(a), *supra* note 8. However, in 1944 when Public Law 346 was enacted containing this bar, a bad conduct discharge by court-martial was not authorized in the Army. General and special courts-martial were authorized to adjudge such a discharge in the Army by §§ 209 and 210, respectively, of Public Law 759, 80th Congress, ch. 625, 62 Stat. 604, 629 (1948). This was made applicable to the Air Force by Public Law 775, 80th Congress, ch. 648, 62 Stat. 1014 (1948). These acts are now superseded by the Uniform Code. Today in the Army a bad conduct discharge is not usually within the jurisdiction of a special court-martial. See note 55 *supra*.

to establish the right to benefits." This final and conclusive authority, however, does not extend to matters which are within the peculiar function of another government agency, such as character of discharge. The expression "under conditions other than dishonorable" requires no exercise of authority by the Veterans' Administration where a discharge is honorable, general, or dishonorable. The determination of the service department as to these three categories of discharge is conclusive for veterans' benefits purposes. If there is an undesirable or bad conduct discharge, however, the service department has exhausted its function with respect thereto, in the absence of mistake or in the absence of the application of the provisions of sections 1552 and 1553 of title 10 of the United States Code[59] and the Veterans' Administration must evaluate the actions of the serviceman which resulted in the undesirable or bad conduct discharge for the purpose of ascertaining whether such discharge was "under conditions other than dishonorable."

VA Regulations 1012 provide that a discharge or release is under dishonorable conditions in the following circumstances unless the person was insane at the time of committing the offenses:[60] mutiny, spying, or any offense involving moral turpitude or willful and persistent misconduct; by reason of sentence of a general court-martial; acceptance of an undesirable discharge to escape trial by general court-martial; resignation by an officer for the good of the service; as a deserter; as a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities; as an alien at his own request during a period of hostilities; because of willful and persistent misconduct. However, where service was otherwise honest, faithful, and meritorious, a discharge or separation other than dishonorable because of a minor offense shall not constitute willful and persistent misconduct. The regulation further states that "Homosexual acts or tendencies generally will be considered a discharge under dishonorable conditions."

The regulation may be changed in the light of developments in the service department practices since the enactment of Public Law 346. For example, the regulation provides that a discharge for homosexual tendencies generally will be a bar to benefits. But the Department of Defense Directive distinguishes between acts and tendencies, providing as a rule, for a general discharge as to tendencies (as indicative of unsuitability), and a general discharge is under honorable conditions.

[59] See text accompanying note 71 *infra*.

[60] VA Reg. No. 1012, 38 C.F.R. § 3.12 (1961), which implements 38 U.S.C. §§ 101(2) and 3103 (1958).

The regulation states, pursuant to section 3103 of title 38 of the United States Code, that a discharge which would be a bar to benefits shall not stand if it is held by the Veterans' Administration that the offense, for which the discharge was given, was committed while the serviceman was insane. In a claim for veterans' benefits, insanity need not be affirmatively asserted. If the records indicate a possibility thereof, the Veterans' Administration will consider the matter. In this connection, neuropsychiatric and medical examinations made in the service are important evidence.

The regulation also provides, pursuant to this same section, that a discharge for alienage at the servicemen's request during hostilities is a bar to benefits. As a practical matter, this has reference only to World War I veterans of the Army where the discharge was during a period of hostilities. Discharge on this basis is not authorized under the Department of Defense Directive. In 1959, section 3103, *supra*, was amended by adding the following:

> No individual shall be considered as having been discharged on his own application or solicitation as an alien in the absence of affirmative evidence establishing that he was so discharged.[61]

D. *OPERATIONAL STATISTICS*

The Veterans' Administration does not have comprehensive statistics as to the number of cases in which benefits are barred because of the character of discharge requirement. It must be recognized that in many cases where there was a dishonorable discharge—probably the large majority—and also in cases where there was a bad conduct discharge by general court-martial, no formal claims for benefits are made.

The following statistics have been supplied informally by the Veterans' Administration, Department of Veterans' Benefits, for the Fiscal Year 1960: A total of 191,216 new disability claims were adjudicated, of which 91,156 were disallowed, the cause in 1,344 cases being character of discharge. A total of 120,888 new death cases were adjudicated; 69,178 were disallowed, the cause in 358 cases being character of discharge.

In the Report of the President's Commission on Veterans' Pensions,[62] there appears the following summary:

> A survey of action taken by the Veterans' Administration in 415 cases of veterans given undesirable discharges during the period of July 1, 1953 [sic] [63]—June 30, 1954, discloses that 32 were found eligible for veterans' benefits. . . .

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[61] Act of July 28, 1959, 73 Stat. 262.

[62] *Supra* note 51.

[63] Date probably should be July 1, 1952—June 30, 1954.

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A survey of action taken by the Veterans' Administration in 184 cases of veterans given bad conduct discharges during the period July 1, 1952—June 30, 1954, disclosed that only 5 were found by the Veterans' Administration to have been separated under conditions other than dishonorable and therefore eligible for benefits.[64]

E. *PROCEDURE*

Where there is a claim for veterans' benefits in which a bad conduct or undesirable discharge is presented, it has been the practice of the Veterans' Administration to request further information from the service department as to the attendant facts and circumstances. This is done by execution of a VA Form 3101, "Request for Information," which has been devised for the purpose of seeking information from a service department on any aspect of a person's records, including, for example, the dates of service, his marital status, medical data, etc. Recently the service departments began the practice of indicating the basis for discharge or release from service by use of a code number on the Department of Defense Form No. 214, "Armed Forces of the United States Report of Transfer or Discharge." It is standard procedure for copies of this form to be sent by the service department to the Veterans' Administration within 48 hours after discharge.[65] The practice of using code numbers[66] does not appear to have affected the need of the Veterans' Administration to seek further information in such cases.

In the event of a claim for veterans' benefits in which the serviceman received an undesirable or bad conduct discharge, an adjudicator of the Veterans' Administration, upon receiving necessary data from the service department, prepares a memorandum of his findings and conclusion as to whether the discharge is a bar to benefits. This is subject to the approval of the authorization officer. If it is concluded that the discharge is not a bar, further action within the agency to ascertain entitlement is taken, depending on the nature of the claim. If it is concluded that the discharge is a bar, the claim is disallowed,[67] subject to appeal. Determinations respecting such discharges may also be made by

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[64] *Id.* at 396–97.

[65] VA, Manual MP–1, pt. 2, para. 1201.02 (1956); Army Regs. No. 635–5 (1960); Bupers Instruction No. 1900.2B (March 31, 1959); and Air Force Reg. No. 35–10 (1959).

[66] The numbers and their meanings for officers and enlisted personnel are given in AR 635–5, *supra* note 65; Bupers Instruction 1900.2B, *supra* note 65; and AFR 35–10, *supra* note 65.

[67] VA, Manual 8–5, para. 6*a* (1954).

the Veterans' Administration upon request of other agencies, such as the Departments of Labor and State.[68]

Appeal from an adverse determination by the Veterans' Administration as to a claim for benefits is authorized by statute.[69] An appeal must be filed within one year of the mailing of the notice of the determination. It is decided by the Board of Veterans' Appeals, established by the statute. The decision of the Board is final. The number of appeals relating to questions of discharge is a relatively small proportion of the appeals filed.[70]

Denial of benefits by the Veterans Administration because of character of discharge, whether by the adjudicating activity or by the Board of Veterans' Appeals, does not bar an award at a later date if a Board for Correction of Records or a Discharge Review Board, acting upon an application to correct the record or remove an injustice under the provisions of section 1552 or 1553 of title 10 of the United States Code, corrects or changes the discharge to one which is under conditions other than dishonorable. Reconsideration by the Veterans Administration is based on the discharge as so corrected or changed.[71]

F. *VARYING PERIODS OF SERVICE*

If a person has had two periods of service, he may have one discharge under conditions other than dishonorable, the other under honorable conditions. In such event, benefits may be awarded based upon the period of service for which a discharge was given under conditions other than dishonorable.[72] The sequence of the discharges is immaterial. Where a disability is incurred in line of duty, it may be compensable if it was suffered during the period of service for which a discharge was given under conditions other than dishonorable, but it is not compensable if it was suffered during a period of service not so terminated.[73] Also, in the absence of entitlement to compensation or where compensation is the lesser benefit, a non-service-connected pension may be payable, where otherwise proper, based on the period of service for which a discharge was given under conditions other than dishonorable.

Sometimes a determination must be made whether a person has had one period of service or two. For example, the date of expira-

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[68] *Id.* para. 180.

[69] 38 U.S.C. §§ 4001–4008 (1958).

[70] Of 15,825 appeals decided during the period July 1, 1960 through December 31, 1960, 55 cases were on the character of discharge.

[71] 38 U.S.C. § 3004 (1958); Administrator's Decision No. 665, August 15, 1945.

[72] Administrator's Decision No. 655, June 20, 1945.

[73] VA Reg. No. 1012(A), 38 C.F.R. § 3.12(a) (1961).

tion of a term of service could occur in time of war when statutory provisions keep the person in the service. In such a case the discharge ultimately given, when war conditions and other circumstances permit, would be the only discharge to be considered for veterans' benefits. A VA regulation [74] provides that a discharge to accept appointment as a commissioned or warrant officer, or to change from a Reserve or Regular commission to accept a commission in the other component, or to reenlist is not a discharge for the purpose of veterans' benefits if it was issued in World War I prior to November 11, 1918; in World War II or Korean Conflict prior to the date the person was eligible for discharge under the point or length of service system, or under any other criteria in effect; or in peacetime prior to the date the person was eligible for an unconditional discharge. Eligibility to entitlement will be determined by the character of discharge upon the final termination of active service.

G. *WHAT IS A DISCHARGE?*

Closely related to the matter of whether there were one or two periods of service is the question of whether a person was discharged or not. One important decision in this area concerned a member of the Lighthouse Service of the Department of Commerce. This service was under the jurisdiction of the Navy from April 14, 1917, until July 1, 1919. The person who made claim for benefits served during this period, and he remained with the Lighthouse Service until his retirement. It was held that when the Service reverted to the Department of Commerce, the man was regarded as discharged for veterans' benefit purposes. The opinion stated, citing cases: [75]

> Under the precedents of the Pension Bureau of the Secretary of the Interior, it is not necessary that a veteran receive a discharge so labeled in order to be entitled to pension. It has been held that if the veteran's military service were terminated under honorable conditions, either by operation of law, Executive act, or the mutual assent of the parties thereto, the requirements of the law concerning discharge are sufficiently complied with. . . .[76]

A similar situation was considered in another case, decided in 1934. A sailor who was eligible for discharge extended his enlistment, and no certificate of discharge was then issued. He ultimately was given a bad conduct discharge. The question was whether he could be regarded as having been discharged when his

[74] VA Reg. No. 1013, 38 C.F.R. § 3.13 (1961) ("Discharge to Change Status").

[75] United States v. Emory, 19 Ct. Cl. 254 (1884), *aff'd*, 112 U.S. 510 (1884); 6 P.D. 255 (1893); 6 P.D. 260 (1893); 16 P.D. 240 (1905).

[76] Administrator's Decision No. 104, November 17, 1932.

term of enlistment expired. The statute under which he extended his enlistment provided that an extension should not deprive a man of any rights or benefits. Under the circumstances, the question was answered in the affirmative.[77] Another decision concerned a person who accepted a reserve commission January 20, 1939. He had active service from June 11, 1939 to June 30, 1939, and again from September 8, 1940 to June 30, 1941. He was recalled to active duty January 14, 1942, and his resignation for the good of the service was accepted April 27, 1943. The resignation was a bar to benefits under section 300 of Public Law 346.[78] The question presented was whether his active duty from September 8, 1940 to June 30, 1941, could be considered a period of service from which he had a "discharge or release." The decision held in the affirmative, noting "that when a reserve officer is released from active duty he reverts to the status of a civilian, and that such release is tantamount to a discharge from such period of active service." [79] The National Guard Bureau was recently concerned as to whether the discharge or release of a guardsman was necessary before he could be eligible to veterans' benefits. The Bureau was advised that if the guardsman was now in civilian status he would be eligible, even though not relieved from possible liability for future service with the National Guard. Likewise, members of the Armed Forces who became civilians with a reserve obligation are considered discharged or released for the purpose of veterans' benefits.

H. *VALIDITY OF ENLISTMENT*

Another factor which enters into a determination of whether a particular discharge is a bar to veterans' benefits relates to the validity of an enlistment. For example, a person could misrepresent his age or conceal a criminal record. A VA regulation [80] which applies to benefits other than insurance, states that such service is valid unless the enlistment is voided by the service department. But if the service department voids an enlistment which is not prohibited by statute, the voidance takes effect on the day of the voidance. Benefits could therefore be paid if the discharge was under conditions other than dishonorable. Where the enlistment is prohibited by statute, however, as in the case of a deserter or person convicted of a felony, or where the person did not have legal capacity to contract for a reason other than minority, the voidance by the service department is retrospective.

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[77] Administrator's Decision No. 275, October 8, 1934.
[78] See note 8 *supra*.
[79] Administrator's Decision No. 653.
[80] VA Reg. No. 1014, 38 C.F.R. § 3.14 (1961).

In the case of concealment of minority or misrepresentation of age, the regulation provides that service is valid from the date of entry upon active duty to the date of discharge.

The provision on minority is more liberal than the Department of Defense Directive, under which an enlistment may be voided for minority, although discharge, honorable or general, is also permitted. In this instance, the Veterans' Administration is not bound by the voidance of an enlistment by the service department in view of legislation to that effect.[81]

Although compensation is not payable when a person suffers disability during an enlistment which was voided by the service department for fraud (concealment of a conviction for a felony), a contract of National Service Life Insurance, entered into before the voidance of the enlistment, is not voided by the action of the service department.[82] But forfeiture of the insurance results from desertion.[83]

VI. LENGTH OF SERVICE

Length of service is not generally material with respect to entitlement to veterans' benefits in the case of persons now entering service. It may indirectly affect entitlement, however. Every person employed in the active service for six months or more in peacetime is presumed to have been in sound condition when he entered service, except as otherwise shown or then noted.[84] The presumption could be important in establishing service connection in a claim for disability compensation and death benefits. In wartime, the six months' limitation is not applicable.[85] Also entitlement to disability or death compensation might arise upon service of one day, wartime or peacetime, if a service-connected injury were incurred that day which resulted in disability or death.[86]

In time of war, length of service as well as character of service has been material to eligibility for entitlement to some benefits: educational benefits; unemployment assistance; loan guaranty for home, farm, or business; and non-service-connected pension. These benefits have generally expired except as to some veterans of the Korean conflict, who are still eligible for all of these benefits;

[81] See Administrator's Decision No. 643, April 9, 1945.
[82] Ops. Sol. VA 253–51, 235(a)–51 (1951). These are the published decisions of the Solicitor, now General Counsel, of the Veterans' Administration.
[83] 38 U.S.C. § 711 (1958).
[84] 38 U.S.C. § 332 (1958).
[85] 38 U.S.C. § 311 (1958).
[86] 38 U.S.C. §§ 310, 321, 331, 341 (1958).

loan guaranty benefits for veterans of World War II;[87] and pensions for veterans of any war. If the history of our Nation is indicative, legislation will be enacted to make available, in the event of future wartime service, benefits similar to those which have expired.[88] Gratuitous social security credits were granted retroactively to veterans of World War II and the Korean conflict if they had a discharge under conditions other than dishonorable, either after good service of 90 days or more, or by reason of a disability or injury incurred or aggravated in the active service.[89] Persons in the service after December 31, 1956, are now covered as "employees." [90]

Where the character of discharge requirement is met, entitlement of Korean conflict veterans to education and training allowance and the duration thereof depends as a rule upon the length of Korean conflict service.[91] Duration of entitlement of World War II veterans also depended upon the length of service.[92] Eligible veterans of the Korean conflict—primarily those who have continued in the active service—must be enrolled in an approved course within three years of discharge. In the event of service-connected disability which is compensable, vocational rehabilitation is available without regard to length of service. A like benefit was granted veterans of World War I and World War II if they had a service-connected disability.[93]

Loan guaranty and unemployment assistance were first granted to veterans of World War II.[94] These benefits were granted veterans of the Korean conflict by the 82d Congress.[95] Criteria for eligibility for veterans of the Korean conflict are the same as for veterans of World War II: 90 days or more good service, or discharge for a service-connected disability. Unemployment benefits for veterans of the Korean conflict are usually payable by the several states under agreements with the Secretary of Labor.[96] Loan guaranty is accomplished by the Veterans' Administration.

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[87] Extended to June 30, 1962, by Public Law 86–665, 74 Stat. 531 (1960).

[88] Legislation is now pending to grant readjustment benefits to veterans of the "cold war" including S. 349; S. 1153; H.R. 803; H.R. 1966; H.R. 2558; H.R. 3884; and H.R. 4904.

[89] Section 105, ch. 809, 64 Stat. 477, 512 (1950), as amended, 42 U.S.C. § 477 (1958).

[90] Section 402, 70 Stat. 857, 870 (1956), 42 U.S.C. § 410(m)(1) (1958).

[91] Act of July 16, 1952, ch. 875, 66 Stat. 663, now codified in 38 U.S.C. § 1610 *et seq.* (1958).

[92] Section 400, Public Law 346, *supra* note 46.

[93] Act of March 24, 1943, ch. 22, 57 Stat. 43, now codified in 38 U.S.C. §§ 1501–1510 (1958); sections 400–407, World War Veterans Act, *supra* note 8.

[94] Titles III and V, Public Law 346, *supra* note 46.

[95] 38 U.S.C. §§ 1801–1824 and 2001–2014 (1958).

[96] 38 U.S.C. § 2001 (1958).

Non-service-connected pension may be payable to a veteran discharged under conditions other than dishonorable in the event of permanent and total disability, provided his income is below a certain ceiling and provided he had good service of 90 days or more during World War I, World War II or the Korean conflict. If he was discharged for a service-connected disabiilty, the 90-day service requirement is not applicable.[97] For veterans of prior wars, conditions are more liberal. The criteria relating to service or discharge for disability are the same in a claim to pension by the widow of a veteran of World War I, World War II, or the Korean conflict.[98] Surviving children[99] of such veterans may be entitled if there is no widow, or if she remarries. The income limitations were liberalized as to such veterans, widows, and children under certain conditions by amendments of pertinent sections of title 38 in 1959.[100]

VII. CONCLUSION

On the whole, it is the character of discharge which controls eligibility to entitlement to veterans' benefits. The timing of a discharge may also be important, however, as indicated. Early detection of an individual's character would preclude the induction or enlistment of the non-conformist, the inapt, or the abnormal and thus could preclude an ultimate undesirable or punitive discharge.

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[97] 38 U.S.C. § 521 (1958). See also VA Reg. No. 1, pt. III, Exec. Order No. 6089, as amended (1933).

[98] 38 U.S.C. §§ 536, 541 (1958).

[99] A "child" of a veteran, as defined in 38 U.S.C. § 101(4) (1958), is a person who is unmarried and under the age of 18 unless he (a) became permanently incapable of self-support before age 18 or (b) is attending school while under 21.

[100] 73 Stat. 432 (1959).

A HISTORY OF SHORT DESERTION*

BY ALFRED AVINS**

I. INTRODUCTION

Article 85(a) of the Uniform Code of Military Justice[1] provides, in part, as follows:

> Any member of the armed forces of the United States who—. . . (2) quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service . . . is guilty of desertion.

The above section of the article punishing desertion is a relatively recent addition to the military law, and is commonly known as "short desertion" or sometimes "constructive desertion." This form of desertion is primarily of consequence during wartime, when important military duties become more numerous, and when the military force of the nation is engaged in armed combat, resulting in the necessity for performance of many hazardous duties arising from or incident to such combat. Indeed, as this article will show, wartime conditions such as these initially prompted the enactment of the statute.

This article will examine the historical basis of the offense of short desertion. It will trace the offense from its origin in the British practice through its final enactment in the American articles of war and the Uniform Code of Military Justice.

II. EARLY BRITISH DEVELOPMENT

While the offense of desertion committed with intent to avoid hazardous or important service, as a separate statutory offense, is of relatively recent origin, the acts sought to be prohibited thereby are as old as the military service itself, and recorded

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** Assistant Professor of Law, The John Marshall Law School, Chicago, Illinois; B.A., Hunter College; LL.B., Columbia University School of Law; LL.M., New York University, and University of Chicago; Member of Bars of Florida, District of Columbia, New York, and United States Court of Military Appeals; Author, The Law of AWOL (Oceana, 1957), and numerous other legal articles.

[1] Act of May 5, 1950, § 1, ch. 169, 64 Stat. 108 (effective May 31, 1951). Reenacted in 1956 as 10 U.S.C. §§ 801–940. Act of August 10, 1956, § 1, ch. 1041, 70A Stat. 1, 36–79 (effective Jan. 1, 1957).

courts-martial therein. The earliest records of English courts-martial in the navy, dating from the seventeenth century, show, for example, a case where a naval lieutenant deserted his station during a battle and hid for two hours in the captain's storeroom. He was sentenced for this "to be taken to each flagship in the fleet between the hours of ten and twelve and his crime to be there proclaimed by the Provost Martial [sic] with beat of drum."[2] As noted below, this type of battlefield desertion was punished under the general statute forbidding desertion.[3]

The earliest reported case in the civil court reports dealing with the crime of desertion likewise deals with an offense which would now be punished under Article 85(a)(2). The rather fragmentary report indicates that certain soldiers who had been drafted into Queen Elizabeth's service to fight rebels in Ireland had deserted. It was held that, under the provisions of an ancient statute, they might be tried for a felony and executed.[4] Similarly, twenty-seven years later, cases arose which would now be classified as embarkation desertion, and there the judges held that "one who receives presse-money to serve the King in his wars, and is in the King's wages, and with others is delivered to a conductor, to be brought to the sea-side, and withdraweth himself and runneth away without license," is guilty of felony.[5]

Prosecution in the civil courts for desertion rapidly fell into disuse in England with the advent of the Mutiny Act, but there is ample evidence to indicate that courts-martial punished short desertion by finding the offender guilty of an intent not to return to service, and hence convicting him of straight desertion. It is not that the court would be unaware of the difference between absence without leave and desertion; the distinction, requiring an intent to remain away permanently in the case of the latter offense, was observed at an early date.[6] Rather, the facts which today would show short desertion were considered, as they indeed still are in many cases, as exhibiting an intent not to return at all, and so proof of desertion in the traditional sense. A passage from Hough makes this clear:

> If a soldier quits his ranks during an action, or his corps when on service, it must either be with an intention of deserting, through

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[2] Hannay, Naval Courts-Martial 14 (1914). See also James, General Courts-Martial 124 (1820) (Case of Capt. Charles Gore, 1802).

[3] In this case, § 17 of the Articles for the Government of the Navy of 1661, 13 Charles II, c. 9. See also § 12 (misbehavior before enemy) and § 27 (forsaking station).

[4] The Case of Soldiers, 6 Co. Rep. 27a, 77 Eng. Rep. 293 (1601).

[5] The Soldier's Case, Hutt. 134, 123 Eng. Rep. 1154, Cro. Car. 71, 79 Eng. Rep. 663 (1628).

[6] Avins, The Law of AWOL 40 (1957).

cowardice, with the design of assisting the enemy, or from disaffection to the service, and therefore, from whichever cause, the case deserves the severest penalty.[7]

In a later work, the same author amplifies his point with a case wherein a soldier deserted while his battalion was on service during the war with Nepal of 1814–1816, by quoting the Commander-in-Chief's remarks that "the enormity of the crime of deserting on active service having been justly exhibited to the native troops by the proper and conscientious judgment of the court-martial, the Commander-in-Chief warns the soldiers, that no man must expect mercy who shall abandon his colours."[8] Moreover, the sweep of Hough's strictures extended to deserting when under orders for service. He declares that this offense should rank next to desertion on service, because the examples of those soldiers who commit this crime may lead others to do likewise, and thus no reliance can be placed on the number of soldiers available in an emergency.[9]

Finally, Hough condemns all wartime desertion as deserving of the death penalty because the government is deprived of the soldier's service when it is most needed and when it is most difficult to find a replacement. He particularly notes the difficulty of augmenting units in overseas areas which are reduced by desertion. He declares that "deserting in front of the enemy . . . or during an action, or when on actual service, deserves a sentence of death."[10]

No one can read the above views without being impressed by the probabilty that courts-martial of that time would not be likely to inquire too closely as to whether the intent not to return existed or not when presented with a situation where the accused went absent without leave from a unit in combat or from one going into combat, or attempted to evade, by unauthorized absence, an overseas shipment. On the contrary, the average court of military officers, who were not judge advocates as was Hough, would probably not draw any such line, but rather, in those circumstances, find the accused guilty of desertion without hesitation. It would seem, therefore, quite probable that short desertion was generally punished under a straight desertion charge and specification.

In light of the frequency with which short desertion occurs, especially in wartime, the failure of other writers to mention these offenses specifically is a significant item of evidence showing that

[7] Hough, The Practice of Courts-Martial 138 (1825).
[8] Hough, Precedents in Military Law 139–40 (1855) (Case #4).
[9] *Id.* at 133 (Case #4).
[10] *Id.* at 132 (Case #2).

they were handled no differently from other desertion cases. As late as the fourth edition of Simmons[11] or D'Aguilar's book,[12] mention is only made of intention to remain away permanently under the discussion of desertion. And in several treatises on naval law, there is likewise an absence of any discussion of short desertion.[13]

III. ESTABLISHMENT OF SHORT DESERTION IN BRITISH LAW

In the closing years of the Mutiny Act in England, the first indication appears that short desertion would be considered separately from regular desertion. In a late edition of Simmons, it is stated that "proof that a soldier belonged to a draft which embarked to join the service companies of a regiment abroad, and that he was apprehended after the transport had sailed, and at a distance from the port of embarkation, has been held to justify a conviction for desertion, the prisoner not offering any explanation for his absence."[14]

It is highly significant that the above passage is found, not in the section on discussion of desertion itself, but rather in the section on evidence, and more particularly, under presumptions. As noted above, intent to avoid hazardous duty or embarkation was originally considered as evidence of intent to remain away permanently, the only ultimate proof which would satisfy the common-law definition of desertion. Gradually, a presumption evolved that the presence of such intent proved the intent necessary for desertion, but it must be noted that at this time the presumption was still rebuttable. Thus, it is clear that the separate offense of short desertion evolved originally from a rule of evidence from which courts-martial used to find the intent necessary for straight desertion. This fact, which will be more particularly noticed

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[11] Simmons, Courts-Martial 800 (4th ed. 1852).

[12] D'Aguilar, Courts-Martial 148 (1866).

[13] Hickman, Naval Courts-Martial 179–80 (1851); Stephens, Gifford & Smith, Manual of Naval Law 151 (1901 ed.); *Id.* at 145 (1912 ed.).

[14] Simmons, Courts-Martial § 878, p. 360 (7th ed. 1875). It might also be noted that Pipon in Manual of Military Law (1863), presented some of the elements of the modern offense of short desertion. He declared that "it may be suggested that a presumption of desertion . . . would arise from a soldier's being found on shore at a distance from the port of embarkation, when his regiment or draught had sailed." *Id.* at 149. He likewise noted that "if any such officer, volunteer, or noncommissioned officer, not incapacitated by infirmity for military service, refuses or neglects to so assemble or march, he shall be deemed a deserter." *Id.* at 316. While it is of significance that this was an official publication, nonetheless, the section involved was a discussion of evidence of desertion. The portion dealing with the substantive elements of desertion was traditional. *Id.* at 97.

below, is the only explanation which could logically justify the presence of the first American statute on this subject, not with the punitive articles, but rather cast as a statutory rule of evidence.

A few years later, the mutiny acts gave way to a major reform in British military law, the Army Act of 1881.[15] The offense of desertion is not defined therein; rather, the statute simply provides that "Every person . . . who . . . (a) Deserts or attempts to desert Her Majesty's service" shall be punished by a court-martial.[16] Nothing appears in the statute which would seem to justify a change in the military comon-law definition of desertion as absence without leave with intent to remain away permanently. Nevertheless, an examination of the military textwriters of this period makes clear the fact that the passage of the Army Act marked the turning point after which short or constructive desertion was recognized as having an independent status of its own.[17]

As early as a year after the passage of the Army Act, O'Dowd, a barrister and Deputy Judge Advocate General, after discussing the offense of desertion in traditional terms, declares that "absence without leave for the purpose of avoiding active service also constitutes desertion."[18] Active service is not defined in that section, but it may be presumed that, on the basis of other passages in the book and on generally accepted English military terminology of the time, it meant active military operations, especially combat.

This definition of desertion, or more properly constructive desertion, spread rapidly to British forces and dominions overseas. Four years after O'Dowd, the following questions and answers appear in a simplified version of a military law book published in Canada for use primarily in the Canadian militia:

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[15] 44 & 45 Vict., c. 58.

[16] *Id.* § 12(1).

[17] Nothing could more forcefully illustrate this point than the fact that a few textbooks written on the eve of the Army Act still do not mention short desertion. See, Gorham, Textbook of Military Law 86 (1880), and Douglas-Jones, Notes on Military Law 113 (1881), which still defined the offense in the traditional manner only. Indeed, Douglas-Jones' Text on Military Law (1882), written in January, 1882, for instructional use at the Royal Military College of Canada by the Professor of Military Law therein, and which incorporates the 1881 Army Act and regulations, still does not mention short desertion. *Id.* at 174–75.

[18] O'Dowd, Practical Hints to Courts-Martial 52 (1882). See also Pratt, Military Law 126 (1884), which states: "161. Desertion is constituted when a man absents himself with the intention either of not returning to the service, or escaping some particular service, such as active or foreign service." Pratt also declared: "A man who hides himself at the time his regiment is embarking for foreign service can be tried for desertion as his intention to evade this particular service is apparent." *Id.* at 127–28.

#21. Q. What constitutes the crime of desertion when called out for active service?

A. Absence without leave for a longer period than seven days.[19]

#58. Q. What is the penalty for refusal to turn out when warned for active service?

A. [It] amounts to desertion.[20]

By the time of the Manual of Military Law of 1888, all pretense that absence without leave with intent to avoid important service was merely evidence of an intent not to return was gone. The following passage from that Manual makes this clear:

> A man who absents himself in a deliberate or clandestine manner, with the view of shirking some important service, though he may intend to return when the evasion of the service is accomplished, is liable to be convicted of desertion just as if an intention never to return had been proved aaginst him.[21]

It should be noted that the above passage assumes that the absentee does in fact intend to return to the service. What it does is to permit the court-martial to substitute an intent to avoid important service for the intent to remain away permanently. Nothing in the statute would appear to authorize such administrative legislation. Nor is any authority cited for the change.

It is significant that the above paragraph occupies no special position in the discussion on desertion. Instead, it is merely sandwiched in with other paragraphs discussing the traditional ways of proving an intent to remain away permanently. For aught that would appear to the casual reader, the above paragraph, which for the first time sets forth the elements of constructive or short desertion, is nothing more than a rule of evidence for the proof of desertion of the traditional variety. The fact that short desertion entered British military law in this fashion is significant in understanding its development in the United States.

The identical paragraph in the 1888 manual was copied into the 1914 manual,[22] which, as will be noted below, served as the model for the American development. In addition, the 1914 manual contained a specimen charge for short desertion, consisting of embarkation evasion.[23] It may be assumed that this feature, too, was copied by the American manuals for courts-martial.

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[19] MacPherson, Military Law 12 (1886).

[20] *Id.* at 20. Active service is also not defined here. However, it may be read in connection with the remarks of Col. Frederick A. Stanley, Secretary of State for War, who, during the debate on the Army Discipline and Regulation Act of 1879, 42 & 43 Vict., c.33, defined the term "active service" as meaning "service in war or when in occupation of an enemy's country." 243 Parl. Deb. (3rd. ser.) 1915 (1879).

[21] Manual of Military Law 6 (1888).

[22] Manual of Military Law 18–19 (1914).

[23] *Id.* at 665.

Textwriters also began to comment on this new form of desertion. Pratt declared that "desertion is constituted when a man absents himself with the intention either of not returning to service, or escaping some important service, such as active service, embarkation for foreign service, or service in aid of the civil power."[24] He also declared that a soldier who hides himself at the time his regiment is embarking for foreign service can be tried for desertion because his intention to evade such embarkation, which Pratt refers to as "important service," is evident.[25]

The close of World War I brought a further clarification of short desertion. Thus, the 1921 manual defined desertion as unlawful absence with "an intention on the part of the absentee either not to return to His Majesty's Service at all, or to return only after having avoided some particular important duty such as embarkation for active service, or a tour of duty in the trenches."[26] Likewise, a decade later, another textwriter declared that "if a man on the eve of embarkation or when called out to aid the civil power hides himself in barracks, the Court may be justified in presuming an intention to escape the important service on which he was ordered and in convicting him of desertion."[27] Two other textwriters of this period also draw the sharp distinction between short and straight desertion.[28] Indeed, a parliamentary committee declared that "desertion frequently begins with absence from a draft which is being sent abroad."[29]

The distinction between straight and short desertion received additional crystallization during World War II. The last manual of military law prior to embodiment of short desertion into the Army Act itself declared that "the offense of desertion . . . implies an intention on the part of the accused either (i) not to return to His Majesty's service at all, or (ii) to avoid some particular important service such as active service, service in a forward area, embarkation for foreign service or service in aid of the civil power."[30] Commenting on the latter form of desertion, the manual declared:

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[24] Pratt, Military Law 160 (18th ed. 1910). Note the change from the 1884 edition's use of "particular service" to "important service."

[25] *Id.* at 162.

[26] Manual of Air Force Law 18 (1921).

[27] Wilkins and Charney, Handbook of Military Law 68 (1930). The authors also noted: "A man who deliberately absents himself with the view of avoiding some important duty, though he may intend to return when the evasion of duty is accomplished, is liable to be convicted of desertion."

[28] Townsend-Stephens, A Practical Digest of Military Law 20 (1933); Lewis, Australian Military Law 137–38 (1936).

[29] Report of the Interdepartmental Committee on Proposed Disciplinary Amendments of the Army and Air Force Acts 11 (1925) (for House of Commons, Great Britain).

[30] Manual of Military Law pt. I, § 2(a), p. 211 (1951).

(d) With regard to that type of desertion constituted by the existence of an intention to evade some particular service (sometimes known as *constructive desertion*) this, if proved, will lead to a conviction for desertion under this section exactly in the same way as desertion with an intention not to return to His Majesty's service at all. Thus, if an officer or soldier on the eve of the embarkation of a draft for overseas service for which he has been properly warned hides himself, thereby avoiding the draft, he might properly be convicted of desertion if the court drew the inference, after hearing all the evidence, that the accused intended to avoid that particular draft for overseas service. In such cases, the particulars of the charge should allege this required intention. Such an allegation is normally supported by strict proof of the order or orders detailing the accused for the particular embarkation and of the further fact that such order was duly brought to the notice of the accused. It is desirable to prove, if possible, that the accused had been personally warned for embarkation, and acknowledged the same. . . . The fact that an accused overstays his "draft" leave after warning for a foreign draft will, if the circumstances warrant the inference that he intended to avoid the draft, lead to a conviction for desertion.

(e) The intention must be to avoid some important particular service, and not merely some routine duty or duty only applicable to the accused. Even on active service, a routine patrol not in the forward area or fire piquet duty for which the accused was detailed would not amount to an important particular service, the intention of avoiding which would constitute desertion under this section.[31]

The Army Act of 1955,[32] which for the first time defined desertion in the statute itself, declared that "For the purposes of this Act a person deserts who— . . . (c) absents himself without leave with intent to avoid serving at any place overseas or to avoid service or any particular service when before the enemy."[33] It can be readily seen that this provision changed the definition of short desertion as found in prior manuals of military law. No longer is there a generalized criterion of "important service." Rather, the types of service avoidance which will constitute desertion are specifically spelled out. As a result, the statute in some respects is broader than the American law and in other respects is narrower. For example, British law now makes unauthorized absence with intent to avoid all overseas duty desertion, whereas, as will be noted below, only in some cases in the United States is such an intent considered sufficient for short desertion, because the service, although performed overseas, must still fall within the definition of "important." On the other hand, according to the above statute, unauthorized absence with an intent to avoid a particular service in the home territory, unless the same is before the enemy, can never be short desertion, while in American

[31] *Id.* at p. 212.

[32] 3 & 4 Eliz. 2, c. 18.

[33] *Id.* § 37(2).

law if the service can be classified as either "important" or "hazardous" an intent to avoid it coupled with an unauthorized absence is enough to constitute short desertion.[34]

Of course, in most instances, the definitions will in practice overlap. An illustration of this fact can be found in the current British manual of military law, which in discussing proof of short desertion, says:

> It must be proved that the accused was warned for embarkation. This is normally done by calling a witness who saw the accused sign a warning order. The warning order should be proximate to the time when the unit or draft is due to leave for overseas and the signing of a preliminary warning order which does not specify the date, or approximate date, of embarkation, would not be conclusive evidence of an intent to desert.[35]

As will be shown below, the requirements stated in the above paragraph are substantially similar to those imposed by the American manual for courts-martial and decisional law in the American armed services for finding intent to avoid embarkation through circumstantial evidence.[36]

Commonwealth countries, whose military law was originally taken from the British, show a considerable variation in their definition of short desertion. For example, Canada uses a hybrid between the British practice and the American practice. According to Canadian law, "a person deserts who being on or having been warned for active service or other important service, is absent without authority with the intent of avoiding that service."[37] Presumably, the definition of "important service" in the Canadian act would be the same as it is in the Uniform Code of Military Justice. Precisely what the meaning of "active service" is cannot be stated with precision; however, from the one reported case under this section, it would seem to correspond, at least in part, with the American term of "hazardous duty."[38]

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[34] United States v. Hyatt, 8 USCMA 67, 23 CMR 291 (1957); United States v. Deller, 3 USCMA 409, 12 CMR 165 (1953); United States v. Apple, 2 USCMA 592, 10 CMR 90 (1953).

[35] Manual of Military Law pt. I, § 10(b), p. 252 (9th ed. 1956).

[36] U.S. Dep't of Defense, Manual for Courts-Martial United States 1951, para. 164*a*, p. 314; United States v. Hemp, 1 USCMA 280, 3 CMR 14 (1952).

[37] National Defence Act of Canada, c. 43, § 79(2)(a) (1950); 3 Can. Rev. Stat. c. 184 at p. 3823 (1952).

[38] Goulet v. The Queen, 1 Canadian Court Martial Appeal Reports 19 (1952).

There is no definition of the term "deserts" in the military codes of India,[39] New Zealand,[40] or South Africa,[41] all of them merely providing that one who "deserts" commits a military offense, just as the Army Act of 1881 did. Presumably, in light of the fact that the term is derived from the Army Act, and no other definition appears, the word includes both short desertion as well as straight desertion, as defined in the Manual of Military Law of 1951, set forth above. One New Zealand case would appear to suggest this to be the fact,[42] although it should be noted that this case was decided prior to the latest revision of the New Zealand statute. Under the above view, the law of those three jurisdictions would be generally similar to American law.

Finally, Australian forces are expressly made subject to the Army Act itself.[43] Hence, they would follow the British definition of short desertion.

IV. EARLY AMERICAN DEVELOPMENT

As noted above, in British military law, the special offense of short or constructive desertion developed out of the practice of courts-martial of finding an intent to remain away permanently from evidence of intent to avoid hazardous or important duty. There is no evidence of so uniform a practice in the United States Army, although some items do exist which would tend to point in the same direction.

For example, during the Civil War, "cowardice prompted men to desert when they knew a battle was impending or even during the actual conflict."[44] Thus, in *Pvt. James Burnell's* case,[45] the accused was convicted of desertion from December 29, 1862 to July 9, 1863, in having absented himself, "without leave, from the service of the United States, his said company and Regiment then and there being in constant expectation of a battle." So too, one opinion of General Holt, then The Judge Advocate General, sustained a conviction for desertion in the face of the enemy on November 1, 1862, because "when on a march to meet the enemy and within sound of his cannon, the accused fell out from the ranks to drink at a well, and did not return until after the battle then impending, when he returned voluntarily."[46]

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[39] Indian Army Act (No. 46) of May 20, 1950, 1 India Code, Armed Forces, § 38(1), p. 227 (1955).

[40] New Zealand Army Act of 1950, § 32(1)(a).

[41] South African Defence Act (No. 44) of 1957, First Schedule, § 13.

[42] Close v. Maxwell, [1945] N.Z.L.R. 688.

[43] Australian Defence Act of 1903–1956, §§ 54A and 55; *Ex parte* Cupit, 55 S. R. (N.S.W.) 184, 72 W. N. 186 (1954).

[44] Lonn, Desertion During the Civil War 33 (1928).

[45] Gen. Orders No. 30, Dep't of War (Feb. 27, 1864).

[46] Ops. JAG, R.8–109 (March 14, 1864).

There is also some post-Civil War authority which is similar to these cases. One opinion of The Judge Advocate General holds that misbehavior before the enemy, although not an essential element of desertion, may be evidence of it.[47] In another, the accused was charged among other things with desertion in violation of Article of War 58 and with misbehavior before the enemy in violation of Article of War 75. The specification under the 58th Article alleged that, while on a march from the St. Mihiel to the Argonne front on October 6, 1918, the accused deserted and remained absent until he surrendered himself to his company about November 30, 1918. The specification under Article of War 75 alleged in effect that accused, while on a march from the St. Mihiel front to the Argonne front, about October 7, 1918, did run away from his company which was then expected to engage with the enemy and did not return until November 30, 1918, after the engagement was concluded. The court convicted the accused of absence without leave under the 61st Article of War and found him guilty of the charge under the 75th Article of War. The reviewing authority remarked:

> The finding of not guilty of violating the 58th Article of War is disapproved due to the fact that . . . the court found the accused guilty of violating the 75th Article of War under circumstances which must have presupposed an intention consistent only with desertion.[48]

That the above cases did not reflect Army-wide custom is shown by the fact that Winthrop does not mention them in his section on desertion, and merely contents himself with remarking that "in time of war, an absence of slight duration may be as significant as a considerably longer one in time of peace."[49] Likewise, the 1916 Manual for Courts-Martial does not discuss the relation between misbehavior before the enemy and desertion, although the fact that such misconduct was not overlooked is found in the provision permitting the prosecution to show in aggravation of the offense "that his act was done . . . in the presence of a certain outbreak of Indians, or of a certain unlawful assemblage, which his organization was opposing, or in time of war."[50]

When, however, Brigadier General Samuel T. Ansell became Acting Judge Advocate General during World War I, he made a significant effort to import British thinking into the American military law. Thus, in one opinion he referred to soldiers who have "deserted" to avoid service in Europe,[51] while in another he

[47] Dig. Ops. JAG 1912, Desertion para. IE (Feb. 1901).

[48] Gen. Court-Martial Order No. 33, Hq. 78th Division, A.E.F., France (1919).

[49] Winthrop, Military Law and Precedents 638 (2d ed. reprint 1920). See also *id.* at 608, where he refers to the abandonment of an important duty as an aggravated AWOL.

[50] Manual for Courts-Martial, U.S. Army, 1916, para. 409(d), p. 202.

[51] Ops. JAG 1918 § 250.4, p. 591 (July 24, 1918).

declared: "Men who have deserted from their organizations just before the latter left for overseas should whenever practicable, be sent to their organizations for trial" and not be tried in the United States for absence without leave because "otherwise, they have escaped overseas service and thus have achieved the purpose for which they deserted."[52] And in a case arising in France where the accused left his organization, intending to return to it after it came out of the front line, and did, in fact, come back to his company after it was relieved, it was held that the court-martial which tried him was justified in finding him guilty of desertion because an intention to return to his organization after its relief from the front line is equivalent to an intention not to return unless it is relieved, which may never happen.[53] It might be noted that this case diametrically conflicts with an opinion rendered after Ansell left office wherein it was held that the fact that a soldier ran away from his company while it was engaged with the enemy and surrendered himself thirty-five days later was insufficient to show an intent to desert.[54]

Ansell's most significant attempt to import British practice into American law, however, came at the close of World War I in a series of embarkation cases. In the first of them, *Pvt. Thomas T. Barnes'* case,[55] the accused, who had been in the stockade for a prior AWOL, was released under guard and assigned to an oversea replacement detachment. He was fully equipped for overseas service, and was notified that he could not leave the regiment's limits because the detachment was likely to leave at any time. The very evening that the guard was removed, accused went AWOL, and was found nearly two months later in a civilian jail almost a thousand miles from his base. During accused's absence his unit embarked for overseas duty. His guard overheard him tell his companions "that if he was out it wouldn't be this time tomorrow night until he would be gone again, that he was through soldiering."

In holding the conviction for desertion legally sufficient, Ansell quoted the British Manual of Military Law's provision respecting short desertion, underscoring it in its entirety,[56] and then declared:

> The 58th Article of War taken in connection with the 29th Article of War, indicates that Congress never intended to attach to the offense of desertion the qualification that there must be shown an intent per-

[52] Ops. JAG 1918 § 250.4, p. 183 (March 18, 1918).

[53] CM 130018, *Seaman* (March 26, 1919), digested in Dig. Ops. JAG 1912–40 § 416(9), p. 269.

[54] CM 129601, *Cahn* (July 9, 1919).

[55] CM 118019, *Barnes* (Sept. 23, 1918); Gen. Court-Martial Order No. 220, Dep't of War (1918).

[56] Manual of Military Law para. 16, pp. 18–19 (1914).

manently to sever relations with the military establishment in order to constitute the offense. The soldier cannot avoid one service by enlisting in another. Neither can he forsake his duty in his own proper organization with the expectation that by this means he may avoid the necessity of undertaking it.[57]

The entire rationale of the above statement appears to be a non sequitur. If Article of War 58 could be interpreted so as not to require an intent to remain away permanently, then Article 29 would be unnecessary; and conversely, Article 29 is needed only if Article 58 would otherwise be strictly limited to cases involving an intent to permanently abandon the service. Hence, far from showing that Congress in Article 58 did not intend to limit desertion to its historic elements, as Ansell says, the presence of Article 29, which would otherwise be redundant unless it were needed to engraft an extension to the historic rule, shows the exact opposite. Moreover, even if that were not so, the fact that a soldier who intends to abandon one organization for another becomes a deserter does not show that if he intends to avoid his duties temporarily he is a deserter.

Moreover, Ansell concluded his opinion by completely confusing the issue. After enumerating the various items of evidence, he contents himself with declaring that "the question of intention is a question of fact." Since there was ample evidence in this case of traditional straight desertion, such as a prolonged absence, travel quite a distance from station, and expressions of intent to desert, the result is to leave the basis of the decision completely in doubt.

No such doubt remained after *Pvt. Edgar C. Bloser's* case.[58] There, the accused was a member of an overseas replacement detachment, knew it, and was warned not to absent himself. In fact, the unit was expected to embark for overseas duty "at any minute" and "the men were kept prepared for that." They were, moreover, told that there was no chance for a furlough or for other leave. The accused went AWOL, and in his absence his unit actually embarked for overseas service. During his absence, he telegraphed his commanding officer to ascertain whether it would be better for him to surrender to Army authorities where he was or to return to camp, and while awaiting a reply to this telegram he was apprehended.

On trial, the accused testified that he repeatedly went absent without leave and received mild punishments therefor. He also testified that he did not intend to desert, and that he did intend

[57] See note 55 *supra*.

[58] CM 117807, *Bloser* (Sept. 25, 1918), Gen. Court-Martial Order No. 216, Dep't of War (1918).

to come back. However, he declared that "I didn't want to go with that overseas detachment," testimony which Ansell's opinion emphasized. Two members of accused's unit, who were likewise absent without leave in the same vicinity, testified that they met accused during his absence, that he was in uniform, and that he told them he would return to camp in a week or two.

It is obvious that the evidence in this case strongly rebuts an intent to remain away permanently. Ansell, however, cited *Barnes'* case as holding that "a soldier who was a member of a replacement detachment detailed for duty overseas, and who went absent without leave and remained absent until after his organization had sailed, was properly found guilty of desertion," and affirmed the conviction on this basis.[59] And there are several other cases with similar holdings.[60]

Professor Edmund M. Morgan, then a Lieutenant Colonel under Ansell, approved of this attempt to expand the scope of desertion through a common-law development.[61] Even he, however, recognized that the then current definitions of desertion would have to be expanded, and that the manual for courts-martial would have to be redrafted. In fact, he advocated such a step.[62]

As late as five years after the Articles of War of 1920 were passed, suggestions were still being made that the short desertion statute was nothing more than a codification of the common-law

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[59] *Ibid.*

[60] CM 117043, *Jacobs* (Sept. 26, 1918); CM 117944, *Walker* (Sept. 24, 1918); see also CM 104305, *Vuicich* (July 30, 1917).

[61] Morgan, Notes on Military Law 18 (1920) (Mimeographed copy on file in Law Library, Office of The Judge Advocate General, Department of the Army, Washington). See also Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 Yale L. J. 52 n.2 (1919).

[62] *Ibid.* Morgan declared: "Furthermore, according to the decisions of the English military authorities and those of the Judge Advocate General of the Army of the United States during the present war, an unauthorized absence with the intention to avoid some important or hazardous service constitutes desertion. Thus, where a soldier, a member of an organization about to sail overseas, leaves his organization without leave, intending to remain away until the organization has sailed, he is guilty of desertion. (C.M. Nos. 117043, 117807, 117944, 118109; Pratt Mil. Law, Sec. 160). In the same manner a soldier who left his organization without authority for the purpose of avoiding front line trench work or listening post duty or any other hazardous or specially important duty, would be guilty of desertion. The statement in the Court-Martial Manual on page 201 to the effect that where a soldier leaves his post intending never to come back unless a certain event happens, is doubtless intended to cover such a situation as that just described. In other words, the Court-Martial Manual attempts to phrase the matter of intention throughout in terms of expectation to return or to remain away from the service. In my opinion such phraseology is entirely inapplicable. The definition of desertion should be entirely reframed. According to modern authority, desertion is committed when a person subject to military law goes absent without leave, accompanied by an intention never to return to the service, or to terminate or dissolve the existing status, or to avoid some important or hazardous duty."

definition of military desertion. For example, Lt. Col. A. W. Brown, later The Judge Advocate General of the Army, declared that the short desertion statute was an "interpretation clause" or "in the nature of [an] interpretation clause."[63] Likewise, he said that there was "considerable authority" for regarding this statute as "declaratory," citing Ansell's opinions, but conceded that "undoubtedly the service at large prior to the enactment of the Code of 1920 did not regard quitting important or hazardous duty as desertion." He surmised that the statute was intended to "extend the general meaning of the word 'service' as used in the 58th Article of War so as to include" some particular hazardous or important duty, and notes that a similar extension was made by the British without benefit of legislation.[64]

Brown is correct in stating that Ansell's views did not meet service-wide acceptance,[65] but nothing has been found to indicate what were the views of General Enoch H. Crowder, who was The Judge Advocate General of the Army from 1911 until 1923, towards the innovations of Ansell. By the time of the passage of the 1920 Articles of War, General Crowder's relations with his erstwhile protege were extremely strained,[66] and it is doubtful that Morgan influenced his views very much.[67] Accordingly, the 1920 legislative history is the sole source for the proper interpretation of short desertion in American military law.

V. LEGISLATIVE HISTORY IN AMERICAN LAW

Prior to World War I, the United States had never fought a major overseas war. Never before did such a large number of American troops have to be shipped to foreign territory. True, during the Spanish-American War, troops were sent overseas, but in much smaller numbers; they were mostly volunteers; and they included no draftees. During the Civil War, large numbers of

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[63] Memorandum for General Hull, The Judge Advocate General of the Army, from Lt. Col. A. W. Brown, Judge Advocate, On Desertion, p. 2, May 11, 1925, on file in Law Library, Office of The Judge Advocate General, Department of the Army.

[64] *Id.* at p. 3.

[65] See *Hearings on S. 64 Before a Subcommittee of the Senate Committee on Military Affairs*, 66th Cong., 1st Sess. 239 (1919) (hereinafter referred to as 1919 Senate Hearings) (Letter of General Ansell, Aug. 16, 1919). See also 58 Cong. Rec. 3943–4 (1919).

[66] See the Crowder Papers, Western Historical Manuscripts Collection, University of Missouri Library. (Letters from General Crowder to Colonel Carbaugh, March 6, 1912; Major General Franklin Bell, Army Chief of Staff, June 20, 1913; Rep. Julius Kahn, Chairman of the House Armed Services Committee, July 7, 1919; and Henry L. Stimson, Secretary of War, April 5, 1920.)

[67] *Ibid.* (Letter from General Crowder to William M. Bullitt, November 4, 1919.)

troops served in the contending armies, and draftees were included, but there was no problem of evasion of service at a port of embarkation. But starting in 1917, the United States was forced to send overseas large numbers of involuntarily drafted troops. The result was that, for the first time, this country experienced the same problem as England, whose troops had often served abroad and which had known for many years the problem of evasion of foreign service at the port of embarkation.

Originally, an attempt was made to deter evasion of overseas duty by punishing absences as aggravated absences without leave. For example, in one case an accused officer, on applying for a leave of absence, was informed that his organization was under orders for departure overseas and that leaves of absence would not be granted except in urgent cases. He promptly went absent without leave to attend to his own affairs, and it was held that the offense warranted dismissal from the service.[68] As General Ansell's previous opinions had indicated, where the intent to evade the service abroad was manifest, or thought to be so, penalties were considerably heavier. Yet even this was not enough, as the following Report of the Inspector-General to the Secretary of War of May 8, 1919, makes clear:

> From the establishment of the stockade at the Port of Embarkation, Hoboken, New Jersey, in April, 1918, to November 13, 1918, two days after the signing of the armistice, 9,280 enlisted men were confined therein. The stockade was constructed on account of the alarming increase in the number of absences without leave. One regiment alone departed for overseas service leaving 400 men behind absent without authority. One company had 25 absentees at the date of departure. Before the establishment of the stockade, one soldier absented himself six successful times from as many different casual organizations bound for overseas service. This will give an idea of the difficulties under which the War Department was laboring, due to the frequency of soldiers deserting their commands or absenting themselves therefrom on the eve of departure overseas.[69]

General Crowder, who served as both Provost-Marshal General, and Judge Advocate General during World War I, and who had the primary responsibility in his former capacity of supervising the drafting of needed men for overseas service, made the same observation. He furnished the Senate Subcommittee of the Military Affairs Committee which was engaged in the revision of the Articles of War the following information:

> The number of men who were absent without leave at the port of embarkation at Hoboken for the calendar year of 1918, at the time their organizations were due to embark for the theater of war, was approximately 14,098. . . . The call had come from Europe as early as March

[68] Dig. Ops. JAG 1912–40, § 419(2), CM 120814 (1918).

[69] 1919 Senate Hearings, *supra* note 65, at 763.

> that the English had their backs to the English Channel and the French had their backs to Paris. . . . As Provost Marshal General I had to furnish three times as many men as the schedule called for for April of that year; four times as many as the schedule called for for May; about the same percentage for June. The culminating peak was reached in July, during which month I furnished, under call, 401,000 men. . . . The officers who were expected to go abroad with their organizations and win battles found their commands disintegrating at the ports of embarkation.[70]

Moreover, it was not only with absences from ports of embarkation that army commanders during World War I had to contend. Once American troops reached France, and the prospect of battle hazards loomed up in the immediate future, a notable increase took place during this period in absences without leave. General O'Ryan, a New York lawyer and army commander in France, told the Senate Subcommittee that:

> I think that the form of misdemeanor which affected the discipline and morale of the Army more than any other was the conduct which prompted the soldier to quit in action, to shirk his battle duties, or in anticipation of battle to leave his command, not for the purpose of deserting the Army but for the purpose of avoiding battle by going absent without leave. In other words, we found that a man who went absent without leave in anticipation of battle was as much a demoralizing influence upon the Army as was the man who actually deserted.[71]

A special, three-man War Department board (popularly called the Kernan Board, after the name of its chairman), set up by The Judge Advocate General to investigate complaints about the administration of military justice during World War I which had swelled up in the aftermath of that war, had the same observation to make. This board, with General O'Ryan as one of its members, declared that:

> The shirker who, knowing his company is to go into battle on the following day, absents himself therefrom without leave, and then makes a dishonest and of course fruitless effort to rejoin his company (which has in the meantime gone forward) is of the class which menaces not only the discipline of his command, but the success of the Army. No

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[70] *Id.* at 1158–59.

[71] *Id.* at 320. See Osborn, *From Lawyer to General* (O'Ryan), 22 Case & Comment 268 (1915). And see also the statement of Brig. Gen. Frank Parker, who told the same subcommittee, "[s]uppose that the division is about to attack tomorrow morning. We know that we are going into a bloody fight; that we shall probably lose 60 percent of our officers and men, which happens on occasion—on one occasion with my command. Certain men deliberately go absent. They know what is in front of them; they have had it all explained to them by careful talk, what they will have to do on the following day, and they know full well what is going to happen, and they deliberately absent themselves. . . . It seems to me that at such a time there should be some speedy method of punishing those men adequately . . . not so much for the punishment to the individual as for the moral effect produced upon the unit in general." 1919 Senate Hearings, *supra*, at 440.

military offense in war is as contagious as the one of absence without leave.[72]

And here, we pause to note a significant fact in the legislative history of the statute. As will be shown below, it is generally conceded that short desertion in American law was copied from the British manual of military law. But, as the 1914 edition of the British manual, set forth above, shows, that book refers to "absence without leave" with intent to avoid important service. Nowhere in the British manual or circulars which were before The Judge Advocate General's Office or Congress does the word "quits" his organization appear. Yet the final draft of Article of War 28 insofar as it relates to short desertion contains the word "quits." Where, it may be asked, did this word come from, and why was it used?

Throughout the long hearings on the revision of the Articles of War, and the allied material constituting debates in legal periodicals, reports, and other publications, in only two places can reference be found to this word which would be likely to have come to the attention of General Crowder, whose version of short desertion was finally, as noted below, enacted into law. One was General Ansell's original draft of short desertion; the other was the use of this word by General O'Ryan, as set forth above.

A careful examination of the notes of the then Judge Advocate General, General Crowder, as printed for the use of the Senate Military Affairs Committee, leads to the conclusion that the word "quits" found its way into the statute through General O'Ryan's use thereof. These notes show that General Crowder adopted the Kernan Board's comments on absence without leave, especially from a unit going into battle.[73] Since General O'Ryan was a member of that board, it would follow logically that The Judge Advocate General would be inclined to adopt language used by members of that board, and hence use language used by General O'Ryan. In light of the fact that General Crowder changed other provisions of General Ansell's proposed revision of the Articles, but retained this language, it seems probable that this word is traceable to General O'Ryan's strictures.

Now that the origin of the use of the word "quit" has been traced, the question remains, why was it used in reference to short

[72] Proceedings and Report of Special War Department Board on Courts-Martial and Their Procedure 32 (1919). See also Bogert, *Courts-Martial: Criticisms and Proposed Reforms*, 5 Cornell L. Q. 18, 40 (1919).

[73] Comparative Print (Articles of War), Showing Changes Proposed by The Judge Advocate General as Compared with the Changes Proposed by the Kernan-O'Ryan-Ogden Board and with Existing Law, for Senate Committee on Military Affairs, 66th Cong., 2d Sess., p. 35 (1919) (hereinafter referred to as 1919 Crowder Comparative Print).

desertion instead of the British usage of absence without leave? The answer would appear to lie in the fact that its meaning was understood to be broader than absence without leave. The word "quits" appears in two places in the 1916 Articles of War, viz: Article 28, referring to an officer who, "having tendered his resignation . . . quits his post or proper duties" and Article 75, referring to someone who "quits his post or colors to plunder or pillage." In addition, Article of War 40 of 1874 refers to an "officer or soldier who quits his guard."

The last-named usage, as described by Winthrop, clearly contemplates leaving a specific place of duty.[74] Quitting post or colors to plunder or pillage, again according to Winthrop, contemplates leaving a fixed or specific place of duty or point, as well as an organization.[75] Winthrop does not discuss this point in respect to resignation of officers,[76] but in light of the disjunctive usage of *"post or proper duties,"* the latter of which refers to duties as distinguished from organization, it is clear that the article contemplates a leaving or abandoning of duties without removal from the military control of one's organization. Thus, in all three cases, the articles involved contemplated either an absence from a specific place of duty, such as would today be charged under Article 86(2) of the Uniform Code of Military Justice, or the abandonment of duties without physical absence, or both. Indeed, insofar as Article of War 40 of 1874 was concerned, the word "quit" could not be the same as absence without leave in the sense of Article 86(3), Uniform Code of Military Justice, because the object of this verb was a specific place of duty encompassed only in what would now be Article 86(2).[77]

To have used the term "absence without leave," on the other hand, would have narrowed the meaning of the statute unduly. This term in Article of War 61 of 1916 came from Article of War 32 of 1874,[78] and retained its initial meaning, in consolidation, of unauthorized absence from a unit or more precisely, from military control.[79] Such usage would have been inconsistent with the words

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[74] Winthrop, *op. cit. supra* note 49, at 611. See also Dep't of War, Manual for Non-Commissioned Officers and Privates of Infantry 138 (1914), in which is reprinted in the Manual of Interior Guard Duty, the regulations relating to General Orders for sentinels. Paragraph 155 provides that "General Orders apply to all sentinels." Paragraph 156 provides that "sentinels will be required to memorize the orders." Order No. 5 states: "To quit my post only when properly relieved." It is obvious that the word "quit," in this connection, meant to leave a specific place of duty.

[75] *Id.* at 627.

[76] *Id.* at 652.

[77] CGCMS 19131, *Skipper*, 1 CMR 581 (1951).

[78] Avins, *op. cit. supra* note 6, at 37.

[79] Winthrop, *op. cit. supra* note 49, at 607–08; Avins, *op. cit. supra* note 6 at 55–63, 115–19.

of Article of War 28 which encompassed not only an "organization" but also a "place of duty," the latter being, by contrast with the former, a specific place of duty such as is now referred to in Article 86(2), UCMJ, or as was referred to in Article of War 40 of 1874.

The 1920 manual for courts-martial is further evidence of this fact. Where the manual uses the words "place of duty" in the discussion under Article of War 61 (AWOL), it is referring in all cases to a specific place of duty, while "absence without leave" is used to denote absence from military control.[80] The two sets of words are not used together. It must therefore be concluded that "quits" is used to denote unauthorized absence from both a specific place of duty as well as military control.

There is no apparent reason for using the word "shirk" instead of "avoid." The word is not otherwise found in the punitive articles, and appears, in context, to be synonymous with "avoid." It can only be concluded that this word was used as a derogatory epithet, as General O'Ryan used it in his testimony and in the Kernan Board report. In all probability, it came from the 1914 British manual of military law, which, as noted above, refers to "shirking some important service."

As set forth above, the problem of absenteeism for the purpose of evading embarkation or combat had become a major one by the end of the First World War. This fact was taken notice of by former Acting Judge Advocate General Ansell, who drafted S. 64 of 1919, the Chamberlain Bill for the revision of the Articles of War.[81] Article 55 of Ansell's bill provided as follows: "Any person subject to military law who quits the miliary service with the deliberate and fixed intent not to return to it, or who quits his organization or place of duty with the intent to avoid hazardous duty, shall be guilty of desertion."[82]

The above provision which made reference to evasion of hazardous duty was one of the few innovations in Ansell's bill which General Crowder approved. He told the Senate Subcommittee of the Committee on Military Affairs that:

> There is one merit about the pending Chamberlain bill that ought not to escape notice, and that is the creation of what the British call short-time desertion. It is provided for in the Chamberlain bill, but not under that name. If we had had a statute of that kind, these more than 14,000 men that were absent at Hoboken at the time they were expected to embark could have been tried for short desertion, or an abandonment

[80] Manual for Courts-Martial, U.S. Army, 1921, para. 412, pp. 349–50.

[81] 1919 Senate Hearings, *supra* note 65, at 1133; 59 Cong. Rec. 5843 (1920).

[82] 1919 Senate Hearings, *supra* note 65, at 14.

of the command at a time of perilous duty. They distinguish that in the English articles as short-time desertion, and in effect though not in name, it is made short time desertion in the Chamberlain bill, and I want to commend that part of the bill. I believe it would be an improvement, and if we had that legislation these absentees would have been "short-time deserters," punishable under article 55 of the Chamberlain-Ansell bill with death.[83]

Moreover, in his comments on the final proposed draft, he declares that "willful absence from dangerous duty is made desertion as it is in the British service. (S. 64.)"[84] Presumably, therefore, the Ansell proposal met with general approval. Yet the statute adds the words "shirk important service" to Ansell's draft. Where, it may be asked, did these words come from?

Initially, the statutory language can be traced to Senator Chamberlain's amended bill to revise the Articles of War[85] which became the 1920 statute.[86] This bill adopted the War Department and Kernan Board's proposals, as set forth in General Crowder's draft revisions.[87] General Crowder's draft is identical with the final statute, yet he merely comments that his draft "adds the

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[83] *Id.* at 1162. Additional corroboration of the fact that General Crowder was thinking of Ansell's addition primarily in terms of soldiers who evaded embarkation for combat duty is to be found in a letter from General Crowder to Congressman Julius Kahn, Chairman of the House Military Affairs Committee, dated July 7, 1919, in the Crowder Papers, Western Historical Manuscripts Collection, University of Missouri Library, wherein he writes: "Absence without leave at a Port of Embarkation or immediately prior to embarkation operates to disintegrate an army and might lose a campaign; while absence without leave from a training camp might be, comparatively speaking, a trivial offense. . . . Would not these limits of punishment prove most inadequate and invite disintegration of the Army under the special circumstances prevailing at our Ports of Embarkation during this war?" On the other hand, it is equally possible that motivation for adding a short desertion section was derived at least in part from the prevalence of pre-combat absence without leave in France. For example, in a memorandum dated May 12, 1919, found among the Crowder papers, *supra*, Maj. Gen. William H. Johnson comments on the Ansell Bill to The Adjutant General by first complaining about the technical and restrictive interpretation given by courts-martial to the words "before the enemy" in Article of War 75, and then notes: "There were a few instances in which soldiers were absent [without leave] from their companies at the time the companies were engaged in an offensive and frequently after they had received notice that their companies were ordered forward or by their presence with their companies knew that they were moving against a formidable enemy. After every offensive in which the 91st Division was employed I assembled the commanders of all units, directed them to investigate the case of every officer or man absent without authority at any time the division was engaged. I directed that charges be preferred under the Seventy-Fifth Article of War against every such officer or soldier whose absence as indicated by available testimony constituted an offense under the Seventy-Fifth Article of War. * * * A number of men thus tried were acquitted or found guilty merely of absence without leave."

[84] 1919 Crowder Comparative Print, *supra* note 73, at 4.

[85] 59 Cong. Rec. 5836, 5838 (1920).

[86] *Id.* at 5845.

[87] *Id.* at 5844.

provision covering the 'short desertion' of the British system, which is included in article 55 of S. 64."[89] General Crowder makes no mention of his addition to S. 64 of the words "shirks important service," and a legislator looking at the comment would be led to believe that there was none.

The evidence is impressive that the words "important service" were taken by General Crowder from the 1914 British Manual of Military Law. Early in the hearings on the 1920 articles, a copy of this manual was left with the members of the Senate subcommittee.[89] Moreover, there was printed in the hearings for the subcommittee the text of a circular memorandum used by the British forces setting forth the elements and proof of short desertion in some detail.[90]

The 1921 manual for courts-martial strengthens this conclusion. In discussing the offense of short desertion, the manual declares:

> Congress thereby adopted the principle that willful absence from dangerous or hazardous duty is desertion, as it is in the British service ('short desertion'). Under this article a man who absents himself in a deliberate or clandestine manner, with a view of (1) avoiding some hazardous duty or (2) of shirking some important service, though he may intend to return when the evasion of the duty or the service is accomplished, is liable to be convicted of desertion, just as if an intention never to return had been proved against him. (Brit. M.M.L., chap. III, sec. 16, pp. 18–19). Thus, if a man on the eve of the embarkation of his regiment for overseas service, or when ordered to aid in the suppression of riot or insurrection, or on strike duty, conceals himself in barracks, or is absent without leave, the court may be quite justified in presuming an intention to escape the hazardous duty or important service on which he was ordered, and convicting him of desertion.[91]

It might be noted, in respect to the above passage, that the example of a soldier concealing himself in barracks was also taken from the example given in the British Manual of Military Law, referred to above. And in another part of the court-martial manual, which discusses proof of short desertion, the writer has copied almost verbatim the British circular previously referred to which was printed in the Senate Committee hearings.[92]

Article 85(a) (2) of the Uniform Code of Military Justice was

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[89] 1919 Crowder Comparative Print, *supra* note 73, at 20.

[89] 1919 Senate Hearings, *supra* note 65, at 386.

[90] *Id.* at 416.

[91] Manual for Courts-Martial, U.S. Army, 1921, para. 409, pp. 343–44.

[92] *Id.* at p. 345. Indeed, the copying is so close that the writer uses the phrase "warned, if possible on parade." While the term "parade" in British military terminology means an assembly of soldiers to hear orders, in the United States it has an entirely different connotation, meaning a public exhibition of marching soldiers and equipment with music, etc. The corresponding American term would be "formation" or "assembly," but so intent was the drafter on copying the British circular that he used an inapplicable word.

taken unchanged from the short desertion section of Article of War 28.[93] In so doing, the drafters of the Code broadened the more limited naval provision found in the Articles for the Government of the Navy, which punished any naval personnel who, in time of battle, deserted their duty or station.[94] The latter offense would now form merely one way in which short desertion could be committed.

VI. PRESENT DAY SIGNIFICANCE OF LEGISLATIVE HISTORY

The legislative history of short desertion is of more than merely academic interest today. The Court of Military Appeals has repeatedly stated that Congress intended no substantial change from prior law in enacting Article 85 of the Uniform Code of Military Justice.[95] In a recent case, a unanimous Court held that "the legislative history of Article 85 indicates that Congress did not intend to change substantially the existing law on desertion."[96]

Moreover, the Court of Military Appeals has followed the above language in practice by referring to and relying on the legislative history of Article 85 in construing its meaning. In *United States* v. *Johnson*,[97] the Court declared:

> If Congress just recodified the existing law on desertion and intended no change of substance, it becomes necessary for us to determine whether an enlistment in another or foreign service without a discharge from the service in which an accused is serving was a substantive offense prior to the Uniform Code of Military Justice. This can best be done by following the history and legislative background of the relevant enactments.[98]

While the *Johnson* case dealt with a different clause of Article 85, there is no reason to believe that the Court of Military Appeals would reject its rationale were an issue as to the interpretation of short desertion raised. Indeed, in the only case in which the Court touched on this issue, it did in fact look to the history of the statute.[99] Accordingly, while the Court of Military Appeals has never dwelled at length on the interpretation to be placed on Article 85(a)(2), nor expounded on the legislative history of the statute, its treatment of Article 85 in general indicates clearly that should an issue arise as to the interpretation of that enactment, reference to the legislative history of the provision will prove decisive.

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[93] *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 605, 1225 (1949).

[94] Legal and Legislative Basis, Manual for Courts-Martial, U.S., 1951, p. 252.

[95] United States v. Redenius, 4 USCMA 161, 15 CMR 161 (1954); United States v. Bondar, 2 USCMA 357, 8 CMR 157 (1953).

[96] United States v. Huff, 7 USCMA 247, 22 CMR 37 (1956).

[97] 5 USCMA 297, 17 CMR 297 (1954).

[98] *Id.* at 301, 17 CMR at 301.

[99] United States v. Hemp, 1 USCMA 280, 3 CMR 14 (1952).

COMMENTS

THE AFTERMATH OF THE MICHIGAN TAX DECISIONS: STATE TAXATION OF FEDERAL PROPERTY AND ACTIVITIES TODAY* The most important recent development in the Federal-State tax field, and by that term is meant the taxation by the States of Government property, real or personal, or of Government contractors with respect to performance of, or transactions under, their Government contracts, has been the collapse of the Michigan tax decisions insofar as they were thought to be fertile objects of raids by the States on the Federal Treasury.

I. THE MICHIGAN TAX CASES

In March 1958, the United States Supreme Court decided the *Borg-Warner*[1] and *Murray*[2] cases. The court held in *Borg-Warner* that a Michigan statute, Public Act 189 of 1953,[3] which permitted the taxing of the lessee or user of tax exempt Federal property for the full value of such property as if he were the owner, was valid. Neither the long-established doctrine that a State's direct tax on the Federal Government will not lie[4] nor the more recent "legal incidence" test developed in the *Mesta Machine Company* case[5] for determining whether a state tax is, in fact, a direct tax on the Federal Government was upset in this decision. The Court pointed out that the taxes due under the statute were the personal obligation of the lessee or user, and that there was no

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* This article is a modified version of a speech delivered by the author at the Annual Convention, Southeastern Association of Tax Administrators, Asheville, North Carolina, July 25, 1960. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] United States v. City of Detroit, 355 U.S. 466 (1958).

[2] City of Detroit v. Murray Corporation, 355 U.S. 489 (1958).

[3] "When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for a profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public [sic], shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property." Mich. Stat. Ann., § 7.7(5) (Supp. 1959).

[4] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 448 (1829).

[5] United States v. Alleghany County, 322 U.S. 174 (1944); *cf.* Alabama v. King and Boozer, 314 U.S. 1 (1941).

attempt to levy against the property of the United States.[6] The question expressly reserved in *Mesta Machine* as to whether a State could tax a person possessing and using Federal property for the measure of that person's interest[7] was thus squarely before the Court in *Borg-Warner*, and the Court answered it affirmatively. The fact that the possessor's interest was equated to the full value of the property apparently was of no consequence. In *Murray* the Court held that Michigan's personal property tax statute[8] permitted local authorities to tax a Government contractor for the full value of Government-owned work in process and inventory in its possession on tax day. The taxing jurisdiction had argued in the courts below that title to the property sought to be taxed actually remained in the contractor, notwithstanding the contract provision which vested absolute title in the United States upon receipt of progress payments by the contractor, and it was upon this point, in finding that the United States had acquired full title, that the decision in favor of *Murray* turned.[9] The Supreme Court passed over this issue without discussion by assuming that the United States had full title to the property,[10] and then went on to decide that the personal property taxes in question were identical to those upheld in *Borg-Warner*,[11] striking down in the process, as an empty formalism, the argument that the Michigan statute did not authorize the taxing of the person in possession, and ignoring the fact that the question of

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[6] ". . . [T]he Court concluded [in United States v. Alleghany County] that the tax was simply and forthrightly imposed on the property itself, not on the privilege of using or possessing it . . . . Here we have a tax which is imposed on a party using tax-exempt property for its own 'beneficial personal use' and 'advantage'" 355 U.S. at 471–72.

[7] 322 U.S. at 186.

[8] An ordinary ad valorem personal property statute of the type existing in most of the states. At the time, the state statute did not specifically authorize the taxation of the possessor of personal property, a situation which was corrected later by the Michigan Legislature in enacting Public Act 266 of 1959. However, in commenting upon the statutory status existing at the time of *Murray*, the Supreme Court said: "The relevant statutory provisions are set forth in full in 6 Mich. Stat. Ann., 1950, secs. 7.1, 7.10, 7.81, and Tit. VI, c. II, sec. 1, and Tit. VI, c. IV, secs. 1, 7, 26, 27, of the Charter of the City of Detroit. They provide in part that 'The owners or persons in possession of any personal property shall pay all taxes assessed thereon. . . .'"355 U.S. 489 at 491 n. 1. No such language as that quoted with respect to persons in possession then appeared in the State statute.

[9] City of Detroit v. Murray Corporation, 234 F.2d 380, 382 (6th Cir. 1956).

[10] 355 U.S. at 492 n. 2.

[11] "We see no essential difference so far as constitutional tax immunity is concerned between taxing a person for using property he possesses and taxing him for possessing property he uses when in both instances he uses the property for his own private ends." 355 U.S. at 493.

the taxing jurisdiction's right to impose a "possessory interest" tax on the contractor under the statute involved had never been raised by either party.

Most Government tax lawyers and most other tax law authorities felt that the Michigan decisions had given the States a blank check to tax Government contractors for Government property in their possession and/or use. On the real property side, it was anticipated that many States would enact legislation like Michigan's Public Act 189 to take advantage of the *Borg-Warner* situation. On the personal property side, it was anticipated that the States would attempt to levy *Murray*-type taxes against Government contractors under their already existing personal property tax statutes, most of which were similar to Michigan's. A well-documented estimate put the possible tax cost to the Department of Defense at one-half billion dollars per year.[12]

II. AFTERMATH

A. *ECONOMIC REALITIES*

As it has turned out, the tax bill has not approached that figure and most States have not jumped on the Michigan bandwagon. The New York Legislature was one of the first to pass an act like Michigan's Public Act 189. However, the Governor of that State in an extremely well written message vetoed the act.[13] In essence, he stated that the act discriminated against the Federal Government and pointed out the serious adverse effects the act would have on defense industries in New York. New York was not alone in considering legislation of this type. Shortly thereafter, bills designed to impose taxes on Federal Government-owned real or personal property were introduced in California, Colorado, Connecticut, Florida, Hawaii, Maryland, South Dakota and others, but they were either defeated, died in committee, were referred to study groups or the legislature adjourned without action.[14]

California's entry into this arena had actually commenced much earlier. In 1953, tax authorities of Los Angeles County and other neighboring jurisdictions began to levy a tax on Government-owned personal property in the possession of Federal contractors under circumstances similar to those in *Murray*. Long before the final decision in *Murray*, the test cases were rising through the

[12] Van Cleve, *States' Rights and Federal Solvency*, 1959 Wis. L. Rev. 190, 207.

[13] New York Herald-Tribune, April 25, 1958, p. 1, col. 8.

[14] During the current 1961 legislative sessions, bills of this type have been introduced in Connecticut, Indiana, Maryland, Massachusetts, Ohio, Tennessee, and Washington. As of 1 April 1961 none of these states has passed such a bill and in Tennessee and Indiana the bills died in committee.

State courts. However, it was subsequent to the Michigan decisions that the Supreme Court of California decided that the personal property statutes of that State did not permit a possessory interest tax upon the users of Government personalty, and some members of the court suggested in their separate concurring opinions (it was a unanimous decision) that such a law might be contrary to the California Constitution.[15] The refunding of over forty millions of dollars to the various Federal contractors (for subsequent reimbursement to the United States) by California taxing authorities has placed a severe financial strain upon the local communities there, not to mention the untold administrative burdens upon the local and Federal governments in effecting the refunds.[16] It is to the obvious advantage of both the Federal Government and a State to avoid such a situation when it is possible to settle upon a mutually agreeable course of action. Disgorging tax dollars to which a taxing jurisdiction is not entitled is a very painful process.

Besides the admirable restraint which the States have shown in electing not to follow Michigan's lead, perhaps the most significant development, as an aftermath to the Michigan decisions, has been the unanimous decision of the Supreme Court of the United States in *Phillips Chemical Company* v. *Dumas Independent School District*.[17]

B. *DISCRIMINATION—THE PHILLIPS CHEMICAL CASE*

In 1954, the Dumas Independent School District in Texas assessed a property tax against Phillips, for the years 1949–1954, as lessee of the Cactus Ordnance Works, an industrial plant located within the District's taxing jurisdiction and belonging to the Federal Government. Phillips had occupied the plant for purely commercial purposes since 1948 under a lease contract with the United States for a primary period of fifteen years with an option to renew for two additional five year periods. The Government had a right to terminate upon the happening of certain contingencies and the giving of ninety days' notice. The tax, meas-

[15] General Dynamics Corp. v. County of Los Angeles, 51 Cal. 2d 59, 330 P.2d 794 (1958).

[16] While some of the disputed tax money had been placed in escrow pending the outcome of the test cases, a considerable amount had been distributed by the counties and long since spent by the local communities sharing in the proceeds. To soften the impact in Los Angeles County, an agreement was negotiated between the Department of Defense and the County whereby part of the refund was repayed by October 1, 1959, and the remainder is being repayed in installments over the next three tax years.

[17] 361 U.S. 376 (1960), *reversing* 316 S.W.2d 382 (Texas 1959).

ured by the estimated full value of the plant, was assessed under a 1950 amendment to Article 5248, Vernon's Annotated Texas Civil Statutes, authorizing the taxation of one who uses and occupies Federal property in his private capacity or in the conduct of any private business or enterprise.[18] Phillips contested the tax as being unconstitutional on several grounds, the significant one for the purposes of this discussion being that it unjustly discriminated between lessees of Federally-owned property and lessees of State-owned and other exempt properties.[19] For this proposition, Phillips relied upon Article 7173 of the Texas Statutes which taxes the lessee of State-owned or other tax exempt property only if he holds under a lease for a term of three years or more, or holds under a contract to purchase, and upon Article 7174 which assesses leasehold interests, for tax purposes under Article 7173, at their fair market value. So, said Phillips, we are being taxed, under the law applicable to lessees of United States property, for a short term lease[20] at the full value of the property while a lessee of State-owned property is taxed only if his lease is for three years or longer, and then at the value of his interest.

The Texas Supreme Court held that the taxes were lawfully charged against Phillips beginning with the effective date of the amendment to Article 5248 (March 17, 1950).[21] Phillips appealed to the Supreme Court of the United States[22] and, at that point, the Department of Justice, at the request of the Department of Defense, intervened. The decision of the Court was handed down

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[18] Art. 7150, subdiv. 4, Vernon's Ann. Tex. Civil Stats. provides an exemption from taxation for "[a]ll property, whether real or personal, belonging exclusively to . . . the United States . . . ." Sec. 1, Acts 51st Leg., 1st C.S., p. 105, c. 37, eff. March 17, 1950, amended Art. 5248 of Vernon's Ann. Tex. Civil Stats., by adding a proviso authorizing the taxation of personal property belonging to the user and operator of Federal plants located on Federal lands, and a further proviso ". . . that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions." The similarity to Michigan's Public Act 189 is obvious. See note 3 *supra*.

[19] Much of what was said by the Supreme Court of the United States in *Borg-Warner*, *supra*, was adopted by the Supreme Court of Texas in holding against Phillips on the other grounds. 316 S.W.2d at 385–387.

[20] In Trammell v. Faught, 74 Tex. 557, 12 S.W. 317 (1889), the Texas Supreme Court had held that a long term lease, subject to cancellation, is not a lease for a term of three years or more within the meaning of Article 7173.

[21] Dissenting Justice Calvert concluded, "That the amendment of Article 5248 is discriminatory and unconstitutional unless it be construed to apply only to leasehold estates of three or more years duration." He had previously determined, in his dissenting opinion, that Phillips' lease was *not* for three years or more. 316 S.W.2d at 396.

[22] 359 U.S. 987 (1959).

on 23 February 1960.[23] The Court agreed with the dissent of the lower court[24] that Article 5248 discriminated against lessees of the United States, and then considered whether the discrimination was justified by determining how other taxpayers, similarly situated,[25] were treated. In facing this question, the School District argued: (1) that the State and its subdivisions collect in rent from their lessees what they lose in taxes; (2) the State may legitimately foster its own interests by facilitating the leasing of its property; and (3) the greater magnitude of Federal leasing has a greater impact on the local economy.[26] The Court rejected these arguments. As to the first point, it said that what the State's subdivisions lose in taxes by favoring short-term lessees of their property cannot be made up in this fashion. "Other local taxpayers—including the Government's lessees—must make up the difference."[27] The second argument, said the Court, merely begs the question. If the incentive to facilitate the leasing of its lands discriminates against the other class of lessees of tax-exempt lands, "the question remains, is it permissible?" Finally, the Court pointed out that Article 5248 imposes its burdens on all Federal lessees; its applicability is not based upon such factors as size, value or number of employees. In looking at individual pieces of leased property, the State had to concede that it also leased valuable property to commercial and business enterprises. Said the Court ". . . the identity of the exempt lessor bears no relation to the impact on local government of otherwise identical leasing activities."[28] Quoting further, the Court went on to state that in its Michigan decisions, "we did not decide—in fact, we were not asked to decide—whether the exemption of school-owned property rendered the statute discriminatory. Neither the Government nor its lessees, to whom the statute was applicable, claimed discrimination of this character."[29] Thus brushing aside those cases the Court concluded, by citing and paraphrasing *McCulloch* v. *Maryland*,[30] that "a state tax may not discriminate against the Government or those with whom it deals."[31]

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[23] 361 U.S. 376 (1960).

[24] See note 21 *supra*. Justice Calvert had been joined by three others in dissenting.

[25] By operation of interrelated Texas laws the only class of taxpayers similarly situated would be lessees of lands owned by the State and subdivisions of the State; exemptions for real property owned by churches, charities and similar entities would not survive a lease to a commercial or business lessee.

[26] 361 U.S. at 384.

[27] *Ibid.*

[28] *Id.* at 385.

[29] *Id.* at 386.

[30] Note 4 *supra*.

[31] 361 U.S. at 387.

Military tax lawyers are satisfied that in the *Phillips* decision the Supreme Court has invited them to take a second look at the Michigan cases. Even before *Phillips*, they were relitigating the *Murray* question before a Michigan court on the theory that while the Supreme Court has decided that Michigan's personal property tax on the owners of property could be assessed against *possessors* who were not the owners, a Michigan court would not necessarily agree with that interpretation of its law. The test case is *Continental Motors Corp.* v. *County of Muskegon* and trial was held in the Muskegon County Circuit Court on 7 and 8 June 1960. It is probable that this case too will reach the United States Supreme Court.[32] Pending final resolution of that case all Government contractors have been instructed to pay *Murray*-type taxes in Michigan under protest. As a result of *Phillips* they are now including the discrimination argument in their Michigan briefs and petitions involving protested personal property taxes. The discrimination argument is based upon the allegation that State and municipal personal property is leased to individuals or firms for private or commercial use but in most, if not all, instances those lessees are not taxed either for the value of the property or for the value of their interests; only users of Federal Government-owned personal property appear to be charged with *Murray*-type taxes.[33]

But the military departments have not stopped with personal property taxes. They have also re-examined the application of Michigan's Public Act 189 which, as previously mentioned, permits the taxation of users for a profit of Federal real property as if they were the owners, but exempts property used by concessionaires at a public airport, park, market or fair ground (all of which is usually state or municipally owned real estate).[34] In

[32] On October 12, 1960, the Muskegon Court decided against Continental Motors. The hearing judge considered the *Murray* case to be controlling and did not discuss the discrimination argument made by Continental Motors and the United States, as intervening plaintiff. He did, however, quote at great length from Mr. Justice Harlan's dissenting opinion in *Murray* and concluded as follows: "It is not for the Circuit Court of Muskegon County to disagree with the majority opinion of the Supreme Court of the United States. However, I must confess that I lean toward the logic of the dissenting opinion of Mr. Justice Harlan." Continental Motors Corp. v. Township of Muskegon, Circuit Court for the County of Muskegon, File No. 16462, Oct. 12, 1960.

[33] New *Murray*-type cases are heading for the courts from Detroit. General Motors Corp. v. City of Detroit et al., Wayne County, Mich. Cir. Ct. Law Action No. 309,227, and General Motors Corp. v. County of Wayne et al., Wayne County, Mich. Cir. Ct. Law Action No. 309,228, involve 1959 Detroit and 1959 Wayne County personal property taxes. Many other cases are being held in abeyance pending decisions in these cases. Trial of these cases is expected early this summer.

[34] Note 3 *supra*.

searching for a good vehicle to relitigate the validity of Public Act 189, the military departments found a ready-made test case already under way. The background of this case is unusual. In the early 1950's, the General Services Administration rented a part of an axle plant which it owned in Detroit to a certain Jefferson Corporation. Jefferson served notice of cancellation of such lease to be effective 30 June 1954, but held over for one month with permission of the Federal Government through July 1954. During July of 1954, taxes under Public Act 189, levied by the City of Detroit and Wayne County, fell due. Jefferson refused to pay and was sued by the City and County for payment.[35] The Department of Justice intervened on request of the General Services Administration. In 1956, by stipulation of the parties, the case was continued pending the decision in *Borg-Warner* with rights reserved by the litigating parties to introduce further testimony. Following *Borg-Warner,* the Department of Justice closed its file on the theory that no grounds remained to contest the tax, but the case was not dismissed by a curious sequence of events. These included the illness of the judge, the death of his secretary, the mislaying of the transcript of evidence taken, and the adamant attitude of Jefferson's attorneys. The case lay dormant until 1960. Then came the *Phillips* decision, and of course the Government's interest in the case has been rekindled. The judge has told all attorneys they must be ready for an early trial and at a pretrial conference held on 25 March 1960 narrowed the issue to whether Public Act 189 discriminates against lessees of Federal property.[36]

This case is but a forerunner to others. The military departments have instructed all Government contractors in Michigan to resist the application of taxes imposed under Public Act 189, and both sides are preparing for the second round of litigation over "possessory interest" taxes on Federal real property.[37]

[35] City of Detroit v. Jefferson Corp. and County of Wayne v. Jefferson Corp., Wayne County, Mich. Cir. Ct. Law Actions No. 279,297 and No. 280,494.

[36] At the suggestion of the court, Jefferson has submitted "Requests for Admissions" to Detroit and Wayne County setting out sixty specific instances where it contends that tax-exempt state and county property was, or is, being used by private persons for commercial purposes without being taxed. Stipulations have been prepared by the parties and are expected to be agreed to. The filing of the briefs and the argument of the case is expected to be completed by the end of September, 1961.

[37] On 23 February 1961, a three judge Federal District Court, Northern District of Illinois, granted a permanent injunction enjoining the State of Illinois from assessing or collecting the Illinois retailers occupation (sales) tax from individuals or concerns with respect to sales of tangible personal property to the United States. United States and Olin Mathieson Chemical Corp. v. Illinois Department of Revenue, 29 U.S.L. Week 2418 (March 14, 1961) (N.D. Ill. 1961). The court ruled, on the basis of the *Phillips* case, that the state unconstitutionally discriminated against the Federal Government by collecting tax on these sales while exempting sales to the state, political subdivisions, and various charitable organizations.

C. *GOVERNMENT CONTRACTORS AS PURCHASING AGENTS: THE DU PONT CASE*

The other significant recent development in the area of state taxation of Federal activities is the *du Pont* case decided in November of 1959 by the United States District Court for the Eastern District of South Carolina.[38] At issue were South Carolina sales taxes upon the purchase of materials from South Carolina vendors by du Pont and use taxes upon purchases from out-of-state vendors, both types of which were used at the Federal Government's Savannah River Project which produces nuclear and related materials under the direction of du Pont and the supervision of the Atomic Energy Commission. Significant parts of du Pont's contract are quoted and paraphrased, *infra*. On the basis of the contractual provisions, du Pont contended that no sales and use taxes could be imposed against it because it made the purchases as agent for the United States, and therefore brought the action to enjoin the collection. The United States intervened and the court recognized that the United States was the real party in interest.

An important procedural question was first considered by the court; that is, whether this was a proper case for a Federal court in view of the so-called Johnson Act which provides in part that "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[39] The court concluded that this statute does not apply to the United States as a party in interest to such a suit. It went on to say that a state remedy is not "plain, speedy and efficient" as to the United States, if its availability is conditioned upon the prepayment of the tax, and as the exclusive remedy, under the laws of South Carolina, is a suit for refund after prepayment of the tax in full, the Johnson Act did not deprive it of jurisdiction. Also, the fact that it was, at least, doubtful that the State court would allow interest on the refund would preclude the application of this Act. The court said in this connection:

> It is well settled that a right to recover taxes illegally collected is not an adequate remedy if it does not include the right to recover interest at a reasonable rate for the period during which the taxpayer's money is withheld. Even if existence of the right be merely cast in substantial doubt, the remedy is not plain or adequate.[40]

The court then went on to the merits of the case. After discussing the history of the project and portions of the agreement

[38] United States v. Livingston, 179 F. Supp. 9 (E.D.S.C. 1959).
[39] 28 U.S.C. § 1341 (1958).
[40] 179 F. Supp. at 15. Numerous cases are cited for this proposition.

between the United States and du Pont, the court decided that du Pont was, in fact, acting as the alter ego of the AEC in purchasing the supplies. Therefore, the constitutional question involving Federal immunity from state taxation was raised. As stated in Circuit Judge Haynsworth's opinion:

> The doctrine of mutual immunity of state and of nation from taxation by the other, enunciated by Chief Justice Marshall in McCulloch v. State of Maryland, . . . has not lost vitality with age. If, at times, it has seemed that 'the line between the taxable and the immune has been drawn by an unsteady hand,' the basic principle that the United States, its property, its essential functions and activities are not subjects of taxation by the states has not been questioned in modern times.[41]

The court concluded that du Pont's procurement activities under its contract resulted in the direct sale of goods and services to the United States rather than to du Pont and that the purchases were immune from ordinary sales and use taxes upon the purchaser or upon du Pont, the purchasing agent; hence it enjoined the collection of taxes. Although each such case is somewhat different from others on its facts, most contain many of the same contractual provisions, procedures and circumstances. It is worth while, therefore, to review, in some detail, what the court found to be persuasive in this case:

1. The contract between du Pont and the AEC provides that title to all supplies and material procured under the contract by du Pont "shall vest in the Government whenever title passes from the vendor," and this arrangement was referred to in provisions of du Pont's purchase order forms.[42]

2. The Government has the optional right to furnish materials and supplies directly, in lieu of their purchase by du Pont, and, to some extent, exercised its right. This property was marked and identified exactly like the property which the state sought to tax.[43]

3. Du Pont has authority to draw from bank balances deposited and owned by the Government in making payment for the purchases.[44]

4. Du Pont does the work for a fixed-fee of one dollar and

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[41] *Id.* at 19. The "unsteady hand" thought was first raised by Mr. Justice Jackson in the *Mesta Machine* case when he said, in describing the confusion in this field: ". . . the line between the taxable and the immune has been drawn by an unsteady hand." 322 U.S. at 176. This prompted Mr. Justice Harlan, in his dissenting opinion in *Murray* (see note 32 *supra*), to say: "For until today the line between property and privilege taxes, if 'drawn by an unsteady hand,' was at least visible." 355 U.S. at 510.

[42] 179 F. Supp. at 17. As the contract involved in this litigation is still in force, the present, rather than the past tense, is used in this discussion.

[43] *Ibid.*

[44] *Ibid.*

without risk of loss. Du Pont is not required to lend its credit or its funds.[45]

5. The contract requires that du Pont include in its purchase orders a number of provisions applicable to public contracts.[46]

6. Purchases and subcontracts involving more than $10,000 cannot be made without the specific advance approval of the AEC. Such approval was made in almost seventy-five percent of the purchases by dollar amount.[47]

7. Although Congress repealed the portion of section 9(b) of the Atomic Energy Act of 1946[48] which expressly exempted the AEC from any form of state taxation, it merely intended thereby to remove the extraordinary relief from taxation which that provision provided, and to leave the Commission with the same constitutional immunity as is possessed by other Government agencies and activities.[49]

8. In *Kern-Limerick, Inc.* v. *Scurlock*[50] the Supreme Court decided that purchases by a contractor who had been constituted purchasing agent for the Navy Department in connection with the construction of an ammunition depot, were those of the United States and hence immune from Arkansas sales tax. While there was a substantial question in *Kern-Limerick* as to the contracting officer's authority to appoint the contractor the purchasing agent of the Government, there is no such question under this contract. This appears to be the sort of contract Congress contemplated in 1946 when it envisioned the role of American industry in the nuclear program. There is no reason why purchasing authority, subject to the strict controls of the AEC, could not be delegated to the managers of the project just as it would have been had they been employed by the AEC individualiy rather than collectively. The court rejected the argument by the State that since the contract did not call du Pont an "agent" in connection with procurement, du Pont was not an agent. An agent need not be called by that name to be one; liabilities of principals and immunities from taxation do not depend upon the use, or omission, of a magic label.[51] It was clear to the court that du Pont's procurement activities were authorized under the terms of the contract and were openly on behalf of the United States; hence, an agency re-

[45] *Id.* at 18.

[46] *Ibid.*

[47] *Ibid.*

[48] Atomic Energy Act of 1946, 60 Stat. 765, 42 U.S.C. § 1809(b) (1958), as amended by act of August 13, 1958, 67 Stat. 575, 42 U.S.C. § 2208 (1958).

[49] 179 F. Supp. at 19.

[50] 347 U.S. 110 (1954).

[51] 179 F. Supp. at 22.

lationship did, in fact, exist when du Pont purchased the supplies which the State sought to tax.

The State also wanted to apply the theory of the *Murray* case, contending that du Pont had a separable, beneficial and taxable use of all goods and materials, whether procured by it or by the AEC. The argument was made that du Pont accepted the contract for the purpose of furthering sales of its commercial products. However, the court recognized that careful safeguards were employed to insure that du Pont's managerial functions did not influence the procurement of their own products. Also, any knowledge and experience acquired by du Pont's scientists and technicians were of doubtful value, since the work would probably remain a monopoly of the Government for many years. The Court further concluded that even if the State's contention that du Pont's motivation was not entirely unselfish were accepted, the United States is still immune from state taxation and the property in question was the United States', not du Pont's.[52]

The Michigan cases were further distinguished by the court in that there the Supreme Court was concerned with the taxation of a completely separate business enterprise which used Government property for its purposes of profit and which derived as much advantage from the use as if it had legal title to the property. No such condition was found in the *du Pont* case; the use of the purchases taxed was that of the United States. In a sense, of course, du Pont did have the use of all of the materials and facilities at the project, but in the same sense it may be said that the individual members of the AEC have the use of all of the facilities entrusted to their care.

On April 29, 1960, the State Tax Commission filed an appeal with the United States Supreme Court. The two questions presented upon appeal were (1) whether du Pont was an agent of the United States in procurement of an use of materials and supplies and thereby immune from assessment and collection of South Carolina sales and use taxes; and (2) whether Section 1341 of the Judicial Code bars maintenance of the Federal Government's suit. The Supreme Court by a per curiam opinion on 27 June 1960 granted review, and affirmed the judgment below.[53]

Procurement personnel are, of course, extremely gratified with the decision in the *du Pont* case both for what it held and for its implications. One of the cardinal principles of equity is that equity will act wherever there is an inadequate remedy at law. Multiple suits at law to contest state taxes thought by the Federal

[52] *Id.* at 23.
[53] 364 U.S. 281 (1960).

Government to be illegally imposed upon its contractors, are hardly an adequate remedy. Therefore, it can be expected that the military departments will request injunctive action against the States whenever they feel that a State's interpretation of its statutes imposes on the inherent immunity of the Federal Government from state taxation and the only remedy available in the State is multiple suits.

III. CONCLUSION

So it is that, as of this moment, the 1958 Michigan decisions have become hollow victories to that State. Every material issue that was decide in *Borg-Warner* and *Murray* is being relitigated. At the same time, Michigan has received little support from her sister States for her way of taxing Federal activities. Only two, Utah and Minnesota, appear to have taken any legislative action of the Michigan type in the property field,[54] and most of the other States have not attempted to squeeze through the door which

[54] The Utah law, which was enacted in 1959 to be effective December 31 of that year, and which applies to both real and personal property, provides pertinently: "Sec. 1. From and after the effective date of this act there is imposed and there shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation, when such property is used in connection with a business conducted for a profit, except where the use is by way of a concession in or relative to the use of a public airport, park, fairground or similar property. . . ." Chap. 5, Laws of Utah Special Session 1959. The Minnesota law, as first enacted in 1959, also applied to both real and personal property and, on its face ("When any real or personal property which for any reason is exempt from ad valorem taxes . . . is leased, loaned, or otherwise made available . . ."), still does. However, by a later enactment of the same special session of the State Legislature a specific exemption was provided for *Murray*-type taxes on personalty; viz: "3. The provisions [hereof] . . . shall not apply to: . . . . (D) Inventories of raw materials, work in process and finished goods and machinery and equipment owned by the Federal Government and leased, loaned or otherwise made available and used by private individuals, associations or corporations in connection with the production of goods for sale to the Federal Government." Minn. Stats. 1957, § 272.01, subdiv. 3, as amended by c. 1, Laws of Minnesota Special Session 1959, as further amended by c. 85, same session. Otherwise the Utah and Minnesota laws are essentially the same.

Murray partially opened into the sales and use tax field.[55] The lesson in *Phillips* cannot be ignored by those States which give tax advantages to lessees of its own property or that of its subdivisions, and most are appreciative of the adverse position in which Government contractors within their borders would be placed by special taxes not imposed upon Government contractors in other States. Decisions favorable to Michigan and its local taxing jurisdictions in the second round of cases now being litigated may change all that, but, in the meantime, the bonanza to the States predicted for the first round has not materialized.

EDWARD H. KURTH*

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[55] For example, there was then in the Louisiana courts a suit by Chrysler Corporation to recover use taxes paid to the City of New Orleans, under protest, for machinery and tools purchased out of state, on behalf of the United States, and shipped to a Government plant in New Orleans where Chrysler was manufacturing tanks under a Government contract. After the Michigan cases were decided, the City filed an exception of no cause or right of action to Chrysler's petition. Under local practice this was in the nature of a demurrer. The City's position was that the Michigan decision, without more, required a finding in its favor. The exception was maintained in the New Orleans Civil District Court and Chrysler appealed to the Supreme Court of Louisiana. That court reversed and set aside the judgment below in distinguishing the Michigan statute from the New Orleans ordinance. Chrysler Corp. v. City of New Orleans, 238 La. 123, 114 S.2d 579 (1959). About the same time, the question arose in Georgia as to whether that State's sales tax could be imposed upon the retail sale of personal property by Georgia vendors to the United States. The aswer turned upon whether the statute imposed a vendor-type tax, in which case the tax would be valid, or a vendee-type tax, in which case it would not be. See Alabama v. King and Boozer, note 5 *supra*. A test case, Oxford v. J. D. Jewell, Inc., 215 Ga. 616, 112 S.E.2d 601 (1960), was rushed to the State Supreme Court where that court decided in favor of the State's contention that the tax was of the vendor-type. In short order, the State Legislature passed an amendment to the law which specifically exempted sales to the United States from the tax. Sec. 2(d), Georgia Retailers' and Consumers' Sales and Use Tax Act, as added by Act 509, Ga. Laws 1960, effective March 1, 1960.

* Colonel (Ret.); JAGC, U.S. Army; Former Chief, Procurement Law Division, Office of The Judge Advocate General, Department of the Army; B.S., United States Military Academy, 1939; LL.B., Harvard Law School, 1950; Former Army Member, Armed Services Tax Council and Army Legal Member, Armed Services Procurement Regulation Committee.

THE FUNCTION OF INTERNATIONAL LAW IN THE INTERNATIONAL COMMUNITY: THE COLUMBIA RIVER DISPUTE.* [*Editor's Note:* The matter of peaceful settlement of international disputes is more than of mere academic interest to the military lawyer who, by reason of his training, frequently thinks only in terms of the legal rights of parties to a dispute. This is particularly true in the field of international law. It is well for the military lawyer to recognize that all international disputes of a purely legal nature need not be resolved by a court of law, especially when the role of the International Court of Justice and the current debate concerning the repeal of the United States reservation relating to the jurisdiction of that Court is considered. In many situations, other means of settling disputes exist and can be utilized more successfully, a point made abundantly clear in the Columbia River Dispute. Considering that the military posture of the United States may be vitally affected by the decisions reached in negotiated or judicial determinations of international disputes, it is highly desirable that military lawyers be made aware of the fact that quite often a purely legalistic approach to disputes of an international nature may create problems which otherwise could have been avoided.]

I. INTRODUCTION

An eminent British diplomat, Sir Harold Nicolson, once wrote: "The worst kind of diplomatists are missionaries, fanatics and lawyers; the best kind are the reasonable and humane sceptics." [1] If this statement is true, it is perhaps so because of an unfamiliarity on the part of lawyers with nonlegal aspects of international relations, and a resulting misconception as to the function of international law in the international community.

Setting aside jurisprudential controversies as to the nature of law, and whether international law is "true law," international law cannot function with the high degree of effectiveness attained by most national legal systems. The reasons for the comparative ineffectiveness of the international legal order are made apparent by a brief institutional comparison of the two legal orders.[2]

The legal rules of the national society strictly regulate the activities of its subjects to the end that, with rare exceptions,

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] Nicolson, Diplomacy 50 (2d ed. 1950).

[2] For a more detailed comparison, see Van Dyke, International Politics, ch. 2 (1957).

those subjects are denied the use of force in the settlement of their disputes. Accordingly, each national society has, if not a monopoly on the use of force, at least a sufficient amount of force to enforce its rules effectively.

Further, national legal orders provide institutions for the accomplishment of what is usually referred to as "peaceful change." The need for this flexibility is dictated by the dynamic quality of social, economic, and political conditions. It may be said that the amount of force which the national government must possess to preserve internal order is inversely proportional to its ability and willingness to effect peaceful change. As laws are made in the light of existing social, economic, and political conditions, they must be changed to accommodate changes in those conditions. Although peaceful change is accomplished mainly by the legislative branch of the national government, no small part is played in this regard by the executive and judicial branches.

Although it is generally conceded that international law now forbids the use of "aggressive force" in the settlement of disputes, the applicable rules are deficient in their definition of such controlling concepts as "aggression" and "sufficient provocation." Accordingly, the contention that the international legal order provides for a monopoly on the use of force by the international society [8] is theoretical rather than actual.

Despite the tremendous advances made by the international legal order since World War I toward the establishment of effective institutions for the accomplishment of peaceful change, the existing international institutions appear woefully undeveloped, when compared with their national counterparts. There is no effective international legislative body with authority to enact rules binding on nations; no international executive controlling sufficient force to require states to obey rules of law; and no international judicial tribunal possessed of compulsory jurisdiction before which nations may be cited and tried for their delicts. These deficiencies are generally declared to be the result of the concept of state sovereignty as enhanced and magnified out of all necessary proportion by the ideology of nationalism.

On the national scene, the concept of sovereignty operates to protect the national legal order from external influence, thereby increasing its internal effectiveness. The concept of sovereignty is complemented by nationalism, which acts to unify the subjects of the national legal order in regard to their attitudes toward national objectives, and thus makes them more amenable to the rule of law. However, these protective and unifying forces of the

[8] Kelsen, Principles of International Law 44 (1952).

national legal order become disruptive, and act to delay, if not prevent completely, the development of an effective international legal order. The paradox is, therefore, that the international legal order—by extending juridical acceptance to the doctrine of state sovereignty, as that doctrine exists today—has accepted as its *grundnorm*[4] a concept which, if allowed to remain unmodified, will preclude that legal order from ever becoming truly effective.

This ineffectiveness of international law, resulting as it does in a failure of states to demand in most cases their "full legal rights," has important implications for the lawyer, including the military lawyer. In the absence of reliable institutions for the enactment, interpretation, and enforcement of international law, nations will continue to transact the vast bulk of their international business by means of negotiation. They will continue to legislate for themselves by means of treaties, form alliances and counter-alliances to meet force with force, and settle their disputes by a number of alternative methods mainly of an *ad hoc* nature and requiring prior negotiation. The vast corps of negotiators utilized by states is composed of persons of varying backgrounds and professions, including both the military and legal professions. It would not be an exaggeration to state that almost every negotiation presents legal problems requiring the participation of legal advisers. The military negotiator may often utilize the services of military lawyers.

In order that the legal adviser to any negotiator properly may perform his function, it seems apparent that he must have the capacity to transcend his system of national law and must not adhere ". . . to rigidily compartmentalized national legal systems, which are unable to cope with an economic order of international dimensions."[5] The problem is clearly stated by Professor Bishop as follows: "At times, an international law solution to a particular problem may appear obvious, when in fact it would prove entirely impracticable when viewed against the entire background, particularly when that political, economic, or social background is unfamiliar."[6] It is precisely this problem that the following case study is designed to illustrate.

II. THE COLUMBIA RIVER DISPUTE

An expressed desire on the part of Canada to divert waters from the Kootenay River into the Columbia, and from the

[4] *Grundnorm* is a German word, frequently used by international law writers, to refer to a basic rule, a principle, or an axiom.

[5] Timberg, *International Combines and National Sovereigns*, 95 U. Pa. L. Rev. 575, 577 (1947).

[6] Bishop, International Law xvii (1953).

Columbia into the Fraser, gave rise to the Columbia River dispute. The Fraser River system lies entirely within the boundaries of Canada.

The Kootenay River has its source in British Columbia, flows south into Montana, west through Idaho, and then back into British Columbia, where it empties into Kootenay Lake.

The Columbia River has its source in Columbia Lake in southeast British Columbia. It flows northwest and then turns south, receiving the outlet of Kootenay Lake and flowing into the State of Washington. It empties into the Pacific Ocean between Washington and Oregon.

In view of the fact that the proposed diversion by Canada would materially reduce the supply of water within the United States, the United States Government properly became concerned. It is obviously within the best interests of the United States to receive a sufficient supply of water in the Kootenay and Columbia Rivers to satisfy present needs and to allow for such future uses as may be reasonably foreseeable. It is equally within the best interests of Canada to utilize its water supply so as to achieve the maximum benefits therefrom.

Ostensibly, the dispute was purely one of international law. To what extent may an upper riparian state divert waters which normally flow from its territory into a neighboring state? Conversely: what are the rights of a lower riparian state in regard to waters normally flowing into its territory from a neighboring state? These questions provoked a considerable number of articles and studies concerning the legal rights of the parties involved.[7] Clearly, however, there were serious policy questions presented which deserved equal, if not greater, consideration.[8] Should either of two friendly nations insist upon the full exercise of legal rights to the material injury of the other? What technique or techniques of pacific settlement of disputes would best be suited to arriving at a mutually satisfactory solution? Obviously, any solution to this dispute necessarily would have a profound economic impact, with resulting social and political implications, on the inhabitants of the areas directly affected. It is to the credit of both governments that other than legal considerations ultimately were deemed to be of prime importance.

Although the legal questions involved in a particular dispute may be considered to be of secondary importance, the legal posi-

[7] *E.g.*, Griffin, *Legal Aspects of the Use of International Waters*, S. Doc. No. 118, 85th Cong., 2d Sess. (1958). (Cited hereafter as S. Doc. 118); Cohen, *Some Legal and Policy Aspects of the Columbia River Dispute*, 36 Can. B. Rev. 25–41 (1958).

[8] Cohen, *op. cit. supra* note 7.

tions of the parties to that dispute may have a direct influence upon their choice of methods of pacific settlement. Thus, a party who has an untenable legal position should not insist upon adjudication of the dispute by the International Court of Justice. Further, in this connection, the relative strength of the legal positions of the parties may largely determine their tactics at the conference table. For these reasons, at an early stage in the Columbia River dispute, the Senate Committee on Interior and Insular Affairs requested the State Department to provide the committee with a ". . . memorandum on the international law applicable to the proposed diversions by Canada from the Kootenay River into the Columbia and from the Columbia into the Fraser."[9] The requested memorandum was prepared by Mr. William Griffin, of the State Department, and was printed as Senate Document No. 118, 85th Congress, 2d Session.

III. THE USE OF INTERNATIONAL WATERWAYS

The conclusion that the Columbia and Kootenay Rivers are international waterways is well-settled. The late Professor J. L. Brierly stated the definition of international waterways and the attending problem succinctly:

> The only rivers . . . which concern international law are those which flow either through, or between, more states than one. Such rivers are conveniently called "international rivers"; and they raise the question whether each of the riparian states has in law full control of its own part of the river, or whether it is limited by the fact that the river is useful or even necessary to other states.[10]

A. *THE TREATY OF 1909*

On 11 January 1909, the United States and Great Britain signed a convention concerning the boundary waters between the United States and Canada,[11] which convention is still in effect. The Treaty of 1909 is concerned with three categories of waters, only one of which was involved in the Columbia River dispute. That portion of the Treaty dealing with waters flowing across the international boundary is set forth in Article II, as follows:

> Each of the High Contracting Parties reserves to itself . . . the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion

[9] S. Doc. 118, Foreword.

[10] Brierly, The Law of Nations 200 (5th ed. 1955).

[11] Treaty Relating to Boundary Waters and Questions Arising Along The Boundary between the United States and Canada, January 11, 1909, 36 Stat. 2448, T.S. No. 548 (effective May 5, 1910).

> from their natural channels of such waters on either side of the boundary resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs;

Senate Document 118 contains a detailed analysis of the legal history of the Treaty of 1909.[12] It is concluded therein that the intent of the parties was to subject the use and diversion of waters flowing across the boundary to the applicable provisions of customary international law.[13]

Although it is not possible in a study of this scope to treat the subject in sufficient detail to arrive at a definitive opinion, it is deemed warranted to make a few observations for the sole purpose of demonstrating that the conclusions arrived at by Mr. Griffin are highly controversial, and are not nearly so clearly established as he contends.

(1) In 1895, United States Attorney General Harmon had rendered an opinion which, in effect, stated that an upstream proprietor may divert waters within its territory at will regardless of the effect such diversion may have upon the downstream proprietor.[14] The United States subsequently negotiated a treaty with Mexico in which it was expressly stated that the delivery of water to Mexico in the Rio Grande River was not to be construed as recognition by the United States of any Mexican claim to such water; that the United States did not concede any legal basis for Mexican damage claims; and that the United States did not concede the establishment of any general principle or precedent by the negotiation of the treaty.[15] The so-called Harmon doctrine was well known at the time the Treaty of 1909 was negotiated.

(2) In negotiating the 1909 treaty with Great Britain, Secretary of State Elihu Root relied heavily upon the advice and assistance of Mr. Chandler P. Anderson, whom Secretary Root had retained as special counsel. Pertinent extracts from a report submitted to the Secretary by Mr. Anderson in December 1907 are set forth below:

> It will be observed that so far as these matters are embraced wholly within the territory of either the United States or Canada or relate . . . to waters flowing from one country into the other across the boundary, *international law is not directly concerned with them.*
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> It is not likely that the approval of the Senate would be given to a treaty delegating to an international commission such unrestricted

[12] S. Doc. 118 at 6–62.
[13] *Id.* at 62.
[14] 21 Ops. Att'y Gen. 274 (1895).
[15] Convention Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, 34 Stat. 2953, T.S. No. 455 (effective January 16, 1907).

> powers over matters wholly within the borders of the United States, and it is doubtful if any amendment to the treaty could be devised which would overcome the difficulty presented. Where, as in this case, *international law fails to apply*, it is necessary . . . to establish . . . some other principles or rules of law which will control.[16]

(3) The debates held in the Canadian House of Commons reveal that Canada was well aware of the Harmon doctrine and recognized that doctrine as the official position of the United States and as included in the Treaty of 1909, though therein modified by that portion of Article II which provides for claims for damages.[17]

(4) Professor Charles Cheney Hyde, an eminent authority on international law, refers to the Harmon doctrine as the rule recognized by the United States, and considers it to be incorporated into the Treaty of 1909, as modified by the provisions concerning damages.[18]

It is believed that the foregoing observations furnish sufficient basis for the conclusion that a protest lodged by the United States on the basis of the Treaty of 1909, alleging that the proposed diversions by Canada would violate international law, would be of doubtful legal validity. However, assuming that the Treaty of 1909 does not incorporate a modified Harmon doctrine, there remains to be considered the further question as to what are the rights of riparian states in the absence of an applicable treaty provision.[19]

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[16] Papers of Chandler P. Anderson in Manuscript Division, Library of Congress. Quoted in S. Doc. 118, 15–21. (Emphasis supplied.)

[17] 1 H.C. Deb. (Dominion of Canada) 870–912 (1910–1911). See S. Doc. 118 at 61. Mr. Griffin arrives at the opposite conclusion based on the same debates, and it is readily admitted that his conclusion can be supported by sentences considered out of context. The Canadian Minister of Public Works stated that, in his opinion, the Harmon opinion correctly stated international law. When asked if the Canadian Government had accepted the Harmon doctrine, the Minister replied, "No, the treaty is not framed on that theory." In construing the remarks made in the Canadian House of Commons, it must be remembered that the Harmon doctrine embodied two elements, (1) the absolute right of diversion on the part of upper riparians, and (2) the absence of any ground for complaint on the part of the lower riparians. The second element was discarded in framing the treaty. Accordingly, the statement made by the Minister to the effect that the treaty was not framed on that theory is perfectly consistent with the inclusion of the first element of the Harmon doctrine.

[18] 1 Hyde, International Law: Chiefly as Interpreted and Applied by the United States 565–72 (2d. ed. 1945).

[19] The question as to whether the United States would be estopped from asserting the invalidity of the Harmon opinion is not discussed by Mr. Griffin, and will not be considered herein.

B. *RIPARIAN RIGHTS UNDER GENERAL INTERNATIONAL LAW*

In the absence of an applicable treaty provision, the sources of international law available to the International Court of Justice are declared by Article 38 of the Statute of the Court to be:

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(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[20]

Although treaties create law only as between signatories and only as to the specific subject concerned therein, the existence of similar provisions in a number of treaties may be used as evidence of the existence of customary rules of international law. Mr. Griffin notes that more than 100 treaties governing the use of international waterways have been concluded.[21] These treaties all contain limitations upon the untrammeled sovereign power of a contracting state to utilize international waterways without regard to the injurious effects on the neighboring states.[22] Some of these treaties he discusses in some detail.

It must be remembered, however, that this type of evidence is at best weak. As pointed out by Professor Brierly:

> The ordinary treaty by which two or more states enter into engagements can very rarely be used as evidence to establish the existence of a rule of general law; it is more probable that the very reason of the treaty was to create an obligation which would not have existed by the general law, or to exclude an existing rule which would otherwise have applied.[23]

The leading case on the rights of riparian owners cited in international law texts and casebooks is the case of *Wurttemberg and Prussia* v. *Baden* (*The Donauversinkung Case*).[24] It was therein decided that the parties must refrain from interfering with the natural flow of the Danube to the injury of the other parties.

In domestic situations, the United States Supreme Court has rejected the application of any Harmon-like doctrine to the relations between several riparian states, and has laid down rules

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[20] Article 59 of the Statute of the International Court of Justice provides, in substance, that the decisions of the Court are binding only on parties to the suit and then only as to the specific subject-matter involved. In other words, there is no doctrine of *stare decisis* in international law.

[21] S. Doc. 118 at 63.

[22] *Id.* at 63–71.

[23] Brierly, *op cit. supra* note 10, at 58.

[24] German Staatsgerichtschof, 1927, Annual Digest 1927–28, Case No. 86, p. 128.

permitting diversions which were conceived to be equitable. The American rule is perhaps adequately set forth by the following words of Mr. Justice Holmes:

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of lower states could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both states have real and substantial interests in the River that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an equitable apportionment without quibbling over formulas.[25]

Although the teachings of publicists are listed in Article 38 of the Statute of the International Court of Justice as "subsidiary means for the determination of rules of law," the importance of the influence of text-writers in the development of international law should not be underemphasized.[26] A summary of the opinion of publicists and associations of international lawyers is set forth by Mr. Griffin in which he notes that only a few authors maintain the view that riparian states have unlimited sovereign rights to use at will the waters in their territories.[27]

On the basis of the brief summary of authorities set forth above, it is submitted that the legal positions of the parties concerned—The United States and Canada—were such that neither party could have entered the field of judicial settlement assured of a victory. The basic issue would have been whether the Treaty of 1909 incorporates a modified version of the Harmon doctrine. If that question were resolved in favor of Canada, the legal aspects of the dispute would have been settled. In the case of the United States, however, a legal victory would have required in addition to a favorable construction of the Treaty, a decision of the tribunal upholding some strong legal rights on the part of lower riparian states. Although such a decision would have been probable, it was by no means a certainty.

IV. AVAILABLE MEANS OF PACIFIC SETTLEMENT

The experience of states in settling disputes between themselves has resulted in the development of a number of recognized techniques, each utilizing rules which have become, to some extent, standard, and each peculiarly suited to certain types of disputes.

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[25] New Jersey v. New York, 283 U.S. 336, 342–43 (1931).

[26] See West Rand Central Gold Mining Co. v. The King, King's Bench, [1905] 2 K.B. 391; The Paquete Habana, 175 U.S. 67 (1900).

[27] S. Doc. 118 at 82.

In addition to those methods which have acquired a definite status in international relations, recent practice has demonstrated the availability of what may be termed new and unorthodox methods, but what may become the standardized methods of the future. In this connection, specific reference is made to the various forms of intercession used by the League of Nations and, more particularly, the United Nations. The following methods will be briefly considered: negotiation, good offices, inquiry, mediation, conciliation, arbitration, and judicial settlement.

A. *NEGOTIATION*

The settlement of disputes by negotiation may be said to be one of the two oldest means of settling disputes, the other being the use of force. There are few procedural rules involved, and any mutually satisfactory terms which end the dispute result in a settlement. Negotiation is best suited for the settlement of purely political disputes—those said to be inherently incapable of legal settlement—and in fact is often the only suitable method for settling some disputes. The instrument of foreign policy used in negotiation is diplomacy; the result is a compromise.

The prerequisites for settlement by negotiation are stated by Professor Lerche to be an understanding of the nature of the conflict, adequate power, and disposition to compromise.[28] Obviously, a clear understanding of the nature of a dispute and all peripheral questions involved therein is necessary to any effective negotiation, and the realities of international politics demand that a nation possess adequate power to enable it to bargain. It seems apparent that each party must be willing to compromise because a settlement which is not a compromise is not reached by negotiation, but by one party abandoning the dispute and meeting the other party's demands.

A good compromise, in Professor Lerche's opinion, must meet three basic requirements: (1) it must satisfy the minimum requirements of both sides; (2) it must represent a reasonably accurate reflection of the actual power situation; and (3) it must be of a sort that saves the prestige of both sides.[29]

B. *GOOD OFFICES*

In the event the parties fail to reach an agreement by means of negotiation, or refuse to negotiate, the next logical step in the process of pacific settlement is that of good offices.

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[28] Lerche, Principles of International Politics 184–86 (1956).

[29] *Id.* at 187.

> Good offices introduces an element common to all the subsequent means of settlement, the introduction of a third party. If the disputing parties are refusing to negotiate or if the negotiations have broken down, a third state may offer its "good offices" for the purpose of inducing the parties to negotiate between themselves. The third state does not itself participate except to the extent of bringing them together.[30]

The sole function of good offices is to insure the resumption of direct negotiation.

Two of the best known instances of the use of good offices are President Theodore Roosevelt's actions in bringing about the negotiations which ended the Russo-Japanese War of 1905, and the actions of the United Nations in connection with the Netherlands-Indonesian dispute of 1946–49.[31] Although certain techniques of exerting pressure were used in each case, in both instances the ultimate settlement was the result of direct negotiation between the parties.

C. *INQUIRY*

A more formal procedure utilizing the services of a third party is that of the commission of inquiry. Inquiry was specifically recognized at the Hague Conventions of 1899 and 1907, as friendly action by third parties. The Hague Convention of 1907 stated:

> In disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the contracting powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.[32]

The function of a commission of inquiry is to investigate and render a report on the facts of a case. It has no power to decide a controversy. It may make recommendations, but these have only such effect as the parties choose to give them. The Dogger Bank incident between Great Britain and Russia is usually cited as an outstanding example of the use of a commission of inquiry.[33]

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[30] Jaeger and O'Brien, International Law 583 (rev. ed. 1960).

[31] Lerche, *op. cit. supra* note 28, at 224.

[32] Convention For The Pacific Settlement of International Disputes, October 18, 1907, art. 9, 36 Stat. 2199, T.S. No. 536 (effective in United States on January 26, 1910).

[33] The Dogger Bank incident was a dispute resulting from the actions of Russian naval vessels during the Russo-Japanese War of 1905, in firing upon a British fishing fleet. Russia asserted that the vessels had been mistaken for Japanese gunboats. In actually deciding the case on its merits and in making an award to Britain, which Russia accepted, the commission greatly exceeded its fact-finding powers.

D. *MEDIATION*

A technique closely resembling a mixture of good offices and inquiry, but transcending both in scope, is found in mediation. Mediation is the most precise of the techniques of non-judicial settlement and confers the greatest initiative on third parties. In the process of mediation, the third party takes an active part in the negotiations and proposes solutions attempting to harmonize the differing points of view. Mediation requires the consent of both parties to the dispute. It may be *ad hoc* or it may be institutionalized by means of treaties or conventions. Like good offices and inquiry, mediation is designed to deal with nonjusticiable issues. An example of the use of mediation is the United Nations' mediation in the case of Palestine, in which Count Folke Bernadotte of Sweden, and later Dr. Ralph Bunche of the United States, served ably as "United Nations Mediator."

E. *CONCILIATION*

Conciliation is used in international relations in two ways. Professor Lerche uses the term in a broad sense to denote a class of methods including good offices, inquiry and mediation.[34] In its more narrow sense, conciliation is a recognized method which is a logical outgrowth of the commission of inquiry.

> A conciliation commission undertakes to clarify the facts of a controversy, just as commissions of inquiry, but *in addition* such commissions include in their reports proposals for a settlement. Since these proposals are not binding, they have not the character of an award or judgment; thus conciliation is an intermediate form between the purely fact-finding functions of commissions of inquiry and the judicial functions of arbitration and adjudication.[35]

The advantages of a conciliation commission are obvious. It may investigate and clarify issues, and propose solutions to be presented to the parties. In other words, it may do all that good offices, mediation, and inquiry permits, and need not bring the parties into direct contact with each other. Conciliation is of great value in intense disputes, requiring that the parties maintain a *status quo* and "cool off."

F. *ARBITRATION*

Arbitration is a legal or quasi-legal method which is of value in settling disputes involving questions of legal rights. In the area of purely political disputes it is of little or no value.

> The Hague Convention defined arbitration as the settlement of disputes between states "by judges of their own choice and on the basis of

[34] Lerche, *op. cit. supra* note 28, at 228.
[35] Jaeger and O'Brien, *op. cit. supra* note 30, at 584.

> respect for law." The arbitral tribunal is a court, bound by rules both procedural and substantive; as such, it has the right to make definite findings which both parties are bound to accept.[36]

Disputes may be submitted to arbitration in any of these ways. It may be purely *ad hoc*; it may be the result of a specific treaty containing a clause wherein the parties agree to arbitrate disputes arising out of the treaty; it may be the result of a general treaty wherein the parties agree to arbitrate all disputes or certain classes of disputes.

> The basis of arbitration is the *compromis*. By the *compromis* the parties establish the jurisdiction of the tribunal, the procedures to be followed, the exact questions to be answered, and whatever other aspects of the proceedings require their prior consent. . . . A *compromis* may establish the law to be followed by the arbitrators, and even bind them to certain extra-legal understandings of the parties.[37]

Arbitration may be used in situations wherein the parties desire that an impartial judgment be rendered as binding, yet are apprehensive of the utilization of established courts applying strict rules of international law. The fact that the parties select the judges and decide the rules to be followed, makes arbitration more attractive in certain types of cases.

G. *JUDICIAL SETTLEMENT*

The method of judicial settlement may be explained best by contrasting it with arbitration.

> Arbitration differs from judicial settlement . . . particularly in this respect: parties to an arbitration constitute their own court, establish the procedural (and to a limited extent the substantive) rules and delimit sharply the scope of the award; international tribunals such as the International Court of Justice are permanent courts which define their own jurisdiction and follow their own procedures once an action has been brought before them. . . . [I]nternational adjudication in the strict sense involves the application of international law as the tribunal interprets it.[38]

The method of judicial settlement is of great value in deciding conflicts involving disputes of law devoid of intense political differences, where any solution reached on purely legal grounds could be accepted by both parties with good grace and little bitterness. A clear example of such a dispute is the Clipperton Island arbitration between France and Mexico, which was a dispute over the ownership of an unimportant bit of territory.[39]

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[36] Lerche, *op. cit. supra* note 28, at 229.

[37] Jaeger and O'Brien, *op. cit. supra* note 30, at 586–87.

[38] *Ibid.*

[39] Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v. Mexico) (1931), in 26 Am. J. Int'l L. 390 (1932).

V. SETTLEMENT OF THE DISPUTE

On 29 January 1959, the Governments of the United States and Canada requested the International Joint Commission[40] to make recommendations concerning the principles to be applied in determining and apportioning power and flood control benefits which would result from cooperative development of the Columbia River Basin.[41] The requested report was submitted on 29 December 1959.[42]

On 25 January 1960, the Governments of the United States and Canada appointed delegations to represent their respective Governments in negotiations looking toward the formulation of an agreement covering cooperative development of the water resources of the Columbia River Basin for the mutual benefit of both countries. The delegations held seven formal meetings, supplemented by a number of discussions by technical advisers, and were greatly assisted in their work by the report of the International Joint Commission.[43]

The delegations recommended that a treaty be concluded between the two nations providing substantially as follows:[44]

1. Canada, at its own expense, to provide and operate in Canada, 15.5 million acre feet of storage usable for increasing hydroelectric power generation and improving flood control in the United States.

2. To provide this quantity of storage, Canada to construct dams at Mica, High Arrow, and Duncan Lake areas in Canada.

3. The United States to pay Canada in kind 50% of the power benefits resulting from the Canadian storage.

4. The United States to pay Canada an amount equal to one-half of the flood control benefit from the Canadian dams.

5. Canada to authorize and make available a reservoir area extending forty-two miles into Canadian territory for the construction of Libby Dam on the Kootenay River in Montana.

In addition, the proposed treaty would preclude each country from diverting water out of the Columbia River Basin above the point that the main stem or any tributary crosses the boundary, or out of any sub-basin that crosses the boundary, except for a diver-

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[40] Established by the Treaty of 1909, *supra* note 11.

[41] State Dep't, Press Release, Oct. 19, 1960.

[42] *Ibid.*

[43] See State Dep't, Report to the Governments of the United States and Canada, rendered by the delegations on Sept. 28, 1960.

[44] State Dep't, Analysis and Progress Report: Cooperative Development of the Columbia River Basin Water Resources (Oct. 19, 1960), pp. 1–6.

sion of 1.5 million acre feet of water annually from the Kootenay River to the Columbia River. This diversion may not occur before the expiration of 20 years, and may not deplete the flow of the Kootenay River below a stated rate.[45]

In January, 1961, a treaty substantially embodying these provisions was entered into between and signed by the United States and Canada.[46] Although the treaty has not yet been ratified by either country,[47] the two Governments appear to be in substantial accord as to its terms, and there is little reason to believe that the negotiations cannot be completed in the near future.

VI. CONCLUSIONS

On the basis of the foregoing comments, the following conclusions appear to be warranted:

A. *THE FUNCTION OF INTERNATIONAL LAW*

A fully developed international legal order should perform the same function presently performed by the more highly developed national legal orders, *i.e.*, control the use of force in order that its subjects are required to settle their differences pacifically. What is lacking that is needed in the international legal order is a legislative body with authority to bind its members, an executive with sufficient force to enforce its rules, a court with compulsory jurisdiction, and, above all, a willingness to effect peaceful change.

B. *THE USE OF INTERNATIONAL LAW*

International law should be used, in the sense of resort to court action, only as a last resort. Aside from such consideration as the delays and expenses usually incident to litigation, there must also be considered such factors as the interdependence of nations and the inability of courts to settle many disputes in a manner that is satisfactory to all parties to the suit.

The economic, social, and political interdependence of the United States and Canada in regard to specific matters is exemplified by the nature and settlement of the Columbia River Dispute. Their general interdependence is a necessary result of their memberships in NATO. Friends, clients, and customers estranged as a result of litigation may easily be replaced, but, because of

[45] *Id.* at 6.

[46] 44 Dep't State Bull. 227 (1961). For text of the treaty, see *id.* at 234–40.

[47] On March 15, 1961, the Senate Committee on Foreign Relations unanimously reported out the treaty. See Transcript of Presidential Press Conference in Washington Post, March 16, 1961, § A, p. 16. On March 16, 1961, the Senate gave its advice and consent to ratification of the treaty by a 90–1 vote. 107 Cong. Rec. 3910–3924 (1961).

geographical and other factors, it is infinitely more difficult to compensate for the loss of an ally.

An examination of the terms of the proposed treaty to settle the problems involved in the Columbia River Dispute reveals that such a solution would be beyond the power of any court to adjudge. Canada could not be required by court decree to build dams or to make land available to the United States for its use as a reservoir, nor could the United States be required similarly to construct the Libby Dam. Such a solution could only be arrived at by negotiation, utilizing, as did the United States and Canada, fact-finding procedures and the advice of experts.

The implications of these conclusions for the international lawyer have been discussed previously and will not here be repeated. Suffice it to say that to perform their function satisfactorily, international lawyers must train themselves to think and act like diplomats.

WALLACE S. MURPHY*

* Major, JAGC, U.S. Army; Member of Faculty, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; Member of South Carolina Bar; LL.B., 1949, University of South Carolina Law School.

BOOK REVIEW

The Military Law Dictionary. By Richard C. Dahl and John F. Whelan. New York: Oceana Publications, Inc., 1960. Pp. 200. $6.00.

The literature of military law—especially that of military criminal law—has increased noticeably in the first decade of the Uniform Code of Military Justice.[1] New treatises have been written.[2] New editions of familiar digests[3] have been joined by still another digest.[4] Casebooks have multiplied.[5] A loose-leaf citator has appeared.[6] Practical handbooks and manuals have been published,[7] and books have been written for the nonlawyer.[8] The authors consist of the predictable preponderance of active, reserve, and retired uniformed lawyers, but also include lawyers who are not members of the Armed Forces,[9] and at least one officer who is not a lawyer.[10]

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[1] Act of May 5, 1950, § 1, ch. 169, 64 Stat. 108 (effective May 31, 1951). Reenacted in 1956 as 10 U.S.C. § 801–940. Act of Aug. 10, 1956, § 1, ch. 1041, 70A Stat. 1, 36–79 (effective Jan. 1, 1957).

[2] In order of publication, they are: Snedeker, Military Justice under the Uniform Code (1953), with 1954 supplement; Aycock & Wurfel, Military Law under the Uniform Code of Military Justice (1955); Everett, Military Justice in the Armed Forces of the United States (1956); Avins, The Law of AWOL (1957); Munster & Larkin, Military Evidence (1959).

[3] Philos, Handbook of Court-Martial Law (rev. ed. 1951), with 1953 supplement; Tillotson, Index-Digest and Annotations to the Uniform Code of Military Justice (4th ed. 1956). It appears that there will be no further editions of either volume.

[4] Tedrow, Digest—Annotated and Digested Opinions—United States Court of Military Appeals (1959), with June 10, 1960, supplement. Earlier editions of the digest, in paperbound form, were given a limited official distribution.

[5] Lawyers Co-operative Publ. Co. (eds.), Military Jurisprudence—Cases and Materials (1951); Jacobs, Outline of Military Law—United States Supreme Court Decisions (rev. ed. 1951); Schiller, Military Law (West Publ. Co. Amer. Casebook Series, 1952); Walker, Military Law (Prentice-Hall Law School Series, 1954).

[6] Hamilton, Citer to United States Court of Military Appeals Opinions.

[7] Wiener, The Uniform Code of Military Justice (1950); Feld, A Manual of Courts-Martial Practice and Appeal (1957); Spratt, Military Trial Techniques (1957).

[8] Edwards & Decker, The Serviceman and the Law (6th ed. 1951); Snyder, Every Serviceman's Lawyer (1960). Also, Spratt, *op. cit. supra* note 7.

[9] Avins, *op. cit. supra* note 2. The following authors, whose works are cited in notes 2, 4, 5, 7 *supra*, are present or former commissioners of USCMA: Everett, Tedrow, Walker, and Feld.

[10] Spratt, *op. cit. supra* note 7.

Armed Forces texts and manuals abound.[11] Army and Navy lawyers attending the Judge Advocate Officer Career Course at the Army Judge Advocate General's School have written 161 theses—nearly one-half of which deal with military criminal law—and 28 more are being written now. Topics for the latter were selected from a list of 125 recommended.[12]

As in the period immediately before the Uniform Code was enacted, law reviews have published scores of articles, comments and case notes dealing with military law.[13] The Judge Advocates Association resumed (in December 1948) publication of its bulletin, the *Judge Advocate Journal.* The contents of the *American Bar Association Journal,* the *Federal Bar Journal* and *Federal Bar News,* and *United States Law Week* likewise reflect an appreciation of the importance of military law to the profession at large. The Navy's monthly *JAG Journal,* the bimonthly *Air Force Judge Advocate General's Bulletin,* and the Army's quarterly *Military Law Review* are "must reading" for lawyers in all services.[14] If more persuasive evidence of the demand for keeping abreast in the most dynamic field of American public law is needed, it can be found in the existence of almost-weekly periodicals that convey information swiftly to practicing military lawyers. Those are the Army's *Judge Advocate Legal Service*[15]

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[11] Representative of current works pertaining to military criminal law are the following: U.S. Dep't of Army, Pamphlet No. 27–10, Military Justice Handbook—The Trial Counsel and the Defense Counsel (1954); U.S. Dep't of Army, Pamphlet No. 27–9, Military Justice Handbook—The Law Officer (1958); U.S. Dep't of Air Force, Air Force Manual No. 110–5, Court-Martial Instruction Guide (1959); U.S. Dep't of Air Force, Air Force Manual No. 110–8, Military Justice Guide (1959); U.S. Dep't of Army, Pamphlet No. 27–172, Evidence (1961). In addition, both the Army and Air Force have more or less regularly published pocket supplements to the Manual for Courts-Martial.

[12] Some theses concerning military law also have been written by graduate students in civilian law schools. Those, and the theses mentioned in the accompanying text, are listed in Amer. Bar Research Center, Pub. No. 1, List of Unpublished Legal Theses in American Law Schools—List of Current Legal Research Projects in American Law Schools (1954), with annual supplements.

[13] Among the partial bibliographies that have been compiled are: Hall, *Selected Recent Material on Military Law,* 8 Record of N.Y.C.B.A. 132 (1953); Mott, Harnett & Morton, *A Survey of the Literature of Military Law—A Selective Bibiography,* 6 Vand. L. Rev. 333, 363–69 (1953); Hartnett, *Survey Extended—The Literature of Military Law Since 1952,* 12 Vand. L. Rev. 369, 380–92 (1959); USCMA, Bibliography on Military Justice and Military Law (Allport ed. 1960).

[14] Only the *JAG Journal* and the *Military Law Review* are currently sold by the U.S. Gov't Printing Office. All three, however, are now indexed in the American Association of Law Libraries' *Index to Legal Periodicals.*

[15] Published as a series of Department of the Army Pamphlets numbered 27–101–1 *et seq.* Formerly distributed as the *JAG Chronicle* (1952–1954) and The Judge Advocate General's *Chronicle Letter* (1954–1959).

and *Procurement Legal Service*,[16] and the *Air Force JAG Reporter*.[17]

The latest entry into the catalog of the military lawyer's potential library is a military law dictionary.

The Military Law Dictionary has been compiled by two civilians employed within the Department of Defense. Mr. Richard C. Dahl, an attorney, is the law librarian of the Office of The Judge Advocate General of the Navy. He also is the author of a helpful article in a recent issue of the *JAG Journal* entitled "Finding the Law of Naval Justice." [18] Mr. John F. Whelan is reference librarian in the law section of the Army Library, Office of The Adjutant General. They state the purpose of their dictionary as follows:

> We have resisted the temptation to include definitions of our own. Our aim was to collect the important definitions currently used in military, legal, medical and allied fields. This dictionary was not intended to supplant the many fine dictionaries in these fields. Instead its purpose is to bring together all those definitions, and many of the abbreviations, most likely to be used by the military lawyer.[19]

The Foreword also reveals that the origin of the dictionary was a card file, "compiled over a long period of time," and "kept, used, and tested in the Army Library and the Navy JAG Law Library." [20]

The dictionary contains 2,148 entries more or less.[21] They include words and phrases peculiar to military law, terms relating to military organization and administration, general legal terms—including Latin maxims, and a number of terms from international law—and many medical terms.[22] A table of abbreviations and a bibliography are included. As is reasonably to be expected of a slim and specialized volume, the entries include no syllabi-

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[16] Published as a series of Department of the Army Pamphlets numbered 715-50-1 *et seq.* The contents of prior issues (Procurement Legal Service Circulars [1954] and Department of the Army Circulars in the 715-50-series [1955-1956]) were incorporated in the first issue of the present series.

[17] Formerly issued as the *JAGAF Index-Digest* (1953-1958) and *Air Force JAG Bulletin* (1958-1959). In some ways, the *JAG Journal*, note 14, *supra*, fulfills a similar purpose for Navy and Marine Corps lawyers. The Coast Guard has published a monthly *Coast Guard Law Bulletin* to help lawyers of that service keep abreast of developments in military law.

[18] 14 JAG J. 67 (1960).

[19] *Foreword.*

[20] *Ibid.*

[21] Neither the book nor the publisher's advertising state the number of entries in the dictionary. The figure given above was compiled by the reviewer, who guarantees only that it is approximately correct.

[22] The enumeration of various forms of perversion or illicit sexual activity —constituting almost 4 per cent of the total entries—seems unusually complete. This results in an apparently unintended overemphasis on the more sordid and less frequent aspects of military criminal law practice.

cations, pronunciations, or etymologies. In general, the definition of a word or phrase is only the one believed most pertinent to military law practice; few alternates are given. Synonyms are omitted, and the volume is practically devoid of cross references. In this light, the volume could be described as more lexicon or glossary than dictionary.

Obviously, it is much easier to criticize a dictionary than it is to write one. In dictionaries of limited scope, there always can be disagreement with particular selections or omissions.[23] Specialists in various fields of armed forces law undoubtedly will find some of their special words and phrases mishandled if not altogether missing. Experienced military lawyers will also disagree with some definitions the authors apparently adopted verbatim from laws or regulations without recognizing that they have been qualified by administrative and judicial decisions.[24] Dr. Samuel Johnson is said to have observed that "dictionaries are like watches; the worst is better than none, and the best cannot be expected to go quite true."[25] Watches have, of course, improved somewhat since Johnson's day. With the addition of a few jewels and somewhat more attention to mechanics, future editions of *The Military Law Dictionary* can be made more reliable, too.

By including definitions pertinent to such specialized fields as claims and procurement law, the authors wisely have recognized that military law is made up of more than only criminal law, or military justice. This recognition alone, however, does not guarantee the authors perfect empathy respecting the practitioners, for it also must be recognized that they are a heterogeneous group. They include lawyer-members of all components of each of the Armed Forces, civilian lawyers employed in the defense establishment and those in some other agencies (such as the General Accounting Office), and lawyers whose private practice brings them into contact with armed forces law. Second, it seems likely

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[23] As Voltaire observed of limited dictionaries, albeit in a somewhat different context, "We rarely find what we are in quest of, and often what we are not." 2 Voltaire, A Philosophical Dictionary 393 (J. & H. L. Hunt 1824).

[24] A striking example is the term "dependent" as defined in § 102(g) of the Career Compensation Act of 1949, which provides that "the term 'dependent' shall include at all times and in all places the lawful wife . . . of any member." Ch. 681, 63 Stat. 804, as amended, 37 U.S.C. § 231(g) (1958). That definition is adopted by the *Military Law Dictionary*. It is misleading, for it has been held that a member with a "lawful wife" is not entitled to count her as a dependent if they are legally separated and he is not contributing to her support. See Robey v. United States, 71 Ct. Cl. 561 (1931); 39 Decs. Comp. Gen. 374 (1959); MS. Dec. Comp. Gen. B–138091 (Jan. 26, 1959); MS. Dec. Comp. Gen. B–125889 (Feb. 6, 1956); 33 Decs. Comp. Gen. 308 (1954); 26 Decs. Comp. Gen. 514 (1947).

[25] Piozzi, *Anecdotes of Dr. Johnson*, in Johnsoniana 119 (Croker ed. 1842).

that those in civilian status seldom have the opportunity to gain broad experience in military law. Moreover, it has been noted that the level of experience of the uniformed group is declining.[26] Finally, one must note that time is a very important factor in most military legal problems, and that the research facilities available to uniformed lawyers in particular are limited by the dispersion of their duty stations, by the need for mobility, and, of course, by limited funds.

If the factors mentioned above collectively suggest that a dictionary devoted to military law can be very useful, they also suggest certain standards against which the present volume must be measured. For example, a large group of potential users will be looking for terms that are altogether new to them or which have a different application than in other fields of law. Such terms include arrest, commandant's parole, commute, constructive condonation, felony, finally approved, return to military control, and separation. Of those mentioned, the present volume defines "commandant's parole" and "return to military control" not at all; "arrest" and "felony" are not defined in any sense peculiar to military law; and "separation" is only defined as occurring between husband and wife, not serviceman and service. Second, armed forces law is in large part statutory. Surely, the authors have recognized that some terms have different meanings under different statutes, but they have not said so. Examples of such terms are claim, dependent, employee of the United States, line of duty, and war.[27] Finally, unification—"the continuing movement toward centralization in some form"[28]—has been with us for some time.[29] Accordingly, for a significant segment of their prospective audience, the authors should have been alert to detect variant uses of the same term by different services (for example, the term "misconduct" as used in line-of-duty regulations), and different terms used to describe the same phenomenon (such as "stoppage" [Army and Air Force] or "checkage" [Navy] of pay,

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[26] Remarks to this effect have appeared in the annual reports of The Judge Advocate General of the Air Force for the years 1955–1959, annual reports of The Judge Advocate General of the Navy for the years 1957–1959, and annual reports of The Judge Advocate General of the Army for the years 1958–1959. See also U.S. Dep't of Army, Report of the Committee on The Uniform Code of Military Justice, Good Order and Discipline in the Army 241–42 (1960).

[27] Only few of the varying definitions can be located by consulting the heading entitled "Definitions" in the General Index to the United States Code (1958 ed.).

[28] Hammond, *Unification—The Continuing Debate*, in National Security in the Nuclear Age 201 (Turner & Challenger eds. 1960).

[29] Some practical aspects of unification are discussed in West, *Observations on the Operation of a Unified Command Legal Office*, Mil. L. Rev., Jan. 1959, p. 1; and Cope, *The Unified Legal Office*, JAG Journal, July 1958, p. 13.

and "reserve duty training," an Army term meaning "inactive-duty training").

A few definitions would benefit from some historical exposition. Contrary to the implication derived from the definition of the term "military" in the present volume, the term has not always included things naval.[30] Those familiar with the distinction—however obsolescent it is—may in fact be misled by the dictionary's own title.[31] A more disturbing omission arises from the failure to recognize that the term active duty has not always included active duty for training.[32] True, the broader definition of active duty (as including active duty for training) was adopted in the 1956 enactment of title 10 of the United States Code as positive law.[33] However, the decisions that have since been rendered suggest only that the results are likely to be more uniform from now on, and not that problems will be avoided altogether.[34] Furthermore, the Army dictionary has until now clung to the narrower definition of active duty (as excluding active duty for training).[35] This seems to indicate that some Army regulations use the term active duty in its more limited sense. If so, users of a military law dictionary certainly ought to be warned accordingly.

As indicated by the useful bibliography appended to their dictionary, the authors have relied to some extent upon current official dictionaries published by the Armed Forces. Those dictionaries, however excellent sources they may be for terms relating to military science, are not necessarily reliable sources for terms that have legal connotations. In the first place, some terms may not be included in those dictionaries. The Army dictionary no longer includes definitions of such terms as judge advocate, judicial council, law officer, military court, military law, next of

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[30] Whether or not a cause of the sometime difference between those terms as used in Federal laws, it should be recalled that each house of Congress once had a *Military* Affairs Committee and a *Naval* Affairs Committee, instead of one Armed Services Committee, as at present.

[31] In some ways, the dictionary is more "naval" than "military" in outlook. The Navy's Board for the Correction of Naval Records; Board of Review, Discharges and Dismissals; medical boards; Physical Review Council; Physical Disability Appeal Board; and Naval Clemency Board are described without apparent recognition that similiar boards exist in the Army and Air Force. The term Navy Regulations is defined, but the terms Army Regulations and Air Force Regulations are not.

[32] Armed Forces Reserve Act of 1952, § 101(b), ch. 608, 66 Stat. 481.

[33] 10 U.S.C. § 101(22) (1958); S. Rep. No. 2484, 84th Cong., 2d Sess. 34 (1956).

[34] See 39 Decs. Comp. Gen. 241 (1959); 39 Decs. Comp. Gen. 223 (1959); 39 Decs. Comp. Gen. 217 (1959); 38 Decs. Comp. Gen. 251 (1958); 37 Decs. Comp. Gen. 264 (1957). *But see* 40 Decs. Comp. Gen. (B–144624, Feb. 6, 1961).

[35] See Army Regs. No. 320–5, Dictionary of United States Army Terms, p. 7 (Jan. 13, 1961).

kin, trial counsel, and unauthorized belligerents.[36] "Call" is the procedure through which the President brings all or part of the militia into active Federal service.[37] Partly because of certain constitutional limitations, it must be carefully distinguished from "order," which is the process by which the Army National Guard of the United States and Air National Guard of the United States, reserve components of the Armed Forces, are brought to active duty.[38] The Army dictionary has not defined "call," which may be the reason why the authors have overlooked that important term in the present volume. On the other hand, neither have the authors defined such terms as militia, Army (or Air) National Guard, Army (or Air) National Guard of the United States, or Naval Militia. The omission seems ill-advised, for no other components of the Armed Forces have been so surrounded with legalisms.[39] Second, service dictionaries are sometimes wrong. The 1958 edition of the Army dictionary defined "death gratuity" in a manner indicating that the emolument could be paid only in cases of death occurring on active duty and not resulting from the decedent's misconduct.[40] The definition was incorrect,[41] but

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[36] Definitions of those terms were included in Army Regs. No. 320–5 (Nov. 28, 1958), but omitted from the present edition dated Jan. 13, 1961. Of course, a "superseded" dictionary retains legal and historical value. For an excellent bibliography, see Craig, A Bibliography of Encyclopedias and Dictionaries Dealing with Military, Naval and Maritime Affairs, 1626–1959 (Houston: Rice Univ., 1960) (mimeo).

[37] Army Regs. No. 130–5/Air Force Regs. No. 45–2, para. 2*g* (July 10, 1959).

[38] See Army Regs. No. 135–300, paras. 13, 14, 31 (Dec. 18, 1959). The purposes for which the militia may be "called forth" are limited by U.S. Const. art. I, § 8, cl. 15. See 29 Ops. Att'y Gen. 322 (1912). Recent events afford an example of possible confusion. In September 1957, the President directed the Secretary of Defense to "order into the active military service . . . any or all of the units of the National Guard of the United States and of the Air National Guard of the United States within the State of Arkansas." Exec. Order No. 10730, 22 Fed. Reg. 7628 (1957). The Secretary, however, "call[ed] into Federal service . . . units and members thereof of the Army National Guard and Air National Guard of the State of Arkansas." 22 Fed. Reg. 8090 (1957). Under the circumstances involved, it appears that the Secretary's order may contain the better description of the President's intent. See 41 Ops. Att'y Gen. 67 at 17 (Nov. 7, 1957).

[39] See generally Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940).

[40] Army Regs. No. 320–5, Dictionary of United States Army Terms, p. 141 (Nov. 28, 1958).

[41] Under certain conditions, the gratuity may be paid although death does not occur during active duty. 10 U.S.C. §§ 1475(a)(2), 1476 (1958). The "misconduct" criterion was eliminated effective Jan. 1, 1957, by the Servicemen's and Veterans' Survivor Benefits Act, tit. III, ch. 837, 70 Stat. 868 (1956). See H.R. Rep. No. 993, Pt. 1, 84th Cong., 1st Sess. 38 (1955). The definition has been corrected in Army Regs. No. 320–5, p. 175 (Jan. 13, 1961).

the error is repeated verbatim in *The Military Law Dictionary*.[42] Indexes to published compilations of digests of opinions of The Judge Advocates General and Court-Martial Reports usually have entries entitled "definitions" or "words and phrases." So do the periodic indexes to decisions of the Comptroller General. Those should afford a more reliable, and possibly more complete, source of terms that are likely to be of especial interest in military law practice.

Certain characteristics of *The Military Law Dictionary* might be reevaluated in any future revision.

It is possible that the emphasis on general legal and medical terms is misplaced. Certainly this is true if the volumes available to Army field law libraries are typical of those available to lawyers in other Armed Forces. Those libraries can have one or more of four American law dictionaries and one or both of two medical dictionaries.[43] Even the minimal "basic combat library" includes either of two law dictionaries and either of two pocket medical dictionaries.[44] A volume that "was not intended to supplant the many fine dictionaries in these fields"[45] clearly is no substitute for any one of them that is nearby.

It seems especially desirable that sources be cited. Although asserting that definitions contained in the dictionary are not their own, the authors have lost sight of the fact that definitions for which no supporting authority is cited *are* their own until the contrary appears. The Uniform Code of Military Justice is cited in only a few definitions. It is the obvious source of many others (a number of which contain references to "this code," without stating what code). Citing authority would have several advantages. The user would know at once the source of a definition that, at first glance, might seem unusual in the light of his

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[42] Fortunately, the authors did not place similar faith in the official list of Army abbreviations. Their dictionary includes abbreviations for convening authority (CA), law officer (LO), staff judge advocate (SJA), and a number of others that Armed Forces lawyers frequently use, but which Army regulations do not formally adopt. See Army Regs. No. 320–50, Authorized Abbreviations and Brevity Code (Nov. 15, 1960).

[43] Adj. Gen. Office, U.S. Dep't of Army, 1960 Selections and Holdings List for Army Field Law Libraries 3. This is not to say that we all use a dictionary when and as we should, however. According to the digest of an opinion relating to the validity of proxy marriages, The Judge Advocate General's Office once wrote that it could not "properly undertake to advise as to the manner of *consummating* such a marriage. . . ." 1 Bull. JAG 265 (Oct. 14, 1942). (Emphasis added.) Perhaps with some embarrassment, "consummating" was later changed to "solemnizing." Bull. JAG, Cum. Index and Tables to Vols. 1–2, 49 (1944).

[44] Adj. Gen. Office, *op. cit. supra* note 43, at 58. The several classes of Army field law libraries are described in Army Regs. No. 1–115 (1956).

[45] *Foreword.*

knowledge of the law of other jurisdictions (for example, the terms larceny and sodomy, as used in the Uniform Code). If the source were a statute or regulation, he could more easily check the present wording to see whether it had changed since the dictionary was published, and locate relevant decisional authority. Furthermore, if authorities were cited there might be less tendency to overlook other possible definitions of a given term. This dictionary affords a number of examples of such oversight, some of which were mentioned previously.[46] Another example is the definition of the term "absence without leave," which is taken, without benefit of citation, from Article 86 of the Uniform Code of Military Justice.[47] However, the term "absent without leave" as used in such administrative statutes as the Armed Forces Leave Act of 1946 has a distinctly broader connotation.[48] Also, "dependent" is defined only as used in the Career Compensation Act of 1949, and without citing that statute.[49] Must all users of the dictionary be expected to know that parents-in-law, who are not included there, are dependents within the meaning of some statutes, such as the Dependents' Medical Care Act?[50] Finally, if authority for a definition were routinely cited, one who is not conversant with the Uniform Code of Military Justice might be spared the unsettling experience of reading a definition of the "General Article" without being able to discover the number of that article.[51]

Some of the problems encountered in using *The Military Law Dictionary* apparently were provided by the publisher. The use of only capital letters in the words defined is unfamiliar and hard on the eyes (although the boldface type helps). Also, the user is thereby deprived of any helpful advice as to capitalization. Misspelled words, a nuisance in any book, could be fatal in a dic-

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[46] Text accompanying note 27 *supra*.

[47] 10 U.S.C. § 886 (1958). UCMJ, art. 87, 10 U.S.C. § 887 (1958), deals with a related offense (missing movement). Neither article, however, actually uses the phrase "absent without leave."

[48] Sec. 4(b), ch. 931, 60 Stat. 964, as amended, 37 U.S.C. § 33(b) (1958). For example, a member who is delivered to civil authorities for trial is not necessarily AWOL under the UCMJ. U.S. Dep't of Defense, Manual for Courts-Martial United States 1951, para. 165, at 315. However, the member is AWOL for basic pay purposes unless the absence is excused as unavoidable. *Cf.* Merwin v. United States, 78 Ct. Cl. 561 (1933); 36 Decs. Comp. Gen. 173 (1956). Similarly, a member held in military confinement on behalf of civilian authorities sometimes is AWOL for basic pay purposes. *Ibid.*

[49] Sec. 102(g), ch. 681, 63 Stat. 804, as amended, 37 U.S.C. § 231 (1958). See note 24 *supra*.

[50] 10 U.S.C. § 1072(2)(F) (1958).

[51] It is UCMJ, art. 134, 10 U.S.C. § 934 (1958).

tionary. Fortunately, those detected so far have not resulted in any terms being misplaced.[52]

Perhaps the authors will disagree with the somewhat more encyclopedic treatment this reviewer envisages as the ideal for a military law dictionary.[53] However, something along the lines suggested above is essential if a dictionary for military lawyers is to be useful and not misleading. But, if it be supposed that *The Military Law Dictionary* may be little used and less often cited, this still should not be allowed to obscure the authors' valor in undertaking the project at all, and the value of the beginnings they have made. After all, combing Armed Forces regulations, manuals, and legal opinions for significant legal terms can be a full-time job. Comparing the usages, past and present, of the several Armed Forces also requires painstaking research. Deciding how to treat terms defined in slightly different ways by different laws, and statutory definitions given greater substance by case authority, requires the making of decisions that will not please everyone.

In the final issue of his *Digest of Decisions of the Armed Services Board of Contract Appeals*, Roswell M. Austin aptly observed that "most people who work for the Government are dedicated people, so genuine in their zeal that they are not content just to do their jobs, but feel impelled to add something extra to their work, to perform, if only in small degree, a 'labor of love.' "[54] Demonstrably, Mssrs. Dahl and Whelan have that attribute. They are in an excellent position to continue their task, and it is to be hoped only that the observations above may prove helpful.

WILLIAM S. FULTON, JR.*

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[52] The word adultery has been spelled like "sultry." (The definition, however, is even more in error than the spelling.) Other misspelled terms are circumstantial evidence ("circumstantiai"), unauthorized belligerents ("unauthored"), and willful ("willfull").

[53] In this connection, it seems only fair to refer the reader to less critical comments concerning *The Military Law Dictionary* that have appeared to date. See Larkin & Carrick, *Military Law and Justice Developments*, 8 Fed. B. News 77 (1961); Avins, Book Review, 47 A.B.A.J. 84 (1961).

[54] *Editor's Preface*, 4 Austin, Digest of the Decisions of the Armed Services Board of Contract Appeals 1955–56, at v (1959).

* Major, JAGC, U.S. Army; Member of the Faculty, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; Member of the New Mexico State Bar.

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