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# Conscription By The STATE Through The Time Of The Civil War

By William Lawrence Shaw \*

*"We must train and classify the whole of our male citizens"*<sup>1</sup>

## I. INTRODUCTION

An astonishing feature of the War between the States is the vast total number of men enrolled in each of the Union and the Confederate Armies. Over 2,500,000 men passed through the Union ranks.<sup>2</sup> While opinion varies as to the end count, 1,230,000 men have been estimated as the maximum number of Confederate forces.<sup>3</sup>

How were 3,750,000 individuals brought into military service during a total war? Volunteering as a mode of admission suggests itself. Conscription or draft is another method of inducing service. In this study, we shall especially consider the impact of obligatory military service enforced by the

State, sometimes called a *State Draft*. We shall seek to trace the evolution of the State Draft from the earliest Colonial beginnings through the War of Independence, 1812, 1846, and 1861-1865. Particular attention will be devoted to New York and to Louisiana.

In using the term 'State', reference is made to the individual American State and not to the central government, either Federal or Confederate. We shall regard the *militia* aspect in State recruitment and draft and trace the course of the volunteer, organized militia. The fluctuations in the size of the U.S. Regular Army will be noted. By way of terminology, 'conscription' and 'draft' are viewed as interchangeable terms referring to

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<sup>1</sup> Thomas Jefferson, 1813, letter to James Madison: quoted in Stern, *The Citizen Army* 137 (1957).

<sup>2</sup> Fish, *Conscription in the Civil War*, 21 *Amer. Hist. Rev.* 100-3 (1915): Final Report to the Secretary of War by the Provost Marshal General of the Operations of the Bureau of the Provost Marshal General, Part I (hereinafter termed PMG I, or II for Part II) App. Doc. 6, 142.

<sup>3</sup> Livermore, *Numbers and Losses in the Civil War in America, 1861-1865*, 63 (*Civil War Cent. Ed.* 1957).

the enforcement by the State Government of its constitutional right to require all citizens of requisite age and capacity to enter the military service of the State.<sup>4</sup>

The word 'militia' has had at least two different conflicting meanings. One use has been to designate all able-bodied males, usually untrained citizens, who could be called out in an emergency to defend the State. The other use and the one now most commonly employed in America, is the reference to those male citizens, generally between the ages 18 and 45 years, who are enrolled and trained in organized, uniformed units. This latter group is sometimes known as the *Volunteer militia* or the *active militia* or the *established militia* or the *organized militia*.<sup>5</sup>

## II. THE MILITIA ROLE OF THE STATE WITH STRESS OF NEW YORK

### A. The Militia In England

Essentially, the militia derives from Anglo-Saxon antecedents.<sup>6</sup>

The institution reached a high stage of development level during the reign of King Alfred when the military obligation rested upon males between the ages 16-60 years.<sup>7</sup>

The beginning of a comprehensive militia law may be found in the Statute of Winchester in 1285,<sup>8</sup> which declared the age limits of service to fall between 15-60 years. The basis of the universal military obligation was that *every man capable of bearing arms was to obtain weapons and present himself in a state of readiness* to maintain the King's peace in the realm.<sup>9</sup> The Statute of Winchester was restressed in effect in a subsequent statute in 1403.<sup>10</sup>

In 1327, there was enacted a provision that:

'... the king will that no Man from henceforth shall be charged to arm himself, otherwise than he was wont in the Time of his Progenitors Kings of England; (2) and that no Man be compelled to go out

<sup>4</sup> *Lanahan vs. Birge*, 30 Conn. 438, 443 (1862); *Kneedler vs. Lane*, 45 Pa. (9 Wr.) 238, 267 (1863); *Ex parte Coupland*, 26 Tex. 386 (1862); *Jeffers vs. Fair*, 33 Ga. 347 (November Term 1862); *Burroughs vs. Peyton*, 57 Va. (16 Grat.) 470 (1864); *Ex parte Hill*, 38 Ala. 429 (1863); *Simmons vs. Miller*, 40 Miss. 19 (1865).

<sup>5</sup> Todd, *Our National Guard*, in 'Military Affairs', 5 Jour. Amer. Mil. Inst. 73-74 (1941).

<sup>6</sup> 15 Ency. Brit. 484 (1958 ed.).

<sup>7</sup> *Ibid.*

<sup>8</sup> 13 Edward I, ch. 6.

<sup>9</sup> 27 Henry II, (1154).

<sup>10</sup> 5 Henry IV, ch. 3.

of his Shire but where Necessity requireth, and suddain coming of strange Enemies into the Realm; and then it shall be done as hath been used in Times past for the Defence of the Realm.'<sup>11</sup>

The above quoted statute stresses that the basis of enforced military service is *defense* of the realm.

A statute of Edward III required that the military forces resulting from commissions issuing from the King should receive the King's *pay* and that such forces should not become a charge upon the "commons of the counties".<sup>12</sup>

A few years later, an enactment set forth that men of arms would be paid by the King from the day that they departed from their counties and until their return.<sup>13</sup>

In 1640 during the troublous times of Charles I, involving overseas service for the county militiamen, an enabling statute was passed authorizing *foreign service*.<sup>14</sup> Therein it is provided that the justices of the peace of every county shall *levy and impress* as many men to serve as soldiers, gunners, and surgeons as shall be determined by the King in both Houses of Parliament. The jus-

tices are to bring before them persons fit and necessary for military service and such persons are to be impressed. Imprisonment is prescribed for any person willfully refusing to be inducted. This statute contains a sound basis of conscription based upon *levy* in the county by *local officials* adhering to *fixed standards* and calling only *approved numbers* of men.

After the restoration of Charles II, a succession of laws regulated the national militia.<sup>15</sup> Blackstone summarized:

"... the present militia laws, the general scheme of which is to discipline a certain number of the inhabitants of every county, chosen by lot for *three* years, and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders, under a commission from the crown. They are not compellable to march out of their counties, unless in case of invasion or actual rebellion within the realm (or any of its dominions or territories), nor in any case compellable to march out of the kingdom. They are to be exercised at stated

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<sup>11</sup> 1 Edward III, ch. 5.

<sup>12</sup> 1 Edward III, ch. VII (1327).

<sup>13</sup> 18 Edward III, ch. VII (1344).

<sup>14</sup> 16 Car. I, ch. 28.

<sup>15</sup> 13 Car. II, ch. VI (1661); 14 Car. II, ch. III (1662); 15 Car. II, ch. IV (1663).

times; and their discipline in general is liberal and easy;"<sup>16</sup>

We may find the inception of established local regiments in the practice of the lords-lieutenants of the counties organizing "trained bands" which were fixed local units turned out at stated times for drill and inspection. This was a definite step towards an organized militia.<sup>17</sup>

#### B. The Colonial Period in America

The settlers in Colonial America who mainly came from England, brought with them fixed notions of militia service. As military duty was of the greatest urgency in a frontier land ringed by savage tribes, the personal dedication of the settlers to militia practices was early evident.<sup>18</sup> From the militia, drafted men or volunteers constituted the *Trained Bands* similar to those functioning in England.<sup>19</sup>

The first colonial laws in this regard may be traced to Massachusetts or Plymouth Colony.<sup>20</sup>

New York, like the other Colonies, early provided for military service by males aged 16 to 60 years. In 1684, the General Assembly acted "for the better Regulating of the Militia within this Province for the Common Defence and Preservation thereof."<sup>21</sup> The statute provided that a major be appointed by the Governor in each *county* as head of the militia. All persons were required to keep convenient *arms and ammunition* in their houses. *Fines* for neglect of duty were to be imposed by the county courts. Excused from service were those persons "pretending tender Consciences" who were required to furnish a man to serve in their stead or to pay fines.

An Act of 1691 "for settling the Militia" imposed service on persons from 15 to 60 years who became liable to duty after the elapse of one month from the time of their arrival in the colony.<sup>22</sup>

An instance of a special militia enactment is found in a statute in 1692<sup>23</sup> which related to the

<sup>16</sup> Blackstone's Commentaries (Cooley 4th Ed., 1899) v. I, p. 413.

<sup>17</sup> Spaulding, *The United States Army in War and Peace* 3 (1937).

<sup>18</sup> Ansell, *Legal Aspects of the Militia*, 26 *Yale L.J.* 471, 473 (1917).

<sup>19</sup> *Ibid.*

<sup>20</sup> French, *First Year of the American Revolution* 33 (1934). A footnote, p. 33 discloses the sources of the Colony Laws from 1630 to 1686 and the legislative enactments from 1692 until Independence.

<sup>21</sup> *Selective Service, Mon. No. 1, v. II, pt. 9, Vollmer, "Military Obligation: The American Tradition, New York Enactments"* 2 (hereinafter termed Vollmer) Act of October 27, 1684.

<sup>22</sup> Vollmer 15, Act of May 6, 1691.

<sup>23</sup> *Id.* at 25-30, Act of April 19, 1692.

raising of 200 men with proper officers for the reinforcement of the frontiers at Albany. The measure provided that service should not extend longer than the first day of the following October. A commander-in-chief was specified for this special force authorized to issue warrants to the military officers in *nine designated counties for the levy of men*. Pay schedules were established and *quotas* of men were imposed on the various counties.

In New York, as in all of the other Colonies, the first military statutes were "draft laws" extending to the whole of a part of the colony or province. The impact of the French and Indian Wars hastened the development of *volunteer regiments* which tended in many instances to become fixed in personnel subject only to normal attrition among the members.<sup>24</sup> Officers for a regiment were first appointed by the Governor and then would enlist recruits who often assumed a fixed period of service in a definite unit.<sup>25</sup> In the French and Indian Wars, uniformed volunteers were supplied by New York, Pennsylvania and New Jersey.<sup>26</sup>

In 1678, there is satisfactory record that the militia in New York City was formed into *fixed companies* of 100 men each who were *regularly drilled* and became proficient marksmen through *frequent musket practice*.<sup>27</sup>

The interval of the French and Indian Wars was a period of training of leaders of men who some years later employed their talents and knowledge in the service of the American Continental Army.<sup>28</sup> There occurred during this somewhat intermittent conflict with France, the first great victory in America against a foreign enemy when on June 17, 1745, Sir William Pepperell and 4,000 New England militiamen with varying degrees of training besieged and captured the strong fortress of Louisburg at Cape Breton.<sup>29</sup>

The close of the wars 15 years before the coming War of Independence brought to the colonials a knowledge of two military systems, (1) the volunteer militia regiments of fixed personnel serving for a definite period, and (2) the unorganized militia composed of all able-bodied men from which quotas of men, previously enroll-

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<sup>24</sup> French, op. cit., 34.

<sup>25</sup> Ibid.

<sup>26</sup> Todd, op. cit., 75.

<sup>27</sup> Mead, First American Soldiers, 1 Jour. Amer. Hist. 123 (1907).

<sup>28</sup> Bernardo-Bacon, American Military Policy 2 (1955).

<sup>29</sup> 2 Parkman, A Half Century of Conflict 150 (1902).

ed, were drawn or drafted to meet military needs.<sup>30</sup>

### C. The War For Independence

As early as 1772, some of the colonies began to make active preparations for an armed conflict with Great Britain.<sup>31</sup> In Massachusetts, local companies of militia obtained arms and equipment, drilled at stated intervals, made contact with neighboring companies, and, in general, assumed a state of partial readiness.<sup>32</sup>

The conflict was precipitated on April 19, 1775 by the attempt of General Gage, the British Commander, to seize and destroy *militia supplies* and stores including munitions located at Concord.<sup>33</sup>

A general degree of spontaneous mobilization followed the clash at Lexington-Concord. Militia and "minute-men" from all the New England colonies gravitated towards Boston, and, in effect, created a state of siege of the British forces.<sup>34</sup>

On April 23, 1775, the Massachusetts Provincial Legislature proposed raising an army of 30,000 men to be drawn from all the colonies. Massachusetts assigned to itself a quota of 13,400 in this respect.<sup>35</sup>

After George Washington took command of the colonial forces at Cambridge on July 3, 1775, the strength of the ready American militia was about 17,000 of whom 15,000 were present for duty.<sup>36</sup> The stock of powder on hand was sufficient only for nine rounds per musket for those men who were armed.<sup>37</sup> The Continental Army was formed mainly of new regiments raised for the occasion and following the English system of a regiment composed of ten companies of 59 men each.<sup>38</sup>

On June 14, 1775, Congress authorized one regiment of ten companies of riflemen to be recruited for a period of one year from Pennsylvania, Virginia and Maryland.<sup>39</sup> *This measure established the Continental Army* although it

<sup>30</sup> French, op. cit., 34; consult Dupuy, *Military Heritage of America* 79-80 (1956).

<sup>31</sup> Upton, *Military Policy of the United States* 1 (2nd ed. 1907).

<sup>32</sup> French, op. cit., 32-38.

<sup>33</sup> Bernardo-Bacon, op. cit., 3.

<sup>34</sup> Upton, op. cit., 36.

<sup>35</sup> French, op. cit., 56-61.

<sup>36</sup> Spaulding, op. cit., 36.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Id.* at 30.

<sup>39</sup> 2 *Journals of the Continental Congress* by Ford, Worthington C. (hereinafter termed JCC) 89-90 (1905).

also began the unsound system of short enlistments which prolonged the war in consequence.

Washington is stated to have wished for a militia composed of "trained bands" in fact as well as in name.<sup>40</sup> The first Continental Army was composed of *volunteers from the militia* of the 13 states who at the outset were *recruited for one year* instead of the duration of the war. The result was that a new army had to be trained each year, a factor which usually brought a great turnover in personnel.<sup>41</sup> At the beginning of the year, the army was allowed to shrink to a size smaller than that of the previous year despite the advent of spring weather suitable for military campaigns.

On July 18, 1775,<sup>42</sup> Congress passed what has been called the "first military service act of a national American deliberative assembly".<sup>43</sup> This was a resolution or *proposal* to the people of the colonies that all able-bodied males, 16-50 years of age in each colony form themselves into *regular companies of militia*. The resolution lacked any self-execution effect as

the accomplishment of the recommendation rested with each colonial assembly. The measure did state that minute-men could "be relieved by *new draughts* - - - from the whole body of the *militia*, once in four months". The right to draft, however, rested in the *colony* and not in the Continental Congress. There is *no instance throughout the war of any attempt at a draft by Congress* which rested content to suggest quotas to the states.

In January, 1776, the aggregate strength of the army was 16,000 of whom 13,000 were present for duty. A month later the total force was even 2,000 less.<sup>44</sup> By mid-August, 1776, Washington had 30,000 men on paper, but only 20,000 of whom were actually present and fit for duty.<sup>45</sup> In early 1777, Washington embarked on what he called his "annual task" of terminating one army and then raising another force of new men in the face of the enemy.<sup>46</sup>

It was not until 1777-1778, that it became unnecessary to disband an entire army and start afresh with a new force. The Continental

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<sup>40</sup> Palmer, *America in Arms* 22 (1941).

<sup>41</sup> *Id.* at 22-23.

<sup>42</sup> 2 JCC 187-190, Act of July 18, 1775.

<sup>43</sup> Duggan, *Legislative and Statutory Development of Federal Concept of Conscription for Military Service* 3 (1946).

<sup>44</sup> Spaulding, *op. cit.*, 39-40.

<sup>45</sup> *Id.* at 57. There were 30,000 Tory troops engaged during the Revolution: Spaulding, *op. cit.*, 434.

<sup>46</sup> *Id.* at 69.

Congress authorized enlisting troops for the period of the war, and approved in September, the creation of 88 battalions with additional artillery and cavalry support.<sup>47</sup>

Before the spring of 1778, *Congress was urging upon the states, the application of a draft system to stimulate recruiting.* Further, it was suggested by Congress that the states enact laws compelling exempt men to furnish able-bodied substitutes.<sup>48</sup>

On February 6, 1777, Congress recommended to the states to draft for nine months men who might be discharged before that time, as they were replaced by three year volunteers.<sup>49</sup>

During the Revolutionary War, Congress treated all volunteers as militiamen. The total militia levies during the eight years of the war amounted to 164,087 militia.<sup>50</sup> It has been estimated that the enrolled militia of the 13 states in 1783 numbered more than 400,000

available men.<sup>51</sup> It should be borne in mind, however, that this was the entire general body of the potential militia and by no means reflected any number of even partially-trained men. Despite this tremendous manpower pool of 400,000, Washington was never able to raise an army of more than some 20,000 men in all stages of training. Usually he had about one-half that number under his command.<sup>52</sup>

During the war at least *nine of the states drafted men* from the general body of the militia in order to meet quotas imposed by Congress.<sup>53</sup> These were New Hampshire, Virginia, New York, North Carolina, Maryland, South Carolina, Rhode Island, Massachusetts and Georgia.<sup>54</sup> Two of the colonies, namely, *Massachusetts and Virginia, utilized conscription to a marked extent* from 1777 onward<sup>55</sup> when the course of events indicated that volunteering was uncertain as a method of obtaining trained men.

<sup>47</sup> Upton, op. cit., 27.

<sup>48</sup> Id. at 27-28.

<sup>49</sup> Bernardo-Bacon, op. cit., 26.

<sup>50</sup> Cutler, History of Military Conscription with Especial Reference to United States 39. This is an unpublished doctorate dissertation submitted to Clark University, Worcester, Mass., and is most informative.

<sup>51</sup> Palmer, America in Arms 24 (1941).

<sup>52</sup> Comage, 37 Scholastic 11, 16 (1940).

<sup>53</sup> Buehler, Compulsory Military Service, Debaters' Help Book, v. VIII, 8 (1941).

<sup>54</sup> Duggan, op. cit., XVIII - XIX.

<sup>55</sup> 6 Ency. Brit. 285 (1958).

Maryland drafted to meet its state quota in 1778, but allowed the draftees a choice of service for either nine months, three years, or the duration. The short term was the popular selection.<sup>56</sup>

In New York, an Act of March 24, 1772<sup>57</sup> provided for the enrollment of every male person from 16 to 50 years to be enlisted by a captain in the county where he resided, under penalty of a militia fine or five shillings. The enrollees were to be formed into companies of 50-60 men and were to be armed with prescribed weapons and trained at fixed intervals. The enrollment law in New York was reenacted on April 1, 1775<sup>58</sup> with more specific stress upon training and the performance of ordered military duty.

On April 1, 1778, an act was passed in New York for "Compleating the five Continental battalions raised under the direction of this State."<sup>59</sup> The measure provided that *men were to be drafted for the space of nine months* and were to rendezvous at Easton in Pennsylvania. "Drafts shall be made from the militia of this State of every fifteenth man". Men were divided into classes of 15 men each and two draftees

were selected from each of these classes. There were exempted from military call, the Chancellor and Judges of the Supreme Court, Legislators, Justices of the Peace, Sheriffs, Quakers, Ministers of the Gospel, Clerks of Courts, powder makers, forgermen, certain journeymen printers and all persons above 50 years of age. Exempt persons could be compelled to contribute towards the expense of the draft and a bounty was authorized for persons obtained for the military service.

After active hostilities with Great Britain had ceased, a New York Act of February 21, 1783<sup>60</sup> authorized the Governor to call militiamen into active service up to eight months for the *defense of the frontiers*. Draftees were to be chosen from classes of able-bodied men and the *assessors of the counties* were to compose lists of names of available men in each class from whom selections should be made.

A table in the footnote discloses the number of soldiers furnished by the various states from the militia to the *Continental Army* during the war for a total of 231,771 men. The figures do not include states militiamen whom we

<sup>56</sup> Maryland, Votes and Proceedings, 1778, March Session, p. 87-91.

<sup>57</sup> Vollmer 241.

<sup>58</sup> Id. at 251: as to Colonies other than N.Y., consult Alexander, How Maryland Tried to Raise Her Continental Quotas, 42 Md. Hist. Mag. 193-95 (1947); Alexander, Pennsylvania's Revolutionary Militia, 69 Pa. Mag. Hist. & Biog. 15-25 (1945).

<sup>59</sup> Vollmer 266.

<sup>60</sup> Id. at 326.

have previously noted totaled 164,-087.<sup>61</sup>

#### D. 1783-1812

At the close of the War for Independence, the state constitutions in nine states authorized compulsory military service.<sup>62</sup> However, in time of peace, the states tended to fear any organized military force. The Massachusetts Constitution of 1780 declared that armies are dangerous to liberty in time of peace!<sup>63</sup> However, the same Constitution provided that the Governor was authorized to train, instruct, exercise and govern the militia and to put them "in a war-like posture".<sup>64</sup>

The New York Constitution of 1777 specified that the militia of the state at all times in peace and in war "shall be armed and disciplined and in readiness for service."<sup>65</sup> Clearly, the defense effort of the *states stressed re-*

*liance on a militia* rather than upon a standing army or other force.

George Washington in his "Sentiments on a Peace Establishment"<sup>66</sup> suggested in May 1783, a military policy for the United States. In this writing which was lost sight of for almost 150 years, Washington stressed a "well organized Militia; upon a Plan that will pervade all the States, and introduce similarity in their Establishment Maneuvres, Exercises and Arms." In the same writing, General Washington further urged a *regular army* for garrison purposes on the frontiers, the establishment of *arsenals* of all kinds of material stores, the introduction of one or more *academies for instruction* in military arts and the establishment of *factories of military stores*. Washington recommended that 2,631 officers and men

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Massachusetts	67,907
Connecticut	31,939
Virginia	26,678
Pennsylvania	25,678
New York	17,781
Maryland	13,912
New Hampshire	12,497

New Jersey	10,726
North Carolina	7,263
South Carolina	6,417
Rhode Island	5,908
Georgia	2,679
Delaware	2,386

Total	231,771
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Upton, op. cit., 58.

<sup>62</sup> Leach, *Conscription in the U. S.: Historical Background IX* (1952).

<sup>63</sup> 3 Thorpe, *American Charters, Constitutions and Organic Laws 1892* (1909).

<sup>64</sup> *Id.* at 1901.

<sup>65</sup> *Id.* at vol. 5, 2637.

<sup>66</sup> Palmer, *Washington-Lincoln-Wilson, Three War Statesmen*, App. I, 375-396 (1930).

comprise the number of federal garrison troops.<sup>67</sup>

Alexander Hamilton criticized the authority in Congress under the Articles of Confederation over the militia as being merely "a power of making requisitions upon the States for quotas of men."<sup>68</sup> Experience during the Revolutionary War had shown that such a quotas method was unsound. Hamilton urged the introduction of a military policy wherein the central government would possess an independent power to raise armies for national defense.<sup>69</sup>

General Frederick von Steuben in 1783 developed a proposed system of a national military organization based upon a force of *well trained* militiamen to be called the *Established Militia*. Steuben urged the division of the nation into three geographical military departments and the creation of a Continental Militia (which is remarkably similar to the present day National Guard) composed of young volunteers from the militia *enlisting for three years and receiving 30 days of annual field*

*training*. The national force was to exist at a minimum of 21,000 men. A small regular army would guard the frontiers.<sup>70</sup> *General Washington favored the Steuben plan.*<sup>71</sup>

Before the adoption of the Constitution, effective in 1789, any military system that functioned was pursuant to the Articles of Confederation drafted in 1777 and finally ratified by all the states in 1781.<sup>72</sup> Weak as the confederation government proved to be, the following articles are noteworthy: (VI) ". . . Every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered. . . . (VIII) All charges of war . . . incurred for the common defense or general welfare, and allowed by the United States, shall be defrayed out of the common treasury, which shall be supplied by the several states."<sup>73</sup>

General Washington resigned his command of the Army in December, 1783.<sup>74</sup> The army dwindled to one regiment of infantry and two battalions of artillery for an

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<sup>67</sup> ROTC Manual 145-20, "American Military History, 1607-1953" (hereinafter termed Manual) 105 (1956).

<sup>68</sup> Federalist Number XXII, December 15, 1787.

<sup>69</sup> Hamilton, The Federalist, Nos. VIII and XXIX.

<sup>70</sup> Palmer, General von Steuben 322 (1937).

<sup>71</sup> Palmer, America in Arms 31 (1943).

<sup>72</sup> Mason, Constitution of California (with Appendix) 1475 (1946).

<sup>73</sup> Id. at 1476-1477.

<sup>74</sup> 25 JCC 837-839; Ganoe, History of the United States Army 89 (1924).

approximate strength 700 men.<sup>75</sup> On June 2, 1784,<sup>76</sup> Congress further reduced the Army retaining in service only Alexander Hamilton's old New York Company of Artillery to look after military stores and provisions. This Continental Artillery unit subsequently became Battery D, 5th U.S. Field Artillery of the Regular Army. In providing for a military establishment containing 80 men, Congress ignored the concept of a "well regulated militia".

On the day immediately following the reduction of the army from 700 men, Congress somewhat inconsistently passed a resolution to raise an army of 700 men from the militia to serve for one year.<sup>77</sup>

The proposed new *Constitution recognized the militia system of the states* and at the same time the need for a federal authority to raise and support armies. Congress was authorized:

- (1) "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions;
- (2) "To provide for organizing, arming, and disciplining the Militia . . .

(3) "(To provide for) governing such Part of them (the militia) as may be employed in the Service of the United States . . ." <sup>78</sup>

There is reserved specifically to the states (1) "the appointment of officers" and (2) the "authority of training the militia according to the discipline prescribed by Congress."<sup>79</sup>

The militia provisions of the Constitution aroused considerable discussion throughout the states in connection with ratification proceedings. In the Virginia ratifying convention of 1788, the topic of the militia was discussed in fuller detail than any other aspect of the proposed federal-state system embraced within the Constitution.<sup>80</sup>

General Henry Knox, the first Secretary of War, desired to see *federally controlled military training for all able-bodied men*. This would be achieved by placing men, 18-21 years, in an Advanced Corps to be trained six weeks yearly. Enrollees 21-35 years would comprise a Main Corps trained four days yearly while men 46-60 years constituted a Reserve Corps mus-

<sup>75</sup> Id. (Ganoë) at 88, 90.

<sup>76</sup> 27 JCC 524.

<sup>77</sup> 27 JCC 530-531, Resolution of June 3, 1784.

<sup>78</sup> United States Constitution, Art. I, sec. 8, cl. 15, 16.

<sup>79</sup> Id. at cl. 16.

<sup>80</sup> Riker, *Soldiers of the States* 9 (1957).

tered twice yearly.<sup>81</sup> The Knox plan provided for a *draft system*, where volunteering did not suffice, *available to the states or the federal government*, and stressed the establishment of a "well-constituted militia". A bill to carry out the Knox plan was tabled by Congress in 1791. In 1790, the authorized strength of the army was about 1300 men.<sup>82</sup>

### 1. *The Militia Act of 1792*<sup>83</sup> *and Other Legislation*

One of the most criticized pieces of legislation in congressional history has proved to be the Militia Act of 1792. The measure itself was a compromise of conflicting federal-state interests. The law required all able-bodied white males, 18-45 years, to be *enrolled within the states for militia duty*, and each militiaman was to furnish his musket, bayonet, belt, knapsack and other accouterments. The measure permitted the state legislators to organize and train the militia according to state policy. The Act exempted a few federal employees, including postmen, congressmen, mariners, etc. States, however, could add their own exemptions which usually resulted in excluding clergymen,

teachers, students and state and local officials. Each state was to function under an Adjutant-General with additional provision for a Brigade Inspector of troops. *In addition to the untrained militia, the states could authorize organized military companies.* One narrator has commented that the 1792 Act "was the 17th and 18th Century version of universal military training . . . by the middle of the 19th Century, the states . . . did invent a new and more easily administered system of volunteer militia, the forerunner of the National Guard."<sup>84</sup>

Another writer has noted that the same statute developed "the truly democratic doctrine that every able-bodied man owes military service to his country . . . Under the 'militia clause' of the Constitution, it did try to standardize the discipline and training through the states and rather feebly requested an annual report from each."<sup>85</sup>

The tabling of the Knox Plan in 1790-1791 and the adoption of the Act of 1792 showed a Congressional intent that the states would continue to control the militia system.

In 1794, we find the *first fed-*

<sup>81</sup> Knox, A Plan for the General Arrangement of the Militia of the U.S. 8 (1786); consult, Logan, The Volunteer Soldier of America 127-156 (1837).

<sup>82</sup> Upton, op. cit., 75.

<sup>83</sup> 1 Stat. 271-274, Act of May 8, 1792.

<sup>84</sup> Riker, op. cit., 21.

<sup>85</sup> Todd, op. cit., 79.

eral use of the militia power in the authorization of 80,000 militia to be "detached" for possible use against France with whom international relations had deteriorated at that time.<sup>86</sup>

Thomas Jefferson in his first annual message to Congress on December 8, 1801, stated that a regular establishment was not only unnecessary, but was also a burden upon the laboring classes!<sup>87</sup> On December 19, 1801, the army numbered only 257 officers and cadets and 3,794 enlisted men.<sup>88</sup> By March 16, 1802, this small force had been further reduced to 3,042 personnel.<sup>89</sup> On February 4, 1805, the annual returns on the strength of the army showed it to consist of 2,579 officers and men.<sup>90</sup>

Congress, on April 18, 1806, authorized the President to require the Governors to take effective measure to organize 100,000 militia and to accept for up to six months, the services of any corps of volunteers.<sup>91</sup> This force which never came into existence was to be available in times of emergency,

but a *six months* period of service was held to be the maximum time of service!

A first slight tendency towards any degree of federal centralization in the control of the militia may be traced to an Act of 1798<sup>92</sup> which allowed the states to purchase muskets for the militia at national arsenals. As a further sign of a trend towards centralization, on April 23, 1808, Congress enacted what has been termed "the most important military legislation of this period", providing for an annual appropriation of \$200,000 to be expended to arm the militia.<sup>93</sup> This was the *first grant-in-aid in federal congressional history*.<sup>94</sup> The muskets were to be distributed among the states in ratio to their militia enrollment. Each of the Acts of 1792, 1794, 1798 and 1808, pointed to a measure of responsibility in the federal government for at least partial management of the militia in the intervals between wars. Strangely enough, there was no increase by Congress from the \$200,000 annual appropriation allowed

<sup>86</sup> 1 Stat. 522, Act of June 24, 1794.

<sup>87</sup> Cited in Bernardo-Bacon, op. cit., 94.

<sup>88</sup> Ganoe, op. cit., 108.

<sup>89</sup> Ibid.

<sup>90</sup> Bernardo-Bacon, op. cit., 101.

<sup>91</sup> 2 Stat. 383-384.

<sup>92</sup> 1 Stat. 569-570, Act of June 22, 1798.

<sup>93</sup> 2 Stat. 490; Bernardo-Bacon, op. cit., 107.

<sup>94</sup> Riker, op. cit., 9.

in the Act of 1808 until 1887,<sup>95</sup> when the fund was increased to only \$400,000 despite an enormous population gain throughout the United States. In 1820, the States were required to use the discipline and exercises of the Regular Army.<sup>96</sup>

In 1809, when President James Madison took office, the Regular Army strength was less than 3,000 men despite the legislation of 1808 which had authorized 9,921 men.<sup>97</sup> Each state had maintained its own militia system subject to the mild suggestions within the Act of 1792. President Madison in January 1810, concerned with increasing international tensions, recommended that a force of 20,000 volunteers be raised and trained. *Congress refused to vote the volunteer force.*<sup>98</sup>

At the beginning of the year 1812, the army, according to one narrator, was "almost as heterogeneously organized, or disorganized, as when Steuben appeared at Valley Forge."<sup>99</sup> Another writer

goes on that "America declared war against the mistress of the seas with a military and naval establishment whose puniness startled even the British. A paper Army, a dispersed navy, and mediocre leadership in the former, was the extent of the military might that could be thrown against England in June, 1812."<sup>100</sup>

### E. The War of 1812 and the Mexican War

#### 1. 1812-1815

On January 11, 1812, Congress authorized the creation of 15 regiments of troops to be enlisted for five years unless sooner discharged.<sup>101</sup> In short order, Congress thereafter empowered the President to receive and organize 50,000 "volunteer military corps."<sup>102</sup> Subsequently, the President was authorized by Congress to enlist up to 15,000 dragoons for 18 months.<sup>103</sup> Finally, the President was given the mandate to require the States to hold in readiness 100,000 militia.<sup>104</sup> All of these

<sup>95</sup> 24 Stat. 401-402, Act of February 12, 1887. The grant applied for the benefit of the organized, trained militia.

<sup>96</sup> 3 Stat. 577, Act of May 20, 1820.

<sup>97</sup> 2 Stat. 481, Act of April 12, 1808.

<sup>98</sup> Manual, op. cit., 123.

<sup>99</sup> Ganoe, op. cit., 116.

<sup>100</sup> Bernardo-Bacon, op. cit., 118.

<sup>101</sup> 2 Stat. 671.

<sup>102</sup> 2 Stat. 676, Act of February 6, 1812.

<sup>103</sup> 2 Stat. 704, Act of April 8, 1812.

<sup>104</sup> 2 Stat. 705, Act of April 10, 1812.

were forces existing on paper only and recruitment and mustering did not in fact get under way until late 1812. The actual strength of the Regular Army in June 1812 was under 7,000 men out of an authorized strength of 35,000.<sup>105</sup> There had been *no advance planning for mobilization* in the likelihood of war.

A factor which mitigated against the Americans during the war was the circumstance that the overthrow of Napoleon in 1814 released great numbers of well-trained British regulars for duty outside of Europe. While the collapse of Napoleon could scarcely have been foreseen in 1812, the timing of the French debacle worked against any prospect of success which the Americans might otherwise have enjoyed.

It has been estimated by Upton that during the course of the war, there were engaged a total number of 527,654 men in the following categories:

1. Regulars (including 5,000 sailors and marines).  
56,032
2. Volunteers.  
10,110
3. Rangers.  
3,049
4. Militia.  
458,463<sup>106</sup>

The terms of service of the indicated troops were as follows:

- a. 12 months or more.  
63,179
  - b. 6 months or more.  
66,325
  - c. 3 months or more.  
125,643
  - d. One month or more.  
125,307
  - e. Less than one month.  
147,200
- Total 527,654<sup>107</sup>

The purpose of this writing is not to review the military campaigns which took place during this ill-fated contest. It has been somewhat in vogue to criticize the role of the militia. It might be urged with more accuracy that any fault should be attributed to the federal government which had failed to equip and train the militia even under the standards of the day. In extenuation for the militia, one may point to the Battle of Chipewewa on July 5, 1814, when a *well-trained militia* under General Winfield Scott routed an equal force of British regulars by advancing under withering fire and driving the enemy at the point of the bayonet from the field.<sup>108</sup> Consider also that in January 1815, at Chalmette, General Andrew Jackson with an army mainly composed of Louisiana, Tennessee and Kentucky mili-

<sup>105</sup> Spaulding, op. cit., 127.

<sup>106</sup> Upton, op. cit., 137.

<sup>107</sup> Ibid.

<sup>108</sup> Ganoe, op. cit., 138.

tia decisively defeated a British invasion force.<sup>109</sup>

At the beginning of the war, *quotas of militia* were assigned to the various states. New York, for example, drew a quota of 13,000 men which aroused dissatisfaction among the militia called to fill the quota.<sup>110</sup>

On September 26, 1814, Governor Daniel D. Tompkins called the Legislature of New York into extra session and various significant war measures were enacted,<sup>111</sup> including (1) increasing the militia rate of pay, (2) extension of aid and recognition to privateering, and (3) approving the creation of a corps of 20 militia companies for coastal defense purposes.<sup>112</sup> On October 24, 1814, the Governor of New York was authorized under the "Classification Law" to raise 12,000 troops from the militia for two years service. All militiamen were to be classed and from each "class", one man was to be furnished. If a militiaman did not volunteer from his particular class, a financial assessment was levied

upon the property of each member of the class in order to induce recruitment.<sup>113</sup>

The whole effect of the New York statutory classification system was to arrive at a *draft procedure* which strongly influenced militiamen to the point of coercion to enter the state service for a somewhat extended period of active military duty.

A majority of the seventeen states comprising the nation followed the "Rules with Regard to Militia Draughts" set forth in the Rules and Regulations of the Army, dated May 1, 1813.<sup>114</sup> The *United States would requisition through the Governor*, the number of officers and men required. The mustered men were then sent with little or no training to the locale of action.<sup>115</sup>

In 1814, Secretary of War James Monroe proposed a plan for the raising of *federal troops* to mount an offensive against Canada. The essence of the proposal was to call men from classes of 100 each by the method of "draught".<sup>116</sup> Mon-

<sup>109</sup> Gayarré, *History of Louisiana* 467-470 (1866).

<sup>110</sup> New York "Evening Post", May 12, 1812.

<sup>111</sup> Alexander, *A Political History of the State of New York* 226 (1906).

<sup>112</sup> Hammond, *The History of Political Parties in the State of New York* 377, 380-381 (1852).

<sup>113</sup> *Id.* at 379, 385-387, 389.

<sup>114</sup> *American State Papers, Military Affairs* (hereinafter termed *Am. St. Mil. Aff.*) 425-438 (1832).

<sup>115</sup> Kreidberg & Henry, *History of Military Mobilization in the U.S. Army, 1775-1945* (D of A Pam. 20-212) 51 (1955).

<sup>116</sup> *Am. St. Mil. Aff.* 514.

roe would place the onus of military duty upon "the unmarried and youthful who can best defend the country and best be spared." The *draft plan* was to be executed by *county* courts or by militia officers in each county or by persons appointed to draft in each county. The Monroe plan was finally tabled in effect in the Senate on December 28, 1814, by a 14-13 vote, as the two Houses of Congress could not agree upon the term of service of the militia who would be drafted.<sup>117</sup> As peace had been signed between the belligerents on December 24, 1814 at Ghent, the proposed federal draft system became academic. The Monroe conscription proposal is significant because of the close vote in Congress where federal conscription failed of passage by only one vote.

## 2. *The Volunteer Companies*

Previously, we have noted that the Militia Act of 1792 empowered the states to authorize military companies in addition to or apart from the untrained militia. Section 8 of the statute countenanced the incorporation by the state of private companies which might be attached to the militia. Possibly, Congress was motivated to preserve several, old, fashionable companies functioning after the close of the War of Independence. In

England, the independent companies trace back to at least the sixteenth century. The Fraternity of Saint George or Artillery Guild which is now the Honorable Artillery Company was granted a charter in 1537.<sup>118</sup> In 1638, the 'Antient and Honorable Artillery Company of Massachusetts' was established along formal lines, as was the First Troop of Pennsylvania Cavalry in Philadelphia. The colonial train-bands, as time went on, acquired a permanency which elevated them above the unorganized militia which was the mass of untrained men in the county.

The volunteer companies were usually uniformed and had a fixed table of organization. The number of companies increased steadily. By 1804, for example, it has been estimated that there were about 25,000 members of independent companies throughout the nation.<sup>119</sup>

In New York, Governor Thomas Dongan, commissioned by James II in 1686, encouraged the drill and discipline of the militia companies or train-bands and sought to place the scattered companies into definite *regiments*.<sup>120</sup> The New York City Regiment of Artillery was organized in 1786 from existing companies. By 1808, New York City could boast of three regiments of light artillery, one of infantry, a

<sup>117</sup> Leach, op. cit., 116-117.

<sup>118</sup> Todd, op. cit., 80.

<sup>119</sup> *Ibid.*

<sup>120</sup> 1 Clark, *History of the Seventh Regiment of New York* 9 (1890).

squadron of cavalry, two companies of heavy artillery and several unattached rifle units.<sup>121</sup> In 1824, after elaborate preparations, there was formed a new battalion called the "Battalion of National Guards" which subsequently became better known as the 27th New York Regiment National Guard, and, still later, the Seventh Regiment, New York National Guard.<sup>122</sup> *The inactive militia declined* noticeably after the War of 1812 because the conflict had demonstrated the error of pitting untrained militiamen against regulars and organized militia. By 1826, the volunteer companies personnel comprised 10-15% of the total militia and had supplanted the untrained militia for many purposes originally contemplated in the Act of 1792.<sup>123</sup>

The *volunteer companies flourished in the larger cities* and supplemented the inadequate police forces of that time. For example, during the 30 years between 1834 and 1864, the 27th New York Regiment, later the Seventh Regiment, was called into state or local service to preserve law and order during fires and riots on at least eighteen occasions averaging at least three days period of serv-

ice.<sup>124</sup> Some measure of criticism has been leveled at the volunteer companies, to the effect that they were social organizations of leading citizens and that selective membership was a characteristic of some of the companies and regiments. Doubtless there is an element of truth in this notion, but as one writer has commented: "Criticism of them (volunteer companies) appears impertinent if we remember that it was they who were footing the bill of 'preparedness'".<sup>125</sup>

The derivation of the name "*National Guard*" stems from the decade following the conclusion of the War of 1812. General Lafayette in fact brought the name, "National Guard" to the United States in connection with his visit in 1824.<sup>126</sup>

During the French Revolution of 1789, General Lafayette was Commander of a French volunteer force which had assumed the name "National Guard" and as a unit had aided in the defeat of Duke Charles of Brunswick at Valmy in 1792.<sup>127</sup> This was the same princeling who during the American Revolution had hired out his subjects as mercenaries to King

<sup>121</sup> Todd, op. cit., 156.

<sup>122</sup> Id. at 103.

<sup>123</sup> Riker, op. cit., 42-43.

<sup>124</sup> Todd, op. cit., 84.

<sup>125</sup> Id. at 83.

<sup>126</sup> Cutler, op. cit., 54.

<sup>127</sup> Id. at 22.

George III. Lafayette's triumphal tour of the United States in 1824-1825 inspired the members of an *organized volunteer battalion* in New York City to assume the designation of National Guards. The name captured the popular fancy and from 1825 until the time of the Dick Act of 1903,<sup>128</sup> 'National Guard' was officially applied to all state volunteers in America.

The Militia Act of 1792 had achieved a result unforeseen by the law makers of that day. The Act had countenanced the Volunteer Corps, and the *course of events aided the development of volunteer, uniformed, organized, state militia units*. Still later, the same organized militia became in great part the Federal National Guard of the Twentieth Century. As early as 1810, a training school existed in Massachusetts for volunteer companies' officers.<sup>129</sup>

The untrained militia musters continued in many of the states, but with varying degrees of success in point of achieving any training or uniformity. Attendance at a militia muster was enforced by a *fine* imposed upon

those men failing to appear on the muster date. Usually, the fine was payable into the public treasury. The fines became increasingly unpopular in the counties.<sup>130</sup> In 1840, militia fines were abolished in Massachusetts, and the volunteer, organized militia system in that state replaced the untrained militia.<sup>131</sup>

In New York in 1846, the militia fine was converted into a commutation fee of 75 cents yearly and the proceeds went to support the militia.<sup>132</sup> In 1847, the inactive militia was taxed to buy equipment and arms for the volunteers.<sup>133</sup>

Massachusetts and Connecticut had summer training for the organized militia from the 1850's onward.<sup>134</sup> By the 1880's, most of the states had established camps of instruction for their organized militia, called the National Guard.<sup>135</sup>

In Great Britain, the militia experienced a somewhat similar decline followed by a resurgence of interest. During the Napoleonic war years 1805-1813, out of 227,510 men enrolled in the counties'

<sup>128</sup> 32 Stat. 775, Act of January 21, 1903.

<sup>129</sup> Cutler, *op. cit.*, 58.

<sup>130</sup> London, "The Militia Fine, 1830-1860", 15 *Military Affairs* 133-144 (1951).

<sup>131</sup> Massachusetts Laws, 1840, ch. 92, p. 233-240, Act of March 24, 1840.

<sup>132</sup> New York Laws, 1846, ch. 270, Act of May 13, 1846.

<sup>133</sup> New York Laws, 1847, ch. 290, Act of May 13, 1847.

<sup>134</sup> House Report No. 754, 52nd Cong., 1st Sess., March 17, 1892.

<sup>135</sup> Manual, *op. cit.*, 291.

militia, 95,755 voluntarily transferred to the regular army.<sup>136</sup> A "general apathy" developed after peace in 1815 and the militia declined. Beginning in 1852, the Crimean situation induced a revival of interest. In 1871, control of the militia passed from the counties to the Crown.<sup>137</sup>

### 3. *The Mexican War*

The inception of the military plan followed by the United States in the conduct of the Mexican War, 1846-1848, may be traced to the influence of Secretary of War John C. Calhoun, 1817-1825, under President James Monroe. Congress on May 11, 1820, had reduced the strength of the army to 6,000 men.<sup>138</sup> Secretary Calhoun, although an opponent of federalism on December 12, 1820, transmitted to Congress a memorable State Paper.<sup>139</sup> Calhoun urged an "expandible standing army" which meant the expansion of the regular army in time of emergency by the absorption of volunteer recruits into regular units. Calhoun contended:

1. The Militia, in an emergency should man fortifications and act as light troops in the field. Apparently, no planning was to be given to an adequate training of the militia at any stage.
2. The regular army would act directly against a foe in the field and would be expanded to at least 19,000 from the 6,000 limit of 1820.<sup>140</sup>

In disregard of the Calhoun plan, however, Congress merely voted on March 2, 1821 to set the army at 6,183 men,<sup>141</sup> of whom 5,211 were present for duty. In 1843, despite a marked population movement westward throughout America, the army was below an authorized strength of 8,613 men.<sup>142</sup>

In 1845, on the eve of war, the army strength continued at 8,613.<sup>143</sup> On April 24, 1846, the Mexicans attacked a detachment of United States Dragoons upon the north side of the Rio Grande River which was clearly an act of war.<sup>144</sup> President James K. Polk on May

<sup>136</sup> Coulton, *Compulsory Service* 217 (1917).

<sup>137</sup> Cutler, *op. cit.*, 12.

<sup>138</sup> 2 Am. St. Mil. Aff. 188.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Id.* at 189.

<sup>141</sup> 3 Stat. 615-616; 2 Am. St. Mil. Aff. 452, 454.

<sup>142</sup> *Congressional Globe* (hereinafter termed *Cong. Globe*) 27th Cong., 3d Sess., App., p. 33-34, November 30, 1843.

<sup>143</sup> Spaulding, *op. cit.*, 174.

<sup>144</sup> Ganoe, *op. cit.*, 202-203.

11, 1846, in his war message to Congress, asked leave to raise a body of *volunteers* to serve at least six months and not more than twelve months. Congress, two days later, authorized 50,000 volunteers to serve for twelve months or for the duration of the war.<sup>145</sup>

The significance of the congressional provision for volunteers is that a foreign war outside of the United States was now involved and probably the invasion of Mexico would ensue. Constitutional restrictions mitigated against the use of the militia in a foreign war beyond the confines of the United States which was well illustrated during the attempted invasion of Canada in 1812-1815.

Because of a lack of funds, the first volunteers had to furnish their own equipment for which they were to be reimbursed by the federal government at a later date. This situation was corrected in 1848.<sup>146</sup>

In the Mexican War, reliance was mainly placed upon the regular army expanded to 31,000, plus a recruited force of volunteers totaling 73,000 men and a comparatively small militia enrollment of 12,601. The militia were re-

garded as volunteers in the total army strength 104,284 men.<sup>147</sup>

The percentage of militia, namely, 12% of the total does not loom large compared to the 88% militia strength of the total army force in the War of 1812.<sup>148</sup> There is reason to believe, however, that the 12% militia force during the Mexican War was extracted mainly from the organized, uniformed, trained militia, and, hence, was an available "volunteer" addition to the army.

The recruitment of volunteers was in most instances linked directly to the state governments. After the attack by the Mexicans on Thornton's patrol, General Zachary Taylor's first act was to call on each of the Governors of Louisiana and Texas for four regiments of volunteers or a total of 8,000 men which were immediately forthcoming.<sup>149</sup> In Louisiana, 4,500 volunteers were raised in New Orleans in 10 days and the State Legislature voted \$100,000 for their equipment. Later, as enthusiasm diminished and enlistments fell off, the Louisiana Governor offered a state bounty of \$10.00 plus a month's pay and threatened to invoke "*a statewide draft*".<sup>150</sup> The Adjutant-

<sup>145</sup> 9 Stat. 9-14.

<sup>146</sup> 9 Stat. 210, Act of January 26, 1848.

<sup>147</sup> Randall, *Civil War and Reconstruction* 406 (1953); consult Riker, *op. cit.*, 41.

<sup>148</sup> Upton, *op. cit.*, 221.

<sup>149</sup> Bill, *Rehearsal for Conflict* 102 (1947).

<sup>150</sup> *Id.* at 103.

General of Indiana under state auspices raised fourteen regiments of volunteers although the state had no organized militia to offer.<sup>151</sup>

President Polk rhetorically stated in May, 1846: "A volunteer force is beyond question more efficient than any other description of citizen soldiers, and it is not to be doubted that a number far beyond that required would readily rush to the field upon the call of their country."<sup>152</sup> This was fanciful thinking as experience had shown in the War of Independence and in 1812 and would aptly demonstrate in 1861-1865, 1917, 1941, and 1950.

The war proved that *volunteers for a short period of service are not superior to untrained militia* called for a brief period of duty. For example, in April 1847, General Scott was ready to move on Mexico City, but was compelled to stand idle because he had to discharge his volunteers whose term of service of six months to one year had expired. Scott, in a hostile land, waited for reinforcements from April to August 1847 before he could resume the offensive.<sup>153</sup>

The war brought together many junior officers who less than two decades later, became the great names upon the American military scene. We find Grant, Lee, Mc-

Clellan, the two Johnstons, Beauregard, Hooker, Thomas, Bragg, Meade, Pemberton, Hope, McDowell, Buell, Gustavus W. Smith, Longstreet, Hardy, Jackson, Burnside, Reno, Sumner, Franklin, Magruder, Pleasanton, Stoneman, Hunt, the two Hills, Ewell, Heintzelman, Mansfield, Loring, Anderson, Fitzjohn Porter, and Buckner, from a non-complete list.

During the 1850's, Captain George B. McClellan returned as observer from the Crimean War. Captain McClellan, later to achieve fame in 1861-1864, urged that the regular army could never be made large enough to provide for all military contingencies that might require the use of armed forces. McClellan argued that to meet emergencies, the *militia and the volunteer system should be placed upon an effective basis* with instructors furnished to the militia from the regular army and with all possible steps taken to train the militia for future use.<sup>154</sup>

## RESUME

The colonial period in America developed a reliance upon the militia as a primary military force. A general call upon the entire militia of the colony seldom if ever occurred. The militia functioned as a *training and mobilization base*. As the need warranted, in-

<sup>151</sup> Ibid.

<sup>152</sup> Cong. Globe, 29th Cong., 1st Sess., p. 782-783.

<sup>153</sup> Upton, op. cit., 211; Spaulding, op. cit., 211.

<sup>154</sup> Michie, General McClellan 46-47 (1901).

dividuals or even small units could be selected for active field service, usually against the Indians. Selection often resulted from volunteering. If there was an insufficient number of volunteers, the local troop commanders could *draft men and units* as needed. The Colonial Legislature from the earliest times exercised a close control and supervision over all matters affecting the militia.

During the War of Independence, the Continental Congress requested the states to furnish *quotas* of men. A *majority of the states drafted militiamen* to meet the quotas imposed by Congress. During the War of 1812, the regular army of trained men was too small, and the state militiamen were inadequately trained and led. After this conflict, the unorganized militia declined, and there grew in importance, the *organized militia* usually found in *volunteer companies* which in the larger cities became battalions and regiments.

In 1814, New York adopted a stringent conscription law to enroll men by classes and to select individuals for extended military service.

The first signs of federal influence upon the state militia may be traced to the Acts of 1792, 1794, 1798, 1808 and 1820. Congressional notions of *economy* however were all-pervading as to each of the Militia and the Regular Army.

During the Mexican War, reliance was placed upon an *expanded regular army* supplemented by a large *volunteer force*. Untrained volunteers were not an improvement over untrained militia. By the 1840's, the unorganized militia ceased to have any importance in military planning. The state militia for all practical purposes had become the organized, trained, uniformed militia.

From the colonial period until 1792, the militia was under state control. After 1792, the militia in time of peace continued under state control but with an increasing measure of federal supervision. After 1792, in time of war, the militia was subject to a dual control, state and federal. This system, as we shall note, prevailed through 1865. *The state could draft from the militia for all purposes before and after 1792.*<sup>155</sup>

### III. APRIL 1861—JULY 1862 IN THE UNION

#### A. One Million Men Called

Abraham Lincoln believed that America was indebted to the *Militia Draft* for the successful outcome of the War for Independence.<sup>156</sup> For the first two years of the Civil War, the Lincoln Administration sought to place reliance upon the militia system.

The official numerical record of the untrained militia forces in the

<sup>155</sup> An Act of Congress, June 30, 1834, 4 Stat. 726, refers to "draughted militia" in service on the frontiers against the Indians.

<sup>156</sup> 7 Nicolay & Hay, Abraham Lincoln, 55, 39, 34 (1890).

United States at the beginning of hostilities in 1861 showed a grand total 3,163,711 men. Of these, 2,471,377 were from the Union States. The number 692,334 were militia from the Confederate States.<sup>157</sup> These militia totals are inordinately large in some instances, but are small as to other states. Some returns date back to the year 1827. Generally, as muster and drill day was seldom observed, the numbers are not significant except to show that there was a vast reservoir of manpower available in the North and in the South for mobilization in the conflict. The Militia Act of 1792 was still in effect for all purposes in the Union states.

President Lincoln on April 15, 1861, after Fort Sumter, by proclamation, called for 75,000 volunteers to serve for three months and to be furnished by the states from the militia.<sup>158</sup> The proclamation by the President was under the authority of the Militia Act of 1803, Section 24.<sup>159</sup> As Congress was not called into session until July 1861, militia were the only

troops available without further legislative action.

After Manassas, between July 22-July 25, 1861, Congress authorized the President to call over 500,000 men. The first enlistees were to serve not less than six months or more than three years. A short time later, men were to be engaged for the duration of the war.<sup>160</sup> A total response of 700,680 men resulted from the calls.<sup>161</sup>

In response to Lincoln's initial request for 75,000 volunteers, those states which had promoted the volunteer, trained militia organizations produced a far more efficient force than those states which had not encouraged an organized militia.<sup>162</sup> Innumerable, organized, state units volunteered for full war service, and militia companies were accepted as "United States Volunteers".<sup>163</sup> Congress, in 1861, regarded the volunteers, trained or untrained, as militia called under the militia clause of the Constitution,<sup>164</sup> and the raising of *national volunteers* was assigned to the states.

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<sup>157</sup> The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies (hereinafter termed O.R.) ser. III, v. 1, p. 66-69; PMG I, 161.

<sup>158</sup> Randall, op. cit., 360; O.R. ser. III, v. 1, 68-69.

<sup>159</sup> 2 Stat. 215, 223, Act of March 3, 1803.

<sup>160</sup> Ganoe, op. cit., 259-260.

<sup>161</sup> Leitch, op. cit., 133.

<sup>162</sup> Todd, op. cit., 154.

<sup>163</sup> Riker, op. cit., 41.

<sup>164</sup> Cutler, op. cit., 56.

The President in calling the volunteer militia, acted under the authority of the Act of 1795,<sup>165</sup> which empowered the President to call the militia of any state for three months whenever the laws of the United States should be opposed or obstructed in any state. Further, an Act of 1803<sup>166</sup> authorizing calling the militia to preserve law and order in the District of Columbia.

Under the Act of 1803, the President issued calls through the War Department for ten companies of militia on April 9, five companies on April 13, one company on April 15, and eight companies on April 16, or a total 23-24 companies, all for service in the District of Columbia.<sup>167</sup> These calls began early in April before the fall of Fort Sumter, and, meager as they were, comprised the "first step toward mobilization".<sup>168</sup>

A somewhat incredible instance of Congressional caution may be found in the enactment by Congress on July 29, 1861 of a statute declaring that at the end of the war, the army should be reduced to 25,000 men! With the entire nation-in-arms, plunged in war, and with over 500,000 men called

in the Union States, Congress blandly provided for a diminutive-sized regular army after the cessation of hostilities, whenever that should occur.<sup>169</sup>

### B. Confusion In the Volunteering System

Beginning in April 1861, the recruiting of men was under State auspices in response to quotas indicated to the states by the federal government. As discussed previously, the states relied upon militia men to respond to the volunteer calls.

On December 3, 1861, Secretary of War Simon Cameron took action seriously affecting state volunteering. The Secretary declared that the governors were to send forward no more regiments unless they were requisitioned by the War Department. Federal recruit depots were established in each state and state recruitment ended. Apparently, the Lincoln administration concluded in early 1862 that an army in excess of 660,000 men was sufficient for all offensive and defensive purposes.<sup>170</sup>

On April 3, 1862, Secretary of War Edwin M. Stanton issued an order which discontinued the fed-

<sup>165</sup> 1 Stat. 424-425, Act of February 28, 1795: O. R. ser. III, v. 1, 68-69.

<sup>166</sup> 2 Stat. 215-225, Act of March 3, 1803.

<sup>167</sup> O.R. ser. I, v. 51, part 1, 321-325; ser. III, v. 1, 75; consult 1 Shannon, *The Organization and Administration of the Union Army 1861-1865*, 30-31 (1928).

<sup>168</sup> 1 Shannon, *op. cit.*, 30.

<sup>169</sup> 12 Stat. 279; Ganoe, *op. cit.*, 261.

<sup>170</sup> O.R. ser. III, v. 1, 722-723.

eral recruitment of volunteers, and ended the army recruiting service through the federal government.<sup>171</sup>

On May 1, 1862, the War Department directed army commanders to requisition recruits through the governors.<sup>172</sup> This seemed to restore state control of volunteering.

There was considerable apathy towards recruitment which as a consequence languished throughout the nation. By an order dated June 6, 1862, the recruiting system under federal control was restored.<sup>173</sup> The effect upon public morale of six months of wavering by the Secretary of War was to render more difficult the obtainance of men, as the war stepped up in tempo in mid-1862.

Escaping Confederate Army conscripts entering the Union lines were allowed to join the Union Army, as early as 1863.<sup>174</sup> An Act of July 4, 1864 permitted the Union States to recruit behind the federal lines in Confederate States.<sup>175</sup> New Hampshire offered a bounty of \$500.00 to recruits

from Confederate States while only \$300.00 bounty was paid to New Hampshire citizens who enlisted!<sup>176</sup>

President Lincoln permitted recruitment for the Union Army from the inmates of the Rock Island Federal Prison.<sup>177</sup>

#### C. The Militia Act of July 17, 1862

This statute<sup>178</sup> amended the Militia Act of 1795 and was designed to aid recruitment within the states through a *militia draft* and sought some degree of uniformity in the state standards of accepting men. The words "draft" or "conscription" were not used in the statute. The Chief Executive for the first time received statutory authority to resort to a *presidential draft to compel the service of state militia* where a state did not adopt a state draft system. This result was achieved on the basis that the President could provide *regulations* for a draft in a state lacking a state draft system.

Cutler has commented that the act was one of "universal compul-

<sup>171</sup> O.R. ser. III, v. 2, 2-3.

<sup>172</sup> O.R. ser. III, v. 2, 28-29.

<sup>173</sup> O.R. ser. III, v. 2, 109.

<sup>174</sup> O.R. ser. III, v. 3, 834.

<sup>175</sup> 13 Stat. 379.

<sup>176</sup> O.R. ser. III, v. 4, 536-537.

<sup>177</sup> O.R. ser. III, v. 4, 680; compare that George Washington emphatically opposed the recruitment of convicts in the Continental Army, and in January 1776, *prison recruitment was prohibited*: Kreidberg, op. cit., 13; 8 Fitzpatrick, *The Writings of George Washington* 56, 78 (1931-1944).

<sup>178</sup> 12 Stat. 597.

sory militia service", but notes that the states preferred to substitute a system of "bounty-stimulated volunteering".<sup>179</sup> The same writer attributed 87,000 drafted militia to the workings of the compulsory militia-service process.<sup>180</sup>

The regulations of August 9, 1862<sup>181</sup> sought to achieve some degree of uniformity among the states. Exemptions rested with the states and a varied basis of exclusion from military duty resulted. On August 4, 1862, the President called for a draft of 300,000 state militia to serve for nine months. The governors were to fill their quotas, if possible, by volunteers or to *make up any deficiency by a special draft*.<sup>182</sup>

The Militia Act of July 1862 renewed the practice of compulsory state military service which had fallen into disuse after 1815.<sup>183</sup> As the states had not utilized a draft for some years, some of the states through generous bounties sought to attract such sufficient numbers of men that a draft was unnecessary. The pay-

ment of costly bounties proved to be a poor substitute for compulsory military service.

Provost Marshals were first used in our history on August 9, 1862 when one was appointed by the President for each Congressional District on nomination of the respective governors in order to enforce the militia draft.<sup>184</sup>

As the state draft was not successful in obtaining the numbers of men required in the war, there was enacted on March 3, 1863, an "Act for Enrolling and Calling Out the National Forces and for Other Purposes", commonly called the Enrollment Act.<sup>185</sup> *This statute for the first time achieved a federal draft or conscription act upon a nationwide basis in the United States*.<sup>186</sup>

The Enrollment Act in a sense took the place of the Militia Draft Act of July 1862, as a device to encourage recruiting. The measure has been termed a means to raise armies without regard for States' Rights.<sup>187</sup> Another com-

<sup>179</sup> Cutler, op. cit., 41.

<sup>180</sup> Id. at 55.

<sup>181</sup> O.R., ser. III, v. 2, 334.

<sup>182</sup> Id. at 291.

<sup>183</sup> Cutler, op. cit., 69.

<sup>184</sup> Upton, op. cit., 442; PMG II, 105-107.

<sup>185</sup> 12 Stat. 731; also set forth in PMG II, 182-188.

<sup>186</sup> For a discussion of the federal draft, consult *The Civil War Federal Conscription and Exemption System* by this writer in *Judge Advocate Journal*, February 1962, 1-27.

<sup>187</sup> Bernardo-Bacon, op. cit., 199.

mentator concluded that "one good result of conscription was a spur it gave to volunteering."<sup>188</sup>

The constitutionality of the Enrollment Act was not resolved in the United States Supreme Court. By a 3-2 vote, the Act was upheld by the Pennsylvania Supreme Court on January 16, 1864.<sup>189</sup>

Subsequent to the Enrollment Act, there was only one call for militia—that of June 15, 1863 limited to four states.<sup>190</sup>

#### IV. JANUARY 1861 - APRIL 1862 IN THE CONFEDERACY

##### A. Mobilization From January 1861

General Grant after his retirement wrote that "the initial superiority of the Southern Troops was due to the fact that the Confederacy had no standing armies."<sup>191</sup>

The Confederate forces came into existence through the acquisition of state militia units ob-

tained under a quotas system prescribed by the central government, and observed by the seceding states. State action preceded the military legislation by the central government. For example, after Alabama seceded on January 11, 1861, the Governor recommended to the Legislature three days later, "that the State of Alabama be placed, at as early a period as practicable, upon the most efficient war footing. The first requisites of this condition are money, men, and arms."<sup>192</sup> After secession, various Southern states mobilized portions of their volunteer units and the militia.<sup>193</sup>

Although the South like the North had experienced a decline in the state militia from about 1852 through 1857,<sup>194</sup> the growing war spirit led to a revitalization of the trained militia from 1858 onward.<sup>195</sup> Generally, each state that joined the Confederacy had a well-organized militia of several thou-

<sup>188</sup> Ganoë, op. cit., 289.

<sup>189</sup> *Kneedler vs. Lane*, 45 Pa. (9 Wright) 238 (1863). In *Lanahan vs. Birge*, 30 Conn. 438, 443 (1862) the authority of the State to enforce compulsory military service was upheld. A dissent in *Kneedler* urged that the federal government could only call for militia through the States; contra is *Cox vs. Wood*, 247 U.S. 3, 6 (1918). Consider the *Legal Tender Cases*, 12 Wall. 457 where under the war stress, a constitutional power evolved.

<sup>190</sup> Winthrop, *Military Law and Precedents*, 88n. (2nd ed. rev. 1920).

<sup>191</sup> 1 Grant, *Memoirs* 283, quoted by Stern, op. cit., 140.

<sup>192</sup> O.R. ser. IV, v. 1, 50; consult, Fleming, *Civil War and Reconstruction in Alabama* 27-39, 88-100 (1905).

<sup>193</sup> PMG I, 115-116.

<sup>194</sup> P. T. Smith, *Militia of the U. S. from 1846 to 1860*, 42-47, in 15 *Ind. Mag. of Hist.* 20 (1919).

<sup>195</sup> *Id.* at 43.

*sand enthusiastic partisans.* President Jefferson Davis in his Inaugural Address requested Congress to utilize the state militia as the nucleus for the army of the central government.<sup>196</sup>

On February 28, 1861, President Davis was authorized by Congress to assume control of all Confederate military operations.<sup>197</sup> The Provisional Army was created and the President could receive into the Confederate service for one year, militia units offered by the states or which might volunteer with state consent.

President Davis on March 6, 1861, called for 100,000 volunteers to serve for one year, and by mid-April, the Confederacy had 35,000 well equipped, partially trained men in the field.<sup>198</sup> "The soldiers of Lee and Stonewall Jackson, like Washington's Continentals were citizen soldiers."<sup>199</sup>

In a general sense, the South repeated the errors made in America during the Revolutionary War and in 1812. The states succeeded in

maintaining strong forces within their own boundaries and this as a practice tended to defeat the military policy of the Confederacy. *Localism was a factor* to be reckoned with by Richmond throughout the war. There resulted a wide dispersion of strength which mitigated against a strong concentration of forces in a few strategic areas.<sup>200</sup> It has been estimated that at various times, the states were withholding from the central government up to 100,000 men, together with arms and equipment.<sup>201</sup> For a greater or less period of time, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia created and maintained state armies.<sup>202</sup> The Tennessee Adjutant General reported on July 31, 1861 that the state forces contained 19,400 infantry, 2,079 cavalry and 558 artillery.<sup>203</sup> The diversion of arms from the central government was perhaps a main fault of the states. Secretary of War Judah Benjamin

<sup>196</sup> 1 Journal of the Congress of the Confederate States 65 (Senate Documents, v. 25-31 incl., 58th Cong., 2d Sess. (U.S.) (1903-1904) (hereinafter termed Journal).

<sup>197</sup> Years, The Confederate Congress 60 (1960).

<sup>198</sup> Upton, op. cit., 226.

<sup>199</sup> Palmer (America in Arms) op. cit., 94.

<sup>200</sup> Rose, Why the Confederacy Failed, 53 Century Illus. Mag. 33-37 (1896). The argument is refuted by Lt. Gen. Stephen D. Lee and Lt. Gen. Joseph Wheeler, CSA, in 53 Cent. Illus. Mag. 626 (1897).

<sup>201</sup> Owsley, Local Defense and the Overthrow of the Confederacy: A Study in State's Rights 491 in 11 Miss. Val. Hist. Rev. 490 (1925).

<sup>202</sup> Id. at 500-501, 505.

<sup>203</sup> O.R. ser. I, v. 52, part II, 123-124.

in March 1862 informed President Davis that the Secretary could put 350,000 men in the field if he had arms.<sup>204</sup> General Albert Sidney Johnston was hampered in early 1862 because the states refused to part with arms.<sup>205</sup>

President Davis sought to curtail the division of military strength between the central government and the States. In January 1862, Davis vetoed a bill to authorize a regiment of volunteers to serve on the Texas frontiers under Texas control. The President commented:

"Unity and cooperation by the troops of all the States are indispensable to success, and I must view with regret—indications of a purpose to divide the power of States by dividing the means to be employed in efforts to carry on separate operations."<sup>206</sup>

#### B. The Militia Call of January 29, 1862

Congress authorized the states to draft from the militia, for three years, for men to be furnished to the central government.<sup>207</sup>

It is questionable whether the

states needed congressional authority to draft the militia, but the statute unquestionably facilitated recruitment in order to avoid the stigma of state conscription. In February 1862, Virginia began to exercise this authority.<sup>208</sup> General Pierre Beauregard suggested in November 1861, a plan of conscription to be managed by the states.<sup>209</sup> During the autumn of 1861 and the following spring, the Confederacy was face to face with the problem of continuing in service the existing army which had achieved magnificent training and combat experience and the need to add additional strength to the army. *State drafts were an aid to local defense forces*, but did not inure to the advantage of the central government and additional legislative measures became necessary. On February 18, 1862, the Confederate Congress assembled for a first session and strove to solve the problem.

#### C. Conscription Act of April 16, 1862

The comment has been offered that the adoption of compulsory military service was due largely to the advocacy of *President*

<sup>204</sup> O.R. ser. IV, v. 1, 970, 1168: ser. I, v. 7, 907.

<sup>205</sup> O.R. ser. I, v. 7, 794-795.

<sup>206</sup> Stephenson, *The Day of the Confederacy* 38 (1919).

<sup>207</sup> *Statutes at Large of the Provisional Govt., CSA*, 8 Feb. 1861 to 18 Feb. 1862, 5th Sess., ch. 68, Act of January 29, 1862.

<sup>208</sup> Cutler, *op. cit.*, 70.

<sup>209</sup> O.R. ser. IV, v. 3, 168.

*Davis*.<sup>210</sup> Credit also has been extended to *George W. Randolph*, a grandson of Thomas Jefferson, for his part in formulating conscription.<sup>211</sup> Another commentator has stressed that *Judah P. Benjamin* helped bring about conscription in Congress.<sup>212</sup> *General Robert E. Lee* urged the enactment of a conscription law reaching all white males, 18-45 years. Lee insisted: "The whole nation should for the time be converted into an army, the producers to feed and the soldiers to fight."<sup>213</sup>

President Davis in January 1862, had declined the use of volunteers to the number of 50,000 upwards to be called through quotas upon the states.<sup>214</sup> On April 16, 1862, Congress enacted a conscription law.<sup>215</sup> The measure required all men presently serving in the army to continue for an additional two years. All white men 18-35 years, were to be called to military duty for three years.

Substitution was allowed. Enlistment of men was to be by the Governors or by Confederate Officers. Enrollment was by state officials under Confederate supervision. The election of company officers was permitted, and draftees were to be assigned to units from their home states whenever possible. All enrollees not assigned for duty to military companies, constituted the reserve subject to call when needed.

The enactment of conscription reduced the importance of the states in the obtainance of manpower by the central government. Approximately one-third of each House of Congress voted against the conscriptive law.<sup>216</sup>

An *exemption act* was adopted on April 21, 1862.<sup>217</sup> Substitution was abolished in the Act of December 28, 1863,<sup>218</sup> and thereafter the conscriptive law has been likened to one of "selective service" or a "proper draft."<sup>219</sup>

<sup>210</sup> 6 Evans, Confederate Military History 97 (1899).

<sup>211</sup> Archer Jones, Confederate Strategy from Shiloh to Vicksburg 42-44, 45-47 (1961).

<sup>212</sup> Patrick, Jefferson Davis and His Cabinet 123-124, 45n.

<sup>213</sup> Myers, Robert E. Lee 60 (1961).

<sup>214</sup> 2 Roman, General Beauregard 432 (1884).

<sup>215</sup> Public Laws of the CSA (hereinafter termed Pub. L. CSA) 1st Cong., 1st Sess., ch. 31, p. 29-32; also set forth in O.R. ser. IV, v. 1, 1095-1097.

<sup>216</sup> 2 Journal 154; 5 Journal 228.

<sup>217</sup> Pub. L. CSA, 1st Cong., 1st Sess., ch. 74, p. 51-52. For a discussion of the Confederate Draft, consult Shaw, The Confederate Conscription and Exemption Acts, 6 American Journal of Legal History, October 1962.

<sup>218</sup> Pub. L. CSA, 1st Cong., 4th Sess., ch. 3, p. 172.

<sup>219</sup> Cutler, op. cit., 84; Ganoe, op. cit., 275-276; Coulter, The Confederate States of America, 1861-1865, 315 (1950).

During the Civil War, despite local weaknesses, *centralized control over mobilization of manpower was achieved first in the Confederacy* although the doctrine of States' Rights would seem to mitigate against such centralization.

## V. THE LOUISIANA SYSTEM

### A. The Volunteering-Militia Phase

In the interest of discussing how a *State Militia* System was related to the conscription organization of the central government, the State of Louisiana has been selected for purpose of example. The population in 1860 numbered 708,000, an increase of 36% since 1850. Of these, 81,029 or 11% were foreign born. New Orleans, the largest city in the South, had 168,675 inhabitants.<sup>220</sup> In the State were 350,400 slaves and free Negroes or 49% of the population.<sup>221</sup> In the New Orleans area there were 38.31% aliens contrast- ing with Arkansas and Mississippi

which had only 0.86% and 1.08% foreign population respectively.<sup>222</sup>

Legislative acts regulating the militia date back to the first year of territorial government. In 1834, an act was adopted laying down a complete militia structure system.<sup>223</sup> The 1834 Law continued until 1861 when the Legislature placed the militia on a war footing.<sup>224</sup> The Louisiana Constitution of 1852, Article 46, stated: "The free white men of the State shall be armed and disciplined for its defense."<sup>225</sup>

On December 12, 1860, the Legislature in Extraordinary Session passed an act<sup>226</sup> creating a military board composed of the Governor and four others to purchase arms and make distribution to volunteers. In each parish, there was authorized the formation of a company of 32 men, either cavalry or infantry, on a basis of 48 parishes in the State. The sum of \$500,000 was appropriated.

<sup>220</sup> Bragg, *Louisiana in the Confederacy* 34-35 (1941).

<sup>221</sup> *Id.* at 36; consult Gayarré, *op. cit.*, 692; Census of 1860, Population, 33.

<sup>222</sup> *Ibid.* (Census).

<sup>223</sup> Acts of the Legislature of the State of Louisiana (hereinafter termed Louisiana Acts) 1834, p. 143.

<sup>224</sup> Leland, *Organization and Administration of the Louisiana Army during the Civil War 2*. This is an unpublished thesis at Louisiana State University, 1938, and has been most informative.

<sup>225</sup> Official Journal of the Proceedings of the Convention of the State of Louisiana (hereinafter termed Journal Convention) 297-330, J. O. Nixon, Printer to the State Convention (1861, New Orleans). A duplicate original of this rare volume is in the Congressional Library, Washington, D. C.

<sup>226</sup> Louisiana Acts #1 (1861) p. 3-4. The few enactments of the three day session appear at the beginning of the 1861 Acts.

The legislative act preceded by about one month the adoption of the Ordinance of Secession on January 21, 1861 by a 113-17 vote.<sup>227</sup> The same Convention provided for the establishment of a regular military force for Louisiana,<sup>228</sup> adopted a State Flag,<sup>229</sup> ratified the Constitution of the Confederate States<sup>230</sup> and authorized the Governor to transfer State army units to the general government of the CSA.<sup>231</sup>

On January 10, 1861, the Federal Arsenal at Baton Rouge was seized along with gunpowder and 47,372 small arms.<sup>232</sup>

On March 9, 1861, Confederate Secretary of War Leroy P. Walker appealed to Governor Thomas O. Moore for 1700 Louisiana troops.<sup>233</sup> On March 15, 1861, the Legislature authorized the Governor to transfer the military forces of the State to the military service of the Provisional Government of the Confederate States and to

grant permission to troops of Louisiana to volunteer for service in the Confederate Army.<sup>234</sup>

After Fort Sumter, Governor Moore by proclamation sought 8,000 additional troops to enter Confederate service.<sup>235</sup> By June, 1861, more than 12,000 men equipped by the State had departed for the war and by mid-July, 1861, a detailed report showed a grand total of 20,540 fully equipped men serving outside of the State in the Confederate forces.<sup>236</sup>

Organized militia units were absorbed into the Confederate forces including the Washington Artillery formed in 1840 in New Orleans. After service in the Mexican War,<sup>237</sup> this organization was revitalized in 1857.

#### B. Compulsory Enrollment and Service: Order of September 28, 1861

On September 28, 1861, Governor Moore issued an order setting forth rules for the organiza-

<sup>227</sup> Journal Convention 10, 231-233.

<sup>228</sup> Id. at 247-249.

<sup>229</sup> Id. at 257.

<sup>230</sup> Id. at 277.

<sup>231</sup> Ibid.

<sup>232</sup> O.R. ser. I, v. I, 292.

<sup>233</sup> O.R. ser. IV, v. I, 135.

<sup>234</sup> Louisiana Acts, 1861, #152, p. 113.

<sup>235</sup> O.R. ser. IV, v. I, 747-748.

<sup>236</sup> Caskey, *Secession and Restoration of Louisiana* 41 in *LSU Studies* #36 (1938).

<sup>237</sup> Leland, *op. cit.*, 16; Consult Owen, *In Camp and Battle with the Washington Artillery 1-2* (1885).

tion of the militia. A census of all persons from 18-45 years was to be made. Any person neglecting to perform militia duty would be deemed "suspicious" and fined under an Act of 1853.<sup>238</sup> Exemption from the *Militia Order* was allowed to officers and employees of the CSA and of Louisiana, and of telephonic offices, factories, and foundries, "actually engaged on works for the state and Confederate governments."

On January 23, 1862, the Legislature passed an Act to reorganize the militia<sup>239</sup> which was to be composed of all free white males capable of bearing arms, 18-45 years, residing in the State. The Act required the *tax assessors to enroll inhabitants of their parishes or districts* and to return a roll to the Adjutant General. No militiamen were required to serve for more than three months at one time, except in case of urgent necessity. Company officers were elected in their units.<sup>240</sup>

An unusual feature of militia service is attributed to the European Brigade of approximately 5,000 militiamen formed in February 1862 in New Orleans. During the Federal occupation of the

city, the Brigade preserved life and property by means of patrols, strengthening the levees, aiding the weak, etc.<sup>241</sup>

On January 3, 1863, the Legislature enacted an "Act to raise an army for the defense of the State of Louisiana". The Governor could enlist 20,000 men for service within the State up to 12 months. On the same day, a new militia law was adopted which set age limits at 17-50 years and made additional exemptions. The Governor could call out the State Militia for a period not to exceed six months "or for as much longer as may be necessary". Any person failing to report within ten days after public notice was to be held and tried as a deserter.

The average term of active service of a militiaman was at least 16 months.<sup>242</sup> One-half of the militia of north, south, and east Louisiana was ordered into service February 25, 1863.<sup>243</sup>

On April 18, 1864, Governor Henry W. Allen issued a general order acknowledging that the Confederate Congress had amended the Conscription Law to embrace the *entire militia of the state which henceforth belonged to the*

<sup>238</sup> O.R. ser. IV, v. 1, 753 for the Order.

<sup>239</sup> Louisiana Acts, 1861-1862, #97, 61-72.

<sup>240</sup> As examples of detailed Militia Laws, consult Tennessee Laws, 1861, p. 57-96 restating the Act of January 28, 1840; South Carolina Laws, 1850, #4020, p. 57-59, Act of December 20, 1850, restoring the Militia Act of 1841.

<sup>241</sup> Leland, op. cit., 56.

<sup>242</sup> Louisiana Acts 1862-1863, #21, 18-20, 36-40; Livermore, op. cit., 61.

<sup>243</sup> Ibid. (Livermore) at 60.

*Reserve Corps of the Confederate Army.*<sup>244</sup> The Governor was referring to the Act of Congress, February 17, 1864, extending age limits to 17-50 years and strengthening the reserves system.<sup>245</sup>

By resort to a "Stay Law", the Legislature sought to extend certain benefits of legal protection to men in military service. On December 21, 1861, the Legislature enacted that "no suit or other judicial proceedings shall hereafter be instituted or had against any person or persons of the State who may be at the time in the military or naval service of the State or the Confederate states".<sup>246</sup> Similar "Stay Laws" were enacted in most of the seceded states. This is a recognizable forerunner of the type of protection sought in the Soldiers and Sailors Civil Relief Act of 1940, as amended.<sup>247</sup>

Based upon perhaps incomplete records, the enrollment in Louisiana throughout the war shows:<sup>248</sup>

Infantry .....	36,243
Artillery .....	4,024
Cavalry .....	10,046
Sappers .....	276
Engineers .....	212
Signal Corps .....	76
New Orleans	
State Guards .....	4,933
	<hr/> 55,820

With regard to the male population, Livermore estimated all total state military strength at 96,808, including reserves and irregulars.<sup>249</sup> Louisiana also furnished to the Union Army 5,224 white troops of whom 945 died.<sup>250</sup> A total of 980 Confederate companies was organized for service in the state.<sup>251</sup> 600 engagements, great and small, were fought by Louisiana contingents during the war.<sup>252</sup> Louisiana was the first state to seek access to captured Confederate muster rolls and other papers seized by the Union troops.<sup>253</sup>

<sup>244</sup> O.R. ser. I, v. 34, part III, 778.

<sup>245</sup> O.R. ser. IV, v. 3, 178, 181; also set forth in Pub. L. CSA, 1st Cong., 4th Sess., ch. 65, p. 211-215.

<sup>246</sup> Louisiana Acts, 1861-1862, #18, 12.

<sup>247</sup> 54 Stat. 1178, Act of October 17, 1940, 76th Cong., 3rd Sess.

<sup>248</sup> Evans, op. cit., 284-285. The total number of troops from Louisiana is believed to have been at least one-fifth above this figure.

<sup>249</sup> Livermore, op. cit., 25-26.

<sup>250</sup> Todd, The 79th Highlanders, NY Vols., 500 (1886).

<sup>251</sup> Caskey, op. cit., 41.

<sup>252</sup> Booth, Louisiana Confederate Military Records 379 in 4 Louis. Hist. Quart. 369 (1921).

<sup>253</sup> Id. at 378.

## VI. THE NEW YORK SYSTEM

### A. The Volunteering-Militia Phase

As discussed previously, the State of New York offers a record of over 200 years of organized militia development and utilization before the outbreak of hostilities in 1861. On January 1, 1861, the available manpower in the State, aged 18-45 years totaled 797,000 men. There were in existence 300 *volunteer companies*, mainly functioning in regiments with a total *active militia strength of 19,000 men.*<sup>254</sup>

Even before the fall of Fort Sumter, the New York Legislature enacted a sweeping military measure and appropriated considerable money for the support of the state troops. New York asked to be permitted to muster 30,000 two-year volunteers and granted the sum \$3,000,000, secured by new taxes, to finance the operation.<sup>255</sup> The Attorney General of New York on May 1, 1861, urged the federal government to accept 38 regiments of two-years militia in place of the 17 regiments of three-months men assigned to the state as a quota under the Presidential Call of April 15, 1861 for 75,000 militia volunteers throughout the

nation.<sup>256</sup> It is interesting that the Governor of Indiana asked to raise 30,000 troops and the State of Massachusetts offered 20,000 more than were requisitioned. These three states were willing to furnish more than the total number, 75,000 militia, required.<sup>257</sup>

The *7th New York Regiment* was the first unit to leave the State on April 19, 1861.<sup>258</sup> During the following months, innumerable New York organized units volunteered en masse for field war service. In answer to the April 15 call, there departed the 5th, 6th, 7th, 8th, 12th, 13th, 20th, 25th, 28th, 69th, and 71st infantry regiments. Further, after reorganization, there were tendered for three years or the duration, the 2nd, 9th, 14th, 64th and 79th infantry regiments. At the same time, the 10th, 19th, 55th and 74th infantry regiments were reorganized and offered for periods of from nine months to two years. In addition, the state furnished 11 emergency regiments in 1862, 21 in 1863, and 17 in 1864. All of these units were regular, organized state troops and were not the purely volunteer regiments created for the war only.<sup>259</sup> The 7th N.Y.N.G. regiment alone

<sup>254</sup> Todd (Our National Guard) op. cit., 153.

<sup>255</sup> New York Laws, 1861, 634-636.

<sup>256</sup> O.R. ser. III, v. 1, p. 91, 169.

<sup>257</sup> 1 Shannon, op. cit., 31-32.

<sup>258</sup> 1 Phisterer, New York in the War of the Rebellion 78 (3rd ed. 1912).

<sup>259</sup> Todd, op. cit., 155.

provided the Union Army with over 600 officers during the course of the war.<sup>260</sup>

**B. Compulsory Enrollment and Service: Act of April 23, 1862**

Recruiting fell off in New York in the autumn of 1861. Adjutant General Hillhouse in January 1862 urged the New York Legislature to adopt the Prussian style of militia system under which all able-bodied men of military age may be held liable for service. A bill was drawn seeking to achieve a general conscriptive method. On April 23, 1862, the Legislature enacted into law<sup>261</sup> the requirement that all able-bodied white male citizens 18-45 years, should enroll. Exemptions were allowed. Enrollment was accomplished by the Captain of the Company in the district where the enrollee resided. Assessors furnished the assessment rolls to the captains and others. Those enrolled composed the "reserve militia of the State of New York" in two classes. *When an organized militia*

*unit was entering service, any deficiency in the ranks was made up by compulsion from the reserve militia of the first class to raise each company to a required minimum number. Reservists provided their own uniforms and companies elected their own officers. On June 3, 1862, enrollment under the new law began through the state.*<sup>262</sup>

As the war dragged on, the *payment of bounties resulted* in an effort to encourage enlistment. New York topped all other states in a total bounties payment in excess of \$86,000,000 for the year 1864.<sup>263</sup> In February 1864, a new regiment of volunteers recruiting in New York City offered \$852.00 to veterans and \$677.00 to new recruits, \$300.00 down being paid in cash on muster.<sup>264</sup> In January, 1865, the County Board of Supervisors raised the County bounty alone to \$1,000.00.<sup>265</sup>

The records seem to establish that New York furnished 448,000 men of whom 46,534 died.<sup>266</sup> Phisterer claimed 400,000 men received into service.<sup>267</sup> The total number of draftees from the state was

<sup>260</sup> 2 Clark, op. cit., 479-487.

<sup>261</sup> New York Laws, 1862, ch. 477, p. 3.

<sup>262</sup> Leitch, op. cit., 137.

<sup>263</sup> O.R. ser. III, v. 5, 741-749.

<sup>264</sup> Shannon, *The Mercenary Factor in the Creation of the Union Army* in 12 Miss. Val. Hist. Rev. 545 (1926).

<sup>265</sup> Ibid.

<sup>266</sup> Todd (*The 79th Highlanders, NYV*) op. cit., 500.

<sup>267</sup> 1 Phisterer, op. cit., 69.

33,753.<sup>268</sup> The average age for all men falls at 25 years, 7 months.<sup>269</sup> The following table indicates the composition of all state units:

Militia and National Guard	63 Regiments, 7 Companies
State Volunteers	227 Regiments, 54 Companies
U.S. Volunteers	4 Companies
Colored Troops	3 Regiments
Total	293 Regiments, 65 Companies <sup>270</sup>

### C. The Federal-State Relationship

In 1864, in connection with an amendment to the Enrollment Act of March 3, 1863, Senator Henry Wilson of Massachusetts who had introduced the original Enrollment Act, stated:

"The Federal Government has enlisted during this war but very few men. Nearly all the men that have been put into the service have been enlisted by the States; and the federal Government does not know much about enlisting men. It has done

but very little of it during this war and that at an enormous expense. The States have raised most of the men who have gone into the Army."<sup>271</sup>

From the very beginning of mobilization, the Secretary of War left all major arrangements to the states to be accomplished by the Governors. The federal government simply assigned cities as places of rendezvous, and the state officials achieved all other details. Training camp sites were selected by the states and there was no federal supervision of training until the completed regiments joined the army.<sup>272</sup> Federal participation increased as the war continued, but the major responsibilities rested with the states.

Of nearly 2,500,000 Union soldiers enlisted during the war, only 170,000 were obtained by the federal government directly. All others were raised through the states.<sup>273</sup> The conclusion seems inescapable that the state militiamen and volunteers, uniformed, equipped and partially trained by the states, formed the bulk of the Union forces which achieved victory in the four-years war.

<sup>268</sup> Id. at 67.

<sup>269</sup> Id. at 70.

<sup>270</sup> Id. at 78.

<sup>271</sup> Cong. Globe, 38th Cong., 1st Sess., 1404-1405.

<sup>272</sup> Shannon, State Rights and the Union Army in 12 Miss. Val. Hist. Rev. 61 (1925).

<sup>273</sup> O.R. ser. III, v. 5, 637, 639, 720, 722, 730-737.

## CONCLUSION

*"Neither gallantry nor heroism will avail much without professional training."*<sup>274</sup>

There was considerable improvising in the Civil War in the matter of raising military manpower in such particulars as length of service, volunteering, the draft both state and federal, and payment of bounties. This is not surprising when we consider the many weapons-innovations such as the rifled gun, magazine rifle, torpedoes, land mines, submarine mines, lamp and flag signalling, field telegraph, hand grenades, rockets, submarines, balloons, booby-traps, wire entanglements, etc.<sup>275</sup>

In September, 1904, at Manassas, Virginia, under the command of General H. C. Corbin, combined maneuvers at the scene of the Battle of Second Manassas were staged by 5,062 Regulars and 21,234 National Guardsmen from the former Union and Confederate states. For two days, this force worked upon the tactical situations that had confronted Generals Lee and Pope in 1862.<sup>276</sup> We may well draw cheer from the circumstance that within 40 years of the close of the Great American Civil War, the *joint federal-state troops* were training at maneuvers in behalf of a reunited nation.

<sup>274</sup> Biddulph, Lord Cardwell at the War Office: A History of His Administration 1868-1874, 117 (1904) declared in connection with the abolition of purchase of commission in the British Army in 1871.

<sup>275</sup> Fuller, Armament and History 118-119 (1945).

<sup>276</sup> Ganoë, op. cit., 420. For a discussion of the U. S. Selective Service operation in 1917, 1940, 1950 and thereafter, consult Selective Service: A Source of Military Manpower, by this writer in Military Law Review, July 1961, p. 35-68, DA Pam 27-100-13.

Addendum: as to the decade 1860-1870, consult, by this writer:

U. S. Senator James A. McDougall of California 1861-1867, *Pacific Historian*, November 1962.

The Impact of Napoleon III upon the Pacific Coast, *Pacific Historian*, February 1963.

# THE 1962 ANNUAL MEETING

The sixteenth Annual Meeting of the Association was held in the Lawyers' Lounge of the Bar Association of San Francisco at 220 Bush Street, San Francisco, on 6 August 1962. About 150 of the members were present.

Commander Frederick R. Bolton, USNR-Ret., of Detroit, the first vice-president, presided in the absence of the President, Major General E. M. Brannon. After receiving the usual formal reports, Commander Bolton called upon the representatives of The Judge Advocates General of the Services and of the U. S. Court of Military Appeals for their reports.

Rear Admiral William C. Mott, The Judge Advocate General of the Navy, reported with satisfaction upon the progress made toward an even better relationship between the military and civilian bars during the past year. He announced that during the year, the Navy had adopted on a service-wide basis the judiciary program by which law officers in the general court martial system are made in effect circuit riding judges. Admiral Mott spoke briefly about the need for a Navy JAG Corps and the pending legislation to accomplish this need, but expressed little optimism for enactment during this Congress. He did express hope for the early enactment of

an amendment to U.C.M.J. Article 15 which would strengthen the disciplinary authority of commanders while reducing the incidence of courts martial proceedings.

Major General Moody R. Tidwell, The Deputy Judge Advocate General of the Air Force, reported for his service. General Tidwell briefly reviewed the personnel organization of the Office of The Judge Advocate General of the Air Force and observed that the overall personnel position had greatly improved in the past year with the result that in personnel procurement the office can be highly selective. He discussed the Judge Advocate Area Representative Plan through which reserve judge advocates receive training and preserve reserve officer status by rendering legal services to personnel of outlying installations away from major bases and to retired personnel in large cities too far from established bases. He stated that the services had abandoned hope of securing needed amendments to the Uniform Code by an Omnibus Bill and were now proceeding with greater success by urging enactment of separate pieces of legislation to meet individual amendments to the code. He expressed hope for the early enactment of an amendment to Article 15 U.C.M.J. which would increase the range of non-judicial punishments.

Colonel Kenneth J. Hodson, the Assistant Judge Advocate General of the Army, reported for Major General Charles L. Decker, The Judge Advocate General, who was at the time engaged as Chairman of a meeting of the Criminal Law Section of the American Bar Association. Colonel Hodson announced that the Army's Field Judiciary Program has been designated as an independent field activity (Class 2) and renamed as the U.S. Army Judiciary. This will be the largest single activity within The Judge Advocate General's Corps being composed of seventy officers assigned to duties as law officers, members of boards of review and officers of the appellate divisions. Colonel Hodson also discussed the current re-organization of the Army designed to remove operational activities from the headquarters and place them in the hands of field commands. Under the re-organization, he expressed the opinion that The Judge Advocate General's Corps would preserve most of its former functions and personnel status. He also discussed the Career Officer Procurement Program by which regular officers are granted "three years leave" to attend law school at individual expense with the view to becoming career legal officers of the Army.

Commander Anthony Caliendo, U.S. Coast Guard, expressed greetings from the General Counsel of the Treasury. He said that the Coast Guard adopts the best of each of the services; and, there-

fore, it does as well or better than they in the field of legal services.

Chief Judge Robert E. Quinn of the U.S. Court of Military Appeals reported that the Court was entirely current in its calendar. He expressed the pleasure of the Court in its opinion that there has been real improvement in the administration of military justice. Judge Quinn gave credit to the field judiciary program in use in the Army and Navy for a measure of the improvement in the quality of trials. He noted that there had been a noticeable rise in the quality of representation of the accused and the Government both at trial and review levels.

Concerning the imminent amendment to Article 15 of U.C.M.J., Judge Quinn expressed some concern because the bill passed by the House and approved by the Senate Committee would give Commanding Officers authority to impose limited periods of confinement as non-judicial punishment. He would insist that the accused's right to demand trial by court martial be preserved.

At the conclusion of the meeting, the report of the Board of Tellers of the Election was read and the following were announced to have been elected to the offices indicated:

President: Cdr. Frederick R. Bolton, USNR - Ret., 1930 Buhl Building, Detroit 26, Michigan

First Vice President: Col. Allen G. Miller, USAFR, 595 Fifth Avenue, New York 17, New York

- Second Vice President: Col. John H. Finger, USAR, 702 Central Tower, San Francisco, California
- Secretary: Cdr. Penrose L. Albright, USNR, Perpetual Building, Washington, D. C.
- Treasurer: Col. Clifford A. Sheldon, USAF-Ret., 912 17th Street, N.W., Washington, D. C.
- Delegate, ABA: Col. John Ritchie, III, USAR, 357 Chicago Avenue, Chicago 11, Illinois
- Board of Directors:
- Col. Daniel J. Andersen, USAFR, 639 Woodward Building, Washington, D. C.
- Col. Maurice F. Biddle, USAF, OTJAG-9, Hq. Air Force, The Pentagon, Washington 25, D. C.
- Maj. Gen. Charles L. Decker, USA, The Judge Advocate General, Department of the Army, Washington 25, D. C.
- Brig. Gen. Sheldon D. Elliott, USAR, 40 Washington Square South, New York 12, New York
- Maj. John W. Fahrney, USAF, Department of Law, USAF Academy, Colorado
- Lt. Col. Osmer C. Fitts, USAR-Ret., 16 High Street, Brattleboro, Vermont
- Col. Morton J. Gold, USAF, 7826 Teton Way, North Highlands, California
- Capt. Mack K. Greenberg, USN, 4707 Connecticut Avenue, N.W., Washington, D. C.
- Lt. Col. Gerald T. Hayes, USAFR, 510 E. Wisconsin Avenue, Milwaukee, Wisconsin
- Brig. Gen. Kenneth J. Hodson, USA, 6519 Lone Oak Drive, Bethesda 14, Maryland
- Brig. Gen. Thomas H. King, USAFR, 912 17th Street, N.W., Washington, D. C.
- Maj. Gen. Albert M. Kuhfeld, USAF, Department of Air Force, The Pentagon, Washington 25, D. C.
- Lt. Cdr. James J. McHugh, USN, Office of The Judge Advocate General, Department of the Navy, The Pentagon, Washington, D. C.
- Col. Martin Menter, USAF, Office of the General Counsel, Federal Aviation Agency, 1711 New York Avenue, N.W., Washington 25, D. C.
- Col. Frank E. Moss, USAFR, 617 Kearns Building, Salt Lake City, Utah
- R. Adm. William C. Mott, USN, The Judge Advocate General, Department of the Navy, Washington, D. C.
- Lt. Col. Joseph F. O'Connell, Jr., USAR, 31 Milk Street, Boston, Massachusetts
- Col. Alexander Pirnie, USAR, 313 Mayro Building, Utica, New York

Col. Fred Wade, USAFR-Ret., 30  
West Lauer Lane, Camp Hill,  
Pennsylvania

Col. Ralph W. Yarborough, USAR,  
2527 Jarratt Avenue, Austin,  
Texas



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## In Memoriam

Since the last issue of the Journal, the Association has been advised of the death of Major Dodd M. McRae of San Francisco, California, and of Captain John H. Daily of Indianapolis, Indiana.

The members of the Association profoundly regret the passing of their fellow members and extend to their surviving families, relatives and friends, deepest sympathy.

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# JAA NAMES STATE REPRESENTATIVES

The President of the Association, Cdr. Frederick R. Bolton, has named the following members of the Judge Advocates Association as State Chairmen to serve for a term of one year beginning 10 October 1962, or until their successors have been designated thereafter:

Alabama	Alfred W. Goldthwaite, 26 South Perry Street, Montgomery
Alaska	John S. Hellenthal, Box 941, Anchorage
Arizona	John Paul Clark, Box 53, Winslow
Arkansas	John M. Smith, P. O. Box 830, West Memphis
California	John H. Finger, 703 Central Tower, San Francisco Edward L. McLarty, 600 Hall of Justice, Los Angeles, 12
Colorado	Milton Blake, 375 Denver Club Building, Denver
Connecticut	Max R. Traurig, 111 West Main Street, Waterbury
Delaware	James L. Latchum, 2209 Baynard Boulevard, Wilmington
District of Columbia	Zeigel W. Neff, 9706 Singleton Drive, Bethesda 14, Maryland
Florida	Sanford M. Swerdlin, 234 Security Trust Building, Miami
Georgia	Hugh H. Howell, Jr., 511 Connally Building, Atlanta
Hawaii	Arthur H. Spitzer, 588 Alex Young Building, Honolulu
Idaho	Raymond T. Greene, Jr., 323 North Second Avenue, Sandpoint
Illinois	Morton J. Barnard, 39 S. LaSalle Street, Chicago William G. Vogt, Greene County National Bank Building, Carrollton
Indiana	Erle A. Kightlinger, Jr., 111 Monument Circle, Indianapolis
Iowa	Oliver P. Bennett, 321½ E. Main Street, Mapleton
Kansas	Milton Zacharias, 435 N. Main Street, Wichita
Kentucky	Walter B. Smith, Fourth & Main Streets, Louisville
Louisiana	William B. Lott, 333 St. Charles Street, New Orleans

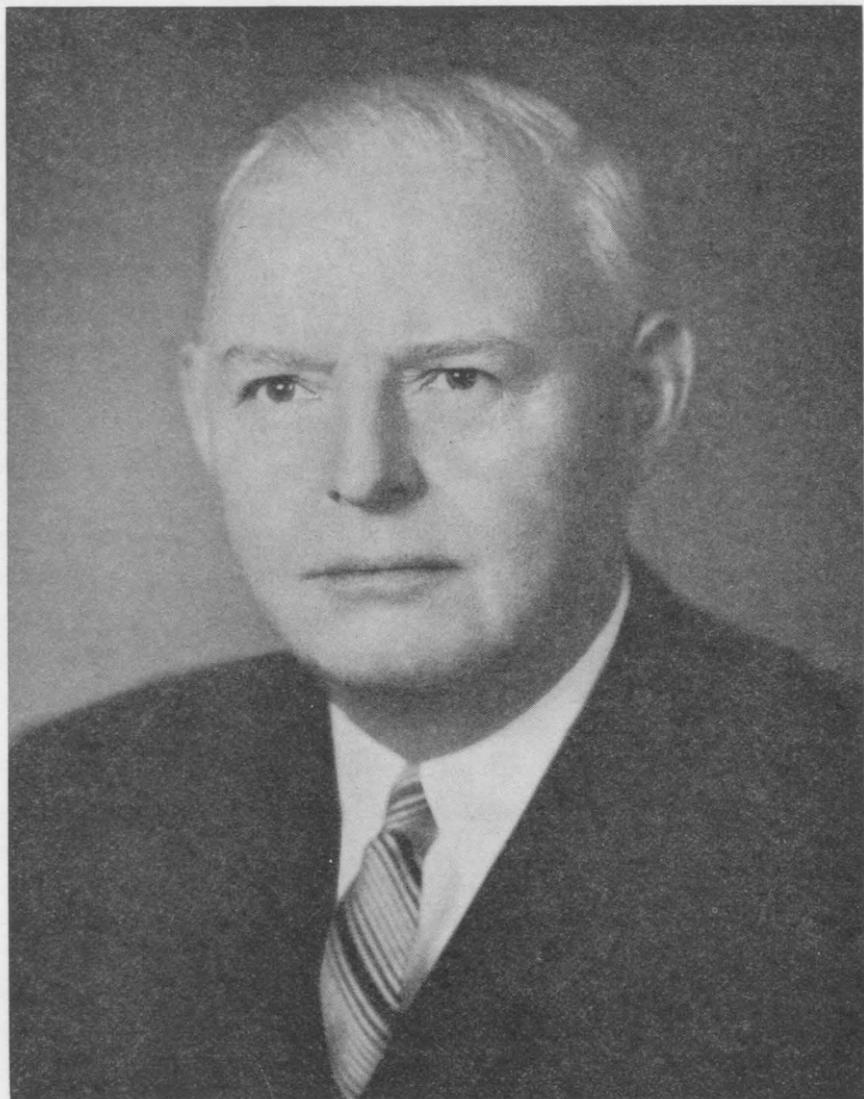
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Maine	Kenneth Baird, 477 Congress Street, Portland
Maryland	Robert H. Williams, Jr., 309 Suffolk Road, Baltimore
Massachusetts	Joseph F. O'Connell, Jr., 31 Milk Street, Boston
Michigan	Richard E. Hinks, 1456 First National Building, Detroit
Minnesota	John H. Derrick, 832 Midland Bank Building, Minneapolis
Mississippi	Richard A. Billups, Jr., P. O. Box 1056, Jackson
Missouri	John H. Hendren, Jr., Central Trust Building, Jefferson City Charles Frank Brockus, 1107 Home Savings Building, Kansas City
Montana	Robert D. Corette, Professional Building, Butte
Nebraska	Lewis R. Ricketts, 3415 W. Pershing Road, Lincoln
Nevada	Clel E. Georgetta, Washoe County Court House, Reno
New Hampshire	Ralph E. Langdell, 95 Market Street, Manchester
New Jersey	Franklin H. Berry, 26 Main Street, Toms River
New Mexico	Sam Dazzo, 615 Simms Building, Albuquerque
New York	Birney M. Van Benschoten, 485 Lexington Avenue, New York Sherwood M. Snyder, 6 State Street, Rochester
North Carolina	Louis J. Poisson, Jr., Box 807, Wilmington
North Dakota	Everett E. Palmer, 11½ East Broadway, Williston
Ohio	James Arthur Gleason, 1506 Williamson Building, Cleveland Edward L. Douglass, Jr., 1318 Union Central Life Building, Cincinnati
Oklahoma	Albert G. Kulp, 1307 S. Boulder, Tulsa
Oregon	Adelbert G. Clostermann, 254 Multnomah Hotel, Portland
Pennsylvania	James S. Clifford, Jr., 2010 Two Penn Center Plaza, Philadelphia John W. Cost, 1414 Frick Building, Pittsburgh

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Rhode Island	Edwin B. Tetlow, 917 Turks Head Building, Providence
South Carolina	William S. Hope, 87 Broad Street, Box 816, Charleston
South Dakota	Leo A. Temmey, Northwest Security National Bank Building, Huron
Tennessee	Arthur Crownover, Jr., 216 Third Avenue, N., Nashville
Texas	Robert S. Young, Jr., Burwell Building, Knoxville
	Gabriel H. Golden, 807 First National Bank Building, Dallas
	Boyd Laughlin, Box 670, Midland
Utah	Bert E. Johnson, 106 Laburnum Drive, San Antonio
	Calvin L. Rampton, Continental Bank Building, Salt Lake City
Vermont	Charles F. Ryan, Rutland
Virginia	Walter W. Regirer, Mutual Building, Richmond
Washington	Josef Diamond, Hoge Building, Seattle
West Virginia	Abraham Pinsky, P. O. Box 190, Wellsburg
Wisconsin	Gerald T. Hayes, 510 E. Wisconsin Avenue, Milwaukee
Wyoming	George F. Guy, 410 Bell Building, Cheyenne





COMMANDER BOLTON—PRESIDENT, 1962-63

## BOLTON ELECTED PRESIDENT OF JAA

Cdr. Frederick R. Bolton, USNR-Ret. was elected President of the Association 6 August 1962, at the annual meeting in San Francisco. The President is a member of the Detroit law firm of Lacy, Lawson, Kirkby, Bolton and Hoffman. Cdr. Bolton served in both World Wars. Between 1942 and 1946, he served in the 9th Naval District, in the Pacific and in the District of Columbia. He joined the Judge Advocates Association in 1952 and has served as an officer and director of the Association during the last five years.





General Decker and Mrs. Hodson pin one on the new General.

## HODSON NAMED ASSISTANT TJAG —ARMY

Gen. Kenneth J. Hodson was promoted to the rank of Brigadier General on October 1, 1962, and assigned the duties of Assistant Judge Advocate General for Military Justice.

Gen. Hodson, a native of Kansas, is a graduate of the law school of the University of Kansas. He practiced law in Jackson, Wyoming from 1937 to 1941. In May, 1941, he entered upon active duty as a first lieutenant of artillery, but in the following year was detailed to The Judge Advocate General's Department. He has served in the European Theatre, the Far East and at various stations in the Zone of Interior. He is a graduate of the Command and General Staff College at Ft. Leavenworth and the Army War College at Carlisle Barracks.

Gen. Decker, The Judge Advocate General of the Army, administered the oath of office to Gen. Hodson at the Pentagon in the presence of Mrs. Hodson, the little Hodsons and the members of the office of The Judge Advocate General. The Hodsons reside at 6519 Lone Oak Drive, Bethesda.



# *What The Members Are Doing . . .*

## **Alabama**

Maj. Alfred M. Goldthwaite, USAFR, of Montgomery, has been elected to the House of Delegates of the State of Alabama from Montgomery County without opposition. Maj. Goldthwaite engages in the private practice of law with offices at 26 S. Perry Street, Montgomery.

## **California**

Col. Winston L. Field, of Sunny Vale, recently became an Administrative Assistant at Stanford University. He is also Staff Counsel of the Stanford Linear Accelerator Center.

Lt. Col. William L. Shaw, of Sacramento, Deputy Attorney General of the State of California, assigned to the State Military Department, has been named Executive Secretary of the Civil War Centennial of California and is President of the Sacramento Civil War Round Table.

## **Colorado**

Capt. William K. Ris, of Denver, was recently named President of the Colorado Bar Association. Capt. Ris is a member of the law firm of Wood, Ris and Haines, with offices in the Denver Club Building.

## **Connecticut**

Lt. Col. Paul J. Driscoll, of Norwich, is Trustee of the University of Connecticut. Col. Driscoll

is a member of the law firm of Brown, Jewett and Driscoll with offices at 120 Broadway, Norwich.

## **District of Columbia**

The D. C. Chapter, JAA, had a luncheon meeting at the Army and Navy Club on October 2. Cdr. Zeigel Neff, State Chairman, presided and Rear Adm. Robert D. Powers, Deputy Judge Advocate General, of the Navy, was the guest speaker.

Col. Michael Leo Looney was recently elected chairman of the Board of Directors of the State National Bank of Bethesda, Maryland. Col. Looney engages in the private practice of law with offices in the Wyatt Building, Washington.

Cdr. J. Kenton Chapman recently married the former Miss Frances Busam. Both are natives of the State of Mississippi. The Chapmans are making their home at 3803 Southern Avenue, Suitland, Maryland. Cdr. Chapman engages in the practice of law at 1010 Vermont Avenue, N.W., Washington.

Capt. George H. Spencer recently announced the formation of a partnership under the style of Spencer and Kaye for the practice of law in patent, trademark and copyright causes. The firm's offices are in the Wyatt Building, Washington.

Col. Neil Tolman, Commanding Officer of the 43d USAR Mobilization Designation Detachment, was recently made Chairman by the Board of Trustees of the University of Vermont. Col. Tolman has law offices at 1625 Eye Street, N.W., Washington.

Maj. John Semmes recently announced the formation of a partnership with David H. Semmes and the association of James C. Wray for the practice of patent and trademark law under the firm name of Semmes and Semmes with offices at 1000 Connecticut Avenue, Washington.

Lt. Col. John Wolff was recently appointed Adjunct Professor of comparative law at Georgetown University Law School. Col. Wolff, lawyer of the Department of Justice, is a violin virtuoso. He is a member of the Department of Agriculture Symphony Orchestra and the Georgetown University String Quartet.

Col. Sidney Ullman was recently appointed as a hearing examiner of the Securities and Exchange Commission. Until his recent appointment, he was a lawyer in the Anti-trust Division of the Justice Department.

#### Florida

Lt. Col. Delbridge L. Gibbs, of Jacksonville, was recently elected President Elect of the Florida Bar. Col. Gibbs will be named President of the Florida Bar next year. He has served as a member of the governing board of the

Florida Bar since 1958 and is a former president of the Jacksonville Bar Association. Col. Gibbs is a member of the law firm of Marks, Gray, Yates, Conroy and Gibbs with offices in the First Bank and Trust Building, Jacksonville.

#### Illinois

Lt. Cdr. Etha B. Fox, of Chicago, was recently promoted to that rank from Lieutenant, United States Coast Guard Reserve. Cdr. Fox is the Judge Advocate for the Navy Armory Chapter, Reserve Officers Association.

Lt. Col. William W. Brady, of Elgin, recently announced that two new partners were taken into the firm for the general practice of law. The firm's new name is Kirkland, Brady, McQueen, Martin and Schnell. The firm's offices are at 80 S. Grove Avenue, Elgin.

#### Kentucky

Col. James K. Gaynor, Staff Judge Advocate of the United States Army Armor Center at Ft. Knox entertained members of the Hardin County Bar Association on the occasion of the 187th "birthday" of the Judge Advocate General's Corps of the Army.

Col. Walter B. Smith, of Louisville, recently retired from the United States Army Reserve. Members of the Army Reserve Unit commanded by Col. Smith presented him with a rocking chair on his retirement. When asked if the rocking chair had any political significance, Col. Smith assured that it

did not and that he was still a Republican. Col. Smith also assured those present at the retirement ceremony that he intends to practice law for at least another 20 years, probably with offices in the Columbia Building where he has practiced for many years.

#### Maryland

Lt. Frank D. Winston has joined the faculty of the European Division of the University of Maryland. The "Santa Clara Lawyer" recently published Lt. Winston's article *Insanity as a Defense under U.C.M.J.*

#### Michigan

Capt. Ronald S. Supena, of Detroit, having recently completed a tour of duty with the Air Force, has joined the staff of the Regional Counsel of the Internal Revenue Service in Detroit.

#### Missouri

Col. Tom B. Hembree, after more than 30 years service, retired as Staff Judge Advocate, First U. S. Army on 26 September. Col. Hembree will reside at Joplin, Missouri. He has become legal adviser to the Missouri Compensation Commission.

Col. Allan R. Browne of Kansas City, has been named President-Elect of the Kansas City, Missouri Bar Association—the oldest organized bar association west of the Mississippi. Col. Browne, a member of the law firm of Ennis, Browne and Martin, has offices in

the McGee Street Building in Kansas City.

#### New Hampshire

Capt. Robert A. Shaines of Portsmouth, has been elected President of the Portsmouth Bar Association for the year 1962-63.

#### New Jersey

Col. Frederick H. Hauser of Hoboken, a member of the New Jersey Legislature for 15 years, is Chairman of the Rules Committee and the Education Committee. He is also Chairman of the New Jersey Law Revision Commission.

#### New York

Col. Charles A. Gross has been appointed Army Staff Judge Advocate, First U.S. Army. He succeeds Col. Tom B. Hembree, who retired on 26 September. Col. Gross was an artillery officer prior to his transfer to JAGC in 1946. He has had a full range of assignments as a judge advocate officer including duty as a circuit law officer under the Army's Field Judiciary program.

Lt. Col. Edward Ross Aranow of New York City, recently received the Alumni Medal of the Columbia University Alumni Association for distinguished alumni service.

Lt. Col. Murray Steyer of Scarsdale, has been elected President of District #2 of the Board of Education, Scarsdale. Col. Steyer is a member of the recently formed law firm of Sirota, Bernstein and

Steyer with offices at 60 East 42nd Street.

Col. Arthur Levit has been re-elected Comptroller of the State of New York.

Col. Alexander Pirnie, of Utica, has been re-elected as member of the United States Congress from the 32nd Congressional District of New York.

Lt. Col. Charles J. Klyde was recently appointed by the Department of Defense as a Hearing Examiner to preside at cases in New York City involving DOD contractors and their employees under the Industrial Personnel Access Authorization Review Program.

Capt. Arthur Venitt, of Jamaica, was recently elected President of the Jamaica Lawyers Club in New York City.

Lt. Col. Edward R. Garber, of Glen Cove, has been named acting City Court Judge for Glen Cove.

**Ohio**

Col. James Arthur Gleason, of Cleveland, has announced the formation of an association with Arthur E. Griffith for the general practice of law with offices in the Williamson Building, Cleveland.

Col. Gleason has been elected for the tenth year as President of the Board of Trustees of the Cleveland Grays. Col. Gleason has commanded the Cleveland Grays since 1952. He is also President of the Federal Bar Association, Cleveland

Chapter, Commander of the Military Order of the World Wars, Cleveland Chapter, and Vice Commander of the American Legion—Shaker Heights Post #481.

Lt. Col. Thomas P. Dickinson, USAR-Retired, formerly of Detroit, Michigan, has been assigned as U.S. Army Corps of Engineers attorney-adviser, at Georgetown, Ohio in connection with the Captain Anthony Meldahl Locks and Dam Project.

Col. Lyman Brownfield, of Columbus, after serving as general counsel to the Housing and Home Finance Agency for several years, is back in general practice with the firm of Brownfield and Malone with offices at 50 West Gay Street, Columbus. Col. Brownfield is Vice Chairman of the Urban Renewal Commission of Columbus.

**Oklahoma**

Col. Carl Albert, of McAlester, has been re-elected a member of the United States House of Representatives.

**Pennsylvania**

Capt. Louis D. Apothaker, of Philadelphia, is associated with the firm of Blank, Rudenko, Klaus and Rome for the general practice of law with offices at 1660 Suburban Station Building, Philadelphia.

**Tennessee**

Lt. Col. Elmer P. Fizer is a member of the legal staff of ARO, Inc. the operating contractor of Arnold Air Force Station.

**Texas**

Capt. Virgil Howard of Corpus Christi, a member of the law firm of Wade and Howard, has been assigned as Associate Judge Advocate to the 813th AC & W Squadron, Rockport Air Force Station. This assignment is pursuant to the Air Force program of reserve training for lawyers with active duty organizations.

Col. Leon Jaworski, of Houston, is the President of the State Bar of Texas. Col. Jaworski is a member of the firm of Fulbright, Crooker, Freeman, Bates and Jaworski, with offices in the Bank of the Southwest Building.

**Utah**

Col. Clarence C. Neslen, of Salt Lake City, recently announced the formation of a new law firm to engage in the general practice of law under the style of Neslen and Mock with offices in the Continental Bank Building. The partners besides Col. Neslen are: Lt. Col. Byron Mock, Lt. Leo Jardine and Capt. Kent Shearer. All four are reserve judge advocates and members of the Association.

**Virginia**

Lt. Col. Ralph Herrod of Falls Church, has been appointed Chief of the Defense Appellate Division of the Army's Judge Advocate General's Office. He succeeds Col. William H. Blackmar.

**Washington**

Col. Wheeler Grey recently announced the removal of his law

firm to the Norton Building, Seattle. Col. Grey is a member of the firm of Jones, Grey, Kehoe, Hooper and Olsen.

Jack M. Whitmore, of Seattle, was recently promoted to Colonel, USAFR. Col. Whitmore attended classes as a reserve legal officer at The Judge Advocate General's School in Charlottesville, Virginia just prior to his promotion. Perhaps Army education is the way to Air Force promotion. Col. Whitmore is a member of the law firm of Whitmore, Vinton, Powers and Manion, with offices in the Hoge Building, Seattle.

**Wisconsin**

Col. Franklin W. Clarke, of Madison, has retired from the United States Army and has accepted an appointment as Clerk of the Wisconsin Supreme Court. He resides at 5802 Doresett Drive, Madison.

Lt. Col. Sverre Roang, of Edgerton, is Judge of the Rock County Court. Judge Roang is a member of the National Conference on Commissioners of Uniform Laws and is Chairman of the Advisory Committee to the Wisconsin Department of Veterans Affairs.

**Wyoming**

Col. George F. Guy has been transferred from the Wyoming National Guard to the 5022nd Logistical Command, an Army reserve unit in Cheyenne. Following his transfer he was promoted to the rank of Colonel, JAGC,

USAR. Col. Guy engages in the private practice of law in Cheyenne.

**Okinawa**

Maj. Louis A. Otto, Jr. recently resigned as Attorney General of Guam to accept a position as attorney with the Legislative and

Legal Department, U. S. Civil Administration, Ryukyus, Okinawa.

**Republic of the Philippines**

Lcdr. Walter F. Brown, USN, Legal Officer of the United States Naval Station, Subic Bay, was recently elected President of the Philippine-American Legal Association.



# RIGHT TO COUNSEL IN SPECIAL COURTS-MARTIAL

By Ziegel W. Neff \*

There are three criminal law jurisdictions operating in the United States today, being administered through three separate court systems, the State, the Federal and the Military. The administration of State and Federal law is familiar but few individuals have any real understanding and, consequently, appreciation of military criminal law. This unfamiliarity is unfortunate for the latter embraces a very extensive area, affects the lives and liberties of a great segment of the country's youth, and from the standpoint of the compulsory nature of military service demands even more careful attention than the other two.

The Uniform Code of Military Justice (hereafter referred to as the Code) wrought great changes in the prior practices and pro-

cedures within the field of military criminal law. The Code was enacted by the Congress to specifically correct abuses in military justice which came to light as an aftermath of World War II. Overall, the Code has made a bold advance towards this goal. Military law and procedure has been radically changed, and in most instances for the better. For example, in a general court-martial the accused as well as the Government must be represented by counsel trained in the law and the trial is presided over by a judge, called the law officer. However, Codal right to lawyer-counsel in a general court-martial still left large areas of lawyer representation undefined. The Court of Military Appeals has gone a long way toward filling in the cracks, but this phase of the military criminal law

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\* Mr. Zeigel W. Neff has been a civilian member of the Board of Review Number One in the Office of the Judge Advocate General of the Navy since 1957. Among his earlier positions were those of Assistant Attorney General of Missouri; Special Assistant to the Judge Advocate General of the Navy for Military Justice; and Commissioner on the U.S. Court of Military Appeals. Mr. Neff holds the degrees B.A. from Southwest Missouri State College, the LL.B. from the University of Missouri, and the LL.M. from Georgetown University. He is a Commander in the U.S. Naval Reserve, having served in World War II as a naval aviator with carrier-based fighter squadrons, and during the Korean hostilities as a Navy Law Specialist. Among his combat awards is the Navy Cross. He is a member of the bar of the State of Missouri and numerous Federal bars. Mr. Neff is a frequent contributor to legal periodicals on the subject of military justice.

is still developing. A better understanding of this development can be gleaned by a Constitutional-historical approach to right to counsel in the military.

At first, the right to counsel—if recognized at all—meant little more than the right to have a lay advisor present in court. Lawyers were suspect and to be excluded. Thus in 1861, DeHart, a military writer who early recognized that the accused had a “positive right” to counsel, added that individuals known “significantly as lawyers” were apt to be “very forward and troublesome persons” and consequently courts-martial “wisely . . . exercised the right of refusing their assent for the appearance of such persons.”<sup>1</sup>

A few years later, in 1875, another military writer, Colonel Winthrop, noted that there had been no relaxation in courts-martial “as to the silence of professional advisors and their taking no part in the proceedings.”<sup>2</sup> Counsel was precluded from all oral communications, not being permitted to examine witnesses or to address

the Court by statement or argument.

Although not guaranteed by statute, the right to counsel was first granted by administrative regulation as a matter of privilege and thereafter as a matter of right.

Congress, in 1855, established a system of summary courts-martial in the Navy and provided that such courts should be conducted under form and rules prescribed by the Secretary of the Navy, with the approval of the President.<sup>3</sup> Pursuant to this authority, Navy Regulations were amended to provide that a summary court-martial, if requested by accused, would permit a commissioned, warrant, or petty officer to appear as counsel and cross examine witnesses in the accused’s behalf. The regulation, however, restricted counsel’s participation, for there was to be no written defense or argument, nor any *protracted* oral defense or argument.<sup>4</sup>

The right to counsel was finally afforded certain Army accused in 1890. General Order Twenty-Nine

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<sup>1</sup> DeHart, Observations on Military Law, at page 134.

<sup>2</sup> Winthrop, page 166. The Massachusetts Articles of War (5 April 1775) and the American Articles of War (30 June 1775) represent our earliest military codes. They, as well as the Articles for the Government of the Navy (1862), were derived in large part from British military law (Winthrop, page 21). With minor exceptions Article 23, AGN, provided that one whose conduct is being examined by a Court of Inquiry (or his attorney) shall have permission to cross examine all witnesses. The right of counsel did not receive statutory status in the Articles of War until 1916, and was not specifically recognized in Navy statutory law until 1950.

<sup>3</sup> Sec. 9, Act of 2 March 1855.

<sup>4</sup> Article 32, Sec. 3, Para. 1247, Navy Regs. of 1865.

represented a step toward unleashing counsel in order to permit effective representation of an accused.<sup>5</sup> That order required Army commanders, where general courts-martial were convened, to detail a "suitable officer" to represent the accused, provided the latter so requested. Use of the word counsel, absent restrictions and qualifications, undoubtedly meant that counsel so detailed were to perform such duties as ordinarily devolve upon civilian counsel in the civil courts of criminal jurisdiction insofar as compatible with the procedure of military courts.

The Navy followed the Army lead. By the turn of the century, in instances where the accused had no legal advisor, the commanding officer was required, pursuant to the accused's request, to detail a suitable officer to act as counsel, and the officer so detailed was called upon to perform those duties expected of counsel representing a defendant before a civil court. Thereafter, Navy Courts and Boards provided for the right of counsel. By 1937, this right had been expanded to provide that an accused was guaranteed lay counsel and, whenever practicable, to counsel of his own choice; the court could no longer deny him the assistance of a professional or other advisor.<sup>6</sup>

Nevertheless, it was not until after World War II that the big change came. By a revision of the Articles of War (referred to as the Elston Act), it was provided that the trial judge advocate and defense counsel of all general courts-martial should be a member of the Judge Advocate General's Department, or an officer who was a member of the bar of a Federal Court or the highest court of a State. The same provision was likewise made regarding the defense counsel. So finally after a century and a half the lawyer moved partially into the military courtroom. Another major step was taken on 31 May 1951, effective date of the Uniform Code of Military Justice.

The Uniform Code of Military Justice guarantees to an accused the right to be represented by civilian counsel, if provided by him, before a special court-martial, a pretrial investigation, a general court-martial, and before the two appellate tribunals, the service boards of review and the Court of Military Appeals. On the other hand, an accused has the right to be represented by a duly appointed defense counsel—not necessarily a lawyer—before a special court, but where the trial counsel is a lawyer, accused must be also represented by one so qualified.<sup>7</sup>

<sup>5</sup> Winthrop, page 165.

<sup>6</sup> Navy Courts and Boards, Sec. 356, at 220; also Article of War 17 provided that an accused shall have the right to counsel of his own selection for his defense if such counsel is reasonably available.

<sup>7</sup> Article 27c, UCMJ.

In a general court-martial, the military has under the Code, arrived in a position comparable, and in some respects superior, to representation before a Federal criminal court. The appointed defense counsel must be an attorney, certified as competent to perform such duties by the Judge Advocate General. Of course, the government is also represented by one so qualified.<sup>8</sup> Moreover, appeals to boards of review are mandatory from special courts where the sentence extends to a bad-conduct discharge, and from general courts-martial where the sentence affects a flag or general officer, extends to death, dismissal of an officer, cadet, or midshipman, punitive discharge, or confinement for one

year or more.<sup>9</sup> After action by the board of review, accused may petition the Court of Military Appeals for grant of review, or the Judge Advocate General may certify the case to the Court. In the above appeals, military attorneys are furnished as counsel by the government.<sup>10</sup>

In addition to the foregoing, accused has a right to be represented at a pretrial investigation by counsel appointed by the officer exercising general court-martial jurisdiction over the command and he has a right to be represented at the taking of a deposition, before proceedings to vacate suspension of a punitive discharge as well as before courts of inquiry.<sup>11</sup>

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<sup>8</sup> Article 27b, UCMJ.

<sup>9</sup> Article 66, UCMJ.

<sup>10</sup> Article 70, UCMJ.

<sup>11</sup> The Court of Military Appeals has been zealous in insuring an accused's right to qualified counsel. In *U.S. v. Tomaszewski*, 8 USCMA 266, the Court held that an accused must be represented by an attorney, if requested by him, during a pretrial investigation. However, accused may waive counsel, provided he is fully informed of, and understands, his right to have a qualified counsel. But accused can't waive lawyer in GCM. *U.S. v. Kraskouskas*, 9:607. In *U.S. v. Jacoby*, 11 USCMA 428 29 CMR 244, a majority of the Court held that the protections of the Bill of Rights of the Federal Constitution, except those which are expressly or by necessary implication excepted, are available to members of the armed forces. From this premise, a majority of the Court found that a correct and "constitutional" construction of Article 49 of the Code requires that accused be afforded the opportunity, although he may waive it, to be present with his counsel at the taking of written depositions (overruling the interpretation of Art. 49 by *U.S. v. Sutton*, 3 USCMA 220, 11 CMR 220, and *U.S. v. Parrish*, 7 USCMA 337, 22 CMR 127). However, it should be noted that accused does not have an absolute right to a personal choice of counsel nor can he completely control defense tactics or require counsel to proceed contrary to the ethics of his profession or his good judgment. His control over the case is obviously subject to certain limitations. The accused does not have the right to arbitrarily reject qualified counsel; improper rejection of counsel can reach a point where appointed counsel may remain in the case regardless of accused's desires. "However, if an accused protests against

There is, however, one area wherein an accused is still relatively unprotected by requirements that he be represented by a lawyer—at least in the Navy and Marine Corps and to a lesser extent in the other services. That is: when he is tried before a special court-martial.

Under Article 19 of the Code, a special court-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by the code, except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months. In addition, a bad-conduct discharge cannot be adjudged unless a verbatim record of the proceedings and testimony before the court has been made.

Article 27(c) provides that in the case of a special court-martial, if the trial counsel is qualified to act before a general court-martial, the defense counsel appointed by the convening authority shall be a person similarly qualified; and if the trial counsel is a judge ad-

vocate, or law specialist, or a member of the bar of a Federal court or the highest court of a State, the defense counsel appointed by the convening authority shall be so qualified.

The foregoing means that in the Navy and Marine Corps, where military lawyers are in short supply, a majority of convening authorities appoint nonlawyer trial counsel and of course then the accused is not entitled to have counsel furnished him who is trained in the law.

Frequently in the Navy and Marine Corps, the special court adjudges a sentence which includes a bad-conduct discharge, and because fewer officers are tied up in special court trial and the proceedings are less complicated from a layman's standpoint, serious offenses, many recognized as felonies in the civilian community, are tried by such courts-martial. In a majority of these trials the persons accused are represented by nonlawyers, who are simply inadequate where complicated offenses are involved. This is not to say that such officers are not properly motivated to represent the accused to the best of this ability. They are. They are sim-

<sup>11</sup> (Continued)

such an order and insists on firing his appointed lawyers, he cannot later complain if the board concludes not to require counsel to remain in the case, for an accused who is sane can always forfeit his right to representation before a board, and actions showing an arbitrary and calculated refusal to accept appointed counsel may constitute an abandonment of that right." For instance, in *U.S. v. Howell*, 11 USCMA 712, 29 CMR 528, law officer did not err in letting accused represent himself after the latter insisted on discharging his defense counsel and after law officer fully advised him of the consequences involved.

ply lacking in training, for the average officer does not possess the professional legal skill required to represent an accused before a tribunal which has the power to forfeit his liberty and stigmatize him for the remainder of his life with a punitive discharge. It is somewhat analogous to letting an engineer remove your appendix.<sup>12</sup>

An interesting question is posed in the Navy and Marine Corps Special Courts, therefore, as to what extent the Federal Constitution protects an accused before such tribunals with respect to their right to qualified (in the sense of one trained in the law) appointed counsel.

Perhaps a distinction between the civilian and military spheres of criminal law can be argued here. In a civilian proceeding, the court confronted with an issue concerning the right of accused to have counsel furnished him, must decide either he is entitled to a lawyer or to no counsel at all, while in the military, accused is entitled by statute to the services of at least a commissioned officer to assist him in his defense. From a practical viewpoint, however, certainly in a

contested case, the foregoing distinction represents little solace to an accused, for in such an instance the latter is not effectively represented by non-lawyer counsel. This fact was pointed up by the United States Supreme Court in *Johnson v. Zerbst*, 304 US 458, wherein the Court stated that the "right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."

In the Navy an issue was made of this precise point in *United States v. Harpster*.<sup>13</sup> In that case, the accused was denied his request for lawyer counsel to represent him and assigned as error, before Navy Board of Review Number One, the denial of his Constitutional right under the Sixth Amendment to have counsel, as "counsel" used there has been interpreted to mean one trained in the law. A sympathetic Board, noting that the argument had considerable merit, felt bound by the *Sutton* case,<sup>14</sup> wherein a majority of the United States Court of Military Appeals held "that a

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<sup>12</sup> The Army and the Air Force have been able to eliminate many of the practical difficulties in special courts, insofar as counsel is concerned. The Army by regulation will not furnish a reporter qualified to take a verbatim record in a special court. The result is that the court may not adjudge a punitive discharge since Article 19, UCMJ, requires a verbatim record in those cases where a punitive discharge is adjudged. The Air Force, on the other hand, in cases serious enough to warrant a punitive discharge, furnishes lawyers as appointed counsel.

<sup>13</sup> *U.S. v. Harpster*, SPCM NCM 58, 00139, decided 4 April 1958.

<sup>14</sup> *U.S. v. Sutton*, 3 USCMA 220.

military accused is not entitled per se, to guarantees found in the Constitution." However, it will be noted that *Harpster* and *Sutton* were early cases and the thinking reflected in *Sutton* has been overruled by the present court, so there is no question now but what one in the military is entitled to all constitutional rights of any other citizen, except those excluded by the Constitution, either directly or by fair implication.<sup>15</sup> Interestingly enough, in *United States v. Kraskouskas* 9 USCMA 607, 26 CMR 387, we hear the Court speaking of the "Constitutional right to effective assistance of counsel."

Nevertheless, having traveled this far down the road of Constitutional rights, the Court has yet to meet head on the Constitutional question raised by non-lawyer representation in special courts-martial. Perhaps a brief background examination of the Constitution with respect to this question will bring it more sharply into focus.

The Sixth Amendment to the United States Constitution provides in part that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The Fifth Amendment states that "No person shall be held to answer for a capital, or otherwise infamous crime, unless by a presentment or indictment of a grand jury, except in cases aris-

ing in the land or in the naval forces, or in the militia, when in actual service in time of war or public danger . . ."

A consideration of the Federal cases discloses that "counsel" as used in the Sixth Amendment has been interpreted to mean one trained in the law. *Johnson v. Zerbst, supra*; *Powell v. Alabama*, 28 US 745, 68, 69.

If counsel, as used in the Sixth Amendment, has been interpreted to mean one trained in the law, if the Constitutional guarantees, except grand jury presentment and jury trial, apply to accused persons in the military, then it logically follows that an accused in a special court (along with accused in a general court-martial) should be represented by a lawyer in those more serious cases wherein a punitive discharge can be anticipated, unless the record shows, or there is an allegation and the evidence shows, that an accused was offered lawyer counsel but "intelligently and understandingly" rejected the offer. *Carnley v. Cochran* (No. 158—October term, 1961), decided by the Supreme Court, 30 April 1962.

When we turn to the Federal courts to find support for this position, we find a trend but no clear-cut trails blazed. Insofar as can be determined, the specific number, if any, of the Bill of Rights and other Constitutional guarantees which might apply to

<sup>15</sup> *U.S. v. Ivory*, 9 USCMA 516; *U.S. v. Jacoby*, 11 USCMA 428. See also the court's affirmation of a man's constitutional rights being protected in the military in the last three annual reports filed by the Court to Congress.

a military tribunal has not been specifically defined by the Federal courts. There have been—at least in the early cases—numerous discourses about the unlimited authority of Congress to pass legislation as to the military, absent any restrictions of the Fifth, Sixth, or any other Constitutional Amendment.<sup>16</sup> But more recent pronouncements of the Supreme Court have veered away from this tack, indicating, rather, that Constitutional guarantees do prevail, at least to some degree, in the military.<sup>17</sup> The unsettled condition of the law in this regard was observed by Mr. Justice Black in the *Covert* case. He stated: "As yet it has not been clearly settled to what extent the Bill of Rights and other prohibitive parts of the Constitution apply to military trials."<sup>18</sup>

It is believed, however, that a study of some of the comparatively recent Federal decisions will indicate a trend toward the position now taken by the Court of Military Appeals; i.e., that Constitutional guaranties, except those specifically excluded by the Constitution, do apply to Military personnel.

Following the *Zerbst* extension of *habeas corpus*, review of military cases to include a determina-

tion of whether accused's Constitutional rights had been protected was given a broad interpretation by the Federal courts. This trend, however, was momentarily slowed by *Hiatt v. Brown*, supra. There the Supreme Court indicated that the scope of courts-martial review by the civil courts *should not* be extended to constitutional questions; that the "single inquiry" must be jurisdiction. The restrictive language in *Hiatt, supra*, led many to believe that the Supreme Court was not going to concern itself with the problem of "to what extent" the constitution guarantees were applicable in the military. But such doubts were laid to rest in *Burns v. Wilson*, supra, for in that case the distinct impression was left that constitutional guarantees *do apply* to courts-martial; that future review would encompass a claim of due process denial; that the records would be examined to determine whether the military has given a fair consideration to that claim.

The court stated it thus:

"Petitioners' applications . . . set forth serious charges—allegations which, in their cumulative effect were sufficient to depict fundamental unfairness in the process whereby their guilt

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<sup>16</sup> *Ex Parte Milligan*, 71 US 2. See also *Hiatt v. Brown*, 339 US 103; *In re Yamashita*, 327 US 1; *U.S. v. Grimley*, 137 US 147; *Johnson v. Eisentrager*, 339 US 763; *Ex Parte Quirin*, 317 US 1; *Easley v. Hinter*, 209 F 2d 483; *Reaves v. Ainsworth*, 219 US 296.

<sup>17</sup> *Burns v. Wilson*, 346 US 137, 142, 143.

<sup>18</sup> *Reid v. Covert*, 354 US 137.

was determined . . . Had the military courts manifestly refused to consider these claims, the District Court was empowered to review them de novo. *For the constitutional guarantees of due process is meaningful enough and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by disposing with fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.*" (Emphasis supplied)<sup>19</sup>

By virtue of the reasoning used in the Burns case, it can be forcibly argued that the Supreme Court has certainly indicated that, with certain exceptions, an accused in the military is protected by the Constitution. The Court of Military Appeals apparently has gone even further, excepting only grand jury indictment or presentment and jury trial. As stated previously, if this position is sound, then it follows that accused persons before special courts-martial where a bad-conduct discharge can be anticipated are entitled to have lawyers represent them, for certainly proceedings in these tribunals, which try many serious fel-

ony-type offenses, must be considered trials within the meaning of the Sixth Amendment to the Constitution. These Courts can deprive a man of his liberty and mark him for life with a punitive discharge. A vast majority of accused who appear before special courts cannot afford civilian counsel at their own expense, so right to counsel must mean a government appointed lawyer. If Article 27(c) of the Code is inconsistent with the rights guaranteed by the Federal Constitution, it, of course, must give way.

At the very least, it would appear that the Navy should, as soon as possible, adopt a uniform policy comparable to that now used in the Air Force. In serious BCD cases before such courts, lawyers should be made available to represent the Government and the defense. This is not as difficult as it sounds for ninety percent—or more—of business before special courts is composed of routine military offenses wherein the accused pleads guilty and little time and difficulty is involved. Headquarters and dockside special courts (for seagoing sailors) with lawyers available could take care of the more serious offenses, or perhaps lawyers could be assigned to the larger fleet operating units or the large ships, such as aircraft carriers.

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<sup>19</sup> In *Easley v. Hunter*, 209 F 2d 483, the court concluded "It is now urged that *Burns v. Wilson*, supra, expand the jurisdiction of the civil courts beyond the former concept, and seemingly it does . . ."

To digress a bit, but pertinent to the need for lawyers in the services, note should be taken of the view expressed by various eminent writers on military law that the drafters of the Uniform Code ignored fundamental differences between the civilian and military community. According to one commentator, some of the basic mistakes were: "first, to extend the jurisdiction of military courts even more widely than had ever been done before; second, to institute the completely adversary system of trial; and third, to take the administration of military justice out of the hands of the service at large . . ." <sup>20</sup>

Of course, the administration of military justice was in the hands of the military for about two hundred years. It was the Army that brought in lawyers in general courts-martial, by their 1948 Manual (actually before that—1920). This was prompted in part from the tremendous wave of criticism of the administration of military justice by the military following both World Wars.

As stated previously, this is not to say that changes are not needed to the Code. It would be strange indeed if such a complex and voluminous law were letter perfect. As a matter of fact, after its first year of operation, the Code committee <sup>21</sup> recommended seventeen changes to the law. Had

those amendments been enacted, much of the present criticism about administrative detail, paperwork and time consumption would have been remedied.

An even greater step should be taken with respect to one of the recommended changes. That is, in the area of increasing a commanding officer's powers under Article 15 of the Code, more commonly referred to as non-judicial punishment.\* A commanding officer should be given the punishment powers now reserved to a summary court-martial. This court is in practical effect only an extension of the commanding officer's authority in any event. He appoints the summary court and reviews the record. It should be what its name implies—summary. That power should in fact reside in the commanding officer and the summary court-martial, as it now exists, should be abolished.

Other time consuming mechanics of the Code should be taken care of in conformity with the aforementioned recommended changes. Basically, the Code is a forward looking, enlightened law for the military, which takes into consideration that the services are ever more technical with an increasing need for a more intelligent, better educated civilian soldier, sailor, or marine, with which to carry on military functions in the atomic age. Despite what any-

<sup>20</sup> Soldiers versus Lawyers, Col. Frederick Bernays Wiener.

<sup>21</sup> Composed of the three judges of the U.S. Court of Military Appeals, the three judge advocates general, the general counsel of the Department of the Treasury, and distinguished members of the civilian bar.

\* Recently accomplished.

one may personally desire—in or out of the military—the clock of progress is not going to be turned back. An intelligent person when given a tool, whether he believes it is the most efficient or not, uses it in the most effective manner he can in order to get the job done.

In conclusion, there is no question in the minds of military lawyers but what under the Code the rights of accused persons are better protected than they are in many spheres of civilian criminal law. The reasons for this are numerous. Foremost among them is the fact that an accused in the military is furnished counsel not only at trial but also all the way up to the Court of Military Appeals, as his case goes forward on appeal. His appeal is automatic in all the serious cases (where the court adjudges a punitive discharge or confinement of one year or more) and all expenses incident thereto are paid by the Government. After appeal, great numbers of accused persons, convicted of even felony-type offenses, are still rehabilitated at the service confinement facilities and returned as useful members of the military

community without any stigma of "ex-con" attached.

In the services, time, expense and attention are given to probation activities. Psychiatrists and psychologists are maintained in conjunction with hospitals, brigs and other confinement facilities. On appellate review, before boards of review, all trial records and confinement reports which accompany these records are carefully examined by the board members regarding the prisoner's prior delinquency or criminal experience, his social background, abilities, physical and mental health, and all other pertinent data which might have a bearing on whether or not to return the prisoner to duty.

There are other advantages which time and space prevent enlargement upon here. Suffice it to say that in this writer's opinion—based upon criminal law practice in and out of the service—a military accused, even without any changes to the Code, is oftentimes better off than his civilian counterpart, but this position would even be improved were lawyers utilized in BCD special courts-martial.



# AMENDMENTS TO ARTICLE 15, UNIFORM CODE OF MILITARY JUSTICE

By: Major General Albert M. Kuhfeld \*

In 1950, the Uniform Code of Military Justice consolidated and made uniform the authority of military commanders to impose nonjudicial punishment. Article 15, Uniform Code of Military Justice (10 U.S.C. 815), provided a means whereby military commanders could deal with minor infractions of discipline without criminal law processes. Commanders were empowered to impose specific limited punishments, in addition to reprimand and admonition, for minor offenses and infractions of discipline. Since this punishment is nonjudicial, it was not considered as a conviction of a crime.

However, the punishment that could be imposed under Article 15 was limited. In the case of officers and warrant officers, the punishment was limited to withholding of privileges or restriction to limits for two weeks, or, if imposed by an officer exercising general court-martial jurisdiction, forfeiture of one-half of one month's pay. In the case of enlisted personnel, punishment was limited to withholding of privileges, restriction to limits, or extra duty not exceeding two hours per day for two weeks, reduction to the next inferior grade if within

the promotion authority of the commander imposing the punishment, and, in special cases, involving personnel attached to or embarked on a vessel, confinement for seven days or confinement on bread and water for not more than three days.

Because of the limitations of Article 15, a commander was faced with the problem of being required to impose one of the limited forms of punishment which, in many instances, have been found to be ineffective as a disciplinary deterrent; or he must resort to reduction in grade which is a continuing punishment, or trial by court-martial with its stigma of criminal conviction, with its very serious consequences.

A member of the Armed Forces who is convicted by court-martial is stigmatized with a criminal conviction on his record not only throughout his service career, but it also may follow him into civilian life. It may interfere with his job opportunities and it may affect him adversely if he is involved with a civilian law enforcement agency. The use of nonjudicial punishment aids in the enforcement of military discipline by permitting minor disciplinary infrac-

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\* The Judge Advocate General of the Air Force.

tions to be handled promptly and effectively.

The Service Departments recognized that increased authority of commanding officers to impose non-judicial punishment would, in many instances, obviate criminal convictions and facilitate the rehabilitation of minor offenders.

In addition to the Service Departments, the need for reform in this area was recognized and supported by the United States Court of Military Appeals, the American Legion (Mr. John Finn, Chairman, American Legion Special Committee on the Uniform Code of Military Justice and the United States Court of Military Appeals), the American Bar Association, The Judge Advocates Association, the Association of the Bar of the City of New York (Mr. Donald Rapson, Member of the Special Committee on Military Justice of the New York Bar Association), New York County Lawyers Association (Mr. D. George Paston, Chairman, Committee on Military Justice), and the American Veterans Committee (Mr. Frank E. G. Weil, Member of the National Board of the American Veterans Committee).

A bill embodying proposed amendments to Article 15, Uniform Code of Military Justice, was introduced in the House of Representatives on June 14, 1961 as H.R. 7656, 87th Congress, 1st Session. The Secretary of Defense delegated to the Department of the Air Force the responsibility for expressing the views of the

Department of Defense. Prior to the time that hearings were held on the bill by the House Committee on Armed Services, committee amendments were made to the bill embodying changes recommended by the American Legion. Although the American Legion concurred with the basic principles of H.R. 7656, it opposed the form of the bill because it left to Presidential and Secretarial regulations many of the safeguards which the American Legion believed should be incorporated in the statute itself. Hearings were held on H.R. 7656 by the Rivers Subcommittee of the House Committee on Armed Services on April 11, 1962. Amendments were incorporated in a clean bill reported out as H.R. 11257, on April 17, 1962, by the House Committee on Armed Services, the Honorable Carl Vinson, Chairman. The bill passed the House on May 15, 1962.

Further hearings on H.R. 11257 were held by a Senate Subcommittee of the Committee on Armed Services on July 17, 1962, the Honorable Sam J. Ervin, Jr., Chairman. The Senate Committee on Armed Services reported favorably on the bill, with an amendment providing that, except for those who may be attached to or embarked in a vessel, punishments may not be imposed under Article 15 if the military member demands a trial by court-martial in lieu of such punishment.

Public Law 87-648, approved September 7, 1962, makes changes effective February 1, 1963, in Ar-

ticle 15, Uniform Code of Military Justice, to accomplish the ends desired. Under the provisions of the new law, the punitive authority of designated commanders has been increased. In the case of officers, the maximum punishments imposable include restriction to specified limits for 30 days. If imposed by a general or flag officer or by an officer exercising general court-martial jurisdiction, the punishment may extend to arrest in quarters for not more than 30 days, restriction to limits for not more than 60 days, forfeiture of one-half of two months' pay, or detention of one-half of three months' pay. It should be noted that detention of pay is a new form of punishment authorized for officers and enlisted personnel under the amendments to Article 15, Uniform Code of Military Justice. This permits a portion of the offender's pay to be withheld for a stated period of time not to exceed one year or the expiration of his term of service, whichever is earlier. At the end of the stated period of time, the offender receives the detained pay.

Generally speaking, the maximum punishment imposable upon other than officer personnel is limited by the rank of the commander imposing the punishment. However, there is an exception to this in that any commanding officer may punish enlisted personnel of his command attached to or embarked on a vessel by confinement on bread and water or diminished rations for not more

than three consecutive days. In all other cases, if imposed by an officer in the rank of major or lieutenant commander or above, the punishment may include combinations and apportionments of correctional custody for not more than 30 days, forfeiture of one-half of one month's pay for two months, reduction in grade (limited by promotion authority and grade of offender), extra duty for 45 days, restriction to specified limits for 60 days, detention of one-half of one month's pay for three months. The term "correctional custody" refers to the physical restraint of a person during duty or nonduty hours, and may include extra duties, fatigue duty, or hard labor.

The maximum limitations of punishment which may be imposed by a company grade officer are considerably less, including correctional custody for seven days, forfeiture of seven days' pay, reduction to the next lower grade (subject to promotion authority), extra duty for 14 days, restriction to limits for 14 days and detention of 14 days' pay.

The new law continues the right of appeal from punishment imposed to the next superior authority and makes provision for review, mandatory with respect to certain punishments, by a Judge Advocate, Law Specialist, or lawyer in the respective departments concerned. Another noteworthy amendment is the expansion of the rehabilitative, suspension of pun-

ishment, feature of nonjudicial punishment. The officer who imposes the punishment, or his successor in command, may suspend probationally any part or amount of the unexecuted punishment imposed, and may set aside in whole or in part, the punishment whether executed or unexecuted, and restore all rights, privileges and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. In providing for suspension and vacation of punishments which impose reductions in grade, the amendment seeks to remedy the restrictive implication

of the Comptroller General decision (B-131093, June 1957) holding that a reduction imposed pursuant to Article 15 is complete upon imposition, precluding suspension or vacation thereof.

At the present time, the proposed Executive Order implementing Public Law 87-648 is being coordinated by the respective Service Departments, prior to submission to the Secretary of Defense for further action.

A comparison of the former provisions of Article 15, Uniform Code of Military Justice, and the new law is attached.

## FORMER LAW

Section 815 (art. 15 of title 10, United States Code)

§ 815. Art. 15. *Commanding officer's non-judicial punishment*

(a) Under such regulations as the President may prescribe, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers of his command—

(A) withholding of privileges for not more than two consecutive weeks;

(B) restriction to certain specified limits, with or without suspension from duty, for not more than two consecutive weeks; or

(C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of not more than one-half of one month's pay; and

(2) upon other military personnel of his command—

(A) withholding of privileges for not more than two consecutive weeks;

(B) restriction to certain specified limits, with or without suspension from duty, for not more than two consecutive weeks;

## AMENDMENT

That section 815 (article 15) of title 10, United States Code, is amended to read as follows:

“§ 815. Art. 15. *Commanding officer's non-judicial punishment*

“(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, except in the case of member attached to or embarked in a vessel, punishment may not be imposed upon any member of the Armed Forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. Under similar regulations, rules may be prescribed with respect to the suspension of punishments authorized hereunder. If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in com-

## FORMER LAW

(C) extra duties for not more than two consecutive weeks, and not more than two hours per day, holidays included;

(D) reduction to next inferior grade, if the grade from which demoted was established by the command or an equivalent or lower command;

(E) if imposed upon a person attached to or embarked in a vessel, confinement for not more than seven consecutive days; or

(F) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days.

(b) The Secretary concerned may, by regulation, place limitations on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers authorized to exercise those powers, and the applicability of this article to an accused who demands trial by court-martial.

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mand may delegate his powers under this article to a principal assistant.

“(b) Subject to subsection (a) of this section, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

“(1) upon officers of his command—

“(A) restriction to certain specified limits, with or without suspension from duty for not more than 30 consecutive days;

“(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command—

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“(i) arrest in quarters for not more than 30 consecutive days;

“(ii) forfeiture of not more than one-half of one month’s pay per month for two months;

“(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

“(iv) detention of not more than one-half of one month’s pay per month for three months;

“(2) upon other personnel of his command—

“(A) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days;

“(B) correctional custody for not more than seven consecutive days;

“(C) forfeiture of not more than seven days’ pay;

“(D) reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

“(E) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

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“(F) restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;

“(G) detention of not more than 14 days’ pay;

“(H) if imposed by an officer of the grade of major or lieutenant commander, or above—

“(i) the punishment authorized under subsection (b)(2)(A);

“(ii) correctional custody for not more than 30 consecutive days;

“(iii) forfeiture of not more than one-half of one month’s pay per month for two months;

“(iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E-4 may not be reduced more than two pay grades;

“(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

“(vi) restriction to certain specified limits, with

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or without suspension from duty, for not more than 60 consecutive days;

“(vii) detention of not more than one-half of one month’s pay per month for three months.

Detention of pay shall be for a stated period of not more than one year but if the offender’s term of service expires earlier, the detention shall terminate upon the expiration. No two or more of the punishments of arrest in quarters, confinement on bread and water or diminished rations, correctional custody, extra duties, and restriction may be combined to run consecutively in the maximum amount imposable for each. Whenever any of those punishments are combined to run consecutively, there must be an apportionment. In addition, forfeiture of pay may not be combined with detention of pay without an apportionment. For the purposes of this subsection, “correctional custody” is the physical restraint of a person during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor. If practicable, correctional custody will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial.

(c) An officer in charge may, for minor offenses, impose on enlisted members assigned to the unit of which he is in charge,

“(c) An officer in charge may impose upon enlisted members assigned to the unit of which he is in charge such of the punishments

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such of the punishments authorized to be imposed by commanding officers as the Secretary concerned may by regulation specifically prescribe, as provided in subsections (a) and (b).

(d) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The officer who imposes the punishment, his successor in command, and superior authority may suspend, set aside, or remit any part or amount of the punishment and restore all rights, privileges, and property affected.

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authorized under subsection (b) (2)(A)-(G) as the Secretary concerned may specifically prescribe by regulation.

“(d) The officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend probationally any part or amount of the unexecuted punishment imposed and may suspend a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges, and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. When mitigating—

“(1) arrest in quarters to restriction;

“(2) confinement on bread and water or diminished rations to correctional custody;

“(3) correctional custody or confinement on bread and water or diminished rations to extra duties or restriction, or both; or

“(4) extra duties to restriction;

the mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating forfeiture of pay to deten-

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(e) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

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tion of pay, the amount of the detention shall not be greater than the amount of the forfeiture. When mitigating reduction in grade to forfeiture or detention of pay, the amount of the forfeiture or detention shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.

“(e) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (d) by the officer who imposed the punishment. Before acting on an appeal from a punishment of—

“(1) arrest in quarters for more than seven days;

“(2) correctional custody for more than seven days;

“(3) forfeiture of more than seven days' pay;

“(4) reduction of one or more pay grades from the fourth or a higher pay grade;

“(5) extra duties for more than 14 days;

“(6) restriction for more than 14 days; or

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“(7) detention of more than 14 days’ pay;

the authority who is to act on the appeal shall refer the case to a judge advocate of the Army or Air Force, a law specialist of the Navy, or a law specialist or lawyer of the Marine Corps, Coast Guard, or Treasury Department for consideration and advice, and may so refer the case upon appeal from any punishment imposed under subsection (b).

“(f) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

“(g) The Secretary concerned may, by regulation, prescribe the form of records to be kept of proceedings under this article, and may also prescribe that certain categories of those proceedings shall be in writing.”

