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THE CIVIL WAR FEDERAL CONSCRIPTION AND EXEMPTION SYSTEM

By William L. Shaw *

"What we need is a good army, not a large one".¹

I. INTRODUCTION

On 1 January 1861, the numerical size of the United States Army was 16,367.² On 1 May 1865, the same army had expanded to 1,000,576 men not including casualties and those men discharged during the course of the war.³

This remarkable increase of over 60 times the initial strength of the army was not an easy transition process. A trial and error method of obtaining men was followed until the very cessation of hostilities. The federal government sought to raise troops through successive stages of calls for state militia, volunteering, a "presidential draft", and, finally, the adoption of the Enrollment Act of 3 March 1863. We shall review

these phases and consider the constitutionality of the Act and judicial review. There will be stressed the Oakes Report of 9 August 1865 which made specific recommendations for any conscriptive system of the future.

II. GENERAL BACKGROUND

A. Voluntary Recruiting

In the organization of an army in 1861, the Confederacy gained at least a six months start on the Union.⁴ At the period of the inauguration of President Abraham Lincoln, the United States were without an army of any proportions.⁵

There were three phases of American military service existing by law

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¹ General George Washington to the President of the Congress immediately after the disastrous Battle of Camden on 17 August 1780: Upton, *Military Policy of the United States*, p. VII (1907).

² Upton, *op. cit.*, 225.

³ Selective Service System, Monograph No. 16, *Problems of Selective Service*, p. 5-7 (1952).

⁴ Channing, *A History of the United States: vol. VI, 'War for Southern Independence'*, 398 (1925).

⁵ 2 Draper, *History of the American Civil War*, 186 (1868).

and by practice in the matter of raising military forces:

1. A *regular army* of professional soldiers was made up by voluntary enlistment.⁶ As indicated above, the size of this force was 16,367 officers and men in January 1861.⁷

2. When war would occur, an emergency *national army* was used composed of *volunteers* who temporarily joined the military establishment and who returned to civil life after the emergency was ended.⁸ During the Mexican War, for example, the volunteers totaled 73,000 men while the regular army was expanded for the duration to 31,000 for a total strength 104,284 men.⁹

3. The *militia* was both State and Federal. The State recruited the militia, paid all initial expense and through the Governor appointed the officers.¹⁰ The Constitution declares that Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.¹¹ Further, Congress shall provide for organizing, arming, and

disciplining the militia and for governing such part as may be employed in the service of the United States.¹² The President may call out the State militia for national objectives through the auspices of the State Governor. When so called by the Federal Government, the militia ceases to be State inspired and is Federal in nature.¹³

On 15 April 1861, President Lincoln as Chief Executive called for 75,000 volunteers to be furnished by the states from the militia to serve for three months.¹⁴ Thus, without a declaration, the war began as a domestic disturbance within the United States. The state governments of the Union were stable and financially sound. The various legislatures were prompt to pass military legislation and to furnish the first quotas of volunteers. On 13 April 1861, a day before the surrender of Fort Sumter, a war act had passed the Wisconsin legislature empowering the governor to take measures necessary to respond to any call from the President to aid in maintaining the Union and

⁶ Upton, *op. cit.*, 223-224.

⁷ Of these, only 14,657 were present for duty. From this number, deduct 313 officers who resigned to go South: Randall, *The Civil War and Reconstruction* 406n (1953) (hereinafter termed *Randall-War*).

⁸ Meneely, *The War Department 1861, 14-21* (1928).

⁹ *Randall-War* 406.

¹⁰ *Randall-War* 406-407; Upton, *op. cit.*, XIV-XV.

¹¹ United States Constitution, Art. I, sec. 8, cl. 15.

¹² United States Constitution, Art. I, sec. 8, cl. 16.

¹³ *Randall-War* 407.

¹⁴ *Randall-War* 360.

to suppress insurrection.¹⁵ In general, however, most of the state regiments and companies were short of men and equipment and were not ready for immediate war service.¹⁶

In calling the volunteer militia, the President acted under the authority of two old militia acts. That of 28 February 1795¹⁷ empowered the President to call the militia of any state or states whenever the laws of the United States should "be opposed or the operation thereof obstructed in any state". No militia man was to serve longer than three months after his arrival at the place of rendezvous. The Act of 3 March 1803 provided for calling out the militia for the preservation of law and order in the District of Columbia.¹⁸

The April call for volunteers was comparatively small. Apportioned by quotas upon the states according to population, 17 regiments of 780 men each were received from New York, 14 from Pennsylvania, and 13 from Ohio. The other states were assessed 1-6 regiments each. All officers and grades from corporal through major

general were named by the states although the end product was to be a federal task force.¹⁹ "The first Federal armies were more State organizations than were those of the Confederacy."²⁰

On 3 May 1861, the President apparently trusting that Congress when and if it met would legalize his acts, acting as both *Commander-in-Chief and President*, by proclamation called for 42,034 additional volunteers, 10 regiments of regulars totaling 22,714 men, and 18,000 seamen to serve for three years unless sooner discharged.²¹ This call was a recognition that the term of the three months men would expire even before they were trained and some portion of a new force must be permanent.²²

On the day following the Battle of Manassas, Congress, at last in session, passed an act authorizing the enlistment of 500,000 volunteers to serve not more than three years or less than six months.²³ Quotas were to be apportioned among the states by population. Volunteer regiments were to be composed of 10 companies each.

¹⁵ Wisconsin General Laws, 1861, p. 266-267.

¹⁶ 1 Shannon, *The Organization and Administration of the Union Army 1861-1865*, 28 (1928).

¹⁷ 1 Stat. 424-425.

¹⁸ 2 Stat. 215-225.

¹⁹ *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (hereinafter termed O.R.) ser. I, v. 51, part 1, p. 321-325; ser. III, v. I, p. 75.

²⁰ Channing, *op. cit.*, 403.

²¹ O.R. ser. III, v. I, 145-146.

²² 1 Shannon, *op. cit.*, 36.

²³ 12 Stat. 268-269, Act of 22 July 1861.

On 25 July 1861, Congress passed a supplemental act providing that volunteers be mustered to serve during the war.²⁴ Congress seemed to assume that a minimum of federal-state activity would produce a great national army.

The federal government generally expected the states to arm, train, and officer their own troops until entry into federal service.²⁵ Congress in the first year of the war took the line of least resistance in using the state militia system to create a national army.²⁶ The bulk of the Union forces consisted of specially recruited units of state militia designated as "United States Volunteers".²⁷ During the first year of the war, the federal government had called upon the states under the militia system to furnish 600,000 volunteers. The states responded by furnishing over 700,000 men to the Union Army despite the weakness of the federal administration military policy.²⁸

On 2 July 1862, formal orders issued from the War Department for the raising of 300,000 additional volunteers through the Governors.²⁹ The response was slow throughout the nation, as interest in volunteering had fallen off due to confusion in the enlistment system and adverse fortunes of war.

B. The Militia Act of 17 July 1862

Effective 17 July 1862, there was enacted a Militia Act designed to regularize the calling of the state militia and to permit the President by regulations to prescribe an enrollment and draft where a state did not call the militia.³⁰ The act provided:

1. The President could call the state militia for not to exceed 9 months.
2. Quotas for any call were apportioned among the states according to representative population of the states.
3. The militia was defined as all able-bodied male citizens, 18-45 years.
4. If a state had an existing procedure to call out the militia, the state provisions would apply.
5. If there were no state provisions or they proved inactive, the President furnished regulations to enroll and raise the militia.

Opinion varies as to the efficacy of the statute. Shannon states: "At the very most, this act was merely a mild persuasive act to stimulate the activities of the state rather than an act granting any considerable cen-

²⁴ Id. at p. 274; Randall-War 367.

²⁵ Fish, *The American Civil War*, 239 (1937).

²⁶ Id. at 454.

²⁷ Randall-War 407.

²⁸ O.R. ser. III, v. I, 383-384.

²⁹ O.R. ser. III, v. II, 180-188.

³⁰ 12 Stat. 597.

tralized authority to the federal government".³¹ Upton observed that Congress "exercised the power to support armies, but the power to raise them it conferred on the governors."³²

In more recent times it has been noted that the "act worked badly, but it was a transitional step toward the drastic act of 3 March 1863 . . . the unusual point of it is seen in the extension of the executive power."³³

Federal regulations for enrolling and drafting the militia followed promptly after the enactment of the statute.³⁴ The governors were requested to designate the rendezvous of the militia, appoint commandants, and enroll ages 18-45 males in all counties through the assessors or other officers. Enrollment was to show name, age, occupation, and facts bearing upon possible exemption. Any enrolled person who was called could furnish an able-bodied substitute of draft age.

Under the act, an order issued from the War Department on 4 August 1862,³⁵ to the Governors calling for 300,000 men to serve 9 months. This was in addition to the quotas of 2 July 1862.

The first federal draft for the raising of federal troops ever conducted in United States history under the Constitution was the *Presidential draft* which resulted in those states lacking a state draft where the President by regulations caused the state quotas of men to be filled.³⁶

The statute shows the evolution of a sense of increased responsibility in the central government for the raising of troops. In contrast with the state militia-recruiting method followed from April 1861 to mid-July 1862, there was a growing "acceptance" by the governors of the leadership of the federal executive.³⁷

The exempted classes under the federal regulations included public employees, essential industrial workers, telegraph operators, pilots, ferry-men, etc. In addition, the states could add to the exempt groups. New York, for example, allowed exemption to clergymen, teachers, students, paupers, Quakers, and others.³⁸ The administration of the statute displayed serious defects as the draft moved very slowly. Although slated to begin on 3 September 1862, most of the governors asked for time extensions.

³¹ 1 Shannon, op. cit., 277.

³² Upton, op. cit. 436.

³³ Fish, op. cit., 454.

³⁴ O.R. ser. III, v. II, 333-335.

³⁵ O.R. ser. III, v. II, 291-292, 295-296, 333.

³⁶ Randal, Constitutional Problems Under Lincoln 254-255 (Rev. Ed. 1951). This is not footnote Randall-War.

³⁷ 1 Shannon, op. cit., 281-283.

³⁸ New York Laws, 1862, ch. 477, p. 881-946, Act of 23 April 1862.

So slow were the returns in men received, that three months after the effective draft date, the War Department asked fourteen governors to report on progress, if any, in the draft.³⁹ From quotas of 334,835, the highest number of men attributed to the Militia Act draft is 87,588, even taking into consideration that the payment of bounties, both state and local, was designed to promote recruitment.⁴⁰

Although the draft produced but few men directly, the conviction was being driven home to the people that if the war should go into a third year, a more efficient method must be devised than anything yet attempted in order to raise necessary men.⁴¹

1. Cases Involving The Militia

The Militia Act of 17 July 1862, above, was upheld in *Re Griner*,⁴² a proceeding for a writ of habeas corpus directed to a commanding officer of certain militia men drafted under the statute. In the absence of a Wisconsin State draft system, the Presidential regulations were applied. The court held that the proclamation by the President of regulations for calling forth and drafting the militia, is not based upon an improper delegation of legislative authority to

the President. A distinction must be drawn between a subject exclusively within the power of Congress and that of the present instance wherein Congress may permit the President to fill out details necessary for execution. The court perceives that the statute has not conferred any new or additional powers on the President, as he is required to avail himself of the provisions of state law, so far as they are applicable, and only when there is no state law on the subject may the President exert the authority vested in him by the Act of 28 February 1795⁴³ for calling forth the militia to execute the laws of the Union.

In *Re Carl Wehlitz*,⁴⁴ the court held that a *resident alien* who has exercised the right of suffrage is liable to be drafted into federal military service under the Militia Act of 17 July 1862.

The court in *Re Spangler*⁴⁵ considered the regulations issued on 9 August 1862 in General Orders No. 99 by the Adjutant General to implement the call of 4 August 1862 by the President for 300,000 militia. The court determined that officers appointed by the Governor who are proceeding under a law of Congress to make a draft exercise a national

³⁹ O.R. ser. III, v. II, p. 291, 430, 436, 442, 446, 450-51, etc.

⁴⁰ 1 Shannon, op. cit., 290, 283-284.

⁴¹ Id. at 292.

⁴² 16 Wis. 447 (1863).

⁴³ 1 Stat. 424-425; see note 17, supra.

⁴⁴ 16 Wis. 468 (1863).

⁴⁵ 11 Mich. 298 (1863).

authority and the draftees are held under national and not under state authority although the draftees have not yet been mustered in point of time into U. S. service. The federal authority does not begin from the date of muster, but, rather from the date of the Presidential call for militia.

In *Druecker vs. Salomon*,⁴⁶ the court was concerned with an action for false imprisonment in 1862 and 1863. The defendant as Governor of Wisconsin averred that in November 1862 in connection with a federal call for troops, the plaintiff was arrested in the suppression of a riot protesting the enforcement of the draft. The court adjudged that the plaintiff had conspired to resist the execution of the draft and that the defendant as State Governor did not exceed his powers in arresting the plaintiff and detaining him in custody for twelve days. The court went on that the President is the exclusive judge when an emergency has arisen under which he might call forth state militia under the Act of 17 July 1862. Draft commissioners appointed by the Governor from the citizenry of the state to enforce the federal draft are officers of the United States in the performance of their duties.

In *Allen vs. Colby*,⁴⁷ the cause was in trespass for the taking of the plaintiff's valise in September 1862. The plaintiff had left Vermont to

avoid the draft call of 3 September 1862, and the defendants, civil officers in Vermont, not finding the plaintiff, took and detained the clothes of the plaintiff. The court upheld an order issued in August 1862 by the President for the arrest of persons absenting themselves to avoid being drafted in the military service. The plaintiff's belongings could be detained by the defendants for a reasonable time in view of the plaintiff secreting himself to avoid the draft. The circumstance that the plaintiff had escaped to Canada did not illegalize the acts of the defendant peace officers in Vermont from where the plaintiff had fled.

A leading case is *Lanahan vs. Birge*,⁴⁸ where habeas corpus was sought in behalf of a minor enlisted in a Connecticut militia regiment of volunteers mustered into federal service. The court recognized that a minor may be lawfully enlisted without the consent of his parents. Enlistment is only one method of securing military service and any person liable to be drafted may be enlisted. The right of a parent to the service and control of a child is subordinate to the right of the government to his services. The court states:

"It is a fundamental principle of national law, essential to national life, that every citizen, whether of age to make contracts generally or not, is under obligation

⁴⁶ 21 Wis. 621 (1867).

⁴⁷ 47 N.H. 544 (1867).

⁴⁸ 30 Conn. 438 (1862). The right of the state to exact road work for the repair of roads and streets is upheld in *Re Dassler*, 35 Kans. 678 (1886); accord, *Butler vs Perry*, 240 U. S. 328 (1916).

to serve and defend the constituted authorities of the state and nation, and for that purpose to bear arms, when of sufficient age and capacity to do so, and when such service is lawfully required of him. The power to enforce that obligation, so far as the necessities of the state may require, is an incident of state sovereignty, and the subject of state constitutional and statutory regulation."⁴⁹

The significance of *Lanahan*, above, is a recognition that the State has full power to exact compulsory military service from its citizens.

In *Houston vs. Moore*,⁵⁰ the Supreme Court by Mr. Justice Bushrod Washington determined that a state court-martial deriving jurisdiction under state law could try a militia man called and "drafted" into federal service under the Act of September 1795⁵¹ and who had refused to obey the call to federal duty. Militia men are in federal service from the time of the appointed rendezvous whether or not they report for duty.

In *Martin vs. Mott*⁵² the Supreme Court by Mr. Justice Story, upheld the power of the President to call forth the state militia and considered a Militia Act of 18 April 1814⁵³ to permit court-martial trial for a militia man who refused to respond to a "draft" by the President.

III. THE ENROLLMENT ACT OF 3 MARCH 1863, AS AMENDED

A. The Statute, As Amended

On 3 March 1863, Congress adopted an "Act for Enrolling and Calling Out the National Forces and for Other Purposes".⁵⁴ The Bill passed the House by a vote 115-49. In the Senate, a motion to postpone indefinitely consideration of the bill was defeated 11-35 nays.⁵⁵

A series of federal military reverses had begun in the spring of 1862 and continued into 1863.⁵⁶ Among others, there were these adverse factors:

1. McClellan's campaign on the Peninsula had failed and Richmond was no longer menaced.

⁴⁹ 30 Conn. at 443.

⁵⁰ 18 U.S. (5 Wheat) 1 (1820).

⁵¹ 1 Stat. 424; see note 17, *supra*.

⁵² 25 U.S. (12 Wheat) 19 (1827).

⁵³ 3 Stat. 134.

⁵⁴ 12 Stat. 731; also set forth in the Final Report to the Secretary of War by the Provost Marshal General of the Operations of the Bureau of the Provost Marshal General of the United States, Part II, (hereinafter termed PMG II, or I for Part I) 182-188.

⁵⁵ 2 Greeley, *The American Conflict*, 487-488 (1866).

⁵⁶ Schwab, *The Confederate States of America* 170 (1901); Rhodes, *History of the Civil War, 1861-1865*, 201 (1917).

2. Vicksburg was withstanding siege in the West.
3. Second Manassas had been fought with no gain to the Union.
4. General Lee had made a first advance into Maryland as a fore-runner of what was to come.
5. The disaster at Fredericksburg had shocked the North.
6. Napoleon III of France had offered to mediate which might precede recognition of the Confederacy.
7. The Confederate Conscription Act of 16 April 1862⁵⁷ was successfully expanding that army.

Volunteering had almost ceased and some form of conscription from the federal government was needed to furnish soldiers. The Act of 3 March 1863 was designed to *operate directly on the people of the nation instead of through the medium of the states* which had previously employed their own state machinery for raising troops.⁵⁸

Senate Bill No. 511 for the enrolling and calling out the national forces was sponsored by Senator

Henry Wilson (R.) of Massachusetts, Chairman of the Military Affairs Committee.⁵⁹ In support of the measure, the Senator stated:⁶⁰

"This grant to Congress of power 'to raise and support armies'⁶¹ carries with it the right to do it by voluntary enlistment or by compulsory process. If men cannot be raised by voluntary enlistment then the Government must raise men by involuntary means or the power to raise and support armies for the public defense is a nullity. . . . Volunteers we cannot obtain and everything forbids that we should resort to the temporary expedient of calling out the militia. Such a call would waste the resources and absorb the energies and increase but little the military forces of the country."

In the House of Representatives, action on SB 511 began on 23 February 1863 and the bill was discussed with increasing bitterness until final vote on 25 February 1863.⁶²

A lucid discussion free from invective, in support of the bill, was offered by Congressman Aaron A.

⁵⁷ Public Laws of the Confederate States of America, 1st Cong., 1st Sess., ch. 31, p. 29-32; also set forth in O.R. ser. IV, v. I, 1095-1097.

⁵⁸ Rhodes, op. cit., 287, 202.

⁵⁹ Congressional Globe, Official Proceedings of Congress, Part 2, 37 Cong., 3d Sess., (hereinafter termed Cong. Globe) 976.

⁶⁰ Id. at 977.

⁶¹ United States Constitution, Art. I, sec. 8, cl. 12.

⁶² Cong. Globe, p. 1175, 1213, 1215, 1218, 1223, 1227, 1249, 1258, 1262, 1269, and 1291.

Sargent of California.⁶³ This representative urged the necessity for the legislation, and stressed that a general enrollment law should have been adopted at the beginning of the war in order that the nation might have avoided "all the inconveniences of a volunteer system with its enormous expense, ill discipline, and irregular efforts".⁶⁴ Mr. Sargent pointed out that the Federal Government was the only major nation on earth depending upon uncertain sources of manpower to conduct a lengthy war. The Confederacy itself had emulated the example of governments in Europe and adopted conscription. SB 511 presumed that "every citizen not incapacitated by physical or mental disability owes military service to the country in its hour of extremity."⁶⁵ As to the bill in issue, he urged:

"I favor it because it is, as I believe, a potent instrumentality to aid the government in its struggle . . . because it is in accordance with the usage of all civilized nations who maintain armies; because it corrects errors in our past practice, and gives the hope of a stable and efficient army in the future; because it distributes equally the burdens of the war, laying them as well upon the lukewarm friends or the open opponents of the Government as upon the true and faithful."⁶⁶

The following factors resulted from the administration of the statute:

1. The national forces were declared to consist of all able-bodied male citizens of the United States and all aliens, aged 20-45 years. These persons were liable to military duty upon call of the President.
2. Exemption from the operations of the draft was allowed to certain persons.
3. Men not exempted were divided into two classes:
 - (a) Men, married or single, between 20-35 years of age and all unmarried men 30-45 years.
 - (b) Married men from 35-45 years. The latter class was not to be called until the first class was exhausted.
4. The law was administered by the Provost Marshal General, Brigadier General James B. Fry, heading a separate Bureau in the War Department, aided by Assistant Provost Marshals throughout the nation.
5. For enrollment and draft the nation was divided into districts corresponding to the Congressional Districts with a Provost Marshal in charge in each District.

⁶³ Cong. Globe, 1220-1222.

⁶⁴ Id. at 1220.

⁶⁵ Id. at 1221.

⁶⁶ Id. at 1222.

6. The Provost Marshal General made rules and regulations to govern enrollment, draft, and the arrest of deserters.
7. An Enrollment Board in each district was made up of the Provost Marshal, a physician, and one other person, to enroll and examine all classes and individuals.
8. A call was broken down into quotas for the districts with credits allowed for men in service from the locality. Written notice was served upon any draftee 10 days before he was summoned.
9. Enrollment was on a personal canvass basis in which the enrolling officer went from house-to-house to enroll all potential draftees.
10. Any drafted man could furnish an acceptable substitute.
11. Commutation permitted a draftee to pay \$300.00 and thereby be released from the draft.

On 24 February 1864, Congress enacted a new draft bill⁶⁷ which provided for the enrollment of Negroes, the setting of quotas on the number of men liable for duty in a district and not as theretofore on population, substitutes must be aliens or veterans, payment of commutation secured exemption only for the parti-

cular draft involved, and members of religious bodies who would swear they were conscientiously opposed to bearing arms were exempt. There were exempted physical and mental rejects and those who had served two years in the armed forces. The separate enrollment by age groups was abolished.

An Act of 3 March 1865⁶⁸ provided for further adjustment of draft district quotas and equitable allowance of credits. A penalty was provided for anyone who caused to be enlisted as volunteers or substitutes, deserters, minors, the insane, convicts, or intoxicated men. Deserters forfeited all citizenship rights and the opportunity to be naturalized and hold office.

Four days after Appomatox, Secretary of War Edwin M. Stanton ordered all drafting and recruiting stopped.⁶⁹

B. Exemptions Under The Act

The Enrollment Act allowed exemption from the obligation to render military service. Persons exempted were of three classes:

- (1) Those physically or mentally unfit or convicted of a felony.
- (2) A limited number of public officials including judges, governors, members of the cabinet, etc.
- (3) The sole support of aged or infirm parents or orphaned children.

⁶⁷ 13 Stat. 6.

⁶⁸ 13 Stat. 487; PMG II, 199-203.

⁶⁹ PMG I, 148-149.

The amendment of 24 February 1864⁷⁰ further extended exemptions to include those members of religious bodies who would swear they were conscientiously opposed to bearing arms and were forbidden to bear arms by the rules and articles of their faith. When their names were drawn, such conscientious objectors were considered non-combatants and assigned to hospitals or to the care of freed men, and, must, in addition, pay \$300.00 for the benefit of the sick and wounded.

A reliable computation as to conscientious objectors in the North is not available. A more accurate notion can be gained of the non-combatants in the Confederacy because a somewhat complete record was made of those exempted in this category. For example, the total number of noncombatants exempted in the areas of Virginia, North Carolina, and East Tennessee totaled 515.⁷¹ This is divisible to Virginia 107, North Carolina 342, and East Tennessee 66.

In the North, the records of the

Society of Friends on 13 April 1866 showed 150 members drafted (plus an earlier 100) of whom 38 were released for physical disability, 16 were never called to report, 56 had commutation payment, 12 obtained substitutes, 4 went into the army and the others did not serve for miscellaneous reasons.⁷²

By contrast in 1917-1918, there were 3989 conscientious objectors out of 2,810,296 inductions into the army, or a percentage of .0014%.⁷³

Exemption was allowed to men with physical and mental infirmities recognized as disqualifying from military service. The rejection rate per thousand in 1863 ran at 316.91 or about one-third. This rate, however, compares favorably with that in the armies of France, Great Britain and Belgium, as disclosed in a table set out in the footnotes.⁷⁴

The exemption rate upon all grounds ran very high and operated to reduce considerably the number of men actually entering the army. For the first draft of 300,000 men, 164,394 were exempted or over 50%.⁷⁵

⁷⁰ Statute cited, note 67, supra.

⁷¹ O.R. ser. IV, v. III, 1103.

⁷² Wright, *Conscientious Objectors in the Civil War* 182 (1931).

⁷³ *Id.* at 244.

⁷⁴ PMG I, 28.

REJECTION RATE PER 1,000 FOR INFIRMITIES

United States in 1863	France		Great Britain		Belgium
	From 1831 to 1843	In 1859	From 1832 to 1851	In 1862	From 1851 to 1855
316.91	324.04	317	318.59	401	320.6

⁷⁵ *Ibid.*

Speaking of the Act of 3 March 1863, the Provost Marshal General in his Final Report, 17 March 1866 noted:

"The large proportion of exemptions defeated, in a measure, the object of the law, and a modification reducing the causes of exemption was urgently demanded by the public exigencies of that period. The necessity for a change having been demonstrated by actual test and practical experience, the more rigid features subsequently introduced as amendments to the law were accepted by the people generally, and added nothing to the difficulties encountered in carrying out the measures."⁷⁶

The reference, above, to amendment relates to the Act of 24 February 1864.⁷⁷

Congress on 4 July 1864 repealed the commutation provision except as applying to conscientious objectors.⁷⁸ Substitution however continued until the end of the war.

C. The Administration Of The Act

After 3 March 1863, the federal government and not the governors, enforced the draft calls for men.⁷⁹ The draft operation did not actually furnish many troops to the army, but did stimulate enlistments to avoid the stigma of conscription.⁸⁰ Coulton observes that the law enabled the North to utilize an enormous numerical superiority and actually increased the size of the armies.⁸¹ Another writer says of the Act of 1863: "It was a most imperfect law, a travesty of a conscription act."⁸² The same commentator goes on: "The success of the Union conscription, however, is not to be measured by the very small number of actual draftees obtained, or the large proportion of deserters, but by the enormous number of volunteers obtained under pressure. Unquestionably, the average qualities of both (Union and Confederate) armies deteriorated as the war dragged on."⁸³

A defect of the system was that the *draft applied only when enlistment failed* to furnish a number of men prescribed in the quota. To en-

⁷⁶ Id. at 29.

⁷⁷ 13 Stat. 6; see note 67, supra.

⁷⁸ 13 Stat. 379-380.

⁷⁹ McMaster, *Our House Divided*, former title *A History of the People of the United States During Lincoln's Administration* 396 (1961).

⁸⁰ Rhodes, *op. cit.*, 291.

⁸¹ Coulton, *The Case for Compulsory Military Service* 143 (1917).

⁸² 1 Morison and Commager, *The Growth of the American Republic* 705 (1950).

⁸³ Id. at 707.

courage enlistments, *bounties* were offered by the states and counties and towns. Bounties cost as much as the pay for the Army during the war: Were twice as great as the cost of subsistence and five times the ordnance cost!⁸⁴ The government bounties expended by way of gifts to the volunteers reached the sum \$586,164,528.⁸⁵ In a major war, the payment of large bounties seems a sort of subsidized or compensated patriotism. Bounties existed, however, both before and after the adoption of the Enrollment Act.

An error in the system was the association of drafting men with the detection and capture of deserters.⁸⁶ This was an unfortunate linking of the problem of delinquency with the goal of obtaining men to fight for their country. The two functions were dissimilar and should not have been joined, at least in the public mind, with the procurement of men throughout the nation. The end result was that conscription was never presented as a popular measure, but rather, as one of very stern and grim necessity.⁸⁷

Judged by modern standards, commutation or a payment to escape

service is unjustifiable. Literally, one could buy out of the obligation to render military duty. So extensive was the practice that the State of Delaware voted to pay the commutation fee for all drafted citizens of Delaware!⁸⁸ Many counties and towns elsewhere did the same.

The Enrollment Act proved an incentive to the reenlistment of men who had served for a total of less than two years. These men could not claim exemption after release from the army. The Union armies had not been recruited at the outset for the duration of the war. Most men enlisted into regiments and the term of service was often less than three years. Even with three-year enlistees, the approach of 1864 marked the expiration of the service of thousands of three-year men. Of 956 volunteer infantry regiments, 455 were about to go out of existence as the year 1863 drew to a close. Of 158 volunteer batteries, 81 would cease to exist at the turn of the year.⁸⁹

A curious outgrowth of the draft is the resort to "*One Hundred Days Men*" in the summer of 1864. Previously, it has been noted that many three-year enlistments were expir-

⁸⁴ Kreidberg & Henry, *History of Military Mobilization in the U. S. Army, 1775-1945*, 110 (1955).

⁸⁵ Fitzpatrick, *Conscription and America* 22 (1940).

⁸⁶ *Id.* at 22-23.

⁸⁷ PMG I, 4.

⁸⁸ Delaware Laws, 1861-1865, ch. 425, p. 450-453, enacted 12 February 1864.

⁸⁹ Catton, *This Hallowed Ground*, 317 (1956).

ing in 1864. In mid-1864, 100,000 One Hundred Days Men were added to the army, being furnished voluntarily by the Governors of Ohio, Indiana, Illinois, Iowa and Wisconsin.⁹⁰ Congress appropriated \$25,000,000 to equip the volunteers who were to perform garrison duty and otherwise relieve field troops who could be sent to the front.⁹¹ In the press of the fighting, a considerable number of the One Hundred Days Men went into the line and did a full share of combat duty.⁹² General U. S. Grant did not approve of the short term men, preferring longer service troops who would better fit into a campaign.⁹⁴ The resort to the services of at least 83,000 One Hundred Days Men flung into the combat zone shows a too fluid reserves structure and a very urgent need for ready men.

After April 1863, the army utilized *Limited Service Men*. A special corps was established to use the services of partially disabled *veterans*. General Order No. 105, dated 28 April 1863, established the Invalid Corps to be composed of officers and men no longer fit for front line service,

but who *volunteered* for further duty. The Corps served in the rear area as prison guards, orderlies, building guards, clerks, etc. In 1864, the force was redesignated as the Veterans Reserve Corps. Over 60,000 men were linked to the Invalid and Veteran Reserve Corps during the war.⁹⁵

1. The Numerical Results From The Act

The total number of enlistments before the Act of 3 March 1863 was 1,356,593 of which 87,000 may be credited to the state draft ordered in August 1862.⁹⁶ Enlistments after the Enrollment Act went into effect numbered 1,120,621.⁹⁷

The following table is compiled from the final report of the Provost Marshal General and discloses the total results from the draft calls subsequent to the enactment of the Enrollment Act of 3 March 1863. The last call was that of 19 December 1864. The table in the footnotes reflects credits, names drawn, failures to report, examinations, ex-

⁹⁰ 2 Draper, op. cit., 465.

⁹¹ O.R. ser. III, v. IV, 237-238.

⁹² 2 Shannon, op. cit., 120; see discussion in McMaster, op. cit., 422-423.

⁹⁴ O.R. ser. III, v. IV, 239.

⁹⁵ PMG I, 91-93.

⁹⁶ Fish, Conscription in the Civil War, 21 Amer. Hist. Rev. 100-103 (1915).

⁹⁷ Ibid.

emptions, substitutes, and enlistments.⁹⁸

Although over 2,000,000 men were enrolled in the Union Army during the war, the actual strength at any one time of men present for duty was less than one-half of that number because of the following factors:

1. Short terms of enlistment and service.
2. Over 200,000 discharges for disabilities from wounds and disease.
3. Death casualties: 359,528 deaths from all causes.
4. Desertions: 16,365 deserted from the Regular Army and 182,680 from volunteer units.⁹⁹

The call of 18 July 1864 for 500,000 men illustrates the practical re-

sults of a draft call. 272,463 men were furnished which is divisible to 188,172 enlistees and 84,291 draftees and substitutes. Over 250,000 numbers were simply credits due to the states on prior calls.¹⁰⁰ It is readily apparent from the 18 July 1864 call that the Enrollment Act, although producing few men numerically, was responsible for the enlistment of many more. The end result was that the army through each draft call gained considerable of the strength desired in the particular call. The quality of men obtained in 1864 and 1865 is another matter entirely.

General George G. Meade discussed the call of 18 July 1864 in a letter dated 11 December 1864 to Henry A. Cram of New York. The General stated:

⁹⁸ PMG I, 43-60; 1 Morison & Commager, op. cit., 706.

	Draft of (1863 July	1864 14 Mar.	1864 18 July	1864 19 Dec.
Number called for		700,000		500,000	300,000
Reduced by credits to		407,092		234,327	300,000
Names drawn	292,441		113,446	231,918	139,024
Failed to report	39,415		27,193	66,159	28,477
Examined	252,566		84,957	138,536	46,128
Exempted for physical disability, etc.	164,855		39,952	82,531	28,631
Exempted by paying commutation	52,288		32,678	1,298	460
Substitutes furnished by registered men		84,733		29,584	12,997
Substitutes furnished by draftees	26,002		8,911	28,502	10,192
Draftees held to personal service	9,881		3,416	26,205	6,845
Voluntary enlistments		489,462		188,172	157,058
Total number obtained		537,672*		272,463	187,092

* The excess, 130,579, credited to call of 18 July 1864.

⁹⁹ PMG I, 78-79.

¹⁰⁰ Id. at 43-44.

"The last loud call for 500,000 men had produced just 120,000. Of these only about 60,000 were sent to the field and the share of my army (Army of the Potomac) one of the largest in the field, was not over 15,000; and of this number the greater part were worthless foreigners, who are daily deserting to the enemy. These are sad facts.¹⁰¹

General Grant commented in September 1864 that men sent to him after frantic state recruiting drives nearly all deserted and the army actually never got more than one out of five reported as having enlisted.¹⁰²

The Final Report of Provost Marshal General Fry shows the following as a total summation of the operation of the Enrollment Act:

1. Quotas
2,763,670 (from 3 months to 4 years)
2. Men furnished
2,778,304 (Army, Navy, Marines)
3. Commutation paid
86,724 men @ \$300 each
4. Seamen, Marines
(105,963, included in #2, above)

5. Reservoir of men not called
2,254,063 not in service at end of war.¹⁰³

In the enforcement activities of the Bureau of the Provost Marshal General from the commencement of operations on 17 March 1863 until the termination of the Bureau on 28 August 1866, 38 employees were assassinated, 60 were wounded, and 12 others sustained property losses from burned houses or barns, etc.¹⁰⁴ These figures do not include police and troop losses resulting from putting down riots and civil commotions.

IV. CONSTITUTIONALITY AND JUDICIAL REVIEW

A. *Kneedler vs. Lane*

The constitutionality of the Enrollment Act of 1863 was never tested in the United States Supreme Court. The constitutionality of the Act was upheld in *Kneedler vs. Lane*¹⁰⁵ by a 3-2 decision.

Kneedler et al. filed three bills in equity in the Pennsylvania Supreme Court against *Lane et al.* who comprised the draft board of the 4th Congressional District of Pennsylvania.¹⁰⁶ The complainants had been enrolled under the 1863 Act, their names drawn, and notices to report

¹⁰¹ 2 Meade, *Life and Letters of George Gordon Meade*, 250-251 (1913).

¹⁰² O.R. ser. III, v. IV, 706.

¹⁰³ PMG I, App. Doc. 6, 142.

¹⁰⁴ PMG II, 352; PMG I, 19.

¹⁰⁵ 45 Pa. (9 Wright) 238 (1863).

¹⁰⁶ Leach, *Conscription in the United States: Historical Background* 374 (1952). Considerable of the factual matter herein relative to *Kneedler vs. Lane* and the composition of the Pennsylvania Supreme Court derives from Leach confirmed by other authorities.

for induction served upon them. Injunction was sought to restrain the board from continuing to enforce the Act in Pennsylvania.

It was alleged that the Act was "in derogation of the reserved rights of the states, and of rights and liberties of the citizens thereof, and that the same is unconstitutional and void, there being delegated by the States and people thereof to the federal government no power to enact such a law." The complainants also averred that the power of calling the militia to the national service was exercisable only under the Militia Act of 17 July 1862. Objection was made to the "inequality" of the commutation clause and to the unfairness of the enrollment. The enrollment lists were said to be fraudulent and void because they were not subject to public inspection; furthermore, the system was declared to be unlawful because men had been drafted in some districts and states while none were drafted in other districts and states.

Before hearing on 23 September 1863, notice was served on counsel for the United States who as counsel did not appear and the case proceeded after an affidavit of service was filed.

Chief Justice Lowrie (D) delivered the first majority opinion of the court on 9 November 1863.¹⁰⁷ Concurring opinions were delivered by Justices Woodward (D) and Thompson (D). Justices Strong (R) and Read (R) filed dissenting opinions.

The *first majority opinion* rules that national conscription could not be called a necessary and proper mode by Congress of exercising power to raise and support armies and to call forth the militia. The government had not first tried to make up for the inadequacy of the standing army by calling out the militia. Congress could correct any defects in the militia forces with regards to the militia powers and could not later set up new authority anent the militia. The 1863 Act was declared inconsistent with the militia clauses because it sought to draft men traditionally understood to constitute the militia forces. No grant of power to enforce a national draft was given or thought of by the framers of the Constitution. As such a power was not among the enumerated powers, it, therefore, was among the residual powers of the states.

The Chief Justice admitted that Secretary of War Henry Knox, under President George Washington, and Secretary of War James Monroe, under President James Madison, had presented plans similar to the Act of 1863. As these plans had been allegedly rejected by Congress, Lowrie urged that the opinions of Washington, Knox, Monroe, and Madison, were not persuasive.

The dissenting opinion of Justice Strong (R)¹⁰⁸ is important because it became the later opinion of the court when *by a 3 to 2 vote, the earlier decision was set aside and a new opinion issued*. In his dissent,

¹⁰⁷ 45 Pa. 238 at 240; the reported decision contains both the first opinion subsequently superseded and the second, final decision.

¹⁰⁸ 45 Pa. 238 at 274, 295.

Strong declared that Congress also had power along with the states over men who made up the militia forces. All able bodied men, organized or unorganized, were militiamen and the states' power over them is subordinate to the authority of Congress to raise armies from their number. Otherwise, the delegation to Congress of this power to raise armies is nothing but an empty gift. Federal law drafting a given number of men is no more an infringement of the reserved authority of the states than is the law for enlisting the same number of men by the voluntary process. The framers of the Constitution intended to institute a new nation within the family of nations. They planned to give the federal government "within a limited sphere, every attribute of sovereignty." The terms of national treaties could not be honored if the federal government had to rely upon the states for militia. "We cannot insert restrictions upon the powers given in unlimited terms". The decision of Mr. Chief Justice Marshal in *Gibbons v. Ogden*¹⁰⁹ was cited as authority that all powers vested in Congress are complete in themselves, and may be exercised to the utmost extent free from limitations except those prescribed in the Constitution. When the Constitution was drawn and submitted to the people, both voluntary enlistment and drafting were well known. The founders at Philadelphia gave Congress an unqualified power to raise

armies. In the United States, civil liberties have never included the right to be exempt from personal military service.

The dissenting opinion of Justice Read (R) quotes the *Federalist* Number 23¹¹⁰ to the effect that the power to raise armies is vested solely in the national legislature because it is impossible to foresee or to define the extent and variety of national exigencies.

After Chief Justice Lowrie (D) had been defeated for reelection by Daniel Agnew (R) and Justice Agnew took his seat on the court, the political complexion of the court altered. On 12 December 1863, counsel for the defendants applied to Judge Strong to dissolve the preliminary injunctions. The second majority opinion delivered by Judge Strong on 16 January 1864, superseded the previous decision, vacated the preliminary injunctions, and overruled the motions for writs of injunction. The *Enrollment Act of 1863* was pronounced valid on the basis of the reasoning in his (Strong) previous dissent. The concurring opinion of Judge Read was subsequently the same as his previous dissenting opinion. Chief Justice Woodward and Judge Thompson delivered joint dissenting opinions declaring their original positions to be unchanged. Mr. Justice Agnew, the new judge, delivered an opinion¹¹¹ concurring with that of Judge Strong. He declared that the power to wage war and to

¹⁰⁹ 22 U.S. (9 Wheat 196) 1 (1824).

¹¹⁰ By Alexander Hamilton, 18 December 1787

¹¹¹ 45 Pa. 238 at 306.

muster the requisite force into national service "inherently" carried with it the authority to conscript. He further stated "every able bodied man is at the call of the government; for assuredly in making war, as there is no limit to the necessity, there can be no limit to the force to be used to meet it. Therefore, if the emergency required it, the entire military force of the nation may be called into service."¹¹²

It should be noted that Chief Justice Woodward had declared in 1861: "If the Union is to be divided, I want the line of separation run north of Pennsylvania."¹¹³

Conceivably, if the first majority opinion in *Kneedler vs. Lane* had continued to the effect that the Enrollment Act was unconstitutional, further drafting under the statute would have come to a halt in Pennsylvania and the example would have been seized upon in other states to escape the draft provisions of what was an unpopular law.

B. Mr. Chief Justice Taney's Doubts

Although the United States Supreme Court did not review judicially the Enrollment Act of 1863 at any time during the operation of the statute, Mr. Chief Justice Roger B. Taney privately expressed serious doubts as to the constitutionality of

the measure. While the Bill was under debate in Congress, Taney wrote "Thoughts on the Conscription Law of the United States".¹¹⁴ Taney regarded the Act as definitely unconstitutional and concluded that the statute went beyond the legitimate authority of the national government and was an invasion of the sphere of power reserved to the states. He believed that the measure would permit the federal government to draft all civil officers of the states except the Governors, and thus all machinery of state government could be disorganized or paralyzed. Taney believed that the general government should only raise armies through voluntary recruitment free from any federal compulsion. The Chief Justice states: "Neither (government) owes allegiance to, or is inferior to the other. The citizen owes allegiance to the general government to the extent of the powers conferred on it, and no further, and he owes equal allegiance to the State, to the extent of the sovereign power they reserved . . . No allegiance can be claimed or is due, from the citizen to either government beyond those limits."¹¹⁵ Each of the federal and the state governments is independent of the other in its sphere and this is true of the raising of troops for the United States. The sovereignty of

¹¹² Id. at 312.

¹¹³ 2 Greeley, op. cit., 508.

¹¹⁴ A manuscript copy made by M. L. York from Taney's original is in the New York Public Library and was lost sight of for many years: Steiner, *Life of Roger B. Taney* 509-511 (1922); Tyler's 18 *Quart. Hist. & Gen. Mag.* 72-87 (1936) sets forth entire manuscript.

¹¹⁵ Id. at 510.

the central government is not a general and pervading one as "the sovereignty of the State, to the extent of the reserve power is wholly independent of the general government."¹¹⁶

The Chief Justice cites in support of his position, the decision in *Ableman vs. Booth*¹¹⁷ where in a decision by Mr. Chief Justice Taney, the Supreme Court invalidated a state assumption of jurisdiction. The Wisconsin Supreme Court had allowed habeas corpus directed to the United States Marshal to produce one who had aided a run-away slave in violation of the Federal Fugitive Slave Act of 18 September 1850,¹¹⁸ and had declared that Act unconstitutional. Taney held that a state cannot authorize its judges or others to exercise judicial power over United States agents. When the state court has been informed judicially that the imprisoned party is held in United States authority, the state's judicial right ends.¹¹⁹

In conclusion in his private manuscript, the Chief Justice opines: "The State sovereignty preserves tranquillity in the State, and guards the life, liberty, and property of the individual citizen and protects him in his home and in his ordinary business pursuits."¹²⁰

C. The *Antrim* Case and Others

The Enrollment Act of 1863 was declared constitutional in *Antrim's Case*,¹²¹ 9 September 1863 by Judge Cadwalader (D) in the Federal District Court for the Eastern District of Pennsylvania. Under the facts, a draftee reported for duty, was issued a uniform, granted a leave of absence, and, while on leave, sought habeas corpus to be released from the army. Previously, the District Enrollment Board had denied him exemption as the only son of a widow whom he supported. The court held that the Board determination was not final in that any further judicial review was precluded. The term "final" as used in Section 14 of the Enrollment Act meant free only from executive revision or the proceedings of courts-martial. Congress could not vest final independent judicial powers in enrollment boards. The court went on that the purpose of the statute was to raise an exclusively national military force through the federal draft and to raise a national army independent of state militia organizations and methods. The authority to enact the enrollment law was viewed to derive exclusively from the power in Congress to raise and support armies.

¹¹⁶ Ibid.

¹¹⁷ 62 U.S. (21 Howard) 506 (1859).

¹¹⁸ 9 Stat. 462.

¹¹⁹ For a general discussion of the Chief Justice, consult C. W. Smith, Jr., Chief Justice Taney (1935) and Swisher, Roger B. Taney (1935).

¹²⁰ Steiner, op. cit., 511.

¹²¹ 1 Fed. Cases (No. 495) 1063.

In the case of *Cornelius McCall*,¹²² Judge Cadwalader in the District Court for the Eastern District of Pennsylvania was concerned with each of the Enrollment Act of 1863 and the Militia Act of 17 July 1862. Shortly after enactment of the Act of 1863, a Pennsylvania militia man was arrested as a deserter under the asserted authority of the 1863 Act. McCall petitioned for a writ of habeas corpus urging illegal restraint by military officers under an assumed authority by the President. The court concluded that while McCall was not subject to the Enrollment Act of 1863, it was proper to consider whether he was a "drafted person" who had deserted with regard to the Act of 17 July 1862. The court discharged Cornelius McCall because his name was entered inaccurately as "Naylor McCall" on the enrollment muster of the state militia. The court, however, goes on to uphold by dictum the 1863 Act and to sustain a muster based upon what should be correct personal identification under the Act of 1862. The court stated:¹²³

"The constitution of the United States authorizes congress to raise armies, and also to call further and organize the militia of

the several states. Under this twofold power, both regular national armies, and occasional militia forces from the several states, may be raised, either by conscription or in other modes. *Houston vs. Moore*, 5 Wheat (18 U.S.) 17.¹²⁴

The power to raise them by conscription may, at a crisis of extreme exigency, be indispensable to national security."

The Enrollment Act of 1863 was affirmed by the United States Circuit Court, Southern District of Illinois, on 15 June 1864 in *United States vs. John Graham*.¹²⁵ The opinion delivered by Mr. Justice Treat with Justice Davis concurring arose from a motion to quash an indictment of several men who resisted enrollment in Fulton County, Illinois, in 1863. The court developed that compulsory military service could be demanded of every able-bodied man. Compulsion was as legitimate a means to expand the army as volunteering.

In *re John Baldinger*,¹²⁶ each of the Presidential Proclamation suspending the writ of habeas corpus and the Enrollment Act of 1863 was sustained by Judge Samuel R. Betts on 18 September 1863 in the United

¹²² 15 Fed. Cases (No. 8669) 1225 (1863).

¹²³ *Id.* at 1226.

¹²⁴ See note 50, *supra*.

¹²⁵ The *Graham* case is not reported in official records; consult *Illinois Daily State Journal*, 17 June and 2 July 1864, p. 2; the case is mentioned in 2 Greeley, *op. cit.*, 509.

¹²⁶ The *Baldinger* case is not reported in official records; consult "Washington Daily Chronicle", 19 September, 1863, p. 2; "New York Times", 18 September 1863, p. 2; the case is discussed in Leach, *op. cit.*, 373.

States District Court for the Seventh District of New York. Baldinger enlisted as a substitute while intoxicated and thereafter returned home where he was arrested as a deserter and held by military authorities. The court determined that the September 1863 Presidential Proclamation suspending the writ of habeas corpus removed the matter from that time from the jurisdiction of the court. As to the Enrollment Act, the court declared that "the Government can call every man into the field if necessary . . . the Government has the right to defend its existence . . . it is enough that he (the citizen) is called on by the Government and is within its reach".

In re *Daniel Irons*,¹²⁷ a decision by the Circuit Court for the Northern District of New York, it was held that a person drafted under the Act of 3 March 1863, is in the military custody and subject to military jurisdiction from the appointed hour when the draftee is instructed by written notice to report to the Provost Marshal regardless of whether or not in fact the draftee does report.

Although the United States Supreme Court did not construe the Enrollment Act, the court did answer two questions certified to the court under the Act concerning the service

of a notice of the draft and whether obstructing an enrolling officer was a penal offense. The issue of constitutionality was not raised in either instance and the court did not pass upon the validity of the Act.¹²⁸

D. Habeas Corpus Suspension

Attorney General Edward Bates in a written opinion on 5 July 1861 declared that the President has power to arrest suspected persons and to suspend the writ of habeas corpus.¹²⁹

An extremely controversial war power of the President from 1861 to 1865 was the privilege of suspension of the writ of habeas corpus.¹³⁰ The first suspension occurred shortly after the outbreak of hostilities in April 1861 when the President proclaimed the suspension in the area between Washington and Philadelphia. This led to the arrest of the Chief of Police and the Mayor of Baltimore and numerous members of the Maryland Legislature.¹³¹ Lincoln first used the power during the absence of Congress and then presented the matter to Congress when it convened in July 1861. The President warned his military officials to use the suspension with great care.¹³²

In May 1861, John Merryman of Baltimore was arrested as a South-

¹²⁷ 13 Fed. Cases (No. 7,066) 98, September 1863.

¹²⁸ *United States vs. Scott*, 70 U.S. (3 Wall) 642 (1865); *United States vs. Murphy*, 70 U.S. (3 Wall) 649 (1865).

¹²⁹ McPherson, *History of the Rebellion* (3d Ed. 1876) 158-161.

¹³⁰ Fish, *op. cit.*, 455.

¹³¹ McPherson, *op. cit.*, 152-153.

¹³² Randall, *op. cit.*, 154.

ern sympathizer and spokesman and was confined in Fort McHenry. Mr. Chief Justice Taney assailed the detention of Merryman who had forwarded a petition to the Chief Justice praying for the issuance of a writ of habeas corpus and for a hearing. The Chief Justice granted a hearing, but General George Cadwalader refused to produce the man from confinement and the United States Marshal was refused entry to the fort in order to serve the writ.¹³³ In this impasse, the Chief Justice apparently sitting in the Circuit Court¹³⁴ on 28 May 1861, accepted the situation, but protested the action of the military in ignoring the writ of habeas corpus,¹³⁵ and stated that only Congress could suspend the writ.

Congress ratified on 6 August 1861, the actions of the President and thus gave a semblance of legality to the Presidential proclamation of the suspension of the writ.¹³⁶

On 3 March 1863, a general suspension of the writ by the President was authorized by Congress.¹³⁷ Thereafter, the President empowered all military, naval and civil officers of the United States to hold any person

in custody as prisoners of war, spies, or aiders or abettors of the enemy.¹³⁸ This suspension continued for the duration of the war.

E. Arver vs. United States¹³⁹

In this Supreme Court decision handed down in 1918, the court resolved the Selective Draft Law Cases and upheld the constitutionality of the Selective Service Act of 1917.¹⁴⁰ In arriving at a decision, the court cited the Enrollment Act of 1863 and reviewed the course of Congressional legislation during the Civil War concluding that the operation of the Enrollment Act produced a force of about a quarter of a million men. The court declared by Mr. Chief Justice White:

“. . . the constitutionality of the Act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment (*Kneedler vs. Lane*, 45 Pa. St. 238).¹⁴¹

¹³³ McPherson, op. cit., 154-156.

¹³⁴ Id. at 158.

¹³⁵ Id. at 155.

¹³⁶ 12 Stat. 326, Act of 6 August 1861.

¹³⁷ 12 Stat. 755.

¹³⁸ McPherson, op. cit., 177-178.

¹³⁹ 245 U.S. 366 (1918) involving six causes consolidated on appeal.

¹⁴⁰ 40 Stat. 76, 50, U. S. C. A. App. 201-211, Pub. Law 12, 65th Cong., ch. 15 (H.R. 3545).

¹⁴¹ 245 U.S. at 388.

In *Arver*, the court cited the Confederate Conscription Act of 16 April 1862¹⁴² as a "selective draft law" not differing in principle from the Selective Service Act of 1917.

V. THE OAKES REPORT AND THE FRY RECOMMENDATIONS

Brig. General James Oakes served from 4 June 1863 until August 1865 as Acting Assistant Provost Marshal General for the State of Illinois and headed the Union Draft in that state.¹⁴³ In a written report dated 9 August 1865, General Oakes submitted specific recommendations based upon his personal experience with the Federal Enrollment Act of Illinois. The specific suggestions of General Oakes proved of vital aid in the drawing of selective service legislation in 1917.¹⁴⁴ The basic recommendations in the Oakes report are:¹⁴⁵

1. The draft machinery should be *civilian operated* rather than by the military.
2. All data essential to the computation of quotas, credits, etc., should be sent to a central of-

fice for the system together with duplicate copies of enrollment lists of names.

3. Selection of men for military service or for deferment should be done by *local boards* functioning within the local communities where the inductees reside.
4. Each enrollee should *register at a designated place* rather than be enrolled by the military in a house-to-house canvass.¹⁴⁶ The obligation should rest upon a man to report himself to the board.
5. Bounties, substitution and commutation for service should not be allowed. Each enrollee if accepted should serve personally.
6. The *State* rather than a congressional district should be the major unit of draft administration.
7. Deserters should be dealt with severely, and, after the end of hostilities, the government should not become lenient to deserters.

¹⁴² Statute cited in note 57, *supra*.

¹⁴³ PMG II, 3, 37.

¹⁴⁴ Crowder, *The Spirit of Selective Service* 7-8 (1920); *Selective Service System, 1 Backgrounds of Selective Service* 74 (1947) (hereinafter termed *Backgrounds*).

¹⁴⁵ PMG II, 1-37; the report is also set forth in *Backgrounds, Appendices No. 24*, p. 154 et seq.

¹⁴⁶ For a discussion of the 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, 35 DA Pam 27-100-13.

8. The period of military service should be for the *duration* of the emergency. Short enlistments should be prohibited and at least a minimum time of three years service should be enforced in all the states.
9. A competent medical officer should be assigned to duties in each state headquarters to direct and supervise the physicians assigned to the boards and to advise as to all medical examinations and reports.
10. A Government Attorney should function in each of the headquarters to whom legal questions should be referred for advice.
11. Quotas should be definite and credits be allowed to a State for enlistments.
12. Clean, adequate railroad accommodations should be assured to recruits moving under orders to report at assembly points.
13. A system of passes should be utilized to prevent an exodus from the country of persons liable to enrollment and draft.
14. Determination of liability should be made at the *place of actual residence* and not at a casual place of registration.

Provost Marshal General Fry in his Final Report dated 17 March 1866,¹⁴⁷ made certain specific recommendations for the improvement of the draft system. General Fry had served since appointment on 17 March 1863.¹⁴⁸ The particular proposals include:

1. Substitute brokerage should be suppressed.
2. *Bounties should not be paid* by "localities" (presumably referring to states, cities and counties.)
3. Every man over 18 years of age should be obligated to *register himself* on the enrollment list of his sub-district where he resides within one month from a date set by the Secretary of War.
4. If an enrollee is not liable to serve, his board should give him a certificate, signed by the board members, stating the reasons for exemption.¹⁴⁹

The Provost Marshal General stated with regard to his Bureau: "The law made it the duty of this bureau to *take*, but did not make it the duty of anyone to *give*, the names of those liable to draft". (Emphasis not added)¹⁵⁰

General Fry reported the per capita cost of recruitment under the Enrollment Act as \$9.84, while the cost

¹⁴⁷ PMG I, 1 et seq.

¹⁴⁸ Id. at 1.

¹⁴⁹ Id. at 1-27.

¹⁵⁰ PMG I, 19.

before the organization of the bureau is stated to be \$34.01 per man.¹⁵¹ These figures do not allow for bounties — federal, state, city and county — paid to recruits. We have noted that the sum \$586,164,528 was estimated to be paid in bounties during the war which works out at \$217.87 per man.¹⁵²

VI. CONCLUSION

“When it was all over those who went home made a new nation.”¹⁵³

Major General E. H. Crowder, Provost Marshal General in 1917-1918 and director of Selective Service during those years stated anent the Enrollment Act of 1863:

“Here was the first wide departure from the old theory of citizenship. Theretofore the liability of the citizen to perform military service had been recognized. But it was liability to the state, not a liability to the nation. Now the awakened national consciousness born of the struggle to preserve the union, envisioned in the necessity of the hour a higher obligation than that of duty to the state. The law imposed upon the citizen a direct and personal obligation to the nation. The

dawn of a new nationalism had arrived.”¹⁵⁴

The role of the militia diminished in importance. A new expression — the “national forces”¹⁵⁵ — became of lasting significance in military planning.

In the Union, the gamut had been run in the stages of a call for volunteers, state draft, presidential draft, and, finally, national conscription in March 1863. In the Confederacy, national conscription was achieved first in point of time in the Act of 16 April 1862.¹⁵⁶ In each section, the trial and error method demonstrated that there was no place in the conscription system for such matters as substitution, commutation, bounties, exclusion of civilian participation, house-to-house enrollment, etc. A relatively obscure civilian-soldier made a permanent contribution to our present knowledge and methods. General Oakes created a blueprint for what became in great part the Selective Service of World Wars I and II, Korea, and 1961. The experience — costly and devastating — of the Draft in the Civil War was necessary to the evolution of the principles of Selective Service as practiced today in a reunited nation.

¹⁵¹ PMG I, 2.

¹⁵² See note 85, *supra*.

¹⁵³ Newman & Long, *The Civil War Digest* 242 (1960).

¹⁵⁴ Crowder, *op. cit.* 81.

¹⁵⁵ 12 Stat. 731, Act of 3 March 1863, “for Enrolling and Calling out the National Forces.”

¹⁵⁶ Statute cited, note 57, *supra*.



Major General Charles L. Decker

THE JUDGE ADVOCATE GENERAL OF THE ARMY

Major General Charles L. Decker became The Judge Advocate General of the Army on 1 January 1961.

General Decker, a native of Kansas, received his education at the University of Kansas, the United States Military Academy and Georgetown Law School. He was commissioned as an infantry officer in 1931 and served with the 29th Infantry and the 14th Infantry. He also was an instructor at the Academy. On graduation from law school, he was admitted to the Bar of Kansas in 1942. He has served as a Judge Advocate at all levels of command from division to Department of the Army, with the exception of the Army Group. During World War II he was the Staff Judge Advocate of the XIII Corps in the European Theatre.

He was the first commandant of the Judge Advocate General's School at Charlottesville, Virginia, and between 1951 and 1955 saw to the development of that School from small beginnings to the very fine institution that it is today.

General Decker has long been active in the American Bar Association and serves as a member of a number of its committees and sections. Last year, he was chairman of the Criminal Law Section. General Decker also is a charter member of the Judge Advocates Association and currently a member of that body's board of directors.

General and Mrs. Decker reside at 4200 Cathedral Avenue, N.W., in Washington.





Major General Robert H. McCaw

THE ASSISTANT JUDGE ADVOCATE GENERAL OF THE ARMY

Major General Robert H. McCaw is a native of Iowa. He received his law degree in 1931 from The Creighton University Law School. He engaged in the general practice of law in Omaha, Nebraska and specialized in insurance law in Los Angeles, California. He was commissioned a second lieutenant in the infantry reserve in 1928. In World War II, he served as Staff Judge Advocate of the 78th Infantry Division until in 1944, he became Judge Advocate of the 1st Airborne Task Force and served in North Africa and Europe. In the latter stages of the War, he served successively as Deputy Judge

Advocate of the 6th Army Group, Staff Judge Advocate of the 1st Allied Airborne Army and as Staff Judge Advocate of the 1st Airborne Army in Berlin. He was commissioned in the regular Army in 1946. Since that time he has served in the Canal Zone, the Far East, Europe and in the Office of The Judge Advocate General in Washington.

General McCaw is a member of the American Bar Association and a charter member of the Judge Advocates Association. He and Mrs. McCaw reside at 4536 Dittmar Road, Arlington, Virginia with their two children, Robert and Martha.





Brigadier General Alan B. Todd

PRIVATE TO GENERAL

Alan B. Todd was commissioned Brigadier General on 24 February 1961, and appointed Assistant Judge Advocate General of the Army for Military Justice, just 20 years after he had entered the Army as a private. General Todd, a native of Connecticut and graduate of the University of Miami and Harvard Law School, had been a practicing lawyer in the City of New York for 3 years prior to his entering service with the Anti-Tank Company, 29th Infantry, Fourth Infantry Division at Ft. Benning, Georgia. He was commissioned as second lieutenant in the infantry in 1942 on graduation from Officer

Candidate School. He served as an infantry officer and military police officer in the European Theatre. He was commissioned in The Judge Advocate General's Department, Regular Army in 1947, and since that time has served with distinction in many legal assignments in the Far East, Europe and here at home.

General Todd is a member of the American Bar Association and presently a member of the board of directors of the Judge Advocates Association. General and Mrs. Todd live with their 4 children at 1204 Inglewood Street in Arlington, Virginia.



JURISDICTION OVER LAND MASSES IN SPACE

By Colonel Martin Menter *

As law is not an exact science, there are many areas where governing rules are not definitive and determinations are made on a case-by-case basis. While we have understanding of each nation exercising "sovereignty," the geographical limits of a nation's sovereignty are uncertain. For example, we have no universally accepted rule of international law as to the geographical limit of a nation's territorial sea, or the upward geographical limit of its sovereignty above its surface. Where new lands on earth have been discovered and settled, disputes as to sovereignty thereof have sometimes arisen which were resolved by arbitration, court determination or by war. Even if the governing rules for sovereignty over new lands on earth may be said to be well understood, certainly difficulty has been experienced in the application of such rules. The difficulties of satisfying the requirement of "effective occupation" are reflected in the note of April 15, 1929, of Mr. Bachke, the then Norwegian Minister, delivered to Mr. Stimson, the then United States Secretary of State. The note concerned

U.S. and Norwegian exploration at Antarctica and referred to territory taken possession of by Captain Amundsen in the name of the King of Norway during December 1911. This 1929 note, in part, read:

"My Government has instructed me to add that while it is not my intention at the present time to claim sovereignty to the territories referred to above, it considers that the said [1911] discovery and annexation constitute a valid basis for a claim of priority to acquire such territories whenever the requirements of international law as to effective occupation of a new territory shall have been fulfilled."¹

Certainly if effective occupation is a difficult criterion on Earth, how much more difficult it will be in an environment hostile to natural life, as we know it. Nevertheless, our basic question remains:

Are the rules for acquisition of sovereignty by effective occupation developed for the celestial body Earth, applicable to other land masses in space?

* The author is a Judge Advocate, USAF; his present assignment is as Chief Attorney, General Law, Office of the General Counsel, Federal Aviation Agency. This article is taken from an address given by the author (introductory preliminaries omitted) at the International Institute of Space Law of the International Astronautical Federation held in Washington, D. C. on October 4, 1961. The views expressed are the author's and are not to be construed as representing the views or policy of any agency of the United States Government.

¹I. Hackworth, *Digest of International Law*, 1940, p. 454.

To properly approach this problem, it may be profitable to examine briefly how law in the past had developed. This in turn includes a consideration of the evolution of man and society. In applying existing law to new situations, the underlying reasons for the rule should be perused to determine their application to the new factual environment.

I believe that through the ages, the law on any given subject reflects man's sense of what is just and proper, as conditioned by his needs and environment.

Man and society are a part of the continuing evolutionary development of life on earth which began—we have now learned by our atomic achievements—about 1,750,000 years ago. Our universe itself, however, has existed for billions of years. It was only about 8,000 years ago, at the end of the Fourth Ice Age that man began settling down by the shores of lakes and rivers. Tribal villages grew and society which originally had been organized on a familial or tribal basis assumed the character of a territorial and eventually a political organization. As villages grew, agricultural and animal husbandry developed. Property lines assumed significance. Villages began trading with one another and alliances were formed. While most vil-

lages remained agricultural, some became centers of trade, commerce, and manufacture, and grew into cities and metropolises.^{2 3 4}

What rules governed early man's actions? The early hunter respected tribal boundaries on pain of a retaliatory arrow for hunting in another's domain. Social control within these early cultures, as they progressed from family to tribe to city-state, was through their evolved folkways and mores and the mandates of the family and tribal leader or head of state. Unwritten rules evolved that were believed to emanate from concepts of rational behavior prompted by nature. The development of this philosophical conception is attributed to the Stoics in Greece and was adopted by the Romans. It was known as "jus naturale," or "the natural law" and meant in effect the sum of those principles which ought to govern human conduct because founded in the very nature of man as a rational or social being. This concept of "natural law" is an underlying principle frequently forming the basis for legislative and judicial actions.^{5 6}

The late Judge John J. Parker, in discussing his concept of law in an article entitled "The Role of Law in a Free Society," stated:

² Coon, Carleton S., *The Story of Man*, 1958, pp. 6, 9, 22, 115, and 122.

³ Reither, Joseph, *World History at a Glance*, 1958, pp. 3-5.

⁴ Lee, Alfred, *Principles of Sociology*, 1957, pp. 82-84.

⁵ Lee, *op. cit.*, pp. 105, 152 and 153.

⁶ Brierly, J. L., *The Law of Nations*, 5th Ed., 1955, pp. 1, 16-18, 23.

"... There is something . . . in the nature of human beings and of society that they compose that determines how society should act and how the members of society should act toward one another. This is law in its true sense. It must be interpreted in terms of rules and these rules must be enforced by the power of the state, but it must never be forgotten that the source of law is not the power that enforces the rules but the life that gives rise to the power, and that the source of the rules is not the power but reason applied to the life from which the power arises."⁷

An earlier jurist, Hugo Grotius, generally accepted as the "father of international law," in his early (1604) writing made reference to the concept of natural law as a basis for the law of nations, or international law. He quoted Cicero as having declared in his *Tusculan Disputations* that "on any matter, the consensus of all nations should be regarded as a precept of the natural law." Grotius later stated:

"For just as the common good of private persons gave rise to the precepts above set forth, so also, owing to the existence of a

common good of an international nature, the various peoples who had established states for themselves entered into agreements concerning that international good . . ."⁸

The concept of natural law recognizes that a governing principle may be appropriately modified through the years to accord to the needs of a changing society. As stated in 1814 by Judge Van Ness of the Federal Circuit Court for the District of New York:

"... The law of nations, without defining or developing its divisions more minutely, may be stated to be the law of nature, rendered applicable to political societies, and modified in progress of time, by the tacit or express consent, by the long established usages and written compacts of nations; usages and compacts become so general that every civilized people ought to recognize and adopt their principles . . ."⁹

International law is of slow growth and has its roots in antiquity. However, as a body of law between sovereign and equal states, it dates only from about the time of Grotius, or about 400 years.¹⁰

⁷ *American Bar Association Journal*, 1950, p. 180, republished in *The Lawyer's Treasury*, ABA, 1956.

⁸ *Commentary on the Law of Prize and Booty*; (1950 reprint) pp. 12 and 26.

⁹ *Johnson et al. v. 21 Bales, etc.*, Jan. 1814, Case No. 7417, 13 Fed. Case, p. 857.

¹⁰ Oppenheim, *International Law*, Vol. 1, 8th Ed., 1955, p. 72.

The chief recognized sources of international law are reflected in paragraph 1 of Article 38 of the Statute of the International Court of Justice, which recites:

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

It is believed beneficial to give consideration to some of such sources as are here pertinent.

One of our oldest and now well-established rules of international law is the concept of the freedom of navigation on the high seas. This concept exhibits a steady growth whose origins lie in the political struggles between Spanish claims on the one hand, and the claims of England and the opinions of Grotius on the other.^{11 12} The concept was early modified to the extent of recognizing that a coastal state should have jurisdiction over its adjacent territorial sea.^{13 14} The development of the airplane has led nations to declare, for like reasons of protection, that their sovereignty also extended to the airspace above them.¹⁵

The evolutionary development of the international law governing acquisition of sovereignty over land on Earth has necessarily been a slow process. While it has been generally recognized that only *terra nullius* (i.e., land not already forming part of the domain of any state, and whether or not inhabited) is subject to acquisition by occupation, the difficulty has been in determining whether such was the status of the land at the time of the claimed annexation and whether a particular discovery had ripened into the "occupation" required. In the *Island of Palmas*

¹¹ C. J. Colombos, *The International Law of the Sea*, 4th Rev. Ed., London, 1959, pp. 48-49.

¹² Butler and Maccoby, *History of International Law* (Carnegie Endowment Contributions to International Peace), London, 1927, devotes a whole chapter to the subject.

¹³ Grotius, Hugo, *De Jure Belli ac Pacis*, 1625.

¹⁴ *U. S. v. California*, 322 US 35.

¹⁵ *Smith v. New England Aircraft Co.* (Mass. 1930), 170 N.E. 385; 69 ALR 308.

case,¹⁶ Judge Max Huber, the Arbitrator of The Tribunal of the Permanent Court of Arbitration, held that the United States' claim derived through cession of the Philippine Islands by Spain in 1898, and based an earlier discovery alone without subsequent exercise of authority upon the island, was not sufficient to overcome The Netherlands' claim to the island based on continuous uncontested peaceful display of dominion in the period from 1706 to 1906.

Some statements of the Arbitrator, Judge Huber of Switzerland, are here particularly worthy of note, viz:

"The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right.¹⁷

* * *

"Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ ac-

ording as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas.¹⁸

* * *

"International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals.¹⁹

* * *

"International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection. If, as in the present instance, only one or two conflicting interests is to prevail, because sovereignty can be attributed to but one of the Parties, the interest which involves the maintenance of a state of things

¹⁶ *Reports of International Arbitral Awards*, Vol. II, p. 829, 22 A.J.I.L. 867, April 1928.

¹⁷ *Id.*, p. 839.

¹⁸ *Id.*, p. 840.

¹⁹ *Id.*, pp. 845-846.

having offered at the critical time to the inhabitants of the disputed territory and to other States a certain guarantee for the respect of their rights ought, no doubt, to prevail over an interest which—supposing it to be recognized in international law—has not yet received any concrete form of development.”²⁰

In the case of *Legal Status of Eastern Greenland*,²¹ the Permanent Court of International Justice upheld the Danish claim to sovereignty over the entire island of Greenland as against the Norwegian claim proclaimed in 1931 of acquisition by occupation of certain portions of Eastern Greenland which Norway argued were *terra nullius*. The court here found that the Norwegian Minister had earlier advised Denmark, on July 7, 1919, on inquiry, that Norway would not oppose Danish plans for control of Greenland. This reply the court found as binding on Norway and that:

“Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland.”²²

Statements of the International Court of particular interest to us were:

. . . claim to sovereignty based not upon some particular act or

title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.

“Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger. One of the peculiar features of the present case is that up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up till 1921, no Power disputed the Danish claim to sovereignty.

“It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other

²⁰ *Id.*, p. 870.

²¹ P.C.I.J., Series AB, No. 53, April 5, 1953.

²² *Id.*, p. 73.

State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." ²³

In light of the circumstances present, as between the parties to the dispute, the court concluded that Denmark must be regarded as having displayed from 1814 to 1915 her authority over the uncolonized part of the country to a degree sufficient to confer a valid title to the sovereignty.

One of the foremost international law treatises is that of Professor L. Oppenheim. The 8th edition thereof ²⁴ succinctly summarizes the law of occupation. In pertinent part, it states:

"Theory and practice agree nowadays upon the rule that occupation is effected through taking possession of, and establishing an administration over, territory in the name of, and for, the acquiring State. Occupation thus effected is *real* occupation, and, in contradistinction to *fictional* occupation, is named *effective* occupation. Possession and administration are the two essential facts that constitute an effective occupation."²⁵

* * *

"In former times, the two conditions of possession and administration, which now make the

occupation effective, were not considered necessary for the acquisition of territory through occupation. Although even in the age of discoveries States did not maintain that the fact of discovering a hitherto unknown territory was equivalent to acquisition through occupation by the State in whose service the discoverer made his explorations, the taking of possession was frequently in the nature of a mere symbolic act. Later on, a *real taking possession* was considered necessary. However, it was not until the eighteenth century that the writers on the Law of Nations demanded *effective* occupation, and not until the nineteenth century that the practice of the States accorded with this postulate. But although nowadays discovery does not constitute acquisition through occupation, it is nevertheless not without importance. It is agreed that discovery gives to the State in whose service it was made an *inchoate* title; it 'acts as a temporary bar to occupation by another State' for such a period as is reasonably sufficient for effectively occupying the discovered territory. If the period lapses without any attempt by the discovering State to turn its *inchoate* title into a *real* title of occupation, the inchoate title

²³ *Id.*, pp. 45-46.

²⁴ Oppenheim (Edited by H. Lauterpacht); Longmans, Green and Co., London, 1955, Vol. I.

²⁵ *Id.*, § 222.

perishes, and any other State can then acquire the territory by means of an effective occupation.²⁶

* * *

"Since an occupation is valid only if effective, it is obvious that the extent of an occupation ought only to cover so much territory as is effectively occupied. . . ."²⁷

* * *

". . . the Power which assumes sovereignty over the occupied territory is thereafter responsible for all events of international importance on the territory. It must, in particular, maintain a certain order among the native tribes so as to restrain them from acts of violence against neighbouring territories, and must punish them for such acts if committed."²⁸

Another source of international law pertinent to our consideration is the presently concluded Antarctic Treaty.²⁹ Here, the Governments of Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, the Union of South Africa, the USSR, the United Kingdom of Great Britain and Northern Ireland, and the United States, are joining together for their mutual benefit in the

development of the new continent. Under Article III of the text of the Agreement, the parties agree that "to the greatest extent feasible and practicable:

(a) information regarding plans for scientific programs in Antarctica shall be exchanged to permit maximum economy and efficiency of operations;

(b) scientific personnel shall be exchanged in Antarctica between expeditions and stations;

(c) scientific observations and results from Antarctica shall be exchanged and made freely available.

2. . . . every encouragement shall be given to the establishment of cooperative working relations with those Specialized Agencies of the United Nations and other international organizations having a scientific or technical interest in Antarctica."

Article IV is especially apropos. Here, the parties agree that the Treaty will not be construed as a renunciation or diminution of any State's claim or basis of claim to territorial sovereignty in Antarctica. At the same time, the parties, however, agree that no acts or activities taking place while the Treaty

²⁶ Id., § 223.

²⁷ Id., § 225.

²⁸ Id., § 228.

²⁹ T.I.A.S. 4780, December 1, 1959. The treaty became effective when the last of 12 signatories deposited their instruments of ratification on June 23, 1961.

is in force shall constitute a basis for creating rights of sovereignty or for asserting, supporting or denying a claim to territorial sovereignty in Antarctica. Further, no new claim to territorial sovereignty in Antarctica may be asserted while the treaty is in force.

These provisions, covering the sensitive problem of territorial claims is one of the most significant aspects of the treaty. Seven of the twelve countries which signed the treaty had previously asserted claims of sovereignty to portions of Antarctica. However, the United States and the Soviet Union have neither asserted any territorial claim, nor do they recognize the claims of others.³⁰

From the foregoing it is seen that where extension of sovereignty over a *terra nullius* has been recognized by the family of nations, the extension of sovereignty rested upon an "effective occupation." This required the taking of the territory by the acquiring sovereign with the *animus* of exercising dominion over it. The initial taking constituted but an inchoate right, which acted as a temporary bar to occupation by another State, to permit the occupying State within a reasonable period to effect possession in fact by establishing sufficient administration within the territory claimed to reflect the exercise of the sovereignty claimed. The degree of action by a claimant to constitute "effective possession" is recognized to vary dependent upon

the number of claimants, the relative merits of each claim as opposed to one another, and the nature of the territory—i.e., whether accessible, habitable, barren, or sparsely settled. The sovereignty that may be claimed is limited to that area concerned with the occupation.

This principle of effective occupation, in major part, is exemplary in its evolution of the application of the natural law. It was designed to serve mankind in his continual spread about the Earth. However, rules of sovereignty do not necessarily apply to each plateau of man's advancement. The concept of the freedom of the high seas is an early example. The question of sovereignty in the airspace was academic in the 16th century when the then Queen Elizabeth, and later Grotius, in advancing the concept of the freedom of the high seas, stated that the sea and the air were common to all and hence not subject to occupation. Nevertheless, when the question of sovereignty in the airspace was no longer academic, nations were quick to reject the concept of any general freedom of the airspace except that over the high seas. The very first Article in the "Convention on International Civil Aviation" (the Chicago Convention of 1944) expressly recited the customary international law that "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."³¹

³⁰ U. S. Senate, Executive B, 86th Cong., 2nd Sess., p. 3.

³¹ Convention on International Civil Aviation, December 7, 1944, 61 Stat. 1180, TIAS 1591.

Can we now conclude that past rules of effective occupation on Earth extend to land masses in space? While man through the processes of evolution is "tailor-made" to inhabit the Earth, he is not constituted to similarly inhabit the other celestial land masses in our solar system. However, even here on Earth by technological achievement man has extended his evolutionary domain. He has devised means of air and space travel, and of exploring our ocean depths. What was difficult and time consuming in exploring the interiors of unknown continents in Columbus' day, while not less difficult, may be more quickly accomplished on the moon and perhaps on other celestial land masses with the unfolding scientific developments of this Age. If we develop the capability to debark on land masses in outer space, our explorations, unlike those of the past on Earth, will not start at a shoreline and work towards the interior. In fact, the natural perimeters of past explorations will be different. We shall probably disembark on "land" of our choosing on the land masses concerned. Our area of effective occupation, however, will be sharply limited to the state of our developed ability for space survival and exploration. This will be due to lack of oxygen, food, water, atmosphere, the variations of temperature, radiation hazards, and other dangers encountered in travel to, and sojourn on, the land masses concerned. Assuming the application of past "earth-law" principles, initial visits would create but inchoate rights which, because of the natural perils

to success of any occupation, could not effectively ripen into "effective occupation" until demonstrated success of the colony over a substantial period of time.

Many organizations, individuals, and governments have argued either that celestial bodies are not, or should not be, subject to exclusive appropriation by any nation. Sir Leslie K. Munro, President of the 12th Session of the United Nations General Assembly, in an address on June 11, 1958, recited his opinion "that international law as we know it in respect to the acquisition of title by occupation and possession and settlement is not applicable to celestial bodies." In a recent address before the American Bar Association, on August 9, 1961, in St. Louis, Missouri, Sir Leslie Munro urged that nations should expressly agree to such conclusion. The American Bar Association itself, by resolution of its House of Delegates, in August 1959, had argued the adoption of the principle "that celestial bodies should not be subject to exclusive appropriation." Earlier, in May 1959, in a treatise entitled "Astronautical Law," I discussed the possible application of existing principles of law to outer space and recommended that the United States "Adopt and announce the position that it has no desire to claim sovereignty over celestial land bodies to the detriment of any nation, and within the United Nations invite all member nations to jointly (1) disclaim rights of sovereignty over celestial land bodies and (2) agree that sovereignty over celestial land bodies will be exercised

as the U. N. General Assembly may determine." ³² On May 19, 1958, Mr. Dag Hammarskjold, as Secretary General of the United Nations, expressed hope that the General Assembly "would find the way to an agreement on a basic rule that outer space and the celestial bodies therein, are not considered as capable of appropriation by any state . . ." On September 22, 1960, President Eisenhower, in an address before the United Nations, advocated early agreement among the family of nations that "celestial bodies are not subject to national appropriation by any claims of sovereignty."³³

The fact that such agreement is urged itself reflects the absence of certainty that the law of extension of sovereignty to *terra nullius* on Earth would not apply to occupation of land masses in outer space. While we have precatory feelings that such conclusion should not arise, we cannot unequivocally so state. The Earth too is but a celestial body and with vehicles of the future, we must for present purposes assume man will extend some of his activities to man-made and other celestial land bodies. The establishment of some legal order thereon too must be assumed. As man took his laws with him on ship crossings of oceans on Earth, he can argue that on crossing space between land masses in our solar system,

sometimes in less time and with instant communication between terminals, he takes many such laws with him. If the reasons which gave rise to the rule on Earth can be cogently argued to have similar application on land masses in outer space, the claim of such application may well be made. This rather nebulous state of law that could arise, should nations not agree to the concept that celestial bodies are not subject to national appropriation by any claims of sovereignty, was perhaps seen by Mr. Loftus Becker as Legal Adviser to the United States Secretary of State when, in February 1959, in discussing the question of jurisdiction over celestial land masses, spoke of a policy of "wait and see," similar to that of the United States as to the explorations of Antarctica. He stated that "Under such a policy, we would neither assert claims to such bodies ourselves nor recognize claims asserted by other nations, but would reserve any rights to which our activities might entitle us in the future."³⁴

The spirit of cooperation and mutual understanding reflected in the Antarctic Treaty provides an inspiring glow for the firm resolution of our problem. Certainly, such treaty presents an excellent example and a starting point to such end. Some agreement is essential, before man

³² Menter, Martin, Colonel, USAF, "Astronautical Law," reprinted in U. S. Senate Doc. No. 26, 87th Cong., p. 349, at pp. 372 and 395.

³³ Department of State Bulletin, Oct. 10, 1960, p. 555.

³⁴ Becker, Loftus J., "United States Foreign Policy and the Development of Law of Outer Space," *The JAG Journal*, U. S. Dept. of the Navy, Feb., 1959, p. 30.

asserts any inchoate rights to sovereignty on any celestial land mass in space. Nations which establish settlements on land masses in space may well be reluctant then to surrender whatever rights they may be said to have accrued by such settlement. The time to resolve this problem, therefore, is before such a factual situation may develop. The Antarctic Treaty is clearly apropos. There, mutual support is agreed to, for one settlement to assist another in their work in Antarctica. Further, no action or activities taking place while the Treaty is in force may constitute a basis for a claim to territorial sovereignty or create any rights of sovereignty in Antarctica. The hazards to persons and property in exploration of land masses in space may well be greater than were experienced in Antarctica. Each settlement in space therefore could well provide essential assistance to one another. If with the same spirit of mutual cooperation, an agreement were reached that acts or activities taking place on land masses in space would not constitute the basis of a claim to territorial sovereignty or create any rights of sovereignty on such land masses or that such land masses were not subject to national appropriation by any claim of sovereignty, our problem would be obviated. What an unparalleled opportunity the nations of the world would have for joint peaceful ventures! Such cooperation and mutually supporting or joint international ventures would bring us closer to the

day when bayonets may be converted into plowshares.

Of course, some jurisdiction should be provided, preferably through the United Nations by a body thereof, or by a trusteeship on behalf of and under policies of the United Nations.³⁵ However, the agreement could provide otherwise and itself provide a commission with enumerated authority. The agreement too could provide for property rights, and benefits and obligations flowing therefrom, of the nations providing settlements or undertaking activities on the outer space land body. The agreement could provide for the many matters that may be appropriately included, such as for the settlement of disputes as was done in Article XI of the Antarctic Treaty. Here, if the dispute cannot be resolved by negotiation or other peaceful means, it shall, by consent of the parties to the dispute, be referred to the International Court of Justice. Such an agreement would go far to assure peaceful uses of outer space and the elimination of international friction. By such cooperation, the costs to each nation of space exploration should be reduced while providing a greater harvest of knowledge to all. Such a cooperative effort would make the extension of the Rule of Law to outer space more assured. It will resolve the legal dilemma discussed herein. It will avoid a situation such as portrayed in "Night of the Auk."

In past evolution of man and society when new factual situations arose, man's wisdom gained from his

³⁵ See Arts. 76(a), 77(c), 79, 81, Chap. XII, U. N. Charter.

experience provided a base upon which the Rule of Law was extended to bridge each hiatus. The ponderous problems of sovereignty in the air-space ushered in with the 20th century were generally resolved by the makers of policy by statutes and international agreements. Resolution of the new legal problems ushered in with the space age similarly rests on the willingness of the nations of the world to resolve them. The nations concerned in the Antarctic

Treaty have thus far reflected their good faith that resolution of sovereignty problems can be satisfactorily achieved at the conference table. Let us again earnestly approach the conference table in a determination to now resolve the problem of jurisdiction over land masses in space. Like the formulation of law through the ages, such an agreement should reflect man's sense of what is just and proper, as conditioned by his needs and environment.



Use the Directory of Members when you wish local counsel in other jurisdictions. The use of the Directory in this way helps the Association perform one of its functions to its membership and will help you. You can be sure of getting reputable and capable counsel when you use the Directory of Members.

THE 1962 ANNUAL MEETING

The Annual Meeting of the Judge Advocates Association will be held in San Francisco on the afternoon of 6 August 1962. The hour and place of the business meeting have not yet been established, but plans have been finalized for the annual social event.

Col. John H. Finger, of the San Francisco Bar is chairman of the committee on arrangements. He has arranged a different type of program which is sure to be enjoyable to all the members and their ladies. He has reserved the exclusive use of the Commissioned Officers' Club at Treasure Island which includes the cocktail lounge, main dining room and other reception rooms. The reception

and pre-prandial social hour will begin at 6:00 p.m. Liquid refreshments will be served at regular club prices of 35 to 45¢ per drink. Dinner will be served at 7:30 p.m. A full course dinner with beef and fish courses and wine will be served. From 8:00 until 12:00 midnight, there will be an orchestra and dancing and the bar will remain open all evening to serve those who need additional stimulation from time to time. The entire charge for this gala party of Judge Advocates will be only \$5 per person.

This will be an excellent party of Judge Advocates and their ladies and you are urged now to reserve the date on your calendar.



GET RID OF THIS FALLACY

By Richard L. Tedrow *

It is high time that we forever dispose of the statement by loose speaking and/or unthinking persons that the court-martial system traditionally is merely an instrumentality of the Executive power to aid the President in commanding the military and enforcing discipline. There is not now, nor has there ever been, any legal or legitimate basis for this statement.

I cannot conceive how any person could seriously urge that an American citizen can be tried, convicted and imprisoned (or executed) by some administrative procedure, i.e., an Executive instrumentality, under our Constitution. To state the proposition is to answer it. You do not have to be a lawyer to know this, you only have to be able to read. The President has no more control over the free deliberations and determinations of a court-martial than I have (*Ex Parte Reid*, 100 U.S., 13). To urge this "traditional view" is only to downgrade the military judicial system, the legal profession, and the members of the profession who make the system work.

I cannot understand why members of the military legal profession (other than apple polishers) would make this statement, assume they do not know any better, as it only hurts the profession and their own professional standing. If they know

better and make it, they are dishonest. If they do not know better and are unable to understand such an elementary proposition then I suggest they would be better off in the field of bricklaying or animal husbandry.

The mere fact that you are required to write up an action disposing of a case as desired by a convening authority does not make you an Executive creature, as the action is his not yours. And writing it up the way he wants it does not change the law nor your opinion. All you can do is advise him as to what the law is; if he does not like your law then Congress has authorized him to take any action he wants. But he has no authority to change the law or make you agree with him. A similar situation exists in thousands of law offices where the senior partner decides on the handling of a case, after listening to opposing views from his juniors. Never forget that you are no less a lawyer because you are a military lawyer.

To take care of some of the present diehards I will assume for the sake of argument, but only in passing, there may have been some basis for this claim prior to the Uniform Code. But in this regard I must point out that Professor Morgan (the Father of the Code) prepared and presented this Code to the Congress with the strict injunction from the late Mr.

* Of the District of Columbia Bar. the U. S. Court of Military Appeals.

Mr. Tedrow is Chief Commissioner of

Forrestal that our Code was to mean "complete repudiation of a system of military justice conceived of as only an instrumentality of command" (6 Vanderbilt Law Rev., 169, 170, 1953). Congress passed the Code on this basis, specifically providing Article 37 prohibiting Command Control in any aspect, and providing punitive Article 98 for the punishment of the same. As a matter of fact, the Congress spent more time on the question of Command Control than on any other single item in the Code, with the possible exception of Article 67 on the Court of Military Appeals.

It is possible this "traditional view" fallacy had its genesis in a bootstrap non sequitur by *Winthrop* that is now 'bolstered' by citing the case, and only the name of the case, of *Dynes v. Hoover*, 15 Law Ed., 838. The use of *Dynes*, I have never understood, as that case involved only an unsuccessful civil action by *Dynes* trying to claim that a court-martial that tried him for desertion had no jurisdiction to convict him of attempted desertion. The only quote in *Dynes* affecting this 'executive instrumentality' situation is completely contra to the 'instrumentality' approach. The Supreme Court said (844) that "courts-martial derive their jurisdiction and are regulated with us, by an act of Congress" in regard to the offenses that can be tried, the manner of charging and trial, and the punishment which may be imposed.

It may be that *Dynes v. Hoover* has been tossed around as authority by careless persons who are willing to accept and use a footnote citation

without reading the case cited. But here they are even more careless, as *Winthrop* does not cite that case for the Executive instrumentality claim. He merely cites it (1920 Ed. p. 49, footnote 23) for the statement in the preceding paragraph that a court-martial was not a part of the Article III Judiciary as they were provided for by the Congress under Article I.

This is entirely correct, as Congress has always had plenary power over military courts-martial. And the Congress had and exercised this power for years before we had either a President or a Constitution. Possibly *Winthrop* may never have heard of the term "legislative court", a type of court repeatedly set up by the Congress under Articles I and IV of the Constitution, as he proceeds to state that because courts-martial are not Article III Judiciary they must be in the Executive Department as "simply instrumentalities" of the Executive power.

Winthrop cites no Federal case, citation, or Constitutional provision in support of this unwarranted assertion. By footnote he refers to one *Clode* as stating that this was the situation under British law in respect to the Crown. Assuming *Winthrop* means this *Clode* as 'authority' then apparently his approach is similar to that in an Article urging the Royal Prerogatives of the President, 'So Help Me'; see the NYU Law Review of May, 1959, p. 861, et seq.

I will dispose of this Royal Prerogative nonsense briefly with the back of my hand. The Founding Fathers took the question of Royal

Prerogatives generally into consideration, and they took them specifically into consideration in connection with the armed forces. However, the entire approach of the framers of our Constitution to Royal Prerogatives was deliberately and advisedly negative in nature. They went out of their way to insure that there would be no possibility of any Royal Prerogatives in our form of government after having struggled for six years on the battlefield to free themselves from these same Royal Prerogatives.

Just read in the Declaration of Independence about the "long train of abuses and usurpations" designed to reduce the Colonies under the "absolute Despotism" and "tyranny" of a Government of Royal Prerogatives. Hamilton points out in The Federalist papers (LXIX) that the British Crown power to regulate the armed forces would, under our Constitution, "appertain to the legislature".

A little later some fellow went before the Supreme Court trying to use these Royal Prerogatives and precedents as authority for Executive wartime and military powers. The Supreme Court not only rejected such a claim but it refused to even examine the "English decisions" referred to, stating (*Fleming v. Page*, 13 Law Ed. 276, 282) that:

" . . . there is such a wide difference between the power conferred on the President of the U. S., and the authority and sovereignty which belonged to the English crown, that it would be altogether unsafe to reason

from any supposed resemblance . . . (the existence of any Executive rights and powers) as our Constitution must be our only guide."

Winthrop apparently first wrote his book around 1886, although he had prepared a Digest of JAG opinions published in 1868. He would have benefited if he had taken the trouble to read DeHart's Military Law, written in 1846 by Captain DeHart, an excellent but, unfortunately, little known writer on military law. DeHart points out how courts-martial derive all of their power from the legislature which is the supreme body in our form of government (p. 14). Later in his book (217) he seems to take cognizance of those who would urge some extraordinary powers as commander-in-chief for our President because exercised in some other form of government differently constituted. This necessarily gets us back into the Royal Prerogative situation again. Captain DeHart states that it is proper to draw the inference that the President is the depository of final appellate power in all military judicial matters:

"But let us not claim this power for him unless it has been communicated to him by some specific grant from Congress, the fountain of all law under the Constitution."

And Captain DeHart here quoted from one of the Opinions of Attorney General Wirt, who was one of the more able men to occupy that office. I have respect for Winthrop but he

also had other bad days. Like the time when the Court of Claims refused to allow him to enter his appearance in a case because he was legally disqualified through conflict of interests in a rather obvious situation (29 OP. A.G., 408).

Note: In urging this Traditional Executive instrumentality view those advocates have overlooked an even stronger, but equally baseless, statement by Winthrop in the following paragraph (p. 49), also cited without authority, to the effect that a court-martial is a mere creature of orders unless given some independent discretion by statute, and "it is as much subject to the orders of a competent superior as is any military body or person".

What the Supreme Court has actually and specifically ruled in regard to the court-martial system is that it is completely and entirely judicial in nature (*Runkle v. U. S.*, 30 Law Ed., 1167). In that case the Supreme Court ruled that Presidential approval of a court-martial could not be delegated as it is judicial "not administrative", and went on to quote with approval from an Opinion by Attorney General Bates (1174):

"The trial, finding, and the sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in courts of justice,—rights which, in the very nature of things, can either be exposed to danger, nor subjected to the uncontrolled will of any man, but which must be adjudged *according to law.*"

At this point I think it only fair to repeat that under our form of government no person can be deprived of "life, liberty or property" by some administrative process, i.e., Executive instrumentality. And I add to this one of my favorite quotes where the Court stated in *U. S. v. Hiatt*, 141 Fed. 2d, 664, 666:

"That an individual does not cease to be a person within the protection of the 5th Amendment of the Constitution because he has joined the Nation's Armed Forces and has taken the oath to support that Constitution with his life, if need be."



In Memoriam

The members of the Judge Advocates Association profoundly regret the passing of their fellow members here named, and extend to their surviving families, relatives and friends, deepest sympathy:

Col. Howard A. Brundage of Chicago, Illinois. Col. Brundage was one of the founders of the Judge Advocates Association and its first president.

Maj. Gen. Eugene M. Caffey of Las Cruces, New Mexico. General Caffey was formerly The Judge Advocate General of the Army.

George J. Ditchie of Elmhurst, Illinois

Henry T. Dorrance of Utica, New York

Daniel J. Hallahan of Chicago, Illinois

George B. Harris, Jr. of Waynesboro, Pennsylvania

Daniel L. O'Donnell of South Weymouth, Massachusetts

William S. Yard of Washington, Pennsylvania



BOOK REVIEW

AFTER FIFTEEN YEARS, by Leon Jaworski, Houston, Texas: Gulf Publishing Company, 1961, pp. 154. Price: \$3.50

After Fifteen Years is a philosophical appraisal of Nazi Germany as revealed by the War Crimes Trials and a tract of moral instruction to the author's fellow free men.

Leon Jaworski, as a Judge Advocate officer charged with the investigation and prosecution of Nazi prisoners of war for crimes against their fellow prisoners in the POW camps in the United States, and later with the War Crimes Trials conducted by the United States Army in Germany, came in direct contact with an unbelievable spectacle of brutality and inhumanity. To render an objective and unemotional account of what he found and a rationalization of the cause for the moral decay of the German people under Adolph Hitler that permitted this horrible tale to become part of their history, Colonel Jaworski has waited fifteen years before writing this book.

He demonstrates from his accounts of the trials that the deterioration of the moral fibre of the German people was not confined to the leadership that caused its inception but reached high and low—from persons of the learned professions to the simple citizenry, men and women alike, and irrespective of "good Christian backgrounds". He shows that as Hitler rose to undisputed political power "Indignities and depravities were hailed as the rituals of the new day". Thousands upon thousands of people, motivated by ambition or fear, fol-

lowed the Nazi call and even when they discovered the full scope of its insidiousness they lacked the courage to disown it; others, by the hundreds, were changed from "good" people to ruthless torturers and murderers.

He fully justifies the War Crimes Trials as prosecutions for crimes against humanity by persons personally responsible, and shows the results of those trials were just and arrived at by means which were fair to the parties charged beyond any equivocation.

The moral lesson Colonel Jaworski gives in the conclusion of his book is the answer to the question he pondered fifteen years ago. "Could it happen in America?" His answer:

"No nation, no matter how powerful and great and whatever be its form of government, can long withstand the stranglehold of moral deterioration in its people."

"How then is this deterioration to be averted?—The free institutions that made America great must be kept strong and effective, and their work, done faithfully and militantly under God and the Constitution will preserve us."

After Fifteen Years reveals its author to be a man of moral courage and his words deserve reading and heeding.

Richard H. Love

FRANCIS LIEBER AND THE RULES OF LAND WARFARE

By Dr. John Bothwell McConaughy *

Francis Lieber was born in Berlin, Germany, on March 18, 1800. With two of his brothers, Lieber joined the Prussian army under Blucher and fought through the campaign of Waterloo, receiving wounds which nearly cost him his life at the battle of Namur. About 1811 he had come under the influence of Frederich Ludwig Jahn, the great German teacher and founder of societies for the cultivation of gymnastics and patriotism. It was the first modern youth movement.

Lieber, because of his association with the liberal, Jahn, was arrested in 1819 as a dangerous character. Four months later he was released, but forbidden to study at any German University except Jena, where he received his Ph.D. in 1820. The key to Lieber's character was his love of freedom. It was only natural, therefore, that when the Greek war for liberation broke out, Lieber took an active interest in the struggle.

In January, 1822, Lieber sailed from France from Marseilles to fight with Lord Byron in Greece. Refused food and robbed in that unfortunate country, Lieber, like Byron, became disillusioned. After making his way painfully back to Rome, Lieber approached the famous German his-

torian, Niebuhr, who was so impressed with the intelligence and philosophy of the young man that he hired Lieber to tutor his son. Because Niebuhr was German Ambassador at Rome, Lieber had an entry into Italian society and the world of learning.

After spending about a year with Niebuhr, who was writing a history of Rome, Lieber returned to Berlin in 1823. He studied mathematics until August, 1824, at which time the Prussian Government, in fear of liberal conspiracies, arrested a group of young men, including Lieber, and placed them in prison at Kopenick. While there, Lieber was threatened with life imprisonment because he would not testify against his friends. However, after six months he was released on the petition of Niebuhr. After his release, Lieber found it impossible to make a living in Germany, and in 1826, he made his way secretly to England.

After eking out a precarious existence in London by translating German and tutoring, Lieber decided in 1827 to emigrate to the United States. He landed in Boston, and took charge of a gymnasium and swimming school which was modeled after the German gymnasium. It was while he was in Boston that

* Department of Political Science, University of South Carolina, Columbia, South Carolina.

Lieber conceived the idea of an American encyclopedia. The idea of this work was received with much enthusiasm and, in 1829, Lieber went to New York City to edit the *Encyclopedia Americana*. He was the founder and editor of the first American encyclopedia. It consisted of thirteen volumes and was completed in 1833. Many distinguished Americans contributed to its content.

Upon his arrival in New York City in 1829 Lieber married Matilda Openheimer, whom he had tutored previously in London. His better financial prospects made this marriage possible. In 1834, Lieber made his residence in Philadelphia where he became acquainted with Nicholas Biddle and Thomas Drayton, formerly of Charleston, South Carolina. These gentlemen, with the assistance of Judge Story, procured Lieber's unanimous election to the chair of history and political economy at South Carolina College on June 5, 1835. (South Carolina College, now the University of South Carolina, had been founded in 1801, one year after Lieber was born.) Lieber succeeded Thomas Cooper as professor of political economy. (Cooper, brilliant but unorthodox president, was professor of political economy, chemistry, and geology from 1820 to 1833).

Francis Lieber remained at the University of South Carolina for twenty-one years. He gained a great reputation as a teacher, but had difficulties as a disciplinarian and was viewed with some suspicion because of his sympathy with the abolitionists, particularly Charles Sumner, the famous Senator from Massachusetts. Although Lieber's principles were definitely anti-slavery, there is little to substantiate the proposition that he was then an abolitionist.¹ Lieber's attitude seems to have been that while he opposed slavery, he believed that the rights of minorities should be protected. Lieber chided Sumner for his radical views on slavery and pointed out that such agitation on the part of abolitionists would force the South to secede. At the same time Lieber led the movement against secession in South Carolina.² It was only later, in 1856, when Lieber felt that war was inevitable, that he sided with the abolitionists. At any rate, it is the proud record of the University of South Carolina that in a period when passion ran high, academic freedom was preserved and Francis Lieber was allowed to teach without interruption until he resigned in 1857.

In spite of his dislike for slavery, Francis Lieber rented and owned slaves.³ Shortly after his arrival in

¹ Frank Friedel, "Francis Lieber, Charles Sumner, and Slavery," *Journal of Southern History*, IX (1943), p. 77.

² For an excellent account of Lieber's nationalism, see C. B. Robson, "Francis Lieber's Nationalism," *Journal of Politics*, VIII, (February, 1946), pp. 57-73.

³ Frank Friedel, "Francis Lieber, Charles Sumner, and Slavery," *op. cit.*, p. 79.

Columbia, Lieber rented a fourteen-year-old slave boy, Tom, paying his master \$4.50 per month. The following January, Lieber became the owner of two female slaves, Betsy and her daughter Elsa, whom he purchased from a North Carolina dealer. The succession of Lieber's slaves brought a great deal of trouble and sorrow to their professorial owner. Some were dishonest, and Elsa died, a loss of fully a thousand dollars—the hard labor of a year—according to Lieber. Although some might criticize Lieber as a hypocrite for opposing slavery and yet owning slaves, he needed servants and it must be remembered that white servants were unobtainable. Lieber was also interested in studying the institution of slavery and kept voluminous notes about it. It may have been that his ownership of slaves was a sort of a laboratory experiment. If it were an experiment, the results were unsatisfactory from a monetary standpoint.

Although Lieber believed in religion and in the Bible, he disliked some forms of Presbyterian Calvinism. In his diary of February 28, 1837, he wrote:

“This morning Professor Jones of the Theological Seminary preached in the college chapel—hell, eternal damnation, ‘God looks in despair upon the damned.’ Such blasphemies were uttered that I felt excessively

sorry for having taken Oscar (his son) with me. The idea of eternal damnation, even of the very worst, is so abhorrent and unphilosophical that it is very difficult for me to imagine any reflective man that believes sincerely in it.”⁴

Lieber evidently disapproved of the Calvinistic doctrine of predestination. When he was defeated for the presidency of South Carolina College in 1855 by Dr. C. F. McCay, a Presbyterian, Lieber, an Episcopalian, is reported to have commented that he had joined the wrong church.

At times Lieber felt that the various disciplinary duties which he had to perform at South Carolina College were a burden. In his diary of May 15, 1837, he wrote:

“This month is thrown away, entirely so, because I must board in the Commons. The students behave perfectly well. Not once have I yet appealed to their honor and found myself disappointed. If you treat them like a policeman, of course, they do not only try to kick, but you give a zest to resistance. Still it is a trying duty for me.”⁵

Lieber evidently resented the time which these disciplinary duties took from his writing.

Although he usually spoke excellent English, at times under sudden stress would revert to German. The late President Emeritus Leonard T. Baker

⁴ Thomas Sergeant Perry, *The Life and Letters of Francis Lieber* (Boston: James R. Osgood Company, 1882), p. 115.

⁵ *Ibid.*

of the University of South Carolina tells a story about one of these occasions. Lieber had bought a turkey and was trying to fatten it for Thanksgiving. One night he was sitting in his study writing. Suddenly he heard a commotion in the back yard and realized that some students were disappearing with his precious turkey. He ran down the steps after the students. Some piles of brick for building purposes had been left on the campus. In chasing the students, Lieber ran into one of these piles, thoroughly barked his shins, and shouted angrily at the top of his voice: "Mein Gott, All this for three thousand dollars!"

At times the students made fun of him because of his Prussian mannerisms. One day he entered his classroom and found on the blackboard the question: "Why should a German draw a South Carolina salary in Columbia?" Lieber quietly took a piece of chalk and wrote under it: "Because South Carolina drew German blood at Camden." DeKalb, who fought with the Americans, fell at Camden, South Carolina, in the Revolutionary War.⁶

Lieber's twenty-one years at the University of South Carolina (1835-1857) were very fruitful years. During this period, Lieber produced many of the works which have made him famous, his *Manual of Political Ethics* (2 volumes 1838-39), *Legal and Political Hermeneutics* (1829), and *On Civil Liberty and Self-Gov-*

ernment (2 volumes 1853). Lieber believed that the solution of the problem of government lay in the hands of the voter. His motto was: "No right without its duties, no duty without its rights." He reversed the usual order by discussing the natural rights of man, not as a creature in a primitive state, but in his present highly civilized condition. Rights, he maintained, did not come naturally, but only by struggles.⁷

In his *On Civil Liberty and Self-Government* which was used at Harvard and Yale as a college textbook, Lieber defines liberty as "the protection or check against undue interference, either from individuals or masses, or from government." He laid stress on the development of political institutions as the invincible protectors of political liberty. Liberty does not exist in a vacuum, but must be developed gradually through institutions like courts, legislatures, and executives all responsible to the voters, if it is to be maintained. Lieber's favorite motto, which hung over his study, was: "Patria cara, carier Libertas, Veritas carissima" which translated means: "My country is dear, liberty dearer, but the truth is the dearest." Lieber wrote this motto himself.

In January, 1857, Francis Lieber resigned his professorship at South Carolina College and settled in New York City. In 1857, a new site was selected for Columbia College, which is now Columbia University. Francis

⁶ Louis Martin Sears, "The Human Side of Francis Lieber," *South Atlantic Quarterly*, XXVII, (January, 1928), pp. 43.

⁷ Francis Lieber, *On Civil Liberty and Self-Government*, 2 volumes, (Philadelphia: J. B. Lippincott, 1853), I, 53.

Lieber had been consulted about the new plans for Columbia University in 1856, and had made several suggestions providing for a proposed grammar school, the organization of undergraduate courses, and postgraduate courses. Although all Lieber's suggestions were not immediately adopted, they laid the foundation for the future of Columbia University. Lieber had suggested to Hamilton Fish, one of the trustees, that a chair of history and political science be established at Columbia. The establishment of this chair ensued and Lieber was appointed to the professorship in the department in 1857. Although Lieber had really taught political science at South Carolina College, the subject had then been known as political economy and had been mixed with metaphysics and economics. Therefore, Lieber and Columbia University may be given credit for first establishing a social science department which dealt with human relations as a science rather than a philosophy. Lieber also taught international law at Columbia.

It was while Francis Lieber was at Columbia University that he did his great work as a pioneer in international law. Francis Lieber was the first to codify the international law of war on land. In 1863, he wrote *A Code for the Government of Armies* which was issued for the War Department as *Instructions for the Government of Armies in the Field, Gen-*

eral Order 100. In writing, on February 20, 1863, to General Halleck, General-in-Chief of the American armies, Professor Lieber wrote:⁸

Here is the project of the Code I was charged with drawing up I have earnestly endeavored to treat of the grave topics conscientiously and comprehensively; and you, well read in the literature on this branch of international law, know that nothing of the kind exists in any language. I had no guide, no groundwork, no textbook. . . . Usage, history, reason, and conscientiousness, a sincere love of truth, justice, and civilization, have been my guides; but of course the whole must be still very imperfect.

Lieber's project was submitted to a Board of Officers who added some valuable parts, and on May 20, 1863, Lieber again wrote General Halleck as follows:

As the order now stands, I think that No. 100 will do honor to our country. It will be adopted as a basis for similar works by the English, French, and Germans. It is a contribution by the United States to the stock of common civilization.⁹

James Brown Scott pointed out that it was due to Lieber's genius and foresight that the world realized

⁸ Quoted in James Brown Scott, "The Gradual and Progressive Codification of International Law," *American Journal of International Law*, Volume 21, (July, 1927), pp. 420-421.

⁹ *Ibid.*

that international law could be codified.¹⁰ Later this realization led to the International Conferences at The Hague in 1899 and 1907 and to the more complete codification of the law of war on land.

Lieber's Code had an important influence on the continent of Europe and was soon followed there. The civil law of Europe was based on the Napoleonic Code, outside of England, and, therefore, European jurists were accustomed to using codes rather than the case system used in Great Britain and the United States. The very convenience of a code which could be easily understood by officers in the field encouraged its use. The Code was so comprehensive and so accurate, so adequate to war between nations that in spite of the fact that it was originally drawn up for use in a civil war, it was said that only one case which arose out of the Franco-Prussian War of 1870-71 was not covered by its provisions.¹¹

Dr. Bluntschli, a close friend of Francis Lieber and Professor of International Law at the University of Heidelberg, stated the influence of Lieber's Code as follows:¹²

"Since, from beginning to end, they contain general rules, rela-

tive to international law as a whole, and since, besides, the form in which they are expressed is in accordance with the actual ideas of humanity and the manner of conducting war among civilized peoples, their effect will certainly extend far beyond the frontiers of the United States. They will contribute powerfully to fixing the principles of the law of war. Since they are drawn up in accordance with the nature of things and according to the thought of our times, European states cannot in this particular stay behind the United States of North America without being put under the ban of public opinion, and being accused of not rising to the level of progress set by the international law of civilized humanity."

Dr. Bluntschli translated the Instructions into German and dedicated his *Das Moderne Kriegsrecht der Civilisirten Staten als Rechtsbuch Dargestellt* (1878) to Lieber.¹³ Bluntschli pointed out that the latter work was due to Lieber's instructions. Lieber had corresponded with Bluntschli and had strongly encouraged him to draw up a code not

¹⁰ James Brown Scott, "The Codification of International Law," *American Journal of International Law*, Volume 18, (April, 1924), pp. 268-269.

¹¹ Letter by James Brown Scott of March 2, 1925, *American Journal of International Law*, Volume 20, (1926), Spec. Supp., p. 286.

¹² Quoted from Bluntschli, *Das Moderne Kriegsrecht der Civilisirten Staten als Rechtsbuch Dargestellt* by Ernest Nuys, "Francis Lieber—His Life and Work," *American Journal of International Law*, Volume 5, (1911), pp. 358-359.

¹³ James Brown Scott, "The Gradual and Progressive Codification of International Law," *op. cit.*, 421.

only of the laws of war but also the laws of peace.¹⁴

The Instructions take up the fundamental topics of the law of land warfare including: rights of the captor in occupied countries, public and private property, protection of persons, deserters, prisoners of war, booty on the battlefield, partisans, spies, flags of truce, exchange of prisoners, parole, armistices, capitulation and insurrection.

Lieber defined war as:

Public war is a state of armed hostility between sovereign nations or governments. . . . The citizen or native of a hostile country is thus an enemy as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of war. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property and honor as much as the exigencies of war will admit.

In modern regular wars of the Europeans, and their descendants in other portions of the

globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.¹⁵

It can be seen from his discussion of war, that Lieber believes that war is a legal status in international law and that non-combatants and civilians should be protected so far as possible. This distinction is one which has been followed up to the present time although total war is making the distinction more and more difficult to preserve. Lieber does not take up the just and unjust causes of war as Grotius does, nor does he discuss aggression which is a later conception.

Lieber distinguishes between partisans, unauthorized guerillas, spies, armed prowlers and war-rebels. The distinction among these various classes of combatants is still a troublesome problem today. Partisans, according to Lieber, are armed soldiers wearing uniforms who are detached from the main body of troops for the purpose of making raids on territory already occupied by the enemy. These partisans if captured are to be treated as prisoners of war.¹⁶ Unauthorized men who make raids without being part of any army and without wearing uniforms, and who fight intermittently are to be treated as highway robbers and are not entitled to the privileges of

¹⁴ J. C. Bluntschli, Introduction to Volume II, *The Miscellaneous Writings of Francis Lieber*, (1881), p. 13.

¹⁵ Articles 20-25, "Instructions," *The Miscellaneous Writings of Francis Lieber*, Volume 2, pp. 251-252.

¹⁶ Francis Lieber, "Instructions," Article 81.

prisoners of war.¹⁷ Single soldiers dressed in civilian clothes or in the uniforms of their enemy and found lurking about the lines of the captor for the purpose of securing information are to be treated as spies and suffer death.¹⁸ Armed prowlers are not to be treated as prisoners of war.¹⁹ War-rebels are persons who live in occupied territory and rise up against the occupying power.²⁰ If captured, war-rebels may be shot.

Lieber emphasized the legal powers of the occupying power. He stated that civil officers could be forced to take an oath of temporary allegiance to the occupying power upon the pain of expulsion if they refused. At any rate the civil officers and the population of the occupied territory owe strict obedience to the occupying power and the penalty of death may be used for disobedience.²¹

Lieber believed that retaliation was necessary in war in order to prevent an unscrupulous enemy from violating the laws of war, but retaliation should be used only as a last resort since unjust or inconsiderate retaliation leads to counter retaliation and wars come to resemble the wars of savages uncontrolled by law.²² Lieber does not

set up any limits to retaliation such as that retaliation may not be permitted on prisoners of war.

The occupying power has certain duties to perform and must abstain from certain acts. Soldiers of the occupying power are forbidden to use wanton violence, to destroy property without authorization, to rob, to pillage or sack, to rape, to wound, to maim, or to kill peaceful inhabitants of the occupied territory upon pain of death or severe punishment according to the crime. Soldiers or officers of the occupying power may not make use of their position for private gain.²³ Slaves escaping to territory occupied by an invading army which does not recognize slavery are to be freed.²⁴

One of the most troublesome difficulties of the War Between the States was the treatment of prisoners of war. Mutual recriminations were made as to unjust and barbaric treatment. Lieber, however, in his Code laid down the rules which if they had been followed by both sides would have done away with these difficulties. Wounded prisoners were not to be shot and the shooting of such prisoners was a war crime

¹⁷ *Ibid.*, Article 82.

¹⁸ *Ibid.*, Article 83.

¹⁹ *Ibid.*, Article 84.

²⁰ Lieber, "Instructions," Article 85.

²¹ *Ibid.*, Article 26.

²² *Ibid.*, Articles 28-29.

²³ *Ibid.*, Articles 44-47.

²⁴ *Ibid.*, Articles 42-43.

punishable by death.²⁵ This was later confirmed at the German and Japanese war criminal trials. Money and valuables of prisoners were to be considered private property and the appropriation of such property was forbidden. Large sums of money, however, were to be treated as public property and might be confiscated by the capturing army even though found on the person of a captured soldier.²⁶ Prisoners of war are to be fed upon plain and wholesome food and treated with humanity.²⁷ Prisoners of war may be required to work for the benefit of the captor's government, according to their rank and condition. Lieber does not mention any restriction upon the type of work which prisoners may be required to do such as the prohibitions on working prisoners on military fortifications, the manufacture of munitions, and military roads which The Hague Convention on Land Warfare now forbids as well as the Geneva Convention on Prisoners of War.

Lieber defines a spy as a person "who secretly, in disguise or under

false pretence, seeks information with the intention of communicating it to the enemy."²⁸ The spy may be punished by hanging. A citizen of the United States who obtains information legitimately and betrays it to the enemy commits treason and shall suffer death.²⁹

Lieber stated that an armistice is not a temporary peace but only a cessation of military operations.³⁰ Assassination is prohibited by international law.³¹ There is a difference between insurrection and civil war. Insurrection is merely military action while civil war is war.³² Rebellion is an insurrection of a large proportion and is usually war.³³ It seems that Lieber does not make a clear distinction between rebellion on the one hand and insurrection and war on the other. Rebellion at present is not believed to be a separate status in international law from war or insurrection. It might be either. Application of the laws of war to rebels does not constitute either *de facto* or *de jure* recognition of the rebels as a government.³⁴ The commander is to

²⁵ *Ibid.*, Article 71.

²⁶ *Ibid.*, Article 72.

²⁷ *Ibid.*, Article 76.

²⁸ *Ibid.*, Article 88.

²⁹ *Ibid.*, Article 89.

³⁰ *Ibid.*, Article 142.

³¹ *Ibid.*, Article 148.

³² *Ibid.*, Articles 149-150.

³³ *Ibid.*, Article 151.

³⁴ *Ibid.*, Article 153.

throw the burden of the war as much as possible on the disloyal citizens of the occupied territory.³⁵

Francis Lieber wrote two other works on international law which were: *Guerilla Parties Considered with Reference to the Laws and Usages of War*, written in 1862, and *Status of Rebel Prisoners of War* in 1865. In the *Status of Rebel Prisoners of War*,³⁶ Lieber contended that war criminals could be tried for their crimes after the war was terminated.³⁷ The conclusion of surrender terms is purely a military matter and does not bind the capturing government regarding the civil rights of the surrendering soldiers.³⁸ This essay was written in an attempt to determine how far General Grant's convention with General Lee extended. As a result of Lieber's essay, the Southerners were disenfranchised when they returned home and Negroes and carpetbaggers ruled the governments of the Southern States until 1876 and the Hayes-Tilden controversy over the Presidency. Although Lieber's opinion was no doubt correct as a matter of international law, the consequences for the South were disastrous from a domestic point of view. There was no Marshall Plan for the South after the War Between the States.

During the last ten years of his life, Lieber was particularly concerned with international law and peace.

In 1860, he formed, together with Bluntschli and Laboulaye, the "scientific cloverleaf" to promote the study of international law. His ideal was to form a permanent alliance of the leading international lawyers to codify international law and prepare the way for a commonwealth of nations. Lieber was responsible for the founding of the *Institut de Droit International* which was founded in Ghent in 1873, and consisted of the leading international lawyers who worked together in an attempt to codify and define international law. Although the *Institute* was formed about a year after Lieber's death, his ideas were responsible for its origin. Later this idea was used to form the American Institute of International Law in 1916.

We might summarize Francis Lieber's contributions to world culture and scholarship as follows:

1. He established and originated the study of political science as a separate discipline while at Columbia University.

2. He contributed to political theory by writing about and establishing the need of the maintenance of liberty in a civil society through the establishment of the necessary institutions of government. In other words, he advocated the institutionalization of liberty. Contrary governmental institutions must be abolished.

³⁵ *Ibid.*, Article 156.

³⁶ Francis Lieber, *Miscellaneous Writings*, Volume 2, pp. 293-297.

³⁷ *Ibid.*, pp. 296-297.

³⁸ *Ibid.*

3. He founded and edited the first American encyclopedia, the *Encyclopedia Americana*.

4. He largely wrote the first Code of Law for land warfare, his famous, *General Order 100*. This led to the codification of the International law of land warfare for the first time and

to The Hague Peace Conferences of 1899 and 1907.

5. His work led to the founding of the *Institut de Droit International* in Ghent in 1873. In this way, he institutionalized the codification and growth of international law.



LT. ANDERSON RECEIVES JAA AWARD

The Association's Award for Achievement in the study of military law was given Lt. Jarrett S. Anderson upon his graduation in the 35th special class at The Judge Advocate General's School, on Feb. 2. Lt. An-

derson whose home is Provo, Utah is presently assigned to the Judge Advocate Section, U. S. Army Transportation Terminal Command, Ft. Mason, California.

The Journal is your magazine. If you have any suggestions for its improvement or for future articles, please bring them to the attention of the Editor. We invite the members of the Association to make contributions of articles for publication in the Journal. Publishability of any article submitted will be determined by the Editor with the advice of a committee of the Board of Directors.

What The Members Are Doing . . .

District of Columbia

Lt. Col. Oliver Gasch, formerly the United States Attorney for the District of Columbia has become a partner of the firm Craighill, Aiello, Gasch & Craighill for the general practice of law with offices at 725 15th Street, N.W.

Maj. George H. Spencer engages in the practice of law in patent, trade-mark and copyright causes. He recently removed his office from the Munsey Building to the Wyatt Building.

Lt. Col. John F. Doyle, formerly of the office of the United States Attorney has recently announced his association with James C. Toomey for the general practice of law with offices in the Bar Building.

Col. Frederick Bernays Wiener has been elected a member of the council of the Selden Society founded in London in 1887 "to advance the knowledge and encourage the study of the history of English law". Only five other Americans are among its officers or council members. Col. Wiener will address the Selden Society in London in March.

Florida

Capt. Ainslee R. Ferdie of Miami was recently elected to the Junior Section Council of the Inter-American Bar Association as an at large representative of the United States. He was also named chairman of the

Section's World Peace Through Law Committee.

California

Col. John B. Coman recently announced the change of his office address from New York City to the Tishman Building, 3460 Wilshire Boulevard, Los Angeles, California.

Illinois

Lt. Col. John B. Coppinger recently announced the organization of a firm under the style Coppinger, Xanders and Carter for the general practice of law with offices at 2508 Brown Street, Alton, Illinois.

Missouri

Col. Bertram W. Tremayne, Jr. recently announced re-organization of his law firm under the style Tremayne, Joaquin, Lay, Batts and Carr with offices in the new Shell Building, St. Louis (Clayton) Missouri.

Massachusetts

Col. Lawrence W. Lougee, until recently Chief of Field Judiciary, U. S. Army, Europe, upon retirement from the active service, has become a trust officer and member of the legal department of the National Shawmut Bank in Boston.

New York

Shelden D. Elliott, professor of law, New York University Law School has been promoted to the rank of Brigadier General, U. S. Army Reserve. He has been assigned a Mobilization Designation as director

of Special Projects Division, Office of the Judge Advocate General Department of the Army.

Lt. Col. Edward D. Re has been named chairman of the Foreign Claims Settlement Commission of the United States. Col. Re has been a member of the Board of Higher Education of the City of New York and professor of law at St. John's University School of Law.

Canal Zone

Lt. Col. Engelbert J. Berger recently announced the opening of of-

fices for the private practice of law in the Canal Zone with offices in the Masonic Temple, Cristobal, P.O. Box 2791.

France

Lt. Col. Reginald E. Ivory, USA, Retired received France's highest decoration recently at Invalides in Paris for exceptional service to France. The award was made by Lt. Gen. Michel Morin, Comptroller of the French Army. Col. Ivory is Chief of the U. S. Army Claims Office, France.



A strong Association can serve you better. Pay your annual dues. If you are uncertain as to your dues status, write to the offices of the Association for a statement. Stay active. Recommend new members. Remember the Judge Advocates Association represents the lawyers of all components of all the Armed Forces.

