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"Time of War" and The War Powers Resolution

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NOTES

"TIME OF WAR" AND THE WAR POWERS RESOLUTION

The interpretation of the words "time of war" has been litigated in many different contexts with far-reaching effects. In civil litigation, a determination that a period is a time of war can control the validity of insurance claims,[1] trigger certain other benefits,[2] and suspend statutes of limitation.[3] Under military law, its existence can make acts criminal which were not so before,[4] cause some offenses to be punishable by death,[5] and toll the statutes of limitation for certain crimes.[6] In addition, the existence of a time of war can increase the control of the military over civilians,[7] and, potentially, suspend the judicial system and rights protected under the constitution.[8]

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1. Stinson v. New York Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948) (World War II); New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946) (World War II); Stanbery v. Aetna Life Ins. Co., 26 N.J. Super. 498, 98 A.2d 134 (1953) (Korea); Pyramid Life Ins. Co. v. Masch, 134 Colo. 70, 299 P.2d 117 (1956) (Korea); Hammond v. Nat'l Life & Acc. Ins. Co., 243 So. 2d 902 (La. App.), *cert. denied*, 258 La. 347, 246 So. 2d 196 (1971) (Vietnam); Jackson v. North Am. Assur. Soc'y, 212 Va. 177, 183 S.E.2d 160 (1971) (Vietnam).

2. Thomas v. United States, 39 Ct. Cl. 1 (1903) (pay allowance during time of war); Scott v. Commissioner of Civil Service, 272 Mass. 237, 172 N.E. 218 (1930) (civil service job preference); Bashwiner v. Police & Firemen's Retirement Sys., 68 N.J. Super. 1, 171 A.2d 331 (1961) (veteran's preference for retirement benefits); Bateman v. Marsh, 188 Misc. 189, 64 N.Y.S.2d 678 (Sup. Ct. 1946) (civil service job preference).

3. Feil v. Senisi, 7 N.J. Super. 517, 72 A.2d 348 (1950) (military service in time of war tolled statute of limitations); *cf.* Van Heest v. Veech, 58 N.J. Super. 427, 156 A.2d 301 (1959) (military service need not be in time of war in order to suspend statute of limitations).

4. Improper use of a countersign, misconduct as a prisoner and spying are punishable under the Uniform Code of Military Justice only during time of war. Uniform Code of Military Justice, arts. 101, 105, 106, 10 U.S.C. §§ 901, 905, 906 (1970) [hereinafter cited as UCMJ].

5. Under the Uniform Code of Military Justice, desertion, assaulting or willfully disobeying a superior commissioned officer, and misbehavior of a sentinel, are punishable by death only during time of war. UCMJ arts. 85(c), 90, 113, 10 U.S.C. §§ 885(c), 890, 913 (1970).

6. There is no statute of limitations under the Uniform Code of Military Justice for absence without leave, aiding the enemy and desertion if they are committed during time of war. *See* UCMJ art. 43(a), 10 U.S.C. § 843(a) (1970). The statutes of limitation for certain other crimes may be extended if such crimes are committed during time of war, UCMJ art. 43(e), 10 U.S.C. §§ 843(e) (1970), or they may be suspended for a specified period of time. UCMJ art. 43(f), 10 U.S.C. § 843(f) (1970).

7. *See* notes 29-30 *infra* & text accompanying.

8. Time of war is

> when by invasion, insurrection, rebellions, or such like, the peaceable course of justice is disturbed and stopped, so that the Courts be as it were, shut up . . . .

Skeen v. Monkeimer, 21 Ind. 1, 3 (1863) (citing Lord Coke). *In re* Kalanianaole, 10

In 1800 it was held that "war" can include undeclared as well as declared wars.[9] War was said to exist if Congress had authorized the hostilities, even if it had not made a formal declaration of war.[10] Thus, despite the lack of formal declaration, such disparate actions as the Hostilities Against the Indians,[11] the Boxer Rebellion,[12] American intervention in Mexico,[13] and the battle between the United States and the Philippines[14] were considered times of war.

It was not until the Korean conflict, however, that extensive and long-lasting hostilities existed without a formal declaration of war. By this time, time of war decisions had begun to increase greatly in number and divide themselves into two categories of cases: (1) insurance and governmental benefit cases;[15] and (2) cases under the Uniform Code of Military Justice.[16]

In civilian cases, the courts generally have attempted to ascertain the intent of the parties or institutions which make use of the phrase "time of war" in a contract or a legislative act. However, military courts have dealt with this phrase in an often inconsistent, biased and overreaching manner. In this area, the recently-passed War Powers Resolution[17] potentially provides a base from which the courts can formulate more certain and less arbitrary principles by which time of war can be determined. This note will examine in greater detail how military and civil courts have determined the meaning of "time of war" and will discuss the possible impact of the War Powers Resolution on the military's interpretation of this phrase.

Time of War in Insurance and Benefit Cases

One distinguishable category of cases which involves interpretation of the term "time of war" deals with insurance policies and civil suits for governmental benefits which are conferred for service during

Haw. 29 (1895), sustained military trials of civilians in Hawaii during periods of insurrection. *But see* Duncan v. Kahanamoku, 327 U.S. 304 (1946).

9. Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

10. *Id.* at 41.

11. 16 Op. Att'y Gen. 675 (1880).

12. Hamilton v. McClaughry, 136 F. 445 (C.C. Kan. 1905).

13. Arce v. State, 83 Tex. Crim. 292, 202 S.W. 951 (1918).

14. Thomas v. United States, 39 Ct. Cl. 1 (1903). *But see* Newcomber v. United States, 51 Ct. Cl. 408 (1916).

15. Such benefits may include: Civil service job preferences, Scott v. Commissioner of Civil Service, 272 Mass. 237, 172 N.E. 218 (1930); certain retirement benefits for veterans, Bashwiner v. Police & Firemen's Retirement Sys., 68 N.J. Super. 1, 171 A.2d 331 (1961); and tax exemptions, Kaiser v. Hopkins, 6 Cal. 2d 537, 58 P.2d 1278 (1936).

16. 10 U.S.C. §§ 801-935 (1970).

17. Pub. L. No. 93-148 (Nov. 7, 1973), *reproduced in* 1973 U.S. Code Cong. & Ad. News: 4064-69

that time. Such cases are tried in civilian courts, with normal appellate review. These courts have developed standardized ways of analyzing and interpreting the term. As is generally true in insurance cases, these decisions are based on what the court thinks the parties meant by their use of the term "time of war."[18] Since that intent is often ambiguous, the decision is usually based on the general policy of construing insurance policies against the insurance company.[19] Thus, the majority of courts have found a formal declaration of war to be necessary in order to trigger the application of a clause denying compensation for death or damages in "time of war."[20]

In the most recent decision in this area, *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*,[21] the United States District Court for the Southern District of New York found persuasive the maxim that whatever is not *clearly* excluded in all-risk insurance policies is covered. The court held that a time of war exclusionary clause did not clearly contemplate damage resulting from random acts of violence by a splinter political group, and ordered the insurance company to pay $24,288,759 for a plane which was destroyed by the Popular Front for the Liberation of Palestine in 1970.[22] The court followed the principle of looking to the actual or implied intent of the contracting parties.

Cases dealing with governmental benefits are handled in a similar manner. Where a statute or regulation provides that certain benefits will be made available to those who served in the military in time of war, the courts examine the intent of the voters, the legislature or other body responsible for the benefit rule, and determine whether the benefits will be conferred in light of that intention.[23] However, since the body granting the benefit is usually governmental, the benefits are often denied unless there has been a formal declaration of war.[24] This approach

18. 13 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 7386 (1943).

19. New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946); Jackson v. North Am. Assur. Soc'y, 212 Va. 177, 183 S.E.2d 160 (1971).

20. Pang v. Sun Life Assur. Co., 37 Haw. 208 (1945) (Pearl Harbor); Rosenau v. Idaho Mut. Ben. Ass'n, 65 Ida. 408, 145 P.2d 227 (1944) (Pearl Harbor); Beley v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 231, 95 A.2d 202, *cert. denied*, 346 U.S. 820 (1953) (Korea); Harding v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 270, 95 A.2d 221, *cert. denied*, 346 U.S. 812 (1953) (Korea); Jackson v. North Am. Assur. Soc'y, 212 Va. 177, 183 S.E.2d 160 (1971) (Vietnam).

21. 368 F. Supp. 1098 (S.D.N.Y. 1973).

22. *Id.*

23. Kaiser v. Hopkins, 6 Cal. 2d 537, 58 P.2d 1278 (1936); Bateman v. Marsh, 188 Misc. 189, 64 N.Y.S.2d 678 (1946).

24. Kaiser v. Hopkins, 6 Cal. 2d 537, 58 P.2d 1278 (1936) (enlistment after armistice not within time of war for tax exemption purposes); Freed v. Baldi, 166 Colo. 344, 443 P.2d 716 (1968) (service during Korean conflict not in time of war for veteran's

is based on the general legal policy that a court will be reluctant to order the expenditure of public funds unless clearly mandated.[25]

Thus, in *Kaiser v. Hopkins*,[26] the Supreme Court of California determined that a soldier who enlisted and served after the armistice was not entitled to a tax exemption because the voters intended to exempt only those who served in time of actual war.[27] Similarly, in *Freed v. Baldi*,[28] the Colorado Supreme Court held that a serviceman who served during the Korean conflict was not entitled to veteran's preference points because he had not served in a war officially declared by Congress.[29]

These cases all share the same characteristic of approaching the interpretation of "time of war" by looking to the intent of those who drafted the document or statute which makes that interpretation important. As such, the decisions are grounded upon traditionally recognized principles which may be neutrally applied.

TIME OF WAR IN MILITARY CASES

When "time of war" is interpreted in the military context, however, the military courts take almost the opposite approach, generally failing to consider the intent of Congress in enacting the criminal provisions of the UCMJ.[30] These cases lack a consistent method of interpretation which makes it difficult to predict when a period will be considered wartime. The decisions reflect a dominant concern for the needs of the military. Moreover, these determinations are seldom overturned because civilian courts severely restrict their appellate review of military court decisions. Civilian review is limited to a determination of whether the military court gave "full and fair consideration" to the issues raised.[31] This examination, however, only entails either (1) ascertaining whether the issues were brought to the court's attention,[32] or (2) determining

preference point purposes); Scott v. Commissioner of Civil Service, 272 Mass. 237, 172 N.E. 218 (1930) (entering service after armistice signed not service in time of war).

25. *Cf.* Atlantic Richfield v. Hickel, 432 F.2d 587, 592 (10th Cir. 1970).

26. 6 Cal. 2d 537, 58 P.2d 1278 (1936).

27. *Id.* at 539, 58 P.2d at 1279.

28. 166 Colo. 344, 443 P.2d 716 (1968).

29. *Id.* at 352, 443 P.2d at 720.

30. For a discussion of congressional intent see J. SNIDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE (1953).

31. Burns v. Wilson, 346 U.S. 137 (1953).

32. King v. Moseley, 430 F.2d 732 (10th Cir. 1970). This approach has often been criticized. *See* Burris & Jones, *Civilian Courts and Courts-Martial—The Civilian Attorney's Perspective*, 10 AM. CRIM. L. REV. 139 (1971); Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibility*, 54 MIL. L. REV. 1 (1971) [hereinafter cited as Weckstein];

whether the issues raised have in fact been fairly considered by the military tribunal.[33] Even the latter approach encompasses a narrower range of issues than is reviewable in civilian appeals.[34] Under either approach, if the determination is affirmative, the appeal is dismissed. Cursory review is especially unfortunate here, for the ramifications of these decisions may involve imprisonment or even loss of life.

The military courts, by giving increasingly broad meaning to the phrase "time of war," have also expanded military jurisdiction over persons who have minimal ties with the military. Under the Uniform Code of Military Justice, "[i]n time of war, persons serving with or accompanying an armed force in the field" are subject to military control.[35] Prior to 1955, "in the field" had come to have a fairly expanded meaning and the military was often prosecuting dependents and civilian employees under this provision.[36] However, the United States Supreme Court by narrowly interpreting this provision, has limited court-martial jurisdiction over civilians. The Court took the general view that the military courts should have "the least possible power adequate to the end proposed."[37] The primary "end" of allowing a separate court-martial jurisdiction was to permit the military to maintain its special disciplinary and personnel needs in order to adequately defend the nation.[38] Since crimes committed by civilians and dependents were punishable in civilian courts, it was not felt that military jurisdiction was necessary to achieve this end.[39]

Developments in the Law—Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1208-36 (1970).

33. Allen v. VanCantfort, 436 F.2d 625 (1st Cir. 1971); Kauffman v. Secretary of Air Force, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); Heilman v. United States, 406 F.2d 1011 (7th Cir. 1969).

34. *Compare* discussion of Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972), *cert. denied*, 410 U.S. 942 (1973), *and* notes 47-59 *infra* & text accompanying, *with* Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972), *vacated as moot*, 409 U.S. 1100 (1973). In *Love*, an earlier decision handed down the same year as *Broussard*, the Ninth Circuit found unconstitutional an ex post facto reinterpretation of applicable statutes which made the punishment greater, an action it affirmed in *Broussard*. The court held that the Department of Correction, having notified a prisoner by letter that he would be eligible for parole in three years under one interpretation of a statute, was prevented by the ex post facto clause, U.S. CONST. art. I, § 9, from reinterpreting the statute to make the period longer, even though the Attorney General's opinion said the latter was the correct interpretation. 460 F.2d at 384.

35. UCMJ art. 2(10), 10 U.S.C. § 802(10) (1970).

36. In *Ex parte* Gerlach, 247 F. 616 (S.D.N.Y. 1917), the court said, "[t]he words 'in the field' do not refer to land only, but to any place . . . where military operations are being conducted." *Id.* at 617. The courts have even found that this phrase included a civilian salvage worker working on an Army project in Eritrea. Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945), *cert. dismissed*, 328 U.S. 822 (1946).

37. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230-31 (1821).

38. Burns v. Wilson, 346 U.S. 137, 138 (1953).

39. *E.g.*, Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960).

Thus, the Court has held that the military has no jurisdiction over capital crimes committed by dependents accompanying the armed forces overseas in time of peace[40] and no jurisdiction over dependents committing noncapital crimes in time of peace.[41] Nor was there court-martial jurisdiction for capital[42] or noncapital[43] crimes committed by civilian employees. Through these, and similar[44] decisions, the military's control over civilians has been reduced to the point where it would seemingly require a formal declaration of war by either the President[45] or Congress before dependents or civilians serving with the military would be subject to court-martial control.[46]

This trend has not been followed by the lower courts in determining the applicability of the UCMJ to individuals with closer ties to the military than dependents or civilian employees. The extent to which the civilian courts have tolerated the military's expansion of jurisdiction is illustrated by the recent case of *Broussard v. Patton*.[47] The court there permitted the military to retroactively define "time of war," thereby subjecting soldiers who had resumed civilian life to the reimposition of military control.

Broussard deserted October 1, 1964. On December 6, 1967, the Air Force advised him that they were "making no further effort to apprehend [him] . . . since he [was] a peacetime deserter and, as such, the Statute of Limitations [had] expired."[48] The Federal Bureau of Investigation was similarly notified. On February 7, 1969, he was informed that he was again being sought because of a decision in another case that a time of war had existed since August 1964, and therefore the statute of limitations for peacetime desertion was tolled. Broussard was arrested March 18, 1969. He was convicted and sentenced by the

40. Reid v. Covert, 351 U.S. 487 (1955), *rev'd on rehearing*, 354 U.S. 1 (1956).
41. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).
42. Grisham v. Hagan, 361 U.S. 278 (1960).
43. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960).
44. O'Callahan v. Parker, 395 U.S. 258 (1969) (no jurisdiction over nonservice connected offenses); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (discharged soldier not subject to jurisdiction for crime committed before his discharge).
45. The President can effectuate the wartime provisions of the UCMJ through executive order. UCMJ art. 56, 10 U.S.C. § 856 (1970).
46. *See, e.g.*, Robb v. United States 456 F.2d 768, 771 (Ct. Cl. 1972) (no jurisdiction over a civilian employee "serving with or accompanying an armed force in the field" when war had not been formally declared by Congress, "despite the fact that the conflict in Vietnam is a war in the popular sense of the word.") The *Robb* court goes further than the Supreme Court decisions, for the latter pertained to peacetime offenses, whereas Robb was a civilian in Vietnam with the armed forces in the 1960s. *See also* Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969).
47. 466 F.2d 816 (9th Cir. 1972), *cert. denied*, 410 U.S. 942 (1973).
48. *Id.* at 819.

military courts[49] and received only cursory review from the civilian courts.[50] The result of these decisions was to permit the military to retroactively declare a period a time of war so as to toll the statute of limitation. This approach would subject to military prosecution not only all "successful" deserters, such as Broussard, but also all soldiers for whose crimes the statute of limitation has run. The *Broussard* rationale could be extended further to include the act of a soldier which was not criminal until the period in which the act was committed is retroactively declared a time of war.[51]

This action was taken despite the fact that under its own rules the Air Force did not have jurisdiction to try Broussard[52] and despite the fact that the Supreme Court had held both that a discharged soldier was not subject to jurisdiction for a crime committed before his discharge[53] and that the jurisdiction of a court-martial depends on the status of the accused at the time of trial.[54]

This overreach of jurisdiction by the military was compounded by the inadequate consideration given by the Court of Appeals[55] to

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49. United States v. Broussard, 41 C.M.R. 1004 (A.F.C.M.R.), *petition for review denied*, 41 C.M.R. 402 (U.S.C.M.A. 1970).

50. *See* note 57 *infra* & text accompanying.

51. For acts which become crimes only during wartime see note 4 *supra*.

52. The *Air Force Manual* provided for voluntary discharge of personnel AWOL for more than one year, AIR FORCE MANUAL ¶ 2-69b, at 39-10 (Sept. 1, 1966), and for compulsory discharge of AWOLs for whom the statute of limitations had run before their return to military control. AIR FORCE MANUAL ¶ 2-69c, at 39-10 (Nov. 30, 1967). The statute of limitations for peacetime desertion is three years; for wartime it is tolled. UCMJ art. 43, 10 U.S.C. § 843 (1970). The section in the *Air Force Manual* which listed periods which were to be considered time of war for statute of limitations purposes did not list any time during the Vietnam conflict, and stated:

> If the date of absence did not occur during a wartime period . . . the airman will be discharged . . . whether the airman was previously dropped from the rolls as an absentee or as a deserter.

AIR FORCE MANUAL ¶ 2-69c, at 39-10 (Nov. 30, 1967).

This lack of jurisdiction argument was strengthened in Broussard's petition for certiorari. Petitioner's Brief for Certiorari, Broussard v. Patton, 410 U.S. 942 (1973). Under the 1969 MANUAL FOR COURTS-MARTIAL, court-martial jurisdiction "ceases on discharge from the service or other termination of that status . . . ." *Id.* ¶ 11. The notification by the Air Force to Broussard, in compliance with its own rules, was arguably "other termination" as contemplated by the Manual.

53. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14 (1955) (court-martial cannot base its jurisdiction on the prior status of an individual once he has been discharged).

54. O'Callahan v. Parker, 395 U.S. 258 (1969); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14-15 (1955).

55. The denial of Broussard's habeas corpus petition was affirmed by the United States Court of Appeals for the Ninth Circuit on the ground that "the military courts gave 'full and fair consideration' to Broussard's claim." Broussard v. Patton, 466 F.2d 816, 818 (9th Cir. 1972). The Court of Appeals did not consider Broussard's jurisdictional arguments. After stating that habeas corpus "is available only to guard

Broussard's arguments and the ex post facto implications of the case.[56] In particular, in determining that a time of war existed in October 1964, no consideration was given to the purposes of the provision which tolled the statutes of limitation for acts committed in time of war,[57] nor did they consider whether subjecting Broussard to prosecution was necessary or even conducive to the effectuation of any of these purposes.[58] In addition, no court addressed the question of whether the rights and interests alleged by Broussard in his defense outweighed the military objectives at stake.

The Court of Appeals in reaching its holding, uncritically relied upon the decision of the Court of Military Appeals in *United States v. Anderson*.[59] *Anderson*, however, was itself based upon inadequate consideration of congressional intent in providing different penalties for crimes in wartime. Anderson was accused of deserting the Air Force in August of 1964. The court failed to agree upon the reasons which made the desertion "in time of war." It gave little consideration to the state of

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against the military courts exceeding their jurisdiction," the court simply took judicial notice of the fact that the Air Force had notified Broussard that the statute of limitations had run—the basis of his jurisdictional argument. *See* note 52 *supra*. This essentially "rubber stamp" type of review is discussed in text accompanying notes 31-34 *supra*.

56. Under the UCMJ, unlike civilian criminal codes, the nature, as well as the existence of many crimes is determined by the period in which the act is committed. *See* notes 4-6 *supra*. Desertion is one of the crimes whose nature is changed if committed during wartime. If committed during peacetime it carries a three-year statute of limitations, while if committed during wartime the crime becomes much more serious, as evidenced by the tolling of the statute for it. UCMJ art. 43(f), 10 U.S.C. § 843(f) (1970). This change indicates that desertion is not an inherently serious crime, as is murder for example.

It is arguable that the power to declare a period as time of war for defense purposes should not rest with the military, and should have to be expressly made. However, even conceding military control, it is clear that the nature, and consequently the penalty, of the crime cannot be changed after commission and after express declaration of its nature by the body charged with its interpretation. A law is ex post facto if it "changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). Changing the statute of limitations creates a punishment where none existed after a period of three years, thereby inflicting a greater punishment. While arguably Broussard had to act at his peril if he deserted during a period that could be considered time of war since both contingencies are statutorily provided for, he should not be prosecuted after the body charged with interpreting the statute, and whose self-interests were at stake, has notified him that his desertion was during peacetime. Broussard was an outlaw for the requisite three years. Congress had provided for his reentry into society, and the military had notified him the way was clear. The Air Force should not have been allowed to extend its jurisdiction by retroactively tolling the statute of limitations.

57. UCMJ art. 43(f), 10 U.S.C. § 843(f) (1970).

58. *See generally* SUBCOMM. ON TREATMENT OF DESERTERS FROM MILITARY SERVICE OF THE SENATE COMM. ON ARMED SERVICES, 91ST CONG., 1ST SESS., TREATMENT OF DESERTERS FROM MILITARY SERVICE 8-9 (1969).

59. 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968).

hostilities at the time of Anderson's desertion, and primarily focused on the nature of the Gulf of Tonkin Resolution.[60] One judge found that the Resolution was an authorization, but not a formal declaration, of war.[61] Another found it was not an authorization but that the President, under his independent war-making power, had resisted the Gulf of Tonkin attacks to an extent sufficient to equal war.[62] The third judge found it was not necessary to consider the Resolution at all because war existed at the present time, yet failed to explain the relevance of present conditions to the period of Anderson's desertion.[63] There was no discussion of congressional intent concerning tolling of the statute of limitations during time of war. Neither was there any discussion of why, on the facts of the case, a man whose desertion was "virtually indistinguishable from peacetime AWOL"[64] should be punished as if the nation were engaged in a full-scale war.[65]

The determinations of time of war in military cases such as *Broussard* and *Anderson*, unlike the insurance and governmental benefit cases where the consequences are less serious, have been made without standardized methods or adequate appellate review.[66] The decisions, made initially by military courts which are recognizedly biased,[67] result in an expansion of military jurisdiction permitting the subjection of veterans, soldiers and possibly civilians to prosecution without adequate notice[68] or

60. Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384.

61. 17 U.S.C.M.A. at 590, 38 C.M.R. at 388 (Quinn, C.J.).

62. *Id.* at 590-94, 38 C.M.R. at 388-92 (Killday, J.).

63. *Id.* at 594, 38 C.M.R. at 392 (Ferguson, J.).

64. 82 HARV. L. REV. 483, 486 (1968).

65. The statute of limitations was tolled during World War I and World War II by a congressional declaration of war. During the Korean conflict the President suspended the statute of limitations by Exec. Order No. 10247, 3 C.F.R. 754 (Comp. 1949-1953). *See also* note 69 *infra.*

66. *See* note 32 *supra.*

67. The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. . . . [T]he suggestion of the possibility of influence . . . by the officer who convenes it, selects its members, and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law. . . . A court-martial . . . remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.

O'Callahan v. Parker, 395 U.S. 258, 264-65 (1969); *see* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955); Burns v. Wilson, 346 U.S. 137, 138 (1953).

68. It is certainly arguable that the "time of war" standard is constitutionally too vague because "men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." Baggett v. Bullitt, 377 U.S. 360, 367 (1964). *See also* Note, *"In Time of War" Under the Uniform Code of Military Justice: An Elusive Standard*, 67 MICH. L. REV. 841, 850-51 (1969). This argument is supported by the courts' inconsistent determinations of the existence of a time of war. *See* note 81 *infra.*

sufficient consideration of their constitutional rights.

THE WAR POWERS RESOLUTION

To avoid these problems, a standardized method is needed for determining when, where and under what conditions a period will be deemed a time of war under the UCMJ.[69] The recently enacted War Powers Resolution[70] creates a mechanism which courts could rely upon as a source of definitive and authoritative determination of time of war.

The Resolution provides that in undeclared and unauthorized war situations, the President shall submit within 48 hours . . . a report, in writing, setting forth—

> (A) the circumstances necessitating the introduction of United States Armed Forces;
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> (B) the constitutional and legislative authority under which such introduction took place; and
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> (C) the estimated scope and duration of the hostilities or involvement.[71]

Section 5(b)[72] further provides that after sixty days the President shall terminate any use of the armed forces unless Congress has declared war or authorized the use of the forces.[73] The President can extend the sixty-day period for an additional thirty days if he

> determines and certifies to Congress in writing that unavoidable military necessity respecting the safety of . . . Forces requires the[ir] continued use . . . in the course of bringing about a prompt removal of such forces.[74]

Section 5(c)[75] provides that the forces shall be removed at any time if the Congress so directs by concurrent resolution. The President still

69. The "time of war" provisions can be invoked either by a declaration of war by Congress, or by executive order under powers given to the President in article 56 of the UCMJ, 10 U.S.C. § 856 (1970). In undeclared war situations, like Vietnam, however, when neither body takes this action, it has been left to the military courts to decide whether these provisions should apply.

70. Pub. L. No. 73-148 (Nov. 7, 1973), *reproduced in* 1973 U.S. CODE CONG. & AD. NEWS 4064-69.

71. Pub. L. No. 73-148, § 4 (Nov. 7, 1973).

72. *Id.* § 5(b).

73. Congress can extend the sixty day period by passing a law without either declaring war or authorizing the use of forces. *Id.* § 5(b)(2). This, however, would be at least tacit approval.

74. *Id.* § 5(b)(3).

75. *Id.* § 5(c).

has the initiative in committing armed forces, but it is now subject to the approval of Congress.

The situations calling for the filing of this notice[76] include all that would reasonably call for the increased discipline and order which are to take effect during time of war. Use of the War Powers Resolution would protect both the military's special needs and the serviceman's interest in adequate notice and definition of the area and scope of wartime controls.[77] Under this system, the military should no longer be able to take advantage of the confusion that existed over deployment of troops in undeclared conflicts to decide when it wished to expand its jurisdiction and control.

Since Congress has provided for increased penalties in time of war, the courts should look to Congress to see whether the hostilities were authorized by it before a period would be declared wartime. Thus the standard would hark back to the *Bas v. Tingy*[78] "authorization"

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76. Sec. 4(a). In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

Id. § 4. In legislative history "commitment" is described as commencing "when the President makes the final decision to act and issues orders putting that decision into effect." H.R. REP. No. 93-287, 93d Cong., 1st Sess. 7 (1973) [hereinafter cited as HOUSE REPORT]. "[H]ostilities," besides meaning situations in which fighting has already begun, "also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict." *Id.* "'*Imminent hostilities*' denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict." *Id.*

The report then goes on to cite examples in which reporting would, or would not be required.

> A 100-percent increase in numbers of Marine guards at an embassy—say from 5 to 10—clearly would not be an occasion for a report. . . . However, the dispatch of 1,000 men to Guantanamo Bay, Cuba, which now has a complement of 4,000 would mean an increase of 25 percent, which is substantial. Under this circumstance, President Kennedy would have been required to report to Congress in 1962 when he raised the number of U.S. military advisers in Vietnam from 700 to 16,000.

Id. at 8.

77. *See* Pub. L. No. 73-148, §§ 4(a)(3)(A), (C) (Nov. 7, 1973). Section 4(b) provides additional opportunity for specificity:

> The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

Id. § 4(b). The reports are "to the maximum extent possible . . . to be unclassified." HOUSE REPORT, *supra* note 76, at 8.

78. 4 U.S. (4 Dall.) 37 (1800); *see* text accompanying note 10 *supra.*

distinction, except that now congressional action is required. At most, there may now be a two-month period[79] in which "time of war" will still have to be determined by the courts. During that period the President's reports should give the courts some aid in determining the seriousness of the situation, and the process of reporting can be considered some notice. Perhaps this should be a period in which there is a presumption of peacetime for military code purposes. If the situation is not serious enough to have prompted congressional approval by a declaration of war or specific authorization, or disapproval by the passage of a concurrent resolution ordering removal, or of such little necessity that the President has not tried to gain congressional support, then the military should not be granted the additional power. This would conform to the Supreme Court's move to limit military jurisdiction,[80] would help solve notice and due process problems, and would give needed consistency[81] to court decisions.[82] The courts should now

79. There is the potential of presidential use of forces without congressional action while the Congress is adjourned. Section 5(a) has anticipated this and provides:

> If, when the report is transmitted, the Congress has adjourned sine die or for any period in excess of three calendar days the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

Pub. L. No. 73-148, § 5(a) (Nov. 7, 1973).

However, under the Constitution, only the President can convene Congress, and therefore the request would not be obligatory on him or her. U.S. CONT. art II, § 3. However, the action of the Speaker and the President *pro tempore* of the Senate in requesting the convening of Congress should give sufficient indication of the seriousness of the situation.

80. *See* notes 40-44 *supra* & text accompanying.

81. Federal, state and military courts were unable to agree whether the United States was officially at war during the Vietnam conflict. Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970); Robb v. United States, 456 F.2d 768 (Ct. Cl. 1972); United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970); United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968); Freed v. Baldi, 166 Colo. 344, 443 P.2d 716 (1968); Jackson v. North Am. Assur. Soc'y, 212 Va. 177, 183 S.E.2d 160 (1971). *See also* Brief for Members and Former Member of Congress as Amici Curiae at 7, 8, Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972).

Congress has expressed a similar dilemma. Congressional records show that there was no accord, or general feeling that the Gulf of Tonkin Resolution, Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384, was a formal declaration of war. SENATE COMM. ON FOREIGN RELATIONS, 91ST CONG., 2D SESS., DOCUMENTS RELATING TO THE WAR POWER OF CONGRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER-IN-CHIEF AND THE WAR IN INDOCHINA 105 (Comm. Print 1970).

82. Congress could better clarify the situation by requiring the President, in his report under the War Powers Resolution, to specifically state whether the UCMJ's increased penalties for wartime violations are needed. This would give the clearest

determine the existence of a time of war in light of congressional intent demonstrated by actions taken under the War Powers Resolution.

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notice while ensuring that specific thought was given to whether these graver penalties were necessary.