SOME ASPECTS OF MILITARY SERVICE

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MEN find themselves in uniform either by volition or conscription. This paper discusses some of the legal and factual elements involved in creating military forces by volunteer and draft methods.

I

ENLISTMENT

A. Historical and Factual

In 1914, England and the United States were apparently the only nations of substantial size which relied exclusively upon the voluntary system to fill out their military forces. The same was true in 1939. And it has been asserted that in 1940, only Canada, Cuba, the Dominican Republic, Eire, Mexico, New Zealand, Nicaragua, the United States and Uruguay had armies composed of volunteers; by the end of 1940 this assertion could not be made of Canada and the United States.

At the beginning of 1940, existing statutes provided that: “Except in time of war or similar emergency when the public safety demands it, the number of enlisted men in the Regular Army shall not exceed two hundred and eighty thousand, including the Philippine Scouts.” Since the time of the World War the enlisted strength of the army has been governed by the annual Army or War Department appropriation acts. Sometimes a specific maximum figure has been fixed, at other times the same result has been achieved by the size of the appropriation allocated for enlisted men. The number of enlisted men thus provided for has been considerably less than 280,000. It is said that when the

*The views expressed are those of the author and not necessarily those of any agency of the government.

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2 36 TIME 12 (July 15, 1940).


4 See NATIONAL DEFENSE ACT, as amended to January 1, 1940 (printed for use of Committee on Military Affairs, U. S. Senate, 76th Cong.) pp. 15-16, note (Government Printing Office, 1940).
present war broke out the strength of the United States regular army was 167,000.\textsuperscript{5} At present the navy has about 181,000 men.\textsuperscript{6}

In the United States enlistments in the regular army are for the period of one or three years at the option of the soldier, and re-enlistments are for a period of three years.\textsuperscript{7} The Secretary of War may not restrict enlistments to a three year period.\textsuperscript{8} "Enlistments in the Navy may be for terms of two, three, four or six years."\textsuperscript{9} It may be noted that unlike enlistments in the army, no option is given the enlistee in the navy.

Foreign enlistments seem to have had the sanction of international law, early, on an en masse scale, and later, as to individual enlistments;\textsuperscript{10} but there has been a tendency to restrict even the latter, at least as to effecting the enlistment in a neutral country.\textsuperscript{11} In England, foreign enlistment was formerly encouraged so that military experience might be acquired.\textsuperscript{12} In the United States, since 1794,\textsuperscript{13} stringent legislation has forbidden foreign enlistment within the country,\textsuperscript{14} but in the absence of passport obligations, going abroad and enlisting were not forbidden.\textsuperscript{15} However, the control of the executive over passports can be and has been used to prevent such departure.\textsuperscript{16} While expatriation has been the consequence of taking an oath of allegiance to a foreign

\textsuperscript{5} S. Hearings on S. 4164, 76th Cong., 3d sess. (1940), p. 29, before Committee on Military Affairs.
\textsuperscript{6} Washington Evening Star B-5 (Dec. 3, 1940).
\textsuperscript{7} 10 U. S. C. (1934), § 628. Original enlistments in the National Guard and the National Guard of the United States are for 3 years, reenlistments for 1 or 3 years, and if Congress declares an emergency, the enlistment may be extended by Presidential proclamation until a period of 6 months after the emergency. 32 U. S. C. (1934), § 124.
\textsuperscript{9} 34 U. S. C. (1934), § 181. Under navy regulations enlistment is limited to citizens or nationals of insular possessions. Navy Reg., § 3.120, Federal Code of Regulations, tit. 34 (1939). As to marine corps enlistments, see infra, p. 919.
\textsuperscript{10} Riesman, "Legislative Restrictions on Foreign Enlistment and Travel," 40 Col. L. Rev. 793 (1940).
\textsuperscript{11} Id.
\textsuperscript{12} Prendergast, The Law Relating to Officers in the Army, rev. ed., 44 (1855).
\textsuperscript{13} See Riesman, "Legislative Restrictions on Foreign Enlistment and Travel," 40 Col. L. Rev. 793 at 800 ff. (1940).
\textsuperscript{15} United States v. Hertz, (C. C. Pa. 1855) 26 F. Cas. No. 15,357; Riesman, "Legislative Restrictions on Foreign Enlistment and Travel," 40 Col. L. Rev. 793 at 805 (1940).
MILITARY SERVICE

sovereign, and now, loss of "nationality" follows such act, this has not been an insuperable obstacle to many persons who have enlisted abroad.

B. Age

"Congress may require military service of adults and minors alike." It has been said that only Congress may determine the constitution of the army in matters such as nationality, race, age, physical and moral qualifications; and that the age at which an infant is deemed competent to perform military duties "depends wholly upon the legislature." Of course the same power would exist in respect to the navy. Congress on numerous occasions has enacted legislation concerning such matters. Although this power is one which belongs to the legislature it does not follow that, at least within certain limits, this power may not be delegated to administrative officials; that is, Congress may fix minimum and maximum qualifications and leave it to the Navy and War Departments to determine whether to use such minimum and maximum requirements or some other requirements coming within the boundaries fixed by Congress.

In respect to age limits for enlistments in the army and navy, two types of legislation have been common. One type has been the arbitrary fixation of age limits under and above which enlistments are not to be had. The other has been the fixing of an age at which minors could

18 Nationality Act of 1940, 54 Stat. L. 1168, § 401(b), 8 U. S. C. A. (Supp. 1941), § 801(b). This statute provides also for loss of nationality for "entering, or serving in the armed forces of a foreign state unless especially authorized by the laws of the United States, if he has or acquires the nationality of such foreign state." § 401 (e).
19 In a number of instances the possibility of regaining citizenship exists. Cf. 8 U. S. C. (1934), § 18; Nationality Act of 1940, 54 Stat. L. 1149, § 323, 8 U. S. C. A. (Supp. 1941), § 723. See Regulations of Immigration and Naturalization Service, General Order No. C-28, January 9, 1941, §§ 330.6, 330.7, 6 FEDERAL REGISTER 235 (1941). Some nations, such as Finland, do not require an oath. See Riesman, "Legislative Restrictions on Foreign Enlistment and Travel," 40 Col. L. Rev. 793 at 808 (1940).
21 WINTHROP, MILITARY LAW AND PRECEDENTS, 2d ed., 540 (1920).
22 See In re Morrissey, 137 U. S. 157 at 159, 11 S. Ct. 57 (1890); In matter of Riley, (D. C. N. Y. 1867) 1 Ben. 408 at 410.
23 See WINTHROP, MILITARY LAW AND PRECEDENTS, 2d ed., c. 3 (1920). Eligibility requirements for enlistment in the regular army are found in Army Reg., §§ 71.1-71.5; Federal Code of Regulations, tit. 10 (1939). It has been held that the courts are without jurisdiction to review a discharge of an enlisted soldier by the Secretary of War. Nordmann v. Woodring, (D. C. Okla. 1939) 28 F. Supp. 573.
enter into the military forces upon obtaining the consent of their parents or guardians to take such step.

Congress may require or may omit to require consent of the minor’s parents or guardian, and a parent may not bind the government by a condition inserted in the consent. Where parents of an enlistee conditioned their consent to an enlistment upon the minor’s carrying war risk insurance on behalf of his mother, it was held she could not hold the United States after a cancellation of the policy by the infant.

I. The Army

The two branches of the permanent defense agencies of the government have not taken the same course in respect to age limitations. Under the Act of March 16, 1802, men between the ages of eighteen and thirty-five could be enlisted. Between that time and the present there has been much legislation in respect to the ages for men in the armed forces. For many years, statutes have prohibited enlistment of minors without the consent of their parents or guardians entitled to their control.

The Act of March 2nd, 1899, stated that the age limits for original enlistments in the army should be eighteen to thirty-five. The National Defense Act of 1916 revived part of the statutory language which existed prior to 1899, to wit:

“No person under the age of eighteen years shall be enlisted or mustered into the military service of the United States without

25 United States v. Williams, 302 U. S. 46 at 50, 58 S. Ct. 81 (1937). The Court said that Congress had not provided for conditioned enlistments.
27 A review of the early legislation on this matter is contained in In matter of Riley, (D. C. N. Y. 1867) 1 Ben. 408. See WINTHROP, MILITARY LAW AND PRECEDENTS, 2d ed., 542, note 48 (1920). Considerable variation in age provisions existed in nations having compulsory military service in the world war. See ARMY WAR COLLEGE, STATISTICAL COMPARISON OF UNIVERSAL AND VOLUNTARY MILITARY SERVICE 9 (Nov. 1915).
28 Rev. Stat. (1878), § 1117. The Act of March 16, 1802, 2 Stat. L. 132, § 11 required the consent of parent, guardian or master. But between 1814 and through the Civil War it has been said that no such qualification existed. See In matter of Riley, (D. C. N. Y. 1867) 1 Ben. 408 at 414, 418; but cf. WINTHROP, MILITARY LAW AND PRECEDENTS, 2d ed., 543, note 50 (1920), and Matter of Beswick, 25 How. Pr. (N. Y.) 149 at 151 (1863).
the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control."

It was held that the inference could probably be made that there was no prohibition against enlisting minors under eighteen, and that such minors could be enlisted under the Defense Act. And in 1929 it was asserted that there was then no minimum statutory age limit for enlistments in the army. But the army regulations prohibit enlistments in the regular army of minors under eighteen and, as to original enlistments, of adults over thirty-five.

2. The Navy

The sea apparently has been considered more fit for the young than the army. In 1862 it was said that "The act of the 2d of March, 1837, seems to be still in force, and it is an authority for the enlistments of boys not under thirteen, nor over eighteen years of age, to serve until twenty-one." For a short period the Revised Statutes


Habeas corpus to release a minor from the national guard at a time when the guard was not called into service has been held to lie in a state court. Bianco v. Austin, 204 App. Div. 34, 197 N. Y. S. 328 (1922). Cf. Gibson v. State, 173 Misc. 893, 19 N. Y. S. (2d) 405 (1940), affd. 259 App. Div. 1104, 21 N. Y. S. (2d) 362 (1940). Under Tarble's Case, 13 Wall. (U. S.) 397 (1871), a minor enlisted in the federal forces could not obtain habeas corpus from a state court.

It has been said that the consent of the father alone is sufficient if both parents are living. WINTHROP, MILITARY LAW AND PRECEDENTS, 2d ed., 543, note 50 (1920). This may be doubted, since prior statutes used the term "his parent" and Congress may well have used the plural deliberately. Cf. Army Reg., § 71.3. On the other hand, although similar language exists as to navy enlistments, 34 U. S. C. (1934), § 161, the navy regulations require consent papers to be signed by the "father" and use the phrase "his parent." See Navy Reg., § 3.127. War Department Mobilization Regulations of October, 1940, M. R. 1-5, § 2, par. 10, require the consent of both parents unless one is absent for an extended time, and if one parent objects enlistment is not to be accepted.

81 Ex parte Beaver, (D. C. Ohio 1921) 271 F. 493.
83 Army Reg., § 71.3 (a). The War Department Mobilization Regulations issued October 1, 1940, M. R. 1-5, § 2, par. 10, contains a similar requirement.
84 Army Reg., § 71.3 (c).
fixed the minimum age at sixteen, but in 1879 the age limit was dropped to fifteen, and in 1881 to fourteen. At this point it has stayed for many years. Under existing statutes, minors under fourteen are not to be enlisted in the naval service, and those between fourteen and eighteen may be enlisted to serve until twenty-one if they have the consent of their parents or guardians. However, for a period prior to 1939, the navy regulations provided that the minimum age enlistment in the navy was seventeen, and minors between seventeen and eighteen were to be enlisted for the length of their minority. In July of 1939, the minimum age was raised to eighteen. It has been recently announced that the navy has lowered the age limit from eighteen years to seventeen years for enlistments for service until twenty-one, and that older recruits must sign up for six years.

3. The Marine Corps

An interesting question exists as to enlistments in the marine corps. The statutory provision relating to the age for enlistees in the navy does not mention the marine corps, although several other provisions relating to enlistment in the navy refer to enlistees in the navy and in the marine corps. Express provisions as to age requirements in the marine corps have been lacking and the question has arisen as to whether the army or the navy provisions govern. Two early cases took different positions on this matter. But a regulation of the Department of the Navy providing that "the regulations for the recruiting service

39 This provision may be compared with that in respect to enlistments in the army, which provides for written consent. The provision for written consent seems a very proper one and no apparent reason appears to exist for its omission from the statute dealing with enlistments in the navy. The difference probably results from the all too frequent independent legislative recommendations made by these two departments on matters upon which there might well be a uniform policy and a uniform legislative recommendation. However, the navy regulations contain detailed provisions requiring written consent as to minors under twenty-one. See Navy Reg., § 3.127.
41 Navy Reg., § 3.99.
42 Washington Sunday Star 1 (Nov. 17, 1940). It has been said that during 1939 the enlistment period was upped to six years. Washington Evening Star B-5 (Dec. 3, 1940). Married men are not acceptable for first enlistments, Navy Reg., § 3.94, and colored men are enlisted only as messmen, Navy Reg., § 3.95.
of the army shall be applied to the recruiting service of the marine corps, as far as practicable” was held persuasive that enlistments in the marine corps were governed by army regulations as to age."4 Marine corps enlistments are now governed by navy regulations, providing for a four years’ enlistment period for single citizens between eighteen and twenty-five years. Those under twenty-one must get consent of parents or guardian.45 Existing legislation can be construed to give the Secretary of the Navy power to fix age limits,46 but legislation by Congress fixing the age limits for the marine corps, either by way of making the navy or army age qualifications expressly applicable or by creating a set of independent age limits for that branch of the service might be helpful.

4. Some Legalisms

a. Enlistment

A career in the army or in the navy has apparently had a great attraction to minors—enlisted minors may take what cheer they can in that the Supreme Court has said that enlistment “operates to emancipate minors at least to the extent that by enlistment they become . . . entitled to have and freely to dispose of their pay”47—but from the number of reported cases which have dealt with the question of the minor’s or of his parent’s attempts to separate the minor from that career, we may justly conclude that a too youthful ardor is wont to chill with distressing suddenness when subjected to military or naval discipline. Out of this haste to get in and haste to get out has risen a number of interesting legal questions.48

Enlistment has been commonly understood to create a contract between the enlistee and the government, but like contracts dealing with marriage it is something more than a mere contract consisting of mutual promises or a promise in return for a performance. Since it involves a change of status, “no breach of the contract destroys the new status or relieves from the obligations which its existence im-

45 Navy Reg., § 7.13.
48 Both the war and navy departments have attempted to avoid these questions by providing for elaborate precautions in getting the consent of the minor’s parents or guardian. See Army Reg., § 71.3 (enlistment for foreign service requires the consent to state “no objection to oversea service”); Navy Reg., § 3.127. See also 34 U. S. C. (1934), § 162.
poses. 49 There have been many cases in which an enlistee has attempted to avoid his enlistment by the claim that his enlistment was invalid under the applicable statute. Most of such cases, in so far as the reported decisions may be resorted to as data, have been based upon the statutory requirements of consent to a minor's enlistment. Others, however, have been founded upon a flat statutory prohibition against enlistment of persons beyond a certain age. The last type of situation has probably given the courts the most difficulty. In both types of situations, nevertheless, the prevailing factor in guiding the course of decision of the courts has been the realization that they were dealing with a status and a contract to which society was a third-party beneficiary. Public policy meets public policy head on with interesting results. Thus, on the question of voidance of enlistment there has been express recognition of the possibility that a difference in result might be reached where there has been an induction into the armed forces, and where merely an agreement to enlist has been entered into but not yet consummated, since in the latter situation a change of status has not yet occurred. 50

It may be noticed that the quoted statutory provision concerning the requirement of consent as to minors enlisting in the military forces has a proviso that the minor have a parent or guardian entitled to his custody and control. 51 This proviso has been relied upon by the courts where a parent or guardian resided in a foreign country, the position being taken that such parent or guardian could not be said to be entitled to the custody or control of a minor in this country. 52 Nor has disaffirmance been allowed by a guardian appointed in this country after the enlistment of the minor, whose parents resided in Italy. It has been said that the arrival at a later date of a parent or guardian so entitled would not affect the situation. 53 The comparable navy statute relating to enlistment of minors does not contain such a proviso.

"At common law an enlistment was not voidable either by an infant or its parents or guardians." 54 An examination of the cases re-

50 Cf. Tyler v. Pomeroy, 8 Allen (90 Mass.) 480 (1864); see In re Grimley, 137 U. S. 147 at 155, 11 S. Ct. 54 (1890).
51 See supra, note 30.
52 Ex parte Dostal, (D. C. Ohio, 1917) 243 F. 664 at 670.
53 Id.
54 Ex parte Winfield, (D. C. Va. 1916) 236 F. 552 at 553 (national guard); see In re Morrissey, 137 U. S. 157 at 159, 11 S. Ct. 57 (1890); United States v. Williams, 302 U. S. 46 at 49, 58 S. Ct. 81 (1937).
veals that much the same result has been reached by the courts under the numerous statutes relating to this matter. It has been held that in the absence of invocation by his guardian or parent of the statute requiring consent, the infant cannot take advantage of it.\(^{55}\) If he is within the age limits prescribed, he cannot avoid the enlistment during his minority or renounce it when he has become of age.\(^{56}\) The courts in this instance have almost uniformly taken the position that the contract of enlistment is not void, but merely voidable if the proper conditions for voidance exist. If an enlistment be considered in the nature of a contract, it would seem that a condition in the contract giving one a right to disaffirm by taking some permitted action might be waived as in other contracts. And it has been said that a parent or guardian must effect this disaffirmance with reasonable diligence after knowledge of the enlistment, otherwise an implied consent will be found which will waive the requirement of any written consent.\(^{57}\) These statements can hardly be regarded as holdings, however, as they have been made in connection with an attempt at disaffirmance after the infant had become liable to military punishment for a military offense.

Even where disaffirmance may be had for lack of consent and the enlistment cancelled by application of the infant's parent or guardian, such disaffirmance will not relieve the infant from punishment by military law for a breach of army discipline—at least for this purpose the enlistment continues in force until the infant has completed the penal sentence imposed by the military tribunal.\(^{58}\)

As has been noted, statutory provisions exist prohibiting without any apparent qualification the enlistment of certain types of persons, but where such persons have entered the military forces by deception as to their true status the courts here, as in other instances, have taken the position that the enlistment is not void.\(^{59}\) An Act of August 1, 1843, alien refused withdrawal from enlistment; In re Grimley, 137 U. S. 157, 11 S. Ct. 57 (1890).

\(^{55}\) In re Morrissey, 137 U. S. 157, 11 S. Ct. 57 (1890).

\(^{56}\) Id.


\(^{59}\) United States v. Cottingham, 1 Rob. (40 Va.) 649 (1843), alien refused withdrawal from enlistment; In re Grimley, 137 U. S. 147, 11 S. Ct. 54 (1890), over age. In the latter case the Court said that the enlistment would be void if it were shown that "he was not able-bodied, or that he had been convicted of a felony, or that before his enlistment he had been a deserter." 137 U. S. at 153. The statutes provide:
provided that in times of peace persons who had not made a legal declaration of their intention to become citizens should not be enlisted. Habeas corpus has been denied a nondeclarant alien who was held by the military authorities for desertion, although it appeared that he had always protested his induction into the army under the draft and had taken the oath in the army under protest. But here again it has been held that only the United States may plead this disability to avoid the enlistment contract—the enlistee takes the burden of his own deception. Thus, where an infant has enlisted, whose enlistment under the statutes is not permitted even with the consent of his parents, neither the infant nor his parents or guardian can disaffirm so as to prevent the minor’s punishment for a military offense.

During the Civil War there were many instances of minors under the enlistment age enlisting, and the Act of February 13, 1826 provided that “the oath of enlistment taken by the recruit shall be conclusive as to his age.” It was a matter of dispute whether this oath was conclusive on the court.

The interesting question has arisen whether an attempted disaffirmance may be defeated by the military authorities pressing statu-
tory charges for fraudulent enlistment through court martial proceed­ings. In two opinions the United States Circuit Court for the dis­trict of Maine granted habeas corpus to a parent, in one case, In re Carver,66 where charges were preferred before the petition for the writ, and in the other, Ex parte Houghton,67 where charges were preferred after. A similar result was reached by a federal district court of Virginia in regard to a naval enlistment.68 In both of the Maine cases the court said that its jurisdiction had attached and was not to be disturbed by court martial proceedings.69 As to this jurisdictional point, it has been said that

"the weight of authority seems clearly to be that it is immaterial whether the arrest was made before or after the issue of the writ.... These decisions by Circuit Courts of Appeal must be regarded as overruling decisions like those in In re Carver ... and Ex parte Houghton."70

This case and several others have refused to grant civil relief from the court martial proceedings.71

While it may seem hard for a minor to be punished for enlisting, any other course of decision would undoubtedly impair the maintenance of army discipline.72 Undoubtedly the realization of liability for fraudulent enlistment will persuade a minor who has gotten tired of army or navy life to remain for the term of his enlistment and not to try to avoid the enlistment on the ground of being under age. Where such minors have entered the military forces, their physical appearance probably was such as to justify a belief that they were within the proper ages for enlistment. Again, the knowledge that a penalty may be im-

66 (C. C. Me. 1900) 103 F. 624.
67 (C. C. Me. 1904) 129 F. 239.
69 In re Carver, (C. C. Me. 1905) 142 F. 623, where a minor Carver had deserted, the court at first issued a writ of habeas corpus, saying this would not prevent the federal authorities from prosecuting him criminally in the civil courts. On a re­hearing, the court said that since it appeared that the enlistee had been arrested as a deserter prior to the petition, it considered itself bound by other federal cases to discharge the writ.
70 Ex parte Foley, (D. C. Ky. 1917) 243 F. 470 at 472-473.
72 Army Reg. 615-360, par. 44(b), April 4, 1935, specifically forbade discharge for fraudulent enlistment consisting of concealing minority.
posed for fraudulent enlistment will discourage minors from entering the military forces with the idea that they can quit whenever they deem fit to do so. Congress, however, apparently has been impressed with the consideration that as to minors who have served in the military forces there is an inherent hardship and stigma attached to denying an honorable discharge. In 1936, to enable the ex-enlistee or his family to share in the rights, privileges and benefits attached to an honorable discharge, Congress passed a statute to the effect that a soldier who had served as an enlisted man between April 6, 1917, and November 11, 1918, and was discharged for fraudulent enlistment because of minority or misrepresentation of age, should, after March 3, 1936, be held to be discharged honorably if he would otherwise have been entitled to an honorable discharge. 78 Similar provisions have been enacted in regard to sailors in the United States Navy and as to marines. 74

b. Discharge

An enlisted man does not secure any tenure for the term of his enlistment. The government may dismiss him from the service at any time. 75

"When by reason of death or disability of a member of the family of an enlisted man, occurring after his enlistment, members of his family become dependent upon him for care or support, he may, in the discretion of the Secretary of War, be discharged from the service of the United States.

"In time of peace the President may, in his discretion and under such rules and upon such conditions as he shall prescribe, permit any enlisted man to purchase his discharge from the Army." 76

A similar provision for purchase of discharge exists as to the navy and the marine corps. 77 To those who are discharged from the army because

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77 34 U. S. C. (1934), § 196. As to discharge within three months before expiration of the term, see 34 U. S. C. (1934), § 195.
of inaptitude the encouragement may be given that if they are honestly inapt an honorable discharge may be given.  

At present there are on the statute books two provisions concerning the discharge of minors. An Act of June 30, 1921, makes it mandatory for the Secretary of War to discharge enlisted men under eighteen years upon application of either parent or legal guardian. Such discharge is to be with pay and with the form of discharge certificate to which the enlistee’s service entitles him. Another provision exists to the effect that a minor under twenty-one is to be given a similar discharge upon application of his parent or guardian if the application is made within six months after the enlistment, and if the enlistment was made without the written consent of his parent or guardian. It will be noticed that under the first act the right to discharge seems to exist even if a prior consent to enlistment had been obtained from the parent. The first mentioned act allows a discharge on the application of either parent; the latter refers only to “his parent.” There is a time limit for making the application under the second statute and no such restriction appears in the first statute. Other differences are apparent. Under both acts the right to a discharge is given not to the infant but to his parent or guardian.

These statutory provisions have a long and checkered career with variations occurring not infrequently, apparently as Congress was influenced by the presence or absence of war clouds, political pressure, and the sentiment of the particular time. The first mentioned statute was enacted June 30, 1921, and it has been suggested that it may have been superseded by the other provision which was enacted February 12, 1925, and many conflicting views have been forthcoming on

80 43 Stat. L. 896 (1925), 10 U. S. C. (1934), § 653. It has been held that parent means primarily the father and that he may obtain a discharge even if the mother has consented. Dig. Ops. Judge Adv. Gen. 1912-1930, § 246, No. 220.808, February 13, 1926, and that discharge is not mandatory if requested after the soldier becomes of age. 1d.
81 One of the early acts, the Act of February 24, 1864, 13 Stat. L. 10 (1864), conditioned this right of discharge upon the absence of consent, express or implied, of the parent or guardian of the enlistee. This was modified in the same year as to enlistees under 16 years. 13 Stat. L. 380 (1864).
82 Some of the early acts were not so limited. See In matter of Riley, (D. C. N. Y. 1867) 1 Ben. 408 at 415 ff.
83 See In matter of Riley, supra, note 82.
MICHIGAN LAW REVIEW [Vol. 39

this point. It clarifying legislation seems called for. Since both of these provisions provide for a discharge with the form of discharge certificate to which the minor’s service after enlistment entitled him, a question might be raised as to whether a minor could be prosecuted for fraudulent enlistment for misrepresentation of his age and be refused an honorable discharge. These provisions assume that a minor has gotten into the army when he should not be and this undoubtedly would occur almost invariably by virtue of deception on the part of the minor. This view might be considered to be bolstered by the fact that these provisions are prospective and special acts were subsequently passed to take care of minors enlisting during the World War and the Spanish-American War who were discharged for fraudulent enlistment. It is believed, however, that it was not meant by these statutes to prevent the minor from suffering military punishment for fraudulent enlistment even though such enlistment would not prohibit an honorable discharge. It has been held that a mandatory discharge is not required when a minor has been charged with a serious offense.

In respect to the navy there are, likewise, two provisions concerning the discharge of minors. An early statute covers the case of minors under eighteen. It may be noted that both enactments were parts of appropriation acts. At first the United States Code omitted the 1921 act; later it inserted it. See 10 U. S. C. (1934), § 653a. The War Department has ignored the 1921 act at times; see Dig. Ops. Judge Adv. Gen. 1912-1930, § 246, No. 220.808, February 13, 1926, March 3, 1926, but at present appears to regard both as in force, see NATIONAL DEFENSE ACT, as amended to January 1, 1940 (printed for use of Committee on Military Affairs, U. S. Senate, 76th Cong.), p. 67. In 1935 an army regulation was issued stating that discharges would be issued under the Act of 1925 in all cases coming within its provisions, but as to soldiers under 18 whose cases do not come within the 1925 act, the 1921 act would be applied. Army Reg. 615-360, par. 32, April 4, 1935. Subsection (d) of this regulation provided that if the father is alive and has not lost control of the minor, “the consent of the mother for the enlistment of the soldier does not prevent discharge upon application by the father, nor does application by the mother for discharge have any effect if the father has consented to enlistment.” This would seem to be inconsistent with the Act of 1921, which provides for an application for discharge by either parent.

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87 Cf. Army Reg. 615-360, April 4, 1935, par. 39, as to the form of discharge certificate to be given in such case.

88 Dig. Ops. Judge Adv. Gen. 1912-1930, § 246, No. 220.808, July 9, 1921. Army Reg. 615-360, April 4, 1935, par. 34, provided that a minor under charges or in confinement for a serious offense should not be discharged until his case had been properly disposed of when his parents applied for his discharge, but that it was proper to go to considerable lengths to determine that no trial be had or that the remainder of any sentence should be remitted.

While these two enactments seem less inconsistent than the comparable enactments concerning the army, inasmuch as a possible construction could be made concerning these statutes whereby one would be limited to minors under eighteen and the other to minors under twenty-one, on their face they appear to overlap and to be inconsistent. Here again, clarifying legislation would be helpful.

II

Conscription

Compulsory military service is not a new concept, but its use has varied considerably from early times until the present. The philosophy of the Romans made it natural for the citizens of Rome to engage in military service, although late Roman history is full of the mercenary soldier. Conscription for military service appears to have been the rule during the Roman Republic, although voluntary service was permissible; during the Empire this method of raising armies was to a considerable degree supplanted by the volunteer system. Occupational deferments do not seem to have been made; avoidance of military service made one subject to a gamut of punishments running from confiscation of property to, at one time, being sold into slavery. The pay of the Roman soldier, like that of his present compeer, was nothing to boast about but he did have special privileges as to marriage, inheritance, and the making of wills. The length of service of Roman soldiers varied from sixteen to twenty-five years. It is interesting to note that in peacetime the Roman soldiers appear to have engaged in large scale public works construction.

Conscription has been said to have been used also in ancient Greece, but it is generally believed that universal compulsory military service had its roots in the French Revolution, the first conscription act being

92 But magistrates, priests and state officials absent on state business were exempt.
93 Id., at 584.
94 Id., at 587.
95 Id., at 588.
96 Id., at 590.
a French decree during that period. The genesis of this form of service is said to be the fact that by this time pillaging and plundering had been largely done away with so that the profession of soldier was not remunerative and soldiers were drawn from the dregs of society. On July 11, 1792, all able-bodied men were made liable for active service, but this was not very effective because of absence of means to enforce the decree. In the following year a compulsory decree was issued but this brought riots; finally males eighteen to twenty-five years of age were made subject to military service. The French conscription act suffered until 1870 from the abuse that exemptions could be bought. Conscription flowered under Napoleon but reached its apogee in Prussia.

At the time of the World War over thirty-three countries were said to have had conscription. As a result of the World War conscription was forbidden in Austria, Germany, Hungary, Bulgaria and Turkey.

The relative freedom of England and the United States from any peacetime conscription is due, probably, to several factors. The first is the major reliance each of these two countries has had in its navy as an offensive and defensive weapon. The navy usually is able to fill its manpower needs by enlistment. The second factor is that neither country had much dissatisfaction with the international status quo which existed prior to the present war and the World War. The third has been the feeling that war was not an immediate concern either because of the nations' location in respect to war frontiers, because of a liberal national ideology to which the idea of compulsory military service was not well adapted, or because of wishful thinking. A corollary to this has been

99 Id.
100 Id.
101 Id.
102 7 ENCYCLOPEDIA AMERICANA, “Conscription,” 544 (1938).
the belief that war's demands on man-power could be met when war came.

In 1915, the Army War College said that "with reference to man-power, it appears that the total number of males of military age in a nation fit for service is about one-sixth of the total population," and considering the exemptions which must be made, that one tenth of the total population is the maximum man-power a nation can use in actual fighting operations.107

A. The British Empire

The standing army representing a nation was little known in the Middle Ages, and it has been said that a standing army was unknown at common law. The standing army appears to owe its existence, in England, to the Revolution of 1688. Voluntary enlistment has been a normal method of raising an army in England, although conscriptive service has not been unknown. Obligatory military service was customary under the feudal system.

The term "universal selective service" has political significance if we glance back into English history. Under the Tudors, Stuarts and other kings it has been said there were sporadic but unsuccessful attempts to raise armies by conscription. But when conscription came to England in the time of Queen Anne it came as an act directed at the poor—that is, compulsory service was limited to that class. Impressment into the military and naval forces was not uncommon in England and the legality of this practice was approved in numerous cases.

106 Army War College, Statistical Comparison of Universal and Voluntary Military Service 6 (Nov. 1915).
107 Id., 6. This, in the United States, was estimated to be 10 million. Id., 10.
108 On a basis of 18-45 age limits, it has been estimated in 1940 that about 27,000,000 men would be liable to military service, and that after exemptions and disqualifications between 6,000,000 and 7,000,000 men would be available for service. See Fitzpatrick, Conscription and America 99 ff. (1940).
109 Id., 1-2.
110 Id., 38, 39.
A limited conscription act was enacted in England January 27, 1916;114 a general conscription act followed on May 25, 1916.115 War's demands for an augmentation of man-power resulted in a Military Service (Review of Exemptions) Act in 1917.116 An act to provide "for the cancellation of certificates of exemptions for military service granted on occupational grounds" was enacted in the early part of 1918.117 And a few months later liability for military service was extended to include men generally between eighteen and fifty-one, and medical practitioners up to fifty-six years age.118

A fading belief in the efficacy of an appeasement policy led Great Britain to enact the British Military Training Act in May, 1939.119 Of this act it was said:

"This Act is remarkable as the first enactment to be passed in time of peace authorizing a form of conscription in this country. It is of a temporary character, it being provided in s. 21 that the Act is to continue in force for three years from the date of its passing, i.e., May 26, 1939, unless further continued or unless an Order in Council is made declaring that the necessity for the Act has ceased to exist, when it is to expire.

"This Act applies generally to male British subjects between 20 and 21 years of age ordinarily resident in Great Britain (s. 1), with special provisions for Scotland (s. 19), but power is given to apply it to British subjects ordinarily resident outside Great Britain (s. 18) and to extend it to the Isle of Man (s. 20)."120

With the declaration of war, this act was superseded by the National Service (Armed Forces) Act of 1939, on September 3, 1939.121 This last mentioned act is largely a reproduction of the Military Training Act,122 but applies to males between eighteen and forty-one.

During the World War there was considerable reluctance in Canada to invoke a militia statute of long standing under which compulsory

114 5 and 6 Geo. V, c. 104 (1916), conscripting unmarried men and widowers without dependent children between the ages of 18 and 41.
115 6 and 7 Geo. V, c. 15 (1916).
116 April 5, 1917, 7 Geo. V, c. 12.
117 Feb. 6, 1918, 7 and 8 Geo. V, c. 66.
118 8 Geo. V, c. 5 (1918).
121 2 and 3 Geo. VI, c. 81 (1939).
122 The reproduction is a verbatim one in many instances. The two acts are compared in 188 L. T. 205 (1939).
service might have been effected. The Canadian Draft Act of August 29, 1917, was signalized by draft riots in Quebec. At present Canada provides for a four-months compulsory military training period, changing from a thirty-day period.

It has been said that Australia was the first English-speaking nation to have limited compulsory military training and military service. But during the World War a referendum on the question of compulsory service for overseas was defeated.

At present Canada, New Zealand and Australia, although providing for compulsory service, do not provide for such service abroad.

In the British colonial possessions the governors of the various colonies are entitled to the obedience, aid and assistance of all military and air force officers. But except by special appointment from His Majesty, the governor is not vested with command of His Majesty's regular forces in the particular colony, and has no control over the movements of His Majesty's ships. Considerable discretion exists in the Colonial Government as to the raising of troops. In the present war voluntary enlistments have been encouraged in some colonies, while in others a compulsory form of service has been imposed.
B. United States

1. Early Acts

The classic conception of the sources from which the United States gets its military man-power in wartime is the regular army, the state militia, volunteers, and the draft.

The question of compulsory military service has been a live one in the United States on several occasions. A modified form of compulsory service existed in the colonies, where almost uniformly liability for militia service was provided for. The constitutions of at least nine states shortly after the Revolution so provided. A statute dating from 1916 makes male citizens and male declarants of intention to become citizens part of the militia of the United States if they are more than eighteen years of age and not more than forty-five.

The use of the militia in the armed forces has been a troublesome problem in the history of the country largely because of the question of states' rights versus federal rights. Since the inception of the Republic an impressive array of criticism has been levied against the use of militia and volunteers as well, and in time of danger compulsory military service has been recommended by Washington, Jefferson, Lincoln and other leading figures. The National Defense Act of

184 The composition of the regular army is established by statute, 10 U. S. C. (1934), §§ 4, 602. "The Army of the United States shall consist of the Regular Army, the National Guard of the United States, the National Guard while in the service of the United States, the Officers' Reserve Corps, the Organized Reserves, and the Enlisted Reserve Corps." 10 U. S. C. (1934), § 2.

185 The brief of the government, pp. 123-130, in the Selective Draft Law Cases, 245 U. S. 366, 38 S. Ct. 159 (1917), refers to a lengthy list of colonial acts which evidenced the power to compel military service.

186 Selective Draft Law Cases, 245 U. S. 366 at 380, 38 S. Ct. 159 (1917); Government's brief in Selective Draft Law Cases, pp. 18 et seq.


188 For an able discussion of this problem, see Wiener, "The Militia Clause of the Constitution," 54 Harv. L. Rev. 181 (1940).

1916 attempted to avoid the issue of compelling the state national guard to serve in the army and be liable to be sent abroad by providing for the induction into the military service of the nation of the individual members of the national guard together with a proviso that so far as possible the particular organization from which they were drawn be kept intact.\footnote{140} A federal oath of enlistment was required of the members of the national guard and the individuals changed as such individuals from their status as national guardsmen.\footnote{141} The legality of this action was questioned during the World War but upheld by the Supreme Court in the Selective Draft Law Cases.\footnote{142} "A member of the National Guard becomes a part of the military force of the United States from the date of the draft order."\footnote{143}

An unrealistic draft law was passed in 1792 but shortly became a dead letter.\footnote{144} At the time of the War of 1812 compulsory military service was again urged and near the close of the War of 1812 a bill was introduced for this purpose but failed to pass, largely through the opposition of Daniel Webster.\footnote{145}

When the Civil War broke out neither side at first resorted to conscription, but the Confederates were the first to adopt that method of procuring military man-power.\footnote{146} It was followed by the federal Draft Act of March 3, 1863.\footnote{147} This draft act was a half-hearted attempt at compulsory military service.\footnote{148} It came a considerable time


\footnote{143} Ex parte Dostal, (D. C. Ohio 1917) 243 F. 664 at 675.


\footnote{147} 12 Stat. L. 731 (1863).

\footnote{148} It and a Confederate compulsory service act of 1863 have been considered to have been bad failures. See Fitzpatrick, Conscription and America, c. 2 (1940). The title of that chapter is "The Civil War Drafts: How Not to Conscript Men."
after the inception of the conflict and allowed one to be excused by payment of money or the procuring of a substitute.\textsuperscript{149} Its burden fell largely upon the poorer class of persons and it caused widespread riots. It may be noted that the administration of this act was largely by provost marshals;\textsuperscript{150} and that this was true in a modified form during the World War.\textsuperscript{151} Not until the Selective Service Act of 1940 was the administration of selective compulsory military service entrusted to civilians.

The 1917 draft act\textsuperscript{152} was amended on May 20, 1918,\textsuperscript{153} to include persons who had attained twenty-one years since the last registration day and to exclude theological and divinity students and medical students in recognized medical schools; another amendment established draft ages of eighteen to forty-five.\textsuperscript{154}

Universal military service in peacetime was advocated in the United States in 1916.\textsuperscript{155}

"The Congress in 1920 placed upon the War Department General Staff the problem of preparing plans for the mobilization of the manpower of the Nation. For a short time thereafter this was done by conferences between the Army and Navy. In 1926 there was organized the Joint Army and Navy Selective Service Committee, and upon this committee was placed the responsibility of preparing the rules and regulations for the mobilization of the manpower of the Nation."\textsuperscript{156}

The present conscription bill is said to have rested to a large extent on these studies.\textsuperscript{157}


\textsuperscript{149} It has been said that the major purpose of this act was to act as a club for enlistment. See Gillette, "War Legislation Pertaining to the Army," 17 Mich. L. Rev. 127 (1918). $586,164,528 is said to have been spent in bounties to procure men for the Army. Fitzpatrick, Conscription and America 22 (1940).

\textsuperscript{150} Winthrop, Military Law and Precedents, 2d ed., 169, note 58 (1920); Fitzpatrick, Conscription and America 24 (1940).

\textsuperscript{151} The provost marshal was the director of the selective service act, but induction was largely in the hands of the civilian boards.

\textsuperscript{152} 40 Stat. L. 76 (1917).

\textsuperscript{153} 40 Stat. L. 557-558 (1918).

\textsuperscript{154} Act of August 31, 1918, 40 Stat. L. 955.


\textsuperscript{156} Hearings on H. R. 10132, 76th Cong., 3d sess. (1940), p. 67; see also id., p. 112.

\textsuperscript{157} Id., pp. 67, 112. The Senate Committee on Military Affairs reported out a universal compulsory military training bill in 1920. Id., p. 5.
The 1933 edition of the War Department’s industrial mobilization plan had a selective service annex which foreshadowed the present conscription bill. A joint Army and Navy Selective Service Committee in October 1939 issued a pamphlet entitled American Selective Service. In Congress, the pendulum of sentiment swung far to one side in 1939. A number of bills were introduced in Congress to prohibit conscription for service abroad unless a national referendum should have resulted in a vote for such conscription. In 1940, the pendulum swung back again.

Although the draft acts of the Civil War, both Confederate and Federal, had been upheld in several state decisions, it was not until the World War that the Supreme Court found itself forced to decide the question. The constitutionality of the draft act was upheld in the Selective Draft Law Cases, in an opinion thought to be less able than the government’s brief upon which it was based. Nevertheless, the decision is generally regarded as sound.

2. The Burke-Wadsworth Conscription Act of 1940

The present draft act was enacted on September 16, 1940. It may be expected that it will be subjected to an attack on the basis of unconstitutionality. It is not likely that such an attack would be successful. Almost every conceivable argument was raised in the Selective Draft Law Cases except, of course, the one that conscription was being at-

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158 TOBIN and BIDWELL, MOBILIZING CIVILIAN AMERICA 138 (1940).
159 E.g., S. J. Res. 4, S. J. Res. 84, H. J. Res. 66, all of the 76th Cong., 1st sess. (1939).
161 The constitutional issues have been thoroughly discussed and the authorities reviewed in the briefs of the government and opposing counsel in the Selective Draft Law Cases, supra, note 160; see also Black, “The Selective Draft Cases—A Judicial Mile Post on the Road to Absolutism,” 11 BOST. UNIV. L. REV. 37 (1931); CHAMBERLAIN, PRESENT DANGERS CONFRONTING OUR COUNTRY, S. Doc. 78, 65th Cong., 1st sess. (1917).
162 Pub. No. 783, 76th Cong., 3d sess. (1940), 50 U. S. C. A. (Supp. 1940), Appendix, § 201 et seq. The act and the bill as it went through Congress have received a thorough but unsympathetic analysis in 9 INT. JUR. ASSN. MONTHLY BULL. 13 et seq., 33 et seq. (1940).
163 See Mickelwait, “Legal Basis for Conscription,” 26 A. B. A. J. 701 (1940). See note, 54 HARV. L. REV. 278 at 279 (1940). The constitutionality of the act has been supported in a brief submitted by a member of the Judge Advocate General’s office to the House of Representatives’ Committee on Military Affairs, HEARINGS ON H. R. 10132, 76th Cong., 3d sess. (1940), p. 592 et seq., and attacked in another brief submitted to the same body, p. 610 et seq.
tempted in peacetime. It is certainly true that this act has been passed during peacetime whereas the prior act was passed during war. The war power of Congress, however, is not limited to taking steps during war, especially in view of the fact that under modern conditions war is often not formally declared. Congress may prepare for war or for national defense and has done so on innumerable occasions with the approval of the courts. Thus, it has always raised armies during peacetime. It has and is taking property for defense and war purposes in cases arising in courts almost every day. To mention a few of the statutes under which property may be taken for defense or war purposes: the War Purposes Act, the Tennessee Valley Authority Act, the Nitrate Plant Act, and many others. If all these things may be done by Congress because it deems such things necessary for national defense and preparation for war, it would certainly seem that if Congress determines it is necessary in order to provide for the national defense that it raise armies by conscription, such action is well within its constitutional powers. A reading of the briefs in the Selective Draft Law Cases reveals that the focal point of attack was the provision for sending the draftees abroad. It may be noted that there is an express provision in the present act prohibiting such action—not that it is believed the presence or absence of this provision would have any bearing on the constitutional problem. On the question of necessity, it is believed that the courts would hesitate to substitute their opinion for that of Congress.

In connection with notifying registrants of their induction, it is interesting to note that in the World War under the draft act of that period and the supplementary rules and regulations, the draft notice was mailed. It was held that the mailing of such notice, whether received or not, was sufficient to bring the draftee under military law and subject him to court martial and that proof of mailing could be circumstantial if it measured up to that degree of proof required in an ordinary law case. It has also been held that a nonprejudicial error in

fixing the date for induction in the notice would not vitiate the notice.\(^{170}\) The present act and regulations provide for the mailing of a questionnaire and a notice of classification, as well as a notice for the registrant to report for a physical examination and a notice advising registrants classified in certain categories that the land and naval forces have called for the induction of registrants in such classes.

At the time the conscription act was passed existing legislation provided for loss of citizenship where one was convicted of going out of the country in order to avoid the draft.\(^{171}\) and this provision is now incorporated in the Nationality Act of 1940.\(^{172}\)

a. **Scope**

The conscription act made the national guard subject to be ordered into active federal service whenever Congress deemed it necessary to have troops in excess of those in the regular army and those in active training.\(^{173}\) Under it, with certain exceptions, all male citizens and male alien residents had to register who on registration day were between twenty-one and thirty-six years of age.\(^{174}\) Except as otherwise provided in the act, such male citizen and such alien who “has declared his intention to become such a citizen” have been made liable to training and service in land or naval forces.\(^{175}\) This appears to apply to aliens who have taken out their first citizenship papers.\(^{176}\) At the hearings in the House the Judge Advocate General’s office recommended that enemy aliens should not be made liable to training service, since this was contrary to international law and might possibly be held unconstitutional.\(^{177}\) The Judge Advocate General’s office seems incorrect in as-


\(^{174}\) Sec. 3 (A).

\(^{175}\) Sec. 3 (A). See 54 Harv. L. Rev. 278 at 280, note 9 (1940).

\(^{176}\) It is interesting to note that under the recent codification of naturalization laws there are a number of instances in which it is provided that citizenship may be acquired without declaration of intention and without taking out first papers. Nationality Act of 1940, 54 Stat. L. 1137, 8 U. S. C. A. (Supp. 1941), § 501 et seq.

\(^{177}\) Hearings on H. R. 10132, 76th Cong., 3d sess. (1940), pp. 594-595.
suming that such inclusion would be unconstitutional. But since the Selective Service Act was passed during peacetime it would seem incongruous to use the expression "enemy alien" in such act. The Draft Act of 1917, however, which was passed when the United States was at war, excepted enemy aliens. The United States has entered into many treaties under which there is a reciprocal exemption of citizens for military service in the forces of a treaty nation. Recruiting conventions, however, with allied nations are not uncommon. In 1918 England had recruiting conventions with Italy, United States, Greece, Russia and France.

The present act applies to males between eighteen and thirty-six. The Selective Draft Act of 1917 fixed the age limits at twenty-one to thirty. The present act provides for a twelve-month training period extendable by the President to such time as may be necessary for national defense whenever Congress has declared that the national interest is imperiled. After completion of such training and service the enrollee is to be transferred to a reserve component until he reaches the age of forty-five or until the expiration of a period of 10 years from such transfer or until discharged. During his connection with the reserve component he is subject to such additional training and service as may be required by law. Limited exception is made as to liability for further service under the act in respect to men who thereafter serve in the regular army or national guard.

The twelve-month period of training provided for by the Selective Service Act is less than that required in Germany, France, Japan and Italy.

The original bill contained no prohibition against paying bounties or hiring substitutes or purchasing a release, nor did it authorize vol-

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179 40 Stat. L. 77-78 (1917).
181 Great Britain, War Cabinet Report for the Year 1918, p. 132.
182 Pub. No. 783, 76th Cong., 3d sess. (1940), § 3 (A).
183 Id. § 3 (C). See 54 Harv. L. Rev. 278 at 284 (1940).
184 Pub. No. 783, 76th Cong., 3d sess. (1940), § 3 (B).
185 Id., § 3 (C). See 54 Harv. L. Rev. 278 at 284 (1940).
untary enlistment. Both were urged by the War Department,\textsuperscript{187} and adopted. Permission to avoid military service by way of substitution or commutation and the system of giving bounties had much to do with the lack of success of the draft act during the Civil War. The second of these methods of favoritism fell by the wayside in 1864 when commutation was prohibited.\textsuperscript{188} The Draft Act of 1917 prohibited all three practices,\textsuperscript{189} and the present act does likewise.\textsuperscript{190}

The act applies to the states, District of Columbia, Alaska, Hawaii and Puerto Rico. While possibly the United States could extend the act to the Philippines,\textsuperscript{191} political considerations might deter such extension at present, especially since the territory of the Philippines has a compulsory military training and service law of its own\textsuperscript{192} and has had the benefit of the services of a highly competent American military adviser.\textsuperscript{193}

b. \textit{Occupational Deferments}

Absolute exemption is provided for as to certain classes of persons but these are quite limited.\textsuperscript{194} Students at colleges and universities were exempted for the academic year of 1940-1941.\textsuperscript{195} Substantial full time attendance is required and the taking of a correspondence course is not sufficient to justify exemption.\textsuperscript{196} Ministers and divinity students are exempted from training and service but not from registration.\textsuperscript{197}

The present act provides for deferment

"of those men whose employment in industry, agriculture, or other occupations or employment, or whose activity in other endeavors, is found ... to be necessary to the maintenance of the national health, safety or interest. ... No deferment from such

\textsuperscript{187} See \textit{id.}, p. 71.
\textsuperscript{188} 13 Stat. L. 379 (1864).
\textsuperscript{189} 40 Stat. L. 78 (1917).
\textsuperscript{190} Pub. No. 783, 76th Cong., 3d sess. (1940), § 7. As late as 1938 we find provisions for exemption from military service in Tunisia by payment of the cost of a substitute. \textit{3 Universal Digest of Laws and Ordinances} 361 (1938).
\textsuperscript{192} Philippines Acts (1940), No. 569.
\textsuperscript{193} See \textit{37 Time} 18 (Feb. 10, 1941).
\textsuperscript{194} Pub. No. 783, 76th Cong., 3d sess. (1940), § 5 (A), (B), (C), and (D).
\textsuperscript{195} Id., § 5 (F).
\textsuperscript{196} See \textit{3 Selective Service Regulations}, "Classification and Selection," § 347 (1940).
\textsuperscript{197} Pub. No. 783, 76th Cong., 3d sess. (1940), § 5 (D).
training and service shall be made in the case of any individual except upon the basis of the status of such individual, and no such deferment shall be made of individuals by occupational groups or of groups of individuals in any plant or institution.”

“In each State, one or more officers of the land or naval forces of the United States shall be assigned to State headquarters for selective service for the purpose of furnishing information with respect to occupational deferments. . . . One or more representatives of labor and an equal number of representatives of industry and, where applicable, one or more representatives of agriculture shall be designated for each appeal board area by the Governor for the purpose of assisting the State adviser on occupational deferments.”

Local boards are to consult with local agents of state employment services and public welfare services to assist in classifying registrants. In the case of occupational deferments the local board may avail itself of federal, state, or local agencies to obtain information. The local board may request the state employment service to assign an agent to it to obtain this information. For a registrant to be considered a necessary man in industry, business, employment, agricultural pursuit, governmental service or other service or endeavor, including training or preparation therefor the following conditions must exist:

“a. He is, or but for a seasonal or temporary interruption would be, engaged in such activity.

“b. He cannot be replaced satisfactorily because of a shortage of persons with his qualifications or skill in such activity.

“c. His removal would cause a material loss of effectiveness in such activity.”

198 Id., § 5 (E). During the World War three industrial advisers furnished the information on which the district board made the actual selection for deferments. See 9 Int. Jur. Assn. Monthly Bull. 13 at 16 (1940). The question of occupational deferments is examined at some length in that article at pp. 16 et seq., and 33 at 40 et seq. See also Hoague, Brown and Marcus, “Wartime Conscription and Control of Labor,” 54 Harv. L. Rev. 50 et seq. (1940), as to industrial deferments during the World War; see Fitzpatrick, Conscription and America 62 et seq. (1940). Estonia provided that members of the army who were elected to a national or local representative body were exempt in time of peace from the obligation to complete their service in time of peace. 3 Universal Digest of Laws and Ordinances 355 (1938).


200 Id., § 136.

201 Id., § 350.

202 3 Id., “Classification and Selection,” § 351 (1940).
In making its determination the local board is to give due consideration to registrants engaged in an activity essential to the national health, safety or interest lest a serious interruption or delay in the activity is likely to impede the defense program. 203 Such deferments are to be for a six-months period, renewable for six-months periods. 204

Peculiarly enough, the first recognition that modern warfare requires an adequate reserve of man-power at home as well as in the combat forces appears to have been made in the Confederate Draft Act of 1862, but apparently little use was made of it. 205 The Draft Act of 1917 recognized the selective service principle 206 and provided for outright exemption or draft for partial military service of a specified list of classes of persons. 207 When the present bill was being adopted in Congress the army representatives made it clear that this principle of occupational deferments was an integral part of the conscription plan. 208

Great Britain has taken a different course than the United States in the matter of occupational deferments. Neither in the military service acts passed during the World War nor under the present military

203 Id., § 352 (b).
204 Id., § 353.
206 See letter of President Wilson to Representative Helvering in 7 Baker, Woodrow Wilson, Life and Letters (War Leader) 30 (1939).
207 See Selective Draft Act of 1917, 40 Stat. L. 79, § 4: "County and municipal officials; customhouse clerks; persons employed by the United States in the transmission of the mails; artificers and workmen employed in the armories, arsenals, and navy yards of the United States, and such other persons employed in the service of the United States as the President may designate; pilots; mariners actually employed in the sea service of any citizen or merchant within the United States; persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment or the effective operations of the military forces or the maintenance of national interest during the emergency. . . ." This was taken in part from a provision in the National Defense Act of 1916 relating to exemptions from militia service in a combatant capacity. This provision is now found in 32 U. S. C. (1934), § 3. During the World War available man-power was divided into three classes. Class one included those whose call would least disrupt a wartime economy. In class two were those engaged in industries the continuance of which was important for the maintenance of normal life, and in class three were those engaged in enterprises directly connected with wartime activities. See War Coordinator, m. 1. Occupational deferments were broken down in considerable detail. See War Coordinator, m. 2 et seq. See Gillette, "War Legislation Pertaining to the Army," 17 Mich. L. Rev. 127 at 130-132 (1918), for an outline of the order of exemptions and considerations underlying industrial occupational exemptions. Occupational deferments were decided upon by local boards except in the case of persons employed in the shipbuilding industry. The latter received a card which exempted them from service. Fitzpatrick, Conscription and America 53 (1940).
The service act was a provision made as to occupational deferments. Of course, the defense regulations issued by Great Britain could and have covered this matter to some degree, but this system during the World War led to the situation that during the initial stages of the war man-power was indiscriminately conscripted for the military forces and when the essential industries complained of a lack of man-power, many of the enlisted men had to be taken out of the army and sent back to employment. This procedure was reversed again early in 1918 when the German offensive was at its height. With this lesson in mind, the Ministry of Labor and National Service of Great Britain has, in the present war, established an elaborate list of occupations which are totally or partially exempt from conscription service.

In Scotland when conscription was introduced during the World War, a special section of the Royal Naval Volunteer Reserve was created to enroll fishermen. Such enrollment relieved fishermen from liability for army service and assured their retention at fishing until they might be required for naval (generally trawler) service.

c. Dependency Deferments

The present draft act, like that of 1917, provides for exemption because of dependency. The Draft Act of 1917 provided for the discharge of "enlisted men whose status with respect to dependents rendered such discharge advisable." The language of the present act provides that the President may defer "those men in a status with respect to persons dependent upon them for support which renders their deferment advisable." This is almost identical with the lan-

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209 See Great Britain, War Cabinet Report for the Year 1918, pp. 122-123. See also Hoague, Brown and Marcus, "Wartime Conscription and Control of Labor," 54 Harv. L. Rev. 50 at 65 et seq. (1940).

209a See S. Doc. 273, 76th Cong., 3d sess. (1940), reprint of a schedule published by the Ministry of Labor and National Service of Great Britain showing a list of occupations of British men and women possessing skill or experience that is required for the maintenance of production or essential services, which are totally or partially exempt from conscription. Age factors are considered in making these exemptions.

210 See Jones, Duncan, Conacher and Scott, Rural Scotland During the War 38 (1926) (Economic and Social History of the World War, British Series—Carnegie Endowment for International Peace).

211 40 Stat. L. 81, §7 (1917).

212 Pub. No. 783, 76th Cong., 3d sess. (1940), §5 (E).
guage of the Draft Act of 1917. Dependency requirements are set out in some detail in the Selective Service Regulations as to persons who may be considered dependents. In the definition of dependents the word "only" is used, although another rule relating to the circumstances of dependency says that hard and fast rules will not work.

d. Conscientious Objectors

Conscientious objectors go back many centuries. Great Britain in her Military Service Act of 1916 allowed exemptions to them; in Canada the Military Service Act of 1917 allowed a certificate of exemption on the following grounds:

"That he conscientiously objects to the undertaking of combatant service and is prohibited from so doing by the tenets and articles of faith, in effect on the sixth day of July, 1917, of any organized religious denomination existing and well recognized in Canada at such date, and to which he in good faith belongs; and if any of the grounds of such application be established, a certificate of exemption shall be granted to such man.

"A certificate may be conditional as to time or otherwise, and, if granted solely on conscientious grounds, shall state that such exemption is from combatant service only."

Canada exempted from combatant service and in some cases from non-combatant service as well, but did not recognize as an alternative work of national importance as did Great Britain, nor the farm or industrial furlough as did the United States.

In England during the World War many conscientious objectors

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218 See on this question of dependency deferment, 9 INT. JUR. ASSN. MONTHLY BULL. 13 at 16 et seq. and 33 at 40 (1940); BUSINESS AND DEFENSE COORDINATOR 300 ff. Dependency exemptions were spelled out in the Civil War Draft Act. 12 Stat. L. 731, § 2 (1863).

219 See Appendix A.

215 3 SELECTIVE SERVICE REGULATIONS, "Classification and Selection," § 354c.

216 See KELLOGG, THE CONSCIENTIOUS OBJECTOR 2 (1919). Major Kellogg was one of the members of the three-man commission who examined into the conscientious objector cases under the United States Draft Law during the World War. See statement by Third Assistant Secretary of War Keppel in EASBY-SMITH, STATEMENT CONCERNING THE TREATMENT OF CONSCIENTIOUS OBJECTORS IN THE ARMY 7 (Government Printing Office, 1919).

217 5 and 6 Geo. V, c. 104, § 2 (1916), permitted certificates of exemption on the ground of conscientious objection; such certificates could be absolute, conditional or temporary.


were inducted into noncombatant units, put to agricultural or other work or imprisoned.\textsuperscript{220} The Representation of the Peoples Act of 1918 suspended the elective franchise for five years to conscientious objectors who had refused to undertake work of national importance,\textsuperscript{221} and up to May 1918 "about 4,800 persons representing themselves as conscientious objectors to military service ... had been sentenced by court martial, 600 had been twice sentenced, 470 three times, 144 four times, and 7 five times."\textsuperscript{222}

In the United States the problem of conscientious objectors was recognized in a number of state constitutions and statutes.\textsuperscript{228} The Civil War Draft Act,\textsuperscript{224} as amended, provided:

"members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, when drafted into the military service, be considered noncombatants, and shall be assigned by the Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars to such person as the Secretary of War shall designate to receive it, to be applied to the benefit of the sick and wounded soldiers."

The Draft Act of 1917 stated:\textsuperscript{225}

"and nothing in this act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious


\textsuperscript{221} 7 and 8 Geo. V, c. 64, § 9 (2). This act applied even to those who had been granted absolute exemption without any condition but had not engaged in and continued some work of national importance. The National Service (Armed Forces) Act, 1939, 2 and 3 Geo. VI, c. 81, § 5, divides conscientious objectors into three classes.

\textsuperscript{222} Chitty, Ann. Stat. 1917-1918, p. 192, note (c). It has been said that in England 5,596 men were court-martialed as against 504 in the United States. Statement by Keppel, in EASBY-SMITH, STATEMENT CONCERNING THE TREATMENT OF CONSCIENTIOUS OBJECTORS IN THE ARMY 8 (1919). But of these 4,646 were placed in work of national importance. Id. 16.


\textsuperscript{224} 13 Stat. L. 9, § 17 (1864). This was not in the original act. Cf. FITZPATRICK, CONSCRIPTION AND AMERICA 26 (1940).

\textsuperscript{225} 40 Stat. L. 78, § 4 (1917).
sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant.

It may be noticed that this act limited exemptions to members of a religious organization. This qualification of conscientious objection to membership of a sect or creed was attacked in the courts without success. In order to obviate the hardship this would involve on conscientious objectors not belonging to such organization, the President issued an executive order in May, 1918, providing for assignment to noncombatant military service of conscientious objectors who failed to receive certificates as members of a religious sect or organization from their local board. "The total number of men in the Army accepted or recognized as conscientious objectors, was about 3,900." Fifteen hundred men were recommended for farm or industrial furlough. During the World War it is said that 450 religious objectors were tried by court martial and sentenced to prison terms. In the Senate and in the House spokesmen for various interests attempted to have Congress follow the provisions of the British National Service Act of 1939 in respect to the conscientious objectors, and while they were not

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226 See brief for plaintiff in error (by counsel for the plaintiff and for the National Civil Liberty Bureau, amicus curiae), Ruthenberg v. United States, 245 U. S. 480, 38 S. Ct. 168 (1917).
227 Ex. Order 2823, March 20, 1918. This order defines what military service is noncombatant service. Cf. 54 Harv. L. Rev. 278 at 281 (1940). See infra note 236.
228 This was a retrogression from the National Defense Act of 1916, which did not contain this qualification in respect to exemptions from militia service. 39 Stat. L. 197 (1916), 32 U. S. C. (1934), § 3. On the interpretation of this order, see Easby-Smith, Statement Concerning the Treatment of Conscientious Objectors in the Army 18 (1919).
229 See Kellogg, The Conscientious Objector 127 (1919).
230 Id. The Furlough Law of March 16, 1918, was construed by the Judge Advocate General's office to be applicable to conscientious objectors and considerable use was made of this law in respect to conscientious objectors. Easby-Smith, Statement Concerning the Treatment of Conscientious Objectors in the Army 18 (1919).
233 Hearings on H. R. 10132, 76th Cong., 3d sess. (1940), p. 150 et seq.
able to secure total exemption they did succeed in liberalizing the provisions in the bill relating to conscientious objectors. Conscientious objectors are to be registered in two classes: those willing to do noncombatant work and others who are liable to work of national importance under civilian direction. Noncombatant training will consist of training in all military subjects except "those relating to the employment of weapons." Apparently, however it is planned to make use of conscientious objectors in reforestation and soil conservation projects as nonmilitary service of national importance.

e. Job Protection

The act provides for job protection to the enrollee, and while it has been noted that such job protection may in many instances be ephemeral, there was no provision at all to this effect in the Draft Act of 1917. The provisions in the present act appear to be based largely on somewhat similar provisions in the British Military Training Act of 1939 and the British National Service Act of 1939. These provisions apply to both draftees and volunteers under the act.

The original bill made all conscientious objectors liable to noncombatant service and applied only to members of well-recognized religious sects. Both of these restrictions were removed, but the act still requires one to be conscientiously opposed to participation in war "by reason of religious training and belief." Conscientious objectors are subject to noncombatant service, but if conscientiously opposed thereto are subject to work of national importance under civilian direction. Pub. No. 783, 76th Cong., 3d sess. (1940), § 5 (G). But cf. 54 HARV. L. REV. 278 at 281-282, notes 24, 27 (1940).

Fear has been expressed that the local boards will vary in their treatment of conscientious objectors. See 54 HARV. L. REV. 278 at 280, note 11 (1940).

Executive Order No. 8606, Dec. 6, 1940, 5 FED. REG. 4887 (1940), 9 U. S. LAW WEEK 2341 (Dec. 17, 1940). Noncombatant military service is defined as follows: "(1) Service in any unit which is unarmed at all times. (2) Service in the Medical Department wherever performed. (3) Service in any unit or installation the primary function of which does not require the use of arms in combat, provided the individual's assignment within such unit or installation does not require him to bear arms or to be trained in their use."

Washington Sunday Star A-8 (Dec. 22, 1940). The Director of Selective Service has been authorized to establish or designate work of national importance under civilian direction for those conscientiously opposed to combatant and noncombatant service in the land or naval forces. Ex. Order No. 8675, February 6, 1941, 6 FED. REG. 831-832 (1941).

Reemployment provisions of the Conscription Act are examined in considerable detail in 54 HARV. L. REV. 278 at 288 (1940).

See 9 INT. JUR. ASSN. MONTHLY BULL. 13 at 18 et seq., 33 at 41 et seq. (1940).

2 and 3 Geo. VI, c. 25, § 7 (1939); 2 and 3 Geo. VI, c. 81, § 14 (1939). See Selective Service Act, Pub. No. 783, 76th Cong., 3d sess. (1940), § 8 (B); Comment of Mr. Dykstra, Director of the Selective Service, Washington Eve-
III

THE INTERPLAY BETWEEN VOLUNTEERING, ENLISTMENT AND THE DRAFT

The Selective Draft Act of 1917 provided that in order to raise and maintain the organizations of the regular army and those embodying members of the national guard drafted into service, enlisted men should be secured by the volunteer method and if the President decided that this could not be done, by selective draft.\(^\text{242}\) No such provision is found in the present conscription act. But although the Selective Draft Act of 1917 authorized up to four volunteer divisions, none was raised under these provisions and it has been said that the Slavic Legion was the only volunteer force in the World War.\(^\text{245}\) The present conscription act is more liberal in allowing volunteering than the Act of 1917. The 1917 Act provided that volunteer enlistments should be for the period of emergency unless sooner discharged and that recruits be between the ages of eighteen and forty years, inclusive.\(^\text{244}\) Before the end of the World War it was recognized that unrestricted volunteer recruiting was incompatible with a selective service system.\(^\text{245}\)

During the World War conscription was not resorted to in England for the navy. The present military service act of Great Britain is applicable in terms to "the armed forces." During the Civil War an amendment to the federal draft law provided that seamen drafted could enlist in the navy but that not more than 10,000 could be so transferred.\(^\text{246}\) The Draft Act of 1917 in the United States was limited to the military establishment. But in 1918 an amendment made registrants liable to service in the navy and marine corps as well as the army.\(^\text{247}\) And it has been said that the navy relied on volunteers until the summer of 1918, when this was stopped and selective service re-

\(^{242}\) 40 Stat. L. 77, § 2 (1917).

\(^{245}\) MILITARY LAWS OF THE UNITED STATES, 7th ed., 112-113 (1929) (historical note). This may be because the act provided merely for infantry divisions and that volunteers be 25 or more years of age. 40 Stat. L. 77, § 1 (7) (1917). The act also provided for the raising of special and technical troops by volunteer enlistment or draft. Id., § 2.

\(^{244}\) See WAR COORDINATOR, m. 12-13.

\(^{246}\) 13 Stat. L. 7 (1864).

\(^{247}\) 40 Stat. L. 956 (1917).
cruits were used for the navy and marine corps.\textsuperscript{248} The present compulsory military service act in the United States is applicable to the navy as well as to the land forces. At present, however, the President has fixed only the number of men to be inducted into the land forces.\textsuperscript{249}

An Act of May 14, 1940, states that in time of war or other emergency declared by Congress, enlistments in the army of the United States shall be for the duration of the war or other emergency plus six months. An earlier discharge may be had at the discretion of the President or otherwise according to law. Eligibility for such enlistment is limited to persons not less than eighteen years old and otherwise qualified under such regulations as the Secretary of War may prescribe.\textsuperscript{250} This statute, of course, does not supersede existing provisions as to enlistment in the regular army, but does complement such provisions.

The Conscription Act of 1940 permits one between the ages of eighteen and thirty-six to volunteer for induction in the land or naval forces under the provisions of the Draft Act subject to certain conditions: one, the quota of the state or territory in which he resides, and two, the condition that he is not deferred after classification.\textsuperscript{251} The enlistment is to be for twelve months unless sooner discharged, and a twelve-month period may be extended by the President whenever Congress has declared the national interest is impaired.\textsuperscript{252} As to persons under twenty-one years of age, written consent of their parents is to be had, but such consent may be dispensed with on the showing that the consent of any parent cannot be obtained because the parent is absent and cannot be reached—parent includes guardian.\textsuperscript{253} Such volunteers are to be classified in exactly the same manner as draftees.\textsuperscript{254} It will be noticed that there now exist under the statute books at least

\textsuperscript{248} Tobin and Bidwell, Mobilizing Civilian America 107, note 2 (1940).
\textsuperscript{249} Executive Order 8590, November 8, 1940, 5 Fed. Reg. 4449 (1940)—800,000 before July 1, 1940. Cf. statement of Admiral Nimitz that the navy by the end of the year 1940 expected to recruit 10,000 additional men. Washington Evening Star B-5 (Dec. 3, 1940). It may be noted that a statute of considerable antiquity provides for the transfer from military to naval service of any person enlisted in the military service upon application to the Navy Department, which is approved by the President. 34 U. S. C. (1934), § 177. It has been said that up to the present selectives have been used only in the army. Washington Post 9:4 (Feb. 6, 1941).
\textsuperscript{250} 54 Stat. L. 213 (1940), 10 U. S. C. A. (Supp. 1940), § 634.
\textsuperscript{251} See Pub. No. 783, 76th Cong., 3d sess. (1940), §§ 3(A), 4(B).
\textsuperscript{252} Id., § 3(B).
\textsuperscript{253} 3 Selective Service Regulations, "Classification and Selection," § 334 (1940).
\textsuperscript{254} Id., § 335.
three different methods of enlistment, and that age requirements and length of enlistment vary as one or the other is chosen.\textsuperscript{255}

The Selective Service Act of 1940 in a few places uses the word "enlist." Thus there is a provision against paying a bounty to induce a person to enlist in or be inducted into the land or naval forces of the United States.\textsuperscript{256} That term is used in other places in the act\textsuperscript{257} and at least once the expression "voluntarily inducted" appears.\textsuperscript{258} Enlistment is not otherwise defined. Some question may arise as to whether the numerous provisions on the statute books concerning enlistments in the army and in the navy would have an application to enrollees under this act, especially in view of the fact that the act itself provides that nothing in the act is to repeal, amend, or suspend the laws "now in force authorizing voluntary enlistment or re-enlistment for the land and naval forces of the United States, including the reserve components thereof."\textsuperscript{259} Almost uniformly statutory provisions relating to enlistment use the term "enlistment" without the modifying adjective "voluntary." It would often be a matter of troublesome construction to determine whether a particular statute referred to voluntary enlistment unless it were considered that enlistment in each case referred to voluntary enlistment. The courts have generally been inclined to regard the term "enlistment" as including not only voluntary induction into the military forces but also compulsory induction.\textsuperscript{260} But in an espionage

\textsuperscript{255} As to the national guard of the states and of the United States, see 32 U. S. C. (1934), § 124—original enlistments for three years, but in the event of an emergency declared by Congress the President may extend enlistment until a period of six months after the termination of the emergency. A query may be made as to whether the six months provision in the May, 1940, act would, in wartime or other emergency declared by Congress, supersede the provision in the Conscription Act that the twelve-month period may be extended "to such time as may be necessary in the interest of national defense," or whether the first act merely applies to ordinary enlistments in the regular army. The last is more likely. Cf. War Department Mobilization Regulations, M. R. 1-5, October 1, 1940, § 1, par. 3(c): "When the situation justifies such action, the War Department will provide through a Presidential proclamation, for enlistments in the Regular Army and the Enlisted Reserve Corps . . . for the duration of the emergency, and to terminate six months thereafter."

\textsuperscript{256} Pub. No. 783, 76th Cong., 3d sess. (1940), § 7.

\textsuperscript{257} E.g., id., § 12. Section 3(D) speaks of "benefits as are provided by law in the case of other enlisted men."

\textsuperscript{258} Id., § 4(A).

\textsuperscript{259} Id., § 14(C). Cf. War Department Mobilization Regulations, M. R. 1-5, October 1, 1940, § 1, par. 1, referring to regulations for the recruiting and reception of volunteer enlisted men.

\textsuperscript{260} United States v. Prieth, (D. C. N. J. 1918) 251 F. 946 at 952—indictment under Espionage Act for obstructing the recruiting and enlistment service held applicable to draftees. Cf. Hilliard v. Stewartstown, 48 N. H. 280 (1869); Tyler v.
case the Supreme Court said that as to recruiting or enlistment service,

"it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act." 261

In connection with the necessity of taking the oath required under article 109 of the Articles of War for enlistment, a court said it did not apply "as the petitioner did not enlist but was drafted." 262

In view of the foregoing the courts may have to determine what enlistment means in this act.


262 Franke v. Murray, (C. C. A. 8th, 1918) 248 F. 865 at 869.

APPENDIX A

3 Selective Service Regulations, "Classification and Selection."

"355. 'Dependent' defined.—A person shall be considered a registrant's dependent only when all of the following conditions are satisfied:

"a. Such person must be either (1) the registrant's wife, divorced wife, child, parent, grandparent, brother, or sister, or (2) a person under 18 years of age, or a person of any age who is physically or mentally handicapped, whose support the registrant has assumed in good faith.

"b. Such person must either be a United States citizen or live in the United States, its Territories, or possessions.

"c. Such person, at the time the registrant is classified, must depend in fact for support in a reasonable manner, in view of such person's circumstances, on income earned by the registrant by his work in a business, occupation, or employment (including employment on work relief projects but excluding employment as an enrollee in the Civilian Conservation Corps and similar employment in the National Youth Administration).

"d. Such person must in fact regularly receive from the registrant contributions (including payments to a divorced wife) to the support of such person and such contributions must not be merely a small part of such person's support. Even though the registrant is unable to furnish such person money or other support for temporary periods because of the registrant's physical or economic situation, he may be considered to be regularly contributing to such person's support, if such person and the community look upon the registrant as the normal source of such person's support.

"356. Certain relatives defined.—a. The term 'child' includes an unborn child, a child legally adopted, or a child born out of wedlock but shall not include any person 18 years of age or over unless he is physically or mentally handicapped.

"b. The term 'parent' includes a person who is supported in good faith by the registrant in a relationship similar to that of parent and child.

"c. The term 'brother' or 'sister' shall include only a person, having one or both parents in common with the registrant, who is either under 18 years of age or is physically or mentally handicapped."