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Clayton Anderson, Specalist Four, United States Army, absented himself from his unit without authority on November 3, 1964. Over two years later, he surrendered to civilian authorities who returned him to military control; Anderson was charged with desertion[1] and convicted by a general court-martial.[2] Because of the Government's failure to prove that Anderson intended to leave his unit permanently, the board of review,[3] on appeal, found him guilty of the lesser offense of unauthorized absence.[4] But Anderson's case involved another issue. Under the Uniform Code of Military Justice (UCMJ), an unauthorized absence in peacetime cannot be prosecuted if the offense was committed more than two years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.[5] However, in time of war there is no applicable statute of limitation.[6] The board of review considered the effect of these provisions and determined that Anderson's offense was committed "in time of war" within the meaning of the UCMJ;[7] thus he could be tried and punished regardless

1. The offense of desertion is defined by article 85 of the Uniform Code of Military Justice, 10 U.S.C. § 885 (1964).

2. *See* United States v. Anderson, 17 U.S.M.C.A. 589, 38 C.M.R. 386 (1968) (C.M. 416,112).

3. The extent of the board of review's authority is set out in article 66 of the Uniform Code of Military Justice, 10 U.S.C. § 866 (1964).

4. 38 C.M.R. 582 (1968). The offense of unauthorized absence is defined by article 86 of the Uniform Code of Military Justice, 10 U.S.C. § 886 (1964). Any reviewing authority with power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense. Uniform Code of Military Justice art. 59, 10 U.S.C. § 859 (1964).

5. UCMJ art. 43(c), 10 U.S.C. § 843(c) (1964). The period of limitation prescribed by the article begins to run on the date the offender first absents himself without leave. 33 OP. ATTY. GEN. 121 (1922).

6. UCMJ art. 43(a), 10 U.S.C. § 843(a) (1964) provides that: "A person charged with desertion or absence without leave in time of war, or with aiding the enemy, mutiny, or murder, may be tried and punished at any time without limitation."

7. 38 C.M.R. 582 (1968).

of when he went "a.w.o.l." From the board of review, the case was appealed to the United States Court of Military Appeals.[8] All three judges agreed that the United States was at war on November 3, 1964; therefore, the court affirmed Anderson's conviction.[9]

The consequences of this holding are profound. The Court of Military Appeals is the highest military court in the nation, and its decisions are binding on all other military courts. By holding that a state of war existed as of November 3, 1964—and presumably at all times since that date—the court has activated three groups of special provisions in the Uniform Code of Military Justice. First, as in *Anderson*, there are many offenses which can be prosecuted without reference to statutes of limitation if they are committed in time of war. These offenses include absence without leave, desertion, aiding the enemy, mutiny, and murder.[10] Moreover, if it is certified[11] to the President that the trial in time of war of any offense will be detrimental to the prosecution of the war or inimical to national security, the prescribed period of limitation is extended until six months after the termination of hostilities.[12] Finally, when the United States is at war, the running of the statute of limitations applicable to any UCMJ offense involving fraud or attempted fraud against the United States in connection with transfers and control of United States property or war-related contractual agreements is suspended until three years after the termination of hostilities.[13] The second major effect of determination that a state of war exists is upon the severity of penalties for certain offenses under the UCMJ; desertion,[14] assaulting an officer,[15] and misbehavior of a sentinel[16] are all punishable by death only in wartime. In addition, misconduct as a prisoner[17] and spying[18] are punishable under the

8. The United States Court of Military Appeals consists of three civilian judges appointed for a term of fifteen years by the President, with the advice and consent of the Senate. This court may prescribe its own rules of procedure. The review jurisdiction of the Court extends to:

(1) all cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;

(2) all cases reviewed by a board or review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and

(3) all cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

UCMJ art. 67, 10 U.S.C. § 867 (1964).

9. United States v. Anderson, 17 U.S.C.M.A. 589, 38 C.M.R. 386 (1968).

10. UCMJ art. 43(a), 10 U.S.C. § 843(a) (1964). This provision is reproduced in note 6 *supra*.

11. This certification must be performed by the Secretary of the appropriate branch of the armed services. UCMJ art. 43(e), 10 U.S.C. § 843(e) (1964).

12. UCMJ art. 43(e), 10 U.S.C. § 843(e) (1964).

13. UCMJ art. 43(f), 10 U.S.C. § 843(f) (1964).

14. UCMJ art. 85(c), 10 U.S.C. § 885(c) (1964).

15. UCMJ art. 90, 10 U.S.C. § 890 (1964).

16. UCMJ art. 113, 10 U.S.C. § 913 (1964).

17. UCMJ art. 105, 10 U.S.C. § 905 (1964).

18. UCMJ art. 106, 10 U.S.C. § 906 (1964).

UCMJ only during a state of war. Third, and perhaps most important, the existence of a state of war may extend military jurisdiction over a significant number of civilians not otherwise subject to military control. The Uniform Code of Military Justice states that "[i]n time of war, persons serving with or accompanying an armed force in the field" are subject to its provisions.[19] Although several Supreme Court decisions have curtailed the extension of military jurisdiction to civilians,[20] these cases dealt with peacetime situations and presumably have had no effect upon previous decisions sustaining military court-martial jurisdiction over civilians serving with or accompanying the armed forces in the field in time of war.[21] Therefore, the decision in the *Anderson* case apparently extends the application of military law to many American civilians in Vietnam who were not subject to such jurisdiction prior to November 3, 1964.[22] Indeed, under previous decisions as to what constitutes being "in the field,"[23] military jurisdiction over civilians could extend to areas other than Vietnam.

In *Anderson*, the three judges of the Court of Military Appeals were unable to agree on the grounds for their conclusion that a state of war exists.[24] In light of this disagreement and the severe consequences resulting from a finding of the existence of "a state of war" for purposes of the UCMJ, it seems important to analyze the approaches employed by the individual judges to support their decisions. This Note will present such an analysis, investigate the deficiencies of the current language in the Uniform Code of Military Justice, and suggest an alternative to the elusive standard that presently exists.

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19. UCMJ art. 2(10), 10 U.S.C. § 802(10) (1964).

20. Cases in which the Supreme Court has held that civilians are not subject to peacetime military jurisdiction include: McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (civilian government employee charged with noncapital felony); Grisham v. Hagan, 361 U.S. 278 (1960) (civilian government employee charged with capital offense); Kinsella v. Singleton, 361 U.S. 234 (1960) (dependent charged with noncapital felony). *See generally* Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 GEO. WASH. L. REV. 273 (1967); Bishop, *Court-Martial Jurisdiction over Military-Civilian Hybrids*, 112 U. PA. L. REV. 317 (1964); Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461 (1961).

21. Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945), *cert. granted*, 327 U.S. 777, *cert. dismissed*, 328 U.S. 822 (1946); Hammond v. Squier, 51 F. Supp. 227 (D.D.C. 1943); *In re* Di Bartolo, 50 F. Supp. 929 (S.D.N.Y. 1943).

22. *But see* Wiener, *Courts Martial for Civilians Accompanying the Armed Forces in Vietnam*, 54 A.B.A.J. 24 (Jan. 1966).

23. *See* McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943) (a military voyage for the purpose of transporting army troops and supplies during war is a military expedition "in the field" within the meaning of a section relating to persons subject to military law); Hines v. Mikell, 259 F. 28 (4th Cir.), *cert. denied*, 250 U.S. 645 (1919) (the phrase "in the field" is used in its military sense, and includes forces in cantonments and training camps within and without the United States).

24. *See* notes 25-40 *infra* and accompanying text.

The board of review in *Anderson* based its conclusion that a state of war exists primarily on the ground that the Gulf of Tonkin Resolution,[25] passed by Congress on August 10, 1964, constituted "official recognition" that the United States was engaged in an "overt confrontation of arms between opposing powers."[26] Chief Judge Quinn, who wrote the *Anderson* opinion for the Court of Military Appeals, also accepted the language of the Resolution as a clear indication that Congress had recognized and declared "that the Gulf of Tonkin attack precipitated a state of armed conflict between the United States and North Vietnam."[27] The opinion of Judge Quinn does not indicate why congressional recognition of a "state of armed conflict" was tantamount to recognition that the nation had entered a "time of war," or why it compelled such a conclusion by the court. He refused to accept the defendant's arguments that the Resolution merely reiterated the American responsibilities under the Southeast Asia Collective Defense Treaty[28] and that it was not a determination that the United States was at war.[29] Responding to these contentions, Judge Quinn stressed that the executive branch, through Under-Secretary of State Nicholas deB. Katzenbach, had characterized the Gulf of Tonkin Resolution as "participation by Congress 'in the functional way . . . contemplated by the Founding Fathers' to 'invoke the . . . war powers.' "[30] Conceding that members of the administration do not always offer *the* definitive statement of congressional intent[31] and that several members of the Senate disagreed with such a characterization of the Resolution,[32]

25. Joint Resolution to promote the maintenance of international peace and security in southeast Asia, 78 Stat. 384 (1964).

26. United States v. Anderson, 17 U.S.C.M.A. 588, 589, 38 C.M.R. 386, 387 (1968). The language of the resolution acknowledges that American vessels had been attacked by the Communist regime in Vietnam and authorize the President to take whatever measures he deems necessary to assure the peace and security of that area. It does not, however, recognize an "overt confrontation of arms between opposing powers." 78 Stat. 384 (1964).

27. United States v. Anderson, 17 U.S.C.M.A. 588, 589, 38 C.M.R. 386, 387 (1968).

28. [1954] 6 U.S.T. 81, T.I.A.S. No. 3170.

29. Quinn also rejected the defense argument that the Gulf of Tonkin attack (against the destroyer *U.S.S. Maddox* on August 2, 1964, and two other United States destroyers on August 4, 1964) was an isolated incident insufficient to constitute a state of war. He deemed both the exact proportions of that attack and the nature of the United States response to it irrelevant to the state of war issue. 17 U.S.C.M.A. at 589-90, 38 C.M.R. at 387-88. Nor would he accept the argument that later North Vietnamese attacks on U.S. forces at Plieku (February 7, 1965), with the attendant reciprocal forceful measures enlarging the conflict, created a new relationship which did not exist at the time of the Gulf of Tonkin attack. 17 U.S.C.M.A. at 590, 38 C.M.R. at 388.

30. 17 U.S.C.M.A. at 590, 38 C.M.R. at 388, quoting *Hearings on S. Res. 151 Before the Senate Foreign Relations Comm. on the United States Commitments to Foreign Powers*, 90th Cong., 1st Sess., at 161-62 (1965).

31. 17 U.S.C.M.A. at 590, 38 C.M.R. at 388. *See also* note 56 *infra*.

32. *See Hearings, supra* note 30, at 118-32; *Hearings on the Gulf of Tonkin, The 1964 Incidents, Before the Senate Foreign Relations Comm.*, 90th Cong., 2d Sess., at 81 (1966).

Judge Quinn nevertheless stated that "when a state of hostilities is expressly recognized by both Congress and the President, it is incumbent upon the judiciary to accept the consequences that attach to such recognition."[33] Again, he equated congressional recognition of a "state of hostilities" with the "state of war" requirement that activates the sections of the UCMJ discussed above.[34]

Judges Kilday and Ferguson disagreed with Judge Quinn about the meaning and effect of the Gulf of Tonkin Resolution. Judge Kilday felt that the emphasis on the Resolution was misplaced since the existence of a state of war at any particular time is not necessarily determined solely by congressional certification;[35] to him, the Resolution represented only "a congressional appraisal of world happenings."[36] It was not, according to Judge Kilday, the Resolution itself, but rather the *events* of which the Resolution took cognizance that were the real reasons why the United States was at war with North Vietnam in 1964. Citing authority for the proposition that war may exist without congressional declaration,[37] Judge Kilday concluded that a state of war existed for "obvious reasons."[38] Judge Ferguson adopted a similar view of the Resolution. For him, however, it was unnecessary even to consider the Resolution, "either as a declaration of war . . . or as evidence of existence of conflict."[39] He admitted that war had not been declared formally "in the Constitutional sense," but, in an approach similar to the "obvious reasons" rationale of Judge Kilday, he contended that "the fact remains that we are at war."[40] At this point, it is also important to recognize that both of the concurring judges failed to specify the events or factors—or the manner of weighing such events or factors—which they relied upon to conclude that a state of war existed as of the fall of 1964.

American courts seem never to have been able to agree on standards for determining the existence of a state of war. To a large extent, judicial definitions and standards apparently turn on the context in which the question arises. Thus, a situation deemed to activate the "in time of war" provisions in the UCMJ may not necessarily preclude recovery by beneficiaries of life insurance policies which include clauses denying benefits when death is a result of war.[41] Although the insurance cases generally deem a formal declara-

33. 17 U.S.C.M.A. at 590, 38 C.M.R. at 388.
34. *See* notes 5-19 *supra* and accompanying text.
35. 17 U.S.C.M.A. at 591, 38 C.M.R. at 389.
36. 17 U.S.C.M.A. at 594, 38 C.M.R. at 392.
37. *See* notes 43-47 *infra* and accompanying text.
38. 17 U.S.C.M.A. at 593, 38 C.M.R. at 391.
39. 17 U.S.C.M.A. at 594, 38 C.M.R. at 392.
40. 17 U.S.C.M.A. at 594, 38 C.M.R. at 392.
41. World War II; New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946) (congressional declaration not required); Pang v. Sun Life Assurance Co., 37 Hawaii 208 (1945) (congressional declaration necessary); Rosenau v. Idaho Mut. Ben.

tion of war by Congress to be the event that the parties to an insurance contract intended to trigger such a clause, even in that limited area there is not complete agreement.[42]

Outside the insurance litigation context, there is general agreement that a state of war can exist without a formal declaration by Congress. As early as 1800, in a case arising out of American and French seizures of each other's ships, the Supreme Court found that the United States was at war without a formal declaration.[43] Similarly, the Texas Court of Appeals characterized the American intervention in Mexico in 1918 as "war," even in the absence of con-

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Assn., 65 Idaho 408, 145 P.2d 227 (1944) (congressional declaration necessary); West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E.2d 475 (1943) (congressional declaration required).

Korea: Harding v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 270, 95 A.2d 221, *cert. denied*, 346 U.S. 812 (1953) (congressional declaration necessary); Beley v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 231, 95 A.2d 202, *cert. denied*, 346 U.S. 820 (1953) (congressional declaration necessary); Western Reserve Life Ins. Co. v. Meadows, 152 Texas 559, 261 S.W.2d 554 (1953) (congressional declaration not required).

In recent years, insurance companies have avoided this problem by either substituting the phrase "during combat" or by specifically stating "acts of war, both declared and undeclared" in the policy.

42. Following the Japanese attack on Pearl Harbor on December 7, 1941, several cases came before the courts in which the actual date of inception of the war became the sole issue of controversy. These cases concerned insurance contracts which contained clauses that denied certain death benefits if death occurred as a result of war or any incident thereto. The insured in each case was killed in the December 7 attack on Pearl Harbor. The insurers denied liability for the accidental death benefits on the ground that the war began on December 7, from the moment the attack commenced. The beneficiaries contended that there was no war until it was formally declared by Congress, which has sole constitutional authority to declare war. U.S. CONST., art. I, sec. 8, cl. 10. Basing their authority on this provision of the Constitution, the majority of the courts in these cases held that the war, within the meaning of the insurance contract, did not exist until declared by Congress on December 8, 1941. *See* cases cited note 41 *supra*.

The same issue arose during the conflict in Korea. The Supreme Court of Texas decided in Western Reserve Life Ins. Co. v. Meadows, 152 Texas 559, 261 S.W.2d 554 (1953), that an insured army officer who died in the crash of a military airplane in which he was traveling, under military orders, was not entitled to recover under the double indemnity provision of the policy because his death occurred in time of war. But again, not all courts were in agreement that the conflict constituted a war. For some courts, the lack of a congressional declaration was sufficient to remove the conflict from classification as a state of war, regardless of the intensity of hostilities there involved. *See* cases cited note 41 *supra*.

43. Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800). Justice Moore, writing for the Court, asked, at 39, "by what other word the idea of the relative situation of America and France could be communicated, than by that of hostilities, or war?" Concurring, Justice Washington stated, at 42, that even without a declaration of war by Congress, "in fact and in law we are at war . . . ."

However, the U.S. Court of Claims approximately eighty years later in several cases involving claims of those whose ships and goods had been destroyed or captured by the French stated: "We are . . . of the opinion that no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures . . . that in short it was no public war, but a limited war in its nature similar to a prolonged series of reprisals." Gray, Admr. v. United States, 21 Ct. Cl. 340 (1886); *see also* Hooper, Admr. v. United States, 22 Ct. Cl. 408 (1887).

gressional declaration.[44] The use of American forces to protect citizens and representatives of this country in China during the Boxer Uprising again raised the issue of undeclared war. In *Hamilton v. McLaughry*,[45] a United States circuit court held that a formal declaration was unnecessary to the finding that a state of war existed; the court asserted that the judicial branch was bound by the determination of that issue by the political department of the government.[46] The court then stated that the increase of military pay for troops in China to wartime standards was sufficient recognition by a political department of the existence of war.

Thus, even before the adoption of the Uniform Code of Military Justice, there was substantial authority for the proposition that a state of war may exist without a formal declaration by Congress. It may fairly be stated, however, that these cases provided neither a satisfactory definition of war[47] nor workable standards by which its existence could be measured.

In determining when the nation is "in time of war" for purposes of the UCMJ, the military courts generally have not tried to formulate a definition of war; rather, they have followed the civilian courts in basing their determination on practical considerations. The involvement of American forces in Korea provided the first opportunity for the United States Court of Military Appeals to consider the "state of war" language of the UCMJ. In *United States v. Bancroft*,[48] the accused was convicted by special court-martial for sleeping on post. The board of review found that a state of war existed in Korea at the time the offense was committed.[49] Thus, it held that since the offense charged carried a possible death penalty during

44. Arce v. Texas, 83 Tex. Crim. 292, 202 S.W. 951 (1818). Faced with the question whether a killing committed during the period when Pershing led the American Expeditionary Force into Mexico was murder because committed in peacetime, or not because committed in time of war, the court stated: "While an invasion of Mexico . . . was not a public war, or not preceded by a declaration of war against Mexico by the United States . . . it was technically and within the limited meaning of the word war." 83 Tex. Crim. at 295, 202 S.W. at 952.

45. 136 F. 445 (C.C. Kan. 1905).

46. 136 F. at 449.

47. *See, e.g.*, Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) ("It may . . . be safely laid down, that every contention by force, in external matters, under the authority of their respective governments, is not only war, but public war."). *See also* New York Life Ins. Co. v. Bennion, 158 F.2d 260, 264 (10th Cir. 1946). The doubtful relevance of these definitions of war to situations involving typical modern limited warfare, such as the Vietnam conflict in 1964, is obvious. Moreover, even if relevant, such definitions fail to take account of degrees of force which must be considered carefully if a line is to be drawn between war and peace. *See, e.g.*, F. GROB, THE RELATIVITY OF WAR AND PEACE 283-89 (1949).

48. 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953); in two earlier cases, the court, without deciding the issue, accepted the stipulation of the parties that the Korean conflict constituted war. *See* United States v. Horner, 2 U.S.C.M.A. 478, 9 C.M.R. 108 (1953); United States v. Young, 2 U.S.C.M.A. 470, 9 C.M.R. 100 (1953).

49. *See* United States v. Bancroft, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953).

wartime,[50] it was a capital case not within the jurisdiction of the special court-martial.[51] The Court of Military Appeals unanimously affirmed.[52]

In its consideration of whether a state of war existed in Korea, the court indicated that it was irrelevant whether authorization for the United States military involvement came from Congress, the United Nations, or the President.[53] It relied instead on the nature of the involvement itself. In support of its finding of a state of war it cited the movement and presence of large numbers of American military personnel on the battlefields in Korea, the large number of casualties, the large draft of recruits, the national emergency legislation, and the tremendous expenditures for operations in the Korean theater.[54] Indeed, the court believed that "it would be an insult to the efforts of those servicemen who are daily risking their lives in defense of democratic principles to hold that peacetime conditions prevail."[55]

According to the court in *Bancroft*, it was the intent of Congress[56] in enacting the UCMJ that the phrase "in time of war" apply regardless of formal congressional declaration.[57] This conclusion was especially appropriate, according to the court, since the primary effect of such a determination is to strengthen military discipline in the area of combat. Thus, when the President ordered the armed forces into the Korean conflict, "he involved this country in hostilities to such an extent that a state of war existed."[58]

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50. UCMJ art. 113, 10 U.S.C. § 913 (1964).

51. *See* United States v. Bancroft, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953). UCMJ art. 19, 10 U.S.C. § 819 (1964) withdraws jurisdiction from the special court-martial in such a case.

52. 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953).

53. 3 U.S.C.M.A. at 5, 11 C.M.R. at 5.

54. 3 U.S.C.M.A. at 5-6, 11 CM.R. at 5-6 (1953).

55. 3 U.S.C.M.A. at 6, 11 C.M.R. at 6 (1953).

56. There is no discussion concerning the phrase "in time of war" in the committee hearings and reports of either the House of Representatives or the Senate. *See* H.R. REP. No. 491, 81st Cong., 1st Sess. (1949); S. REP. No. 486, 81st Cong., 1st Sess. (1949); *Hearings on H.R. 4080, Establishing a Uniform Code of Military Justice, Before the House Comm. on Armed Services*, 81st Cong., 1st Sess. vol. 1 (1949). Likewise, there was no discussion of the phrase during congressional debate prior to passage. *See* 95 CONG. REC. 5718 (1949); 96 CONG. REC. 1412 (1950).

57. 3 U.S.C.M.A. at 6, 11 C.M.R. at 6; "when Congress used the phrase 'in time of war' in the military Code, it intended the phrase to apply to that state regardless of whether it was initiated or continued with or without a formal declaration." No authority was cited for this proposition. *See* note 56 *supra*.

58. 3 U.S.C.M.A. at 6, 11 C.M.R. at 6 (1953). The court also relied on two other factors in support of its conclusion. First, Congress had not seen fit to narrow the scope of the "time of war" formula even though prior to the effective date of the UCMJ, the Judicial Council, in United States v. Gilbert, 9 BR-JC 183 (1950), had held that the Korean conflict constituted a state of war. Second, the court found support in congressional allowance of additional exclusions from gross income for federal tax purposes to officers and enlisted men serving "in a combat zone." 26 U.S.C. 322(b)(B) (1964). Pursuant to this section, the President had designated Korea and the surrounding waters as a combat area. Exec. Order No. 10,195, 15 Fed. Reg. 9177 (1950).

In keeping with the emphasis in *Bancroft* on the practical importance of military discipline in wartime, the Court of Military Appeals, in *United States v. Ayers*,[59] held that the provisions imposing stricter discipline in wartime were also applicable to offenses committed in the United States during the Korean fighting. In *Ayers*, on facts similar to those in *Anderson*, the court noted that whether defection occurs at a port of embarkation on the eve of a shipment of personnel or after a unit's arrival in the theatre of conflict, the gravity of the offense—and the need for discipline—remain the same.[60]

Finally, the Court of Military Appeals was faced with the question of whether and when the state of war engendered by the Korean conflict had come to an end. Consistent with its prior reliance on "practicality" and "reality," the court in *United States v. Shell*[61] found a significant change in the conditions upon which it had predicated its prior holdings; therefore, it held that the state of war had ended. Specifically, the court in *Shell* relied upon the complete cessation of all armed conflict in Korea,[62] establishment of a demilitarized zone, the repatriation of war prisoners, and the change of American strategy in Korea from repelling aggression to maintaining the status quo.[63] However, it is significant to note that the date chosen by the court as marking the end of the state of war was in fact the date of the signing of the Korean Armistice.[64]

It is apparent that the approach now taken by the military courts to the "in time of war" formulation in the UCMJ is subject to serious criticism. While perhaps workable in the clear cases in which war has been formally declared, it becomes, in the context of modern conflict, an extremely indefinite standard. In the increasingly likely "tough" cases—in which there has been no formal declaration, casualties occur but not extensively, troops are committed but not approaching full capacity, expenditures are high but not high enough to burden the national economy, and in which the nature of the fighting deviates substantially from traditional wartime practice—it is doubtful that the "practical" approach adopted by the court in *Anderson* will lead to consistent or meaningful results.

For many reasons, the executive and legislative branches of the government are increasingly reluctant to declare or recognize the existence of war.[65] Accepting the proposition that in times and areas

59. 4 U.S.C.M.A. 220, 15 C.M.R. 220 (1954).
60. 4 U.S.C.M.A. at 225, 15 C.M.R. at 225 (1954).
61. 7 U.S.C.M.A. 646, 23 C.M.R. 110 (1957).
62. According to the court, this was a factor of "crucial importance" in all previous cases in which a state of war was found to exist. 7 U.S.C.M.A. at 651, 23 C.M.R. at 115.
63. 7 U.S.C.M.A. at 651, 23 C.M.R. at 115.
64. 7 U.S.C.M.A. at 651, 23 C.M.R. at 115.
65. To some extent this is a result of efforts in the international community to outlaw war as an acceptable means of implementing national policy and the desire

of conflict the military has a need for stronger disciplinary measures to prosecute its objectives efficiently, the present ad hoc method of concluding that the nation is "in time of war" is hardly conducive to more effective discipline in the zone of combat. It seems to be asking too much of the military personnel serving in those zones to require them to make an accurate assessment of the factors that a court may later rely on in finding a state of war. If three judges on the highest military court are unable to agree even upon the factors to be considered, it is unlikely that servicemen and related personnel will conclude that the stronger measures are in force unless and until a case has been prosecuted and decided and knowledge of that decision has reached them. Thus, it is at least questionable, under the present formulation, whether the UCMJ provisions can be effective in accomplishing their major objective—strengthening military discipline in the combat zone.

But an even more forceful objection to the present UCMJ provisions employing the "in time of war" standard can be made; it seems that there are the serious due process questions posed by these provisions and their present interpretation. It is well settled that "a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law."[66] While the conduct proscribed by these provisions is presumably specified clearly enough, the standards by which different sets of penalties may be imposed are so vague that it is at least arguable that servicemen prosecuted under these provisions are not afforded the adequate notice to which they are entitled by fifth amendment's due process guarantee. Although application of the vagueness concept to the special penalty and statute of limitation provisions of the UCMJ admittedly involves an extension of present precedent,[67] the question of whether military jurisdiction extends to civilians serv-

not to interrupt treaty arrangements which may be suspended or modified with the existence of a state of war. *See, e.g.*, Layton, *The Effect of Measures Short of War on Treaties*, 30 U. CHI. L. REV. 96 (1962).

66. Baggett v. Bullitt, 377 U.S. 360, 364 (1964). *See also* United States v. Cardiff, 344 U.S. 174 (1952); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Constr. Co., 269 U.S. 385 (1926). *Cf.* Lambert v. California, 355 U.S. 225 (1957); Graccio v. Pennsylvania, 382 U.S. 399 (1966).

67. The usual situation involves a statute which describes an offense in terms that are so indefinite that an individual would be unable to determine what kind of conduct is supposed to be prohibited. *See* text accompanying note 66 *supra*; Dombrowski v. Pfister, 380 U.S. 479 (1965) (statutory definition of "subversive organization" in a criminal statute proscribing various forms of participation in such organizations held unconstitutional for vagueness). It would seem that the closest precedent to the problem described in this Note is United States v. Cardiff, 344 U.S. 174 (1952). In that case, the Court struck down the conviction of a factory manager who refused to permit inspection by federal officials. The Court held that the provision of the Federal Food and Drug Act prohibiting such refusal was too vague to inform the manager that he was liable for prosecution if he refused to consent to inspection.

ing with the military is keyed to the same "in time of war" standard.[68] For a civilian serving with the armed forces, this standard determines whether or not he is subject to the provisions of the UCMJ; thus, the traditional authority on unconstitutional vagueness should apply to at least this situation.[69]

Third, the present "time of war" formula does not admit of the flexibility required of workable standards in this area. Once a state of war has been deemed to exist, American servicemen all over the world become subject to the harsher disciplinary measures. The UCMJ does not permit geographical limits of application. The *Anderson* case is an apt illustration, as the defendant absented himself from a Louisiana base far removed from the area of conflict in Southeast Asia. Recognition of some geographic flexibility would result in a more satisfactory solution to the problems of adequate notice and better discipline.

In order to establish fair and workable standards in this area of military law, it is essential to recognize the sometimes competing goals of the political and practical realities of modern day armed conflict, the need for stricter penalties and more summary procedures for greater control and better discipline in the military in combat zones, and the desirability of providing military personnel and others serving with them adequate notice of the imposition of stricter disciplinary controls. Further manipulation of the "in time of war" standard now found in the Uniform Code of Military Justice is unnecessary and unprofitable. Rather, it would be more effective to remove the source of ambiguity from the UCMJ by omitting the phrase "in time of war" and substituting a more precise criterion.

The UCMJ itself suggests an alternative that could accomplish the objectives discussed above. Congress, in the exercise of its power to regulate the armed forces,[70] provided in the UCMJ that the punishment which a court-martial may impose for an offense could not exceed the limits prescribed by the President.[71] Pursuant to this provision, the President by executive order has established maximum limits of punishment.[72] The executive order also provides that immediately upon formal declaration of war the offenses punishable by death in time of war are to be so punishable until formal termination of that war or until further executive order prior to formal termination.[73]

68. *See* notes 19-23 *supra* and accompanying text.

69. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964); Bouie v. City of Columbia, 378 U.S. 347 (1964); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

70. U.S. CONST. art. I, § 8.

71. UCMJ art. 56, 10 U.S.C. § 856 (1964).

72. Exec. Order No. 10214, 3 C.F.R. 408 (1949-53 comp.).

73. MANUAL FOR COURTS-MARTIAL 217 (1951).

This delegation of authority to the President serves to insure a minimum degree of uniformity in punishment application, to provide notice to military personnel of the maximum penalties they face for violations of the UCMJ, and to strengthen military discipline by adjusting the severity of penalties according to the seriousness of the offenses. Congress could have left the decision about all penalties for UCMJ offenses—including death—completely to the discretion of the President, provided that sufficient general criteria were given within which the President might exercise that discretion.[74]

Since the "in time of war" provisions of the Uniform Code of Military Justice were designed to meet the exigencies of that occasion,[75] it seems reasonable for Congress to direct that when any situation exists in which the President, as Commander-in-Chief, determines that increased military discipline is required for efficient control of the armed forces, he may by executive order impose all provisions of the UCMJ which currently are invoked only "in time of war." The UCMJ could provide that the executive order would remain in effect until revoked by subsequent order or by congressional resolution.[76] A companion provision could provide that formal declaration of war by Congress also would activate the same special provisions.

These changes in the UCMJ would answer many of the objections to the present formula. First, in cases like *Anderson*, it would eliminate the need for a judicial determination of the existence of war when there has not been a formal declaration. The elusive standard now used for such judicial conclusions could be discarded. Second, the military's need to insure discipline during combat and comparable situations short of declared war would be satisfied by presidential determination that such a need in fact exists. Third, the due process requirement of adequate notice would be satisfied. Servicemen and related personnel would receive notice that the increased penalties were in effect and that the jurisdiction of the

74. *See* Ehmke, *"Delegata Potestes Non Potest Delegari," A Maxim of American Constitutional Law*, 47 CORNELL L.Q. 50 (1961); Rossman, *The Spirit of Laws: The Doctrine of Separation of Powers*, 35 A.B.A.J. 93 (1949); Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 561 (1947).

75. *Hearings on H.R. 2498 Before the House Armed Services Comm.*, 81st Cong., 1st Sess. (1949).

76. *Cf.* the procedure followed under the Atomic Energy Commission Act, 42 U.S.C. § 2153 (1964), requiring presidential approval of cooperation with any nation or regional defense organization in the atomic energy field. The statute provides that the proposed agreement, together with the presidential approval, must be submitted to Congress, which then has sixty days to pass a resolution disfavoring the agreement. However, in the military law context, this procedure would be inadequate because of the delay that it entails. It also would force Congress to make a decision at a time when it might be politically wise for the national legislature to refrain from taking any official position.

UCMJ had been imposed through the issuance of an executive order. Fourth, the exigencies of limited warfare could be better accommodated, both geographically and militarily, by issuance of an executive order enumerating changes in selected provisions of the UCMJ or directed to particular geographic areas in accordance with the specific need. Fifth, since political considerations might dictate that war should not be recognized either formally or informally, permitting an executive order to issue on standards other than the existence of war would provide an expedient method to impose the current wartime provisions of the UCMJ without risk of diplomatic embarrassment.