A COMPARATIVE LEGAL STUDY OF THE WAR POWER IN THE CONSTITUTIONS OF AUSTRALIA, CANADA, AND THE UNITED STATES.

(Abstract of a thesis submitted to the Board of the Faculty of Law in connection with an application to supplicate for the Degree of Doctor of Philosophy.)

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Part I: The Problem of the War Power.

It is the object of this dissertation to consider, as a problem of constitutional law, the nature and scope of the war power of the central government in Australia, Canada, and the United States. The war power is something of an anomaly in federal constitutional law. In exercising it the central government may transcend the federal division of powers which is described in the organic law, and, to an extent which varies with the degree of emergency which is present, may invade an area which is normally reserved to the regional governments. Under conditions of an emergency attributable to war, the central government may also enact war legislation which in normal times would be considered to fall within the prohibition of a constitutional limitation.

The constitutional systems of Australia, Canada, and the United States exhibit sufficient similarities to make a comparative study of the war power profitable. In each the war power is entrusted to the central government; in each the regional governments possess other reserved powers which in normal times may not be exercised by the central government; in each the federal judiciary has the last word in interpreting a written constitution. But certain basic dissimilarities dictate the pattern which this comparative study must follow.

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Because the war power in each system varies with the peculiarities of its constitutional background, the three war powers are considered separately in the first instance. Because the three systems do not possess the same type of executive branch of government, it is useful to restrict the comparison, in the main, to the legislative aspects of the central war power. After considering the three war powers in the order of their complexity, they may be compared to discover whether they have developed along sufficiently parallel lines to warrant any generalizations as to their nature and scope.

Part II: The Dominion War Power in Canada.

On the face of the Canadian Constitution it appears that the Dominion government possesses complete authority to legislate for the "peace, order, and good government of Canada", and that provincial legislative authority extends only to specifically enumerated subjects of local importance. But the Privy Council has interpreted the division of power in the organic law to mean that the residuum of legislative authority rests with the provinces, and that the Dominion may legislate only over specifically enumerated subjects. One of the subjects which is specifically entrusted to the Dominion Parliament is "Militia, Military and Naval Service, and Defence". It would seem that this specific subject refers to legislation for the organization and equipment of a central military establishment. However, in judicial opinions the war power of the Dominion is treated as one aspect of an "emergency power" which is implied in the general grant of authority over the "peace, order, and good government of Canada." Therefore it is probably more accurate to consider the specific subject of "Militia, Military and Naval Service, and Defence" as illustrative of a certain portion of the general emergency power, rather than as an affirmative grant of legislative power in itself.

The war power of the Dominion is sufficient to support the enactment of legislation for the maintenance of a military establishment, the punishment of subversive activities, and the regulation of the domestic economy in the emergency of war. Particularly with reference to economic regulation, such as price control and rationing, the war power is considered to vary in scope with the degree of the emergency at hand. Although great weight will be attached to a recital by the Dominion Parliament that the existing emergency is sufficient to sustain a war regulation, in the final analysis the decision as to the sufficiency of an emergency will be made by the courts.

Although the Canadian Constitution contains a few negative limitations on the exercise of legislative power, no case has been presented to the appellate courts which involves the effect of such a limitation in a war emergency. Consistently with the concept of a war power which fluctuates with the degree of emergency, and in accordance with the rule in Australia and the United States, it would seem that the restrictive effect of such a limitation is lessened in wartime.

Part III: The Commonwealth War Power in Australia.

Although in the Australian Constitution residuary legislative powers are granted to the states, the war power is specifically entrusted to the Commonwealth. As in Canada, this war power has been interpreted to support legislation for the maintenance of a central military establishment, the punishment of subversive activities, and the control of the domestic economy in wartime. The judgments which deal with economic regulation, in particular, characterize the war power as fluctuating in scope with the requirements of the emergency at hand.

The problem of the proper formulation of a test for determining whether a control has sufficient relation to a war emergency is discussed at length in the Australian judgments. Although tests of "subject-matter" and "purpose" have been suggested, it would seem that the proper inquiry is whether the probable effect of the measure in question is to deal, in a manner competent to the Commonwealth, with such emergency as a court may concede to exist. The High Court of Australia has on several occasions held measures to be ultra vires because they did not in fact contribute to the war effort or because the war emergency upon which they were based had ceased to exist.

Unlike the Canadian Constitution, the Australian Constitution contains several limitations on legislative power, some of which tend to restrict the implementation of the war power. One is the guarantee of religious freedom, which has been invoked in vain to limit the power of the Commonwealth to conscript soldiers and to punish subversive activity. The requirement that the Commonwealth must compensate at "just terms" for the acquisition of property has proved to be a more serious obstacle. Of the constitutional objections which are raised against the manner of enforcement, as distinguished from the substance, of war regulations, the most effective is the implied prohibition on the exercise of judicial power by a non-judicial body.

It is clear that the states may legislate with relation to subjects within their competence so as to promote the Commonwealth war effort. The judgments suggest that certain governmental activities of the states are exempt from regulation under the Commonwealth war power. That position is difficult to align with the decision in World War II that the Commonwealth under circumstances of emergency could take over the entire income tax-collecting department of a state, including employees as well as

physical equipment.

Part IV: The Federal War Power in the United States.

As in Australia, reserved legislative powers under the United States Constitution belong to the states, but the war power is specifically granted to the central government.

The war power includes authority to create and to maintain a federal military establishment. In the conscription of personnel for the armed forces Congress is not restricted by the freedom of religion which is guaranteed by the First Amendment, but would seem to be required to provide administrative "due process" in the sense of the Fifth Amendment. The Constitution has been interpreted to require that "jurisdiction" must not be exceeded in the administration of justice through military tribunals under the war power.

It is within the war power for Congress to promote the domestic security of the United States by punishing subversive activity. The special application of other Congressional powers, such as the naturalization power and the power to condition the use of the postal system, is also a legitimate means of promoting domestic security. The most significant constitutional limitations on this federal security function are the First Amendment and the due process clause of the Fifth Amendment. In the case of state legislation, based upon reserved powers, which is designed to supplement federal security measures, roughly the same limitations have been read from the due process clause of the Fourteenth Amendment.

Applying the war power to the regulation of the domestic economy in an emergency attributable to war, Congress may fix prices and supervise distribution, control housing, restrict the production and consumption of alcoholic beverages, and take over the operation of essential industry. The authority of the

federal government to acquire property in aid of the war power is limited by the "just compensation" clause of the Fifth Amendment.

Part V: A Comparison Of the Federal War Power in Canada, Australia, and the United States.

The constitutional background of the federal war power varys considerably from system to system. One apparent disparity, a division of legislative authority in the Canadian Constitution which seems to leave the Dominion with residuary powers, has been eliminated in the course of judicial interpretation. But the three systems remain inconsistent in the particularity with which the affirmative war power is described and in the number and character of constitutional limitations which a program of war legislation must face.

Nevertheless, the same broad categories of war legislation may be enacted under each constitution. They include measures for the maintenance of a central military establishment, the punishment of persons who endanger the domestic security, and the regulation of the national economy in the emergency of war. Some applications of the war power are sufficiently similar to warrant a more detailed comparison. This is true, for example, of the acquisition of property in aid of war legislation within the terms of the "just terms" proviso of the Australian Constitution and the "just compensation" clause of the United States Constitution.

Although the constitutional background and the specific application of the war power is not the same in each system, it is possible to develop a theory of the federal war power which fits each constitution. In each the central government possesses two types of war legislative power: the "static" war power, which is available at all times, and the "elastic" war power,

which is available only in time of emergency. It is under the "elastic" war power that the central government invades the area which in normal times is reserved for the legislative control of the regional legislatures. In order to determine the constitutionality of a measure enacted under the "elastic" war power, a reviewing court must decide whether it was related to a war emergency of sufficient magnitude. A similar estimate of the magnitude of an emergency must be made in the application of constitutional limitations to war emergency legislation.

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PART 1

INTRODUCTORY

Chapter I: The Problem of the War Power

The governments of Canada, Australia, and the United States of America are federal in the sense that power is divided between the central and regional governments, each of which is coordinate and independent within its sphere. In the case of Australia and the United States, the written constitution as well as the actual functioning of government corresponds to that definition of federalism. Some elements of the Canadian Constitution, however, are unitary rather than federal in that they allow the central government to control the exercise of power by the regional governments. Provincial legislation, for example, may be disallowed by the Dominion executive and may be vetoed by the Lieutenant-Governor of the province, who is appointed by the Dominion executive. But these unitary elements in practice have been greatly modified by custom which is consistent with the federal principle. As one eminent observer concluded, "although the Canadian Constitution is quasi-federal in law, it is predominately federal in practice. Or, to put it another way, although Canada has not a federal constitution, it has a federal government."[1)]

The three federal systems are alike in that the central government in each case has been entrusted with the exercise of the power to wage war, or, as it is sometimes phrased,

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1) Wheare, Federal Government, p.21.

the power to defend the country. This centralized war power is derived from the organic law of each federation. In the constitutions of Australia and Canada, no affirmative war power whatsoever is granted to the regional governments; in fact, the Australian states are specifically forbidden to raise or to maintain armed forces without consent of the Commonwealth. The only powers connected with war which the United States Constitution gives to the states are the relatively unimportant powers of training the militia and appointing militia officers. The war power itself, as well as the lion's share of the militia power, is given to the central government.

The three systems are similar in another important respect: in each the judiciary has the ultimate voice in interpreting the constitution. Many problems of interpretation which reach the courts concern the federal division of power. The courts may be asked to decide, for example, whether the central government has attempted to exercise powers which were granted by the constitution to the regional governments. Other problems of interpretation relate to specific limitations which the constitution imposes upon governmental action. The judicial review of these limitations is aptly described in one of the Federalist papers:

> "By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."(1)

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1) The Federalist, No. LXXVIII.

The problem of whether the central or regional government has exceeded its allotted powers, and the problem of whether it has transgressed a constitutional limitation, are called "constitutional" issues. An act of government which is found by the courts to exceed power or to violate a constitutional limitation is regarded as ultra vires or "unconstitutional".

Probably no power of the central government confronts the courts with more perplexing questions of constitutional interpretation than does the war power. It is something of an anomaly in federal constitutional law. For in peacetime the exercise of the war power includes little more than the maintenance of a centralized military establishment, a function of the central government which would seem to invade no power of the regional governments. But in time of emergency the central government uses the war power to effect a most comprehensive network of control over the life of the entire nation. The central government then assumes many functions which the constitution allocates to the regional governments. Many constitutional limitations on the power of the central government are ignored. It has been said that the federation under these circumstances operates very nearly as a unitary state.(1)

It is the task of the courts to explain in terms of constitutional law the nature of this unusual power. On occasions when the central government has used the war power for a purpose or in a context contrary to the provisions of

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1) See, e.g., Corry, Democratic Government and Politics, p. 380; Scott, "Constitutional Adaptations to Changing Functions of Government" (1945) 11 Can. Jour. of Ec. and Pol. Sc. 329, 334; Bailey, "Reform of the Commonwealth Constitution"(1939) 14 Aus. Quarterly 5, 7; Sugerman and Dignam, "The Defence Power and Total War" (1943) 18 Aus. Law J. 207, 214; Corwin, Total War and the Constitution, pp. 173-76. Compare Greenwood, The Future of Australian Federalism, p. 232.

the constitution, the courts are obliged to rule that the attempted exercise of power is unconstitutional. In many cases, the real issue turns out to be whether the court will accept the estimate which the central government has made of the existing degree of emergency. Probably no ~~other~~ type of judicial review involves a more delicate weighing of social interests. Certainly no ~~other~~ type of review better illustrates the quasi-political position of the judiciary in these federal systems. As Mr. Justice Rutledge wrote:

> "War such as we now fight calls into play the full power of government in extreme emergency. It compels invention of legal, as of martial, tools adequate for the time's necessity. Inevitably some will be strange, if also lifesaving, instruments for a people accustomed to peace and the normal working of constitutional limitations. Citizens must surrender or forego exercising rights which in other times would not be impaired. But not all are lost. War expands the nation's power. But it does not suspend the judicial duty to guard whatever liberties will not imperil the paramount national interest."(1)

It is the object of this dissertation to consider, as a question of constitutional law, the nature and extent of the central war power in Canada, Australia, and the United States. It is proposed to examine the means by which the war power fluctuates in scope with the demands of the emergency, enabling the central government to prepare for war, to wage war, and to wind up the war effort. We are concerned with the effect which the federal division of power and the various constitutional limitations have on the exercise of the war power. Incidentally, we are interested in the techniques of judicial review by which courts have examined war measures. Our chief source materials will be the judgements of the Supreme Court

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1) Yakus v. U.S.(1944) 321 U.S. 414, 461 (dissenting opinion).

of the United States, the Supreme Court of Canada, and the High Court of Australia; as well as those of the Judicial Committee of the Privy Council, which for many years exercised appellate jurisdiction over the Supreme Court of Canada and which now entertains certain classes of appeals from the High Court of Australia.

Many similarities between the three systems facilitate a comparative study of their war powers. We have noted that each has a federal government and a federal or quasi-federal constitution, that the war power in each is given to the central government, and that in each the final decision as to constitutionality is made by the judiciary. It is also helpful to this study that the three countries are predominately English-speaking; that they are governed, in the main, by principles of the common law; and that their institutions and social conditions are alike in many respects. Nor is it without significance that, as allies, they have fought two major wars within the last forty years.

On the other hand, there are fundamental dissimilarities which render the systems less appropriate for comparison. After all, they represent separate nations. They do not exhibit precisely the same division of power between central and regional governments. Constitutional limitations on the exercise of governmental power vary greatly in number and kind from system to system. The traditions and procedures of judicial review are by no means identical. In particular the three groups of decisions in which the law of the war power is expounded are distinct in number, in the subjects which are treated, and in the terminology which is used. Moreover, Canada and Australia adopted the parliamentary system within a constitutional monarchy, while the United States sought to

separate the legislative functions of Congress from the executive functions of the President. Consequently the former countries have a radically different type of executive from the latter.

These dissimilarities have to a large extent dictated the pattern which this comparative study must follow. The war power of each federation will be considered separately in the first instance; its nature and scope will be evaluated from the judgments of its court and in terms of its own constitutional concepts. Finally we shall compare the three war powers in an effort to determine whether they have developed along sufficiently parallel lines to warrant any generalizations as to their nature and scope. Because of the dissimilarity between the executive of Canada and Australia and that of the United States, we shall be most concerned with the legislative aspects of the war power.

PART 2

CANADA

Chapter II: The Nature and Extent of the War Power of the Dominion

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On its face the British North America Act suggests that the Canadian war power is one of the less difficult aspects of a relatively simple quasi-federal system weighted heavily in favor of the Dominion. Under the heading, "Executive power," is found this provision:

> "15. The Command-in-Chief of the Land and Naval Militia and of all Naval and Military Forces of and in Canada, is hereby declared to continue and be vested in the Queen."

More crucial are the terms which describe coordinate lawmaking spheres, under "Distribution of Legislative Powers":

> "91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:---
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> ...
>
> "7. Militia, Military and Naval Service, and Defence:
>
> ...
>
> "29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces: And any matter coming within any of the Classes of Subjects enumerated in this section shall not be deemed to come within the Class of matters of a local or private nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
>
> "92. In each Province the Legislature may exclusively make laws in relation to matters coming within the Classes of Subjects next hereinafter enumerated; that is to say: ---
>
> ...

"13. Property and civil rights in the Province:

...

"16. Generally all matters of a merely local or private nature in the Province."

The apparent simplicity is undisturbed by limitations such as the freedom of speech and "due process" guarantees of the United States Constitution and the "just terms" proviso of the Australian Constitution. It is a familiar axiom of Canadian constitutional law that the Dominion and provinces between them possess the totality of legislative power which is necessary to a modern state.[1] The court's function is merely to decide on which side of the boundary ---Dominion or provincial--- an asserted legislative power lies, or in case of concurrent jurisdiction (as agriculture and immigration, by Sec.95) whether the enactments are repugnant and the Dominion statute therefore controls.

Of course the B.N.A. Act imposes minor restrictions on Dominion legislative power, and it is possible to imagine a war measure running afoul of them. Suppose, for example, that Parliament should pass an emergency war appropriations bill which originated in the upper house or had not been recommended by the Governor-General, as required by Sec.54.[2] Or that legislation, reciting a wartime need to save printing materials, should purport to suspend the minority language rights guaranteed by Sec. 133. These instances would pose the

1) Clement, The Law of the Canadian Constitution, pp.20-22; Riddell, The Constitution of Canada, p.71. See also In Re Bowater's Newfoundland Pulp and Paper Mills (1950) S.C.R. 608, 619-21, 633-34, 658-61. Compare MacKenzie, "Canada and the Treaty-Making Power " (1937) 15 Can. Bar Rev. 436. As to the possible qualification of this statement which Canada's position in the British Commonwealth requires, see generally Wheare, The Statute of Westminster and Dominion Status.

2) See judgment of Duff, C.J., In the Matter of a Reference as to the Validity of the Regulations in Relation to Chemicals (1943) S.C.R.1.

The thornier issue of an affirmative legislative power versus a negative restriction on legislation. So far the federal courts have not faced that problem, nor does it seem likely to confront them in the future. Instead, the issue in each test of war legislation has been that of an affirmative Dominion power versus an affirmative provincial power.

With only the terms of the B.N.A. Act in mind, one might wonder how a court could have difficulty in describing the extent of Dominion powers. The two great fields of authority seem to be the "peace, order, and good government of Canada" (Dominion jurisdiction) and "generally all matters of a merely local or private nature in the Province" (provincial jurisdiction). Certain categories of provincial competence---some of them vague, such as "property and civil rights in the Province"---are placed beyond Dominion reach. Apparently, the residuary power over all other subject-matters is given to the Dominion. Further to guide the courts, illustrative Dominion subject-matters are listed, including "Militia, Military and Naval Service, and Defence." Legislation related to war would seem to fall naturally within Dominion jurisdiction, primarily because it is outside the specified items of provincial competence, and also because it furthers the "peace, order and good government of Canada" as a whole. If additional evidence is needed, it is present in the illustrative subject-matter of "defence" and in the provision for a central command of the forces.

2

Such a cursory analysis, however, does not reckon with the decisions in which the Privy Council has charted the line

between Dominion and provincial jurisdiction. One jurist noted three consequent divergencies: (1) the Dominion residuary power as expressed in the "peace, order, and good government" clause may be invoked only in case of certain emergencies, such as war or famine; (2) although the Dominion is forced to base non-emergency legislation on one of the so-called "specific" subjects of Sec. 91, one of the more useful of them, "the regulation of trade and commerce, " has been qualified into insignificance; and (3) an enumerated subject for provincial legislation, "property and civil rights in the province," has become the de facto residuary field.[1] "(T)he cases reveal, "he concluded, "the perpetuation of judicial over-concern for Provincial autonomy, and of the vital mis-reading of the main branches of sections 91 and 92 induced by that attitude in the nineties."[2] The author of the O'Connor Report on the Canadian Constitution warned that so long as the "specific" subjects of Sec. 91 are considered more important than its residuary clause, "Dominion legislative authority will be restricted in frustration of the text of the B.N.A. Act."[3] Although the decisions of the Privy Council have not limited the scope of the Dominion war power, they have characterized the war power as one aspect of an implied emergency power rather than as that part of the Dominion residuary power which is illustrated by Sec. 91 (7).

The germinal idea that matters of unusual national concern justify Dominion legislation is seen in the decision, in Russell v. The Queen,[4] that there was no invasion of provincial powers in

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1) McDonald, "The Constitution in a Changing World" (1948) 26 Can. Bar. Rev. 21. Compare Cameron, The Canadian Constitution, Vol. II, p.15.
2) Ibid., p. 41.
3) O'Connor, "Property and Civil Rights in the Province" (1940) 18 Can. Bar. Rev. 351, 361.
4) (1882) 7 App. Cas. 829.

the Canada Temperance Act of 1878, which authorized the Governor-General to prohibit the retailing of liquor on a local option basis. Dominion competence was based on its authority over "peace, order, and good government" and "criminal law," suggesting a federal police power. Laws "deemed to be necessary or expedient for the national safety ... to prohibit the sale of arms, or the carrying of arms" or restricting "the sale or custody of poisonous drugs, or of dangerously explosive substances"[1] were described as *intra vires* the central government.

Subsequent decisions of the Privy Council discountenanced any such federal police power. In the case of *Attorney-General for Ontario v. Attorney-General for the Dominion*[2] (holding an Ontario liquor control act operative in areas which had not exercised local option to secure federal prohibition) Lord Watson rather reluctantly accepted the *Russell* judgment as binding. He urged, however, that recognition of the "peace, order, and good government" clause of Sec. 91 as a peg for Dominion legislation "ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance."[3] The decision of *Attorney-General for the Dominion v. Attorney-General for Alberta*[4] (holding the Dominion Insurance Act of 1910 *ultra vires*) followed the reasoning that legislation based on the "general" Dominion power, unlike that grounded on "enumerated" powers of Sec. 91, could not "trench" on the provincial

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1) *Ibid.*, p. 838.
2) (1896) A.C. 348.
3) Ibid., p. 360.
4) (1916) 1 A.C. 588.

subjects listed in Sec. 92. Viscount Haldane warned that the principle of the Russell case "ought to be applied only with great caution."[1]

The relation of the emergency doctrine to the Dominion war power was settled in two leading cases which were decided after World War I: In Re The Board of Commerce Act,[2] and Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.[3] The former decision dealt with the Dominion Combines and Fair Prices Act of 1919, which prohibited the operation of a "combine" and required those who had stocked unreasonable amounts of basic commodities to release them at a "fair"price. The Supreme Court divided on the question of the authority of the Dominion Board of Commerce, acting to enforce the statute, to limit the profits of certain retail clothiers. Speaking for the Board, which held the legislation ultra vires, Viscount Haldane wrestled with the ubiquitous ghost of Russell v. The Queen. The general words, "peace, order and good government," were limited by the enumerated subjects of Sec. 92, he reminded, and only in "special circumstances, such as those of a great war,"[4] might Dominion interest be great enough to interfere in an otherwise provincial field. Although the Russell case seemed to recognize this as "constitutionally possible, even in time of peace," the principle had "always been applied with reluctance and its recognition as relevant can be justified only after scrutiny

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1) Ibid.,p. 596.
2) (1922) 1 A.C. 191.
3) (1923) A.C. 695.
4) In Re the Board of Commerce Act (1922) 1 A.C. 191, 197.

sufficient to render it clear that the circumstances are abnormal."[1] Because the Combines Act was not passed "to meet special conditions in wartime" and was "not confined to any temporary purpose" but was to "continue without limit in time," it exceeded the emergency power.[2]

In the latter decision the Board sustained the regulation of prices by administrative delegates under the War Measures Act, directing recovery by a newsprint buyer of a rebate which the administrator had ordered on sales made during 1919. The Dominion cannot "ordinarily" legislate in interference with "property and civil rights in the province," said Viscount Haldane, citing the Board of Commerce decision. But "sudden danger to a social order arising from the outbreak of a great war" may require Sec. 91 to be interpreted as providing for "such an emergency."[3] The improbability of cooperative provincial action makes this "implied" power necessary. It was immaterial that some wartime controls had been discontinued: "consequential conditions arising out of war, which may obviously continue to produce effects remaining in operation after war itself is over" are within the scope of the emergency power.[4] The Dominion Parliament must have "considerable freedom to judge" the degree of urgency, and "very clear evidence that the crisis had wholly passed away" is necessary to justify a court in declaring emergency legislation ultra vires.[5]

In Toronto Electric Commissioners v. Snider[6] (invalidating

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1) Ibid., p. 200.
2) Ibid., p. 197.
3) Fort Frances Pulp and Power Co. v. Manitoba Free Press Co. (1923) A.C. 695, 703-4.
4) Ibid., p. 707.
5) Ibid., pp. 705-6.
6) (1925) A.C. 396.

the Industrial Disputes Investigations Act of 1907), Viscount Haldane repeated the formula that in the event of "some extraordinary peril to the national life of Canada" such as war or epidemic the general clause of Sec. 91 might be resorted to, "simply because such cases are not otherwise provided for."[1] Between World Wars I and II this emergency doctrine was invoked in vain to support the social legislation of the "Bennett New Deal".[2]

3

One of the most important principles established in the war power decisions is that the Dominion legislative authority may be delegated and re-delegated on down the administrative hierarchy. A contrary doctrine would have emasculated the War Measures Act, which has provided the legal master plan for the Canadian war effort since its enactment in 1914. This statute gives the Governor-in-Council power to make any regulation he deems advisable for the "security, defence, peace, order and welfare of Canada" by reason of "real or apprehended war, invasion, or insurrection." There follows

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1) Ibid. p. 412.
2) See, e.g., Attorney-General for Canada v. Attorney-General for Ontario (1937) A.C. 326. (Labour Conventions legislation), Attorney-General for Canada v. Attorney-General for Ontario (1937) A.C. 355 (Employment and Social Insurance Act), Attorney-General for British Columbia v. Attorney-General for Canada (1937) A.C. 377 (Marketing Act).
The treatment by the Privy Council of the emergency doctrine is discussed in Scott, "Consequences of the Privy Council Decisions" (1937) 15 Can. Bar. Rev. 485, and MacDonald, "The Constitution and the Courts in 1939" (1940) 18 Can. Bar. Rev. 147. See also Laskin, "Peace, Order, and Good Government Re-examined" (1947) 25 Can. Bar. Rev. 1054.

an illustrative but not restrictive list of appropriate subjects for regulation, including:

> "(a) censorship...;
> "(b) arrest, detention, exclusion and deportation;
> "(c) control of the harbours;
> "(d) transportation...;
> "(e) trading, exportation, importation, production and manufacture;
> "(f) appropriation, control, forfeiture and disposition of property and of the use thereof."

"More comprehensive language it would be difficult to find," remarked one judge.[1]

The Military Service Act of 1917, reciting an intent not to impair the power of the Governor-in-Council under the War Measures Act, inaugurated the policy of drafting men according to occupation and family status. An order-in-council of 1918 (issued under the War Measures Act) purported to authorize the drafting of all men of a certain age and family group, regardless of their prior exemption by the 1917 act.[2] In Re Gray the Supreme Court denied habeas corpus to a registrant, exempt by the 1917 act but called to service under the 1918 order-in-council, who was arrested for refusing to submit to induction. A majority of the Court reasoned that Parliament may delegate to the Governor-in-Council sufficient legislative power to repeal an intervening act of Parliament. Being defined in ambit and subject to revocation at any time, the delegation was not a complete abdication of the duties of Parliament.

Under the War Measures Act the Governor-in-Council delegated to the Ministry of Munitions and Supply the power to allocate critical commodities in World War II. The ministry in turn delegated to the Controller of Chemicals

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1) In Re Gray (1918) 57 S.C.R. 150, 178.(judgment of Anglin, J).
2) Ibid.

the power to make the necessary regulations. In the Chemicals Reference[1] the Supreme Court sustained this re-delegation, although it was not specifically authorized by the War Measures Act. As in Re Gray, it was emphasized that Parliament could at any time revoke the delegation. One judge observed, "It is manifest that the business of government in war time cannot be effectively carried out without delegation by the Executive of a very great part of its duties."[2]

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It is peculiarly appropriate to the elastic nature of the emergency power that Parliament should continue some war regulations after hostilities have ceased. Such formal acts of state as the signing of a peace treaty or proclamation of "the end of the war" have little relevance to the continuing need for demobilization, price control, and other incidents of "winding up" the war. Parliament must be given sufficient leeway to effect de-control as gradually and painlessly as possible, lest the sudden lifting of all restrictions in itself precipitate an emergency. In the Fort Frances case[3] the Board sustained a price control order covering sales made after the Armistice and proclamation of peace in World War I. A more striking instance of transitional legislation was presented by leasehold regulations, first promulgated in 1941, which were kept in effect through March, 1950, by a series

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1) In the Matter of a Reference as to the Validity of the Regulations in Relation to Chemicals (1943) S.C.R. 1. See note (1943) 21 Can. Bar. Rev. 141.
2) Ibid., p. 36.
3) Fort Frances Pulp and Power Co. v. Manitoba Free Press Co. (1923) A.C. 695.

of statutes which recited the persistence of a temporary emergency requiring Dominion control. The Supreme Court upheld the regulations,[1] although they affected matters normally within provincial jurisdiction, because of insufficient evidence that the war-created housing crisis had passed. It was noted with approval that the Dominion had allowed many controls to expire and the leasehold regulations themselves had been relaxed progressively as conditions returned to normal.

Nor is it necessary that the transitional measure be a continuation of controls which were inaugurated during hostilities. An order-in-council of December, 1945, (after the Japanese surrender of August, 1945) authorized the deportation of certain persons of Japanese descent, including those found disloyal by an investigating board, plus their wives and children. The regulation, which provided for the loss of political status by those deportees who were Canadian nationals or British subjects, was continued in effect through 1946 by a transitional statute. Answering a reference as to the constitutionality of deportation orders, four of seven Supreme Court judges found the scheme ultra vires in one or more aspects.[2] The Privy Council held it wholly intra vires.[3] Once the judiciary concedes the existence of "a sufficiently great emergency, such as that arising out of war," the Board declared, it may not question the wisdom of a particular measure or the practical ability of the executive to enforce it.[4]

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1) In the Matter of a Reference as to the Validity of the Wartime Leasehold Regulations (1950) S.C.R.124.
2) In the Matter of a Reference as to the Validity of Orders in Council... in Relation to Persons of the Japanese Race (1946) S.C.R.248.
3) Co-operative Committee on Japanese Canadians v. Attorney-General for Canada (1947)A.C.87.
4) Ibid., pp. 101-2.

From the facts at hand the Board could not say that the threat to Canadian security was insufficient to support the postwar deportation program.

The Board of Commerce case[1] demonstrates that effective postwar legislation must be framed with reference to a relatively temporary, war-born emergency. The Supreme Court has also weighed the fact t at hostilities and the general war emergency had ended as evidence that the Governor - in-Council did not intend to authorize his delegate to institute a new type of commodity control.[2] But these decisions only illustrate by constrast the general principle that some facets of a war emergency may extend indefinitely into the postwar period.

We have seen that the Dominion war power is merely one aspect of a more comprehensive Dominion emergency power which may be used when the courts are satisfied t at an emergency in fact exists. In such circumstances the Dominion is said to legislate on the basis of the "general" clause of Sec.91, for the "peace, order, and good government of Canada," although it has been hinted that emergency powers would exist by implication independently of the text of the B.N.A. Act.[3] This analysis assumes that the Dominion acquired no part of its war power by virtue of the "specific" subject- matter of Sec. 91 (7), "Militia, Military and Naval Service, and

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1) In Re the Board of Commerce Act (1922) 1 A.C. 191.
2) In Re Price Bros. & Co. and the Board of Commerce of Canada (1920) 60 S.C.R. 265.
3) See Toronto Electric Commissioners v. Snider (1925) A.C. 396, 412.

Defence." Perhaps it would be more satisfactory to theorize that authority to regulate the military establishment and the purely military aspects of war---matters which are never within provincial jurisdiction---comes from that subsection and is available at all times. The other components of the war power, which are normally of provincial competence, might still be considered part of the emergency power, available to the Dominion only in time of crisis.

The role of the courts in passing on the exercise of the war power is particularly important. They must decide whether emergency conditions obtain and whether the measure in question has sufficient relation to them. Obviously, the fact that Parliament has declared the existence and relevance of an emergency will weigh heavily. Parliament must have "considerable freedom to judge" for itself the existence of emergency, [1] and"very clear evidence that an emergency has not arisen, or that the emergency no longer exists" [2] will be required to disprove the recital. But this is not to say that the courts are "bound" by such a recital, [3] a misconception which dies hard. The notion has also persisted that because the War Measures Act was held

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1) Fort Frances Pulp and Power Co. v. Manitoba Free Press Co. (1923) A.C. 695, 705.

2) Co-operative Committee on Japanese Canadians v. Attorney-General for Canada (1947) A.C. 87, 101-2. Compare the language of Kerwin, J., In the Matter of a Reference as to the Validity of the Wartime Leasehold Regulations (1950) S.C.R. 124, 135 ("very clear evidence" or "clear and unmistakable evidence"); and that of Taschereau, J., at p. 142 of the same decision ("unmistakable evidence").

3) See, semble, judgments of Duff, C.J., and Kerwin, J., In the Matter of a Reference as to the Validity of the Regulations in Relation to Chemicals (1943) S.C.R. 1; and the judgment of Mignault, J., in Re Price Bros. & Co. and the Board of Commerce of Canada (1920) 60 S.C.R. 265. And see the language of the Exchequer Court in Nakashima v. The King (1947) Ex. Ct. Rep. 486, 501:

> "... it is clear that the Court has no right to question the decision of the Governor in Council as to the necessity or advisability of the measure."

intra vires, everything deemed necessary by the Governor-in-Council or his delegate acting under that statute must be sustained by the courts.[1] The Act as a whole has been held intra vires only so far as the system of delegation is concerned.[2] Every order made under it is legislation in itself, and must be examined independently as though it were a separate act of Parliament.[3]

It is erroneous to speak abstractly of the substantive limit of the Dominion war power, as though it could be plotted mechanically and precisely like the period of a Statute of Limitations. The subjects which may be regulated and the extent to which they may be regulated depend upon the nature and extent of the emergency in question. A court is free to decide, for example, that there exists an emergency in regard to subversive activity but not in regard to inflation, or that an existing emergency is serious enough to support Price Regulation "A" but not the more encompassing Price Regulation "B".

The few judgments in which the constitutionality of applications of the war power has been considered demonstrate that the Dominion may legislate in relation to three general war objectives. One is the maintenance of a military establishment,[4] an objective which would not seem to conflict with

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1) See Nakashima v. The King (1947) Ex.Ct.Rep. 486.
2) In Re Gray (1918) 57 S.C.R.150, In the Matter of a Reference as to the Validity of Regulations in Relation to Chemicals (1943) S.C.R.1.
3) See Rex v. Singer (1941) S.C.R.111.
4) See In Re Gray(1918) 57 S.C.R.150. Many decisions assume without discussion that the Dominion has the power to conscript soldiers. See, e.g., Cooke v. The King (1928). Ex.Ct.Rep.20, Greenlees v. Attorney-General of Canada (1946) S.C.R.462. As to the purely military aspect of the war power, see In the Matter of a Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts (1943) S.C.R.483. And see In Re the Regulation and Control of Aeronautics in Canada (1932) A.C.54; Attorney-General of Canada v. Jackson (1946) S.C.R. 489 (Judgment of Kellock,J.).

provincial legislative powers, and which to that extent may be attributed to a permanent Dominion power rather than to an "emergency" power. Another deals with control of the domestic economy in wartime,[1] an objective which nearly always involves conflict with provincial legislative powers. A third objective, the internal security of the nation in wartime,[2] has also been related to the war power. It would seem possible, however, to accomplish this objective by means of the specific Dominion power over criminal law.[3]

Obviously, the decided cases provide the merest outline of the scope of the Dominion war power. Many fundamental questions cannot be answered without the aid of authority on a greater variety of issues. It seems probable that future decisions will add to the types of legislation which may be based on the war power; certainly they will multiply examples of the types which have been considered so far. Perhaps the cases will make what has been advanced as a legitimate distinction between the permanent war power of maintaining a military establishment, and the temporary war power of invading the sphere of provincial legislative power during an emergency. Eventually, the Court will be asked to determine the effect of a specific constitutional limitation, such as the guarantee of minority language rights, upon the exercise of the Dominion war power.

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1) See, e.g., In the Matter of a Reference as to the Validity of the Wartime Leasehold Regulations (1950) S.C.R.124.
2) See, e.g.,Co-operative Committee On Japanese Canadians v. Attorney-General for Canada (1947) A.C.87.
3) See B.N.A. Act, Sec. 91 (27). Compare Vaaro v. The King (1933) S.C.R. 36.

PART 3

AUSTRALIA

Chapter III: The Nature of the War Power of the Commonwealth.

1

As in the United States by virtue of the Tenth Amendment and in Canada through the prevailing interpretation of Secs.91-92, residuary powers under the Commonwealth of Australia Constitution Act are left to the states. In specific language, however, the war power is given to the Commonwealth:

> "Sec.51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-
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> ...
>
> "(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:
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> ...
>
> "(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:
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> ...
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> "(xxxix) Matters incidental to the execution of any power vested by this Constitution ..."
>
> "Sec.68. The command-in-chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative."
>
> "Sec.119. The Commonwealth shall protect every State against invasion, and, on the application of the Executive Government of the State, against domestic violence."

This centralized war power is reinforced by a provision for the transfer of state departments of "naval and military defence" to the Commonwealth (Sec.69) and a prohibition on the raising or maintenance of state armed forces without the consent of the Commonwealth Parliament (Sec.114).

In Australia the task of determining the extent of the

war power is complicated by many constitutional limitations which do not exist in Canada. For example, the Commonwealth may acquire property, but only on "just terms" (Sec. 51 [xxxi]); it may not legislate so as to prohibit the free exercise of a religion (Sec. 116); it may not effect a preference among states by means of commercial or revenue legislation (Sec. 99). The limitations are fewer than those of the United States Constitution, but their effect is telling. Although every major test of Canadian war legislation has involved only the issue of the Dominion war power versus the provincial residuary power, the Australian court has frequently faced the more difficult issue of the Commonwealth war power versus a constitutional prohibition on legislation.

The essence of the Australian war power is its elasticity , its quality of fluctuating in scope with the demands of the emergency at hand. In the case of Commonwealth legislation for the maintenance of the military establishment, which may beenacted in peacetime as well as in wartime, this elasticity is not pronounced. But the bulk of the war controls affect matters normally reserved to the States, and may be enacted only in relation to some war emergency. The courts have applied the criterion of necessity to measures passed in the midst of hostilities as well as to those passed in preparation for war or passed to bridge the gap between war and peace.

(A) Preparation for war.

Much federal legislation in preparation for war, involving

functions which are concededly within the authority of the Commonwealth, usurps no state legislative powers. These measures concern the maintenance of a military establishment, which may be considered the static element of the war power.[1] They may be passed in peacetime as well as wartime, and it is difficult to imagine a situation in which a reviewing court would question their necessity. Obvious examples are the enlistment and conscription of soldiers and the acquisition of military stores. The elastic element of the war power is involved when the Commonwealth enacts legislation which, but for emergency conditions, would be appropriate only to the states. When measures of this type are enacted to prepare the nation for war, the courts will evaluate their relation to the necessity which is invoked to support them. It is not enough, to demonstrate that certain legislation is supported by the war power, that administrative action taken under it has in fact prepared the Commonwealth for war. It must be apparent from the terms of the statute that the Commonwealth Parliament enacted it with that purpose in mind.

Two cases of Commonwealth-operated industry illustrate the point. The first involved the Commonwealth Shipping Board, created to manage a Commonwealth steamship line and to conduct "any other business incidental thereto." It was held that the Board, under this general legislation, could not conduct an electrical engineering business in peacetime in order to maintain a staff which would be useful in case of war.[2] "Extensive as is that power [Sec.51(vi)]," the

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1) See infra, Chapter IV(1).
2) Commonwealth v. Australian Commonwealth Shipping Board (1926) 39 C.L.R.1.

Court reasoned, "still it does not authorize the establishment of businesses for the purpose of trade and wholly unconnected with any purpose of naval or military defence."[1] The second case concerned a Commonwealth clothing factory, authorized by the Defence Act (1903-32) for a specific war purpose: "the manufacture of naval and military equipment and uniforms." Gradually the factory began to sell uniforms to the civilian employees of Commonwealth, state and local government and to private individuals, as well as to the forces. A majority of the Court held the non-forces sales intra vires, presuming them necessary to the maintenance of a factory which in wartime would manufacture uniforms for the forces.[2]

(B) Transitional control.

The task of reviewing emergency legislation becomes particularly onerous in the transitional period between war and peace, when the actual degree of emergency may decline rapidly while a particular measure remains in force.[3]

Commonwealth war legislation in both World Wars has consisted chiefly of broad statutory grants of executive authority, plus the administrative regulations made under them. The War Precautions Act (1914) empowered the Governor-General to make regulations "for securing the public safety and the defence of the Commonwealth," enumerating certain illustrative subjects of control. The National Security Act (1939) of World War II was framed in similar terms. Its scope was increased in 1940 by Sec.13A: "Notwithstanding anything

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1) Ibid., p.9.
2) Attorney-General for Victoria (ex.rel. Victorian Chamber of Manufactures) v. Commonwealth(1935) 52. C.L.R.533.
3) The problem is discussed in Denholm, "Some Aspects of the Transition Period from War to Peace 1918-1921" (1944) 16 Aus. Quarterly 39; Mitchell, "Transitional and Post-War Powers in the Commonwealth of Australia" (1947) 25 Can. Bar.Rev.854; and Sawyer, "The Transitional Defence Power of the Commonwealth" (1949) 23 Aus. L.J.255.

in this Act, the Governor-General may make such regulations making provision for persons to place themselves, their services and their property at the disposal of the Commonwealth, as appear to him to be necessary or expedient for securing the public safety, the defence of the Commonwealth and the Territories of the Commonwealth, or the efficient prosecution of any war in which His Majesty is or may be engaged."

The earliest challenge of transitional legislation was answered in the language of statutory interpretation rather than that of constitutional law. Under the War Precautions Act, which purported to remain in effect during a "state of war", deportation proceedings were held after hostilities of World War I had ceased and after the Crown had proclaimed the end of the war in Germany. The Court in Jerger v. Pearce[1] stressed that the province of fixing the length of a "state of war" was peculiarly an executive one, holding that the continuance of such a state was demonstrated by the facts that no peace treaty had been signed, and that no proclamation had been made of the end of the war with Austria-Hungary.

Following World War II it became apparent that the Court should consider the constitutionality of the enforcement of war regulations in peacetime. Unlike the War Precautions Act, the National Security Act was phrased to continue until an official proclamation of peace, but in no event longer than six months after the Crown "ceases to be engaged in War." In Australian Textiles v. Commonwealth[2] the Court upheld wage-fixing orders which were

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1)(1920) 28 C.L.R. 588. See also Roche v. Kronheimer (1921) 29 C.L.R. 329.
2)(1945) 71 C.L.R. 161.

proclaimed the day after the Japanese surrender. Latham, C.J., reasoned that "prosecution of the war" continued because enemy territory was being occupied and demobilization had not been completed. Dixon, J., noted the plastic character of the war power, shrunken since wartime but still adequate to meet "the exigencies that attend the cessation of war."[1]

The effective period of the National Security Act was extended through December 31, 1946, by an amendment which continued existing regulations in effect and empowered the Governor-General to make new ones. The amending statute was held intra vires as to the continuance of land transfer regulations in Dawson v. Commonwealth.[2] "The defence power does not cease instantaneously to be available as a source of legislative authority with the termination of active hostilities or even with the end of the war,"[3] concluded the Chief Justice. Although blackout regulations would no longer be constitutional, he suggested, it would be within the transitional war power to demolish air raid shelters built in wartime.[4]

The Defence(Transitional Provisions)Act (1946) extended regulatory powers through December 31, 1947. Under that act the Cream (Disposal and Use) Order purported to limit

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1) Ibid., p. 179. See also judgment of Latham, C.J., in O'Neill v. O'Connell (1945) 72 C.L.R. 101.
2) (1946) 73 C.L.R. 157.
3) Ibid., p. 176.
4) See also Miller v. Commonwealth (1946) 73 C.L.R. 187, and Real Estate Institute v. Blair (1946) 73 C.L.R. 213.

the domestic consumption of cream in furtherance of a wartime agreement with Britain for the postwar export of butter and cheese. In sustaining the order, the Court appeared to relate its validity to the emergency context of the original agreement rather than to the actual relation of an export scheme to defense in 1947.[1] The Court in Nelungaloo Ltd. v. Commonwealth,[2] however, specifically recognized that the acquisition of "all wheat harvested in Australia during hostilities or their aftermath as a means of prosecuting and winding up the war"[3] is a transitional war function.

The transitional cycle was completed with the decision of The King v. Foster,[4] in which a unanimous High Court held that the Commonwealth had attempted to extend certain controls too far into the postwar period. The application of three National Security measures was considered: (1) the regulation of the conditions of employment of women in an intrastate business in December, 1948, (2) the rationing of petrol in November, 1948, and (3) the enforcement of a housing acquisition of March, 1949, by a "protected person" under the War Service Moratorium Regulations. Noting the continued occupation of an enemy area by Australian troops and conceding the existence of a technical state of war, the Court warned that the Commonwealth may not deal with every consequence of war, however remote. "The

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1) Sloan v. Pollard (1947) 75 C.L.R. 445.
2) (1948) 75 C.L.R. 495.
3) Ibid., p. 503. And see Hume v. Higgins (1949) 78 C.L.R. 116.
4) (1949) 79 C.L.R. 43.

recent war has produced some changes in almost every part of our lives," the Court said. "This fact does not mean that the whole life of man is to be regarded as a war consequence."[1] Controls may be extended after hostilities for two purposes only---(1) to effect gradual decontrol, lest sudden decontrol itself create an emergency, and (2) to deal with emergencies which remain and which have a sufficient causal connection with the war. The measures under review were held to be enacted for neither purpose. The period had passed during which the Commonwealth might gradually have tapered off controls, and the emergencies dealt with were insufficiently related to war, having "become part of the ordinary social, economic, and industrial complex of the community."[2]

3

We have seen that the validity of measures passed under the elastic war power depends upon the extent of the emergencies to which they relate. As the war emergency waxes and wanes, the line between Commonwealth and state powers shifts accordingly. The Court has found difficulty in formulating a test by which the extent of the Commonwealth war power in a given emergency may be predicted.

(A) The subject-matter test.

The Australian Constitution, Sec. 51 (vi), speaks of "naval and military defence"; and it was argued in the

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1) The King v. Foster (1949) 79 C.L.R. 43, 85.
2) Ibid., p. 88.

dissenting opinions of Gavan Duffy and Rich, JJ., in Farey v. Burvett[1] that the phrase is a restrictive one, limiting the Commonwealth to the maintenance of armed forces and to a few ancillary security functions. Price control, for instance, was thought to be beyond the "subject-matter" of "naval and military defence". Were this thesis accepted, "defence" might perhaps be regarded as a "subject-matter", as immutable and as easily identified as "census and statistics" (Sec.51 [xi]) or "weights and measures" (Sec.51 [xv]). The result would be a Commonwealth war power no greater in scope than that which we have termed the "static" war power. Clearly it would be inadequate for the waging of total war.

A majority of the High Court in Farey v. Burvett held (1) that "naval and military defence" should not be regarded as a "subject-matter" for legislation, and (2) that the grant of authority supports war legislation which is related to matters not strictly "naval" or "military". In the light of the second conclusion, the first is inevitable. It borrows confusion to speak of "defence" as a "subject-matter", unless we limit its scope to the mere establishment of a military machine. "Defence" in the larger sense of the elastic war power includes many categories of legislation--- price control, rationing, control of employment, etc. --- which may be appropriate to the states only or to the Commonwealth, depending on the degree of emergency. There is no constant "subject-matter" of "defence",identifiable without regard to extraneous factors. Although the expression appears not infrequently in subsequent judgments on the war power,[2]

1) (1916) 21 C.L.R. 433.
2) See, e.g.,the judgments of Starke,J., in Stenhouse v. Coleman (1944) 69 C.L.R.457, and Victorian Chamber of Manufactures v.Commonwealth (Women's Employment Regulations) (1943) 67 C.L.R. 347.

since the decision of Farey v. Burvett[1] the "subject-matter" test cannot be considered to be an authoritative formulation of the problem.

(B) The purpose test.

It was recognized by Dixon, J., that the war power, unlike other powers mentioned in Sec. 51, is granted with the implication that "defence" is a purpose for which the Commonwealth may legislate rather than the label of a subject-matter for legislation.[2] Certainly it is desirable to distinguish Sec. 51 (vi) from less comprehensive Commonwealth powers, such as "census and statistics" and "weights and measures," which are static in content. To evaluate legislation in terms of its war purpose is at least to emphasize the latitude which the Commonwealth should be granted in dealing with war emergencies. Once we have disposed of the minority argument that "naval and military" is a restrictive term, there is no doubt that the price controls under review in Farey v. Burvett,[3] for example, were enacted for the purpose of waging war.

It is not surprising that the most thorough development of the "purpose" approach is found in a judgment[4] in which an exercise of the war power was sustained. The difficulty, explained Dixon, J., lies in the inadequacy of the rules of admissibility and judicial notice as a means of presenting facts upon which a court may estimate the degree of emergency which exists. It is consistent with a presump-

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1) (1916) 21 C.L.R. 433.
2) Stenhouse v. Coleman (1944) 69 C.L.R. 457, 471.
3) (1916) 21 C.L.R. 433.
4) Stenhouse v. Coleman (1944) 69 C.L.R. 457. (judgment of Dixon, J.).

tion in favor of the validity of legislation, upon which courts tend to rely, to limit inquiry to the legislative purpose.

In a strained sense, the purpose of legislation is the fact situation with which it is concerned, but as the word is more commonly used, purpose refers to the object which the legislators had in view. It is the "purpose" test in the latter sense which confronts a court with equally undesirable alternatives. One is to rely completely upon a formal recital of war purpose in the text of the legislation, which is in fact to abdicate judicial review. The other is to attempt to find the "real" purpose from the legislation as a whole plus judicial notice of contemporaneous events. Again two possibilities arise. The search for "real" purpose may become an inquest into the motives which individual legislators entertained, a completely irrelevant issue. Or the court may demonstrate that from the probable effect of the legislation upon contemporaneous events, no reasonable legislature could have enacted it for a war purpose. This may be called a "purpose" test only in the strained sense of the word; its function is to measure the actual effect, rather than purpose, of legislation.

Adequately to review war legislation, the court must probe beyond a recital of legislative intent, but stop short of questioning the motives of lawmakers. To phrase the test of constitutionality in terms of "purpose" may conduce to either error. The only satisfactory interpretation of the "purpose" test is that which entails evaluation of the effect of legislation in its emergency context. This can be better accomplished by phrasing the test in terms of

"effect" rather than "purpose".

(C) The test of effect.

A distinguished commentator has concluded that two possible courses of action are open to the High Court: (1) to overrule Farey v.Burvett and treat "naval and military" as restrictive of "defence" (using the "subject-matter" analysis of Gavan Duffy and Rich, JJ.) or (2) "to admit that, in time of war, the opinion of Parliament and of the Executive as to the purpose of an alleged defence law, or as to the connection between a law and defence, must be taken as conclusive because there is no clear legal criterion and no satisfactory evidentiary process by which the Court can challenge that opinion."[1] The first alternative, in the absence of some additional doctrine of implied emergency power, is manifestly unsuited to the waging of modern war. The second means the abdication of judicial review of war legislation in time of emergency.

It is submitted, with deference, that there is a third course open to the Court, one which has in fact been followed. That is to sustain a measure if its probable effect is to deal, in a manner competent to the Commonwealth, with such emergency as the Court may concede to exist. The opinion of Parliament and the Executive (1) that a sufficient degree of emergency exists and (2) that the measure is conducive to its remedy will of course be given great weight. But the Court, if it reaches an opposite conclusion on either issue, may declare the measure ultra vires the Commonwealth.

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1) Sawyer, "The Defence Power of the Commonwealth in Time of War" (1946) 20 Aus. L.J. 295,300. Compare Sugerman and Dignam,"The Defence Power and Total War" (1943) 17 Aus L.J. 207.

The technique of examining the effect of legislation is the standard method of applying constitutional limitations on legislative power, some of which have been held to invalidate war measures. Regardless of the purpose of the Commonwealth to provide "just terms" in the acquisition of property for war purposes, the legislation authorizing the acquisition will be held ultra vires if its actual effect is to deny "just terms".[1] Transport controls, though instituted for purposes of defense, are rendered unconstitutional by Sec. 92 if their effect is to penalize interstate movements as such.[2] The Court has also used the test of effect when the factor limiting war legislation was not a specific constitutional prohibition, but the residuary power of the states. Thus it was held ultra vires to restrict admissions to certain faculties of a university, when the applicant was left free to pursue, in other faculties, studies of less value to defense.[3] On the other hand, the actual effect of controls has frequently been cited as proof of their relation to the emergency and their consequent validity.[4]

It may be contended that the "effect" approach requires the Court to make essentially the same "inescapably political"[5] decisions that the legislature has made. The Court is asking, "Will this measure help to win the war? Is its severity proportionate to the emergency?" rather than, "Did Parliament enact this for the purpose of aiding

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1) See infra, Chapter IV (3).
2) See infra, Chapter IV (5).
3) The King v. University of Sydney (1943) 67 C.L.R.95.
4) See Attorney-General v. Balding (1920) 27 C.L.R.395, Repatriation Commission v. Kirkland (1923) 32 C.L.R.1, Real Estate Institute v. Blair (1946) 73 C.L.R. 213, Ferguson v. Commonwealth (1943) 66 C.L.R. 432.
5) Sawyer, "The Defence Power of the Commonwealth in Time of War" (1946) 20 Aus.L.J. 295, 300.

the war effort?" The answer is simply that the Australian courts, like their Canadian and American counterparts, have used this technique with success in the review of war legislation, and that no other formulation has been suggested which enables the judiciary to keep the elastic war power within constitutional limits.

(D) An appropriate formula.

Opinions dealing with war legislation are often concerned with the development of a verbal formula for the proper test of constitutionality. Especially when it essays to evaluate the effect of legislation in a given emergency, the Court has difficulty compressing all relevant considerations into a succinct, useful phrase. The tests propounded in Farey v. Burvett have been quoted in many judgments:

> "Can the measure in question conduce to the efficiency of the forces of the Empire, or is the connection of cause and effect between the measure and the desired efficiency so remote that the one cannot reasonably be regarded as affecting the other?" (Griffith, C.J.) (1)

> "If the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence the Court must hold its hand..." (Isaacs,J.) (2)

> "[It is] enough that it is capable of being an Act to aid defence, enough that the statement of Parliament [regarding its purpose] is not necessarily untrue." (Higgins,J.) (3)

The formula for the necessary relationship between a measure and the war emergency has been rendered in a multiplicity of ways, e.g.,"reasonably capable of aiding", (4) "real

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1) (1916 21 C.L.R. 433, 441.
2) Ibid.,p.455.
3) Ibid.,p.460.
4) Victorian Chamber of Manufactures v.Commonwealth (Prices Regulations) (1943) 67 C.L.R. 335, 342.

connection,"[1] "real relation,"[2] "real and plain connection,"[3] "real and substantial connection,"[4] "reasonable and substantial basis,"[5] "sufficient nexus,"[6] "specific connection,"[7] "real and substantial relation,"[8] "capable of conducing to".[9]

There may be observed in more recent decisions a tendency to minimize the importance of any "abstract formulation of the general test."[10] "The answer to the question," wrote Rich, J., "does not depend upon an idiosyncratic use of words."[11] Starke, J., has concluded that "no general test applicable to all cases can safely be laid down, because the causal connection with the emergency "is only one of degree and in the end becomes a rule of expedience."[12] "Use what words we will, securing or aiding or tending to secure or aid or appreciably or conceivably aiding the defence of the Commonwealth, 'there is really only one question --- a question as to the limits of the power of the Federal Parliament to make laws' with respect to naval and military defence."[13]

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1) Adelaide Company of Jehovah's Witnesses v. Commonwealth (1943) 67 C.L.R. 116, 154.
2) Gonzwa v. Commonwealth (1944) 68 C.L.R. 469, 478.
3) Ibid., p. 481.
4) Real Estate Institute v. Blair (1946) 73 C.L.R. 213, 227.
5) Sloan v. Pollard (1947) 75 C.L.R. 445, 465.
6) McKay Massey Harris v. Commonwealth (1944) 69 C.L.R. 501, 507.
7) Shrimpton v. Commonwealth (1945) 69 C.L.R. 613, 635.
8) Attorney-General for Victoria v. Commonwealth (1935) 52 C.L.R. 533, 566.
9) South Australia v. Commonwealth (1942) 65 C.L.R. 373, 459.
10) Stenhouse v. Coleman (1944) 69 C.L.R. 457, 469.
11) Victorian Chamber of Manufactures v. Commonwealth (Women's Employment Regulations) (1943) 67 C.L.R. 347, 375.
12) The King v. Commonwealth Court (1942) 66 C.L.R. 488, 514.
13) South Australia v. Commonwealth (1942) 65 C.L.R. 373, 445.
14) Victorian Chamber of Manufactures v. Commonwealth (Women's Employment Regulations)(1943) 67 C.L.R. 347, 380.

It is submitted that this departure from a labored stylization of the problem is to be encouraged. The function of the formula is to direct the attention of a court toward the probable effect of the legislation under consideration and the probable extent of the emergency which is invoked to support it. The formula should also suggest, expressly or by implication, the great weight which a court will attach to the Parliament's conclusions on those issues. Flexibility and simplicity should be its primary characteristics. In fact, the necessity for a general formula of constitutionality will probably decrease as the body of case law on the war power grows. Already decisions refer to war repatriation measures, anti-inflation measures, and manpower controls as though they represented specific Commonwealth powers rather than certain well-defined aspects of a single war power. Instead of asking, "Has the measure sufficient relation to the war effort?" the Court tends to ask more specific questions, for example, "Is the measure related to the control of inflation in war-time?"

(E) The time of inquiry.

That a statute has been held unconstitutional generally implies that it was unconstitutional when enacted. Although a court may consider the subsequent operation of a statute in order to determine its purpose or effect, we think of the question of constitutionality as relating back to enact-ment. Similarly, that a measure has been held constitutional generally implies that it will continue to be constitutional in the future. It is fundamental to the concept of the elastic war power, however, that war legislation, constitu-tional when enacted, may become unconstitutional because the emergency upon which it was based has diminished. Constitu-

tionality may therefore depend upon the time when the challenge is made. The court must ask the question, "Has the measure sufficient relation to the war effort?" as at the time when the cause of action arose. Neither that question nor the pronouncement as to constitutionality should relate back to the date of enactment.

This principle places the Court in a difficult position. A regulation which yesterday was held to bear sufficient relation to defense may be successfully challenged tomorrow on the ground that the supporting emergency has disappeared. In theory at least, a decision on the relation of legislation to a war emergency is authoritative only for the period covered by the cause of action. Realizing that the emergency doctrine tends to encourage the re-litigation ad infinitum of the validity of war measures, the Court is prone to phrase its inquiry toward conditions at the time of enactment, rather than at the time of challenge. Perhaps the sense of regularity which attends this formulation is comfortingly reminiscent of more traditional types of judicial review.

The technique of extending war legislation annually by means of transitional statutes lends itself in particular to this practice. Admittedly, there is little likelihood that conditions will change enough in twelve months to render the continuance of controls grossly disproportionate to the emergency. But even when enquiry is phrased as of the date of enactment, the possibility is recognized that the emergency might so diminish, after enactment but before challenge, that the regulation would become unconstitutional. Thus Dixon,J., addressed himself to "the validity at the time that it was passed" of a transitional statute, but admitted

> "... it nevertheless remains, I suppose, logically or theoretically possible ... that during the year and before the critical date the regulation had lost its force because, as the defendant would say, the defence power had in the meantime contracted.."[1)]

It remains to distinguish the language of two decisions which appear to relate validity back to an anterior event other than enactment. The Court in Roche v. Kronheimer[2)] held that property devised by an Australian to a German national could be confiscated under the Treaty of Peace Regulations, which were promulgated after World War I. Particularly in the judgment of Knox,J., do we find the suggestion that the constitutionality of the regulations under the war power was settled by the validity of the peace treaty which they implemented. In Sloan v. Pollard[3)] the Court enforced an administrative order of 1947 which was designed to regulate the domestic consumption of cream. The Court considered the order to be supported by the war power because it was made pursuant to a marketing agreement of 1944 between Britain and Australia, which was dictated by the exigencies of war.

The result of these decisions, though not their language, is consistent with the emergency doctrine. In each case, the emergency present when the cause of action arose must surely have sufficed to sustain the control. Winding up a war would seem to include the regulation of property transfers across former enemy lines, whether mentioned in a treaty of peace or not. The cream regulations would appear to be supported by the interrelation of the Australian

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1) Hume v. Higgins (1949) 78 C.L.R.116, 135 (italics supplied).
2) (1921) 29 C.L.R. 329.
3) (1947) 75 C.L.R. 445.

and British economies during World War II as well as by the temporary, warborne dependence of Britain upon Australian food supplies.

It is also significant that each case involved a complicated system of controls which had its inception in a recognized war emergency. The decisions would seem to fall within the principle that the Commonwealth is allowed to continue some controls in the period following hostilities, lest precipitate decontrol in itself create an emergency. There was in each case an element of treaty obligation which may help to account for the relation-back dicta: in the Roche case the regulations were designed to enforce a formal peace treaty, and in the Sloan case the wartime executive agreement in which the order originated contained at least some features of an international obligation. If we classify the decisions as illustrations of Commonwealth authority over "external affairs", which is not elastic in scope, rather than the Commonwealth war power, we may concede the appropriateness of the doctrine of relation back.

Chapter IV: The Extent of the War Power of the Commonwealth.

It is important to remember that the "war power" is in reality several specific war powers, and that a "war emergency" is actually a combination of several contributing emergencies. When we say that the general war power fluctuates in parallel to the general war emergency, we are speaking in approximation. To find a more nearly parallel fluctuation we must look to these specific war powers and their corresponding emergencies. The anti-inflation power varies in direct ratio to the inflationary emergency, and the power to regulate employment varies with the employment emergency. But the inflationary emergency (and power) may be virtually non-existent at a time when the employment emergency (and power) is at its height. If we could chart these variations of emergency against a "Y" axis of time and an "X" axis of intensity, we should find that they would not coincide. Comparing the variation curve of a particular emergency with that of the general war emergency, we would see at best an approximate resemblance.

Even the symmetry between specific war powers and their corresponding emergencies is distorted by constitutional limitations, such as the "just terms" requirement of Sec.51 (xxxi) and the guarantee of religious freedom in Sec.116. Conceding that there may be some extreme degree of emergency which may justify the Commonwealth in ignoring all constitutional limitations, certainly in the intermediary stages of emergency thus far explored by decision they operate to inhibit war powers which would otherwise be proportionate to their corresponding emergencies.

Because the concept of a single war power which fluctuates directly with the general war emergency is subject to these qualifications, we must consider the specific types of war legislation which have been sustained, and the constitutional limitations which have been read against them.

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The most elemental preparation for the waging of war is the maintenance of armed forces and the procurement of military supplies. The cases affirm that this is a function of the Commonwealth war power. The implication is evident, however, that legislation for this purpose will not be subjected to the same test of relation to emergency by which most war measures are judged.

This difference in treatment may be explained in two ways. We may say that the courts are in fact applying the test of emergency, but that the necessity for such measures, in peacetime as well as in wartime, is too obvious to be questioned. The result is that legislation for the military establishment is part of the general elastic war power. Alternatively we may say that the courts do not apply the standard of emergency because such legislation is not enacted under the elastic war power. It is rather the exercise of a distinctive Commonwealth power, constant in scope during war and peace, of maintaining armed forces. Because state defense departments were transferred by the Constitution to the exclusive control of the Commonwealth,[1] and because states may maintain their own forces only with Commonwealth consent,[2] this legislation does not threaten to usurp state authority, as does that enacted under the elastic war power. What powers the states retain to

1) Australian Constitution, Sec.69.
2) Ibid., Sec.114.

legislate in the interest of the Commonwealth military establishment would seem to be subject to Sec.109,[1] in peacetime as well as in wartime. Commonwealth measures are by this analysis constitutional, regardless of emergency, if they relate to what may be considered a "subject-matter" for legislation --- the military establishment. The result is that there are two Commonwealth war powers, one elastic in scope , which encroaches upon erstwhile state powers as the emergency requires, and another of static scope, which encroaches on no state powers and is available to the Commonwealth at all times.

The Court has sustained legislation under this "static" war power for compulsory service in the armed forces,[2] the discipline and administration of the forces,[3] and the manufacture and acquisition of military supplies.[4] No constitutional limitation has been successfully invoked against it. It was held no denial of the religious freedom secured by Sec.116 to compel a conscientious objector to train, at least for non-combatant service, with the armed forces.[5] Similarly, it was held no infringement of the right to jury trial and no usurpation of the federal judiciary function to subject persons within military jurisdiction to trial by court-martial.[6]

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1) Australian Constitution, Sec.109: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."
2) Krygger v. Williams (1912) 15 C.L.R.366, Polites v. Commonwealth (1945) 70 C.L.R.60.
3) The King v. Bevan (1942) 66 C.L.R.452, The King v. Cox(1945) 71 C.L.R. 1. Compare Chow Hung Ching v. The King (1948)77 C.L.R. 449, Pirrie v. McFarlane (1925) 36 C.L.R.170, Allpike v. Commonwealth (1948) 77 C.L.R. 62.
4) Attorney-General for Victoria (ex.rel. Victorian Chamber of Manufactures) v. Commonwealth (1935) 52 C.L.R. 533, Jenkins v. Commonwealth (1947) 74 C.L.R.400.
5) Krygger v. Williams (1912) 15 C.L.R. 366.
6) The King v. Bevan (1942) 66 C.L.R. 452, The King v. Cox (1945) 71 C.L.R. 1.

Although the Commonwealth "has no power to pass laws for the punishment of crime generally",[1] it may use penal sanctions to implement other Commonwealth powers, such as the war power. The internal security of Australia is one of the more obvious concerns of the war power, under which the Commonwealth may punish persons who discourage recruiting[2] or spread disloyalty among the forces.[3] In wartime the Commonwealth may punish those who advocate the destruction of life or property,[4] and may authorize the summary internment of individuals upon the belief of an administrative official that they are "disaffected or disloyal".[5] It may authorize the deportation after hostilities of enemy nationals who are charged with wartime propaganda activities.[6]

In limitation of this war security power the Australian Constitution does not erect such comprehensive guarantees of individual liberty as are found in the American Bill of Rights. The most nearly analoguous provision is the guarantee of religious freedom in Sec.116. But this has been interpreted to inhibit only those security measures which are directed against religious practices as such, and does not prevent the restriction of religious practices as an incident to the punishment of sedition. Just as persons may be compelled to serve with the forces against their religious scruples, an organized religion which teaches disloyalty to the political institutions of the Commonwealth may be suppressed in time of emergency.[7]

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1) The King v. Sharkey (1949) 79 C.L.R.121, 158. (judgment of McTiernan, J.)
2) Sickerdick v. Ashton (1918) 25 C.L.R. 506.
3) Wishart v. Fraser (1941) 64 C.L.R. 470.
4) Pankhurst v. Kiernan (1917) 24 C.L.R.120.
5) Lloyd v. Wallach (1915) 20 C.L.R. 299;
6) Jerger v. Pearce (1920) 28 C.L.R.588. And see Ferrando v. Pearce (1918) 25 C.L.R. 241.
7) See Adelaide Company of Jehovah's Witnesses v. Commonwealth (1943) 67 C.L.R. 116.

In the elastic nature of the war power itself, however, the Court has found an effective limitation on Commonwealth security legislation. The doctrine that war measures may not be more severe than the emergency demands, as applied in Australia, may insure a greater protection against war legislation than the Bill of Rights has provided in the United States.

The judgments in Adelaide Company of Jehovah's Witnesses v. Commonwealth [1] indicate that the High Court will apply this doctrine of necessity strictly where freedom of religion is concerned. The Subversive Associations Regulations there involved (which authorized the suppression of organizations which the Governor-General should declare "prejudicial to the defence of the Commonwealth or the efficient prosecution of the war") were held to be unconstitutional, in part, for providing sanctions disproportionate to the requirements of the emergency. In particular a majority of the Court found it excessive to suppress all doctrines, however innocent in themselves, which were taught by an outlawed organization; to confiscate the property of innocent third parties which was found in the possession of the organization; and to occupy the premises of the organization so long as any such property remained.

In reviewing the Communist Party Dissolution Act of 1950, the High Court invoked the necessity doctrine in aid of political freedom. Reciting the existence of an acute danger to Australia from the activities of the Communist Party, the Commonwealth statute provided for the dissolution of bodies which were found by an executive officer to threaten the "security and defence of the Commonwealth". Property of the dissolved bodies would then be confiscated and their

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1) (1943) 67 C.L.R.116.

members disqualified from certain offices and employment. A majority of the Court held that the Act was an unconstitutional application of the war power in peacetime, refusing to concede that Communist activity so threatened the security of Australia as to require dissolution of the party.[1] The Chief Justice, dissenting, reasoned that the measure was within the defense power of preparing the country against the risk of war.

It must be remembered that only the war power, from its elastic nature, is subject to the doctrine of necessity. Other Commonwealth powers on which security legislation may be based are available permanently. A measure which relied upon these permanent security powers was the Crimes Act (1914-46), which prohibited the use of "words expressive of a seditious intention". A majority of the Court sustained the conviction under this statute of officials of the Australian Communist Party who stated that, in the event of war between the Soviet Union and the Commonwealth, Australian Communists would fight for the Soviet Union.[2]

The Court specifically related the constitutionality of the Crimes Act to the power to execute the Constitution and laws of the Commonwealth (Sec.61), the incidental power (Sec.51 [xxxix]), and, insofar as sedition against another British Commonwealth nation was prohibited, the power over "external affairs" (Sec.51 [xxix]). It was suggested by Dixon,J., that the requisite power may be implied from the very nature of the Australian Constitution.[3] Webb, J., pointedly reserved for future decision the question whether the war power would support such legislation in peacetime.[4]

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1) *Decision of the High Court of Australia March 9, 1951 (Unreported). See The Times, issue of March 10, 1951.
2) Burns v. Ransley (1949) 79 C.L.R.101.
3) The King v. Sharkey, supra, pp. 148-9.
4) Ibid.,p.163. Compare Burns v. Ransley, supra,p.110 (judgment of Latham, C.J.).

*Australian Communist Party v. Commonwealth.

The initial impact of many war measures upon the individual comes, not as an arraignment in criminal court, but as a taking of his property by the Commonwealth. Property may be acquired under the static war power of maintaining a military establishment: for example, disposing of the property of deceased soldiers[1] or commandeering private property for military purposes.[2] Insofar as it is involved in controls which are normally within the powers of the state, the acquisition is a function of the elastic war power. This is true of compulsory marketing schemes,[3] for example, and of the wholesale transfer of the taxcollecting departments of the states to the Commonwealth.[4] The acquisition of property is present in a more subtle form in the compulsory transfer of property between private individuals.[5]

If the Constitution were silent as to a Commonwealth power to acquire property, we would expect the Court to treat it as implied from the grant of other legislative powers, or from the "incidental" power of Sec.51 (xxxix). The Court perhaps would sanction any acquisition related to a Commonwealth power, enforcing no requirement that just compensation of- be paid. But the framers, by Sec.51 (xxxi), specifically granted to the Commonwealth authority for

> "The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."

Seizing upon the restrictive implications of the phrase, "on just terms", the Court has changed this apparent grant of power into a limitation of Commonwealth powers akin to the "just compensation" clause of the American Constitution.[6]

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1) See Allpike v. Commonwealth (1948) 77 C.L.R.62.
2) See Minister of State v. Dalziel (1944) 68 C.L.R.261.
3) See Andrews v. Howell (1941) 65 C.L.R.255.
4) See South Australia v. Commonwealth (1942) 65 C.L.R.373.
5) See McClintock v. Commonwealth (1947) 75 C.L.R.1 (judgment of Starke, J.).
6) U.S.Constitution, Fifth Amendment: "...nor shall private property be taken for public use, without just compensation."

The result is that a war measure which involves the acquisition of property has a double hurdle to clear: that of connection with a war purpose, and that of the provision of "just terms".

The exposition of Sec. 51 (xxxi) in relation to the war power has been an exacting task indeed. Only recently has the Court explicitly recognized that the "just terms" requirement does in fact limit the war power.[1] In several cases of property acquisition under the war power, it was ignored by court and counsel alike.[2] Until its application is explored in a more detailed body of case law it will be possible only to outline some problems of its effect on war legislation.

We may safely predict that the Court will interpret "acquisition" and "property" in the broadest possible terms. A majority of the Court in Minister of State v. Dalziel[3] considered the temporary occupation of land held by weekly tenancy to be an acquisition of the tenant's property. In McClintock v. Commonwealth[4] it was considered that the compulsory delivery of pineapples by growers to a cannery designated by the Commonwealth, with the purpose of eventually supplying the fruit to the forces, was a scheme of "acquisition". No "just terms" problem is raised when the Commonwealth diverts back pay and allowances due a deceased member of the forces, however, because of the common law doctrine that a soldier has no absolute right to such sums.[5] The retention of his personal effects by the

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1) See Johnston Fear & Kingham v. Offsett Printing Co.(1943) 67 C.L.R.314.
2) See Burkard v. Oakley (1918) 25 C.L.R. 422. Roche v. Kronheimer (1921) 29 C.L.R.329.
3) (1944) 68 C.L.R. 261.
4) (1947) 75 C.L.R. 1.
5) Allpike v. Commonwealth (1948) 77 C.L.R.62.

Commonwealth, on the other hand, would probably constitute an "acquisition".[1]

It is only slightly less certain that the compulsory transfer of property between private individuals is tantamount to Commonwealth acquisition. The Dalziel decision at least supports the proposition that compulsory transfer to a Commonwealth agent is an "acquisition", and the judgment of Starke, J., in that case would suggest the same conclusion for any compulsory transfer. The language of The King v. Foster[2] treats the "just terms" clause as applicable to a regulation for the compulsory letting of housing accomodation. It requires some imagination, admittedly, to read Sec. 51 (xxxi) as a limitation upon compulsory transfer as well as upon direct Commonwealth acquisition. There may be a danger that the Court will be tempted to read into that limitation too much of the substance of the American "due process" clause. But perhaps the alternative is to perpetuate a constitutional distinction without a difference. The practical impact on the war effort and on the individual is the same, whether his property is given to another individual or acquired by an agent of the Commonwealth.

In order to constitute "just terms", compensation must represent the particular property acquired from an individual. So it was held ultra vires to compensate a producer on the basis of the average value of fruit grown by all participants in a marketing scheme.[3]

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1) See ibid., p. 70.
2) (1949) 79 C.L.R. 43.
3) Australian Apple and Pear Board v. Tonking (1942) 66. C.L.R. 77.

Compensation must also be awarded with relation to the actual pecuniary damage suffered by the individual, which may exceed the market value of the property acquired. So when the Commonwealth required a printer to surrender a press which he found difficulty in replacing, "just terms" included the damage to his business from his being deprived of the machine in the meanwhile.[1] Similarly, a weekly tenant whose interest was taken over by the Commonwealth was awarded compensation for the loss of his parking lot business as well as for the amount of his weekly rental.[2] It is generally assumed that "just terms" are determined as of the date of acquisition,[3] although the Court has sanctioned the assessing of property values as of a reasonably near anterior date.[4] What compensation should be made to the expropriated individual for a delay in awarding compensation has not been authoritatively determined,[5] but it would seem reasonable to allow interest for the period between the acquisition and the payment of compensation.

The case material is particularly indecisive with regard to the provision which an acquisition measure must make for the machinery of awarding compensation. Systems have been sustained which left the determination of "just terms" to administrative agencies.[6] It has been said

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1) Johnston Fear & Kingham v. Offsett Co. (1943) 67 C.L.R. 314.
2) Minister of State v. Dalziel (1944) 68 C.L.R. 261.
3) See, e.g., judgment of Rich, J., in Australian Apple and Pear Board v. Tonking (1942) 66 C.L.R. 77.
4) See Grace Bros. v. Commonwealth (1946) 72 C.L.R.269.
5) That interest should be allowed: see judgments of Williams and Rich, J., in Commonwealth v. Huon Transport (1945) 70 C.L.R. 293; and see Australian Apple and Pear Board v. Tonking (1942) 66 C.L.R. 77. Compare the judgment of Dixon, J., in Commonwealth v. Huon Transport, supra, and the judgment of Latham, C.J., in Grace Bros. v. Commonwealth (1946) 72 C.L.R. 269.
6) See Andrews v. Howell (1941) 65 C.L.R. 255, Jenkins v. Commonwealth (1947) 74 C.L.R. 400, McClintock v. Commonwealth (1947) 75 C.L.R. 1.

that some hearing is necessary, and that persons interested beneficially in the property should have an opportunity to be present.[1] There are dicta that the hearing need not be of a strictly judicial character, although the opinion has been expressed that provision should be made for eventual judicial review.[2] The actual payment of compensation may be deferred until the Commonwealth has realized a benefit from the acquisition (as through marketing the products acquired),[3] and a retrospective provision for compensation by tax deduction has been sustained.[4]

The most striking feature of the judicial treatment of Sec.51 (xxxi) is its application as a permanently effective constitutional limitation. Although the Court has countenanced the eclipse in a period of emergency of great segments of state legislative powers, only rarely do we find a suggestion that the "just terms" guarantee itself is subject to the emergency doctrine. Perhaps this may be explained as a preference for specific constitutional provisions over general ones. But the fact remains that Sec.51 (xxxi) can claim no higher constitutional efficacy than can the federal division of powers, expressed in Sec.51 of the Constitution, itself. If the latter must bow to an emergency application of the war power, it seems that the former must as well.

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1) See judgments of Latham, C.J., and Rich and Williams,JJ., in Johnston Fear & Kingham v. Offsett Co. (1943) 67 C.L.R.314.

2) See judgment of Starke, J., in Andrews v. Howell (1941) 65 C.L.R.255, and judgment of Williams,J., in Australian Apple and Pear Board v. Tonking (1942) 66 C.L.R.77.

3) Australian Apple and Pear Board v. Tonking, supra.

4) Nelungaloo Ltd. v. Commonwealth (1948) 75 C.L.R. 495.

There is some indication that the Court has provided a verbal avenue of retreat against the day when it becomes necessary to suspend the "just terms" guarantee in a war emergency. It has been suggested that "actual war operations and military necessity" should be excepted from the operation of Sec. 51 (xxxi).[1] Even if this exception is limited to battlefield activities, it demonstrates that "just terms" is not of universal application. Moreover, it has been intimated that a stricter test of "just terms" will be imposed in peacetime than in wartime. The Chief Justice in Grace Bros. v. Commonwealth[2] suggested that under normal conditions the Commonwealth would be required, as a part of lawful acquisition, to state the specific purpose for which property is demanded, but that in wartime the purpose might for security reasons remain undisclosed. Williams, J., in Real Estate Institute v. Blair,[3] indicated that because of emergency conditions "just terms" did not restrict the power of the Commonwealth to enforce the compulsory acquisition of housing by ex-servicemen. In the subsequent case of The King v. Foster,[4] similar housing regulations were invalidated because the war emergency upon which they were based had diminished. Although the Court did not hold that the "just terms" limitation taken by itself operated to invalidate the legislation, the inadequacy of the legislation under Sec. 51 (xxxi) was listed as one of its "extreme provisions," which taken together made the legislation ultra vires.

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1) Andrews v. Howell (1941) 65 C.L.R. 255, 268. (judgment of Starke, J.). And see Johnston Fear & Kingham v. Offsett Co.(1943) 67 C.L.R. 314, 318. (judgment of Latham,C.J.).
2) (1946) 72 C.L.R. 269.
3) (1946) 73 C.L.R. 213.
4) (1949) 79 C.L.R. 43.

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A wartime embargo to prevent economic advantages from accruing to the enemy is related in some degree to each of the foregoing categories of war legislation. Such control has become as familiar a concomitant of hostilities as conscription, and its dependence upon a temporary emergency for validity has never been stressed by the Court. In that sense it may be compared with an exercise of the static war power. But violation of a trading-with-the-enemy decree is economic sedition as surely as the spreading of enemy propaganda is political sedition. Similarly, the control of enemy assets involves the acquisition of property by the Commonwealth, whether in the sense of Sec. 51 (xxxi) or not.

In fact the Court has regarded the regulation of assets likely to reach the enemy as falling within a separate category of war legislation, clearly based upon Sec. 51(vi) but not of such temporary efficacy as most functions of the elastic war power. The few pertinent judgments have been concerned with the disposition of individual cases rather than with the general nature of this type of control. It is clear that the Commonwealth, by the prohibition of "trading with the enemy," may prevent assets within its jurisdiction from falling into enemy hands.[1] The more forceful expedient of seizing property in Australia in which an enemy subject is interested, and directing its sale, has also been sanctioned.[2] In the process of implementing a peace treaty the Commonwealth may confiscate property devised in Australia

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1) Welsbach Light Co. v. Commonwealth (1916) 22 C.L.R. 268.
2) Burkard v. Oakley (1918) 25 C.L.R. 422.

to a national of a former enemy country.[1] The Court has specifically related these controls to the war power rather than to other Commonwealth powers, such as the regulation of foreign commerce and the conduct of "external affairs," which might be supposed to suffice.

Significantly, the decisions which sustain the taking of enemy property do not mention the problem of "just terms". One explanation might be that the guarantee of Sec. 51 (xxxi) does not operate to benefit enemy subjects. The seizure of interests of an Australian national as an incident to the confiscation of enemy assets, as in Burkard v. Oakley,[2] might also be considered a taking of temporary custody under an implied promise to surrender the property or its proceeds when hostilities are concluded, rather than an "acquisition" within Sec. 51 (xxxi). Conceivably, the Court might treat all measures designed to prevent Australian assets from reaching the enemy to be impliedly excepted from the "just terms" guarantee, although this position would be inconsistent with the broad interpretation of Sec. 51 (xxxi) which prevailed during World War II. The uncertainty which attends these speculations should be allayed by a decision of the High Court in which it is explicitly stated whether, and if so, to what extent, the "just terms" proviso limits the power to control enemy assets.

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In the application of many of the Commonwealth war measures which we have considered, the invasion of reserved

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1) Roche v. Kronheimer (1921) 28 C.L.R. 329.
2) (1918) 25 C.L.R. 422.

powers of the states has been more apparent than real. The static war power occupies a field which states may enter concurrently if at all. The punishment of sedition and the quarantine of assets likely to reach the enemy are predominately Commonwealth functions, to say the least. The simpler forms of property acquisition conflict with the corresponding power of the states only in the sense of competing for the same items of property.

The greater bulk of Commonwealth war legislation, however, is designed to regulate the domestic economy, a function which in peacetime lies within the exclusive power of the states. Price control, the rationing of scarce commodities, the regulation of leasehold tenure, the supervision of employment --- these are Commonwealth measures which depend upon a war emergency for validity. The fact is not that the Constitution specifically entrusts these measures to the states. Nor can it be said that state legislatures are in the habit of effecting such comprehensive controls in peacetime, although they possess the power to do so. It is simply that the power to enact such measures is included in the general reservation of authority to the states in Sec.107. Authority for the Commonwealth to enact them must be read into the extraordinary content of the war power in times of emergency. The reasoning by which this is justified, first expressed in the leading case of Farey v. Burvett,[1] is that "naval and military" defense extends to the control of disturbances in the domestic economy which, if unchecked, would impair the capacity of the Commonwealth for waging war.

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1) (1916) 21 C.L.R. 433.

(A) The control of inflation.

The Farey decision itself is authority for Commonwealth emergency control of the price of basic commodities. The formulation of this power reached its logical conclusion when the Court subsequently conceded Commonwealth authority to peg the prices of virtually all goods and services during war.[1] Nor need price levels be uniform throughout Australia. In Dairy Farmers' Co-operative v. Commonwealth[2] the Court enforced regulations which effected a variation depending on the locality of the sale, as well as whether sales were wholesale or retail and whether the buyer was an individual or a government department. It was emphasized, however, that any price control system in which the variation factors themselves were irrelevant to the requirements of ~~the~~ defense would be unconstitutional. Section 99, which provides that "The Commonwealth shall not ... give preference to one State or any part thereof over another State or any part thereof", was held not to invalidate the regulations, because it applies only to "trade, commerce, or revenue" legislation and not to war legislation.

Administrative control of the conditions of leasehold tenure, including the fixing of rentals, has also been sustained.[3] Such a measure has the dual objective of preventing an inflationary spiral of rentals and of allocating scarce housing on priorities relevant to the war effort. A less conventional application of a similar purpose was seen in the Contracts Adjustment Regulations, which purported to authorize "any tribunal" in Australia to alter the terms of a contract if war conditions or the operation of war

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1) Victorian Chamber of Manufactures v. Commonwealth (Prices Regulations) (1943) 67 C.L.R.335.
2) (1946) 73 C.L.R.381.
3) Silk Bros. v. State Electricity Commission (1943) 67 C.L.R. 1.

legislation had made them unreasonably difficult of performance. There are dicta that the regulations were not unconstitutional for lack of relevance to defense, although the Court held that they purported to delegate judicial power without warrant in the parent National Security Act.[1)]

The Court appears to evaluate all economic controls by analogy to conventional anti-inflation measures like price-fixing, the constitutionality of which is firmly established. The less similarity between a challenged control and these conventional measures, the more likely the Court is to hold it ultra vires. Rent controls are an obvious parallel, and even the adjustment of contracts suggests a retrospective regulation of price. The judicial reaction is more hostile, however, to legislation which delegates a broad policy-making power which is not canalized by so specific an objective as price-fixing.

The Economic Organization Regulations, as originally promulgated, gave the administrator unlimited discretion to prohibit or to approve conditionally certain transfers of property in the light of their probable effect on the war economy. Although a majority of the Court never held the regulations unconstitutional, the decisions severely limited the discretion of the administrator to condition his approval of a transfer. In one instance an administrator required that the prospective purchaser of land make a bank deposit of Commonwealth securities almost equal in value to the land itself. A majority of the Court in Shrimpton v. Commonwealth[2)] held this condition to be an abuse of discretion, beyond the purview of the regulations. It was not doubted, however, that the administrator could fix the price of land, require that payment be made in cash, and impose other conditions commonly associated with the control of inflation. A minority

1) Peacock v. Newton Building Soc.(1943)67 C.L.R.25.
2) (1945) 69 C.L.R.613.

of judges contended that the regulations were unconstitutional because they purported to allow the administrator an unfettered discretion. As subsequently amended to limit his discretion more strictly, the regulations were enforced by the Court in the period following hostilities.[1)]

(B) The allocation of goods and services.

The Commonwealth by a variety of regulations has sought to distribute goods and services in the interest of the war effort. This legislation may take the form of a curtailment of non-essential activities, such as the prohibition of holiday gift advertising.[2)] It may entail supervision of an industry of fundamental importance.[3)] Or it may be concerned solely with the fair allocation of a commodity made scarce by the demands of war, as the rationing of meat[4)] and petrol.[5)]

The Court has invalidated certain regulations of this type for three reasons. One is that the measure in question, though concerned with a problem of the most signal war importance, did not in fact have the effect of promoting the war effort. Under the Universities Commissions Regulations an administrator restricted the number of students who could enter certain technical faculties of a university, but set no limit on the number who might be enrolled in other faculties. In The King v. University of Sydney[6)] the Court held this action unconstitutional. The field of education being impliedly reserved to the states ,

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1) Dawson v. Commonwealth (1946) 73 C.L.R.157, Miller v. Commonwealth (1946) 73 C.L.R.187. And see O'Neill v. O'Connell (1946) 72 C.L.R.101.
2) See Ferguson v. Commonwealth (1943) 66 C.L.R.432.
3) See Stenhouse v. Coleman (1944) 69 C.L.R.457, de Mestre v. Chisholm (1944) 69 C.L.R.51.
4) See ~~The~~ Morgan v. Commonwealth (1947) 74 C.L.R.421.
5) See The King v. Foster. (1949) 79 C.L.R. 43.
6) (1943) 67 C.L.R. 95.

to exclude students from certain studies without simultaneously diverting them to occupations of war importance was considered an unwarranted assertion of Commonwealth power. An analogous disposition was made of the Fly and Insects Spray Order, which recited a need to conserve certain insecticide ingredients and purported to require a Commonwealth license to manufacture any insecticide, whether it contained the critical ingredients or not. The order was held to extend beyond the war purpose of its parent regulation, in attempting to restrict the manufacture of insecticides which contained no scarce ingredients.[1]

Regulations of this category have also been held unconstitutional for failure to deal with a problem of sufficient emergency importance.[2] In The King v. Foster it was held that the rationing of petrol more than three years after hostilities had ended was insufficiently related to the war. The Court recognized that the problem with which the control was concerned was a shortage of dollars in the sterling area. Although the Commonwealth may restrict imports from the dollar area under its power over foreign commerce, it may not institute domestic controls to limit the postwar demand for dollar goods, under the aegis of the war power.

This decision may be contrasted with that of Sloan v. Pollard,[3] in which the Court sustained postwar restrictions on the domestic consumption of cream as a means of meeting marketing quotas of butter and cheese which were fixed in a wartime agreement with Britain. Although the language of the Sloan decision would seem to base the validity

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1) Wertheim v. Commonwealth (1945) 69 C.L.R. 601. And see Crouch v. Commonwealth (1948) 77 C.L.R. 339.
2) (1949) 79 C.L.R. 43.
3) (1947) 75 C.L.R. 445.

of the control upon the emergency context of the original agreement, it is submitted that there are more satisfactory means of distinguishing the two cases. Conceding that the economies of Australia and Great Britain became closely coordinated during the war, we can see that some aspects of interdependence were more permanent than others. The emergency dealt with in the Sloan case --- a temporary reliance by Britain upon Australian supplies of dairy products --- could be expected to diminish with the postwar revival of Continental trade. But the association of Australia in the sterling bloc is more permanent, and at the time of the Foster case the Court may reasonably have anticipated the recovery of its dollar balance to be a long-term task. The economic plight of the sterling bloc, although affected by the war, was therefore too permanent a problem to be subject to regulation under the authority of Sec. 51 (vi).

A third reason for invalidating these regulations has been the effect of specific constitutional limitations, such as Sec. 92, which guarantees that "trade, commerce, and intercourse among the States ... shall be absolutely free." In Gratwick v. Johnson [1] an order prohibiting travel between states without permission of the Director General of Transportation was held to violate this provision, for basing its interdiction on the "interstateness" of the proposed journey, as well as for failure to limit the Director General's discretion to considerations relevant to the war, Section 99 of the Constitution, which directs that the Commonwealth "shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another

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1) (1945) 70 C.L.R. 1.

State or any part thereof," was invoked against a coupon system whereby some parts of Australia enjoyed a larger meat ration than others. The Court found the system constitutional, reasoning that Sec. 99 did not apply because the measure was not a regulation of commerce.[1] Nor was it considered to infringe Sec. 92 to prohibit the interstate shipment of meat as an incident to enforcement of this rationing program.

(C) The control of manpower and regulation of the conditions of employment.

The Commonwealth may control the wartime disposition of manpower throughout Australia in a negative way by licensing activities of basic importance to the war effort. Thus it required that all alien doctors who were not licensed to practice under the laws of a state or territory should qualify for a Commonwealth license in order to carry on their profession. A majority of the Court in Gonzwa v. Commonwealth[2] reasoned that such licensing was a necessary part of enrolling all available medical personnel for compulsory service. Similarly the Commonwealth may license the baking and distribution of bread to conserve manpower and to insure adequate supplies.[3]

An affirmative draft of manpower for war purposes may be effected independently of the negative control afforded by a licensing system. The Manpower Regulations empowered an administrator to order "any person resident in Australia" to accept employment of war significance, incidentally requiring that employers obtain Commonwealth permission before

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1) Morgan v. Commonwealth (1947) 74 C.L.R. 421.
2) (1944) 68 C.L.R. 469.
3) Stenhouse v. Coleman (1944) 69 C.L.R. 457. Compare The King v. University of Sydney (1943) 67 C.L.R. 95.

hiring anyone. In Reid v. Sinderberry[1] the Court sustained an order made under these regulations, directing employment in the food and aircraft industries. The most spectecular instance of a wartime draft of manpower was the Income Tax (War Time Arrangements) Act, which authorized an administrator, on war considerations, to transfer the personnel of state income tax departments to the Commonwealth. The measure was one of a series of Commonwealth statutes designed to drive the states from the income tax field during wartime. A majority of the Court considered the act a reasonable emergency measure for avoiding a possible duplication of effort and uneconomical distribution of personnel by the states.[2] In the view of Latham, C.J., and Starke,J., however,the act was unconstitutional in seeking to undermine the federal system. Conceding that individuals may be drafted to the forces or to necessary civilian jobs, the dissenters contended that they may notbe drafted by reason of their position as state employees.

The third, and perhaps most common, method of diverting manpower to war work is Commonwealth regulation of the conditions of employment in industry. Typical of this type of control were the Industrial Peace Regulations, which gave a Commonwealth arbitration tribunal jurisdiction over any "industrial matter" which, in the opinion of the Minister, threatened the war effort. Denying the authority of the tribunal to decide whether state civil servants were entitled to receive holiday pay prescribed by the Commonwealth, the Court held that state governmental activities do not constitute "industrial" enterprise within the terms

1) (1944) 68 C.L.R.504. And see the judgment of Latham,C.J., in Victorian Chamber of Manufactures v. Commonwealth (Women's Employment Regulations) (1943) 67 C.L.R.347.
2) South Australia v. Commonwealth (1942) 65 C.L.R.373.

of the regulations.[1] It was considered beyond the war power to prescribe holiday pay for state civil servants not engaged in war production. This position was affirmed in the decision of Pidoto v. Victoria,[2] in which a majority of the Court sustained Commonwealth jurisdiction of a dispute over holiday pay claimed by state employees who were engaged in loading explosives, partly for forces use. The dispute was thought to be "industrial", although it concerned state employees, and not to involve the "governmental activities of states".

The Female Minimum Rates Regulations granted the Commonwealth tribunal jurisdiction to determine fair wages for women in industries declared by the Governor-General to be "vital" to the war effort. A wage order for the textile industry, which had been declared to be "vital", was enforced in Australian Woollen Mills v. Commonwealth,[3] as a means of attracting women to employment of war importance. In Australian Textiles v. Commonwealth[4] the Court approved an order raising women's pay in relation to men's in "vital" industry, as necessary to the stabilization of employment pending demobilization, after the hostilities of World War II had ceased.

A more readily apparent war factor may be seen in an order for the payment of extra holiday pay to all employees of an establishment which is engaged wholly or partly in war production. The Court has enforced such an award to employees not personally engaged in war production because it

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1) The King v. Commonwealth Court (1942) 66 C.L.R. 488.
2) (1943) 68 C.L.R. 87.
3) (1944) 69 C.L.R. 476.
4) (1945) 71 C.L.R. 161.

conduces to general harmony in war industries.[1] A similarly obvious war connection is seen in the Re-establishment and Employment Act, which gave ex-servicemen preferential reinstatement rights in former employment. The Court in Wenn v. Attorney-General[2] held this act effective as applied to re-employment in a state penal department. Because it expressed the war purpose of standardizing ex-servicemen's benefits, the Commonwealth measure superseded a state reinstatement statute of a more limited coverage but greater benefits.

Another series of Commonwealth regulations gave the federal tribunal jurisdiction to supervise the conditions of employment of women in industries which were introduced to Australia during the war or which before the war employed men. The legislation was sustained as a means of attracting women to the new employment, whether strictly "war production" or not.[3] In The King v. Commonwealth Court,[4] however, it was considered beyond the war power to apply the regulations to female employees of a state tax department. And in The King v. Foster[5] the application of similar legislation (more than three years after hostilities had ceased) to the employment of women in banking was held unconstitutional. The Court reasoned that the factor which once related the measure to the emergency --- that the work before the war was done by men --- could claim no constitutional efficacy in the postwar period. The shortage of manpower which persisted could not

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1) McKay Massey Harris v. Commonwealth (1944) 69 C.L.R. 501.
2) (1948) 77 C.L.R. 84.
3) Victorian Chamber of Manufactures v. Commonwealth (Women's Employment Regulations) (1943) 67 C.L.R. 347.
4) (1942) 66 C.L.R. 488.
5) (1949) 79 C.L.R. 43.

be regarded as a temporary result of the war, but had become part of "the ordinary social, economic, and industrial complex of the community."[1]

We have seen that the Commonwealth has related its regulation of the conditions of employment to some war factor, e.g., whether a dispute is "industrial" and of war significance, whether women are employed in "vital" industry, whether an establishment is engaged in war production, or whether the employment of women in industry was inaugurated with the war. From the Court's decisions on the sufficiency of these various index factors, it is difficult to generalize a rule as to the limits of the regulation of employment in wartime. Probably there is no need to limit controls to enterprise of the magnitude of "industry", and it seems likely that the Court would sustain a characterization of almost any major activity as "vital". But there are some limits to the regulation which will be permitted.

The most effective limit is the immunity of state governmental activities from regulation. Although the Commonwealth may take over an entire state governmental staff in an emergency, the cases deny its power to prescribe the working conditions of those governmental employees who remain. In this connection the position of Latham, C.J., and McTiernan, J., dissenting in The King v. Commonwealth Court,[2] is of interest. The Commonwealth may not legislate for the purpose of restricting state governmental activity, they reasoned, but it may prevent the operation of state government from disrupting the war economy. Should a strike of state governmental employees achieve such proportions as to disturb the national economy in wartime, a Commonwealth

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1) Ibid., p. 88.
2) (1942) 66 C.L.R. 488.

tribunal by this analysis could be given jurisdiction to arbitrate. Likewise substandard conditions of employment in state governmental departments, by threatening to precipitate such a strike, would be of Commonwealth concern.

A more obvious, but equally important, requirement is that the regulation actually relate to a war emergency. In The King v. Foster,[1] for example, the Women's Employment Act was invalidated because it had survived the emergency it was designed to control. Even in wartime the Court will deny effect to a regulation which does not promote the war effort. The Industrial Lighting Regulations, which required that all firms employing more than two workmen meet standards of lighting prescribed by the Minister, were held unconstitutional because their effect was not confined to premises which were devoted to war production.[2] Because the regulations related to a permanent evil of a non-war origin, they were thought to fall beyond the scope of Sec. 51 (vi).

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An important part of winding up the war effort concerns the re-establishment of members of the forces in civilian life. Although legislation for this purpose would appear to be related to regulation of the military establishment the High Court seems to regard it as a separate function of the war power. The constitutionality of two such measures — a system of loans to ex-servicemen[3] and the hire-purchase[4]

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1) (1949) 79 C.L.R. 43.
2) Victorian Chamber of Manufactures v. Commonwealth (Industrial Lighting Regulations) (1943) 67 C.L.R. 413.
3) Attorney-General for the Commonwealth v. Balding (1920) 27 C.L.R. 595.

of furniture in the name of a Repatriation Commission for their use [1] — was established without difficulty.

The benefit may be conferred in the form of a preferential regulation, rather than as a direct gift. Under the War Service Moratorium Regulations "protected persons" (homeless ex-servicemen and their dependents) were authorized to establish by court action a right to tenancy at fair terms in any unoccupied dwelling. The measure was held *intra vires* as to veterans in the immediate postwar period. [2] But in the subsequent decision of *The King v. Foster* [3] the Court found that the measure failed to provide "just terms" and established no priority on the grounds of hardship as between various "protected persons"; therefore it was disproportionate to the then-diminished emergency and unconstitutional.

The Commonwealth may also standardize the reinstatement rights of ex-servicemen in former employment. In *Wenn v. Attorney-General* [4] the existence of a Commonwealth scheme of preferential re-employment was held to suspend the operation of a state reinstatement statute, which provided additional benefits to the more limited class of ex-servicemen which it covered. The Court reasoned that it was within the war power not only to institute a Commonwealth preference system, but to suspend any conflicting system the operation of which might provoke dissatisfaction. Because the Commonwealth statute purported to occupy the field of repatriation benefits, it prevailed over state legislation by Sec. 109.

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1) *Repatriation Commission v. Kirkland* (1923) 32 C.L.R. 1.
2) *Real Estate Institute v. Blair* (1946) 73 C.L.R. 213.
3) (1949) 79 C.L.R. 43.
4) (1948) 77 C.L.R. 84.

These decisions formulate no constitutional justification of repatriation benefits except that they indirectly encourage future enlistments. It may be helpful, in discussing constitutionality, to distinguish two types of repatriation measures. Direct benefits such as loans and bonuses are in the nature of compensation for military service. When they are questioned by the Court, the appropriation power and the static war power should be answer enough. The more indirect type of repatriation measure is less a form of compensation than a regulation of community life to the advantage of the ex-serviceman. He may be protected temporarily from eviction, for example, or assured of a priority in employment. To a considerable extent this type of benefit concerns the ex-serviceman, not as an ex-serviceman, but as a member of the community whose way of life was altered by the war. He is given his old job back because he lost it in the dislocations of war, not because he fought gallantly. He is assured a housing priority because he was made homeless and housing became scarce as a result of war. This indirect type of repatriation measure is concerned with critical aspects of Commonwealth life (e.g., housing and employment) rather than with ex-servicemen as such, and constitutionality should be determined according to the general principles of the elastic war power.

Chapter V: The Enforcement of Commonwealth War Legislation

Many constitutional objections have been made to the manner of enforcement, as distinguished from the substance, of war regulations. It has been urged in vain that the instrumentality of a Commonwealth-owned enterprise, such as a plant for the manufacture of uniforms, is an inappropriate agency for effecting war legislation.[1] The Court has also sustained the delegation of quasi-legislative authority from the Commonwealth Parliament to war administrative agencies.[2] The most formidable obstacle to the implementation of war legislation has been that part of the constitution which deals with the judicial function. Section 71 provides that "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court ... and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction". On its face a simple directive for the organization of a judicial system, the section has been construed to prohibit the vesting of "judicial power" in bodies other than courts. The characterization of a "court" for these purposes has its roots in Sec. 72, which guarantees federal judges a fixed remuneration and security of

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1) Attorney-General for Victoria (ex rel. Victorian Chamber of Manufactures) v. Commonwealth (1935) 52 C.L.R. 533.
2) Welsbach Light Co. v. Commonwealth (1916) 22 C.L.R.268, Roche v. Kronheimer (1921) 29 C.L.R. 329, Wishart v. Fraser (1941) 64 C.L.R. 420. And see judgment of Williams, J., in Silk Bros. v. State Electricity Commission (1943) 67 C.L.R.I. Compare Reid v. Sinderberry (1944) 68 C.L.R. 504, 512.

tenure. Just what constitutes an exercise of "judicial power" has been a sorely vexed issue.

Regulations made under the Women's Employment Act authorized the creation of a board to decide whether women should be employed in certain occupations. It was empowered to prescribe the conditions of such employment by means of awards which bound the employers and employees concerned. The board was assisted by "Committees of Reference", which had the task of deciding whether female employees were engaged in work within the board's jurisdiction. In Rola Co. v. Commonwealth[1] a majority of the Court held that the regulations did not invest the Committees or the board with "judicial power", because their decisions could be enforced only by suit in a court of competent jurisdiction.

A contrary result was reached in the case of the Landlord and Tenant Regulations, which provided that no lessor should terminate a tenancy without permission from the Fair Rents Board. Because an order of the Board was immediately enforceable as between the parties, it was held in Silk Bros. v. State Electricity Commission[2] that the regulations had attempted to confer "judicial power" on a non-judicial body contrary to the implied prohibition of Sec. 71. It was suggested in the judgment of Latham, C.J., and Starke, J., in Victorian Chamber of Manufactures v. Commonwealth[3] that it conferred "judicial power" to

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1) (1944) 69 C.L.R. 185.
2) (1943) 67 C.L.R. 1. And see Peacock v. Newton Building Society (1943) 67 C.L.R. 25.
3) (1943) 67 C.L.R. 413.

authorize a Minister to direct the closing of premises in which he considered that minimum standards of industrial lighting had not been reached. A majority of the Court, however, ruled it no exercise of "judicial power" to determine whether property seized under the Subversive Associations Regulations belonged to an outlawed association or to a non-affiliated person.[1] The trial of military personnel by court-martial[2] and the decision of what constitutes "just terms" in the acquisition of property by the Commonwealth[3] have also been held not to involve a judicial function.

It is difficult to derive a formula for determining what constitutes an exercise of "judicial power" from the patchwork of decisions which have expounded the negative effect of Sec. 71 on war legislation. A learned writer has concluded, "it is questionable whether, as constitutional doctrine, the separation of judicial power is not, because of uncertainty of definition and inflexibility of operation, a most unsatisfactory principle".[4] But, for better or for worse, the principle is soundly entrenched in case law as a limiting factor of the war power. If judicial action is taken under war legislation, it must be taken by a judicial body.

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1) Adelaide Company of Jehovah's Witnesses v. Commonwealth (1943) 67 C.L.R. 116.
2) The King v. Bevan,(1942) 66 C.L.R. 452, The King v. Cox (1945) 71 C.L.R.1.
3) Johnston Fear & Kingham v. Offsett Printing Co.(1943) 67 C.L.R. 314.
4) Cowen, "The Separation of Judicial Power and the Exercise of Defence Powers in Australia" (1948) 27 Can. Bar Rev. 829, 844. And see cases noted in Nicholas, The Australian Constitution, pp.266-68.

Presumably the enforcement of war regulations is also limited by the guarantee of trial by jury which is found in Sec. 80. We must distinguish legislation for the military establishment, under which courts-martial habitually punish offenses against the military code without trial by jury. Although Sec. 80, unlike the Fifth Amendment to the United States Constitution, does not specifically except "cases arising in the land or naval forces, or in the Militia ..." from its guarantee,it obviously was not intended to require jury trial in the administration of forces discipline. We must also distinguish legislation which deals with other elements of prosecution than trial, for Sec. 80 is no more a "due process clause" than is Sec.51 (xxxi). This fact was illustrated by the decision of Fraser Henleins v. Cody,[1] in which the constitutionality of the Black Marketing Act was upheld. Prosecution under that statute was prohibited without written consent of the Attorney-General, which was to be granted after a report from the administrator of the particular regulations involved and upon advice from a special administrative committee. Latham, C.J., denied that this procedure of initiating prosecution was unconstitutional, reasoning that the giving of administrative advice involved no judicial function and left the Attorney-General with an untrammeled choice whether to prosecute or not.

The Court has not hesitated to exercise its original jurisdiction under Sec. 75 (v) to issue writs of mandamus, prohibition, and injunction to restrain the enforcement of

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1) (1945) 70 C.L.R. 100.

war measures, regardless of legislation which purports to curtail judicial review.[1] The perfunctory manner in which these writs have been granted, like the attitude of the Court in reading other phases of the judiciary sections to invalidate war legislation, is alien to the careful weighing of emergency factors which characterizes the Court in passing on the substantive constitutionality of war controls. We are tempted to infer that constitutional limitations on the enforcement of war regulations are always effective, while limitations on their substance will be suspended during an emergency.

To explain this apparent aberration, we must remember that a war emergency is in fact several emergencies. Because there is sufficient emergency to punish black marketeers, for example, it does not necessarily follow that there is sufficient emergency to try them without a jury. Moreover, the emergency which the Commonwealth invokes to sustain a given regulation is typically an emergency with respect to the substance of the regulation, not its manner of enforcement. The constitutional issue of war power versus a limitation on a manner of enforcement will not be presented until the latter type of emergency is involved. An analogous example is the American price control legislation of World War II, which permitted the validity of regulations to be challenged only in proceedings before a special tribunal.[2] Until such a measure raises the issue of the

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1) See Australian Employees Federation v. Aberfield Mining Co. (1942) 66 C.L.R.161, The King v. Drake-Brockman (1943) 68 C.L.R.51, The King v. Hickman (1945) 70 C.L.R. 598, Toowoomba Foundary v. Commonwealth (1945) 71 C.L.R. 545, The King v. Murray (1949) 77 C.L.R. 387.
2) See infra, Chapter XI.

persistence of limitations on enforcement in the face of an emergency with respect to enforcement, we must not assume that constitutional limitations on the enforcement of legislation are not subject to the emergency doctrine.

Chapter VI: The Commonwealth War Power and the States

The entity of the state, as a coordinate head of legislative power in the federal system and as an apparatus of government, has been an obstacle to the enforcement of Commonwealth war legislation. The federal division of legislative authority, rather than any constitutional prohibition on Commonwealth legislation, has been the most telling limitation on the war power. Without the separation of legislative power at its source into the channels of Commonwealth and state authority, reinforced by the reservation of powers to the states by Sec. 107, it would have been unnecessary to formulate the theory of an elastic war power which may invade the province of the states only in circumstances of emergency.

Moreover, the Court tends to regard the apparatus of state government as somewhat exempt from Commonwealth war legislation. Although the individual supplier of milk to a state department must obey price regulations, for instance, the Court hesitates to predict whether a state, as supplier, would also be subject to them.[1] The war power extends to the regulation of employment in private industry and state-operated "industrial" enterprise, but it will not sustain the regulation of state "governmental" employment.[2]

This position is difficult to align with the decision in South Australia v. Commonwealth[3] that during wartime

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1) Dairy Farmers' Co-operative v. Commonwealth (1946) 73 C.L.R. 381.
2) The King v. Commonwealth Court (1942) 66 C.L.R. 488, Pidoto v. Victoria (1943) 68 C.L.R. 87.
3) (1942) 65 C.L.R. 373.

the Commonwealth could take over the tax-collecting department of a state, including employees as well as physical equipment. Certainly the state department in this instance was regulated as a state department; we may be equally certain that its function was "governmental" in the sense of the employment regulation cases. Read in qualification of those cases, the income tax decision seems to signify that World War II produced an emergency which justified a Commonwealth draft of certain state governmental employees, but not an emergency sufficient to sustain the regulation of the employment of state governmental employees in general. It may therefore be misleading to say that state governmental employees as such are immune from the war power. We must qualify that statement with the familiar emergency exception: state governmental employees may be regulated only as the emergency demands and the Court will give exacting scrutiny to any war measure which singles them out for control because of their state position.

The rule is illustrated by the judgment of Latham, C.J., in Wenn v. Attorney-General.[1] In that case it was held that Commonwealth legislation for the preference of ex-servicemen in state employment, being inconsistent with a Victorian statute on the same subject, prevailed by virtue of Sec. 109. The Chief Justice considered it within the war power to apply the Commonwealth preferential system to state employment. He reasoned that state servants are not exempt from reasonable regulation in wartime, citing the income tax decision, and emphasized the fact that the state was treated by the regulation on the same basis as

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1) (1948) 77 C.L.R. 84.

any other employer. "An exclusion of State public servants from Federal benefits given to all other ex-servicemen would be open to more serious objection," he noted.[1)]

It is submitted that the position of the Chief Justice in the Wenn case ----- that the state as an entity enjoys no immunity from war legislation, but only a right not to be discriminated against ----- makes for a more intelligent federalism than does the doctrine which prevailed in the employment regulation cases. It is desirable, of course, that the Court maintain a searching regard for the healthy functioning of state governments. That the doctrine of immunity of instrumentalities has been abandoned does not alter the fundamental truth that federalism depends upon the existence of balanced, coordinate lawmaking authorities.[2)] Indeed, there is much to be said for the contention of Starke, J.,[3)] that the Commonwealth income tax legislation of World War II represented an unwarranted attempt to undermine the independence of state governments. Conversely, the employment regulation cases may in retrospect betray too abject a reverence for state governmental institutions and an unimaginative reluctance to permit their regulation in the interest of the war effort.

We have thus far regarded the entity of the state as an obstacle to the exercise of the war power. But the state, both as an agency of government and as a coordinate

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1) Ibid., p.113.

2) See Amalgamated Society of Engineers v. Adelaide Steamship Co. (1920) 28 C.L.R.129. Compare D'Emden v. Pedder (1904) 1 C.L.R. 91. The problem is discussed in Sawyer, Cases on the Constitution of the Commonwealth of Australia, at pp.16-17, 46, 252-55.

3) South Australia v. Commonwealth (1942) 65 C.L.R. 373 (dissenting opinion).

source of legislation, may be enlisted as a useful ally of the Commonwealth in the prosecution of war. The Court has sustained almost without discussion the delegation of the enforcement of war regulations to state executive and judicial officers.[1] Subject to such specific prohibitions as Sec. 92, the use of state boundaries as convenient subdivisions for the administration of war measures is also permitted.[2]

The Court has conceded only reluctantly, however, that states may legislate in the interest of Commonwealth defense. The once-prevailing view that war is an exclusive Commonwealth function may be traced to the habit of equating the "naval and military defence" of Sec. 51 (vi) with the maintenance of a military establishment (i.e., an exercise of the static war power), which is only one of its branches. It may also have been induced by Sec. 69, which lists the defense department as an arm of state government to be transferred to the Commonwealth at the time of federation, and Sec. 52, which gives the Commonwealth "exclusive power" to legislate regarding transferred departments.

The influence of this doctrine of exclusiveness is apparent in the decision of Joseph v. Colonial Treasurer,[3] in which the Court invalidated action taken by a state administrative official in connection with a state wheat pool which was inaugurated after consultation with Commonwealth

1) de Mestre v. Chisholm (1944) 69 C.L.R. 51, Carter v. Egg and Egg Pulp Marketing Board (1942) 66 C.L.R.557.
2) See Gratwick v. Johnson (1945) 70 C.L.R.1, Morgan v. Commonwealth (1947) 74 C.L.R. 421.
3) (1918) 25 C.L.R. 32.

officials. The decision may be supported by the finding that the administrative action was not taken bona fide as part of the scheme, and the finding that the scheme, though operative in wartime, was designed to provide a local benefit rather than to promote the defense of the nation as a whole. But in its reasoning the Court relied heavily on the assumption that a state may not enact war legislation.

This assumption is reflected in the judgments in Pirrie v. McFarlane,[1] in which a majority of the Court held that a state driver's license act did not conflict with Commonwealth war legislation and therefore was not invalid by Sec. 109. Both the majority, who agreed that Commonwealth war legislation would prevail in the event of conflict, and the minority, who considered that a conflict had been proven, spoke of war as an exclusive Commonwealth power.

Not until the decision of Carter v. Egg and Egg Pulp Marketing Board[2] did the Court admit, distinguishing as obiter statements to the contrary in the Joseph and Pirrie judgments, that a state may legislate to promote the Commonwealth war effort. The plaintiff in the Carter case asserted that regulations made under a state marketing act were invalid because they were in conflict with a Commonwealth marketing scheme and because they sought to acquire eggs for the supposedly unconstitutional purpose of Commonwealth defense. The Court unanimously held there was no conflict within the purview of Sec. 109, and that the state marketing law was valid war legislation, but disagreed in their characterization of the exclusiveness

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1) (1925) 36 C.L.R. 170.

2) (1942) 66 C.L.R. 557.

of the war power. The Chief Justice described the power as non-exclusive, there being

> "... no reason arising from the nature of the subject matter why a State should not, subject to such control as the Commonwealth Parliament may think proper to be exercised, assist the Commonwealth to the maximum in the defence of the country". (1)

Williams, J., distinguished the "exclusive" Commonwealth power of legislating "on subjects which relate exclusively to defence, such as the raising, maintaining, and control of the armed forces", from the "concurrent" power over "subjects which do not appertain exclusively to defence", exampled by marketing systems of the type under review.[2)]

The distinction which Williams, J., makes between aspects of the war power which are exclusively for the Commonwealth, and those which are proper subjects for state legislation, seems to correspond with our characterization, supra, of the "static" and "elastic" war powers. Although to distinguish these types of war power is useful for predicting the applicability of the emergency doctrine, it is submitted with deference that the classification is not directly related to the constitutionality of concurrent state legislation. It would appear to fall within the "static" war power for the Commonwealth to award a bonus to military personnel, for example, or to punish those which discourage recruiting. But no reason is evident why states should not be allowed to pass such legislation, in the absence of conflicting Commonwealth statutes.

Section 52 indicates that the Commonwealth has exclusive legislative power to organize a centralized department of defense, in place of those state departments which

1) Ibid., p.571.
2) Ibid.,pp.597-8.

were transferred to the Commonwealth Executive by Sec.69. Probably Sec.52 would also be construed to preclude any state legislation for the procurement of personnel and equipment for this central war establishment. Beyond that, no policy considerations are apparent for denying to the states a concurrent power to legislate in aid of the war effort. Indeed, Sec. 114 recognises by implication a power in the states, with the consent of the Commonwealth, to raise and maintain armed forces. This must mean that the states have some concurrent power to legislate for these forces. Moreover, if the Commonwealth by the elastic war power may invade the state residuary area only when necessary, the states are left with control over all residuary matters which the Commonwealth has not been compelled to regulate. State legislation should not be considered unconstitutional merely because it indirectly concerns the Commonwealth military establishment. The Court has indicated that states may regulate the re-employment rights of former members of the for[illegible].[1] No reason appears why states should not be allowed to legislate concerning those who are presently in the forces, as well. A clarification or extension of the rights of servicemen to make holographic wills,for example, or the granting of relief from state court process in case of military hardship, would seem intra vires. Of course state legislation in the concurrent field will be inoperative, by Sec.109, if it conflicts with Commonwealth legislation.

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1) Wenn v. Attorney-General (1948) 77 C.L.R. 84.

PART 4

THE UNITED STATES

Chapter VII: The Constitutional Basis of the War Power of the Federal Government

The provisions of the United States Constitution which relate to the war power are an effective embodiment of the purpose, recited in the Preamble, "to provide for the common defence". Although the Tenth Amendment recognizes that residuary legislative powers belong to the states, the Constitution grants the war power to the federal government:

> "The Congress shall have Power
> "To lay and collect Taxes, Duties, Imposts and Excises, to ...provide for the common Defence;
>
> ...
>
> "To declare war ...;
> "To raise and support Armies ...;
> "To provide and maintain a Navy;
> "To make Rules for the Government and Regulation of the land and naval Forces;
>
> ...
>
> "To exercise exclusive Legislation ... over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; --- And
> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof." (1)

> "The President shall be Commander in Chief of the Army and Navy of the United States ..." (2)

The pre-eminence of the federal government in the exercise of the war power is further shown by the provision that states shall not engage in war-like activities without the consent of Congress, and by the injunction that the federal government shall protect the states.

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1) U.S.Constitution, Art.I, Sec.8.
2) Ibid., Art.II, Sec.2.

> "No State shall, without the Consent of Congress ... keep Troops, or Ships of War in time of Peace ... or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." (8)
>
> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."(1)

This centralized war power may be contrasted with the militia power, which is divided between the federal government and the states. The President is commander-in-chief of the militia when it is called into federal service,[2] and Congress is authorized to call out the militia, "to execute the Laws of the Union, suppress Insurrections and repel Invasions".[3] Congress may provide for organizing, arming and disciplining the militia and for governing that part of it which is in federal service.[4] But the Constitution describes it as "the Militia of the several States",[5] and reserves to the states the power of appointing officers and of training the militia.[6]

The problem of interpreting the war power is made difficult by the multiplicity of constitutional limitations --- many more than are found in the Australian Constitution. Some of these limitations specifically restrict the federal war power. In qualification of the federal power to raise and support armies, for example, the Constitution stipulates, "but no Appropriation of Money to that Use shall be for a longer Term than two Years".[7] The Third Amendment provides, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be described by law". On the other

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1) Ibid., Art.IV, Sec.4.
2) Ibid., Art.II, Sec.2.
3) Ibid., Art. I, Sec.8.
4) Ibid.
5) Ibid., Art.II, Sec.2.
6) Ibid., Art. I, Sec.8.
7) Ibid., Art. I, Sec.8.
8) Ibid., Art. I, Sec.10.

hand, one limitation was framed to assist the federal government in the conduct of war. The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed". Some limitations are qualified to allow for the usages of war, for example, the provision that the writ of habeas corpus shall not be suspended,[1] and the guarantee of indictment by grand jury.[2]

The most troublesome limitations have been those which appear to embody broad guarantees without qualification for the eventuality of war. Balancing such general prohibitions as "due process"[3] and freedom of speech[4] against the need for an effective federal war power has called for judicial ingenuity of the highest order.

It is interesting to note the emphasis which was placed upon the war power in the Federalist papers, the most authoritative contemporary commentary on the Constitution. It was Jay in particular who showed that the desire for a common defense was an impetus toward union.[5] "Leave America divided into thirteen, or, if you please, into three or four independent governments", he asked, "what armies could they raise and pay, what fleets could they ever hope to have?"[6] Hamilton carefully countered the arguments for a decentralized war power:

> "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." (7)

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1) Ibid., Art I, Sec.9.
2) Ibid., Fifth Amendment.
3) Ibid., Fifth Amendment.
4) Ibid., First Amendment.
5) See Nos.III, IV, V, VI and VII, The Federalist.
6) Ibid., No.IV.
7) Ibid., No.LXXIV.

> "The idea of restraining the legislative authority, in the means of providing for national defence, is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened." (1)

Aware of the general apprehension that the balance between the federal government and the states would be upset by the enlargement of federal war powers in an emergency, Madison produced a clever, lawyer-like answer:

> "The operations of the federal government will be most extensive and important in times of war and danger; those of the state governments in time of peace and security. As the former periods will probably bear a small proportion to the latter, the state governments will here enjoy another advantage over the federal government. The more adequate indeed the federal powers may be rendered to the national defence, the less frequent will be those scenes of danger which might favour their ascendancy over the governments of the particular states." (2)

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1) Ibid., No.XXVI. See also Nos.VIII, XXII, XXIII, XXIV, XXV, XXVIII, XXIX.

2) Ibid., No.XLV. See also Nos. XLI, XLIII.

Chapter VIII: The Federal War Power and the Military Establishment.

1

The constitutional authority of Congress to declare war and to maintain the army and navy, coupled with the "necessary and proper" clause, extends to securing personnel for the federal armed forces, not only by voluntary enlistment, but by compulsion.[1] It has been said that the war power "necessarily connotes the plenary power to wage war with all the force necessary to make it effective," including "power to say who shall serve ... and in what way".[2] "That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution."[3] Compulsory military service does not constitute "involuntary servitude" within the prohibition of the Thirteenth Amendment.[4] Nor would the drafting of persons whose religious scruples forbid fighting contravene the First Amendment, which prohibits laws "respecting an establishment of religion, or prohibiting the free exercise thereof".[5] The exemption of conscientious objectors - as by the Selective Service Act of 1940, which diverted them to noncombatant occupations essential to the war economy - is accorded by Congress solely as a matter of grace.[6]

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1) Selective Draft Law Cases (1918) 245 U.S. 366, Cox v.Wood, (1918) 247 U.S.3.
2) U.S. v. Macintosh (1931) 283 U.S. 605,622.
3) U.S. v. Schwimmer (1929) 279 U.S.644,650. And see Billings v. Truesdell (1944) 321 U.S.542,556; In Re Summers (1945) 325 U.S.561. Compare U.S. v. Bland (1931) 283 U.S.636, Girouard v. U.S.(1946) 328 U.S.61.
4) Selective Draft Law Cases, supra. See also Robertson v. Baldwin (1897) 165 U.S. 275,280,298.
5) Selective Draft Law Cases, supra.
6) In Re Summers, supra., at p.572. And see U.S. v. Macintosh (1931) 283 U.S.605, Falbo v. U.S.(1944)320 U.S.549.

The Court has given a detailed consideration to the assertion that the state militia power, which is recognized expressly in Article I, Sec.8, and impliedly in the general reservation of powers in the Tenth Amendment, limits the federal draft power. The contention is that because "all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States",[1] neither the federal government nor the states may drain the common reservoir of manpower to the point of exhaustion. In reply, the Court has noted that the Constitution gives Congress the lion's share of authority over the militia system: the states may only appoint militia officers and train the militia as Congress prescribes, while Congress may "provide for organizing, arming, and disciplining" the militia as well as completely controlling it when called into federal service.[2] Moreover, the militia power is subordinate to the federal draft power. Potentially, "all governmental power" to call men to arms may be exercised by Congress.[3] And because men who are drafted under the war power constitute the national armed forces rather than a "national militia", Congress is not limited to the purposes of the militia clause ("to execute the Laws of the Union, suppress Insurrections and repel Invasions") in their deployment.[4]

Although these constitutional limitations have been held ineffectual to frustrate the federal draft power, the

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1) Presser v. Illinois (1886) 116 U.S.252,265.
2) U.S. Constitution, Art.I, Sec.8; Art.II, Sec.2; Art.IV, Sec.4.
3) Selective Draft Law Cases (1918) 245 U.S.366. Compare Houston v. Moore (1820) 5 Wheat.1, Hamilton v. Regents (1934) 293 U.S. 245.
4) Cox v. Wood (1918) 247 U.S.3.

Court has been influenced by the due process clause[1] to require that certain procedural safeguards be observed in the drafting process. The problem was presented by the Selective Service Act of 1940, which exempted certain groups, such as ministers of religion, from conscription. The statute gave to a hierarchy of administrative boards the ultimate power of classifying registrants as exempt or non-exempt: "The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." Soon the federal courts were besieged by registrants who claimed that in classifying them as non-exempt draft boards had acted contrary to established procedure or had made findings without adequate basis in evidence. The dilemma was a perplexing one. The statutory directive that the administrative decisions should be final expressed a clear policy against "litigious interruption" of the conscription process.[2] "Congress wanted men to get into the army, not to litigate about getting in."[3] On the other hand, it was undesirable that registrants should be hustled across "the vast gulf between civil and military jurisdiction, with all the attendant consequences for change in status and rights"[4] by means of irregular procedure or groundless findings of fact.

The Court's solution was to enforce any decision of a draft board, however irregular or erroneous, which was made within its "jurisdiction". The challenge that jurisdiction

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1) U.S. Constitution, Fifth Amendment: "No person shall be... deprived of life, liberty, or property, without due process of law ..."
2) See Falbo v. U.S. (1944) 320 U.S.549,554.
3) Estep v. U.S. (1946) 327 U.S.114,140 (concurring opinion of Mr. Justice Frankfurter).
4) Gibson v. U.S. (1946) 329 U.S.338, 357.

has been exceeded may be raised either by means of an application for writ of habeas corpus, if the petitioner has actually been inducted and is confined under military authority;[1] or as a defense to the criminal prosecution of a registrant for violating Selective Service regulations.[2] The scope of review is substantially the same in both cases.[3] The classification of a registrant as non-exempt will be disregarded (and the registrant released or acquitted, as the case may be) only if it was made (1) in such flagrant violation of an established procedure as to exceed "jurisdiction" or (2) with "no basis" in evidence.[4] Unless the registrant has exhausted all avenues of administrative appeal, however, he will not be allowed to assert in court the illegality of his classification.[5]

It is clear that the challenge of classification by means of habeas corpus is based upon a constitutionally protected procedural right.[6] By suggesting a parallel between the judicial review of draft boards and that of courts-martial, the Supreme Court seems to relate the substantive right of the registrant in these cases to the due process clause. The Court has never categorically held, however, that the Constitution requires that the defendant in a Selective Service prosecution must be allowed to place the illegality of his classification in issue. In the face of the mandate of Congress that the administrative decision be "final", that such a defense is admitted at all strongly suggests that the alternative is a denial of due process.

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1) Eagles v. U.S. ex rel. Samuels (1946)329 U.S.304, Eagles v. U.S. ex rel. Horowitz(1946)329 U.S.317.
2) Estep v. U.S. (1946) 327 U.S.114.
3) See Cox v. U.S. (1947) 332 U.S.442,449; Estep v.U.S., supra, p.122.
4) Estep v. U.S., supra.
5) Falbo v. U.S.(1944) 320 U.S. 549.
6) U.S.Constitution, Art.I, Sec.9: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

A minority of the Court in Estep v. U.S.[1] were clearly of that opinion. The judgment of the majority, however, seemed to admit the defense as a matter of statutory interpretation rather than of constitutional right.

2

"Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. ... (T)he scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority. ... For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others."[2]

In reviewing legislation which was enacted to benefit military personnel, as in passing on the procedural aspects of conscription, the Court seldom discusses constitutionality. In the latter case this diffidence mirrors a reluctance to suggest crippling constitutional limitations when decisions may be made to turn upon statutory interpretation instead. But in the former case the Court seems to assume that the constitutional warrant for legislation is too obvious to require exposition. Generally, the cases reflect a policy of leaving Congress and the President as undisturbed as possible in the internal administration of the armed forces,[3] at least where issues of military penal jurisdiction are not present.[4] Great stress is laid upon the

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1) (1946) 327 U.S.114.
2) See, e.g., U.S. v. Eliason (1842) 16 Pet.291,301; Patterson v. Lamb (1947) 329 U.S.539.
2) U.S. v. Standard Oil Co. (1947)332 U.S.301,305-6.
4) See infra, Chapter IX.

metamorphosis of legal personality - a change of status rather than of contract - which an individual undergoes on entering the service.[1)]

Congress has great powers to legislate for the health and morals of military personnel, for example by making it a federal offense to keep a house of prostitution within a prescribed radius of a federal military reservation.[2)] State and federal courts may be given discretion to stay proceedings against soldiers when military duties make it burdensome for them to appear.[3)] Moreover, the power to protect the serviceman does not cease when he leaves the service. Congress may require that former servicemen be advanced to the seniority in governmental or private employment which they would have attained but for military service, and that they be preferred in promotion over persons of equal skill and seniority who did not serve.[4)] Another type of assistance to ex-servicemen is the provision of gratuities, such as pensions, pre-emptive rights to homestead land, or care and boarding in a soldiers' home. The Court has not been explicit as to the constitutional basis for this legislation. Gratuities are frequently described as "bounty" which Congress may "give, withhold, distribute, or recall, at its discretion".[5)] The Court has also weighed

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1) See Crenshaw v. U.S. (1890) 134 U.S. 99, In Re Grimley (1890) 137 U.S.147, In Re Morrissey (1890) 137 U.S.157, U.S.v. Williams (1937) 302 U.S.46.
2) McKinley v. U.S. (1919) 249 U.S.397.
3) See Ebert v. Poston (1925) 266 U.S.548, Boone v. Lightner (1943) 319 U.S.561.
4) Hilton v. Sullivan (1948) 334 U.S.323 (as to constitutionality, see especially the concurring opinion of Mr.Justice Reed at p.340), Oakley v. L. & N. Railroad Co. (1949) 338 U.S.278. The application of this type of legislation is discussed in Keim v. U.S. (1900) 177 U.S.290, Fishgold v. Sullivan Corp.(1946) 328 U.S.275, Trailmobile Co.v. Whirls (1947) 331 U.S.40, Mitchell v. Cohen (1948) 333 U.S.411, and Aeronautical Lodge v. Campbell (1949) 337 U.S.521.
5) U.S. v. Teller (1882) 107 U.S. 64,68. See also Frisbie v. U.S. (1895) 157 U.S.160,166; Walton v. Cotton (1856)19 How.355,358.

the historical precedent for military gratuities:
" .... the pension system of the country had its origin in the Revolution, and beyond all question was sanctioned by the framers of the Constitution"[1]. It would seem reasonable to ascribe the authority for giving gratuities to the appropriation power[2], buttressed if necessary by the power to maintain armed forces.

An important aspect of the Congressional bounty power consists in making certain that a gratuity will be used to benefit the intended beneficiary. Thus bounty money in the hands of the beneficiary or his guardian may be protected from the claims of creditors,[3] and its embezzlement may be punished as a federal offense.[4] Congress may limit the fees of attorneys who assist beneficiaries to establish their claims.[5] The underlying principle, that a system of federal bounty may be protected from obstruction by an outside party, is illustrated on a broad scale by the case of Ohio v. Thomas.[6] The bounty there involved was distributed by a federal soldiers' home in Ohio. The obstruction came from the Ohio Legislature, which enacted that all establishments serving margarine within the state should advertise that fact by means of a prescribed type of placard. The Supreme Court held that the legislature lacked constitutional power so to interfere with the internal administration

1) U.S. v. Hall (1878) 98 U.S.343, 347.
2) U.S. Constitution, Art.I, Sec.8: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States....".
3) See U.S. v. Hall, supra, at p.355; Trotter v. Tennessee (1933) 290 U.S.354; Carrier v. Bryant (1939) 306 U.S.545. Compare Walton v. Cotton (1856) 19 How. 355,358.
4) U.S. v. Hall (1878) 98 U.S. 343.
5) Frisbie v. U.S. (1895) 157 U.S.160, Lawrence v. Shaw (1937) 300 U.S.245. See also argument of counsel in Hines v. Stein (1936) 298 U.S.94,95.
6) (1899) 173 U.S.276.

of a federal home for pensioners.[1]

The constitutionality of "war risk" insurance, by which the United States undertakes to compensate for the death or disability of a member of the forces, may not be doubted. In the words of Mr. Justice Clark: "Certainly Congress in its desire to afford as much material protection as possible to its fighting force could wisely provide a plan of insurance coverage. Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman."[2]

A policy of war risk insurance is to be distinguished from a simple gratuity, however, in that it gives rise to a contractual obligation on the part of the United States, and a corresponding vested property right on the part of the serviceman.[3] The presence of this obligation does not prevent Congress from making minor changes in the entitlements under an existing policy. For example, the insured may be authorized to substitute as beneficiary a person previously excluded from the list of permissible beneficiaries;[4] and payments of proceeds which fall due after the death of a beneficiary may be diverted to the estate of the insured, although it was originally agreed to make payments in that case to the heirs of the beneficiary.[5] Congress, however, may not completely invalidate an existing contract of war risk insurance. This was attempted by the Economy Act of 1933, which provided that "all laws granting or pertaining to yearly renewable term insurance are hereby repealed".

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1) See also National Home v. Wood (1936) 299 U.S.211, U.S. v. Stevens (1938) 302 U.S.623, for a discussion of federal legislation regulating the right of inmates to leave their property to the home.
2) Wissner v. Wissner (1950) 338 U.S.655,660.
3) See Lynch v.U.S.(1934) 292 U.S.571,576-77; U.S.v.Zazove (1948) 334 U.S.602,611 (Note 12.).
4) White v. U.S.(1926) 270 U.S.175.
5) Singleton v. Cheek (1932) 284 U.S.493.

The Court held that Congress intended to destroy the right to claim rather than the remedy by which the right was enforced; that no "supervening conditions" of emergency justified the measure; and that therefore the statute was prohibited by the due process clause of the Constitution.[1)]

The existence of contractual rights would seem to enhance the power of Congress to prevent third parties from interfering with the beneficiary's realization of the insurance proceeds. Accordingly it has been held, as in the case of gratuities, that Congress may limit the fee which may be charged for prosecuting a war risk insurance claim,[2)] and that the proceeds may be protected from creditors while in the hands of the beneficiary.[3)]

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1) Lynch v. U.S., supra. Compare Worthen Co. v. Thomas (1934) 292 U.S.426.
2) Margolin v. U.S.(1925) 269 U.S.93, Hines v. Lowrey (1938) 305 U.S.85.
3) Lawrence v. Shaw (1937) 300 U.S.245. And see Pagel v. Pagel (1934) 291 U.S.473. Compare U.S. Trust Co. v. Helvering (1939) 307 U.S.57.

Chapter IX: The Federal War Power and Military Jurisdiction

In order to implement the war power, Congress and the President have created a variety of quasi-judicial bodies, such as courts-martial, military commissions, and war crimes tribunals. The obvious connection between these bodies and the prosecution of war suggests that their functioning has presented few constitutional problems. That inference is only partially accurate. The Supreme Court has not doubted their relation to the affirmative war power, but difficulty has arisen with respect to certain negative aspects of the Constitution.

A basic problem is posed by the separation of powers between the three branches of federal government. Do such quasi-judicial bodies exercise legislative, executive,or judicial power? If their function is "judicial" in the sense of Article III, what application has the guarantee of security of judicial tenure and the prohibition on diminution of compensation? Assuming the organization of military tribunals is consistent with the Constitution, which procedural guarantees, if any, extend to military defendants? Must they be accorded indictment by grand jury, trial by jury, and the privilege against self-incrimination? Such specific guarantees aside, of what protection is the broad aegis of the due process clause?

The number and complexity of these issues have led to the development of a body of case law, large in disproportion to the significance of the military tribunal as an institution, which forms an interesting study in the effect of constitutional

limitations on a particular function of the war power. The claims of military defendants normally reach the federal courts by means of the writ of habeas corpus, which the Constitution guards against suspension in peaceful times.[1] The authority of military tribunals may also be questioned in such indirect proceedings as an action for false imprisonment or a suit for back pay. Review has been sought by writ of prohibition as well.[2] In each instance, the inquiry of the federal court is directed toward the issue of military "jurisdiction".

1

"Courts martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, cannot be controlled or revised by the civil courts."[3] They are merely internal regulatory tribunals of the armed services, established under the Congressional power "To make Rules for the Government and Regulation of the land and naval Forces" and "to provide for ... disciplining, the Militia."[4] Because they exercise no "judicial power" in the constitutional sense, courts-martial are not subject to the procedural guarantees of Article III.[5] The prevailing view is that the specific limitations on criminal trial which are found in the Bill of Rights, such as trial by jury and the privilege against self-incrimination, were never intended to restrict military trial.[6] The qualification to the grand jury guarantee ("except in cases arising in the land or

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1) U.S. Constitution, Art.I, Sec.9.
2) Smith v. Whitney (1886) 116 U.S.167.
3) Kurtz v. Moffitt (1885) 115 U.S.487, 500.
4) U.S.Constitution, Art.I, Sec.8.
5) Ex Parte Quirin (1942) 317 U.S.1.
6) Ibid.,p.39.

naval forces, or in the Militia, when in actual service in time of War or public danger") is thought to have been added to retain military jurisdiction over ordinary criminal offenses when they are committed by military personnel.[1] Even the due process clause does not invalidate military trial as such. The Supreme Court has said, "what is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts".[2] (Italics supplied.) Due process is denied only when the military tribunal lacks "jurisdiction".

One jurisdictional requirement is that the court-martial be constituted in conformity with relevant statutes and established military custom. When a statute provided, "officers of the Regular Army shall not be competent to sit on courts-martial to try officers or soldiers of other forces", a tribunal composed of regular officers was held powerless to sentence a volunteer officer.[3] A similar result was reached when the presiding officer of the court-martial was nominally on leave from the Regular Army and held a temporary commission with the volunteers.[4] However, the cases show an understandable tendency to treat statutory rules for the organization of courts-martial as directive rather than jurisdictional.[5]

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1) Ex Parte Quirin (1942) 317 U.S.1,39.
2) Reaves v. Ainsworth (1911) 219 U.S.296,304.
3) McClaughry v. Deming (1902) 186 U.S.49.
4) U.S. v. Brown (1907) 206 U.S.240.
5) See Bishop v. U.S. (1905) 197 U.S.334, Swaim v. U.S.(1897) 165 U.S.553, Mullan v. U.S. (1891) 140 U.S.240.

The court-martial must also have jurisdiction of the person of the prisoner. So where Congress had exempted "judicial and executive officers" from compulsory military duty, a court-martial lacked power to punish a justice of the peace for failing to obey a mobilization order.[1] The Court has held many persons without active military status to be properly subject to court-martial jurisdiction - for example, an officer who was relieved of his command and detailed to supervise a peacetime construction job,[2] a retired officer,[3] a civilian paymaster's clerk,[4] and a civilian paymaster-general.[5]

It is frequently assumed that a court-martial must have jurisdiction of the offense,[6] but it is evident that this limitation will be construed liberally in favor of jurisdiction. When a seaman was charged with desertion but convicted of attempting to desert (an offense which was not specifically prohibited in the statutes governing the Navy), jurisdiction was grounded on a general statute which prescribed that all unspecified crimes should be punished "according to the laws and customs in such cases at sea".[7]

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1) Wise v. Withers (1806) 3 Cranch 331. Compare Givens v. Zerbst (1921) 255 U.S.11.
2) Carter v. McClaughry (1902) 183 U.S.365.
3) U.S. v. Page (1891) 137 U.S.673. See Note (1948) 1 Van.L.R. /312.
4) Johnson v. Sayre(1895) 158 U.S.109, Ex Parte Reed (1879) 100 U.S.13.
5) Smith v. Whitney (1886) 116 U.S.167. See Wales v. Whitney (1885) 114 U.S.564, Ohio v. Thomas (1899)173 U.S.276. Compare Ex Parte Watkins (1830)3 Pet. 193, U.S. ex rel. Hirshberg v. Cooke (1949) 336 U.S.210. See Snoyer, "Amenability of Military Persons to the Laws of the Land" (1906) 5 Mich. L.R.12; Note (1946) 46 Col.L.R.977.
6) See, e.g., Mullan v. U.S. (1908) 212 U.S.516.
7) Dynes v. Hoover (1857) 20 How.65.

When a statute provided that no soldier could be court-martialled for murder in peacetime, the Supreme Court construed it to mean "peace in the complete sense, officially declared", declining to invalidate a conviction for murder which was rendered after the armistice and cessation of hostilities in World War I but before peace had been proclaimed.[1)]

A substantial deviation from a rule of court-martial procedure which is considered "jurisdictional" - more than a "mere error or irregularity" - renders the sentence void.[2)] In Runkle v. U.S.[3)] the Court gave jurisdictional effect to a statute which required that certain sentences be "laid before" the President for his approval. The only evidence of compliance in that case was a memorandum in which the Secretary of War noted approval of the sentence and announced that the "President is pleased" to remit part of it. The Court held that the memorandum failed to show, "otherwise then argumentatively", that the prescribed procedure was followed. Later cases have limited this decision strictly to its facts.[4)] The Supreme Court has also declined to attach jurisdictional importance to the provisions of the Articles of War regarding pre-court-martial investigation.[5)]

Although a court-martial is not a court in the sense of the Judiciary Article, its action will support the plea of double jeopardy in a subsequent federal criminal trial. So a soldier who had been court-martialled for manslaughter could not be tried for "assassination" on the same facts by a Philippine Territorial Court, Congress having incorporated the double jeopardy principle into the law of the

1) Kahn v. Anderson (1921) 255 U.S.1.
2) Ex parte Reed (1879) 100 U.S.13.
3) (1887) 122 U.S.543.
4) U.S.v.Page (1891) 137 U.S.673, U.S.v.Fletcher (1893) 148 U.S.84, Ide v. U.S. (1893) 150 U.S.517.
5) Humphrey v. Smith (1949) 336 U.S.695. And see U.S.v. Smith (1905) 197 U.S.386.

Philippine Territory.[1] But when an officer had been sentenced by court-martial for "conduct unbecoming an officer and gentleman" and "conduct to the prejudice of good order" in connection with a scheme to protect certain soldiers from overseas duty, the Court sanctioned his subsequent prosecution in federal court for conspiracy to deprive the United States of services.[2] Although both charges related to the same acts of the defendant, the Court reasoned that conspiracy was a new offense because it contained the additional element of confederation.

Apparently the double jeopardy rule is applicable to successive trials by court-martial[3] as well as to a trial by court-martial followed by trial in a state court.[4] It is important, however, to consider the various sources of the double jeopardy principle which is applied in these cases. We have seen that the specific prohibition of double jeopardy in the Fifth Amendment applies to instances of second jeopardy in a federal court. The constitutionality of second jeopardy in a state court would seem to depend on the due process clause of the Fourteenth Amendment. But military trial is considered to be excepted from the specific procedural guarantees of the Bill of Rights and subject only to the due process clause.[5] It would therefore seem that the unconstitutionality of second jeopardy by court-martial should be attributed to the due process clause, rather than to the specific prohibition on double jeopardy in the Fifth Amendment.

When a soldier has committed an act which is a violation

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1) Grafton v. U.S. (1907) 206 U.S. 333. And see Wilkes v. Dinsman (1849) 7 How. 89.
2) U.S. v. Bayer (1947) 331 U.S. 532
3) See Wade v. Hunter (1949) 336 U.S. 684.
4) See Coleman v. Tennessee (1878) 97 U.S. 509. Compare the judgment of Mr. Justice Washington in Houston v. Moore (1820) 5 Wheat. 1.
5) See Ex Parte Quirin (1942) 317 U.S. 1.

of both the Articles of War and the criminal code of a state, it will be seen that the federal government may in many cases frustrate an attempt to bring him to state justice. Of course if either the state or the military commander fails to demand the prisoner, the other may prosecute him.[1] If he is first interned by a United States official under color of authority, a state writ of habeas corpus is insufficient by the "supreme law of the land" clause to prevent federal determination of the right to jurisdiction.[2] Once the court-martial has acted, the prisoner would seem to be protected from state prosecution by the double jeopardy rule. Moreover, there are situations in which an exclusive military jurisdiction is recognized although the offender is first apprehended by state authorities. An obvious instance occurs when the state is under federal military occupation and members of the occupying forces are exempted from state penal jurisdiction.[3] It has been suggested that military jurisdiction may be made exclusive in time of a lesser emergency, as well.[4]

Like courts-martial, the internal administrative boards of the forces are not part of the federal judicial system, and United States courts will upset their decisions only when they have exceeded their jurisdiction.[5] The findings of such agencies have been presumed valid from the technical knowledge required to make them and the informal, emergency atmosphere in which they frequently must be made.[6] Answering the complaint

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1) Ex Parte Mason (1881) 105 U.S. 696, Caldwell v. Parker (1920) 252 U.S. 376.
2) Tarble's Case (1871) 13 Wall. 397. Compare U.S. ex rel Drury v. Lewis (1906) 200 U.S.1.
3) Dow v. Johnson (1879) 100 U.S. 158, Coleman v. Tennessee (1878 97 U.S.509.
4) See Coleman v. Tennessee, supra; Caldwell v. Parker (1920) 252 U.S. 376.
5) Reaves v. Ainsworth (1911) 219 U.S. 296.
6) U.S. ex rel. French v. Weeks (1922) 259 U.S. 326, Rogers v. U.S. (1926) 270 U.S. 154, U.S. v. Shrewsbury (1874) 23 Wall. 508.

that a certain Army procedure was inconsistent with the due process clause, the Court has noted that "a much more expeditious procedure is necessary in military than is thought tolerable in civil affairs".[1] Perhaps the Court will be more critical of summary administrative proceedings which involve persons outside the normal military jurisdiction.[2]

2

In circumstances of emergency the federal government has asserted military jurisdiction over persons in the United States who are not members of the armed forces. Typically, this has taken the form of trial by "military commission" - a quasi-judicial panel of civilians and/or army officers organized under the war power and modelled procedurally after courts-martial. Certainly under normal conditions the federal trial of persons who do not belong to the forces is an exercise of "judicial power" under Article III. The defendants may demand trial by jury, protection against self-incrimination, and the other constitutionally-guaranteed incidents of federal trial.[3] But military commissions are not inferior federal courts in the sense of Article III, and do not exercise the federal judicial power.[4] They may be instituted only when a military emergency demands it. It has fallen to the Supreme Court, as the final interpreter of the Constitution, to decide in each case whether the requisite degree of emergency exists.

The Supreme Court has no general appellate jurisdiction over military commissions, however. In order to reach a

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1) U.S. ex rel. Creary v. Weeks (1922) 259 U.S. 336, 343.
2) Compare U.S v. Shrewsbury (1874) 23 Wall.508.
3) U.S. Constitution, Article III, Sec. 2 ; Amendments V, VI, VIII.
4) Ex Parte Quirin (1942) 317 U.S. 1.

federal court, the defendant has often sought a writ of habeas corpus, challenging the jurisdiction of his confinement under authority of the commission. Anticipating this attempt to evade military justice, Congress has in some cases purported to suspend the writ. But the Constitution permits its suspension only "when in Cases of Rebellion or Invasion the public Safety may require it". In these cases, the Court must determine whether the emergency was sufficient to authorize suspension of the writ, before it reaches the substantive problem of whether there was sufficient emergency for the military commission to function.

The "open court" test for determining when civilians may be tried by military commission originated with the case of Ex Parte Milligan,[1] which involved a commission convened during the Civil War in a loyal state where courts were functioning normally, and conditions of relative security prevailed. Congress had authorized the President to suspend habeas corpus during the "rebellion", substituting a scheme of deferred access to the civil courts.[2] The President had suspended the writ for several classes of federal prisoners, including Milligan, a civilian citizen of the loyal state who was arrested by military order and convicted by the commission of seditious conduct.

Directing that Milligan be released, the Court emphasized the supremacy of the Constitution "equally in war and in peace" and declared flatly that the usages and customs of war "can never be applied to citizens in states which have upheld the authority of the government and where the courts are open and their process unobstructed".[3] It was held that the military

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1) (1866) 4 Wall. 2.
2) Act of March 3, 1863.
3) Ex Parte Milligan (1866) 4 Wall. 2, 121.

proceedings had denied Milligan trial by jury, contrary to the Fifth Amendment. A minority of four justices agreed that the military commission lacked jurisdiction to try Milligan, but denied that the reason was that civil courts were open. Congress, they argued, has the power to prescribe trial by military commission in time of emergency, whether civil courts are functioning or not. As a matter of statutory interpretation, they held that Congress had ordained civil trial for persons in Milligan's position.

The "open court" test lost prestige with the decision of Ex Parte Quirin.[1] In that case the Supreme Court conceded the power of a military commission of World War II to try a band of German-trained saboteurs (including one who claimed American citizenship) who had landed in the United States. Writing for a unanimous Court, Chief Justice Stone traced jurisdiction of the commission to an article of War which prescribed military trial for violators of the "law of war". He reasoned that the Bill of Rights was not intended to reform the practice of prosecuting such offenders without a jury. The exception of "cases arising in the land or naval forces"[2] from the guarantee of indictment by grand jury was concerned with violations of the civil law by servicemen. He dismissed the "open court" dictum as "having particular reference to the facts"[3] of the Milligan case. This attitude is reflected in a more recent decision involving military tribunals in Hawaii, in which only one justice spoke of the "open court" test as the binding criterion.[4]

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1) (1942) 317 U.S. 1.
2) U.S. Constitution, Fifth Amendment.
3) Ex Parte Quirin (1942) 317 U.S. 1, 45.
4) Duncan v. Kahanamoku (1946) 327 U.S. 304. (See concurring opinion of Mr. Justice Murphy.)

These decisions demonstrate that the Supreme Court will review the power of a military commission to function in the United States on the issues of (1) whether it had jurisdiction of the person, the offense, etc., and (2) whether emergency conditions justified its existence. In determining the degree of emergency, it is submitted that undue weight should not be given to whether or not the civil courts are functioning. This test may prove misleading when civil courts are indeed functioning but only as puppets of a military government;[1] when courts are capable of functioning but are frustrated by military ukase;[2] and when the civil courts are adequate for ordinary litigation, but it is expedient to try certain offenders by military tribunal.[3]

Although the Milligan and Quirin decisions suggest that persons not members of the forces may be tried before military tribunals within the continental United States only under exceptional circumstances, the Court has been cautious in applying that principle to trials outside the United States. This type of military jurisdiction has been frequently asserted. It was exercised, for example, by occupation courts in the Confederate States during the Civil War, by special military tribunals which functioned in Hawaii during World War II, and by war crimes commissions established after that war. Superficially, the problem of reviewing these extra-territorial military tribunals is simply one of "jurisdiction", as in the case of courts-martial and

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1) See argument of counsel in Ex Parte Milligan (1866) 4 Wall. 2.
2) See Duncan v. Kahanamoku (1946) 327 U.S. 304.
3) See Ex Parte Quirin (1942) 317 U.S. 1.

military commissions. Although these tribunals are not so commonplace as courts-martial, the necessity for their existence is at least as obvious as the emergencies in which trial by military commission has been sanctioned. But there is a more fundamental problem, which the Supreme Court has not yet answered in detail: what constitutional guarantees of fair trial apply in the areas and for the classes of defendants which this type of military jurisdiction embraces?

(A) Military trial of civilians in conquered areas.

Under the war power the United States may establish special tribunals in the course of the military occupation of conquered areas.[1] These tribunals may be created by the President, acting on his own authority as commander-in-chief,[2] or by subordinate commanders, who are presumed to have been empowered by the President.[3] Because they are not inferior federal courts in the sense of Article III, their decrees may be reviewed only collaterally.[4] Their members are not protected in tenure by the Constitution, but may be removed at the discretion of the military authorities.[5] A tribunal may exercise general jurisdiction, like the "Provisional Court for the State of Louisiana", which was established by presidential proclamation when Northern arms had captured a substantial part of that state during the Civil War.[6] Or it may be formed for a special purpose, as the

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1) The Grapeshot (1869) 9 Wall. 129, Pennywit v. Eaton (1872) 15 Wall. 382, Mechanics' and Traders' Bank v. Union Bank (1874) 22 Wall. 276, Lewis v. Cocks (1874) 23 Wall. 466, Santiago v. Nogueras (1909) 214 U.S. 260. The Supreme Court has discussed exhaustively the authority of the federal forces to occupy and govern conquered territory. See American Insurance Co. v. Canter (1828) 1 Pet. 511, Fleming v. Page (1850) 9 How. 603, Cross v. Harrison (1853) 16 How. 164, New Orleans v. The Steamship Co. (1874) 20 Wall. 387, Raymond v. Thomas (1875) 91 U.S. 712, Dooley v. U.S. (1901) 182 U.S. 222, Downes v. Bidwell (1901) 182 U.S. 244, Lincoln v. U.S. (1905) 197 U.S. 419, MacLeod v. U.S. (1913) 229 U.S. 416.

2) The Grapeshot (1869) 9 Wall. 129.

3) Mechanics' and Traders' Bank v. Union Bank (1874) 22 Wall. 276.

4) In Re Vidal (1900) 179 U.S. 126.

5) Handlin v. Wickliffe (1870) 12 Wall. 173.

6) See The Grapeshot, supra.

tribunal created by an American commander in Puerto Rico to hear suits for impeaching municipal office-holders.[1] If the conquered area is subsequently annexed to the United States as a territory, Congress may transfer cases pending in the military tribunals to the newly-organized civil courts.[2] Frequently war-born orders or regulations become part of the permanent judicial structure of a territory, and it is possible that the Supreme Court will take their emergency origin as some evidence of validity.[3]

If Congress delays in establishing a system of civil courts for the conquered area (or, in the case of civil war, postpones the re-establishment of the state judiciary), the Court may be asked to decide how long after the end of war military tribunals may continue to function. The answer is evidently that they may function during military occupation or longer if conditions remain sufficiently abnormal, and that great weight will be accorded the Congressional judgment as to when civil courts are needed.

An illustrative case[4] involved the Provisional Court for Louisiana, formed in 1862 by a proclamation which recited the necessity "to hold the state in military occupation". Appointments to the court were to continue "during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Louisiana".[5] A certain judgment was rendered during the occupation but after the surrender of the Confederate commander-in-chief and the promulgation of a loyalist state constitution. The Supreme Court held the

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1) In Re Vidal (1900) 179 U.S. 126.
2) See Leitensdorfer v. Webb (1857) 20 How. 176, Edwards v. Tanneret (1870) 12 Wall. 446.
3) See, semble, Kepner v. U.S. (1904) 195 U.S. 100, Bosque v. U.S. (1908) 209 U.S. 91, Pendleton v. U.S. (1910) 216 U.S. 305, Dowdell v. U.S. (1911) 221 U.S. 325.
4) Burke v. Miltenberger (1873) 19 Wall. 519.
5) Act of Oct. 20, 1862.

continuing occupation to be "conclusive proof" of the validity of the judgment, and added that the court had a "de facto" existence until it was formally dissolved by act of Congress in 1866. A similar result was reached when the Supreme Court sustained an order of the Provisional Court for Puerto Rico, which was created after the peace treaty with Spain but before civil government had been re-established.[1]

(B) Military trial of civilians in a federal territory.

The domestic area of the United States includes the states, the District of Columbia, and the federal "territories", such as Alaska and Hawaii. Unless and until they become states, territories are completely subject to the legislative power of Congress.[2] Just which constitutional restreints are binding upon Congress when it legislates for the territories is a much-vexed question. One doctrine is that all constitutional provisions apply in a territory once it has been "incorporated" within the United States by act of Congress, although only those provisions which protect "fundamental rights" apply to unincorporated territories.[3]

An opportunity for the Court to consider the constitutional limits of military trial in the territories was presented in Hawaii during World War II. The civil courts of Hawaii ceased to function normally when that territory was attacked in 1941. Invoking his powers under the federal Organic Act, the civil governor announced the suspension of habeas corpus and the institution of "martial law". Civil courts were closed, and the commanding general im their stead set up military tribunals of

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1) Fisher ex rel. Barcelon v. Baker (1906) 203 U.S. 174.
2) U.S. Constitution, Art. IV, Sec.3: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States".
3) See Downes v. Bidwell (1901) 182 U.S. 244, Hawaii v. Mankichi (1903) 190 U.S. 197.

general jurisdiction. Although restrictions on the functioning of civil courts were gradually relaxed, two cases which arose during the period of control reached the Supreme Court:

(1) A civilian stockbroker was sentenced by a military tribunal, more than eight months after the attack on Hawaii, for embezzling money from another civilian, in violation of the civil laws of Hawaii. At the time of his military trial the civil courts were permitted to try only certain non-jury civil cases.

(2) A civilian shipfitter was sentenced by a military tribunal more than two years after the attack, for assaulting sentries at a naval depot where he was employed, in violation of a military order. By that time civil courts were permitted to summon witnesses and jurors, but military tribunals had exclusive jurisdiction of "criminal proceedings for violations of military orders".

A majority of the Court preferred to decide the cases as a matter of statutory interpretation rather than on a point of constitutional law. In the Organic Act of the Territory of Hawaii, Congress had empowered the governor, subject to the ratification of the President, to suspend the writ of habeas corpus and to place the territory under martial law "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it". The Court held that under the existing degree of emergency the governor had exceeded his statutory authority in permitting military trial of the civilians in question.[1] The authority to proclaim martial law, "while intended to authorize

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1) Duncan v. Kahanamoku (1946, 327 U.S. 304. See Frank, "Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii" (1944) 44 Col. L.R. 639.

the military to act vigorously for the maintenance of an orderly civil government and for the defense of the islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals".[1] Although the Milligan case[2] was cited as an example of the preferred position of civil trial under the Constitution, the majority judgment of Mr. Justice Black did not rely upon the "open court" test as a measure of the limits of military jurisdiction.

In a joint dissenting opinion, Burton and Frankfurter, JJ., contended that the policy-making power of the executive in an area so near the theatre of war should be given more respect. They cautioned the Court against provoking an embarrassing clash with the military authorities. It was the concurring opinion of Mr. Justice Murphy, however, which revealed the constitutional issues behind the majority's talk of statutory interpretation. Regardless of the meaning of "martial law" in the Organic Act, he asserted, the military trial of civilians had violated the Bill of Rights, "which applies in both spirit and letter to Hawaii".[3] Although this attitude is consistent with the position of the Justice in the subsequent Yamashita[4] and Homma[5] cases, the persuasiveness of his opinion was weakened by its uncompromising insistence upon the "open court" rule of Ex Parte Milligan.

(C) Trial of enemy nationals for violation of the laws of war.

At the end of World War II, several Japanese military leaders were tried for violation of the "laws of war" by a

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1) Duncan v. Kahanamoku (1946) 327 U.S. 304, 324.
2) Ex Parte Milligan (1866) 4 Wall. 2.
3) Duncan v. Kahanamoku, supra, at p.325.
4) In Re Yamashita (1946) 327 U.S. 1.
5) Homma v. Patterson (1946) 327 U.S. 759.

United States military commission in the Philippine Islands. The Supreme Court considered in detail the case of General Yamashita, who was sentenced to death by the commission for allowing his troops to commit depredations during the final stages of the war in the Philippines. A majority of the Court refused to release him on habeas corpus, holding that the commission had exercised lawful military jurisdiction.[1]

In the majority judgment of Chief Justice Stone the decision was placed within the rule of Ex Parte Quirin,[2] that Congress and the President in time of war may try "any person who by the law of war is subject to trial by military tribunals" for violation of the laws of war. The jurisdiction of the commission, after an elaborate analysis, was sustained. The Court found that it was created pursuant to accepted Army practice and consistently with presidential proclamations, in the interest of preventing future wars; that it charged a violation of recognized "laws of war"; and that its procedure had not deviated from the standards prescribed in the regulations by which it was organized.

A majority of the Court did not consider it necessary to discuss the constitutional limitations on war crimes trials. The dissenting judgments of Murphy and Rutledge, JJ., however, were based on the premise that by virtue of the Fifth Amendment any person "who is accused of a crime by the Federal Government or any of its agencies" is entitled "to be treated fairly and justly according to the accepted rules of law and procedure", to be accorded "a fair trial as to any alleged crimes and to be free from charges of legally unrecognized crimes".[3] Con-

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1) In Re Yamashita (1946) 327 U.S. 1. See Fairman, "The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case" (1946) 59 Harv. L.R. 332.
2) (1942) 317 U.S. 1.
3) In Re Yamashita, supra, at pp.26-27.

-ceding that the commission was lawfully created, they concluded that Yamashita was not charged with a recognized violation of the laws of war, because military law did not hold him responsible for such acts of his troops; that he had not been given adequate time in which to prepare his defense; and that he was not accorded the procedural rights prescribed by the applicable Articles of War.

The Court again divided in passing on the conviction of Homma, a former Japanese commander in the Philippines, for inhumane treatment of prisoners of war. Relying on the Yamashita decision, a majority voted to deny his petition for writ of habeas corpus.[1] Murphy and Rutledge, JJ., dissenting, contended that Homma had been denied due process of law in that forced confessions and the records of other prosecutions were admitted as evidence of his guilt, and in that he was not given adequate time in which to prepare a defense. They asserted that even a military commission outside the United States is restricted by the due process clause. "All those who act by virtue of the authority of the United States are bound to respect the principles of justice codified in our Constitution".[2]

The Supreme Court has refused to inquire into the jurisdiction of the "International Military Tribunal for the Far East", organized by the United States commander in Japan for the prosecution of war criminals.[3] Because the Tribunal was created by authority of the several Allied powers with an international membership, it was not considered to be a proper "tribunal of the United States", the authority of which may be questioned by United States courts.

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1) Homma v. Patterson (1946) 327 U.S. 759.
2) Ibid., p.760.
3) Hirota v. MacArthur (1948) 338 U.S. 197.

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In the judgements of the Supreme Court which expound the constitutional law of military trial, "jurisdiction" is treated as a fundamental concept. The Court has consistently maintained that military trial is an exercise of the war power rather than the judicial power, and that the constitutional guarantees of criminal trial procedure do not apply to certain traditional forms of military trial. So long as the military tribunal is reasonably similar to those traditional forms - so long as it does not transcend "jurisdiction" - the Court will not interfere.

We have seen that the elements of jurisdiction include the organization of the tribunal, its procedure, whether it had power to punish the offense in question, and whether the defendant was of a class properly subject to military trial. In the simpler cases, such as the review of courts-martial, the Court has satisfied itself on most jurisdictional points by asking, "Was the tribunal authorized so to act?" The problem is phrased as an issue of statutory interpretation. In reviewing less commonplace types of military tribunal, however, such as the military commission which tried Milligan, the Court has frankly discussed the power of Congress or the President under the Constitution to authorize a tribunal so to act. Usually the issue has been treated as depending upon a degree of factual emergency: "Under existing conditions, was the exercise of military jurisdiction necessary?"

Both the technique of questioning "jurisdiction" and that of evaluating the degree of emergency consist of judicial review from the standpoint of the affirmative power of the military

tribunal. The Court has seldom reviewed military trial from the standpoint of the defendant, although it is in describing the procedural safeguards which protect him that the Constitution is most explicit. There are two types of constitutional protection which the military defendant may invoke: the general guarantee of due process, and the specific guarantees which relate to double jeopardy, self-incrimination, jury trial, etc. These guarantees are in fact the operative points of constitutional law in the field of military trial, from which subsidiary concepts like "jurisdiction" and "emergency" are deduced.

The most satisfactory way of rationalizing these guarantees with the power to effect military trial would appear to rest upon a distinction between the due process clause and the rest. We may assume that the specific procedural guarantees operate to limit Congress only when it purports to regulate the federal judiciary. Apparently the specific procedural guarantees of Article III were intended to apply only to civil courts. The specific procedural guarantees of the Bill of Rights seem to be worded to relate only to incidents of "judicial" trial. The one guarantee which the Court has abstracted and generalized into a basic principle of freedom is the due process clause. Therefore, when Congress under the war power ordains military trial, the specific procedural guarantees of civil trial are not applicable. Their presence merely shows the predilection of the Constitution for civil, rather than military, trial. The power to authorize military trial is limited only by the due process clause. What amounts to due process in this connection depends upon the traditional meaning of military "jurisdiction" and the willingness of the Court to permit its extension to cognate forms of trial.

In reviewing novel types of military trial, notably in

the Milligan judgment,[1] the Court has sometimes emphasized the restrictive effect of the due process clause. The World War II cases, however, present the curious picture of a majority sustaining the military trial by an analysis of "jurisdiction" or "emergency", while the dissenting justices consider the protective effect of the Fifth Amendment. A lay observer might conclude that the two factions of the Court were discussing completely unrelated constitutional issues. In reality, they were concerned with complementary concepts, the majority considering the problem from the standpoint of affirmative powers, the minority from the standpoint of negative restrictions.

There is a need for the Court to re-examine its position in regard to the constitutionality of military trial, by discussing frankly the limiting effect of procedural guarantees. If the only limiting factor is the due process clause, as we suggest, this should be made clear. Understandably, the Court is reluctant to question the judgment of military commanders in an emergency.[2] But surely the solution is to give the commanders adequate leeway of discretion, not to evade the fact that they must be bound by some constitutional restraint. It is interesting to note in comparison that the Court showed little hesitance to question the power of a state governor, acting under an emergency proclamation of martial law, to suspend the operation of federal civil courts within his state.[3]

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1) Ex Parte Milligan (1866) 4 Wall. 2.
2) Compare the position of the Court in the Japanese-American relocation cases, infra, Chapter X.
3) Sterling v. Constantin (1932) 287 U.S. 378.
Compare Moyer v. Peabody (1909) 212 U.S. 78, 84-85.

Chapter X: The Federal War Power and Security Legislation.

1

The perennial warfare between authority and the individual, waged in nearly every theatre of constitutional law, defies the tidy, imaginary partitions by which lawyers classify the several legislative powers and distinguish one protective right of the individual from all the rest. Whether the legislature has invoked the commerce power, the taxing power, or the war power - whether the individual has defended on the freedom of speech, the due process clause, or the right to jury trial - is often of secondary interest. Isolating a particular segment of the battlefield for the purpose of closer examination, therefore, may involve rather arbitrary distinctions.

We are here concerned with federal legislation, based upon the war power or closely related powers, which is directed towards the punishment or prevention of disloyal conduct likely to endanger the security of the nation. It will be convenient to consider only those sanctions which are enforced through the civil courts or other civilian agencies. Conduct so punished is often the same as that which a military tribunal may punish, but because the constitutional problems of military jurisdiction are somewhat distinct, they have been treated separately.[1] Although we are interested primarily in legislation enacted under the federal war power, we shall compare analogous security legislation of the states and shall explore the constitutional aspects of less crucial situations, where the federal interest involved is perhaps the insurance of

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1) See supra, Chapter IX.

domestic tranquility rather than provision for the common defense.

Treason is not punished under the war power, but under a separate power of Congress, which is granted with careful reservation in the Constitution:

> "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
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> "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." (1)

This limitation upon the power to prosecute treason, the Court has observed, "makes, and properly makes, conviction difficult but not impossible".[2] Behind the Court's sympathetic enforcement of the technicalities of treason lies the realization that the offense "is not the only nor can it well serve as the principal legal weapon to vindicate our national cohesion and security".[3] The result has been to encourage the creation of specific statutory offenses in the nature of sedition, by means of which the majority of security offenders have been prosecuted under the war power.[4]

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It has not seriously been doubted that Congress has the affirmative power to punish activity short of treason which leads to anarchy, revolution, or interference with a legitimate function of government, such as the prosecution of war.

The Supreme Court has frequently assumed without discussion the existence of a legislative power to which such

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1) U.S. Constitution, Art. III, Sec. 3.
2) Haupt v. U.S.(1947) 330 U.S. 631, 644.
3) Cramer v. U.S.(1945) 325 U.S. 1, 45. Compare Frohwerk v. US. (1919) 249 U.S. 204, 210.
4) See Hurst, "Treason in the United States" (1944-45) 58 Harv. L.R. 226, 395, 806.

statutes may constitutionally be ascribed.[1] Perhaps it is most convenient to consider the power to punish interference with a function of government as inherent in the power to undertake that function: so from the explicit grant of power to declare war, to raise federal armed forces, and to call out the militia,[2] we read the power to punish sabotage and the spreading of disloyalty among the forces. In support of this construction we may cite the purpose of "domestic Tranquility" and "common defence" mentioned in the Preamble; the "necessary and proper" clause;[3] and the negative phraseology of the clause protective of habeas corpus,[4] which assumes, rather than grants, Congressional power to suspend the writ in case of emergency. A somewhat less plausible rationale for this type of security legislation might be fashioned from the "exclusive" legislative power of Congress over the District of Columbia and other places of federal authority,[5] plus the duty of the United States "to guarantee to every State ... a Republican Form of Government".[6]

Insofar as states may legislate in aid of the federal war power and to the extent that we are concerned with the state power (analogous to the federal war power) to punish criminal syndicalism, a constitutional justification is even more apparent. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[7]

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1) E.g., Gorin v. U.S. (1941) 312 U.S. 19, Von Moltke v. Gillies (1948) 332 U.S. 708.
2) U.S. Constitution, Art. I, Sec.8.
3) Ibid., loc.cit.
4) Ibid., Art. I, Sec. 9.
5) Ibid., Art. I, Sec. 8.
6) Ibid., Art. IV, Sec. 4.
7) Ibid., Tenth Amendment.

The result is that concurrent state legislation, valid in the absence of conflicting federal legislation, may be used to promote such war functions as are not exclusively federal; and that a legislative catch-all, the state "police power", dominates the vast area remaining.

The difficulty arises, not in sustaining affirmative legislative powers, but in squaring them with the negative restrictions on legislation which the Constitution contains. The most effective defense against a federal indictment for seditious or disloyal conduct has been the First Amendment, which provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The counterpart defense to the state prosecution of a security offender must be read from the Fourteenth Amendment:

> " ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In testing the constitutionality of security legislation restrictive of these rights, therefore, the Supreme Court is faced with the initial difficulty that the constitutional guarantee of individual liberty varies textually, depending upon whether Congress or the state legislature has enacted the measure. An additional complicating element is the fact that both state and federal statutes have been of two basic types - those which describe the function of government which is sought to be protected, and those which describe the specific utterance or action which is sought to be prohibited. The pattern of decisions, as we shall see, has been

in the direction of uniformity. Gradually the guarantees of the two Amendments have been assimilated to each other, so that the individual may claim roughly the same protection from state security legislation as from its federal analogue. To a lesser extent the Court has come to measure both types of legislation by the same judge-made test of constitutionality.

(A) Federal legislation.

The federal security statute under which the problem of interpreting the First Amendment has most frequently reached the Supreme Court is the "Espionage Act" as enacted June 15, 1917 and subsequently amended. Applied to these appeals, the popular title of the act is a misnomer, for the indictments do not concern the obtaining of military information on behalf of an enemy. They were drawn under sections of the act which prohibited certain offenses against the war effort, such as endangering military operations by means of false reports, causing insubordination or disloyalty in the forces, obstructing the recruiting program, and curtailing war production.

Deceptively, the case results have been almost unanimous in favor of the affirmance of Espionage Act convictions. The Court has approved punishment for speech which counselled registrants to evade the draft,[1] and that which questioned the ethical basis of America's role in World War I, deploring the martyrdom of those who were imprisoned for evading the draft.[2] Alien pamphleteers who spiked their exhortation of a proletarian revolution with advocacy of a strike against American intervention in Russia were held rightly convicted,[3] as were Socialists whose pacifist literature stressed war's futility, horror, and repression of liberty[4] and who planned

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1) Sugarman v. U.S. (1919) 249 U.S. 182.
2) Debs v. U.S. (1919) 249 U.S. 211.
3) Abrams v. U.S. (1919) 250 U.S. 616.
4) Pierce v. U.S. (1920) 252 U.S. 239.

to circularise potential draftees on peaceful resistance to conscription.[1] Newspapermen who wrote that the war was morally unjustified and undeserving of popular support,[2] and who consistently exaggerated the nation's military weakness and lack of morale[3] were considered punishable. Only in the most recent decision, Hartzel v. U.S.,[4] has the Supreme Court reversed an Espionage Act conviction.. Yet in the language of the Hartzel majority opinion and in a growing acceptance of the "clear and present danger" test where freedom of utterance is involved, it is possible to discern a shift of emphasis which may presage a greater protection for security defendants in the future.

Before World War II Hartzel, an American citizen, had distributed mimeographed denunciations of the British and American governments. During the war he continued to memorialize military leaders and other prominent citizens on the necessity of abandoning the United Nations, of inaugurating an American police state and of joining with Germany in a global war of genocide. By a vote of 5-4 the Supreme Court reversed his conviction under the Espionage Act for "wilfully" promoting disloyalty in the armed service and obstructing recruiting. The majority spokesman, Mr. Justice Murphy, based his judgment upon the absence of the requisite specific intent on the part of Hartzel. In a significant dictum, however, he endorsed the "clear and present danger" formula as the correct test of the protection which the First Amendment affords to activity proscribed by the Espionage Act.[5]

It seems unfortunate that the Hartzel judgment was based

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1) Schenck v. U.S. (1919) 249 U.S. 47.
2) Frohwerk v. U.S. (1919) 249 U.S. 204.
3) Schaefer v. U.S. (1920) 251 U.S. 466. Compare Stilson v. U.S. (1919) 250 U.S. 583.
4) (1944) 322 U.S. 680.
5) Ibid., at p.687.

upon a narrow and somewhat strained rendering of the intent provisions of the Espionage Act. Hartzel's objective may have been, as he contended, merely to alter the direction of American foreign policy. Nevertheless, it does not appear unreasonable to charge him with the undermining of forces discipline, an easily foreseeable consequence of his propaganda. His position is similar to that of earlier defendants who urged a cessation of war production and bond subscription, not for the purpose of crippling the general war effort, but to deter an American expedition against the revolutionary Russian soviets. A majority of the Supreme Court in Abrams v. U.S.[1] affirmed their conviction for conspiring to curtail munitions production. "Even if their primary purpose and intent was to aid the cause of the Russian Revolution," wrote Mr. Justice Clarke, "the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States ..."[2]

The technique of statutory construction which insists upon a specialized type of intent is hardly an impregnable bulwark for the protection of free speech. Congress may easily pass a clarifying amendment to extend the Espionage Act to defendants whose desire to impede prosecution of the war is as indirect as Hartzel's, or who, like the Abrams pamphleteers, crusade against the general war effort only as a means of discouraging particular troop movements. A more effective safe-guard is found in the "clear and present danger" test for reviewing legislation challenged on the basis of the First Amendment, which is supported in dictum by the majority opinion in the Hartzel case.

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1) (1919) 250 U.S. 616.
2) Ibid., at p.621. But see the opinion of Mr. Justice Holmes, dissenting, in the principal case. Compare the opinion of Mr. Justice Murphy in Haupt v. U.S. (1947) 330 U.S. 631.

The test was evolved by Mr. Justice Holmes, in a judgment affirming an Espionage Act conviction on behalf of the unanimous Court in Schenck v. U.S.:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." (1)

As a skilled analyst has noted, "There are three elements in the criteria set up: first, the words themselves must have a direct relation to the substantive evil (in this case, obstructing recruiting and spreading disaffection among the armed forces); second, the evil itself must be one on which Congress has the power to legislate: third, the context or situation must be such that the speech results in a clear and immediate danger that the purpose of Congress will be frustrated". (2) The standard is objective in the sense that it concerns the probable consequences of conduct rather than the culpability of a state of mind. It frankly arrogates to judges the quasi-legislative job of estimating the degree of danger in a given situation, but if is evasive in explaining just how probable that danger must be to justify repressive action. In the final analysis, the line between Congressional power and First Amendment protection must be drawn by a judge from the promptings of his own conscience, perhaps influenced by the text of the formula in favor of freedom of the individual.

The "clear and present danger " test was reiterated by Mr. Justice Holmes for a unanimous Court in Frohwerk v. U.S.,[3]

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1) (1919) 249 U.S. 47, 52. See Chafee, "Freedom of Speech in War Time" (1919) 32 Harv. L.R. 932. Compare Antieau, "Clear and Present Danger: Its Meaning and Significance" (1950) 25 N.D. Law. 603.
2) Lerner, The Mind and Faith of Mr. Justice Holmes, pp.292-93. See also Antieau, "The Rule of Clear and Present Danger - Its Origin and Development" (1950) 13 Univ. of Det. L.J. 193.
3) (1919) 249 U.S. 204.

sustaining a conviction for seditious newspaper publications. Mr. Justice Holmes also delivered the Court's next Espionage Act judgment,[1] but failed to mention "clear and present danger". If any test can be culled from his opinion it is that of the intended or reasonably probable effect of the defendant's speech. But in his subsequent dissent from the Abrams decision[2] he evaluated the "immediate danger" that defendant's opinions "would hinder the success of the government arms", and in a famous dictum approached the Schenck formula: " ... we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country".[3] In the security cases which followed,[4] the majority of the Court gave scant consideration to the proper formula for review, using criteria like "intent", "attempt","tendency", "purpose", "proximate result", and "probable effect" almost indiscriminately. The dissenting opinions of Mr. Justice Brandeis, however, buttressed the "clear and present danger" test with a libertarian philosophy:

> "The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law —— merely, because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language." (5)

> "There are times when those charged with the responsibility of Government, faced with clear and present

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1) Debs v. U.S. (1919) 249 U.S. 211.
2) Abrams v. U.S. (1919) 250 U.S. 616.
3) Ibid., at p.630. See Chafee, "A Contemporary State Trial" (1920) 33 Harv. L.R.747.
4) Schaefer v. U.S. (1920) 251 U.S. 466, Pierce v.U.S.(1920) 252 U.S. 239, Gilbert v. Minnesota (1920) 254 U.S. 325 (state statute).
5) Pierce v. U.S., supra, at p.273.

> danger, may conclude that suppression of divergent opinion is imperative; because the emergency does not permit reliance upon the slower conquest of error by truth. And in such emergencies the power to suppress exists."(1)

In the interval between those decisions and the review of the Hartzel conviction, "clear and present danger" had become the standard test of constitutionality where First Amendment freedoms are involved. The dictum of Mr. Justice Murphy in the Hartzel case has been generally considered as confirming the applicability of the test to the review of convictions under the Espionage Act.[2]

.. .. ..

A second type of criminal security statute is that which prohibits a certain specified type of conduct or speech, rather than prohibiting all activity detrimental to specified war functions, as was done by the Espionage Act. A familiar example of this type of legislation is the typical state criminal sydicalism statute, after which the federal Alien Registration Act of 1940 (the "Smith Act") was fashioned. The Smith Act makes it a federal offense "willfully and knowingly" to conspire to organize a group to "teach and advocate the overthrow and destruction" of the government "by force and violence", or personally to advocate or teach "the duty and necissity" of so acting. Although the Smith Act has not yet been interpreted by the Supreme Court, in the case of U.S. v. Dennis[3] it was held to be constitutional by the federal Court of Appeals

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1) Gilbert v. Minnesota (1920) 254 U.S. 325, 338.
2) See Antieau, "The Rule of Clear and Present Danger: Scope of its Applicability" (1950) 48 Mich. L.R. 811; Note (1949) 49 Col. L.R. 363. Compare Comment (1920) 29 Yale L.J. 337.
3) (1950) 183 F. (2d) 201. See Nathanson, "The Communist Trial and the Clear-and-Present-Danger Test" (1950) 63 Harv. L.R. 1167; Notes (1950) 99 Univ. of Pa. L.R. 407, (1950) 36 Va. L.R. 1090; Comment (1948) 1 Stan. L.R. 85.

for the Second Circuit.

The defendants in the Dennis case, (officials of the Communist Party of the United States) were charged with a conspiracy to organize that party for the proscribed purpose of teaching the forceful overthrow of government. In affirming their conviction, Judge Learned Hand reasoned that the First Amendment protects a statement of religious or political belief and an attempt to change the beliefs of others, but not a bare appeal to action:

> "The policy rests upon a skepticism as to all political orthodoxy, upon a belief that there are no impregnable political absolutes, and that a flux of tentative doctrines is preferable to any authoritative creed. It rests upon a premise as yet unproved, and perhaps incompatible with men's impatience of a suspended judgment when the stakes are high."(1)

> "The same utterance may be unprotected, if it be a bare appeal to action, which the Amendment will cover if it be accompanied by, or incorporated into, utterances addressed to the understanding, and seeking to persuade. The phrase 'clear and present danger' has come to be used as a shorthand statement of those among such mixed or compounded utterances which the Amendment does not protect. It is a way to describe a penumbra of occasions, even the outskirts of which are indefinable, but within which, as is so often the case, the courts must find their way as they can. In each case they must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" (2)

Applying this test, the court found that the menace of the defendants' conspiracy authorized their punishment for speech activities.[3]

(B) State legislation.

A state antecedent of the federal Espionage Act was the Minnesota statute of World War I which made it unlawful "to

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1) U.S. v. Dennis, supra, at p.207.
2) Ibid., p.212.
3) Compare Dunne v. U.S. (1943) 138 F. (2d) 137.

interfere with or discourage" the enlistment of men in the state or federal armed forces.[1] Affirming the conviction under this statute of a defendant who publicly criticized the declaration of war and who urged that the issue of conscription be put to a popular vote, the Supreme Court held that the legislation could be sustained either on the police power of the state or on its power to encourage the national war effort:[2] "(T)his country is one composed of many and must on occasions be animated as one ... the constituted and constituting sovereignties must have power of co-operation against the enemies of all."[3] Assuming that the Fourteenth Amendment guarantees include the freedom of speech, it was thought that under the conditions of war the defendant's words exceeded "an advocacy of policies or a censure of actions that a citizen had the right to make".[4] A majority of the Court seems to have relied upon the defendant's "purpose" as placing him beyond the protection of the Amendment, although Mr. Justice Brandeis in his dissenting opinion considered the presence of a "clear and present danger" as controlling.

This concept of the co-operation of states in the federal security function is also seen in the decision that a state may punish those who organize quasi-military units or parade with arms without permission of a licensing authority.[5] "To deny the power", the Court said, "would be to deny the right of the State to disperse assemblages organized for sedition and treason ... "[6] The principle is reflected, though more

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1) Act of April 20, 1917.
2) Gilbert v. Minnesota, (1920) 254 U.S. 325. See also Taylor v. Mississippi, (1943) 319 U.S. 583.
3) Gilbert v. Minnesota, supra, p.329.
4) Ibid., p.333.
5) Presser v. Illinois (1886) 116 U.S. 252.
6) Ibid., p.268.

dimly, in the affirmance of a state conviction for using the United States flag for advertising purposes. The Court declared, "it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected".[1] A recent judgment, however, emphasizes that states are restricted by the Fourteenth Amendment in their encouragement of federal patriotism. The defendants in that case were indicted under the laws of Mississippi for criticizing the national war effort, and in particular for distributing pamphlets by which citizens were advised not to salute the United States flag. Reversing their conviction, the Court held that the accused had acted within their constitutional right to communicate political "beliefs and opinions".[2]

.. .. ..

Anticipating the technique of the federal Alien Registration Act of 1940, a series of state statutes of the early part of this century outlawed what came to be known as "criminal syndicalism" - the advocacy of the overthrow of government by force or the practice or advocacy of the use of force to effect an economic or political change. The history of this legislation in the Supreme Court is relevant to a study of the federal war power, both from its resemblance to the recent federal statute and because the decisions amplify the controversy over "clear and present danger" as the measure of the freedom of utterance which the Fourteenth Amendment (or, in the case of federal legislation, the First Amendment) will protect.

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1) Halter v. Nebraska (1907) 205 U.S. 34, 43.
2) Taylor v. Mississippi (1943) 319 U.S. 583.

The state power to punish the advocacy of forceful overthrow of government is a facet of the power to punish the counselling of "disregard" or "actual breach" of the law, which has been sustained readily enough when freedom of utterance was not in issue.[1] Over the defense of the Fourteenth Amendment the Court has sustained the conviction of a publisher of Socialist propaganda which counselled industrial strife and "revolutionary mass action" as a step toward proletarian dictatorship,[2] and that of a former Socialist who helped organize the Communist Party of the United States for the purpose of teaching criminal syndicalism.[3] But it was held a violation of the Amendment to punish a labor organizer who predicted the inevitability of class struggle and who advocated a proletarian dictatorship but advanced no illegal means for securing it.[4] Even a group which teaches criminal syndicalism is free to conduct a meeting for the legitimate purpose of airing the grievances of organized labor.[5] Members of criminal syndicalist groups may not be penalized for such "peaceful and orderly opposition" to government as the mere raising of a red flag as a symbol of sympathy with the world Communist movement,[6] or for activities of enlisting new membership which do not entail incitement to violence or advocacy of illegal purposes of the group as "more than an ultimate ideal".[7]

Although the foregoing decisions emphasize that the Fourteenth Amendment is a limiting factor in the field of state security legislation, and it is settled that a substantially

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1) Fox v. Washington (1915) 236 U.S. 273.
2) Gitlow v. New York (1925) 268 U.S. 652.
3) Whitney v. California (1927) 274 U.S. 357. And see Burns v. U.S. (1927) 274 U.S. 328.
4) Fiske v. Kansas (1927) 274 U.S. 380.
5) De Jonge v. Oregon (1937) 299 U.S. 353.
6) Stromberg v. California (1931) 283 U.S. 359.
7) Herndon v. Lowry (1937) 301 U.S. 242.

equivalent guarantee of freedom of utterance has been assimilated from the First Amendment to the Fourteenth,[1] the Court has not unequivocally established a test whereby one may predict the protection which that freedom will afford in a particular security situation.

In the case of a prohibition of utterances harmful to a specified function of government, the "clear and present danger" test is supported by dicta in the most recent reviews of both state[2] and federal[3] legislation. This suggests that the dissenting opinion of Mr. Justice Brandeis in Gilbert v. Minnesota[4], rather than the majority opinion in that case, expresses the proper test. In the case of the prohibition of a specific type of utterance - as instanced by state criminal syndicalism statutes - the prevailing view is that the Court need only satisfy itself that the defendant advocated forceful overthrow in the "language of direct incitement", although more than "the expression of philosophical abstraction, the more prediction of future events" is required.[5] "(T)he question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration."[6] Although the "clear and present danger test has been vigorously espoused in minority opinions,[7] it has yet to be adopted by a majority of the Court in the case

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1) See Schneider v. State (1939) 308 U.S. 147, 160, and cases there cited.
2) Taylor v. Mississippi (1943) 319 U.S. 583.
3) Hartzel v. U.S. (1944) 322 U.S. 680.
4) (1920) 254 U.S. 325.
5) Gitlow v. New York (1925) 268 U.S. 652, 665.
6) Ibid., at p. 670.
7) Gitlow v. New York (1925) 268 U.S. 652 (dissenting opinion of Mr. Justice Holmes), Whitney v. California (1927) U.S. 357 (concurring opinion of Mr. Justice Brandeis).

of state legislation prohibiting a specified type of utterance.

To apply the "clear and present danger" test only in those cases "where the unlawful quality of words is to be determined not upon their face but in relation to their consequences"[1] seems to create a distinction without a substantial difference. In both types of legislation the "substantive evil" is obvious enough for the Court to estimate the probability that the defendant will cause it. Whether an utterance will be proscribed by reference to its textual content or by reference to the interests which it threatens largely depends on the whim of the legislature. Moreover, the "clear and present danger" test has come to represent a general reminder to the Court to remember its duty to enforce the First Amendment freedoms, rather than the precise delineation of a technical process of review. A tendency towards setting a more objective criterion than "intent" or "purpose" and a more articulate one than "language of direct incitement" may be observed in the recent review of a state criminal syndicalism statute. Mr. Justice Roberts as majority spokesman accepted the principle that the "clear and present danger" is not the controlling consideration. But in its place he used a nearly equivalent formula: "the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government ... " (italics supplied)[2]

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1) Cardozo, J., dissenting in Herndon v. Georgia (1935) 295 U.S. 441,451.
2) Herndon v. Lowry (1937) 301 U.S. 242, 258. See Note (1948) 61 Harv. L.R. 1215.

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The systematic relocation of enemy racial groups began within four months after the United States entered World War II. An executive order, reciting the existence of an emergency, had already authorized the army to designate and police areas of strategic importance (Exec. Order No. 9066, Feb. 19, 1942). The next step was to create the War Relocation Authority to evacuate groups of questioned loyalty - notably, persons of Japanese descent living on the West Coast (Exec. Order No. 9102, March 18, 1942). Congress in effect ratified these security measures by providing misdemeanor punishment for the unauthorized presence or movement of restricted persons (Act of March 21, 1942). The Court in four decisions[1] outlined a reaction of qualified approval to the myriad of military, administrative, and judicial orders issued under this legislation.

No constitutional bar was seen to the confinement of an American citizen of Japanese parentage to his home in Seattle during curfew hours.[2] The war power "extends to every matter and activity so related to war as substantially to affect its conduct and progress",[3] the Court reasoned, and conditions of apprehended invasion formed a "substantial basis" for the curfew. The classification on grounds of race rather than personal guilt was not thought to deny due process under the Fifth Amendment:

> "The adoption by the Government, and in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not

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1) Hirabayashi v. U.S. (1943) 320 U.S. 81, Yasui v. U.S. (1943) 320 U.S. 115, Korematsu v. U.S. (1944) 323 U.S. 214.
2) Hirabayashi v. U.S., supra.
3) Ibid., p.93.

> wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant." (1)

The Court also affirmed conviction of a citizen of Japanese ancestry, whose loyalty was undisputed, for violating an order which excluded him from his West Coast home.[2] Although "(n)othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety"[3] would justify the measure, it was held constitutional under the circumstances. The Court sensed a more acute threat to liberty, however, in an order which directed the confinement of Japanese-Americans in relocation centers. (Mr. Justice Roberts phrased it, "imprisonment in a concentration camp".[4]) Avoiding constitutional issues, a majority held as matter of statutory interpretation that the internment was valid only as a "war measure". Upon proof that the plaintiff citizen was detained, not because her loyalty was suspect, but because WRA feared that her removal to a civil community would occasion racial strife,[5] release on habeas corpus was directed. Assuming the validity of the original internment order, "(w)hen the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized".[6]

The tendency of the Court to test the relocation program step by step - first curfew, then exclusion, then detention - is an understandable one, although it was criticized in the minority opinions of those who were impatient to review the scheme as a whole.[7] Coupled with the fact that the final and most crucial judgment was made to turn upon a point of

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1) Hirabayashi v. U.S. (1943) 320 U.S. 81, 101.
2) Korematsu v. U.S. (1944) 323 U.S. 214.
3) Ibid., p.218.
4) Ibid., p.226 (dissenting opinion).
5) Ex Parte Endo (1944) 323 U.S. 283.
6) Ibid.,p.302.
7) See, e.g., dissenting opinion of Mr. Justice Roberts in Korematsu v. U.S. (1944) 323 U.S. 214, 225.

statutory interpretation, however, this tendency has left us with a great deal of uncertainty as to the constitutionality of the relocation of racial groups in wartime. At the threshold we are faced with the problem of whether a civil court may review the executive determination that such relocation is necessary. The Hirabayashi and Korematsu judgments suggest an affirmative answer. Procedurally, it would seem that courts may review by means of habeas corpus, as well as in the process of criminal trial for violation of the relocation regulations.[1] There is even more confusion with regard to the standard by which a court will review the executive and military judgment: the Court in the Hirabayashi case seemed to inquire whether there was any "substantial basis" in fact for the program,[2] while a majority in the Korematsu case subscribed to a test which would evaluate the reasonableness of the administrator's action, judged by the facts apparent to him at the time.[3] As an eminent writer has said, the former solution is to be preferred:

> "The general's good intentions must be irrelevant. There should be evidence in court that his military judgment had a suitable basis in fact".(4)

4

The federal power to control the admission and deportation of aliens, although not specifically conferred by the Constitution, is related to the foreign commerce and treaty powers, and has been said to be an inherent attribute of sovereignty.[5]

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1) But see dissenting opinion of Mr. Justice Jackson in Korematsu v. U.S. (1944) 323 U.S. 214.
2) Hirabayashi v. U.S. (1943) 320 U.S. 81, 95.
3) Korematsu v. U.S. supra, at pp. 218, 223-24.
4) Rostow, "The Japanese American Cases - a Disaster" (1943) 54 Yale L.J. 489, 516. See also Dembitz, "Racial Discrimination and the Military Judgment" (1945) 45 Col.L.R. 175.
5) U.S. ex.rel. Knauff v. Shaughnessy (1950) 338 U.S. 537, 542. U.S. ex.rel. Turner v. Williams (1904) 194 U.S. 279.

The naturalization power, however, is based on a specific clause of the Constitution.[1] Although statutes enacted under these powers are not necessarily dependent upon the war power for validity, they have frequently been framed as an auxiliary safe-guard of the peace and security of the nation. Accordingly there has developed a body of legislation, sympathetic in purpose with the war power, the constitutionality of which has been considered in much the same terms as that of enactments of a more obvious defense purpose.

(A) Exclusion and deportation.

The exclusion of aliens who seek to enter the United States is restrained by few constitutional inhibitions, if any. The alien's claim to admission, commonly styled a "privilege" rather than a "right", is probably subject to any security condition the federal government wishes to impose. No problem of delegation of power arises when Congress authorizes an executive agency to enforce exclusionary policies, for the power to exclude is thought to reside in the executive branch, not in the legislature.[2] As the alien is admitted solely as a matter of grace, he may not assert that the procedure outlined for his exclusion deprives him of "life, liberty, or property" without due process of law.[3] It seems that he is not entitled to a judicial determination of the issue of his alleged United States citizenship, contrary to the rule in the case of deportation.[4] The Supreme Court, however, will consider the

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1) U.S. Constitution, Art. I. Sec.8: "The Congress shall have Power ... to establish an uniform Rule of Naturalisation... throughout the United States".
2) U.S. ex.rel. Knauff v. Shaughnessy, supra.
3) U.S. ex.rel. Knauff v. Shaughnessy (1950) 338 U.S. 537.
4) U.S. ex.rel. Eichenlaub v. Shaughnessy (1950) 338 U.S. 521, 534 (dissenting opinion).

sufficiency of the emergency on which a particular exclusion program is based.[1]

In its simplest form, deportation is the means of enforcing an exclusionary policy, once the alien has entered the country illegally. For example, if the alien at the time of entry was an anarchist[2] or possessed literature in which the forceful overthrow of the government was advocated,[3] and if those circumstances made his entry illegal, he may be deported under appropriate legislation. Deportation in this connection, including incidental "detention or temporary confinement", is not considered to be criminal punishment within the meaning of the Sixth Amendment guarantee of trial by jury in criminal cases.[4] Nor is deportation a denial of due process of law per se;[5] but the courts will in each case inquire whether the procedure of deportation effected a denial of due process, and whether the evidence upon which the administrator found the alien to be deportable was substantial.[6] To the contention that the deportation of an alien for being an anarchist infringed his freedom of speech under the First Amendment, the Court replied that "those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise".[7]

In an effort to determine the alien's loyalty to the United States at the time of entry, the courts have frequently relied upon evidence of his conduct after entry. The danger

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1) U.S. ex rel. Knauff v. Shaughnessy, (1950) 338 U.S. 537.
2) U.S. ex rel. Turner v. Williams (1904) 194 U.S. 279.
3) U.S. ex rel. Vajtauer v. Commissioner (1927) 273 U.S. 103.
4) U.S. ex rel. Turner v. Williams (1904), supra. ✱
5) U.S. ex rel. Turner v. Williams, supra.
6) U.S. ex rel. Vajtauer v. Commissioner (1927) 273 U.S. 103.
7) U.S. ex rel. Turner v. Williams (1904) 194 U.S. 279, 292.

✱ Compare opinion of Mr. Justice Douglas in Bridges v. Wixon (1945) 326 U.S. 135.

to which this practice may conduce - that of employing deportation as a disguised form of criminal punishment, in which the constitutional guarantees of criminal trial are ignored - is enhanced by legislation which authorizes deportation for the alien's misconduct after entry.[1] It is clear, however, that "(t)here is no question as to the power of Congress to enact a s atute to depart aliens because of past misc nduct".[2] The Supreme Court has sanctioned such deportation under two types of statutes: (1) that which specifies certain offenses for which an alien may be deported, such as possession of criminal syndicalist literature,[3] advocacy of the forceful overthrow of government,[4] membership in a group which so advocates,[5] and violation of various security statutes;[6] and (2) that which allows administrative delegates to determine deportability, as by finding that the alien in question is an "undesirable resident"[7] or "dangerous" to national security.[8]

In these cases it has been reaffirmed that deportation is not criminal punishment, so that the prohibition against *ex post facto* legislation does not a ply.[9] The Court, however, will inquire into whether the deportation procedure afforded due process of law, providing notice, hearing, and some support for the finding in evidence.[10] The prospective deportee is entitled to a judicial trial *de novo* upon the issue of his United States citizenship, if he asserts it.[11] In

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1) See, e.g., U.S. ex rel. Vajtauer v. Commissioner, supra.
2) U.S. ex rel. Eichenlaub v. Shaughnessy (1950) 338 U.S. 521, 529.
3) U.S. ex rel. Bilokumsky v. Tod (1923) 263 U.S. 149, U.S. ex rel. Tisi v. Tod (1924) 264 U.S. 131.
4) Kessler v. Strecker (1939) 307 U.S. 22.
5) Bridges v. Wixon (1945) 326 U.S. 135.
6) U.S. ex rel. Eichenlaub v. Shaughnessy (1950) 338 U.S. 521.
7) Mahler v. Eby (1924) 264 U.S. 32.
8) Ludecke v. Watkins (1948) 335 U.S. 160.
9) Mahler v. Eby, supra.
10) See also the dissenting opinion of Mr. Justice Douglas in Ludecke v. Watkins, supra at p.184.
11) Kessler v. Strecker (1939) 307 U.S. 22.

the case of deportation by administrative finding, the courts will release the alien if no finding has in fact been made.[1]

The language of more recent decisions betrays a stiffening resistence to the use of the deportation power to expel aliens for activities which citizens are free to carry on. Conceding that deportation is technically not criminal punishment, the Court has discussed the hardship which it entails, and has emphasized that aliens resident in the United States, as well as citizens, are protected by the First Amendment.[2] One justice has suggested that deportation orders based upon conduct protected by the First Amendment should not be enforced unless it is shown that the continued presence of the alien within the United States presents a "clear and present danger" to national security.[3] The Court's concern for individual liberty is also reflected in its policy of construing deportation statutes in favor of the alien. When an act directed the deportation of aliens "who, at any time after entering", developed loyalties for which they could have been excluded, the Court required that the forbidden loyalties be proved as of the time of the hearing.[4] Subversive "affiliation" within the terms of a statute was interpreted to mean more than co-operation with a subversive group in legitimate trade union activities.[5]

Respect for the authority of the President as director of the federal war effort as well as the conductor of foreign affairs has discouraged the Court from questioning his decision to deport enemy aliens for security reasons. The problem arose under the Alien Enemy Act of 1798, which provides that in the

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1) Kahler v. Eby, supra.
2) Bridges v. Wixon (1945) 326 U.S. 135.
3) Concurring opinion of Mr. Justice Murphy in Bridges v. Wixon (1945) 326 U.S. 135.
4) Kessler v. Strecker (1949) 307 U.S. 22.
5) Bridges v. Wixon, supra. But compare U.S. ex rel. Eichenlaub v. Shaughnessy (1950) 338 U.S. 521.

event of a proclaimed emergency such as war or invasion, nationals of enemy countries "shall be liable to be apprehended, restrained, secured, and removed as alien enemies", as the President shall direct. During World War II the President invoked this power under the act to arrest enemy nationals, to have their subversive character determined by administrative tribunals, and to intern those found to be disloyal. After hostilities but during the continuance of a proclaimed emergency, he ordered the deportation of those internees who should be found "dangerous" by the Attorney-General, acting as the President's delegate. In Ludecke v. Watkins [1] the Supreme Court denied the petition for habeas corpus of an internee whose deportation as a "dangerous" enemy alien had been ordered. The decision may be described as representing the Court's judgment that under the circumstances of continued emergency, such summary deportation did not deny due process. There is language in the majority opinion of Mr. Justice Frankfurter, however, which suggests that the President's decision to institute a deportation program and the decision of his delegate that a particular internee should be deported are not subject to judicial review during the emergency, whether due process is denied or not:

> "A war power of the President not subject to judicial review is not transmuted into a judicially reviewable action because the President chooses to have that power exercised within narrower limits than Congress authorized." (2)

> "Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined. (3)

It was under that interpretation that the majority opinion was attacked in the vigorous dissent of four justices who felt that due process had been denied the petitioner. It was reasoned that in peacetime the Court may inquire into the

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1) (1948) 335 U.S. 160.
2) Ibid., p.166.
3) Ibid., p.172.

adequacy of the procedure whereby an alien is found to be deportable, and that therefore the Court in wartime may decide whether a given emergency justifies dispensing with the elements of due process. "It is well established", one justice reminded, "that the war power does not remove Constitutional limitations safeguarding essential liberties."[1)]

(B) Registration of aliens.

The federal authority over foreign affairs includes the Congressional power to require the registration of aliens for security reasons. The only serious constitutional problem which alien registration has presented to the Supreme Court arose when both Congress and the Pennsylvania legislature, actuated largely by the threat of World War II, passed alien registration acts. Although the federal statute did not in terms purport to abrogate the state law, its scheme of registration differed by embracing a wider age-group, omitting the requirement that registrants carry identification cards and re-register annually, and insuring the secrecy of the information received. The Court concluded that the Pennsylvania statute, otherwise valid under the state police power, was "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress",[2)] and affirmed the granting of an injunction against its enforcement.

(C) Naturalization and denaturalization.

"Naturalization is a privilege, to be given, qualified or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which

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1) Ibid., p.67 (dissenting opinion of Mr. Justice Douglas).
2) Hines v. Davidowitz (1941) 312 U.S. 52, 67. See also Viereck v. U.S. (1943) 318 U.S. 236, and Fiswick v. U.S. (1946) 329 U.S. 211.

Congress imposes."[1] It is clear that Congress may require that the prospective citizen engage to support the future war effort of his adopted country.[2] The Court has split, however, on the issue of whether a requirement of willingness to bear arms should be read, as a matter of statutory interpretation, from such ambiguous preliminaries as the applicant's oath "that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same". For many years a majority of justices considered that Congress had thereby barred pacifists and conscientious objectors from naturalization: "That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution."[3] That line of cases was overruled, however, in a decision which relied heavily upon the policy in favor of freedom of thought which is expressed in the First Amendment.[4]

The theory of denaturalization in the United States is that the original decree of naturalization was based upon some error which rendered it void, not that the citizen is thereby punished for his disloyal conduct subsequent to naturalization. This theory is adequate when the error is related to an objectively ascertainable, antecedent fact, such as the applicant's previous residence.[5] When the operative antecedent fact is the applicant's state of mind, however, and it is made to be *prima facie* provable by his conduct after naturalization, the theory is less appropriate.[6] In the case of denaturalization for lack of loyalty to the United States at the time of naturalization,

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1) U.S. v. Macintosh (1931) 283 U.S. 605, 615. See Wambaugh, "The Oath Required for Naturalization" (1931) 6 Tul.L.R.131.
2) U.S. v. Schwimmer (1929) 279 U.S. 644.
3) Ibid., p.650. See also U.S. v. Bland (1931) 283 U.S. 636, U.S. v. Macintosh, supra.
4) Girouard v. U.S. (1946) 328 U.S. 61. Noted (1945) 46 Col. L.R. 886.
5) See, e.g., Johannessen v. U.S. (1912) 225 U.S.227.
6) See, e.g., Luria v. U.S. (1913) 231 U.S.9.

there is a palpable danger that post-naturalization conduct will become the real reason for revocation of citizenship, rather than mere evidence of a former state of mind.[1]

Alert to prevent the use of denaturalization as a disguised inquest of treason, the Supreme Court is actuated by the feeling that, once citizenship papers have been awarded, naturalized Americans should have all the political rights of the native born, including the protection of the First Amendment in criticizing the government. "It may be doubted" one Justice said, "that the framers of the Constitution intended to create two classes of citizens, one free and independent, one haltered with a lifetime string tied to its status."[2] Moreover, the Court is vitally concerned that Congress should not use the federal courts as naturalization agencies in a fashion inconsistent with the concept of an independent judiciary which is read from Article III. Although naturalization itself is a legislative function, Congress has enlisted the aid of the judicial function, in empowering courts to grant and to revoke decrees of naturalization. It is considered that the normal rules of res judicata do not apply to a naturalization decree, which may be cancelled at the suit of the government for fraud in the procurement.[3] The limiting effect of Article III has been emphasized by Mr. Justice Rutledge:

> "Congress has plenary power over naturalization ... Congress has, with limited exceptions, plenary power over the jurisdiction of the federal courts ... But to confer the jurisdiction and at the same time nullify entirely the effects of its exercise are not matters heretofore thought, when squarely faced, within its authority".(4)

> " ... conceding that the power to revoke exists, and rightly should exist to some extent, the question remains whether the power to admit can be delegated

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1) See Baumgartner v. U.S. (1944) 322 U.S. 665. And see Note (1944) 44 Col.L.R. 736.
2) Schneiderman v. U.S. (1943) 320 U.S. 118, 167 (concurring opinion). See also Knauer v. U.S. (1946) 328 U.S. 654, passim.
3) Lurie v. U.S. (1913) 231 U.S. 9. Compare Schneiderman v. U.S. (1943) 320 U.S. 118.
4) Schneiderman v. U.S., supra, pp.168-69.

to the courts in such a way that their determination, once made, determines and concludes nothing with finality."(1

It is settled, however, that a suit to cancel is not an action at common law or a criminal proceeding within the purport of the procedural guarantees of the Constitution[2] or the prohibition against ex post facto legislation.[3]

The principal result of these decisions is the establishment of certain evidentiary and procedural safeguards in the cancellation of citizenship for fraud in the procurement. The Court has imposed upon the government, as plaintiff in a cancellation proceeding, various onerous judge-made standards of proof that the alleged disloyalty did in fact exist. A majority have supported the standard of "clear, unequivocal, and convincing" proof as opposed to a simple weight of the evidence,[4] at least in the case of a contested proceeding.[5] This unusual formula has been described as substantially equivalent to the requisite proof in criminal cases ("beyond a reasonable doubt"),[6] and may represent an approach toward the rubric of "clear and present danger".[7] The Court will also investigate whether a particular denaturalization proceeding denied due process of law,[8] an attitude of review which would seem to apply whether Congress chose to effect denaturalization by means of administrative tribunals or through the federal courts.

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1) Ibid., p.167.
2) Ibid.
3) Johannessen v. U.S. (1912) 225 U.S. 227.
4) Schneiderman v. U.S., supra.
5) But see dissenting opinion of Mr. Justice Reed in Klapprott v. U.S. (1949) 335 U.S. 601, 624; and compare the opinion of Mr. Justice Frankfurter in Baumgartner v. U.S. (1944) 322 U.S. 665, 675-76.
6) See the opinion of Mr. Justice Black in Klapprott v. U.S., supra.
7) Compare Schneiderman v. U.S. (1943) 320 U.S. 118, 157-58.
8) Klapprott v. U.S., supra.

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An application of the federal war power is also seen in legislation which seeks to condition the granting of federal benefits upon the recipient's political loyalty or devotion to the national security. Just as federal employees may be prevented from taking "any active part in political management or in political campaigns",[1] trade union leaders who seek to be recognized as collective bargaining agents by the National Labor Relations Board may constitutionally be required to swear that they are not members of the Communist Party.[2] The Court has evenly divided, however, on the issue of whether or not they may be required to deny their belief in the overthrow of government by force or "by any illegal or unconstitutional methods".[3]

On the other hand, the Court has been quick to deny Congress the power to punish subversive conduct by legislative fiat. Following the Civil War, for example, Congress required that members of the bar of the Supreme Court who wished to continue their practice should give an oath of past and present loyalty to the Union. The Court held that the test oath, applied to an attorney who had served the Confederacy, was unconstitutional as a bill of attainder: "Expulsion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for

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1) United Public Workers of America v. Mitchell (1947) 330 U.S.75. See also Oklahoma v. U.S. Civil Service Commission (1947) 330 U.S.127. The decisions apply U.S. Constitution, Art.I, Sec.9: "No bill of attainder ..... shall be passed".
2) American Communications Association v. Douds (1950) 339 U.S.382, noted (1950) 99 Univ. of Pa. L.R. 409.
3) Ibid. See also Osman v. Douds (1950) 339 U.S.846.

such conduct".[1] More recently the stigma of "bill of attainder" was attached to sections of a World War II appropriation bill which directed that no disbursement should be made for the future salaries of named employees of the federal executive department, who had been declared subversive by the House Un-American Activities Committee.[2]

The case of U.S. ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson[3] involved the interesting borderline situation of the discontinuance of a federal benefit, on the ground of subversive activities, by means of an administrative hearing rather than by direct act of Congress. It was held that Congress could authorize revocation of the second-class mailing privilege of a newspaper company which had printed editorials violently attacking the Allied cause in World War I. "Freedom of the press may protect criticism and agitation for modification or repeal of laws", the Court said,"but it does not extend to protection of him who counsels and encourages the violation of the law as it exists".[4] It is significant, however, that the Court inquired at length into whether the hearing afforded due process, and whether there was a substantial basis in evidence for the administrative finding. It seems probable that, were a similar case presented today, the Court would investigate in greater detail whether there had been a denial of the publisher's freedom of speech under the First Amendment. The case would seem appropriate for an application of the "clear and present danger" test. As Mr.Justice Holmes pointed out in his dissenting judgment,'the use of

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1) Ex Parte Garland (1866) 4 Wall.333, 377. See O'Brien, "Loyalty Tests and Guilt by Association" (1948) 61 Harv. L.R.592.
2) U.S. v. Lovett (1946) 328 U.S.303.
3) (1921) 255 U.S.407.
4) Ibid., p.414.

the mails is almost as much a part of free speech as the right to use our tongues".[1]

This federal legislation has its counterpart in the attempts of states to use the "police power" indirectly to promote national security and patriotism. The analogy is clearly seen in the case of state statutes regulating the practice of professions. Thus membership in a state bar may be denied on the ground that the applicant is a conscientious objector.[2] But it was held unconstitutional for a state, shortly after the Civil War, to limit the right to perform the offices of the church to clergymen who had taken an oath of past and present loyalty to the Union.[3]

In the field of education the states possess a broad reserved authority for indirect security legislation, without parallel among federal powers. It is by virtue of this authority that a state may impose compulsory military training upon all able-bodied male undergraduates of a state university.[4] "The States are interested in the safety of the United States, the strength of its military forces, and its readiness to defend them in war and against every attack of public enemies."[5] States may not compel attendance at state-owned schools,[6] but they may reasonably regulate privately-owned schools, as by requiring "that teachers shall be ... of patriotic disposition, that certain studies plainly essential to good citizenship must be taught".[7] Although privately-owned schools may be required to teach the English language, states may not, from motives of patriotism, effect an unreasonable discrimination

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1) U.S. ex rel. Milwaukee Social Democratic Publishing Co. v Burleson (1921) 255 U.S. 409, 437.
2) In Re Summers (1945) 325 U.S. 561.
3) Cummings v. Missouri (1866) 4 Wall. 277. Compare Davis v. Beason (1890) 133 U.S. 333.
4) Hamilton v. Regents (1934) 293 U.S. 245.
5) Ibid., p.260.
6) Pierce v. Society of Sisters (1923) 268 U.S. 510.
7) Ibid., p.534.

against the teaching of foreign tongues. Thus the legislative requirement that only children who have passed the eighth grade may receive instruction in foreign languages was held to violate the Fourteenth Amendment, at least "in time of peace and domestic tranquility".[1] The Supreme Court has also held it unconstitutional to compel students of state-owned schools to take part, against their scruples, in a daily ritual of saluting and pledging allegiance to the United States flag.[2] "Neither our domestic tranquility in peace nor our martial effort in war", it was thought, "depend (sic) on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation."[3]

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We have seen that in a variety of situations Congress may use the war power to promote the internal security of the United States. Persons who seek to interrupt the war effort or who teach the over throw of the government by force may be punished under this broad security power. Persons whose racial stock is that of an enemy nation may be required to submit to curfew laws, zoning regulations, and internment. Congress may use other constitutional powers in the interest of national security, as well. The exclusion and de ortation of aliens, the registration of aliens, and the procedures of naturalization and denaturalization have served this purpose. Congress may also condition the grant of federal benefits and may regulate federal employment so as to promote patriotism and political loyalty.

The power to enact some of this legislation belongs

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1) Meyer v. Nebraska (1923) 262 U.S. 390, Bartels v. Iowa (1923) 262 U.S. 404. And see Yu Cong Eng v. Trinidad (1926) 271 U.S. 500, Farrington v. Tokushige (1927) 273 U.S. 284 Steinback v. Mo Hock Ke Lok Po (1949) 336 U.S. 368.

2) West Virginia State Board v. Barnette (1943) 319 U.S. 624, reversing Minersville School District v. Gobitis (1940) 310 U.S. 586.

3) West Virginia State Board v. Barnette, supra, at p.644 (concurring opinion).

exclusively to Congress. Laws regulating exclusion, deportation, naturalisation and denaturalization would seem to fall within that category. But a great deal of security legislation is within the concurrent power of the state legislatures, for example, the registration of aliens and the punishment of seditious utterances. In addition we have seen that states may use their reserved powers to promote national security, on the principle that the defense of the country as a whole is of concern to each state. The state authority over education in particular has been a prolific source of security legislation.

Frequently the Supreme Court has considered in isolation the constitutional problems which arise from the application of individual security measures. For example, a denaturalization law which was obviously framed to aid the war effort is generally reviewed in the light of other denaturalization cases, rather than in comparison with other cases of security legislation. This tendency to fragmentize, rather than to generalize and assimilate, constitutional doctrines concerning security legislation may be attributed to the fact that the Constitution creates no single "security power". The various statutes which we have considered together as "security measures" were in fact passed under several different legislative powers, both of Congress and the state legislatures. They are alike only in the purpose which they serve. It is not surprising, therefore, that the Court classifies them according to the legislative power on which they were based and the legislative body which passed them.

We may question the wisdom, however, of exaggerating the differences between various types of security measures. The statutes which we have considered in this chapter are more than a miscellaneous collection of laws on denaturalization,

federal employment, state education, etc. They were all passed to promote the internal security of the United States. Their chief significance to the federal system derives from their being applied in concert; it is that combined impact which makes wartime a period of constitutional crisis. A realistic attitude of judicial review will take into consideration the qualities which these measures have in common. Perhaps it would be helpful to regard them all as manifestations of a single function of government, which increases in power with the emergency and which is directed toward national security. At least it should be emphasized that they are not unrelated phenomena.

Just as consideration of the origin of security measures encourages the Court to overestimate their dissimilarity, the application of constitutional limitations demonstrates that they pose similar problems. For this great variety of security legislation has involved the interpretation of only a few constitutional limitations. Minor concepts like "bill of attainder" aside, the chief limitations which have been read against security legislation are the First Amendment, the due process clause of the Fifth Amendment, and the due process clause of the Fourteenth Amendment. Further to simplify the matter, the trend of decision has been to assimilate the guarantees of the First and Fifth Amendments with that of the Fourteenth. We may therefore think of security legislation, whether state or federal, as involving principally an interpretation of (1) the First Amendment freedoms and (2) due process of law. Indeed, the growing acceptance of the "clear and present danger" test as a measure of the First Amendment freedoms makes it possible to characterize them collectively as the "freedom of expression" or "freedom of conscience". We may generalize

further and say that the main constitutional limits of the security function are (1) the policy in favor of freedom of expression, and (2) the policy in favor of fair procedure in the administration of government.

It is submitted that the Court should not ignore these opportunities of generalizing the problems which security measures involve into broad issues of constitutional law. The concept of "freedom of the press", for example, is a principle which runs through many areas of constitutional law. When asked to consider the First Amendment in restrictionof a particular security measure, the Court should remind itself that the legislation under review, regardless of the constitutional power under which it was passed and the lawmaking body which passed it, links up with all other legislation restrictive of free speech. Instead of fragmentizing the problem at hand into a question of the federal power to revoke second-class mailing privileges, for example, or the state power to punish those who advocate the forceful over throw of government, the Court will then generalize it into a problem of the scope of freedom of the press, or perhaps of the collective "freedom of expression". Surely th a more thoughtful attitude of judicial review makes for a more uniform, less capricious interpretation of the Constitution, and for a more realistic awareness of the total impact of the security function. If under the organic law the Court may not postulate a general "security power", at least it may think in terms of a few general restrictions on legislation which is passed for the purpose of security.

Chapter XI: The Federal War Power and Economic Regulation

The aspects of the federal war power which we have considered involve very little displacement of state legislative power. When Congress legislates to draft men, to establish military tribunals, and to promote loyalty to the national government, it leaves untouched the vast area which the Tenth Amendment recognized as belonging to the state legislatures. The problem in the cases which we have considered is generally one of drawing the line between the war power of the federal government and the constitutional rights of the individual.

The waging of modern war, however, demands the most complete regulation of the entire domestic economy. This involves federal enforcement of price control, rent control, restrictions on the consumption of intoxicants, and other measures which are thought to be within the state "police power" in peacetime. In reviewing such legislation, the courts must weigh the constitutional rights of states as well as individuals.

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Although the Supreme Court has not considered the problem in such detail as has the High Court of Australia,[1] the power of Congress to institute rationing and anti-inflation legislation in wartime cannot be doubted. The only measure of this sort to be held unconstitutional was a section of the Food Control Act of 1917 (the Lever Act) which made it unlawful for dealers in staple commodities to make any "unjust or unreasonable

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1) See supra, Chapter IV.

rate or charge". It was thought that the statute did not afford a sufficiently ascertainable standard of guilt to be consistent with the procedural guarantees of the Fifth and Sixth Amendments.[1]

On all other constitutional points the Court has sustained this type of legislation as a legitimate application of the war power. The Emergency Price Control Act of 1942 in particular was attacked for its broad delegation of power to the administrator, who was authorized to make such regulations as "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act". A majority of the Court ruled that the wide canon of discretion was essential to a flexible system of control.[2] "In terms of hard-headed practicalities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations, area by area throughout the land, and then to determine in each case what should be done."[3]

The Court has recognized no constitutional immunity of state governments which exempts their business activity from economic regulation in wartime. So it was held that a state could not sell timber from its school land[4] and that a county could not auction off a surplus tractor[5] for more than the maximum price fixed by the federal administrator. The Court reasoned that state functions "having the incidents of similar enterprises usually prosecuted for private gain" are subject to the federal war power.[6]

Although the due process clause generally protects contract

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1) U.S. v. Cohen Grocery (1921) 255 U.S. 81.
2) Yakus v. U.S. (1944) 321 U.S. 414, Bowles v. Willingham (1944) 321 U.S. 503. See Freund, "The Emergency Price Control Act of 1942: Constitutional Issues" (1943) 9 Law and Contemp. Prob. 77.
3) Bowles v. Willingham (1944) 321 U.S. 503, 515.
4) Case v. Bowles (1946) 327 U.S. 92.
5) Hulbert v. Twin Falls County (1946) 327 U.S. 103
6) Case v. Bowles (1946) 327 U.S. 92, 101.

and property rights, it does not invalidate the fixing of prices and rents at a reasonable level.[1] The Court has been reluctant to specify just what a "reasonable" level is. It has been said that a vendor may not complain if he is allowed a price equal to the "just compensation" which the government would be obliged to pay on requisitioning his goods.[2] But the fact that price control has reduced the market value of goods does not mean that there has been a "taking" under the Fifth Amendment, although the vendor is also compelled to sell the goods to certain buyers.[3]

Unlike the High Court of Australia,[4] the Supreme Court has never declared an economic control to be unconstitutional because the emergency upon which it was based had vanished. But the judgments of the Supreme Court clearly adopt the doctrine that the constitutional warrant for such regulation fluctuates with the degree of emergency and disappears in normal times. Certainly the Court is aware that the controls are complex and burdensome. "The program of price control," wrote Mr. Justice Douglas, "inaugurated probably the most comprehensive legal controls over the economy ever attempted."[5] "Great respect" will be accorded to the finding of Congress or the administrator that an emergency in fact exists.[6] But the Court will evaluate for itself the extent of the particular evil, such as a housing shortage or the danger of speculation, which the legislation concerns.[7]

The Court has said that the cessation of hostilities does

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1) Block v. Hirsh (1921) 256 U.S. 135, Woods v. Miller Co.(1948) 333 U.S. 138.
2) Highland v. Russell Car Co. (1929) 279 U.S. 253. And see Bowles v. Willingham (1944) 321 U.S. 503, 519.
3) Norrisdale Coal Co. v. U.S. (1922) 259 U.S. 188, Pine Hill Coal Co. v. U.S. (1922) 259 U.S. 191.
4) See supra, Chapter IV.
5) Fleming v. Mohawk Wrecking Co.(1947) 331 U.S. 111, 122, and see Stuart v. Bowles (1944) 322 U.S. 398.
6) See Block v. Hirsh (1921) 256 U.S. 135, 154, Chastleton Corp. v. Sinclair (1924) 264 U.S. 543, 548.
7) See, e.g., Highland v. Russell Car Co. (1929) 279 U.S. 253.

not preclude the continuance of controls to alleviate those shortages and inflationary pressures which originated during the war.[1] But some results of war, which persist so long after the conflict as to become a permanent feature of the economy, are too remote to support a continued exercise of the war power. "If about all that remains of war conditions is the increased cost of living, that is in itself not a justification," wrote Mr. Justice Holmes of rent control in the District of Columbia following World War I.[2] The same position was taken by Mr. Justice Jackson, concurring in the extension of rent control in critical areas throughout the United States after World War I :

> "I would not be willing to hold that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended. I cannot accept the argument that war powers last as long as the effects and consequences of war, for if so they are permanent - as permanent as the war debts." (3)

.. .. ..

The most significant constitutional issue which arose under the Emergency Price Control Act of 1942 related, not to the substantive power of Congress to control prices, but to the sufficiency of the enforcement provisions of the act under the due process clause. Congress had provided that any person who was affected by regulations or orders promulgated under the act might challenge their validity by means of a "protest" filed with the administrator. Should the protest be denied, the challenge cou d be continued in the form af a "complaint" before a special federal tribunal, the "Emergency Court of Appeals", with eventual review by the Supreme Court. The act required that invalidity be asserted within a specified ti e after the regulation or order took effect. Moreover, the

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1) Fleming v. Mohawk Wrecking Co.(1947) 331 U.S. 111, 116; Woods v. Miller Co. (1948) 333 U.S. 138, 143.
2) Chastleton Corp. v. Sinclair (1924) 264 U.S. 543, 548.
3) Woods v. Miller Co. (1948) 333 U.S. 138, 147.

Emergency Court had exclusive jurisdiction to investigate invalidity. The issue could not be raised, for example, as a defense to a prosecution in another court for violation of a regulation.

A majority of the Court held that persons affected by the regulations had been accorded a fair opportunity to question their validity.[1] "(W)here Congress has provided for judicial review after the regulations or orders have been made effective," they concluded, "it has done all that due process under the war emergency requires."[2] As to the provision for exclusive jurisdiction of the Emergency Court to inquire into validity, it was reasoned that no constitutional inhibitions restrict the Congressional power to allot jurisdiction over "cases arising" among existing federal and state courts, or to create inferior federal courts of limited jurisdiction.[3] To deny a defendant the opportunity to assert the/validity of a regulation as a defense to the charge of violating it, was not thought to infringe the procedural guarantees of the Sixth Amendment.

It must be remembered that the Emergency Court had exclusive jurisdiction only to determine the "validity" of a regulation or order, i.e., whether or not there was some statutory authority for its issuance. The constitutionality of a regulation or order, or of the act itself, was an issue which could be raised in any court.[4] Although Congress has wide powers to alter the jurisdiction of federal and state courts

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1) Lockerty v. Phillips (1943) 319 U.S. 182, Hecht Co. v. Bowles (1944) 321 U.S. 321, Yakus v. U.S. (1944) 321 U.S. 414, Bowles v. Willingham (1944) 321 U.S. 503.
2) Bowles v. Willingham, supra.
3) See U.S. Constitution, Art. III.
4) Case v. Bowles (1946) 327 U.S. 92. Compare Bowles v. Seminole Rock Co. (1945) 325 U.S. 410, 413-19.

in wartime,[1] it is submitted that they do not extend to denying the criminal defendant an opportunity to assert the unconstitutionality, as distinguished from the invalidity, of the legislation under which he is prosecuted.[2]

2

The manufacture and sale of alcoholic beverages, a subject of considerable state regulation in peacetime, may be brought within federal control in circumstances of war emergency. Acting under powers delegated to him in the Lever Act, the President during World War I prohibited the manufacture of "intoxicating" spirits. His order was supplemented by the War-time Prohibition Act of 1918, passed a few days after the Armistice, which prohibited the sale of distilled spirits for beverage purposes and the manufacture of any "intoxicating" malt or vinous drink. The statute recited the purpose of conserving the manpower of the nation and of increasing efficiency in war production. It was designed to take effect after some seven months of grace, and to continue until the end of demobilization, as proclaimed by the President.

The Supreme Court sustained the act as an emergency measure, conceding "prohibition of the liquor traffic ... to be an appropriate means of increasing our war efficiency".[3] Congress had not effected a taking of private property within the meaning of the Fifth Amendment, the Court ruled, although individuals were prevented from selling liquor in their possession which had been lawfully manufactured before the act

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1) See, e.g., Testa v. Katt (1947) 330 U.S. 386, Mayfield v. Richards (1885) 115 U.S. 137, Mitchell v. Clark (1884) 110 U.S. 633.
2) See dissenting opinion of Mr. Justice Rutledge in Yakus v. U.S., supra, and his concurring opinion in Bowles v. Willingham, supra.
3) Hamilton v. Kentucky Distilleries (1919) 251 U.S. 146, 157.

was passed.

Enforcement of the Prohibition Act was made more difficult by a decision[1] which interpreted the statute as requiring that the "intoxicating" quality of the beverage in question be alleged and proven in each case. Congress replied with the Volstead Act of 1919, which defined an "intoxicating" beverage as one containing more than 0.5% alcohol. A majority of the Court in Jacob Ruppert v. Caffey[2] sustained this prescription under the "implied war power over intoxicating liquors". In the Court's view the alternative of proving intoxicability would have unreasonably hamstrung enforcement. "Since Congress has power to increase war efficiency by prohibiting the liquor traffic, no reason appears why it should be denied the power to make its prohibition effective."[3] Although the Volstead Act, unlike the War-Time Prohibition Act, allowed no period of grace for the sale of stocks on hand, a majority of the Court regarded it as supported by the continuing postwar economic emergency. A minority of three, however, concluded that the act gave no "direct and appreciable effect" and bore no "reasonable relationship" to demobilization.

The ratification of the Eighteenth Amendment, which took effect in January, 1920, spared the Court from having just how far into the postwar period prohibition could be continued under the war power. That amendment incorporated prohibition into the Constitution, and gave Congress and the states concurrent enforcement powers.[4]

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Some industries are so important to the war economy that

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1) U.S. v. Standard Brewery (1920) 251 U.S. 21.
2) (1921) 251 U.S. 264.
3) Ibid., p.301.
4) The Eighteenth Amendment was repealed by the Twenty-first Amendment in December, 1933.

it becomes necessary for the federal government to regulate their activities in greater detail than is possible through ordinary anti-inflation legislation. It is within the war power for the government to take over the operation of these industries for the period of emergency. Whether the taking over is accomplished by putting a federal administrator in nominal command, or whether it consists of replacing all private employees with United States troops, depends upon the exigency of each case. The federal government is said to be in possession and control of the "seized" industry.[1] The legal position of the federal administrator has been compared with that of a general receiver[2] and that of a private employer.[3] It has even been suggested that the government in the seizure cases is invoking an aspect of the war power which is like the power of eminent domain,[4] and that the government in a sense acquires title and ownership in the seized premises.[5] But the judgments do not treat "just compensation" as a problem, which means that temporary government control of an industry is not a "taking" of property within the prohibition of the Fifth Amendment.[6]

Although there are dicta which suggest that the government may operate a wide variety of business organizations in wartime,[7] the only acts of control which the Court has examined in detail were the seizures of transportation and communication facilities

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1) See Northern Pacific Co. v. North Dakota (1919) 25 U.S. 135, 148; U.S. v. United Mine Workers (1947) 330 U.S. 258, 288.
2) See Missouri Pacific Co. v. Ault (1921) 256 U.S. 554, 559; U.S. v. United Mine Workers, supra, at p.320.
3) See U.S. v. United Mine Workers, supra, at pp.287,329 Compare the concurring opinion of Mr. Justice Frankfurter at p.320, and the dissenting opinion of Mr. Justice Murphy at p.337.
4) See North Carolina Co. v. Lee (1922) 260 U.S. 16, 17; Dupont Co. v. Davis (1924) 264 U.S. 456, 462; Virginian Co. v. Mullens (1926) 271 U.S. 220, 227.
5) See U.S. v. United Mine Workers (1947) 330 U.S. 258, 284-5.
6) See infra, Chapter XII.
7) See, e.g., U.S. v. Bethlehem Steel Corp. (1942) 315 U.S. 289, 314.

during World War I and of coal mines during World War II. Each seizure was made by the President, acting as Commander-in-Chief and on the authorization of Congress. In each case he recited a purpose connected with the war emergency. In each case the Supreme Court held the seizure to be within the power of the federal government.[1]

Constitutionally, federal operation of an industry amounts to more than Congress' stepping into a legislative void under authority of the war power. The federal operating agency is protected by certain immunities and exemptions which the displaced private corporation did not enjoy. Consequently the states lose, for the period of the emergency, an area of legislative competence. For example, it was considered a lawful incident of the operation of railroads and telephone systems for the federal administrator to promulgate intrastate rates for those services, invalidating conflicting state-prescribed rates.[2] Because Congress had consented for the United States as operator of the railroads to be sued only on compensatory claims, the Director-General of Railroads was not liable in actions to enforce state statutory penalties.[3] Nor was he bound by a state statute which made it illegal to compromise a cause of action by direct negotiation with the plaintiff rather than by consultation with his attorney.[4] The Director-General could also sue in the state courts on behalf of the controlled railroad without being subject to state Statutes of Limitation.[5]

1) Northern Pacific Co. v. North Dakota (1919) 250 U.S. 135, Dakota Central Co. v. South Dakota (1919) 250 U.S. 163, U.S.v. United Mine Workers (1947) 330 U.S. 258. Compare Commercial Cable Co. v. Burleson (1919) 250 U.S.360. See Keller, Government Seizure in Labor Disputes" (1947) 60 Harv. L.R. 1017.
2) Northern Pacific Co. v North Dakota, supra; Dakota Central Co. v. South Dakota, supra.
3) Missouri Pacific Co. v. Ault (1921) 256 U.S. 554, Norfolk-Southern Co. v. Owens (1921) 256 U.S. 565.
4) Wabash Co. v. Elliott (1923) 261 U.S. 457.
5) Davis v. Corona Co. (1924) 265 U.S. 219.

Chapter XII: The Federal War Power and the Acquisition of Property

The Fifth Amendment of the Constitution provides, "nor shall private property be taken for public use, without just compensation." Although that prohibition does not specifically restrict the war power, it has the effect of limiting the means by which property may constitutionally be taken under any federal power, including that of waging war. We have seen that Sec. 51 (xxxi) of the Australian Constitution imposes the "just terms" requirement as a further test of the constitutionality of a war measure which involves the taking of property. The "just compensation" clause of the Fifth Amendment has the same effect. Although a measure is in all other respects a legitimate exercise of the federal war power, it will be regarded as unconstitutional if it results in a taking of property without "just compensation".

1

The "just compensation" clause, however, does not restrict the United States in all of its dealings with property. There are several methods by which property may be used or acquired under the federal war power without incurring a constitutional obligation to compensate.

The United States is not bound to make "just compensation", for example, when it captures enemy property in wartime. Strictly speaking, captures are not made under the general war power, but under a separate constitutional authority:

> "The Congress shall have Power ...
>
> ...
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> "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

"To ... grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;" (1)

It would seem most consistent with the phraseology of the Constitution to say that the actual power to make captures is derived from the law of nations, and that Congress merely defines the circumstances and prescribes the procedures under which captures will be recognized.[2] Nevertheless it is clear that the mere existence of a state of war does not justify the capture of enemy property; it must be authorized by federal legislation.[3]

During the Civil War, Congress invoked this power to legalize several types of capture on land. The Confiscation Act of 1861 provided that items of property which were acquired or intended to be used for the purpose of aiding the rebellion were "lawful subjects of capture and prize" wherever found. The Confiscation Act of 1862 authorized the seizure, for the support of the army, of the property of persons who should continue to hold office in the Confederacy or who otherwise should aid the rebellion. The Abandoned and Captured Property Act of 1863 provided that the owner of property taken by Northern forces in the territory of the Confederacy might recover its value by suit in the Court of Claims, providing that he could prove his loyalty to the Union. In affirming the constitutionality of these statutes, the Supreme Court attributed them to the power to regulate captures rather than to the authority to take property under the war power, in the

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1) U.S. Constitution, Art. I, Sec. 8.
2) See Ware v. Hylton (1796) 3 Dall. 199, 226; The Prize Cases (1862) 2 Black 635, 666; Mrs. Alexander's Cotton (1864) 2 Wall. 404, 420.
3) Brown v. U.S. (1814) 8 Cranch 110.

sense of the "just compensation" clause.[1]

Nor is the federal government obliged to compensate for the destruction of enemy property in the course of actual hostilities,[2] although payment is frequently made as a matter of bounty. "The safety of the state in such cases overrides all considerations of private loss."[3] It would seem that in certain cases of extreme war emergency the acquisition in a domestic area of the property of loyal citizens imposes the duty to compensate. The distinction is between "the unavoidable deprivations which take place where the conflict rages, and those takings, although for military purposes, which are deliberate appropriations for which compensation must be made."[4] A taking by an officer of the United States acting beyond the scope of his authority, though it may subject him to tort liability will not impose upon the federal government an obligation to compensate.[5]

The United States may also acquire property by contract free from the restriction of the Fifth Amendment. In practice, government contracts have proved to be the most successful means of securing war supplies which are needed on short notice.[6]

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1) Act of 1861: Kirk v. Lynd (1882) U.S. 315, 316; Union Ins. Co. v. U.S.(1867) 6 Wall. 759, 763. Act of 1862: see Miller v. U.S.(1870) 11 Wall. 268, passim; The Confiscation Cases (1873) 20 Wall. 92, 109; and compare the argument of appellant in Day v. Micou (1873) 18 Wall. 156, 159. Act of 1863: Haycraft v. U.S. (1874) 22 Wall. 81, 94: and see U.S. v. Anderson (1869) 9 Wall. 56.

   The distinction between a capture and a "taking" in the sense of the Fifth Amendment was also made in cases which arose during the Spanish-American War. See Ribas y Hijo v. U.S. (1904) 194 U.S. 315, 322-23; Herrera v. U.S. (1912) 222 U.S. 558, 569.

2) U.S. v. Pacific Railroad (1887) 120 U.S. 227, 239. And see Pugh v. U.S. (1871) 13 Wall. 633, Perrin v. U.S.(1870) 12 Wall. 315, Juragua Co. v. U.S. (1909) 212 U.S. 297. See also Marcus, "The Taking and Destruction of Property under a Defense and War Program" (1942) 27 Corn. L.Q. 317, 476, p.330.

3) U.S. v. Pacific Railroad, supra, p.234.

4) Hughes, "War Powers under the Constitution" (1917, 42 Am.Bar. Ass. Rep. 232, 246. Compare Mitchell v. Harmony (1851) 13 How. 115.

5) U.S. v. Goltra (1941) 312 U.S. 203.

6) See the judgment of Mr. Justice Burton in Lichter v. U.S. (1948) 334 U.S. 742, at pp. 770-771.

Such contracts are binding, though their effect is to transfer property to the United States for a consideration less than "just compensation". The citizen, by means of a settlement contract, may even bargain away his right to "just compensation" for property taken under the war power.[1]

It is obvious that the analogy to private contract is an artificial one in many cases. The government has an immeasurably greater bargaining power than has the private contractor. If an individual does not agree to a transfer of property at the government's terms he is likely to be forced to submit to a requisition of the same property. The courts are often hard put to distinguish between a voluntary contract with the government and a compulsory requisition.[2] Occasionally a war contract receives a strained interpretation because of its emergency origin.[3] But when the Court discerns the elements of a contract as distinguished from a requisition, the citizen's rights are determined by contract law rather than by the Fifth Amendment.

It will be readily apparent that when a war or a period of emergency is over, the United States is likely to be left with outstanding contracts for goods and services which are no longer needed. Under these circumstances it is within the war power to cancel the contracts.[4] It is customary for the

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1) See St. Louis Railroad Co. v. U.S. (1925) 267 U.S. 346.
2) Compare American Smelting Co. v. U.S. (1922) 259 U.S. 75; and see Liggett & Myers Co. v. U.S. (1927) 274 U.S. 215.
3) Compare the argument of counsel for the United States in U.S. v. Wormer (1871) 13 Wall 25, and the dissenting opinion of Mr. Justice Frankfurter in Priebe & Sons v. U.S. (1947) 332 U.S. 407, at p.419.
4) Russell Car Co. v. U.S. (1923) 261 U.S. 514.

government to award "just compensation" for the cancellation.[1] This has been interpreted to include the amount of expenditures made in reasonable reliance on the terms of the contract,[2] but not to include the amount of anticipated profits.[3]

The cancellation of contracts when the war effort no longer requires their performance is highly analogous to the revision of existing war contracts with a view to eliminating profits which seem in retrospect to be unduly large. This was the object of the Renegotiation Act (passed in 1942 and subsequently amended), which provided that federal executive officers could alter the terms of contracts for the supply of their departments, in order to eliminate profits which they determined to be excessive. Individuals whose contracts had been revised were allowed a trial de novo before the Tax Court on the issue of whether the agreed profits were in fact excessive. The Supreme Court in Lichter v. U.S.[4] held that the statute was a lawful exercise of the war power. It was reasoned that renegotiation was a mere regulation of war contracts, rather than a "taking" of contract rights within the meaning of the Fifth Amendment. The Court weighed the fact that war contracts are often made under emergency conditions which preclude a careful evaluation of the proper margin of profit. Besides, it was suggested, the government might have assumed control of the contractor's industry or requisitioned its output, instead of adopting the more generous medium of contract. Under the circumstances the Court considered that there was no denial of due process in

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1) In the light of the Lichter decision, infra., it would seem that this award is not required by the Fifth Amendment, but is made as a matter of bounty. Compare Bork v. Rives (1925) 267 U.S. 175, in which Chief Justice Taft described an analogous award under the Dent Act of 1919 as "a gratuity based upon equitable and moral considerations".
2) Russell Car Co. v. U.S. supra.
3) Barrett Co. v. U.S. (1927) 273 U.S. 227.
4) (1948) 334 U.S. 742.

the postponement of administrative review or in the fact that the statute affected some contracts retrospectively.

The acquisition by eminent domain of privately-owned land for war purposes is subject to the "just compensation" clause. But the United States is not constitutionally obliged to compensate for land which is acquired by means of cession from a state legislature, or by purchase with the consent of the legislature of the state in which the land is located. In determining the extent of federal sovereignty over land acquired by the United States, the Court has distinguished between these two types of acquisition. The purchaseof land with the consent of the state legislature is described specifically in the Constitution:

> "The Congress shall have Power ...
> ...
> "To exercise exclusive Legislation in all Cases whatsoever ... over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;" (1)

Acquisition by a simple act of cession from the state legislature depends upon the reserved power of the state to cede parts of its territory which are needed for legitimate federal activities, such as preparation for war.

At one time it was thought that the United States could acquire land only by purchase with consent of the state, as described in the Constitution.[2] The Court subsequently recognized other means of acquisition, but held that purchase with consent of the state was necessary in order that the federal government obtain "political jurisdiction and dominion",

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1) U.S. Constitution, Art. I, Sec. 8.
2) The history is traced in the judgment of Mr. Justice Field in Ft. Leavenworth Railroad Co. v. Lowe (1885) 114 U.S. 525.

as well as the title, of the land.[1] In the case of acquisition by other means, such as eminent domain or an act of cession, the state was thought to lose only that part of its legislative authority which would interfere with legitimate federal activities on the land. For example, it was held that a state could continue to tax the property of a private railroad corporation located on land which had been ceded to the United States for use as a military reservation.[2] And a state statute which modified the common law of tort liability was held to govern an injury on a railroad right-of-way in a federal military reservation.[3] Once the United States ceases to use the land for military purposes (or for other federal purposes for which it was acquired), however, the state is thought to resume complete legislative authority.[4]

This is not to say that the United States possesses no legislative authority over land which was acquired other than by purchase with consent of the state. The general proposition is that Congress may enact any legislation which is necessary to effectuate the federal purpose for which the land was acquired. For example, a murder committed on land which is devoted to a non-military use, within a federal military reservation, may be punished as a federal offense, from the necessity of imposing a uniform penal control over the entire

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1) Ft. Leavenworth Railroad Co. v. Lowe, supra.
2) Ibid.
3) Chicago and Pacific Ry. Co. v. McGlinn (1885) 114 U.S. 542. Compare Arlington Hotel Co. v. Fant (1923) 278 U.S. 439.
4) Palmer v. Barrett (1896) 162 U.S. 399.

reservation.[1] In fact, the more recent decisions of the Supreme Court would seem to increase the scope of permissible federal legislation, at the expense of state legislative powers, by emphasizing the importance of the federal purpose to which the land is devoted, rather than the means by which it was acquired. The reasoning that state legislation will not be allowed to interfere with the operation of a federal military installation is seen especially in decisions which consider the problem of state penal jurisdiction[2] and state price control[3] within a federal military reservation. The effect is to allow Congress an increasingly wide authority to legislate for federal military establishments, regardless of the means by which the United States acquired the land on which they are located.

Generally speaking, the problem of interpreting the "just compensation" clause of the Fifth Amendment is presented to the Supreme Court in two types of litigation: condemnation proceedings in which the United States appears as plaintiff, and private actions against the United States in which "just compensation" is claimed as a matter of implied promise or statutory entitlement.

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1) Benson v. U.S. (1892) 146 U.S. 325, U.S. v. Unzeuta (1930) 281 U.S. 138.
2) See U.S. v. Unzeuta, supra, and Adams v. U.S. (1943) 319 U.S. 312. Compare Franklin v. U.S. (1910) 216 U.S. 559, U.S. v. Press Publishing Co. (1911) 219 U.S. 1, Rodman v. Pothier (1924) 264 U.S. 399.
3) See Pacific Coast Dairy v. Department of Agriculture (1943) 318 U.S. 285, Penn Dairies v. Milk Control Commission (1943) 318 U.S. 261, 269. Compare Standard Oil Co. v. California (1934) 291 U.S. 242, Standard Oil Co. v. Johnson (1942) 316 U.S. 481.

The condemnation proceeding is the traditional method by which the United States takes property under the power of eminent domain. In the course of a condemnation suit, subsidiary issues like "just compensation" are decided by the trial court (and eventually by the Supreme Court) as an incident to determining the plaintiff's right to a decree of condemnation. Originally it was customary for the actual transfer of property to await the final decree. But in the case of condemnation for war purposes the United States may require the immediate use of the property. Accordingly Congress has provided (for example, in the War Purposes Act of 1917 and the Second War Powers Act of 1942) that federal authorities may enter into possession immediately upon filing a petition for condemnation. To avoid "serious questions concerning the statute's validity", the Court has interpreted this provision as vesting only "defeasible title" in the United States when the petition is filed.[1] Full title does not pass until a formal decree of condemnation is entered.

Even this summary type of condemnation proceeding may prove too cumbersome in an emergency. It has long been the practice of federal officers to seize, without preliminary litigation, property which is urgently needed for war purposes. By authorizing an officer to take the property, the United States is considered to have made an implied promise to compensate the owner according to the terms of the Fifth Amendment. The Supreme Court has said that normally the payment of compensation must be made before the taking of private property, but

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1) Catlin v. U.S. (1945) 324 U.S. 229.
2) Campbell v. U.S. (1924) 266 U.S. 368. Distinguish the case discussed earlier in this chapter, of a seizure in the course of actual hostilities, in which the emergency is so great as to negative any constitutional obligation to compensate.

that, "in certain extreme cases", such as war, seizure may precede payment.[1] In the absence of a special statute directing the method of awarding compensation for these seizures, the former owner may sue the United States in any court which has jurisdiction to hear contract claims against the federal government. His claim is evidently based upon the implied promise to make just compensation, not upon the terms of the "just compensation" clause itself.[2]

In more recent times the former owner has not been left to his action on the implied promise. It is customary for Congress to authorize federal officers to take private property which is needed for the war effort without first awarding compensation or instituting condemnation proceedings, but such legislation normally includes the proviso that the former owner may recover "just compensation" by suit in a specified federal court. In that case the cause of action for compensation is based upon the terms of the statute itself. The Supreme Court has sanctioned this system of deferred compensation as well:

> "(t)he duty to make compensation does not inflexibly ... exact ... that compensation should be made previous to the taking ... it being sufficient, having relation to the nature and character of the property taken, that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation." (3)

In practice the compensation which is awarded for this type of property acquisition is usually determined by agreement between the owner and the government agency concerned. The Lever Act of World War I is an example of a familiar type of

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1) U.S. v. Russell (1871) 13 Wall. 623. And see Mitchell v. Harmony (1851) 13 How. 115.
2) U.S. v. North American Co. (1920) 253 U.S. 330, 335. But see Phelps v. U.S. (1927) 274 U.S. 341, 343; and compare the judgment of Mr. Justice Douglas in U.S. v. Causby (1946) 328 U.S. 256, 267.
3) Crozier v. Krupp (1912) 224 U.S. 290, 306.

acquisition statute, which allows the owner to accept a fixed portion of the compensation which the government has tendered, without waiving his claim that it is insufficient under the Fifth Amendment. He may thereafter sue the United States for the difference between the portion which he accepted and the sum which he claims is necessary to constitute "just compensation".[1]

(A) "Private property"

One of the problems which occur in these cases is to determine whether an interest which the government seeks to acquire is "private property" and thereby subject to the Fifth Amendment guarantee of compensation. The Court has sanctioned the taking under the war power of a great variety of interests as "private property".[2] They include a fee simple and leasehold estate[3] in realty; ships which were in the process of being built[4] and cigarettes which were to be produced in the future;[5] as well as such intangibles as patent rights.[6] A liberal interpretation of the term, "private property", is seen in the judgment of De Laval Co. v. U.S.,[7] an action for just compensation for the requisition of a building contract. The plaintiff in that case had agreed to manufacture turbines for a private ship-building firm. The United States during World War I "requisitioned the contract", requiring the plaintiff to make turbines for the government. After the Armistice the plaintiff, at the request of the government, abandoned work on several turbines which were included in the original contract.

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1) See, e.g. U.S. v. New River Collieries (1923) 262 U.S. 341.
2) Sharp v. U.S. (1903) 191 U.S. 341.
3) Duckett & Co. v. U.S. (1924) 266 U.S. 149.
4) Russian Volunteer Fleet v. U.S. (1931) 282 U.S. 481.
5) Liggett & Myers Co. v. U.S. (1927) 274 U.S. 215.
6) See Cramp & Sons v. Curtis Co. (1918) 246 U.S. 28, 39-40.
7) (1931) 284 U.S. 61.

The Court held that the requisition of the contract was a "lawful act under the power of eminent domain",[1] awarding the plaintiff as just compensation the assignment value of the contract at the time of the requisition.

(B) "Taking"

The Court has experienced more difficulty in explaining just what constitutes a "taking" of property within the terms of the Fifth Amendment. On the one hand, a "taking" must be distinguished from a mere regulation of property interests under the war power. It did not constitute a "taking" of coal, for example, for the government to compel a coal dealer to sell to certain private individuals at controlled prices.[2] Moreover, a single exercise of the war power may constitute a "taking" as to some parties, but not as to others. It has been held that the government, in requisitioning the output of a factory during wartime, may effect a "taking" of the contract right of the manufacturer to sell the products, without having "taken" the contract right of the purchaser to buy them.[3] The Court reasoned that the United States acquired the products, not by virtue of the purchaser's contract right, but by means of the government's independent right of eminent domain.

It is also necessary to distinguish a "taking" of property from the consequential damage to that property which results from acts of the United States. So where only one of the

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1) Ibid., p.71.
2) Morrisdale Coal Co. v. U.S. (1922) 259 U.S. 188, Pine Hill Coal Co. v. U.S. (1922) 259 U.S. 191. Compare Atwater & Co. v. U.S. (1927) 275 U.S. 168, and Marion & Rye Valley Ry. Corp. v. U.S. (1926) 270 U.S. 280.
3) Omnia Commercial Co. v. U.S. (1923) 261 U.S. 502. And see Brooks-Scanlon Corp. v. U.S. (1924) 265 U.S. 106. Compare International Paper Co. v. U.S. (1931) 282 U.S. 399.

plaintiff's tracts was acquired as a site for a government nitrate plant, he could not recover compensation under the Fifth Amendment for the depreciation in value of the other tracts as a result of the industrial activities of the government on the plant site.[1] The point is further illustrated by a series of cases which involved the firing of coastal guns from a military reservation across private property, which depreciated in value as a consequence. The Court assumed that it would have constituted a "taking" of property if the United States had installed the guns "not simply as a means of defense in war" but with the purpose and effect of subordinating the private property to use as a permanent practice range. Twice the owner was denied compensation because he alleged only sporadic firing across his land.[2] But in the third case a majority of the Court held that he had stated a cause of action, good against demurrer, by alleging that the United States had mounted heavier guns which pointed toward his land and had erected a permanent fire control tower, with the intent of using the land as a permanent firing range.[3]

. A recent decision of the Supreme Court extended the concept of "taking" to include the acquisition of easement rights in space above private property. The plaintiff owned land near a municipal airport, which was leased to the United States during World War.II. He complained that the constant presence of low-flying military aircraft had caused his property to decrease in value. A majority of the Court held that the United States had caused more than consequential damage, having

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1) Campbell v. U.S. (1924) 266 U.S. 368.
2) Peabody v. U.S. (1913) 231 U.S. 530, Portsmouth Harbor Co. v. U.S. (1919) 250 U.S. 1.
3) Portsmouth Harbor Co. v. U.S. (1922) 260 U.S. 327.

imposed a servitude upon the plaintiff's property for which he was entitled to just compensation.[1]

(C) "Public Use"

In the case of an acquisition under the war power, the "public use" for which private property is taken is a use in aid of the war effort. The war purposes for which the Court has sustained a taking of property reflect on a small scale the diversity of the war power itself. Land may be acquired for a federal military reservation,[2] a federal nitrate plant,[3] and federally-controlled transportation facilities.[4] The government may acquire a laundry plant for the use of the army,[5] and land for the building of community facilities for shipyard workers.[6] [7] Coal and water power[8] may be taken for distribution to private industry of war importance.

Perhaps the most imaginative application of the war power as a basis for the acquisition and disposal of property occurred with the creation of the Tennessee Valley Authority, a federal agency which was organized to produce hydro-electric power on a large scale in peacetime as well as wartime. The Court based the constitutionality of the TVA upon, inter alia, the need to generate power for the manufacture of munitions.[9]

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1) U.S. v. Causby (1946) 328 U.S. 256. See Note (1946) 46 Col. L.R. 108.
2) Sharp v. U.S. (1903) 191 U.S. 341.
3) Campbell v. U.S. (1924) 266 U.S. 368.
4) Duckett & Co. v. U.S. (1924) 266 U.S. 149.
5) Kimball Co. v. U.S. (1949) 338 U.S. 1.
6) Manufacturers' Land Co. v. U.S. Fleet Corp. (1924) 264 U.S. 250.
7) See Highland v. Russell Car Co. (1929) 279 U.S. 253, 260.
8) International Paper Co. v. U.S. (1931) 282 U.S. 399.
9) Ashwander v. T.V.A. (1936) 297 U.S. 288. The war power was also one of the constitutional justifications for the creation of federal corporations for the construction of interstate railroads. See California v. Pacific Railroad Co. (1888) 127 U.S. 1, 39.

It was reasoned that the United States for this war purpose could acquire dam sites and incidentally could sell surplus power in competition with private enterprise. The persistence of the war element in the TVA program is seen in an act of 1942 which authorized the construction of another dam "in order to meet pressing power needs for war production". Under this statute the Supreme Court affirmed the condemnation of private property which was isolated by a consequent flooding, as well as land which was needed for the actual dam site and reservoir.[1]

(D) "Just compensation"

The decisions in which the Supreme Court has applied the "just compensation" guarantee to acquisitions under the war power are consistent with the general law of eminent domain. "Just compensation" has been defined as the "full and perfect equivalent of the property taken"[2] and "the sum which, considering all the circumstances - uncertainties of the war and the rest - probably could have been obtained" for the owner's interest.[3] Compensation is made for the loss which the citizen suffers rather than for the gain which the government realizes from an acquisition.[4] The object is to place the owner "in as good a position pecuniarily as he would have been if his property had not been taken".[5] Although the Court has said that "just compensation" will not be determined by the application of a rigid formula,[6] it is the free market

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1) U.S. ex rel. T.V.A. v. Welch (1946) 327 U.S. 546.
2) Seaboard Air Line Railway Co. v. U.S. (1923) 261 U.S. 299, 304.
3) Brooks-Scanlon Corp. v. U.S. (1924) 265 U.S. 106, 123-24.
4) See Kimball Co. v. U.S (1949) 338 U.S. 1, passim.
5) Campbell v. U.S. (1924) 266 U.S. 368, 371.
6) See the majority opinion of Mr. Justice Douglas in U.S. v. Cors (1949) 337 U.S. 325.

value of the property which usually furnishes the index of compensation.[1] Only in the absence of an ascertainable free market value is "just compensation" determined by other factors, such as the original cost or the replacement cost of the property.[2]

In the event that compensation is awarded subsequently to the taking - a familiar practice when property is acquired under the war power - "just compensation" includes the value of the property at the time of the taking, plus such additional amount "as will produce the full equivalent of that value paid contemporaneously with the taking".[3] Interest at the legal rate, payable for the period between the time of taking and the time of compensation, is regarded as a fair measure of this additional amount.[4]

In order to estimate "just compensation", it must be decided which of the owner's interests in the property are to be regarded as compensable. This is another way of phrasing the problem of which interests are deemed to have been "taken" in the sense of the Fifth Amendment. That the Court relies upon market value as an index of compensation indicates that only those interests which are represented by the purchase price of the property will be counted. "The value compensable under the Fifth Amendment", Mr. Justice Frankfurter wrote, is only that value which is capable of transfer from owner to owner and thus of some exchange for some equivalent."[5] The

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1) Vogelstein & Co. v. U.S. (1923) 262 U.S. 337, U.S. v. New River Collieries (1923) 262 U.S. 341.
2) See the dissenting opinion of Mr. Justice Jackson in U.S. v. Felin & Co. (1948) 334 U.S. 624.
3) Seaboard Air Line Railway Co. v. U.S. (1923) 261 U.S. 299, 306.
4) Brooks-Scanlon Corp. v. U.S. (1924) 265 U.S. 106, Liggett & Myers Co. v. U.S. (1927) 274 U.S. 215.
5) Kimball Co. v. U.S.(1949) 338 U.S. 1, 5.

standard rule is to compensate for the property actually taken, but not for "consequential" damage to "collateral" property interests. The point is illustrated by the acquisition under the war power of land which had been devoted to the production of a special type of corn, which was processed and sold by the owner's private company. The Court held that "just compensation" included the special value of the land arising out of its adaptability to the owner's business, but not the consequential damage to the business which resulted from loss of the land.[1] It was emphasized that only the land, not the business, had been taken.

The acquisition of short-term interests in property, which is frequently necessary in wartime, presents unusual problems of compensation. It is established, for example, that when the government acquires the fee, the owner's expenses in moving off the land are not compensable. But a different case is presented by the acquisition of land for a term less than the unexpired portion of an outstanding lease. Under those circumstances the lessee is entitled to compensation for removal costs, on the theory that he would include them in computing the price for which he would sell the short-term interest.[2]

Similarly, we have seen that when the government acquires in fee property which was used by the owner in connection with a business, the consequent injury to the business is not compensable. But when private business property is taken for a period of years, to be operated by the government as a business,

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1) Mitchell v. U.S. (1925) 267 U.S. 341. See also Sharp v. U.S. (1903) 191 U.S. 341, Campbell v. U.S. (1924) 266 U.S. 368.

2) U.S. v. General Motors Corp. (1945) 323 U.S. 373. Compare U.S. v. Petty Co. (1946) 327 U.S. 372.

an exception will be made to the general rule against compensation for "consequential" damage. The issue was presented by the acquisition in World War II of an entire laundry plant and premises, which the United States sought to operate for a period of years as an army laundry. A majority of the Court held that the owner should be compensated for a decrease in the "going-concern" value of the laundry as a business, in addition to compensation for the use of the physical property for a term of years.[1] The decrease in "going-concern" value resulted from a loss of customers during the temporary suspension of the private laundry business. The majority judgment distinguished the case of a simple acquisition of laundry equipment, which leaves the owner free to carry on his laundry business elsewhere. The inference is that, to a degree of pecuniary significance, the government had taken the laundry business in the instant case.

That an acquisition has been made under the war power rather than another federal power normally does not modify the constitutional requirement of "just compensation". But in applying the subsidiary concept of "market value", the Court in wartime is faced with unusual difficulty. The market value (or, in its absence, the original cost, replacement cost, or other index of compensation) which the rule contemplates is the market value of the property in a relatively free peacetime economy, in which price is determined largely by unfettered bargaining between buyer and seller. . Of course there is no such economic freedom in wartime.

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1) Kimball Co. v. U.S.(1949) 338 U.S. 1.

Often the "market value" of a commodity becomes unusually high in wartime simply because the government seeks to acquire it. Under those circumstances the Fifth Amendment does not require payment of the inflated "value". Instead "just compensation" may be determined by discounting the effect of the government acquisition program on the normal market value.[1]

The reverse of that situation is presented when the United States acquires property, the purchase price of which has been fixed under appropriate war legislation. Does payment of the controlled price constitute "just compensation"? The Court touched upon this problem in Highland v. Russell Car Co.,[2] which involved the sufficiency of a price control order under the due process clause. The fact that individuals who were subject to the order could not prove that the controlled price was less than "just compensation" was taken as some indication of the constitutionality of the order.

The issue was raised more directly in the case of U.S. v. Felin & Co.,[3] in which "just compensation" was sought for an acquisition of meat by a federal war agency. The government had offered to pay the maximum retail price allowable under price regulations. The plaintiff contended that the controlled price did not equal "just compensation" because it did not meet his replacement costs. A majority of the Court decided the case on a factual point, ruling that the plaintiff had not proven that replacement costs were in fact greater than the controlled price. They declined to state categorically whether controlled prices would constitute "just compensation" in every case. Three justices, concurring, declared that "whenever

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1) U.S. v. Cors (1949) 337 U.S. 325.
2) (1929) 279 U.S. 253.
3) (1948) 334 U.S. 624.

perishable property is taken for public use under controlled-market conditions, the constitutionally established maximum price is the only proper standard of 'just compensation'".[1] Two justices, dissenting, contended that Congress is not required to ensure that controlled prices will in all cases equal "just compensation".

In U.S. v. Commodities Trading Corp.,[2] the maximum controlled price was adopted as the presumptive measure of "just compensation". In that case a majority of the Court reversed an award, in excess of maximum price, which the Court of Claims had made for black pepper requisitioned by the War Department. Although "special conditions and hardships" may require additional compensation, it was reasoned that there is "no constitutional obstacle to treating 'generally fair and equitable' ceiling prices as the normal measure of just compensation for commodities held for sale".[3] It was considered that the owner of the pepper had not shown any special hardship which would except his case from the general rule.

It seems anomalous to allow the government to fix prices at a level inconsistent with the amount which it must pay as "just compensation" for an acquisition of the same property. But in view of the marked difference between price control in wartime and the exercise of eminent domain in aid of the war power, we may question the desirability of attempting to equate the constitutional guarantees which limit them.

Price control is available to the United States only in time of emergency, but once inaugurated it affects nearly every citizen. The most telling constitutional limitation upon its

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1) Ibid., p.643.
2) (1950) 339 U.S. 121.
3) Ibid., p.128 (emphasis added).

exercise is the "due process" clause. Judicial review is addressed chiefly to the general reasonableness and procedural fairness of the price control program. The Court will inquire whether price orders and regulations are made by properly-authorized administrative delegates, acting upon reasonable standards; and whether individuals are given an opportunity for a fair hearing on these issues at some stage, either before or after the order in question takes effect. Judicial review of the validity of orders and regulations (as distinguished from the constitutionality of a price control statute) may be divorced from ordinary enforcement procedures and entrusted to a special federal tribunal.[1]

The federal power of eminent domain, on the other hand, may be used to aid the war power in peacetime as well as in wartime. But relatively few citizens are required to submit to acquisitions under the war power. Their most effective constitutional safeguard is the "just compensation" clause, which relates to the adequacy of remuneration in the particular case, rather than to the general reasonableness of an acquisition program. Judicial review consists of applying such concepts as "private property", "taking", "public use", and "just compensation" to the facts of a specific case. On the issues of "public use" and "just compensation" at least, the owner of the property is entitled to a judicial hearing.[2]

Certainly these considerations warrant some hesitance on the part of the Court to hold that the controlled price of a commodity and "just compensation" for its acquisition must always be equal. It is submitted that they present weighty

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1) See supra, Chap.XI.
2) See Cranev. Hahlo (1922) 258 U.S. 142. Compare Note (1947) 27 Bos. Univ. L.R. 229.

reasons against such an equation, as well. In regulating the war economy of the entire nation, Congress should not be handicapped by a requirement that controlled prices must afford "just compensation" as applied to each individual. It is enough that controlled prices are generally reasonable and are formulated and enforced according to fair procedures. But when the government adopts the more drastic expedient of taking private property, it is reasonable to impose the stricter standard of fairness in the particular case. Although allowable price maximums will of course constitute persuasive evidence of fair market value, they should not be taken to be the infallible measure of "just compensation".[1]

3

The Trading With the Enemy Act[2] is a hybrid type of legislation which involves the exercise of two distinct branches of the war power. One is the power to prohibit commercial intercourse which is likely to result in economic advantage to the enemy. Another is the power to seize and dispose of the property of technical enemies which is located within the jurisdiction of the United States.

The constitutionality of the former portion of the Trading With the Enemy Act has not been discussed at length by the Supreme Court. But this type of regulation would seem to be highly analogous to the prohibition of commerce which is inconsistent with the neutrality of the United States. The Supreme Court has repeatedly enforced legislation of this type - such

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1) The problem is considered in Freund, "The Emergency Price Control Act of 1942" (1943) 9 Law & Contemp. Prob. 77.
2) Act of Oct.6, 1917, as subsequently amended.

as the Non-Intercourse Acts of the period of the Napoleonic Wars,[1] and statutes which prohibited the encouragement of rebellion against friendly governments—[2] without questioning its constitutionality. The decision of U.S. v. Curtiss-Wright Corp.,[3] however, dispelled any doubt as to the plenary power of the federal government in this field.

In that case a majority of the Court affirmed the constitutionality of the Joint Resolution of May 28, 1934, which empowered the President to prohibit the shipment of arms to countries involved in the Chaco War. The requisite authority was found in the federal power over the "external sovereignty" of the United States, which was distinguished from the enumerated domestic powers of the federal government:

> "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have been vested in the federal government as necessary concomitants of nationality." (4)

> "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." (5)

It was emphasized that the President, from the nature of his office, may exercise considerable powers in foreign affairs independently of a delegation of authority from Congress.

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1) The Samuel (1816) 1 Wheat. 9, The Schooner Hoppet (1813) 7 Cranch 389, Little v. Barreme (1804) 2 Cranch 170, U.S. v. The Schooner Betsey (1808) 4 Cranch 443.
2) Wiborg v. U.S. (1896) 163 U.S. 632, U.S. v. Chavez (1913) 228 U.S. 525, U.S. v. Mesa (1913) 228 U.S. 533. See also Note (1914) 27 Harv. L. Rev. 485.
3) (1936) 299 U.S. 304. Noted (1937) 50 Harv. L. Rev. 691.
4) Ibid., p. 318.
5) Ibid., pp. 315-16.

That part of the Trading With the Enemy Act which is concerned with the seizure and disposal of enemy property resembles in some respects legislation for the taking of private property in the sense of the "just compensation" clause. The similarity was less pronounced in the act as it was originally passed in 1917. Under that statute the Enemy Property Custodian was allowed to "seize" the property of enemies. It was contemplated that he would return the property to the original owners after the conclusion of hostilities. Meanwhile his position was that of a conservator or trustee rather than that of a confiscator. He was granted the power to sell seized property, however, by an amendment of 1918, and after World War I he was authorized to retain the property as a pledge that the claims of domestic creditors would be honored in former enemy nations. Finally in 1934, after Germany had defaulted on payments toward a fund for American creditors, the right of former enemy nationals to recover seized property was extinguished.[1]

An amendment of 1941 allowed the Custodian to "vest", as well as to "seize", property; and the scope of his authority was widened to include the property of any foreign country or foreign national, as well as that of enemy countries or enemy nationals. One learned writer interpreted the "vesting" power as comprising only a regulatory power in the nature of sequestration, rather than the power to confiscate.[2] He concluded that the Custodian retained an obligation to preserve the value of the property, against the day when it should

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1) The history of these amendments is traced in Littauer, "Confiscation of the Property of Technical Enemies" (1943) 52 Yale L.J. 739.

2) Dulles, "The Vesting Powers of the Alien Property Custodian" (1943) 28 Corn. L.Q. 245.

be returned to the former owner. The more generally accepted view, however, is that the 1941 amendment empowered the Custodian for the first time to confiscate the property of enemies.[1] It is this interpretation of the statute which gives rise to serious constitutional problems regarding the character and limits of the Custodian's power.

Although there are dicta[2] which suggest that the power of the Custodian in regard to property is derived from the Congressional power to "make Rules concerning Captures",[3] the correct view would appear to be that his authority is based upon war powers which are implied in the specific grant of power to declare war.[4] These implied war powers are thought to be "available only insofar as their exercise is necessary to effectuate the purpose for which they are implied".[5] This doctrine of necessity is consistent with the fact that, while enemy property may be taken outright, the property of citizens and alien friends is protected by the Fifth Amendment. Moreover, the 1941 amendment of the Trading With the Enemy Act does not restrict the vesting power to enemy property; it allows the property of other foreign nationals and foreign governments to be vested as well. It would seem unrealistic to speak of the single vesting power as being derived in part

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1) See Littauer, op.cit.; Mc Nulty, "Constitutionality of Alien Property Controls" (1945) 11 Law & Contemp. Prob. 135; Carlston, "Foreign Funds Control and the Alien Property Custodian" (1945) 31 Corn. L.Q.1.

2) Stoehr v. Wallace (1921) 255 U.S. 239, 241-42; and see McGrath v. Manufacturers Trust Co. (1949) 338 U.S. 241, 246 (Note 7).

3) U.S. Constitution, Art.1, Sec.8.

4) This view is ably presented in Littauer, op.cit., pp.754 ff. Generally the language of the Supreme Court is equivocal: see, e.g., Commercial Trust Co. v. Miller (1923) 262 U.S. 51, 53 ("an exercise of governmental power in the emergency of war"); Great Northern Ry. Co. v. Sutherland (1927) 273 U.S. 182, 194 ("the war powers of Congress"); Woodson v. Deutsche Gold und Silber (1934) 292 U.S. 449, 453 ("the war power"); Cummings v. Deutsche Bank (1937) 300 U.S. 115, 120 ("the war power").

5) Littauer, op.cit., p.756.

from the power over captures (i.e., when enemy property is vested) and in part from the general implied war power (i.e., when the property of citizens or alien friends is vested). A more useful classification is to relate all of the Custodian's power ower property to the implied war power, and to explain the difference in treatment of enemy property by the rule of necessity.

Regardless of which clause of the Constitution supports his action, it is clear that the Custodian may seize summarily any property which he deems to be of enemy character, so long as there is an adequate provision for return in case of mistake.[1] This original seizure is considered to entitle the Custodian to preliminary custody only. Whether he may actually acquire the property depends upon whether it belongs to an enemy or not.

The Custodian may exercise unlimited control over enemy property, to the extent of divesting title without incurring an obligation to compensate. The Court has described this function of enemy property control in unusually broad terms:

> "Congress was untrammeled and free to authorize the seizure, use or appropriation of such properties without any compensation to the owners. There is no constitutional prohibition against confiscation of enemy properties." (2)

> "By exertion of the war power, and untrammeled by the due process or just compensation clause, Congress exacted laws directing seizure, use and disposition of property in this country belonging to subjects of the enemy. Alien enemy owners were divested of every right in respect of the money and property seized and held by the Custodian.." (3)

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1) Stoehr v. Wallace (1921) 255 U.S. 239, Central Trust Co. v. Garvan (1921) 254 U.S. 554, Becker Steel Co. v. Cummings (1935) 296 U.S. 74.
2) U.S. v. Chemical Foundation (1926) 272 U.S. 1, 11.
3) Cummings v. Deutsche Bank (1937) 300 U.S. 115, 120. And see Clark v. Allen (1947) 331 U.S. 503. Compare White v. Mechanics Securities Corp. (1925) 269 U.S. 283.

Under the original Trading With the Enemy Act, enemy status was determined chiefly by personal domicile or nationality. Subsequently the classification was broadened to include corporations which were domiciled, controlled, or doing business in enemy territory, and persons who were acting for the benefit of an enemy. In World War II the practice was to vary the enforcement of the legislation by circumstances, using whichever test was useful in reaching particular assets.[1] One writer has suggested that the category may constitutionally be expanded to include persons who are enemies "only in the sense that, through invasion or capture, they have, against their will, fallen under enemy control".[2]

The power of the Custodian to deal with the property of United States citizens, however, is restricted by the "due process" and the "just compensation" clauses. The due process clause does not prevent the seizure of property belonging to a citizen which is erroneously thought to be enemy property. But Congress must afford the citizen a reasonable opportunity to recover property which was seized by mistake, or, in the event that it has been sold in the meantime, to recover its proceeds.[3] The Court has said that it would deny due process to bar the citizen's claim merely because the Custodian has relinquished possession of the property or has disbursed its proceeds.[4] That reasoning is consistent with the principle that the citizen's interest is protected by the just compensation clause. The Custodian may pass good title to the

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1) See Lourie, "'Enemy' Under the Trading with the Enemy Act" (1943) 42 Mich. L. Rev. 383; Note (1942) 51 Yale L.J. 1388.
2) Dulles, op.cit., p.250.
3) See Commercial Trust Co. v. Miller (1923) 262 U.S. 51, Behn, Meyer, & Co. v. Miller (1925) 266 U.S. 457. And see Littauer, op.cit., pp.742-43.
4) Becker Steel Co. v. Cummings (1935) 296 U.S. 74.

property of a citizen which was erroneously seized, but the citizen is entitled to recover not only the proceeds of its sale, but any "increment" which was realized on the property or proceeds while in the hands of the Custodian.[1] It has been suggested that the erroneous acquisition of a citizen's property gives rise to an implied promise of the government to make "just compensation", upon which the citizen may sue in the Court of Claims.[2]

It has frequently been said that an alien friend, as well as a citizen, may claim the protection of the "due process" clause and the "just compensation" clause when his property is seized or vested by the Custodian.[3] It may be doubted, however, whether the extent of the constitutional protection is identical in both cases. The amendment of the Trading With the Enemy Act in 1941 to allow the Custodian to "vest" the property of any alien, whether friend or enemy, indicates that Congress considers an important distinction to exist between the property of a citizen and that of a non-citizen, as well as between the property of an enemy and the property of a non-enemy. Similarly, the progressive broadening of the concept of "enemy" has caused a corresponding decrease in the number of persons who may assert the rights of non-enemy aliens.

Probably the most accurate prediction is that the extent of property control which will be permitted depends upon the factual relationship of a particular control with the pro-

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1) Henkels v. Sutherland (1926) 271 U.S. 298.
2) See Carlston, op.cit., and McNulty, op.cit.
3) As to protection of the due process clause, see Becker Steel Co. v. Cummings (1935) 296 U.S. 74,79; Great Northern Ry. Co. v. Sutherland (1927) 273 U.S. 182, 193-94; Dulles, op.cit., p.252. As to protection of the just compensation clause, see Silesian-American Corp. v. Clark (1947) 332 U.S. 469, 479-80; Russian Fleet Co. v. U.S. (1931) 282 U.S. 481, 489. And see Note (1947) 47 Col. L.R. 1052. Compare the language of Mr. Justice Douglas in Markham v. Cabell (1945) 326 U.S. 404, 407.

-secution of the war, rather than simply upon whether the person whose property is controlled is a citizen, an enemy alien, or a friendly alien. Undoubtedly enemy property falls into a separate category and may be controlled to the point of confiscation. But although the property of citizens and that of alien friends are protected by the same constitutional limitations, the principle of necessity which determines the affirmative extent of the war power would seem to permit a distinction between the degree to which each may be regulated.

PART 5: CONCLUSION

Chapter XIII: A Comparison of the Federal War Power in Canada, Australia, and the United States.

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Of the three constitutions, it is that of the United States which describes the war power in the greatest detail. Although the entire grant of legislative war power is included within Article I, Sec. 8, it is phrased as a series of lesser war powers, rather than as a single Congressional authority. The general war power of Congress must be read from its power to exact revenue in aid of defense, to declare war, to raise and support armies, to provide and maintain a navy, to discipline the forces, and to legislate for areas within military jurisdiction; plus the "necessary and proper" power. Turning to other provisions of the Constitution, however, we become aware of the monolithic and essentially centralized character of the war power. The federal government is charged with a duty to protect the states against invasion and domestic violence, and the states in turn are forbidden to carry on war-like activities without the consent of Congress. The President is made commander-in-chief of the federal forces, and the centralized position of the war power is reflected in the creation of a militia system in which federal control predominates.

The real complexity of the war power in the United States, however, does not arise from the particularization with which its affirmative extent is expressed. Rather it is a result

of the numerous constitutional limitations which restrict the means by which the federal government may wage war. Only two limitations - the restriction of army appropriations to a two-year term and the prohibition against the quartering of troops in private homes - are phrased so as to limit the war power specifically. But several constitutional limitations were designed with the war power in mind. They include the guarantee of the right to bear arms, which expresses the purpose of encouraging the militia system, and the guarantees relating to the writ of habeas corpus and presentment by grand jury, which are qualified to allow for the usages of war. General limitations, such as the "due process" and "just compensation" clauses, have proven to be formidable obstacles to the enforcement of war legislation, although they do not specifically relate to the war power.

The constitutional formulation of the Australian war power is succinct and direct by comparison. The war power of the Commonwealth Parliament is derived chiefly from the enumeration in Sec. 51 (vi), as an aspect of the "peace, order and good government of the Commonwealth", of:

> "The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth."

In addition the Commonwealth is specifically empowered to legislate regarding railway transport for naval and military purposes, and for "matters incidental" to the execution of other powers. As in the United States, the command-in-chief of Commonwealth forces is placed in a central authority, states are forbidden to raise armed forces without the consent of the Commonwealth, and the Commonwealth is charged with the protection of states against invasion and domestic violence.

Further to establish the federal nature of the war power, it is specifically provided that state departments of defense shall be transferred to the Commonwealth upon federation.

The number of constitutional limitations is also less in Australia than in the United States. None specifically restrict the exercise of the war power, and none are qualified to allow for the usages of war. It is only general limitations upon legislative power, such as the guarantee of freedom of religion, the prohibition of a commercial preference among the states, and the "just terms" proviso, which have been invoked against the enforcement of war measures.

In terminology if not in operation, the provisions of the Canadian Constitution which describe the war power stand apart from the corresponding sections of the United States and Australian Constitutions. It must be remembered that in both constitutions residuary legislative powers are left to the states. Only specified powers, among them the war power, are granted to the central legislature. But the British North America Act appears to have just the opposite effect. The basic grant of legislative authority to the Dominion Parliament would seem to be the introductory clause of Sec. 91, which gives power

> " ... to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces ... "

Conversely, the provincial legislatures would seem to possess power over only those matters which are specifically enumerated within Sec. 92.

The apparent result is that the Dominion may legislate for any matter which relates to the "peace, order, and good government of Canada", and that the specific subjects listed

under Sec. 91 are mentioned "for greater certainty, but not so as to restrict the generality of the foregoing terms". If this were true, it would mean that the Dominion war power would spring from the "peace, order, and good government" clause itself, rather than from the illustrative specific subject of "Militia, Military and Naval Service, and Defence", which is listed under Sec. 91. The apparent centralization of the legislative war power is matched with the designation of the sovereign as commander-in-chief of the armed forces and militia. It is not marred by the operation of any broad limitation on legislative power or any less comprehensive limitation which is concerned primarily with a war problem.

As interpreted by the courts, however, the Canadian Constitution more closely resembles those of Australia and the United States. We have seen that, largely as a result of the decisions of the Privy Council, the "peace, order, and good government" clause has come to be regarded as a grant of power for the Dominion to legislate in case of emergency. The category of "property and civil rights in the Province" is the de facto residuum of legislative power. The result is that, in effect, the central government of Canada possesses only enumerated powers, as do the central governments of Australia and the United States. But just as on the face of the Canadian Constitution the war power is part of the general "peace, order and good government" power, it is now merely one part of the general emergency power of the Dominion. It may be reasoned that the phrase, "Militia, Military and Naval Service, and Defence", represents a separate Dominionpower with regard to that part of the war power which does not involve the reserved powers of the provinces, and which may be exercised in peacetime

as well as in wartime. But certainly as regards that part of the war power which is permitted to invade the realm of provincial legislative power in time of emergency, the phrase is merely illustrative of one type of emergency power which the "peace, order, and good government" clause is thought to contain.

2

It must be remembered that, in each of the three systems which we have considered, the extent of the federal war power is determined as a question of domestic constitutional law. Courts do not begin with a predetermined notion of what a federal war power ought to include. Rather they turn to the organic law of the particular country, as expounded by a particular body of decisions. The concept of the war power which emerges is one suited to local conditions and described in terms of local significance. Any generalization on the comparative extent of the three federal war powers is an ex post facto synthesis which may be attempted only with caution. It is believed that a useful comparison may be drawn between the provisions of the three constitutions in which the war power is granted. A general theory of the federal war power may be adduced which fits each system. But the detailed comparison of judgments in which the war power has been applied in particular instances is fraught with difficulty.

The difficulty springs in part from the differences in the three constitutions, particularly with regard to constitutional limitations. It also comes from the differences in the variety and number of relevant judgments. The Canadian decisions are barely sufficient to suggest the broad contours

of the war power, and do not explore any single problem exhaustively. Although the United States judgments are much more numerous than the Australian judgments, they are not consistent as to the relative detail in which specific issues are discussed. For example, the High Court of Australia has treated the regulation of employment and the control of inflation more comprehensively than has the Supreme Court of the United States, but its consideration of security legislation is correspondingly less elaborate than we might expect. The most that can be said is that in each system the courts have enforced the same general categories of war legislation, and that occasionally the war power judgments have turned upon similar constitutional issues.

(A) The military establishment and military jurisdiction.

We have seen that under all three constitutions the central government may secure personnel for the armed forces by conscription or otherwise. The compulsory induction of persons with religious or ethical scruples against military service does not violate the guarantees of religious freedom of the Australian or the United States Constitutions; nor does it amount to "involuntary servitude" within the prohibition of the latter. The Australian and United States judgments also support legislation for the procurement and production of military supplies by the central government. We may assume that such legislation is constitutional in Canada.

In Australia and the United States it is established that the central government may provide gratuities, preferential rights to employment, and other benefits for military personnel, ex-servicemen, and their dependents. No reason appears why such

legislation would not be within the Dominion powers in Canada. In the United States at least, the states may provide their own gratuities and preferences, so long as they do not interfere with federal legislation for the same purpose.

It is in the United States that the constitutionality of military trial has been discussed in the greatest detail. Generally, the rule is that trial by courts-martial and other conventional organs of military justice will be permitted so long as they act within "jurisdiction". In the case of less conventional types of military trial, such as the trial of civilians, the issue of jurisdiction includes an inquiry into the necessity for the institution of the tribunal. The constitutional limitations which have been invoked to restrict military trial are the guarantees of criminal procedure and the "due process" clause. A separate limitation assures that the normal means of review of the military judgment, the writ of habeas corpus, may be suspended only in extreme emergency.

Acting under a constitution which prescribes procedural guarantees for criminal trial but contains no general prohibition equal to the "due process" clause, the Australian court also has treated the constitutionality of military trial as a question of "jurisdiction". The issue has not been considered by the Supreme Court of Canada, but "jurisdiction" would seem to be an appropriate concept under the Canadian Constitution, which contains neither a "due process" clause nor a limitation on the mode of criminal trial. It is submitted that, whatever authority over military trial the Dominion may possess under the war power, it does not extend to replacing all civil courts with military tribunals. The issue would seem to be whether the tribunal in question is supported by

tradition or necessity; in a word, whether it exercises proper "jurisdiction".

(B) Security legislation.

It is within the power of the central legislature in each system to punish subversive activity which threatens the internal security, and therefore the war potential, of the entire nation. It is conjecturable just how far this security power may be identified with the war power, and how far it should be regarded as a federal police power based upon implied authority to protect the institutions of federal government. The question is of secondary importance in Canada, for the Dominion possesses both the war power and the power to establish a uniform criminal law throughout the provinces. In Australia and the United States the central government has no general power to enact criminal law, but sufficient authority, whether derived from the war power or otherwise, to enact security legislation.

In the United States, Congress may punish those who advocate forceful overthrow of the government or who interfere with a particular war activity, as by discouraging enlistment in the forces. The central government may also relocate enemy racial groups in wartime. In addition to legislating directly for security purposes, it may exercise other legislative powers so as indirectly to promote national security. For example, Congress may deny federal employment to members of groups deemed subversive, and may deny postal privileges to subversive publications. The constitutional limitations which have most frequently come into conflict with this security power are the guarantees of religious freedom and freedom of expression which are found in the Bill of Rights. The security

power is also limited by the "due process" clause and the prohibition of bills of attainder.

It appears that the security power - at least that portion of it which derives from the war power - is less extensive in Australia. This is not the result of a greater number of constitutional limitations, because the Australian Constitution matches the Bill of Rights only in its guarantee of religious freedom. Rather it is due to the strict interpretation of the war security power on the part of the High Court. We have seen in Adelaide Company of Jehovah's Witnesses v. Commonwealth [1] how the Court allowed the dissolution in wartime of a subversive organization, but denied effect to certain auxiliary provisions of the penal legislation, which were thought to exceed the requirements of the emergency. More recently it was held that the postwar period did not present an emergency sufficient to support legislation under the war power to outlaw the Australian Communist Party. Although precisely analogous issues have not been presented in the United States, it is significant that the only ground on which a federal war security measure has been held unconstitutional is the prohibition against bills of attainder. This suggests that a narrow interpretation of the war security power in Australia may provide a greater measure of freedom for the individual than has been secured in the United States through the Bill of Rights.

In the United States it is within the affirmative power of the states to enact security legislation, so long as it does not interfere with federal legislation on the same subject.

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1) (1943) 67 C.L.R. 116.

The question has not been examined in the Australian judgments, but the constitutional position would seem to be much the same. In Canada the exclusive Dominion authority over criminal law would appear to preclude provincial enactment of the more direct types of security legislation, such as criminal syndicalist statutes. But no reason is apparent for preventing the provinces from using powers within their competence, such as the power to legislate for schools, indirectly to promote the national security.

(C) Economic regulation.

We have seen that the rationing of scarce commodities, the regulation of housing, and price control are within the power of the central government in each federal system during a period of war emergency. This includes the power to delegate authority on the broad scale which is necessary for the effective administration of these economic controls. In addition the Australian judgments support the regulation of property transfers in wartime, the regulation of employment in war industries, and the curtailment of non-essential business activities. In the United States it is also clear that Congress under the war power may regulate the production and consumption of alcoholic beverages, and may take over the operation of essential industries. Probably all of these measures are within the affirmative war power of each system.

As in the case of security legislation, the High Court of Australia has exhibited the least reluctance to declare economic regulations unconstitutional. Typically this has been done because, in the Court's view, the measure under review did not in fact promote the war effort. But economic regulations have

been invalidated as well for conflict with constitutional limitations, such as the implied prohibition on the exercise of judicial power by an administrative body, and the guarantee of freedom of interstate commerce. More significantly, such measures have been found unconstitutional because the war emergency upon which they were based had disappeared. This was the principal reason for invalidating economic controls in The King v. Foster,[1] which of all the judgments we have considered is precisely the clearest application of the emergency doctrine of the elastic war power. That decision may be contrasted with South Australia v. Commonwealth,[2] in which it was held that the central government could take over the entire income tax collecting system of the states during wartime.

In Canada economic regulations, based upon the war power but applied in peacetime, have been held ultra vires for lack of connection with a war emergency. Economic regulation under the war power has raised serious constitutional issues in the United States, such as the question of whether the enforcement provisions of the Emergency Price Control Act of 1942 afforded procedural due process. But the only reason for which such a measure has been held unconstitutional was a relatively narrow one - that it lacked sufficient certainty of terminology to provide a reasonably ascertainable standard of guilt under the "due process" clause.

(n) The acquisition of property.

There is no special limitation in the Canadian Constitution

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1) (1949) 79 C.L.R. 43.
2) (1942) 65 C.L.R. 373.

which restricts the power of the Dominion to acquire property. But we have seen that the Commonwealth government in Australia is required to provide "just terms", and the federal government in the United States must make "just compensation", for such an acquisition. Although the "just terms" and "just compensation" provisions have restricted in the same general way the acquisition of property under the war power, several divergencies in their application may be noted.

It is well established in the United States that the "just compensation" clause as well as the "due process" clause limits the federal control of property under the Trading with the Enemy Act. Although the uncompensated seizure of enemy property is not thereby prohibited, the property of citizens and of friendly aliens come within the constitutional protection. But in Australia it has not yet been decided to what extent the "just terms" proviso restricts Commonwealth activity under similar legislation.

It has been suggested in Australia that the compulsory transfer of property between private individuals, ordered under the war power, constitutes an acquisition of property within the meaning of the "just terms" provision. In the United States the "just compensation" clause has been interpreted not to embrace such a transfer. Moreover, in Australia the judgments support the conclusion that remuneration at "just terms" must be made for damage to a private business resulting from an acquisition of property which was used to carry on the business. But the rule in the United States is that incidental damage to the business is not to be reckoned in computing "just compensation". These differences in the interpretation of two constitutional limitations of very similar

content illustrate the inaccuracy of assuming that the application of the federal war power is precisely the same in each system.

3

The cases which have been examined demonstrate that the scope of the war power is by no means the same in Canada, Australia, and the United States. But it is possible to formulate a theory of the federal war power which applies to each system, and to make some generalizations concerning the function of the courts in reviewing war legislation.

We may begin by defining the federal war power as that combination of powers which the central government may use to prepare for war, to wage war, and to meet the extraordinary conditions which arise in the transitional period between war and peace. Many of these powers are available to the central government in peacetime as well as wartime, but the more controversial applications of the war power involve legislation which in normal times may be enacted only by the states or provinces. It is useful to distinguish between those two elements of the war power for the purpose of predicting the extent of judicial review to which they are subject. They may be termed the "static" war power, which includes the powers which are available to the central government at all times, and the "elastic" war power, which includes powers which are available to the central government only in the emergency of war. It must be emphasized that this classification is made solely from the standpoint of the central government, and does not necessarily determine whether a power

is available concurrently to the regional governments, as well. Most "static" war powers are exclusively federal, and most "elastic" powers are exclusively federal for the time being. But we have seen that there are exceptions in both instances.

It is difficult to determine from the judgments precisely which powers are "static" and which are "elastic". Probably it is a question of degree, and one which will be answered differently under different constitutions. The conscription of men for the armed forces, and enforcement of forces discipline, and the acquisition of military stores would seem to fall within the "static" war power, in that the central government may legislate for those purposes in peacetime as well as in wartime. It would seem that the provision of pensions and preferential benefits for ex-servicemen also falls within the "static" war power, although it may be effected concurrently by the regional governments. In addition there are some legislative powers which are always within the authority of the central government, but which are not always used in aid of the war power. These may conveniently be described as part of the "static" war power. An example is the naturalization power under the United States Constitution, which has been invoked to require that applicants for citizenship must be willing to serve in the federal forces. On the other hand, price control, the licensing of occupations, and generally the regulation of the domestic economy are within the scope of the legislative power of the central government only in time of emergency. Therefore they form part of the "elastic" war power.

The exercise of the "static" war power presents relatively slight difficulty to a reviewing court, for it is always within

the affirmative power of the central government. But the review of legislation based upon the "elastic" war power involves a judicial estimate of the degree of emergency which is present in a given situation. The question in each case is whether the emergency is sufficient to warrant an intrusion of central legislative authority into a field otherwise reserved for the regional legislatures.

In considering the constitutionality of legislation under the elastic war power, it is oversimplification to speak in terms of a general war emergency which gives rise to a general elastic war power. In fact the overall war emergency is composed of several particular emergencies, each of which will sustain the exercise of a particular element of the elastic war power. These particular emergencies are not necessarily identical in intensity, duration, or in the time at which they occur. The particular elements of the elastic war power which they call into being are correspondingly varied. For example, a federal system may experience a severe war emergency with respect to commodity prices at a time when there is no perceptible war emergency with respect to housing accommodation. It is the duty of the court in that case to sustain an exercise of the elastic war power to control commodity prices, but not of the elastic war power to allocate housing. The question before the court is not the degree to which the entire national economy is disrupted by the war, but the degree to which emergency conditions prevail in that particular facet of the economy which the central government has sought to regulate by the measure under review.

The judgments of the High Court of Australia provide the

most illuminating study of the difficulties which beset a judiciary in attempting to evolve a test for evaluating the extent of a particular war emergency. The Canadian decisions have been too sporadic to provide an opportunity for a carefully considered approach to the broad problem of judicial review of war legislation. The sheer multiplicity of cases for decision has required the Supreme Court of the United States to concentrate on less comprehensive issues. But the cases before the Australian court have been of a sufficient variety, and not of a quantity too vast, to support a thoughtful analysis of the entire subject.

We have seen in particular that the High Court of Australia has rejected a formalized presentation of the proper test of emergency legislation. It has wisely realized that any clear formula will suffice which invites the court to estimate the degree of emergency and the relation of legislation to that emergency. Three "tests" for determining that relation have appeared in the judgments of the High Court, of which the most useful would seem to be the test of the probable effect of the legislation, rather than that of its "purpose" or "subject-matter". Although the test is sometimes loosely addressed to the legislation as of the time of its enactment, the Court has recognized that the crucial time is in fact the time when the cause of action arose.

Although the Canadian and United States judgments do not consider in such detail this problem of the proper technique of judicial review, they agree in substance. In reviewing legislation under the elastic war power, it is the duty of the courts to estimate the degree of war emergency which was present when the cause of action arose, and to determine the effect of

the legislation under review with regard to that particular emergency. If the legislation is sufficiently related to the emergency, it will be considered to be within the affirmative scope of the elastic war power. If not, the court will hold the legislation ultra vires as an unwarranted invasion of regional legislative powers without support in a war emergency. That the elastic war power varies in scope with the fluctuating degree of emergency means that war legislation, intra vires when enacted, may become unconstitutional when the relevant emergency has so diminished that it will no longer support the assertion of power.

This intricate process of review is further complicated, and the judicial responsibility which it entails is enhanced, by the operation of constitutional limitations upon the exercise of federal legislative power. We have described the war power as an affirmative legislative power of the central government, and the elastic war power as increasing in affirmative extent with the advent of a greater emergency. Following that analogy, constitutional limitations are negative restrictions upon legislative power. We have seen that the Canadian Constitution contains very few limitations, none of which have been considered by the appellate courtsto restrict the war power. The Australian Constitution contains several significant limitations, and the United States Constitution many more. They vary in generality from the vague "due process" clause of the United States Constitution to the detailed itemization of the procedural rights of the criminal defendant in Sec. 80 of the Australian Constitution. The two constitutions contain several limitations which are roughly equivalent, such as the guarantee of freedom of religion. Although most limitations

are expressed in the absolute negative, they usually contain phrases, such as "just terms" or "unreasonable searches and seizures", which are susceptible of a wide variety of interpretations.

The early reaction of the United States Supreme Court was to regard constitutional limitations as immutable principles which must not vary in effect, regardless of the presence of emergency conditions. This theory of constitutional limitations is hardly consistent with the concept of an elastic war power which varies in scope with the degree of emergency at hand. Gradually the Court came to consider that the effect of a constitutional limitation, as that of any other provision of the constitution, will vary with the circumstances. We have seen that the prevailing attitude of both the Australian and the United States courts is that the extent to which a constitutional limitation will restrict the exercise of a war power depends upon the degree of emergency which is present. The negative effect of the limitation is no less variable than the affirmative extent of the war power.

The decisions in which the United States Supreme Court has applied the First Amendment as a restriction upon the federal power to punish subversive activities form an interesting study in this problem. The Court there undertook to enforce an apparently constant restrictive principle, under circumstances of varying emergency, in limitation of an exercise of the federal security power. The technique which was evolved might be applied with profit to the enforcement of other constitutional limitations on the war power.

> "The question in every case [Mr. Justice Holmes wrote] is whether the words used are used in such circumstances and are of such a nature as to create a clear and present

> danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right." (1)

The test is useful because it places the burden of proof upon those who assert that the affirmative legislative power overrides the negative restriction on legislation, and at the same time emphasizes that the effect of the limitation varies with the degree of emergency at hand. The result is that the limitation is given the preferred position which the framers of the Constitution presumably intended for it to have, but the court is reminded that the extent of its protection is diminished in wartime.

The principle that the effect of a constitutional limitation varies with the degree of emergency has been applied more readily to some limitations than to others. In the case of a limitation which endorses a general principle of reasonableness, such as the "due process" clause, it is easy to see that reasonableness in fact depends upon circumstances and that what is unreasonable in peacetime may be reasonable in wartime. In applying more specific limitations of less ambiguous content, such as the "just terms" provision or the guarantee of trial by jury in criminal cases, however, the courts tend to speak of them as remaining constant in scope regardless of the degree of emergency.

It is submitted that any attempt to distinguish constitutional limitations which are modified by a war emergency from those which are not should be examined very closely. We may expect that many limitations will go unchallenged because no emergencies will develop with regard to the particular

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1) Schenck v. U.S. (1919) 249 U.S.47,52.

legislative powers which they restrict. But no reason appears in principle for saying that certain constitutional limitations, from their very nature, will never be affected by war emergencies. The courts have not made a corresponding distinction between certain reserved powers of the regional governments which may be eclipsed by the elastic war power, and others which may not. In effect the theory of the elastic war power simply means that the general constitutional limitation against federal usurpation of regional powers is modified in wartime to the extent which the emergency dictates. If this general limitation, the keystone of the federal structure, is subject in wartime to variation with the emergency, it would seem that all other limitations are subject to the emergency doctrine as well.

Notes Toward

A Select Bibliography

From the standpoint of the constitutional lawyer, the primary source materials for a study of the federal war power are judgments of the federal courts of last resort in Canada, Australia, and the United States. The utility of textual material is to lead to the judgments themselves, and incidentally to suggest the proper evaluation of them. There is no general text in which the federal war power of the three systems is studied in detail as a question of constitutional law. The most useful summary of the subject is found in Chapter X of Wheare, Federal Government (1947). Professor Wheare's book is valuable to lawyers as a study of the problems of federalism, although it deals primarily with political institutions rather than with constitutional law as interpreted by the courts. A less comprehensive introduction to federalism in the three countries is included in Wilson, D. and E., Federation and World Order (1940).

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The textual material with which to begin a study of the war power in Canada is even more meagre, in comparison with that of Australia and the United States, than the Canadian case-law. There is no book which is devoted exclusively to a study of the war power, and no recent treatise on constitutional law which discusses the war power in detail. For an introduction to the history of federalism in Canada, the lawyer may turn with profit

to The Report of the Royal Commission on Dominion-Provincial Relations (The Rowell-Sirois Report); Volume VI of the Cambridge History of the British Empire; and Egerton and Grant, Canadian Constitutional Development (1907). The governmental problems of federalism are discussed in Chapter XIII of Corry, Democratic Government and Politics (1946); Part I of Brady, Democracy in the Dominions (1947); Corry, "The Federal Dilemma", which is Chapter V of Dawson (ed.), Problems of Modern Government (1941); and Chapters XXIII and XXIV of Kennedy, The Constitution of Canada (Second Edition 1938).

Especial reference to the governmental difficulties of waging war is made in Scott, "The Constitution and the Post-War World", which is Chapter III of Brady (ed.), Canada After the War (1943); Dawson, "The Impact of the War on Canadian Political Institutions", which is Chapter III of Dawson (ed.), Problems of Modern Government (1941); and Creighton, "Federal Relations Since 1914", which is Chapter II of Martin (ed.), Canada in Peace and War (1941).

Among standard lawyer's treatises on Canadian constitutional law are Lefroy, Canadian Constitutional Law (1918); Munro, The Constitution of Canada (1889); Riddell, The Constitution of Canada (1917); and Clement, The Law of the Canadian Constitution (1892). Although they make some reference to the war power, they are chiefly interesting as general expositions of Sec. 91 and Sec. 92 of the constitution.

The best guide to the problem of the war power is the material found in periodicals, particularly The Canadian Bar Review, The Canadian Journal of Economics and Political Science, and The University of Toronto Law Journal. The following articles are of particular interest, either because they relate

directly to the war power or because they discuss its constitutional background:

Laskin, "'Peace, Order and Good Government' Re-examined" (1947) 25 Can. Bar Rev. 1054.

MacDonald, "The Constitution in a Changing World" (1948) 26 Can. Bar Rev. 21.

Mallory, "The Courts and the Sovereignty of the Canadian Parliament" (1944) 10 C.J.E.P.S. 165.

O'Connor, "Property and Civil Rights in the Province" (1940) 18 Can. Bar Rev. 331.

Richard, "Peace, Order and Good Government" (1940) 18 Can. Bar Rev. 243.

Scott, "The Special Nature of Canadian Federalism" (1947) 13 C.J.E.P.S. 13.

Sellar, "Canadian Non-Permanent Militia Units" (1946) 24 Can. Bar Rev. 98.

Comment (1946) 24 Can. Bar Rev. 713 (emergency legislation).

Comment (1949) 27 Can. Bar Rev. 1248 (civil liberties of Jehovah's Witnesses).

Note (1943) 21 Can. Bar Rev. 141 (the Chemicals Reference).

Note (1943) 21 Can. Bar Rev. 593, 665 (the Visiting Forces Reference).

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The history and nature of federalism in Australia is traced in Vol. VII of the Cambridge History of the British Empire, and The Report of the Royal Commission on the Constitution. The federal division of power is discussed, inter alia, in Moore, The Commonwealth of Australia (Second Edition 1910). The relationship of war to federal government is considered in Greenwood, The Future of Australian Federalism (1946), Chapter VI; and Wynes, Legislative and Executive Powers in Australia (1936), Chapter VII, Sec. 2.

The books which provide the most useful treatment of the

federal war power from the standpoint of the constitutional lawyer, however, are Nicholas, The Australian Constitution (1948) (see Chapter X); and Sawyer, Cases on the Constitution of the Commonwealth of Australia (1948) (see Chapter IV). Supplemented by more recent periodical material, these texts provide an accurate and expeditious means of collecting the judgments of the High Court and the Privy Council on the war power. They make it unnecessary to turn to the earlier treatises on constitutional law and annotations of the constitution.

As in the case of Canada, the most through consideration of the constitutional limits of the war power of Australia may be found in periodicals - notably The Australian Law Journal, The Australian Quarterly, and The Canadian Bar Review. But the greater number of articles makes it possible to choose them for their discussion of specific war problems rather than for the general treatment of the constitutional background of the war power. These are particularly helpful:

Cowen, "The Separation of Judicial Power and the Exercise of Defence Powers in Australia" (1948) 27 Can. Bar Rev. 827.

Denholm, "Some Aspects of the Transition Period from War to Peace 1918-1921" (1944) 16 Aus. Quarterly 39 (No. 1).

Mitchell, "Transitional and Post-War Powers in the Commonwealth of Australia" (1947) 25 Can. Bar Rev. 854.

Mitchell, "Transitional and Post-War Powers in the Commonwealth of Australia" (1950) 28 Can. Bar Rev. 407.

Sawyer, "The Defence Power of the Commonwealth in Time of War" (1946) 20 Aus. Law J. 295.

Sawyer, "The Transitional Defence Power of the Commonwealth" (1949) 23 Aus. Law J. 255.

Sugerman and Dignam, "The Defence Power and Total War" (1943) 17 Aus. Law J. 207.

Williams and Ramsay, "Australian War Effort - 1943" (1943) 15 Aus. Quarterly 46 (No. 2).

Wilson, "Demobilisation of War-time Economic Controls" (1943) 15 Aus. Quarterly 5 (No. 4).

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In marked contrast to the Canadian materials, textual commentaries on the constitutional law of the war power in the United States are present in abundance. The problem is not to find a book or article which discusses the war power. Rather it is to develop a pattern of systematic research in which the textual material is used, not as authority in itself, but as a guide to the even more voluminous case-law.

To place the law of the war power in its proper setting, it is useful to begin with a short study of the background of federalism in the United States. This is effectively presented in Warren, The Making of the Constitution (Second Edition 1937), in the form of a day-to-day account of the Philadelphia Convention. The Federalist papers include a fairly comprehensive treatment of the war power, in Nos. III, IV, V, VI, VII, VIII, XXII, XXIII, XXIV, XXV, XXVI, XXVIII, XXIX, XLI, XLIII, XLV, and LXXIV. Corwin, Total War and the Constitution (1947) is more concerned with political institutions than with the constitutional law of the war power, but it contains a discussion of many of the more important cases. Standard treatises on constitutional law, such as Rottschaefer, American Constitutional Law (1939) and Willoughby, Constitutional Law of the United States (Second Edition 1929), treat the war power briefly and make reference to leading cases.

The most useful textual material for a study of the war power, however, is supplied by the scores of American law reviews, bar association journals, and other legal publications.

They may be correlated by means of the Index to Legal Periodicals; and beginning with the year 1942, the Annual Survey of American Law, published by the New York University School of Law, provides a convenient index to statutes, case-law, and legal writing. The articles and books listed below are among the most informative on the constitutional law of the war power:

Control of the War Economy

Bikle, "State Power over Intrastate Railroad Rates During Federal Control" (1919) 32 Harv. L.R. 299.

Borchard, "When Did the War Begin?" (1947) 47 Col. L.R. 742.

Culp, "Executive Power in Emergencies" (1933) 31 Mich. L.R. 1066.

Franklin, "War Powers of the President" (1942) 17 Tul. L.R. 217.

Freund, "The Emergency Price Control Act of 1942" (1943) 9 Law & Contemp. Prob. 77.

Hoague, et al., "Wartime Conscription and Control of Labor" (1940) 54 Harv. L.R. 50.

Hughes, "War Powers Under the Constitution" (1917) 42 Am. Bar Ass. Rep. 232.

Hull, "Some Legal Aspects of Federal Control of Railways" (1918) 31 Harv. L.R. 869.

Hudson, "The Duration of the War" (1926) 39 Harv. L.R. 1020.

Teller, "Government Seizure in Labor Disputes" (1947) 60 Harv. L.R. 1017.

Wambaugh, "War Emergency Legislation" (1917) 30 Harv. L.R. 663.

Note (1940) 54 Harv. L.R. 278 (mobilization for defense).

Note (1945) 45 Col. L.R. 774 (war plant seizure).

Note (1947) 27 Bos. Univ. L.R. 218 (executive war power).

Note (1947) 47 Col. L.R. 853 (judicial determination of the end of the war).

The Military Establishment and Military Jurisdiction

Glenn, The Army and the Law (1943).

Rankin, When Civil Law Fails (1939).

Ballantine, "Martial Law" (1912) 12 Col. L.R. 529.

Fairman, "The Law of Martial Rule" (1942) 55 Harv. L.R. 1253.

Fairman, "Martial Rule, in the Light of Sterling v. Constantin (1933) 19 Corn. L.Q. 20.

Fairman, "The Supreme Court on Military Jurisdiction" (1946) 59 Harv. L.R. 833.

Frank, "Ex Parte Milligan v. the Five Companies" (1944) 44 Col. L.R. 639.

Glueck, "By What Tribunals Shall War Offenders Be Tried?" (1943) 56 Harv. L.R. 1059.

Smoyer, "Amenability of Military Persons to the Laws of the Land" (1906) 5 Mich. L.R. 12.

Weiner, "The Militia Clause of the Constitution" (1940) 54 Harv. L.R. 181.

Note (1946) 46 Col. L.R. 977 (amenability of ex-servicemen to military law).

Note (1946) 45 Mich. L.R. 86 (trial of civilians by military tribunal).

Note (1947) 27 Bos. Univ. L.R. 235 (judicial review of draft boards).

Note (1948) 1 Van. L.R. 312 (jurisdiction of court-martial over officer on terminal leave).

Note (1949) 63 Harv. L.R. 531 (availability of writ of habeas corpus to military prisoners overseas).

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Antieau, "Clear and Present Danger - Its Meaning and Significance" (1950) 25 Notre Dame Law. 603.

Antieau, "The Rule of Clear and Present Danger - Its Origin and Development" (1950) 13 Univ. of Det. L.J. 198.

Antieau, "The Rule of Clear and Present Danger - Scope of its Applicability" (1950) 48 Mich. L.R. 811.

Chafee, "Freedom of Speech in War Time" (1919) 32 Harv. L.R. 932.

Chafee, "A Contemporary State Trial" (1920) 33 Harv. L.R. 747.

Dembitz, "Racial Discrimination and the Military Judgment" (1945) 45 Col. L.R. 175.

Hurst, "Treason in the United States" (1944-45) 58 Harv. L.R. 226, 395, 806.

Nathanson, "The Communist Trial and the Clear-and-Present-Danger Test" (1950) 63 Harv. L.R. 1167.

O'Brian, "Restraints Upon Individual Freedom in Times of National Emergency" (1941) 26 Corn. L.Q. 523.

O'Brian, "Loyalty Tests and Guilt by Association" (1948) 61 Harv. L.R. 592.

Rostow, "The Japanese American Cases" (1945) 54 Yale L.J. 489.

Wambaugh, "The Oath Required for Naturalization" (1931) 6 Tul. L.R. 132.

Comment (1948) 1 Stan. L.R. 85 (control of Communist activities).

Note (1940) 26 Corn. L.Q. 127 (compulsory flag salute).

Note (1944) 44 Col. L.R. 736 (denaturalization).

Note (1948) 61 Harv. L.R. 1215 (violent overthrow of government).

Note (1949) 49 Col. L.R. 363 (subversive movements).

Note (1950) 99 U. of Pa. L.R. 407 (Smith Act).

Note (1950) 99 U. of Pa. L.R. 409 (non-Communist affidavit).

Note (1950) 36 Va. L.R. 1090 (violent overthrow of government.

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Carlston, "Foreign Funds Control and the Alien Property Custodian" (1945) 31 Corn. L.Q. 1.

Dulles, "The Vesting Powers of the Alien Property Custodian" (1943) 28 Corn. L.Q. 245.

Littauer, "Confiscation of the Property of Technical Enemies" (1943) 52 Yale L.J. 739.

Lourie, "'Enemy' Under the Trading With the Enemy Act" (1945) 42 Mich. L.R. 383.

Marcus, "The Taking and Destruction of Property Under a Defense and War Program" (1942) 27 Corn. L.Q. 317.

McNulty, "Constitutionality of Alien Property Controls" (1945) 11 Law & Contemp. Prob. 135.

Note (1914) 27 Harv. L.R. 485 (preservation of neutrality).

Note (1937) 50 Harv. L.R. 691 (proclamation of embargo).

Note (1942) 51 Yale L.J. 1388 (trading with the enemy).

Note (1946) 46 Col. L.R. 121 (eminent domain).

Note (1947) 27 Bos. Univ. L.R. 229 ~~(1947)~~ (eminent domain).

Note (1947) 47 Col. L.R. 1052 (alien property control).

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