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War - Time of War - Effect of the Gulf of Tonkin Resolution on the Determination of a Time of War in Military and Civilian Courts - United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968); Freed v. Baldi, 443 P.2d 716 (Colo. 1968)

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the original constitutional issue put to the court, it is difficult to make any definite statement about the practical effect of the *Burnell* decision on Colorado law or subsequent decisions in other jurisdictions. Perhaps a lower Colorado court or an appellate court in another jurisdiction could legitimately avoid the apparent holding of *Burnell* on the basis of reasoning such as that outlined above. Even the dictum which the court expressed rests upon a logically unsound basis: "Additionally, we believe the probate court erred in classifying the criminally insane with those found guilty of crimes and incarcerated in the state penitentiary. This classification cannot be found in any legislative enactment."[30] The court is interpreting the probate court's classification of criminally insane with criminally convicted as inconsistent with the legislative classification. However, the probate court made no such ruling, but, to the contrary, found that the legislative classification was invalid as violative of the equal protection clause.

The important issues inherent in the case being left thus unresolved by the *Burnell* decision, it is to be hoped that a subsequent consideration of these issues will provide the law in this area with a legally and logically sound precedent which recognizes the emerging issues of social policy concerning the penology of criminally insane persons.

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WAR — TIME OF WAR — EFFECT OF THE GULF OF TONKIN RESOLUTION[1] ON THE DETERMINATION OF A TIME OF WAR IN MILITARY AND CIVILIAN COURTS. — *United States v. Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968); *Freed v. Baldi*, 443 P.2d 716 (Colo. 1968).

In *Anderson,* the accused absented himself without authority from his unit in Fort Polk, Louisiana, on November 3, 1964. On February 10, 1967, he surrendered to civilian authorities and was

see note 4 *supra* and accompanying text. However, it is apparent that no court dealing with one or more of these distinctions has recognized all of the distinctions, even when they may have been relevant. Thus, all of the cases above cited are distinguishable on their facts, and no principle or principles of law articulated by these courts adequately synthesize the varying fact situations into a logical structure.

[30] State v. Estate of Burnell, 439 P.2d 38, 40 (Colo. 1968).

[1] *Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia,* Pub. L. No. 88-408, 78 Stat. 384 (1964). The resolution was subsequently criticized by members of the Senate as not accurately reflecting the intent of the Congress. *Hearings on S.R. 151 Before the Senate Comm. on Foreign Relations on United States Commitments to Foreign Powers,* 90th Cong., 1st Sess. 118, 132 (1967).

returned to military control. He was charged with desertion[2] and was convicted by a general court-martial for that offense. On review, the conviction for desertion was reversed, but a finding of guilty for the lesser offense of unauthorized absence[3] was affirmed. The Board of Review considered the effect of the Gulf of Tonkin Resolution in establishing a "time of war" for purposes of tolling the two-year statute of limitations[4] and determined that the offense could be tried and punished at any time without limitation. On appeal to the United States Court of Military Appeals, *held,* affirmed. "When a state of hostilities is expressly recognized by both Congress and the President, it is incumbent upon the judiciary to accept the consequences that attach to such recognition."[5] The court was divided on the significance of the Gulf of Tonkin Resolution, passed by Congress on August 10, 1964, in determining the beginning of "time of war" for military justice.

In *Freed*, a patrolman who had taken a civil service examination for promotion to sergeant in the Denver Police Department was awarded a ten point veteran's preference provided by the Colorado constitution for candidates who have served in the armed forces of the United States in time of war and who have been honorably discharged.[6] The constitution enumerated certain wars for which this preference is to be given, including "the period of any war in which the United States may hereafter engage."[7] Patrolman Freed served in the armed forces from June 13, 1952, until June 12, 1956. Without the veteran's preference Freed would have placed 56th on the eligibility list; with the points he was ranked third. Patrolmen displaced by Freed's repositioning because of the veteran's preference brought actions alleging that Freed was awarded the preference points illegally. The trial court did not rule on the effect of the Korean conflict, but found that World War II ended for purposes of the constitution on April 28, 1952, almost two months before Freed entered the service. Thus, the trial court found that Freed was wrongfully awarded ten veteran's preference points. On appeal to the

[2] Uniform Code of Military Justice, 10 U.S.C. § 885 (1964) [hereinafter cited as U.C.M.J.].

[3] U.C.M.J., 10 U.S.C. § 886 (1964).

[4] U.C.M.J., 10 U.S.C. § 843(a) (1964) provides, *inter alia,* that "[a] person charged with desertion or absence without leave in time of war . . . may be tried and punished at any time without limitation." In times of peace, the statute of limitations period for desertion is 3 years and for unauthorized absence, 2 years. *Id.* §§ 843(b), (c).

[5] United States v. Anderson, 17 U.S.C.M.A. 588, 590, 38 C.M.R. 386, 388 (1968).

[6] COLO. CONST. art. XII, § 14.

[7] *Id.*

Supreme Court of Colorado, *held*, affirmed in part.[8] Although the court recognized the presence of United States forces in Korea during the period between June 27, 1950, and January 31, 1955, it determined "that the reference 'in times of war' and 'the period of any war in which the United States may hereafter engage' refers to war officially declared by Congress."[9] Service in Korea, therefore, was not in "time of war" for purposes of the Colorado veteran's preference.

The two subject cases of this Comment demonstrate the wide divergence among the courts in determining when a "time of war" exists. From the strictest interpretation requiring an official declaration of war to the most pragmatic determination requiring only a recognition by Congress and the President that hostilities exist, the responses of the courts are being challenged by a fundamental change in the style of military conflict — the demise of formally declared wars in the traditional sense. As cases arise involving the fighting in Vietnam, the courts will have to consider the effect of the Gulf of Tonkin Resolution, which may be sufficiently analogous to a declaration of war so as to nullify the previously convenient device of finding all military conflicts not formalized by Congress to be something less than wars.

I. Military Jurisdictions

In the military courts, a formal declaration of war has never been a *sine qua non* to finding a "time of war" for purposes of military justice. Since it has become the fashion to commence wars with sudden attacks mounted without warning, the military court usually bases its determination that a "time of war" exists on the occurrence of hostilities outside of the country, involving the use of military forces of the United States.[10] This allows ample opportunity for offenses to occur between the beginning of hostilities and the subsequent Constitutional formality of a declaration of war by Congress, if in fact any such formal action is ever taken. Therefore, the military courts rely heavily on nonformal criteria in identifying the beginning and ending of hostilities for purposes of military justice.[11] Equally important, the consideration given

[8] Freed v. Baldi, 443 P.2d 716 (Colo. 1968), *appeal dismissed,* 89 S. Ct. 553 (1969). The trial court was affirmed in its decision that the veteran's preference points were wrongfully awarded, but the case was remanded so that the trial court could order that the promotion to sergeant be rescinded as well.

[9] *Id.* at 719.

[10] *See, e.g.,* United States v. Shell, 7 U.S.C.M.A. 646, 23 C.M.R. 110 (1957); United States v. Ayres, 4 U.S.C.M.A. 220, 15 C.M.R. 220 (1954); United States v. Bancroft, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953); United States v. Gann, 3 U.S.C.M.A. 12, 11 C.M.R. 12 (1953); United States v. Anderson, C.M. 347025, 1 C.M.R. 345 (1951).

[11] *See* text accompanying note 18 *infra.*

the acts of the political departments goes solely to the *occurrence* of such acts rather than to their validity or constitutionality.

The determination of "time of war" in military law[12] affects the jurisdiction of courts-martial,[13] the availability of defenses,[14] the tolling of the statute of limitations,[15] and the severity of punishment[16] for certain offenses prohibited by the Uniform Code of Military Justice. Because of the abrupt changes in the scope and severity of military prosecutions for certain offenses during wartime, the military court is usually the first to have to consider the existence of a "time of war."

In *United States v. Bancroft*,[17] the leading case identifying the criteria military courts will look to in determining the beginning and ending of a "time of war," the court relied upon

> the very nature of the present conflict; the manner in which it is carried on; the movement to, and the presence of large numbers of American men and women on, the battlefields of Korea; the casualties involved; the sacrifices required; the drafting of recruits to maintain the large number of persons in the military services; the national emergency legislation enacted and being enacted; the executive orders promulgated; and the tremendous sums being expended . . . .[18]

The court expressly rejected the need to consider a formal declaration of war as a condition precedent to a "time of war," and declared that "for our purposes, it matters not whether the authorization for the military activities in Korea springs from Congressional declarations, United Nations agreements or orders by the Chief Executive."[19] In short, the court considers its role to consist solely of determining whether the conditions involved constitute

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[12] For an excellent article considering the existence of a "time of war" in Vietnam for purposes of military justice, but written before the United States Court of Military Appeals considered the question, see Stevens, *Time of War and Vietnam,* 8 AIR FORCE J.A.G.L. REV., May-June 1966, at 23.

[13] U.C.M.J., 10 U.S.C. § 802(10) (1964). In establishing persons subject to the U.C.M.J., this article includes "in time of war . . . persons accompanying or serving with the armies of the United States in the field."

[14] U.C.M.J., 10 U.S.C. § 843 (1964).

[15] U.C.M.J., 10 U.S.C. § 843(a) (1964). For a discussion of the effect of "time of war" on the tolling of the statute of limitations see the comment on *Anderson* in 82 HARV. L. REV. 483 (1968).

[16] U.C.M.J., 10 U.S.C. § 885(c) (1964) provides that "any person found guilty of desertion . . . shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct," and § 913, prohibiting misbehavior of a sentinel, provides that the offense shall be punished "if the offense is committed in time of war, by death or such other punishment as a court-martial may direct . . . ." Section 856 provides that the maximum punishment shall be set by the President. As yet, the President has not raised the maximum limitation for the capital offenses to death for purposes of military justice during present hostilities in Vietnam. *See also* 82 HARV. L. REV. 483 (1968).

[17] 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953).

[18] *Id.* at 5.

[19] *Id.*

a "time of war" within the meaning of the terms as used in the Uniform Code of Military Justice.

In *Anderson,* the issue of "time of war" revolved about the Gulf of Tonkin Resolution. Speaking for the court, Chief Judge Quinn found that "[t]he language of the resolution clearly indicates that Congress also recognized and *declared*, as a legislative decision, that the Gulf of Tonkin attack precipitated a *state of armed conflict* between the United States and North Vietnam."[20] Furthermore, "When a state of hostilities is expressly recognized by both Congress and the President, it is incumbent upon the judiciary to accept the consequences that attach to such recognition."[21] Of the two judges concurring in the result, one did not "agree that the Gulf of Tonkin Resolution amounts to or constitutes a declaration of war,"[22] and the other found that "it is unnecessary to consider the resolution or to characterize it either as a declaration of war . . . or as evidence of the existence of conflict . . . ."[23]

The strongest characterization of the Resolution is still a long way from those words of art which call into effect all of the international implications of a declaration of war. The question still remains — what degree of congressional recognition of a war is required to "make it incumbent upon the judiciary to accept the consequences"[24] and to determine that a "time of war" exists? The answer depends on the case before the court. In *Anderson,* the court was concerned with how much military involvement was required to bring into effect the additional sanctions and provisions the Congress included in the Uniform Code of Military Justice for "time of war."[25] Surely the Congress adequately recognized the state of hostilities when it appropriated funds,[26] or provided the participants in the fighting with additional veteran's benefits,[27] or passed any of the many other acts specifically recognizing the fighting in Vietnam.[28] And there can be no doubt that the President recognized the hostilities when he proclaimed a day of observance and prayer for the defense of South Vietnam,[29] pro-

[20] 17 U.S.C.M.A. at 590, 38 C.M.R. at 388 (emphasis added).

[21] *Id.*

[22] *Id.* at 593, 38 C.M.R. at 391 (Kilday, J.).

[23] *Id.* at 594, 38 C.M.R. at 392 (Ferguson, J.).

[24] *Id.* at 590, 38 C.M.R. at 388.

[25] *See* notes 13-16 *supra.*

[26] Pub. L. No. 89-374, 80 Stat. 79 (1966).

[27] Pub. L. No. 90-77, 81 Stat. 178 (1967).

[28] For court decisions finding congressional recognition of hostilities see Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); Hamilton v. McClaughry, 136 F. 445 (C.C. Kan. 1905); United States v. Bancroft, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953).

[29] Presidential Proclamation No. 3686, 3 C.F.R. 145 (1965).

claimed the area a combat zone for pay and decoration purposes,[30] and raised the maximum sentence for the misbehavior of a sentinel when in an area where forces are eligible for combat pay.[31]

In short, there were ample facts available to allow a military court to determine the existence of a "time of war" even without the Gulf of Tonkin Resolution. The significance of *Anderson* is that the court did rely upon the Resolution to the extent that the judge writing the opinion of the court considered it equivalent to a declaration of war. Because of this characterization of the Resolution, civilian courts which formerly required an actual declaration of war for particular purposes may have to give more credence to the argument that the Resolution is a sufficient condition precedent to a formally declared war.

II. CIVILIAN JURISDICTIONS

In the civilian courts there are two competing lines of authority on the issue whether a "time of war" exists under the circumstances of a particular case.[32] The more conservative approach requires that a formal declaration of war precede any recognition of a "time of war" for judicial purposes.[33] The empirical approach — the one also adopted by the military courts — requires only that the circumstances be recognizable as war-like activity, whether declared or otherwise.[34]

The courts requiring a formal declaration as a condition precedent to a "time of war" do so primarily to favor the insured in the construction of an ambiguous phrase in insurance liability litigation. The courts requiring a mere existence of such conditions as would constitute a "time of war" in the popular understanding of the term do so primarily because they see no ambiguity in the term as understood by both parties to the insurance contract.

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[30] Exec. Order No. 11,216, 3 C.F.R. 301 (1965); Exec. Order No. 11,231, 3 C.F.R. 325 (1965).

[31] Exec. Order No. 11,317, 3 C.F.R. 170 (Supp. 1966).

[32] *See generally* Annot., 168 A.L.R. 173 (1947); Annot., 36 A.L.R.2d 996 (1954).

[33] *Ex parte* Givins, 262 F. 702 (N.D. Ga. 1920); Pyramid Life Ins. Co. v. Masch, 134 Colo. 70, 299 P.2d 117 (1956); Belay v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 231, 95 A.2d 202 (1953), *cert. denied,* 346 U.S. 820 (1954); Mutual Life Ins. Co. v. Davis, 79 Ga. App. 336, 53 S.E.2d 571 (1949); Rosenau v. Idaho Mut. Beneficial Ass'n, 65 Idaho 408, 145 P.2d 227 (1944); West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E.2d 475 (1943).

[34] New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir.), *cert. denied,* 331 U.S. 811 (1946); Gagliormella v. Metropolitan Life Ins. Co., 122 F. Supp. 246 (D.C. Mass. 1954); Carius v. New York Life Ins. Co., 124 F. Supp. 388 (S.D. Ill. 1954); Stinsen v. New York Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948); Thomas v. Metropolitan Life Ins. Co., 388 Pa. 499, 131 A.2d 600 (1957); Christensen v. Sterling Ins. Co., 46 Wash. 2d 13, 284 P.2d 287 (1955); Gudewicz v. John Hancock Mut. Life Ins. Co., 331 Mass. 752, 133 N.E.2d 900 (1954); Langlas v. Iowa Life Ins. Co., 245 Iowa 713, 63 N.W.2d 885 (1954); Western Reserve Life Ins. Co. v. Meadows, 152 Tex. 557, 261 S.W.2d 554 (1953).

In both approaches, the determination of a "time of war" is basically a *factual* one, based on what the phrase was intended to mean in a contract, a statute, or a constitutional amendment. One approach requires the *fact* of a declaration of war,[35] and the other requires only certain *facts* showing an existing hostile military confrontation.[36] In neither approach is the validity or legality of the political departments' actions concerning the hostilities ever before the courts. There is doubt that any such question could be considered by the courts without raising grave constitutional problems of jurisdiction.[37]

The *Freed* decision was based upon the conservative approach. The court saw the case as resting primarily on the interpretation of the phrase "in times of war" in the Colorado constitution.[38] Acknowledging that World War II was officially ended prior to the beginning of Freed's service, the court directed its attention to the following question: "Is a person who has served in the armed forces subsequent to April 28, 1952, during the time of the 'Korean conflict,' entitled to veteran's preference points under the Colorado Constitution as having served in time of war?"[39]

Answering that question in the negative, the court based its reasoning on a two-step process. First, it determined that the people of Colorado had intended the phrase "in times of war" to mean only war "officially declared by Congress."[40] In so doing, the court was fulfilling its responsibilities as final arbiter in interpreting the state constitution, and although its interpretation is questionable, criticism of its holding is not the purpose here. Second, the court relied on the case of *Pyramid Life Insurance Co.*

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[35] Cases cited note 33 *supra.*

[36] Cases cited note 34 *supra.*

[37] Courts have generally refused to decide the politically potent questions arising from commitment of United States forces to undeclared military actions. *See, e.g.,* Johnson v. Eisentrager, 339 U.S. 763 (1950); Stinsen v. New York Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948); New York Life Ins. Co. v. Durham, 166 F.2d 874 (10th Cir. 1948); Citizens Protective League v. Clark, 155 F.2d 290 (D.C. Cir.), *cert. denied,* 329 U.S. 787 (1946); Weissman v. Metropolitan Life Ins. Co., 112 F. Supp. 420 (S.D. Cal. 1953); *In re* Lo Dolce, 106 F. Supp. 455 (W.D.N.Y. 1952). *See* the opinions of Justices Stewart and Douglas, dissenting from a denial of certiorari, in Mora v. McNamara, 389 U.S. 934, *denying cert. to* 373 F.2d 664 (D.C. Cir. 1967).

[38] 443 P.2d at 717.

[39] *Id.*

[40] *Id.* at 719. The court admitted that of the four periods of hostility mentioned in the amendment, only three — the Spanish-American War, World War I, and World War II — were wars formally declared by the United States. The fourth — the Philippine Insurrection — was specifically included because otherwise it would not have been encompassed within the general phrase "in times of war." The court followed with the classic argument that had the people intended to *include* any period of hostility, proper language to do so could have been used. The answer, of course, is equally persuasive in that had the people intended to *exclude* any hostility *not* declared by Congress, proper language to do that could have been used. Inclusion of the Philippine Insurrection seems to lend some weight to the argument that the people must not have intended to restrict the provision to only declared wars. 443 P.2d at 719.

v. Masch[41] in finding that the Korean conflict was never formalized by a declaration of war. The *Freed* court noted that "the phrase 'in times of war' in the Constitution [Colorado] is identical to that used in the insurance policy in *Pyramid*."[42] On the strength of this coincidence the court felt itself compelled to follow the reasoning of *Pyramid* in deciding the *Freed* case; therefore, it could only construe the language in the constitution as excluding the Korean conflict since it had never been formally declared a war by Congress.

The phrase "in times of war" was construed in *Pyramid* to allow the beneficiary of an insurance contract to recover the full value of the policy by finding that the Korean conflict was not a "war" excluded by the policy language.[43] The dissenting opinion in *Freed* points out the incongruity of considering a decision in an insurance contract case as binding on the court when it is interpreting the intent of the people of the state as expressed in a constitutional amendment. Ambiguous language is customarily construed against the company drawing the instrument in insurance cases, but that certainly need not apply to the interpretation of constitutional language.[44]

However much critics may object to this technique used by the *Freed* court, the fact remains that the Korean conflict was never sanctioned by congressional recognition in a formal sense. That, though, brings us to the heart of the present inquiry.

Following a precedent representative of the most conservative approach to the "time of war" problem, the Colorado court established in *Freed* that veteran's preference points could only be awarded to veterans of wars "officially declared" by Congress. That decision effectively excluded those who served in the armed forces during the Korean conflict. In broader perspective, however, it merely opens a Pandora's Box, because veterans returning from Vietnam are able to refer the court's attention to a resolution passed by both houses of Congress which resolved that "the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States . . . to take all necessary steps, including the use of armed force . . . ."[45]

Admittedly, this is not the same wording used to declare war in the five wars during our history formalized by congressional

[41] 134 Colo. 70, 299 P.2d 117 (1956).

[42] Freed v. Baldi, 443 P.2d 716, 719 (Colo. 1968).

[43] Pyramid Life Ins. Co. v. Masch, 134 Colo. 70, 73, 229 P.2d 117 (1956).

[44] Freed v. Baldi, 443 P.2d 716, 720-21 (Colo. 1968) (Kelly, J. dissenting).

[45] *Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia,* Pub. L. No. 88-408, 78 Stat. 384 (1964).

action, but it cannot be said to vary much from the substance of past resolutions.[46] The opinion of the court in *Anderson* characterized the Resolution as "a legislative decision, that the Gulf of Tonkin attack precipitated a state of armed conflict between the United States and North Vietnam."[47] The objection by some members of the military court to characterizing the Resolution as a declaration of war must be tempered by the realization that this court could have reached the decision in *Anderson* even without resort to the Resolution. The court found it to be the intent of Congress to provide for certain measures in administering military justice whenever the circumstances required.

The circumstances confronting the court in *Freed* were similar to those confronting the *Anderson* court. However, there was no resolution to interpret by the *Freed* court. The issue, therefore, is: How will the Gulf of Tonkin Resolution affect the Colorado Supreme Court's determination whether the fighting in Vietnam is what the constitution includes within the phrase "period of *any war*

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[46] War of 1812, 2 Stat. 755.

Be it enacted by . . . Congress assembled, That war . . . is . . . declared to exist . . . and that the President . . . is hereby authorized to use the whole land and naval force . . . to carry the same into effect . . . .

Mexican War of 1846, 9 Stat. 9.

Be it enacted by . . . Congress assembled, That for the purpose of enabling the . . . United States to prosecute said war to a speedy . . . termination, the President . . . is . . . authorized to employ the militia, naval, and military forces of the United States . . . .

Spanish-American War of 1898, 30 Stat. 364.

Be it enacted by . . . Congress assembled, First, That war . . . is . . . declared to exist . . . between the United States of America and the Kingdom of Spain . . . [and] the President . . . is directed . . . to use the entire land and naval forces . . . to such extent as may be necessary . . . .

World War I against Germany, 40 Stat. 1 (1917).

Resolved by . . . Congress assembled, That the state of war between the United States and the Imperial German Government . . . is hereby formally declared . . . [and] the President is . . . authorized . . . to employ the entire naval and military forces . . . .

World War II against Japan, 55 Stat. 795 (1941).

Resolved . . . the state of war . . . is hereby formally declared . . . [and] the President is . . . authorized . . . to employ the entire naval and military forces . . . .

World War II against Germany, 55 Stat. 796 (1941) (same as Japan).

World War II against Italy, 55 Stat. 797 (1941) (same as Japan).

The Gulf of Tonkin Resolution, 78 Stat. 384 (1964) reads in substance:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress approved and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Sec. 2 [T]he United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

[47] United States v. Anderson, 17 U.S.C.M.A. 588, 590, 38 C.M.R. 386, 388 (1968).

in which the United States may hereafter engage."[48] The answer can only be speculative, but the evasive tactics used in *Freed* may not be so readily available to the court when the effect of the Gulf of Tonkin Resolution is raised in a case requiring determination whether the Vietnamese war was "officially declared" by Congress. If the court were to determine that the Vietnamese war came within the intent of the people of Colorado when adopting the constitutional amendment, those same people may wonder how they intended to include the Philippine Insurrection and the Vietnamese war and failed to intend the "war" in Korea. But that problem of interpretation is reserved for the court.

III. MILITARY JURISDICTION OVER CIVILIANS

The Uniform Code of Military Justice purports to give courts-martial jurisdiction over civilians accompanying military forces in "time of war,"[49] and caselaw supports this conclusion.[50] Prior to Vietnam, military prosecutions of civilians under such circumstances were repeatedly upheld. However, in 1957, the Supreme Court held that it was unconstitutional to court-martial servicemen's civilian dependents for capital offenses committed during peacetime in foreign areas.[51] In a series of cases in 1960, the Court went further. holding that in both capital and noncapital cases, it was unconstitutional to court-martial either civilian employees or dependents during peacetime conditions.[52]

Although these decisions apply only to times of peace, they naturally raise the question of their possible effect on civilian offenses in the war zone now that the Court of Military Appeals has determined a "time of war" exists in Vietnam. It appears for the present that civilians accompanying the military in Vietnam are subject to the jurisdiction of military courts.[53] If a prosecution occurs, it is not unlikely that habeas corpus would be initiated to test whether the jurisdiction of the court-martial was validly grounded. That would squarely present the civilian courts with the issue of the

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[48] COLO. CONST. art. XII, § 14 (emphasis added).

[49] U.C.M.J., 10 U.S.C. § 802(10) (1964).

[50] *See Ex parte* Gerlach, 247 F. 616 (D.C.N.Y. 1918); *Ex parte* Falls, 251 F. 415 (D.C.N.J. 1918); *Ex parte* Mikel, 253 F. 817 (D.C.S.C. 1918), *rev'd sub nom.*, Hines v. Mikel, 259 F. 28 (4th Cir.), *cert. denied,* 250 U.S. 645 (1919); Perlstein v. United States, 151 F.2d 167 (3rd Cir. 1945), *cert. granted,* 327 U.S. 777, *cert. dismissed as moot,* 328 U.S. 822 (1946); McCune v. Kilpatrick, 53 F. Supp. 80 (D.C. Va. 1943).

[51] Reid v. Covert, 351 U.S. 487 (1956), *rev'd on rehearing,* 354 U.S. 1 (1957).

[52] Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960).

[53] *See generally* Weiner, *Courts Martial for Civilians Accompanying the Armed Forces in Vietnam,* 54 A.B.A.J. 24 (1968).

existence of a "time of war" in Vietnam. From the general thrust of the past decisions, it appears that the civilian court would reach the same conclusion as *Anderson.* If that occurs, it is likely that the Supreme Court would sustain, as a valid exercise of the war powers by Congress, the extension of military jurisdiction to civilians accompanying the military in "time of war." From the inception of the Union, most hostile military action has been undertaken in undeclared wars.[54] It is unlikely that the Supreme Court would find the intent of Congress to be that a formal declaration of war must precede the operation of the "time of war" provisions in the Uniform Code of Military Justice, even as it pertains to *civilians* in a war zone.

CONCLUSION

A judicial determination that a "time of war" exists is of unusually limited currency. Such a determination means only that the particular activity at issue is substantially what was intended when the phrase "time of war" was used in the particular contract, legislation, or amendment before the court. At any given time, a military situation may be a "time of war" for some purposes and not for others. The determination of a "time of war" is no more than an incidental step in reaching a decision on the main issue. Whatever questions may be entertained in the abstract concerning the war powers of Congress, the morality of a particular war, or the legality of military force, the answers are not to be found in a judicial determination whether or not a "time of war" exists.

The *Freed* court decided that the people of Colorado intended to allow veteran's preference points only to those who served in wars formally declared by Congress, even though the constitutional language is susceptible to a construction much less limited in scope. The *Anderson* court raises the possibility that the Gulf of Tonkin Resolution may be as close to a formal declaration of war as will ever again be seen in a world tempered by 20 years of cold war and hot wars with limited objectives. The conflict between the judicial viewpoints raises a dilemma which will only be resolved when courts confront the Gulf of Tonkin Resolution on the way to deciding whether a "time of war" ever existed in Vietnam.

Robert Edd Lee

[54] *See* enumerated declarations of war note 46 *supra.* All other military actions have therefore been undeclared conflicts.