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Legal War: When Does It Exist, and When Does It End?

By John Alan Cohan*

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I. Introduction

While the ordinary citizen may think that a given conflict constitutes a “war,” the popular conception of war clearly is different from war in the legal sense. What seems to be a state of war to many observers may, from a legal standpoint, be a state of peace. It is important to ascertain whether war in the formal, legal sense exists because various legal consequences attach if there is a state of war. For example, in order to know whether certain wartime legislation is operative, or to determine when wartime exclusionary clauses apply in life insurance contracts, one must know, with as much exactness as possible, whether a state of war exists and, if so, when it started and when it ended.

The political branches of government, as well as the courts, have recognized the distinction between a state of war in the legal sense (Legal War) and war in the pragmatic, de facto sense. Military actions such as reprisal, defensive action, humanitarian intervention, “pacific blockade,” or other forcible measures short of war might

1. The existence of a “true” war is referred to variously in the literature as “war,” “war in the legal sense,” “de jure war,” “war in the sense of international law” and “war in the formal sense.” See AHMED M. RIFAAT, INTERNATIONAL AGGRESSION 20 n.4 (1979). For purposes of readability, this article will periodically refer to war in the legal sense as Legal War.

Occur on a considerable scale, yet because these are "confined in [their] nature and extent; being limited as to places, persons, and things... [these are] more properly termed imperfect war..." Moreover, "[a] state of war may exist without active hostilities, and active hostilities may exist without a state of war." 4

Whether a state of war exists between belligerent states is more often than not far from certain. Very few wars are waged pursuant to a formal declaration of war. American courts seem never to have agreed on a standard for determining the existence of a state of war. To a large extent, judicial definitions and standards turn on the context in which the question arises. Thus, as discussed in this article, situations that will activate the "time of war" provisions in the Uniform Code of Military Justice (Uniform Code)5 may not necessarily operate to constitute a "time of war" under life insurance policies that contain clauses denying or curtailing benefits when death is a result of war or when the insured is in the armed services in time of war. 6

Further complicating the problem, as discussed in this article, is the fact that governments have engaged in significant armed conflicts while vigorously denying that a state of war has existed between

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4. Wright, supra note 2, at 363.
6. For cases pertaining to World War II, see, e.g., N.Y. Life Ins. Co. v. Bennion, 158 F.2d 260, 264 (10th Cir. 1946) stating:
We can discern no demonstrable difference in the supposition and the actual facts, and we therefore conclude that the formal declaration by the Congress on December 8th was not an essential prerequisite to a political determination of the existence of a state of war commencing with the attack on Pearl Harbor.
In more recent years, insurance companies have attempted to avoid these conflicting results by providing more specific language in policies by using phrases such as "during combat," or "acts of war, both declared and undeclared." See Notes, Military Law—"In Time of War" Under the Uniform Code of Military Justice: An Elusive Standard, 67 Mich. L. Rev. 841, 846 n.41 (1969).
them—notwithstanding the obvious state of belligerency, the engagement of troops and the loss of lives. The motivation for states to deny that war exists between them runs the gamut from the desire to maintain normal diplomatic, commercial and legal relations without interruption, to concern about the psychological impact on the public if a war is acknowledged to exist in the legal sense. And if a state of war is admitted, the date on which the war began can be far from certain. Compounding the problem is the fact is that most wars are undeclared wars so that opinions as to the date on which a particular war began may be diverse.

As discussed in this article, the question of whether a given conflict constitutes a state of war—and if so when it began and ended—may be framed by different courts for different purposes. Generally speaking, military courts tend to take a more expansive view for the purpose of applying war status provisions in the Uniform Code, but nonetheless courts-martial have arrived at varying conclusions under similar facts as to whether wartime status existed. Civil courts may take a somewhat diverse, ad hoc, approach as to whether a war exists and, if so, the duration of a war for purposes of interpreting municipal and contract law. There is significant disagreement, particularly in civil courts, as to the weight given to various criteria such as statements from the political branches of government, the number of troops deployed or the number of casualties, in deciding whether a state of war exists.

Finally, there is substantial disagreement as to when a war has ended. When a war ends is often a greater puzzle than when a war starts because the cessation of hostilities or an armistice does not, in and of itself, constitute the end of war under customary international law. Nevertheless, courts, both military and civil, may often depart from traditional views on this point, often in an effort to avoid harsh results.

This article discusses the problems of determining when war exists, when it ends and why these concerns are important. Part II outlines the important military and civil reasons for establishing whether or not a state of war exists and discusses why there is a general political and diplomatic reluctance to admit a state of war despite evidence of a de facto war. Part III addresses the formalities associated in history with respect to declarations of war, and then turns to the question of when a declaration of war exists, problems with ambiguity and retroactivity of war declarations and problems of unilateral war declarations. It also discusses diplomatic powers of the
President that can lead to war and examines the War Powers Resolution and its impact as to whether a state of war exists. Part IV considers military operations other than war that may lead to war but do not constitute Legal War. It discusses the role of commanders in the field in construing whether a state of war has begun, and how third states not a party to a conflict might determine that a state of war exists. Part V turns to case studies of states that have denied the existence of war despite the presence of military battles, and the way courts have interpreted these conflicts. Part VI discusses three modern American case studies and asks whether the American Civil War, the Korean conflict or the Vietnam War were wars in the legal sense.

Part VII examines "time of war" provisions of the Uniform Code, and how these provisions have played out in various conflicts. It also analyzes how courts have interpreted "time of war" provisions in life insurance policies. Part VIII discusses the "political act test" for determining when a war ceases to exist. And Part IX concludes with remarks on how the question of when war exists and ends might be clarified.

II. Reasons for Clarifying Whether a State of War Exists

A. In General

War has been described as a judicial procedure, a "litigation" between nations by which states desirous of obtaining redress for wrongs or settling disputes resort to self-help to administer justice and punishment after available means of peaceful resolution have been exhausted. 7 War exists when peace between states has ended and a certain quantum of hostilities has commenced. How prolonged or embattled the conflict must be, how extensive the casualties, before a state of war exists in the legal sense, is the subject of significant controversy.

One may well wonder why the distinction between war in the formal sense and conflicts that fall short of war is necessary. Isn't it absurd or, at best, highly obfuscatory, to make a distinction between one kind of battle and another when, in either instance, troops are deployed, casualties incurred, international rules of \textit{jus in bello}
observed and prisoners of war captured? To answer this concern, I would refer to the following passage of Ian Brownlie:

In the view of most of the governments there were substantial reasons of policy for avoiding a state of war while at the same time using the desired amount of coercion. In the era of constitutional government the executive was usually bound to observe time-consuming and politically embarrassing procedures before recourse to 'war'. The process involved preparation of public opinion and the rallying of sufficient support in the legislative assembly. Recourse to 'war' incurred a certain odium; 'war' was a term which had acquired a deep psychological and emotional significance. 'War' implied a full-scale combat which offended pacific sentiment and was wasteful of lives and a nation's resources. Furthermore, if a government admitted the existence of a state of war third states could, without embarrassment, demand observance of neutral rights and were themselves under various legal duties. The 'state of war' involved a termination of commercial intercourse between the contending states and the invalidation or suspension of treaties. 8

Thus, distinguishing between a state of war and other kinds of conflict involving the use of force, such as reprisals, retaliations or interventions, has substantial diplomatic implications. The moment that Legal War starts, there are certain profound political, psychological and international consequences: diplomatic relations are cut off; trading, commercial transactions, contracts and debts with the enemy are suspended; 9 treaty obligations are suspended between the belligerents; vast emergency powers may be deployed domestically, 10 and legal relations between neutral states and the

8. Id. at 27.
9. The Trading with the Enemy Act (the Act), makes it unlawful for any person in the United States to directly or indirectly engage in or attempt to engage in a broad range of trade or commercial transactions with an enemy or ally of an enemy of the United States. 50 U.S.C. app. §§ 1-44 (2003). Under the Act, the word "enemy" is deemed to mean any individual, resident or entity of any nation with which the United States is at war, and the government of any nation with which the United States is at war (or any political or municipal subdivisions thereof) and its agents and officers. See id. § 2. The Act defines "the beginning of the war" as designated by formal declarations of war by Congress or the existence of a state of war. See id. It defines "end of the war" to mean the date on which there is a proclamation of exchange of ratifications of the treaty of peace, or such earlier date as the President declares by proclamation. See id. Thus, the Act specifically defines when a war begins and when a war ends for purposes of trading with the enemy.
10. For example, in the course of Operation Enduring Freedom irregular combatants who were captured by allied forces were declared to be subject to military tribunals and exempt from the prisoner-of-war status conferred by the
belligerents are altered.\textsuperscript{11}

For example the existence of war affects certain naval rights including blockades and the right to "visit and search" other vessels. If a war exists, a blockade is a right of the belligerents.\textsuperscript{12} That is, before there can be a blockade, and the possibility of capture under international law for violation or attempted violation of a blockade (and giving jurisdiction in prize court), there must be war.\textsuperscript{13} Further, in time of war, warships of the belligerent states are entitled conduct a "visit and search" of certain vessels.\textsuperscript{14} The purpose of the visit and search is to determine whether a vessel flying a neutral flag is really a neutral vessel and, if so, whether there are reasonable grounds to believe the vessel is engaged in some type of activity, such as breach of a blockade or the transport of contraband or other service in violation of the laws of neutrality, which could subject the vessel to seizure and condemnation by a prize court.\textsuperscript{15} In time of war, the belligerent's right of visit and search may be conducted either on the high seas or in the territorial waters of either belligerent, but not in the territorial waters of neutral states. Any vessel met on the high seas, regardless of flag, may be ordered by a belligerent to submit to a visit in order to search for contraband or unneutral service, and to submit them to national prize courts for condemnation.\textsuperscript{16}

In the \textit{Prize Cases}, the Supreme Court described the change in the mutual relation of states in time of war as follows:

The legal consequences resulting from a state of war between two countries at this day are well understood. . . . The people of the two

\begin{footnotesize}
\begin{enumerate}
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\item Geneva Conventions of 1949.
\item See \textit{The Prize Cases}, 67 U.S. (2 Black) 635, 687-88 (1862) (Nelson, J., dissenting); \textit{James Rogers, World Policing and the Constitution} 34-35 (1945).
\item See \textit{The Prize Cases}, 67 U.S. (2 Black) at 635.
\item \textit{Id.} at 644. In fact, history shows that the institution of a blockade can serve, in and of itself, as an event that institutes war. President Lincoln had, without authorization from Congress, directed the blockade of Southern ports on April 19 and April 27, 1861. \textit{See Edward Corwin, The President: Office and Powers} 277-78 (3d ed. 1948). This appears to have been a substitute for a declaration of war or, at any rate, an act evidencing a state of undeclared war. \textit{See Clyde Eagleton, The Form and Function of the Declaration of War}, 32 Am. J. Int'l L. 19, 25 (1938).
\item This right of visit and search is distinct from the peacetime right, covered by Art. 22 of the 1958 Geneva Convention on the High Seas, the main purpose of which is to verify the vessel's flag, particularly as an aid to the suppression of piracy and slave-trading.
\item \textit{See Encyclopedia of Public International Law} 1126 (Rudolf Bernhardt ed., 3d ed. 1997), "Prize Law," at (c) \textit{Visit and search}.
\item Wright, \textit{supra} note 2, at 363.
\end{enumerate}
\end{footnotesize}
countries become immediately the enemies of each other—all intercourse commercial or otherwise between them unlawful—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, and remission of bills or money to it are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and, in fine, interdiction of trade and intercourse direct or indirect is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land,... all treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war....

B. Political and Diplomatic Reluctance to Admit a State of War

The existence of an armed conflict alone does not suffice to create a time of war, for to rely on armed conflict alone would suggest that every incident, each reprisal, each crisis, each incident in which the military is called in to preserve the peace during a domestic civil disorder—is a time of war. Common sense tells us that not every act of hostility creates a state of war between nations. There are numerous political and diplomatic reasons why states wish to avoid the disruption and embarrassment of admitting that a state of war exists, even in the face of obvious belligerencies. First, nations are reluctant to declare war or admit that a state of hostilities constitutes a Legal War because of the efforts of the international community to outlaw war as an acceptable means of resolving disputes between states. Second, there is the desire not to interrupt the operation of treaty arrangements which are inevitably suspended or modified in time of war, particularly if the war is a formally declared one. Third, states are reluctant to admit a state of war because there is a greater opportunity for the processes of mediation and conciliation on the part of third states to work if, officially, there is no war. Moreover, if

19. See, e.g., Layton, supra note 18.
there is no Legal War, then it is possible to work out a temporary or permanent plan for peaceful relations without the delays incident to a formal treaty of peace.

[T]he extreme anxiety which is shown everywhere in the history of modern diplomacy to avoid coarseness or bluntness of expression, the desire not to provoke, which makes it a point of honor delicately to hint at possible or intended war, and combined with this the eager wish, even at the last moment, to arrange terms of reconciliation, has led in several instances to very curious results. Thus . . . what has been on one side intended as an ultimatum, to be followed under certain contingencies and after a certain lapse of time by a declaration of war, has been, according to the strength or weakness of the power receiving it, treated sometimes as an actual declaration of war, and thereupon at once acted upon; sometimes it has been regarded as only a more than ordinarily threatening communication, suggesting a more active stage of diplomacy; so that in either event a virtually complete surprise has been effected when hostilities actually commenced.\(^\text{20}\)

C. "Time of War" Provisions in Military Law

The question of whether a state of war exists is also important for the purpose of interpreting the "time of war" provisions of the Uniform Code\(^\text{21}\) relating to the maximum punishment for certain offenses,\(^\text{22}\) the acceptance of guilty pleas in capital cases\(^\text{23}\) and the suspension of the statute of limitations, among other provisions.\(^\text{24}\) If, for example, a soldier is charged in time of war with absence without leave or missing movement, the offense can be prosecuted without

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24. "A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. § 843(a) (2003).

The statute of limitations for most military offenses in time of peace is two or three years, but Congress apparently felt that the increased seriousness of wartime AWOL and desertion justified overriding the safeguards of the statute of limitations in order to help maintain discipline and a high esprit de corps among fighting units under combat situations. See Recent Case, Military Law—Uniform Code of Military Justice—Soldier Who Went AWOL on November 3, 1964, Was Absent in "Time of War" and May Not Rely on Statute of Limitations, 82 HARV. L. REV. 483, 485 (1968).
reference to statutes of limitation. In addition, if it is certified to the President that a trial in time of war of any offense will be detrimental to the prosecution of the war or inimical to national security, the prescribed period of limitation is extended until six months after the termination of hostilities (termination of which is established by proclamation of the President or by a joint resolution of Congress). Further, if a state of war is determined to exist, the severity of penalties for certain offenses under the Uniform Code can be punishable by death: these penalties include desertion, assaulting an officer and misbehavior of a sentinel. In addition, misconduct by American POWs and spying are punishable under the Uniform Code only in time of war.

An additional area of concern is that the existence of a state of war can extend court-martial jurisdiction to a significant number of civilian employees not otherwise subject to such jurisdiction. Article 2(10) of the Uniform Code states that "[i]n time of war, persons serving with or accompanying an armed force in the field" are subject to its provisions. The exigencies of wartime have been deemed sufficient to justify some restrictions on the rights of civilians who are intimately connected with military operations. Although several Supreme Court decisions have curtailed the application of court-martial jurisdiction to civilians, these rulings applied to peacetime

26. This certification must be given by the Secretary of the appropriate branch of the armed services. 10 U.S.C. §843(e) (2003).
27. Id. § 843(f).
28. Id. § 885(c).
29. Id. § 890.
30. Id. § 913.
31. Id. § 905.
32. Id. § 906.
33. Id. § 802(10).
35. The Supreme Court held that civilians are not subject to peacetime court-martial jurisdiction in the following cases: Grisham v. Hagan, 361 U.S. 278 (1960) (civilian government employee charged with capital offense); Kinsella v. Singleton, 361 U.S. 234 (1960) (dependent charged with noncapital felony); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960) (civilian government employee charged with noncapital felony). In Reid v. Covert, the Supreme Court said that "[f]rom a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules." 354 U.S. 1, 33 (1957) (emphasis added). The Court suggested that court-martial
situations and presumably do not constrain military court-martial jurisdiction over civilians serving with or accompanying the armed forces in the field in time of war.

Military trials under court-martial jurisdiction do not provide the full array of constitutional safeguards that are inherent in Article III courts. Court-martial deprives a defendant of the Fifth Amendment right to indictment by grand jury and the right under the Sixth Amendment and Article III, section 2, to trial by jury of one's peers.\(^{36}\) A court-martial is tried by a panel of officers empowered to convict by a two-thirds vote, and the panel is generally not required to be larger than five members, even for the most serious crimes.\(^{37}\)

Moreover, it has been observed that “[a] court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.”\(^{38}\) Many think that military judges are not impartial and that there is little semblance of an Article III trial by jury of one's peers: “[T]he convening authority, a non-lawyer, has extraordinary control over law enforcement, prosecution, and adjudicative functions and may intentionally or unintentionally exert unlawful command influence on the criminal proceedings.”\(^{40}\)

That is, there is a command-dominated structure in court-martial in which the convening authority:

jurisdiction over civilians accompanying the military in the field should be limited to the actual areas of hostilities, stating that “[t]he exigencies which have required military rule on the battlefront are not present in areas where no conflict exists.” \(\text{Id. at 35.}\) The Court acknowledged Congress' broad war powers under Article I, § 8 of the Constitution: “We believe that Article 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of ‘in the field.’” \(\text{Id. at 34 n.61 (1957).}\)


\(^{36}\) See Reid v. Cove rt, 354 U.S. at 37.

\(^{37}\) 10 U.S.C. § 816.


\(^{40}\) \text{Id.}\)
[H]and-picks the members of the panel from his own command. Thus, there is potential for improper command influence by the convening authority on the panel members because their officer evaluation reports (similar to job performance evaluations) are prepared by the same person who decides that the accused should be court-martialed.\footnote{41}

And:

Military judges, although they certainly may be honest, are nonetheless military officers who must answer to those above them.\ldots\footnote{42} Unlike article III judges, military judges still do not serve under the protection of life tenure and serve for limited periods of time. Thus, military judges do not have the opportunity to gain experience and develop judicial temperament.\footnote{43}

In \textit{Reid v. Covert}, Justice Black, writing for the Court, observed that:

Courts-martial are typically \textit{ad hoc} bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of “command influence.” In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings—\textit{in short, for their future progress in the service.}\footnote{43}

A recent example of the perception that there can be unfair command influence in court-martial proceedings involved a fighter pilot who was charged with involuntary manslaughter and other crimes for mistakenly bombing Canadian soldiers in Afghanistan, killing four. The pilot, Major Harry Schmidt, refused an offer by the Air Force to face an administrative hearing with possible punishments including merely a reprimand or forfeiture of one month’s pay because he believed he could not get a fair hearing.\footnote{44} Citing an Air Force memorandum that referred to his “lack of judgment” and his “violation of flying regulations,” he claimed that the officer who would have overseen the hearing had already decided Major Schmidt was guilty and had refused to recuse himself.\footnote{45}

If a war exists, that fact is relevant in determining whether certain veterans' benefits accrue. The determination of whether a state of war exists is also relevant in determining whether certain veterans preference points can be given in connection with hiring and promotion of civil servants.

Another area of concern in military law is that the Table of Maximum Punishments prescribed in the Uniform Code can be suspended in time of war. Upon "a declaration of war" the law provides for the automatic suspension of the limitations on maximum punishment set forth in the Table of Maximum Punishments for various offenses under the Uniform Code. Alternatively, the President can, by Executive Order, suspend the limitation on maximum punishment imposable for certain offenses committed in time of war, as he did during the Korean conflict. Such suspension of maximum punishments makes it possible to convert certain offenses to capital status because committed in time of war. A factual determination that there is a state of war for certain purposes, such as the suspension of the statute of limitations under the Uniform Code, apparently relies on less formal constraints than does a determination that a time of war exists for purposes of suspension of the Table of Maximum Punishments. Presidents Kennedy and Johnson declined to exercise their power to suspend the Table of Maximum Punishments during the Vietnam conflict, apparently because they felt that the conditions in Vietnam were not serious enough to warrant suspension of the maximum punishments.

Another area of concern pertains to application of the law of

46. See, e.g., Alire's Case, 1 Ct. Cl. 233 (1865).
48. Manual for Courts-Martial [hereinafter MCM], 1951, para. 127c reads: "Immediately upon a declaration of war ... the prescribed limitations on punishment for violations of Articles 82, 85, 86, 87, 90, 113 and 115 automatically will be suspended ... until formal termination of such war."
49. By Exec. Order No. 10247, May 29, 1951, the President suspended the Table of Maximum Punishments, MCM, 1951, para. 127c, within the area controlled by the Commander-in-Chief, Far East, for violations of the Uniform Code, arts. 82, 85, 86(3), 87, 90, 91(1), and (2), 113 and 115. Under this Order, the suspension of the limitations on punishment applied only to certain time of war offenses committed by personnel under the command of, or within any area controlled by, the Commander-in-Chief, Far East Forces. See David B. Stevens, Time of War and Vietnam, 8 A.F. L. REV. 23, 31 (1996).
50. See Stevens, supra note 49, at 28.
51. See Recent Case, supra note 24, at 489.
seditious speech or conspiracy to commit sedition, which can be used to prosecute extremists for a variety of terrorist plots.\textsuperscript{52} The use of the seditious conspiracy statute historically has depended on the political state of affairs. In Schenck \textit{v. United States}, Justice Holmes said, in construing the predecessor statute of today's sedition law, that "[w]hen 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."\textsuperscript{53}

Another reason for knowing whether a state of war exists is that \textit{jus in bello} rules apply in cases where an actual state of war exists. However, some think that the rules of war apply to hostilities short of formal war, whether labeled reprisals, armed intervention, organized resistance, or other intermediate situations.\textsuperscript{54} The United States has deployed troops abroad to engage in various types of military operations other than war for the purpose of protecting Americans, or to assist in the maintenance of civil order. In recent years such operations have included those in Grenada, Panama, Somalia, Haiti and the former Yugoslavia. In such operations, the question arises whether the United States is required to classify captured personnel as prisoners of war, detainees or refugees.\textsuperscript{55} Commanders face other problems such as whether detainees are required to be quartered in conditions as favorable as their own soldiers, whether captive personnel are to be provided monthly medical inspections, whether they are to be paid "fair" financial compensation for labor, and whether they are permitted to receive correspondence under the provisions of the 1949 Geneva Convention.\textsuperscript{56} Commanders faced these issues in Operation Just Cause in 1989, which was a "non-war" military intervention by the United States in Panama. U.S. forces ended up detaining over 4,100 people during the operation, and

\textsuperscript{52} The seditious conspiracy statute is at 18 U.S.C. §2384 (2000).
\textsuperscript{53} 249 U.S. 47, 52 (1919).
\textsuperscript{54} See, \textit{e.g.}, 2 \textsc{Lassa Oppenheim}, \textsc{International Law} 225 (Sir Hersh Lauterpacht ed., 7th ed. 1952).
\textsuperscript{55} See, \textit{e.g.}, Memorandum from Headquarters XVIII Airborne Corps at Fort Bragg, AEZA-JA, to Department of the Army, subject: Operation Urgent Fury (After Action Report and Lessons Learned) (Dec. 15, 1983) (pertaining to Grenada intervention in 1983 and explaining that judge advocates in Operation Urgent Fury were uncertain on how to classify captured personnel because they were not informed of the legal basis for the operation in a timely manner) (on file with author).
\textsuperscript{56} Bulman, \textit{supra} note 55, at 168.
officials decided to accord them prisoner of war status under the Geneva Conventions even though the hostilities were characterized as something other than formal war.\(^5\)

In 1992, U.N. forces embarked on a humanitarian operation in Somalia called Operation Restore Hope. This intervention started as a simple emergency-relief mission but escalated into an aggressive peace enforcement mission in which large numbers of Somalis who attacked or threatened U.N. forces were detained and disarmed, and then released without a determination being made as to whether or not there was a war that would trigger international legal obligations and protections.\(^5\)\(^8\)

Finally, in time of war the President has, on occasion, sought to suspend habeas corpus or to order certain individuals to be tried by military commissions. During the Civil War, President Lincoln suspended the habeas writ.\(^5\)\(^9\) The President claimed that he had "the right to suspend the writ of habeas corpus himself, at his discretion, [and] to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him."\(^6\) Lincoln asserted this purported right with no public notice to the courts or to the public, by proclamation or otherwise.\(^6\)\(^1\) Lincoln's action was declared unconstitutional by Chief Justice Taney, sitting as a circuit judge, who stated that he "regarded the question as too plain and too well settled

\(^{57}\) Id.

\(^{58}\) Id. at 169.

\(^{59}\) Many think that the language of the Constitution makes clear that only Congress, not the President, may suspend the writ of habeas corpus, and even then that this power is restricted to cases of actual rebellion or invasion. See Ex parte Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487), in which Chief Justice Taney, sitting as a circuit judge, said: "I had supposed it to be one of those points in constitutional law upon which there was no difference of opinion, . . . that the privilege of the writ could not be suspended, except by an act of Congress." See also Joseph Storey, Commentaries on the Constitution, 3: §§ 1333-36 (1883), reprinted in 1 PHILIP B. KURLAND, THE FOUNDERS' CONSTITUTION 378 (1987) ("It would seem, as the power is given to congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge, whether exigency has arisen, must exclusively belong to that body.")

Chief Justice Rehnquist has said that the privilege of habeas corpus "has been rightly regarded as a safeguard against executive tyranny, and an essential safeguard to individual liberty." Chief Justice William H. Rehnquist, Remarks at the 100th Anniversary Celebration of the Norfolk and Portsmouth Bar Association (May 3, 2000) at <www.supremecourtus.gov/publicinfo/speeches/sp_05-03-00.html>.

\(^{60}\) Ex parte Merryman, 17 F. Cas. at 148.

\(^{61}\) See id.
to be open to dispute,” and that the President “has exercised a power which he does not possess under the constitution . . . .”

The power of the President to establish military commissions, which are a recognized method of trying individuals for violations of the law of war, is well established. On November 13, 2001, President Bush signed Military Order 222, authorizing the trial of non-U.S. citizens for war crimes by military commission. This Military Order grants to military commissions “exclusive jurisdiction” over the covered offenses such that individuals subject to the Order “shall not

62. Id.

63. See In re Yamashita, 327 U.S. 1, 10 (1946), in which the Supreme Court construed President Roosevelt’s proclamation of July 2, 1942 “that enemy belligerents who, during time of war, enter the United States, or any territory or possession thereof, and who violate the law of war, should be subject to the law of war and to the jurisdiction of military tribunals.” The Court cited an earlier case, Ex parte Quirin, 317 U.S. 1, 27 (1942), in which it considered at length the nature and authority to create military commissions for the trial of enemy combatants for offenses against the law of war. The Court noted that source of the power to create military commissions is in Article I, § 8, cl. 10 of the Constitution, giving Congress the power to “define and punish . . . Offences against the Law of Nations . . . .” In re Yamashita, 327 U.S. at 7. The Congress, in the exercise of its power, enacted the Articles of War (formerly 10 U.S.C. §§ 1471-1593), which came into existence as part of the 1916 revisions to the Articles of War, thereby recognizing the military commission “as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.” See id. The Court noted that Article 15 of the Articles of War, which in nearly identical language became Article 21 of the Uniform Code, clearly sanctions the trial of enemy combatants for violations of the law of war by military commissions. See id. Clearly, the President has the power to trigger the jurisdiction of military commissions in virtue of the fact that Congress has already recognized the constitutional authority of the President to convene commissions in Article of War 15 (now Article 21) and, in addition, has provided, in Article 36 of the Uniform Code that the President may prescribe rules for the trials of cases arising “in courts-martial, military commissions and other military tribunals.” 10 U.S.C. § 836(a) (2003).

Moreover, many think that the power of the President to convene military commissions is inherent to his role as Commander-in-Chief of the armed forces. See Timothy C. MacDonald, Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts, THE ARMY LAWYER, Mar. 2002, at 19, 20. Indeed, the Supreme Court has held that absent congressional action to the contrary, the President has the authority as Commander-in-Chief to create military commissions. See Madsen v. Kinsella, 343 U.S. 72 (1952). Finally, customary international law recognizes the authority of military commanders to try war criminals by military commission. See Wigfall Green, The Military Commission, 42 AM J. INT’L L. 832, 832 (1948). Military commissions have been convened by the United States to try war criminals in the American Revolutionary War, the Mexican American War, the Civil War, and World War II. See MacDonald, supra at 21.

be privileged to seek any remedy or maintain any proceeding” in “any court of the United States,” “any foreign nation,” or “any international tribunal.” The power to establish military commissions depends on whether a state of war exists.

III. Formalities in Establishing the Existence of War

A. History

The justification for engaging in war and the formalities associated with declaring war have been chronicled throughout history. In China during the Ch’unch’iu Period (722-481 B.C.), war was permissible only between equal states, and not between a feudal state and its dependencies, nor between the Chinese family of states and barbarians. In the ancient Greek states it was the practice to articulate a justification for starting a war. Coleman Phillipson summarizes this practice as follows: “Even in the heroic epoch in Greece, no war was undertaken without the belligerents alleging a definite cause considered by them as a valid and sufficient justification therefore, and without their previously demanding reparation for injuries done or claims unsatisfied.”

In the ancient Roman world there was an emphasis on formal legality. A just war needed to be commenced pursuant to positive law approved by the college of fetiales, with the focus not so much on the intrinsic justice of the war as with the correct observation of formalities. The war also needed to be pium, in accordance with religious prescriptions and the express or implied commands of the

65. See id. § 7(b)(2). This Military Order appears to do away with the double jeopardy protection of the Fifth Amendment. That is, the Military Order omits any reference to this constitutional guarantee, leaving open the possibility that an individual may be charged and tried in the civilian federal court, acquitted, and then detained and brought to trial before a military commission for the same offense—or vice versa. Indeed, the Order seems designed to permit the executive branch to try its hand first in the federal courts, and if it seems that the prosecution may be unsuccessful, bring precisely the same case before a military commission where it will be permitted to use evidence that would be inadmissible in a federal court case because, for example, it might be hearsay, thereby providing a better chance of conviction. Clearly the constraints on liberties imposed by this Order, applicable in time of war, are formidable.


68. Id. at 180.
Cicero and other historians of the Roman world held that no war could be started until there was an official demand for whatever was in contention, and there had been a warning given and a formal declaration of war.\(^\text{70}\) A war was commenced by sending a herald to the frontier to give notice according to established custom.\(^\text{71}\)

From the Scholastics period to the 14th century it was generally believed that a war needed to be commenced under the authority of the emperor or other sovereign.\(^\text{72}\) In addition, the Pope was entitled to declare war against infidels.\(^\text{73}\) According to Martino da Lodi in a treatise dated 1455, war was lawful, after giving due warning, if a sovereign has not been able to enforce state rights in any other way.\(^\text{74}\) In order for a war to be just, a central theme of writers of the 14th and 15th centuries was that the war needed to be declared by one who has the power to declare it (\textit{justitia potestatis}).\(^\text{75}\)

In the 17th and 18th centuries the formalities of commencing a war required notice to be given in a printed proclamation. As late as 1854, “[t]he Sergeant-at-Arms, accompanied by some of the officials of the City, read from the steps of the Royal Exchange Her Majesty’s declaration of war against Russia.”\(^\text{76}\) Whether such notification reached the enemy was not of much consequence. The United States began the War of 1812 without allowing time for notice to reach England. Of course, today, with improved global communication, a declaration of war made in one country would be immediately known in the enemy country.

Since the early 19th century, the practices of states developed the notion that:

[W]ar is not a legal concept linked with objective phenomena such as large-scale hostilities between the armed forces of organized state entities but a legal status the existence of which depends on the intention of one or more of the states concerned. Thus hostilities resulting in considerable loss of life and destruction of property may not result in a state of war, the term commonly applied to this legal status, if the parties contending do not regard a

\(^{69}\) See id.

\(^{70}\) See \textsc{Brownlie}, \textit{supra} note 7, at 4.

\(^{71}\) See \textsc{Eagleton}, \textit{supra} note 13, at 23.

\(^{72}\) See \textsc{Brownlie}, \textit{supra} note 7, at 6-7.

\(^{73}\) See id. at 7.

\(^{74}\) See id.

\(^{75}\) See id. at 9.

\(^{76}\) \textsc{Maurice}, \textit{supra} note 20, at 9.
'state of war' as existing. 77

B. Policy Reasons for Avoiding a Formal Declaration of War

Today it is a settled norm of international law that a formal declaration of war is not a necessary condition for there to exist a state of war. 78 Of the 118 recognized wars that occurred between 1700 and 1872, only ten involved a formal declaration of war. 79

What is less clear, however, is the circumstances short of a formal declaration of war that are sufficient to establish a state of war. Congress can authorize a war without making a formal declaration of war: “[N]either in the language of the Constitution, the intent of the framers, the available historical and judicial precedents nor the purposes behind the clause [Article 1, § 8]” is there a requirement for a formal declaration of war, 80 particularly where a war is engaged in for a limited purpose and scope.

There are numerous policy reasons why a formal declaration of war is undesirable, including:

[I]ncreased danger of misunderstanding of limited objectives, diplomatic embarrassment in recognition of non-recognized guerrilla opponents, inhibition of settlement possibilities, the danger of widening the war, and unnecessarily increasing a President’s domestic authority. Although each of these arguments has some merit, probably the most compelling reason for not using the formal declaration of war is that there is no reason to do so. As former Secretary of Defense McNamara has pointed out “[T]here has not been a formal declaration of war—anywhere in the world—since World War II.” 81

That appears to remain as true today as it was when Secretary of Defense McNamara spoke those words.

Congress has passed resolutions granting the President wide-ranging discretion to engage in hostilities within prescribed places and for stated purposes, such as the Tonkin Resolution, the Gulf War

77. BROWNLIE, supra note 7, at 26-27.
78. 2 OPPENHEIM, supra note 54, at 93; 7 JOHN B. MOORE, DIGEST OF INTERNATIONAL LAW § 1107 (1906).
Resolution, and the resolution following the terrorist attacks of September 11, 2001. Short of such resolutions, Congress has made it clear when it has authorized the use of force by enacting legislation to increase the size of the armed forces or to appropriate additional funds to sustain a use of force.\(^\text{82}\)

**C. The Sufficiency of a Declaration of War: Problems of Retroactivity, Ambiguity and Unilateral Declarations**

There are problems in determining what constitutes a declaration of war in the first place, what form it should take, by whom it should be issued, when a formal declaration has been issued and whether a formal declaration of war in fact results in a state of war. Moreover, in some instances it is not clear what the function of a declaration of war is when the declaration is issued after hostilities have taken place and, hence, after the beginning of the war.

In some cases Congress has had no option but to declare war, the existence of which had already been recognized. For example, in 1846, President Polk authorized General Zachary Taylor to occupy disputed land claimed by Mexico between the Nueces and Rio Grande Rivers. The President instructed General Taylor to treat any crossing of the Rio Grande as an invasion authorizing him to attack first in defense and even enter Mexican territory in pursuit of the invaders.\(^\text{83}\) When, as expected, Mexican forces struck, and the battles between the parties had begun, Polk presented the Congress with a fait accompli, and Congress responded by authorizing further hostilities.\(^\text{84}\) The President sought to justify his recourse to arms without first securing such approval from the Congress by the claim that he was defending the United States against attack. Polk's actions set a precedent for viewing "war" as the invasion of disputed territory claimed under a treaty of annexation. Some years later, in commenting on this conflict, Justice Grier noted in the *Prize Cases*, that: "[t]he battles of Palo Alto and Rasaca de la Palma had been fought before the passage of the Act of Congress of May 13, 1846 [which recognized] a state of war existing by the Act of the Republic

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83. See CLARENCE A. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 70-71 (1921).

of Mexico.\textsuperscript{85}

Thus, when a declaration of war is issued after hostilities have already broken out, the declaration does not mark the commencement of a state of war, but serves as notice of when the war actually commenced. Such a declaration effectively admits that war was already in existence before the declaration was issued, in which case the declaration serves as a retroactive declaration of war.\textsuperscript{86} In four out of the five instances that Congress has formally declared war, the declaration has recognized the prior existence of that war.

Another problem concerning formal declarations of war is ambiguity, so that the sufficiency of a declaration of war may be doubted. An example of ambiguity that can be associated with a formal declaration of war involved the case of \textit{The Teutonia}.\textsuperscript{87} A vessel by that name arrived off Falmouth, England on July 10, 1870, and the next day received orders to proceed to Dunkirk, where it arrived on July 16. The master of the ship had heard rumors of war between France and Germany, so he did not enter the French port. In fact that day the French minister had made a declaration to the French Chamber of Deputies that appeared to be a declaration of war. On July 18, the master of the ship was informed by the German consul at Deal that war had broken out. On July 19, he brought his vessel into Dover, the nearest neutral port. An English firm sued for failure to deliver its goods to Dunkirk, and the defendant pleaded that a state of war made the contract impossible to perform. The lower court held for the defendant, finding that war existed on July 16 even though the French did not issue a formal declaration until July 19. The Lords reversed, holding as follows:

\textlspace There does not appear to their Lordships to be any satisfactory evidence that a state of war existed between France and Prussia prior to the 19th of July.

Their Lordships do not think that either the declaration made by the French Minister to the French Chambers on the 16th of July, or the telegram sent by Count Bismarck to the Prussian Ambassador in London, in which he states that that declaration appears to be equal to a declaration of War, amounts to an actual declaration of War. And though it is true . . . that a War may exist \textit{de facto} without a declaration of War, yet it appears to their Lordships that

\textsuperscript{85} See The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862).
\textsuperscript{86} See Eagleton, \textit{supra} note 13, at 32-33.
\textsuperscript{87} The Teutonia, 4 L.R.-P.C. 171 (1872).
this can only be effected by an actual commencement of hostilities, which, in this case, is not alleged.\textsuperscript{88}

Thus, the court noted that the declaration itself did not appear sufficiently clear as to constitute a declaration of war, and there was no evidence of a de facto state of war inasmuch as hostilities had not yet broken out.

A further issue concerning ambiguity occurs if there is a unilateral declaration of war. A declaration of war by one country against another need not automatically place the countries at war. For example, when Bulgaria, Hungary, and Rumania declared war on the United States on December 13, 1941, President Roosevelt simply ignored the declarations. Only later, as a gesture of friendship to the Soviet Union, did he ask Congress to recognize that the United States was at war with these countries.\textsuperscript{89}

However, it is possible for Legal War to exist by the action and intentions of one state alone.\textsuperscript{90} At the Second Hague Conference in 1907 a Chinese representative raised the question “whether a declaration of war can be considered by the State toward which it is directed as a unilateral act and whether the latter can regard it as null and void.”\textsuperscript{91} The answer is that generally, “a declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other.”\textsuperscript{92} In other words, “The state acted against may be forced into a state of war against its will.”\textsuperscript{93} But a unilateral declaration of war by a relatively weak state against a more powerful state may well be regarded as, in effect, null and void. Or, “[i]t may be open to a powerful state to disregard a declaration of war against it by a weaker state which fails to follow up the declaration with actual hostilities.”\textsuperscript{94} Moreover, odd results are possible if a state of war can

\begin{itemize}
\item \textsuperscript{88} Id. at 178-179.
\item \textsuperscript{89} 88 CONG. REC. 4787 (1942).
\item \textsuperscript{90} See Wright, supra note 2, at 363 n.6.
\item \textsuperscript{91} 3 PROCEEDINGS OF THE 1907 HAGUE CONFERENCE 169 (Translation in Official Texts).
\item \textsuperscript{92} The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) (quoting Lord Stowell in The Eliza Ann, 1 Dodson 244, 247 (Adm. 1813)). War, as defined by Corpus Juris, may exist prior to any contest of the armed forces. “The Courts are bound by a declaration or determination by the proper department of government that a war exists,” while until there has been such a declaration or determination, the Courts cannot take judicial notice of the existence of a war by their government. 93 C.J.S. War § 1 (2001).
\item \textsuperscript{93} Wright, supra note 2, at 363 n.6.
\item \textsuperscript{94} Manley O. Hudson, The Duration of the War Between the United States and
arise from the actions and intentions of one state alone. For example, one state could commit an act of aggression by launching a fleet to embark on an attack, unbeknownst to the victim state, thus establishing a state of war. The victim state would be unaware of the "state of war," and indeed the war would technically exist before the attack becomes imminent.\(^9\)

"Congress has never in its history declared war except as a consequence of the President's acts or recommendations. It has never refused a request from the President that war be declared."\(^9\) In U.S. history there have been only five wars formalized by straightforward congressional declarations. In four of the five instances that Congress formally declared wars, the declarations of war recognized the prior existence of war. The fifth, involving the War of 1812, simply stated, "war be and the same is hereby declared to exist."\(^9\) Five formal U.S. declarations of war are reprinted below, along with the Gulf of Tonkin Resolution, whose formality or lack thereof debatable.

**War of 1812:**

*Be it enacted by... Congress assembled, That war be and the same is hereby declared to exist... and that the President... is hereby authorized to use the whole land and naval force... to carry the same into effect.*\(^9\)

**Mexican War of 1846:**

*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...*\(^9\)

**Spanish-American War of 1898:**

*Be it enacted by... Congress assembled, First, That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April... between the United States of America...*\(^9\)

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\(^9\) Germany, 39 Harv. L. Rev. 1020, 1024 (1926).


\(^9\) Declaration of War Between the United States and Great Britain, 2 Stat. 755 (1812).

\(^9\) *Id.*

\(^9\) Act of May 13, 1846, ch. 16, 9 Stat. 9 (providing for the prosecution of the existing war between the United States and Mexico).
and the Kingdom of Spain... [and] the President is... [authorized]... to employ the entire naval and military forces.  

World War I against Germany:

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

World War II against Japan:

Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America [referring to the Japanese attack on Pearl Harbor on December 7, 1941]... Resolved... That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared... [and] the President is... authorized... to employ the entire naval and military forces.  

The Gulf of Tonkin Resolution:

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... [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.  

100. Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 (declaring war between the United States and Spain).  
101. Joint Resolution of Apr. 11, 1917, ch. 1, 40 Stat. 1 (declaring war between Germany and the United States and provision to prosecute the same).  
102. Joint Resolution of Dec. 8, 1941, ch. 561, 55 Stat. 795 (declaring war between Japan and the United States and provision to prosecute the same) The declarations of war against Germany and Italy contained substantially similar language to the declaration of war against Japan. See Joint Resolution of Dec. 11, 1941, ch. 564, 55 Stat. 796 (declaring war between Germany and the United States and provision to prosecution the same); Joint Resolution of Dec. 11, 1941, ch. 565, 55 Stat. 797 (declaring war between Italy and the United States and provision to prosecute the same).  
There is a split of opinion as to whether the Gulf of Tonkin Resolution constituted a formal declaration of war or simply a legislative acknowledgement "that the Gulf of Tonkin attack precipitated a state of armed conflict between the United States and Vietnam."¹⁰⁴

D. Military and Diplomatic Operations Other Than War

The United States has frequently deployed troops abroad to engage in various types of military operations other than war for the purpose of protecting Americans or to assist in the maintenance of civil order. Some situations clearly do not constitute a state of war. Armed forces might be employed with a view to reprisals, humanitarian interventions and other kinds of action, without any intention of creating a state of war. Reprisal, for instance, is a classic mode of "self-help, part execution and part sanction. Its value [lies] in the possibility of gaining redress without creating a formal state of war."¹⁰⁵

Presidential authorization for U.S. forces to be utilized for evacuation and rescue operations of Americans abroad and other limited missions to rescue endangered American citizens do not constitute a "time of war."¹⁰⁶ The rationale for this is that troops are not being introduced into hostilities as such in rescue operations, but are engaged in a limited defensive mission.¹⁰⁷

The power of the President to deploy troops for peacemaking missions without Congressional authorization appears to be firmly within his authority as Commander-in-Chief. In 1912 President Taft deployed the armed forces in Nicaragua to help protect American lives. The State Department at the time drew a distinction between "intervention," which pertained to the interference with another state's political concerns, and "interposition," which involved the

¹⁰⁴. See discussion, Part IV.B., infra.
¹⁰⁵. BROWNLIE, supra note 7, at 220.
¹⁰⁶. See Cruden, supra note 84, at 86-87.
¹⁰⁷. During the Senate debate on the War Powers Resolution, Senator Javits stated:
I think the normal practice which has grown up on this [evacuation and rescue operations] is that it does not involve such a utilization of the forces of the United States as to represent a use of forces appreciably, in hostilities so as to constitute an exercise of the war power or as to constitute a commitment of the Nation to war.

protection of the persons or interests of the interposing country. An "interposition" was not the sort of use of force as would require authorization from Congress.

President Taft also once said that the power of the President as Commander-in-Chief to order the army and navy anywhere:

[...] gives the President an opportunity to do things which involve consequences that it would be quite beyond his power under the Constitution directly to effect. [...] the President can take action such as to involve the country in war and to leave Congress no option but to declare it or to recognize its existence. [...] Indeed... in the prize cases... [the Supreme Court held] it was only in the case of a war of aggression that the power of Congress must be affirmatively asserted to establish its legal existence.

In addition to interventions to protect American property or lives abroad, it is considered part of the inherent power of the President as Commander-in-Chief to render military assistance in periods of civil disorder abroad, especially when the local authorities are unable to provide needed protection, or to intervene where fighting has already begun between non-democratic states or between factions within non-democratic states. These limited military interventions, while forceful and involving the deployment of troops in combat, are generally not regarded as a state of war. Such actions are not aimed at attacking the sovereignty of any nation, but at scattered rebels or thugs. In recent years such operations have included interventions in Grenada, Panama, Somalia, Haiti and the former Yugoslavia. With the invasion of Panama, for example, the President took action without congressional authorization on the grounds that the government of Manuel Noriega was illegitimate, and that this illegitimacy gave rise to a unilateral right to invade the country. Another example was the unanimous resolution of the U.N. General Assembly in 1991, demanding that its member states take "action to bring about the diplomatic isolation of those who hold

108. Note, supra note 80, at 1788.
111. See generally Bulman, supra note 55, at 167 n.71.
power illegally in Haiti” and “suspend their economic, financial, and commercial ties” with the country until democratic rule is restored.\(^{113}\)

Recently, no eyebrows were raised, apparently, when the Pentagon worked up a plan for the President to commit up to 2,000 troops to oversee a cease-fire in war-battered Liberia to restore stability—a deployment that was thought to take only a few months.\(^{114}\) Similarly, without Congressional authorization, President Bush committed himself to sending 1,700 American troops to help root out Muslim militants in southern Philippines.\(^{115}\)

Some, however, think that the decision to deploy troops abroad, even ostensibly for peaceful purposes, belongs to Congress, and particularly in cases where the likelihood of conflict is apparent.\(^{116}\) Indeed, these types of engagements, where troops have been deployed without congressional authorization, have led to several of the most significant wars of the past century. Examples include the Korean War (1950-1953), which President Truman originally characterized as “police action,”\(^{117}\) and the conflict in former Yugoslavia (1991-1995).

Diplomatic and other executive powers of the President, while falling short of declaring or waging war, can have a substantial likelihood of leading to war. One commentator has referred to the “ability of the President simply by his day-to-day conduct of our foreign relations to create situations from which escape except by the route of war is difficult or impossible.”\(^{118}\)


\(^{116}\) See Note, supra note 80, at 1787.

\(^{117}\) See ROBERT LECKIE, THE WARS OF AMERICA 858 (1968). General Douglas MacArthur expressed his view as to the manner in which the President had deployed troops to the Korean conflict:

I could not help being amazed at the manner in which this great decision was being made. With no submission to Congress, whose duty it is to declare war, and without even consulting the field commander involved, the members of the executive branch of the government agreed to enter the Korean war. All the risks inherent to this decision—including the possibility of Chinese and Russian involvement—applied then just as much as they applied later.

DOUGLAS MACARTHUR, REMINISCENCES 376 (1965).

\(^{118}\) CORWIN, supra note 13, at 274.
For example, President Wilson decided to rely on his own legal authority in ordering American merchant vessels to be equipped with guns, over the objections of Congress, and said later that he knew his action was "practically certain" to draw the United States into war. President Franklin Roosevelt took various actions, without congressional authorization, that were said to have pushed the nation toward World War II. On September 3, 1940, he made the famous "Fifty Destroyer Deal," a controversial exchange of fifty aging destroyers for a lease of British bases in the Western Atlantic. In April 1941, he sent troops to occupy Greenland, a Danish possession since 1814, under an agreement with the Danish Minister in Washington—Denmark itself having been invaded by Germany on April 9, 1940. Two months later he took the strategic country of Iceland under American protection at that country's request; he authorized the occupation of Dutch Guinea, and issued his famous "shoot-on-sight" order to the Navy:

[W]hen you see a rattlesnake poised to strike, you do not wait until he has struck before you crush him. The Nazi submarines and raiders are the rattlesnakes of the Atlantic... They are a challenge to our sovereignty.

And President Lyndon Johnson authorized secret payments to Filipino, Thai and Korean troops in Vietnam in an effort to give the appearance that there was free-world support for American involvement.

A foreign country might regard the deployment of U.S. forces for peace-keeping or other similar "non-war" missions as a threat requiring retaliation, but that does not imply that the President has exceeded his powers as Commander-in-Chief. Nor does action by the President in shaping and directing American foreign policy in a particular direction, though it may provoke a country into an attack,

119. 55 CONG. REC. 103 (1917); see also ARTHUR S. LINK, WILSON THE DIPLOMATIST 84-85 (1963). The Senate defeated, through a filibuster, a bill that would have given authorization for President Wilson to arm U.S. merchant ships in 1917. Following that defeat, the President proceeded under "the plain implication of my constitutional duties and powers" to order the arming of such vessels with instructions to fire on sight at submarines. See 54 CONG. REC. 4273 (1917). The action was justified as necessary to defend the neutral U.S. merchant vessels against the dangers inherent in submarine warfare.

120. President's Address on Freedom of the Seas, N.Y. TIMES, Sept. 12, 1941, at A4. "The fact that the September 11 [''shoot-on-sight''] speech put the nation into war is widely recognized." MERLO PUZEY, THE WAY WE GO TO WAR 72 (1969).

121. Cruden, supra note 84, at 59.
thereby imply that the President has unconstitutionally "initiated" war. 122

While it is the general view that the actual commitment of troops to combat, not their deployment in non-combat situations, is subject to congressional control, 123 there are problems with this view. The degree and extent of troop deployments can make a big difference in the likelihood that hostilities might erupt, even if "peacefully" deployed abroad. It is one thing to send troops to maintain order in weak countries where a severe contest at arms with another nation is not likely to result, and quite another thing to send troops to "hot spots" in the world, whereby the President might in effect guarantee that there will be an attack on the U.S. troops stationed there. And if there is an attack on troops stationed abroad, there will need to be a decision as to whether the risk of war inherent in military retaliation is worth the interests involved.

Over time, each instance of the use of presidential powers to influence world affairs in a way that draws the nation into war has in effect ratcheted up the public’s tolerance of a kind of de facto power of the President to declare war, despite the fact that Article I, section 8 of the Constitution states that Congress has the power "to declare war." "[I]n each successive crisis the constitutional results of earlier crises reappear cumulatively and in magnified form." 124 The public apparently allowed the Vietnam conflict to escalate, based almost exclusively on presidential authority, coupled with the Gulf of Tonkin Resolution that bolstered the President’s authority. But the public’s tolerance threshold came to a head when a wellspring of anti-war sentiment swept the nation, and Congress felt impelled to rein in on what was perceived as a usurpation of its Article I, section 8, power to declare war. This culminated in the War Powers Resolution.

E. The War Powers Resolution—An Effort to Rein in the President

The War Powers Resolution (the Resolution), 125 was enacted in 1973 in the wake of public outrage about the Vietnam conflict and


123. See Note, supra note 80, at 1786.

124. CORWIN, supra note 13, at 262.

what many regarded as runaway presidential war-making despite the absence of a declaration of war. To some extent, the Resolution provides a mechanism which can be relied upon as a source of determining whether a time of war exists. The Resolution provides that in the absence of a declaration of war, if armed forces are introduced:

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

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

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

the President shall submit within 48 hours [to the Congress] a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

126. There is a split of opinion as to whether the Gulf of Tonkin Resolution constituted a formal declaration of war or simply a legislative acknowledgement "that the Gulf of Tonkin attack precipitated a state of armed conflict between the United States and Vietnam." United States v. Anderson, 17 C.M.A. 588, 590 (1968). Chief Judge Quinn regarded the Gulf of Tonkin Resolution to be a declaration of war. However, Judge Kilday did not find the Resolution to be a declaration of war, but simply evidence that the war had already begun pursuant to the President's inherent power to repel sudden attacks in response to the confrontation in the Gulf of Tonkin. To Judge Kilday, the Resolution represented only "a congressional appraisal of world happenings," and that it was the events rather than the Resolution that determined the existence of a state of war. Id. at 594. He said that war may exist without congressional declaration, and that a state of war existed for "obvious reasons." Id. at 593. Judge Ferguson said that it was clear that the United States was in a state of war, and that reference to the Gulf of Tonkin Resolution was therefore irrelevant.


Clearly, the Resolution pertains only to instances of "the absence of a declaration of war." The Resolution does not imply that the introduction of U.S. armed forces into any one of the three categories of involvement stated constitutes a time of war. That determination would be subject to an ad hoc determination, just as in any other conflict that occurs without a formal declaration of war on the part of Congress. In enumerating the three types of occasions that trigger the 48-hour reporting requirement, the Resolution does not use the word "war," but rather the terms "hostilities," "imminent involvement in hostilities," "equipped for combat," or the substantial enlargement of the number of armed forces already deployed in a foreign nation. If U.S. armed forces are deployed in a manner that falls into one of the three categories, the President is required to submit a written report to the Congress within 48 hours of the deployment.

The next step under the Resolution is for the Congress to take appropriate action. Under section 5(b) of the Resolution the President must terminate any use of U.S. armed forces within sixty days after such report is submitted, unless Congress has declared war, has "enacted a specific authorization" for the deployment, or has extended the sixty day period. Of the three options available to it under section 5(b), Congress has chosen to use the "specific authorization" route in recent times.

Section 8(a)(1) of the Resolution provides that Congressional appropriations shall not be construed to imply authority to introduce U.S. forces into hostilities unless such provision specifically authorizes the introduction of armed forces into hostilities and states that it is intended to constitute specific statutory authorization within the meaning of the War Powers Resolution. In other words, the Resolution makes it clear that appropriations for troops do not imply statutory authorization for their deployment, much less a formal declaration of war, even if such appropriations in fact are intended for troops already in the field or being readied for combat.

The War Powers Resolution was triggered in the wake of the terrorist attacks of September 11, 2001. After the President deployed forces to Afghanistan, he submitted the 48-hour report, following which the Congress passed a joint resolution pursuant to section 5(b) of the Resolution, entitled the Authorization for Use of Military
This joint resolution provided in part:

Sec. 2. Authorization for use of United States Armed Forces.

(a) In general. That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution requirements. (1) Specific statutory authorization. Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.131

In other words, the Congress opted not to declare war, but simply to provide "authorization" for the President's deployment of force for the purpose of going after those responsible for the terrorist attacks and in order to prevent future terrorist attacks against the United States.

The War Powers Resolution appears to have brought to the surface what was known to be the case sub silencio, that is, that Congress can authorize war without declaring war. Nonetheless, in the absence of a formal declaration of war, a mere "authorization" of Congress can result in divergent opinions in cases that construe whether a state of war exists, as illustrated above in my discussion of the Tonkin Resolution.

The Congress is empowered under the War Powers Resolution to enact authorization under section 5(b) in advance of military action. As the standoff between Iraq and U.N. weapons inspectors escalated in the fall of 2002 (or, at any rate, failed to garner satisfactory results from the perspective of the United States and the United Kingdom), and even though diplomatic efforts were still under way, Congress passed a joint resolution called the Authorization for Use of Military Force Against Iraq Resolution of 2002.132 This joint resolution provided authorization for the President to use armed forces as he determined to be necessary and appropriate

130. 50 U.S.C. § 1544.
131. 50 U.S.C. § 1544(b) (emphasis added).
in order to defend the national security of the United States against the continuing threat posed by Iraq. The joint resolution stated that this was intended to constitute "specific statutory authorization" under section 5(b) of the War Powers Resolution for the use of armed forces. As such, the "authorization" did not constitute a declaration of war.

The silence or inaction on the part of Congress in the wake of Presidential action to engage in hostilities, does not, in and of itself, imply approval. "The burden is not upon Congress to make its views clear or be deemed to have acquiesced, but rather upon the President to obtain legislative approval before he acts." Today, with the War Powers Resolution, the onus is even more squarely placed on the President to obtain legislative approval once hostilities have been commenced, if the relevant threshold contemplated by the Resolution has been met.

IV. The State of War Doctrine

A. Applies to Situations Where There Is No Declaration of War

It is not possible to uncover precisely the sequence of events that may convert a mere conflict or reprisal or interdiction into a full-fledged war.

Clearly, initiator and aggressor are not always identical, as a participant might provoke its adversary into military action by mobilization or other aggressive diplomatic or economic actions. But the designation of the initiator of military aggression should nevertheless provide some tentative clues as to the relative belligerency of system members.

Under this view, there is an effort to distinguish an aggressor from its opponent, perhaps in order to analyze whether the initiator of a war justified the move based on plausible claims of self-defense or other justification under international law. But as the examples below make clear, even a justifiable attack that is provoked by an adversary, in and of itself, does not mean the conflict is a Legal War.

Some have endeavored to articulate a litmus test by which a

133. 50 U.S.C. § 1544(b).
134. Reveley, supra note 82, at 1290 n.155.
135. Id.
conflict may be said to be a Legal War. For example, according to the Correlates of War Project (COW), a conflict is not classified as a war unless 1000 battle fatalities have occurred. In accordance with COW protocol, wars are classified as "extra-systemic" (where at least one party is not yet a recognized state), civil wars (occurring within one state), or interstate in nature. This approach, classifying a conflict as war if the numbers meet a certain threshold, has a practical ring to it, but has little authoritative weight in international law.

The notion that the legal existence of war depends on the intention of the parties concerned is known as the "state-of-war" doctrine. The state of war doctrine is a subjective test. What is peculiar about the state of war doctrine is that an invasion, military occupation, blockade, reprisal or other acts of aggression can occur in the absence of a state of war if the governments concerned so determine. Under this doctrine, a war in the formal sense exists: (1) if one state issues a declaration of war against another state; or (2) if, absent such a declaration, one state commits an act of aggression against another state (e.g., a blockade, interdiction, invasion by military troops or other act traditionally regarded as aggression), and calls upon other states to observe the international obligations of neutrality; or (3) if, absent such a declaration, a state commits an act

138. See id.
139. Of course, when there is a use of force that falls short of actual war, the laws of neutrality do not apply. The concept of neutrality, established in the 18th century, is a vital feature of international law, and has been variously described by international law publicists. To Christian Wolff (1679-1754) a neutral state could not distinguish between the combatants, and would not be concerned with the question of whether one side or the other was engaged in a just war. See BROWNLEI, supra note 7, at 16. The laws of neutrality govern the relations between neutral and belligerent states. An obligation to remain neutral may be treaty-based or predicated on a general state policy of permanent neutrality. A formal declaration of neutrality is not legally required, although in practice usually is made. Bilateral neutrality agreements that relate to specific conflicts are, in effect, politically supportive of one of the parties. The basic rights and obligations of neutrality are as follows. The neutral state has the right of territorial integrity, that is, the belligerents may not invade the neutral state. The neutral state in time of war may carry on commerce with the belligerents, and not be subjected to blockade (unless, of course, the neutral state is engaged in shipping contraband to a belligerent). The neutral state may not intervene in the conflict to the advantage of one or the other belligerents, not even if the intention is equal treatment for both parties. The neutral state may not provide financial aid or supply war materials to the belligerents, nor accord them the right of booty in sea warfare, nor allow war vessels to enter its ports for repairs, although they may be allowed to enter to take on provisions. See BROWNLEI, supra note 7, at 32-33.
of aggression against another state and the latter state, in deploying forces to repel the aggression, chooses to regard the circumstances as establishing a state of war between the two states.

In 1927 a Report of the Secretary-General of the League of Nations affirmed the state of war doctrine in this statement:

[F]rom the legal point of view, the existence of a state of war between two States depends upon their intention and not upon the nature of their acts. Accordingly, measures of coercion, however drastic, which are not intended to create and which are not regarded by the State to which they are applied as creating a state of war, do not legally establish a relation of war between the states concerned.\textsuperscript{140}

Quincy Wright confirms the view that “an act of war can always be construed by either the attacker or the attacked as initiating war, but if neither of them does so construe it, war does not exist.”\textsuperscript{141}

Thus, the state of war doctrine holds that the existence of a state of war depends not upon objective facts, such as the nature and scale of the acts, but upon the subjective “state of mind” of the parties, and their intentions. A blatant act of force or violation of territorial integrity by one state against another, while objectively an act of aggression under international law, becomes Legal War only if one state or the other so regards it.\textsuperscript{142}

However, if one state commits acts of aggression on a large scale against another state, while repeatedly asserting that it does not intend to make war, it is possible for the victim state to regard the act as instituting a state of war, and if it does, a state of war exists.\textsuperscript{143}

\textbf{B. Construal of State of War by Commanders in the Field}

It is possible that the actions of proclamations of a commander in the field, or an admiral in the navy, can be equivalent to a declaration


Under the state of war doctrine, states generally accept the legal characterization that a war does not exist given by the parties to a conflict, and thereby refrain from claiming that the laws of neutrality come into play. \textit{See BROWNLIE, supra} note 7, at 39.

\textsuperscript{140} \textit{See BROWNLIE, supra} note 7, at 38.

\textsuperscript{141} Quincy Wright, \textit{Changes in the Conception of War}, 18 Am. J. Int'l L. 756, 759 (1924). By “acts of war” Wright was referring to an invasion of a state's territory or an attack on the public forces of a state. \textit{See id.}

\textsuperscript{142} \textit{See RIFAAT, supra} note 1, at 19.

\textsuperscript{143} \textit{See Wright, supra} note 2, at 365.
of war or may establish a state of war. The independence of Greece was in fact a result of the unauthorized action of naval commanders who sunk Turkish vessels at Navarino, although the states involved claimed that the hostilities did not amount to a state of war. Often enough, naval commanders or generals in the field are given the authority to use their discretion to proceed to deploy force against an enemy as they deem fit. Examples include the 1846 authorization of President Polk for General Zachary Taylor to occupy land and proceed against Mexican insurgents if they crossed the Rio Grande and President Lincoln's proclamation of a blockade against states in rebellion, giving broad authority to naval commanders to engage in interdiction.

C. Construal of a State of War by Third States Not Party to the Conflict

If two states engaged in hostilities disclaim that a state of war exists, can a third state, not a party to the conflict, issue a declaration that effectively establishes the existence of war? Though this rarely happens, third states have in fact converted situations into Legal War by recognizing them as such. The American action in the blockade of Venezuela in 1902 is a leading example. Another example occurred when European states issued proclamations of neutrality, effectively declaring that the American Civil War was in fact a war before it was deemed a Legal War in the United States. Another example was when the President of the United States issued a proclamation during the Italo-Ethiopian conflict, asserting that a state of war existed between those two states. In addition, courts of one country have often passed judgment as to whether a state of war existed between two other countries. Still, it seems odd, or at least counterintuitive, that a third state, by issuing a proclamation acknowledging that a state of war exists between other states, could have compelling force over the relations of the belligerents

144. See Eagleton, supra note 13, at 28.
145. See id.
147. See Wright, supra note 2, at 366.
148. See id. at 367.
149. See Eagleton, supra note 13, at 26.
150. See id.
151. See id. at 27.
themselves, such that the hostile states might have to suspend their treaties, comport with the laws of war and submit to all other consequences that append to a state of war.

But third states may be motivated to proclaim that other countries are in a state of war if hostilities are interfering with their commerce on the high seas, so that they can formally be secured by the international laws of neutrality. Moreover, third states may need to decide whether a state of war exists in order to determine the interpretation of the phrase "war" in domestic statutes, and to determine the applicability of insurance contract limitations on property destroyed by bombardment, the incidence of international responsibility for such losses, or other legal questions concerning the interests of their citizens, as well as the more general obligations with respect to neutrality or anti-war treaties.

D. Deference to the Political Branches of Government in Construal of a State of War by the Courts

Courts generally place the determination of the state of war within the sole province of the political branches of government: "The question, whether or not war, in its legal sense exists, is to be determined alone by the political power of the government; and of this determination the courts must take judicial knowledge ...."152 But there is a wide divergence among the courts in the criteria used to determine whether the political branches of the government have decided that a state of war exists. Courts have run the gamut from the strictest interpretation, requiring a formal declaration of war by Congress, to a pragmatic approach that takes into consideration the nature of the hostilities and surrounding circumstances. And courts have ruled that a given military situation may be a "time of war" for some purposes but not for others. Some cases give the sense that courts, in both court-martial and civil jurisdiction, have exhibited divergent views on whether a state of war exists in order to effectuate what a given court perceives to be a just outcome in the case at hand.

In the absence of an expressed declaration of war, courts may look to expressions of the political will of the government in official pronouncements that clarify, one way or another, that the government regards a given conflict as a state of war. Courts have, however, thwarted the political will of the executive and legislative branches' disclaimer of any intention of making war, by finding, in

152. Sutton v. Tiller, 46 Tenn. (6 Cold.) 593, 595 (1869).
some cases, that the existence of war may be implied by warlike acts that contradict official denials. An example of this pragmatic approach was in *Dole v. The Merchant’s Marine Insurance Company*, in which the court said:

War is an existing fact and not a legislative decree. Congress alone may have power to declare it beforehand, and thus cause or commence it. But it may be initiated by other nations, or by traitors; and then it exists, whether there is any declaration or not. It may be prosecuted without any declaration, or Congress may, as in the Mexican War, declare its previous existence. In either case it is the fact which makes “enemies” and not any legislative act.\(^{153}\)

Courts will construe appropriations by Congress to support military operations abroad as implied approval of the President’s war making, and serving as authorization to continue the expedition.\(^{154}\) Such appropriations generally come after the hostilities have already begun, with the President presenting Congress with a *fait accompli* that makes it difficult to do anything other than “support our troops.” Courts may also be influenced by the existence of active hostilities on a large scale, the nature of resolutions of Congress referring to the hostilities, authorizations for soldiers in combat to be provided with additional veterans’ benefits, and Executive Orders relating to the conflict such as presidential proclamations prescribing the area of combat as a combat zone for pay and decoration purposes\(^ {155}\) or in proclaiming a day of observance and prayer in connection with the hostilities.\(^ {156}\) Other warlike acts, such as the proclamation of blockade or other hostile acts, may convince courts that a state of war exists. Courts have noted that “[b]lockade itself is a belligerent right, and can legally have place only in a state of war,”\(^ {157}\) and that “the proclamation of blockade is, itself, official and conclusive evidence to the court that a state of war existed.”\(^ {158}\) The most compelling example of a blockade in modern time occurred with the Cuban Missile Crisis in October 1962, although in and of itself, the blockade was not

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153. 51 Me. 465, 470 (1862).
154. See Note, *supra* note 80, at 1801.
156. See, e.g., Proclamation No. 3686, 3 C.F.R. 145 (1965) (proclaiming a day of observance and prayer for the defense of South Vietnam).
accompanied by further acts of hostilities, and was short lived so that a state of war did not exist. 159

And as to the existence of other hostile acts, courts have regarded the existence of authorized hostilities, or the mere authorization of hostilities, as evidence that the political department intends to regard the situation as a state of war, and in connection with this, courts will gauge how long and on how great a scale hostilities have existed before the situation will be recognized as a state of war. 160

V. Case Studies of Conflicts Denied To Be War by Belligerents

In light of these features of the state of war doctrine, it is instructive to examine the extent to which states have gone in denying that a state of war exists, and the status accorded such conflicts by courts that have had occasion to consider various types of legal issues in connection with the conflicts. It is first well worth asking the question: Is there an intermediate state between war and peace? The answer is, simply, that it is a principle of international law that there is no "intermediate" state between war and peace. Hugo Grotius established the maxim, "Inter bellum et pacem nihil est medium" (There is no intermediate state between war and peace). 161 The House of Lords, speaking through Lord MacNaghten in Janson v. Driefontein Consolidated Mines Ltd., said in 1902: "I think the learned counsel for the respondent was right in saying that the law recognizes a state of peace and a state of war, but that it knows nothing of an intermediate state which is neither one thing nor the

159. The United States imposed the naval quarantine on Cuba to compel the removal of Soviet missiles that were perceived to pose a threat to American security, based on anticipatory-self defense. See President John Fitzgerald Kennedy, Proclamation 3504: Interdiction of the Delivery of Offensive Weapons to Cuba, 57 AM. J. INT’L L. 512 (1963). President Kennedy stated that the Soviets were assembling delivery systems for intermediate range ballistic missiles in Cuba. Regarding this development as "a deliberately provocative and unjustified change in the status quo," Kennedy ordered the naval blockade, which he termed a "quarantine," to prevent the transport of missiles and related materiel to Cuba. Address by President Kennedy, reprinted in ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 153 (1968). During the course of debates on the matter in the U.N. Security Council, members differed as to whether the missiles in question were defensive or offensive, but no one claimed that the American blockade constituted a state of war. See AREND & BECK, supra note 112.

160. See Ronan, supra note 95, at 645.

other—neither peace nor war.” However, in many conflicts, the belligerents are clearly “up in arms” against one another, casualties are incurred, appropriations are made by the respective legislative or parliamentary authorities and other indicia of wartime are in place—but the parties deny that there is a state of war. Surely, however, these situations do not constitute a state of peace.

I have selected the following historical examples to illustrate different ways in which states have engaged in hostilities that they have denied, with varying degrees of tenacity, constituted a state of war.

A. United States Naval Operations Against France, 1798-1801

After the United States signed the Jay Treaty, which granted privileges to Great Britain that had previously been conferred on France alone, numerous instances of French interdictions against American shipping occurred. The French seized American vessels and had them condemned in prize courts. American citizens were imprisoned, beaten, and other vessels were fired upon, burned and looted. Diplomatic relations between France and the United States were broken off in December 1796. The Congress passed laws to suspend trade between the two countries, to authorize armed vessels of the United States to seize armed vessels of France for adjudication as prize, and to recapture American vessels and goods. The United States captured as prize about eighty-five French vessels. Despite the severe and prolonged nature of the conflict, neither the French nor the U.S. governments considered that a war existed between them, and the legislation passed by the Congress referred to “the existing differences” and justified its move “in case war should break out.” In 1801, the U.S. Senate ratified a Convention that resolved the dispute, but did not refer to a state of war and the document was not regarded as a peace treaty.

Despite the fact that both the United States and France denied that a state of war had existed, early cases in the Supreme Court held

162. L.R. 12 Digest 243 (K.B. 1902).
163. See BROWNLIE, supra note 7, at 29.
164. See id.
165. See id. (citing GROB FRITZ, THE RELATIVITY OF WAR AND PEACE 37-63 (1949)).
166. See BROWNLIE, supra note 7, at 29.
167. See id. (citing 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 480 (Hunter Miller ed., 1931)).
that hostilities on the high seas between public armed ships of the United States and France had constituted a "public war." The most famous of these cases was Bas v. Tingy, in which the Court focused on the congressional authorization of hostilities on the high seas by certain persons in certain circumstances. Justice Paterson referred to the operations as "an imperfect war, or a war as to certain objects and to a certain extent," and Justice Chase referred to the conflict between America and France as a "limited, partial war." Going further, Justice Washington stated:

Every contention by force between nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation, and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no farther than to the extent of their commission. Still, however, it is a public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the government restrains the general power.

Each of the justices agreed that a "public war" existed (rather than a state of reprisals or some other "intermediate" condition), even though it was being waged in a limited manner. The Court seemed to have reached this conclusion based on the fact that the hostilities were ordered or condoned by the political branches of the

168. See Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); see also Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800). But see The Schooner Endeavor, 44 Ct. Cl. 242 (1909); Hooper v. United States, 22 Ct. Cl. 408 (1887); Cushing v. United States, 22 Ct. Cl. 1 (1886); Gray v. United States, 21 Ct. Cl. 340 (1886).
169. 4 U.S. (4 Dall.) 37 (1800).
170. Id. at 44.
171. Id. at 40-41.
government. Congress had enacted prize regulations and authorized American vessels to resist search, even though no declaration of war had been issued either by France or the United States.\footnote{172}

For a period of a century or so following \textit{Bas v. Tingy}, claimants whose ships and goods had been destroyed or captured by the French pressed the United States for compensation, based on legislation enacted by Congress. This culminated in a series of judgments by the Court of Claims referred to as the French Spoliation Cases.\footnote{173} In 1886, in \textit{Gray, Adm'r. v. United States}, the Court of Claims appeared to sidestep \textit{Bas v. Tingy}, observing:

\begin{quote}
[T]he political and judicial departments of each Government recognized the other as an enemy; that battles were fought and blood shed on the high seas; that property was captured by each from the other and condemned as prize; that diplomatic and consular intercourse was suspended, and that prisoners had been taken by each Government from the other and “held for exchange, punishment, or retaliation, according to the laws and usages of war.” While these statements may be in substance admitted and constitute very strong evidence of the existence of war, still they are not exclusive, and the facts, even if they existed to the extend claimed, may not be inconsistent with a state of reprisals straining the relations of the States to their utmost tension, daily threatening hostilities of a more serious nature, but still short of that war which abrogates treaties, and after the conclusion of which the parties must, as between themselves, begin international life anew.
\end{quote}

\dots

\begin{quote}
We are, therefore, of the opinion that no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations; that, in short, it was no public general war, but limited war in its nature similar to a prolonged series of reprisals.\footnote{174}

The Court of Claims did not take itself to be contradicting \textit{Bas v. Tingy}, because it interpreted that case to hold that the United States and France were only in “partial warfare,”\footnote{175} that is, a limited degree of hostility carried on without a declaration of war. The court said:

There was no declaration of war; the tribunals of each country were

\footnotesize
\begin{itemize}
\item \footnote{172}{See Ronan, \textit{supra} note 95, at 645.}
\item \footnote{173}{See \textit{id.} at 648.}
\item \footnote{174}{21 Ct. Cl. 340, 367-68, 375 (1886).}
\item \footnote{175}{\textit{Id.} at 371.}
\end{itemize}
open to the other—an impossibility were war in progress; diplomatic and commercial intercourse were admittedly suspended; but during many years there was no intercourse between England and Mexico, which were not at war; there was retaliation and reprisal, but such retaliations and reprisals have often occurred between nations at peace; there was a near approach to war, but at no time was one of the nations turned into an enemy of the other in such manner that every citizen of the one became the enemy of every citizen of the other; finally, there was not that kind of war which abrogates treaties and wiped out, at least temporarily, all pending rights and contracts, individual and national. 176

Another Court of Claims decision dealing with the French Spoliation Cases held that “within the limits prescribed by Congress there was war; limited imperfect war, not general public war, but war complete as to the vessels engaged in it to the extent only of the powers given by the Congress.” 177 As late as 1909, another Court of Claims case involving the French Spoliation Cases, said:

While reprisals are acts of war in fact, it is for the state affected to determine for itself whether the relation of actual war was intended by them; ... Congress, in whom the power resides, did not see fit to declare war, and the hostilities actually carried on were not only limited but of a defensive character. 178

More recently, the U.S. Navy Department published documents pertaining to the 1798-1801 conflict with France, referring to “Quasi War with France.” 179 Thus, in the annals of legal history there is a widely divergent field of opinion as to whether the U.S. naval operations against France in 1798-1801 constituted a Legal War.

B. Battle of Navarino, 1827

In 1827, when a Greek independence movement against Turkey was at its height, Great Britain, France and Russia were aligned on a policy of joint intervention on behalf of the Greek revolutionaries. 180 The three allies used their naval fleets to blockade Turkish supply ships bound for Greece. Superior orders to naval commanders

176. Id. at 374.
177. Hooper, Adm’r. v. United States, 22 Ct. Cl. 408, 429 (1887).
178. The Schooner Endeavor, 44 Ct. Cl. 242 (1909).
179. See Navy Department, Office of Naval Records and Library, Naval Documents, Quasi War with France, Operations, February 1797-December 1801 (7 vols., 1935-38).
180. See FRITZ, supra note 165, at 84-85.
prohibited the use of force unless Turkish vessels forced a passage. Nonetheless, the allied admirals apparently provoked the Turkish fleet into a battle at the harbor of Navarino. The Turks suffered a loss 4,000 men and their entire fleet of 60 ships. "When the news reached the governments of the three Powers they did not consider that a state of war had arisen and none came into existence. The British Cabinet regarded 'the battle as an 'accident.'"\textsuperscript{181} This battle illustrates that "in certain situations limited conflicts which result from accidents, mistaken actions, and unauthorized acts of subordinates may not cause a major breach of the peace when it is obvious that no official sanction, previous or \textit{ex post facto}, is given to the use of force. . . . [This conflict] passed as an isolated incident, the subject merely of a demand for damages and an apology."\textsuperscript{182}

\textbf{C. The Indian Wars, 1790-1890}

The U.S. Indian wars, which lasted roughly a century, from 1790 to 1890, were undeclared. In \textit{Montoya v. United States}, the Supreme Court construed the Indians Depredation Act, by which Congress had vested the Court of Claims with jurisdiction to adjudicate all claims of U.S. citizens who had property taken or destroyed, without just cause or provocation, by Indians belonging to any band, tribe or nation in friendly relations with the United States.\textsuperscript{183} The Act provided for judgments against the United States and against the tribe itself, against whom the Government could seek indemnification.\textsuperscript{184} The Act was intended to "impose upon the tribes the duty of holding their members in check or under control, and for a failure so to do to fix upon the tribe the responsibility for the acts of individual members acting in defiance of the authority of their tribe or band . . . ."\textsuperscript{185} Congress did not intend to provide for compensation for depredations that were part of a hostile demonstration against the Government or citizens in general because:

\begin{quote}
[I]f the marauders are so numerous and well organized as to be able to defy the efforts of the tribe to detain them, in other words, to make them a separate and independent band, carrying on hostilities against the United States, it would be obviously unjust to hold the
\end{quote}

\begin{flushright}
\begin{tabular}{r}
181. \textsc{Brownlie}, \textit{supra} note 7, at 31. \\
182. \textit{Id.} \\
184. \textit{See id.} at 268. \\
185. \textit{Id.} \\
\end{tabular}
\end{flushright}
tribe responsible for their acts. It can hardly be supposed that Congress would impose a liability upon tribes in amity with the United States for the acts of an independent band, strong enough to defy the authority of the tribe, although it would not be inequitable to hold the tribe liable for individual members whom it was able, but had failed, to control.\footnote{186}

The Court expressed the view that there could not be any expressed declarations of war against the Indian tribes, which have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. \ldots While, as between the United States and other civilized nations, an act of Congress is necessary to a formal declaration of war, no such act is necessary to constitute a state of war with an Indian tribe.\footnote{187}

The Court added:

We recall no instance where Congress has made a formal declaration of war against an Indian nation or tribe; but the fact that Indians are engaged in acts of general hostility to settlers, especially if the government has deemed it necessary to dispatch a military force for their subjugation, is sufficient to constitute a state of war.\footnote{188}

The Court said that the Indian wars constituted a state of war, but of the "imperfect" type, being "confined in its nature and extent, being limited as to places, persons and things \ldots \)\footnote{189}

The Court held that a band of Indians known as "Victoria's band" who had broken away from the Mescalero Apache Indians in Arizona, had embarked on a series of hostile acts against citizens of the United States (horse stealing, plunder and killing of citizens) until they were driven out of the country by military forces, "was carrying on a war against the Government as an independent organization," and that therefore the Mescalero tribe was not held responsible for their acts.

Thus, with respect to the Indian wars the following two principles appear to have emerged: one, that a state of war can exist even though one party to the conflict might not be an independent nation, as the Indian tribes were neither regarded as independent nations or sovereign states; and two, that separate factions that broke away from

\footnotesize{\footnote{186. Id.} \footnote{187. Id. at 265, 267.} \footnote{188. Id. at 268.} \footnote{189. Id. at 267 (quoting Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40-41 (1800)).}}
tribes that were at peace with the United States, and subsequently engaged in hostilities against the United States or its citizens, were deemed to be carrying on war against the United States.\textsuperscript{190}

D. The "Boxer Uprising," 1900-1901\textsuperscript{191}

In 1899 Chinese militia, known as "Boxers," started a violent campaign against native Christians and foreigners. The accredited representatives of the United States and other foreign governments were imprisoned in Peking. By June 1900 the violence was such that President McKinley, without congressional authorization, sent an army of 5,000 men and a naval contingent to join a coalition of Austrian, British, French, German, Japanese, Italian and Russian war vessels that had assembled at Taku, China. Congress made no objection to the action of the President.\textsuperscript{192}

The Boxers, aided by Chinese Imperial troops, engaged in large scale fighting with the allied forces. The allies captured the city of Tientsin on July 14, 1900. In August, allied troops invaded Peking, pillaged and looted the city, released from prison the foreign legations, and committed atrocities against the population. They continued a campaign of expeditions throughout Northern China to suppress the Boxers, and by October they occupied Paotingfu, the capital of the Chihli province, and an allied provisional government was soon established in the occupied region. The deployment of naval forces by President McKinley was not merely for the purpose of rescuing and protecting American lives and property, but also to aid in avenging and punishing the rebels. Yet the President continued to claim that our goal was solely for the legitimate purpose of rescuing imperiled citizens and that no "war" was involved.\textsuperscript{193}

During the conflict, diplomatic documents variously referred to the situation as "war," "actual warfare," "de facto state of war," "intervention," "armed intervention," "hostilities," "expedition,"

\textsuperscript{190} In the \textit{Prize Cases}, the Supreme Court noted that "[t]he parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other." 67 U.S. (2 Black) 635 (1862).

\textsuperscript{191} The account provided herein is attributed to BROWNLIE, \textit{supra} note 7, at 33-34; \textit{see also} RIFAAT, \textit{supra} note 1, at 21-22.

\textsuperscript{192} Congress neither declared war nor formally ratified the President's decision, although it recognized a state of war by providing for combat pay. \textit{See} Act of March 2, 1901, ch. 803, 31 Stat. 903 (1901).

\textsuperscript{193} \textit{See} Note, \textit{supra} note 80, at 1789.
"military measures" and "warlike acts." Neither the Allies nor the Chinese Government ever declared war against the other nor did they regard the conflict to be a "state of war," and in letters to President McKinley and the German Emperor, the Emperor of China referred to the "friendly relations" existing between the parties. In addition, during the conflict third powers were not requested to observe neutrality, and diplomatic relations remained in place between the belligerents. The British Prime Minister, in an interview with the Chinese Minister in London in June 1900, stated that there was no reason to say that a "time of war" existed. In September 1901, the Powers signed what was distinctly not termed a peace treaty, but a "Final Protocol," consisting of twelve articles, none of which referred to war, which provided for the settlement of the dispute and the evacuation of Allied troops.

Notwithstanding the denial of a state of war by the belligerents, in the case of Hamilton v. McClaughry, a U.S. court of appeals held that the Boxer Uprising was a "time of war" within the meaning of the fifty-eighth Article of War, which provided for certain offenses committed by soldiers in time of war, so that the murder of a fellow serviceman in China constituted offense triable by court-martial. After stating that the existence of a state of war is a political question, and that it was bound by the determination of that issue by the political department of the government, the court paradoxically ignored the statements of the Executive branch, and instead examined other elements. The court concluded that the Boxer Rebellion was a "time of war" because of

The occupation . . . by the large military force . . . the many conflicts between the forces of this government and the armed Chinese troops, and the recognition of a condition of war by the Congress . . . in making payment to the officers and men . . . on a war basis, and all the other facts and circumstances.

The court also observed that during the Boxer Uprising there were 271 trials by general court-martial, which resulted in 244 convictions. The court said that a formal declaration of war "is unnecessary to constitute a condition of war. . . . [T]he question here is whether this government was, at the time of the commission of this homicide by petitioner, prosecuting its right in Chinese territory by

194. 136 F. 445 (10th Cir. 1905).
195. Id. at 449, 451 (emphasis added).
196. Id. at 448.
force of arms.\textsuperscript{197} The court concluded that:

[W]hen the armed forces of this government, by authority of the Department of War, are commissioned to enforce the lawful demands of this government against a foreign country, or to protect the lives of citizens lawfully stationed in a foreign country, or the accredited representatives of this government in such foreign country, there must exist military jurisdiction and power to enforce such discipline among the troops as will command the respect of foreign nations, assure the safety of the nonoffending citizens of such foreign nation and their property, and protect the lives and the citizens of this country engaged in such military operations.\textsuperscript{198}

According to Arthur Schlesinger, Jr., the intervention in China was the first significant action against a sovereign state by the United States and marked a new era in Presidential war powers.\textsuperscript{199}

\textbf{E. The Joint Blockade by Germany, Great Britain and Italy against Venezuela, 1902-1903}\textsuperscript{200}

In 1902, as a result of the Venezuelan government’s refusal to honor its contract debts owed to citizens of Germany, Great Britain and Italy, the three European governments formed a coalition and seized most of the Venezuelan fleet. At Puerto Cabello, a Venezuela mob seized and looted a British steamer and imprisoned her officers and crew. British and German cruisers shelled two forts at Puerto Cabello after local authorities refused to apologize for the incident. The allied forces then notified other nations that they were blockading the Venezuelan ports, and that vessels of third states attempting to violate the blockade were to be subject to seizure and trial in a prize court. In February 1903, through the mediation of the United States, the conflict was settled, the blockade ended, and captured ships were restored.

Was this blockade a Legal War? There was a simple exchange of protocols, and no treaty of peace was drafted. One commentator at the time described the conflict as “war sub modo” and “anomalous,”\textsuperscript{201} and another referred to it as “essentially a pacific

\begin{footnotesize}
\begin{enumerate}
\item 197. \textit{Id.} at 449-50.
\item 198. \textit{Id.} at 450.
\item 199. \textsc{Arthur Schlesinger}, Jr., \textsc{The Imperial Presidency} 89-90 (1973).
\item 200. The account provided herein is attributed to \textsc{Brownlie}, \textit{supra} note 7, at 35-36; \textit{see also} \textsc{Rifaat}, \textit{supra} note 1, at 23-24.
\item 201. Sir Thomas Erskine Holland, \textit{War Sub Modo}, 19 L.Q. Rev. 133 (1903).
\end{enumerate}
\end{footnotesize}
blockade.\textsuperscript{202} The German government initially held to the position that the blockade was a "pacific blockade," but later asserted that it was a "warlike blockade" and that a state of war existed. The British Secretary of State for Foreign Affairs said that "the establishment of a blockade created \textit{ipso facto} a state of war between Great Britain and Venezuela." Thus, under the state of war doctrine, a war existed in the legal sense inasmuch as the states concerned stated that it existed. Moreover, in an award of February 22, 1904, the Permanent Court of Arbitration at The Hague referred to the "war between the blockading Powers and Venezuela" in the \textit{Venezuelan Preferential Claims} case.\textsuperscript{203}

\textbf{F. The United States Occupation of Vera Cruz, 1914}\textsuperscript{204}

In April 1914, three crewmembers of the U.S.S. Dolphin were improperly arrested at Tampico by soldiers of the army of General Huerta, who headed the provisional government of Mexico. The prisoners were soon released, but a conflict arose after General Huerta failed to satisfy the regional commander of the American naval forces with an apology and special ceremony that the commander had demanded. President Wilson immediately requested that Congress authorize the use of armed forces so as to obtain from General Huerta "fullest recognition of the rights and dignity of the United States."\textsuperscript{205} Congress then passed a joint resolution stating:

\begin{quote}
That the President is justified in the employment of armed forces of the United States to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States.
\end{quote}

\begin{quote}
\textit{Be it further resolved}, That the United States disclaims any hostility to the Mexican people or any purpose to make war on Mexico.\textsuperscript{206}
\end{quote}

It should be observed that this resolution, by its own terms, was not a declaration of war.\textsuperscript{207} U.S. forces seized the customs-house at

\begin{enumerate}
\item\textsuperscript{202} 2 Oppenheim, \textit{supra} note 54, at 146 n.1; cf. Herbert W. Briggs, \textit{Law of Nations} 959 (2d ed. 1952).
\item\textsuperscript{203} James Brown Scott, \textit{Hague Court Reports} 56 (1916); Manley Ottmer Hudson, \textit{Cases on International Law} 608 (3d ed. 1951).
\item\textsuperscript{204} The account provided herein is attributed to Brownlie, \textit{supra} note 7, at 36-37; see also, Rifaat, \textit{supra} note 1, at 24-25.
\item\textsuperscript{205} Brownlie, \textit{supra} note 7, at 36.
\item\textsuperscript{206} See Brownlie, \textit{supra} note 7 (citing Mexican Disturbances, 63 Pub. Res. 22; 38 Stat. 770 (1914)).
\item\textsuperscript{207} Compare the text of declarations of war of Congress set forth \textit{supra} at notes
\end{enumerate}
Vera Cruz to prevent arms which were expected to arrive there from falling into the hands of General Huerta. After several days of severe fighting, American forces gained control over the whole city, and remained in occupation until November 23, 1914.

Was this invasion and occupation a Legal War? It seems that the U.S. government expressly denied a state of war. Senator Root in Congress stated that the operation was justified as a reprisal or an intervention to protect American lives and property. The U.S. Secretary of State denied that a state of war existed. More likely, the action was a means of salvaging national pride and to affect a regime-change of the government of General Huerta, whose regime had been popularly denounced as a "government by murder." On the other hand, the Mexican Minister of Foreign Affairs sent a note to the American charge d'affaires stating that "According to international law, those acts of the armed forces of the United States... must be understood as the initiation of war against Mexico."

G. The Pershing Expedition into Mexico, 1916

In March 1916 the United States invaded Mexico in search of the Mexican commander, Pancho Villa, and his army, who had raided a town in New Mexico. President Wilson ordered a punitive expedition under the command of General John J. Pershing into Mexico. The President stated that:

[T]he expedition is simply a necessary punitive measure, aimed solely at the elimination of the marauders who raided Columbus [New Mexico] and who infest an unprotected district near the border which they use as a base in making attacks upon the lives and property of our citizens within our own territory. It is the purpose of our commanders to cooperate in every possible way with the forces of General Carranza [the de facto head of Mexico] in removing this cause of irritation to both governments and to retire from Mexican territory so soon as that object is

97-103.


210. RIFAAT, supra note 1, at 25.

211. BROWNLIE, supra note 7, at 37.

212. The account provided herein is attributed to BROWNLIE, supra note 7, at 37.
accomplished. 213

Congress approved of this action. 214 The U.S. Senate adopted resolutions that stated in part:

Whereas the President has obtained the consent of the de facto government of Mexico for this punitive expedition; and

Whereas the President has given assurance . . . that the military operations now in contemplation will be scrupulously confined to the object already announced, and that in no circumstance will they be suffered to trench in any degree upon the sovereignty of Mexico or develop into intervention of any kind; Therefore be it

Resolved . . . That the use of the armed forces of the United States for the sole purpose of apprehending and punishing the lawless band of armed men who entered the United States from Mexico on the 9th day of March, 1916, committed outrages on American soil, and fled into Mexico, is hereby approved . . . .

President Wilson may have been more timid than presidents today insofar as deferring to Congress with respect to approval of military operations falling short of war. This language, authorizing the President's "expedition" for the limited purpose of restoring civil order, does not rise to a declaration of war.

Soon, General Carranza denounced the American punitive expedition "as an invasion without Mexico's consent, without its knowledge, and without the cooperation of its authorities," and demanded the immediate withdrawal under threat of military retaliation. 216 Numerous clashes occurred between U.S. troops and regular Mexican forces inasmuch as American forces remained in the region and patrolled a portion of Mexico to protect the American border. In July 1916, a series of conferences took place in Washington in an effort to mediate a settlement of the conflict. A peaceful settlement was reached and American forces withdrew from Mexico in February 1917. At no time did either the United States or

213. The Confidential Agent of the de facto Government of Mexico to the Secretary of State, 10 AM. J. INT'L L. 191 (Official Document Supp. 1916); see also George A. Finch, Mexico and the United States, 11 AM. J. INT'L L. 399, 400 (1917).

214. A resolution approving the use of armed forces passed the Senate but did not come up for a vote in the House. See Background Information on the Use of United States Armed Forces in Foreign Countries: Hearings on War Powers Legis. Before the S. Comm. on Foreign Relations, 92d Cong., 1st Sess. 301 (1971).


216. Finch, supra note 213, at 401.
Mexico claim that a state of war existed. However, the Pershing Expedition was said to have been war by the Texas Court of Appeals, which reversed the conviction of several Mexican soldiers who were tried in the Texas state courts for murder with respect to one of the regular army battles that occurred in the conflict. The court said that the matter of trial and punishment of the captured soldiers was subject to an international or federal question, and not a state matter, because the killing occurred in the context of a state of war.

We know, as a matter of history . . . that the United States invaded Mexico, with a column of troops . . . . It is not the purpose of this opinion to go into the history of the trouble between the two countries and the incidental fights and battles which may have occurred in connection with those troubles. Suffice it to say they did occur, and under the authorities this brought about a condition of war between the two countries . . . . There was no formal declaration of war . . . . That a state of warfare existed between the two countries is not questioned.217

The foregoing are obviously not exhaustive of 19th and 20th centuries cases in which states denied that a state of war existed despite the use of force. However, these cases have the following factors in common with one another: (1) they pertain to operations which had a limited purpose; (2) the operations did not have the purpose of conquering or annexing the opponent; (3) they involved conflicts that were limited in geographical terms or in the numbers of forces involved, or both; and (4) the states in contention denied that there was a state of war.

VI. Modern Case Studies of Conflicts

A. Was the American Civil War a War in the Legal Sense?

Even before President Lincoln issued a proclamation ordering a blockade of the Southern ports in 1861, federal and state courts generally ruled that a state of war existed, despite the absence of a declaration of Congress.218 President Lincoln had, without authorization from Congress, directed the blockade of Southern ports

on April 19 and April 27, 1861. This appears to have been a substitute for a declaration of war or, at any rate, an act evidencing a state of undeclared war. As a result, Union vessels captured four ships off the coast of the Confederacy and brought them to port in order to be labeled as prizes. Their seizure and condemnation were sustained in a 5 to 4 decision by the Supreme Court in the Prize Cases. The Court reasoned that actual war existed although there had been no declaration of war. The Court said: "A state of actual war may exist without any formal declaration of it by either party; and this is true of both a civil and foreign war."

The Court in effect approved an expanding power of the President to make war without prior authorization under the theory that the President has unlimited power to wage war in defending against an invasion or rebellion, which is how the secession of the South was characterized. The Court said that "[t]he President was bound to meet it [the secession of Southern states] in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him could change the fact." The Court approved the theory of defensive war, stating "[I]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."

The Court also recognized that the President was to be the sole judge of when an invasion or rebellion amounted to "war." The Court said:

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219. See Corwin, supra note 13, at 277-78. The proclamation of the President stated that the President has:

[D]eemed it advisable to set on foot a blockade of the ports within the States aforesaid [the States referred to in the recitals] in pursuance of the laws of the United States and of the law of nations, in such case made and provided. . . . If, therefore, with a view to violate such blockade, a vessel shall approach or shall attempt to leave either of said ports, she will be duly warned by the commander . . . and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo, as prize, as may be deemed advisable.


220. See Eagleton, supra note 13, at 25.

221. The Prize Cases, 67 U.S. (2 Black) at 635.

222. Id. at 640.

223. Id. at 669.

224. Id. at 668.
Whether the President in fulfilling his duties as Commander-in-Chief, in suppressing an insurrection had met with such armed resistance . . . as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decision and acts of the political department of the Government to which this power was entrusted.225

This language is important because it indicates that the President rather than Congress may determine that a state of war exists or has been thrust upon the nation, as distinguished from making a declaration of war. At any rate, the Prize Cases has been construed to validate a broad power of the President to order troops into combat without express authorization from the Congress.226 The actions taken by President Lincoln during the Civil War "served vastly to expand Presidential prerogatives and to accumulate a storehouse of precedents for strong executive initiative in military conflicts not only of a domestic nature but also with regard to foreign nations."227

The Prize Cases remains uncontroverted today, but there was a compelling dissent, joined by Chief Justice Taney, that stated:

[T]here was no existing war between the United States and the States in insurrection within the meaning of the law of nations, which drew after it the consequences of a public or civil war. . . .[N]o civil war existed between this Government and the States in insurrection till recognized by the Act of Congress 13th of July, 1861; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress of the United States, and, consequently, that the President had no power to set on foot a blockade under the law of nations, and that the capture of the vessel and cargo . . . in all cases

225. Id. at 670.
226. According to one commentator, the holding of the Prize Cases is:
[B]road enough to empower the President to do much more than merely parry a blow already struck against the nation. Properly construed, in truth, it constitutes juristic justification of the many instances in our history (ranging from Jefferson’s dispatch of a naval squadron to the Barbary Coast to the 1962 blockade of Cuba) in which the President has ordered belligerent measures abroad without a state of war having been declared by Congress. BERNAARD SCHWARTZ, THE REINS OF POWER 98 (1963).
before us . . . for breach of blockade, or as enemies' property, are illegal and void . . . . 228

This sentiment was echoed by the Supreme Court of Texas in Bishop v. Jones & Petty, a case in which a principal issue was whether the Civil War was a Legal War. 229 The court refused to take judicial notice of such facts as: the establishment of the various secession conventions and election of provisional governments by Confederate states early in 1861; the election of Jefferson Davis as president; the dispatch of U.S. troops to reinforce Fort Pickens; the deployment of U.S. war vessels; and numerous other facts. The Court said that the belief that war existed in March 1861, the time of the cause of action, various:

[T]hreatening aggressions had been meekly borne. When armies, forts, arsenals, public property, and vessels had been captured, no resistance had been made. When the flag had been fired on, no shot had been returned. When all these immense trainings and preparations were going on, congress remained silent. When states declared that they were out of the union, the public authorities took no notice of the fact. 230

The court made a distinction between the “popular sense” of war and Legal War:

War does not exist merely on the suspension of the usual relations of peace. Commerce may be interdicted without producing it. Reprisals and embargoes are forcible measures of redress, but do not, per se, constitute war. Hostile attacks and armed invasions of the territory or jurisdiction of a nation, accompanied by the destruction of life and property by officers acting under the sanction and authority of their governments, however great and flagrant provocations to war, are often atoned for and adjusted without its ensuing. War in its legal sense has been aptly defined to be “the state of nations among whom there is an interruption of all pacific relations, and a general contestation of arms authorized by the sovereign.” It is true, it may and has frequently in latter times been commenced and carried on without either a notice or declaration. But still, there can be no war by its government, of which the court can take judicial knowledge, until there has been some act or declaration creating or recognizing its existence by that department of the government clothed with the war-making

229. 28 Tex. 294 (1866).
230. Id. at 300-01.
power.\textsuperscript{231}

**B. Was the Korean Conflict a War in the Legal Sense?**

It was not until the Korean conflict that another extensive and long-lasting state of hostilities existed without a formal declaration of war. There was a split of opinion as to whether the Korean conflict was in fact a Legal War. Sir Hersh Lauterpacht labeled the conflict as hostilities for the "collective enforcement" of international law.\textsuperscript{232} The U.N. Command in the Korean conflict declared its intention to observe the laws of war and the rules of the Geneva Conventions of 1949.\textsuperscript{233} President Truman committed forces to combat on the grounds that it was necessary to repel the invaders, and that without immediate action Korea would have been overpowered.\textsuperscript{234} The Administration described the conflict as a mere "police action,"\textsuperscript{235} suggesting that the President had deployed forces for purposes short of war without congressional authorization pursuant to his inherent power as Commander-in-Chief.

Cases construing the Uniform Code in the context of the Korean War appear to have steadfastly held that the conflict was a major war. These cases generally relied on an objective analysis of such criteria as the number of troops ultimately deployed, the number of casualties incurred, the extent of emergency legislation that was enacted and the total costs.\textsuperscript{236}

Cases during this period appear to have analyzed the notion of the geographic scope of war. Wars often have a geographic limitation, so that we might employ such terms as "theatres of war," or "regions of warfare." Assuming that we can establish that there is a state of war, one might inquire as to what the geographic scope of the war is. This issue became important in considering whether, under the Uniform Code, the statute of limitations is suspended worldwide or only in the combat zone in time of war. This issue is associated with the doctrine of "imperfect war," a concept that was first enunciated in American law by Justices Washington and

\begin{footnotes}
\item[231] Id. at 319.
\item[232] 2 OPPENHEIM, supra note 54, at 224-25.
\item[234] See Note, supra note 80, at 1791.
\item[235] See LECKIE, supra note 117, at 858.
\item[236] See Note, supra note 80, at 1792.
\end{footnotes}
Patterson in *Bas v. Tingy.* The Court held that the armed conflict between France and the United States had been "an imperfect war, or a war as to certain objects and to a certain extent." Justice Patterson construed the scope of the war to be limited to maritime engagements on the seas. This concept of geographical limitations on the scope of a war, as a particular species of warfare, has been recognized in subsequent cases.

It has been suggested that modern war is global war in effect, and that this justifies the suspension of the statute of limitations everywhere as well as the worldwide application of desertion in time of war, both within and without the combat zone. The Navy Court of Military Review held, in *United States v. Robertson,* that if it is established that "time of war" provisions of the Uniform Code are in effect, then the statute of limitations is suspended worldwide, not simply in the combat zone.

In *United States v. Ayers,* the Court of Military Appeals considered a case involving an unauthorized absence from Fort Lewis, Washington, which occurred on December 23, 1950, during the Korean conflict. The question was, first, whether the Korean conflict triggered the "time of war" provisions of the Uniform Code, and if so, whether the "time of war" provision would serve to suspend the statute of limitations for an offense of desertion that took place outside the combat zone. The Court held to a "yardstick of practicality," reasoning that there was a state of war notwithstanding the conflict being undeclared by the Congress, and that given the potential global impact of war in an atomic age, an unauthorized absence of a soldier in the United States was just as grave a matter as an unauthorized absence of a soldier in the combat zone itself. The court said:

> When asked—as now—to differentiate in result between an unauthorized absence occurring within the continental United States and one arising in Korea, we recognize immediately that,

237. 4 U.S. (4 Dall.) 37 (1800).
238. Id. at 45.
240. See Pye, *supra* note 79 at 52.
243. Id. at 221.
whether the defection occurs at a port of embarkation on the eve of shipment of personnel, or following a unit’s arrival in Korea, we are faced with essentially the same problem. In either instance the Armed Forces are deprived of a necessary—perhaps vitally necessary—combat replacement.  

The court, perhaps inappropriately, relied upon the holdings of civil cases that had construed wartime exclusionary clauses in life insurance contracts involving soldiers who had died in the Korean conflict.

In another case, United States v. Anderson, it was held that a soldier who left his army unit in Louisiana without permission on November 3, 1964, could be charged without regard to the statute of limitations because the offense occurred during the Vietnam conflict, which the court construed to be in a “time of war.” And with respect to the geographic scope of a war, the court took the view that given the nature of modern warfare, especially airlift techniques for the transportation of large numbers of troops thousands of miles away, a soldier who left a unit which was destined for the war zone might be said to have committed as serious an offense as a soldier who deserted in the combat zone. However, there was no evidence before the court that Anderson’s unit was anticipated to be sent shortly overseas or that Anderson was engaged in any activity directly connected to the war effort. It is therefore questionable whether Anderson’s AWOL from a Louisiana base in 1964 imposed any different influence on manpower, combat readiness, and morale than any peacetime AWOL.

In United States v. Taylor, a similar result was reached regarding the Korean conflict in a case involving the suspension of the statute of limitations under Article 43(f) of the Uniform Code, involving fraud or attempted fraud against the United States. The case involved the court-martial of an accused for fraudulently enlisting in the U.S. Army during the Korean conflict. The court affirmed the suspension of the statute of limitations in this matter.

Chief Judge Quinn dissented in both the Ayers and Taylor cases,

244. Id. at 220, 225.
245. 17 C.M.A. 588, 590 (1968).
246. 4 C.M.A. 232 (1954).
249. Id. at 240.
urging: that while there may have been a state of war in Korea, "the entire genius of our Government's policy in the Korean crisis was to confine the hostilities and its consequences to the combat zone"; that the Korean conflict did not precipitate U.S. entry into a full-scale state of war; and that the suspension of the statute of limitations should not, in any event, apply to a soldier located within the United States. Judge Quinn cogently argued that Congress and the President regarded the Korean conflict as limited in place, purpose and in its consequences. He pointed out that one day after President Truman ordered military support for South Korea, Senator Taft stated in the Senate that this commitment meant de facto war, but that this was not to be regarded as a war extending to the continental United States. Senator Taft "considered the President's action as only a new executive development of the foreign policy of the United States which brought danger of war, but not war itself." Senator Douglas stated that he did not regard Korea as indicating a state of war in the continental United States, and similar expressions of Congressional opinion on the floor of both houses of Congress occurred.

Judge Quinn also noted: that when the Communist aggression began in Korea, Congress extended the Selective Service Act of 1948 for only one year; that there was a limitation written into the Universal Military Training and Service Act on June 19, 1951, which expressly prohibited extension of certain enlistments without consent, in the absence of a war or national emergency declared by Congress; that Congress extended the grant of free mail privileges to military personnel only in Korea and combat zones designated by the President, but that in general wartime conditions the privilege is extended within as well as without the United States; and that Congress granted the exclusion of pay from income tax only to those serving in a combat zone, as designated by the President, whereas in time of general war this exclusion is customarily granted to all personnel on active duty, wherever the place of service. Moreover, in 1950, the President suspended the Table of Maximum Punishments only in the Far East command, whereas in World War II the President had suspended the Table for every part of the world in

250. Id. (Quinn, C.J., dissenting); United States v. Ayers, 4 C.M.A. 220, 228 (1954) (Quinn, C.J., dissenting).
251. United States v. Ayers, 4 C.M.A. at 228 (citing 96 Cong. Rec. 9322 (1950)).
252. See id. at 229.
253. See id.
which American forces were located.254

Judge Quinn also pointed out that the reliance by the majority on insurance cases construing the Korean conflict are not germane to the issue in the case, for "[t]he meaning of a public law is to be found in what Congress itself has done and said" rather than in what courts say with respect to the interpretation of insurance contracts.255

Thus, a persuasive argument was made that the Korean conflict, while constituting a state of war, was limited in scope, and did not intimate a state of war within the territorial limits of the United States.

*United States v. Bancroft*256 involved a soldier accused and convicted for sleeping on post during the Korean conflict, a charge that carries a possible death penalty if committed during wartime. The U.S. Court of Military Appeals expressly rejected the need to consider a formal declaration of war as a condition precedent to finding a "time of war," saying:

> We believe a finding that this is a time of war, within the meaning of the language of the Code, is compelled by 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 service; the national emergency legislation enacted and being enacted; the executive orders promulgated; and the tremendous sums being expended for the express purpose of keeping our Army, Navy and Air Force in the Korean theatre of operations .... [A]n appreciation of the size of the forces involved; a recognition of the efforts, both military and civilian, being expended to maintain the military operations in that area; and knowledge of other well-publicized wartime activities convinces us beyond any reasonable doubt that we are in a highly developed state of war .... It would indeed be an insult to the efforts of those servicemen who are daily risking their lives in defense of democratic principles to hold that peacetime conditions prevail.257

The court noted that civilian courts in some instances held that a

255. *Id.* at 231.
256. 3 C.M.A. 3, 4 (1953).
257. *Id.* at 5-6.
formal declaration of war is a condition required in order for a state of war to exist, but that "the reasons which are influential there are not persuasive here. For our purposes we need not get into the refinements of those cases which interpret the terms of a contract nor decide whether we are engaged in a de facto or de jure war. Practical considerations are more important. . . ."258 One commentator has noted that military holdings in the foregoing cases seem to find a state of war more readily than cases in municipal law because:

[T]he exigencies of the military situation are the same whether there is a declared war or a mere outbreak of hostilities. Clearly, the operation of the maximum punishment provisions should be the same for the guard who slept at his post in a bunker along the Yalu as it was for one who slept at his post on a front line in World War II. It is, therefore, reasonable to assume that Congress intended that the "wartime" sections of the Code should be operative whenever persons subject to the Code were actively engaged in hostilities.259

One other case involving the Korean conflict pertained to whether war existed for the purpose of determining veteran's preference points. In Freed v. Baldi, the Colorado Supreme Court considered whether someone who had served in the Korean conflict had served "in the armed forces of the United States in time of war" for purposes of being entitled to certain veterans' preference points under the Colorado Constitution.260 The court held in the negative, finding, first, that the people of Colorado had intended the phrase "in times of war" to mean only war "officially declared by Congress," and second, that the Korean conflict was never formalized by a declaration of war.261

As we can see, one of the problems with undeclared conflicts such as Korea is ascertaining when mere "police action" has escalated into a Legal War. At what point in time will the commitment of troops into foreign military action and other criteria become "war"? Is it when the casualties reach a certain figure, and if so what level—5,000 or 10,000, more than that, or less? And who would determine when that point was reached? Or, does military action become war when a certain period of time has elapsed? What other criteria other

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258. Id. at 6.
259. Pye, supra note 79, at 47.
261. Id. at 719.
than the level of troops are relevant? These are questions for which there are no straightforward answers.

C. Was the Vietnam War a War in the Legal Sense?

American involvement in Vietnam began with the gradual infiltration of guerrilla fighters from North Vietnam into South Vietnam. From 1959 to 1960, an estimated 2,700 or more Viet Cong crossed the frontier. By 1965, Viet Cong forces under the direction of the military High Command in Hanoi numbered 35,000 regular forces and as many as 80,000 irregular forces. Soon thereafter, the conflict involved hundreds of thousands of soldiers of several nations. On March 4, 1965, the Department of State issued the following statement:

The fact that military hostilities have been taking place in Southeast Asia does not bring about the existence of a state of war, which is a legal characterization of a situation rather than a factual description. What we have in Viet Nam is armed aggression from the North against the Republic of Viet Nam. Pursuant to South Vietnamese request and consultations between our two Governments, South Viet Nam and the United States are engaged in collective defense against that armed aggression. The inherent right of individual and collective self-defense is recognized in Article 51 of the United Nations Charter.

Since war was never declared in Vietnam, the question arises whether there was a time of Legal War. The evidence in support of that is the magnitude of the conflict in terms of total forces, casualties, money and material expended, and the acts of the political departments concerning the hostilities. Among the acts of the political departments, in August 1964, Congress passed a joint resolution authorizing the President to take all necessary measures to repel any armed attack by the forces of the Communist regime in North Vietnam. Congress later appropriated special funds for the
evacuation of dependents in Vietnam, and made provision for free postal service, income tax exclusions, the establishment of the Vietnam service medal and special combat pay for soldiers in the combat zone. The President referred to the conflict as a "war" that was "dirty and brutal and difficult." Thus, as in the case of the Korean conflict, once the quantum of executive orders, emergency legislation, and speeches or statements by the executive branch supportive of a conflict reached a certain threshold, courts construing the wartime provisions of the Uniform Code found in most instances find that a state of war existed.

In United States v. Robertson, the Navy Court of Military Review considered whether there was a "time of war" that suspended the two year statute of limitations for unauthorized absence that occurred from December 27, 1972 to May 21, 1975. The court held that the Vietnam War formally terminated when the Paris peace agreement was signed on January 27, 1973. Thus, the court held that December 27, 1972 was a "time of war" within the meaning of Article 43(a). The court wasted no time in referring to the Vietnam conflict as a "time of war." Its only concern was whether the state of war might have ended prior to the Paris peace agreement such that the statute of limitations would have operated to bar the action against the soldier in this instance.

Broussard v. Patton involved a case of desertion in which the court of appeals considered the definition of "time of war" for purposes of suspension of the statute of limitations with respect to the Vietnam conflict. The court adhered to a de facto notion of war rather than requiring a formal declaration of Congress. The court allowed the military to define "time of war" retroactively so as to

267. Stevens, supra note 49, at 27.
268. Id. (quoting a speech by President Johnson at Johns Hopkins University on April 7, 1965).
269. 1 M.J. 934 (1976).
270. Article 43(a) of the Uniform Code then provided: "(a) A person charged with desertion or absence without leave in time of war, or with aiding the enemy, mutiny, or murder, may be tried and punished at any time without limitation." 50 U.S.C. §618(a) (1950) (emphasis added). The present provision, amended in 1986, has slightly different wording: "A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. §843(a) (2003).
271. United States v. Robertson, 1 M.J. at 935.
273. Id. at 819.
reimpose court-martial jurisdiction on soldiers who had returned to civilian life.\textsuperscript{274} Broussard deserted on October 1, 1964.\textsuperscript{275} On December 6, 1967, the military advised him that they were “making no further effort to apprehend [him] . . . since he [was] a peacetime deserter and, as such the Statute of Limitations [had] expired.”\textsuperscript{276} In 1969, however, he was informed that he was being sought because a decision in another case held that a time of war had existed prior to the date of his desertion, and therefore the statute of limitations for the charge of desertion had been suspended.\textsuperscript{277} Broussard was then tried and convicted in court-martial.\textsuperscript{278} The decision makes it apparent how grossly unpredictable the approach can be to “time of war” issues vis-à-vis military jurisdiction.\textsuperscript{279} The Broussard case could be extended to include acts of civilians accompanying armed forces or for penalty enhancement, or other purposes in situations that might be thought of as time of peace but which can be determined to be time of war, retroactively.\textsuperscript{280}

More recently, in United States v. Dienst, the Air Force Court of Military Review held that the Vietnam conflict was a “time of war” such as to allow the trial and punishment of a person charged with desertion without limitation.\textsuperscript{281}

Some cases suggested that the Vietnam conflict was a time of war based largely upon the Gulf of Tonkin Resolution. In United States v. Anderson, the Court of Military Appeals expressed a split as to the significance of the Gulf of Tonkin Resolution.\textsuperscript{282} The issue was whether the Vietnam conflict constituted a “time of war” so that the statute of limitations was suspended with respect to a soldier charged with absence without leave.\textsuperscript{283} The court’s opinion held that the Gulf of Tonkin resolution by Congress on August 10, 1964,\textsuperscript{284} in response to the attack by North Vietnamese forces on the U.S. destroyers Maddox and C. Turner Joy in the Gulf of Tonkin, constituted

\begin{itemize}
  \item 274. \textit{Id.} at 818.
  \item 275. \textit{Id.} at 817.
  \item 276. \textit{Id.} at 819.
  \item 277. \textit{Id.} at 820.
  \item 278. \textit{Id.}
  \item 279. \textit{See id.}
  \item 282. 17 C.M.A. 588, 590 (1968).
  \item 283. \textit{Id.} at 589.
  \item 284. Gulf of Tonkin Resolution, \textit{supra} note, 266.
\end{itemize}
"official recognition" that the United States was engaged in a state of war. Two of the three judges concurred in the result but disagreed over the correct construction of the Gulf of Tonkin resolution. The court noted that Undersecretary of State Nicholas Katzenbach, testified to the Senate Foreign Relations Committee in 1967, that the Administration regarded the resolution as participation by Congress "in the functional way . . . contemplated by the Founding Fathers" to "invoke the . . . war powers." While the Tonkin Resolution might not be a formal declaration of war, it nonetheless "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.

Judge Kilday, concurring, noted that the power of Congress to declare war and the power of the President as Commander-in-Chief are "very closely entwined," and that the Gulf of Tonkin Resolution, to his thinking, did not constitute a declaration of war, but simply asserted the resolve of Congress, following the urging of the President, "to join in affirming the national determination that all such attacks will be met, and that the United States will continue in its basic policy of assisting the free nations of the area to defend their freedom." The concurring opinion of Judge Ferguson stated that it was unnecessary to consider or characterize the Gulf of Tonkin Resolution as a declaration of war or as evidence of the existence of a conflict and that, in effect, the court may simply take judicial notice of the "continuing casualties among American forces [in Vietnam] and the expenditure on their efforts of two billion dollars per month."

Two Army review board opinions in 1965, after the Resolution, found that no war had been declared in Vietnam. While the Gulf of Tonkin Resolution’s language is undoubtedly a

286. Id. at 590-94.
287. Id. at 590 (citing Hearings on S. Res. 151, relating to United States Commitments to Foreign Powers, Senate Foreign Relations Committee, 90th Cong., 1st Sess. at 161-62 (1967)).
288. Id.
289. Id. at 591 (Kilday, J., concurring).
290. Id. at 594 (Kilday, J., concurring) (quoting from The Situation in Southeast Asia, Message from the President of the United States, H.R. Doc. No. 333, 110 Cong. Rec., 88th Cong., 2d Sess., at 18237 (1964)).
291. Id. at 594 (Ferguson, J., concurring)
cogressional acknowledgement that hostilities existed, it differs from
the straightforward formal declarations of war previously issued by
Congress. Furthermore, it was preceded by very little congressional
comment, coming quickly upon the heels of the attacks on the
Maddox and the C. Turner Joy. A number of Senators who voted for
the Resolution suggested that they did not regard it as a formal
declaration of war.

Had Anderson held that the Gulf of Tonkin Resolution did not
constitute evidence that there was a state of war, and had the court
instead relied on the approach taking in the Korean conflict cases, the
court may well have held that there was no state of war. For example,
the factual criteria required by United States v. Bancroft—such as "the
movement to, and the presence of large numbers of American men
and women on, the battlefields," "the casualties involved," "the
drafting of recruits to maintain the large number of persons in the
military service," "the national emergency legislation enacted and
being enacted," "the executive orders promulgated," and "the
tremendous sums being expended" in the "theatre of operations" and
"other well-publicized wartime activities"—were lacking in kind
and degree in Vietnam in November 1964, when Anderson had
absented himself without authority. A major troop buildup did not
occur until the spring of 1965, and casualties did not significantly
increase until the fall of that year. Moreover, the Tonkin attacks
did not result in requests for supplemental appropriations, nor
hasten conscription programs, or cause an increase in the number of
AWOL personnel. Moreover, tax benefits and special mail

293. 3 C.M.A. 3, 6 (1953).
294. DEP'T OF DEF. ANN. REP. FOR FISCAL YEAR 1966, at 5-6 (Statement of Sec'y
of Def. McNamara).
295. See Samuel H. Weissbard and Mark R. Wiener, Military Law—Gulf of
Tonkin Resolution Constitutes Political Recognition of Vietnam Hostilities and
Requires Classification of the Conflict as Time of War, 37 GEO. WASH. L. REV. 609,
20,775 (C.M.A., June 21, 1968)).
296. Senate Comm. on Foreign Relations, Background Information Relating to
297. See 1966 DIRECTOR OF SELECTIVE SERVICE ANN. REP. 86.
298. See ARMY PROGRESS REPORTS, OFFICE OF DEPUTY CHIEF OF STAFF FOR
(Supp. III, 1965-1967) (provided for troop tax benefits retroactively as of Jan. 1,
1964).
privileges for troops in the combat zone were not ordered until mid-1965. Therefore, while the Tonkin attacks may have led to a de facto escalation in Vietnam, under the Bancroft approach there may not yet have been sufficient facts in place to precipitate a "time of war."

Other cases pertaining to the Vietnam conflict dealt with the question of whether the Vietnam conflict was a "time of war" that would confer courts-martial over civilians accompanying the armed forces in the field. Article 2(10) of the Uniform Code provides: "In time of war, persons serving with or accompanying an armed force in the field [are subject to trial by court-martial]." On this point, it may be informative to briefly digress to consider the background of court-martial jurisdiction over civilians.

American court-martial jurisdiction over civilians is derived from the British Articles of War of 1765 which provided that "[a]ll Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though no inlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War." In 1775, the Continental Congress passed a substantially similar provision in the American Articles of War, and after the U.S. Constitution was adopted, subsequent versions of the Articles of War contained substantially similar provisions up to and including the Articles of War of 1874. In the Articles of War of 1916, the Congress expanded military jurisdiction to include civilians who accompanied the armed forces outside the territory of the United States in time of peace. Substantially the same provision was adopted by the Uniform Code of Military Justice in 1950. The traditional wartime jurisdictional provision over civilians is found in Article 2(10) of the Uniform Code, and the peacetime application of civilian jurisdiction was set forth in Article 2(11). However, in a series of cases, the Supreme Court struck down court-martial jurisdiction over civilians in time of peace,

302. British Articles of War of 1765, § XIV, art. XXIII, reprinted in WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 941 (2d ed. 1920) [hereinafter WINTHROP].
so that jurisdiction under Article 2(11) no longer is the law.\textsuperscript{306} Court-martial jurisdiction over civilian employees of the armed forces is permissible only in wartime, based on Article 2(10).

Cases involving court-martial jurisdiction over civilians appear to have construed the Vietnam conflict as not constituting a state of war. In Robb v. United States, it was held that there could be no jurisdiction over a civilian employee "serving with or accompanying an armed force in the field" when the Vietnam conflict had not been formally declared to be a war by Congress, "despite the fact that the conflict in Vietnam is a war in the popular sense of the word."\textsuperscript{307}

In United States v. Averette, the U.S. Court of Military Appeals reversed the court-martial of Averette, a civilian employee in charge of a motor pool at Camp Davies in Vietnam, of conspiracy to commit larceny and attempted larceny of 36,000 Government-owned batteries.\textsuperscript{308} Averette successfully challenged the Army's jurisdiction by contending that since Congress had not formally declared war, the Vietnamese conflict did not constitute "a time of war" as would trigger Article 2(10).\textsuperscript{309} Article 2(10) sets forth three conditions in order for a civilian to be subject to court-martial jurisdiction. The civilian must be: (1) "serving with or accompanying an armed force"; (2) "in the field";\textsuperscript{310} (3) during a "time of war." The Averette court

\textsuperscript{306} See, e.g., Grisham v. Hagan, 361 U.S. 278 (1960) (holding that courts-martial could not constitutionally try non-capital crimes committed by civilian employees of the armed forces in time of peace); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960) (extending the Grisham holding to cover non-capital crimes committed by civilian employees of the armed forces in time of peace).

\textsuperscript{307} 456 F.2d 768, 771 (Ct. Cl. 1972).

\textsuperscript{308} 19 C.M.A. 363, 366 (1970).

\textsuperscript{309} Id. at 365-66.

\textsuperscript{310} On the question of whether Averette was "in the field" for purposes of Article 2(10), Averette's counsel argued that Averette was not "in the field" because that phrase connoted the idea of being in a battlefront arena without civilian forums to try crimes and the corresponding need for strong discipline. Case Comments, 46 NOTRE DAME LAWYER 629, 633-34 (1971) (citing Brief for Appellant at 2). The court apparently did not address this issue, but the phrase "in the field," according to the argument given by the United States, included the city of Saigon where Averette had been working, and where eighteen enemy battalions were located. See id. at 634. Moreover, the cases construing the phrase "in the field" as it appeared in the Articles of War of 1916, from which Article 2(10) was derived, have broadly construed the term. For example, civilian employees on merchant vessels transporting supplies for armed forces have been deemed to be "in the field." Shilman v. United States, 73 F. Supp. 648 (S.D.N.Y 1947); In re Berue, 54 F. Supp. 252 (S.D. Ohio 1944); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943); Ex parte Falls, 251 F. 415 (D.N.J. 1918); Ex parte Gerlach, 247 F. 616 (S.D.N.Y. 1917).

The case of In re DiBartolo, 50 F. Supp. 929, 933 (S.D.N.Y. 1943), involved a
found the first two elements applicable to the defendant, but construed "war" to mean a war formally declared by Congress, and held that this element was wanting in the case of the Vietnam conflict. In a dissenting opinion, Chief Judge Quinn pointed out that it has never been the law that the words "in time of war" as used in a military sense requires a formal declaration of war.\footnote{311}

The \textit{Averette} interpretation of the words "in time of war" rested in part upon a Colorado insurance case\footnote{312} and a 1920 federal district court case involving military jurisdiction over an officer.\footnote{313} The court refused to renew its inquiry into the meaning of the Gulf of Tonkin Resolution, and instead said:

\begin{quote}
Id.
\end{quote}

However, in \textit{Reid v. Covert}, the Supreme Court noted in dictum that "[e]xperts on military law, the Judge Advocate General and the Attorney General have repeatedly taken the position that 'in the field' means in an area of actual fighting." 354 U.S. 1, 34 n.61 (1956).

312. Pyramid Life Ins. Co. v. Masch, 299 P.2d 117 (Colo. 1956). Pyramid Life Insurance dealt with the death of a policyholder while serving in the armed forces in Korea. It held that the Korean conflict was not a "time of war" for purposes of triggering an exception clause in the policy. \textit{Id.} at 119. However, see \textit{infra} Part VII, noting that there are two lines of cases construing "war" clauses in insurance contracts, with a minority of cases holding that the term "war" should require an official declaration of war by Congress, and the majority view being that the term should be understood in its broader, commonly understood sense of armed conflict between regular combatants.

313. \textit{Ex parte Givins}, 262 F. 702 (N.D. Ga. 1920), \textit{aff'd} Givins v. Zerbst, 255 U.S. 11 (1921). \textit{Ex parte Givins} involved the issue of whether a captain of the U.S. Army was subject to court-martial jurisdiction for a murder committed within the United States, where the trial occurred after the Armistice but before the signing of any peace treaty. \textit{Id.} at 703-04. The court said:

\begin{quote}
[I]t must be held that for military persons, at least, such a time [of war] continued from the date of the declaration... by Congress until some formal proclamation of peace by an authority competent to proclaim it. The rapid movement of soldiers, causing the scattering of witnesses before the civil courts could act, as well as the necessity of firm discipline and full control over an army when on a war footing, are prime causes for the substitution of courts-martial for civil courts in time of war.
\end{quote}

\textit{Id.} at 705.
We conclude that the words "in time of war" mean, for purposes of Article 2(10), Code, supra, a war formally declared by Congress. . . . As a result of the most recent guidance in this area from the Supreme Court\textsuperscript{314} we believe that a strict and literal construction of Article 2(10) would open the possibility of civilian prosecution by military courts whenever military action on a varying scale of intensity occurs.\textsuperscript{315}

With the Averette case concluding that the words "in time of war" in Article 2(10) refer only to a declared war, and with the Anderson case holding that the same phrase with respect to Article 43 is not limited to declared wars but extends to undeclared wars, the court has created an internal inconsistency in the Code. Judge Quinn, who dissented in the Averette case, pointed out that there is no "compelling or cogent reason" to construe the phrase "in time of war" differently for different articles of the Uniform Code, and that in any event there was ample evidence that the Vietnam conflict constituted a "time of war" despite the absence of a formal declaration of war.\textsuperscript{316}

The majority in Averette, in construing "time of war" more narrowly with respect to military jurisdiction over civilian employees than with respect to enlisted soldiers, believed that this was required in light of "the most recent guidance in the area from the Supreme Court . . . ".\textsuperscript{317} The Averette court had in mind O'Callahan v. Parker,\textsuperscript{318} in which the Supreme Court drastically curtailed traditional military jurisdiction with respect to military servicemen in matters that occur in time of peace and are not, strictly speaking, connected to matters of military discipline.\textsuperscript{319} O'Callahan held that if there is time of war, servicemen are subject to court-martial jurisdiction for all offenses, but in time of peace court-martial jurisdiction extends only to service-related offenses.\textsuperscript{320} The majority in Averette appear to have wrongly construed O'Callahan, which dealt with a soldier in a situation that

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\textsuperscript{314} The court was referring to the decision in O'Callahan v. Parker, 395 U.S. 258 (1969) (holding that an army sergeant was not amenable to military jurisdiction in peacetime for the nonmilitary offenses of assault and attempted rape on a girl that occurred while he was on an evening pass from his army post and in civilian attire, because the crimes were not "service-connected").

\textsuperscript{315} Averette, 19 C.M.A. at 365.

\textsuperscript{316} Id. at 366 (Quinn, C.J., dissenting).

\textsuperscript{317} Id. at 365.

\textsuperscript{318} 395 U.S. 258 (1969).

\textsuperscript{319} Averette, 19 C.M.A. at 364.

\textsuperscript{320} O'Callahan, 395 U.S. at 273-274.
\end{flushright}
clearly constituted a time of peace, who committed an offense deemed non service-connected. By contrast, the issue in Averette was whether a civilian contractor accompanying armies in the field and accused of conspiracy to commit larceny of government property was subject to court-martial jurisdiction.

The O'Callahan case was more properly construed in United States v. Taylor, which involved a soldier who was charged with unauthorized absence, communicating threats to an officer, and forgery. In the United States v. Taylor case, the court, in considering the charge of forgery, took note of the O'Callahan holding that barred court-martial prosecution of soldiers for non-service related offenses in time of peace. In discussing this issue, the court said that, in the first instance, the charge of forgery was service-connected (for reasons articulated in the opinion) and, second, that the offense occurred "in time of war" as construed by the Anderson case, which, as mentioned above, found that the United States was at war in Vietnam at least from the date of the Gulf of Tonkin resolution (August 4, 1964).

At any rate, in 1987 O'Callahan was expressly overruled by the Supreme Court, which returned to the previous standard permitting military courts to find subject-matter jurisdiction over members of the armed services in time of peace simply based on their military status. Thus, peacetime offenses as well as those committed in time of war are subject to court-martial jurisdiction with respect to service members, and the present war-peace distinction has relevance now only with respect to tolling the statute of limitations and triggering other provisions of the Uniform Code in time of war.

D. Due Process Concerns

The fact that people of common intelligence might literally have to guess as to whether or not the "time of war" provisions of the

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322. Id.
323. Id.
This case presents the question whether the jurisdiction of a court-martial convened pursuant to the Uniform Code of Military Justice (U.C.M.J.) to try a member of the armed forces depends on the "service-connection" of the offense charged. We hold that it does not, and overrule our earlier decision in O'Callahan v. Parker.
Id. (emphasis added).
Uniform Code are triggered under a given situation suggests a due process problem based on vagueness. The diverse ways in which courts have construed the "time of war" provisions fuels the view that this provision of law is impermissibly vague in that "men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ."325 As a result, people are not afforded the adequate notice to which they are entitled by the Fifth Amendment's due process guarantee. The question is important for soldiers in the combat zone, soldiers serving in units located outside the combat zone and indeed soldiers throughout the world, as well as civilians serving with the armed forces in the field, because they all become subject to harsher disciplinary rules in time of war.

There are greater hurdles to making a convincing due process vagueness claim in the military context than under municipal law. In Parker v. Levy, a case construing free speech and other issues concerning a serviceman accused of "conduct unbecoming an officer and a gentleman," the Supreme Court said that the Uniform Code "cannot be equated to a civilian criminal code" since it regulates conduct unregulated in the civilian sphere.326 The Court said that the proper standard for review of a vagueness challenge to a military offense is not the one applicable to normal civilian offenses, but the standard applied to criminal statutes regulating economic affairs, in which the same high standard of definiteness is not required and there is a strong presumptive validity of sufficiency of notice.327 The Court concluded that the Uniform Code need not meet the same procedural due process standards as to vagueness as statutes applicable in the civilian sphere.328

In dissent, Justice Stewart observed:

The question before us is not whether the military may adopt substantive rules different from those that govern civilian society, but whether the serviceman has the same right as his civilian counterpart to be informed as to precisely what conduct those rules prescribe before he can be criminally punished for violating them.329

Another hurdle to a due process challenge to the Uniform


327. Id. at 756.

328. Id. at 751-52.

329. Id. at 787 (Stewart, J., dissenting).
Code’s vagueness on when the “time of war” provisions apply is seen in In re Berue, a case involving military jurisdiction over civilians in time of war. The Court dispensed with a due process challenge regarding the insufficiency of notice when military jurisdiction over civilians in time of war occurs. The Court said:

[Existence of jurisdiction cannot be defeated by lack of consent or lack of knowledge that such jurisdiction exists. Assuredly one who committed a crime without knowing that he was thereby subjected to the jurisdiction of a Federal Court, could not be heard to contest the jurisdiction on that ground. It is proper, therefore, to determine the question of jurisdiction upon the facts and circumstances; it cannot rest upon knowledge or consent.]

Due process concerns could be resolved if Congress amended the Uniform Code to provide a precise definition of the phrase “in time of war” or to provided other precise criteria denoting when the “time of war” provisions apply. One solution would be to amend the Uniform Code and the War Powers Resolution to define “time of war” as occurring if the President suspends the Table of Maximum Punishments by executive order, provided Congress enacts specific authorization within the timeframe provided under the War Powers Resolution. By so acting, the President would automatically trigger the “time of war” provisions in the Uniform Code. This would eliminate the necessity of a judicial determination of the existence of war when there has not been a formal declaration by Congress. It would further provide for the military’s need to insure discipline during combat and other situations short of declared war by making it clear that an undeclared war is nonetheless a “time of war” for purposes of the Uniform Code. It would also shore up any concerns regarding the due process requirement of adequate notice. It would insure a maximum degree of uniformity in applying and interpreting the law by providing notice to military personnel and to civilians accompanying the military in the field of the suspension of the statute of limitations, the increased punishments, and the other applications of the Uniform Code that apply in time of war but not in time of peace. This would also accommodate the general reluctance of Congress to issue a formal declaration of war, with its attendant diplomatic repercussions. Of course, a formal declaration of war by Congress would also, in and of itself, trigger the “time of war”

331. Id. at 256.
provisions. As to the formal ending of war, clarity may be provided, again through an amendment to the Uniform Code and the War Powers Resolution, by allowing the President to mark the end of war by revoking the suspension of the Table of Maximum Punishments, or, in the event of the President's failure or refusal to so act, by issuance of a Congressional Resolution to that end.

VII. Insurance Cases Construing Whether a State of War Exists

Many life insurance policies exclude coverage for deaths occurring while the insured is in military service and is killed in a "war." The purpose of such clauses is that "[i]t is difficult to determine the scope of risks assumed by members of the armed forces in view of the methods of warfare," and that military service in time of war, "whether in training or combat, is admittedly hazardous, fraught with incalculable danger."³³²

There is a split of authority as to whether an undeclared war constitutes war for purposes of insurance policy exclusionary clauses. One line of cases holds to a legalistic, technical construction of the word "war," while other courts give the word a realistic, pragmatic interpretation when used in private contracts. Many courts have held that the provisions of life insurance policies excluding certain death benefits in the event that the insured dies in the military service "in time of war" apply to de facto wars. Many other courts have held, with equal vigor, that the same provisions apply only to a war officially declared by Congress. Generally speaking, the interpretation of "war" in insurance contracts will vary, depending on the contract at issue. An examination of a wide range of insurance cases pertaining to exclusionary clauses applicable in time of war indicates that there is a trend for courts to be pragmatic in deciding whether war exclusion clauses apply. The majority view is that the existence of actual fighting and other factors short of a formal declaration of war are sufficient to trigger "time of war" exclusionary clauses.³³³ This approach emphasizes that war clauses in insurance

contracts are interpreted according to the "ordinary and generally accepted meaning of war" as distinguished from "war" in its "technical" or "legal sense." At the same time, insurance contracts are generally construed against the insurance company. Those cases that have found a formal declaration of war to be necessary in order to trigger a "time of war" clause to deny or restrict compensation for death or damages seem to emphasize this approach in an effort to favor the insured. Some of these cases sought to permit coverage under circumstances such as the Japanese attack on Pearl Harbor, a day before the United States declared war. For example, in *Savage v. Sun Life Assurance Co. of Canada*, the insured, an ensign in the Navy, died in the attack on Pearl Harbor on December 7, 1941. The policy provided for double indemnity for "accidental death by external, violent and accidental means," except for death resulting from "war" or an act incident thereto. The court held that "war" does not exist—merely because of an armed attack by the military forces of another nation—until it is a condition recognized or accepted by the political authorities of the government that is attacked, either through an actual declaration of war, which did not happen until December 8, 1941, or by other acts demonstrating such position. The court noted that at the time of the attack the United

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334. See Pye, supra note 79, at 46.


338. 57 F. Supp. at 620.

339. *Id.*

340. *Id.* at 621.
States and Japan were at peace and, in fact, negotiating for settlement of their differences by peaceful means, albeit the Japanese were evidently negotiating deceitfully.\textsuperscript{341} The court held for the plaintiff.\textsuperscript{342}

In \textit{West v. Palmetto State Life Insurance Co.}, another court considered an substantially similar double indemnity provision with respect to a navy seaman who also was killed at Pearl Harbor.\textsuperscript{343} This insurance policy contained restrictive provisions effective when the insured was "engaged in military or naval service in time of war."\textsuperscript{344} The court, in holding that there was no state of war until Congress declared it on December 8, 1941, relied upon the definition of war in \textit{Corpus Juris}, which states that:

\begin{quote}
[L]awful war can never exist without the actual concurrence of the war-making power, but may exist prior to any contest of the armed forces. The courts are bound by a declaration or determination by a proper department of government that a war exists, while until there has been such a declaration or determination the courts cannot take judicial notice of the existence of a war by their government.\textsuperscript{345}
\end{quote}

In \textit{Rosenau v. Idaho Mutual Benefit Association}, another court considered a nearly identical life insurance clause with respect to a member of the armed services killed in the Pearl Harbor attack.\textsuperscript{346} The court adhered to the view that the power to declare was is fixed solely in the Congress, by Article I, section 8, of the Constitution, and that therefore the attack did not trigger the wartime exclusion.\textsuperscript{347} In a dissent, it was pointed out that the President, in addressing Congress the day after Pearl Harbor, said "I ask that the Congress declare that, since the unprovoked and dastardly attack by Japan on Sunday, December 7, a state of war has existed between the United States and the Japanese Empire."\textsuperscript{348} The dissent pointed out that most wars have been commenced without any formal declaration of war, and that a war dates from its inception rather than from the time when a formal

\begin{flushleft}
\textsuperscript{341.} \textit{Id.}
\textsuperscript{342.} \textit{Id.}
\textsuperscript{343.} 25 S.E.2d 475, 476 (S.C. 1943).
\textsuperscript{344.} \textit{Id.}
\textsuperscript{345.} \textit{Id.} at 477 (citing Corpus Juris, 67 C.J. 336).
\textsuperscript{346.} 145 P.2d 227, 227-28 (Idaho 1944).
\textsuperscript{347.} \textit{Id.} at 229.
\textsuperscript{348.} \textit{Id.} at 234 (Ailshie, J., dissenting) (citing \textit{Cong. Rec.}, 77th Cong., vol. 87, pt. 9, at 9505).
\end{flushleft}
The formal declaration of war by Congress on December 8, 1941 declared the previous existence of war. That is, it acknowledged the existence of war which commenced the day before. As such, it did not constitute a declaration of the commencement of war, but was an official recognition of a status already existent.

Other cases, sympathetic to this dissent, include *New York Life Insurance Co. v. Bennion*, in which the Tenth Circuit held that the parties to the contract clearly intended for "war" to have a pragmatic meaning. In *Bennion* the parties contracted with reference to war in its real and practical sense, that is, with respect to its hazards to human life. Thus, in construing a life insurance policy with respect to one who died in the attack at Pearl Harbor on December 7, 1941, the court held that war existed on that day, although a declaration of war did not occur until the next day. The court said that the attack on Pearl Harbor, before the formal declaration of war, was "war or an act incident thereto" within the meaning of the insurance contract:

When one sovereign nation attacks another with premeditated and deliberate intent to wage war against it, and that nation resists the attacks with all force at its command, we have war in the grim sense of reality. It is war in the only sense that men know and understand it. Mankind goes no further in his definitive search—he does not stand on ceremony or wait for technical niceties. To say that courts must shut their eyes to realities and wait for formalities, is to cut off the power to reason with concrete facts. We cannot believe that the courts are deprived of the power to deal with this vital question in a practical and realistic sense.

In *New York Life Insurance Co. v. Durham*, the Tenth Circuit again considered whether a life insurance policy's war provision, which resulted in a reduced payout, applied. The policy restricted the amount payable if the insured's death occurred "outside the home areas while the insured is in the military or naval forces of any country engaged in war . . . . 'War' includes undeclared war." This clause is a "status clause," not a "result clause"; that is, coverage under the policy depends not upon the cause of death, but upon the

349. *Id.* at 236 (Ailshie, J., dissenting).
350. 158 F.2d 260, 265 (10th Cir. 1946).
351. *Id.*
352. *Id.*
353. *Id.* at 264.
354. 166 F.2d 874, 875 (10th Cir. 1948).
355. *Id.*
status of the decedent when death occurs. The insured was in the military, and died outside his home area from wholly non-military causes. The death occurred in September 1945, after the unconditional surrender of the Germans and Japanese. The question was whether this country was still engaged in war. The court noted that:

[T]here had been no declaration, proclamation or official act of the executive or legislative departments of the Government declaring, proclaiming, or otherwise announcing the formal termination of the existence of a state of war. On the contrary, it was not until December 31, 1946, that the president of the United States publicly stated: "Although a state of war still exists, it is at this time possible to declare, and I find it in the public interest to declare, that hostilities have terminated."356

The court noted that it is a political question, solely for the determination of the political departments of the Government, as to whether the country was or was not engaged in war at the time the death occurred.357 Inasmuch as there had been a political determination that the country was still at war, the court said it was conclusively bound by that determination.358 However, the court noted that under the insurance contract in question the parties had in mind the risk incident to being engaged in military service in war, whether declared or undeclared.359 By including undeclared war in the policy terms, the contract did not intend for the word “war” to be used in its technical or formal sense, but “rather in the practical and realistic sense in which it is commonly used and understood—in the sense it bears to the hazards to human life."360 Thus, the court held that “war” under this contract was construed as it is ordinarily understood and accepted, and in the relationship it bears to the risk assumed.361 Since the death of the insured occurred after the unconditional surrender of the enemies, the court held that the contract would not restrict coverage under these facts.362

Courts were in disagreement as to whether the Korean conflict constituted a “time of war” within the meaning of certain life

356. Id.
357. Id.
358. Id.
359. Id. at 876.
360. Id.
361. Id.
362. Id.
insurance policy provisions. The majority view in state and federal cases that interpreted insurance contract provisions pertaining to the Korean War was that the conflict was in fact a Legal War notwithstanding a lack of formal declaration of war.\textsuperscript{363} For example, in \textit{Beley v. Pennsylvania Mutual Life Insurance Co.}, the Supreme Court of Pennsylvania held that the Korean conflict did not constitute a “time of war” so that the death of an army soldier was not excluded by the terms of the life insurance policy.\textsuperscript{364} The court reasoned that since Congress has the exclusive power to declare war, and the “action being waged in Korea” was not declared to be a war by Congress, the contract plainly would not curtail recovery by the decedent.\textsuperscript{365} The court said that there was “merely a dispatch to Korea by Presidential order of military, naval and air forces of the United States in accordance with the provisions of the Charter of the United Nations and the recommendations of the Security Council.”\textsuperscript{366} The court noted that the majority of cases involving life insurance policies on lives that were lost in the Pearl Harbor attack held that war did not exist on December 7, 1941, the day of the attack and one day before Congress issued a declaration of war.\textsuperscript{367} The court added:

A policy of life insurance is a highly technical instrument, drawn up presumably with meticulous care by legal experts on behalf of the Insurance Company, and who not only intend to use all terms in their legal sense but know how to accomplish that result; it may be assumed, therefore, that if defendant had here meant to invest the term “war” with a broader connotation than its “constitutional” or “legal” intendment, it would have effected this by the addition of words indicating such an intention as, for example, “declared or undeclared” war.\textsuperscript{368}

One of two dissenters in this case pointed out that in \textit{Stankus v. New York Life Insurance Company}, the Supreme Court of Massachusetts, in considering a similar policy of insurance with respect to the death of a seaman on a U.S. destroyer, killed when his

\begin{itemize}
  \item \textsuperscript{364} 95 A.2d 202, 205-06 (Pa. 1953), cert denied, 346 U.S. 820 (1953).
  \item \textsuperscript{365} \textit{Id}. at 205.
  \item \textsuperscript{366} \textit{Id}.
  \item \textsuperscript{367} \textit{Id}. at 206.
  \item \textsuperscript{368} \textit{Id}. at 205.
\end{itemize}
ship was torpedoed on convoy duty in the Atlantic in October 1941, prior to Congress declaring war against any nation—held that the death resulted from war. The court said:

The term "war" is not limited, restricted or modified by anything appearing in the policy. It refers to no particular type or kind of war, but applies in general to every situation that ordinary people would commonly regard as war.

The Beley case was criticized by Stanbery v. Aetna Life Insurance Co., a New Jersey decision that reached an opposite conclusion. That case defined the Korean conflict as a war in its "ordinary, usual and realistic meaning, viz., actual hostilities between the armed forces of two or more nations or states de facto or de jure." The court said that to hold that the Korean conflict was not a war would be "inexplicable and absurd."

Another case that construed a wartime exclusionary clause involved a hijacked commercial jet. In Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., a Federal District Court held that a time of war exclusionary clause did not clearly contemplate damage resulting from acts of violence by a splinter political group, and ordered the insurance company to pay $24,288,759 for a plane that was destroyed by the Popular Front for the Liberation of Palestine in 1970.

Courts have been equally split in deciding whether a war exclusion clause applies after there has been a cease fire or formal surrender of an enemy. Some cases hold that the death of an insured does not occur during "war" if it happened after the cessation of actual hostilities but prior to the signing of a peace treaty, and other cases find that war still exists after the formal surrender of an enemy.

370. Id. at 688.
372. Id. at 138.
373. Id.
As a result of the uncertainty attending the effect of "war" exclusion clauses, many insurance policies specify that the exclusion applies to war "declared or undeclared," or by using general language that refers to being engaged in or employed in connection with military operations, and some exclusionary language might even extend to cover an officially declared truce of a declared or undeclared war, at least until a formal peace treaty is signed or a proclamation of peace issued by the political department of government.

VIII. When Does a War Cease to Exist?

A. The Limited Function of an Armistice, Ceasefire or Formal Surrender

Although the Constitution provides that Congress has the power to declare war, there is no provision regarding which branch has the power to terminate war. It has been said that the determination of when a war terminates is a far more difficult question to answer than when a war starts. The general rule is that the end of a war is something determined by the political branches of the government, such as by presidential proclamation. Corollary to this is the principle that a general armistice or cease-fire does not, in and of itself, constitute the end of a war.

An armistice, in the law of war, is an agreement between belligerents that calls for the cessation of military operations by mutual agreement. An armistice is regarded as a "capitulation," that is, "a convention stipulating special terms of surrender." A general armistice may suspend military operations between the belligerents throughout the world, while a local armistice may suspend military operations only as between certain parts of the belligerent armies or with respect to operations in a determined geographic boundary. A general armistice contemplates a complete cessation of all hostilities for a specified period of time, usually of a considerable duration, or

379. See Hudson, supra note 94, at 1045.
380. 2 LEVIE, supra note 363, at § 141.1.
381. See id. at § 141.2.
for an indeterminate period. Unless its duration is specified, the belligerent parties may resume hostilities at any time, provided they give due warning within the time agreed upon or otherwise comply with the terms of the armistice. 382

An armistice stops the shooting, and is of obvious importance in that it immediately terminates the hostilities. But it does not imply, and is not intended to imply, that the war in question is over. It has been pointed out that "the official termination of the war is usually not declared until a considerable period after the cessation of actual hostilities." 383 There is often a long period between an armistice and the ratification of a treaty of peace, during which war has not yet ended, though there is no longer a conflict, and though armies have been demobilized and ships returned to their home ports. 384 Examining the text of an armistice is the best means of determining the full import of the agreement and, in particular, whether it can be regarded as terminating a Legal War. For example, section 60 of the Korean Armistice Agreement apparently anticipated that a subsequent political agreement would be implemented to establish peace:

In order to insure the peaceful settlement of the Korean question, the military Commanders of both sides hereby recommend to the governments of the countries concerned on both sides that, within three (3) months after the Armistice Agreement is signed and becomes effective, a political conference of a higher level of both sides be held by representatives appointed respectively to settle through negotiations the questions of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question, etc. 385

Section 62 of the Agreement stated that the armistice would remain in effect "until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement for a peaceful settlement at a political level between both sides." 386 The military commanders in the field did not consider the war to be over because during the first month following

382. See id.
384. Eagleton, supra note 13, at 22.
385. Military Armistice in Korea and Temporary Supplementary Agreement, June 27, 1953, § 60, 4 U.S.T. 234, 260. The Korean Armistice Agreement was perhaps the most detailed armistice agreement in history.
386. Id. at § 62.
cessation of hostilities pilots and crews were still maintained "at a high degree of combat readiness in the event hostilities should be resumed," and United Nations' naval forces continued "in position to counter immediately further aggression or attack." It is interesting to note that the Paris peace agreement, which formally ended the Vietnam War, and the Armistice signed on July 27, 1953, which formally ended the Korean War, had distinctly different provisions. The Paris peace agreement called for a truce at midnight that day and resulted in the disengagement of American combat forces in South Vietnam from hostilities with the enemy, the removal of American combat forces from South Vietnam within sixty days, and the return home of prisoners of war. By comparison, the Armistice that ended the hostilities of the Korean War did not call for the removal of all American combat forces from South Korea, and a considerable number remained there under the United Nations banner. But even if their terms are similar or identical, the legal effect of an armistice and peace accord are completely different. An armistice ends hostilities; only a peace accord formally ends Legal War.

With respect to Operation Iraqi Freedom, on May 1, 2003, President Bush declared an official cessation of major combat, but over the following two months 25 soldiers were killed in action and 117 wounded. About 146,000 troops remained in Iraq as of July 4, 2003, at which time the commander of the allied forces in Iraq stated that "we're still at war."

Ample historical and legal precedent supports the principle that an armistice does not constitute the end of war but that, instead, one must refer to some political act of the political branch of government. For example, the Supreme Court ruled in *The Protector* that it is necessary to refer to "some public act of the political departments of the government to fix the dates" not only of the beginning, but also of

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387. 30 Dep't State Bull. 652, 653 (1954).
388. Id. at 92-93.
390. See id. In 1976, the time of the Robertson case, there were 40,000 American military personnel stationed in South Korea.
the termination of the Civil War. The Court held that pursuant to a presidential proclamation on April 2, 1866, the Civil War had ended in every Southern state except Texas, and that a second presidential proclamation on August 20, 1866, ended the war in Texas on that date. In 1868, Secretary of State Seward stated: "What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances." In Ribas y Hijo v. United States, the Supreme Court held that while actual hostilities ceased with respect to the Spanish-American War on August 12, 1898, a state of war continued until the ratification of a treaty of peace in April 1899. In a case construing the armistice of World War I, Judge Learned Hand stated: "An armistice effects nothing but a suspension of hostilities; the war still continues."

A notable exception to the rule that an armistice marks only the suspension of hostilities but not the end of a war existed in Turkey up to the middle of the 18th century. It was Turkey's practice to refrain from entering peace treaties with Christian states, but to mark the end of war with Christian states with armistices only, on the conviction that the Koran forbade making treaties of peace with the infidels.

Whether a war begins by formal declaration or otherwise is irrelevant to establishing the date on which a war ends:

The cases decided following the Civil War indicate clearly that the determination of the date of termination of a war does not in any way depend on the manner in which the war commenced—i.e., by formal declaration or otherwise. [citations omitted.] It follows that the facts that the Korean war commenced by executive action and that no declaration of war was ever made, are immaterial for purposes of determining when the war terminated.

395. See id.
396. 2 U.S. DIPLOMATIC CORRESPONDENCE 34 (1868).
397. 194 U.S. 315, 323 (1904).
Even though it is well-established that an armistice does not, in itself, mark the end of a war, courts have on occasion interpreted armistices differently. In some World War I era cases, courts departed from the traditional view. This occurred despite the fact that American troops occupied German territory and were not finally withdrawn until 1923.401 One state court considered whether a soldier was entitled to an exemption from property tax under a state law that stated in part: "Every soldier . . . residing in this state who served for thirty days or more in the army of the United States in any war in which the United States has been engaged, and received an honorable discharge . . . shall be exempt each year from taxation upon his taxable property to the value of one thousand dollars."402 The issue was whether the plaintiff, who became a soldier on October 21, 1918, and was honorably discharged on December 10, 1918, had served thirty days or more during World War I. The court held that the Armistice of November 11, 1918, marked the end of the war, so that the soldier had served less than thirty days in the war. It said:

In common thought and understanding the Armistice of November 11, 1918, ended the war. Not only did hostilities then cease, temporarily, but, as the event shows, permanently as to that war. In the popular mind it was the definite and complete end. By the Armistice Germany surrendered to her enemies, as of its day, practically and effectively on such terms as were then and as might later be demanded. While the plaintiff remained in military service after the Armistice his war service was then at an end, as the ordinary person would say. If in technical aspects a state of war continued until peace was officially proclaimed, in almost every practical sense the period was of negotiation and settlement of terms, and not of actual war.403

In United States v. Hicks,404 a defendant had been convicted of keeping a house of prostitution on December 7, 1918, under an act of Congress that directed the Secretary of War to suppress and prevent the keeping or setting up of houses of ill fame within certain distances of military camps or stations—a law which by its own terms applied

401. "The court is advised that the period of final return of the American troops from overseas was fixed by the War Department on March 3, 1923." In re Martinez, 52 Wash. Law Rep. 674 (Sup. Ct. D.C. 1924).
403. Id.
404. 256 F. 707, 710, 711 (W.D. Ky. 1919).
only “during the present war.” The acts charged in the indictment were committed at least twenty-five days after President Wilson communicated to the Congress that the war had come to an end. The court ordered a new trial, stating that:

[W]hile Congress has not itself declared the war to be ended, in its presence the President—also the commander-in-chief of the army—did officially communicate to Congress the fact that it “is at an end” upon the momentous occasion referred to and in the explicit terms we have given, and information of all the details of which no doubt reached our entire population, including the person now under accusation, and all of whom might act upon the assumption that this official statement of the President was true.

The court noted that war is usually terminated by a treaty of peace, “and that such treaty is the best evidence of such termination,” but that there have been:

[M]any instances in which wars were terminated without any treaty at all. Notably this must be so in domestic wars. So it is also where a complete conquest of the weaker nation leaves no one authorized to make a treaty. The public is oftentimes, perhaps generally, notified of treaties by official proclamation. But there is no prescribed form for such latter documents, and at last they are but official announcements of a state of fact. The President’s official communication to Congress met all the conditions of an official proclamation, so far as such documents are designed for giving information. It was made on a notable occasion; it was made upon a theater that attracted the attention of all the people of the United States, and indeed of the civilized world. The purpose of the President’s oral message being to communicate information, it, if true, met the requirements of the question before us. Was that information accurate, or were the facts perverted? Does it now lie in the mouth of the government, in the prosecution made in its name, to insist that it was false, even if there is nothing like a


406. Hicks, 256 F. at 710-11. The Presidential communication referred to was an address by President Wilson to Congress on November 11, 1918, only a few hours after the German army had signed the armistice agreement, in which he declared: “The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it.” H.R. Doc. No. 1339, at 8 (1918). The Congress itself interpreted the President’s words to mean that active hostilities had ceased but that there was still a technical state of war. See Manley O. Hudson, supra note 94, at 1030 n.35.
The court concluded that "there is no formal or ceremonious way agreed upon in international law or otherwise for ending a war." I think the court may have been persuaded to take this position in light of another wartime statute passed by Congress, the War-Time Prohibition Act, which declared illegal the export, import manufacture and sale of alcoholic beverages. That Act used somewhat precise language, extending its ban "until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President." However, the court's use of that Act for comparative purposes clearly was misplaced. On November 21, 1918, Congress passed and the President approved the Act. That is, the Act was enacted after the armistice of November 11, 1918. If Congress had regarded the armistice as marking the "end of the war," it would not have referred to "the conclusion of the present war" in the text of the War-Time Prohibition Act, enacted as it was ten days after the armistice was declared.

This point was brought into sharper focus by the Supreme Court in Hamilton v. Kentucky Distilleries Co., which considered whether a state of war existed with respect to the War-Time Prohibition Act. The Court held that the Act was in operation after the date of the armistice:

In view of facts of public knowledge, some of which have been referred to, that the treaty of peace had not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it can not even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid.

In a World War II era case, Lee v. Madigan, the Supreme Court construed Article 92 of the Articles of War, which provided that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the

407. Hicks, 256 F. at 711.
408. Id.
410. Hicks, 256 F. at 713, (construing Act of November 21, 1918, ch. 212).
411. 251 U.S. 146, 163 (1919).
412. Id.
District of Columbia in time of peace." 413 The Court noted that:

The Germans surrendered on May 8, 1945 (59 Stat. 1857), the Japanese on September 2, 1945 (59 Stat. 1733). The President on December 31, 1946, proclaimed the cessation of hostilities, adding that "a state of war still exists." 61 Stat. 1048. The war with Germany terminated October 19, 1951, by a Joint Resolution of Congress (65 Stat. 451) and a Presidential Proclamation (66 Stat. c3). And on April 28, 1952, the formal declaration of peace and termination of war with Japan was proclaimed by the President (66 Stat. c31), that being the effective date of the Japanese Peace Treaty. 414

The Court held that the date of the charge of murder, June 10, 1949, was "in time of peace" and therefore not subject to court-martial jurisdiction under the former Article 92.415 This apparently contradicts the Court's decision in Kahn v. Anderson, which unanimously held that the term "in time of peace" in Article 92 "signifies peace in the complete sense, officially declared." 416 Apparently the Court in Lee believed it was proper to construe the nation to be at war for one purpose and at peace for other purposes, and it apparently wanted to "guard jealously against the dilution of the liberties of the citizen that would result if the jurisdiction of military tribunals were enlarged at the expense of the civil courts." 417

In the end, the Court simply said, "Whatever may have been the plan of... Congress in continuing some controls long after hostilities ceased, we cannot readily assume [that Article 92 would] deny soldiers or civilians the benefit of jury trials for capital offenses four years after all hostilities had ceased." 418

In another departure from the political act test, cases that have interpreted statutes granting benefits to veterans in connection with World War II have generally construed the term "war" to mean "actual hostilities." 419

413. 358 U.S. 228, 229 (1959) (construing Article of War 92, 10 U.S.C. § 1564 (1946 ed., Supp. IV), which, prior to the adoption of the Uniform Code, governed proceedings involving charges of murder or rape before courts-martial).
414. Id. at 230.
415. Id. at 236.
416. 255 U.S. 1, 10 (1921).
418. Id. at 236.
In *United States v. Shell*, the Court of Military Appeals was presented with the question of whether and when the state of war in the Korean conflict had come to an end. The question pertained to whether the statute of limitations had been suspended with respect to a charge of absence without leave that commenced on August 4, 1953. The court adhered to a pragmatic approach, and held that the state of war had ended before then because of the complete cessation of all armed conflict in Korea, the establishment of a demilitarized zone, the repatriation of war prisoners, and the change of American strategy in Korea from repelling aggression to maintaining the status quo. The court noted that the Korean conflict, while undeclared by Congress, was a "time of war" so that:

Manifestly, if, in the absence of formal Executive or Legislative action, a collection of factors compels a conclusion that a state of war is being maintained, when those factors or a substantial part thereof no longer exist, a contrary deduction may be required. It is true, as we indicated in *United States v. Sanders*, 7 USCMA 21, 21 CMR 147, that various official actions in other governmental departments were considered to be circumstances touching on the ultimate issue before us, but they were only straws in the wind which we used to support our holding in that case, and were not essential to the decision. There we held that the Korean war had ended by June 4, 1955, at least, but we did not hold that it had not terminated before that date.

The court found that for purposes of military law, the state of war terminated on the date of the signing of the Korean Armistice, July 27, 1953.

Pursuant to its terms "... a complete cessation of all hostilities in Korea by all armed forces" was accomplished. Armed combat

420. 7 C.M.A. 646 (1957).
421. The court indicated that this factor was of "crucial importance" in all previous cases in which a state of war had been found to exist. *Id.* at 651.
422. *Id.*
423. *Id.* at 650-51. The case cited by the court in the quoted passage, *United States v. Sanders*, 7 C.M.A. 21 (1950), was decided a year earlier and held, in similar fashion, that a "time of war" situation depends upon the existence of actual armed hostilities. That court also noted that "many steps have been taken to end the consequences of the armed conflict" in Korea, that an armistice had existed as of July 27, 1953, that on February 1, 1955, the President ended the period of eligibility of entitlement to certain veterans' benefits for soldiers serving in Korea, and that the President had also terminated certain income tax benefits for those engaged in combat in the region. *United States v. Sanders*, 7 C.M.A. at 22.
ended and battlefield conditions ceased; there was no more shooting and there was no more battle casualties; a Demarcation Line and Demilitarized Zone were established; and war prisoners were repatriated. Assessing the situation existing as of that time, we note the absence of many of those factors upon which we predicated our previous holdings that we were at war. Thereafter, it was no longer necessary to provide the logistical support essential to maintain combat operations in terms of both quality and quantity. American troops no longer had to be rotated to equalize combat duties. Patrolling, while no doubt still intensive, no longer was aimed at penetration into enemy territory. A buffer zone was established to prevent just that sort of activity. The kind of medical support required in a combat situation no longer had to be furnished. Last, and perhaps most important, the whole theory upon which the presence of our troops in Korea was premised changed with the signing of the Armistice. We were no longer there to repel aggression; thereafter our mission was to maintain a peaceful status quo. Our military situation was that of immediate readiness, not armed conflict.425

The Supreme Court reiterated the political act test for determining when a war has ceased to exist in *Ludecke v. Watkins*, another World War II era case.426 This involved a writ of habeas corpus by a German resident who contested the President's authority, under the Alien Enemy Act of 1798 (which has remained essentially unchanged since its enactment),427 to order the removal from the

425. Id.
Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public
United States of all alien enemies "who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States." 428 The Act empowers the President to deport enemy aliens in time of war. 429 The petitioner claimed that the order of his deportation was unlawful because there had been a formal proclamation of the cessation of hostilities of World War II by the President on December 31, 1946. The Court first upheld the constitutionality of the Act, and then said that the wording of the statute makes it clear that Congress intended for it to bar judicial review. 430 However, the Court went on to consider whether the President's powers under the Act survived the actual cessation of the hostilities of World War II. The Court held, in an opinion by Justice Frankfurter, that "War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when the war is declared but is not exhausted when the shooting stops." 431 A war "may be terminated by treaty or legislation or Presidential proclamation. 432
Whatever the mode, its termination is a political act.” The Court quoted a case handed down only a few months earlier in which it said, regarding the cessation of hostilities in World War II: “We have armies abroad exercising our war power and have made no peace terms with our allies, not to mention our principal enemies.”

In dissent, Justice Black, pointed out that the U.S. Department of State declared, on June 5, 1945, that the German armed forces had completely capitulated and unconditionally surrendered: “‘There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers.’” The State Department further stated that the United States, Russia, Great Britain and France had assumed “‘supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal, or local government or authority.’”

In a subsequent decision, the Supreme Court held that World War II still existed in 1950.

The political act test for determining whether a state of war continues to exist and, if it has ended, when it ended, as enunciated in Ludecke v. Watkins, has generally been followed. It is precedent for the principle that war does not end with the cessation of hostilities in and of itself, but that a formal proclamation or peace treaty is necessary to establish that a war has in fact come to an end in the legal sense.

In Waller v. United States, the Court of Claims considered whether the Treasury Department had the authority, on July 1, 1946, on July 2, 1921, the President approved a joint resolution of Congress that stated the war “is hereby declared at an end.” Hudson, supra note 94, at 1035.

434. Id. at 169 (citing Woods v. Miller Co., 333 U.S. 138, 147 (1948) (Jackson, J., concurring)).
435. Id. at 177-78 (Black, J., dissenting).
436. Id. at 178 (Black, J., dissenting) (citing 12 Dep’t State Bull. 1051).
438. For an extensive list of lower court cases that have generally held, for the purpose of applying various federal statutes, that a war continues to exist until such time as peace is declared and approved by congressional action and by the appropriate representative authority of the foreign country, see Pye, supra note 79, at 53 n.57. It should be noted that in the context of war exclusion or restriction clauses under insurance contracts, courts have generally held that a war ends upon the “cessation of hostilities.” Id.
to modify a certain petroleum products contract to allow additional payments to the contractor under the authority of the First War Powers Act, if it "would facilitate the prosecution of the war." The court held that the war had not ended and that the Treasury Department therefore still had the discretion to modify the contract at issue:

No treaty of peace has been signed with either Germany or Japan, our troops were in occupation of these countries in whole or in part, and the administration of their government affairs were either wholly or in part subject to the control of our forces. It cannot be said that the war is over so long as the enemy countries are occupied with our troops.

Similarly, in Kahn v. Anderson, a World War I era case, the Supreme Court held that a soldier could be tried for murder before a court martial on November 25, 1918, notwithstanding the signing of the Armistice on November 11, 1918, and notwithstanding the provision of the Articles of War that "No person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." The Court said: "That complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities, is not disputable." The Court added that the expression "in time of peace" used in the Articles of War referred to a "complete peace" which "in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities."

Judge Learned Hand similarly adhered to the traditional view that an armistice does not mark the close of the war, in Commercial Cable Co. v. Burleson, a case involving an act of Congress that authorized the President to take possession and control of telegraph and marine cables during the continuation of war. The court held that while the armistice occurred on November 11, 1918, a state of war still existed because only a treaty of peace, not an armistice, ends

441. 255 U.S. 1 (1921).
442. Id. at 9 (referring to Art. 92, 10 U.S.C. § 1564) (emphasis added).
443. Id.
444. Id.
A war:

An armistice affects nothing but a suspension of hostilities; the war still continues. It is true that a war may end by the cessation of hostilities, or by subjugation; but that is not the normal course, and neither had the hostilities ceased, nor had the enemy been subjugated in the sense in which that term is used. There were still military operations, the armistice had not been carried out, and after it was, armed forces of the United States were in occupation of enemy territory, and were in European and Asiatic Russia, where, indeed, they still remain. The President was still in command of these forces, and to their conduct telegraphic communication was still essential. All that the armistice could do was to introduce a new, though very vital, consideration into his decision; but it did not affect its finality. 446

The difficulty with adhering to the traditional view that only a peace treaty or similar formal proclamation, but not an armistice or cease-fire, marks the end of a war, is that sometimes undeclared wars end with no formal peace treaty ever being established. Still, we want to be able to say that such wars have definitively ended. For instance, while a truce occurred with respect to the war between Mexico and Texas in 1843, and future negotiations were anticipated, no final peace plan was ever agreed upon. 447 Similarly, the war between Prussia and Liechtenstein ceased in 1866, but there was no formal peace treaty, and the war eventually was considered over by the mere cessation of hostilities. 448 As mentioned above with respect to the U.S. Naval Operations Against France (1798-1801), in 1801, the U.S. Senate ratified a Convention that resolved the dispute, but the document was not regarded as a peace treaty. Also, as mentioned above, in September 1901, the parties engaged in the Boxers Uprising

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446. *Id.* at 105. The court cited 2 *Lassa Oppenheim, International Law* § 231 (1912):

Armistices or truces, in the wider sense of the term, are all agreements between belligerent forces for a temporary cessation of hostilities. They are in no wise to be compared with peace, and ought not to be called temporary peace, because the condition of war remains between the belligerents themselves, and between the belligerents and neutrals on all points beyond the mere cessation of hostilities. In spite of such cessation the right of visit and search over neutral merchantmen therefore remains intact, as does likewise the right to capture neutral vessels attempting to break the blockade, and the right to seize contraband of war.

447. See *Pye, supra* note 79, at 59.

448. See *id.* (citing Charles C. Tansill, *Termination of War by Mere Cessation of Hostilities*, 38 L.Q. REV. 26, 32, 36 (1922)).
signed what they specifically characterized was not a peace treaty, but a "Final Protocol." Similarly the Joint Blockade by Germany, Great Britain and Italy against Venezuela in 1902-1903 was settled by mediation, but no peace treaty.

There is a certain intuitive appeal to the pragmatic approach, embodied by *United States v. Shell* and *United States v. Sanders*, that if the consequences of actual hostilities are no longer present, war no longer exists. In the case of the Korean conflict, there was no formal peace plan as late as 1956. Yet there was a complete cessation of all armed conflict in Korea, the establishment of a demilitarized zone and the repatriation of war prisoners. The President had ordered a substantial reduction of armed forces in the region, terminated income tax benefits which had applied to soldiers engaged in the Far East and ended the period of eligibility of certain veterans' benefits with respect to soldiers participating in the Korean conflict. Furthermore, the United Nations military forces ceded administrative control to the Republic of Korea, while the Department of the Navy terminated its authorization of the National Defense Service Medal and the Korean Service Medal—which had been authorized for soldiers engaged in the Korean conflict.\(^{449}\)

**IX. Conclusion**

If we were to denominate as war all foreign actions in which U.S. military forces have been engaged, we would have to conclude that the United States has practically never been at peace in the history of our country. As early as 1800, in *Bas v. Tingy*,\(^{450}\) courts have attributed minimal significance to a formal declaration of war. And clearly it is the case today that a formal declaration of war is not necessary to establish that a state of Legal War exists that would alter the relations between states and trigger "time of war" provisions of the Uniform Code of Military Justice. Perhaps the only function that uniquely remains for a formal declaration of war is "that of a solemn act of state which serves as a means of arousing popular support at home and abroad and which is usually reserved for extreme cases."\(^{451}\) But when there is no declaration of war, no authorizing resolution from Congress and the parties to a conflict deny that a state of war exists, it remains problematic as to whether and precisely when "war"

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450. 4 U.S. (4 Dall.) 37, 45 (1800).
provisions of military law and of insurance contracts kick in.

Despite occasional judicial attempts to discover a unique, general legal definition [of war] applicable in all contexts, it seems clear that no verbal formula can identify one class of armed hostilities as properly subject to rules and considerations wholly different from those applicable to other classes. At best "war" will assume different meanings depending on the context which prompts the investigation, whether it be the interpretation of a contract, a life insurance policy, a statute, or a constitution.\footnote{452. \textit{Id.} at 1774.}

Compounding the problem is the fact that the Supreme Court has held that "Congress in drafting laws may decide that the Nation may be 'at war' for one purpose, and 'at peace' for another. It may use the same words broadly in one context, narrowly in another."\footnote{453. Lee v. Madigan, 358 U.S. 228, 231 (1959).} There are various types of acts or announcements short of a formal declaration of war that can be interpreted as evidence of a state of war. Generally, any act of hostility that results in a state of war can be construed to be an ipso facto declaration of war.

From the discussions set forth in this article, it is clear that court-martials have arrived at varying conclusions under similar facts as to whether wartime status existed, and that military courts construe "time of war" on an ad hoc basis. The question of whether a "time of war" exists lacks a consistent method of interpretation, making it difficult to predict when a period will be considered wartime. In addition, the scope of appellate review is limited to a determination of whether the military gave a fair consideration to each of the petitioner's constitutional claims.\footnote{454. See, e.g., King v. Moseley, 430 F.2d 732 (10th Cir. 1970). This approach has been criticized by various commentators. See Donald S. Burris & David Anthony Jones, \textit{Civilian Courts and Courts-Martial—The Civilian Attorney's Perspective}, 10 AM. CRIM. L. REV. 139 (1971); Donald T. Weckstein, \textit{Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibility}, 54 MIL. L. REV. 1 (1971); \textit{Developments in the Law—Federal Habeas Corpus}, 83 HARV. L. REV. 1038, 1208-36 (1970).} Moreover, there is little clarity in the Uniform Code itself as to precisely when, and over what geographic scope, a "time of war" exists. Compounding the difficulty is the fact that military decisions generally reflect a bias for the military and for military jurisdiction.\footnote{455. See O'Callahan v. Parker, 395 U.S. 258, 264-65 (1969).} This contributes to
uncertainty for those who wish to know, in advance, whether a wartime offense has or has not been committed. Given that it was the judgment of Congress that offenses are more serious and morally blameworthy when committed in time of war than in peacetime, and that the suspension of the statute of limitations provides a form of increased deterrence, it would seem to be important for individuals to be able to identify when and where a "time of war" exists.

While courts have generally deferred to the political branches of government on the question of whether a state of war exists, courts have also fashioned outcomes based on a common sense approach when they have seen fit to do so. This "objective" approach, in some instances, has had the effect of overriding official pronouncements of the political branches.

As developed in this article, it becomes particularly problematic to determine whether a technical state of war exists when these factors are present: (1) there is no formal declaration by Congress, no other resolution that acknowledges a state of war and no Tonkin-type resolution that authorizes presidential action; (2) casualties occur, but in relatively small numbers; (3) troops are committed but not nearly at a level approaching full capacity; (4) expenditures are significant but not high enough to burden the national economy; and (5) other elements are present that fall short of a full-blown state of war, such as actions to quell uprisings or to liberate oppressed groups, defensive actions by troops in peace-keeping missions in response to attacks by irregular combatants or guerilla forces and deployments to liberate oppressed groups or to join forces with local armed forces for the purpose of combating terrorists or other irregular combatants.

Clearly, when Congress makes a straightforward declaration of war, as happened with respect to both World Wars, there is no question but that the "time of war" provisions of the Uniform Code fall into place. But where there is no explicit declaration of war or Executive Order pertaining to suspension of the Table of Maximum

nurtured by the judicial tradition, but is a military law officer.... [T]he suggestion of the possibility of influence... by the officer who convenes it, selects its members, and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law.... A court-martial... remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.

Id.

456. See discussion of Gulf of Tonkin Resolution, supra note 126, and accompanying text.
Punishments, it is left to the military courts to decide whether the "time of war" provisions apply. In such cases, courts may take a pragmatic approach, and determine that the "time of war" provisions are operative, but this ad hoc method produces inconsistent results.

Also as developed in this article, in the context of life insurance policies there has been a significant split of authority in defining "war." This is unhelpful to consumers who often enough do not read fine print and, at any rate, cannot predict whether exclusionary clauses may apply to certain situations, as was seen in the various cases that arose out of the Pearl Harbor attack.

Establishing a uniform set of criteria that would define when a state of war exists can serve several useful purposes. Presently, when military operations are of the type that tradition holds fall short of war—such as peace-keeping missions or interventions to quell civil unrest abroad—it is unclear whether the "time of war" provisions of the Uniform Code apply. In such contexts, military commanders may have too wide a latitude in deciding, one way or the other, whether the *jus in bello* rules under the Geneva Convention of 1949 relating to prisoners of war and other terms apply to the conflict. A uniform set of criteria to establish whether a state of war exists would also make it clear that the laws of war provide legal protection to the populations impacted by the conflict. Domestically, it could furnish authority for legislative or executive acts which depend on the existence of war. It could also furnish a guide for domestic court action in the interpretation of contracts that contain war exclusion clauses in life insurance contracts and other civil contexts. Internationally, it could furnish notice to neutral states of the coming into force of a different legal status, with its consequent variation of rights and duties, and it could fix the exact time at which this new legal status is considered to go into effect, for the benefit of neutral states and their citizens. It would make it easier for governments and courts to deal with the exercise of prize jurisdiction. Finally, it would also give greater certainty of the status of military operations or other missions carried out with the authority of an organ of the United Nations.

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457. For an illustration of the difficulties of defining "war" in the context of life insurance policies, compare the majority and dissenting opinions in N.Y. Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946).