Control Over Nationals Abroad: Domestic Prescriptions and Military Service

By Chin Kim *

1. Introduction

A nation-state as a body politic in the contemporary transnational power processes presupposes a perspective through which demands and expectations of mutual relationships are created. This is so by virtue of the supremacy of its common will over its individual participants for the goals contemplated by it. It consists of a determinate number of individuals, occupying a particular territory and acting through agents for whose behaviour it may be made responsible by other nation-states.

While under the territorial organization of the modern body politic the prescription of a given state can be enforced only within its territorial limits, this does not mean that the prescription of that state cannot affect legal relations of persons outside its physical domain. Appreciation of the far reaching ramifications of this body of evolving policy as developed and implemented by individual nation-states, has had considerable expression in the past. A learned British judge made an early inquiry: “Can the island of Great Britain pass a law to bind the whole world? We think.....the answer should be, no, but every country can pass laws to bind a great many persons.”(1)

Prescription, or the doctrine and formula commonly designated as “law” is not something material which spreads out until it reaches a territorial boundary and then stops. Human interests and human problems no longer stop at the border of any nation-state, and the prescribing function of any legal order likewise cannot be territorially limited.(3)

Each nation-state determines who shall be considered its national, who may become its naturalized national, and under what conditions this can occur.(4) It is therefore but an appli

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(1) Schiby v.L.R., 6 Q.B. 155 (1870)
(2) Cook, The Logical and Legal Bases of the Conflict of Laws, 33 Yale L.J. 457, 484(1924);
Comment, Overseas Effect of Federal Statutes, 1 Stan. L. Rev. 768 (1949)
(3) Kuh, Pathways in International Law 1 (1953)
(4) Sandifer, A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality,
cation of this general legal policy, when nation-states assert a claim over their own nationals abroad, and attempt to subject them to their own legal order.

In the case of the nationals of one state living in another state, there is, from the transnational perspective, an over-lapping of control and authority over an individual, since he owes a primary and permanent "allegiance" to his native state, and a temporary and qualified "allegiance" to the state where he is residing.\(^5\) So, also, a dual nationality is created when the national of a state is not recognized as expatriated, and is naturalized by another state. Thus, though ultimately the implemented legal policies must derive from one particular nation-state in the immediate future, the consequences bear international repercussions. Therefore any formulation of policy objectives, must take into account transnational consequences, and in the final analysis we must ask whether transnational legal policy governing these areas will not provide the most satisfactory solutions.

Another contemporary problem requiring analysis lies in the emergence of the ideological conflicts which have created a concept of plural worlds. This global alignment of bases of power has produced wide-spread ramifications for the control of people abroad. There are number of situations wherein a previously single nation-state has been divided into two, thereby creating entirely different units and perspectives for handling internal affairs as well as external affairs in the respective divided parts. The conflicting claim of control over nationals in this predicament saliently appears in the event of armed conflict.\(^6\) When the degree of tension is low, the constant struggle of claims over nationals abroad by the respective authoritarian and democratic forms of body politics in the divided countries again produces novel problems.\(^7\)

By virtue of the personal supremacy over its nationals abroad, a home state may retain its power over such nationals as emigrated without losing their citizenship; may set the date at which time they attain majority; may command them to come home and fulfill their military service; may require them to pay taxes for the support of the home finance; may impose the certain conditions on marriage or divorce performed abroad; may limit its own nationals abroad to receive foreign decorations and honors; may adopt health prescriptions having trans-national

A.J.I.L. 29 (1935)

\(^5\) "Allegiance", as its etymology indicates, is the name for the tie which binds the national to his state to whom liege fealty is due. Its substance is the aggregate of persons owing this allegiance.

\(^6\) Consider the prisoner of war repatriation issue in the Korean conflict.

\(^7\) One burning issue in this subject is, for instance, which of the body politic of China will exercise control over the Chinese abroad. For the background material, see McNair, The Chinese Abroad (1924); Kunz, Identity of States under International Law, 49 A.J.I.L. 68 (1955)
effect, i.e., compulsory vaccination, the sale and consumption of alcohol or the smoking of opium; may control in-flow of communication coming from nationals abroad or intraflow of communication among the nationals abroad; may honor the skills obtained by its own nationals abroad; may punish its own nationals of crimes committed abroad pursuant to the fundamental norms of responsible conduct prevailing within the home state.

How far a given state intends to stretch its control in regard to its own nationals abroad is a matter of domestic concern to be considered in view of its own constitutional limitations. However, any attempt to control its own nationals or even other nationals beyond its own physical domain by the act of state will meet a number of obstacles, some of which cannot be easily overcome. Most of all, however broad the transnational effect designed by an act of particular nation-state may be, it will always be limited by the general and powerful principle of territoriality.

The competence of the nation-state to prosecute and punish its nationals abroad on the sole basis of their nationality is conceded. This is particularly so in the nation-states wherein the code system prevails. In Italy, for instance, nationals as well as aliens can commit, according to the code, such crimes as counterfeiting and using the seal of the State. Articles 4 and 5 of the Swiss Penal Code prescribe that crimes committed abroad can be punished if national interests so require, as for instance crimes against the State or against Swiss nationals. The

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(8) Declared Mr. Justice Day in Sandberg v. McDonald, 248 U.S. 185, 195, 1918 that "legislation is presumptively territorial, and confined to limits over which the lawmaking power has jurisdiction".


(10) Generally speaking, a particular state has necessarily exclusive and absolute control over all persons and property within its territory, see Chief Justice Marshall's opinion in Schooner Exchange case, 7 Cranch 116, 136, (1812). Declared Mr. Justice Story, in the Apollon, 9 Wheat 362, 370 (1824) that "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And however general and comprehensive the phrases used in municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature have authority and jurisdiction."


(12) See Kaiser & Attenheffer v. Basle, Ann. Dig., (1950) Case no. 46, at 189. As to similar legis-
security of the state required France to adopt a series of legal policies in which control over its nationals abroad was asserted in broad terms calling for the punishment of all offenses qualified as crimes or delicts under the French law, committed between 1939, and a date to be determined by a governmental order, in Germany or Italy or in the foreign countries occupied or controlled by German or Italian forces when the offenders or the victims are French citizens, French subjects or subjects of a French protectorate.\(^{(13)}\)

Punishment for crimes of a similar nature under the common law system is by no means new.\(^{(14)}\) In England, Rex v. Munton \(^{(13)}\) in 1793 was a case in which the defendant was punished for fraud committed as a British subject abroad against the government. It was contended that the criminal act had been wholly committed and completed in the West Indies. The British court, however, responded that there was a crime committed in London where false returns were received. The actual legislative authority of the British Parliament goes as far as that there would be no legal difficulty, either in the enactment or in the enforcement, of a prescription by the Parliament enacting that a French committing a murder in France can be punished in England. Even if the competence so to prescribe exists, it is ineffective unless the Frenchman puts himself within the physical domain of England; and for the reason of comity, such prescription is not adopted.\(^{(15)}\) In spite of such a broad legislative competency, it was not until 1843 when an express legislative mandate made English court possible to prosecute homicide committed abroad.\(^{(17)}\)

The United States on the other hand has been very reluctant to extend its domestic prescriptions transnationally until 1909 when the Supreme Court in American Banana Co. v. United Fruit Co.\(^{(18)}\) recognized, in dicta, that Congress might legislate in regard to the crime committed in foreign territory if the crime affected "national interests".\(^{(19)}\)
Primary task of this study is to reveal the trend which clearly indicates the extra-territorial assertion of domestic prescriptions in the United States. Secondly, in order to illustrate this trend a study will be made on the subject of military service which would disclose conflicting claims over the U.S. nationals abroad. Thirdly, a general observation will be made to indicate the precipitating factors which have been conditioning this trend to extend domestic prescriptions to U.S. nationals abroad.

II. Trend in the U.S.A.

Bowman Case

A leading case which deals with the general question of jurisdiction of United States courts to try cases involving offenses committed without the territorial limits of the United States is United States v. Bowman.\(^{(20)}\) This case was decided by the United States Supreme Court in 1922. A U.S. national, Bowman, was prosecuted because of a conspiracy to defraud the United States by presenting false claims. The prosecution was instituted under the United States Criminal Code \(^{(21)}\) which provided, inter alia, for the punishment of any one who should "enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or office thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment, or allowance of any false or fraudulent claim." It was charged that the crime has been committed on the high seas, in the port and harbour of Rio de Janeiro, and in the city of Rio de Janeiro. The statute violated in the Bowman case was silent as to the locus of the crime but the Supreme Court of the United States reasoned that a strict territorial limitation would negative the purpose of Congress in enacting the statute. The Court responded with the statement that\(^{(22)}\)

"There is a right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially, if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them, others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for fraud as easily committed by citizens on the high seas and in foreign countries as at home. In such


\(^{(21)}\) Sec. 35, 40 Stat. 1015, 7 U.S.C.A., 18, Ch. 4.

\(^{(22)}\) Supra note 18 at 98—100
cases, Congress has not thought it necessary to make specific provision in the Act that the locus shall include the high seas and foreign countries but allows it to be inferred from the nature of the offenses.” Chief Justice Taft further went on to illustrate various statutory provisions which are not dependent on the locality of the crime under the United States Criminal Code.

Reasoning similar to that of the Bowman case was followed in the case of United States ex rel. Majka v. Palmer. A circuit court of appeals was of the opinion that the crime of perjury was applicable where the act was committed outside of United States territorial boundaries.

**Treason Trials**

In the flow of decisions growing out of the recent treason trials in the United States, a trend clearly shows that treason can be committed by American nationals living beyond the physical domain of the United States. The treason statute of the United States prescribes:

> “whoever, in allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason…….” (Underline applied)

Thus the transnational nature of the prescription is enunciated with the common concept that a national owes allegiance at all times and in all places. This is particularly so in the punishment of treason which undermines community trust. To permit committed treason unpunished simply because of the act occurs outside of the punishing state, would mean that the government should be helpless against the deceit of nationals who leave the shelter of a nation-state to make war upon it. The nature of the crime, the particular effect and intent to deceit a particular government is by no means unrelated to the place where the physical event occurs. It was declared at an early date in Great Britain that “treasons, committed out of England,

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(23) 67 F. 2d 146 (7th Cir.) 1933
(24) Thus perjury committed in Poland by an alien applying for a passport before the American consul in Warsaw was punished under Section 1750 of the Revised Statutes.

In 1926, a former American Vice Consul at Vancouver, British Columbia, was found guilty of having accepted a bribe while in that city to issue a certificate for the entry of a Chinese into the United States. He was sentenced by the Supreme Court of the District of Columbia, under Section 6 of the Act approved May 6, 1882, as amended July 5, 1884 (22 Stat. 58; 23 Stat. 155) to serve one year in jail and to pay a fine. See 2 Hackworth, Digest of International Law, 202 (1941). See also Ann. Digest. 1943–5, Case No. 46, where the punishment of a similar crime is reported.

(25) 18 U.S.C. Sec. 2381 (1948). Compare the Act of April 30, 1790, 1 Stat. 112 which provides that “if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere,……such person or persons shall be adjudged guilty of treason against the United States,…….” See also treason provisions of the United States Constitution, Art. III, Sec. 3, Cl. 1 & 3. As to the legislation punishing treason by states of the United States, see Harvard Research in International Law, Supra note 12 at 598–9.
shall be tried in like manner as if they had been committed in the shire where the trial took place".\(^{(26)}\) This seems to indicate a justification of the idea that the locus of the treason is in the prosecuting state because it is there that the effect of the acts take place and endangers community values.\(^{(27)}\)

Difficult questions arise when there is a conflict of allegiances between the state to which an individual owes perpetual allegiance because of his nationality, and the temporary allegiance that stems from his residency. This conflict becomes more acute when there is the existence of a state of war between the states of which he is a national and the state wherein he resides. This dilemma was revealed in the trial of Chandler so-called Paul Revere,\(^{(28)}\) who was convicted for treason for broadcasting for the Third Reich during World War II. The court properly stated that "the defendant,......while domiciled in the German Reich, owed a qualified allegiance to it, he was obligated to obey its laws and he was equally amenable to punishment with citizens of that country if he did not do so. At the same time the defendant......while residing in Germany......owed to his government full, complete, and true allegiance".\(^{(29)}\) Thus his voluntary aid to an enemy of the United States was not justified by his mere presence in Germany and the obligation to obey the then prevailing German legal order.

The Chandler decision has shown the illogical basis of Coke’s famous maxim: “Protection draws allegiance and allegiance draws protection”. Since Chandler was beyond the protection of the United States and yet he retained an allegiance to the United States. The courts have made remarkable effort to rationalize the transnational application of domestic prescription over treason committed abroad.\(^{(30)}\) It carries a strong suggestion that the treason provision of the Constitution “contains no territorial limitation......and that this was a deliberate omission......with a purpose to encompass foreign treason.”\(^{(31)}\) The Chandler case further went on to say:

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\(^{(27)}\) In 1917, when Sir Roger Casement was tried on a charge of treason against the British King, the Treason Act of 1351 was paraphrased by the British court in the following words: “It shall be treason if a man do levie war against our Lord the King in his realm or be adherent to the King’s enemies in his realm, giving to them aid and comfort in the realm or elsewhere”. In this connection, see The King v. Casement, (1917) 1 K.B. 98.


\(^{(29)}\) Id. at 944.

\(^{(30)}\) Id. at 929—31.

\(^{(31)}\) Id. at 929. In 1950, this transnational nature of punishment was further reflected in the Gillars
“When war breaks out, a citizen’s obligation of allegiance puts definite limits upon his freedom to act on his private judgment. If he traffics with enemy agents, knowing them to be such, and being aware of their hostile mission intentionally gives them aid in steps essential to the execution of that mission, he has adhered to the enemies of his country, giving them aid and comfort, within our definition of treason......” 

Thus the transnational application of the domestic prescription that denounces treason committed abroad prevailed in the trials of broadcasters, such as that of Best, Burgman and the famed “Tokyo Rose” case.

The transnational application of U.S. treason prescription has also prevailed in the situation where a person has a dual nationality. The Supreme Court of the United States affirmed the conviction of Kawakita on the ground that even if Kawakita was possessed of dual nationality, he still owed such allegiance to the United States as would make his acts constitute treason. Kawakita, a citizen of the United States by birth and a national of Japan under the Japanese statute, was in Japan during World War II employed as a civilian interpreter by a Japanese war plant, which was under the supervision of the Japanese army, and was manned partly by American prisoners of war. He was not required by employment to inflict punishment on prisoners. Instead of assuming a role of interpreter, he imposed cruel acts upon American prisoners. Thus the court held that Kawakita’s acts of cruelty to prisoners helped make them fearful, docile, and subservient and tended to strengthen Japan’s war effort and hence gave aid and comfort to the enemy within the constitutional definition of treason.

As we have seen before, one who owes allegiance to more than a single nation is placed in a peculiarly precarious position should those nations become antagonistic toward one another. This is particularly so in the case of persons having different and often conflicting allegiances.

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so-called “vision of invasion” trial, 182 F. 2d 962 (D.C. Cir. 1950), wherein the court said: “... ...By the statute itself the overt act may have been committed outside the United States. Adherence to the enemy and the treasonable intent, when they exist, attach to the act and to its perpetrator wherever he is......”

(32) Id. 944.
(33) So called “Best’s Little Life-savers”, 184 F. 2d 131 (1st Cir. 1950)
due to a plural nationality. In this situation there is direct conflict, in that performance on one
side constitutes a breach on the other. As a general rule, the primary allegiance of a dual
national is to the nation in which he resides. However, that does not mean he owes no loyalty
 whatsoever to the other nation which also claims him as a national.\(^{37}\) Whether a bona fide
expatriation existed became the central issue of the Kawakita case. It is, however, settled that
the act of expatriation, to be effective, should be bona fide and manifested by at least the act
of removal to another nation-state.\(^{38}\) But a national of the United States cannot thrown off
his allegiance to his native state as a cover for fraud, nor as a justification for the commission
of a crime against the home state, or for a violation of its domestic prescription, when this
appears to be the intention of the act.\(^{39}\) But, once has bona fide expatriated himself, he no
longer owes allegiance to the United States\(^{40}\) and therefore may not be guilty of treason.\(^{41}\)

Treason provision of the United States Constitution further applied in the case of Shinohara,

\(^{37}\) Kawakita v. United States, supra at 735. It is reported that a more reasonable outcome was reached
in a trial of a dual national by a Belgian military tribunal. The perpetrator was held not to have
renounced Belgian nationality by the mere fact of having joined the German army, but the fact
that he was regarded by the German authorities as a German national, and his own belief that in
joining the German army he renounced Belgian nationality, eliminated the intent necessary to
prove him guilty of treason. This case is reported in Annual Digest, Case No. 56 (1947). In
this connection, it is interesting to note that the Italian treason statute specifically states that
anyone who has ever been a national, regardless of the cause of loss, is punishable for treason.
Codice Penale, art. 242, Franchi, Feroci, (1949)

\(^{38}\) Chief Justice Marshall, speaking for the Supreme Court of the United States said that even if one
is a citizen of this country by birth, he has the right to expatriate himself and become a citizen
of any other country which he may prefer, if it is done with a bona fide and honest intention,
at the proper time, and in a public manner, Murray v. Schooner Charming Betsy, 2 Cranch
64, 120, 2 L. Ed. 208 (1804)

\(^{39}\) The Santissima Trinidad, 20 U.S. 283 (1822)


\(^{41}\) Congress in 1907, passed an act which provides what no citizen of the United States may expatriate
himself in time of war. In re Grant, 289 F. 814 (D.C. Cal., 1923). In this connection, see
act of Kawakita should be tantamount to a bona fide one is not our immediate concern. However,
it should be pointed out that clarity is desirable as to the relationships of this section of the treason
statute and the status of dual nationals. Furthermore, it is submitted that the courts should main-
tain a more consistent position in deciding what constitutes the act of expatriation. The courts in
one line of cases apply a deaf ear to the prima facie expatriation in treason trials while in another
series of cases the courts are eager to find any prima facie expatriation performed during war. For
instances, in Fulemoto v. Acheson, 105 F. Supp. 1 (D. Hawaii, 1952), an American-born son of
Japanese parents, who went to Japan in 1939 to study and who was allowed by Japanese author-
ties to renounce his Japanese citizenship in September, 1941, was held to have become expatriated
by "voluntary naturalization in a foreign state" when in 1943 he asked for and recovered Japa-
nese nationality, claiming he needed this in order to work or marry in Japan during the war. In
Harsanti v. Acheson, 103 F. Supp. 1011 (D. Mass. 1952), an Italian who was naturalized in the
an enemy alien resident of an enemy occupied territory of the United States, for acts of giving
aid and comfort to his native state, Japan.(42) Treason within the armed services is tried under
the United States Uniform Code of Military Justice which provides that the Code "shall be
applicable in all places."(43) Out of the Korean conflict, a series of cases involved with the
treason within the armed forces emerged.(44)

**Others**

With the close relationship to the national defense and security, the atomic energy legislation

United States in 1917, returned to Italy in 1919, and who was a Fascist party member in Italy
from 1923 to 1945, was held to have lost American citizenship by reacquiring Italian citizenship,
the court saying: there was "no better way to evidence an intention to acquire national citizenship
than joining the Fascist Party."

(42) Noted in 17 Geo. Wash. L. Rev. 283 (1949). Shinohara was a civilian who was born in Japan
and as a young man went to the Island of Guam. He married a native of Guam and children
were born of their union. When the United States declared war upon the Empire of Japan, the
American authorities in Guam placed Shinohara in confinement, together with a number of other
Japanese nationals who were resident in the island. The military forces of Japan occupied the island
and thereupon released Shinohara. He was employed by the Japanese as an interpreter. After
Guam was reoccupied by United States military forces, he was brought to trial for offenses alleged
to have been committed by him during the period of Japanese occupation. Authority for the prose-
cution for treason of an alien enemy under the circumstances involved in the present case is
found in the widely cited case of De Jager v. Attorney General of Natal, A.C. (Eng.) 326
(1907), 15 Digest 629, 664. De Jager was a national of the South African Republic and lived in
British territory. During the Boer War, the South African Republic forces captured the area in
which De Jager lived, and he took an official position under the Boers. After the war's end he
was convicted of high treason, the Judicial Committee of the British Privy Council being of
the opinion that "the protection of a State does not cease merely because the State forces, for stra-
tegical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the
rights of an army in occupation.

On what ground "Lord Haw-Haw" was tried has been an issue of wide ranging speculation. Rex
A.C. 347. Joyce was an American national, who paid with his life for acts committed in Ger-
many against the legal order of England. The English courts subjected him to the penalties of
English Justice because he obtained an English passport and thereby exposed himself to that state's
authority. It seems that the British courts have sought to base their decisions on the justification
lying in the correlation between allegiance and protection.

(43) 64 Stat. 107 (1950). As to the legislative history of article 5 of this Code, see U.S. Uniform
Code of Military Justice, Index and Legislative History 897 (1950); U.S. Uniform Code of Military
Justice, Text, References and commentary based on the Report of the Committee on a Uniform
Code of Military Justice to the Secretary of Defense, 10—11 (1950). A nation-state can exercise
disciplinary control over its armed forces, when those forces are operating outside its territorial
limits. Indeed, there may be greater reason for recognizing such power when troops are operating
in an enemy state than when they are within their own territory. Fairman, Some New Problems
of the Constitution Following the Flag, 1 Stan. L. R. 587 (1949). Also see, Helming Jr.,
Military Justice and Conflict of Laws in Foreign Nations, 17 Penn. B.A.Q. 47; Wigmore, the
Extraterritoriality of the U.S. Armed Forces Abroad, 29 A.B.A.J. 121 (1943)

(44) The military tribunals invoked severe penalties in the trial of Corporal Dickenson who was charged
contains the clauses of extra-territorial application of domestic prescription.\(^{(45)}\) For the successful execution of economic warfare and national defense, the United States trading with enemy legislation prevents the U.S. nationals from engaging in commercial intercourse with the "enemy", or by prohibiting the U.S. nationals in neutral states from engaging in business transactions with the "enemy".\(^{(46)}\)

In 1962, the U.S. Congress broadened the scope of the Espionage Act covering espionage committed overseas by U.S. citizens and permanent residents in preparation for naturalization.\(^{(47)}\) Similar efforts are made to amend the so-called wartime sedition statute which would apply to conduct committed anywhere in the world by citizens and nationals of the United States, and permanent resident aliens.\(^{(48)}\) Early in 1799, it was enacted in the United States that "every citizen of the United States whether actually resident or abiding within the same" who

with the overt acts of collaboration with the enemy and uttering enemy propaganda. 6 U.S.C.M. A. 438, 20 C.M.R. (1954). The trial of Corporal Batchelor, for instance, shows that the accused was charged with several offenses based on his conduct while a prisoner of the Chinese Communists in Korea. His main offenses were communication with the enemy without proper authority and uttering a letter which was disloyal to the United States, intending thereby to promote disloyalty and disaffection among United States civilians in violation of the Uniform Code of Military Justice. Thus the military tribunal convicted him of collaborating with the enemy and sentenced to life imprisonment when he repatriated. 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1955)

\(^{(45)}\) See Atomic Energy Acts of 1946 (60 Stat. 755, 42 U.S.C. secs. 1801 et seq., 1946) and of 1952 (42 U.S.C. secs. 1805 et seq., 1952). Section 57 of the 1954 Act reads in part: "(a) It shall be unlawful for any person to... (2) directly or indirectly engage in the production of any special nuclear material outside of the United States except (A) under an agreement for cooperation made...", or (B) upon authorization by the (Atomic) Commission after a determination that such activity will not be inimical to the interest of the United States”. As to the interpretation of acts, see Green, American Participation in Foreign Atomic Energy Activities: The Statutory Framework, Vil. L. Rev. 9, (1956); Dixit, International Cooperation for the Peaceful Uses of Atomic Energy under the Atomic Energy Act of 1954, 61 Dick. L. Rev. 29 (1956)

\(^{(46)}\) After the declaration of war against Germany, the United States adopted a legal policy pertaining to trading with the enemy. (Public Law No. 91, 65th Congress, approved on Oct. 6, 1917). The United States’ statute was enacted as a permanent piece of legislation to serve not only the immediate needs arising from the involvement of the United States in the First World War, but also to meet the exigencies of future national emergencies. Therefore, the Act was not re-enacted when World War II broke out since it automatically went into effect upon the declaration of the state of war with Japan. As to the history of prohibition of trading with the enemy in the common law, see Friedman, A Study in Judicial Legislation, 22 Solicitor 195 (1955); Domke, Trading with the Enemy in World War II (1943)

\(^{(47)}\) Public Law 87–369 extends the reach of Chapter 37, Title 18, United States Code. Before passage of this legislation, application of the espionage statute was limited to the United States, the admiralty and maritime jurisdiction of the United States and the high seas.

\(^{(48)}\) See Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 87th Congress on H.R. 4897. A bill to repeal subsection (d) of Section 2388 of Title 18 of the United States Code.
carries on correspondence with a foreign nation "with intent to influence its action in any controversy with the United States, or to defray the measures of the government of the United States," shall be punished by fine and imprisonment.\(^{(49)}\) It is reported that this act was passed because American nationals residing abroad were actually plotting to undermine the measures of the government.\(^{(50)}\) Reported cases do not contain a single instance of a prosecution under it.\(^{(51)}\)

Any one nation-state will frequently find it necessary and desirous to obtain the presence of a person from beyond its territorial jurisdiction in order to effect, efficiently, judicial or other authoritative proceedings commenced within the state. One of the recurrent problems in this area is that of imposing compulsory testimony from persons abroad. Probably the clearest instance of control in subjecting a national abroad to testimonial proceedings based on allegiance to the United States is Blackmer v. United States.\(^{(52)}\)

Blackmer, a national of the United States residing in France, was personally served by the American consul with a subpoena to appear as a witness in a trial in which the United States government was a party.\(^{(53)}\) The government desired to obtain the testimony of Blackmer as an important witness in the prosecution of certain persons for fraud in securing title to public oil-lands. On Blackmer's failure to appear, a large amount of his property was seized by the government by way of penalty for contempt. The United States Supreme Court in affirming the lower court said that the "......United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it......"\(^{(54)}\) Thus the United States Supreme Court endorsed the transnational appli-


\(^{(51)}\) See Million, Political Crimes, 5 Mo. L. Rev. 164, 169 (1940)

\(^{(52)}\) 284 U.S. 421, 76 L. ed. 375, 52 Sup. Ct. 252 (1932). The Court of Appeals' decision is discussed in 30 Mich. L. Rev 137 (1931); 17 Cornell L.Q. 117, (1931); 17 St. Louis L. Rev. 58, (1931); 65 U.S.L Rev. 639 (1931); 25 A.J.L. 723 (1931). The Supreme Court's decision is discussed in 30 Mich. L. Rev 968, (1932); 32 Col. L. Rev. 747 (1932); 17 St. Louis L. Rev. 274 (1932); 2 Idaho L. J. 211 (1932); 6 So. Calif. L. Rev. 60 (1932); 1 Geo. Wash. L. Rev. 132 (1932). As to the general reference, see Bishop, International Law, 439–40, 2nd ed. (1962)

\(^{(53)}\) This constructive notice was found to satisfy the requirements of due process. Actual service of process outside the state would seem an essentially fair way of bringing knowledge of a pending suit to one who is subject to the authority and control of the state.

\(^{(54)}\) 284 U.S. 421, 437 (1932)
cution of a federal statute which provides that anyone who is a national of the United States or domiciled therein, may, though outside the physical domain of the country, be subpoenaed as a witness at the trial of a criminal action when desired by the Attorney General or as attorney acting under him. It would appear, however, that allegiance as a basis for control over the person for this purpose is proper only when the state has a real interest in the outcome. The statute under which Blackmer was subpoenaed was so limited.

III. Military Service

Objectives

The conscription of man power for military service is not a modern technique. Many historical examples of the use of this device to expand military forces are readily available. For, the union for common defense is one of the first objectives of all political associations. Modern body politics, be they monarchies, dictatorships, or democracies, presuppose a communion of people within their physical domain. Theoretically the state, as such, relies on its nationals to fill the ranks of its service, and to defend the society it represents.

(55) A series of enactments starting with the Walsh Act, 4 Stat. 835 (1929); 28 U.S.C.A. secs. 711-718 (127), bears witness to this underlying legal policy. For an excellent brief review of the development of the Act, see 43 Harv. L. Rev. 121 (1929); Note, 27 Col. L. Rev. 204 (1927). See also critique of this statute. 8 Wigmore on Evidence. Footnote 2, 92-3 (3rd ed. 1949). Also see the Federal Rules of Civil Procedure (1938). Rule 37 (c), Rule 45 (e), the Federal Rules of Civil Procedure; Rule 15 (c), Rule 17 (b), the Federal Rules of Criminal Procedure. In 1928, New York State adopted a statute similar to the Walsh Act, see N.Y.C.P.A., sec. 406a (L. 1928, c. 643, March 27). In view of the Skiriotis case (313, U.S. 69, 1941), it is interesting to note to what extent New York State can exert control over a “citizen of the State of New York or domiciled therein” who is abroad. In the Skiriotis case, the Supreme Court of United States asserted that “if the United States may control the conduct of its citizens upon the highseas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with an act of Congress.”


(57) Under the provisions of the Walsh Act, an alien domiciled in the United States, who is temporarily abroad, might be punished for failure to respond to a summons to appear and testify before a court in the United States. Had Blackmer been a Frenchman domiciled in the United States, instead of a fugitive citizen of the United States residing in France, a different and somewhat more difficult question would have been presented since in the United States jurisdiction to entertain civil suits against the person may be founded upon the person's domicile.

(58) Vattel, Law of Nations, Bk. 3, c. 2, sec. 8 (1797)

(59) Cf., McKelvain, Legal Basis for Conscription, 26 A.B.A.J. 701 (1940). The sacred obligation of military service is often enunciated by the Constitutions of modern nation-states. Art.52, Constitution
Effective utilization of manpower resources becomes a guiding policy of the nation-state during a period of war or national emergency. Since the strength of any particular nation-state is its people, the fullest possible development of manpower is a major strategic goal. For the measures which it should adopt in the marshalling of its resources, a nation-state must be guided by the nature of the resources which it has at its disposal. Striking changes in the size and composition of the population which occurred during the past decade have significantly affected the availability of manpower for the national defense effort. In recent years manpower resources become the vital importance in planning and operation of the national defense effort.

An example is England, where, before the Norman Conquest, the obligation of the great body of the subjects to military service was recognized and enforceable. British legal policy in calling its nationals from abroad for military service manifested in 1942. This British legislation provides for the imposition upon British subjects in foreign countries of a military obligation. The Act contemplated transnational enforcement by means of depriving British subjects of nationality as penalties for failure to comply with the requirements of Orders in Council made under the Act.

An early common law practice indicates that the basis of the state’s inherent power to recall its nationals from abroad was exercised at the will of the state through the prerogative writ of return and that there existed the power of the Crown to punish its subjects for failure to return for military service by seizing property of said subject. Today this is generally invoked only in times of national emergency, notably as a means of raising an army in anticipation of war.

While on the other hand, in the United States, it has been generally conceded among the writers that military service may properly be demanded of the absent nationals. Furthermore
it has been reiterated elsewhere that the United States has a broad power to compel resident aliens to submit to military service.\(^{66}\)

**Unilateral Claim**

There is no decided case which may be regarded as a complete answer to compel U.S. nationals abroad to perform the military service in the U.S. armed forces. But strong dicta has been expressed elsewhere to the extent that the U.S. Congress has the power to exact military service of its own nationals home and abroad.\(^{67}\) However, United States ex rel. Feld v. Ballard raises a general question of obligations of U.S. nationals abroad to serve at home.\(^{68}\) Since the U.S. is only participant in this instance, a title of unilateral claim is utilized.

Samuel Feld, a citizen of the United States, after registration under the Act\(^{69}\) sailed to Brazil and remained there for a year, and when hostilities ceased returned to the United States. During his absence he was drafted by virtue of a notice mailed to him at his address in the United States, which he failed to answer although a partial reply to the questionnaire of the local board was submitted by his father. Upon his failure to report as required in the notice he was recorded as a deserter. After his return to the United States he was arraigned for trial by court-martial for desertion, and his petition for release from the Army authorities was denied.\(^{70}\)

The court said that while the Act did not require registrants to remain in their homes or places of legal residence until drafted into the service, their absence did not excuse them from


\(^{67}\) In Blackmor v. U.S., the United States Supreme Court said: "Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal".

\(^{68}\) 290 F. 704 (1923), cert. den. 262 U.S. 760 (1923)

\(^{69}\) Under the Selective Service Act, all male persons between the ages of 21 and 30 (except persons already in the military or naval service) were required to register.

\(^{70}\) By section 6 of the Selective Service Act, Comp. St. (1918), Comp. St. Ann. Supp. (1919), Sec. 2044 f, which provides that: "Any person......who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in a District Court of the United States having jurisdiction thereof be punished by imprisonment for not more than one year, or if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct."
their obligation to perform military obligation under the Act. And that it was their obligation under the Act to keep in touch with and be advised by their local boards, and to perform the required acts, including the act of reporting when required under the Selective Service Act. It has also been held that the fact that permission was granted to issue a passport to a registrant by one department of the government and that there were extensions granted by the consul general in a foreign country might be matters in mitigation of the offenses of a registrant in failing to report for obligation but that they could not affect his status in the military service, for the reason that he could be exempted and excused only through the medium of the local and district boards established for that purpose.\(^{(71)}\)

**Sanctions**

United States legislation prescribes that a national who departs from or remains outside of the control of the United States in time of war or during a period of national emergency for the purpose of avoiding military service shall lose his American citizenship.\(^{(72)}\) Legislation further prescribes that "for the purpose of this Paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States".

The 1965 desertion statute\(^{(75)}\) was amended in 1912 to include draft evaders.\(^{(74)}\) The new Act of 1952 makes proof of purpose easier by creating a presumption of such purpose on the failure to comply with compulsory service acts.\(^{(75)}\) A flow of decisions has been rendered by the administrative agencies with respect to this subject.\(^{(76)}\)

By serving in the armed forces of a foreign nation native born and naturalized alike have lost their U.S. citizenship except with the written consent of the Secretary of Defense.\(^{(77)}\)

\(^{(71)}\) Cf., U.S.v. McIntyre, 4 F.2d 823 (9th Cir. 1925); Hurley v. Grawley, 50 F. 2d 1010 (D.C. Cir. 1931).


\(^{(73)}\) 13 Stat. 490.

\(^{(74)}\) 37 Stat. 356.


\(^{(77)}\) Act of Oct. 14, 1940, c. 876, Title I, sec. 401 (d), 54 Stat. 1168 continued in 66 Stat. 267, 8 U.S.C. sec. 1481, (1952). The 1952 Act further prescribes that native born and naturalized alike have lost their citizenship by voting in a foreign election, Biagiola v. Acheson, 196 F. 2d 865 (D.C. Cir. 1952); Acheson v. Wohlmut, 196 F. 2d 866 (D.C. Cir. 1952); assuming posts and offices which normally are filled by citizens of the foreign national only, Insogna v. Dulles, 116
The decisions indicate that a national must do something above and beyond availing himself of leaving the country and taking up residence somewhere else. He must place himself under an obligation to a foreign nation inconsistent with the allegiance he owes to the United States. Duress constitutes a defense to loss of citizenship by serving in a foreign army. The courts have recognized the fact that dual nationals living abroad are frequently placed in positions in which they have no reasonable alternative but to serve their other country. In Acheson v. Maenza,\(^{(78)}\) for instance, the court responded to the effect that while duress cannot be implied from the mere fact of conscription, it is likewise erroneous to hold that the mere entry into foreign country constitute a voluntary entry of the army on the ground that one should have known that he was liable to be drafted. Thus, in Dos Reis v. Nocolis,\(^{(79)}\) the tribunal held that there was no voluntary element on the part of Camara who was born in the United States of a Portuguese father and a Brazilian mother. He was taken by them during his minority to a Portuguese island and was thereafter inducted into the Portuguese army. One writer reports a flow of decisions on this subject\(^{(80)}\) and the various pertinent issues coming under the subject are discussed elsewhere.\(^{(81)}\) The pertinent provision written into the Nationality Act of 1940 at the behest of the State Department, gave the United States Government wide latitude in dealing with these classes of nationals.\(^{(82)}\)

**Conflicting Claims**

The exercise of the transnational power of a home state to summon its nationals abroad for the purpose of military service is by no means immune from the conditioning factors, the

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\(^{(81)}\) Rudnick, Loss of Nationality in Conjunction with Foreign Military Service 6 1; N.S. Monthly Rev. 9, 12 (1948).

\(^{(82)}\) Roche, The Loss of American Nationality, op. cit., supra note 76.

\(^{(82)}\) The testimony before the House Committee on Immigration and Naturalization reads in part: "This is a new law (referring to expatriation for service in foreign armies). We have no such law now. In very recent years Americans have entered the armies of foreign states. For instance, in the Spanish War and in the present war, a good many are going into armies of foreign states, and it does not seem reasonable that a person should give himself up and risk his life for the good of a foreign state and remain a citizen of the United States, ...." Testimony of Richard W. Fournoy, Jr., Assistant to the Legal Advisor of the State Department, testifying on the revision and codification of the naturalization laws, as reported in Hearings before the House Committee on Immigration and Naturalization in H.R. Rep. 6127 and H.R. Rep. 9980, 76th Cong. 1st Sess. 131— 132 (1939—40).
pressures from other states, which have widely permeated interactions between and among the participants of contemporary world community. However, the main body of prepositions prescribing the conditions under which a state can assert transnational claims with respect to its own nationals abroad for the military service can be conveniently stated. Two pertinent questions are of immediate concern. The first is where a home state bases its factual claim on the nationality doctrine, but its national has a domicile elsewhere. The second is where a home state bases its claim on nationality but its national acquires the citizenship of the nation-state where he resides and this state refuses to honor the expatriation requested, so that the status of dual nationality is created. In both situations, when a home state summons its national abroad to perform military service at home, its factual claim is based on the nationality doctrine. This factual claim may be confronted with the counter-claim by the other nation-state wherein the person in question resides. This counter-claim may be based on the doctrine of domicile or nationality doctrine.

It has been acknowledged that the United States imposes upon its resident aliens an obligation to serve in its armed forces as well as its own nationals abroad. This practice indicates that the United States is using two doctrines in order to justify its factual claims over persons for the purpose of its own defense. When the doctrine of domicile is invoked, the emphasis shifts to a new element, the actual process of living in a community; and of such "living together" as promotes the psychological conditions necessary for a feeling of belonging. In many civil law countries, all questions relating to the status of a person and to family relationships are decided according to the prescription applicable at the place of the person's nationality. Therefore, an alien residing in Switzerland, for instance, is not, under any circumstance, subject to Swiss military service since the allegiance which a national owes by virtue of his nationality is the organic basis for his service in the armed forces. Since national defense rests on a state's citizens only, they must fulfill this obligation even though residing abroad.

Status of dual nationality in the military service presents a complicated situation. This began to appear between the emigrated nation and the emigre's nation ever since the nineteenth

(83) See note 66. For this type of legislation to extend the obligation to military service to resident aliens, see 3 Canadian War Orders and Regulations 81 (1942); National Service Act, (1951), XLIX Acts of Parliament 2 (Australia); Law of Sept. 8, 1949, Defense Service Law, secs. 4, 6 (d) 4 (Code of Laws of the State of Israel).
(85) Id., Swiss citizens abroad, for instance, may replace personal service by the payment of a military tax in time of peace.
century. Emigrants who left certain European countries, for instance, without serving their political ties, and, who after becoming naturalized in the United States, sojourned in their countries of origin on business or as transient passengers or visitors, were detained there and compelled to perform military service. One writer refers to the dilemma produced by conflicting military service requirements due to dual nationality with specific reference to the Italo-American.\(^{(86)}\) The reported cases illustrate a series of tragic events in consequence of this conflict. British court, for instance, has held, despite the clear words of the statutory provision then in force,\(^{(87)}\) that a person who was a Swiss national as well as a British subject and who had fulfilled his military service obligation in Switzerland, might not even execute a declaration of alienage by virtue of his Swiss nationality in time of war.\(^{(88)}\)

A series of conflicting claims is reported and gives a vivid picture of hardship created by the conflicting claims resulting from dual nationality.\(^{(89)}\) The United States requested the Italian government in 1915 to release from military service Frank Ghiloni, born of an Italian father in the United States. He lived in the United States for seventeen years before going to Italy. The Italian government, however, refused to recognize the claim of the United States. However, a third-party, Austria-Hungry on capturing him in battle, acknowledge the legitimacy of the claim of the United States and released.\(^{(90)}\) One of the most outstanding illustrations of the consequences of imposing compulsory military service in the case of dual nationality is that which occurred during the progress of the First World War. The Italian government adopted the practice of detaining in Italy the wives and children of naturalized American citizens of

\(^{(86)}\) Barone, Dual Nationality; with Particular Reference to the Legal Status of the Italian-American, 23 Fordham L. Rev. 243, 263—268 (1954). In determining a person's nationality at birth, some nations adhere to the doctrine of jus soli, i.e., citizenship is determined by birth within the country. In others status depends upon jus sanguinis, i.e., nationality is inherited from the parents regardless of place of birth. A third group, which includes the United States, confines citizenship under both theories. The most common method of acquiring a particular nationality after birth is, of course, through the available procedure for naturalization. Ordinarily, one who takes advantage of such a procedure renounces all former allegiances. However, not all nation-states recognize such renunciation. Scott, Nationality: "jus soli" or "jus sanguinis", 24 A.J.I.L. 58 (1950); Orfield, The Legal Effects of Dual Nationality, 17 Geo. Wash. L. Rev. 427 (1949)

\(^{(87)}\) See Parry, Plural Nationality and Citizenship with Special Reference to the Commonwealth, 30 B.Y.I.L. 244, 274, n.8 (1953)

\(^{(88)}\) Gschwind v. Huntingdon 2 K.B. 420. (1918), See the position of U.S. court on this issue. In re Gogel, 75 F. Supp. 268, (1947), wherein the court recognized the amenability to the military service law of the persons, foreign nationality, Czechoslovakia, so as to hold that his compulsory enlistment thereunder works no forfeiture of his American citizenship, as would voluntary service.

\(^{(89)}\) 3 Hackworth, Digest of International Law, 352, 359, 362—7 (1942); Fenwick, International Law, 255—6 (1948)

\(^{(90)}\) Am. White Book, European War 111, 373—387, reproduced in Fenwick, Id., 255.
Italian origin for the purpose of compelling the husbands and fathers to return to Italy for military service.\(^{(91)}\)

It is unreasonable that a person should be subject to equal claims by two nation-states to his military service as a national.\(^{(92)}\) Some states have concluded bilateral agreements.\(^{(93)}\) These agreements usually provide that a person who has done military service in a country of which he is a national shall be exempt from the requirement of military service in the other country of which he is a national.\(^{(94)}\) Even transnational agreements, in which the contracting parties have agreed on certain points, do not suffice if subsequently the concept of nationality undergoes changes and new hybrid forms of questions come into existence.\(^{(95)}\) A writer indicates the complexity of this subject in relation to the treatment to be accorded to the conflict between a transnational agreement and a municipal prescription within the different legal orders.\(^{(96)}\)

IV. Postscript

The determination of legal policy by any particular nation-state is no longer only the domestic concern of the formulating state, but this problem of policy formulation now produces new transnational ramifications and effects. The proclamation of the individual nation-states, such as that of the legal policy, asserted control of nationals abroad produces certain effects in other participants of the world community.

In the midst of the dynamic and rapid interaction between and among nation-states in the contemporary world community, the United States has taken a step to evolve a legal policy which indicates the extraterritorial application of domestic prescriptions over its own nationals abroad. This trend has saliently shown in the area of national security and defense which are intensified and made more complex by political, military, economic and ideological struggle.

A demand for control over the persons may be made on the basis of presence within the territory, or, when not in residence, on the basis of a presumed allegiance. The doctrinal

\(^{(91)}\) 3 Hackworth, op. cit., supra., note 89, 187.
\(^{(92)}\) For this reason a Protocol was signed relating to Military Obligations in Certain Cases of Double Nationality in 1930 which sought a solution to this problem (Signed at Hague, April 12, 1930).
\(^{(94)}\) See Harvard Research, Draft Convention on Nationality, art. 40 (1929)
\(^{(95)}\) Consider the intricacies of legal policy dealing with nationality and immigration in the United States. In this connection, see introductory remarks made by Auerbach, Immigration Laws of the United States (1955)
\(^{(96)}\) Probst, op. cit., supra., note 81, 45. Cf., Schenkel v. Landon, 133 F. Supp. 305 (1955). This case is also reported in 36 B.U.L. Rev. 122 (1956)
distinction for the basis of control is accordingly, that of "domicile" or "nationality". It is the interplay of concepts of the claim of the nation-state over persons because of physical control, and because of allegiance that the major problems in this area are to be found. For, as trans-national commerce and activities of all kinds augment in volume and significance, it more frequently occurs that physical control of persons, and claims to allegiance do not coincide in one nation-state, but are divided between two or more states.

When this situation occurs, the interests of the individual having multi-state contacts and possibly a dual nationality, must be taken into account. Here a preference to extended legal connections after a factual change in practical and cultural adjustment may work hardship and individuals freedom of movement is at stake. The effect of pursuing one of alternative policies on trans-national interactions must be studied. Here the stress is on the facility of interpersonal, political and economic transnational activities or frustrates transnational cooperation. An overall solution to this problem as it bears on world order is obviously beyond the competence of any particular nation-state. It is a problem for mutual cooperation among the participants of the world community.