MEMORANDUM

DRAFTING ALIENS IN THE UNITED STATES

A. Application of Draft Act of May, 1917, to Aliens in the United States.

The Draft Act of 1917 requires service of
(1) Citizens of the United States;
(2) Declarants, except alien enemies.

Declarants are:

(1) Those having treaties of exemption from military service.

(a) Allied countries -- Italy,
Japan,
Serbia.

(b) Allies of Germany -- None.

(c) Neutral countries -- Argentina,
Costa Rica,
Honduras,
Paraguay,
Spain,
Switzerland .

Note. The treaty provision generally runs as follows: "They (citizens of either contracting party) shall, however, be exempt in their respective territories from compulsory military service either on land or sea in the regular forces or in the national guard or in the militia." (Treaty with Italy, 1871.) Some of the other treaties end with the word "sea."

(2) Those not having treaties of exemption.

(a) Allied countries -- Great Britain,
France,
Russia,
Belgium, etc.

(b) Allies of Germany -- Austria-Hungary,
Turkey,
Bulgaria.

(c) Neutral countries -- Several.

(3) Those having naturalization treaties stipulating that declarants are not citizens.

(a) Allied countries -- Brazil.

(b) Allies of Germany -- Austria-Hungary.

(c) Neutral countries -- Costa Rica,
Haiti,
Nicaragua,
Peru,
Salvador,
Sweden,
Norway,
Honduras,
Uruguay.

Note. The treaty provision runs as follows: "The declaration of an intention to become a citizen of one or the other country has not for either party the effect of citizenship legally acquired." (Treaty with Sweden and Norway, 1869.) Another form is: "The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of naturalization." (Treaty with Austria-Hungary, 1870.) The Supreme Court of the United States has uniformly held that a declaration of intention by an alien does not make him a citizen of the United States. Under the statute the alien is not required to renounce allegiance upon taking out his first papers, but he declares his intention to do so.

(4) Those having naturalization treaties stipulating that persons "naturalized" shall be regarded as citizens (i. e., by inference declarants are not citizens).

(a) Allied countries -- Great Britain,
Belgium,
Portugal.

(b) Allies of Germany -- None.

(c) Neutral countries -- Denmark.

Note. The treaty provision runs generally as follows: "Citizens of the United States of America who have become or shall become and are naturalized according to law within the Kingdom of Denmark as Danish subjects shall be held by the United States of America to be in all respects and for all purposes Danish subjects, and shall be treated as such by the United States of America. In like manner, Danish subjects who have become or shall become and are naturalized according to law within the United States of America as citizens thereof shall be held by the Kingdom of Denmark to be in all respects and for all purposes as citizens of the United States of America, and shall be treated as such by the Kingdom of Denmark." (Treaty with Denmark, 1872.)

Non-declarants exempt under the Act of 1917 are:

(1) Those exempt by treaty from military service.
(Same as (1) above.

(a) Allied countries -- Italy,
Japan,
Serbia.

(b) Allies of Germany -- None.

(c) Neutral countries -- Argentina,
Costa Rica,
Honduras,
Paraguay,
Spain,
Switzerland.

(2) Those not exempt by treaty.
(Same as (2) above.

(a) Allied countries -- Great Britain,
France,
Russia,
Belgium, etc.

(b) Allies of Germany -- Austria-Hungary,
Turkey,
Bulgaria.

(c) Neutral countries -- Several.

Protests received -- Switzerland, in a memorandum handed in August 13, 1917, has pointed out her protest against conscription during the Civil War of her citizens who are exempt by the Treaty of 1850 and has taken the same view now.

Austria-Hungary, through the Swedish Legation, in a note of July 28, 1917, has protested against the draft of her subjects in the United States, on the ground that her treaty of naturalization provides that declarants are aliens, which is true.

Spain, in a note of June 14, 1917, called attention to the treaty provision of exemption of all Spaniards. In a note of August 11th the Spanish Ambassador protested against the draft of non-declarants and orally stated that his Government would not object to the draft of declarants.

Honduras, in a note of May 30, 1917, at the time of the registration called attention to her treaty of exemption, but did not refer to the draft.

B. Draft of Aliens in the United States During the Civil War.

The Draft Act of 1863 provided as follows:

> "That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, except as hereinafter excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose."

Subsequently the Act of 1863 was amended by the Act of February 24, 1864, Section 6 providing:

> " * * * * * * all persons who shall arrive at the age of twenty years before the draft; all aliens who shall declare their intentions to become citizens; * * * * "

and Section 18 providing:

> "That no person of foreign birth shall, on account of alienage, be exempted from enrolment or draft under the provisions of this act, or the act to which it is an amendment, who has at any time assumed the rights of a citizen by voting at any election held under authority of the laws of any state or territory, or of the United States, or who has held any office under such laws or any of them; but the fact that any such person of foreign birth has voted or held, or shall vote or hold, office as aforesaid, shall be taken as conclusive evidence that he is not entitled to exemption from military service on account of alienage."

It will be observed that the terms of the Act of 1863 were practically the same as those of the Act of 1917, except as to alien enemies and the age limit. As the result of the application of the Act of 1863 to declarants, a discussion arose, chiefly with Great Britain, as to the exemption of declarants, which resulted in a compromise, set forth in the proclamation of the President of May 8, 1863, a copy of which is attached. It will be observed that this proclamation

exempted

exempted from the draft under the Act of 1863 declarants who had left the United States within sixty-five days from the date of the proclamation, or who had no exercised the right of suffrage or any other political franchise.

Switzerland protested that both declarants and non-declarants were exempt from military service under Article 2 of the Treaty of 1850. Secretary Seward contested this view on the ground that each state could prescribe for purposes of state citizenship merely the qualification of a declaration under the Federal Act of Naturalization. Secretary Seward stated:

> "* * * Congress passed the law which is recited in the President's proclamation. And they passed another act which authorized the Secretary of State to extend the protection of the Government to all persons who, by any laws of the United States are bound to render military service. The two laws seem to this government to be reasonable and just, and they constitute a new, additional, and uniform law of federal naturalization. But it was foreseen that emigrants who had declared their intention might complain of surprise if they were immediately subjected to conscription. To guard against this surprise the proclamation was issued giving them ample notice of the change of the law, with the alternative of removal from the country if they should prefer removal to remaining here on the footing on which Congress had brought them. Surely no foreigner has the right to be naturalized and remain here in a time of public danger and enjoy the protection of a Government, without submitting to general requirements needful for his own security. The law is constitutional and the persons subjected to it are no longer foreigners but citizens of the United States. The law has been acquiesced in by other foreign Powers, and I am sure that Switzerland can not stand alone in her protest." (For. Rel., 1863, Part II, 748 et seq.)

It would seem the Swiss view prevailed, for, in 1888, Secretary Bayard stated:

> "In our late Civil War, when the Government of the United States was compelled to use every just effort to put down the

> the insurrection by which its existence was assailed, and when in the application of its conscription acts it was compelled to consider many cases of aliens on its shores, there is not a single instance in which an alien was held to military duty when his government called for his release." (Bayard to McLane, 15 Febr. 1888: For. Rel., 1888, I., 510, 512.)

Sweden and Norway took no exception to the President's proclamation of 1863, on the grounds that all Swedes and Norwegians who had declared their intention to become citizens of the United States had forfeited all claim of protection from the laws of their native country and were aliens. (For. Rel., 1863, II., p. 1314 et seq.)

Before the Draft Act of 1863 was passed, it appears that some aliens were forced to do military service in the militia at the beginning of the Civil War. In correspondence with Secretary Seward, the French Minister protested against the impressment (except for police duty) of Frenchmen, even voters or declarants, as contrary to the law of nations. On November 10, 1862, Secretary Seward stated that so far only two persons had claimed exemption from military draft on the ground of their being French subjects, and both of these, upon presentation of their cases to the State Department, were discharged promptly and without delay. As stated, however, this was before the Act of 1863 became a law. (For. Rel., 1863, II., pp. 811 et seq.)

It appears from the diplomatic correspondence that in 1864, when the city of Memphis was open to attack, aliens were forced into the militia formed to protect the city. Upon protest of the British Minister the order was changed, substituting enforced departure from

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the district in lieu of enforced service in the militia or fine and imprisonment. This appears to have been accepted by the British Government. (For. Rel., 1864, Part II, pp. 657 et seq.)

In September, 1862, and February and March, 1863, the Mexican Government protested against the impressment of Mexican citizens into the militia of the United States in contravention of the law of nations and of the Treaty of 1831. (MSS. Notes of Mexican Legation, Vol. 12.) These claims for exemption from military service in the armies of the United States were promptly recognized and respected by the United States Government, according to Secretary Evarts in 1880. (For. Rel. 1881, 751.)

Secretary Seward refused in 1863 to ask for exemption of Americans in Germany from military service, because they ought rather to be fighting at home than raising embarrassments abroad. (For. Rel. 1863, II, p. 1021.)

In 1863 the United States had treaties of exemption from military service with Argentine, Costa Rica, Mexico, Paraguay, Venezuela, and Switzerland, and in 1864 with Honduras and Haiti. The situation, therefore, at that time, was theoretically the same as the present situation, because the Draft Act of 1863 was the same as the present Act, there were treaties of military exemption, and, I am told, the quotas for the draft were made up in the same way as at present. In a practical way, however, the situation was different, in that in 1863 the foreign population most affected by the draft was composed of British and German subjects, whose countries had no treaties of

exemption,

exemption, and who were not associated with the United States in the war; whereas since that time the alien population has been increased by large numbers of Italians, who may claim exemption under treaty, Austro-Hungarians, who are under suspiciton as allies of Germany, and unnaturalized Scandinavians who are likely to claim exemption on the ground of alienage. Eliminating all of these from the draft would make the quota fall heavily on Americans.

Historical Attitude of the United States Toward Drafting of Aliens.

In 1803 and 1804 Secretary of State Madison insisted that Americans in Santo Domingo and in Great Britain should be allowed to leave, in order to avoid compulsory military service. In the latter case Madison held that "Citizens or subjects of one country residing in another, though bound by their temporary allegiance in many common duties, can never be rightfully forced into the military service."

In 1813 Secretary of State Monroe, upon request of the French Minister, endeavored to have two Frenchmen released from military duty in the United States Army.

In 1862 Secretary Seward stated: "There is no principle more distinctly and clearly settled in the law of nations than the rule that resident aliens not naturalized are not liable to perform military service. We have uniformly claimed and insisted upon it in our intercourse with foreign nations. * * * * It is proper to state, however, that in every case where an alien has exercised suffrage in the United States, he is regarded as having forfeited allegiance to his native sovereign, and he is, in consequence of that act, like any citizen, liable to perform military service."

In 1862 Secretary Seward again stated that "No alien-born person is liable to render military service unless either he has become naturalized on his own application or has made his voluntary declaration on oath of his intention to become a citizen by naturalization according to law, or has claimed and actually exercised the political right of voting as a citizen of the United States."

In 1867

In 1867 Secretary Seward held that the treaty between the United States and Argentine exempting citizens from military service made the enrollment of two Americans during a rebellion in Argentine illegal.

In 1868 Secretary Seward said, in a hypothetical case, that the Government was not disposed to drew in question the "right of a nation in a case of extreme necessity to enroll in the military forces all persons who are within its territories, whether citizens or domiciled foreigners." Nevertheless, he said he would endeavor to obtain the release of an American citizen about to be drafted in Canada.

In 1869 Secretary Fish, in a hypothetical case, said: "This Government, though waiving the exercise of the right to require military service from all residents, has never surrendered that right, and can not object if other Governments insist upon it."

In 1873 Assistant Secretary Davis said: "During the late civil war in this country there were numerous instances where British subjects were drafted into the military service of the United States, but were subsequently discharged upon the application of the British minister here. The only cases in which a compliance with such an application was refused were the few in which persons of that nationality had voted in States where foreigners not fully naturalized are allowed that privilege."

In 1874, Secretary Fish, in a hypothetical case, authorized the American Minister in Guatemala to demand the discharge of an American citizen if he should be called into the military service of Guatemala, at least for any other purpose than to defend the town of which he may be a resident during a siege.

In 1880 Acting Secretary Hunter demanded the release of American citizens impressed into military service in a battalion of the Mexican Army, in contravention of international law and the Treaty of 1831. Later Secretary Evarts said there was not a single instance in which Mexicans claiming exemption from military service in the United States during the Civil War was not "promptly recognized and respected by this Government." Subsequently, Secretary Blaine placed the imprisonment of these men on a level with the imprisonment of seamen by Great Britain. The exemption treaty of 1831 with Mexico was not terminated until 1881.

In 1888 Secretary Bayard held, as to compulsory military service in Batavia, that

> "It is well settled by international law that foreigners temporarily resident in a country can not be compelled to enter into its permanent military service. It is true that in times of social disturbance or of invasion their services in police or home guards may be exacted, and that they may be required to take up arms to help in the defense of their place of residence against the invasion of savages, pirates, etc., as a means of warding off some great public calamity by which all would suffer indiscriminately. The test in each case, as to whether a foreigner can properly be enrolled against his will, is that of necessity. Unless social order and immunity from attack by uncivilized tribes can not be secured except through the enrollment of such a force, a nation has no right to call upon foreigners for assistance against their will."

In 1894 the American Ambassador in London reported in regard to military service in the South African Republic that

> "The question of the exemption of British subjects, resident in other countries, from compulsory military service, had been submitted to the law officers of the Crown, whose reply was to the effect that, by the general rule of law, such exemption was not held to exist, and that it was not claimed as a legal right by Great Britain, but that, by conventional agreement, based upon mutuality between governments, such an exemption could be established. And Lord Kimberley also said that by existing treaties between the South African Republic and Portugal, Belgium, France, Germany,

Germany, Italy, and Switzerland, severally, it is mutually stipulated that resident citizens of either and both of the respective contracting governments shall be exempted from compulsory military service."

It does not appear that any of the cases in which the United States Government expressed itself as above, involved American citizens who had either taken out their first papers abroad or exercised political privileges. It may be possible, therefore, to work out from the history of the matter, that the United States has distinguished between compulsory military service of declarants, voters, office-holders, etc., and non-declarants alien residents who had never exercised franchises of a political nature.

D. General Practice and Opinion as to Drafting of Aliens.

The practice of nations and the opinion of writers is divided in respect to compulsory military service of aliens. Some believe that compulsion should be limited to local militia or police duty in times of emergency, as from social disorder, invasion by savages, sieges of towns, etc., and not for national or political purposes. Others believe that the question is one of domicile, persons transiently resident being exempt, while those making the country their home or domicile are subject to military service, even compulsory military service, so long as they retain their domicile.

From the point of view of international right, it seems that the basis of a claim to draft aliens is that (1) In case of non-declarants they owe temporary allegiance while here and are in turn entitled to protection in their persons and property; and (2) In the case of declarants, in addition to owing temporary allegiance and enjoying protection, they have declared their intention to repudiate their primary allegiance (although they have not formally done so or formally taken allegiance to the United States) and that therefore their home country might be expected to take less interest in them. It is a question whether (1) is a sound basis for compulsory military service, inasmuch as the temporary allegiance is voluntary and transitory, and may be changed at will, even in time of war. Much of the same reasoning applies, technically, to (2), for declarants in law still owe primary allegiance to their home country; and, as a matter of fact, in the last five years there has been an evident tendency among nations to retain the allegiance of their subjects even after complete

naturalization abroad. Even earlier, many nations refused to concede that naturalization abroad exempted their nationals from military service should they return to their country of origin. This reservation is made in several naturalization treaties. On the other hand, morally, declarants have repudiated their home country and look to the United States as their guardian until they have been accorded the full rights of citizenship. By making their declaration of intention, they have publicly professed their desire for new political connections, and their intention to remain in the United States. It may be, therefore, that a fair compromise would be to insist that declarants are subject to compulsory military service if not exempted by treaty if they have exercised the right of suffrage or other political franchise, or if they remain in the United States after being given liberty to leave within a certain period. Such residence outside of the United States would in most cases vitiate the requirement of the law that declarants must reside in the United States five years before taking out their final papers, which must be taken out within seven years of the declaration of intention. This was the course more or less closely followed under the Draft Act of 1863. In respect to the citizens or subjects of the United States and its co-belligerents a different question is involved. It does seem that such persons ought not to be able to escape conscription by taking up residence in the country of a co-belligerent. By no theory of exemption based upon such residence should such persons escape the performance of their duty to their country.

E. Suggestions as to Possible Courses of Action in Respect to Drafting Aliens in the United States.

(A) Declarants having

(1) Treaties of Exemption from military service.

(a) Allied countries.

If the treaties with Italy, Japan, and Serbia are to be complied with, declarants of these nationalities ought not to be drafted. As, however, the subjects of Italy and Serbia particularly would thus escape military service in the present war, it is suggested that negotiations be instituted with a view to reach an agreement suspending the treaties during the war, and subjecting reciprocally the citizens or subjects of either country to military service under the flag of the country in which they reside, or, if they desire, under the flag of their country of origin.

(b) Allies of Germany — None.

(c) Neutral countries.

It is suggested that treaties of exemption with these countries (Argentina, Costa Rica, Honduras, Paraguay, Spain, Switzerland) many of which probably do not have a large number of persons in the United States, be upheld, and the citizens or subjects exempted from military service. The Spanish Ambassador has stated orally that his Government would not object to the drafting of declarant Spaniards on account of the treaty of exemption. Switzerland and Honduras will probably object.

(2) Declarants not having treaties of exemption.

(a) Allied countries. (Great Britain, France, Russia, Belgium, etc.)

It is suggested that negotiations be commenced with a view to reach a reciprocal agreement for the drafting of the citizens or subjects of these countries in the United States and of American citizens in those countries abroad.

(b) Allies of Germany. (Austria-Hungary, Turkey, Bulgaria.)

For obvious reasons, it is suggested that the citizens or subjects of these countries could not safely be incorporated in the American Army. If, however, it should be decided to draft certain nationalities, such as the Poles and others, who

owe nominal allegiance to the Central Powers, but who would desire to fight against Germany, there would be difficulty in distinguishing the loyal from the disloyal applicants. It might be possible, perhaps, to draft persons of this class, and discharge the disloyal ones. Austria-Hungary has already protested against the drafting of her subjects.

(c) Neutral countries. (Norway, Sweden, Denmark, Holland, Mexico, etc.)

It is suggested that citizens or subjects of neutral countries who have taken out their first papers should be drafted if they have exercised the right of suffrage or other political franchise, or if they elect to remain in the United States after a certain period notified to them within which they must depart.

(B) Non-declarants (not subject to Draft Act, 1917) having

(1) Treaties of exemption from military service.

The Draft Act does not cover this class of persons, but several bills have been introduced in Congress for military service of non-declarants.

(a) Allied countries. (Italy, Japan, Serbia.)

Similar treatment as suggested under (1) (a) above.

(b) Allies of Germany --- None.

(c) Neutral countries. (Argentina, Costa Rica, Honduras, Paraguay, Spain, and Switzerland.)

Same treatment as suggested under (1) (c) above.

(2) No treaties of exemption from military service.

(a) Allied countries. (Great Britain, France, Russia, Belgium, etc.)

Same treatment as suggested under (2) (a) above.

(b) Allies of Germany (Austria-Hungary, Turkey, Bulgaria.)

Same treatment as suggested under (2) (b) above.

(c) Neutral countries. (Norway, Sweden, Denmark, Holland, Mexico, etc.)

It is suggested that citizens or subjects of these countries should be drafted if they have exercised the right of suffrage, held office, etc.

It will be observed from the foregoing that the suggested solution (1) takes care of declarants and non-declarants of the Allies by the negotiation of treaties; (2) allows the exemption of declarants and non-declarants of allies of Germany because of their doubtful loyalty or difficulty of ascertaining their loyalty; (3) allows the exemption of declarants and non-declarants of neutrals having treaties of exemption because they would probably be few in number; (4) allows the drafting of declarants of neutral countries not having treaties of exemption (Scandinavia, Holland, Mexico, etc.) who have voted, etc., or remain in the United States after a certain period, and allows the drafting of non-declarants of such countries who have voted, held office, etc. There would remain in the United States, however, a large number of non-declarant neutral aliens who would go scot free. The exact proportion of these to the remaining population, however, I have no figures to show. If the Government should insist on drafting these persons or causing them to leave the United States, possibly large numbers would prefer to take out their first papers and place themselves subject to the draft and in a measure outside the control of their home government's claims of exemption on the ground of alienage.

The attached tables showing the number of aliens available for the national army, classified under allies of the United States, neutrals, and allies of Germany, have just been received from the Provost Marshal General's Office, where they were prepared from the Thirteenth Census data.