

# ALIENS AND THE DRAFT

## I.

The diplomatic history of the United States as a belligerent in the Great War presents on the whole a remarkable record of generous and disinterested action, rightfully entitling this country to the elevated moral position it now occupies among the states of the world.

Yet the record contains a chapter of continuing controversy, of which little has been heard, which is strangely out of harmony with this country's otherwise steadfast adherence to high moral principle.

It involves the enforced service of thousands of aliens in the army of the United States.

In the administration of the Selective Service law, of May 18, 1917, more than two hundred thousand aliens were taken into the army, and at the date of the signing of the armistice, November 11, 1918, approximately forty thousand complaints, protests and requests for exemption or discharge had been filed with the Department of State by the diplomatic representatives of their respective countries.

The germ of the problem lay in the Selective Service law itself, wherein liability to military service was made to attach to certain large categories of aliens, in clear violation of the principles of international law and comity. The controversy was provoked and rendered acute, however, through the severity of the administration of the law by the War Department, and to consequent inductions of aliens into the Military Service, regardless of international obligation. It was no wonder the Germans seized upon this as the basis for propaganda in neutral countries, asserting that the United States was conscripting all aliens, in spite of their sympathies and rights.

The position of the United States in the past with reference to cases in which its domestic laws is in conflict with international obligations is clear and consistent. As an indication of what it had been we may advert to the Cutting case, in which Secretary Bayard wrote on November 1, 1887:

"If a government could set up its own municipal law as the final tests of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford no protection either to states or individuals. It has been constantly maintained and also admitted by the government of the

United States that a government cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties."<sup>1</sup>

The rights and duties of resident aliens have become recognized, and with reasonable definiteness, under the laws of nations, only within the last century. As Fiore says:

"The foreigner is no longer an enemy as he was in antiquity, a serf as he was in the middle ages, nor an 'aubain' as he was in the eighteenth century; he is a guest to whom all civil rights are conceded, and who is welcomed as a friend."

Territorial sovereignty, of course, implies the right of a state to exclude certain aliens, or, after admission, to expel them for cause; but so long as residence is permitted the alien is not only entitled to the benefit of the same laws, the same administration and the same redress for injury which the state gives to its own citizens, but this protection must conform to a certain civilized standard.<sup>2</sup>

Although the alien is thus conceded civil rights, he does not enjoy political rights, for the reason that he possesses political rights in and owes political duties to the society whence he came. The performance of military service involves the exercise of political duty of a very high order, and since political rights and duties constitute a reciprocal relation, liability to military service logically attaches to citizens only. It is they who are principally concerned with the defense and preservation of their society.

The alien, says Oppenheim,<sup>3</sup> is not under the personal supremacy of the state of residence, but is merely under its territorial supremacy; and although the state of his residence may accept his proffered services in its army, and may call upon him to assist in the preservation of the local peace, it cannot exact compulsory service of him in a civil or foreign war. This statement summarizes the universally accepted opinion of the relation of aliens to military service.<sup>4</sup> And to the clarification of the subject the United States has contributed largely during two controversies which form historic chapters in our diplomatic annals.

At a very early period in our existence as an independent state, Great Britain assumed to force American citizens into her navy. Many of the persons thus impressed were former British subjects

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1. For. Rel., 1887, 751, 753.

2. Proceedings A. S. F. L., 1910, IV, 20.

3. 1 Oppenheim, sec. 317.

4. Bluntschli, Art. 391; Bonfils, No. 445; Hall (5th ed.), 207-209; 1 Halleck, 419-420; Lawrence, sec. 117; 4 Moore, sec. 548; 1 Westlake, 211-212; 2 Wharton, sec. 202.

who had been naturalized in the United States, whom Great Britain continued to regard as her subjects under her feudal doctrine of indelible allegiance,—*nemo potest exuere patriam*. The ground then taken by the United States and maintained through eventful years of controversy, is summed up in the following excerpts from Madison's instructions, as Secretary of State, to James Monroe, Minister to England, January 5, 1804:

"Citizens or subjects of one country residing in another, though bound by their temporary allegiance to many common duties, can never be rightfully forced into military service, nor be restrained from leaving their residence when they please."<sup>5</sup>

And in 1803, Madison had written to M. Pichon, the French chargé, saying:

"The most inviolable and most obvious right of an alien resident is that of withdrawing himself from a limited and transitory allegiance, having no other foundation than his voluntary residence itself."<sup>6</sup>

The impressment of our citizens into British naval service was one of the causes contributing to the outbreak of the war of 1812, but, like all of the causes involved in that conflict, it was left unsettled. It was gratifying to note as time went on, however, that the American position, relative to the rights of aliens, was gaining ground. Thus in 1846 France and England, in espousing the cause of their nationals, who had been compelled to serve in the army of the Argentine Confederation, went to the extent of blockading the port of Buenos Aires.<sup>7</sup>

The relation of aliens to military service arose again in diplomatic form with the opening of our Civil War, when foreign states, with complete unanimity, advanced our former arguments against us in behalf of their respective nations who found themselves involuntarily in the military forces. In some of the states of the Union, then as now, state citizenship, as distinguished from United States citizenship, was conferred upon aliens without the requirement of complete naturalization; and such aliens acquired certain political privileges in the states. And in the organization of state military forces these aliens were held equally with citizens to be liable to service.

As early as 1861 the British government admonished the United States government that if enforced enlistments of British subjects

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5. For. Rel., III, 81, 87.

6. 4 Moore, 52.

7. Fiore, *Nouveau droit int pub. sec.*, 647.

were persisted in Her Majesty's government would be compelled to concert with other neutral states for the protection of their respective subjects.<sup>8</sup>

On March 3, 1863, the Conscription Act was approved, subjecting to liability to military service, equally with citizens, "all male persons of foreign birth, who shall have declared on oath their intentions to become citizens."

Secretary Seward, who was required to meet the diplomatic problems growing out of the situation, appears at the outset to have taken the view that, as political rights and duties are reciprocal, only those aliens ought properly to be liable to military service who had either voted or held office.<sup>9</sup> Thus he wrote to Governor Morton of Indiana, on September 5, 1862:

"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. While the state of Indiana holds that an alien becomes a citizen by one year's residence and declaration to become a citizen of the United States, the law of Great Britain holds that a native British subject owes allegiance to the British government until he has completely effected his naturalization in the United States and under the laws of Congress. \* \* \*

"On examining the records of the Department it was found that from the foundation of the government, the Department has refused to grant passports as citizens to aliens who had merely filed the preliminary declaration of intention, and who had not effected their naturalization under the United States laws; and had informally recognized the passports granted to them by the proper authorities of the governments of which they had been subjects. It was deemed wise and prudent to adhere to this course, insomuch as it seemed to be not only equal and just, but also entirely in conformity with the laws of Congress.

"The conjuncture of a Civil War, moreover, was thought an unfavorable one for a departure from the settled practice of the government in its intercourse with foreign countries, with all the hazards of conflict. 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 his allegiance to his native sovereign, and he is,

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8. 2 Halleck, 365.

9. 58 MS. Dom. Let., 169.

in consequence of that act, like any citizen, liable to perform military service. It is understood, moreover, that foreign governments acquiesce in this construction of the law. It is hoped that under this construction your militia force will not be sensibly reduced."<sup>10</sup>

After the passage of the Conscription Act, Secretary Seward attempted to uphold the right of the United States to require military service of declarant aliens, as the law provided, but foreign governments, whose nationals were affected, insisted that a declaration of intention did not have the result of changing the alien's former allegiance or of modifying the right of his native state to protect him. The British government, particularly, adverting to the early views of the United States, suggested that declarant aliens should be allowed a reasonable time within which to elect to depart from the country or to continue to reside therein with the annexed condition.

The matter was submitted to President Lincoln with the result that, although the law attached liability to declarants, he granted by proclamation a period of sixty-five days within which they might freely leave the United States, including those who had exercised political privileges; and foreign governments uniformly declined to interpose in behalf of their nationals who had failed to avail themselves of the opportunity.<sup>11</sup>

The general rule of law that aliens may not be compelled to perform military service has been fortified in a number of instances by treaties, stipulating not only for mutual exemption from liability to military service, but also for freedom from forced loans and the like. Thus, at the outbreak of the Civil War the citizens or subjects of Argentine, Costa Rica, Honduras, Paraguay, Persia and Switzerland were under treaty protection against compulsory military service in the United States. A typical provision is article 10 of the treaty of May 27, 1853, between the United States and the Argentine Confederation:

"The citizens of the United States residing in the Argentine Confederation and the citizens of the Argentine Confederation residing in the United States, shall be exempt from all compulsory military service whatsoever, whether by sea or by land, and from all forced loans, requisitions or military exactions."<sup>12</sup>

To those states, with which the United States was bound by treaty, there had been added at the time of our entrance into the

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10. 2 Wharton, sec. 202.

11. Parl. Pap., No. 337, 1863.

12. 1 Malloy, p. 23.

Great War, Belgium, Great Britain, Italy, Serbia, Spain and Japan, making twelve states in all, whose nationals—declarants and non-declarants—were protected by the solemnly pledged word of the United States.

## II.

In the enactment of the Selective Service Law, May 18, 1917, Congress apparently intended that the draft should be based upon liability to military service of all male citizens and male persons, not alien enemies, who had declared their intentions to become citizens; yet in providing for registration of all male persons between the ages of 21 and 30, both inclusive (on June 5, 1917) it declared that these registrants "shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided." As it was required of non-declarant aliens affirmatively to claim exemption, it appeared that liability to military service attached quite as fully to them as to citizens or declarants, where they failed to claim exemption under the stringent regulations issued for the administration of the law.

The law was wholly silent on our treaty obligations, no exceptions being made in the act or in the regulations with respect to nationals of the treaty countries previously enumerated. In fact, the act itself set out that "all laws and parts of laws in conflict with the provisions of this act are hereby suspended<sup>13</sup> during the period of the emergency," and it was distinctly held in at least one federal court that any treaty in conflict with the Selective Service Act had ceased to be operative, and could not be invoked to protect the subject of a treaty country.<sup>14</sup>

All declarant aliens, including those of treaty countries, were made equally liable with citizens to perform military service; and whether or not the declaration of intention had been filed more than seven years previously, and was therefore void for the purposes of completing naturalization, was held to make no difference.<sup>15</sup>

With respect to non-declarants the first set of regulations, issued by the War Department simultaneously with the passage of the act, provided for their exemption by the local boards, only, however, "upon a claim for exemption being made and filled by, or in respect of, any such person and substantiated in the opinion of the local

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13. S. S. L., May 18, 1917, Sec. 14.

14. *In re Dragutin Blazekovic*, U. S. Dist. Ct. E. Dist., Mich., So. Div.

15. *U. S. ex rel Omero Bartalini vs. Mitchell*, U. S. Dist. Ct., E. Dist. N. Y.

board." In the registration certificate (Form 1) the twelfth and last question was, "Do you claim exemption (state grounds if any)? But an affirmative answer could not be construed as a claim for exemption. The claim was required to be filed formally subsequently "on or before the seventh day after the mailing by the local board of the notice required to be given such person of his having been called for service."<sup>16</sup>

Through ignorance of the complex requirements of the Regulations and the fact that the burden was placed entirely upon the alien to prove his alienage to the satisfaction of his local board within a very limited time, thousands were certified for service and unwillingly inducted. The local boards possessed the authority to extend the time for filing claims for exemption upon good cause, and many used the authority in a spirit of commendable liberality, realizing that non-declarant aliens could not rightfully be compelled to enter the military service. Other local boards, however, held more or less rigidly to the Regulations and were inclined generally to construe a failure to file the claim within the prescribed time as forever concluding the registrant.

On November 8, 1917, revised Regulations were promulgated, instituting the Questionnaire system, and revoking all exemptions and discharges made prior to noon on December 15, 1917,<sup>17</sup> on which date reclassification was to begin. Thus all uninducted non-declarant aliens who had previously been exempted, as well as citizens and declarants, were required to renew their applications in connection with the Questionnaire (Form 1001). The questionnaire system was an improvement upon the previous method, particularly as it made provision for the institution of legal advisory boards to assist registrants, and as the questionnaire itself appeared to embody a form upon which the claim for exemption might be made.

In all other respects, however, the rigidity of the Regulations with respect to aliens not only remained unrelaxed, but in some instances instructions to local boards were made more severe. The questionnaire mailed out to all registrants, beginning December 15, 1917, was required to be returned, answered and sworn to, on or before the seventh day after mailing. Failure to comply with this provision rendered the registrant a delinquent, to be classified in Class 1. These delinquents—as well as those who became such by reason of failure to respond to other orders of the local board, such as orders to appear

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16. S. S. R., June 30, 1917, Sec. 18, f.

17. S. S. R., Nov. 8, 1917, Sec. 4.

for physical examination—were liable to arrest and prosecution, involving upon conviction a maximum penalty of one year's imprisonment. They were also liable to forfeiture of rights and to immediate induction into the military service, or they might receive an extension of time, according as the delinquency was "willful" or "non-willful."

The Regulations defined willful delinquency as a failure to obey an order of the local board "with an intent to evade military service"; but it was apparent from subsequent investigations made in cases where diplomatic requests for discharge were lodged, that many local boards had confused a perfectly proper desire on the part of a non-declarant alien to avail himself of the right of exemption, with an intent to evade service, and they adjudged delinquents accordingly.

With the mailing out of questionnaires, it was the common experience of local boards that a considerable percentage were returned by the post offices undelivered. Registrants were under the duty to advise their respective local boards of changes of address, but large numbers, particularly those of the migratory classes, had nevertheless moved to other parts leaving no information behind. These registrants, many of whom had been previously exempted, were picked up daily by the police and Department of Justice operatives in all parts of the country as delinquents and held pending telegraphic instructions from their local boards. They were later taken before the nearest local board, there to be heard upon the quality of the delinquency, unless an order for induction had been made by the local board originally having jurisdiction. In that event they were sent forthwith to camp.

Many of these alien delinquents, in whose behalf requests for discharge from military service were subsequently made, were reported, after investigation of their cases by the War Department, to have received "a full and fair hearing" and "to have voluntarily waived their rights." The facts, in a large number of cases, were that the delinquents, having rendered themselves liable to prosecution, agreed to submit to immediate induction with an express or implied assurance that they would thereby escape prosecution. The fact that a registrant had actually received no questionnaire or other order from his local board was held in the Regulations to constitute no excuse, nor was he any the less punishable.<sup>18</sup>

The important section of the questionnaire with respect to aliens was series VII, entitled Citizenship, containing eleven questions, which might be answered and sworn to by non-declarant aliens desiring to

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18. S. S. R., Nov. 8, 1917, Sec. 7, g.

claim exemption, when it would constitute a preliminary claim. The first question was:

"Are you a citizen of the United States?"

and the second,

"Do you claim exemption from military service because you are not a citizen?"

Unlike the previous Registration Certificate (Form 1) the questionnaire included the information that alienage was a ground upon which exemption might be claimed. If exemption were claimed in the specific Question 2, of Series VII, the registrant was required to answer the remaining nine questions, the last of which was:

"Are you willing to return to your native country and enter its military service?"

The reason for this question is not apparent, unless it was meant to have a psychological effect, although some local boards construed a negative answer to it as nullifying the effect of an affirmative answer to Question 2, and inducted the claimant.

Although the alien might formally claim exemption in his questionnaire on the ground of alienage, the local board was not only authorized but it was specifically "enjoined," under the Revised Regulations of the War Department, of November 8, 1917, "to scrutinize carefully any claim for exemption of a registrant on the ground of alienage, and, before classifying an alleged alien in Class V, to satisfy itself beyond a reasonable doubt that the registrant claiming such exemption is not a citizen of the United States and has not declared his intention to become a citizen."<sup>19</sup>

The alien had, therefore, little actual advantage in having included a claim for exemption, sworn to in his questionnaire, since he was required subsequently to satisfy his local board "beyond a reasonable doubt" that he was not a citizen or a declarant. The requirements of this provision could only be predicated upon an assumption that every claim of alienage was false and every claimant guilty of perjury, until he proved to the contrary. Local boards generally called for further information, requiring, in some instances, affidavits of the wife, if the claimant was married, of his friends, of his Consul, and information concerning the date of his immigration and port of entry, which they independently verified.

The instructions to local boards were amplified in the Regulations of September 16, 1918, wherein it was further directed that "in considering all of the evidence in the case the boards should give to

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19. S. S. R., Nov. 8, 1917, Sec. 101, Rule XXVII, Note.

the statement of the alien, sworn to in his questionnaire, or in accompanying affidavits, the same consideration they would, as jurors, give to the testimony of witnesses appearing before them"; and that where it clearly appeared that an alien waived his rights through ignorance, the local board should call him before it, explain his rights to him, and "decide whether or not he may withdraw his waiver."<sup>20</sup> It should be borne in mind that great numbers of the aliens had not the slightest knowledge of the English language.

The penal provisions of the Selective Service Law, extending also to a violation of the Regulations, are found in Section 6, of the Act, where all persons charged with any duty under the law or Regulation, who fail or neglect to perform such duty, "shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the 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."

Delinquency was a civil offense until the delinquent had been certified, as such, to the Adjutant General of the State, and until the Adjutant General had published or otherwise given notice to the delinquent to respond and a period of not less than ten days had elapsed; from that time forward the civil offense of delinquency became the military crime of desertion, the offender passing under military jurisdiction. Upon his apprehension the "deserter" was sent immediately to camp to be dealt with there in the discretion of the military authorities. Some sentences imposed in the camps involved imprisonment for a term as long as 20 years.

The penal provisions of the law, however, were very rarely invoked in the civil courts against delinquents, as local boards usually viewed induction as a proper and more practical form of punishment. Such prosecutions as did take place generally involved alleged conspiracies on the part of others than registrants to obstruct the draft

### III.

Diplomatic activity in behalf of aliens inducted into the army began in the summer months of 1917, and increased with the expansion of the army until it taxed the clerical facilities of the Department of State, which is charged with receiving and responding to diplomatic communications. Since diplomatic action was arising from the conduct of another department, namely, that of War, over which the

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20. S. S. R., Sept. 16, 1918, Sec. 79, Rule XII, Notes 4-5.

Department of State had no control, the matter of satisfying the complaining foreign governments became at once a serious one.

In the operation of the Conscription Act of 1863, General Orders Nos. 53 and 65 made it the duty of provost-marshals, when not satisfied that a claimant was entitled to exemption on the ground of alienage, to refer the case, with affidavits and evidence, through the provost-marshal-general, for the decision of the Department of State, meantime suspending action in the case.<sup>21</sup> Under these orders certain duties rested upon the subordinate authorities to protect the rights of aliens, and doubtful cases were properly referred to the department of the government which is charged with the duty of safeguarding our international rights and duties and of preserving good relations with other countries.

In the operation of the Selective Service Act and Regulations, however, the rights of aliens were not only left obscure, but questions involving these rights were confided to the decision of subordinate authorities, represented in the local boards. While very broad corrective powers inhered in the President as Commander in Chief, the Department of State was wholly without authority effectively to intervene to correct the action of another department of the government vitally affecting foreign relations.

Becoming increasingly conscious as time went on that there existed considerable foundation for the complaints of foreign governments and realizing the necessity for adequate authority in the Department of State to satisfy those governments in their rights, the Secretary, in the early spring of 1918, laid the whole matter before the President. The President thereupon communicated to the Secretary of War the following decisions, in the form of an order:

"1. That both declarants and non-declarants of treaty countries shall in all cases be promptly discharged upon the request of the accredited representative of the countries of which they are citizens.

"2. That non-declarants of non-treaty countries shall be promptly discharged upon the request of the Secretary of State, and also when the War Department is satisfied that a discharge should be granted in cases where a full and fair hearing has not been given by the local board."

The effect of these decisions was to recognize the continuing binding force of our treaty obligations, and to give the Secretary of State authority to restore the rights of aliens of treaty countries, and those of non-declarant aliens of non-treaty countries, who had been

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21. Mr. Seward to Mr. Stanton, Sept. 9, 1863, 61 MS. Dom. Let. 520.

involuntarily inducted into the service. The decision did not, however, extend to the so-called "exemption cases," wherein the alien had been improperly classified for service and was not yet inducted. The Department of State was still powerless to prevent such inductions, even with respect to the subjects of treaty countries. It not infrequently happened, therefore, that the expedient was adopted of requesting the War Department to induct an alien, in whose behalf exemption had been asked, in order that the Secretary of State might then invoke his authority to request the alien's discharge, and thereby meet the wishes of the diplomatic officer concerned.

#### IV.

The problem of alien in the army was attacked from another angle in the spring of 1918, through an amendment to the naturalization laws, which, among other things, made of non-declarants in the military or naval service an exceptional class, who might be admitted to citizenship without submitting to the delays of the normal procedure. Thus no preliminary declaration of intention was necessary in their case, no proof of residence was required, nor need they take the oath of allegiance in open court.

With the approval of this amendment on May 18, 1918, a campaign for citizens was undertaken in the various camps of the United States, the military authorities co-operating with representatives of the Naturalization Bureau. The provisions of the law were made known to all aliens and representatives from the respective naturalization districts were present and ready to transform them forthwith into citizens. Although the figures are not available, the campaign met with considerable success.

Yet another result was a variation in the character of complaint reaching the Department of State from diplomatic officers of foreign governments, and particularly, one to the effect that coercion was being practiced upon their nationals in the camps, to compel them to become citizens, and that those who refused the offer of immediate citizenship were discriminated against in their privileges and otherwise mistreated.

These complaints were promptly brought to the attention of the War Department, with a request in every case that a thorough investigation be made and that the findings be submitted to the Department of State. In no instance, however, did the findings of the War Department indicate that the military authorities were chargeable with any improper conduct or methods. The undoubted success in the

campaign had necessarily involved a certain amount of vigor in its prosecution; and it is not improbable that some of those foreigners who were known to have refused citizenship experienced more or less inconvenience and discomfort at the hands of the overwhelming number of their red-blooded citizen-associates in uniform.

Congress undertook some further legislation on the subject of declarant aliens of "countries neutral in the present war" in the appropriation act of July 9, 1918, giving to them the option of exemption or release from military service upon withdrawing the declaration of intention; the withdrawal of the declaration to operate, however, as a bar to naturalization at any future time. The declarant who availed himself of the privilege of the law, even though the subject of a treaty country and entitled to release, was rendered forever ineligible to become a citizen.

This law was construed at the outset as not applying to declarant aliens inducted before the date of the approval of the act, July 9, 1918, but in October, 1918, the Attorney-General held the law to be retroactive, and to apply to all inducted or uninducted neutral declarants. Facilities had meantime been instituted in the local boards and in the camps whereby the declarants might procure exemption or discharge, as the case might be, through subscribing to an oath and a surrender of the duplicate copy of the declaration of intention.

In view of the rights of declarants of treaty countries having been recognized in the President's order, with instructions to discharge them upon the request of the accredited diplomatic representative, there appeared to be some inconsistency in requiring of them a withdrawal of the declaration, in order to procure release, particularly since, in some states, it involved a loss of important privileges, among others, that to take title to real estate.

The United States was not legally at war with Bulgaria and Turkey, the allies of the Central Powers, although diplomatic relations had been severed with the latter country. The position of the nationals of these states in the United States was, therefore, anomalous. The War Department, however, classed them as neutrals in the administration of the Selective Service Law, and inducted thousands of them into the army, many of whom could not read or write the English language. No small percentage of the requests for discharge from military service, in fact, came from the Spanish Ambassador, in charge of Turkish interests in the United States, in behalf of Ottoman subjects.

The impropriety of compelling an alien to perform military service

against a state which is in alliance with his own, is at once apparent; it even appears to contravene the spirit, if not the letter, of the laws of civilized warfare.

With the signing of the Armistice an Executive order of November 11 suspended further inductions, thus eliminating that phase of the alien problem; and on November 14 a general order of the War Department gave to all neutral non-declarants in the camps of the United States the privilege of discharge upon application to their camp commanders. There remained to be dealt with only the cases of aliens who had been sent overseas, and nationals of co-belligerent states, with respect to whom no vigorous diplomatic action had been taken or was to be anticipated.

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