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In My View

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IN MY VIEW . . .

Who Makes War?

Sir,

This is in reference to the article in the Summer 1989 issue of the *Naval War College Review* by David L. Hall, "The Constitution and Presidential War Making against Libya."

The author neglects some early occasions when Congress, while not "declaring war," did authorize the President to use armed force. He quotes Secretary of War McHenry advising President Adams to resort to "qualified hostility" with France (p. 35) and leaves the impression that the President did so on his own authority. Actually, Congress, by act of 28 May 1798, permitted the President to employ the navy to capture armed French vessels operating along the coast with designs on American shipping. Then, on 9 July, Congress approved the capture of French armed vessels anywhere, by warships or privateers, which the President was authorized to commission.

Another early occasion involved problems with the Barbary states. President Jefferson, in his annual message of 8 December 1801, emphasized trouble with Tripoli and the inability to exploit naval superiority. "The legislature," he said, "will doubtless consider whether, by authorizing measures of offense also, they will place our forces on an equal footing with that of the adversaries." Six days later Representative Samuel Smith, brother of the Secretary of the Navy, offered a resolution to empower the President "by law, further and more effectually to protect the commerce of the United States against the Barbary Powers." Following considerable debate, the "Act for the protection of the commerce and seamen of the United States Against the Tripolitan Cruisers" became effective on 6 February 1802. The President now could use force to protect commerce, commission privateers, and allow the taking of prizes.

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Science: Antarctica's Most Visible Export

Sir,

With the probable review of the Antarctic Treaty a year away (1991), Professor Joyner's discussion (Autumn 1989 *Review*) of the potential for disruption of the nonmilitarization of the Antarctic is very timely. The outcome of this year's meetings on mineral resource issues indicates that there is a serious potential for economic resource matters in the Antarctic to become divisive in the next few years.

Professor Joyner's discussion of the nonmilitarization of the Antarctic might have been stronger had he taken greater note of the International Geophysical Year (1955-56) and the role of the Antarctic as a unique scientific laboratory. I think it may be argued that the international success of the IGY and the desire to continue an environment conducive to the valuable scientific research done in the Antarctic were important factors in the establishment of the treaty.

In any event, science is what the white continent has been about, and science continues to be its most visible export. Some might argue that scientific research is merely a public patina for geopolitics. However, if that were the case, the American research program there would be much smaller than it is.

One might also note that at the time the treaty was written, the Antarctic had not much strategic significance. Thus, it was not difficult for the treaty nations to forgo doing what they really had no immediate intention of doing—militarizing the continent. The needs of the scientific community for a condominium working environment were a natural basis for nonmilitarization.

In discussing the role of Article VII of the treaty, which provides for unannounced onsite inspections, Professor Joyner might have noted the half dozen or so times that such inspections have been done. The United States has conducted onsite inspections at research stations across and around the continent. (This writer was a member of three of those inspection teams.) The inspection clause is more than a good wish; it has been used to demonstrate the resolve of the United States to include verification in nonmilitarization agreements. The onsite inspections have shown that such activities can be conducted without undue interference with legitimate activities.

The significance of these onsite inspections lies in their impact on thinking and planning for more extensive arms limitation arrangements in Europe. In this sense, the thirty-year success of the Antarctic Treaty may extend well beyond its continental limits.

Frank C. Mahncke
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A Rich Literature for the Tapping

Sir,

Professor Brennan's article in the Autumn 1989 *Review* repeats many of the problems raised, and methodologies attempted, in teaching legal ethics (or Professional Responsibility, as it is now titled) in the law schools.

While once taught at Wake Forest as a one-semester-hour course in the first year of a three-year curriculum, Professional Responsibility was relegated to a third-year graduation requirement with precisely the same result Professor Brennan describes. Now it is available as a second or third-year course credited at two hours, with higher interest because of practical use in cliuic courses, i.e., those courses in which students are paired with practitioners in actual cases. Moreover, our students have become more interested in values and ethies because of media presenration such as *L.A. Law*, the Watergate scandals, and a grass-roots feeling, that I have perceived, that life is not value-free. Interest has also been heightened because of state and federal courts' and legislatures' adoption of rules punishing lawyers for filing frivolous claims or defenses to claims. While a single instance of deliberate or grossly negligent conduct usually does not trigger professional sanctions from a lawyer licensing agency, e.g., the State Bar, a pattern of such misbehavior will, and the offending counselor may have to pay stiff fines for each, not to mention the possibility of claims from clients. Finally, most states now impose the Multistate Professional Responsibility Examination as part of the bar examination process before admission to practice. Other states integrate ethics issues into the basic bar examination.

The current trend is the pervasive approach, pioneered by Vanderbilt University in the 1960s, in which ethics problems are dropped into traditional courses, e.g., discussion of ethical aspects of frivolous filings in a litigation class, or conflicts of interest in property transactions or family law courses. Most law schools cap this off with a second or third-year Professional Responsibility course as Wake Forest does.

We have found that the subject is better taught through emphasis on practical settings for what may be viewed as "theoretical" problems, even if these are only mentioned in the freestanding professional responsibility course. In my Civil Procedure course, dealing with litigation problems, adding ethics components makes an interesting spectrum, running from what the court or client will do to a lawyer as sanctions in the case, or in a malpractice suit, to what will happen to the lawyer in terms of licensure.

Much of the above is reflective of the Wake Forest University Law School experience, and other law schools have employed different curriculum methods. The point is that a rich literature in eithics education for legal professionals exists and might be tapped, not so much for the rules but for tbe concepts and methodologies, for education in ethics for the military.

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