

**MILITARY LAW**  
**REVIEW**  
**VOL. 42**

Articles

**EXCLUSIVE REMEDY PROVISION OF THE FEDERAL  
EMPLOYEES' COMPENSATION ACT—FACT OR FICTION?**

**THE SITUATION OF THE ARMED FORCES IN A  
CONSTITUTIONAL DEMOCRACY**

**MIRANDA AND THE MILITARY DEVELOPMENT OF A  
CONSTITUTIONAL RIGHT**

**LIABILITY TO PASSENGERS IN MILITARY AIRCRAFT**

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**HEADQUARTERS, DEPARTMENT OF THE ARMY OCTOBER 1968**



## PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

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 WASHINGTON, D.C., 1 October 1968

MILITARY LAW REVIEW—VOL. 42

Articles:

|  | Page |
|--|------|
| Exclusive Remedy Provision of the Federal<br>Employees' Compensation Act—Fact or<br>Fiction?<br>Major John R. Thornock ..... | 1    |
| The Situation of the Armed Forces in a<br>Constitutional Democracy<br>Professor Dr. Klaus Obermayer .....                    | 41   |
| <i>Miranda</i> and the Military Development of a<br>Constitutional Right<br>Major Donald W. Hansen .....                     | 55   |
| Liability to Passengers in Military Aircraft<br>Major Norman S. Wilson .....   | 101  |

## PAUL JOSEPH KILDAY

*Judge of the United States Court of Military Appeals  
1961-1968*

Paul Joseph Kilday was born in Sabinal, in Uvalde County, Texas, on 29 March 1900, the son of Patrick Kilday and Mary Tallant Kilday. He went to school in San Antonio, Texas, where he graduated from high school in 1918. Subsequently, he attended St. Mary's College in San Antonio. He received his LL.B. degree from Georgetown University, Washington, D.C., in 1922. Judge Kilday is survived by his widow and two daughters, Mary Catherine Kilday and Betty Ann Drogula, and two grandchildren.

From 1918 to 1921, Judge Kilday served as Clerk to the United States Civil Service in Washington, D. C. The following year he served as Clerk to the United States Shipping Board, Emergency Fleet Corporation, also in Washington. In 1922, Judge Kilday was admitted to the Texas Bar and entered private practice in his home city of San Antonio. He was appointed first assistant District Attorney for Bexar County, Texas, which includes San Antonio, in 1935, and served in that capacity from 1936 until 1938, when he was elected to Congress.

Judge Kilday represented the Twentieth Congressional District in Texas, in the House of Representatives, beginning with the 76th Congress in 1939, until the 87th Congress, in 1961. During that time he served on the House Armed Services Committee from 1946 until 1961, and also on the Joint Committee on Atomic Energy for over ten years. As a Congressman and a Chairman of various House Armed Service Subcommittees, Judge Kilday played a significant part in the drafting of the Uniform Code of Military Justice, the creation of an independent Air Force, and the sponsoring of continued pay raises for service members.

Judge Kilday resigned from Congress in 1961, when he was appointed by President Kennedy as a Judge of the United States Court of Military Appeals. He served in that capacity until his death on 12 October 1968.

In addition to being a member of the Texas Bar, Judge Kilday also belonged to the American, Texas, and San Antonio Bar Associations, as well as the Democratic Party and the Knights of Columbus.

It is with great sorrow and a keen sense of loss that the Judge Advocate General's Corps and the Armed Forces learned of Judge Kilday's death at the age of 68. A lifelong friend of the individual serviceman throughout his career as both a Congressman and a Judge, he will probably be best remembered for liberal interpretations of military law, equating the constitutional rights of service members with those of civilians.





## EXCLUSIVE REMEDY PROVISION OF THE FEDERAL EMPLOYEES' COMPENSATION ACT— FACT OR FICTION?\*

by Major John R. Thornock\*\*

*This article contains an examination of the exclusive remedy provision of 5 U.S.C. § 8116 (c) (1966), with emphasis on its application when one government employee is injured or killed by the tortious conduct of another; its relationship with the Government Drivers' Act, 28 U.S.C. § 2679 (1964), and similar legislation. The author discusses the liability of the United States by way of contribution or indemnity as a joint tort-feasor when compensation has been awarded a plaintiff.*

### I. INTRODUCTION

It is the aim of this article to probe the background of workmen's compensation and to analyze critically various principles, concepts and fallacies which have produced unintended and somewhat deleterious effects by the application of the exclusive remedy provisions of the Federal Employees' Compensation Act<sup>1</sup> and various provisions of the Federal Tort Claims Act.<sup>2</sup> Particular attention will be given the so-called "Government Drivers' Act"<sup>3</sup> and the liability of the United States for contribution or indemnity as a joint tort-feasor when F.E.C.A. compensation has been awarded a plaintiff-government employee. The problems herein arise first, when one government employee acting within the scope of his employment injures another government employee under circumstances making the injured employee eligible for

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\*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Sixteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup> 5 U.S.C. §§ 8101-50 (1966) [hereafter called F.E.C.A.].

<sup>2</sup> 28 U.S.C. §§ 1346(b), 2671-80 (1964) [hereafter called F.T.C.A.].

<sup>3</sup> 28 U.S.C. § 2679(b)-(e) (1964).

F.E.C.A. benefits; and second, the United States' liability by way of contribution as a joint tort-feasor when compensation has been awarded a plaintiff. The various combinations of injured parties and causes of injury considered will be:

1. Federal civilian employee tortiously injured by a member of the armed forces.

2. Federal civilian employee tortiously injured by another co-worker federal employee.

3. Federal civilian employee tortiously injured by another federal employee (co-employee) who does not qualify as a co-worker.<sup>1</sup> Throughout the article reference will be made to the exclusive remedy provisions of F.E.C.A. It should be noted that the Longshoremen's and Harbor Workers' Compensation Act<sup>2</sup> is made applicable to most employees of nonappropriated funds,<sup>3</sup> and that the exclusive remedy provision applicable to the nonappropriated fund employees is virtually identical to that of F.E.C.A.<sup>4</sup> Therefore, whenever the provisions of F.E.C.A. are considered, those discussions and conclusions are equally applicable to the nonappropriated fund employee.

## II. HISTORY OF WORKMEN'S COMPENSATION

### A. HISTORICAL BACKGROUND

The scope and magnitude of the changes brought by the industrial revolution have been and will continue to be analyzed by writers of nearly every bent. For the purposes of this article, suffice it to say that one of the sociological changes wrought by industrialized society was a greater awareness of the workingman's position in life and his basic rights vis-a-vis industry and society.

#### 1. *Industrial Disability Law.*

Contrary to popular belief, workmen's compensation had its beginnings in the tribal laws of Charlemagne's time and the Frankish Empire.<sup>5</sup> These earliest beginnings found new life in nineteenth century Germany under Bismarck. In 1884, after a progressive development, Germany adopted the first modern compensation system, some thirteen years before England; twenty-five years before the first United States jurisdiction; and fully

<sup>1</sup> The details of these categories will be discussed in part V *infra*.

<sup>2</sup> 38 U.S.C. §§ 901-50 (1964).

<sup>3</sup> 5 U.S.C. § 8172 (1966).

<sup>4</sup> 5 U.S.C. § 8173 (1966).

<sup>5</sup> See Small, *The General Structure of Law Applicable to Employee Injury and Death*, 16 VAND. L. REV. 1021 (1963).

## FEDERAL EMPLOYEES' COMPENSATION ACT

sixty-five years before Mississippi, the last American state to do so.<sup>9</sup> The German system was unique in that it featured contributions by the worker himself.<sup>10</sup> The English development took a similar, although somewhat later course. The common law proved incapable of adapting to the new industrial age requirements in this area. With common law tort principles bottomed on fault-liability concepts and the defenses of (a) fellow-servant, (b) assumption of risk, and (c) contributory negligence, the employer was virtually immune from the hazards of his enterprise and the worker was judicially stymied in his attempts to recoup for industrial injuries.<sup>11</sup> In 1897 the first English Workmen's Compensation Act was passed.<sup>12</sup> This Act was later expanded and liberalized.<sup>13</sup> This latter Act of 1906 deeply influenced the later American statutes.<sup>14</sup>

### 2. *Early American Attempts.*

The legislation of both Germany and England had profound effects on early American attempts in the field. Various jurisdictions patterned their first statutes after their European counterparts. With the modest, and somewhat unsuccessful, beginnings of Maryland in 1902,<sup>15</sup> the workmen's compensation bandwagon began to roll. Various state and federal statutes were passed in 1906<sup>16</sup> and 1908.<sup>17</sup> The bandwagon took on the aspects of a steam roller in 1909 and by the period 1911-1920, it had all the characteristics of an avalanche. During this period various study commissions were appointed and studies conducted in nearly all of the states.<sup>18</sup> By 1920 the Federal Government and all but eight of the states had adopted some type of compensation act, and on 1 January 1949, the last state, Mississippi, enacted its

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<sup>9</sup> 1 A. LARSON, WORKMAN'S COMPENSATION LAW, § 5.10 (1966) [hereafter cited as LARSON].

<sup>10</sup> *Id.*, at 34-35.

<sup>11</sup> S. RIESENFELD—R. MAXWELL, MODERN SOCIAL LEGISLATION 129 (1950) [hereafter cited as RIESENFELD-MAXWELL].

<sup>12</sup> 60 & 61 Vict. c. 37 (1897).

<sup>13</sup> 6 Edw. 7, c. 58 (1906).

<sup>14</sup> RIESENFELD-MAXWELL 130.

<sup>15</sup> 1 LARSON § 5.20, at 37. In 1904 the Maryland statute was declared unconstitutional for attempting to give the state insurance commissioner plenary power to make insurance fund payments to covered employees when death resulted from the negligence of a fellow servant or the employer. There were no provisions for jury trial or any appellate procedure. See *Franklin v. United Ry. R. & Elec. Co. of Baltimore*, 2 Bait. City Rpts. 309 (1904).

<sup>16</sup> Employers Liability Act, ch. 8073, 34 Stat. 232 (1906).

<sup>17</sup> Federal Compensation Act of 1908, ch. 236, 35 Stat. 556 (1908).

<sup>18</sup> 1 LARSON § 5.20, at 37-39; RIESENFELD-MAXWELL 132-36.

statute.<sup>19</sup> It was during this period of rapid development, in 1916, that the Federal Employees' Compensation Act was passed.<sup>20</sup>

### B. LEGAL BASIS

Common law trained attorneys often think of workmen's compensation as a branch of tort law.<sup>21</sup> Although workmen's compensation has a distinct relationship to tort, it is in reality a discipline all its own. It has been variously described by authorities as social insurance,<sup>22</sup> fundamentally tort in nature,<sup>23</sup> and a unique system of security for injured workers.<sup>24</sup> The latter description is most accurate. The American compensation system has forsaken most traces of tort in that it is not per se an adversary contest to right a wrong between contestants or to establish fault. Traditional fault concepts are inapplicable to recovery. On the other hand, the American system with its private character; the allocations of the cost to industry and a class of consumers; and compensation based on the individual's past earnings and present loss of earning capacity sharply contrast with purely public social insurance plans.<sup>25</sup> In analyzing the legal basis of workmen's compensation, it is important to remember that workmen's compensation sounds neither in tort nor social insurance, but is a unique branch of the law with some of the features of both, and that it is a creature of social policy and statutes. Judicial pronouncements and interpretations, whether upholding the constitutionality of compensation systems<sup>26</sup> or variously

<sup>19</sup> 1 LARSON § 5.30, at 39.

<sup>20</sup> 39 Stat. 742 (1916).

<sup>21</sup> 1 LARSON § 1.20, at 3.

<sup>22</sup> RIESENFELD-MAXWELL 139.

<sup>23</sup> F. HARPER, A TREATISE ON THE LAW OF TORTS § 207, at 415 (1933).

<sup>24</sup> 1 LARSON § 2.70, at 14.

<sup>25</sup> For a detailed discussion of the contrasting theories, see 1 LARSON § 1-3, at 2-21.

<sup>26</sup> The constitutionality of all types of compensation schemes is now firmly established. 1 LARSON § 5.20, at 38. See *Sheehan Co. v. Shuler*, 265 U. S. 371 (1924), upheld contributory fund as not contra to 14th Amendment due process; *New York Central R.R. v. White*, 243 U.S. 188 (1917), upheld New York compulsory system. Denial by state of trial by jury on compensation claims was not unconstitutional; *Hawkins v. Bleakley*, 243 U.S. 210 (1917), upheld Iowa elective system. Withdrawal of common law defenses of assumption of risk, contributory negligence, and fellow servant rule was not violative of due process as to employers who voluntarily rejected the system; *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917), upheld Washington obligatory monopolistic state fund system. The act did not violate constitutional rights of trial by jury and due process; and RIESENFELD-MAXWELL 160-61. However, some early acts were held unconstitutional by state courts on the ground that imposition of liability without fault on the employer was a taking of property without due process of law. See *Ives v. South Buffalo Ry.*, 201 N.Y. 271 (1911).

## FEDERAL EMPLOYEES' COMPENSATION ACT

discussing recovery, joinder of third party tort-feasors, or contribution and indemnity, must be analyzed carefully in light of the various compensation theories to discern the principles or precedents involved. The tenor of the treatment of the F.E.C.A. within this article should be viewed with these concepts in mind.

### C. HISTORY OF F.E.C.A.

As indicated above, the Federal Government was an active participant in the compensation arena of the early 1900's. An early forerunner of the 1916 F.E.C.A. was the Federal Compensation Act of 1908.<sup>27</sup> This Act, now known as the Federal Employers' Liability Act,<sup>28</sup> provides an insurance scheme for railroad employees. The Supreme Court early indicated the Act's purpose:

[The Federal Employers'] Compensation Act is the expression . . . on the part of the United States . . . to give compensation to its employees, who otherwise would be without remedy. . . .<sup>29</sup>

Since that early date citations concerning the scope of the Act are legion, but generally indicate that the Act's purpose is to provide a remedy to injured employees regardless of fault, within the generally accepted rules of workmen's compensation law.<sup>30</sup> Based on the constitutional principles enunciated in state workmen's compensation cases,<sup>31</sup> the Act's constitutionality has rarely been challenged, and when various provisions have been challenged on constitutional grounds they have been upheld.<sup>32</sup>

## III. LIABILITY OF THE UNITED STATES

### A. SOVEREIGN IMMUNITY AND CONSENT<sup>33</sup>

A host of scholars have directed themselves to the origins of sovereign immunity. The precise source is veiled in the shadows of antiquity. Although the subject is open to debate, it has been suggested that the doctrine of exemption of governments from

<sup>27</sup> 35 Stat. 556 (1908).

<sup>28</sup> 45 U.S.C. §§ 51-60 (1964).

<sup>29</sup> *Dahn v. Davis*, 258 U.S. 421, 431 (1922). At this early date Congress had not consented to sovereign liability for torts. So the Supreme Court used the language "when injured by fault of the government. . . ." The statute (39 Stat. 742 (1916), as amended, 5 U.S.C. §§ 8101-50 (1966)) makes no mention of fault. This is a good example of the early infusion of tort concepts into the compensation field. It will later be seen that the Court's use of the term, "be without remedy," with respect to exclusive remedy provisions of F.E.C.A. is an over statement when the employee attempts recovery for a tortious injury by another federal employee.

<sup>30</sup> See *id.* *United States v. Browning*, 359 F.2d 937 (10th Cir. 1966); *Allman v. Hanley*, 302 F.2d 559 (5th Cir. 1962); and *Busey v. Washington*, 225 F. Supp. 416 (D.C.C. 1964).

<sup>31</sup> See note 26 *supra*.

<sup>32</sup> *E.g.*, *Hancock v. Mitchell*, 231 F.2d 652 (3d Cir. 1956).

<sup>33</sup> For an excellent treatment of the concept for sovereign immunity see *R. WATKINS, THE STATE AS A PARTY LITIGANT* (1927).

legal responsibility may be traced to Roman law.<sup>54</sup> The doctrine, often described as "the king can do no wrong", was well established in England before the American Revolution. The principle was accepted almost without question by the constitutional framers when the Constitution was adopted. And later, destroying the holding of *Chisholm v. Georgia*,<sup>55</sup> the Eleventh Amendment incorporated the doctrine as to the several states. Historically, after the Eleventh Amendment the doctrine has not been challenged. Rather it has been accepted and perforce justified on various theoretical bases, but perhaps its most realistic and persuasive justification was given by Justice Holmes in *Kanawanaoka v. Polybank*.<sup>56</sup>

Some doubts have been expressed as to the source of immunity of a sovereign power from suit without its own permission, but the answer has been public property ever since before the days of Hobbes. . . . A Sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.<sup>57</sup>

The important caveat to sovereign immunity in its historical development has been that the United States cannot be sued *without its consent*.<sup>58</sup> In keeping with Holmes' view it would appear, then, that the frequent use of the term "waiver of sovereign immunity" by writers and practicing attorneys is imprecise, and that "consent" or "permission" better theoretically connotes the concept. In this context neither the right to bring suit successfully against the sovereign nor sovereign liability exist a priori, and it is only after consent or permission is given by the sovereign to liability *and suit* that any such action can properly be heard. This brings us then to various expressions of sovereign consent to tort liability and suit.

#### B. STATUTORY PROVISIONS

It is not suggested that the statutory provisions considered herein are exhaustive as examples of sovereign consent. The examples cited are those best suited for the scope of this article. The legal dilemma that results from application of the various statutes considered is merely illustrative of the problems extant whenever sovereign consent principles are applicable.

<sup>54</sup> F. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW 149, 169 (1893).

<sup>55</sup> 2 U.S. (2 Dall.) 418 (1793).

<sup>56</sup> 205 U.S. 349 (1907).

<sup>57</sup> *Id.* at 353.

<sup>58</sup> See *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824).

## FEDERAL EMPLOYEES' COMPENSATION ACT

### 1. *Federal Tort Claims Act.*

The Federal Tort Claims Act<sup>39</sup> provides sovereign consent to liability in tort and provides the procedure for effecting recovery in federal courts. Essentially this Act makes the United States liable under the local law of the place where the tort occurs for the negligent or wrongful acts or omissions of federal employees within the scope of their employment, "in the same manner and to the same extent as a private individual under like circumstances."<sup>40</sup> The body of law and the volume of litigation which this Act has engendered are encyclopedic. For present purposes suffice it to say that the consent is a liberal one.

Furthermore, Congress has extended a broad federal umbrella of protection as the *exclusive* remedy against tortious conduct of federal drivers<sup>41</sup> and Veterans Administration doctors.<sup>42</sup> However, these statutory provisions do not affect the sovereign's consent to liability or suit. The sovereign's liability, if any exists, is exactly the same as before. These provisions merely limit a prospective claimant's remedy. If the claimant is tortiously injured by a federal employee, either a covered driver or doctor, in the scope of his employment, these statutes say in effect the employee is immune from personal liability.<sup>43</sup>

The Federal Government has, *as a benefit of employment*, caused itself to be substituted as a party defendant under the F.T.C.A. This procedural act on the part of the sovereign does not add to or change the consent previously given, nor as indicated above, does it alter any federal liability. This, then, leaves unsolved the question of the employee's liability for a

<sup>39</sup> 28 U.S.C. §§ 1346 (b), 2671-80 (1964).

<sup>40</sup> 28 U.S.C. § 2674 (1964). See 28 U.S.C. § 1346 (b) (1964).

<sup>41</sup> 28 U.S.C. § 2679 (1964).

<sup>42</sup> 38 U.S.C. § 4116 (1966).

<sup>43</sup> See 28 U.S.C. § 2679 (1964), which provides:

"(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

"(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

"(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General,

## 42 MILITARY LAW REVIEW

common law tort in a state court. This problem will be discussed in part V.C.

all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

"(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

"(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 and with the same effect." See also 38 U.S.C. § 4116 (1966), which provides:

"(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death allegedly arising from malpractice or negligence of a physician, dentist, nurse, pharmacist, or paramedical (for example, medical and dental technicians, nursing assistants, and therapists) or other supporting personnel in furnishing medical care or treatment while in the exercise of his duties in or for the Department of Medicine and Surgery shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or his estate) whose act or omission gave rise to such claim.

"(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or his estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Administrator to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Administrator.

"(c) Upon a certification by the Attorney General that the defendant was acting in the scope of his employment in or for the Department of Medicine and Surgery at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merit that the case so removed is one in which a remedy by suit within the meaning of sub-



## FEDERAL EMPLOYEES' COMPENSATION ACT

### 2: Federal Workmen's Compensation.

As earlier indicated, the Federal Government has been in the workmen's compensation business for some time. The various statutory enactments generally provide a scheme of compensation for various injuries and disabilities caused by or incident to federal employment. Like most modern workmen's compensation acts, the federal statutes provide for an employer's liability to contribute these employment benefits without regard to fault. The federal legislation requiring workmen's compensation benefits to be extended to certain categories of non-federal employees (e.g., longshoremen) is unaffected by considerations of sovereign immunity. This distinction is helpful in analyzing the proper application of F.E.C.A. to federal employees, because a different question is posed with regard to the Federal Government as an employer. Are the statutes a consent to liability in the tort sense, or are they positive legislation conferring employment benefits on employees and certain generally accepted corresponding employer obligations and duties? Careful analysis indicates the latter. First, let us briefly look at pertinent statutory provisions.

#### a. Longshoremen's and Harbor Workers' Compensation Act.<sup>44</sup>

This Act is a classic workmen's compensation statute of particular relevance to the military. Although it generally applies to private employers, in 1952, it was made the workmen's compensation act for all nonappropriated fund employees within the United States.<sup>45</sup> It provides in pertinent part that "[e]very employer shall be liable for and shall secure the payment to his employees of [the benefits of the Act].<sup>46</sup> Section 904(b) further provides that "[c]ompensation shall be payable *irrespective of fault* as a cause for injury."<sup>47</sup> The benefits may be secured in one of two ways, either by meeting certain qualifications to be a self-insurer or by purchasing commercial insurance.<sup>48</sup>

The exclusive remedy section of this Act, in addition to detailing the exclusiveness of the remedy as to the employee and the exclusiveness of the liability of the employer, provides that if

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section (a) of this section is not available against the United States, the case shall be remanded to the State court.

"(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect."

<sup>44</sup> 33 U.S.C. §§ 901-50 (1964).

<sup>45</sup> 66 Stat. 139 (1952), as amended, 5 U.S.C. § 8171 (1966).

<sup>46</sup> 38 U.S.C. § 904 (1964) (emphasis added).

<sup>47</sup> *Id.*

<sup>48</sup> 33 U.S.C. § 982 (1964).

the employer fails to secure the payment of compensation as provided in the Act, he may be liable to a common law suit and in such instance the defendant-employer may not plead negligence of fellow servant, assumption of risk nor contributory negligence doctrines as defenses.<sup>49</sup> The wrong in such instances can logically be argued to be the failure to secure payment of compensation and not a tortious act per se. These provisions strongly indicate that this statute is a system that should be viewed apart from traditional tort concepts, as it initially eliminates the general requirement for fault. It further provides for suit only if payments are not secured by the employer, and then eliminates the traditional tort defenses. Although it is easily argued and is maintained by traditionalists that such a separate theory is not the case, a careful analysis of current practice, historical foundations, and sovereign consent theories strongly support such a postulate.

b. *Federal Employees' Compensation Act.*<sup>50</sup> F.E.C.A. provides, in pertinent part, that: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty . . ." <sup>51</sup>

Many other sections of the Act talk in terms of "The United States shall," but with the exception of the exclusive remedy provision,<sup>52</sup> the sections do not talk in terms of liability or tort but rather speak in terms of benefits, services, compensation, disability and rehabilitation.<sup>53</sup> The language of the statute clearly imports a system of compensation rather than one of tort liability and fault. In short, it is a positive enactment of social benefits generally categorized as workmen's compensation for federal employees. Courts have indicated that the purpose of F.E.C.A. is to provide a "broad and comprehensive plan for compensation of injured government employees," <sup>54</sup> that the language of the Act is unambiguous and concise, and that its words therefore must be

<sup>49</sup> 33 U.S.C. § 905 (1964).

<sup>50</sup> 5 U.S.C. §§ 8101-50 (1966).

<sup>51</sup> 5 U.S.C. § 8102(a) (1966) (emphasis added).

<sup>52</sup> 5 U.S.C. § 8116(c) (1966).

<sup>53</sup> E.g., 5 U.S.C. §§ 8102-13 (1966).

<sup>54</sup> *Snapp v. Civil Service Commissioners*, 137 F. Supp. 679 (S.D. Ohio 1955); *United States v. Browning*, 359 F. 2d 937 (10th Cir. 1966). In *Browning*, although the court was speaking of the interaction of the F.T.C.A. and the F.E.C.A., the principle of a compensation plan was stressed. It was not referred to in terms of tort.

## FEDERAL EMPLOYEES' COMPENSATION ACT

given their "common sense" application.<sup>35</sup> When looking at the provisions of the exclusive remedy provision<sup>36</sup> itself, we find that the basic section is entitled "Limitations on right to receive compensation" and that except for subsection (c), section 8116 speaks in terms of benefits and compensation. The language of the Act is "unambiguous and concise" and the "common sense" application of these words compels the conclusion that a workmen's compensation system of benefits has been created by Congress. The system provides compensation without regard to fault as an employment benefit and not one of tort judgment. Further weight is given this conclusion by the fact that section 8116(a) substitutes payments under the Act for any salary the injured employee might otherwise receive, except for services actually performed. This provision clearly connotes that in addition to compensation for injury, it is a substitute for salary. Although loss of wages may be a partial measure of tort damages, it, in and of itself, is not a tort liability concept.

Thus we see in both the major federal workmen's compensation acts the statutes provide a system of benefits incident to employment which are generally considered part of the overall system of "job security" and "conditions of employment" used by enlightened employers. These laws are generally viewed as substitutes for suits and tort damages. The legislative history and the plain language of the statutes support this conclusion.<sup>37</sup> Although accepted originally as a substitute for tort remedies, workmen's compensation is now expanded to a separate concept

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<sup>35</sup> *United States v. Hayes*, 254 F. Supp. 849 (W.D. Ky. 1966). Here the court was referring to section 8132 of the Act (formerly section 777); however, its reasoning and conclusion are equally applicable to all sections of the Act.

<sup>36</sup> 5 U.S.C. §§ 8116 (1966).

<sup>37</sup> See *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 n.5 (1963). The Senate Report explained the addition of the exclusive remedy provision as follows:

"Section 7 of the act would be amended by designating the present language as subsection '(a)' and by adding a new subsection '(b)'. The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.

not a part of tort. In short, the substitute has become a full-fledged player in its own right. The attempted use of tort principles and concepts mistakenly injected by lawyers and the courts frequently confuses in an attempt to enlighten. The confusion comes, perhaps not so much from a lack of knowledge of operative legal principles, but from imprecise thinking. It is axiomatic that situations which give rise to benefit claims under workmen's compensation, on exactly the same facts, not infrequently form the basis of a tort at common law. Today it is elementary that a given fact situation, say, an assault and battery or an automobile accident, can give rise to a tort claim; in all likelihood violate a criminal statute, and in turn involve applications of insurance and contract law as well. Perhaps at an earlier time in our law's evolution such a statement could not be made. Today it is unquestioned, and all lawyers distinguish the different operative rules, principles and concepts involved in such a situation. It is suggested that similar thought processes and analysis should be recognized and applied in federal workmen's compensation situations, so that we speak in terms of consequences of operative facts and not stereotyped tort principles.<sup>58</sup>

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"Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act and the like, authorize in general terms the bringing of civil actions for damages against the United States. The inadequacy of the benefits under the Employees' Compensation Act has tended to cause *Federal employees* to seek relief under these general statutes. Similarly, corporate instrumentalities created by the Congress among their powers are authorized to sue and be sued, and this, in turn, has resulted in filing of suits *by employees* against such instrumentalities based upon accidents in employments.

"This situation has been of considerable concern to all Government agencies and especially to the corporate instrumentalities. Since the proposed remedy would afford *employees and their dependents* a planned and substantial protection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both *the beneficiaries involved* and the Government. S REP No. 836, 81st Cong, 1st Sess. 23." (Emphasis supplied by Court.)

<sup>58</sup> Although the main discussion concerning liability herein centers on tort, it is recognized that the term includes any legal obligation and that the doctrine of sovereign immunity extends to any situation to which sovereign consent to liability and suit has not been given. See *Kanawanakoa v. Polybank*, 205 U.S. 349 (1907).

## FEDERAL EMPLOYEES' COMPENSATION ACT

### IV. LEGAL EFFECT OF EXCLUSIVE REMEDY PROVISION OF F.E.C.A.

Considerations of the consequences of legislation as broad in scope as F.E.C.A. require detailed analysis and comparison with other legislation and legal principles. In the analysis of section 8116(c) it first must be determined against whom does the section apply.

#### A. EXCLUSIVE AGAINST WHOM

F.E.C.A. provides:

The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.<sup>60</sup>

The provisions of the Act are quite clear. The courts have consistently held that as against the United States persons for whom the Government has provided an administrative compensation remedy are precluded from seeking recovery under the F.T.C.A.<sup>60</sup>

The generally accepted view of exclusive remedy provisions of workmen's compensation statutes is that such provisions are construed to apply only to actions against the employer, and that they do not prevent an injured employee from maintaining a common law action against third parties.<sup>61</sup> *Allman v. Hanley*<sup>62</sup> upholds this principle as applicable to F.E.C.A. This case involved a damage suit by a civilian employee of the United States against medical officers of the United States Air Force and a civilian doctor employed by the Air Force, for injuries sustained as a result of negligent surgery. Allman first brought suit in a state court. The action was removed to federal district court under

<sup>60</sup> 5 U.S.C. § 8116(c) (1966).

<sup>61</sup> *United States v. Demko*, 385 U.S. 149 (1966); *Patterson v. United States*, 359 U.S. 459 (1959); *Johansen v. United States*, 343 U.S. 427 (1952). See also cases cited in *United States v. Demko*, 385 U.S. 151 n. 4 (1966).

<sup>62</sup> See 101 C.J.S., WORKMEN'S COMPENSATION § 983 (1958); 2 LARSON §§ 65-66; and 1 W. SCHNEIDER, WORKMEN'S COMPENSATION § 90, at 229-30 (1941), and cases cited therein.

<sup>63</sup> 302 F.2d 559 (5th Cir. 1962).

the provisions of 28 U.S.C. § 1442 (a). The district court sustained the defendant's motion for summary judgment based upon the exclusive remedy provision of F.E.C.A.<sup>65</sup> On appeal, the court was careful to point out that:

In any examination of statutory provisions for remedies certain basic inquiries should be kept in mind. Against whom is the remedy exclusive? The employer? A third party? A fellow employee?<sup>66</sup>

The court went on to observe that by explicit language F.E.C.A. limits the employee's remedy against the United States to that statute, and that cases construing similar provisions of state statutes support the proposition that in the absence of specific statutory authority, compensation statutes are not construed to abrogate common law rights of employees to maintain tort actions against fellow employees. The court specifically held that:

[S]ince the Act itself recognizes the right of an employee to recover from "some person other than the United States" and a negligent co-employee is such a person in the absence of a specific provision to the contrary, it therefore follows that *the Federal Employees' Compensation Act does not abrogate the common law right of an employee to sue a negligent fellow employee.*<sup>67</sup>

The court also cited with approval the proposition that construction of workmen's compensation acts in derogation of common law rights of employees should be avoided whenever possible.<sup>68</sup> Further analysis of *Allman* reveals no language which would permit the conclusion that a third party tort-feasor is necessarily liable, for he may have been given the benefit of some separate substantive rule of immunity. Most courts' language concerning this question is usually carefully chosen to reflect that the exclusiveness spoken of is as between the employee and his employer—the United States. The Supreme Court has been careful to make this same distinction. In speaking of the exclusive remedy or liability provision of F.E.C.A. the Court said:

The purpose [of the section] was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive.<sup>69</sup>

<sup>65</sup> 5 U.S.C. § 757 (b) (1960), as amended, 5 U.S.C. § 8116 (c) (1966).

<sup>66</sup> *Allman v. Hanley*, 302 F.2d 559, 562 (5th Cir. 1962).

<sup>67</sup> *Id.* at 563 (emphasis supplied) (footnote omitted), citing *Johansen v. United States*, 343 U.S. 427 (1952), and *Martin v. Theockary*, 220 F.2d 900 (5th Cir. 1955). See also *Frantz v. McBee Co.*, 77 So. 2d 796 (Fla. 1955), and 1 LARSON §§ 72.00-72.50.

<sup>68</sup> *Allman v. Hanley*, 302 F.2d 559 (5th Cir. 1962). Accord, *Marion v. United States*, 214 F. Supp. 320 (D. Md. 1963); *Seligman v. Gerlach*, 215 N.Y.S. 2d 684 (1961).

<sup>69</sup> *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 601 (1963).

## FEDERAL EMPLOYEES' COMPENSATION ACT

We see, then, that the weight of reason and authority hold that the exclusive remedy provision of F.E.C.A. is exclusive only as between the employee and the United States without regard to third parties or fellow employees.<sup>68</sup>

### B. CONSTITUTIONALITY

As previously indicated, the constitutionality of various workmen's compensation schemes, including acts similar to F.E.C.A., is firmly established.<sup>69</sup> It is recognized that frequently the exclusive remedy provision would be taking a property right (a common law action in tort) in violation of constitutional safeguards if there was not a substitution of remedies.<sup>70</sup> Various other similar constitutional attacks have been uniformly rejected.<sup>71</sup> It should be noted, however, that the property right spoken of is a right against the employer (the United States in a federal employee's case). It will be recalled that except as against the United States the exclusive remedy provisions do not deprive an employee of any remedy he may have had at common law.<sup>72</sup>

## V. PERMISSIBLE REMEDIES OF INJURED GOVERNMENT EMPLOYEES

### A. INJURY WITHOUT FAULT

Historically, a worker who was injured or who contracted a disease incident to his employment but without the fault of his employer or another was without remedy. He and his family frequently, if not always, became public charges or even more destitute than most in a poverty stricken class of society.<sup>73</sup> It

<sup>68</sup> 2 LARSON § 65, at 135-41.

<sup>69</sup> See note 26 *supra*. See generally 16A C.J.S., *Constitutional Law* § 634 and 99 C.J.S., *Workmen's Compensation* § 19 (1956).

<sup>70</sup> See *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). Several cases heard in various jurisdictions after this case recognized the same principle, e.g., *Zancanelli v. Central Coal & Coke Co.*, 25 Wyc. 511, 173 P. 981 (1918).

<sup>71</sup> See, e.g., *Cardillo v. Liberty Mut. Ins. Co.*, 380 U.S. 469 (1947); *Smith v. Bush*, 312 F.2d 131 (5th Cir. 1963); *Coates v. Potomac Elec. Power Co.*, 95 F. Supp. 779 (D.C.C. 1951); *Wilson v. Wilson*, 1 Ariz. App. 77, 399 P.2d 698 (1965).

<sup>72</sup> See *Allman v. Hanley*, 302 F.2d 559 (5th Cir. 1962); see also *Treadwell Const. Co. v. United States*, 372 U.S. 772 (1963), *for remand see*, 223 F. Supp. 111 (W.D. Pa. 1963); *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 (1963); *American Stevedores v. Porello*, 330 U.S. 446 (1947); *Brady v. Roosevelt Steamship Co.*, 317 U.S. 575 (1943); *Dahn v. Davis*, 258 U.S. 421 (1922); *Parr v. United States*, 172 F.2d 462 (10th Cir. 1949); *Militano v. United States*, 156 F.2d 599 (2d Cir. 1946); *Panama R.R. v. Minnix*, 282 F. 47 (5th Cir. 1922); *Panama R.R. v. Strobel*, 282 F. 52 (5th Cir. 1922); *Hines v. Dahn*, 267 F. 105 (8th Cir. 1920).

<sup>73</sup> See generally RIESENFELD-MAXWELL 127-61; 1 LARSON §§ 4-5; and 1 W. SCHNEIDER, *WORKMEN'S COMPENSATION* §§ 1-5 (1941).

was not until the workmen's compensation system was well established that injuries and diseases incident to employment, but without fault in the tort sense, were recognized and incorporated into compensation schemes. As the compensation field grew and developed, it became apparent that unlike tort, workmen's compensation allowed recovery without fault. Compensation payments are not intended to restore to the claimant what he has lost; rather they give him a sum which when added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others. These benefits are now paid for injuries or diseases arising within the scope of a worker's employment.<sup>15</sup> The federal system generally adopts this philosophy. It is axiomatic that such compensation frequently is inadequate when compared to the injury suffered. This is particularly true in cases of permanent disability.<sup>16</sup>

## B. WHEN TORTIOUSLY INJURED

### 1. *By Employer Alone.*

In situations where no third parties or co-workers are directly involved and the tort liability of the United States as an employer, if any, would be its alone, the overwhelming weight of authority is that the employee's remedy is F.E.C.A. alone.<sup>17</sup> It is recognized that a corporate entity or a sovereign cannot conduct its affairs without servants or employees, and in this sense such an entity cannot injure an employee by itself. However, there may be situations in which no one person is found to be negligent. For example, a familiar *res ipsa loquitur* case—a complicated machine malfunctions causing an injury to an employee. Due to the nature of the machine and the malfunction, no one can be said to be negligent. In such instances, absent a manufacturer's product warranty claim, the injured worker's action is limited to the employer alone. Some state statutes also abolish any cause of action an employee may have against a fellow employee and the liability is assumed by the employer and the state's workmen's compensation system.<sup>18</sup> F.E.C.A. does not abolish causes of action against fellow employees.

<sup>15</sup> 1 LABSON § 2.

<sup>16</sup> See 5 U.S.C. §§ 8105-07 (1966). The rate of compensation is 66 2/3 per cent of monthly pay for a set period of weeks. For severe disfigurement of face, head or neck a lump sum of not more than \$3500 is provided.

<sup>17</sup> See part IV *supra*.

<sup>18</sup> *E.g.*, the Illinois statute which provides in pertinent part: "No common law or statutory right to recover damages from the employer or his employees for injury or death sustained by any employee while engaged in the line of



## FEDERAL EMPLOYEES' COMPENSATION ACT

### 2. *By Third Parties.*

When an employee is injured or contracts a compensable disease, such injury or disease must arise out of and in the course of his employment.<sup>78</sup> These criteria are almost universal.<sup>79</sup> This discussion will be limited to injuries, because to discuss diseases except as incident to injuries opens up a completely separate and rather detailed study. Before the various categories of injury sources are developed, some understanding of the interpretation of "arising out of" and "in the course of employment" is required.

a. *Arising Out of Employment.* Although F.E.C.A. eliminates the use of the language, "arising out of employment" and "in the course of employment," it does substitute the phrase "injury sustained while in the performance of duty."<sup>80</sup> The interpretation of this latter language has generally followed and applied the reasoning applicable to "arising out of employment" and "in the course of employment."<sup>81</sup>

"Arising out of employment" is generally construed to refer to causal origin.<sup>82</sup> The various interpretations of "arising" have been reduced by writers to four general areas.<sup>83</sup>

(1) The peculiar or increased risk doctrine.<sup>84</sup> This rule has been announced by most courts as controlling. An injury arises out of employment only when there is a causal connection to a hazard peculiar to or increased by that employment and one which is not common to people generally. The strict application of this doctrine has produced exclusions which led to a development of other applications.

(2) Actual risk doctrine.<sup>85</sup> This is an extension of the previous doctrine, wherein courts look to the *actual* risk of the

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his duty . . . other than the compensation herein provided, shall be available to any employee who is covered by the provision of this Act. . . ." ILL. ANN. STAT. ch. 48 § 1385(a) (1967). For a case interpreting this provision see *Chmelik v. Vana*, 31 Ill.2d 272, 201 N.E.2d 434 (1964). The Government Driver's Act, 28 U.S.C. § 2679(b)-(e) (1964), is another example of the employer's attempting to assume an employee's liability. Admittedly it is not a workmen's compensation statute, but the principle is the same.

<sup>78</sup> 1 LARSON § 6, at 41.

<sup>79</sup> *Id.*

<sup>80</sup> 5 U.S.C. § 8102(a) (1966).

<sup>81</sup> The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902 (1964), retains the traditional language and since many judicial precedents construing this Act are applied to F.E.C.A. and vice-versa, the traditional view takes on double importance.

<sup>82</sup> 1 LARSON § 6.10, at 42.

<sup>83</sup> *Id.* at 43.

<sup>84</sup> *Id.* § 6.20.

<sup>85</sup> *Id.* § 6.80.

employment concerned, rather than whether the risk is peculiar to the employment and not peculiar to the public generally. The best examples of its application are street risks, automobile accidents, falls, etc.

(3) Positional risk doctrine.<sup>56</sup> This doctrine is a "but for" application: The injury would not have occurred but for the fact of employment duties. This infrequently used test is applied to very unusual injuries such as stray bullets and acts of God occurrences.

(4) Proximate cause.<sup>57</sup> This test is an older view and is strictly tort in concept. It demands that the injury be foreseeable as a hazard of employment, and that the chain of causation not be interrupted by an intervening cause. Such a doctrine when strictly applied produces narrow and often harsh results, as personal injury attorneys know.

b. *In Course of Employment.*<sup>58</sup> The meaning of the phrase "in course of employment" is the subject of countless decisions and treatises. The following brief discussion merely gives a very general conceptual background. Larson's scholarly definition is:

An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidental thereto.<sup>59</sup>

The course of employment requirement tests work-connection as to *time, place* and *activity*. Larson has perceptively noted that the definition does not say that the employee must have been in the course of his employment, it says the injury must arise in the course of employment. He next notes that the verb used is "arise," not "occur," thus reflecting the basic idea of causal connection to the employment itself. This principle, course of employment, is taken directly from the well recognized doctrine *respondeat superior*. However, there is an extremely important distinction. Classic *respondeat superior* always deals with an act or omission of the servant. The inquiry then becomes whether the act or omission was in furtherance of the master's business. In workmen's compensation situations, although the analogy is generally applicable, frequently the harmful force is not the employee's act or omission, but something acting upon the employee.

<sup>56</sup> *Id.* § 6.40.

<sup>57</sup> *Id.* § 6.50.

<sup>58</sup> For a complete discussion of the various aspects of this important area of workmen's compensation see 1 LARSON, Ch. IV-V.

<sup>59</sup> 1 LARSON § 14, at 193.

## FEDERAL EMPLOYEES' COMPENSATION ACT

It can readily be seen that the workmen's compensation application is much broader than class: *respondet superior*.<sup>90</sup>

### 3. Injury by Strangers.

From the above discussion it should be apparent that when a government employee is tortiously injured by a stranger, that is a third party who is neither a co-worker or other government employee,<sup>91</sup> and the injury arises out of and in the course of employment, the employee will be covered by F.E.C.A. It should be equally apparent that the employee has an independent cause of action sounding in tort against the stranger.<sup>92</sup> Such a suit could lie either in a state court or, assuming jurisdictional requirements are met, a federal court.<sup>93</sup> Such suits and the choice of forum will be considered in more detail in part C.1. *infra*.

a. *Co-workers*. Injuries caused by negligent co-workers obviously make up the bulk of employment connected injuries caused by third parties; even the casual observer can readily see such to be the case.<sup>94</sup> F.E.C.A. provides for subrogation and adjustment by the covered employee after recovery from a third person.<sup>95</sup> The theory is to preclude a double recovery on the part of the injured employee and to partially indemnify the government for any payments made. As previously indicated, F.E.C.A.'s exclusive remedy provisions extend only to the Federal Government and not to co-workers.<sup>96</sup> An injured employee can therefore, in addition to F.E.C.A. compensation, sue his own co-worker. The fellow servant doctrine is precluded by the wording of the federal statute<sup>97</sup> and it is specifically not applied by judicial precedent.<sup>98</sup> The details of the Federal

<sup>90</sup> *Id.* at 193-94.

<sup>91</sup> "Co-worker" is used to mean a person actually working with an injured employee at the same job site. He could easily be an acquaintance and is analogous to "fellow servant." The term does not include a co-worker covered by a compensation statute other than F.E.C.A., e.g., an armed service member. "Other government employee" refers to any other employee of the government covered by F.E.C.A. who is not a "co-worker."

<sup>92</sup> 2 LARSON §§ 71-71.10.

<sup>93</sup> See generally part IV.A. *supra*. Note particularly the language of the Supreme Court in *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 601 (1963). Although the court is speaking of an admiralty rule, it is equally applicable to tort wherein they say "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines . . . affecting the mutual rights and liabilities [of private parties]."

<sup>94</sup> See 1 LARSON § 4.30, wherein at least one empirical study supports this conclusion.

<sup>95</sup> 5 U.S.C. §§ 8131-32 (1966).

<sup>96</sup> See part IV.A. *supra*.

<sup>97</sup> 5 U.S.C. § 8102(a) (1966).

<sup>98</sup> See *Allman v. Hanley*, 302 F.2d 559 (5th Cir. 1962).

Government's liability as a contributor will be discussed in Part VII *infra*.

*b. Other Government Employees.* This category of potential tort-feasor is relevant because of the ever growing number of federal employees and armed service members. The result is an increasing possibility of injury by another federal employee or member of the armed services. In this category as with the others, the injured employee will be covered by F.E.C.A. He may then also be concerned about a possible tort action as well. The procedural aspects of a suit against the "other government employee" may vary because of the other statutes involved;<sup>99</sup> however, as a practical matter the results and considerations will be the same as those of the co-worker category. Now that we have considered the various categories of potential tort-feasors, we move to the actual suit at common law.

### C. SUIT AT COMMON LAW

Since it has been shown that F.E.C.A. exclusive remedy provisions apply only to the Federal Government as an employer, absent a statutory prohibition,<sup>100</sup> common law suits sounding in tort are available against individual tort-feasors notwithstanding F.E.C.A. compensation. In the event of recovery against third parties, the statute requires the employee to return to the government an amount equal to the F.E.C.A. compensation paid.<sup>101</sup> After determining that an actionable case exists, the first consideration is whether there is a likelihood of a recovery sufficiently in excess of the F.E.C.A. compensation to make suit worthwhile. Once this determination is made, how does one proceed?

#### 1. Choice of Forum.

Likelihood of profitable success, albeit important and measurable, cannot in reality be considered apart from the forum of the suit. Since the scope of this inquiry deals with a tortious injury to a government employee by another government employee, there is immediately posed the possibility of at least two forums—state or federal. Depending on the jurisdictional theory

<sup>99</sup> For example, nonappropriated fund and District of Columbia employees are covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1964). Members of the armed forces have another scheme of compensation which is apart from workmen's compensation *per se*; however, they are compensated for injuries by a continuance of full pay and allowances, disability retirement, or veterans' benefits. For the exclusive remedy provision applicable to nonappropriated fund employees see 5 U.S.C. § 8173 (1966).

<sup>100</sup> *E.g.*, The Government Drivers' Act, 28 U.S.C. § 2679(b)-(e) (1964).

<sup>101</sup> 5 U.S.C. § 8132 (1966).

## FEDERAL EMPLOYEES' COMPENSATION ACT

used, there may be instances where more than one federal court could be considered as the initial forum.<sup>102</sup>

If a federal court is chosen as the initial forum, our government employee plaintiff must then decide who the defendant is to be—the other government employee or co-worker or the United States. If he is advised to sue the United States as the principal defendant, under F.T.C.A. (as shown in part IV *supra*) his efforts will be for naught. The United States attorney will move for summary judgment on the basis of F.E.C.A. exclusive liability provisions and the summary judgment will be granted.<sup>103</sup> The same result will be obtained if the other government employee is an employee of a nonappropriated fund.<sup>104</sup> The same results can be anticipated under other federal liability statutes as well.<sup>105</sup> Our injured employee's attorney may be aware of these precedents and advise suit in federal court against the individual. Such a course would prove equally hazardous.<sup>106</sup> Because of the Government Drivers' Act<sup>107</sup> or the Veterans' Doctors Act<sup>108</sup> in many instances the United States would be substituted as a defendant, the suit would be converted to a federal tort claim, the United States would defend on exclusive liability language and our plaintiff would again be out of court. This logically leaves but one choice of forum, a state court. Since there are removal provisions in various statutes,<sup>109</sup> why should a state forum be chosen? Mainly because under the current posture of the law, it is the only chance of success. The effect of removal provisions and the possibilities of success—the *Gilliam* rationale—will be discussed in part VI *infra*.

### 2. Choice of Defendant.

As indicated above, the choice of the initial defendant can be crucial. Since the choice of forum question must be resolved first, the choice of initial defendant really cannot be resolved apart from the choice of forum. The wisdom of electing the state forum has been indicated as the most likely route to success. This is so even though a federal court may have a history of

<sup>102</sup> *E.g.*, a District of Columbia employee who resides in Maryland injuring another employee in Virginia; such examples of potential federal forums could be infinite.

<sup>103</sup> *E.g.*, *O'Connell v. United States*, 221 F. Supp. 404 (D. Mass. 1963).

<sup>104</sup> See *Dolin v. United States*, 371 F.2d 813 (6th Cir. 1967).

<sup>105</sup> See notes 93 and 99 *supra* and accompanying text.

<sup>106</sup> See *Noga v. United States*, 272 F. Supp. 51 (N.D. Cal. 1967).

<sup>107</sup> 28 U.S.C. § 2679(b)-(c) (1964).

<sup>108</sup> 38 U.S.C. § 4117 (1966).

<sup>109</sup> *E.g.*, Government Drivers' Act, 28 U.S.C. § 2679(d) (1964), and Veterans' Doctors Act, 38 U.S.C. § 4116(d) (1966).

more liberal judgments. Since the practical choice is the state forum, the Federal Government is effectively eliminated as an initial defendant. This leaves our plaintiff with but one practical choice—the individual tort-feasor or his representatives as defendants in a state court.

#### D. EFFECT OF REMOVAL PROVISIONS OF FEDERAL STATUTES

There are two general types of removal statutes. The first type includes those which permit removal of a suit instituted against a federal employee acting under color of office, but which do not permit conversion to a federal tort claim. In such cases the defendant remains the same; only the forum changes.<sup>120</sup> The second general category, and that which is relevant to the scope of this inquiry, requires removal and conversion to a federal tort claim when a covered federal employee is sued for tortious acts committed within the scope of employment. These statutes, in addition to substituting the United States as defendant, provide immunity to the employee from any other suit. These statutes are commonly known as the Government Drivers' Act<sup>121</sup> and the Veterans' Doctors Act.<sup>122</sup> We are concerned only with the former. However, the discussion would be equally applicable to the latter. The Government Drivers' Act provides that the defendant employee give notice to the attorney general of any suit or action brought against him. Thereafter, the attorney general determines if the tortious conduct was committed within the scope of the employee's employment. If it was, a "scope certificate" is issued and the action is removed and converted to a F.T.C.A. claim against the United States.<sup>123</sup> This can produce one harsh result, which it is submitted was not intended by the Congress. This is so because of the exclusive remedy of liability provisions of F.E.C.A.<sup>124</sup> The problem arises in the following fashion: A federal employee acting within the scope of and in the course of his employment is tortiously injured by a co-worker or other federal employee's negligent operation of a motor vehicle. The injured employee collects or is eligible for F.E.C.A. benefits and in addition brings suit against the co-worker or other federal employee. If the plaintiff initially chooses a federal court for the forum and the United States as a defendant under F.T.C.A., his suit will be dismissed and his sole remedy

<sup>120</sup> 28 U.S.C. § 1442 (1964).

<sup>121</sup> 28 U.S.C. § 2679(b)-(e) (1964).

<sup>122</sup> 38 U.S.C. § 4116 (1966).

<sup>123</sup> See note 43 *supra*.

<sup>124</sup> 5 U.S.C. § 8116(c) (1966).

## FEDERAL EMPLOYEES' COMPENSATION ACT

is F.E.C.A. In a recent case, *Noga v. United States*,<sup>115</sup> this was precisely the result. The effect of the *Noga* decision is to deprive the plaintiff of a cause of action against the individual defendant, and in addition, by a positivist application of the statutes involved (5 U.S.C. § 8116 and 28 U.S.C. § 2679) deprive the plaintiff of an action against the United States on the theory that F.E.C.A. compensation is an exclusive liability of the United States in a tort sense. This reasoning completely overlooks the probable inadequacy of the compensation and does not adequately consider current workmen's compensation theory, to say nothing of the constitutional question of depriving an individual of a property right—a cause of action without due process of law. In short it leaves the plaintiff with neither a remedy he formerly had nor any equivalent substitute. How can this result be avoided? In another recent case, *Gilliam v. United States*,<sup>116</sup> on a factual situation similar to *Noga*, a subtle but extremely important distinction was drawn. In that case the suit was originally instituted in a state court against the co-worker as an individual defendant. The action was removed to a federal court and converted to a federal tort claim via 28 U.S.C. § 2679. The judge, in a well-reasoned, analytical decision, permitted the action to proceed against the United States. This brings us then to the *Gilliam* rationale.

### VI. THE GILLIAM RATIONALE

Briefly the facts of the *Gilliam* case were as follows: In 1963 the plaintiff, a deputy federal marshal, was assigned to accompany her superior on a trip escorting two federal prisoners to jail. En route the car driven by her superior was involved in an accident in which the superior and one prisoner were killed. The plaintiff and the other prisoner were injured. The plaintiff was clearly within the purview of the exclusionary language of 5 U.S.C. § 8116. On 12 November 1964, the plaintiff filed a tort suit for damages in a state court against the estate of her deceased superior. On 30 December 1966, her superior's administratrix petitioned for removal to a federal court under 28 U.S.C. § 2679 (d). The petition had a "scope certificate" attached. That same day the United States District Attorney filed a motion for substitution, setting forth that the decedent was acting within the scope of his employment at the time of the automobile accident and that 28 U.S.C. § 2679(b) made the exclusive remedy of the plaintiff a suit against the United States under

<sup>115</sup> 272 F. Supp. 51 (N.D. Cal. 1967).

<sup>116</sup> 264 F. Supp. 7 (E.D. Ky. 1967).

28 U.S.C. § 1346(b) (F.T.C.A.). Substitution and removal were granted. The United States then moved to dismiss on the ground that at the time and place of the accident, the plaintiff was an employee of the United States, acting within the scope and in the course of her employment, and as such was within the purview of the exclusionary language of 5 U.S.C. § 8116, and hence precluded from suing the United States under F.T.C.A. The motion was overruled.

### A. THEORY

#### 1. Common Law Tort.

The government urged that dismissal was compelled under the reasoning of *Johanson v. United States*;<sup>117</sup> *Patterson v. United States*;<sup>118</sup> *United States v. Demko*;<sup>119</sup> and *Dolin v. United States*.<sup>120</sup> The plaintiff reasoned and the court sustained the theory that these cases were not dispositive of the case. The plaintiff agreed that "persons for whom the Government has supplied an administrative compensation remedy are precluded from seeking recovery against *the United States* for injuries received in the course of their work under the Federal Tort Claims Act. . . ." <sup>121</sup> The cases urged as controlling by the defendant United States were all cases<sup>122</sup> in which the action was originally brought by the plaintiff against the United States as a federal tort claim in a

<sup>117</sup> 343 U.S. 427 (1952). In *Johanson* the plaintiffs had been injured while employed as civilian members of the crews of Army transport vessels owned and operated by the United States. The plaintiffs received F.E.C.A. compensation, and later filed a libel in personam under the Public Vessels Act, 46 U.S.C. § 781 (1964). *Held*: ". . . the benefits available to [plaintiffs] under the Federal Employees Compensation Act . . . are of such a nature as to preclude a suit for damages under the Public Vessels Act."

<sup>118</sup> 359 U.S. 495 (1959). In *Patterson* the plaintiffs had been injured while employed as merchant seamen aboard vessels operated by the United States. The plaintiffs received F.E.C.A. compensation. *Held*: accord with *Johanson*.

<sup>119</sup> 385 U.S. 149 (1966). In *Demko* a former federal prisoner who had been awarded compensation under the Prison Compensation Act, 18 U.S.C. § 4126 (1964), for personal injuries sustained while performing an assigned prison task in a federal penitentiary, brought suit under F.T.C.A. *Held*: recovery under compensation law is exclusive and an adequate substitute for tort recovery.

<sup>120</sup> 371 F.2d 813 (6th Cir. 1967). In *Dolin* plaintiff's husband died as a result of knife wounds inflicted by a fellow employee of the Officers' Club at Redstone Arsenal. Plaintiff had received compensation under the Longshoremen and Harbor Workers' Act, 33 U.S.C. § 901 (1964), and later filed suit under F.T.C.A. *Held*: Longshoremen's Act was exclusive remedy.

<sup>121</sup> Plaintiff's Memorandum Brief in Reply to Motion to Dismiss, *Gilliam v. United States*, pp. 1-2, citing *Jarvis v. United States*, 342 F.2d 799 (5th Cir. 1965), cert. denied, 382 U.S. 881; *Rizzuto v. United States*, 298 F.2d 748 (10th Cir. 1961); *Lowe v. United States*, 292 F.2d 501 (5th Cir. 1961); *Somma v. United States*, 283 F.2d 149 (3d Cir. 1960) (emphasis added).

<sup>122</sup> *E.g.*, *Noga v. United States*, 272 F. Supp. 51 (N.D. Cal. 1967).



## FEDERAL EMPLOYEES' COMPENSATION ACT

federal court. In *Gilliam* the suit was originally instituted against an *individual defendant* (not the United States) in a *state court*. These two procedural aspects materially affect the outcome of a common law tort action.

### 2. Effect of Federal Removal.

The immediate effect of removal, of course, is to change both the forum and the defendant. The knotty problems, however, are not so obvious. They deal with results and constitutionality.

a. *Results.* If the United States' reasoning in *Gilliam* is followed, it compels the conclusion that the plaintiff is denied any right of tort recovery at all. This reasoning requires one to impart to Congress this intent. The legislative history of the Government Drivers' Act indicates that the Act was passed primarily for the protection of employees.<sup>123</sup> It is difficult to conceive that, given this purpose, the Act should operate to deprive an employee of an otherwise just recovery, particularly since the cause of action is one which exists at common law. Such an interpretation requires that the law deny a right to recover solely on the grounds that the plaintiff is an employee of the United States. *Gilliam* reasons that this harsh result was not intended. Further, since the action was begun strictly as a common law tort action against an individual in a state court, the United States could not now successfully dismiss the action solely because it undertook to supplant itself as a defendant for the original defendant and to discharge his obligation and personal liability. The United States in effect acts as a volunteer. It was not being sued and had no liability save that which it voluntarily undertook for itself. As the court said:

Under these facts and circumstances, . . . inestimable wrong would be done Mrs. Gilliam by denying her the right to seek redress . . . [and] denying her the right to prosecute a common law action for a tort against her in the forum [and against the defendant] of her choosing. . . . [C]ongress [did not intend] to go so far in its enactment of the compensation or substitution statute when it was in the minds of the legislators that they were passing enactments for the benefit of employees and not to foreclose their right to seek redress for wrongs committed against them. The . . . compensation laws are for immediate aid to the injured employee and as a protection to the employer. There is no parallel between those laws and the federal laws which the United States seeks to impose here as a means of denying an allegedly just claim.

I subscribe to the language of the Court in *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 63 S. Ct. 425, 87 L. Ed. 471: "We can only

<sup>123</sup> See 2 U.S. Code Cong. and Adm. News 2784, 1961; and 2 U.S. Code Cong. and Adm. News 2515, 1966.

## 42 MILITARY LAW REVIEW

conclude that if Congress had intended to make such an inroad on the rights of claimants it would have said so in unambiguous (sic) terms" and "in the absence of a clear Congressional policy to that end, we cannot go so far."<sup>124</sup>

The court also followed *Allman v. Hanley*,<sup>125</sup> which held that since F.E.C.A. itself recognizes the right of the employee to recover from "some person other than the United States," and a negligent co-employee is such a person, in the absence of a specific provision to the contrary, F.E.C.A. does not abrogate the common law right of an employee to sue a negligent fellow employee.

b. *Constitutionality.* The constitutionality of the removal provision of 28 U.S.C. § 2679(b) has been tested on at least three occasions.<sup>126</sup> The courts acknowledged that tort actions were recognized at common law and removal of these actions from state courts could abrogate constitutional guarantees. (In *Nistendirk* and *Gustafson* jury trial was at issue. In *Adams* abolition of a cause of action against an individual tort-feasor was the issue.) In upholding the constitutionality of section 2679, the courts reasoned that common law actions could be abolished and statutory remedies substituted. The Constitution does not forbid the creation of new rights or abolition of old ones recognized at common law to obtain a permissible legislative object.<sup>127</sup> The reasoning that a vested cause of action is a property right and is constitutionally protected is well settled.<sup>128</sup> It is equally well settled that a party has no vested right, in the constitutional sense, in any form of remedy. The Constitution guarantees merely the substantial right to redress by *some effective procedure*. In other words, replacement of a common law right of action with a statutory remedy is not violative of due process if the statutory remedy is a *substantial and effective* remedy. Note well, however, the caveat: there must be a remedy. Accordingly, the removal provisions standing alone are constitutional for they do provide a substitute remedy. However, in a *Gilliam* fact situation, after removal and substitution of defendants has been accomplished, it is submitted that to interpose the exclusive remedy provisions of F.E.C.A. as a bar to recovery effectively removes the con-

<sup>124</sup> *Gilliam v. United States*, 264 F. Supp. 7, 10 (E.D. Ky. 1967).

<sup>125</sup> 302 F.2d 559 (5th Cir. 1962).

<sup>126</sup> *Nistendirk v. McGee*, 225 F. Supp. 881 (W.D. Mo. 1963); *Adams v. Jackel*, 220 F. Supp. 764 (E.D. N.Y. 1963); and *Gustafson v. Peck*, 216 F. Supp. 370 (N.D. Iowa 1963).

<sup>127</sup> See *Silver v. Silver*, 280 U.S. 117 (1929).

<sup>128</sup> See *id.* See also *Craine v. Hahlo*, 258 U.S. 142 (1922), and *Crowell v. Benson*, 285 U.S. 22 (1932).

## FEDERAL EMPLOYEES' COMPENSATION ACT

stitutional protective umbrella because it removes the substitute remedy and thus the "vested cause of action" or property right has been taken without due process of law. Such actions are constitutionally proscribed. The legislative history of the Government Drivers' Act clearly shows Congress recognized that there must be a remedy of some kind and the removal provisions were not intended to deny a plaintiff a remedy he otherwise would enjoy. Rather it was to protect an employee of the government from a liability. Congress recognized that if no remedy was found under section 2679 (b), the case could be remanded to the state court.<sup>129</sup>

In 1928 the Supreme Court was faced with an analogous situation in *Richmond Screw Anchor Co. v. United States*.<sup>130</sup> In this case, the plaintiff was the assignee of a patent. In support of the war effort for World War I, the government had caused a contractor to infringe the patent by installing several hundred cargo beams. Congress had provided by statute that, in such instances, the patent holder's sole remedy was suit against the United States. Another statute had proscribed the assignment of claim against the United States.<sup>131</sup> Normally, the plaintiff assignee would have had a cause of action against the government contractor for infringement damages. However, the government sought to interpose the anti-assignment act as a defense. In holding that the Act's provisions were inapplicable to the plaintiff's situation, the Court reasoned that if the Act were to be applied, it would have the effect of not only taking away the plaintiff's cause of action against the infringing contractor but also depriving him of a substitute cause of action against the government. Such would be more than a declaration of governmental immunity; it would be an attempt to take away from a private citizen his lawful claim for damages to his property by another person. Thus if the statute were to be applied, in the words of Chief Justice Taft:

[It] would seem to raise a serious question as to the Constitutionality of the Act . . . under the 5th Amendment. . . . We must presume that Congress in the passage of the Act . . . intended to secure to the owner of the patent the *exact equivalent* of what it was taking away from him. . . .

It is our duty in the interpretation of Federal statutes to reach a

<sup>129</sup> See 2 U.S. Code Cong. and Adm. News 2791-92, 1961.

<sup>130</sup> 275 U.S. 331 (1928).

<sup>131</sup> 31 U.S.C. § 203 (1964).

conclusion which will avoid serious doubts of their constitutionality.  
(sic)<sup>37</sup>

Certainly, the same logic and reasoning applies to the constitutionality of the interaction of the exclusive remedy provisions of F.E.C.A. and the Government Drivers' Act.

The results of *Gilliam* and *Noga* present two additional questions: *Did* the procedural differences in the cases (where and against whom the suits were started) affect their result; and *should* the procedural differences affect their result? Obviously, the procedural differences *did* affect the result. In *Noga* summary judgment for the United States was granted. In *Gilliam* the United States' motion to dismiss was overruled. *Noga* did not reach the hypothetical situation of what the result would have been had the case been started in a state court and later removed to the federal district court. However, in the writer's judgment the positivist tenor of the opinion indicates that the judge would not have been receptive to the *Gilliam* reasoning. The *Noga* opinion focuses on exclusive liability-federal immunity concepts almost as absolutes, to the exclusion of the merits of the individual's arguments and without regard to results. Applying the *Noga* reasoning, the judge would reach the same conclusion whether the case was started in a state or federal court. On the other hand *Gilliam* takes a realistic and essentially pragmatic view of results intended by the various statutes. The judge recognizes the exclusive liability-federal immunity concepts, but interpolates congressional intent and constitutional principles with the facts presented. With these factors in mind, he treats the right-remedy posture of the plaintiff, and reasons that the suit must be allowed to preserve both the plaintiff's right and her remedy. In the writer's opinion, it would not affect the outcome of *Gilliam* had the suit been initiated in the federal district court against the *individual* defendant. The judge is careful to point out the distinction between directly seeking recovery against the United States and seeking recovery against an individual defendant. It is submitted that the procedural differences in the cases should not affect their outcome. The fact that there were different results is one of the law's anomalies which can be attributed not to the law, but to the individual judge's jurisprudential philosophy.

#### B. ALTERNATIVES

What are the alternatives to the dilemma posed by the statutes and holdings such as *Noga* and others which, because of F.E.C.A.

<sup>37</sup> *Richmond Screw Anchor Co. v. United States*, 275 U.S. 381, 345 (1928) (emphasis added).

## FEDERAL EMPLOYEES' COMPENSATION ACT

exclusive remedy provision, foreclose injured plaintiffs' suits under F.T.C.A.? One alternative obviously is the *Gilliam* rationale discussed above. To the writer's thinking, the *Gilliam* rationale represents the soundest approach under the present posture of the law, and it is the apocalyptic result of both analytical reason and congressional intent. It is the writer's view that *Noga* and other cases of similar holding are constitutionally unsound and produce a harsh result unintended by Congress.

### 1. *Waiver and Release by Government Employees.*

Another possible, though not necessarily desirable, solution would be to obtain a waiver and release from injured government employees affirmatively waiving their right to action in tort against another government employee, or the government itself, and releasing all liability in return for the compensation paid under F.E.C.A. The Act as presently written does not support the authorization for such actions, and such actions frequently would not be in the best interest of an employee. Further, such a result should not obtain without a clear congressional mandate. The posture of workmen's compensation, and rights and benefits being extended workers today, militate against such a congressional mandate.

### 2. *Employees Self-Insured.*

Certainly a prudent employee may insure himself to cover contingencies presented by his becoming a defendant, or as a plaintiff being injured and faced with the prospect of inadequate compensation under F.E.C.A. Such a requirement would be difficult to enforce as a condition of employment and would be contrary to the congressional intent of providing the employee with an umbrella of protection from suit.<sup>100</sup> If an employee purchases accident, health and income continuation insurance at his own expense, he is purchasing protection that F.E.C.A. was designed to provide. Even to suggest the necessity of purchasing individual insurance points to the inadequacy of F.E.C.A. compensation. When this suggestion is considered with the limitations imposed by the F.E.C.A. exclusive liability provisions, the inadequacy of protection and the lack of viable remedies become abundantly clear. These factors strongly indicate the need for corrective action. Such corrective action can be effected by the courts' adoption of the *Gilliam* rationale or by statutory amendment.

### 3. *Statutory Amendment.*

The historical development and background of F.E.C.A. and the Government Drivers' Act indicate a clear intent on the part

<sup>100</sup> See 2 U.S. Code Cong. and Adm. News 2791-92, 1961.

of Congress to provide benefits to United States employees. Nowhere, except in some courts' narrow interpretations and harsh results, can there be found an expression, congressional or judicial, that the Congress intended to deprive an injured employee of a satisfactory remedy. Quite the contrary, the expressions indicate a desire to confer benefits. The incompleteness of the statutes and a narrow interpretation of them produces a clearly unintended harsh result. Another possible solution of the *Noga-Gilliam* issue is an amendment to 5 U.S.C. § 8116(c). The following language would be more reflective of the sovereign consent to liability and suit principles that should be applied to workmen's compensation law.

(c) . . . Nor shall this section apply when a federal employee is tortiously injured by another federal employee under circumstances which would render the tort-feasor individually liable but for the removal and conversion provisions of 28 U.S.C. § 2679 (1964); 38 U.S.C. § 4116 (1966), or any similar legislation.

Such a provision would eliminate the harsh results of *Noga* type cases and would preserve to injured government employees the same rights and remedies as other citizens have for torts committed against them by government agents. It would also permit the injured plaintiff to choose the forum and the defendant without regard to possible technical dismissal solely on the basis of improper selection of initial forum or initial defendant. Alternatively, a statutory amendment could also eliminate the dilemma by indicating that section 8116(c) would not be applicable in cases originally brought in state courts and removed to federal courts only by virtue of 28 U.S.C. § 2679. Arguably Congress intended such a result in the first instance. The effect of either of these two amendment proposals would be to preserve to the employee rights he would have against any other tort-feasor. Similar results could be obtained throughout the federal compensation system by amendments to all similar statutes.

We turn now to the pertinence of 5 U.S.C. § 8116(c) to United States' liability by way of contribution as a joint tort-feasor once compensation has been awarded an employee of the United States.

#### VII. CONTRIBUTION AND INDEMNITY

Thus far we have discussed the exclusive remedy provisions of F.E.C.A. largely from an injured federal employee's standpoint. We now move to consideration of the effect of F.E.C.A.'s exclusive remedy provisions on third party practice, and specifically inquire whether 5 U.S.C. § 8116(c) operates to preclude

## FEDERAL EMPLOYEES' COMPENSATION ACT

United States, liability by way of contribution or indemnity to a private party defendant sued by a covered federal employee plaintiff.

### A. THEORY

Initially it is important to note that not all jurisdictions recognize contribution and indemnity principles in tort cases. Consequently the precedents discussed herein will be of value for federal practice only in those jurisdictions which have adopted as substantive law the liability of a joint tort-feasor by way of contribution or indemnity.

#### 1. Contribution.

A distinction exists between contribution and noncontractual tort indemnity. In the former the parties are said to be *in pari delicto* so damages are equally divided; or in jurisdictions which recognize comparative negligence and in admiralty practice the contribution may be apportioned. Liability for contribution in tort cases is a minority rule and exists usually by virtue of statutes. The general rule is that, in the absence of express contract or statutory provisions, there is no contribution between joint tort-feasors.<sup>134</sup>

#### 2. Indemnity.

The doctrinal basis for noncontractual tort indemnity among tortfeasors is unjust enrichment. The concept is restitutional in nature. Generally indemnity is permitted where the indemnitee has only an imputed or vicarious relationship with the actual tort-feasor and is not personally at fault. Indemnity may also be awarded where there is a marked difference in the degree or character of the negligence attributed to two or more tort-feasors. The parties are not *in pari delicto* so the entire burden of satisfying the judgment ultimately rests with the indemnitor.<sup>135</sup>

### B. THIRD PARTY RECOVERY PRACTICE

By their very nature contribution and indemnity involve third party practice. Some understanding of the terminology and procedure of federal third party practice is therefore essential.

#### 1. Definitions.

In order to simplify the terminology used and make it more reflective of the contextual scope of this study, the following definitions will be used:

*Plaintiff*—a tortiously injured federal employee covered by F.E.C.A.

<sup>134</sup> *United Air Lines v. Wiener*, 355 F.2d 379, 398 (9th Cir. 1964), *appeal dismissed sub nom.*, *United Air Lines v. United States*, 379 U.S. 951 (1964).

<sup>135</sup> *Id.* at 398-401.

*Private party defendant*—the original tort-feasor defendant other than the United States.

*United States defendant*—The United States as a third party defendant, involuntarily impleaded by a private party defendant seeking contribution or indemnity.

### 2. Procedure.

Third party impleader, adopted from admiralty practice, has greatly liberalized the conduct of litigation. The present federal procedure is found in rule 14 of the Federal Rules of Civil Procedure. Rule 14 as originally promulgated permitted the defendant to implead a third party "who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim."<sup>120</sup> After some procedural difficulties, not pertinent here, the rule was changed to provide for impleader by a defendant of any person "who is or may be liable to him" for all or any part of "the plaintiff's claim against him."<sup>121</sup> Today, therefore, a private party defendant may implead the United States defendant only when the United States is or may be liable to the private party defendant. Procedurally this is without regard to the United States defendant's liability to the plaintiff. This brings us then to the problem posed by section 8116(c).

### 3. The Problem.

As we have just seen, rule 14 sets up the requirement of possible liability between the private party defendant and the United States defendant. In such situations the question becomes whether section 8116(c) substantively precludes United States defendant's liability to private party defendant.

a. *Factual Situations.* There are many conceivable factual situations in third party practice where the instant problem is operative. However, a typical situation is that found in the recent case of *Wien Alaska Airlines, Inc. v. United States*.<sup>122</sup> In *Wien* the widow of a federal employee killed in an airline crash (plaintiff) brought suit against the airline (private party defendant), alleging that her husband's death was due to the negligence of the airline. The airline (private party defendant) impleaded the United States (United States defendant) alleging that a United States' air traffic control specialist had been negligent in the performance of his duties. The airline sought full

<sup>120</sup> 1A W. BARRON-A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 421, at 641 (Rules Ed., C. Wright rev. 1960) (footnote omitted).

<sup>121</sup> *Id.* (emphasis added) (footnote omitted).

<sup>122</sup> 375 F.2d 736 (9th Cir. 1967). Note the suit was originally filed in a state court, but was later removed to a federal district court for trial.



## FEDERAL EMPLOYEES' COMPENSATION ACT

indemnity in the event it was held liable to the estate. The widow had been receiving F.E.C.A. benefits prior to instituting the suit against the airline. The United States contended that section 8116(c) substantively barred any tort claim by the plaintiff against the United States and that therefore the United States could not be liable to the airline (private party defendant) for all or any part of the plaintiff's claim against the airline. The action of the district court dismissing the airline's third party action against the United States was affirmed by the Court of Appeals.

b. *Development.* In 1951 the Supreme Court settled the question whether the United States could be impleaded as a third party defendant by its holding in *United States v. Yellow Cab Co.*<sup>138</sup> The Court held that the United States may be involuntarily impleaded as United States defendant by a private party defendant on the same basis as an individual third party defendant similarly situated. The Court further held that by the F.T.C.A. the United States has consented to suit and liability for contribution or indemnity under any pertinent local law contemplating contribution or a duty of indemnity between joint tort-feasors. However, in *United States v. Gilman*<sup>139</sup> the Court made it clear that if the United States is held liable under F.T.C.A. it has no right of indemnity against the negligent federal employee who generated the liability. This posture of the law seems to be dictated by compassion for government employees and a realistic approach to ability to pay rather than strict legal logic.

(1) Contribution. In *Weyerhaeuser S.S. Co. v. United States*<sup>141</sup> the unanimous Court, reversing the lower court, held that the admiralty statute in question<sup>142</sup> was intended to impose on the United States the same liability a private ship owner would have. Since admiralty law permitted contribution, it was held that the exclusive remedy provision of F.E.C.A. would not defeat recovery of contribution by a private party defendant against the United States defendant.

(2) Indemnity. In a 1963 case, *Hart v. Simons*,<sup>143</sup> plaintiff brought suit against private party defendant who impleaded United States defendant. The court concluded, paraphrasing

<sup>138</sup> 340 U.S. 543 (1951).

<sup>139</sup> 347 U.S. 507 (1954).

<sup>141</sup> 372 U.S. 597 (1963).

<sup>142</sup> Public Vessels Act, 46 U.S.C. § 781 (1964).

<sup>143</sup> 223 F. Supp. 109 (E.D. Pa. 1963).

*Weyerhaeuser*, that "there is no evidence that Congress in enacting the exclusive liability section of the Federal Employees' Compensation Act was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of the law of *contribution or indemnity* affecting the mutual rights and liabilities of parties in tort cases."<sup>144</sup>

### C. POST-WEYERHAEUSER DEVELOPMENTS

*Hart v. Simons*<sup>145</sup> was decided after *Weyerhaeuser* and in the writer's opinion represents an accurate interpretation of *Weyerhaeuser*, logically extended beyond admiralty to tort. A tort case with similar results is *Drake v. Treadwell Construction Company*.<sup>146</sup> Some three weeks after *Weyerhaeuser*, the Supreme Court remanded *Drake*.<sup>147</sup> In the per curiam opinion ordering remand the court returned the case for "further consideration in light of *Weyerhaeuser*." Although the Court did not specifically extend the admiralty contribution to tort, its remand order strongly indicates the Court's thinking and all but directs the extension of *Weyerhaeuser* to tort. On remand it was held that the exclusive liability language of F.E.C.A. was not available to the United States defendant as a defense in actions brought against it for indemnity of contribution by private party defendants. The United States appealed the judgment but later moved for dismissal of the appeal ". . . for the reason that Solicitor General of the United States has recommended against appeal. . . ." <sup>148</sup> The appeal was dismissed.

A contrasting view was taken in *Busey v. Washington*.<sup>149</sup> In this case a mail carrier was injured when a mail truck in which he was riding struck a piece of iron negligently protruding from a salvage truck. The mail carrier both received F.E.C.A. benefits and brought a civil tort action (as plaintiff) against the driver of the salvage truck (private party defendant). The driver pleaded the mail truck driver and the United States (United States defendant) seeking contribution under F.T.C.A. The third party claim against the United States defendant for contribution was denied, notwithstanding the fact that the judge found the United States' employee-driver was negligent. The legal impedi-

<sup>144</sup> *Id.* at 111 (emphasis added) (footnote omitted).

<sup>145</sup> 223 F. Supp. 109 (E.D. Pa. 1963).

<sup>146</sup> 299 F.2d 789 (3d Cir. 1962).

<sup>147</sup> *Treadwell Const. Co. v. United States*, 372 U.S. 772 (1963).

<sup>148</sup> The opinion on remand was not reported but action on remand is summarized in *Hart v. Simons*, 223 F. Supp. 109, 111 n.1 (E.D. Pa. 1963).

<sup>149</sup> 225 F. Supp. 416 (D.C.C. 1964).

## FEDERAL EMPLOYEES' COMPENSATION ACT

ment relied upon is discussed at length beginning at page 419 of the opinion. The gist of the opinion is that since F.E.C.A. benefits were paid to the plaintiff, the exclusive liability provisions of F.E.C.A. preclude liability of further payment in tort by the United States even though not to the plaintiff. The decision seems to turn on two additional factors: First, the judge is concerned that if a third party claim for contribution or indemnity is allowed, the United States would be paying out more money via the judgment than it would be obligated to pay by virtue of F.E.C.A. benefits alone. The judge felt this was contrary to the intent of F.E.C.A. *Busey's* reasoning fails to accord full significance to *Weyerhaeuser, Drake* and *Hart*.

Second, *Busey* distinguishes *Yellow Cab* on the basis that the plaintiffs therein were not government employees, and distinguishes *Weyerhaeuser* on the basis that contribution among joint tort-feasors cannot be equated to the historic admiralty rule of divided damages. In deciding *Busey* the court relied heavily on the opinion of the United States Court of Appeals in *Drake v. Treadwell Construction Co.*<sup>150</sup> This judgment was appealed to the Supreme Court and was the subject of an order of remand. The subsequent decision on the Supreme Court's remand of *Drake* renders *Busey* of questionable validity.

Two other recent cases<sup>151</sup> have held that F.E.C.A. exclusive liability language barred private party defendants' claims against United States defendant where the plaintiffs were F.E.C.A. beneficiaries. The rationale of these cases is: That rule 14 (a) and *Yellow Cab* permit the *procedural impleading* of the United States as a third party defendant; however, before a claim for tort indemnity or contribution can be *substantively* maintained there *must be* a tort liability on the part of the United States defendant to the plaintiff. Since F.E.C.A.'s exclusive liability provision absolves the United States defendant from liability to the plaintiff there can be no substantive recovery from the United States defendant.

How the United States' tort liability is determined deserves comment. The F.T.C.A. provides for United States liability "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."<sup>152</sup> This requires the

<sup>150</sup> 299 F.2d 789 (3d Cir. 1962).

<sup>151</sup> *Wien Alaska Airlines, Inc. v. United States*, 375 F.2d 736 (9th Cir. 1967); *United Air Lines v. Wiener*, 385 F.2d 379 (9th Cir. 1964).

<sup>152</sup> 28 U.S.C. §§ 1346(b), 2672 (1964).

application of local law (*lex loci*) in third party actions seeking indemnity or contribution. Accordingly, if the United States defendant (or any individual third party defendant) would have no liability to the plaintiff under applicable local law, the holdings of *Wiener* and *Wien* would indicate no liability for contribution or indemnity by the United States defendant to the private party defendant. The recent case of *Maddux v. Cox*<sup>153</sup> illustrates the application of these principles. *Maddux* was an action commenced in a state court against Maddux for injuries sustained by a serviceman passenger (Cox) of a government vehicle. Cox was injured incident to his service when the government vehicle was involved in an accident with Maddux's vehicle. In addition to the principal claim, the case ultimately extended to cross claims and a third party action against the United States. In disposing of the claim of Maddux (private party defendant) against United States defendant both the district and appeal courts carefully considered the application of both local and federal law as it affected the United States defendant's liability for contribution to Maddux. The courts determined that there was no liability to Maddux for contribution as to any damages he might have to pay to Cox. This holding was on the basis that Cox had no claim against the United States under F.T.C.A., citing the "incident to service doctrine" as enunciated by the Supreme Court in *Feres v. United States*.<sup>154</sup> The lower court turned to Arkansas' Uniform Contribution Among Joint Tortfeasors' Act.<sup>155</sup> That Act defines joint tort-feasor as follows: "two [2] or more persons jointly and severally liable in tort for the same injury to the person or property, whether or not judgment has been recovered against all or some of them."<sup>156</sup> The lower court determined "that before there can be any contribution it must appear that at least originally the person seeking contribution and the person from whom contribution is sought must have been under a common legal liability to the injured party. Thus, there can be no contribution where the injured party had no cause of action originally against the party sought to be charged."<sup>157</sup> In short there was a finding that the state law re-

<sup>153</sup> 382 F.2d 119 (8th Cir. 1967), *reversing*, 255 F. Supp. 517 (E.D. Ark. 1966).

<sup>154</sup> 340 U.S. 135 (1950). The Court concluded at page 146 "that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

<sup>155</sup> Ark. Stats., Ann. §§ 34-1001-09 (1941).

<sup>156</sup> *Id.* § 34-1001.

<sup>157</sup> 255 F. Supp. 517, 525 (E.D. Ark. 1966) (*emphasis added*).

## FEDERAL EMPLOYEES' COMPENSATION ACT

quired a common liability running from both the United States defendant and private party defendant (Maddux) to plaintiff (Cox) before the United States would be liable for contribution. Since there was no common liability to plaintiff, Maddux's claim for contribution was denied.

The court of appeals approved of the lower court's holding, citing both *Wiener* and *Wien*. The difficulty with using *Wiener* and *Wien* as precedent is that the states involved in those cases (Nevada-*Wiener*, Alaska-*Wien*) do not have a statutory basis for contribution or indemnity. Both states have adopted the common law when it is not inconsistent with either the federal or state constitution or state law.<sup>158</sup> *Wiener* includes a detailed analysis of the question whether the common law recognizes a right of indemnity. The court concluded it does, and that therefore a Nevada court could recognize both principles.<sup>159</sup> Common law indemnity does *not* necessarily require United States defendant liability to plaintiff.

However, United Airlines' prayer for indemnity from the United States, the more culpable tort-feasor, was disposed of in a different manner as to each class of plaintiffs.<sup>160</sup> Indemnity was granted for damages payable to plaintiffs whose decedents were not employed by or in the armed services of the United States; the defendants were not *in pari delicto*; the United States was principally at fault; and the common law was considered to extend the principle of indemnity in such circumstances. With respect to the government employee group of decedents, the United States was held not liable for indemnity. Notwithstanding its greater culpability, the court held that by virtue of F.E.C.A. there was no underlying liability to these plaintiffs on the part of the United States. Similarly, the "incident to service" bar of *Feres*, immunizing the United States from liability on account of the servicemen's deaths in any direct suit by their survivors, also immunized the United States from liability to them for indemnity.

*Wien* followed *Wiener*. Although similar in result to *Maddux*, the two airline cases were decided by a different line of reasoning. The most significant divergence in reasoning is that, once ascertaining a general right to indemnity in the common law,

<sup>158</sup> Nevada, NEV. REV. STATS. § 1.030 (1957); Alaska, ALAS. STATS., ch. 10, art. 1 (1958).

<sup>159</sup> See *United Air Lines v. Wiener*, 255 F.2d 379, 401 (9th Cir. 1964).

<sup>160</sup> There were three classes of plaintiffs' decedents in the *Wiener* case: (1) private citizens with no connection with the Federal Government; (2) federal employees covered by F.E.C.A.; and (3) armed forces personnel.

without further reference to local law, the two airline opinions reject its specific application unless there is an underlying liability from the United States as indemnitee to plaintiff. One is not informed whether the *Wiener* and *Wien* limitation on indemnity is considered by the courts to be derived from local common law, or is a uniform federal rule. If the limitation is the former, the cases are theoretically sound. If it is the latter, the cases are at the very least suspect because of *Weyerhaeuser* and *Drake*.

The next considerations have to be *Hart* and the *Drake* remand. Both cases were decided in Pennsylvania. Pennsylvania has also adopted the Uniform Contribution Among Joint Tort-Feasor Act.<sup>163</sup> Although Pennsylvania law may require a substantive common liability between the United States defendant and the private party defendant to the plaintiff, *Hart* and *Drake* seem to recognize that once the *lex loci* common liability requirements are satisfied *Weyerhaeuser* applies and that F.E.C.A. exclusive liability provisions are not applicable. The language of *Hart* is particularly applicable to this reasoning wherein the court says, "there is no evidence that Congress in enacting the exclusive liability section of the Federal Employees' Compensation Act was concerned with the rights of unrelated third parties much less of any purpose to disturb the settled doctrines of the law of *contribution* or *indemnity* affecting the mutual rights and liabilities of parties in tort cases."<sup>162</sup>

In addition, the reasoning in both *Wiener* and *Wien* also suffers from the same defect as *Busey*. These cases fail to give full effect to *Weyerhaeuser*, *Drake*, and *Hart*, and in the writer's opinion place emphasis on form over substance. These cases also fail to accord the present rule 14 its plain meaning. That is, they have extended the requirement of liability of the United States defendant to the plaintiff as a *substantive* rule without regard to the requirements of local law. This former *procedural* requirement for impleader was dropped from rule 14 as being impractical<sup>164</sup> and all that the rule presently requires is that the United States defendant be, or possibly be, liable to the private party defendant.<sup>165</sup>

<sup>162</sup> 12 Pa. Stats. Ann. §§ 2082-89 (1967).

<sup>163</sup> 223 F. Supp. 109, 111 (E.D. Pa. 1963) (emphasis added) (footnote omitted).

<sup>164</sup> 1A W. BARRON-A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 421 (Rules Ed., C. Wright rev. 1960).

<sup>165</sup> *Id.*

## FEDERAL EMPLOYEES' COMPENSATION ACT

In sum, the more recent cases seem to interpose F.E.C.A. exclusive liability provisions as a defense between United States defendant and private party defendants without regard to requirements of local law. However, the better reasoning appears to be that of *Hart* and the *Drake* remand, both of which recognize that once the *lex loci* requirements are met, *Weyerhaeuser* should extend to tort concepts of contribution and indemnity. Neither case permits the exclusive liability language of F.E.C.A. and similar language in other statutes to be interposed as a defense by the United States on third party claims. A criticism common to all the cases is that they fail first to point out the operative *lex loci* requirements clearly before they move to a determination of United States defendant liability to the private party defendant.

### VIII. CONCLUSIONS

#### A. CONSTITUTIONALITY-PROGNOSIS

Based on the constitutional principle that there must be an effective substitutive procedure for redress whenever a right of action is eliminated or changed, the provisions of 5 U.S.C. § 8116(c) and 28 U.S.C. § 2679 should be declared unconstitutional as violative of due process. If together they are invoked to bar any tort recovery against the United States in a *Gilliam* type factual situation, such an application effectively takes away an injured person's remedy without providing an acceptable substitute or effective recourse.

#### B. RECOMMENDED PROCEDURE

The statutes involved should be amended as recommended above in part VI. In addition, the following observations and recommendations are noted:

##### 1. *Injuries Without Fault.*

In such instances the statute's allowable compensation should be expanded to provide realistically for items of damages which could normally be expected in the case of a trial, *e.g.*, pain and suffering and adequate compensation for loss of earning capacity over an injured person's life expectancy. At present if F.E.C.A. compensation is inadequate, the only slim hope an injured employee has is a private bill through Congress.

##### 2. *Injuries by Third Parties.*

a. *Strangers.* The injured employee is free to accept F.E.C.A. compensation and sue the stranger individually in an appropriate court for additional damages. Such a plaintiff, if successful, can expect a set off for compensation received, and by virtue of

F.E.C.A. itself, can be required to indemnify the United States for any amounts paid under F.E.C.A.<sup>166</sup>

b. *Other Government Employee or Co-Worker.* If tortiously injured by another government employee, the injured plaintiff at present should sue the tort-feasor in a state court. He should anticipate a possible removal to a federal court under applicable statutes. In such instances he should be prepared to argue both the *Gilliam* rationale and the constitutional question of elimination of a remedy.

### C. RECOMMENDED STATUTORY REVISIONS

F.E.C.A. should be amended as indicated in part VI so as to permit a common law tort action in addition to F.E.C.A. compensation or by indicating that section 8116(c) would not be applicable when suits were originally brought in state forums. Such amendments would eliminate the present adverse affects of the interplay between 5 U.S.C. § 8116(c) and 28 U.S.C. § 2679.

F.E.C.A. should also be amended to implement clearly the holdings of *Weyerhaeuser*, *Hart*, and the *Drake* remand. Such an amendment should spell out that nothing contained in F.E.C.A. should be construed as being available as a substantive or procedural defense to the United States when the United States is impleaded as a third party defendant by a private party defendant. Further, unless the local law requires a finding of direct liability to a plaintiff, it should specifically eliminate the criterion of liability between the plaintiff and the United States defendant before the United States may be liable for contribution or indemnity.

If the reasoning and recommendations of this article were adopted they would have the salutary effect of eliminating areas of inequity and uncertainty in the law. They would fully confer on federal employees the substantive and procedural benefits, rights, and remedies congressional enactments intended them to have.

It is the writer's respectful hope that this article will stimulate both the bench and bar to greater precision in the application of the operative principles discussed herein.

<sup>166</sup> 5 U.S.C. §§ 8131-32 (1966).



## THE SITUATION OF THE ARMED FORCES IN A CONSTITUTIONAL DEMOCRACY\*

(Treated on the model of the German Bundeswehr)

By Professor Dr. Klaus Obermayer\*\*

### I. INTRODUCTION

Every State is obliged to take necessary precautions for the security of its population. Apparently the hope that one day man will be able to overcome his conflicts peacefully is a dream, which probably will not be realized in this age. As long as international organizations cannot assure the peace of the world effectively, only the armed forces of single nations or of greater defense organizations can insure the safety of human communities.

Under these circumstances even constitutional democracies cannot renounce the maintenance of an armed force. The effectiveness of the military is guaranteed, of course, only by a system in which order and obedience are the essential principles of behavior. The recruiting of troops raises many problems in a democracy which is based on the will of the majority and which confirms the inalienable rights of the individual.

The general problem of the situation of the armed forces in a constitutional democracy will be studied herein on the basis of the example of the Bundeswehr. The German situation may well have its own special aspects for the discussion of the relation between State and military power. Nevertheless it sheds light on those fundamental problems which arise in all constitutional democracies as soon and as long as they have a defense force.

The particular topical importance of our theme for the Federal Republic of Germany is to be found in the fact that it has not yet been possible to develop an image of the Bundeswehr which is clearly seen and accepted by all citizens. The notion of a "necessary evil" is widespread outside the Bundeswehr. This opinion may be quite understandable in view of the perversion of military principles in a dark period of German history, but it is no

\*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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proper basis for the fulfillment of a task which has the purpose of protecting the lives of individuals and of the whole community against extreme threats.

Within the Bundeswehr we can recognize some persistent attempts to form a commonly shared image and to announce it as generally valid. However, there are conflicting tendencies—rather superficially called either conservative or progressive—which have not yet found a synthesis. Sometimes the discords are covered up by a compromise in the formulation while in the matter itself no solution has been found.

The following observations cannot be more than fragments. Certainly I cannot offer any pat answers for mastering all the complicated issues concerned. But I will try to make clear that there must be followed a certain way of legal, moral, and human thinking to solve the problem. As our topic is connected inextricably with the particular material and spiritual situation of our present life, it cannot be evaluated merely from the standpoint of law. When we consider it, we must place it against the enormously changing and fluctuating background of the realities of life in the present twentieth century. The nature of the matter dealt with urges the consideration of nonjuridical reflections as well, for there is a sphere of existence transcending law in which fundamental personal decisions are required. The last and most serious legal questions may prove to be questions of conscience.

In part II, I should like to enlarge on the unique situation in which the Bundeswehr finds itself, in the context of both national and world policies. In part III, I will develop a concept of legal theory which I shall call "constitutional images" derived not only from the language of the constitution but also from its spirit, and I will discuss the meaning and the function of such images. Part IV will offer specifically an outline of the constitutional image of the Bundeswehr. Finally, part V will take up two extremely controversial ideas—those of tradition and of fatherland.

## II. NATIONAL AND WORLD POLICY

All questions connected with the defense of the Federal Republic of Germany are influenced by entirely new and *unique circumstances of national and world policy*. I will indicate their most important aspects briefly.<sup>1</sup>

1. The *Bundeswehr* is an *institution within a democratic constitutional order* which the German people in the western occupation zones have set up after having suffered a total defeat

<sup>1</sup>U. DE MAIZIERE, SOLDATISCHE FUEHRUNG HEUTE, VORTRAEGE UND REDEN ZUR AUFGABE UND SITUATION DER BUNDESWEHR 13, 18, 32, 44, 60, 73 (1966).

brought about by a criminal regime. According to the new understanding of law and constitution, it seemed necessary to provide the Bundeswehr with a legal structure which was to differ completely from that of the armed forces of earlier German history. The lack of legal safety in the army of the monarchical era is expressed perfectly in a formulation stated in 1901 by Gerhard Anschuetz, a famous German teacher of constitutional law in the first decades of this century; according to him, all instructions of military authorities were not legal rules but "simply orders which take effect and exhaust themselves within the large state institution called army."<sup>2</sup> After the establishment of the Weimar Republic, German military policy did not abandon its secret connection with monarchical principles to which it owed its origin and development.<sup>3</sup> The Reichswehr became a state within the State largely removed from democratic control. The extreme antidemocratic and antilegal manipulations to which the Wehrmacht was exposed under National-Socialism are so well known that they need not be mentioned here.

2. The *divided Germany* presents a major problem of conscience to the soldier who has the task of defending the Federal Republic of Germany. Like all citizens of free Germany he is haunted by the vexatious question, whether and at what time the Germans behind the iron curtain will regain their right of self-determination.

3. The *association of the Bundeswehr with NATO* involves problems which touch upon the full scope of military planning. They require a solution of many different tasks regarding the development of materiel, munitions and equipment, training and leadership, supply and defense-technology.

4. The *atomic age* must be mastered manually, rationally and spiritually. Atomic weapons, infra-red waves, radar, directional beams and computers are some of the concepts which indicate the break-through of man into a new period of his existence and thereby affect defense-policy, as well as tactics and strategy. The increasing technical standards lead to an increasing specialization of military personnel and require a new cooperative style of work and leadership even in the military sphere itself.

5. The *territorial conditions of our strategic situation* cannot

<sup>2</sup> G. ANSCHUETZ, DIE GEGENWAERTIGEN THEORIEN UEBER DEN, BEGRIFF DER GESETZGEBENDEN GEWALT UND DEN UMFANG DES KOENIGLICHEN VERORDNUNGS RECHTS NACH PREUSSISCHEM STAATSRICHT 85 (1901).

<sup>3</sup> F. Scheruebl, *Fragen der Befehls- und Kommandogewalt*, in STELLVERTRETUNG IM OBERBEFEHL 7 (E.W. Boeckenoerde, G. Duerig, F. A. von der Heyde & F. Scheruebl ed. 1966).

be compared with those of earlier times. The expression, "the battle for space"—as an antithesis to a battle for lines—expresses primarily a strategic principle. But in addition it refers to a logistic bottleneck of a very dangerous kind. Finally, the word "Landesverteidigung" (defense of the country) has received a thoroughly new meaning by the exposed situation of our country, which would probably become a battle area as a whole should we be required to defend ourselves.

6. Today all defense policies must take into account the *unity of the globe*. Certainly this unity does not represent a close and secure legal community; for the United Nations does not yet include all nations and at times its members show a political and legal impotence with disturbing clarity. Nevertheless our world demonstrates itself as a unity, sharing a common fate, threatened by continual catastrophes—a unity in which any human error can lead to a chain-reaction of disaster.

7. Last but not least the unique character of our military situation is determined by the *general situation of man in our time*. Newly discovered horizons overwhelm familiar modes of thought which were based on a carefully nurtured tradition. Our idea of reality loses its compactness and changes from an imaginable system to a merely mathematical formula. The unlimited enlargement of our scientific knowledge is accompanied by a loss of metaphysical substance. While man tries to adapt to the gigantic technical apparatus, his conscience asks him questions for which he can find no binding answer. The physical loneliness of the individual on a modern battlefield is still surpassed by his mental isolation, in which the sense of his own existence proves an insoluble problem. Added to these universal questions, the burden of military decisions becomes almost unbearable.

### III. CONSTITUTIONAL IMAGES

Having presented the above review of different factors which influence the institution of the Bundeswehr decisively, we will now consider the fundamental question of the meaning and function of what I call *constitutional images*. This is a question of legal theory which has far-reaching political importance. If a constitution is to be able to fulfill its task of leading and uniting the community, it has to project images of the different areas of life that are subject to the authority of law (civil service, the educational system, marriage, the family and so on).<sup>1</sup>

<sup>1</sup> K. HESSE, GRUNDZUEGE DES VERFASSUNGSRECHTS IN DER BUNDESREPUBLIK DEUTSCHLAND 5 (1967); R. SMEND, *Verfassung und Verfassungsrecht* in STAATSRRECHTLICHE ABHANDLUNGEN UND ANDERE AUFSATZE 119 (1955).

1. Constitutional images cannot be *comprehended* merely by means of logical deduction.<sup>8</sup> To understand a constitution we are required to employ a value-directed interpretation which respects general principles of justice as well as the social reality of a certain period. By this way the meaning of the constitution and of its images becomes the result of a dialectic process between the normative effect of the written rules and the social structure.<sup>9</sup> The wording of the constitution is the result of a given historical law-making development. Determined by the will of the constitutional assembly, the constitution enters the actuality of law able to gain a life of its own and to develop further—within the limits defined by the wording of the text.<sup>7</sup> The political community—especially through its legislative, judicial and executive organs—thus becomes obliged to give to the constitution a creative political and moral thrust. Its text, consisting of words and concepts which require interpretation, receives dynamic power. The constitutional provisions create a concrete purposeful order which not only regulates everyday matters, but which also defines the fundamentals of the social structure.<sup>7</sup>

2. The constitutional image has a double *function*.

a. On the one hand it is *normative* in a purely legal sense. As such it is binding in its directives, in its limits and in its rules of interpretation for the areas of legislative, executive and judicial power.<sup>9</sup> All sovereign acts which fail to respect the precepts of the constitutional images are unconstitutional—parliamentary laws as well as administrative regulations and decisions of the courts and of other authorities.

b. Furthermore, the constitutional image serves to *clarify the essence and purpose of institutions and activities* devoted to the community. It will thus be instrumental in setting free impulses which have an eminently spiritual significance—impulses which transcend questions such as whether a governmental measure is constitutional or not.<sup>10</sup> The important and integrating task of the constitutional image is to give the community worthwhile objectives beyond any questions of the application of legal rules.

<sup>8</sup> K. HESSE, *supra* note 4, at 20.

<sup>9</sup> K. LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 193 (1960).

<sup>7</sup> Concerning the historical relevance of law, see R. BAEUMLIN, *STAAT, RECHT UND GESCHICHTE* 15 (1961).

<sup>8</sup> Judgment of Dec. 14, 1965, 19 BVERFG 206.

<sup>9</sup> Judgment of Jan. 15, 1958, 7 BVERFG 198.

<sup>10</sup> R. Smend, *Das Recht der freien Meinungsäußerung*, in *STAATSRECHTLICHE ABHANDLUNGEN UND ANDERE AUFSÄTZE* 89 (1955); Judgment of Jan. 15, 1958, 7 BVERFG 198.

## IV. CONSTITUTIONAL IMAGES OF THE BUNDESWEHR.

After consideration of the general theoretical problems of constitutional images, we must now investigate the *constitutional image of the Bundeswehr* which is binding upon the Bundeswehr as an institution as well as upon the individual soldier in its ranks.

1. The *legal framework* of the constitutional image of the Bundeswehr is to be found in the provisions of our basic law which define the position of the individual of our time in his society, which determine the organization of constitutional democracy, which acknowledge the order established by international law and adherence to international communities, and which contain special rules with regard to the defense organization.

a. The basic rights contained in article 1 et seq. guarantee the *dignity and freedom of the individual* in his relationship to the state as well as to the other members and institutions of the community. According to article 17a they are limited<sup>11</sup> with regard to soldiers to some degree only by the nature of things.<sup>12</sup> Thus, for instance, a soldier may be restricted for disciplinary reasons in his right to petition jointly with others—soldiers or civilians. His right to petition alone, however, cannot be infringed upon. A negative aspect of insuring fundamental rights, from the point of view of the Bundeswehr, is the right to become a conscientious objector according to article 4, section 3.<sup>13</sup>

b. The provisions of articles 20, 28, and 19, section 4, which assure generally the *order of a constitutional democracy*, also define the organization of the military forces. They are supplemented by the rules of articles 65a, 45a, 45b, 59a, 87a, 96a, sections 2 and 4, and article 143, which establish additional legal limits for the armed forces. These articles contain the following regulations:

(1) The supreme command is entrusted to the Secretary of Defense and—after the proclamation of a State of National Defense—to the Chancellor;

(2) Provisions are made for a Parliamentary Committee of

<sup>11</sup> T. Maunz & G. Duerig, *Kommentar zum Grundgesetz art. 17(a)*, no. 1 (2d ed. 1963); F. NEUMANN, H. C. NIPPERDEY, U. SCHEUNER & K. A. BETTERMANN, *DIE GRUNDRECHTE: HANDBUCH DER THEORIE UND PRAXIS DER GRUNDRECHTE* pt. IV/1, at 447 (1960).

<sup>12</sup> R. JAEGER, *BAYERISCHE VERWALTUNGSBLAETTER* 289 (1956).

<sup>13</sup> R. Zippelius, in *KOMMENTAR ZUM BONNER GRUNDGESETZ art. 4* (2d ed.), no. 88 (H. J. Abraham ed. 1950-1967).

Defense and for a Defense Deputy—Ombudsman—of the Bundestag;

(3) The proclamation of a State of National Defense is granted to the Bundestag and—in case of emergency—to the President;

(4) The Bundestag has the power to establish military disciplinary courts and likewise military criminal courts. However, the latter may function only after a State of National Defense has been proclaimed.

(5) The Defense Budget must be published in such detail that “the numerical strength and the main features of the organization of the armed forces” will “be visible in the budget.”

(6) The use of the armed forces in cases of internal emergency situations is permitted only on the basis of a statute passed by a qualified parliamentary majority.<sup>11</sup>

*c.* The existence of *political and especially of defense objectives which surpass national interests* is made evident by the proclamation of a dedication to world peace contained in the preamble, in article 9, section 2, and in article 26. This is also illustrated by the explicit adoption of the general rules of International Law as the Law of the Land in article 25, and by the rules of article 24 pertaining to the integration of the Federal Republic of Germany into an international system of collective security. According to article 24, section 2, these objectives are directed toward “a peaceful and permanent order in Europe and among the nations of the world.”

*d.* Details regarding the *administration of the Bundeswehr*—as a special branch of the federal government administration—are contained in article 87a.

2. In its *concrete shape* the constitutional image of the Bundeswehr is dominated by the tension which exists between the necessity of effective defense guarantees on the one hand and the assurance of activities compatible with the principles of constitutional democracy on the other.<sup>12</sup> An adequate understanding of the above-mentioned constitutional rules, which also

<sup>11</sup> The rules above mentioned have partly been changed by the “Seventeenth Law to Supplement the Basic Law” from June 24, 1968 (BGBl. I, 709 et seq.). Presently, the State of National Defense can—in case of emergency—be proclaimed by a newly created Parliamentary Committee (“Gemeinsamer Ausschuss”), consisting of 22 members of the Bundestag and 11 members of the Bundesrat (Art. 11a, para. 2). Furthermore, the cases of internal emergency situations justifying the use of the Bundeswehr have been legally defined in Art. 91 of the Basic Law.

<sup>12</sup> P. Lerche, *Bundeswehr und Wehrverfassung*, in EVANGELISCHES STAATSLIXIKON col. 238 (H. Kunst & S. Grundmann ed. 1966).

has to take into account the introduction of compulsory military service, will clarify the image concerned. I will describe the following features: the military constitution, the defense task of the Bundeswehr, and the situation of the individual soldier as a citizen.

a. The *military establishment* is a part of the governmental power of a constitutional democracy. Thus the exercise of military power is part of the exercise of the power of the executive branch within the meaning of article 1, section 3, and article 20, section 3.<sup>30</sup> Thereby military power becomes subject to all the provisions involving the principle of the separation of powers which are intended to restrict the executive. With regard to the provisions for the Commander in Chief and the Proclamation of the State of Defense there can be no doubt about the clear superiority of the political power over the military power. Contrary to earlier times, military power can no longer assume the privilege of operating secretly far from parliamentary control, with size, structure and goals strictly concealed from the public. The subjection of the Bundeswehr to the legislative power and to parliamentary control is effectively established by the creation of the Parliamentary Committee of Defense (as a permanent committee of the Bundestag) and the creation of the office of the Defense Deputy of the Bundestag.<sup>31</sup> Such subjection is further underlined by the constitutional provisions for budgetary disclosures (mentioned above).

b. The defense policy of the Bundeswehr is stated in § 7 of the Military Law. It obliges every soldier "to serve the Federal Republic faithfully and to defend bravely the law and the freedom of the German people." In the light of the principles of the constitution these duties are basically different from those national interests to which the existence of a military power was exclusively or at least predominantly allied in former times. For the highest constitutional principle of our basic law protects the dignity of the individual, not only of a German citizen but of any individual. And the dignity of the individual requires the maintenance of peace throughout the world, which certainly cannot be guaranteed by our own efforts alone. The task of defending

<sup>30</sup> E. BARTH, *DIE OEFFENTLICHE VERWALTUNG* 153 (1966); but see P. Lerche, *supra* note 14, col. 241.

<sup>31</sup> J. KARKOWSKI, *DIE PARLAMENTARISCHE KONTROLLE DER WEHRMACHT* (unpublished dissertation, 1960, in Marburg University Library); J. SALZMANN, *DER GEDANKE DES RECHTSSTAATES IN DER WEHRVERFASSUNG DER BUNDESREPUBLIK* (1962); G. WILLMS, *PARLAMENTARISCHE KONTROLLE UND WEHRVERFASSUNG* (unpublished dissertation, 1959, in Goettingen University Library).



the German nation is always to be understood in international terms. Today we are responsible for the peace of the whole world as far as this is within our power. No longer may any state set for itself the task of strengthening, preserving or regaining its national sovereignty as the final aim of its political activity irrespective of the peace of the world as a whole. This concept surely is expressed very effectively in a well known statement of John F. Kennedy: "For we seek not the world-wide victory of one nation or one system, but a world-wide victory of men."<sup>12</sup>

a. *The position of the German soldier as a citizen* is influenced by the fact that many persons in our nation are required—usually under compulsion and with an unavoidable burden of their vocational training—to sacrifice extended periods of time in the service of national defense, which—although absolutely necessary—is still not without its problems; and, in this service they must be welded into a tightly bound group. The type and extent of rights enjoyed by the soldier during his term of service have been clarified through legal doctrine and judicial decisions to a large degree. There is agreement that the increased dependence on public power which comes with service in the armed forces is controlled by law in all its aspects, and that the entry into the armed services brings about no basic change of the status of the citizen. There is also agreement that all measures taken by the defense forces, whether they relate to conscription, training or the use of the forces, like all other sovereign acts must be subject to the principles of legality and judicial control. The special nature of the task of the Bundeswehr requires that officers and members of the staff be given a certain amount of free play for interpretation within the framework of the legal regulations. This may result in varying—more or less appropriate—decisions, all of which are defensible and therefore legal. We may, however, rest assured that in all essential matters the protection of the individual within the armed forces is complete. The normal courts have jurisdiction according to article 19, section 4, in all cases which do not come under the jurisdiction of special courts set up in compliance with the principles of judicial independence. According to § 1 and § 6 of the Military Complaint Law, all soldiers who believe they have suffered injustice from their superiors or from any other military authority can apply to independent military courts.

The task of charging the armed forces with educating its

<sup>12</sup> THE BURDEN AND THE GLORY 34 (A. Nevins ed. 1964).

members in exemplary adherence to those civil virtues which are the foundation of a genuine constitutional democracy has not yet been sufficiently explored.

(1) The most important point in such a program is the strengthening of a *sense of responsibility for other individuals and for the community*. The anonymity of our industrial society grows at an alarming pace. Along with the increasing application of management principles in large administrative areas, there exists a growing apathy toward the personal interests of the individual. The working atmosphere is largely determined today by consideration of the best possible utilization of the individual and by the individual's endeavor to put himself into the foreground. Moral concepts have lost their relevance and are pushed into the background. If we wish to master the tasks given us—everywhere, not only in the armed forces, but also in the executive branch of our constitutional government and in the organization of mammoth concerns—then we must approach a humanization of our work. The duty of caring for one's subordinates cannot be permitted to exhaust itself in legal guarantees of social benefits and gratuities. When men become more or less replaceable work units in the eyes of their superiors, then their initiative will die out and they will become ineffective. A tiny spark of understanding for individual problems can fill an otherwise mechanized operation with that confidence which provides the necessary complement to a command system based on absolute obedience. Just so far as a working group can manage to become a human community will its members be capable of manifesting spiritual values beyond all their mechanical motions and intellectual accomplishments.

(2) Military service is well-suited to bringing out the *value of individual initiative* in the service of the community. It has not yet been possible to awaken in all individuals a real social understanding in the widest sense along with all the practical and ethical consequences which arise from such an understanding. The task of filling this delicate gap in the training and education of our citizens falls upon the Bundeswehr. How the spreading civil lethargy can be overcome is a political problem of the first order. How will it be possible to move the individual to political engagement for the good of the community while he is required to make personal sacrifices and can expect neither political power nor any elevation of his social status?

(3) This initiative entails the courage to *maintain one's own opinion* whenever knowledge of facts and conscience make it

necessary. It is a saddening sign of decadence in our social order that opportunism is rapidly taking the place of civil initiative everywhere. We need men who, particularly in the areas of public life, are willing and ready to break through the taboos, men who will not capitulate to illegitimate power merely because it is more comfortable to do so, men who will make known their opinions about public wrongs not only to their friends in private, but publicly and before the responsible persons themselves.

(4) The situation in the Bundeswehr combines all those elements which are required to develop in the individual an ability for teamwork. This situation prevails to the point where necessities of defense require the chain of command to exert absolute control. At the outset teamwork is confined to the military and technical activities of the individual if he is to take part in the "coordination of weapons" necessary in modern warfare. This military and technical teamwork must be paralleled, however, by an intellectual teamwork. Where men of different social levels, different vocational backgrounds, different religious faiths and philosophies, different parties and interest groups come together, there is always the possibility that the intellectual and spiritual dialogue of our pluralistic society may finally come into its own. It is then possible that this dialogue will be carried further and will include the public outside of the military in discussions of major social issues.

3. The shaping and representation of the constitutional image of the Bundeswehr is a *permanent task* devolving upon the entire community. The Bundeswehr itself must also take part in the development of its constitutional image by conducting itself exemplarily in all its activities. To the very extent to which the Bundeswehr realizes its own aim, it will, from within its sphere of activity, influence the political and legal opinion of the whole community. If it should become possible to convey this constitutional image of the Bundeswehr to every citizen, the sting would be taken out of the antithesis which is now widely felt to prevail between "inside" and "outside." The society outside the Bundeswehr would lose its attitude of animosity toward the military, and the Bundeswehr in turn would no longer appear to this very society to be an institution where out-of-date militaristic attitudes still enjoy support, cut off from the democratic and constitutional safeguards of our state.

#### V. TRADITION AND FATHERLAND

Having completed our discussion of the constitutional image of the Bundeswehr, we will finally consider *two concepts* which

have determined the intellectual position of the German soldier in the past, but which have become of *questionable value* in our days. These are the concepts of "tradition" and of "fatherland."

1. The question of the worth or worthlessness of *tradition* is one which is always with us. We come out of history on the one hand, but we wish to conquer the future on the other. Also, our present sense of the times cannot free itself from traditional concepts even though they may undergo intensive modification through the invasion of new social, scientific, ethical and religious perceptions. We can never begin completely anew. Even after the greatest collapse, it is possible to save some of the scattered values for a purified future. Therefore, it is wrong to speak of an alternative between a friendly and an inimical attitude toward tradition. We must determine with a mind open to the realities of our time, of our law, of our ethical concepts and of our social structure, which ones of the maxims of past epochs are still binding today, and which postulates have shown themselves to be insufficient or false even though they may have accompanied us a long way through our own lives. That attitude is out of date which pays homage to the military for its own sake or which measures defense and military readiness only in terms of national interests. Particularly out of date is any glorification of battle. There is another side to the tradition of the German soldier which must exert its influence in the future: The spirit of modest and selfless fulfillment of duty, as it is expressed in the well-known admonition of Graf Schlieffen—"Accomplish much, stand out little, be more than you appear to be."<sup>19</sup> This is the value-oriented spirit of honesty, hardiness and self control ready for any sacrifice which General von Beck maintained throughout his life and which he formulated in the memorable sentence—"We need officers who follow the path of rational conclusions with mental self-discipline to the end, whose character and nerves are strong enough to carry out what reason dictates."<sup>20</sup>

2. The concept "fatherland" requires a new understanding. While we are engaged in efforts toward the development of a supra-national community of nations, we must not overlook the fact that the single nation is still an integrating factor in our lives. The overly hurried downgrading of the nation can only increase the prevailing confusion in personal relationships and the dissolution of order itself. It is surely not surprising that a certain shadow of suspicion has fallen on the concept "fatherland."

<sup>19</sup> A. VON SCHLIEFFEN, *CANNAE* 384 (1925).

<sup>20</sup> L. BECK, *WISSEN UND WEHR* 744 (1935).

If we wish to give it a new content, then we must approach the matter carefully and soberly. It is of decisive importance that we shun any national vanity or feeling of superiority. It is also of decisive importance that we recognize our homeland as our fatherland, that is to say as the sum of all memories, hopes and values connected with our life in this homeland. Finally, it is decisive that we seek the task which our fatherland has to fulfill in today's community of peoples, in showing hospitality, giving aid, paying a debt or in assuming exchanges in cultural, scientific or general human affairs. If we experience our fatherland in this way as destiny, gift, duty and possibility, then one day the national symbols—now robbed of their meaning—will again take on a programmatic and unifying power.

#### VI. CONCLUSION

He who wishes to survive in our time has to resist the pressure of chaotic forces. He has to accept the fact that our material and spiritual existence stands radically in question; he must be ready, to quote Carl Friedrich von Weizsaecker, for "living with the bomb."<sup>21</sup> Pandora's box is no longer closed and unlike any generation before us we find ourselves approached by threats of apocalyptic dimensions. Yet for the sake of an existence worthy of human beings we may still endeavor to seize those possibilities that are still open to us, even after our entry into the interplanetary age.

The soldier of today—above all the officer charged with command duty—finds himself in a situation of utter conflict irresolvable by actionable law. He can bear it only when he keeps in mind the hard, even terrible duty of maintaining peace through determined readiness for defense. He must be ready to think ahead of the unthinkable and to put his life at stake should it be necessary to protect the values which have been entrusted to us.

The change in the world that is taking place in front of our eyes can be felt, but cannot as yet be conceived in its full range of consequences. We do not know the extent to which we are destined to control the course of events, but we do have to know the prime objective. And, as Antoine de Saint-Exupery stated in a letter to a French general, there is "but one problem, a single one in the world. How to give back to man a spiritual meaning, a spiritual unrest. . . ."<sup>22</sup> Let us, wherever we are concerned with

<sup>21</sup> C. F. VON WEIZSAECKER MIT DER ATOMBOMBE LEBEN. DIE GEGENWAERTIGEN AUSSICHTEN EINER BEGRENZUNG DER GEFAHR EINES ATOMKRIEGES (1958).

<sup>22</sup> A. DE SAINT-EXUPERY, DEM LEBEN EINEN SINN GEBEN 200 (C. Reynal ed. 1957).

## 42 MILITARY LAW REVIEW

social duties and thus with man himself, be driven by this spiritual unrest. Then we shall be capable of counteracting the fateful autonomy of the military and of resolving the defense problems imposed upon us in the spirit of the inviolable precepts of law and justice.

## MIRANDA AND THE MILITARY DEVELOPMENT OF A CONSTITUTIONAL RIGHT\*

By Major Donald W. Hansen\*\*

*This article contains an analysis of the Miranda decision and how it affects the use of confessions in the military. The author discusses Miranda, its history, and its relation to custodial interrogation and article 31 of the Uniform Code of Military Justice. The author concludes that the Court of Military Appeals will give full effect to the Miranda decision.*

### I. INTRODUCTION

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.<sup>1</sup>

With this terse summary of what was to follow, the Supreme Court, in *Miranda v. Arizona*,<sup>2</sup> made the right to counsel an integral part of the interrogation process. There is little to be gained in tracing the ancestral lineage of *Miranda*,<sup>3</sup> nor its applicability to the military.<sup>4</sup> Suffice it to say that *Miranda* pur-

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\*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>2</sup> 384 U.S. 436 (1966).

<sup>3</sup> The interested reader is invited to compare Mr. Justice White's dissenting opinion, *id.* at 526, with Kamisar, *A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966).

<sup>4</sup> *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). The Court of Military Appeals has made it clear that constitutional safeguards will be applied in "military trials, except insofar as they are made

ported to sweep away the rather vague and subjective test of "voluntariness" under the due process clauses, characterized by Justice Harlan, in his dissent, as "an elaborate, sophisticated, and sensitive approach to admissibility of confessions."<sup>6</sup> In its place, the Supreme Court established absolute prerequisites of warnings and waiver required by the Constitution. It was anticipated that rigid adherence to these new, definitive standards would lead lower courts to a correct resolution in cases involving disputed confessions, and obviate the necessity for them to re-view those cases on a factual basis.<sup>7</sup>

The shift from a subjective to an objective test was not new to the Supreme Court; it had occurred just before in the "right to counsel" cases. For example, in *Betts v. Brady*,<sup>8</sup> the Supreme Court held that an indigent accused was entitled to the appointment of counsel in noncapital cases only when the "special circumstances" of the case indicated the absence of counsel would make the proceedings "fundamentally unfair." The Supreme Court, in speaking of the due process clause of the fourteenth amendment, said:

Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such denial.<sup>9</sup>

Dissatisfaction with the "special circumstances" test led to its reexamination in *Gideon v. Wainwright*.<sup>10</sup> In the latter case, the Supreme Court overruled *Betts*, and held that the right to appointed counsel for noncapital felony cases was absolute under the sixth amendment and not dependent upon evaluation of "special circumstances." This resulted in an objective standard that was immediately applied by all lower courts.

Unfortunately, these lower courts have been unable or unwilling to apply the absolute requirements of *Miranda* in a similar,

inapplicable either expressly or by necessary implication." *Id.* at 634, 37 C.M.R. at 254. For a review of military cases adopting recent Supreme Court decisions, see Birnbaum, *Effect of Recent Supreme Court Decisions on Military Law*, 36 *FORDHAM L. REV.* 153 (1967).

<sup>6</sup> A most comprehensive study of "voluntariness" may be found in *Developments in the Law—Confessions*, 79 *HARV. L. REV.* 935, 954-83 (1966).

<sup>7</sup> *Miranda v. Arizona*, 384 U.S. 436, 508 (1966).

<sup>8</sup> The Supreme Court granted certiorari "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* at 441.

<sup>9</sup> 316 U.S. 456 (1942).

<sup>10</sup> *Id.* at 462.

<sup>11</sup> 372 U.S. 335 (1963).



computer-like manner. Examination of such cases suggests that *Miranda* raised more questions than it answered. Nevertheless, the Supreme Court has only once<sup>11</sup> rendered an opinion regarding the attempts of such courts to deal with this new constitutional procedure.<sup>12</sup>

On the other hand, the Court of Military Appeals has dealt with *Miranda* issues on a number of occasions. As a result, a substantial body of law concerning disputed confessions and the right to counsel exists for the military practitioner.<sup>13</sup> This article will examine the right to counsel as it now exists in the military, compare the applicable language of *Miranda* with the position taken by the Court of Military Appeals, and point out the extension by the latter Court into areas foreseen by *Miranda*, but as yet unresolved by the Supreme Court.

## II. MILITARY LAW PRIOR TO MIRANDA

The *Uniform Code of Military Justice*<sup>14</sup> makes no provision for appointment of counsel prior to a pretrial investigation under the provisions of article 32.<sup>15</sup> Therefore, whether the accused was provided a right to counsel at the interrogation stage had to be determined by the Court of Military Appeals.<sup>16</sup> In general, military law developed along three of the lines ultimately resolved by the *Miranda-Tempia* decisions: First, the right to appointed counsel at the interrogation stage; second, the right to be informed of such right; and, third, the right to the presence of such counsel at the interrogation stage.

<sup>11</sup> In *Mathis v. United States*, 36 U.S.L.W. 4879 (May 6, 1968), the Supreme Court held that the subject of a "routine tax investigation" who was serving a state sentence must be warned in accordance with *Miranda*.

<sup>12</sup> It can be anticipated the Supreme Court will further amplify its decision in *Miranda* because "by the Parkinson's Law of Supreme Court decisions, one decision in one term begets three within a short span of years." George, *The Fruits of Miranda: Scope of the Exclusionary Rule*, 39 U. COLO. L. REV. 478 (1967).

<sup>13</sup> The California experience with *People v. Dorado*, 62 Cal.2d 350, 398 P.2d 361 (1965), provides an additional source of authority for the researcher. It has been summarized in Graham, *What is "Custodial Interrogation?"*: *California's Anticipatory Application of Miranda v. Arizona*, 14 U.C.L.A. L. REV. 59 (1966).

<sup>14</sup> 10 U.S.C. §§ 801-840 (1964) [hereafter called the Code and cited as UCMJ].

<sup>15</sup> UCMJ, art. 32b, provides in pertinent part: "The accused shall be advised . . . of his right to be represented at that investigation by counsel. Upon his request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction over the command."

<sup>16</sup> For a discussion of military law prior to *Escobedo v. Illinois*, 378 U.S.

Relying on precedent established by state and Supreme Court decisions, the Court of Military Appeals, in *United States v. Moore*,<sup>17</sup> held that there was no right to appointed military counsel prior to the filing of charges. The rationale of this decision was spelled out in *United States v. Gunnels*,<sup>18</sup> where the Court distinguished actual criminal proceedings, where the accused "requires the guiding hand of counsel at every step in the proceedings against him,"<sup>19</sup> from interrogation by a law enforcement agent, which is before the filing of charges. In the Court's view, the interrogation process was not a part of the "pretrial proceedings during which counsel investigates the facts and prepares his defense"<sup>20</sup> within the scope of *Powell v. Alabama*,<sup>21</sup> requiring the appointment of counsel.<sup>22</sup>

The uninformed suspect was not entitled, as a matter of right, to be informed of his rights to counsel provided he was advised he could remain silent and the consequences of foregoing that right.<sup>23</sup> However, if the suspect requested information concerning counsel, he was entitled to correct advice. This requirement was met if the suspect were advised that he could "consult with a lawyer of his choice or with the staff judge advocate."<sup>24</sup> As long as the interrogator did not give incorrect advice, any statement the accused made was inadmissible only if it was found to be the result of a denial of counsel.<sup>25</sup>

478 (1964), see Christensen, *Pretrial Right to Counsel*, 23 MIL. L. REV. 1, 18-28 (1964).

<sup>17</sup> 4 U.S.C.M.A. 482, 16 C.M.R. 56 (1954).

<sup>18</sup> 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957).

<sup>19</sup> *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

<sup>20</sup> *United States v. Gunnels*, 8 U.S.C.M.A. 130, 133, 23 C.M.R. 354, 357 (1957).

<sup>21</sup> 287 U.S. 45 (1932).

<sup>22</sup> A comparison between *Gilbert v. California*, 388 U.S. 263 (1967), and *Wade v. United States*, 388 U.S. 218 (1967), indicates the Supreme Court is currently following a similar approach where only the sixth amendment is involved.

<sup>23</sup> *United States v. Wimberley*, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).

<sup>24</sup> *United States v. Dickson*, 16 U.S.C.M.A. 392, 895, 37 C.M.R. 12, 15 (1966). Cf. *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), for the form of advice normally given by a staff judge advocate.

<sup>25</sup> *United States v. Kantner*, 11 U.S.C.M.A. 201, 29 C.M.R. 17 (1960). After *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Court of Military Appeals appeared to change this approach as indicated by this excerpt from *United States v. Houston*, 15 U.S.C.M.A. 239, 245, 35 C.M.R. 211, 217 (1965): "Finally, as we have pointed out on many occasions, if an accused during the investigative process requests an opportunity to consult with counsel and is denied such, statements thereafter obtained from him in the investigation are inadmissible in evidence."

As early as 1957, the Court of Military Appeals indicated that a suspect could have his attorney present during the interrogation,<sup>26</sup> and that the failure to so advise the accused might be error.<sup>27</sup> However, when directly confronted with a case involving the exclusion of defense counsel, the Court declined to answer the specific question whether an accused is entitled to have individually retained counsel physically present during a preliminary interrogation.<sup>28</sup>

Although in retrospect, these decisions may appear somewhat harsh, they reflected the state of the law as practiced in most civilian jurisdictions. Additionally, the procedural shortcomings were ameliorated by the provisions of the Code and the *Manual for Courts-Martial*<sup>29</sup> requiring specific warnings. Article 31b of the Code provides:

No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.<sup>30</sup>

Additionally, the Manual indicates an involuntary confession is one obtained:

[B]y interrogation or request during an official investigation (formal or informal) in which the accused was a person accused or suspected of the offense, . . . unless it is shown that through preliminary warning of the right against self-incrimination, or—if the statement was not obtained in violation of Article 31b—for some

<sup>26</sup> "It seems to us to be a relatively simple matter to advise an uninformed and unknowing accused that . . . he does have . . . a right to have his counsel present with him during an interrogation by a law enforcement agent." *United States v. Gunnels*, 8 U.S.C.M.A. 130, 135, 28 C.M.R. 354, 359 (1957).

<sup>27</sup> *United States v. Brown*, 13 U.S.C.M.A. 14, 32 C.M.R. 14 (1952).

<sup>28</sup> See *United States v. Melville*, 8 U.S.C.M.A. 597, 25 C.M.R. 101 (1958). Shortly thereafter the Supreme Court, in *Cicenia v. La Gay*, 357 U.S. 504 (1958), declined to find a constitutional right to the presence of counsel during interrogation.

<sup>29</sup> *Manual for Courts-Martial, United States, 1951* [hereafter called the Manual and cited as MCM].

<sup>30</sup> UCMJ art. 31b; The duty to warn the accused under article 31b arises as soon as he is a "suspect" and is in no way dependent on custodial interrogation, *United States v. Souder*, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959). See Maguire, *The Warning Requirement of Article 31b: Who Must Do What To Whom And When?*, 2 MIL. L. REV. 1 (1958), and U.S. DEP'T OF ARMY, PAMPHLET No. 27-172, MILITARY JUSTICE—EVIDENCE 114-48, for discussions of the warning requirement of article 31b.

other reason, the accused was aware of his right not to make a statement and understood that it might be used as evidence against him.<sup>23</sup>

This provision requires the interrogator, as a minimum, to inform the suspect of his rights against self-incrimination,<sup>24</sup> the basic prerequisite of *Miranda*.

The prior decision of the Supreme Court, *Escobedo v. Illinois*,<sup>25</sup> had no measurable impact on the military right to counsel.<sup>26</sup> In general, military law seemed to meet these requirements as they were illustrated by Mr. Justice Goldberg:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.<sup>27</sup>

The first case to reach the Court of Military Appeals on this issue was *United States v. Wimberly*.<sup>28</sup> The Court, in a unanimous decision, reaffirmed its prior holdings that an accused is not denied the assistance of counsel unless he requests and is refused the right to consult counsel during the interrogation, or is misinformed as to his rights to counsel. The Court treated the issue as turning on the right to counsel under the sixth amendment,

<sup>23</sup> MCM § 140a.

<sup>24</sup> In *United States v. Lake*, 17 U.S.C.M.A. 3, 37 C.M.R. 267 (1967), the failure of an FBI agent, who need not give an article 31b warning, to advise the suspect of his right against self-incrimination was fatal to the admissibility of the accused's confession.

<sup>25</sup> 378 U.S. 478 (1964).

<sup>26</sup> Seven years prior to *Escobedo*, the Court of Military Appeals was faced with a similar fact situation in *United States v. Rose*, 8 U.S.C.M.A. 441, 24 C.M.R. 251 (1957). The accused, suspected of accepting "kickbacks" in the performance of his official duties was arrested, advised of his rights under article 31b, and questioned. Rose stated: "I would like to call my attorney, it will only take a matter of a couple of seconds and he will be right down." The agent, believing there was no right to counsel prior to the referring of charges, denied his request. The Court reversed the conviction holding the denial of the accused's right to consult his privately retained attorney was error.

<sup>27</sup> *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

<sup>28</sup> 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).

parallel to *Escobedo*, and concluded that the warning requirement of article 31 sufficed to apprise the suspect of his rights:

This Court has always been alert to the accused's need for counsel at all stages of the proceedings against him. We are not persuaded, however, that the right to counsel must be extended to include the investigative processes. Under Article 31 of the Uniform Code of Military Justice, the accused must be informed he has the right to say absolutely nothing; but if he speaks, whatever he says may be used against him in a trial by court-martial. And it must appear that the accused understands his right to remain silent. If the accused exercises his right to say nothing, but the agent persists in continuing the interrogation, such continued questioning may constitute coercion, and invalidate any statement obtained in the interrogative session. Nothing in the Uniform Code, *supra*, or in the decisions of this Court, and nothing in our experience with military methods of interrogation, indicate that the only feasible way to give maximum effect to the Constitutional right to the assistance of counsel is that the accused have counsel beside him during police questioning.<sup>57</sup>

Thus on the eve of the *Miranda* decision, the suspect's right to counsel in the military had been clearly delineated. He would not be furnished appointed counsel during the investigative process, nor would he be advised of his right to consult counsel absent a request regarding such right.

### III. ADVENT OF *MIRANDA* IN THE MILITARY

Following the *Miranda* decision, the Court of Military Appeals was called upon to reevaluate *Wimberley* in the case of *United States v. Tempia*.<sup>58</sup> Prior to any questioning, Tempia was advised of his rights under article 31. In addition, he was told "you may consult with legal counsel if you desire." The interrogation was terminated when Tempia stated he wanted to see an attorney. Tempia was later recalled for questioning, and after stating he had not received any legal advice, was sent to the staff judge advocate's office. The accused signed a form indicating he had been advised by the staff judge advocate:

- a. That he had the right to retain civilian counsel at his own expense;
- b. That no military lawyer would be appointed to represent him while under investigation by law enforcement agents;
- c. That he would be furnished military counsel if charges were preferred and referred to trial or a pretrial investigation convened;
- d. Of his rights under . . . Article 31;
- e. Of the maximum punishment involved; and,
- f. That he had not discussed his guilt or innocence or any of the facts involved with [the staff judge advocate].<sup>59</sup>

<sup>57</sup> *Id.* at 10, 36 C.M.R. at 166.

<sup>58</sup> 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

<sup>59</sup> *Id.* at 682, 37 C.M.R. at 252.

Upon returning to the OSI office, Tempia was again informed of his rights under article 31 and his right to seek counsel. Tempia stated he did not desire further legal counsel as "they could not help me—they didn't do me no good." A confession followed.

At the outset, the Court was met by the contention of amicus curiae<sup>40</sup> that military law is not affected by constitutional limitations and thus the *Miranda* principles are not applicable. Appellate government counsel, though conceding the applicability of the Constitution to the military itself, nevertheless contended that *Miranda* involved procedural devices under the Supreme Court's supervisory power, not bottomed on the Constitution and thus not binding on the military; they further contended that the *Miranda* rules were not necessary or desirable in the administration of military justice.

The Court summarily rejected any argument that the Constitution is inapplicable to the military by stating: "The time is long since past . . . when this Court will lend an attentive ear to the argument that members of the armed forces are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights."<sup>41</sup> In the view of the Court, even though military law has developed separate and apart from federal or state law, it must still satisfy constitutional safeguards unless they are made inapplicable either expressly or by necessary implication. Since the protection of the fifth amendment was granted to military defendants prior to and contemporaneous with the Constitution, it is therefore applicable to the military. With this, the Court's "firm and unshakeable conviction that Tempia . . . was entitled to the protection of the Bill of Rights, insofar as we are herein concerned with it"<sup>42</sup> was firmly established.

The Court then turned its attention to the nature of the *Miranda* rules. Despite the Supreme Court's indicating that legislatures or courts could adopt "other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring continuous opportunity to exercise it,"<sup>43</sup> the Court of Military Appeals held that the *Miranda* rules were in fact bottomed on the Constitution, and thus binding on the military. In any event, the Court held the protections afforded

<sup>40</sup> The Judge Advocate General of the Navy. It is interesting to note that the attorney who represented Miranda before the Supreme Court also appeared as amicus curiae in *Tempia* urging *Miranda* was of constitutional dimensions binding on military interrogators.

<sup>41</sup> 16 U.S.C.M.A. 629, 633, 37 C.M.R. 249, 253 (1967).

<sup>42</sup> *Id.* at 634, 37 C.M.R. at 254.

<sup>43</sup> *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

an accused under article 31 of the Code do not meet the minimum requirements of *Miranda*:

Now, the accused must have a lawyer; before, he need not have been given one; now, he must be warned of his rights to counsel; before, he need not be so warned; and, now finally, he will receive effective legal advice not only as to what he can do, but also as to what he should do.<sup>42</sup>

Expansion of the Supreme Court's prophylactic function of defense counsel<sup>43</sup> into a conventional attorney-client relationship followed:

[The accused is entitled to] a lawyer who is peculiarly and entirely the accused's own representative; who owes him total fidelity; to whom full disclosure may be safely made in a privileged atmosphere; and from whom accused can learn with confidence a proper course of action.<sup>44</sup>

From this analysis the Court concluded that "the doctrine set forth in our earlier decision in *United States v. Wimberley*, . . . has been largely set at naught by the *Miranda* decision."<sup>45</sup>

Since the Supreme Court, in *Johnson v. New Jersey*,<sup>46</sup> applied

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<sup>42</sup> *United States v. Tempia*, 16 U.S.C.M.A. 629, 640, 37 C.M.R. 249, 260 (1967). In this respect, the Court failed to address itself adequately to the Chief Judge's contention that military law provides an acceptable substitute since "[t]he central purpose of *Miranda* was to effectuate the Fifth Amendment right of the individual to remain silent" and the right to counsel portion of the opinion was merely a procedural protection to that end. *Id.* at 643, 37 C.M.R. at 263 (Quinn, C.J., dissenting). His argument is most persuasive when considered in light of the Supreme Court's express approval of the military warning requirements (*Miranda v. Arizona*, 384 U.S. 436, 489 (1966)) and the fact that military interrogations are not generally characterized by the techniques of compulsion and pressure condemned by the Supreme Court. (*United States v. Wimberley*, 16 U.S.C.M.A. 3, 10, 36 C.M.R. 159, 166 (1966).)

<sup>43</sup> "The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial." *Miranda v. Arizona*, 384 U.S. 436, 470 (1966).

<sup>44</sup> *United States v. Tempia*, 16 U.S.C.M.A. 629, 639, 37 C.M.R. 249, 259 (1967).

<sup>45</sup> *Id.* at 631, 37 C.M.R. at 251.

<sup>46</sup> 384 U.S. 719 (1966). Cases tried after *Miranda* but before *Tempia* were governed by the Supreme Court decision in *Miranda*, even though there was a hiatus of approximately ten months before the Court of Military Appeals held the decision applicable to the military. See *United States v. Solomon*, 17 U.S.C.M.A. 262, 38 C.M.R. 60 (1967).

the requirements of *Miranda* to cases tried after 13 June 1966, the Court of Military Appeals decided to apply *Tempia* retroactively to military cases tried after that same date. In cases tried before such date, warnings sufficient to support an admissible confession need only meet the requirements of *Wimberley*.<sup>49</sup>

#### IV. WHEN IS A WARNING REQUIRED?

It is only when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" <sup>50</sup> that the *Miranda* warnings must be given. As a matter of policy, however, The Judge Advocate General has indicated that *Miranda-Tempia* warnings should be given whenever an article 31 warning is required.<sup>51</sup> This extremely cautious approach is not required by the decisions,<sup>52</sup> but it is a very practical guide for commanders and criminal investigators to follow.<sup>53</sup>

Yet cases will arise where the issue is in fact whether the warning was required at all, such as those involving a defective warning or the government's inability to establish a free and voluntary waiver. Here a confession may be salvaged if the government can show that it was taken under circumstances in which no warning was required.<sup>54</sup> It is therefore important to examine the nature of "custodial interrogation," as that term has been defined by the Court of Military Appeals, to determine when a *Miranda-Tempia* warning must be given.

<sup>49</sup> See *United States v. Swift*, 17 U.S.C.M.A. 227, 38 C.M.R. 25 (1967). It is the date of trial and not the date of the confession which governs *United States v. Bosley*, 17 U.S.C.M.A. 350, 38 C.M.R. 148 (1968).

<sup>50</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "This is what we meant in *Escobedo* when we spoke of an investigation which had focused on the accused." *Id.* at n. 4.

<sup>51</sup> Dep't of the Army Message No. 812214 (reprinted in 67-9 JALS 6).

<sup>52</sup> The necessity to warn a suspect under article 31 may be present even though he has not been taken into custody or otherwise deprived of his freedom of action in any significant way. See e.g., *United States v. Souder*, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959). On the other hand, compliance with the *Miranda-Tempia* warning does not obviate the necessity of an article 31 warning. See *Miranda v. Arizona*, 384 U.S. 436, 463, n. 32 (1966). Cf. *United States v. White*, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).

<sup>53</sup> Numerous studies have indicated a full and complete warning does not generally impede the interrogator in his quest for a confession. See, e.g., Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1521 (1967). The compulsion to confess in spite of the required warnings appears to be equally strong among supposedly bright and well educated suspects. See Note, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L. J. 800 (1967).

<sup>54</sup> See *United States v. Hardy*, 17 U.S.C.M.A. 100, 37 C.M.R. 364 (1967).



A. BURDEN OF PROOF CONCERNING  
"CUSTODIAL INTERROGATION"

1. *As Affected By the Nature of Interrogation.*

The initial question to be resolved is who has the burden of establishing whether the circumstances of the questioning were "custodial" in nature? In *United States v. Hardy*,<sup>55</sup> the Government contended the burden was on the defense to establish that the incriminating statement was made in a coercive atmosphere calling for the *Miranda-Tempia* warning. Since the record was silent concerning the reason for the suspect's presence in the investigator's office, the Government concluded that it was just as reasonable to assume that the suspects sought out the agents to give an entirely voluntary and spontaneous confession.<sup>56</sup> Under this theory, the defense would have failed to meet its burden, and the confession would be admissible despite the concededly defective warning. As authority for this proposition the Government contended that the *McNabb* rule<sup>57</sup> places the burden on the defense to establish that an incriminating statement was made during a period of unreasonable delay between arrest and arraignment, and that a similar burden should be met by the defense under *Miranda-Tempia*.

The Court rejected the Government's contention by returning to the view, expressed in *Tempia*, that *Miranda* established procedures of constitutional import rather than judicial supervision of the rules of evidence. Since the *McNabb* rule is "a judicial device to guard against the overzealous or despotic police officer, who failed to comply with his duty to take a person under arrest to the nearest judge or commissioner for preliminary hearing,"<sup>58</sup> it must give way to constitutional safeguards. Reference to military law prior to *Miranda*, requiring the government to establish that the accused was not denied the right to counsel, compelled the conclusion that:

[W]hen a law enforcement agent obtains a statement from an accused, or a suspect, the burden rests upon the Government to prove

<sup>55</sup> *Id.* The suspect was questioned in the OSI office without a proper warning that he had the right to the presence of an attorney during the investigation.

<sup>56</sup> "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

<sup>57</sup> *McNabb v. United States*, 318 U.S. 332 (1943).

<sup>58</sup> *United States v. Hardy*, 17 U.S.C.M.A. 100, 101-02, 37 C.M.R. 364, 365-66 (1967).

"*Id.*, at 102, 87 C.M.R. at 366. *Accord*, United States v. Bollons, 17 U.S.C.M.A. 253, 88 C.M.R. 51 (1967).  
 "In United States v. Keller, 17 U.S.C.M.A. 507, 88 C.M.R. 305 (1968), the Government contended that where interrogating agents are instructed to comply with the *Miranda* requirements, the presumption of regularity in the conduct of governmental affairs leads to an inference that the agent gave the correct advice. The Court rejected the argument saying there is no such presumption and the Government must produce evidence of a proper warning. The record indicates Keller was advised "concerning legal counsel" and of his "right to legal counsel."  
 "See MCM ¶ 1406. The Manual Language requiring a preliminary showing for confessions but not for admissions was rejected in United States v. Lincoln, 17 U.S.C.M.A. 830, 88 C.M.R. 128 (1967), on the basis of the Supreme Court's language in *Miranda v. Arizona*, 384 U.S. 436, 476 (1966): "No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense."  
 "The burden is on the United States to establish compliance with *Miranda* and *Tampa* . . . and absence of objection thereto does not excuse its failure to prove a proper warning." United States v. Gustafson, 17 U.S.C.M.A. 150, 151, 87 C.M.R. 414, 415 (1967).  
 "The 'principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation.' *F. Inbau & J. Reid, CRIMINAL INTERROGATION AND CONFESSIONS* § (2d ed. 1967)."  
 "*Miranda v. Arizona*, 384 U.S. 436, 475 (1966)."

2. As Affected by the Nature of Military Procedure.  
 The government's burden in establishing the admissibility of

shoulders,"  
 during incommunicado interrogation, the burden is rightly on its means of making available corroborated evidence of warnings given stances under which the interrogation takes place and has the only Since the State is responsible for establishing the isolated circum- speaking of the burden to establish the requisite waiver, stated:  
 was conducted. Under these circumstances, the Supreme Court, corroborating evidence of the manner in which the interrogation ical compulsion, but it also prevents the suspect from supplying questioning. Custodial interrogation not only involves psycholog- mainly concerned with the nature of incommunicado " police keeping with the *Miranda* decision. The Supreme Court was pri- The position taken by the Court of Military Appeals is in burden."  
 This burden requires an affirmative showing that the confession was voluntary," unless the defense expressly waives it." The ac- cused's mere silence will not relieve the prosecution from this burden."  
 in which the accused had full freedom of choice and conduct."  
 or to demonstrate that the statement was made under circumstances compliance with the *Miranda* safeguards for a voluntary statement.

## MIRANDA AND THE MILITARY

a confession is complicated by the dual responsibility in military law for determining such admissibility. The Manual allocates this responsibility between the law officer and the members of the court:

The ruling of the law officer . . . that a particular confession or admission may be received in evidence is not conclusive of the voluntary nature of the confession or admission. Such a ruling merely places the confession or admission before the court, that is, the ruling is final only on the question of admissibility. Each member of the court, in his deliberation upon the findings of guilt or innocence, may come to his own conclusion as to the voluntary nature of the confession or admission and accept or reject it accordingly. He may also consider any evidence adduced as to the voluntary or involuntary nature of the confession or admission as affecting the weight to be given thereto.<sup>66</sup>

The Manual provision was construed in *United States v. Dykes*<sup>66</sup> to place the initial responsibility for determining admissibility of a confession on the law officer. Since his ruling is interlocutory<sup>67</sup> in nature, the government's burden of establishing that the requirements of *Miranda-Tempia* were met, or that a warning was not required, is satisfied by a mere preponderance of the evidence.<sup>68</sup> This may be of little value to the government as it will not meet the "reasonable doubt" standard required when the issue is submitted to the members of the court for their consideration in resolving the ultimate issue of guilt or innocence. Nevertheless, where there is no disputed issue of fact to be submitted to the court,<sup>69</sup> or where the defense declines to

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<sup>66</sup> MCM ¶ 140a. The Supreme Court's requirement in *Jackson v. Denno*, 378 U.S. 368 (1964), that the judge rule on the voluntariness of a confession before submitting it to the jury is met by this provision. See CM 411750, *Robinson*, 35 C.M.R. 534 (1964), *petition denied*, 15 U.S.C.M.A. 675, 35 C.M.R. 478 (1965). However, if the law officer, when faced with a conflict in the evidence, submits the question to the court without making a preliminary determination of his own, *Jackson v. Denno*, *supra*, has been violated. *United States v. Landrum*, 17 U.S.C.M.A. 526, 38 C.M.R. 324 (1968) (dictum).

<sup>67</sup> 5 U.S.C.M.A. 735, 19 C.M.R. 31 (1955).

<sup>68</sup> *United States v. Goard*, 13 U.S.C.M.A. 588, 33 C.M.R. 120 (1963). See UCMJ art. 51b and MCM ¶ 57g.

<sup>69</sup> *United States v. Mewborn*, 17 U.S.C.M.A. 431, 38 C.M.R. 235 (1968). In the opinion of the Court, "the law officer does not sit as a judge trying a case without a jury, and his findings of fact deal only with the admissibility of the statement." *Id.* at 437, 38 C.M.R. at 241.

<sup>70</sup> *United States v. Ballard*, 17 U.S.C.M.A. 96, 37 C.M.R. 360 (1967). Ballard asserted he did not make the statement attributed to him. The only issue under these circumstances is one of credibility.

relitigate the issue before the court,<sup>70</sup> the lesser standard will suffice, and the confession will be admitted.

The opinion expressed in *Dykes* that the court considers evidence relating to voluntariness only in conjunction with the weight or credibility to be given the confession was revised in *United States v. Jones*.<sup>71</sup> There the court of Military Appeals returned to the clear language of the Manual and held that the court members will "determine the credibility and weight of the confession [only] if they have first found that it was voluntarily made."<sup>72</sup> *United States v. Odenweller*,<sup>73</sup> a case decided prior to *Miranda-Tempia*, has been cited by the Court of Military Appeals as establishing the rule that when voluntariness is submitted to the court as a factual matter it must be proved beyond a reasonable doubt. *Odenweller* involved the effect of denial of counsel on the voluntariness of a confession. The Court of Military Appeals held that since a confession was such an important factor in the trial of a case, its voluntariness should be measured by the standard applicable to the ultimate issue of guilt or innocence, *i.e.*, beyond a reasonable doubt. This standard was subsequently applied in *United States v. Westmore*,<sup>74</sup> a case arising after *Miranda-Tempia*, to an accused's contention that his stated desire to remain silent was not honored. The Court of Military Appeals held that it was error for the law officer not to instruct that the prosecution's burden of proof on this issue was "beyond a reasonable doubt."<sup>75</sup>

### 3. As Affected by the Nature of the Statement.

Prior to *Tempia*, military law distinguished between confessions and admissions insofar as the requirement to prove voluntariness was concerned.<sup>76</sup> This distinction was based on the express language of the Manual:

The admissibility of a confession of the accused must be established by an affirmative showing that it was voluntary, . . . but an

<sup>70</sup> *United States v. Mewborn*, 17 U.S.C.M.A. 431, 38 C.M.R. 235 (1968).

<sup>71</sup> 7 U.S.C.M.A. 623, 23 C.M.R. 87 (1957).

<sup>72</sup> *Id.* at 628, 23 C.M.R. at 92.

<sup>73</sup> 13 U.S.C.M.A. 71, 32 C.M.R. 71 (1962).

<sup>74</sup> 17 U.S.C.M.A. 406, 38 C.M.R. 204 (1968).

<sup>75</sup> See also *United States v. Gustafson*, 17 U.S.C.M.A. 150, 37 C.M.R. 414 (1967), where the Court, in *dictum*, indicated the general view that the prosecution must prove compliance, beyond a reasonable doubt, with all aspects of *Miranda-Tempia*. But *cf.* *United States v. Landrum*, *supra* note 65, where the failure of the law officer to instruct the court that the Government had the burden of proving beyond a reasonable doubt that the defendant did not request defense counsel was error.

<sup>76</sup> See *United States v. Lake*, 17 U.S.C.M.A. 3, 37 C.M.R. 267 (1967).

## MIRANDA AND THE MILITARY

admission of the accused may be introduced without such preliminary proof if there is no indication that it was involuntary."

Under this provision, the necessity to show the warnings had been given arose only when the record contained an "indication" that the admission was involuntary.<sup>48</sup>

The Government contended, in *United States v. McCauley*,<sup>49</sup> that appellant's statement was "volunteered in the sense that it is exculpatory in nature, not of the whole cloth, and designed solely to escape the clutches of the county sheriff as well as the FBI."<sup>50</sup> Under the Manual an exculpatory statement would be an admission for which a preliminary showing of proper warnings need not be made.<sup>51</sup> The Court of Military Appeals indicated that *Miranda* has a "muting effect upon the suggestion that so-called exculpatory statements are necessarily voluntary,"<sup>52</sup> but declined to meet squarely with the issue of the validity of the Manual provision.<sup>53</sup>

The Court of Military Appeals was again faced with construing the effect of *Miranda* on the Manual in *United States v. Lincoln*,<sup>54</sup> when the Government used an admission of the accused to impeach his in-court testimony, without making any attempt to show compliance with *Miranda-Tempia*. The Court of Military Appeals first looked to the language in *Miranda* rejecting any difference between confessions, admissions, and exculpatory statements:

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<sup>48</sup> MCM ¶ 140a.

<sup>49</sup> See, e.g., *United States v. Seymour*, 3 U.S.C.M.A. 401, 12 C.M.R. 157 (1953).

<sup>50</sup> 17 U.S.C.M.A. 81, 37 C.M.R. 345 (1967). The agent failed to advise the accused he had the right to the presence of an attorney during the questioning.

<sup>51</sup> *Id.* at 84, 37 C.M.R. at 348. The accused was AWOL at the time he was questioned concerning his failure to have a draft card.

<sup>52</sup> MCM ¶ 104a; see also *United States v. Kelley*, 7 U.S.C.M.A. 584, 23 C.M.R. 48 (1957).

<sup>53</sup> *United States v. McCauley*, 17 U.S.C.M.A. 81, 85, 37 C.M.R. 345, 349 (1967).

<sup>54</sup> "[W]e leave for future determination such auxiliary or collateral matters as the effect of *Miranda* upon paragraph 140a, Manual for Courts-Martial, United States, 1951, and the line of cases concerned with that particular evidentiary problem. Cf. *United States v. Lake*, 17 USCMA 3, 37 CMR 267." *Id.* at 86, 37 C.M.R. at 350.

<sup>55</sup> 17 U.S.C.M.A. 330, 38 C.M.R. 128 (1968). At the trial Lincoln testified, in effect, that the victim accidentally impaled himself on the knife and that he had no previous arguments with the victim. The trial counsel impeached Lincoln with pretrial statements in which he admitted having a prior argument with the victim and that he did not know how the stabbing occurred because he had blacked out.

No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner: it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication.<sup>85</sup>

The Court of Military Appeals viewed this language as modifying the Manual rule on a constitutional basis, and then announced:

The correct principle requires proof by the United States of the proper warning as to the accused's right to remain silent and to a lawyer, as the predicate for the use of any pretrial statement, obtained during custodial interrogation, whether it be inculpatory or exculpatory.<sup>86</sup>

It follows that the nature of the statement has no effect on the requirement for *Miranda-Tempia* warnings.

#### B. REQUIREMENT OF CONFRONTATION

Not every contact between the police officer and the citizen calls for constitutional warnings. It is only when the confrontation carries with it an element of custodial coercion that *Miranda* applies. A mere face-to-face encounter with police officers will not suffice. For example, "general on-the-scene questioning as to the facts surrounding a crime or other general questioning of citizens in the fact-finding process"<sup>87</sup> is not encompassed within the *Miranda* decision. In the military, the routine administrative questioning of persons found near a base supply office was sustained over a "lack of warning" objection.<sup>88</sup> The requisite confrontation is achieved only when the police officer has created an interrogation atmosphere "for no purpose other than to subjugate the individual to the will of the examiner."<sup>89</sup>

The issue of whether a *Miranda-Tempia* warning is necessary readily points out the distinction between such coercive confron-

<sup>85</sup> *Miranda v. Arizona*, 384 U.S. 436, 476-77 (1966).

<sup>86</sup> *United States v. Lincoln*, 17 U.S.C.M.A. 330, 333, 38 C.M.R. 128, 131 (1968).

<sup>87</sup> *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

<sup>88</sup> *United States v. Ballard*, 17 U.S.C.M.A. 96, 37 C.M.A. 360 (1967).

<sup>89</sup> *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

tation and the situation where an undercover agent is used to secure a confession. Normally the undercover agent represents himself as an enemy of the law, and the suspect is unaware of his true identity. This issue came up in *United States v. Hinkson*,<sup>90</sup> where a marine, who overheard conversations dealing with the blackmarket sale of Marine Corps equipment, reported the incident to the Office of Naval Intelligence and agreed to assist the agents as an undercover informant. His reports ultimately uncovered Hinkson as a possible suspect. Hinkson was called to the agent's office for interrogation and was seated in a small waiting room. As the informer left the agent's office and entered the waiting room, he said over his shoulder, "[Y]ou ain't getting nothing out of me," which of course was designed to give the impression that the informer was also a suspect. The informer initiated a conversation with the defendant, and he hoped that by bragging about his own criminal activities, Hinkson would do the same. Hinkson's subsequent statement to the informer that he had stolen more than thirty sections of pipe was used at the trial.

The Court of Military Appeals began by assuming Hinkson was in custody as that term has been developed in the military.<sup>91</sup> Nevertheless, there was no atmosphere of coercive confrontation appearing in the conversation between the informer and the accused:

In their conversation none of the accused's weaknesses of intellect or fortitude were pitted against the powers, real or imagined, of the Government.<sup>92</sup>

The Court of Military Appeals viewed the factual situation as one of casual conversation between strangers. The waiting room locale does not clothe the defendant with any greater degree of protection than conversations at other public places such as "a park bench, at a bar, or in the accused's own quarters."<sup>93</sup> The Court of Military Appeals noted:

[T]he only kind of pressure discernible in this situation, if it can

<sup>90</sup> 17 U.S.C.M.A. 126, 37 C.M.R. 890 (1967). Hinkson was tried prior to the effective date of *Miranda*; however, the Court considered the issue on its merits.

<sup>91</sup> In the military, presence at an interrogation pursuant to the direction of the suspect's superiors is considered the equivalent of "custodial interrogation." See part C.1. *infra*.

<sup>92</sup> *United States v. Hinkson*, 17 U.S.C.M.A. 126, 128, 37 C.M.R. 390, 392 (1967).

<sup>93</sup> *Id.*

be described as such, is that human quality which leads one person to talk about *his* life when he hears another discussing his own. The hope by an undercover agent that a suspect will talk in response to that human quality is not coercion or unlawful influence.<sup>74</sup>

Since no element of custodial coercion confronted the suspect in his conversation with a self-proclaimed criminal, the *Miranda-Tempia* warnings were held not to be required.

In the writer's opinion, it is doubtful whether the *Hinkson* approach would be accepted by the Supreme Court.<sup>75</sup> To permit civilian police to avoid the *Miranda* warning requirements by the simple expedient of having a "cell mate" conduct the questioning instead of a uniformed policeman is contrary to the result the Supreme Court was attempting to reach. This is the position taken in Judge Ferguson's dissent when he argued that "the mask of the informer . . . must be laid aside at the door of the police station":<sup>76</sup>

The substance of my brothers' position seems to be that if a military policeman openly announces himself as such, after the suspect's arrest, he must advise the accused of his rights and see they are protected. But if he pins his badge to his underwear, carefully conceals his identity as a cop and approaches the accused on a histrionic basis, he is, by reason of his acting ability, excused from complying with the mandate of the Congress.<sup>77</sup>

*Hinkson* appears to be the exception, rather than the rule, in the military. Normally, persons conducting official questioning are required to advise the suspect of his rights under article 31 of the Code regardless of the latter's knowledge of the interrogator's true status.<sup>78</sup> Application of this rule would prevent the improper avoidance of the warning requirements by the military undercover agent whenever an "interrogation" takes place. Once

<sup>74</sup> *Id.*

<sup>75</sup> *Miller v. California*, 245 Cal. App. 2d 112, 53 Cal. Rptr. 720 (1966), cert. granted, 389 U.S. 968 (1967). The issue is "whether the introduction of admissions made to an undercover agent planted in petitioner's jail cell constituted a violation of petitioner's constitutional rights to counsel and against self-incrimination."

<sup>76</sup> *United States v. Hinkson*, 17 U.S.C.M.A. 126, 129, 37 C.M.R. 390, 393 (1967) (dissent).

<sup>77</sup> *Id.* at 131, 37 C.M.R. at 395.

<sup>78</sup> *United States v. Souder*, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959). *But see United States v. Gibson*, 3 U.S.C.M.A. 746, 14 C.M.R. 164 (1954). A discussion of the effect of *Souder* on *Gibson* may be found in Maguire, *Interrogation of Suspects by "Secret" Investigation*, 12 MIL. L. REV. 269 (1961). See Judge Ferguson's analysis in *United States v. Hinkson*, 17 U.S.C.M.A. 126, 131, 37 C.M.R. 390, 395 (1967) (dissent) that *Gibson* did not involve a government informer.



the required article 31 warning is given, the suspect knows he is being confronted by the powers of the Government, and the full *Miranda-Tempia* warning must then be given. However, in *Hinkson*, the informer did not question the defendant. His conduct was in keeping with the traditional role of the informer<sup>99</sup> which Judge Ferguson conceded was not affected by the Supreme Court in *Hoffa v. United States*.<sup>100</sup>

### C. REQUIREMENT OF "CUSTODIAL INTERROGATION"

#### 1. Nature of "Custody."

Although each of the cases decided with *Miranda* involved a suspect who had been arrested,<sup>101</sup> the holding is not limited to a technical state of custody. It is sufficient if the suspect has been "deprived of his freedom of action in any significant way,"<sup>102</sup> Unlike civilian life, the very nature of service in the armed forces carries with it a high degree of limitation of freedom falling short of custody. For example, a military suspect can be ordered to report for questioning "quite without regard to warrants or other legal process."<sup>103</sup> This unique feature has led the Court of Military Appeals to attempt an explanation of the limitation of freedom aspect of *Miranda* in advance of the Supreme Court.

In *United States v. Tempia*,<sup>104</sup> the suspect was arrested, released to seek legal counsel and consult with the staff judge advocate, and later summoned for interrogation. The Court of Military Appeals noted that had the suspect failed to report for interrogation, he could have been prosecuted under article 86 of the Code for failure to repair;<sup>105</sup> so that when a suspect is ordered to report for interrogation under these circumstances, "[i]t ignores the realities of that situation to say . . . [he] has not been significantly deprived of his freedom of action,"<sup>106</sup> within the pur-

<sup>99</sup> "We merely prevent them [informers] from obtaining evidence by interrogation. . . . [They may still] listen, observe, and report." *United States v. Gibson*, 8 U.S.C.M.A. 746, 758, 14 C.M.R. 164, 176 (1954) (concurring opinion).

<sup>100</sup> 385 U.S. 293 (1966).

<sup>101</sup> See *Miranda v. Arizona*, 384 U.S. 436, 491-99 (1966).

<sup>102</sup> *Id.* at 444.

<sup>103</sup> *United States v. Tempia*, 16 U.S.C.M.A. 629, 636, 37 C.M.R. 249, 256 (1966).

<sup>104</sup> *Id.*

<sup>105</sup> The text of article 86 reads as follows: "Any member of the armed forces who, without proper authority—(1) fails to go to his appointed place of duty at the time prescribed; (2) goes from that place; or (3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed; shall be punished as a court-martial may direct."

<sup>106</sup> *United States v. Tempia*, 16 U.S.C.M.A. 629, 636, 37 C.M.R. 249, 256 (1966).

view of *Miranda*. The Court added, with regard to the reason for the suspect's presence at the office for interrogation:

Common knowledge of the lack of freedom of movement by military personnel, especially during normal working hours, supports an inference that the accused were directed by a superior to go to the agent's office.<sup>107</sup>

Thus the Government must not only demonstrate beyond a reasonable doubt that a statement was made under circumstances in which the accused had full freedom of choice and conduct, but they are also met at the outset with an inference that any statement made during normal duty hours was coercive in nature and therefore subject to the *Miranda-Tempia* warnings.

Although the limitation of freedom aspect of *Miranda* was treated as custodial interrogation in *Tempia*, it is suggested that the reverse is more accurate, *i.e.*, custody is merely one form of limitation of freedom. The difference lies in the degree of limitation placed upon the suspect.<sup>108</sup> If he is, in fact, in custody, he can readily perceive that he has been apprehended and is in the hands of the law;<sup>109</sup> but if not, it is far more difficult for him to determine whether his freedom of action has been limited in any significant manner.

The limitation of freedom involved in directing the suspect to report to criminal investigators gives rise to the question of whose understanding of the freedom to leave the interrogation shall govern. Is it the suspect's view of his status or the intent of the agent which perfects the constitutional right to counsel warnings? In *United States v. Bollons*,<sup>110</sup> the accused had been called back for interrogation after he spoke to his attorney. In holding Bollons was sufficiently deprived of his freedom of action, the Court of Military Appeals stated the circumstance that he had been called for interrogation more than offset the agent's testimony that no force was used in keeping the defendant in the interrogation room or that the defendant expressed no desire to leave. Would a different result be reached if in fact the suspect were informed that he is not under apprehension or in custody

<sup>107</sup> *United States v. Hardy*, 17 U.S.C.M.A. 100, 102, 37 C.M.R. 864, 386 (1967) (dictum).

<sup>108</sup> *E.g.*, MCM ¶ 19c provides: "An apprehension is effected by clearly notifying the person to be apprehended that he is thereby taken into custody."

<sup>109</sup> There is no necessity to advise the suspect in accordance with MCM ¶ 19c, provided his "freedom of locomotion" is, in fact, nonexistent. ACM S-2435, *Ramirez*, 4 C.M.R. 543 (1952).

<sup>110</sup> 17 U.S.C.M.A. 253, 38 C.M.R. 51 (1967).

and that he is free to go at any time? This situation was present in *United States v. Gustafson*,<sup>111</sup> however, the Court declined to answer the question by holding that the defense consented to introduction of the accused's statement without the requisite warnings. Nevertheless, the Court of Military Appeals had indicated a subjective test will be used. In *United States v. McCauley*,<sup>112</sup> the Court of Military Appeals cited with approval *People v. Collieran*,<sup>113</sup> which held that the test of custodial interrogation is the belief of the person under interrogation as to whether he is in custody. A similar approach was taken in *United States v. Hinkson*,<sup>114</sup> in which the absence of governmental confrontation was dispositive of the case, since the suspect did not know he was being confronted by governmental agents.

## 2. Nature of "Interrogation."

In *Miranda*, the Supreme Court was concerned with the questioning of an individual who had become the prime target of an investigation for the purpose of securing incriminating statements. Although the techniques of interrogation received considerable exposure, little was said concerning the necessity for questioning itself.

The nature of the questioning process, which calls forth the warning requirements in the military, was considered in *United States v. Ballard*.<sup>115</sup> In that case, an air policeman at Maguire Air Force Base observed a private automobile backing up to the platform of the base equipment management office. The policeman observed the defendant get out of his automobile and receive a tool box from someone inside the building. As the air policeman drove over the base equipment office, he saw another box being handed out to the defendant. Upon arriving at the scene, the questioning went substantially as follows:

Air Policeman: Do you work here?

Ballard: Give me a break.

Air Policeman: Let's see your identification card.

Ballard: Give me a break.

Air Policeman: Give me your ID card.

Ballard: How much is it worth to you? Fifty dollars if you let me go.

The defense objected to the introduction of these admissions on

<sup>111</sup> 17 U.S.C.M.A. 150, 37 C.M.R. 414 (1967).

<sup>112</sup> 17 U.S.C.M.A. 81, 37 C.M.R. 345 (1967).

<sup>113</sup> 35 U.S.L.W. 2540 (Mar. 13, 1967).

<sup>114</sup> 17 U.S.C.M.A. 126, 37 C.M.R. 390 (1967).

<sup>115</sup> 17 U.S.C.M.A. 96, 37 C.M.R. 360 (1967).

the basis that they were unwarned and therefore inadmissible. The Court of Military Appeals held that this was not an interrogation within the contemplation of *Miranda-Tempia*, saying: "Most assuredly, the questions asked and the demand made of the accused were not designed, nor geared, to elicit a statement of incrimination."<sup>118</sup>

At the outset, it might appear difficult to reconcile *Ballard* with the Court's approval in *United States v. McCauley*<sup>117</sup> of the view that:

"Compulsion" under the Fifth Amendment and its State counterpart does not have its precise dictionary meaning. It has no relationship to "coercion" and is applicable in many settings not related to any "critical stage." *Compulsion is simply questioning in any setting* (civil proceeding, administrative or departmental hearing, grand jury and all court proceedings) *where a criminal fact may be elicited.*<sup>119</sup>

While the reasons for the Court's conclusion in *Ballard* are not specifically set forth in the opinion, it is clear Ballard's questioning resulted in a criminal fact being elicited contrary to the position taken in *McCauley*. Nevertheless, the approach in *Ballard* is consistent with the Supreme Court's exclusion of general on-the-scene questioning from the rules announced in *Miranda*.<sup>120</sup> Viewed in this context, the air policeman was merely conducting a routine administrative check of the identity of persons found in an area open to twenty-four hour activity. Although Ballard was not free to go without giving a proper explanation of his presence in the area, he was not even considered as suspect within article 31. A second potential explanation for the decision is that the admission was spontaneously volunteered.<sup>120</sup> As the Supreme Court indicated: "The fundamental import of the privilege . . . is not whether [ the subject] is al-

<sup>118</sup> *Id.* at 99, 37 C.M.R. at 363.

<sup>117</sup> 17 U.S.C.M.A. 81, 37 C.M.R. 845 (1967).

<sup>118</sup> *Id.* at 84, 37 C.M.R. at 348 (emphasis added).

<sup>119</sup> "General on-the-scene questioning as to the facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966).

<sup>120</sup> "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment." *Id.* at 478.

lowed to talk to the police . . . but whether he can be interrogated."<sup>122</sup> Prior to *Miranda*, military law had already recognized that volunteered statements do not permit, much less require, warnings under article 31.<sup>123</sup> Whatever rationale for *Ballard* is chosen, it seems clear that interrogation under *Miranda-Tempia* occurs only when "an accused person [is] asked to explain his apparent connection with a crime under investigation,"<sup>124</sup> and the privilege protects him only "from questioning, routine or otherwise, which seeks to elicit a criminal or clue fact."<sup>125</sup> Accordingly, the language in *McCauley* should be construed to require the *Miranda-Tempia* warnings only in those settings in which the purpose of the questions is to elicit an admission which will incriminate the person being interrogated.

Moreover, there must also be an actual process of interrogation. In *United States v. Hinkson*,<sup>126</sup> the Court affirmed the earlier holding of *United States v. Gibson*<sup>127</sup> that it was not interrogation to engage in ordinary conversation, even though the purpose be to obtain incriminating statements. To allow for the human tendency to talk about one's self is not questioning under *Miranda-Tempia*.<sup>127</sup>

### 3. Relating "Custody" to "Interrogation."

Numerous federal cases have held that questioning initiated in locales other than the police station, such as one's home,<sup>128</sup> or office,<sup>129</sup> does not require *Miranda* warnings. The Government assimilated these cases in *United States v. McCauley*,<sup>130</sup> and argued that there must be a relationship between custody and

<sup>122</sup> *Id.* But see *Mathis v. United States*, 86 U.S.L.W. 4379 (May 6, 1968). The Supreme Court indicated any questioning which "frequently lead[s]" to criminal prosecution must be preceded by the *Miranda* warnings.

<sup>123</sup> *United States v. Workman*, 15 U.S.C.M.A. 228, 35 C.M.R. 200 (1965).

<sup>124</sup> *Brown v. Walker*, 161 U.S. 591, 596 (1896), cited with approval in *Miranda v. Arizona*, 384 U.S. 436, 442 (1966).

<sup>125</sup> *People v. Allen*, 50 Misc. 2d 897, 903, 272 N.Y.S.2d 249, 255 (1966), cited with approval in *United States v. McCauley*, 17 U.S.C.M.A. 81, 84, 37 C.M.R. 345, 348 (1967). Following *McCauley*, *Allen* was reversed by the New York Supreme Court. See 28 App. Div. 2d 724, 281 N.Y.S.2d 602 (1967).

<sup>126</sup> 17 U.S.C.M.A. 126, 37 C.M.R. 390 (1967).

<sup>127</sup> 3 U.S.C.M.A. 746, 14 C.M.R. 164 (1954).

<sup>128</sup> Judge Ferguson would not limit the word "interrogation" to a process of questioning. In his view "interrogation" means any method designed to get the suspect to talk. See *United States v. Hinkson*, 17 U.S.C.M.A. 126, 130-31, 37 C.M.R. 390, 394-95 (1967) (dissenting opinion).

<sup>129</sup> *E.g.*, *United States v. Hill*, 260 F. Supp. 139 (S.D. Cal. 1966).

<sup>130</sup> *E.g.*, *United States v. Fiore*, 258 F. Supp. 435 (W.D. Pa. 1966).

<sup>131</sup> 17 U.S.C.M.A. 81, 37 C.M.R. 345 (1967). The agent failed to advise *McCauley* that he had the right to have an attorney present at the interrogation.

interrogation, so that for *Miranda* warnings to be required, the custody must be incident to the offense for which questioned. In *McCauley*, the questioning had taken place while the accused was in a civilian jail pursuant to an unrelated sentence. On these facts, Judge Quinn, in his dissent, failed to see the compulsive pressures incident to "custodial interrogation" proscribed by *Miranda*:

The jail cell to the sentenced prisoner is his place of abode; it is his home. In my opinion, therefore, the atmosphere of restraint incident to his status, does not generate the same psychological pressure as custodial restraint incident to station house interrogation or street arrest.<sup>152</sup>

The majority, however, rejected the Government's argument that sentenced imprisonment precludes subjugation to psychological pressures. Relying on *Westover v. United States*,<sup>153</sup> a companion case of *Miranda*, the Court of Military Appeals held that mere being in jail itself is a sufficient limitation on freedom of action to bring the questioning within *Miranda*. And subsequently, the Supreme Court held, in *Mathis v. United States*,<sup>154</sup> that the warnings must be given regardless of the reason for the suspect's present custody. Therefore, there need be no relationship between the offense for which the suspect was jailed and that for which he is being interrogated.

#### V. THE REQUIRED WARNING A. *MIRANDA* AND ARTICLE 31

Since 1948, military law, by statute,<sup>155</sup> has imposed an affirmative obligation on the armed forces investigator to inform a suspect of his fifth amendment rights against self-incrimination before requesting any statement. The adoption of the *Miranda* rules has resulted in a dual system of warnings for the military suspect, one flowing from the Constitution<sup>156</sup> and the other from statutory enactment.<sup>157</sup>

<sup>152</sup> *Id.* at 86, 37 C.M.R. at 350 (dissenting opinion).

<sup>153</sup> 384 U.S. 436, 494 (1966).

<sup>154</sup> 36 U.S.L.W. 4379 (May 6, 1968).

<sup>155</sup> Act of June 24, 1948, ch. 625, 62 Stat. 631.

<sup>156</sup> *Miranda v. Arizona*, 384 U.S. 436, 468-73 (1966). An adequate warning would include the advice: (1) You have the right to remain silent, (2) Anything you say can and will be used against you, and (3) You have the right to consult with a lawyer and have him present with you during the interrogation. If you cannot afford a lawyer, one will be appointed for you.

<sup>157</sup> UCMJ art. 31b. An adequate warning would include the advice: (1) You are suspected of the offense of \_\_\_\_\_, (2) You do not have to make any statement at all, and (3) Any statement made by you may be used against you in trial by court-martial.

## MIRANDA AND THE MILITARY

Despite some basic similarity, an advice which satisfies one warning requirement does not fully satisfy the other. Article 31 contains no advice concerning the right to counsel, and the *Miranda* warning does not inform the suspect of the nature of the accusation against him. Although the Court of Military Appeals, in *Tempia*, held the article 31 warnings did not meet the requirements of *Miranda*, interrogators who are subject to the Code must still give the warnings contained therein.<sup>137</sup> As a result, military interrogators have combined the two sets of warnings into one; the subject is first informed of the offense of which he is accused or suspected and then advised:

Before I ask you any questions, you must understand your rights:

1. You have the right to remain silent.
2. Any statement you make may be used as evidence against you in a criminal trial.
3. You have the right to consult with counsel and to have counsel present with you during questioning. You may retain counsel at your own expense or counsel will be appointed for you at no expense to you. If you are subject to the Uniform Code of Military Justice, appointed counsel may be military counsel of your own selection if he is reasonably available.
4. Even if you decide to answer questions now without having counsel present, you may stop answering questions at any time. Also, you may request counsel at any time during questioning.<sup>138</sup>

This warning affords the military suspect benefits beyond those required by *Miranda*, although the expansion is in keeping with the Supreme Court's desire to inform the suspect "not only of the privilege, but also of the consequences of foregoing it."<sup>139</sup> The most important improvement concerns the necessity to advise the suspect of the nature of the accusation against him. The value to the suspect of this portion of the warning was enunciated by the Court of Military Appeals in *United States v. Reynolds*:<sup>140</sup>

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<sup>137</sup> In *Miranda v. Arizona* 384 U.S. 436, 463, n. 32 (1966), the Supreme Court stated that the prompt arraignment requirements of rule 5(a) of the Federal Rules of Criminal Procedure must still be met: "Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder." *Accord*, *United States v. White*, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).

<sup>138</sup> GTA 19-6-1, Procedure for Informing Accused or Suspect Person of His Rights (1 Sep 1967).

<sup>139</sup> *Miranda v. Arizona*, 384 U.S. 436, 469, (1966).

<sup>140</sup> 16 U.S.C.M.A. 403, 37 C.M.R. 23 (1966).

[The] inclusion of this requirement seems clearly to have been designed so to orient an accused or suspect as to allow him intelligently to weigh the consequences of responding to an investigator's inquiries.<sup>111</sup>

The second aspect of the new warning which merits attention deals with the right to appointed counsel. Under *Miranda*, the necessity for warning the suspect that he has a right to appointed counsel is predicated upon a finding of indigency.<sup>112</sup> However, since "the armed forces are already provided with a complete, functioning system of appointed counsel,"<sup>113</sup> indigency should not be a prerequisite. Accordingly, the military suspect is advised he may have appointed counsel without reference to his ability to pay for private counsel, and he may also specify whom he desires to have appointed.

In addition, the new warning procedure extends the obligation of the military interrogator beyond the requisites of either *Miranda* or article 31. The Supreme Court indicated, as a procedural matter following proper warnings, that the suspect may request counsel or terminate the questioning at any time he chooses;<sup>114</sup> however, no requirement to so inform the suspect was included in the warning. The military warnings, apprising the suspect of these procedural rights, follow the Supreme Court's determination to afford the suspect "real understanding and intelligent exercise of the privilege."<sup>115</sup> Finally, the broader warning offered an accused under article 31 will extend its applicability beyond the mere testimonial compulsion protected by the fifth amendment.<sup>116</sup>

<sup>111</sup> *Id.* at 404, 37 C.M.R. at 25. The agent's statement that he was interested in Reynold's activities during an AWOL period did not properly inform the suspect under article 31 of a vehicle misappropriation charge. The vehicle was taken by Reynolds as a means to leave the camp at the inception of the absence.

<sup>112</sup> See *Miranda v. Arizona*, 384 U.S. 436, 472-74 (1966). But *cf.*, *id.* n. 43, "While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score."

<sup>113</sup> *United States v. Tempia*, 16 U.S.C.M.A. 629, 638, 37 C.M.R. 249, 258 (1967). *Cf.* *United States v. Stanley*, 17 U.S.C.M.A. 384, 38 C.M.R. 182 (1965).

<sup>114</sup> See *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966).

<sup>115</sup> *Id.* at 469.

<sup>116</sup> Compare *United States v. White*, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967), with *Gilbert v. California*, 388 U.S. 263 (1967).



While the suspect enjoys substantial benefits under the composite military advice, its value may be limited by the inartful use of "counsel," instead of "lawyer."<sup>147</sup> Advising a suspect that he is entitled to "counsel," taken in conjunction with the military rule that "counsel" at a special court-martial need not be a lawyer,<sup>148</sup> "may [lead to the contention] that the *Miranda* requirements may be met by giving an accused, prior to interrogation, counsel of the type qualified to defend him before the court-martial by which he is ultimately tried."<sup>149</sup> This position is essentially unsound. Initially, it should be noted that both *Miranda* and *Tempia* clearly indicate that the suspect is entitled to a lawyer at the interrogation stage,<sup>150</sup> although there is some authority for the proposition that warnings need not be given for relatively minor quasi-criminal charges.<sup>151</sup> A more cogent argument in the military, however, is that if the agent is permitted to determine that an accused will not be tried by a general court-martial when he furnishes non-lawyer counsel to a suspect, the agent has unlawfully usurped the commander's power to make that determination.<sup>152</sup> Although it presents something of an

<sup>147</sup> In CM 417565, *Brown* (19 Mar. 1968), the suspect testified he believed "counsel" meant someone opposed to his interests. The board held his assertion, in the face of a proper advice, merely raised a factual question for the court: "Were we to hold merely on the basis of a subsequent allegation by an accused that he didn't understand his rights at the time he made a statement that such statement therefore becomes inadmissible as a matter of law, the burden on the government to show that he 'intelligently and understandingly rejected the offer' of counsel would no longer be merely 'heavy'—it would become intolerable. Under the instant circumstances, appellant's understanding of his right to counsel during custodial interrogation was a question of fact—not of law." *Id.* at 9.

<sup>148</sup> *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); accord, *Kennedy v. Commandant*, 377 F.2d 339 (10th Cir. 1967), *LeBallister v. Warden*, 247 F. Supp. 349 (D.C. Kan. 1965). *Contra*, *Application of Stapley*, 246 F. Supp. 316 (D.C. Utah 1965).

<sup>149</sup> *Birnbaum*, *supra* note 4 at 164.

<sup>150</sup> "It is apparent . . . from *Miranda* that what was intended was to require that a suspect be informed . . . that he has an unqualified right, during all periods of custodial interrogation, to the presence and assistance of a person trained and qualified in the law, whether he be denominated as 'counsel,' 'lawyer,' or 'attorney.'" CM 417565, *Brown* at 9 (19 Mar. 1968). It is not necessary for the lawyer to be a member of the Judge Advocate General's Corps or to be certified under the provisions of UCMJ art. 27b. CM 417453, *Wright* (1 May 1968).

<sup>151</sup> See, e.g., *Columbus v. Hayes*, 9 Ohio App.2d 38, 222 N.E.2d 829 (1967), cert. denied, 389 U.S. 941 (1967); and *State v. Zucconi*, 93 N.J. Super. 380, 226 A.2d 16 (1967).

<sup>152</sup> The power to refer cases to trial can only be exercised by the commander. *United States v. Roberts*, 7 U.S.C.M.A. 322, 22 C.M.R. 112 (1956). Limitations on his discretion are invalid. See *United States v. Hawthorne*, 7 U.S.C.M.A. 293, 22 C.M.R. 85 (1956).

anomaly both in military and civilian law, "in the present state of the cases, it would appear that the accused is entitled to a lawyer at any interrogation but not, in some cases, at a subsequent trial."<sup>153</sup>

### B. THE REQUIREMENT

In those cases which turn upon the completeness of the warning, the Court of Military Appeals will not require the interrogator to use the exact warning contained in *Miranda*. If "they convey the substantive concept required by law, the technical ineptness of words does not vitiate their legal effect."<sup>154</sup> Under this test, in *United States v. Mewborn*,<sup>155</sup> the advice that the accused could have an attorney "then and there" sufficiently indicated that the accused was entitled to the presence of an attorney at the interrogation. But the difficulty of testing a warning by a substantive concept is illustrated by *United States v. Pearson*,<sup>156</sup> where the accused was told that he was "entitled either to 'legal assistance' from the staff judge advocate's office or to representation by civilian counsel at his own expense." Here the Court held the advice inadequate as failing to inform the accused that a military lawyer would be provided free of charge. Read together, *Mewborn* and *Pearson* distinguish a warning that is inherently defective from one that is substantially correct, though inartfully expressed.

Considering, however, the armed forces' policy of early and complete training on the subject of an accused's fundamental rights, the warning in *Pearson* would appear to be sufficient. In *United States v. Stanley*,<sup>157</sup> the Government contended that a suspect should be deemed to know that appointed military coun-

<sup>153</sup> Birnbaum, *supra* note 4 at 165. The Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1964), requires appointment of counsel at the trial only if the penalty exceeds imprisonment for a period in excess of six months, or a fine in excess of \$500.00, or both. The Supreme Court subsequently has declined to extend the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963), to misdemeanor cases. See, e.g., *Winters v. Beck*, 397 S.W.2d 364 (Ark. 1965), *cert. denied*, 385 U.S. 907 (1966), and *DeJoseph v. Connecticut*, 3 Conn. Cir. 624, 222 A.2d 752 (1966), *cert. denied*, 385 U.S. 982 (1966).

<sup>154</sup> *United States v. Mewborn*, 17 U.S.C.M.A. 431, 434, 38 C.M.R. 229, 232 (1968). In *United States v. White*, 17 U.S.C.M.A. 211, 218, 38 C.M.R. 9, 16 (1967), the Court held the suspect need not be separately advised, as to each "particular item of evidence, that anything he says or does in regard thereto may be used against him in a court-martial," provided he is not misled concerning his right not to perform a protected right.

<sup>155</sup> 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968).

<sup>156</sup> 17 U.S.C.M.A. 204, 37 C.M.R. 468 (1967) (per curiam).

<sup>157</sup> 17 U.S.C.M.A. 384, 38 C.M.R. 182 (1968).

sel would be without charge. But in a direct application of the principles expressed in the *Miranda* decision,<sup>158</sup> the Court of Military Appeals rejected the argument, saying:

The necessary advice as to the accused's right to counsel must be shown on the face of the record, and circumstantial evidence that an accused should have known of his rights absent the proper warning, "will [not] suffice . . . in its stead."<sup>159</sup>

While "[a]ssessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities."<sup>160</sup> cannot be used to infer knowledge of his rights, these factors may be important in determining whether the suspect, in fact, understood the particular warning given. Here, the military practitioner may also gain from those cases arising under article 31, where the effect of intoxication,<sup>161</sup> mental derangement,<sup>162</sup> or ignorance of the English language<sup>163</sup> on the suspect's understanding of the warning have been considered. Where any circumstance indicates the suspect's ability to comprehend the warning was lessened, the government's burden is correspondingly increased.

The most frequent warning errors are a failure to advise the suspect that he may have free military counsel<sup>164</sup> and that his lawyer may be present at the interrogation.<sup>165</sup> In those cases reversed by the Court of Military Appeals, the usual issue is the

<sup>158</sup> "No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right." *Miranda v. Arizona*, 384 U.S. 436, 471-72 (1966).

<sup>159</sup> *United States v. Stanley*, 17 U.S.C.M.A. 384, 386, 38 C.M.R. 182, 184 (1968).

<sup>160</sup> *Miranda v. Arizona*, 384 U.S. 436, 468-69 (1966).

<sup>161</sup> See *United States v. Dison*, 8 U.S.C.M.A. 616, 25 C.M.R. 120 (1958). In *United States v. Keller*, 17 U.S.C.M.A. 507, 38 C.M.R. 305 (1968), a post-*Tempia* case, the Court held the law officer must instruct on the need to find that the accused, in spite of his claim of intoxication, was "mentally capable of understanding the warning and deciding whether to refrain from speaking." *Id.* at 510, 38 C.M.R. at 308.

<sup>162</sup> See *United States v. Erb*, 12 U.S.C.M.A. 524, 31 C.M.R. 110 (1961).

<sup>163</sup> See *United States v. Sanchez*, 11 U.S.C.M.A. 216, 29 C.M.R. 32 (1960).

<sup>164</sup> See, e.g., *United States v. Gehmlich*, 17 U.S.C.M.A. 845, 38 C.M.R. 143 (1967) (Advice: "'could consult with counsel and have counsel present at the time of interview'"); *United States v. Grover*, 17 U.S.C.M.A. 295, 38 C.M.R. 93 (1967) (Advice: "'of his right to consult with legal counsel and to have legal counsel present during his interrogation'").

<sup>165</sup> See, e.g., *United States v. Roan*, 17 U.S.C.M.A. 163, 37 C.M.R. 427 (1967) (Advice: "consult with legal counsel 'at any time he desired'"); *United States v. Burns*, 17 U.S.C.M.A. 39, 37 C.M.R. 303 (1967) (Advice: "Consult with legal counsel, if you so desire").

legal sufficiency of the advice, rather than a factual dispute over what advice was given. Normally the facts set forth in the opinion clearly indicate that the warning did not meet the requirements of *Miranda-Tempia* as a matter of law. Even in those cases where it is necessary to resolve a factual issue between the agent and the accused, the Court of Military Appeals will re-examine the evidence, bearing "in mind that the demeanor of a witness at trial may have affected his credibility."<sup>168</sup> However, if the factual dispute is resolved against the accused under appropriate instructions, and is supported by ample evidence, the findings of the trial court will be affirmed.<sup>167</sup>

In light of the publicity given to the necessity for the complete warnings, it is difficult to see why defective warnings are still being given and the confession accepted in court. One potential source of error may be that an inadequate foundation is being laid at the trial, and in the heat of advocacy, the participants do not notice the failure to establish that an essential portion of the advice was given. The failure of trial participants adequately to explore the exact nature of the warning is illustrated by the Army board of review opinion in *United States v. Byrd*.<sup>169</sup> The testimony of the agent was as follows:

I explained to him that he had a right to have counsel present; by that I meant a military lawyer [sic] or civilian attorney to be with him at any time I talked with him, that if he desired civilian counsel, sufficient time would be granted to allow him to retain such counsel, and if he did, he would have to pay for it himself; however, if he did not desire civilian counsel the Government would provide him with a competent JAG officer to represent him, and I was prepared at that time to assist him in obtaining counsel if he so desired.<sup>169</sup>

The defendant contended that everything following the emphasized portion was what the agent meant to convey to the suspect by advising him that "he had a right to have counsel present." The Government contended that the entire testimony reflected the manner in which the witness actually explained the suspect's rights. The board held that since the record is susceptible of either interpretation, the Government failed to meet the heavy

<sup>168</sup> *United States v. Mewborn*, 17 U.S.C.M.A. 481, 484, 38 C.M.R. 229, 232 (1968).

<sup>167</sup> See *United States v. Barksdale*, 17 U.S.C.M.A. 500, 38 C.M.R. 298 (1968).

<sup>169</sup> CM 416671, *Byrd*, 38 C.M.R. 1 (1968).

<sup>168</sup> *Id.* at 2 (emphasis in original).

burden required by *Miranda-Tempia*. It is abundantly clear that the basic responsibility for establishing in the record with overwhelming certainty that the warnings were given rests with the trial counsel; however, the law officer must also be alert to clear up ambiguities in order to make an informed ruling.

Another problem deals with the sequence of the warnings. It is clear from the *Miranda* decision that the warnings must precede any statement;<sup>170</sup> however, the decision does not deal with the necessity for subsequent warnings. This question may arise in a variety of situations, such as where an interrogation is interrupted, or where the nature of incriminating evidence sought from the suspect changes.

Under article 31, the military rule was that an adequate warning will carry over to a subsequent interrogation concerning the same subject matter.<sup>171</sup> In *Westover v. United States*,<sup>172</sup> the Supreme Court held that a defective state warning tainted a properly obtained confession subsequently secured from a suspect by the FBI, since "the impact on him was that of a continuous period of questioning."<sup>173</sup> Accordingly, if a subsequent request for a statement is an integral part of the original interrogation, at which proper warnings have been given, no further advice should be necessary. This was the approach taken in *United States v. White*<sup>174</sup> where a later request for additional handwriting exemplars did not even raise an issue to be submitted to the court:

Pierce was present when Roulier advised the accused of his rights under Article 31; he was also present when the accused furnished the two lists of names as exemplars of his handwriting; the accused was brought to the same office in which he had made his statement and provided the first exemplars; he was informed by Pierce that he "had been requested by Mr. Roulier" to obtain other exemplars, which were to be sent to the same crime laboratory as the first exemplars; and that these exemplars were for the case on which Mr. Roulier was working. The accused's own testimony leaves no doubt that the "impact on him was that of a continuous period of questioning."<sup>175</sup>

<sup>170</sup> "As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning [right to counsel] is an absolute prerequisite to interrogation." *Miranda v. Arizona*, 384 U.S. 436, 471 (1966).

<sup>171</sup> See, e.g., CM 397250, Beckwith, 25 C.M.R. 543 (1958), *petition denied*, 9 U.S.C.M.A. 814, 26 C.M.R. 516 (1958).

<sup>172</sup> 384 U.S. 494 (1966).

<sup>173</sup> *Id.* at 496.

<sup>174</sup> 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).

<sup>175</sup> *Id.* at 218. 38 C.M.R. at 16.

And in *United States v. Mewborn*,<sup>176</sup> warnings at an interrogation were held to continue into a subsequent lineup as they "were not separate and distinct incidents, but part of a single custodial confrontation."<sup>177</sup>

#### VI. THE WAIVER

Although the Supreme Court may have desired to establish "concrete constitutional guidelines for law enforcement agencies and courts to follow,"<sup>178</sup> the necessity for factual determinations under the *Miranda* decision is most apparent in the area of waiver. The morass in resolving the question whether the suspect "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel"<sup>179</sup> would seem to be the same as that involved in determining whether a confession is "free and voluntary" under a due process test. Indeed, the Supreme Court perpetuated that very difficulty by reaffirming the method of proving waiver established by *Johnson v. Zerbst*,<sup>180</sup> where they earlier noted:

The determination of whether there has been an intelligent waiver of the right to counsel must depend in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.<sup>181</sup>

A compromise between absolutes and a recognition that waiver is primarily a factual matter led to a conglomeration of rules covering both evidentiary matters and principles of law.<sup>182</sup> When dealing with the waiver rules, it is important to distinguish between factual matters which must be considered in determining whether the waiver is valid and those rules which establish legal precepts which must be applied regardless of the facts. The former will constitute factors to be submitted to the fact finder under appropriate instructions; however, the latter will be rules of law to be applied by the law officer.

Without defining the exact standard to be met, the Supreme Court stated that the government, as a matter of law, has a "heavy burden"<sup>183</sup> to prove the requisite waivers. In *United States v. Westmore*,<sup>184</sup> the Court of Military Appeals held that the

<sup>176</sup> 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968).

<sup>177</sup> *Id.* at 434, 38 C.M.R. at 232.

<sup>178</sup> *Miranda v. Arizona*, 384 U.S. 436, 441 (1966).

<sup>179</sup> *Id.* at 475.

<sup>180</sup> 304 U.S. 458 (1938).

<sup>181</sup> *Id.* at 464.

<sup>182</sup> See generally, *Miranda v. Arizona*, 384 U.S. 436, 475-77 (1966).

<sup>183</sup> *Id.* at 475.

<sup>184</sup> 17 U.S.C.M.A. 406, 38 C.M.R. 204 (1968).

"heavy burden" is satisfied only by proof beyond a reasonable doubt that the suspect did not indicate his unwillingness to give a statement. The failure to so instruct where the "court members were left free to believe that by subsequently giving the statement the appellant had abandoned his right to remain silent"<sup>150</sup> was error.

The only assistance given by the Supreme Court in determining whether the government's burden has been met is the rather surprising comment that:

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement *could* constitute a waiver.<sup>151</sup>

It is difficult to imagine what more "could" be required, or, for that matter, what more "could" be secured than an express statement waiving the rights provided for in the decision. Certainly, nothing less will suffice since waiver will not be inferred either from a silent record, "from the silence of the accused . . . or the fact that a confession was eventually obtained,"<sup>152</sup> or that "the individual answers some questions or gives some information on his own prior to invoking his right to remain silent."<sup>153</sup> These legal rules are further enforced by evidence tending to negate a voluntary waiver such as "lengthy interrogation or incommunicado incarceration," or "evidence that the accused was threatened, tricked, or cajoled into a waiver."<sup>154</sup> Thus, the Government is not only faced with a heavy legal burden, but it is also denied any inferences, and must rebut strong factual indications of involuntariness. Since these guidelines are essentially negative in nature, further treatment by the Supreme Court of waiver devices suggested by the ingenuity of law enforcement agents can be anticipated.

Surprisingly enough, few military cases have dealt directly with the waiver problem. In *United States v. Tempia*,<sup>155</sup> the Court of Military Appeals established the primary rule that there can be no waiver without a full and complete warning.<sup>156</sup> Tempia's

<sup>150</sup> *Id.* at 410, 38 C.M.R. at 208.

<sup>151</sup> *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (emphasis added).

<sup>152</sup> *Id.* at 475.

<sup>153</sup> *Id.* at 475-76.

<sup>154</sup> *Id.* at 476.

<sup>155</sup> 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

<sup>156</sup> In *Miranda v. Arizona*, 384 U.S. 436, 470 (1966), the Supreme Court stated in unequivocal terms: "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given."

statement to the agents upon his return from the staff judge advocate's office that "they could not help [me] . . . [t]hey didn't do me no good" clearly indicated to the Court that Tempia had been frustrated in his efforts to secure legal advice. Under these circumstances, submission to questioning could not be construed as a waiver. Additionally, the Court has stated that neither submission to continued interrogation, while awaiting the arrival of a requested counsel,<sup>122</sup> nor a silent record<sup>123</sup> will satisfy the burden to prove waiver required by *Miranda-Tempia*. And the failure of an investigator to ask the suspect if he desired counsel was fatal to a confession, according to an Army board of review in *United States v. Long*.<sup>124</sup> The confession waiver certificate now used for interrogations in the military requires the suspect to make a specific election concerning the right to remain silent and his right to counsel.<sup>125</sup> Negative responses to these questions should provide the necessary waiver, assuming the suspect was properly advised of his rights initially, "at least for that point in time when the suspect signs the pretrial statement."<sup>126</sup>

#### VII. CESSATION OF QUESTIONING

As valuable as the warnings may be to a suspect, his right to terminate questioning may be more important. In *Miranda*, the Supreme Court viewed this right as indispensable in eliminating compulsions:

[A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.<sup>127</sup>

Even though the Supreme Court believes that the procedure to be followed after warnings is clear, the Court of Military Appeals has had occasion to address itself to the cessation of questioning problem on several occasions.

<sup>122</sup> *United States v. Solomon*, 17 U.S.C.M.A. 262, 38 C.M.R. 60 (1967) (dictum).

<sup>123</sup> *United States v. Stanley*, 17 U.S.C.M.A. 384, 38 C.M.R. 182 (1968).

<sup>124</sup> CM 415677, *Long*, 37 C.M.R. 696 (1967).

<sup>125</sup> DA Form 2820 (1 Oct. 1967), Statement by Accused or Suspect Person, contains the following election:

"I (do) (do not) want counsel.

"I (do) (do not) want to make a statement and answer questions."

<sup>126</sup> *United States v. Westmore*, 17 U.S.C.M.A. 406, 409, 38 C.M.R. 204, 207 (1968).

<sup>127</sup> 384 U.S. at 474.



In *United States v. Solomon*,<sup>198</sup> following a polygraph examination which indicated he was withholding information, the suspect requested the assistance of counsel. While efforts were being made to locate a lawyer, the remaining agent continued to question Solomon. Before an attorney was made available, a confession resulted which was subsequently used against the suspect. The Court of Military Appeals held that this procedure violated the proscriptions of the *Miranda* decision that government agents must stop the interrogation when the suspect requests counsel.<sup>199</sup> Although *Solomon* reflects a result compelled by *Miranda*, the Court's reliance on prior military decisions is misplaced. The cases cited by the Court deal with confessions obtained either by a denial of the right to consult counsel or misadvice concerning the right to counsel; however, Solomon's confession resulted from the agent's continued questioning without either of those defects. Nevertheless, the Court's decision should be read as having reversed, sub silentio, those cases permitting governmental authorities to ignore or frustrate a suspect's request for counsel.<sup>200</sup> The Government then contended that the request to consult counsel was based solely on a desire to determine another's criminal liability and therefore not within the purposes to be served by the appointment of counsel. Assuming *arguendo* that the purpose of Solomon was correctly stated by the Government, the Court said:

[T]he mere disclosure of the identity of such a potential witness against him is incriminating *per se* and thus a matter concerning which he has the right to consult counsel.<sup>201</sup>

The effect of a suspect's denial of responsibility for the crime as an implied assertion that he did not wish to make any other statement was raised by the evidence in *United States v. Westmore*.<sup>202</sup> The interrogation had been interrupted and upon the

<sup>198</sup> 17 U.S.C.M.A. 262, 38 C.M.R. 60 (1967).

<sup>199</sup> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." 384 U.S. at 474.

<sup>200</sup> *E.g.*, *United States v. Kantner*, 11 U.S.C.M.A. 201, 29 C.M.R. 17 (1960); *United States v. Adkins*, 11 U.S.C.M.A. 9, 28 C.M.R. 233 (1959); and *United States v. Cadman*, 10 U.S.C.M.A. 222, 27 C.M.R. 296 (1959).

<sup>201</sup> *United States v. Solomon*, 17 U.S.C.M.A. 262, 266, 38 C.M.R. 60, 64 (1967); see also *United States v. Cadman*, 10 U.S.C.M.A. 222, 27 C.M.R. 296 (1959).

<sup>202</sup> 17 U.S.C.M.A. 406, 38 C.M.R. 204 (1968).

## 42 MILITARY LAW REVIEW

agent's return Westmore handed him a handwritten slip of paper containing an assertion that Westmore was a victim of circumstances. The agent assumed it was a denial of guilt and continued his questioning. At the trial, defense counsel elicited the following:

Q: If he had kept on writing out statements denying the offense, denying any participation, you would have kept plugging away until you got a statement to incriminate, was that your purpose?

A: As long as I felt I had the right man and he agreed to talk to me and I did not violate his rights, yes sir.

The mere fact of the suspect's denial was not treated by the Court as precluding further questioning; however, there was additional conflicting testimony concerning a specific refusal to give any further statement, which was submitted as an issue of fact to the court, making such determination unnecessary on review.

It is highly unlikely that any case will involve the narrow issue presented in *Westmore*. On the other hand, it is highly likely that suspects will deny committing an offense, but waive their rights and agree to discuss the case. Normally, the suspect is attempting to match wits with the interrogator in an effort to convince the agent of his innocence or to allay any suspicion that might be aroused by an assertion of rights. Under these circumstances, if confessions "remain a proper element in law enforcement"<sup>213</sup> the agent should be free to probe the suspect's assertions without considering the denial a touchstone of termination. Indeed, in the rare circumstance where the denial is truthful, a contrary result would prevent the agent from eliciting any further knowledge of the individual which might be of value in solving the crime.<sup>214</sup>

The final case considered by the Court of Military Appeals was concerned with the manner in which the suspect claims his right to remain silent. In *Miranda*, the Supreme Court indicated government agents must be alert to detect an assertion of rights no matter how inartfully attempted:

If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.<sup>215</sup>

The applicability of this provision to the military setting was

<sup>213</sup> *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

<sup>214</sup> See, e.g., *United States v. Mewborn*, 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968).

<sup>215</sup> 384 U.S. at 473-74.

specifically raised in *United States v. Bollons*.<sup>205</sup> Bollons, after being properly advised of his rights under article 31 and the *Miranda-Tempia* decision, requested permission to consult with an attorney. The interrogation was terminated and several days later the suspect was recalled for further questioning where he waived the presence of his attorney. The allegation against Bollons was carnal knowledge. Whenever he was asked about the fact of intercourse, he invoked his rights against self-incrimination; however, he did not otherwise indicate a desire to terminate the interview. In response to questions asked by the agent, Bollons admitted he knew the complainant, that he had been out with her and that he knew she was not a virgin. When told she was pregnant, Bollons asserted, "One time couldn't get her pregnant," and later conceded he could be the father.

The question presented to the Court of Military Appeals was whether under these circumstances there can be selective assertion of rights, or is the interrogator bound to cease questioning whenever a suspect invokes his rights to any specific question. The Court declined to answer this question and held that since the record does not "clearly and convincingly"<sup>207</sup> show that the incriminating statements were made prior to an initial assertion of rights, the Government failed to meet its procedural burden. Under the circumstances of this case, there was in fact no selective assertion of rights because the agent continued to penetrate by seemingly innocent questions into the areas Bollons was seeking to protect:

The picture that emerges from the record is that of an interrogation in which the agent blended seemingly innocent questions with broadly incriminating ones. The accused recognized the obvious import of the latter and refused to answer them, but it is apparent he either did not understand, or did not appreciate, the incriminating potential of the former. The pattern of his response spells out a frustration of his effort to assert his right against self-incrimination during the interrogation.<sup>206</sup>

Thus the question remains open whether the suspect can selectively assert his rights, answering some questions and declining to answer others.<sup>209</sup> Since the suspect can waive his rights, or

<sup>205</sup> 17 U.S.C.M.A. 253, 38 C.M.R. 51 (1967).

<sup>206</sup> *Id.* at 257, 38 C.M.R. at 55.

<sup>207</sup> *Id.*

<sup>209</sup> In *United States v. Barksdale*, 17 U.S.C.M.A. 500, 38 C.M.R. 298 (1968), the Court, in affirming a conviction, seemed to approve selective assertion of rights: "[T]he inescapable conclusion from the whole of the accused's testimony is that he was, at all times, willing to be questioned by Agent Gonyon, but he reserved the option to refuse to answer specific questions." *Id.* at 504, 38 C.M.R. at 302.

recall a waiver once given, it is suggested that continued interrogation after a selective assertion of rights would also be proper under the *Miranda* decision, so long as the agent does not intrude into the area the suspect is seeking to avoid. Whenever confronted with this situation, the agent should stop the questioning and clearly establish the areas which the suspect is willing to discuss. The agent exceeds those areas at his peril.

#### VIII. THE UNRESOLVED QUESTIONS OF *MIRANDA*

The Supreme Court has yet to extend the *Miranda* decision beyond the area of incriminating statements used for the purpose of conviction. Nevertheless, the case contains within its pages the hint of applicability to other criminal situations. In the view of one author, the unanswered problems result from the fact that "justices as advocates say much more than they ought to in order to make the specific point they have in mind."<sup>30</sup> In three of the potential problem areas created by the language of the *Miranda* decision,<sup>31</sup> the Court of Military Appeals has had occasion to resolve the issue for the military practitioner.

##### A. AN EXCLUSIONARY RULE FOR FRUIT OF THE POISONED CONFESSION?

The exclusionary rule's "stated motivation has been to eliminate trustworthy evidence in order to discipline law enforcement authorities and to coerce them into compliance with either constitutional or statutory requirements governing their official activity."<sup>32</sup> Yet the Supreme Court has never passed on the admissibility of evidence derived from unlawful confessions as it has in the areas of search and seizure<sup>33</sup> or wire tapping.<sup>34</sup>

In *Miranda*, the Supreme Court appeared to address itself to an exclusionary rule for fruits of unwarned confessions in the following language:

But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant].<sup>35</sup>

<sup>30</sup> George, *The Fruits of Miranda: Scope of the Exclusionary Rule*, 39 U. COLO. L. REV. 478, 489, (1967).

<sup>31</sup> See generally, Arthur, *Questioning By the Police Since Miranda*, 4 WILLAMETTE L. J. 105, 116-47 (1966).

<sup>32</sup> George, *supra* note 210 at 479.

<sup>33</sup> See, e.g., *Silverthorn Lumber Co. v. United States*, 251 U.S. 385 (1920).

<sup>34</sup> See, e.g., *Nardone v. United States*, 308 U.S. 338 (1939).

<sup>35</sup> 384 U.S. at 479.

The four dissenters either concede or assume that the majority opinion established a rule of evidence.<sup>215</sup>

In *United States v. Solomon*,<sup>217</sup> a prosecution witness testified against the accused under a grant of immunity. He also turned over to the CID agents a package of money which he had been holding for the accused. On cross-examination, the agents admitted their first indication of the prosecution witness's involvement was through the interrogation of the accused. The Court held the interrogation unlawful because it continued after a request for counsel had been made.

Citing *Miranda* and *Wong Sun v. United States*,<sup>218</sup> the Court of Military Appeals then turned its attention to the exclusionary rule question:

If the testimony of Scott and his action in turning over the money was a product of the illegal questioning of the accused, the issue is squarely presented as to whether this evidence is competent.<sup>219</sup>

The Court appeared to apply an exclusionary rule, indicating the record was not clear, as postulated by *Wong Sun*, "whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." <sup>220</sup> This facet of the case could be explored on a rehearing. The opinion, written by Judge Kilday, cited *United States v. Haynes*,<sup>221</sup> where Judge Ferguson applied an exclusionary rule to witnesses whose identity was secured by a statement following alleged promises of confidentiality:

Our *dictum* in *United States v. Fair* . . . to the effect that even if the admission as to the location of a lethal weapon be deemed involuntary, the gun itself would be admissible in evidence, is not controlling and does not express sound legal principle. Likewise, paragraph 140a of the Manual for Courts-Martial, United States, 1951, is declared incorrect insofar as it states that evidence found by

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<sup>215</sup> Justice Clark: "The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof." *Id.* at 500. Justice White, joined by Justice Harlan and Justice Stewart: "Today's decision leaves open such questions as . . . whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation." *Id.* at 545.

<sup>217</sup> 17 U.S.C.M.A. 262, 38 C.M.R. 60 (1967).

<sup>218</sup> 371 U.S. 471 (1963).

<sup>219</sup> *United States v. Solomon*, 17 U.S.C.M.A. 262, 266, 38 C.M.R. 60, 64 (1967).

<sup>220</sup> *Wong Sun v. United States*, 371 U.S. 471, 487 (1963).

<sup>221</sup> 9 U.S.C.M.A. 792, 27 C.M.R. 60 (1958).

means of an inadmissible confession or admission is itself admissible.<sup>220</sup>

Since both Chief Judge Quinn and Judge Ferguson concurred in Judge Kilday's opinion, *Solomon* does establish a military exclusionary rule for evidence obtained as a direct result of an invalid confession.

#### B. UNWARNED STATEMENTS FOR IMPEACHMENT PURPOSES?

Initially, the reason for excluding involuntary confessions was the fear of testimonial unreliability.<sup>221</sup> As investigation techniques became more sophisticated, the theory of exclusion embraced considerations of voluntariness and ultimately were concerned with punishing the police for violations of the law of confessions regardless of the truth or falsity of the specific statement.<sup>222</sup>

Whether confessions given by a suspect are admissible for purposes of impeachment should depend on the theory adopted for the exclusion of the statement itself. One writer views the present day reason for exclusion as a persuasive argument for the use of an unwarned statement for impeachment purposes:

If confessions are to be excluded not because of their proven involuntariness or unreliability but because of the police methods used to obtain them, and there is nothing on the facts of the particular case to suggest that the confession is unreliable, the *Walder* case, relating as it does to another exclusionary rule aimed at controlling law enforcement activities, would be a good analogy for admitting the confession for impeachment purposes.<sup>223</sup>

In *Walder v. United States*,<sup>224</sup> the Supreme Court held that when the accused elects to testify on his own behalf and on direct examination testifies that he has never previously had narcotics in his possession, the Government, for the purpose of attacking his credibility, may question him concerning a previous possession which was discovered through an unlawful search. The rationale of the decision is that the exclusionary rule of evidence does not give the accused the right to lie with impunity. Having

<sup>220</sup> *Id.* at 796, 27 C.M.R. at 64.

<sup>221</sup> See generally, *Developments in the Law, Confessions*, 79 HARV. L. REV. 935, 964-68.

<sup>222</sup> *Id.* at 969-72. In *Miranda*, the Supreme Court indicated a failure to give the required warnings will exclude a confession even though the Court "might not find the defendants' statements to have been involuntary in traditional terms." 384 U.S. at 457.

<sup>223</sup> George, *supra* note 210 at 491.

<sup>224</sup> 347 U.S. 62 (1954).

himself raised the issue, the defendant cannot deny the prosecution the right to explore it further.

Whether this approach should be applied in the military to unwarned statements as well was the subject of *United States v. Lincoln*.<sup>227</sup> On his direct examination, the accused testified the victim impaled himself on the knife accidentally and that he, the accused, had never been involved in any altercation with the victim before. Without making any attempt to prove compliance with the warning requirements of *Miranda-Tempia*, the Government impeached the accused with a pretrial statement containing assertions that he did not remember what happened as he had blacked out, and that he had had a previous fight with the victim. The Court of Military Appeals held that the *Miranda-Tempia* warning is applicable to all statements made by an accused during a period of custodial interrogation including those used for impeachment. The Court based its holding on the rejection in *Miranda* of any distinction between inculpatory or exculpatory statements used for purpose of impeachment:

In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.<sup>228</sup>

Since the Government did not establish, beyond a reasonable doubt, that the requisite warnings were given and the necessary waivers received, use of the statement for impeachment purposes was reversible error.

It was not entirely necessary for the Court of Military Appeals to go outside the confines of military law to find authority for its holding. The Manual<sup>229</sup> prohibits the use of a confession for impeachment purposes when an article 31 warning was required but not given. The difficulty with the Court's application of the Manual provision revolved around an admission-confession dichotomy. If the statement to be used clearly violated article 31, it

<sup>227</sup> 17 U.S.C.M.A. 330, 38 C.M.R. 128 (1967).

<sup>228</sup> 384 U.S. at 477.

<sup>229</sup> MCM ¶ 153b(2)(c): "[A]n accused who has testified as a witness may not be cross-examined upon, or impeached by proof of, any statement which was obtained from him in violation of Article 31 or through the use of coercion, unlawful influence, or unlawful inducement."

would be inadmissible regardless of its exculpatory nature.<sup>250</sup> On the other hand, if there was no indication of a violation of the warning requirement and the statement was treated as an admission, there was no preliminary requirement to show compliance with article 31.<sup>251</sup> By rejecting this distinction, *Lincoln* placed military law on an equal footing with *Miranda*.

### C. A WARNING REQUIREMENT FOR CONSENT SEARCHES?

Prior to *Tempia*, military law imposed no obligation to warn a suspect, either of his article 31 rights or that he could refuse to consent, before asking for permission to search his property,<sup>252</sup> even though the suspect was in police custody.<sup>253</sup> The lack of such a warning was treated, however, as one factor to be considered in determining whether the suspect voluntarily consented or merely acquiesced in the agent's demand.<sup>254</sup>

One of the most interesting extensions of *Miranda* concerns the necessity of giving a warning before a suspect, who is in custody or otherwise limited in his freedom, can be asked to consent to a search. The effect of *Miranda* in this area could take either of two forms:

First, if consent to search is a self-incriminating statement, *Miranda* may require that explicit warning of both fifth and fourth amendment rights be given before such consent is obtained. Second, even if the self-incrimination clause has no application to consent searches, the reasoning of the Supreme Court may nevertheless dictate that an individual's fourth amendment right to prevent the invasion of his premises be waived only with the same knowledge and intelligence required for an effective waiver of the fifth amendment right to remain silent.<sup>255</sup>

Under this approach, it may become necessary to advise a suspect of his fourth, fifth, and sixth amendment rights before requesting permission to search.

The Court of Military Appeals sharply divided on this issue in *United States v. Rushing*.<sup>256</sup> At the time of the search, Rushing was advised of his fourth amendment rights to the effect that

<sup>250</sup> *United States v. Kelley*, 7 U.S.C.M.A. 584, 28 C.M.R. 48 (1957).

<sup>251</sup> *United States v. Davis*, 10 U.S.C.M.A. 624, 28 C.M.R. 190 (1959).

<sup>252</sup> *United States v. Whitacre*, 12 U.S.C.M.A. 345, 30 C.M.R. 345 (1961).

<sup>253</sup> See *United States v. Justice*, 13 U.S.C.M.A. 31, 32 C.M.R. 31 (1962).

<sup>254</sup> See generally, *United States v. Mathis*, 16 U.S.C.M.A. 522, 37 C.M.R. 142 (1967).

<sup>255</sup> Note, *Consent Searches, A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 134 (1967).

<sup>256</sup> 17 U.S.C.M.A. 298, 38 C.M.R. 96 (1967).



the agent did not have the authority to make a search without the accused's consent and that the accused did not have to permit the search. Following this advice, the accused granted consent to search. On appeal he contended he also should have received fifth and sixth amendment warnings concerning his right to counsel and the fact that anything found could be used against him.

Chief Judge Quinn, speaking for the Court, concluded it was not an indispensable condition for a consent search to inform the suspect of:

- (1) The specific reason for the search;
- (2) that he has a right to counsel and to the presence of counsel before he gives his consent;
- (3) that the police officer cannot make a search without a warrant and without his consent;
- (4) that he has the absolute right to refuse to give consent to the search; and
- (5) that if he consents to the search, any evidence discovered in the search can be used against him in a criminal trial.<sup>27</sup>

To reach this conclusion, the Chief Judge looked at the purposes to be served by the various warnings. He found that consent searches are not so dissimilar from other searches so as to call it a critical stage for the appointment of counsel. In his view consent is a neutral circumstance which avoids the necessity of the government's recourse to other available methods of conducting a search: "It is directed more to the propriety of proposed conduct by the Government than to a hostile confrontation between the accused and the Government."<sup>28</sup> In this respect, a request to search is similar to a request for fingerprints or to submit blood samples, neither of which requires advice under the sixth amendment.

Concerning the direct applicability of a *Miranda* warning, the Chief Judge first considered the nature of the interrogation contemplated by the Supreme Court:

[It] is not the mere asking of a question irrespective of its content; it is rather questioning to elicit information about the individual's knowledge of the matters contained in the question.<sup>29</sup>

Since consent to search does not import information under this test, it "is not 'interrogation,' and the accused's response is not

<sup>27</sup> *Id.* at 305, 88 C.M.R. at 103. However, Judge Kilday, concurring in the result, is unwilling to grant search and seizure issues the same status as those arising from self-incrimination in advance of a Supreme Court pronouncement on the subject. *Id.* at 308-09, 88 C.M.R. at 106-08.

<sup>28</sup> *Id.* at 303, 88 C.M.R. at 101.

<sup>29</sup> *Id.* at 305, 88 C.M.R. at 103.

a 'statement,' within the meaning of *Miranda*.'<sup>240</sup> Accordingly, while warnings are "eminently desirable,"<sup>241</sup> to show voluntary consent rather than submission to authority, they have not been established as a constitutional mandate.

In his dissent, Judge Ferguson views this problem, not as an extension of *Miranda*, but a direct application of the Supreme Court's holding. In his opinion, the fourth amendment's protection is so intertwined with the fifth and sixth amendments as to require equal treatment. Secondly, he views *Miranda* as dealing not only with the fifth amendment but an extension of the *Escobedo* sixth amendment right to counsel. Under this theory, consent to search is a critical pretrial confrontation in which the accused must be advised of his right to have an attorney present. Judge Ferguson's conclusion is:

[W]hen such consent is obtained as part and parcel of a criminal interrogation while the accused is in custody, it constitutes a statement, the introduction of which requires proof of the necessary warning as in the case of any other declaration made by the accused to interrogating officers.<sup>242</sup>

As in other areas dealing with the *Miranda* decision, precedent was available which would have permitted the Court to go either way.<sup>243</sup> However, in the absence of a Supreme Court decision, it appears that the Court of Military Appeals will not extend *Miranda* into the area of search and seizure.

#### IX. CONCLUSION

From the foregoing review of military cases, it should be clear that the Court of Military Appeals is determined to give full effect to the *Miranda* decision:

If the Government cannot comply with [the constitutional standards], it need only abandon its reliance in criminal cases on the accused's statements as evidence. That is the essence of the *Miranda* holding, and it is the choice of the Government whether to pay this

<sup>240</sup> *Id.* at 306, 38 C.M.R. at 104. See *United States v. Insani*, 10 U.S.C.M.A. 519, 28 C.M.R. 85 (1959).

<sup>241</sup> *Id.* at 305, 38 C.M.R. at 103.

<sup>242</sup> *Id.* at 309, 38 C.M.R. at 107.

<sup>243</sup> Compare *United States v. Nickrash*, 367 F.2d 740 (7th Cir. 1967), and *United States v. Blalock*, 255 F. Supp. 268 (E.D. Pa. 1966), with *Gorman v. United States*, 380 F.2d 158 (1st Cir. 1967); *State v. McCarty*, 199 Kan. 116, 427 P.2d 616 (1967), and *State v. Forney*, 181 Neb. 757, 150 N.W.2d 915 (1966).

<sup>244</sup> *United States v. Tempia*, 16 U.S.C.M.A. 629, 639, 37 C.M.R. 249, 259 (1967).

price for withholding counsel at the critical moment of police interrogation.<sup>24</sup>

This should come as no surprise to anyone who has been associated with military justice, for the Court has often expressed the general view that "members of the armed forces are [not], by reason of their status, *ipso facto*, deprived of all protections of the Bill of Rights."<sup>24,5</sup>

What should be interesting to the military lawyer is the close parallel between the warning requirements of article 31 and those of *Miranda*. As a result, neither the military practitioner, nor the armed forces investigator should view the additional warning requirements as a radical innovation in the law. Many of the issues raised in *Miranda* have been resolved by reference to the extensive body of law developed over the years under article 31. Those principles offer the military researcher a fruitful source of materials to be utilized in answering other questions which are sure to arise under *Miranda-Tempia*.

<sup>24</sup> *Id.* at 633, 37 C.M.R. at 253.



## LIABILITY TO PASSENGERS IN MILITARY AIRCRAFT\*

By Major Norman S. Wilson.\*\*

*This article discusses the rights and remedies for survivors of disasters involving aircraft owned or chartered by the military. Recovery through the Federal Tort Claims Act, and other judicial and administrative procedures, along with limitations, such as the Warsaw Convention, the Pre-flight Waiver, and the "incident to service" doctrine, are considered by the author. Concluding that the remedies in general are adequate, the author hopes that some of the concepts behind the limitations will be elucidated, in order not to frustrate legislative intent.*

## I. INTRODUCTION

Air travel has become commonplace in the twentieth century. Huge jet planes carry scores of passengers across the United States in six to eight hours and span the oceans in a slightly longer time. The commercial air transportation industry is mammoth, but the largest of the corporate giants constituting that industry is rivaled by the aviation activities of the Federal Government through its Armed Forces.

Tragedies are as much a part of military aviation as they are of the commercial industry, and when a military plane falls into the ocean, crashes into a mountain, or cracks up on take-off, a host of complex and entangled legal questions arise. The basic question spawned by a military aircraft disaster is the same as that arising from the fall of a commercial aircraft, to wit: What are the legal rights of injured parties? The rights of injured parties in the latter case is, of course, governed, for the most part, by local law. In the former case, where the defendant is the United States, the question is more difficult to answer.

Therefore, this article examines some of the legal issues flowing from a military aviation disaster with a view toward determining the rights and remedies of passengers on military aircraft for personal injury and death. The inquiry extends beyond purely

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"military flights" because the Armed Services move significant numbers of service members, employees, and their dependents by charter flights. Since the purposes of the charter flights are either military or have a military connection, a discussion of certain aspects of liability to passengers thereon is warranted. As used herein, the term "military flight" refers to those flights performed by the Armed Forces. The term "military charter flight" refers to flights by commercial airlines under contract with the military establishment.

Military planes operate around the world. Accordingly, the scope of this article extends to accidents on the high seas and in foreign countries. Since aviation cases involve a determination of the applicable law by which the substantive rights of the parties will be measured, it is necessary to consider the choice of law rules in aviation cases where the United States is the defendant. In the case of certain classes of passengers, the Armed Services generally require, as a condition of passage, that a pre-flight waiver of liability be executed. This practice is examined against the background of the Federal Tort Claims Act<sup>1</sup> and case law. Further, in view of the world-wide operation of military aircraft and the charter flight activity of the Armed Forces, it is also appropriate to discuss some aspects of the Warsaw Convention,<sup>2</sup> an international agreement concerning international transportation by air, to which the United States is a party. Finally, since there are situations wherein no judicial remedy exists on behalf of a person injured or killed on a military aircraft, mention will be made of other possible avenues through which redress may be obtained.

There is no dearth of scholarly articles dealing with aviation accident law generally. However, no writer to the knowledge of this author, has devoted specific attention to the field of military aviation and the particular legal requirements which must be met before the Federal Government will be held liable for negligence. To illuminate this narrow area, then, is the purpose of this article. In many areas the law is still developing; in others the courts are in conflict; in still others, there has been no significant case experience. Thus, more questions may be raised herein than are answered. It is hoped, nevertheless, that this article will serve as a source of answers to threshold questions on the present state of the law in the areas discussed and further, as a direction

<sup>1</sup> 28 U.S.C. §§ 1346(b), 2671-80 (1964) [hereafter called FTCA].

<sup>2</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 (1934) [hereafter called Warsaw Convention].

indicator for the practitioner who may be presented with a case arising from the crash of a military or military chartered plane.

## II. THE FEDERAL TORT CLAIMS ACT

### A. A TYPICAL CASE

Attorney at Law, Ourtown, USA, sits at his desk alternately thumbing a pile of folders and reading a recent local newspaper. The headlines announce the crash of an Air Force transport plane in which all persons aboard were killed. The plane was enroute to Washington, D.C., had taken off from Tinker Air Force Base, Oklahoma, and had crashed in Indiana, presumably because of a malfunction in the plane's fuel injection system. Passengers on the fatal flight included: the crew; a serviceman catching a "hop" to return to his station from leave; two reporters returning to Washington after witnessing the demonstration of a new type jet fighter-bomber; a civilian employee traveling on orders for official business; a retired officer going to the Pentagon to examine his personnel records; two reservists traveling to annual reserve training; and a friend of the plane commander who was "just going along for the ride." The services of the attorney have been engaged by the survivors of several victims of the crash who reside in Ourtown. His research is completed and he is ready to advise his clients concerning their best course of action.

### B. GENERAL

Whether or not there is a right to recover damages for the personal injury or death of a passenger on a military aircraft occurring in the United States, its territories or possessions, depends upon whether the requirements of the FTCA are met.<sup>2</sup> FTCA basically provides that the district courts have exclusive jurisdiction over civil actions for money damages against the United States for injury to property or personal injury or death due to the negligent or wrongful act or omission of employees of the Government acting within the scope of their office or employment, under circumstances where the United States, if a private person, would be liable to the claimant under the law where the act or omission occurred.<sup>3</sup> The Act also provides for the

<sup>2</sup> Claims arising in foreign countries are discussed at part II.F. *infra*.

<sup>3</sup> 28 U.S.C. § 1346(b) (1964). Property damage claims will not be discussed herein.

administrative settlement of tort claims against the United States.<sup>5</sup>

Other pertinent provisions of FTCA bar claims arising in foreign countries<sup>6</sup> and claims arising out of combatant activities.<sup>7</sup>

Governmental liability in tort exists only where those factors spelled out in 28 U.S.C. § 1346(b) are present. Accordingly, there follows a discussion of those factors and the manner and extent to which they have been applied in aviation cases.

### C. ELEMENTS OF THE CAUSE OF ACTION

#### 1. A Negligent Act or Omission.

In *Dalehite v. United States*,<sup>8</sup> Mr. Justice Reed stated that the FTCA is to be invoked only in the case of a negligent or wrongful act or omission and that the United States is not liable without fault.<sup>9</sup> Although the universal application of this rule is unsettled,<sup>10</sup> the vast majority of cases filed under FTCA rely upon some form of negligence and thus, aviation accident cases generally hold that liability is determined by the ordinary rules of negligence and due care under the circumstances.<sup>11</sup>

The complex nature of the machine and the technical expertise required to deduce meaningful conclusions from the wreckage of a fallen plane renders proof of negligence in some plane crashes a formidable task. Although an adequate showing of negligence can sometimes be made, the testimony of crew and passengers as to what occurred on a stricken craft is, more often than not, unavailable due to the death of all persons aboard. Negligence may be shown from a variety of circumstances. A violation of regulations constituting a standard of care is evidence of negli-

<sup>5</sup> 28 U.S.C. § 2672 (1966). Prior to 1966, this statute only provided for the administrative settlement of claims not in excess of \$2,500. Administrative settlement was optional with the claimant. Pursuant to the 1966 amendment, judicial action may not be initiated until the claim has been presented administratively and denied or final action taken thereon which is unsatisfactory to the claimant. There is no dollar limitation on the settlement authority.

<sup>6</sup> 28 U.S.C. § 2680(k) (1964).

<sup>7</sup> 28 U.S.C. § 2680(j) (1964).

<sup>8</sup> 346 U.S. 15 (1953).

<sup>9</sup> *Id.* at 44-5.

<sup>10</sup> See Jacoby, *Absolute Liability Under the Federal Tort Claims Act*, 24 *FED. B. J.* 139 (1964), for discussion of a group of cases where governmental liability has been found in situations where the doctrine of absolute liability is normally applied in private litigation.

<sup>11</sup> See Dosta, *Aviation Law Under the Federal Tort Claims Act*, 24 *FED. B. J.* 165, 174 (1964).



gence.<sup>12</sup> Also violation of self-imposed internal regulations and standards of procedure has been held to constitute negligence. For instance, in *Montellier v. United States*,<sup>13</sup> where Air Force operational procedures prescribed a flap setting of 30° for the take-off roll of a particular type aircraft, the use of 40° flap settings was negligence. Again, where governmental regulations prescribe a particular air traffic pattern for approaching and departing aircraft at an airport, it is negligence to vary from that pattern.<sup>14</sup> Permitting insufficiently trained personnel to operate aircraft has also been held to be negligence. In *Montellier*, for example, where an unrated Air Force officer was at the controls of an unusual type plane in a take-off crash, it was held to have been one of a series of negligent acts which produced the disaster.<sup>15</sup> And lastly, flying at an insufficient altitude may constitute negligence.<sup>16</sup>

Proving negligence need not be limited to proof of the actions of the crew of a plane. The Government has been held liable for the actions of airport tower controllers for negligently clearing two aircraft to land on the same runway at approximately the same time.<sup>17</sup> Also, failure to conduct proper maintenance has been cited as negligence.<sup>18</sup>

As has been stated, proving negligence can be difficult or even impossible in many cases. Thus, in many jurisdictions the plaintiff is an aviation case may rely upon the doctrine of *res ipsa loquitur*<sup>19</sup> to establish a *prima facie* case. Although the doctrine was early held to have no application to aircraft accidents because of the unreliable nature of "flying machines,"<sup>20</sup> it is com-

<sup>12</sup> See *Prashker v. Beech Aircraft Corp.*, 258 F.2d 802 (3d Cir. 1958), cert. denied, 358 U.S. 910 (1958), where a violation of C.A.A. regulations concerning instrument flying by a pilot without an instrument rating was held to be contributory negligence. See also *Citrola v. Eastern Airlines*, 264 F.2d 815 (2d Cir. 1959).

<sup>13</sup> 202 F. Supp. 384 (1962), *aff'd*, 315 F.2d 180 (2d Cir. 1963).

<sup>14</sup> See *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), *rev'd*, 350 U.S. 907 (1955), *modified and remanded*, 350 U.S. 962 (1956).

<sup>15</sup> See also *Evans v. United States*, 160 F. Supp. 5 (N.D. La. 1951), where an inexperienced pilot crashed into a group of workers in a cotton field.

<sup>16</sup> See *Citrola v. Eastern Airlines*, 264 F.2d 815 (2d Cir. 1959); *Orchard v. Northwest Airlines, Inc.*, 236 Minn. 42, 51 N.W.2d 645 (1952). In these cases, a jury was permitted to infer negligence from an unusually low approach to a landing field during a period of limited visibility.

<sup>17</sup> See *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955). But see *United States v. Schultetus*, 277 F.2d 322 (5th Cir. 1960).

<sup>18</sup> See *Blumenthal v. United States*, 306 F.2d 16 (3d Cir. 1962). See also *Richards v. United States*, 369 U.S. 1 (1963).

<sup>19</sup> See *Schneider v. United States*, 188 F. Supp. 911, 914 (S.D. N.Y. 1960).

<sup>20</sup> See *Bolineaux v. City of Knoxville*, 20 Tenn. App. 404, 99 S.W.2d 557 (1935).

monly applied in such cases today.<sup>21</sup> Indeed, the doctrine of *res ipsa loquitur* seems especially appropriate for application in airplane accident cases.<sup>22</sup>

According to Jayson,<sup>23</sup> *res ipsa loquitur* has been used more often in aviation cases than any other type case. Therefore, without question, it would seem that the doctrine is available for use in FTCA aviation cases. In *Blumenthall v. United States*,<sup>24</sup> *res ipsa loquitur* was applied by a court when the plaintiff showed several negligent circumstances and the Government failed to satisfactorily explain the cause of the accident. In an earlier case involving a plane crash in Alaska,<sup>25</sup> the court ruled that *res ipsa loquitur* applied in Alaska only to accidents involving common carriers and hence, was not available to the plaintiff in his cause against the United States. Negligence was found, however, on circumstantial evidence and a presumption of unfavorable testimony based upon the failure of the Government to call two eyewitnesses whose statements had been taken in an official investigation.

The doctrine has also been applied extensively in cases involving damage to persons and property on the ground resulting from aviation disasters.<sup>26</sup>

## 2. Absolute Liability.

No cases were found where the United States has been held liable for injury or death to a passenger on a military plane on the theory of absolute liability. Thus, the absolute liability question is not, at the present time, germane to this discussion. But FTCA is still young. The fact that *res ipsa loquitur* is now applied in aviation cases in most jurisdictions is eloquent proof of the capacity of the common law to adapt itself to changing technological conditions. While the airplane of today is no longer considered to be a dangerous instrumentality, at least insofar as the passenger industry is concerned, the industry now promises supersonic transports capable of carrying several hundred pas-

<sup>21</sup> See *Capital Airlines, Inc. v. Barger*, 47 Tenn. App. 636, 841 S.W.2d 579 (1960); *Smith v. Pennsylvania Cont. Airlines Corp.*, 76 F. Supp. 940 (D. D.C. 1943).

<sup>22</sup> See 1 L. KREINDLER, *AVIATION ACCIDENT LAW* 101-25 (1963).

<sup>23</sup> L. JAYSON, *HANDLING FEDERAL TORT CLAIMS* 9-25 (1964).

<sup>24</sup> 306 F.2d 16 (3d Cir. 1962). The opinion raises the interesting question of whether *res ipsa* applies where plaintiff shows specific acts of negligence. Suffice it to say, for this question as well as for the question of whether *res ipsa* raises a presumption, or merely permits an inference of negligence, that the cases hold both ways. Here it was treated as permitting an inference as the court implies that a satisfactory explanation of the engine malfunction would have put the plaintiff on his proof.

<sup>25</sup> *Vigderman v. United States*, 175 F. Supp. 802 (E.D. Pa. 1959).

<sup>26</sup> See *Jacoby*, *supra* note 10 at 148.

sengers per flight. It is certainly conceivable, should such super "leviathans of the air" become a reality, that the public will demand more certainty in the protection provided by the law than is available under the present concepts of "due care under the circumstances." Conceivably, there may be a reliance upon present day concepts of absolute liability. Accordingly, some comment on the issue is deemed appropriate.

The Supreme Court considered the question of absolute liability and FTCA in *Dalehite v. United States*.<sup>27</sup> The Court held that the theory of liability without fault did not apply to the United States since FTCA requires a negligent or wrongful act, whereas, in the liability without fault situation, the degree of care exercised by the tortfeasor was irrelevant.<sup>28</sup> The position of the Court today is uncertain in this regard. It declined to review a Fourth Circuit case<sup>29</sup> holding the Government liable under a state statute making the owner of aircraft absolutely liable for injuries to persons or property on the ground by reason of the flight, crash, or dropping or falling of any object therefrom. In *United States v. Taylor*,<sup>30</sup> the Sixth Circuit denied recovery to persons on the ground who were injured in the crash of an Air Force plane because, among other reasons, absolute liability did not apply under FTCA. The Supreme Court granted certiorari but remanded the case to the district court for consideration of a settlement between the parties. Then, in *Rayonier v. United States*,<sup>31</sup> the *Praylou* case was cited with approval in connection with the Court's rejection of an argument that there should be no governmental liability for the negligent acts of federal employees when they are engaging in "uniquely governmental" activities. Thus, from the flat denial of absolute liability in *Dalehite*, which statement could well have been a holding<sup>32</sup> in that factual context, to the unclear reference to *Praylou* in the *Rayonier* case, which did not at all involve absolute liability, the Court has moved from a definite position to one in which lawyers and judges can only speculate until the issue is again presented.

<sup>27</sup> 346 U.S. 15 (1953).

<sup>28</sup> *Id.* at 44. See also Jacoby, *supra* note 10 at 140, as to the characterization of the Court's conclusion concerning absolute liability.

<sup>29</sup> *United States v. Praylou*, 208 F.2d 291 (4th Cir. 1953), *cert. denied*, 347 U.S. 934 (1954).

<sup>30</sup> 238 F.2d 649 (6th Cir. 1956), *cert. granted*, 352 U.S. 963, *remanded*, 358 U.S. 956 (1957).

<sup>31</sup> 352 U.S. 315 (1957).

<sup>32</sup> *But see* Jacoby, *supra* note 10 at 140, where he expresses doubt whether the conclusion was either holding or dictum.

## 42 MILITARY LAW REVIEW

The lower federal courts appear, in fact, to be finding liability without proof of negligence in a variety of situations in which the doctrine of absolute liability has been applied in private litigation.<sup>35</sup> True it is that the language of negligence is being used in these cases. But by emphasizing the "extreme dangers" of certain commodities and the "hazardous nature" of certain activities, together with notions of "non-delegable duty" and "highest degree of care," these courts seem to be closely approaching the traditional tort concepts of strict liability for engaging in ultrahazardous activities or keeping in possession dangerous instrumentalities.

Granting that FTCA bottoms governmental liability upon a negligent or wrongful act or omission, it also indicates that the Government will be liable as a private person under local law.<sup>36</sup> Accordingly, it does not seem to violate the congressional purpose of the Act to hold the Government liable in the absence of negligence, if private persons would be liable under local law. This seems to have been the crux of Judge Parker's argument in *Praylou*. In distinguishing *Dalehite*, he said:

The Government relies upon *Dalehite v. United States . . .*, where one of the questions involved was whether the government was liable on the theory that it was maintaining a nuisance in having in possession the ammonium nitrate which exploded. . . . [W]e do not think that the doctrine there laid down was intended to apply to a case of this sort, where the result of its application would be patently absurd. To say that the Tort Claims Act was not intended to cover liability arising from the possession of dangerous property by the government is a very different thing from saying that it was not intended to apply to a liability for damage inflicted by government employees merely because the law of the state imposes absolute liability for such damage and not mere liability for negligence.<sup>37</sup>

It was also stated that the infliction of damage was a wrongful act which gave rise to liability under the state law.

In private litigation most jurisdictions have rules, either

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<sup>35</sup> See Jacoby, *id.* at 148, citing the following examples: Aviation—*Pucell v. United States*, 104 F. Supp. 110 (S.D. W.Va. 1951), where two Air Force planes crashed near plaintiff's residence; Use of electricity—*Pierce v. United States*, 142 F. Supp. 721 (E.D. Tenn. 1955), *aff'd*, 235 F.2d 466 (6th Cir. 1956), United States held liable for injuries to employee of electrical contractor doing work at government plant; Government held to have "non-delegable duty" to provide protection because of extremely dangerous nature of electricity; Explosives—*Meara v. United States*, 119 F. Supp. 662 (W.D. Ky. 1954), owner of explosives has duty to exert highest degree of care and is liable for natural consequences of breach.

<sup>36</sup> 28 U.S.C. § 2674 (1964).

<sup>37</sup> *United States v. Praylou*, 208 F.2d 291, 295 (4th Cir. 1953).

statutory or common law, which permit the imposition of strict liability upon one who engages in ultrahazardous activity or who keeps within his possession or control a dangerous instrumentality. The philosophical and social justifications supporting such rules against private individuals would appear to have as much validity against the Government. When an individual is injured or killed as the result of governmental activity in a situation where the local law imposes absolute liability, the result to the victim is precisely the same as though the injury stemmed from private activity. Given the benevolent intent of FTCA, the "no absolute liability" arguments seem, in the writer's opinion, to counter congressional purpose rather than effectuate it.

It is submitted that a Supreme Court ruling recognizing the applicability of absolute liability under FTCA would be a just, realistic, and enlightened development. Such action should not be withheld for fear of a proliferation of absolute liability measures which would seek to expand the traditional concepts of the doctrine at the expense of the Federal Government. By so framing its ruling, the Court could reserve the right to measure any purported departures from the traditional concepts or to define the limits within which absolute liability standards would apply. In this manner it would be able to thwart any state statutes which sought to discriminate against the Government. At any rate, existing laws could be given full application within the scope of FTCA.

### 3. *Scope of Employment.*

Another element of a cause of action under FTCA is that the employee causing the injury complained of must have been acting within the "scope of his office or employment." The statute defines this term to mean "acting in the line of duty,"<sup>36</sup> which phrase has further been interpreted by the courts as being synonymous with "scope of employment" and the principles of "*respondeat superior*" under the applicable law.<sup>37</sup> The scope of employment requirement is illustrated by *Campbell v. United States*.<sup>38</sup> There, the plaintiff was injured when knocked down by a sailor running to catch a troop train. The court concluded that the limitation of the Government's liability to situations in which private persons would be liable under local law required the adoption of state rules of *respondeat superior*, under which the liability of a private employer for the actions of his employee

<sup>36</sup> 28 U.S.C. § 2671 (1964).

<sup>37</sup> *United States v. Campbell*, 172 F.2d 500 (5th Cir. 1949).

<sup>38</sup> *Id.*

is determined. The district court judgment for plaintiff was reversed and the complaint dismissed since, under Louisiana law, a private employer in a similar factual situation would not have been liable. In *Williams v. United States*,<sup>39</sup> the Supreme Court specifically directed the adoption of state rules of *respondent superior* for determining governmental liability under FTCA. Thus, mere status as an officer, agent, or employee of the United States, coupled with a negligent act or omission, will not alone give rise to a valid claim under FTCA. The employee must be acting in furtherance of his master's business as well.

In *United States v. Taylor*,<sup>40</sup> an Air Force plane on a training mission flew significantly beyond the assigned training area to the pilot's home town where the plane exploded and crashed, injuring bystanders and causing property damage. Plaintiffs were denied recovery since the pilot was not acting within the scope of his employment and, under the Tennessee rule of *respondent superior*, a master is not liable for the activities of his employees outside the scope. The same result was reached when a drunken Air Force cadet crashed a plane being operated without the knowledge and permission of his superior.<sup>41</sup>

Persons sustaining injuries while passengers on military aircraft have been denied recovery where the craft was being operated by personnel outside their scope of employment.<sup>42</sup> In some instances a finding of no scope of employment has been premised upon a violation of federal laws. For example, in *Wrynn v. United States*,<sup>43</sup> where plaintiff was injured incident to the unlawful use of an Air Force helicopter in a search for an escaped state convict, recovery was denied. The use of Army and Air Force personnel to enforce the civil law is forbidden by the "posse comitatus" act,<sup>44</sup> a federal statute. Under the reasoning of this case, violation of federal laws renders the employee beyond the scope of his employment. However, in other instances of violations of laws, if the law violated is a "safety" ordinance, regulation, or statute, the violation is a basis for a finding of negligence.<sup>45</sup>

<sup>39</sup> 350 U.S. 857 (1955).

<sup>40</sup> 286 F.2d 849 (6th Cir. 1956).

<sup>41</sup> *King v. United States*, 178 F.2d 320 (5th Cir. 1949).

<sup>42</sup> See part E, *infra*.

<sup>43</sup> 200 F. Supp. 457 (E.D. N.Y. 1961).

<sup>44</sup> 18 U.S.C. § 1385 (1964).

<sup>45</sup> See *Dostal*, *supra* note 11 at 183.

#### 4. The "Private Person" Analogy.

Early in the history of FTCA the Government argued that the "private person" language meant that the United States was to be held liable only where there was a literal private counterpart liability. Such an interpretation, if accepted, would have resulted in putting the majority of potential claims beyond the scope of FTCA because of the patent governmental nature of nearly all activities which could be the subject of claims. In an early case on this issue, *Cerri v. United States*,<sup>46</sup> the above restrictive argument was rejected. However, the argument was accepted initially by the Supreme Court in *United States v. Feres*,<sup>47</sup> and was partially relied upon in denying recovery by servicemen for injuries sustained "incident to their service." The Supreme Court said: ". . . [P]laintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States. . . . [N]o private individual has power to conscript or mobilize a private army. . . ." <sup>48</sup>

Fortunately, this narrow approach was abandoned in *Indian Towing Co. v. United States*,<sup>49</sup> where the Supreme Court said that the "private person" language was not to be read as excluding liability for negligent conduct in the operation of an enterprise in which private persons were not engaged. Justice Frankfurter stated that the proposed interpretation of the "private person" language would "push the courts into the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations, [and so defeat the purposes of FTCA]." <sup>50</sup> A fresh approach, and one which is consistent with the benevolent purposes of FTCA, is that when there is no analogous private activity, the court should determine what the law would be if there were such activity and measure the Government's liability by the judge-made standard.<sup>51</sup>

The *Feres* application of "private person" was subsequently applied in airplane accident cases as one of the bases upon which recovery was denied for the death of servicemen.<sup>52</sup> It is submitted that the use of the "private person" rationale for exclusionary

<sup>46</sup> 80 F. Supp. 831 (N.D. Cal. 1948).

<sup>47</sup> 340 U.S. 135 (1950).

<sup>48</sup> *Id.* at 141.

<sup>49</sup> 350 U.S. 61 (1955).

<sup>50</sup> *Id.* at 64.

<sup>51</sup> *United States v. Gavigan*, 280 F.2d 319 (5th Cir. 1960), *cert. denied*, 364 U.S. 933 (1961).

<sup>52</sup> *Archer v. United States*, 217 F.2d 548 (9th Cir. 1954); *Fass v. United States*, 191 F. Supp. 367 (E.D. N.Y. 1961).

purposes is patently unsound. If the *Feres* doctrine is accepted, it would necessarily follow that there could never be a recovery for injury caused by the various activities of the Armed Forces, since no private person maintains and administers an army.

Therefore, the "private person" language is now generally taken to indicate the abrogation of the concept of sovereign immunity rather than to indicate a congressional purpose to predicate governmental liability upon the governmental-non-governmental distinction found in the law of municipal corporations.<sup>23</sup>

#### D. CHOICE OF LAW

FTCA requires that governmental liability be determined according to the "law where the act or omission occurred." No problem is presented where all operative facts in a case occur in one jurisdiction. However, in the case of airplanes, where negligence may occur in one jurisdiction and injury in another, the choice of law issue presents a problem.

The Supreme Court, in *Richards v. United States*,<sup>24</sup> construed the "law of the place" language in the FTCA. There, an American Airlines commercial liner crashed in Missouri killing all passengers. Under the Missouri wrongful death statute, recovery was limited to \$15,000 per person, which sum was tendered by American and accepted by the plaintiffs. Subsequently, an action was brought against the United States upon the allegation that employees of the Civil Aeronautics Agency in Oklahoma had been negligent in failing to enforce federal regulations prohibiting certain practices in maintenance and repair of aircraft engines. These prohibited practices were allegedly followed by employees of American at its maintenance facility in Oklahoma. Plaintiffs alleged that Oklahoma law, which had no limitation on recovery for wrongful death, was applicable. The Supreme Court held that FTCA required resort to the whole law of the state where the negligent act or omission occurred, including its choice of law rules. Therefore, if the choice of law rule prevailing in the state where the negligent act or omission occurred refers to the law of the state of impact, the Government's liability will be fixed by the law of the latter.

The *Richards* rule was based upon several considerations. They include a desire to provide for flexibility in the assimilation by the federal courts of new principles in state conflicts of law, and to effectuate congressional intent to make the United States liable to the same extent as a private individual under like circum-

<sup>23</sup> See *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957).

<sup>24</sup> 369 U.S. 1 (1962).



stances.<sup>55</sup> In the latter aspect, the *Richards* rule is particularly important in aviation cases where negligence is likely to occur in several jurisdictions and may involve private entities as well as the Government. In such situations, the liabilities of the co-defendants have been determined by the laws of different states.<sup>56</sup>

Unquestionably, *Richards* will result in the United States being treated as a private person similarly situated in the majority of jurisdictions where the normal multi-state choice of law rule still prevails.<sup>57</sup> But, *Babcock v. Jackson*<sup>58</sup> has spawned a new choice of law rule to be applied in multi-state tort situations. *Babcock* permits the court of the forum to evaluate the contacts between the parties, the events, and the jurisdictions involved to determine which jurisdiction has the most significant contacts with the parties. After deciding this, the court then applies the law of the jurisdiction so determined.

What criteria are used by the courts in determining the governing law? In *Mertens v. Flying Tiger Lines, Inc.*,<sup>59</sup> the court implied, in dicta concerning selection of controlling law on limitation of damages, that the place of the accident, the place of departure, and the domicile of the decedent had contacts which should be considered. Lowenfeld and Mendelsohn,<sup>60</sup> discussing choice of law in the context of an aviation accident in a foreign country in the absence of a uniform limitation on damages, suggest that domicile of passengers or survivors, nationality or place of business of the airline, place of purchase of the ticket and commencement of the journey, place of destination, place of the accident, and forum of the action all have contacts to be considered.

Given the existence of different rules for choice of law within the federal system of the United States, it is still possible for the United States to be treated differently from a private person similarly situated. For example: A commercial plane crashes in State B (limited recovery for wrongful death) as the result of negligence of both the United States and the carrier in State A

<sup>55</sup> *Richards v. United States*, 369 U.S. 1, 6-7 (1962); see also 28 U.S.C. § 2674 (1964).

<sup>56</sup> See, e.g., *Eastern Airlines v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955), cert. denied, 350 U.S. 907 (1955), where liability of the United States for negligence in causing a midair collision was limited to \$15,000 under Virginia law, but Eastern faced unlimited liability under the laws of the District of Columbia.

<sup>57</sup> RESTATEMENT OF CONFLICTS §§ 377-78, 391 (1934).

<sup>58</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

<sup>59</sup> 341 F.2d 851, 858, n. 4 (2d Cir. 1965).

<sup>60</sup> Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 582 (1967).

(unlimited recovery). Action is brought in State C (unlimited recovery), the domicile of the plaintiffs' decedents.<sup>61</sup> The carrier is amenable to service of process and is joined as a defendant with the United States. The *Babcock* rule obtains in C, while A and B follow the Restatement rule.<sup>62</sup> The liability of the United States will be determined, and limited, by the law of State B.<sup>63</sup> As to the airline, however, the federal diversity court would follow the conflict of laws rule of State C<sup>64</sup> and could apply the law of either of the three jurisdictions, depending upon which was determined to have the dominant interest in the outcome of the litigation. Should the law of either A or C be chosen, the airline would face unlimited liability.

Conversely, it is possible for the liability of the airline to be limited while that of the United States is not. This result might occur if, in the example given, State A followed the *Babcock* rule while the Restatement rule prevailed in C. And too, given the applicability of the *Babcock* rule, a court may have to determine and apply the laws of as many jurisdictions as there are passengers on a plane.

The foregoing possibilities are but one result of a federal system "which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies differing from those of her neighbors."<sup>65</sup> In any event, even where the same law has been applied in cases involving the United States and a private co-defendant, differing verdicts for the same injury or death are not unusual.<sup>66</sup> Finally, it may be said that Congress did not require literal similarity of result, for when it prescribed the law by which the liability of the United States would be measured it was silent as to the law by which the liability of a private co-defendant would be measured.

#### E. PROPER CLAIMANTS UNDER FTCA

Does the remedy afforded by FTCA extend to the general public? Or, are some classes of persons excluded from coverage? As it developed, FTCA extended its remedy to the general public; however, there are situations in which no remedy was available

<sup>61</sup> 28 U.S.C. § 1402(b) (1964), provides that action on a tort claim under § 1346(b) (1964) may be brought either in the judicial district where the plaintiff resides, or where the act complained of occurred.

<sup>62</sup> RESTATEMENT OF CONFLICT: § 377 (1934). "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

<sup>63</sup> See *Richards v. United States*, 269 U.S. 1 (1926).

<sup>64</sup> See *Klaxon v. Stentor Mfg. Co.*, 313 U.S. 487 (1941).

<sup>65</sup> *Id.* at 496.

<sup>66</sup> See *Dostal*, *supra* note 11 at 186, n. 165 (1964).

by reason of the status of the claimant. Since the majority of passengers on a military aircraft have some status or relationship with the Government, an understanding of when a remedy does in fact exist is essential.

Originally, no persons were excluded, as a class, from coverage under FTCA. However, certain activities were made the subject of specific exceptions,<sup>67</sup> e.g., claims arising from the execution of statutes or regulations or the exercising of a discretionary function;<sup>68</sup> claims for which remedies are provided under the Suits in Admiralty Act;<sup>69</sup> claims arising out of combatant activities;<sup>70</sup> and claims arising in foreign countries.<sup>71</sup> As a result, there exist several fairly easily definable categories of persons who, in certain circumstances, have been held to be without remedy under FTCA. These categories are discussed below in terms of their application in aircraft cases.

### 1. *Military Persons On Active Duty.*

In *Brooks v. United States*,<sup>72</sup> the first FTCA case to reach the Supreme Court, it was clearly held that military persons were not barred from coverage under FTCA. The area in which recovery may be allowed was, however, subsequently narrowly restricted in *United States v. Feres*.<sup>73</sup> *Feres* held that members of the Armed Forces on active duty, and not on leave or furlough, sustaining injuries incident to their service, had no cause of action under FTCA. This case was distinguished from *Brooks* on the ground that the service members there involved were on leave and divorced from their duties; whereas, in *Feres*, they were not. The rationale of *Feres* had several facets: (1) It was argued that Congress had intended to provide a remedy for those who had been without one; that servicemen already had an adequate and comprehensive system of compensation for themselves and their dependents; that Congress did not mean to provide for a double recovery; and that by not providing for adjustment between recovery under the Act and existing benefits, it was implied that the system of benefits was to be the exclusive remedy. (2) Since the liability of the United States was to be measured by the

<sup>67</sup> 28 U.S.C. § 2680(a)-(n) (1964).

<sup>68</sup> 28 U.S.C. § 2680(a) (1964).

<sup>69</sup> 28 U.S.C. § 2680(d) (1964).

<sup>70</sup> 28 U.S.C. § 2680(j) (1964).

<sup>71</sup> 28 U.S.C. § 2680(k) (1964).

<sup>72</sup> 337 U.S. 49 (1949). Two service members were injured while on leave when their automobile was struck by an Army truck. Recovery was permitted, as there was no indication that Congress had intended to exclude soldiers from coverage.

<sup>73</sup> 340 U.S. 15 (1950).

liability of a private individual under like circumstances and no private individual maintained an army, there was no analogous private liability. (3) Considering that Congress had further indicated that governmental liability was to be determined by the law where the act or omission occurred, and that soldiers had no control over where their duty might take them, the Supreme Court reasoned that Congress could not rationally have intended that a soldier's right to recover would be subject to the vagaries of varying state laws.

Since that decision, actions have been permitted or denied servicemen, depending upon the similarity of the factual situation presented to that which obtained in *Brooks* or in *Feres*. A reference to cases involving actions for injury or death sustained in military aircraft demonstrates the foregoing conclusion.

Following the *Brooks* doctrine that a service member injured while on leave was not precluded from recovery under FTCA, in *Wilcox v. United States*,<sup>74</sup> a Government motion for summary judgment based upon the "incident to service" rule of *Feres* was denied. In *Wilcox*, plaintiff's decedent was killed in the crash of an Air Force plane engaged in a cross-country training flight. Decedent was not the pilot, and had no duties in connection with the mission. He had been granted a pass and was permitted to participate in the flight. The case appears to have turned on the single circumstance that the airman was on pass at the time of his death.<sup>75</sup>

Beginning with *Archer v. United States*,<sup>76</sup> a case practically indistinguishable from *Wilcox*, courts dealing with actions under FTCA for the deaths of servicemen while passengers on military aircraft took a decidedly conservative stance. In fact, the courts applied the *Feres* rule as though it had overruled *Brooks*. For example, *Rosen v. United States*,<sup>77</sup> an action for the death of a military cadet killed in a plane crash while returning from leave, was dismissed. The court held that a cadet riding under military discipline in an army plane under the control of a superior officer had no claim for injury sustained from any cause, and without regard to whether he was on leave or whether he was in the plane voluntarily or by command.<sup>78</sup> The essence of *Archer* and

<sup>74</sup> 117 F. Supp. 119 (S.D. N.Y. 1953).

<sup>75</sup> See *Rosen v. United States*, 126 F. Supp. 13 (E.D. N.Y. 1954) (similar in fact and result).

<sup>76</sup> 217 F.2d 548 (9th Cir. 1954).

<sup>77</sup> 126 F. Supp. 13 (E.D. N.Y. 1954).

<sup>78</sup> This position was adopted in *Fass v. United States*, 191 F. Supp. 367 (S.D. N.Y. 1961), and *Hemlitas v. United States*, 202 F. Supp. 520 (D. Ore. 1952).

subsequent aviation cases seems to be that when a service member, being on leave and free to select whatever mode of transportation on a military plane, available to him as an incident of his military status,<sup>79</sup> he places himself in an incident to service situation and within the ambit of the exclusionary rule of the *Feres* case.

Notwithstanding the foregoing aircraft cases which follow the *Feres* doctrine, a conclusion that *Feres* will operate to bar recovery in aircraft disaster cases would be premature. In *Lee v. United States*,<sup>80</sup> the most recent case of an attempt to recover damages for the death of a serviceman killed in the crash of a military plane, a Government motion to dismiss based upon the *Feres* doctrine was denied.

In *Lee*, several Marines were killed when an Air Force plane bound for Vietnam crashed shortly after take-off from a Marine Corps Air Base in California. The plaintiffs contend the crash was the result of erroneous information concerning terrain clearance given the pilot by the control tower. The tower was manned and operated by employees of the Federal Aviation Agency.

Despite twenty years of precedent stemming from *Feres*, the district court denied the Government's motion to dismiss. The court reasoned that the fundamental underpinnings of *Feres* had been swept away in successive decisions of the Supreme Court. In *United States v. Brown*,<sup>81</sup> the Supreme Court rejected the existence of a system of benefits as a reason for exclusion. The lack of analogous private liability was "specifically rejected" in *Indian Towing Co. v. United States*.<sup>82</sup> Lastly, *Muniz v. United States*<sup>83</sup> abandoned so much of *Feres* as sought to base exclusion upon the "irrationality of premising soldiers' rights to recover upon varying state laws." Thus, only the peculiar and special relationship between the soldier and his superiors, the necessity for maintaining discipline and efficiency, and the obviously corrosive effect that would be manifested if commanders were required to debate their orders in terms of subsequent governmental liability in the event of miscarriage, remain extant and vital as reasons for the judge-made exclusionary *Feres* doctrine.<sup>84</sup> Finding that petitioners

<sup>79</sup> Service regulations authorize free transportation to service members, space permitting, when on leave or pass, Army Reg. No. 96-20, para. 4a (11 Jun. 1953).

<sup>80</sup> 261 F. Supp. 25 (S.D. Cal. 1966).

<sup>81</sup> 348 U.S. 110 (1954).

<sup>82</sup> 350 U.S. 61 (1955).

<sup>83</sup> 374 U.S. 15 (1963).

<sup>84</sup> See *Brown v. United States*, 340 U.S. 110, 112 (1955).

in no way relied upon the negligence of anyone within the military relationship, but rather upon a "third-party" governmental agency, the court concluded that the reason for *Feres* did not apply, and that plaintiffs were not precluded from recovery if the negligence of tower personnel could be established.<sup>52</sup>

*Lee* obviously heartens those who favor a liberal construction and application of FTCA. It is the freshest approach manifested since *Feres* was decided.<sup>53</sup> The validity of the distinction alleged to exist is, however, questionable. By attributing controlling importance to the fact that the negligence occurred outside the *Feres* "military relationship" context, the incident to service rule may have been unacceptably delimited in *Lee*. As was stated in *Archer*, negligence of fellow service members is irrelevant. It may be that the *Feres* doctrine was meant to cover any injury caused by any officer, agent, or employee of the government while the serviceman is in the "incident to service" situation. Viewed in this light, if the *Archer* conclusion is valid, the *Lee* distinction cannot be. These Marines, traveling on a military aircraft enroute to a combat zone, were infinitely more "incident to service" than in any case heretofore considered.

Although not specifically stated, it was necessarily implied that had the tower been operated by military personnel instead of civilian employees of the Federal Aviation Agency, the *Feres* doctrine would have compelled dismissal. How important is it then, that the tortfeasors were civilians, and not soldiers? Would a soldier in a *Feres* setting who is injured by a civilian employee of the Army be entitled to recover under FTCA? The civilian employee is by definition not a party to the "military relationship." *Lee* would seem to indicate that recovery would be proper. If *Lee* is determined to be valid, it signals the permanent impairment of *Feres* as an exclusionary rationale. It may well toll its death knell. Therefore, in the writer's opinion, *Feres* must necessarily be restricted to those cases where injury results from the most direct and palpable service-connected injuries.

Assuming the *Lee* distinction is valid and the *Feres* rule does not preclude recovery where death or injury is caused by the act of a "third-party" governmental agency, the "combatant activities" exclusion<sup>54</sup> may still bar recovery. The combatant activities

<sup>52</sup> It is clear that tower negligence is a basis for recovery under FTCA. See *United States v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955), *aff'd*, 350 U.S. 907 (1955).

<sup>53</sup> See *Callaway v. Garber*, 289 F.2d 171 (9th Cir.), *cert. denied*, 368 U.S. 874 (1961), where the parties were incident to service, but there was no connection between their duties and the negligence.

<sup>54</sup> 28 U.S.C. § 2680(j) (1964).

exclusion has seldom been relied upon by the Government, and when it has, the results have not been satisfactory.

In *Perucki v. United States*,<sup>88</sup> a veteran with a combat leg injury contended his injury was aggravated by a Veterans' Administration doctor in connection with an examination pursuant to an appeal from a reduction in disability rating. The court dismissed the complaint as being barred by the "combatant activities" exclusion. In a bit of particularly uninspired reasoning, the court decided that as the injuries giving rise to the examination were suffered in combat, the injuries sustained during the examination arose out of combat as well.<sup>89</sup> However, in a cause of action for damages where plaintiffs' decedent was killed when struck by a piece of iron which fell from army planes engaged in wartime target practice, a Government motion to dismiss upon the theory of "combatant activities" was denied.<sup>90</sup> The court stated:

It is believed that the phrase was used to denote actual conflict, such as where the planes and other instrumentalities were being used, not in practice and training, far removed from the zone of combat, but in bombing enemy occupied territory, forces or vessels, attacking or defending against enemy forces, etc.<sup>91</sup>

In another case construing the phrase, *Johnson v. United States*,<sup>92</sup> the Government's argument was likewise ignored. There the plaintiffs' "clam farm" in Discovery Bay, Washington, was ruined for a season by the discharge of oil, sewage, and other ship's waste by Navy ammunition tenders waiting to be docked and unloaded after V.J. Day. The United States had successfully defended in the district court on the theory of "combatant activities." In holding that activity taking place after the fighting had ceased did not constitute combatant activity, the circuit court said:

"Combat" connotes physical violence; "Combatant", its derivative, as used here, connotes pertaining to actual hostilities; the phrase "combatant activities," of somewhat wider scope, and superimposed upon the purpose of the statute, would therefore include not only physical violence, but activities both necessary to and in direct

<sup>88</sup> 80 F. Supp. 959 (N.D. Pa. 1948).

<sup>89</sup> The notion that veterans are barred from recovery for injuries sustained incident to treatment of service-connected injuries was later rejected in *Brown v. United States*, 348 U.S. 110 (1954).

<sup>90</sup> *Skeels v. United States*, 72 F. Supp. 372 (W.D. La. 1947).

<sup>91</sup> *Id.* at 374.

<sup>92</sup> 170 F.2d 767 (9th Cir. 1948).

connection with actual hostilities. . . . The rational test would seem to be the degree of connectivity (sic). . . .<sup>19</sup>

The interpretation given the "combatant activities" exception in *Skeels v. United States*,<sup>21</sup> and *Johnson* seems aptly suited for application to the facts of *Lee*. The best analysis found is that appearing in *Johnson* where the court said that the exception referred to "Government activities which by their very nature should be free from the hindrance of a possible damage suit."<sup>22</sup> It may be argued that the activity, to come within the exception, need not occur in actual combat, but must have a direct and essential connection with combat. The movement of troops into the combat zone has such a direct and essential connection and injuries occurring during the process of such movement, whether through the negligence or omission of the military or another governmental agency, necessarily arise from a combatant activity as thus defined.

The rationale of *Skeels* and *Johnson* supports the proposed application. The facts in *Lee* do not suggest mere practice or training, removed from the combat zone, but in fact the direct and necessary connection with combat required by *Johnson*. Of course, the "third-party" governmental agency would have to be engaged in a related effort, as was the Federal Aviation Agency in *Lee*; otherwise the essential connection would be lacking.

It seems unlikely that the *Lee* case can be permitted to go unchallenged. For one thing, should *Lee* become the law, the entire purpose of the *Feres* doctrine will be frustrated, even if nothing more remains to support it than the necessity for permitting the military departments to perform their various essential functions without inhibitions engendered by fear of miscarriage resulting in governmental tort liability. In situations such as in *Lee*, and in countless others which may arise, the military will bear the brunt of the investigation and fact gathering incident to discovery procedures and the defense of such an action. The resulting administrative burdens will necessarily detract from the principal and historic training and combat readiness functions of these departments.

Thus, for the continued vitality and effectiveness of the military relationship, the *Lee* case should not be permitted to become

<sup>19</sup>*Id.* at 770 (emphasis added). See also *United States v. Carol*, 369 F.2d 618 (8th Cir. 1966), where the exception was treated as being synonymous with "incident to service."

<sup>21</sup>72 F. Supp. 372 (W.D. La. 1947).

<sup>22</sup>*United States v. Johnson*, 170 F.2d 767, 769 (9th Cir. 1948).



law. The *Feres* doctrine, although denying to individuals the benefit of a recovery for tortious injury, protects commanders from the debilitating hesitancy to which they would be subjected if, in the prosecution of their missions, they must concern themselves with the prospect of suit for negligent errors. Would it then be appropriate to overrule the *Brooks* case? The writer suggests that it would not, as service members are often injured in situations, totally divorced from the military, and to permit recovery for negligence in such circumstances is in keeping with the basic purposes of the law of negligence. So *Brooks* and *Feres* can remain side by side, wherein non-service injuries are compensable, but service-connected ones are not, in order to protect and maintain the effectiveness of military departments. What is needed, in order to bring unity and order into the area, is a clear and all-embracing concept of what is "incident to service." The difficulty of framing such a universal rule is appreciated, but it is suggested that duty status at the time of injury, the original concept as announced in *Brooks* would be an apt starting point.

## 2. Reservists.

Members of the National Guard and Reserve units have generally been precluded from recovery when injured in the performance of duty or incident to training.<sup>98</sup> For example, where a decedent had just enlisted in the Naval Reserve and was killed in the take-off crash of an orientation flight, the complaint was dismissed on the authority of the *Feres* case.<sup>99</sup> Also, in *Layne v. United States*,<sup>100</sup> the decedent, a major in the Indiana Air National Guard, was killed while piloting a jet fighter in training, as a result of the alleged negligence of Government employees in the airfield control tower. Summary judgment was granted the United States upon a finding by the court that Major Layne had a dual status as a member of the State National Guard and the reserve component of the Armed Forces. As such, at the time of his death he was in line of duty and incident to his service within the meaning of *Feres*.

The most recent case involving an attempt by a reservist to recover for injuries sustained in the crash of a military aircraft was *Carrol v. United States*.<sup>101</sup> In that case plaintiff, a Naval Re-

<sup>98</sup> See *Carrol v. United States*, 247 F. Supp. 703 (1965), *rev'd*, 360 F.2d 618 (8th Cir. 1966); *Layne v. United States*, 295 F.2d 433 (7th Cir. 1961); *Drumgoole v. Virginia Electric and Power Co.*, 170 F. Supp. 824 (E. D. Va. 1959); *O'Brien v. United States*, 192 F.2d 948 (8th Cir. 1951).

<sup>99</sup> See *O'Brien v. United States*, 192 F.2d 948 (8th Cir. 1951).

<sup>100</sup> 295 F.2d 433 (7th Cir. 1961).

<sup>101</sup> 247 F. Supp. 703 (E.D. Mo. 1966).

servist residing in St. Louis, Missouri, was required to attend periodic drills at a naval air station in Memphis, Tennessee. Because of difficulties in obtaining transportation from St. Louis to Memphis for the periodic drills, a naval transport plane was regularly made available for plaintiff and others similarly situated for the purpose of travel to drill. On one such occasion, due to the admitted negligence of the pilot, the plane crashed and injured Carrol. The district court overruled a Government motion to dismiss—based upon the “combatant activities” exception—and awarded judgment to Carrol. The court erroneously relied upon *Meister v. United States*,<sup>100</sup> where a reservist, en route to an inspection, fell on an icy sidewalk at a naval air station, and injured himself. The reason Meister recovered was not, however, because the injury was “not incident to service,” but because it was “incident to service,” under a different statute providing emoluments for reservists “disabled in line of duty while so employed.”<sup>101</sup> Thus in holding that Carrol was not “incident to service,” the district court misconstrued *Meister*, and the case was later reversed by the circuit court on the authority of *Feres*.

### 3. Retired Members.

That retired members are not affected by the “incident to service” rule of *Feres* was the holding in *Watt v. United States*.<sup>102</sup> In *Watt* a retired service member, in an Army hospital pursuant to a statute authorizing medical services to retirees when facilities permitted,<sup>103</sup> was injured when a defective telephone stand toppled and fell on his foot. The Government’s motion for summary judgment bottomed upon *Feres* was denied. The court held that the retired status of the plaintiff sufficiently removed him from the class of persons to which the *Feres* doctrine could be applied.

*Fass v. United States*<sup>104</sup> arose out of the death of a retired serviceman in an airplane crash, and recovery was denied on a basis other than the “incident to service” rule. Decedent had requested and received permission to travel space-available to the Air Force Finance Center at Denver, Colorado, for the purpose of reviewing his records. The crash was due to an unknown mechanical defect in the engine. The district court likened Colonel Fass to a guest in a motor vehicle who, under New York law, was entitled to be informed of any danger of which the owner was

<sup>100</sup> 319 F.2d 875 (Ct. Cl. 1963).

<sup>101</sup> 10 U.S.C. § 6148(a) (1964).

<sup>102</sup> See 246 F. Supp. 386 (S.D. N.Y. 1965).

<sup>103</sup> 10 U.S.C. § 1074 (1964).

<sup>104</sup> 191 F. Supp. 367 (E.D. N.Y. 1961).

aware, and to the exercise of ordinary, reasonable care. Plaintiff's evidence failed to show a danger or defect known to the United States and likewise failed to establish negligence in the operation of the craft. The court reached its result by analogy from the principles controlling the liability of common carriers, wherein a distinction is made between the duty of care owed to a non-paying passenger and a passenger for hire. Significantly, although recovery was denied, no mention was made of the "incident to service" rule.

It may be concluded then, that where a service member obtains passage on a military plane gratuitously and is killed or injured thereon, recovery may, in some states, be denied in the absence of a showing of a breach of the duty to use reasonable care.<sup>103</sup> In any event, it is apparently not necessary for the retired serviceman to overcome the "incident to service" hurdle.

#### 4. *Unauthorized Invitees.*

Service regulations prescribe the classes of persons and the purposes for which passage on military aircraft is authorized.<sup>106</sup> Included in the categories are: military personnel while in a duty status, or while in a leave status on a space-available basis, retired military personnel; civilian employees of the Department of Defense and other Government agencies; technical advisers to military authorities when engaged in activities of the Department and traveling on orders. Dependents are authorized passage on military aircraft other than the regularly scheduled passenger flights (Military Airline Command) only in extenuating circumstances in individual cases, when special permission has been given at a level no lower than that of a service chief of staff.<sup>107</sup> Accredited members of the press and other news media are authorized to be furnished transportation by the military to cover activities of the military establishment and to cover news stories of transcendental national interest when commercial facilities cannot be obtained.<sup>108</sup>

Where persons not authorized to ride in military aircraft have nonetheless obtained passage and suffered injury therein, the courts have denied recovery, applying the *respondet superior* in-

<sup>103</sup> Recovery was permitted in *Rogow v. United States*, 173 F. Supp. 547 (S.D. N.Y. 1959), which arose from the same accident. Rogow was classed as an "invitee," rather than a "licensee." Compare *Friedman v. United States*, 138 F. Supp. 530 (S.D. N.Y. 1956).

<sup>106</sup> Army Reg. No. 96-20, Air Force Reg. No. 76-6, OPNAVINST 4630.10 (11 Jun. 1953).

<sup>107</sup> Army Reg. No. 96-20, para. 5 (11 Jun. 1953).

<sup>108</sup> Army Reg. No. 360-5, paras. 25, 28 (27 Sep. 1967).

terpretation of the "scope of employment" language of FTCA decreed by the Supreme Court in the *Williams* case.<sup>109</sup> No cases involving "stowaways" were found. In such cases, general principles of the law of trespass would bar recovery in the absence of a willful breach of duty.

The fortunes of unauthorized invitees in their attempts to be made whole are exemplified by *United States v. Alexander*<sup>110</sup> and *Hottovy v. United States*.<sup>111</sup> In *Alexander*, an Air Force plane was used to assist plaintiff, a professional golfer whose services the Air Force desired in a fund-raising project for the Civil Air Patrol, to reach his home in North Carolina. He was severely injured when the plane crashed in Indiana. In reversing a lower court verdict for plaintiff, the circuit court found that Alexander's presence on the plane was not authorized by regulations, that the plane was not being used for official purposes but for the personal convenience of the plaintiff, and that the pilot had exceeded his authority and was without the scope of his employment. In dicta, the court indicated that even had the pilot been within the scope of employment, recovery would have been barred by an Indiana Guest Statute applicable to aircraft.

In *Hottovy*, an airline hostess who had been invited to accompany an Army helicopter pilot on an orientation flight was injured when the vehicle crashed. In awarding judgment to the United States, the court stated that the pilot, although operating the craft within the scope of his employment, had violated his instructions in permitting Miss Hottovy aboard. Although the general rule is that a master is responsible for the torts of his servant who is in the scope of his employment, even if the servant's conduct consists of forbidden acts, the court applied the Restatement rule,<sup>112</sup> in effect in Arizona, and granted judgment to the United States.

In those jurisdictions not following the Restatement rule, an unauthorized invitee may be permitted to recover when the servant is within the scope of his employment.<sup>113</sup>

<sup>109</sup> *Williams v. United States*, 215 F.2d 800 (1954), *remanded*, 350 U.S. 857 (1955).

<sup>110</sup> 234 F.2d 861 (4th Cir. 1956).

<sup>111</sup> 250 F. Supp. 315 (D. Ariz. 1966).

<sup>112</sup> RESTATEMENT (SECOND) OF AGENCY § 242 (1958): "A master is not subject to liability for the conduct of a servant toward a person harmed as a result of accepting or soliciting from them an invitation, not binding on the master, to enter or remain upon the master's premises or vehicle, although the conduct which occasions the harm is within the scope of . . . employment."

<sup>113</sup> See *Meyer v. Blackman*, 59 Cal.2d 668, 381 P.2d 916, 31 Cal. Rptr. 36 (1963).

5. *Dependents and Civilian Employees.*a. *Dependents.*

Dependents of military personnel have been permitted recovery under FTCA in a number of cases.<sup>114</sup> It is clear that the *Feres* doctrine has no application to dependents, who are not members of the Armed Forces.<sup>115</sup> It has been held, however, that where a dependent receives medical treatment for his injuries at Government expense, this fact should be considered in determining the amount of any award.<sup>116</sup>

In the sole case found involving a claim for injuries to a dependent suffered while a passenger on a military plane, recovery was denied because the injury occurred in a foreign country.<sup>117</sup>

b. *Civilian Employees.*

Claims for the injury or death of civilian employees of the United States arising out of the performance of duty are compensable under the Federal Employees' Compensation Act.<sup>118</sup> This statute is, by its terms, the exclusive remedy against the United States for injuries sustained in the performance of duty.<sup>119</sup> Civilian employees are authorized passage on military aircraft only pursuant to orders for official purposes.<sup>120</sup> And, as coverage under the Compensation Act is the civilian employee's exclusive remedy, no claims would lie under FTCA.<sup>121</sup>

Should a civilian employee obtain passage on a military plane for an unofficial or unauthorized purpose and suffer injury or death therein, a claim would probably be precluded by rules pertaining to "licensees"<sup>122</sup> or "unauthorized invitees."<sup>123</sup>

<sup>114</sup> See, e.g., *Jones v. United States*, 236 F.2d 756 (E.D. N.C. 1964) (wife injured in auto accident); *Snyder v. United States*, 118 F. Supp. 585 (D. Md. 1953) (children killed when plane crashed into house); *Barnes v. United States*, 103 F. Supp. 51 (W.D. Ky. 1952) (family injured in auto accident); *Grigalaukas v. United States*, 155 F.2d 494 (1st Cir. 1952) (child injured in hospital).

<sup>115</sup> See *Herring v. United States*, 98 F. Supp. 69 (D. Colo. 1951).

<sup>116</sup> *Jones v. United States*, 236 F.2d 756 (E.D. N.C. 1964).

<sup>117</sup> *Pignataro v. United States*, 172 F. Supp. 151 (E.D. N.Y. 1959).

<sup>118</sup> 5 U.S.C. §§ 751-57 (1964). Nonappropriated fund activity employees are covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1964), which is the exclusive remedy against the United States for such employees. 5 U.S.C. § 150k-1 (1964).

<sup>119</sup> 5 U.S.C. § 757(b) (1964).

<sup>120</sup> Army Reg. No. 96-20, para. 4m (11 Jun. 1953).

<sup>121</sup> See *Johansen v. United States*, 343 U.S. 427 (1952). As to nonappropriated fund employees, see *Aubrey v. United States*, 254 F.2d 768 (D.C. Cir. 1958).

<sup>122</sup> See *Fass v. United States*, 191 F. Supp. 367 (E.D. N.Y. 1961).

<sup>123</sup> See *United States v. Alexander*, 234 F.2d 861 (4th Cir. 1956).

## F. THE TERRITORIAL LIMITATION

Up to this point the discussion has centered upon military plane crashes occurring in the United States. But suppose a plane crash occurs in Mexico or Canada, or some other foreign country? What effect will the geography of the accident have upon the right to recover damages under FTCA?

Claims arising in foreign countries are excluded from coverage under FTCA.<sup>127</sup> Therefore, claims for injury and death of passengers on military aircraft which occurred in foreign countries have been denied.<sup>128</sup> For example, a death claim arising from an airplane accident at Harmon Field Air Force Base, Newfoundland, was denied as being barred by the exception.<sup>129</sup> In construing that exception, the Supreme Court said:

We know of no more accurate phrase in common English usage than "foreign country" to denote territory subject to the sovereignty of another nation. By the exclusion of claims "arising in a foreign country," the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States.<sup>130</sup>

. . . .

In brief, though Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power. The legislative will must be respected. The present suit, premised entirely upon Newfoundland's law, may not be asserted against the United States in contravention of that will.<sup>131</sup>

Also in *Pignataro v. United States*,<sup>132</sup> the claim of an infant who had suffered speech impairment and a permanent loss of hearing when an Air Force plane on which he was a passenger flew at an unreasonably high altitude on a flight from Saudi Arabia to Eritrea was dismissed as having arisen in a foreign country.

From its inception, coverage under FTCA was "geared to the sovereignty of the United States." In a series of decisions the courts have made it clear that nothing short of untrammelled legislative power over an area renders that area within the reach of FTCA. Thus, claims arising on Okinawa both before<sup>133</sup> and

<sup>127</sup> 28 U.S.C. § 2680(k) (1964).

<sup>128</sup> See, e.g., *United States v. Spelar*, 338 U.S. 217 (1949); *Pignataro v. United States*, 172 F. Supp. 151 (E.D. N.Y. 1959).

<sup>129</sup> *United States v. Spelar*, 338 U.S. 217 (1949).

<sup>130</sup> *Id.* at 219.

<sup>131</sup> *Id.* at 221.

<sup>132</sup> 172 F. Supp. 151 (E.D. N.Y. 1959).

<sup>133</sup> *Cobb v. United States*, 191 F.2d 604 (9th Cir. 1951).

after the peace treaty<sup>131</sup> are barred, as are claims arising on Kwajalein, held by the United States under mandate from the United Nations.<sup>132</sup> Claims which arose in Japan,<sup>133</sup> Korea,<sup>134</sup> and Belgium,<sup>135</sup> where United States presence was based upon conquest or military occupation following World War II, are likewise excluded from coverage. The Island of Guam, however, is a possession of the United States, subject to its sovereignty,<sup>136</sup> and thus covered by the Federal Tort Claims Act.<sup>137</sup> Possible avenues of redress for those who are injured or killed as passengers in military aircraft in foreign countries will be commented upon in a subsequent chapter.<sup>138</sup>

#### G. AVIATION ACCIDENTS ON THE HIGH SEAS

It is undoubted that the jurisdiction of the federal courts extends to admiralty and maritime matters.<sup>139</sup> In addition, the Supreme Court has recognized the right of the states to create a cause of action for death occurring on the high seas.<sup>140</sup> However, wrongful death actions were unknown at common law and general maritime law followed the common law in this regard.<sup>141</sup> Courts provided a remedy for death due to maritime torts in territorial waters by enforcing state wrongful death statutes and used such fictions as "law of the home port" and "law of the flag" in an attempt to extend jurisdiction to the high seas.<sup>142</sup> Conflict and confusion in the law was the result.

In 1920 Congress passed the Death on the High Seas Act<sup>143</sup> to end conflict and confusion and to create a uniform right of action. This Act provided a cause of action for the death of a person by wrongful act, neglect, or default on the high seas in international waters, to the personal representative of the decedent, for the benefit of the wife, husband, parent, child, or dependent relative,

<sup>131</sup> *Burns v. United States*, 240 F.2d 720 (4th Cir. 1957).

<sup>132</sup> *Callas v. United States*, 253 F.2d 838 (2d Cir. 1958).

<sup>133</sup> *Brunnel v. United States*, 77 F. Supp. 68 (S.D. N.Y. 1948).

<sup>134</sup> *Orion Shipping and Trading Co. v. United States*, 247 F.2d 755 (9th Cir. 1957).

<sup>135</sup> *Straneri v. United States*, 77 F. Supp. 240 (E.D. Pa. 1948).

<sup>136</sup> See *Williams v. United States*, 350 U.S. 857 (1955).

<sup>137</sup> See *Orken v. United States*, 239 F.2d 850 (6th Cir. 1956) (per curiam).

<sup>138</sup> See part V *infra*.

<sup>139</sup> "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction. . ." U.S. CONST. art. III, § 2. And see 28 U.S.C. § 1333 (1964).

<sup>140</sup> *The Hamilton*, 207 U.S. 398 (1907).

<sup>141</sup> Annot., 66 A.L.R.2d 1003 (1959).

<sup>142</sup> Cohn, *Death Resulting From Air Crashes at Sea*, 26 J. AIR L. & COM. 344 (1959).

<sup>143</sup> 46 U.S.C. § 761-68 (1964).

against the vessel, person, or corporation causing the decedent's death.

Obviously, Congress was not thinking of ocean-spanning, continent-linking constellations, but of ships and vessels, the traditional grist of admiralty mills. Nevertheless, with the advent of commercial air transportation and the unfortunate penchant of airplanes to fall without regard for the formal requisites of the law, the Act has been held to apply to aircraft in a maritime setting. As one judge said:

The purpose of the act was to create a uniform cause of action where none existed before and which arose beyond the territorial limits of the United States or any state thereof. When the act was passed . . . the only feasible way to be carried beyond the jurisdiction applicable to wrongful death was by ship. However, with the development of the transoceanic airship the same extraterritorial situation was made possible in the air. The act was designed to create a cause of action in an area not theretofore under the jurisdiction of any court. The means of transportation into the area is of no importance. The statutory expression "on the high seas" should be capable of expansion to, under, or, over, as scientific advances change the methods of travel. The law would indeed be static if a passenger on a ship were protected by the Act and another passenger in the identical location three thousand feet above in a plane were not. Nor should the plane have to crash into the sea to bring the death within the Act any more than a ship would have to sink as a prerequisite.<sup>144</sup>

What then of the passenger on a military plane, killed when the craft falls into the sea? It is clear that the Death on the High Seas Act affords a remedy which is enforceable under FTCA.<sup>145</sup>

*Moran v. United States*<sup>146</sup> involved a wrongful death action for the death of plaintiffs' decedents which occurred when a bomb which had been deposited in the water by Air Force planes on a practice bombing mission became entangled in a fishing net and exploded alongside decedents' boat. The court held that the action for wrongful death under FTCA was permissible at law, even though the substantive right upon which suit was based was granted by the Death on the High Seas Act, a maritime statute. The United States argued that FTCA did not extend to maritime torts by employees of the Government and that the

<sup>144</sup> *D'Aleman v. Pan American World Airways*, 259 F.2d 498, 495 (2d Cir. 1958).

<sup>145</sup> See, e.g., *Blumenthal v. United States*, 189 F. Supp. 439, 442 (E.D. Pa. 1960), *aff'd*, 306 F.2d 16 (3d Cir. 1962); *Kunkel v. United States*, 140 F. Supp. 591 (S.D. Cal. 1956); *Moran v. United States*, 102 F. Supp. 275 (D. Conn. 1951).



plaintiffs' sole remedy was in admiralty. The court held, however, that FTCA extended to all maritime torts except those for which a remedy had been provided under the Suits in Admiralty Act, and the Public Vessels Act,<sup>147</sup> which statutes were specifically excluded by the terms of FTCA,<sup>148</sup> and did not provide a remedy for all maritime injuries. Nor was the court impressed by the fact that the jurisdiction of the federal courts under the Death on the High Seas Act was stated to be "in admiralty" while no similar limiting or descriptive language was used in the grant of jurisdiction under FTCA. It was observed that Congress, in the Jones Act,<sup>149</sup> created maritime rights to be enforced at law. Moreover, it was felt that the term "civil action", as used in FTCA, did not infer that the jurisdiction conferred was exclusive of the subject matter of proceedings in admiralty. It was used in a generic sense to cover all private actions for damages, as opposed to criminal proceedings.

Subsequent cases have agreed that the remedy granted by the Death on the High Seas Act is enforceable under FTCA. What has not been agreed upon is whether, as the United States argued in *Moran*, the remedy may be had only in admiralty. In *Somerset Seafood Co. v. United States*,<sup>150</sup> it was stated to be settled law that maritime rights could be enforced either at law or in admiralty, but that maritime principles would be applied. In *Kunkel v. United States*,<sup>151</sup> a wrongful death action based upon a claim arising on the high seas, but pleaded at law under FTCA, was dismissed without prejudice because, being based upon the Death on the High Seas Act, the claim was actionable only in admiralty. This court indicated that the grant of jurisdiction under FTCA was broad enough to sustain an action to enforce a claim, whether asserted at law or in admiralty, but that dismissal on the "law side" was required, since the Government had consented to be sued and to be liable only under the same circumstances as a private person would be liable under prevailing law. Since the prevailing law was the Death on the High Seas Act, giving an actionable claim only in admiralty, the court at law lacked jurisdiction over the United States.

<sup>146</sup> 102 F. Supp. 275 (D. Conn. 1951).

<sup>147</sup> 46 U.S.C. §§ 741-52 (1964), and 46 U.S.C. §§ 781-90 (1964), respectively.

<sup>148</sup> 28 U.S.C. § 2680(d) (1964).

<sup>149</sup> 46 U.S.C. § 688 (1964).

<sup>150</sup> 95 F. Supp. 298 (D. Md.), *rev'd on other grounds*, 193 F.2d 631 (4th Cir. 1951).

<sup>151</sup> 140 F. Supp. 591 (S.D. Cal. 1956).

Nevertheless, in *Blumenthal v. United States*,<sup>122</sup> a libel in admiralty under FTCA was successfully maintained. The decedent was a civilian technical representative of the Philco Corporation stationed in Japan. He drowned, bailing out of a military plane over the Sea of Japan, after the plane developed motor trouble because of negligent maintenance. On appeal, the Government merely argued that application of the *Richards* choice-of-law rule would result in denial of the claim as having arisen in a foreign country. The permissibility of an action in admiralty under FTCA was not questioned. However, in *Gavagan v. United States*,<sup>123</sup> a wrongful death action against the United States for negligent failure to rescue crewmen on a stricken boat in international waters, the action was apparently maintained at law, with no question of the propriety or permissibility of the forum.

Finally, it is probably insignificant whether the cause of action arising from a military aviation accident on the high seas is tried in admiralty or at law. What is important is that there is a forum where the plaintiff (or libellant in admiralty parlance) can present his claim and receive compensation.

### III. THE PRE-FLIGHT WAIVER

Regulations of the Armed Forces<sup>124</sup> make mandatory in the case of certain classes of passengers<sup>125</sup> the execution of a pre-flight waiver of liability for injury or death occurring on military aircraft. In terms, the release purports to absolve the United States from "any and all claims, demands, actions, or causes of action, on account of my death or on account of any injury to me or my property which may occur from any cause. . . ."<sup>126</sup> Additional language purports to represent an assumption of risk of harm by the passenger. Use of this waiver as a defense has also engendered considerable litigation.

The United States, relying on these waivers as a defense against liability in aviation accident cases, has argued that such releases were contracts, to be construed according to federal

<sup>122</sup> 189 F. Supp. 439 (E.D. Pa. 1960).

<sup>123</sup> 280 F.2d 319 (5th Cir. 1960), cert. denied, 364 U.S. 933 (1961).

<sup>124</sup> Army Reg. No. 96-20, Air Force Reg. No. 76-6, OPNAVINST 4630.10 para. 14 (11 Jun. 1953).

<sup>125</sup> Army Reg. No. 96-20, para. 4(j): "any person in case of emergency involving catastrophe or possible loss of life, or in emergency when other means of suitable transportation are not available . . ."; para. 4(k): "any person deputized to participate in fighting forest fires or engaged in disaster relief activities . . ."; para. 4(l): "any person when the travel is necessary for the preservation of peace, order and safety of the nation. . . ."

<sup>126</sup> Army Reg. No. 96-20, para. 14 (11 Jun. 1953).

law.<sup>157</sup> Such was the holding of the court in *United States v. Starks*,<sup>158</sup> where, pursuant to a "hold harmless" clause in a lease of grazing lands on a military reservation, the United States was held not liable for the death of livestock resulting from their foraging in an area which had been sprayed with arsenic.<sup>159</sup> Nevertheless, the Government's putative choice of law rule has been uniformly rejected by the courts in aviation accident cases. It has been held, instead, that the intent of Congress was that release from liability was to be determined in the same manner and by the same standards as the existence of liability, *i.e.*, by the applicable state law.<sup>160</sup>

In *Air Transport Associates, Inc. v. United States*,<sup>161</sup> an Air Force base in Alaska was made available for commercial use pursuant to statute.<sup>162</sup> A clause of an agreement between the United States and Air Transport concerning its use of the field purported to release the United States from all claims except those arising from willful misconduct on the part of agents and employees of the United States. One of plaintiffs' planes was damaged in landing when it collided with two military vehicles on a runway. The court held that the Tort Claims Act required that release from liability was to be determined in the same manner as the existence of liability, that is, by the applicable state law. The court looked to the law of the State of Washington, the *lex loci contractus*, determined that under Washington law an attempted release from liability was void as against public policy where the party seeking immunity was engaged in a public or quasi-public service, and invalidated the exculpatory provision.

Federal courts in New York have dealt with three cases involving the release required of certain passengers on military aircraft, with one case reaching a result wholly at variance with another on almost identical facts. In *Friedman v. Lockheed Aircraft Corp.*,<sup>163</sup> decedent, a member of the Aviation Underwriters' Association, was killed in the crash of a recently developed jet

<sup>157</sup> See *United States v. County of Allegheny*, 322 U.S. 174, 183 (1944); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943); *Girard Trust Co. v. United States*, 149 F.2d 872, 874 (1945).

<sup>158</sup> 239 F.2d 544 (7th Cir. 1956).

<sup>159</sup> *Id.* at 547. The court failed to find any statute or federal court decision holding an indemnity provision in favor of the United States void under federal law.

<sup>160</sup> See *Montellier v. United States*, 202 F. Supp. 384, 398 (E.D. N.Y. 1960); *Rogov v. United States*, 173 F. Supp. 547 (S.D. N.Y. 1959); *Air Transport Associates, Inc. v. United States*, 221 F.2d 467 (9th Cir. 1955).

<sup>161</sup> 221 F.2d 467 (9th Cir. 1955).

<sup>162</sup> 49 U.S.C. § 1102(b) (1964).

<sup>163</sup> 138 F. Supp. 530 (E.D. N.Y. 1956).

fighter in which he had been invited to ride. The plane was abandoned over Long Island Sound, when engine trouble developed; plaintiff's decedent failed to eject. Prior to boarding the plane, decedent had executed a pre-flight waiver of liability. The complaint alleged negligence by the United States in the maintenance and operation of the plane. The court held that the release ran only to damages caused by simple negligence, since under New York law a purported release from liability for gross negligence is void as against public policy. Although negligence was shown, the court characterized it as simple negligence and denied recovery. The court further indicated that the release ran only in favor of the United States and would not bar any provable claim against Lockheed, the manufacturer of the airplane. However, in *Rogow v. United States*,<sup>164</sup> recovery was permitted on similar facts and an identical release. The decedent was a writer who had been engaged to write a script for an Air Force recruiting film. For the purpose of obtaining background information, he was to travel to a number of Air Force installations. Originally he was scheduled to travel by commercial plane, with the Air Force reimbursing him for his expenses. At the suggestion of the responsible Air Force official he agreed to travel in an Air Force plane and signed a release purporting to waive all claim for injury or death resulting from his engaging in the flight. In refusing to enforce the release as a defense, the court stated that releases from liability were not favored under New York law, and when given in connection with a service to the exculpator, were not binding unless the service being rendered was a gratuity. It was determined that Rogow was not receiving a gratuity, as he was entitled to be reimbursed for his transportation, and the Air Force was to receive a benefit from the undertaking as well.

It is interesting to note that the court neither cited nor mentioned the *Friedman* opinion. In *Friedman*, no mention was made of New York policy that releases given in connection with a service to the releasor would be upheld where such service was gratuitous. If this issue had been considered in *Friedman*, a benefit to the exculpatee United States may well have been found.

*Montellier v. United States*<sup>165</sup> was the third of the New York

<sup>164</sup> 173 F. Supp. 547 (S.D. N.Y. 1959).

<sup>165</sup> 202 F. Supp. 384 (E.D. N.Y. 1960). Of particular interest in *Montellier* is the discussion of the effect of a release under a "survival" statute, granting a "derivative" right, as opposed to a statute which grants an independent right of action to the heirs or personal representatives of a decedent. *Id.* at 393. See also Dostal, *Aviation Law Under the Federal Tort Claims Act*, 24 *FED. B. J.* 165, 188 (1964).

cases involving a release. Decedent was a reporter for United Press International who had been invited, together with other representatives of the press, to participate in what was planned to be a record-breaking non-stop, non-refueling round trip of an Air Force KC 135 jet tanker to London and return. The plane crashed on take-off from Westover Air Force Base, Massachusetts, because of an incredible set of negligent circumstances, killing all on board. The court declined to enforce the release, holding that under Massachusetts law, the cause of action for wrongful death vested in the personal representatives of decedent, and was thus beyond decedent's power to release. The court rejected the Government's argument that the effect of the release was to be determined under federal law.

These cases illustrate that the Government's choice of law rule has, by and large, been ignored—and quite properly so. Had Congress intended the Government to have the benefit of a special rule concerning release of liability of claims under FTCA, it could very easily have provided for it. But for the purpose of argument, suppose the courts adopted the choice of law rule as contended by the Government. Need it follow that prospective releases under that rule are valid? Probably not, for an analysis of the cases upon which the Government relies<sup>166</sup> indicates that they do not establish a substantive rule to be applied in all situations.<sup>167</sup> In other words, given acceptance of the principle that federal law governs, what is the substantive rule to be applied? It may be argued that neither *United States v. Starks*,<sup>168</sup> nor any of the cases cited therein for the principle that indemnity clauses in commercial contracts do not violate federal public policy, provides a binding rule in the case of an anticipatory release of liability given in connection with passage on a military aircraft. In that circumstance, the courts would be required to "fashion a rule after their own standards" and, surveying the "general law" of releases, indemnity contracts, and covenants

<sup>166</sup> See *United States v. County of Allegheny*, 322 U.S. 174, 183 (1944); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943); *Girard Trust Co. v. United States*, 149 F.2d 872, 874 (1945).

<sup>167</sup> *E.g.*, *Allegheny* dealt only with the question of whether certain property was owned by the United States and hence immune from state taxation; *Clearfield Trust* was concerned with determining the law governing United States' duties and obligations on commercial paper issued by it; *Girard Trust* held only that the rights of parties under a lease executed by the United States was to be determined by federal law and it directed the lower court to consult the "general law" of landlord and tenant to determine the applicable substantive principles.

<sup>168</sup> 239 F.2d 544 (7th Cir. 1956).

not to sue, determine desirable policy to be that anticipatory waivers of liability resulting from personal injury or death in a non-commercial setting are invalid. Thus, although the federal choice of law principle would prevail, the United States case in defense would be none the better for it.

More basic, however, than considerations of applicable law in determining the validity of prospective releases, is the consistency of the practice of requiring them with the unquestionably benevolent purpose of FTCA. The use of exculpatory provisions in transactions and activities of various kinds is common in business practice. However, the cases will demonstrate that they are not favored by the common law and that their employment is subjected to qualifications and restrictions of varying degrees.

The common law imposed a duty to act with due care for the safety of the persons and property of others, and in default of that duty, it gave injured persons a remedy in tort. Thus, a provision which sought to excuse future negligent acts was contrary to public policy as it sought to cause one to contract away a right not presently held which might not vest; and if it did, at the time of its relinquishment its value was not known. Moreover, anticipatory releases were not favored because such contracts might tend to encourage abandonment of the duty to act with the requisite care, and by reason of an anticipatory renunciation of rights, deprive injured parties of their right to recover the damages permitted by law. Some states hold such provisions to be void.<sup>170</sup> Other states, while opposed to the notion of prospective releases, permit such contracts where they are arrived at in bargaining, and each party has an equal bargaining position,<sup>171</sup> but strike them down where the releasor occupies a weaker position.<sup>172</sup> Still other states temper their concern for protecting one person from the negligence of another with concern for the preservation of contractual freedom as well. In these states, exculpatory provisions are held valid except where the exculpattee owes a public duty.<sup>173</sup> Of course, where releases are

<sup>170</sup> See *Apache Ry. Co. v. Shumway*, 62 Ariz. 359, 158 P.2d 142 (1945); *Freigy v. Gargaro Co.*, 228 Ind. 342, 60 N.E.2d 288 (1945); *French v. Gardeners and Farmers Market Co.*, 275 Ky. 660, 122 S.W.2d 487 (1938).

<sup>171</sup> See *Moll v. Sinclair Refining Co.*, 242 N.C. 707, 89 S.E.2d 896 (1955); *Jackson v. First National Bank of Lake Forest*, 415 Ill. 453, 114 N.E.2d 721 (1953).

<sup>172</sup> See *Kuzmiak v. Brookchester, Inc.*, 38 N.J. Super. 575, 111 A.2d 426 (1955).

<sup>173</sup> See *Airport Transport Associates, Inc. v. United States*, 221 F.2d 467 (9th Cir. 1955); *Werner v. Knoll*, 89 Cal. App.2d 474, 201 P.2d 45 (1949); *King v. Smith*, 47 Ga. App. 369, 170 S.E. 546 (1933).

enforced, they must be supported by consideration,<sup>173</sup> and are void where obtained by fraud or lack of mutual consent.<sup>174</sup>

The validity of releases given in connection with passage in military aircraft is determined by state rules similar in substance to those above.

The Congress did not command the use of releases under FTCA. If the matter was considered at all during the drafting of the legislation, the most that can be said is that Congress intended to permit their use in circumstances where a private individual could successfully use releases under local law. Applying the tests of local law generally mentioned above, what may we conclude? On the public policy test, it is submitted that Congressional policy should be controlling. That policy is that the Government shall pay for its torts. Thus, the practice of anticipatory release is inconsistent with that policy.

Consider the test of equality-of-bargaining-position. What individual stands on an equal footing with the Government? The inherent inequality is apparent when it is recalled that absent permission, the individual has no right whatever against the Government in the courts. It simply is not fair, given the vast disparity in the relative positions of the United States and the recipient of transportation by air, to compel the individual to surrender his right to sue for damages if the occasion arises. Finally, no one would question that the Government, in all its activities, is performing public duties. Therefore, prospective release fails all three general tests of validity applied in the local law.

The pernicious nature of the practice of the services is aggravated by the instances in which a release is specifically required of the passenger on a military plane. A release is required when transportation is furnished to persons in emergency situations involving catastrophe and possible loss of life.<sup>175</sup> This may occur in a rescue operation at sea, or at a site not easily accessible by other means. If the plight of the individual is worsened by the negligence of the Government, what policy will prevail: The policy underlying the release, or the policy underlying the "Good Samaritan" doctrine? Releases are required from persons given transportation for the purpose of fighting forest fires and

<sup>173</sup> Compare *Friedman v. Lockheed Aircraft Corp.*, 138 F. Supp. 530 (E.D. N.Y. 1956), with *Rogow v. United States*, 178 F. Supp. 547 (S.D. N.Y. 1959).

<sup>174</sup> See *In re Garcelon's Estate*, 104 Cal. 570, 38 Pac. 414 (1894).

<sup>175</sup> Army Reg. No. 96-20, para. 4(j) (11 Jun. 1953).

engaging in disaster relief activities.<sup>176</sup> Why should such persons, not serving their own ends but that of the general public, be deprived of a significant protection against disaster to themselves en route? And perhaps most illogical of all, a person who travels in the interest of peace, order, and the *safety of the nation*<sup>177</sup> must first formally surrender his or his dependent's right to be made whole before he may be allowed to go forth on a military plane to act in the interest of the safety of the country.

In passing the Federal Tort Claims Act, the United States took a major step forward from the late, unlamented era of governmental immunity. It may be said that there was a realization that the slogan "the State is an honest man" is more just, modern, and considerate of the human needs of those who helplessly come to grief as the result of negligent governmental activity than the totally uncharitable notion that "the King can do no wrong." Congress supposedly opened the courts and the public treasury to *tort claimants*. By requiring pre-flight releases from passengers on military aircraft, the Government is made to appear as a kind of "Indian-giver," seeking to take back with one hand what has been given with the other. This practice contravenes sound public policy and social duty, and should be discontinued.

#### IV. THE WARSAW CONVENTION

##### A. GENERAL

The charter flight has become a principal means for the transportation of increasing numbers of servicemen, their dependents, and civilian employees about the world. Because charters play such an important role in military transportation, no comment upon the rights and remedies of passengers in military aircraft for personal injury would be complete without some mention of an international agreement which imposes significant limitations upon recovery rights arising from injury or death incurred in international transportation by air. This treaty is, of course, the Convention for the Unification of Certain Rules Relating to International Transportation by Air.<sup>178</sup>

This treaty, promulgated at Warsaw, Poland, in 1929, was adhered to, with reservation, by the United States in 1934. Paragraph (1) of article 2 of the Convention makes its provisions applicable to international flights by States and legal entities

<sup>176</sup> Army Reg. No. 96-20, para. 4(k) (11 Jun. 1953).

<sup>177</sup> Army Reg. No. 96-20, para. 4(l) (11 Jun. 1953).

<sup>178</sup> 49 Stat. 3000 (1934) [hereafter called and cited as Warsaw Convention].



organized under public law. An "additional protocol" to the agreement permitted States to declare, at the time of adherence, a reservation of the provisions of that paragraph. The United States made such a reservation. No significant discussion of the motivation behind the reservation was found. But it is important to recall that governmental immunity from suit had been waived only in certain narrow instances at the time. One moving consideration may have been that adherence to the treaty without reservation would have been tantamount to a waiver of immunity from suit as to any person injured while a passenger on a plane being operated in international flight directly by the Government.

### B. ESSENTIAL PROVISIONS OF THE TREATY

While the treaty is also concerned with rules covering liability for checked baggage<sup>178</sup> and the standardization of bills for shipped freight,<sup>180</sup> the interest herein is only with those provisions limiting liability of the carrier for damages for personal injury and death occurring on the aircraft or incident to embarking or disembarking. A concise summary of these provisions is set out below:

The applicability of the Warsaw Convention is not determined by the place of the accident or whether the particular flight is domestic or international in character.

The issue of applicability is resolved by determining whether or not the places of origin, destination and intermediate stops listed on the passenger's ticket are embraced by the definition of "international transportation" appearing in Article 1 of the convention. "International transportation" are words of art and render the treaty applicable to a ticket that lists, as both the departure and destination, places within countries that have adopted the treaty. The definition further includes a ticket that presents either the place of departure or destination within a treaty country, provided the ticket also lists a stopping place within any other country. For example, a ticket providing passage between Chicago, New York and London would be governed by the treaty because England and the United States have adopted it. The treaty would be applicable even though the accident occurs during the domestic portion of the itinerary. In addition, a ticket for passage originating in Saudi Arabia, with a stopover in London, and terminating in the United States would be governed by the treaty even though the country of origin has not adhered to Warsaw.

When the itinerary of a particular ticket constitutes "international transportation", then the substantive terms of the convention govern

<sup>178</sup> Warsaw Convention, arts. 4, 18, 19.

<sup>180</sup> Warsaw Convention, arts. 5-16.

the liability of the air carrier or carriers providing the transportation. . . .

Article 17 creates a presumption of liability. It provides that the carrier shall be liable for damages caused by an accident on board the aircraft or in the course of embarking or disembarking. Article 20 enables the carrier to exculpate itself completely from liability by proving that it took "all necessary measures to avoid the damage" or that it was impossible to take such measures. . . .

Article 21 provides that in the event the carrier establishes contributory negligence "of the injured person", the court may exonerate the carrier wholly or partially. Since other provisions of the treaty refer to both death and personal injury of passengers, and the terms of Article 21 refer to the injured person alone, a court could conclude that the defense of contributory negligence is unavailable in the event of death of a passenger.

Absent the necessary exculpatory proof required by Articles 17 and 21, the carrier is liable for the damages sustained, but in an amount not to exceed the \$8,300 limitation established by Article 22.

The limitation can be evaded and actual damages recovered upon proof by the claimant of facts that meet the terms of Articles 8 and 25. The latter provides that the carrier cannot exclude or limit its liability if the damage is caused by the carrier's willful misconduct. . . . [W]illful misconduct is established only upon proof of culpability of a degree greater than ordinary and gross negligence.

Article 8 states that the carrier must deliver a ticket to the passenger. Absent delivery, the carrier is deprived of the benefits of Articles 20, 21 and 22, which exclude or limit liability. In addition, Article 8 requires that the ticket contain a specific statement that the transportation is subject to the liability provisions of the treaty. The obvious purpose of such a statement is to give the passenger notice of the limitation and afford him the opportunity of protecting himself by obtaining accident insurance. . . .<sup>15</sup>

Article 28 provides that the plaintiff may bring an action for damages in the territory of a member State, either before a court of the domicile of the carrier or of its principal place of business, or before a court at the place of destination. Moreover, questions of procedure are governed by the law of the forum. Thus, while the Convention provides the substantive terms upon which liability will be determined, courts are free to apply their own procedural rules.

Because of intense dissatisfaction with the harsh liability limits of the convention and other factors, the United States was instrumental in arranging for an international conference to re-examine the treaty with a view toward raising the liability limi-

<sup>15</sup> Sincoff, *Absolute Liability and Increased Damages in International Aviation Accidents*, 52 A.B.A.J. 1122-23 (1966) (footnotes omitted).

tation. This conference resulted in an amendment to the treaty now referred to as the Hague Protocol.<sup>182</sup> Under the Hague Protocol the liability limitation was increased to \$16,600; but the provisions of article 25, permitting a claimant to evade the limiting clauses of the Convention upon a showing of willful misconduct, were amended to require proof of an act done with intent to cause damage, or recklessly with knowledge that damage would probably result. Recovery of actual damages in excess of treaty limits was thus rendered more difficult.

The United States did not adhere to this protocol. As stated by Sincoff, this failure was "primarily due to the inadequacy of the increased limitation of \$16,600 in relation to our economic standards."<sup>183</sup> On November 15, 1965, the United States elected to denounce the treaty pursuant to article 39 thereof.<sup>184</sup> The denunciation was to become effective on May 15, 1966.<sup>185</sup> Even while denouncing the treaty the United States made it clear that it wished to participate in future negotiations which would substantially raise the limits of liability for personal injury and death. It was also indicated that the United States would be willing to withdraw its action, prior to the effective date, if there existed a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of \$100,000 per passenger, or on uniform rules without any limitation of liability, and if, pending the effectiveness of such international agreement, there were to be a provisional agreement among the principal airlines waiving limits of liability up to \$75,000 per passenger.<sup>186</sup>

Prior to the effective date of the denunciation, a provisional agreement among carriers serving the United States, their Governments, and the Government of the United States was reached, establishing new liability limitations.<sup>187</sup> This agreement provides for liability up to \$75,000 per passenger in case of injury or death. Furthermore, the carriers agreed not to avail themselves of the defenses provided by article 20(1) of the Conven-

<sup>182</sup> See U.S. Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 290 (1967).

<sup>183</sup> Sincoff, *supra* note 181 at 1123.

<sup>184</sup> Article 39 permits withdrawal of a party upon six months written notice deposited with the Polish Government.

<sup>185</sup> 50 Dept. State Bull. 922, 923 (1964).

<sup>186</sup> *Id.*

<sup>187</sup> 31 Fed. Reg. 7302 (May 1966); 54 Dept. State Bull. 954, 955 (1966).

tion.<sup>188</sup> In view of the agreement, and the reasonable expectation that a more permanent liberal limit of liability provision might be negotiated afterward, the United States withdrew its notice of denunciation one day before the denunciation was to have become effective. The article 21 defense of contributory negligence was not mentioned in the agreement. Thus contributory negligence will continue to be available as a defense to the carriers.<sup>189</sup>

The new agreement applies only to flights originating, ending, or having an agreed stopping place in the United States. The \$8,800 liability limit will still govern other international flights. It also appears that where actual damages exceed the liability limitation, such excess damages may still be recovered upon any failure of the carrier as regards delivery of a ticket under article 3, or willful misconduct under article 25.

### C. THE CONVENTION IN THE COURTS

As of this date there has been no reported litigation under the Convention as augmented by the agreement. There are, however, several cases in which the provisions of the original Convention have been construed and applied so as to permit or deny recovery in excess of the Convention limits. Those cases discussed herein are concerned with the applicability of the treaty to charter flights and the requirement of delivery of a ticket to the passenger.

#### 1. Charter Flights.

The charter flight, as known to the air transport industry at the time of the Convention, was an insignificant factor in international transportation. Accordingly, the provisions of the Convention did not deal expressly with charter flights. Today, however, charter transportation is a signal feature of the industry.<sup>190</sup>

Commercial charter contracts generally provide that the provisions of the Convention shall be applicable to any international transportation furnished under the contract.<sup>191</sup> While a number of

<sup>188</sup> Article 20(1) permits the carrier to avoid liability by showing either that all measures to avoid damage were taken or that it was impossible to take them. National, Delta, and United Airlines accepted the new liability limitation, but declined to surrender the article 20 defense. See Sincoff, *supra* note 181 at 1124.

<sup>189</sup> See Sincoff, *supra* note 181 at 1125.

<sup>190</sup> See generally K. Gronfors, AIR CHARTER AND THE WARSAW CONVENTION (1956).

<sup>191</sup> See *Mertens v. Flying Tiger Lines*, 341 F.2d 851 (2d Cir. 1965); *Warren v. Flying Tiger Lines*, 352 F.2d 494 (9th Cir. 1965).

cases have involved the charter question generally, it was the principal question presented to the court in *Block v. Compagnie National Air France*.<sup>192</sup> The Atlanta Art Association had contracted with Air France to fly the members of the group from Atlanta to Paris and back for a consideration of \$36,000. On June 3, 1962, an Air France jet, taking off for the return trip from Paris to Atlanta, crashed and killed all passengers. In a subsequent wrongful death action in Georgia, plaintiffs moved to strike the Warsaw liability limitation defense, arguing that the Convention did not apply to charter flights. In denying the motion the trial court said:

The Convention first provides when it shall apply. It specifies three exceptions to its applicability (Articles 2 and 34) but it does not except charter flights. . . .

Like any other treaty or statute, if the facts come within its general provisions, and with (sic) an exception, Then the Treaty applies. . . .<sup>193</sup>

This court holds that, under the factual situation in the cases at hand, where the Atlanta Art Association chartered an aircraft from Air France for the carriage of passengers on a specific flight from the United States, a High Contracting Party to the Warsaw Convention, to France, another High Contracting Party to the Warsaw Convention, with return to the United States; where Air France, the air carrier, owns, operates, and controls the aircraft and, prior to departure, delivers proper tickets to the passengers for their passage, the Warsaw Convention would be applicable. . . . and Air France . . . would be entitled to the limitation of liability also contained in the Convention against the passengers.<sup>194</sup>

As has been stated, when the United States adhered to the Convention it did so on condition that international flights performed by the Government would not be affected by the Convention. Hence, it is clear that military flights would be unaffected. No case has been found wherein an attempt was made to apply the Convention to strictly military flights. As to military charter flights, however, plaintiffs and the Government itself have sought to avoid the strictures of the Convention on the grounds that such flights were not subject to the Convention by reason of the article 2 reservation.<sup>195</sup> Indeed, the Department of Defense at one time took the position that the reservation excluded from

<sup>192</sup> 229 F. Supp. 801 (N.D. Ga. 1964), *aff'd*, 386 F.2d 323 (5th Cir. 1967).

<sup>193</sup> 229 F. Supp. at 805.

<sup>194</sup> *Id.* at 809.

<sup>195</sup> In *Flying Tiger Line, Inc. v. United States*, 170 F. Supp. 422 (Ct. Cl. 1959), the two-year limitation of actions provision of the Convention was invoked to prevent the United States from counter-claiming for damages for lost goods on a past freight charter contract with Flying Tiger.

the scope of the Convention not only aircraft owned by the Government, but also aircraft chartered by the Government.<sup>196</sup> Article 26 of the Hague Protocol sought to resolve the issue of applicability to charter flights by permitting States to except military charter flights from the scope of the Convention at the time of adherence.<sup>197</sup>

The courts, in dealing with the charter question, have relied on an "analytic distinction." In *Mertens v. Flying Tiger Line, Inc.*,<sup>198</sup> the court said:

Doubts as to the applicability of the Convention arise from the fact that when . . . Roosevelt . . . adhered to the Convention, he did so subject to the reservation that the Warsaw Convention shall not apply to international transportation that may be "performed" by the United States. . . . It is urged that because defendant's plane was regularly and in this instance chartered by the United States for the transportation of military cargo and personnel to military destinations this international transportation was "performed by the United States," thereby making the Convention inapplicable. We are of the opinion, however, that the transportation was performed by the Flying Tiger Line, the owner and operator of the aircraft and that it was performed for the United States, not by the United States.<sup>199</sup>

Other courts have uniformly followed the above rationale.<sup>200</sup>

#### 2. *Necessity for Delivery of a Ticket.*

Article 3 of the Convention requires the delivery of a ticket to each passenger, which ticket must contain a specific statement that the transportation is subject to the liability provisions of the treaty. In the absence of delivery of a ticket, the carrier may not seek to avoid or limit liability under the appropriate articles of the Convention.<sup>201</sup> An early case construing the delivery provisions of article 3 resulted in a strict interpretation of the delivery requirement. In *Ross v. Pan American World Airways*,<sup>202</sup> an entertainer going overseas at the request of the War Department to perform with a U.S.O. troupe was critically injured when a commercial liner upon which she had been booked by the Army crashed in Portugal. Plaintiff's argument was that she had merely accepted her ticket from the Army employee respon-

<sup>196</sup> 59 AM. J. INT'L L. 377 (1965).

<sup>197</sup> See U.S. Civil Aeronautics Board, *supra* note 182 at 328.

<sup>198</sup> 341 F.2d 851 (2d Cir. 1965).

<sup>199</sup> *Id.* at 853 (emphasis in original).

<sup>200</sup> See *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Pardounet v. Flying Tiger Line, Inc.*, 223 F. Supp. 683 (N.D. Ill. 1964).

<sup>201</sup> Warsaw Convention, arts. 20-22.

<sup>202</sup> 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert. denied*, 349 U.S. 947 (1955).

sible for transportation arrangements. She had no knowledge of the liability limitation nor had she assented to it. The court held that the limitation arose independently of the assent of any particular passenger, from the Convention itself, and that a carrier need only show that a ticket was delivered and that the passenger traveled under the ticket.

Subsequent cases have been more liberal. They now seem to require that the passenger have an opportunity to inform himself of the limitations by timely delivery of a readable ticket. The passenger must have an opportunity to take additional steps, such as the purchase of insurance, should he desire to do so. In the *Mertens* case, for example, where decedent was a military courier performing a courier run and the ticket was not delivered to him until he was aboard the plane, it was held that delivery was inadequate and the liability limitations were not applicable. The court said in *Mertens*:

We read Article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. . . . The delivery requirement of Article 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air. . . .<sup>203</sup>

The requirement for adequate delivery has also been held to mean that a readable ticket be delivered. The District Judge in *Warren v. Flying Tiger Line, Inc.*,<sup>204</sup> after concluding that a ticket had been delivered volunteered: "[I]t must be said, in all frankness, that it would be most difficult for one to read the fine print without a magnifying glass."<sup>205</sup> In *Mertens*, the court observed that the statement concerning the limitation of liability was printed in such a manner as to be both "unnoticeable and unreadable." And, in *Lisi v. Alitalia-Linee Aeree Italiane*,<sup>206</sup> the court held delivery to be inadequate because the notice of limitation of liability was unreadable due to "Lilliputian-size" print. The "Lilliputian" issue is now probably moot, as the notice of limitation of liability is now required to be in 10 point type.

<sup>203</sup> 341 F.2d 851, 856 (2d Cir. 1965). The same result was reached in *Warren v. Flying Tiger Lines, Inc.*, 352 F.2d 494 (9th Cir. 1965), where decedents were given tickets at the boarding ramp of the plane upon entering.

<sup>204</sup> 234 F. Supp. 223 (S.D. Cal. 1964), *rev'd*, 352 F.2d 494 (9th Cir. 1965).

<sup>205</sup> *Id.* at 230.

<sup>206</sup> 253 F. Supp. 237 (S.D. N.Y. 1966).

## D. STATE WRONGFUL DEATH LIMITATIONS

Thirteen of the states of the United States still maintain statutory limitations on the amount of damages recoverable in wrongful death actions.<sup>207</sup> The existence of these limitations, substantially less than the maximum recovery permissible under the supplemental agreement to the Warsaw Convention,<sup>208</sup> presents a paradoxical situation: The plaintiff with a cause of action to which the supplemental agreement applies may be denied the more liberal limitation because of the provisions of the *lex loci*. A parallel paradox existed under the Convention prior to May 15, 1966, the date the supplemental agreement became effective. It lay chiefly in the context of a liability limitation lower than the \$8,300 permitted under the Warsaw Convention imposed by the law of some foreign jurisdiction. The most frequent example cited was that of a cause of action arising in Italy, where the maximum permissible recovery was stated to be \$256.00.<sup>209</sup> Lowenfeld and Mendelsohn discussed the issue of protecting the traveling American public from unrealistic limitations on liability in foreign situs law against the background of the imminent withdrawal of the United States from the Warsaw Convention.<sup>210</sup> These writers cited the "Kilberg-Pearson-Babcock" line of cases as demonstrating that American courts would develop an effective rationale for avoiding such undesirable limitations. Their views are also relevant where the limitations inhere in the laws of some of the states. Another writer, Drion, concluded that such limitations would not be displaced by the Convention in view of the attitude taken by courts in the United States toward a cause of action based on the Warsaw Convention.<sup>211</sup>

Although most authorities agree that article 17 of the Warsaw Convention was intended to create an independent cause of ac-

<sup>207</sup> See 1 L. KREINDLER, *AVIATION ACCIDENT LAW* 345 (1963). The limitations range from a variable limitation of \$10,000-\$25,000 in New Hampshire, to \$30,000 in Illinois, South Dakota, and Virginia.

<sup>208</sup> It is thought safe to assume that the \$8,300 limitation is no longer relevant to flights beginning, ending, or having an agreed stopping place in the United States.

<sup>209</sup> *But see* *Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965), cert. denied, 383 U.S. 943 (1966), where plaintiffs' recovery for decedents' deaths in a mid-air collision over Brazil was limited to \$170 by Brazilian law.

<sup>210</sup> See Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 526 (1967).

<sup>211</sup> See H. Drion, *Limitations of Liabilities in International Air Law* 128 (1954); see also Kreindler, *supra* note 207 at 373.



tion, American courts have held otherwise.<sup>212</sup> The apparently authoritative view in the United States is that the Convention did not create a cause of action.<sup>213</sup> Thus, in those jurisdictions applying the classical rule for choice of law in tort claims, one may, as a first step, conclude that the lesser liability limitation of the local law will apply. But what of the "overriding federal policy" announced in the Warsaw Convention, which permits liability limitations, although such limitations contravene the public policy of the State? May the "overriding federal policy" of the supplemental agreement, envisioning recovery of actual damages up to \$75,000, be applied in reverse to supplement a lesser limitation imposed by state law?<sup>214</sup> The paradox may be avoided if a claimant brings an action, arising in the circumstances under consideration, in a forum where the classical rule is no longer followed.<sup>215</sup> Then, given a sufficient nexus of the parties, either with the forum or some jurisdiction other than the *locus*, *situs* law could well be rejected.

How long the paradox will continue to exist is problematical. The modern trend has been toward the repeal of wrongful death limitations in some cases, and raising the limits in others. It is not known whether the existence of the limitations will actually present a significant problem. Plaintiffs may elect to settle for an amount permitted by local law, and airlines may elect to settle for a sum in excess of the local limitations, rather than run the risk of litigation. At any rate, should a problem develop which is not satisfactorily handled by the courts, there is the alternative of legislation. An act of Congress to create a uniform cause of action for deaths occurring in international transportation by air would be one means of assisting beneficiaries of a cause of action arising from aviation tragedies to take advantage of the more liberal provisions of the amended Warsaw Convention.

#### V. OTHER AVENUES OF REDRESS

Where injury or death occurs in a military aviation accident, under circumstances in which FTCA is not applicable, there are

<sup>212</sup> See Lowenfeld and Mendelsohn, *supra* note 210 at 517. See also Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR. L. & COM. 217 (1959).

<sup>213</sup> See *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957), *cert. denied*, 355 U.S. 907 (1957); *contra*, *Salamon v. Koninklijke Luchtvaart Maatschappij*, 107 N.Y.S.2d 768 (Sup. Ct. N.Y. Co. 1951), *aff'd*, 281 App. Div. 965, 120 N.Y.S. 2d 917 (1953).

<sup>214</sup> See *Block v. Compagnie Nationale Air France*, 229 F. Supp. 801, 811 (N.D. Ga. 1964).

<sup>215</sup> See, e.g., *New York: Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 748 (1963); *Pennsylvania: Griffith v. United Airlines, Inc.*, 416 Pa. 1, 208 A.2d 796 (1964).

alternative avenues through which redress may be obtained. Generally speaking, these avenues may be classified as administrative and legislative.

### A. ADMINISTRATIVE REMEDIES

The Armed Services have broad statutory authority to determine and settle various types of claims administratively. For instance, the Military Claims Act<sup>216</sup> provides authority for settlement of claims arising from the activities of employees and members of the services within the scope of their employment, or otherwise incident to the noncombat activities of the department. The Army Maritime Claims Act<sup>217</sup> authorizes administrative settlement of maritime claims in favor of, and against, the United States. There are others, under the authority of which may be paid claims ranging in scope from damage of household goods occurring during shipment by the Government,<sup>218</sup> to claims arising from the use of Government-owned vehicles.<sup>219</sup>

The Military Claims Act<sup>220</sup> is of greatest interest within the framework of this discussion. Pertinent provisions of that statute are as follows:

(a) Under such regulations as the Secretary of a military department may prescribe, he or, subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, if designated by him, may settle, and pay in an amount not more than \$5,000 a claim against the United States for—

(3) . . . personal injury or death; either caused by a civilian officer or employee of that department, or a member of the Army, Navy, Air Force, or Marine Corps, as the case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department.

(d) If the Secretary of the military department concerned considers that a claim in excess of \$5,000 is meritorious and would otherwise be covered by this section, he may pay the claimant \$5,000 and report the excess to Congress for its consideration.

Claims for personal injury or death of a service member or civilian employee incident to service are excluded, as are claims

<sup>216</sup> 10 U.S.C. § 2733 (1964).

<sup>217</sup> 10 U.S.C. §§ 4801, 4804, 4806 (1964). See Whalen, *The Settlement of Army Maritime Claims*, 34 MIL. L. REV. 135 (1966), for a definitive discussion of service maritime claims settlement authority.

<sup>218</sup> Military Personnel and Civilian Employees Claims Act, 78 Stat. 766 (1964), as amended, 79 Stat. 788 (1965).

<sup>219</sup> 10 U.S.C. § 2736 (1964).

<sup>220</sup> 10 U.S.C. § 2733 (1964).

wherein the claimant, his agent or employee, was contributorily negligent.

It will be noted that there are two circumstances in which a claim may rise under the Military Claims Act: Where the damage is caused by an employee or service member acting within the scope of his employment; and incident to noncombat activities. Thus, under the former circumstance, "scope of employment" must be present before a claim will lie. In the latter aspect, all that need be shown is that damage was sustained "incident to noncombat activity."

What constitutes a "noncombat activity" is described as:

[A]uthorized activities essentially military in nature, having little parallel in civilian pursuits and which historically have been considered as furnishing a proper basis for payment of claims, such as practice firing of missiles and weapons, training and field exercises, and maneuvers, including, in connection therewith, the operation of aircraft, . . . .<sup>225</sup>

The application of the "noncombat activities" provision has been liberal, and has been stated as giving the claimant benefits comparable to those he would receive under the doctrine of *res ipsa loquitur* by some courts in civil cases.<sup>226</sup>

While a claim arising anywhere in the world would be payable if it arises under the "noncombat activities" clause of the statute, a claim arising under the "scope of employment" clause would be payable only if it arose outside the United States or its possessions.<sup>228</sup>

Which aspect of liability under the Military Claims Act is to be preferred in connection with a claim for injury or death of a passenger in a military aircraft? Clearly, the "noncombat activities" aspect is preferable, for there is no necessity to find either negligence or scope of employment. The difficulty with this view is that it strains the language of the definition of "noncombat activity" to apply it to a non-tactical military passenger plane. And the air transportation industry certainly provides a "parallel civilian pursuit."

Nevertheless, Air Force policy is to settle such claims under the "noncombat activities rationale." While the Army does not have an official policy, due to a lack of experience in claims for injuries by aircraft passengers, the attitude of at least one key official in the Army Claims Service is that such claims, being

<sup>225</sup> Army Reg. No. 27-21 (28 Jun. 1967).

<sup>226</sup> U.S. DEP'T OF ARMY, PAMPHLET No. 27-162, CLAIMS 118 (1968).

<sup>228</sup> Such claims inside the United States or its possessions are pre-empted by the Federal Tort Claims Act.

analogous to claims against commercial carriers, should be handled under the "scope of employment" prong of the Military Claims Act. Under the Army view then, a claim for injury or death of a passenger on a military aircraft would be handled as though it had been filed under the administrative provisions of FTCA.

It thus appears that the passenger on a military aircraft, killed or injured under circumstances where FTCA provides no remedy, may be compensated under the Military Claims Act. In the *Pignataro* case,<sup>224</sup> for instance, where a dependent was injured by severe air pressure in a military plane over a foreign country, a claim would have been payable under the Military Claims Act, either under the "scope of employment" rationale or the "noncombat activities" rationale. On the other hand, the plaintiff in the *Spelar* case<sup>225</sup> would have had no claim since claims by civilian employees arising in the course of their employment are barred.

#### B. LEGISLATIVE REMEDIES

Another avenue for obtaining redress is through congressional relief in the form of a private bill.<sup>226</sup> The bill may take the form of a direct payment of money or it may confer jurisdiction upon a court to hear and render judgment on a claim.

The case of *Massey v. United States*<sup>227</sup> resulted from a private bill which authorized a federal district court to hear and render judgment on the claim of an employee of the Civil Aeronautics Agency who was injured in the line of duty while teaching a naval cadet how to fly. His claim was denied by the court on the ground of assumption of risk.

Relief may also be had for claims which rest on other than legal grounds.<sup>228</sup> An unusual claim which resulted in a hearing before the Court of Claims by means of a private bill was

<sup>224</sup> *Pignataro v. United States*, 172 F. Supp. 151 (E.D. N.Y. 1959).

<sup>225</sup> *United States v. Spelar*, 338 U.S. 217 (1949).

<sup>226</sup> See L. JAYSON, *HANDLINE FEDERAL TORT CLAIMS* 1-11 (1964), for a practical discussion of the procedures involved.

<sup>227</sup> 198 F.2d 359 (4th Cir. 1952).

<sup>228</sup> See *Froman v. United States*, 157 Ct. Cl. 661 (1962), where the Congress both made an outright grant of money and referred an "equitable claim" to the Court of Claims for consideration and report to Congress in the case of three entertainers injured in a commercial plane crash during World War II while en route to a combat zone to entertain soldiers at the request of the War Department. The same plaintiffs were involved in *Ross v. Pan American World Airways*, 298 N.Y. 88, 85 N.E.2d 880 (1949).

*Armiger v. United States.*<sup>329</sup> This case resulted from the midair collision of a Navy plane with a Varig liner over Brazil in 1959,<sup>330</sup> in which 19 members of the United States Navy Band were killed. The widows of decedents acknowledged that there was no legal claim, both by reason of the incident to service bar and the foreign country exclusion of FTCA. They argued that over a period of years the band drum major had made a practice of distributing commercial insurance applications prior to flights and that the members generally purchased insurance in amounts ranging up to \$50,000, that the band members had come to rely upon the drum major for the service, and that on the date of the fatal flight, the drum major failed or neglected to make insurance forms available. Absent this failure, the argument ran, each deceased sailor would have left an estate in the amount of the insurance purchased. The Court of Claims considered these claims "within the framework" of FTCA and held that the plight of the plaintiffs was due to the negligence of the drum major in failing to provide the insurance forms according to the custom upon which the band members had come to rely. Plaintiffs were awarded \$25,000 each.

Thus, even where no judicial remedy exists and no claim is possible within the administrative claims settlement authority of the military services, relief through congressional enactment is possible. It is emphasized that this is a last resort, being both time consuming and uncertain. The cases cited above, however, illustrate that it is sometimes successful.

## VI. CONCLUSION

The underlying theme throughout this article has been that the majority of persons comprising the group "passengers on military aircraft" are service members and civilian employees of the United States. As the law has developed under the Federal Tort Claims Act, no claim exists for service members killed or injured while passengers on military planes. By judicial fiat, administrative benefits accruing from their status as service members is their only source of compensation. Civilian employees are precluded from recovery under FTCA by the express terms of legislation authorizing benefits for such employees injured while

<sup>329</sup> 339 F.2d 625 (Ct. Cl. 1964). This may have been the last "Congressional Reference" case sent to the Court of Claims. In *Glidden v. Zdanok*, 370 U.S. 530 (1962), the Court of Claims was recognized as a constitutional court under art. III of the Constitution. Five of the Justices thought that recognition precluded further handling of congressional references.

<sup>330</sup> The case of *Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965), arose from the same incident.

performing duty. Other individuals who may be authorized passage on military aircraft have a remedy under the FTCA, subject to a showing of negligent or wrongful conduct, scope of employment, and occurrence of injury or death within an area for which claims are not excluded by the express provisions of FTCA.

In many cases, individuals will have executed a pre-flight waiver of liability. In that event, recovery will depend upon the policy of the applicable state law concerning prospective waivers of liability for negligence.

Doubtless many legal scholars will disagree, but the writer believes that the "incident to service" rule is basically sound. It has perhaps been stretched in its application to servicemen injured while engaging in activities having no, or at most only an attenuated connection with their duties as servicemen. The time is ripe for a redefinition of the concept for the purpose of clearly and uniformly establishing those situations in which a service member is incident to service and when he is not. While the substance of the redefinition is not clear at this time, it should surely begin with a determination of the duty status of the member at the time of his injury.

Regarding the Warsaw Convention, a claimant seeking damages for injury or death of a passenger on a United States-connected flight is no longer faced with an arbitrary and totally unrealistic limitation of \$8,800. While the amended maximum limitation is equally arbitrary, it is more realistic and, in many cases, will provide adequate damages. For other flights, the purchase of supplemental insurance, at modest expense, should provide adequate protection for survivors in the event of death.

Again, the great majority of passengers on military aircraft are military persons, currently barred from receiving compensation for injuries sustained therein. Should the *Lee* case, the most recent case involving a claim for the death of servicemen on a military plane, reach the Supreme Court, the exclusionary rule of the *Feres* case may well be modified so as to permit such claims under appropriate circumstances.

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