

Military Law Review Vol. 46

Articles

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the Army under Executive Order 10988

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are United States Employees

1969 ANNUAL INDEX

HEADQUARTERS, DEPARTMENT OF THE ARMY
OCTOBER 1969

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.

The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

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HEADQUARTERS
 DEPARTMENT OF THE ARMY
 WASHINGTON, D.C., 1 October 1969

MILITARY LAW REVIEW—VOL. 46

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GRIEVANCE ARBITRATION WITHIN DEPARTMENT OF THE ARMY UNDER EXECUTIVE ORDER 10988*

By Major David C. Davies**

This article analyzes grievance arbitrations within the Army. The author traces the history of such grievances since Executive Order 10988 was promulgated in 1962, briefly compares Army experience with that of the other services, and suggests techniques for counsel in such arbitrations. The conclusion indicates that the arbitration system has successfully alleviated pressures that might have impaired employee morale.

I. INTRODUCTION

On 17 January 1962, President Kennedy signed Executive Order 10988 and thereby formally established government-wide policy favoring employee-management cooperation in the federal service.¹ By November of 1968, over 1.4 million persons, or fifty-two per cent of all federal civilian employees, were represented by labor organizations with exclusive bargaining rights.² That figure has continued to increase sharply.³

Magnitude of coverage alone makes it abundantly clear that today public employee labor organizations are forces to be reckoned with in the federal service. The draft report of a task force estab-

*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 Seventeenth 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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¹ Exec. Order No. 10988, *Employee-Management Cooperation in the Federal Service*, 3 C.F.R. 521 (1959-63 Comp.), 5 U.S.C. § 631, at 366 (1964) [hereafter cited as E. O. 10988].

² U.S. CIVIL SERVICE COMMISSION, OFFICE OF LABOR-MANAGEMENT RELATIONS, UNION RECOGNITION IN THE FEDERAL GOVERNMENT, STATISTICAL REPORT 2 (Nov. 1967).

³ As of 7 April 1969, Department of the Army personnel covered by exclusive agreements totaled 154,736 persons, an increase of 31,190 persons over November 1967. Interview with W. J. Schrader, Chief, Labor Relations Division, Office of Civilian Personnel, Deputy Chief of Staff for Personnel, U.S. Army, 7 Apr. 1969.

lished in late 1967 to recommend to the President changes in Executive Order 10988 has recently been submitted.⁴ While the strikes and picketing by public employees which have become increasingly widespread in the state and local sector so far have left the federal sector virtually untouched, the possibility of even this type of activity cannot be ignored.

Section 8(b) of Executive Order 10988 authorizes the inclusion of grievance arbitration clauses in collective bargaining agreements. This article will examine those grievance arbitrations held to date within Department of the Army, briefly contrasting Department of the Navy and Department of the Air Force experience, with the objective of determining the present and potential significance of such arbitrations within the total Army labor relations framework. In addition, it will discuss arbitration mechanics, techniques, and preparation sources about which counsel at arbitration hearings should be aware.

A basic assumption underlying the following pages is that labor relations already have achieved and increasingly will achieve substantial importance, both to the Army as a whole and to the individual commander having civilian employees within his command. There are many aspects of labor relations within Department of the Army well worth exploring in depth. Several, including the resolution of negotiation impasses and the determination of appropriate bargaining units and majority status, either currently or potentially involve the use of arbitration. The scope of this article, however, is confined to that arbitration authorized by section 8(b) of Executive Order 10988 as the final step in negotiated grievance procedures.

II. HISTORICAL BACKGROUND

A. THE FEDERAL EMPLOYEE PRIOR TO EXECUTIVE ORDER 10988

Until the promulgation of Executive Order 10988, no government-wide policy on labor relations within the federal sector existed, although collective bargaining had been encouraged and regulated by the federal government within the private sector since the passage of the Norris-LaGuardia Act in 1932.⁵ The National Labor Relations Act (Wagner Act)⁶ and the Labor-Management Relations Act (Taft-Hartley Act)⁷ expressly excluded

⁴ The report was made public on 16 Jan. 1969. BNA 280 GOV'T EMPL. REL. REP. A-1 (20 Jan. 1969) [hereafter cited as GERR].

⁵ 29 U.S.C. §§ 101-15 (1964).

⁶ 29 U.S.C. §§ 151-68 (1964).

⁷ 29 U.S.C. §§ 141-87 (1964).

government employees from coverage, while reaffirming the common law rule that such employees have no right to strike.

The only legislation specifically recognizing the right of federal employees to affiliate with labor organizations was the Lloyd-LaFollette Act in 1912.⁸ Limited to postal employees and carefully forbidding strikes, it revoked Executive Orders of 1902, 1906, and 1908 which had prohibited such affiliation and had denied the right of individual petition to Congress.

Department of Defense experience with collective bargaining began as far back as the early 1800's at such industrial-type installations as shipyards and arsenals. In the year 1836, strikes occurred at both the Washington Navy Yard and the Philadelphia Navy Yard over the issue of hours of work.⁹ In 1893, the Army encountered a similar experience at Watervliet Arsenal over the issues of hours of work and rates of pay.¹⁰ In 1899, machinists at Rock Island Arsenal struck over the issues of discipline, discrimination against union members, and failure to consult and to hear grievances. This last incident resulted in a War Department order for arsenal commanders to deal with grievance committees and to refer unresolved matters to the Department.¹¹

In the early 1900's, trade unionism increased rapidly, as Frederick Taylor's principles of scientific management were introduced into some Army industrial settings. Interestingly, while most employees appeared to oppose these principles,¹² some favored them.¹³ In any event, employee activities resulted in various congressional resolutions and riders prohibiting the use of funds for such things as time studies and the payment of bonuses.¹⁴

World War I and the resultant need for a stable military-industrial environment brought about some specific recognition of union activity. In 1916, the Department of the Navy urged employees to organize in order to facilitate coordination with management,¹⁵ while within Department of the Army a number of

⁸ 5 U.S.C. §§ 7101-102 (1964).

⁹ D. ZISKIND, ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES 24-25 (1940).

¹⁰ *Id.* at 30.

¹¹ S. SPERO, GOVERNMENT AS EMPLOYER 94-95 (1948).

¹² At Rock Island Arsenal and at Watertown Arsenal, in 1911, employees strongly objected to the introduction of scientific management principles. The ENCYCLOPEDIA OF MANAGEMENT 875-76 (Heyel ed. 1963).

¹³ Employees at Frankfort Arsenal during the same period petitioned for a continuance of the Taylor system. *Id.* at 876.

¹⁴ *Id.*

¹⁵ OFFICE OF INDUSTRIAL NAVAL RELATIONS, IMPORTANT EVENTS IN AMERICAN LABOR HISTORY 9 (1963).

arsenals negotiated piece work rates and promotions in exchange for agreements by employees not to restrict output.¹⁶

While the shop committee system established by President Harding after World War I was not successful because of employee fear that it was a management trick, the onset of World War II gave the union movement sharp impetus.¹⁷ By the end of the war, federal employee-management policy was a widespread topic of discussion.¹⁸ The prevailing sentiment which gained momentum in the ensuing years was well expressed in the 1955 Report of the Committee on Labor Relations of Governmental Employees of the American Bar Association:

A government which imposes upon other employers certain obligations in dealing with their employees may not in good faith refuse to deal with its own public servants on a reasonably similar favorable basis, modified, of course, to meet the exigencies of the public service. It should set the example for industry by being perhaps more considerate than the law requires of private enterprise.¹⁹

Beginning in 1949, Representative George M. Rhodes and Senator Olin D. Johnston introduced on a yearly basis a federal employee labor relations bill. In 1956, Senator John F. Kennedy went on record as supporting the bill.²⁰ Unfortunately, the bill as it evolved contained some questionably extreme positions, such as mandatory suspension, demotion, or removal for any administrative official violating certain parts of the law, regardless of knowledge, intent, or other circumstances.²¹

During the entire period of union growth in the federal sector prior to Executive Order 10988, the only formal government-wide policy, aside from the Lloyd-LaFollette Act in 1912, was inclusion of provisions in the Federal Personnel Manual from 1951 on encouraging the solicitation of the views of federal employees in the formulation of personnel policy. Not until 1958, however, were those provisions interpreted to apply to employee organizations as such.²²

¹⁶ H. AITKEN, *TAYLORISM AT WATERTOWN ARSENAL; SCIENTIFIC MANAGEMENT IN ACTION, 1908-1915*, 240 (1960).

¹⁷ SPERO, *supra* note 11 at 100-02.

¹⁸ *Id.* at 104.

¹⁹ 1955 PROC. AM. BAR ASSOC. SEC. OF LAB. REL. LAW 90 (1955).

²⁰ *Hearings on S. 5393 Before the Senate Comm. on Post Office and Civil Service, 84th Cong., 2d Sess.* 36 (1956).

²¹ W. HART, *COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE* 140-73 (1961).

²² PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS, *A POLICY FOR EMPLOYEE-MANAGEMENT CO-OPERATION IN THE FEDERAL SERVICE*, pt. I, at 2-3 (1961) [hereafter cited as TASK FORCE REPORT].

In spite of such limited encouragement, by 1961 some 33 percent of all federal employees, or 762,000 persons, belonged to some type of employee organization.²⁵ Relations between management and these organizations varied widely from department to department and agency to agency. Many departments and agencies had little or no significant relationship.²⁶

B. PROMULGATION OF EXECUTIVE ORDER 10988

Early in his administration, President Kennedy recognized a valid need for a government-wide policy on employee-management relations in the federal sector. He further recognized that the mood of labor was such that, if the executive branch failed to act, Congress might well enact unduly restrictive legislation, such as the Rhodes-Johnston bill.

Consequently, on 22 June 1961, he appointed a Task Force on Employee-Management Relations in the Federal Service, headed by then Secretary of Labor, Arthur J. Goldberg. Its membership was composed of John W. Macy, Jr., Chairman of the United States Civil Service Commission; David E. Bell, Director of the Bureau of the Budget; J. Edward Day, Postmaster General; and Theodore Sorenson, Special Consultant to the President.²⁵ Its key staff members were drawn from the labor-management field in the private sector.²⁶

The Task Force spent some five months hearing testimony from all available interested parties. On 30 November 1961, it reported its findings to the President. It recommended to him promulgation of an executive order which would give federal employees certain bargaining rights. Finding that no uniform system of employee-management relations had been followed in the federal service, it selected those approaches from both the public and the private sectors which appeared best suited to a workable relationship.²⁷

Based upon the recommendations of the Task Force, President Kennedy issued Executive Order 10988 on 17 January 1962. The Order established the ground rules for employee-management cooperation in the federal service. In brief, it: (a) established a gov-

²⁵ *Id.* at 1.

²⁶ Address by Assistant Secretary of Labor Thomas R. Donahue, Governor's Conference on Public Employee Relations, New York, 14 Oct. 1968, 267 GERR F-2 (1968).

²⁷ Memorandum from President John F. Kennedy to the Heads of Departments and Agencies, 22 Jun. 1961, TASK FORCE REPORT ix.

²⁸ W. Hart, *The U. S. Civil Service Learns to Live with Executive Order 10988: An Interim Appraisal*, 17 IND. & LAB. REL. REV. 203, 206-07 (1964).

²⁹ TASK FORCE REPORT.

ernment-wide policy on employee-management relations, (b) included as the basis of that policy the recognition of employee organizations as bargaining representatives, (c) retained certain rights for management while limiting the rights of employees to strike or discriminate, and (d) specifically authorized advisory arbitration as the final step in a negotiated grievance procedure.²⁸

The issuance of Executive Order 10988 effectively stopped legislative efforts such as the Rhodes-Johnston bill. It gave the unions the recognition which they said they wanted, although stopping short of the union shop type of arrangement for which many unions undoubtedly hoped.²⁹ It paved the way for a new era in federal personnel practice.

C. GROWTH OF FEDERAL EMPLOYEE UNIONISM UNDER EXECUTIVE ORDER 10988

The impact of Executive Order 10988 has been particularly significant in terms of union representation. As has already been noted, in 1961, 33 percent of all federal employees, or 762,000 persons, were represented by employee organizations.³⁰ Many, of course, were postal workers whose union affiliation had first been given impetus by the Lloyd-LaFollette Act of 1912. Within the military departments, the breakdown was: Navy—36,528 persons (29%); Army—39,331 persons (11%); and Air Force—24,650 persons (9%).³¹

Under Executive Order 10988, recognition of exclusive representational status proceeded quickly. By August of 1966, 40 percent of all federal employees, or 1,054,417 persons, were represented by labor organizations having exclusive status.³² By November of 1968, the figures had risen to 52 percent and 1,416,073

²⁸ E. O. 10988.

²⁹ Hart, *supra* note 26 at 205.

³⁰ See text accompanying note 23, *supra*. This figure includes members of employee organizations which may not later have gained exclusive representational status under Executive Order 10988.

³¹ PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, STAFF REPORT II, at 10-11 (1961).

³² U.S. CIVIL SERV. COMM'N. OFFICE OF LABOR-MANAGEMENT RELATIONS, STATISTICAL REPORT OF EXCLUSIVE RECOGNITION AND NEGOTIATED AGREEMENTS IN THE FEDERAL GOVERNMENT UNDER EXECUTIVE ORDER 10988 2 (Aug. 1966). Excluding the highly-organized postal workers drops this figure to 23 percent, or 434,890 persons. The reduced figure includes approximately 243,500 (40%) blue collar workers and 191,350 (15%) white collar workers.

persons.³³ Within the military departments Department of the Army showed the greatest gain, going from 56,182 persons (15%) to 151,837 persons (39%) in that twenty-seven month period. At the same time, Department of the Air Force rose from 55,266 persons (19%) to 123,669 persons (44%), while Department of the Navy rose from 151,331 persons (44%) to 206,213 persons (53%).³⁴

Taking into account the provisions of Executive Order 10988 generally excluding from exclusive units managerial executives, employees engaged in non-clerical personnel work, rating supervisors of other members of the unit, and employees engaged in intelligence and investigative functions,³⁵ the percentage of eligible federal employees with exclusive representation is fast approaching the majority mark if it has not already exceeded that mark.

This significant growth factor, together with the experience gained over the initial years of the program established by Executive Order 10988, resulted in the appointment by President Johnson on 8 September 1967 of a Review Committee on Employee-Management Relations in the Federal Service. The Committee, chaired by Secretary of Labor Willard Wirtz, was composed of Secretary of Defense Robert S. McNamara, Postmaster General Lawrence F. O'Brien, Bureau of the Budget Director Charles L. Schultze, Civil Service Commission Chairman John W. Macy, Jr., and Joseph A. Califano, Jr., Special Assistant to the President. The Committee was charged with fully reviewing experience under Executive Order 10988 and recommending any adjustments needed.³⁶

The Committee's report, designated a "draft" and dated April 1968, was released on 16 January 1969 as an attachment to the 1968 Annual Report of the Department of Labor. Change in composition of the Committee was the reason stated why submission of a final report to the President was not possible.³⁷

The Committee's report noted substantial benefits resulting from Executive Order 10988—including improved communications between agencies and employees, increased participation by employees in the determination of working conditions, and a con-

³³ U.S. CIVIL SERV. COMM'N, *supra* note 2, at 2. Excluding postal workers drops this figure to 31 per cent, or 629,915 persons. The reduced figure includes 338,660 (54%) blue collar workers and 291,255 (21%) white collar workers.

³⁴ *Id.* at 1; U.S. CIVIL SERV. COMM'N, *supra* note 32 at 1.

³⁵ E. O. 10988 §§ 6(a), 16.

³⁶ Memorandum from President Lyndon B. Johnson to the Heads of Departments and Agencies, 8 Sep. 1967, 209 GERR A-6, 7 (1967).

³⁷ 280 GERR A-1 (1969).

tinuity of labor-management relationship through collective bargaining agreements. At the same time, the Committee recommended substantial changes in the existing program in order to bring it to the level of development indicated by the accumulated experience of both labor and management since 1961.²⁸

No attempt will be made here to detail all the Committee's recommendations. Two of the more significant are establishment of an inter-agency panel to oversee the program and placing in the Department of Labor the authority to decide unit, representation, unfair labor practice, and standard of conduct matters.

Regarding grievances and grievance arbitration, the Committee recommended, subject to existing law: (1) integrating all grievance and appeal procedures into a single system; (2) making the negotiated grievance and appeals procedures the only procedures available to employees in organized units; (3) ensuring that arbitration is available for the resolution of disputes over the interpretation and application of agreements, as opposed to only those disputes based upon individual grievances and appeals; and (4) limiting exceptions to arbitrators' decisions to those sustainable on grounds similar to grounds applied by the courts in private sector labor relations cases, with a limited right of appeal to the inter-agency panel.²⁹

The Review Committee's recommendations, the rapid growth of employee unionism in the federal sector, and the experience gained over the past seven years convincingly demonstrate the permanency of federal employee involvement in determining conditions of work. The Committee's recommendations concerning grievances and grievance arbitration procedures make it equally apparent that grievance arbitration will continue to play a significant role in that involvement. The ideal labor relations climate in which grievances are few and always resolved immediately is no more likely to be found in the federal government than in private industry. As noted by arbitrator Eli Rock at the 1967 Annual Meeting of the National Academy of Arbitrators:

The need on both sides, not only to obtain an answer in arbitration for the irreconcilable but to delegate to a third party the

²⁸ President's Review Committee, *Report on Employee-Management Relations in the Federal Service*, 280 GERR, Special Supplement (20 Jan. 1969) [hereafter cited as *Review Committee Report*].

²⁹ *Id.* at 4-5.

blame at times for reconciling the reconcilable, will probably be as prevalent in the federal service as in private industry.⁴⁰

III. NEGOTIATED GRIEVANCE PROCEDURES UNDER EXECUTIVE ORDER 10988

A. PRESENTING THE GRIEVANCE

As a general proposition, grievance procedures are designed to provide a series of steps, at increasingly higher levels of the management structure, through which employee complaints may be processed. Within Department of the Army, as is true generally in the federal service, there exist detailed regulations setting up a grievance system which considerably antedates Executive Order 10988. Appeals under this system never leave agency channels.⁴¹

With the advent of Executive Order 10988, authority for the establishment of alternative grievance systems was established. Section 8(a) of the Order states:

Agreements entered into or negotiated in accordance with this order with an employee organization which is the exclusive representative of employees in an appropriate unit may contain provisions, applicable only to employees in the unit, concerning procedures for consideration of grievances. Such procedures (1) shall conform to standards issued by the Civil Service Commission, and (2) may not in any manner diminish or impair any rights which would otherwise be available to any employee in the absence of an agreement providing for such procedures.⁴²

Fifty-two out of the first one hundred collective bargaining agreements negotiated within Department of the Army contained grievance procedures,⁴³ and nearly all of the over one hundred agreements coming into effect since that time have also contained grievance procedures.⁴⁴ Where such negotiated grievance proce-

⁴⁰ 191 GERR D-3 (1967) (E. Rock, *Role of the Neutral in Grievance Arbitration in Public Employment*, a paper presented at the Twentieth Annual Meeting of the National Academy of Arbitrators, San Francisco, California, 3 Mar. 1967).

⁴¹ Dept of the Army, Civilian Personnel Regulation No. E-2 (22 Jun. 1962) [hereafter cited as CPR].

⁴² 3 C.F.R. at 525 (1959-63 Comp.). The standards established by the Civil Service Commission are contained in U.S. CIVIL SERV. COMM'N FEDERAL PERSONNEL MANUAL 771, Subch. 1-7 (21 Jul. 1967) [hereafter cited as FPM].

⁴³ Interview with B. J. Moeller, Chief, Labor Relations Branch, Office of Civilian Personnel, Deputy Chief of Staff for Personnel, U.S. Army, 28 Feb. 1967.

⁴⁴ Interview with D. M. Atkinson, Employee-Management Relations Specialist, Labor Relations Division, Office of Civilian Personnel, Deputy Chief of Staff for Personnel, U. S. Army, 3 Feb. 1969.

dures have been available, they have been used to a much greater extent than the agency procedure.⁴⁴

The scope of negotiated grievance provisions within Department of the Army has varied widely.⁴⁵ Most such provisions cover expressly at least the interpretation or application of the collective bargaining agreement itself.⁴⁶ Many others have included as well both any other dispute which might arise between the parties and the interpretation or application of policies and regulations of the local command or its higher headquarters.⁴⁷

Nearly all agreements expressly exclude complaints or appeals arising from a number of types of actions, often in conformance with Department of the Army policy restricting such complaints or appeals to procedures set up by specific regulations.⁴⁸ Typically, these include such things as unfair labor practices; reductions in force; adverse actions; job evaluations; discrimination based upon race, creed, color, religion, or sex; non-selection for promotion where the grievant's sole allegation is that he is better qualified than the person selected; performance ratings; position classification; and wage determinations.⁴⁹

It is important to both union and management to have an effective channel through which dissatisfied employees may air their feelings and secure appropriate relief regarding working conditions or management policies. To the unions, the grievance procedure is additionally important because employee dissatisfaction lies at the very core of unionism, as successful prosecution of

⁴⁴ *Id.* An employee filing a grievance must choose initially which procedure he will follow and will be bound by that choice. CPR 711.A-XI, C. 4. a. (18 Aug. 1964).

⁴⁵ While a thorough analysis of possible grievance and grievance arbitration provisions is beyond the scope of this article, a description of the typical coverage of existing provisions within Department of the Army is necessary for effective examination of arbitration awards made to date.

⁴⁶ *E.g.*, Memorandum of Agreement Between Granite City Army Depot and Local 149A, IUOE, Art. X, para. 47 (11 Mar. 1966).

⁴⁷ See, e.g., Agreement Between Rock Island Arsenal and Arsenal Lodge 81, IAM, AFL-CIO, Art. XXIV, 1 (9 Dec. 1966), and Agreement Between U. S. Army Watervliet Arsenal and Lodge 2352, AFGA, Ch. VI, Art. 1, § C.a. (5 May 1967). Some of the variety of coverage of negotiated grievance procedures is indicated in a Bureau of National Affairs analysis of ninety agreements negotiated under E. O. 10958 at 92 GERR X-3-X-5 (1965).

⁴⁸ *E.g.*, CPR E-2.5 (22 Jun. 1962) (adverse action appeals) and CPR 713.D (30 Sep. 1966) (equal employment opportunity complaints).

⁴⁹ *E.g.*, Granite City Army Depot, *supra* note 47, at Art. X, paras. 50, 52, and 53; Rock Island Arsenal, *supra* note 48, at Art. XXIV, § 1; Watervliet Arsenal, *supra* note 48, at Ch. VI, Art. 1, § C.b.; Agreement Between Red River Army Depot and Local 237, United Ass'n of Plumbers and Pipe Fitters, Art. XVIII, paras. 1-4 (14 Mar. 1966).

grievances is a most effective recruiting technique. The establishment of negotiated grievance procedures under Executive Order 10988 thus properly can be considered of real benefit to unions, employees, and management alike.⁵¹

B. PURSUING THE GRIEVANCE TO ARBITRATION

The effectiveness of a grievance procedure which provides no opportunity for obtaining independent judgment from outside the agency in which a grievance arises, or even from outside the total governmental structure, is seriously suspect, at least from a morale standpoint. Recognizing this, the drafters of Executive Order 10988 expressly provided for advisory grievance arbitration in section 8(b), as follows:

Procedures established by an agreement which are otherwise in conformity with this section may include provisions for the arbitration of grievances. Such arbitration (1) shall be advisory in nature with any decisions or recommendations subject to the approval of the agency head; (2) shall extend only to the interpretation or application of agreements or agency policy and not to changes in or proposed changes in agreements or agency policy; and (3) shall be invoked only with the approval of the individual employee or employees concerned.⁵²

Thirty-nine out of the first fifty-two collective bargaining agreements negotiated within Department of the Army which contained grievance procedures provided for advisory arbitration as the final step in those grievance procedures.⁵³ Nearly all of the over one hundred agreements coming into effect since that time have contained provisions for advisory grievance arbitration.⁵⁴ To date, fourteen arbitration hearings have been held.⁵⁵

⁵¹ This is true so long as the grievance procedure is in fact used by employees to keep genuine grievances from silently festering, regardless of whether distrust of the agency grievance system prevented such airing of differences before a negotiated system existed and regardless of whether prompting by union stewards is involved.

⁵² 8 C.F.R. at 525 (1959-63 Comp.).

⁵³ Interview with B. J. Moeller, *supra* note 43.

⁵⁴ Interview with D. M. Atkinson, *supra* note 44.

⁵⁵ This is considerably less than within Department of the Navy, which had sixty-four arbitration hearings completed through 7 Apr. 1969. Interview with T. Garnett, Employee-Management Cooperation Specialist, Contract Administration Analysis Branch, Labor and Employee Relations Division, Office of Civilian Manpower Management, Department of the Navy, 8 Apr. 1969. It is considerably more than within Department of the Air Force, which has had only one arbitration hearing to date. Interview with R. Lazarus, Union Relations Branch, Employee Programs Division, Directorate of Civilian Personnel, Department of the Air Force, 24 Jan. 1969. The sole Air Force hearing and twenty Navy hearings have involved discipline matters, which are not grievable under negotiated procedures within Department of the Army.

Necessarily, the scope of grievance arbitration provisions has varied in accordance with the grievance provisions upon which each is based. In addition, the express limitations of section 8(b) of the Executive Order apply, regardless of whether or not specifically incorporated into the language of an agreement.⁵⁴

Most agreements provide that arbitration may be invoked by either party⁵⁷ or by the grievant alone⁵⁵ and call for selection of a single arbitrator. Typically, the arbitrator, unless mutually agreed upon by the parties, is to be selected by elimination from a list of five names submitted by the Federal Mediation and Conciliation Service.⁵⁶ Department of the Army regulations expressly provide for equal sharing of costs between union and management. A maximum of \$150.00 fee per day, plus travel and per diem, is allowed.⁶⁰ Nearly all agreements provide for the arbitration award to be advisory to the installation or activity commander involved,⁶² whose decision shall then be final.⁶³

From the union viewpoint, the ability to invoke grievance arbitration is that which gives a grievance procedure, and perhaps an entire collective bargaining agreement, integrity. From management's viewpoint, grievance arbitration provides an impartial means of judging its administration of both grievance systems and entire agreements.

The advisory nature of the arbitration permitted by section 8(b) of Executive Order 10988 is a point which the unions in the federal sector have found particularly distressing.⁶³ Applied arbitrarily, the management discretion inherent in that nature could

⁵⁴ Just how effective any but the most specific limitation would be if the question of arbitrability were taken to court, in light of *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574 (1960), and *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), the famous "Trilogy" decided by the United States Supreme Court on 20 Jun. 1960, is doubtful. So long as grievance arbitration in the federal service remains advisory in nature, of course, chances of this issue being pursued in the courts are not great. For a recent discussion of the "Trilogy," see G. TORRENCE, *MANAGEMENT'S RIGHT TO MANAGE* 7-26 (Rev. ed. 1968).

⁵⁷ *E.g.*, Rock Island Arsenal, *supra* note 48 at Art. XXV, §1.

⁵⁵ *E.g.*, Watervliet Arsenal, *supra* note 48 at Ch. VI, Art. 1, § E.(2)(a); Granite City Army Depot, *supra* note 47 at Art. X, para. 47(f).

⁵⁶ *E.g.*, Rock Island Arsenal, *supra* note 48 at Art. XXV, § 2; Red River Army Depot, *supra* note 50 at Art. XIX, § 1.

⁶⁰ CPR 711.A-XI.C.4 (18 Aug. 1964).

⁶¹ Usually the same person who has rejected the grievance at the final pre-arbitration step of the grievance procedure.

⁶² *E.g.*, Granite City Army Depot, *supra* note 47 at Art. X, para. 47(f); Watervliet Arsenal, *supra* note 48 at Ch. VI, Art. 1, E(2)(d).

⁶³ Review Committee Report 4-5.

effectively negate the value of providing for arbitration in the first place. To regard arbitration awards as inviolable, on the other hand, flies in the face of the explicit language of the Executive Order. It also disregards whatever merit exists for the concept that a sovereign employer must not surrender its basic power to govern.⁶⁴ Equally, it ignores the very practical problem that an arbitrator not thoroughly schooled in the complex and changing system of federal rules and regulations is likely to recommend an award which violates those rules and regulations.⁶⁵

In February 1966, the Civil Service Commission attempted to meet union objections partially by suggesting that any proposed modification or rejection of an advisory award be made at an administrative level higher than that of the agency official who made the original decision which forced the grievance to arbitration.⁶⁶ By removing a potential conflict of interest, the chances of arbitrary modification or rejection of an award would be reduced.⁶⁷ Department of the Army has not implemented that suggestion.⁶⁸ It is the author's experience, however, that unwritten Department policy strongly urges commanding officers to take a hard look at local implications and coordinate with higher headquarters for more widespread implications before modifying or rejecting an advisory award.

The recommendations of The President's Review Committee on Employee-Management Relations in the Federal Service, if adopted, should provide a reasonable solution to the problem. By

⁶⁴ Belenker, *Binding Arbitration for Government Employees*, 16 LAB. L. J. 234 (1965); Blaine, Hagburg, and Zeller, *The Grievance Procedure and Its Application in the United States Postal Service*, 15 LAB. L. J. 725 (1964); Shenton, *Compulsory Arbitration in the Public Service*, 17 LAB. L. J. 138 (1967); W. VOSLOO, COLLECTIVE BARGAINING IN THE UNITED STATES FEDERAL CIVIL SERVICE 17-20 (1966).

⁶⁵ This precise situation has resulted in rejected or modified awards in several Navy arbitrations, as well as in two Army arbitrations discussed in Section IV, *infra*. The Federal Mediation and Conciliation Service is in the process of establishing a separate list of arbitrators with experience in the public sector. 280 GERR B-4 (1969).

⁶⁶ U.S. Civil Serv. Comm'n, FPM Letter No. 711-3, 7 Feb. 1966.

⁶⁷ Department of the Navy substantially implemented that suggestion in April 1967 by requiring commanding officers proposing a rejection or modification of an advisory award to refer the matter to the Office of Civilian Manpower Management for advice prior to decision. Sec'y of the Navy Notice 12721, para. 3(b), 24 Apr. 1967. Adverse action appeals were expressly exempted from this requirement because of being further appealable to the Office of the Secretary of the Navy.

⁶⁸ Interview with D. M. Atkinson, *supra* note 44. Two Army arbitrations have resulted in partial rejection of an award. As twelve of the Army total of fourteen awards have supported management on the basic issues, the question of rejection or modification has not arisen in any other instance.

severely restricting the grounds upon which an exception to an arbitrator's award could be sustained and by providing a limited right of appeal to an inter-agency panel overseeing the entire federal labor relations program,⁶⁸ a sufficient guarantee of integrity and certainty should exist which still allows minimal flexibility to both parties for the correction of substantial inequities or regulatory conflicts.⁷⁰

It does not appear likely that collateral attacks in the federal courts upon the grievance system or upon an arbitration award would be successful. Recent cases dealing with such matters as dismissal from federal service⁷¹ and promotions⁷² carefully stress the very limited scope of review over the exercise of administrative discretion. One flatly stated that the courts may not interfere with the day-to-day internal administration of government departments.⁷³ Those cases dealing directly with the validity of negotiated agreements,⁷⁴ representational election procedures,⁷⁵ withdrawal of recognition,⁷⁶ or wage regulations⁷⁷ have unequivocally declared that the federal courts have no jurisdiction to police the Executive Order, as has a very recent case where the relief sought was an order requiring Army officials to process complaints under the Executive Order as implemented rather than under agency grievance procedures.⁷⁸ Either the separation of powers, sovereign immunity, or both have been given as rationale.⁷⁹

⁶⁸ The limitation being a requirement that every attempt to resolve the matter be made at all union and agency levels before reference to the inter-agency panel. Review Committee Report 4-5.

⁷⁰ The Review Committee's recommendations appear to contemplate that either party may challenge an arbitrator's decision. *Id.* at 4.

⁷¹ *E.g.*, Bishop v. McKee, 400 F.2d 87 (10th Cir. 1968); West v. Macy, 284 F. Supp. 105 (D.D.C. 1968); Menick v. U.S., 184 Ct. Cl. 756 (1968).

⁷² Cominsky v. Rice, 233 F. Supp. 180 (E.D. Pa. 1964).

⁷³ Lodge 1858, AFGE v. Webb, 283 F. Supp. 155 (D.D.C. 1968).

⁷⁴ Morris v. Steele, 253 F. Supp. 769 (D. Mass. 1966).

⁷⁵ NAIRE v. Dillon, 356 F.2d 811 (D.C. Cir. 1966) (per curiam); Manhattan-Bronx Postal Union v Gronouski, 350 F.2d 451 (D.C. Cir. 1965), cert. denied, 382 U.S. 978 (1966).

⁷⁶ NAGE v. White, Civil No. 1617-68 (D.D.C., filed 28 Jun. 1968), appeal docketed, No. 22630, D.C. Cir., 8 Jan. 1969.

⁷⁷ Canal Zone Central Labor Union v Fleming, 246 F. Supp. 998 (D. Canal Zone 1965), rev'd on other grounds, 383 F.2d 110 (5th Cir. 1967).

⁷⁸ Lodge 1647 and Lodge 1904, AFGE v. McNamara, 291 F. Supp. 286 (N.D. Pa. 1968).

⁷⁹ The sole exception, Hicks v. Freeman, 273 F. Supp. 334 (D. N.Car. 1967), aff'd on other grounds, 397 F.2d 193 (4th Cir. 1968), involved a change of practice regarding which the plaintiff argued that there should have been at least prior consultation. The court cited favorably the Manhattan-Bronx Postal Union v. Gronouski case, supra note 75, holding that E. O. 10988 gives no judicially enforceable rights, then decided the case on the merits by finding management's retained rights controlling.

IV. GRIEVANCE ARBITRATION EXPERIENCE WITHIN
DEPARTMENT OF THE ARMYA. *THE INITIAL CASE*

All of the fourteen grievance arbitrations held to date within Department of the Army have occurred at installations within the Army Materiel Command, which controls the Army's industrial facilities. The first grievance to go to arbitration arose early in 1966 at Granite City Army Depot, an installation involved primarily in the repair and maintenance of engineer equipment, located on the Illinois side of the Mississippi River just across from St. Louis, Missouri. For the writer, newly-arrived Post Judge Advocate at that installation, it constituted an abrupt introduction to the problems of labor-management relations in the federal sector.

The grievance in question arose because management had assigned the task of fabricating web strapping for aviation repair vans to the mechanics assembling the vans. The union, in this case the International Union of Operating Engineers, contended that the fabrication should have been performed by a "wood body repairman" whose job description included upholstery duties and who had performed some of that type of work before. Primary reliance was placed upon that paragraph of the collective bargaining agreement which stated that any deviation from existing practices would not occur until after consultation with the union. The relief sought was an award declaring management to have been in violation of the agreement and directing that such work be assigned exclusively to wood body repairmen in the future.

Management's position was that past practice had not in fact involved such fabrication being performed only by wood body repairmen. It asserted that the work was an incidental task falling under that part of the mechanics' job descriptions reading "and other duties as assigned," and that assignment of that work formed the essence of management's reserved rights to maintain efficiency of operations and to determine the methods, means, and personnel by which operations were to be conducted.⁶⁰ It pointed out also that the collective bargaining agreement placed a duty upon management only to consult, not to secure agreement, before deviating from existing practices. Consequently, even on the union's version of the facts, the future relief sought was inappropriate.

⁶⁰ These are two of the rights expressly reserved to management by § 7(2) of E. O. 10988 and repeated for emphasis in most collective bargaining agreements.

Recognizing the importance of the case, both as the first to be held within Department of the Army and as involving an issue basic to efficient and economical operation of any government maintenance activity,⁵¹ management prepared for the arbitration with particular care. Close coordination was maintained with Army Materiel Command Headquarters and with the Office of the Deputy Chief of Staff for Personnel at Department of the Army Headquarters. The hearing was held on 14-15 July 1966. Post-hearing briefs were submitted on 3 September 1966.

On 3 October 1966, arbitrator Joseph M. Klamon rendered an award in favor of management. He concluded that management's actions were within its retained rights and in accordance with past practice and the terms of the collective bargaining agreement. He specifically noted that job descriptions give no proprietary interest in any particular tasks or duties. He also noted the special need of the military for efficiency through flexibility in industrial functions, particularly in light of time and budgetary limitations during periods of international strife.⁵² The award of the arbitrator was accepted by the Depot Commander on 12 October 1966.

B. SUBSEQUENT CASES

1. *Fort Detrick.*

The second grievance arbitration decision to be rendered within Department of the Army involved Fort Detrick, a research and development installation at Frederick, Maryland. The union, the International Association of Machinists and Aerospace Workers, objected to a 17 October 1966 change of the work week for caretakers at an experimental animal farm which eliminated Saturday and Sunday overtime work. In a brief opinion issued on 24 May 1967, arbitrator J. Harvey Daly did not reach questions such as management's motive for the change or the remedy for a failure to consult with the union. He simply found that the express language of the collective bargaining agreement exempted the change in work week for employees such as animal farm caretakers from any requirement of prior negotiation or consultation, past practice notwithstanding, and recommended that the grievance be denied.⁵³

⁵¹ The issue in the case could be variously described as involving assignment of work, job classification, or inherent craft jurisdiction.

⁵² Local 149A, IUOE v. Granite City Army Depot, 161 GERR, Gr. Arb. 41-44 (1966) (Klamon, Arbitrator).

⁵³ Columbia Lodge 174, IAMAW v. Fort Detrick, 196 GERR, Gr. Arb. 17-20 (1967) (Daly, Arbitrator).

2. Rock Island Arsenal.

Both the third and the thirteenth arbitration awards within Department of the Army concerned Rock Island Arsenal at Rock Island, Illinois. The grievance giving rise to the first involved a number of issues, both real and apparent. The union, the International Association of Machinists, objected: (1) to management's adding to the job descriptions of W-11 electricians the requirement for rotating shifts, (2) to management's failure to meet the time limits for replies set up by the negotiated grievance procedure, and (3) to management's allegedly threatening manner of informing the electricians in question of the change in job description as an example of its general labor relations attitude.

In his award, issued on 5 July 1967, arbitrator Anthony V. Sinicropi took both parties to task for presenting the issues in a confusing and intertwined manner. With regard to the job descriptions, he found that management did not violate the collective bargaining agreement by formalizing an established practice of twenty-three years, one which the union readily admitted should be followed. With regard to the remaining charges, he found that management had violated the time limits for reply under the negotiated grievance procedure, but that there was no willful violation of the spirit and intent of Executive Order 10988 in management's attitude.⁵⁴

In an additional advisory opinion, the arbitrator further expressed disappointment in the labor relations atmosphere at the Arsenal. He criticized the union for letting emotions lead it to push to arbitration a grievance based upon an insignificant and not clearly defined issue. At the same time, he criticized management for being unwilling to make accommodations and work with the union. He specifically recommended that the parties affirmatively improve communications, adopt a flexible bargaining posture, center bargaining around issues rather than personalities, and demonstrate mutual respect and sincerity.⁵⁵

The second arbitration at Rock Island Arsenal dealt with the obligation of management to replace employees who were absent from work because of sickness or leave with other employees at overtime rates. One instance of each such type of absence had occurred in April 1968. The contract clause in question, as it applied to the facts, stated that between 1 October and 14 May of each year "normally" two steamfitters would be scheduled for the sec-

⁵⁴ Arsenal Lodge 81, IAM v. Rock Island Arsenal, 202 GERR, Gr. Arb. 31-35 (1967) (Sinicropi, Arbitrator).

⁵⁵ *Id.* at Gr. Arb. 36.

ond and third shifts. The union contended that past practice and bargaining history established that the word "normally" in the contract clause allowed management flexibility only to increase the number of steamfitters assigned. Management contended that the word provided flexibility in both directions, the true issue being one of justifying overtime rather than of altering hours of work. In the two instances in question, mild weather had precluded such justification.

In an award submitted on 18 December 1968, arbitrator John F. Sembower recommended that the grievance be denied. He found past practice and bargaining history to be consistent with management's position, with no guarantee of overtime work opportunities contained in the contract provisions under consideration. He cautioned the parties not to interpret his award as recommending alteration of the regular scheduling of two steamfitters between the dates specified in the contract, however, in the absence of special circumstances other than prevailing weather conditions.⁶⁶

3. *Red River Army Depot.*

The fourth and fifth grievance arbitrations within Department of the Army occurred at Red River Army Depot, Texarkana, Texas, and involved the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

The first of these cases concerned the assignment to mobile equipment operators on an overtime basis of the job of installing bumper guard rails in a parking lot when the employees who regularly performed the welding and cutting work involved were available for overtime. The grievant, a welder then next on the rotational overtime chart within his section, sought to be paid for the lost opportunity at overtime rates. He relied upon provisions in the collective bargaining agreement specifying: (1) equal distribution of overtime by organizational element and skills required, and (2) that an employee not "normally" be scheduled to work overtime out of his regular assigned classification when employees regularly performing such duties are available for overtime.

In an opinion submitted on 7 August 1967, arbitrator Raymond L. Britton found that the first contract provision relied upon by the grievant did not apply. He concluded that the provision could not come into play until after management had chosen the employees to perform overtime under its reserved right to determine the

⁶⁶ Arsenal Lodge 81, IAM v. Rock Island Arsenal, 283 GERR, Gr. Arb. 5-10 (1968) (Sembower, Arbitrator).

methods, means, and personnel by which its operations were to be conducted. He also commented that the fact of two different organizational elements being involved made the provision literally inapplicable. Concerning the second contract provision cited by the grievant, the arbitrator concluded that the word "normally" was intended to make the scheduling of overtime in the circumstances described by that provision a discretionary function of management under the same reserved rights.⁸⁷

The second arbitration at Red River Army Depot involved an allegedly improper job description. The grievant, a W-10 steamfitter, contended that he spent more than 25 percent of his working time under environmental conditions requiring the wearing of protective clothing and equipment beyond that normally required of steamfitters. It was not disputed that, if his contention were accurate, that factor should be included in his job description.

In an award submitted on 20 September 1967, arbitrator Roy R. Ray found in favor of management. He noted initially that he was limited to deciding whether in fact the grievant's contention as to the time he spent in which extra protective clothing and equipment were required was accurate, rejecting the union's formulation of the issue as requiring him to decide a job evaluation appeal in violation of the grievance jurisdiction provisions of the collective bargaining agreement.⁸⁸ He then compared the rather indefinite testimonial evidence presented by the union with the time studies submitted by management⁸⁹ and concluded that the grievant's contentions could not possibly be accurate.⁹⁰

4. *Watervliet Arsenal.*

The sixth, seventh, eighth, tenth, and fourteenth grievance arbitrations within Department of the Army all occurred at Watervliet Arsenal, just outside Albany, New York, and involved the American Federation of Government Employees. Additionally, the arbitration of one grievance which was closely related to an unfair labor practice charge was terminated at the outset of the hearing

⁸⁷ Local 237, United Ass'n of Plumbers and Pipefitters v. Red River Army Depot, 206 GERR, Gr. Arb. 37-42 (1967) (Britton, Arbitrator).

⁸⁸ The issue framed by the union was: "Whether Mr. Haggard worked 26% or more of his work cycle under environmental working conditions which would entitle him to 20 additional points as prescribed in CPR-P42, Section 5-2(f)?" Local 237, United Ass'n of Plumbers and Pipefitters v. Red River Army Depot, 216 GERR, Gr. Arb. 61 (1967) (Ray, Arbitrator).

⁸⁹ Management used data processing equipment to compute from the employees' daily job description cards the total hours worked in the grievant's section in 1966 under pertinent environmental conditions.

⁹⁰ Local 237, *supra* note 88, at 61-63.

when the union insisted that the arbitrator decide the merits of the unfair labor practice charge and management refused to proceed upon that basis.⁹¹ The matter has now been presented to the Federal District Court for the Northern District of New York and should be argued shortly.⁹²

The first of the grievances at Watervliet Arsenal to reach the arbitration stage involved the question of whether the grievant had been passed over for promotion to a temporary welder-leader position improperly, in light of his past experience in the same and higher positions and his comparatively high qualifications. The union contended that management had abused its discretion, first, by not promoting the grievant, noncompetitively, in spite of both his qualifications and his supervisory experience,⁹³ and, second, by not selecting the grievant under competitive promotion procedures. The basis for these alleged abuses of discretion was claimed to be a combination of personal dislike and failure to evaluate his qualifications objectively in accordance with applicable regulations.⁹⁴

The opinion of arbitrator Benjamin H. Wolf, submitted on 6 June 1968, totally agreed with the union. Soundly castigating management for a serious abuse of official authority, the arbitrator noted that "under the Army regulations the right of a supervisor to use his discretion is limited by cautions to be fair and equitable, without discrimination or favoritism."⁹⁵ He recommended that the grievant be promoted to the position which was the subject of the grievance and be granted pay retroactively.⁹⁶

The second arbitration at Watervliet Arsenal also involved non-selection for promotion. In that case the grievant claimed that management had violated her rights by selecting candidates for the job of computer technician from outside the Arsenal. She cited alleged irregularities in the selection procedure and in the timing

⁹¹ Interview with CPT C. G. Chernoff, JAGC, counsel for management, 22 Apr. 1968.

⁹² Interview with CPT A. K. Knorowski, JAGC, Post Judge Advocate, Watervliet Arsenal, 4 Apr. 1969.

⁹³ Applicable regulations allowed noncompetitive promotion to a given vacancy of employees who had satisfactorily held the same or higher positions before and who had been demoted through no fault of their own.

⁹⁴ His immediate supervisor was said to personally resent the grievant, and higher management officials' passing on the vacancy in question were said to object to the grievant's attitude for trivial or improper reasons.

⁹⁵ Lodge 2352, AFGE v. Watervliet Arsenal, 252 GERR, Gr. Arb. 69, 72 (1968) (Wolf, Arbitrator).

⁹⁶ *Id.* at Gr. Arb. 69-74. Management accepted the award and promoted the grievant as recommended. It was unable to grant retroactive pay under existing regulations, however, and to that extent subsequently rejected the award. Interview with J. E. Benson, Jr., Chief, Personnel and Training Office, Watervliet Arsenal, 28 Jan. 1968.

of interviews, as well as the friendship of another applicant's father with the selecting supervisor, as constituting a violation of her rights. Management denied any irregularity and asserted that it had properly exercised its discretion in filling the vacancies.

The award in this case, also rendered on 6 June 1968, fully supported management. Arbitrator Peter Seitz stated that, "The question really is whether in relation to the job requirements and in comparing her qualifications with other candidates . . . the grievant was treated fairly."⁸⁷ He rejected a contention that a contract provision regarding preference to underutilized employees applied, noting that there was no evidence of underutilization of the grievant's skills in the technical field involved. He questioned the wisdom of the selecting supervisor in choosing the son of a man whom he knew to fill an opening, but stated that this fact alone did not constitute proof positive of a corrupt and discriminatory act.⁸⁸

The third arbitration at Watervliet Arsenal was unique in that the issue presented was stipulated to be whether the negotiated grievance procedure excluded a grievance the subject matter of which had been a part of an adverse action expunged from the records on the basis of a substantial procedural defect. The grievant claimed that the accusation of insubordination, upon which suspension proceedings had been based and then negated by his adverse action appeal, was distinguishable from the adverse action. Management maintained that the grievance was merely a continuation of the controversy resolved by the adverse action appeal and, as such, barred from consideration by that provision of the negotiated grievance procedure specifically excluding adverse action appeals.

Arbitrator Daniel C. Williams, in an opinion submitted on 9 July 1968, answered the stipulated issue in the affirmative. He cited the need for the principles of *res judicata* to apply to arbitrations as well as to court actions, stating that in his opinion the gist of the grievance was the same adverse action of suspension already resolved upon appeal. He recognized that under given conditions an adverse action might give rise to a distinct and proper grievance even though an appeal has been processed.⁸⁹ The burden

⁸⁷ Lodge 2352, AFGE v. Watervliet Arsenal, 252 GERR, Gr. Arb. 65, 66 (1968) (Seitz, Arbitrator).

⁸⁸ *Id.* at Gr. Arb. 65-67.

⁸⁹ For example, a foreman could strike an employee in connection with suspending him for insubordination, or could deliberately publicize the suspension widely. Lodge 2352, AFGE v. Watervliet Arsenal, 256 GERR, Gr. Arb. 79, 85 (1968) (Williams, Arbitrator).

of proof would be heavy, however, and upon the grievant. It was not met in this case.¹⁰⁰

The fourth arbitration at Watervliet Arsenal involved the matter of training for promotional opportunity. The grievant had applied for the position of "electronic-mechanical communications equipment installer and repairer," but had been rejected as not having the necessary training. Thereafter, another applicant from outside the Arsenal with better but not full qualifications had been hired and given the necessary training to qualify him for the job. The union claimed that management had failed to make every reasonable effort to utilize existing employees when training was necessary for new positions, as required by the negotiated agreement. It sought to have the grievant trained and displace the selected applicant.

In a 10 September 1968 opinion, arbitrator Paul D. Hanlon found the grievance to be justified. Noting the lack of any improper motivation on management's part and the hardship on the selected applicant if abruptly displaced, however, he rejected the union remedy. Instead, he saw an apparent need for an additional back-up employee to work on the equipment in question and recommended that the grievant be trained, assigned such duties, and "given available promotion or step-up in grade, commensurate with his increased skills and responsibilities."¹⁰¹

The latest arbitration at Watervliet Arsenal again involved the subject of promotions. The grievant, a W-11 machine parts inspector, contended that he should be promoted to the grade of W-12, which required more complex and independent inspections with a minimum of supervision. He claimed already to be performing much the same work as a W-12 and to be fully qualified as such, but to have been denied promotion in spite of these facts.

In an opinion submitted on 17 December 1968, arbitrator James B. Wilson found the grievance to be without substance. Noting the frequent opportunities for proving his qualifications and the special training afforded the grievant, the arbitrator concluded that he had been given fair consideration for promotion but was not yet qualified.¹⁰²

¹⁰⁰ *Id.* at Gr. Arb. 79-85.

¹⁰¹ Lodge 2352, AFGE v. Watervliet Arsenal, unpublished transcript of arbitrator's award, 1, 8 (10 Sep. 1968) (Hanlon, Arbitrator).

¹⁰² Lodge 2352, AFGE v. Watervliet Arsenal, unpublished transcript of arbitrator's award (17 Dec. 1968) (Wilson, Arbitrator).

5. *Army Aeronautical Depot Maintenance Center.*

The ninth, eleventh, and twelfth arbitrations within Department of the Army occurred at Army Aeronautical Depot Maintenance Center, Corpus Christi, Texas, and involved the International Association of Machinists and Aerospace Workers.

The first of these cases concerned overtime pay for attending off-the-job classes conducted pursuant to an apprenticeship program. Training under the program consisted of both on-the-job training and classroom instruction, some of which was provided on post during duty hours and some off post outside of duty hours. The grievants, who had voluntarily read and assigned an agreement upon entering the program to attend such classes without pay, claimed that such training was a condition of employment and thereby qualified as compensable work under applicable regulations.

Arbitrator Byron R. Abernathy, in a 19 July 1968 opinion, found the grievant's contentions to be without merit. Noting that the collective bargaining agreement was silent on the matter, he looked to applicable civil service regulations, the language of the Government Employee's Training Act,¹⁰³ and decisions of the Comptroller General to find explicit authority that such training does not qualify as compensable work, particularly at overtime rates.¹⁰⁴

The second arbitration at the Army Aeronautical Depot Maintenance Center involved the interpretation of contract language requiring a grievance at the second step of the grievance procedure to be "reduced to writing . . . stating the exact nature of the grievance, date incident occurred and remedy sought. . . ." ¹⁰⁵ In this case a meeting between management and union representatives had been held on 4 October 1967, concerning union objections to promotional procedures affecting aircraft welder leaders. On 18 March 1968 the president of the local union filed a grievance, stating merely: "Amendment to protest filed by L. L. 2049 on L-10 A/C Welder leaders" ¹⁰⁶ and asking for corrective action which included removal and replacement of L-10's unable to perform their duties. Management refused to process the grievance without a more detailed statement of its basis. A separate grievance was

¹⁰³ 5 U.S.C. §§ 4101-118 (1958).

¹⁰⁴ Aero. Lodge 2049, IAMAW v. ARADMAC, unpublished transcript of arbitrator's award (19 Jul. 1968) (Abernathy, Arbitrator).

¹⁰⁵ Aero Lodge 2049, IAMAW v. ARDMAC, 267 GERR, Gr. Arb. 99, 100 (1968) (Ray, Arbitrator).

¹⁰⁶ *Id.* at Gr. Arb. 99.

then filed and processed through to arbitration protesting management's failure to process the first grievance.

The union contended that because management knew of the problem referred to in the grievance, a more specific statement was not required. Management contended that for lack of specificity the alleged grievance did not raise any question under the jurisdictional portion of the negotiated grievance procedure. It further contended that specificity was particularly necessary in this instance, since the grievance procedure specifically excluded consideration of promotion questions when the sole basis for complaint was an allegation of the grievant being better qualified than the person selected.

Arbitrator Roy R. Ray, in an award submitted on 7 October 1968, agreed with management. While noting the additional justification for demanding specificity present because of the exclusion of promotion grievances, he based his decision upon the requirement of specificity in the grievance procedure itself, stating:

Without a more specific statement of the basis of its complaint and a specification of the part of the Agreement allegedly violated by ARADMAC the Grievance cannot be considered as raising any question concerning the interpretation or application of the Agreement, policies or regulations.¹⁰⁷

The latest grievance arbitration award to be submitted at Army Aeronautical Depot Maintenance Center involved alleged harassment of the grievant by his supervisors, as well as refusal to let him discuss complaints with union officials and to let him select his own representative on a grievance. The corrective action requested was for a cessation of the harassment, a written apology, and appropriate disciplinary action against all supervisors and work leaders concerned.

In a 12 October 1968 award, arbitrator J. Earl Williams found the grievance to be unsupported by the evidence. Specifically commenting upon the apparent communication problem regarding the rights and responsibilities of union officers and other employees, to which both parties had contributed, he suggested guidelines for improving communication through the use of greater consideration and specificity on both sides.¹⁰⁸

V. ARMY COUNSEL AT GRIEVANCE ARBITRATIONS

It is axiomatic that counsel representing an installation or other command at a grievance arbitration hearing must be well pre-

¹⁰⁷ *Id.* at Gr. Arb. 99-101, 101.

¹⁰⁸ Aero. Lodge 2049, IAMAW v. ARADMAC, unpublished transcript of arbitrator's award (12 Oct. 1968) (Williams, Arbitrator).

pared. As the body of arbitration awards in the federal sector grows and as arbitrators develop expertise in government regulations and practices, the precedential effect of any given award could be substantial. The more basic the issue involved is to economical and efficient operations, the more likely other commands or even other military services will be affected.¹⁰⁹

Preparation should begin immediately upon receipt by the command of a request for arbitration. The primary consideration at this point is a thorough analysis of the grievance from its inception, with an eye toward formulating a precise definition of the issue.¹¹⁰ A loosely stated issue invites confusion by opening the hearing up to the introduction of evidence not relevant to the incident giving rise to the grievance. The result might be an award more far-reaching than either party contemplates, or wants.¹¹¹

Unless agreement upon an arbitrator can be reached by the parties, most arbitration provisions call for jointly requesting a list of five arbitrators from the Federal Mediation and Conciliation Service.¹¹² Once the list of arbitrators is received, immediate investigation into the experience, integrity, and intelligence of each arbitrator should be conducted.¹¹³ Additionally, a check of the reported cases should be made to see if decisions in similar cases have been rendered, particularly by any of the five listed arbitrators.¹¹⁴ Generally, the more extensive an arbitrator's experience, the more likely he is to understand a case fully and decide it correctly.

¹⁰⁹ Long before other grievances on the same issues reach the arbitration stage, unions at other installations will be able to increase the pressure on management by alluding to rendered awards.

¹¹⁰ If counsel has been able to participate in management's discussions of the grievance at a prior stage, and thus help to define the issue during the course of the grievance, so much the better. The more complete and accurate a record is kept at each step of the grievance procedure, the more that record will assist the arbitrator and the easier it will be for counsel to focus the arbitrator's attention upon the actual issue.

¹¹¹ Should there be a question of arbitrability involved, such as excusability of a time lapse under the terms of the grievance procedure, it is preferable to state that question separately in order to avoid waiver or confusion.

¹¹² Care should be taken that, in that request and in later correspondence with the arbitrator selected, an "issue" is not stated which is not in fact intended by both parties to be the finally-defined issue in the case. Such an "issue" could be held to be binding, or at least could tend to obscure the actual issue.

¹¹³ The experience sheet provided for an arbitrator by the Federal Mediation and Conciliation Service is helpful but not adequate to form the basis of a well-informed choice. A good source of additional information often is a local manufacturers' association or the personnel departments of local industries.

¹¹⁴ While most such awards probably would have been rendered in the private sector, they at least can provide insight into an arbitrator's reasoning.

As in thorough preparation for presenting a case in a court of law, all facts bearing upon the grievance must be gathered and analyzed from the viewpoint of both parties.¹¹³ The entire collective bargaining agreement should be examined in order to ascertain what clauses are relevant, either directly or indirectly.¹¹⁴ Custom and the past practice of the parties in analogous situations may be extremely important, even if the agreement does not contain the usual clause spelling out the agreed effect of past practice. Witnesses should be carefully interviewed and properly instructed.¹¹⁷

Exhibits, including background material as basic as a chronology sheet, can be most helpful and should be used freely so long as they will aid the arbitrator. A view of the scene should be considered. Above all, counsel should remember that the arbitrator can base his award upon the facts only if they are presented to him. It is the counsel's job to get those facts accurately before the arbitrator and to interpret them persuasively in accordance with his theory of the case.

Arbitration hearings are often quite informal, compared to court proceedings. The degree of informality depends in each case, of course, upon the wishes of the arbitrator. Some may prefer to control the scope and relevancy of the questioning themselves; others will expect counsel to object to at least the more extreme departure from normal rules of evidence. Most procedural matters are often left for prehearing agreement between the parties.¹¹⁵

Generally, if either party requests permission to submit a post-hearing brief, the request will be granted. In the opinion of the author, submission of a post-hearing brief is usually desirable. Especially if a transcript of the testimony is not made, it is the most effective means of assuring that the arbitrator has both facts and argument before him when reaching his final conclusions.

A number of useful reference works are available to help potential counsel in preparing for arbitration hearings. The most comprehensive treatise known to the author is *How Arbitration Works*

¹¹³ Much of this fact gathering and analysis, of course, will be accomplished in the process of defining the issue.

¹¹⁴ In interpreting these clauses, their bargaining history is often a useful tool.

¹¹⁵ It is usually sounder to plan on proving a case with one's own witnesses, rather than through the other party's witnesses.

¹¹⁶ Counsel may find it desirable to get written agreement on such matters as whether to have a transcript of testimony, the order and the availability of witnesses, the exact issue and the order of consideration if there is more than one issue, the swearing of witnesses, the order of presentation, rebuttal limitations, and whether to submit post-hearing briefs.

by Frank and Edna Elkouri.¹¹⁹ Others include *Arbitration of Labor Disputes* by Clarence M. Updegraff,¹²⁰ *The Labor Arbitration Process* by R. W. Fleming,¹²¹ and *Anatomy of a Labor Arbitration* by Sam Kagel.¹²² More concise aids such as Boaz Seigel's *Proving Your Arbitration Case*,¹²³ a report on a speech by Robert A. Levitt of Western Electric Company contained in the 29 May 1967 issue of *Government Employee Relations Report*,¹²⁴ and an article by Samuel H. Jaffee in the *Labor Law Journal*¹²⁵ are also available.

VI. CONCLUSION

A. SIGNIFICANCE OF EXPERIENCE TO DATE

Fourteen grievance arbitrations have taken place at six Army installations. While that experience has been limited, it has been sufficiently varied to be representative of labor relations conditions throughout Department of the Army.

Analysis of the fourteen arbitrations reveals a wide spread of issues, ranging from administration of the grievance procedure to assignment of work. The importance of some of the issues necessarily has been restricted by the local nature of the grievances in question. In at least four types of arbitrations, however, the awards have been significant on a much broader scale.

One of those four types involves the issue of work assignments. The ability of management to assign its personnel in accordance with the changing demands of its mission is vital to the maintenance of efficient and economical operations. Both awards dealing directly with this issue—one at Granite City Army Depot and one at Red River Army Depot—recognized this fact and stressed in their rationale that the retained rights contained in section 7 of Executive Order 10988 also recognize it.¹²⁶ Even the right to assign personnel must be exercised reasonably, of course, as the one award in the related area of overtime assignments cautioned.¹²⁷

¹¹⁹ F. ELKOURI AND E. ELKOURI, *HOW ARBITRATION WORKS* (Rev. ed. 1960).

¹²⁰ C. UPDEGRAFF, *ARBITRATION OF LABOR DISPUTES* (2d ed. 1961).

¹²¹ R. FLEMING, *THE LABOR ARBITRATION PROCESS* (1967).

¹²² S. KAGEL, *ANATOMY OF A LABOR ARBITRATION* (1961).

¹²³ B. SEIGEL, *PROVING YOUR ARBITRATION CASE* (1961).

¹²⁴ 194 GERR A-5—A-7 (1967) (Address by Robert A. Levitt, labor counsel of Western Electric Company, at a labor law institute sponsored by the Creighton University School of Law in cooperation with the Nebraska State Bar Association, 1967).

¹²⁵ Jaffee, *A Funny Thing Happened on the Way to the Forum*, 14 *LAB. L. J.* 271 (1963).

¹²⁶ Local 149A, *IUOE v. Granite City Army Depot*, *supra* note 82; Local 237, *United Ass'n of Plumbers and Pipefitters v. Red River Army Depot*, *supra* note 87.

¹²⁷ *Arsenal Lodge 81, IAM v. Rock Island Arsenal*, *supra* note 86.

A second of those four types involves the issue of promotions. All four arbitrations involving this issue arose at Watervliet Arsenal.¹²⁸ Two of the awards found merit in the grievance, with one severely castigating management for apparent bad faith. The standard which the arbitrators attempted to apply in all four cases was one of basic equity. The lesson for management would appear to be twofold: (1) regulatory procedures concerning promotions should be followed with particular care; and (2) both fairness and the appearance of fairness are vital to sound personnel actions.

A third type involves the issue of what constitutes a sufficient description of a grievance to qualify for processing under a negotiated grievance procedure. Any grievance procedure can operate effectively to resolve disputes only if the parties are communicating on at least the identification of the facts giving rise to the grievance and how those facts allegedly violate the negotiated agreement. For that reason, nearly every negotiated grievance procedure calls for reducing grievances to writing by the second step.¹²⁹ In the one award upon this issue, arbitrator Roy R. Ray strongly upheld the need for specificity.¹³⁰

The last of the four types involves the issue of arbitrability of matters excluded from the grievance procedure because other avenues of appeal are provided for them. The one award upon this issue upheld management without hesitation, applying the reasoning that the principles of *res judicata* should logically apply to administrative grievances as well as to court judgments.¹³¹ As was noted earlier, a similar question relating to the arbitrability of an unfair labor practice charge is now before the courts.¹³²

There is no question but that labor relations at some installations is in a relatively early stage of development, although sophistication is rapidly being acquired by both management and labor. In three of the Army's fourteen arbitrations, the arbitrator has made note of immature attitudes and has felt constrained to offer guidelines for improving them. As is not surprising, communication has been the biggest hurdle involved.

¹²⁸ Lodge 2352, AFGE v. Watervliet Arsenal, *supra* note 95 at 69-74; Lodge 2352, AFGE v. Watervliet Arsenal, *supra* note 97 at 65-67; Lodge 2352, AFGE v. Watervliet Arsenal, *supra* note 101; Lodge 2352, AFGE v. Watervliet Arsenal, *supra* note 102.

¹²⁹ Yet the author's experience has been that many stewards feel a distinct reluctance to identify fully a grievance in any true sense, particularly in writing.

¹³⁰ Aero. Lodge 2049, IAMAW v. ARADMAC, *supra* note 105 at 99-101.

¹³¹ Lodge 2352, AFGE v. Watervliet Arsenal, *supra* note 99 at 79-85.

¹³² See text accompanying note 92, *supra*.

Grievance arbitration within Department of the Army appears to be serving its purpose well. By providing a means of resolving disputes outside of agency channels, it has acted as an escape valve for pressures which otherwise would have impaired morale and worsened communication between labor and management. To be sure, political motivations and stubborn or overaggressive officials¹³³ have sometimes been behind carrying grievances to arbitration; and sometimes the true issues are never brought out for resolution until a grievance reaches arbitration. In such cases the arbitrator is seldom fooled, however, and may be able to guide the parties toward improved relations.

B. OUTLOOK FOR THE FUTURE

There is no reason to believe that grievance arbitration will not continue to serve the same functions in the future even more effectively than in the past. As union coverage grows and employees become accustomed to the grievance procedure's availability, undoubtedly more arbitrations will result.¹³⁴ Political motives inevitably will continue to play a role, too.¹³⁵ At the same time, as both labor and management become more experienced, hopefully attitudes and communication will improve sufficiently to hold arbitrations down to those cases where there is a meaningful issue and a real need for an independent judgment.

Should the recommendations of the President's Review Committee on Employee-Management Relations in the Federal Service concerning grievance arbitration be adopted, the role of such arbitrations in labor relations would almost surely be strengthened. The system fostered by Executive Order 10988 seeks to have effective participation by federal employees in matters concerning their welfare. The more integrity the system has, the better the work force and the more meaningful the participation that will result.

¹³³ Both union and management officials.

¹³⁴ The rate of frequency to date has been 1966-1, 1967-4, 1968-9. This contrasts with the Navy's experience of 1964-1, 1965-13, 1966-10, 1967-27, 1968-21, and 1969-15 (through 4 Apr. 1969). The Navy's experience is in terms of arbitration requests received, however, and includes 9 cases settled prior to hearing and 15 awaiting hearings. It also includes 20 disciplinary appeals, which are not grievable within Department of the Army. Interview with T. Garnett, *supra* note 55. The Air Force experience of one case, also a disciplinary appeal, is too slight for significant comparison.

¹³⁵ This is not entirely unhealthy. For an excellent discussion of the role of grievance arbitration in the total labor relations context which specifically points out the many reasons why a grievance might be pursued to arbitration, see R. FLEMING, *supra* note 121, at 20-21 and 203-06.

THE POSITION OF THE UNITED STATES AND THE SOVIET UNION ON TREATY LAW AND TREATY NEGOTIATIONS*

By Albert J. Esgain**

This article compares the Soviet Union and the West in relation to international agreements. Various aspects of entering, following, breaking, and cancelling treaties are discussed, with running contrasts of the Soviet and Western approach. It is stated, in conclusion, that knowledge of these differences is valuable in drafting and negotiating treaties with the Soviet Union.

I. INTRODUCTION

This article is concerned with the drafting and the negotiation of treaties and the rules and principles which are applicable to treaties, particularly those which relate to their enforcement and termination.

Its principal purpose is to compare the position of the Soviet Union with that of the United States and other Western Nations on various traditional treaty rules and general principles of international law, and to discuss the implications which arise from substantive dissimilarities in views on these matters. In this manner the paper seeks to establish a valid basis for determining the feasibility of concluding various types of treaties with the Soviets and the extent to which the Western Nations can rely on the provisions of treaties concluded with the Soviets. Determinations of this nature entail a consideration of the views of the Soviets on such important matters as the binding effect of treaty commitments, the circumstances that would justify the unilateral modifi-

*This article is the result of the research and analysis which the author performed in the fulfillment of a portion of a research contract with the United States Arms Control and Disarmament Agency. The article contains some new material, nevertheless, it is in large measure substantively similar to the material which he submitted to the agency under the contract. The opinions and judgments expressed are those of the author and do not purport to reflect the views of the United States Arms Control and Disarmament Agency, the Department of the Army, or any other department or agency of the United States Government.

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cation or abrogation of treaties, and the manner and means of enforcing treaty obligation. These considerations provide important guidelines in reaching decisions as to the manner in which treaties with the Soviets should be drafted, and the matters which should be expressly set forth in such treaties.

Generally, it may be said that, in theory, the Soviets recognize most of the rules and principles of treaty law that are recognized by the United States and other Western Nations. An examination of Soviet practice as opposed to theory, however, discloses material differences both in the application of these rules and principles, and in their binding effect. This is because international law in the Soviet Union plays only a subordinate role in Soviet foreign policy and is used primarily to justify and further that policy.¹

II. INTERNATIONAL LAW DEFINED

For the purpose of this article international law is defined as those principles and rules of conduct, both customary and conventional, which states consider legally binding upon them in their relationships with each other. These principles and rules include those which relate to the functioning and the relationships of international institutions and organizations and those which relate to the conduct of entities and individuals that are of concern to the international community.²

This definition recognizes that the basis of international law is the common consent of the states which comprise the international community.³ This consent may be either tacit or express. Tacit

¹ See J. TRISKA AND R. SLUSSER, *THE THEORY, LAW AND POLICY OF SOVIET TREATIES* 26, 57, 397, 404-05 (1962) [hereafter cited as TRISKA AND SLUSSER].

² See J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 1 (4th ed. 1955) [hereafter cited as STARKE]. See generally 1 L. OPPENHEIM, *INTERNATIONAL LAW* 15-27 (8th ed. Lauterpacht 1955) [hereafter cited as OPPENHEIM].

³ 1 OPPENHEIM 17, 25. As to duress or force in the conclusion of peace treaties, Brieryly has observed that peace treaties belong to an entirely different category of legal transactions from ordinary international agreements. J. BRIERLY, *LAW OF NATIONS* 245 (5th ed. 1955). The use of force in their effectuation does not derogate from the legislative character and binding force of a peace treaty. To allow otherwise, he states, would carry the principle of consent to the extreme, beyond the application given to it in municipal legislation where laws are imposed against the will of subjects in the general interest. In 1 OPPENHEIM 891-92, it is said that prior to the Covenant of the League of Nations, the Kellogg-Briand Pact of 1928, and the Charter of the United Nations, international law disregarded the effect of coercion in the conclusion of peace treaties, which was before that period a necessary corollary of the admissibility of war as an instrument for changing the existing law. It is further stated, however, that insofar as war is now prohibited by the Kellogg-Briand Pact and the UN Charter, states which resort to war in violation of the Pact and the Charter must be considered as having applied force in a manner not permitted by law and that duress in such cases vitiates the treaty.

consent is an implied consent, or consent which is clearly evidenced by the conduct of states and reflected by their adoption of the custom of conforming to certain general rules of international behavior. Express consent, on the other hand, is an affirmative consent which is given either verbally or in writing to rules of international conduct.⁴

III. THE NATURE OF INTERNATIONAL LAW: ITS BINDING EFFECT

It has been said that the designation, "international law," is a misnomer and that such a law does not exist because there is no international agency that is both empowered and capable of enforcing it. The critics consider international law as an inefficient code of conduct, of moral force only, and that war conclusively attests to its ineffectiveness in influencing and controlling the behavior of states.

This view has persisted since the very development of modern international law. More than three centuries ago Grotius wrote:

There is no lack of men who view this branch of law with contempt as having no reality outside of an empty name. On the lips of men quite generally is the saying of Euphemus which Thucydides quotes that in the case of a king or imperial city nothing is unjust which is expedient. Of like implication is the statement that for those whom fortune favors might makes right . . .⁵

Law, properly defined, is "a body of rules for human conduct within a community which by common consent of the community is and must be enforced by external power."⁶ The essential conditions of law, as defined above, are to be found in international law, including the most essential condition: that the rules of international conduct shall be enforced by external power. Governments of states and world opinion agree that international law shall, if necessary, be enforced by external power. In the absence of a central authority for the enforcement of international law, states have resorted to self-help, intervention, and war, under the circumstances prescribed by the Charter of the United Nations, as means of enforcing international law. The Charter of the United Nations, by providing a system of sanctions for repressing violations of its principle obligation, has in effect recognized the enforcement of law as a principle of conventional law. Perhaps the best evidence of the existence of international law is its recognition

⁴ 1 OPPENHEIM 25-26.

⁵ H. GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 9 (Carnegie Trans. 1925).

⁶ 1 OPPENHEIM 10.

in practice as law.⁷ Neither its legal nature nor its obligatory force is questioned by those who create and apply it.⁸ International courts have held that treaty undertakings are legal in nature, and that their interpretation is a legal, not a political, question.⁹ World public opinion also considers every state legally bound to comply with international law; and states have formally recognized the binding effect of international law by requiring, under their domestic legislation, that their citizens, officials, and courts comply with the obligations imposed on their states by international law.¹⁰ Almost without exception states that violate international law give lip service to it by invoking its rules to justify or to prove the validity of their acts; as for example, Hitler's instructions of 1 October 1938, which suggested explanations to be issued by the international law group to justify German actions under the laws of war.¹¹ Finally, the Charter of the United Nations and the Statute of the International Court of Justice clearly express the belief of nations in the binding effect of international law.¹²

As Payson Wild puts it:

International law . . . intrinsically is no different from any other form of jurisprudence. The rules in regard to treaties . . . are based upon the same type of community of interest and mutual need in the world society as exists behind the rules of contracts or of traffic regulations in the smaller domestic sphere. What differentiates international law from other law is not a matter of sanctions, sovereignty, and consent, but . . . the community to which it applies. There is not so much of a community internationally as there is nationally; therefore, there is less law in international relations than in domestic. That is all. The difference is not in kind but in extent. Rules which states feel to be to their interests to obey, and which in time they consider ought to be obeyed, states for the most

⁷ *Id.* at 14.

⁸ See Kuntz, *Sanctions in International Law*, 54 AM. J. INT'L L. 325 (1960); Kuntz, *The Law of Nations, Static and Dynamic*, 27 AM. J. INT'L L. 630 (1933); Roxburgh, *The Sanctions of International Law*, 14 AM. J. INT'L L. 26-37 (1920); Brierly, *Problems of Peace and War*, 17 GROTIUS SOCIETY 5-14 (1950); and J. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 105 (1944).

⁹ [1922] P.C.I.J., Ser. B, No. 1 at 19; [1948] I.C.J. 61.

¹⁰ 1 OPPENHEIM 15.

¹¹ W. GOULD, *AN INTRODUCTION TO INTERNATIONAL LAW* 133 (1957) [hereafter cited as GOULD], citing Doc. No. 002-C, 84 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946 145-48, partially translated in VI NAZI CONSPIRACY AND AGGRESSION 799-814.

¹² STARKE 17.

part will obey without the need for comprehensive sanctions. It is the same for individuals within the state.¹³

Treaties are in fact more regularly observed than violated and the use of threat of force has, generally, little to do with this behavior of states. The treaties which states are most likely to observe are those which are based on a mutuality of interests. Treaties most likely to be violated are those which, without considering various political considerations that may cause states to disregard the law, attempt to control political conduct by prescriptive rules. International law therefore "must be conceived of less as a body of commands which are expected to achieve their prohibitive purposes in opposition to social and political realities than as a canalization of those tendencies considered valuable in terms of social ends."¹⁴

The absence of an international legislature with power to enact new rules of international law and the lack of compulsory jurisdiction by an international court has not prevented states from recognizing, creating, and applying international law. It is true that international law has stressed substantive rights and obligations but that it has not yet developed adequate remedies and procedural rights. Nevertheless it cannot be denied that international law has established legal rights and obligations that are generally recognized. The absence of an enforceable judicial remedy does not, any more than in the municipal sphere, preclude the designation of these rights and obligations as real law.¹⁵

IV. SOURCES OF INTERNATIONAL LAW

Custom is the original source of international law and it is for that reason that international custom is referred to when the proper interpretation of a treaty is in doubt. It is worth noting that treaties derive their force and effectiveness from the rule of customary international law that treaties are binding upon the contracting parties (*pacta sunt servanda*).¹⁶

A. SOVIET VIEW

The Soviet Union gives limited recognition to custom as a source of international law. It has, however, consistently held that treaties are the primary, and until recently, the sole source of in-

¹³ Wild, *What Is The Trouble With International Law*, 32 AMER. POL. SCIENCE REVIEW 491 (1938).

¹⁴ H. BRIGGS, *THE LAW OF NATIONS* 20 (2d ed. 1952) [hereafter cited as BRIGGS].

¹⁵ *Id.*

¹⁶ 1 OPPENHEIM 28. GOULD 294.

ternational law, and that they form the fundamental foundation of international relationships.¹⁷ International custom is now recognized by the Soviets as the second source of international law but only to the extent that it "reflected the agreement of governments" so to consider it.¹⁸ Soviet recognition of custom as a source of international law is dictated by its desire to obtain certain rights that were compatible with its ideology and which "required no treaty formulation."¹⁹ The Soviets have also asserted as fundamental sources of international law what Soviet scholars refer to as basic "concepts and principles,"²⁰ which include a series of "basic laws, norms and concepts" that have been given a peculiar Soviet legal, political, ideological, and ethical content.²¹ On occasion the Soviets have viewed decisions of international organizations such as the League of Nations, the United Nations, and other international agencies as sources of international law provided, however, "that they were recognized and applied in practice" as sources of international law.²² In theory, the Soviet sources of international law resemble closely those recognized by the United States and other Western Nations. It has been pointed out, however, that Soviet adherence to these rules and its interpretation of them is an entirely different matter, in that the Soviets in their self-interest select freely from any and all sources of international law, even those not recognized by others, under the criterion of "domestic principles" (discussed below) which, when read in proper Soviet syntax, means "with the consent of the Soviet Union" or, in other words, those which are compatible with Soviet ideological goals.²³

B. THE TRADITIONAL VIEW: THAT OF THE WEST

In the West, the most important sources of international law are custom and treaties. Other, but less important, sources include:

1. *The General Principles of Law.*

Article 38, paragraph 1 (a), of the Statute of the International Court of Justice authorizes the court to apply in the resolution of justiciable disputes "the general principles of law recognized by civilized nations." This provision is considered as empowering the

¹⁷ TRISKA AND SLUSSER 26.

¹⁸ *Id.* at 13-14, 22.

¹⁹ *Id.* at 14.

²⁰ *Id.* at 28.

²¹ *Id.*

²² *Id.* at 29.

²³ TRISKA AND SLUSSER 29-30.

court "to apply legal analogies; natural law; general principles of justice; general principles of international law, as opposed to specific rules of international law; customary international law; and general principles of positive national law, or comparative law."²⁴ Charles Rousseau states that the jurisprudence of international tribunals indicates that recourse to general principles of international law, and to general principles of positive law recognized *in foro domestico*, is recognized by states as a subsidiary means for determining the rules of international law.²⁵ Thus, even excluding the Statute of the International Court of Justice, by which states conferred this authorization upon the court, the recourse to general principles of law is an accepted juridical procedure. Although sparingly employed by the court in practice, it provides a means of extending the scope of content of international law.²⁶ The resort to "general principles of law" is an acceptance of the view that while decisive weight will be given to the will of the states as the basis of international law, that law is not divorced from the legal experience and practice of mankind.²⁷ International courts have seldom found occasion to apply the ambiguous formula "general principles of law" in the resolution of disputes because they have been able to find in cases before them the applicable law in either treaties, customary rules, principles of international law, or judicial precedent.²⁸

2. *Judicial Decisions.*

Article 38 of the Statute of the International Court of Justice provides, subject to certain limitations, that the court shall apply judicial decisions as a subsidiary means for the determination of rules of law. The decisions of international courts, however, do not themselves constitute rules of international law; they provide only direct evidence of the existence of a rule of international law. As a practical matter, the decisions of international tribunals exercise a considerable influence on the development of international law,²⁹ for, unlike the establishment of an international custom, which requires the repetition, continuity, and generality of a series of analogous acts, a single judicial decision is often sufficient to exert

²⁴ BRIGGS 48. See GOULD 136; 1 OPPENHEIM 24-25.

²⁵ 1 C. ROUSSEAU, PRINCIPLES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC 889-929 (1944).

²⁶ BRIGGS 48.

²⁷ 1 OPPENHEIM 31-32.

²⁸ *Id.* at 29-30; STARKE 40-44.

²⁹ 1 OPPENHEIM 31; BRIGGS 49.

a preemptory influence on a judge.³⁰ There is little doubt, however, that "with the exception of treaties, the decisions of the . . . court are now the most powerful influence in the development of public international law."³¹

3. *Writings.*

The Statute of the International Court of Justice designates, as a subsidiary source of international law, "the teachings of the most highly qualified publicists of the various nations." To date the court has not formally relied on this subsidiary source of international law.³² Teachings of this nature have occasionally appeared in judicial pronouncements, but only as evidence of international law, not as a law-creating factor or as a source of law.³³

4. *Recommendations, Resolutions, or Decisions of the General Assembly or Other Organs of the United Nations.*

As a general rule these resolutions and decisions do not create binding obligations in positive law.³⁴ They constitute only intermediate steps in the evolution of customary law.³⁵ Under certain circumstances, however, they produce "important juridical consequences and possess binding legal force."³⁶ Under Article 25 of the Charter of the United Nations, for example, the members of the United Nations are obligated by "decisions" of the Security Council. It is not clear, however, that all resolutions of the Security Council are to have a binding effect. Gould is of the opinion that the "recommendations" of the general Assembly, and of other organs of the United Nations, "attain the character of law if the Security Council decides, under Article 39, that noncompliance constitutes a threat to the peace."³⁷ Ambiguity in the language

³⁰ M. SORENSEN, *LES SOURCES DU DROIT INTERNATIONAL*, 153-76, 155 (1946); 1 OPPENHEIM 31; STARKE *supra* note 12 at 40-41; H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 10 (1934).

³¹ Gardner, *Judicial Precedent in the Making of International Public Law*, XVII JOURNAL OF COMPARATIVE LEGISLATION 251 (3d Series, 1935).

³² 1 OPPENHEIM 31; BRIGGS 19; Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 BRIT. Y.B. INT'L L. 65 (1929); 1 G. SCHWARZENBERGER, *INTERNATIONAL LAW* 12-13 (2d ed. 1949).

³³ 1 OPPENHEIM 45; STARKE, *supra* note 12 at 44-46; GOULD 142-44.

³⁴ Sloan, *The Binding Force of the United Nations*, 25 BRIT. Y.B. INT'L L. 1-33 (1948).

³⁵ STARKE, *supra* note 12 at 33.

³⁶ Sloan, *supra* note 34 at 27.

³⁷ GOULD 144. See H. Kelsen, *LAW OF THE UNITED NATIONS*, 95-98, 293-95, 444-50, 459 (1950). See also Sloan, *supra* note 34 at 22-28. Cf. the position of the Soviet jurist, Krylov, *Les nations principales du droit des gens (La doctrine soviétique du droit international)*, 70 RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE, 92-93 (1947).

of the Charter prevents a conclusive judgment concerning which resolutions of the UN organs have the force of law, and only future practice will permit classification with any degree of certainty.³⁸

The strength of the new nations in the United Nations may lead to increased efforts to develop law through UN General Assembly resolutions. Although such declarations have no binding effect, they reflect a world consensus which nations cannot ignore and which can be used either to strengthen existing precedents or to develop such new rules and principles of international law as may be required.

V. CONVENTIONAL INTERNATIONAL LAW

A. GENERAL VIEW

A treaty is an agreement of a contractual nature between states or organizations of states and their agencies which is legally binding upon them as signatories.³⁹ A treaty, therefore, no matter how it may be technically designated or referred to, constitutes a restriction on the sovereignty of the signatory states, which either establishes, regulates, modifies, or terminates a juridical relationship between them.⁴⁰

B. THE SOVIET VIEW

The Soviets define a treaty somewhat differently. Their definition is a composite of traditional and ideological concepts. A treaty is defined and explained by them as (a) an international agreement between states creating rights and obligations of a public character in international law, usually embodied in a written instrument, and (b) a typical and most widespread legal form of struggle or cooperation in the realm of political, economic, and other relations among states which "rests on legal principles of equality of the contracting parties, bilateral acceptability, and mutual benefit."⁴¹ The first part of the definition is substantially identical to that given to a treaty by the West. The second part, however, is a doctrinal dissension and qualification which could

³⁸ GOULD 144.

³⁹ 1 OPPENHEIM 877.

⁴⁰ See Myers, *Treaty Violations and Defective Drafting*, 17 AM. J. INT'L L. 538, 565 (1917).

⁴¹ TRISKA AND SLUSSER at 40-41.

become "a serious obstacle to Soviet 'peaceful competition' if and when applied to Soviet treaty practice."⁴²

VI. TREATY FORM AND TREATY CLASSIFICATION

International law contains no rules which prescribe a required form for treaties. A treaty is concluded as soon as the mutual consent of the parties to a special undertaking is clearly manifested by their express consent or by their conduct. Thus, it is immaterial whether the understanding or agreement is an oral one or one in writing in order for the understanding to be a legally binding one.⁴³ The international juridical effect of an understanding is not dependent upon its form or upon the name given to the instrument.⁴⁴ Tacit acquiescence only, however, does not constitute a treaty.⁴⁵

Generally, the classification of the different kinds of treaties is juridically irrelevant, except for municipal purposes.⁴⁶ The term "treaty" is applied to a variety of international instruments and understandings which have little in common except their contractual aspect. They range from agreements, exchanges of notes, letters, telegrams, to oral understandings; and they range from those concerned exclusively with political arrangements, through multi-lateral "legislative" or "law-making" conventions, to international conveyances of a "dispositive" nature. Thus, a treaty may be primarily political, relating to alliances, neutrality, arms control and disarmament arrangements, or political settlement; or it may be economic, and concerned solely with commerce and tariffs; administrative, and concerned with such matters as drug control, navigation, international postal regulations; or juridical, and con-

⁴² *Id.* at 38, 41. Vishinsky in 1948 accurately defined international law under Soviet theory as "the sum total of the norms regulating relations between states in the process of their struggle and cooperation, expressing the will of the ruling classes of these states and secured by coercion exercised by states individually or collectively." Vishinsky, *Mezhdunarodnoie Pravo i Mezhdunarodnail Organizatitla*. 1 SOVETSKOIE GOSUDARSTVO I PROVO 22 (1948), cited by Lissitzyn, *International Law in a Divided World*, INTERNATIONAL CONCILIATION, No. 542, 16-17 (March 1963).

⁴³ P. COBBETT, LEADING CASES ON INTERNATIONAL LAW §19 (3d ed. 1909) [hereafter cited as COBBETT]; P.C.I.J. Ser. A/B No. 53, p. 75. See 1 OPPENHEIM 898, and GOULD 303 for instances of oral treaties.

⁴⁴ HARVARD RESEARCH IN INTERNATIONAL LAW, DRAFT CONVENTION ON THE LAW OF TREATIES 710 (James W. Garner, Reporter, 1935) [hereafter cited as HARVARD RESEARCH]. See McNair, *The Functions and Differing Legal Character of Treaties*, 11 BRIT. Y.B. INT'L L. 100 (1930).

⁴⁵ 1 OPPENHEIM 827.

⁴⁶ *Id.*

cerned with extradition, international judicial cooperation, or the enforcement of foreign judgments.⁴⁷

The Harvard Research in International Law states:

In addition to the terms "treaty" and "convention," which in earlier times were employed almost exclusively to designate the instruments which are considered today as treaties in the generic sense, there have come into use on a wide scale such terms as "protocol," "agreement," "arrangement," "accord," "act," "general act," "declaration," "*modus vivendi*," "statute," "regulations," "provisions," "pact," "covenant," "compromise," etc. In fact the number of instruments designated by these terms is now in excess of those styled "treaties" and "conventions."⁴⁸

The Harvard Research concludes that "from the juridical point of view all treaties are essentially alike and are governed by the same rules of international law."⁴⁹ The distinction, however, under the U.S. Constitution and the decisions of the Supreme Court of the United States, between a "treaty" and an "Executive agreement" is of considerable *juristic* importance, as will be noted below.

In international practice the terms *treaty* and *convention* are employed interchangeably by states, including the USSR,⁵⁰ to mean formal agreements that require ratification. The term *convention* has, as a general rule, been reserved for agreements of minor importance or those of a technical nature, whereas the term *treaty* has been used to designate agreements which deal with the larger political interests of states and matters of a general nature.⁵¹ Among the formal documents encompassed by the term *treaty* are those which bear designations reflecting the increased recourse to international conferences such as *act*, *general act*, *final*

⁴⁷ D. O'CONNELL, *THE LAW OF STATE SUCCESSION* 15 (1956).

⁴⁸ HARVARD RESEARCH 686, 688, 711-13. See GOULD, *supra* note 16 at 298-306. An Examination of more than "300 multipartite instruments concluded during the years 1919-1929 . . . indicates that only 18 are designated as 'treaties,' and 123 as 'conventions'; 105 are designated as 'protocols,' 39 as 'agreements,' 9 as 'statutes,' 12 as 'declarations,' 5 as 'arrangements,' 7 as 'provisions,' 2 as 'general acts,' 2 as 'additional acts,' and several as 'regulations' . . ." HARVARD RESEARCH 686.

⁴⁹ HARVARD RESEARCH at 688.

⁵⁰ Under United States law the term "treaty" is restricted to international agreements concluded by the President by and with the advice and consent of the Senate. The terms "agreement" or "Executive Agreements" are used to designate international agreements concluded by the President or under his constitutional authority without the advice and consent of the Senate. The judicial significance of a "treaty" and of an "Executive Agreement" under United States law is considered elsewhere. See E. BYRD, *TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES*, 80-122, 163-65, 177-78, 199-202 (1960) [hereafter cited as BYRD].

⁵¹ See TRISKA AND SLUSSER 38-40.

act, declaration, agreement, regulation, statute, covenant, charter, and pact. Certain of these designations, such as *charter, general act, or statute,* imply that the agreement reached is law-making, or constitutional in nature, as in the case of the UN Charter.

The term *declaration* may be used to designate either a legislation instrument; a statement of two or more states of joint policy; or a document issued for propaganda purposes only, for example, the joint declaration of 14 August 1941, referred to commonly as the "Atlantic Charter." The essential factor in determining the binding nature of an instrument as a treaty is not its description, but whether it is intended to create legal rights and obligations. A declaration under this test may not be a treaty. In some cases, as in the Universal Declaration of Human Rights, the absence of an intent to undertake a treaty obligation is clearly apparent from the statements made by the signatories prior to the adoption of its text. In other cases the clauses of the instrument usually indicate with sufficient clarity that they are intended as general statements of policy only, rather than legal obligations.⁵²

The term *general act* is usually applied to agreements arrived at by some congress or conference of powers on matters of general international concern.⁵³

The term *protocol* is used in several senses. It may refer to a document which sets forth the conclusions reached, or the reservations made, by the signatories at various stages in the course of prolonged negotiations or conferences.⁵⁴ It may designate, as well, an instrument supplementary to a treaty. The term is also employed to signify the *process-verbal* (signed minutes) of a conference.⁵⁵

A *compromis* refers to an agreement whereby states submit a dispute to arbitration and which specifies the *bases* on which the court's decision is to be predicated.⁵⁶

A *pactum de contrahendo* is an agreement whereby the signatories undertake to explore in good faith the possibility of reaching an agreement on a particular subject.⁵⁷

⁵² COBBETT 318; GOULD 298; STARKE 284.

⁵³ See generally, Fawcett, *The Legal Character of International Agreements*, 30 BRIT. Y.B. INT'L L. 381 (1953).

⁵⁴ COBBETT 318; GOULD 299; STARKE 286-87.

⁵⁵ COBBETT 48; STARKE 284.

⁵⁶ GOULD 300; 1 OPPENHEIM 878.

⁵⁷ GOULD 300.

A *modus vivendi* is a temporary understanding pending a more definitive and permanent agreement.⁵⁸

An *exchange of notes* may be said to be an understanding reached in a manner similar to that on private commercial transactions by means of offer and acceptance. The notes exchanged need not be signed. This method of reaching an understanding is both simple and expeditious, and its binding nature is in no way prejudiced, it being as binding as any other treaty. An exchange of notes may also be issued to amend or to modify a formal treaty.⁵⁹

VII. LAW-MAKING OR LEGISLATIVE TREATIES

Oppenheim believes that the whole body of treaties can be divided into two meaningful general classes. First are those concluded for the purpose of laying down general rules of conduct among a considerable number of states. Treaties of this kind are termed law-making. In the second class are treaties concluded for all other purposes. It is his opinion that although all treaties, bilateral as well as multilateral, are in effect law-making, inasmuch as they lay down rules of conduct which are binding upon the contracting parties, the term law-making should properly be reserved for those which judicial practice has recognized, even though contractual in origin and character, as "possessing an existence independent of and transcending the parties to the treaty." He cites as examples of law-making treaties the provisions of the Mandate for South-West Africa, which were in the nature of a treaty between the Council of the League of Nations and South-West Africa as to which the International Court of Justice held in 1950, in the case of the *Status of South-West Africa*, that the provisions of the Mandate continued in force and effect even though the League of Nations had ceased to exist.⁶⁰ In its decision the court stated: "The international rules regulating the Mandate constituted an international status for the Territory recognized by all the Members of the League of Nations including the Union of South Africa."⁶¹ A second example is the *Reparation for Injuries* case, in which the International Court of Justice held that the provisions of the Charter of the United Nations invested the United Nations with

⁵⁸ *Id.*

⁵⁹ *Id.* See STARKE 287. See also E. BYRD 148-65, for a useful summary of the various constitutional methods of effectuating international agreements in the United States.

⁶⁰ 1 OPPENHEIM 878-80

⁶¹ [1950] I.C.J. 123, 155-57.

an international status which transcended the group of states comprising the membership of the United Nations.⁶² McNair asserts that there are "two classes of treaties which have a law-creating effect beyond the immediate parties to them." The first consists of "treaties which form part of an international settlement," for example, World War I peace treaties; the second of "treaties which regulate the dedication to the world of some new facility for transit or transportation," for example, the right of world navigation upon a river formerly closed.⁶³ In support of his contention he quotes Roxburgh:

It frequently happens that a treaty becomes the basis of a rule of customary law, because all the States which are concerned in its stipulations have come to conform habitually with them under the conviction that they are legally bound to do so. In this case third states acquire rights and incur obligations which were originally conferred and imposed by treaty but have come to be conferred and imposed by a rule of law.⁶⁴

A "conviction" by third states that such a treaty is legally binding upon them is a matter of proof which is difficult if not impossible of establishment, particularly when the imposition of burden is involved. It is said, however, that the conviction is to be presumed with respect to treaties designated as international settlements.⁶⁵ It is more probable that it is not the implied conviction of third states which give treaties of this nature whatever binding effect they may have upon noncontracting states but rather the preponderant strength and power of the signatory states, which third states cannot successfully challenge or which they decline to challenge because of the risk of combat, adverse public opinion, political repercussions or other detrimental action.

It is worth noting that in the Soviet view no treaty can impose obligations on third states. Under the Soviet concepts of consent, will, and equality, their position on this matter appears to be absolute, even as to law-making treaties.⁶⁶

Quincy Wright has classified treaties according to their subject matter as being: (1) political (peace, alliance, neutrality, guaran-

⁶² [1949] I.C.J. 178-85.

⁶³ McNair, *So-Called State Servitudes*, 6 BRIT. Y.B. INT'L L. 122-23 (1925).

⁶⁴ R. ROXBURGH, INTERNATIONAL CONVENTIONS AND THIRD STATES 51-60 (1917).

⁶⁵ *Id.* Cf. A. KEITH, STATE SUCCESSION 20-25 (1907). In I OPPENHEIM 927 (n. 2), the opinion is expressed that treaties intended to establish an international regime or settlement "would seem to be a case of unanimous consent."

⁶⁶ See TRISKA AND SLUSSER 105.

tee); (2) commercial (tariff, consular, fishery, navigation); (3) constitutional and administrative (establishing or regulating international unions, international organizations such as the United Nations, and international agencies such as the International Labor Organization); (4) criminal justice (defining international crimes (*e.g.*, the 1949 Geneva Prisoners of War Conventions, extradition)); (5) civil justice (human rights, trademarks, and copyrights); (6) codifying international law (Hague Convention of 1907 on rules of land warfare and the 1962 Vienna Convention on Diplomatic Immunities).⁶⁷

A somewhat more functional and informative breakdown of treaties would be one based upon the extent or scope of their effectiveness or enforceability. Under a breakdown of this nature, treaties could be identified as: (1) *law-making*; (2) *universal* (binding upon all states without exception); (3) *general* (binding upon a large number of states, including the leading states); (4) *regional* (the so-called American International Law binding only upon the various states of the American continent except Canada); (5) *particular* (binding on two or a few states only).

Treaties can also be broken down into two broad categories which are indicative of the scope of their dispositive nature: personal treaties and dispositive treaties. Personal treaties are those which bind the contracting parties only and are subject to the rules generally applicable to treaties (treaties of alliance, tariff, etc.). Dispositive treaties, on the other hand, are those which are in the nature of a conveyance, *e.g.*, cessions of territory, those fixing territorial boundaries, or those which create so-called "international servitudes," alleged to transfer or create real rights and obligations, which, being attached to the territory itself, are alleged to be binding upon all states for all time.⁶⁸

VIII. FUNCTIONS AND OBJECTIVES OF TREATIES

A treaty is the means by which states carry out their numerous and various international transactions. It is the instrument by which states perform all types of legal international acts. In addition to other purposes, it is used to transfer or lease territory; to establish boundaries; to enact international constitutional law, as for example, the UN Charter; to create international organiza-

⁶⁷ 22 ENCYCLOPAEDIA BRITANNICA (1963).

⁶⁸ See D. O'CONNELL, *THE LAW OF STATE SUCCESSION* 16-17, 49-54 (1956). Cf. Esgain, *Military Servitudes and the New Nations: The New Nations in International Law and Diplomacy*, III *THE YEARBOOK OF WORLD POLICY* 42 (1965).

tions, such as the International Telecommunication Union, the International Monetary Fund, the International Civil Aviation Organization, the Universal Postal Union, the World Meteorological Organization, and the International Labor Organization; to create military alliances, such as NATO and the Warsaw Pact; to neutralize or demilitarize certain areas, as for example, Austria and the Aaland Islands; and to enact international legislation by law-making treaties, such as the World War I peace treaties and the Internationalization of Waterways.⁶⁹ As a practical matter, treaties are employed to regulate and coordinate the conduct of interstate relations. They establish the procedures through which international cooperation is promoted, differences are reconciled, national and international security is insured, and economic, commercial, and military activities are developed and coordinated.⁷⁰

The effectiveness of treaties in developing and perfecting a politically integrated world community is impeded largely because of cultural and ideological differences. Only when states possess certain cultural and ideological similarities in the sphere of values and procedures can international agreements attain a minimum of international stability.⁷¹ The reliability of a treaty is in large measure proportionate to the cultural and ideological similarities that exist between the contracting states, their comparative strength, and the extent to which they will benefit from its conclusion.

Successful recourse to treaties is further ensured when each contracting state is convinced that the treaty will accomplish the desired ends, and that each other state has consistently observed prior treaties. In the light of the teachings of Soviet leaders on the advantages of the political tactics of advance, retreat, and consolidation of political advantages,⁷² and the numerous branches by Russia of its interwar treaties of friendship,⁷³ it would be prudent to

⁶⁹ See McNair, *The Functions and Differing Legal Character of Treaties*, 11 BRIT. Y.B. INT'L L. 100 (1930).

⁷⁰ See GOULD 291.

⁷¹ *Id.* at 292.

⁷² *Id.*

⁷³ A study prepared by Congress in 1953 of treaties made during World War II between the United States, United Kingdom, and Russia on 72 different subjects concludes that at least 37 provisions of these agreements were violated by the Soviets and that in many instances the violations were recurrent. COMMITTEE ON FOREIGN AFFAIRS, STAFF STUDY, ENTITLED WORLD WAR II INTERNATIONAL AGREEMENTS AND UNDERSTANDINGS, 83d Cong., 1st Sess. (1953). For a consideration of important treaty violations by the USSR, see TRISKA AND SLUSSER and the list of publications on this subject which appears in their footnote 4 in Chapter 26 at 523.

recall that the Soviets regard a political treaty primarily as a weapon for attaining a world Communist society, not as an instrument for the settlement of differences and the achievement of mutual advantages.⁷⁴

IX. THE ROLE OF SELF-INTEREST IN TREATIES

The conclusion of treaties is dictated in large measure by considerations of self-interest and mutual advantage. The pronouncements and tactics of those negotiating treaties can be understood only by relating them to the interests of their states on questions of military, political, economic and commercial importance. The primary responsibility of negotiators is, of course, to protect and enhance the over-all security and general welfare of their states. It is only because states, although politically independent, are otherwise interdependent that they are forced to conclude treaties and thereby forego certain of their interests and prerogatives in order that they may enhance their special interests which depend upon international cooperation. This end is attained by choosing between conflicting interests, and sometimes by compromise.⁷⁵ Some international relationships are essential to the life and development of a state, and such relationships can be maintained only within some framework of mutually acceptable behavioral norms. The penalty for a failure to observe generally recognized standards of behavior is the interruption or termination of desired relationships. This observation, of course, applies to all states. Compliance by the Soviet Union with many of the rules and principles of international law is, therefore, not surprising. It merely reflects the vital role of international law, and reciprocity in particular, in normal day-to-day relations, even between hostile states. Important modifications in Soviet international practice are directly attributable to reciprocity, for example, the action of the United Kingdom in 1955 in denying certain Soviet diplomatic personnel the full immunities which were normally enjoyed in the United Kingdom by the diplomatic personnel of other countries, because the domestic law of Russia on diplomatic immunity precluded the extension of diplomatic immunity to certain categories

⁷⁴ GOULD 292. The Soviets, dedicated to the overthrow of the capitalist world order, envision, eventually, a classless society in which neither states nor laws will be required. They view history as a struggle between antagonistic classes in which compromise is not possible, and which will end with the defeat of the capitalist, the oppressors of mankind. See Lissitzyn, *International Law in a Divided World*, INTERNATIONAL CONCILIATION No. 542 (March 1963), and TRISKA AND SLUSSER 41-42, 47.

⁷⁵ See GOULD 118-19.

of diplomatic personnel of the United Kingdom. This action, detrimental to Soviet interests, was sufficient to induce the Soviet Union in 1956 to enact legislation that was compatible with its obligations under customary international law to accord immunity to all of the diplomatic personnel of foreign countries.

The Soviets have always recognized the importance of treaties as a means of attaining policy objectives and the importance of direct negotiations for the purpose of reaching acceptable agreements on disputed matters in the interest of peace.⁷⁶ They have asserted as their broad treaty objectives general welfare, nonaggression, and peace. These Soviet statements, however, are illusory because the Soviets have breached their treaties on a wholesale and ruthless basis whenever such action fostered the interests of world communism, an objective which they have openly and repeatedly admitted. History is replete with instances in which the Soviet Union has, under the guise of nonaggression treaties, relentlessly subjugated its neighbors without in any way satiating its desire to expand the area of Communist domination.⁷⁷

Considerations of self-interest profoundly influence decisions to make or break treaties and also the feasibility of enforcement action in case of breach. Self-interest can also preclude the adoption of treaties. Disarmament conferences, both past and present, have generally foundered upon the desire of the participants to exclude therefrom the weapons which would provide them an advantage in war. In negotiations between the United States and Russia to control the development and use of atomic energy, each insisted on measures to its advantage—the USSR on the destruction of existing stocks of atomic bombs, the United States on inspection. This situation in arms control and disarmament agreements has continued to date for the same reason: positive security insurance and military advantage. The numerous disarmament proposals by the United States and the Soviet Union since 1945 vividly reflect the role of security and self-interest in negotiations.⁷⁸

The primary role of self-interest as the basis for the conclusion of treaties was recently evidenced in the military operations of the United States and the Communist states in Korea, Laos, and Vietnam. In Korea the United States acted upon Communist armistice overtures because it had an interest backed by public sentiment, in ending what was still a limited war on honorable terms. The

⁷⁶ *Id.*

⁷⁷ See TRISKA AND SLUSSER 397-99.

⁷⁸ See J. SPANIER AND J. NOGEE, *THE POLITICS OF DISARMAMENT* (1962).

Communists in Korea were equally desirous of terminating a war which they were losing on a negotiated basis, rather than by a surrender. In 1954, the United States considered the Geneva Accords preferable to letting the war continue as it was, and, on that basis, expressed its willingness to abide by them, as it was willing to abide by the Geneva Accord on Laos in 1962 for the same reason. The Soviet Union accepted these accords because it felt that nothing tangible could be attained from what it considered to be the "wrong war in the wrong place," and perhaps because of internecine rivalry with Communist China. The advantages of the 1954 Accords to North Vietnam and Communist China, on the other hand, appear to have been avoidance of an open war with the United States while retaining the possibility of accomplishing their objectives through subversive and covert activities.¹⁹ The role of self-interest as the basis for the peace talks now in progress between the United States, the Republic of Vietnam, the Democratic Republic of Vietnam, and the National Liberation Front is so obvious that it needs no elucidation.

X. NEGOTIATIONS

Negotiations between states, as indicated previously, are undertaken for a host of purposes. They may be initiated for the purpose of exchanging views on political questions or issues; to discuss procedural matters; for the settlement of differences; or, more particularly, for the purpose of concluding a treaty.

A. INDIRECT NEGOTIATIONS

The stage for negotiations may be set in a variety of ways. Formal negotiation may arise from action taken, or from inquiry made by representatives of states on the basis of an ostensibly casual statement, a speech, or an expression of a view, public or otherwise, by an influential citizen of another state. They may even arise from an inspired leak to the press, or on the unilateral action

¹⁹ See THE FORRESTAL DIARIES 309, 322-23, 341, 344-48, 362-64 (Millis ed. 1951). Gould has observed that international negotiations are not initiated or concluded, nor treaties breached solely for national advantage or the general welfare of states. Powerful industrial, commercial, or social groups within a nation, in pursuit of their particular interests, are also capable of exerting a motivating influence on foreign policy, international negotiations, and international law. This influence is to be observed in the rules applicable to international claims by entities doing business in foreign countries and the policy of imposing sanctions on foreign states to induce them to comply with their private international commercial commitments. GOULD 124.

or conduct of a state which effectively communicates its intent to other states on a particular issue, as for example, arms control and disarmament matters, modifications in defense appropriations, a shift from soft to hard missiles or the manner of their deployment, mobilization of troops, their removal from particular areas, or their reduction in numbers. These and other means of indirect but effective communication may result in fruitful negotiations and treaties.

Even though the statements and conduct of representatives of one state may not lead to formal negotiations or the conclusion of a treaty on a particular matter, they may nevertheless motivate other states to take similar action or to pursue a like course of conduct so that in effect the result is substantially similar to that which would have been attained by the conclusion of a treaty. In some instances, by unilateral course of conduct which they hope others will follow, states can accomplish indirectly and effectively what could not have been accomplished by treaty due to prestige, face saving, or public opinion considerations.⁸⁰ The self-imposed US moratorium on nuclear tests which it was hoped would lead to similar action on the part of the USSR was an attempt to attain indirectly a result which the United States considered improbable of accomplishment by formal negotiations and a treaty.

B. NEGOTIATIONS THROUGH CONDUCT

Unilateral action by one state, the continuance of which is expressly predicated upon reciprocity, and which in fact results in reciprocal conduct, can also produce a legal relationship which is substantially similar to the one which would have resulted from a formal understanding on the matter. Should the conduct initiated by this procedure be followed by states generally over an appropriate period of time, it could attain the stature of customary international law. It should also be observed that reciprocal self-restraint can provide an effective means of keeping limited wars from escalating into general war, as was vividly demonstrated during the Korean, Laotian, and Vietnamese conflicts.⁸¹

⁸⁰ See Schelling and Halperin, *Negotiation and Agreement*, which appears as Chap. 19 in *ARMS CONTROL AND DISARMAMENT* (Lefever ed. 1961). See also Fisher, *Constructing Rules that Effect Governments*, which appears as Chap. 3 in *ARMS CONTROL, DISARMAMENT, AND NATIONAL SECURITY* (Brennan ed. 1961).

⁸¹ The President of the United States has officially declared the intention of the United States to subscribe to the aim of limiting war should it break out. He has stated: "If . . . a local dispute should flare into armed hostilities, the next problem would be to keep the conflict from spreading." President Eisenhower, State of the Union Message, 9 Jan. 1959, *New York Times*, 10 Jan. 1959.

The airing before the United Nations of international disputes on which it takes an official stand, by resolution or otherwise, can on occasion attain a binding result which could not have been obtained through treaty negotiations.

C. FORMAL NEGOTIATIONS

Formal international negotiations, bilateral or multilateral, are conducted by official agents of the negotiating states. The heads of states may conduct the negotiations personally through representatives, or by communications, as appropriate. As a rule, however, negotiations concerning important matters are conducted by their secretaries of state or foreign affairs, as the case may be, with the assistance of their diplomatic agents and a staff of technical advisers.⁶²

The agents of the negotiating states operate under preliminary instructions. They may at any time, of course, consult with their governments and, when they deem such action necessary, may seek from them new instructions. As a general rule, they do seek instructions prior to the signing of the agreement. International law does not prescribe the manner in which negotiations are to be conducted. They may take place *viva voce* or by the exchange of written drafts and supporting documents. Generally, important negotiations are initiated and conducted by the exchange of written documents through diplomatic channels; and they should be, for this procedure insures against the misunderstanding that could easily arise if they were undertaken by *viva voce* negotiations.

The importance of the negotiating stage of the treaty process cannot be overemphasized. The realization of the benefits visualized by the treaty depends in large measure upon the meticulousness of the preparations for the negotiations, the means used to insure that the negotiations progress in the manner and in the direction desired, the assessment of the various possible negotiating positions and tactics which the other party or parties to the agreement may take, and each party's argumentation in support of its position. It is needless to say that the negotiators and the personnel of technical staffs should be men of broad knowledge, experience, and ingenuity. It is essential, for example, that the personnel of the negotiating team be well versed in international law, the law of the other contracting states, and the judicial decisions

⁶² STARKE 292.

under these various systems of law. The treaty that is eventually concluded can then be clear, complete, precise, and to the point. If it is based upon a full knowledge of the various applicable laws (international, foreign, and domestic), the possibility of misunderstanding and varying interpretations of its provisions will be reduced to the very minimum. This objective is paramount, for a treaty is not violated, under international law, through a difference of opinion as to its meaning; it can only be violated when the parties accept the same meaning, and the sense thereof is contravened. If a treaty is to have a fair chance of success, therefore, its provisions must be so clear and precise, that differing interpretations cannot later arise which could occasion dissension and misunderstanding. This type of draftsmanship is particularly essential in treaties concluded with the Soviets, especially those which relate to defense and security matters, because their views and concepts of international law in practice and application vary considerably from those of the West. They have also used ambiguities and gaps in treaty provisions to justify action which would appear to contravene the over-all intent and purposes of the agreement. The Soviets are clever draftsmen of international agreements so worded that they can be used to their advantage even though ostensibly invulnerable to varying interpretations. For this reason it would be prudent to maintain a complete record of the negotiations leading to treaties with the Soviets and to insure that the minutes reflect their approval by the Soviets. By this procedure the intent of the parties on matters which may later be put in issue can be clarified, and interpretations precluded which would be plausible were it not for the record.

D. GUIDELINES IN TREATY NEGOTIATIONS WITH THE SOVIETS

Triska and Slusser,⁴⁸ based upon a survey of more than 40 years of Soviet theory, law, and policy, have concluded that the following guidelines should "serve as a kind of irreducible minimum" for those who negotiate with the Soviet Union: (a) the Soviets, because of their ideology, have little respect and show little concern for the concept of the sanctity of treaties; (b) the Soviets are ingenious and resourceful in devising reasons to support the abrogation and termination of treaties. The reason which they advance may be entirely unrelated to the text, the content, or the intent reflected in the treaty; (c) a cardinal point to be kept in mind is the

⁴⁸ TRISKA AND SLUSSER 404-05.

need for precise formulation of any agreement with the Soviet rulers. This means, in practice, an almost total ban on agreements inherently susceptible to a variety of interpretations, particularly oral agreements. The terms used in agreements should be defined as accurately as possible. The terms "democracy," "free elections," "freedom," and "self-determination" for example may appear to be unequivocal and not subject to misinterpretation, yet experience has shown that they can be given a meaning entirely different from their proper meaning when employed by diplomats of the Soviet Union. Even better than a definition of such terms would be the substitution of specific practical modes of action and procedure designed to help each party put its treaty obligations into operation.

Agreements with the Soviet Union should include specific provisions for (1) their modification, revision, or termination by mutual agreement; (2) the adjudication of disputes, the appointment of a joint arbitration board, or the submission of the dispute to an impartial tribunal to enhance the possibility of attaining mutually beneficial results; and (3) their termination by a given date or upon the completion of the purposes for which the agreement was concluded.⁵⁴ Preferably, it is believed that treaties with the Soviets should provide for the unilateral termination of treaties subsequent to written notice of intent to terminate, rather than to make their termination subject to mutual consent. It is illogical to suppose that such a provision would in any way deter the Soviets from breaching agreements which have become burdensome or incompatible with their basic interests. The requirement for mutual consent under these circumstances would serve no useful purpose and would only intensify existing tensions and conflicts.

In anticipation of possible misunderstanding that may arise incident to the interpretation of treaties, it would be proper for the United States to seek in negotiations with the Soviets express treaty provisions which, depending upon the sensitivity of the subject matter, provide for (1) unilateral termination after notice; (2) the revision of the treaty or certain provisions thereof on the request of any party, and the right to terminate the treaty should revision by mutual agreement prove impossible; (3) compulsory submission of justiciable disputes to the International Court of Justice, and the settlement of political disputes, preferably *ex aequo et bono*, by an arbitral tribunal, a group of experts mutually agreeable to both parties, or perhaps even by a majority vote of

⁵⁴ *Id.*

the UN General Assembly. Provision should be sought for the investigation of disputes and the marshalling of facts by a UN group, and for the submission of its findings and recommendations to the body which the parties have vested with adjudicatory authority.⁵⁵

It is doubtful that certain of these methods for the peaceful and orderly settlement of disputes would be acceptable to the Soviets, particularly the referral of disputes to the International Court of Justice or the General Assembly, and the investigation of disputed facts by the United Nations or any other international agency. It is improbable, on the basis of past experience, that the Soviets would agree to submit disputes, particularly political disputes, to an arbitral tribunal or group of experts for definitive resolution. In any event, a refusal by the Soviets to agree to one or some of these methods of settling disputes would in itself provide some indication as to the sincerity of the Soviets on the matter at hand, and the extent to which they regarded the proposed treaty as a benefit to them.

Although the Soviets have on numerous occasions alleged their firm desire to have all disputes settled by peaceful means, they have in practice steadfastly refused impartial or judicial settlement by the International Court of Justice or by an arbitral tribunal, or by other impartial agencies, except for disputes which have arisen incident to trade agreements of minimal importance, and disputes under agreements which related to private rights only.

The impartial or judicial settlement of disputes is inherently repugnant to Soviet ideology, which views this means of settlement as posing a threat to the Communist regime. Soviet leaders have displayed a negative attitude toward all proposals to refer disputes to the International Court of Justice or to an arbitral tribunal. They have recently rejected the repeated offers of the United States to submit to the court the disputes that have arisen due to the shooting down of US military aircraft by the Soviets. They have strongly opposed all efforts to extend the compulsory jurisdiction of the court and have never consented to such jurisdiction under the "optional" clause of Article 36 of the Statute of the International Court of Justice.⁵⁶ This position is based in large

⁵⁵ See L. BLOOMFIELD, *THE UNITED NATIONS AND US FOREIGN POLICY* 100-01 (1960). See also Bowie, *Arms Control and United States Foreign Policy*, *ARMS CONTROL* 70-71 (Henkin ed. 1961).

⁵⁶ See Lissitzyn, *International Law in a Divided World*, *INTERNATIONAL CONCILIATION* No. 542, at 28-29 (Mar. 1963).

measure on the fact that the Soviet Union considers itself a minority state and is, therefore, fearful of entrusting its interests for decision by a body which has no rule of unanimity. As Litvinov expressed it in 1922:

It was necessary to face the fact that there was not one world but two—a Soviet world and a non-Soviet world . . . there was no third world to arbitrate . . . Only an angel could be unbiased in judging Russian affairs.⁸⁷

The Soviet Union has little trust in the United Nations as an agency for the impartial settlement of disputes. It still considers the United Nations as a minion of the United States which the latter can manipulate as an instrument of national policy.⁸⁸

The Soviets, therefore, have sought settlement of political disputes through conciliation, diplomatic channels, and mediation, in that order of preference. They much prefer to have disputes settled by conciliation commissions composed of an equal number of nations of the contracting states, appointed by the contracting states, and when deadlocks occur in conciliation proceedings, to seek settlement then through diplomatic channels.⁸⁹

The importance attributed to treaties by the Soviet Union, and the significance which the Soviets give to the drafting of treaties and the development of new international legal norms by treaties, was clearly expressed by Aleksandr Troianovskii, the first Soviet Ambassador to the United States, in a speech delivered before the American Society of International Law in 1934. He expressed the view that moral law and the law of human conscience could hardly be taken seriously as bases of international order, since "the guidance from the source is too subtle" and lacking in preciseness. It was essential, in his view, that "something more positive, more concrete, and definitive" be found. He states his belief that the solution rested in treaties—"very precise international treaties"—

⁸⁷ Quoted by Lissitzyn, *id.* at 29.

⁸⁸ See L. BLOOMFIELD, *supra* note 85 at 111-14.

⁸⁹ TRISKA AND SLUSSER 382. The Soviet fear of prejudice and arbitral and judicial decisions dates back to the period when the Soviet's form of government in the international community was a minority of one and it believed an impartial settlement to be impossible. In this respect Korovin in 1923 stated: "The obligatory minimum and the basic premise of any form of arbitration, is a body of common legal opinion and common criteria, and in the absence of such a community any attempt to find an arbitral authority of two halves of humanity speaking different languages is doomed *a priori*." (TRISKA AND SLUSSER 383.) Soviet practice admits of arbitration but only as to minor disputes of a technical nature or disputes concerned with private right. *Id.* at 381, 384-86.

based on "exact formulas and determined obligations."⁹⁰ These views reflect those of the present Soviet Government, which has consistently and unequivocally recited its preference for treaties as the primary source of international order. It is worth noting that Soviet violations have most often been violations of political treaties—treaties of alliance, peace, mutual assistance regional security, nonaggression, and neutrality. Primarily, Soviet treaty violations have related to three issues: nonaggression and respect for sovereignty and independence of states; the establishment and maintenance of effective international controls and cooperation; and the forbidding of revolutionary propaganda and subversive activity abroad, all of which are generally incompatible with basic Soviet doctrines and aspirations for a Communist-dominated world.

It is well to remember that the Soviet discipline of international law performs a supporting function in the formulation and the justification of Soviet foreign policy and that Soviet international law experts have repeatedly and ably demonstrated their ability to provide an effective defense for any action taken by the Soviet Union on political matters, no matter how flagrant a violation of generally recognized principles of international law it may constitute.⁹¹ Soviet jurists have consistently claimed the right to reject any rule of international law that is not acceptable to their government.⁹² As Triska and Slusser have observed:

The reasons for the Soviet government's violations of its political obligations and ideological treaty obligations are not difficult to understand in historical terms. What is difficult to understand is the apparent success with which Soviet scholars have persuaded themselves that they have achieved a genuine unity between the "realistic" practice of the Soviet government in its treaty relations and the determined high-minded treaty theory developed by the scholars themselves. The relation between Soviet treaty theory and practice displays not the unity proclaimed by Soviet scholars, but a perversion of the rational processes of scholarship and the moral responsibilities of citizenship.⁹³

XI. SIGNATURE AND RATIFICATION OF TREATIES

The effect of signing a treaty depends on whether it is one which is subject to ratification. In the case of those which are subject to ratification by their terms or which are so under the

⁹⁰ Address delivered on 28 April 1934, Proc. AM. Soc'y of INT'L L. 195-96.

⁹¹ TRISKA AND SLUSSER 394-95.

⁹² *Id.* at 398.

⁹³ See Lissitzyn, *supra* note 86 at 22.

⁹⁴ TRISKA AND SLUSSER 395.

provisions of the domestic law of one or more of the contracting states, a signature to the treaty merely reflects the fact that the agents of the contracting states have reached an agreed text and are willing to refer it to their governments. The contracting states are under no obligation to ratify a treaty signed by their authorized representatives, if its coming into force is subject to ratification.

The states, therefore, may take whatever action they desire in regard to the acceptance or rejection of a signed treaty which is subject to ratification. The rationale of ratification is that states require an opportunity to re-examine the whole effect of the treaty upon their interests, as it is possible that there may have been changes since the signing of the treaty that would make the treaty provisions no longer acceptable to them. Furthermore, treaties, according to the constitutional law of most states, are not valid without the consent of their legislative bodies. Governments must therefore have an opportunity of withdrawing from a treaty, should the legislature deny it their approval. Ratification, however, is not always required. Treaties which are concluded by authorized representatives, which do not require ratification by their express provisions, and which do not require ratification under the domestic law of the contracting states, are binding upon the contracting states.⁹⁵

Neither is ratification required when the contracting parties provide expressly that the treaty shall be binding at once without ratification. Express renunciation of the right of ratification is valid only when given by representatives duly authorized under their domestic law to make such a renunciation. A renunciation of a ratification by one not so authorized is not binding upon the state he represents.⁹⁶

A. UNITED STATES

Under the Constitution of the United States, a treaty is the "supreme law of the land, binding alike National and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights."⁹⁷ Treaties under United States

⁹⁵ 1 OPPENHEIM 906. See BRIGGS 582-83. Cf. STARKE 295.

⁹⁶ 1 OPPENHEIM 908.

⁹⁷ *Maiorano v. Baltimore & Ohio Railroad Co.*, 218 U.S. 286, 272 (1909), and cases cited in E. BYRD 81-121; 5. G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 194ff (1944); 5. J. MOORE, DIGEST OF INTERNATIONAL LAW, 221ff (1906); 2 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES 458ff (2d rev. ed. 1945).

law, however, are of two types: those which are self-executing and those which are not—that is, those which require implementing legislation to make them effective as law. In *Foster v. Nelson*, Chief Justice Marshall stated:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of Justice as equivalent to an act of legislature, when it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.⁹⁸

1. *Self-Executing and Non-Self-Executing Treaties.*

A self-executing treaty has been defined as one which specifies that it has force and effect without the need of any implementing legislation; or one that, in the absence of specification, is later held by the courts not to need such legislation.⁹⁹ A non-self-executing treaty is one which specifies that it is ineffective domestically in the absence of implementing legislation, or one that is later held by the courts to be so.¹⁰⁰

As a matter of constitutional law a self-executing treaty, as distinguished from a self-executing executive agreement, effectively supersedes any incompatible federal statute which was enacted prior to the effective date of the self-executing treaty. A federal statute, however, which is enacted subsequent to the effective date of a self-executing treaty and which is incompatible with such a treaty, effectively supersedes and abrogates the treaty's legal effectiveness.¹⁰¹ As a practical matter, however, a self-executing treaty is not deemed to have been abrogated or modified by a statute of subsequent date, unless such purpose on the part of Congress has been clearly expressed.¹⁰² It is to be noted, however,

⁹⁸ 27 U.S. (2 Pet.) 258, 314 (1829). As to self-executing and non-self-executing treaties and agreements, see generally BYRD 201-03. See also 5 HACKWORTH at 177ff; 2 HYDE 1455ff; Reiff, *The Proclaiming of Treaties in the United States*, 30 AM. J. INT'L L. 63-79 (1936), and 44 AM. J. INT'L L. 572-76 (1950).

⁹⁹ BYRD 202.

¹⁰⁰ *Id.*

¹⁰¹ See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

¹⁰² *Cook v. United States*, 268 U.S. 102.

that the treaty power is subordinate to the United States Constitution, and treaties incompatible with the Constitution would have no legally binding effect in the United States.¹⁰³

To date the Supreme Court has never found it necessary to declare a provision of a treaty unconstitutional. It has obviated this necessity on occasions by construing questionable treaty provisions so as to make them conformable to constitutional limitations. United States statutes that were enacted to implement treaties have been declared unconstitutional, however, without any regard for the treaty provisions which were thereby abrogated.¹⁰⁴

2. *Congressional and Executive Agreements.*

The foreign relations power of the United States, of course, is not limited to the treaty power, and Congress under its delegated power has provided for the negotiation and conclusion of international agreements other than treaties. The President also may legally conclude agreements under powers delegated to him by the Constitution.

A self-executing agreement, as distinguished from a self-executing treaty, becomes the law of the land unless its provisions are in derogation of the Constitution or are incompatible with the provisions of any prior or subsequent statutes on the subject matter involved.¹⁰⁵

It may also be noted that when a treaty or agreement is abrogated in whole or in part within the United States for any of the reasons mentioned above, it nevertheless remains a valid international obligation of the United States, even though it may not be enforceable by United States courts or administrative authorities. The abrogation constitutes a breach of an agreement for which the United States is liable internationally.¹⁰⁶

B. THE UNITED KINGDOM

Under the laws of the United Kingdom treaties which affect private rights, and those which require a modification of the common law or of a statute for their enforcement by British courts, must receive parliamentary approval through an enabling act. Thus treaties do not become British law until they are expressly

¹⁰³ BYRD 121.

¹⁰⁴ *Id.*

¹⁰⁵ BYRD 110-22. See *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Park*, 315 U.S. 203 (1941); *Missouri v. Holland*, 252 U.S. 416 (1920); *Guaranty Trust Company v. United States*, 304 U.S. 126 (1938).

¹⁰⁶ 5 HACKWORTH 185-86; HARVARD RESEARCH, Article 23, 1029-44; *Polish Nationals in Danzig Case*, [1932] P.C.I.J., Ser. A/B No. 44, at 24.

made so by the legislature. This departure from the common law rule is due to the fact that, under British constitutional law, the ratification of treaties is a prerogative of the Crown, which otherwise would be in a position to legislate without obtaining parliamentary consent. In practice, treaties are, as a rule, submitted to Parliament for approval prior to their ratification by the Crown, so that enabling legislation is enacted before the treaty is ratified on behalf of the United Kingdom. British statutory law is absolutely binding on British courts, even when incompatible with international law. A failure by Parliament to enact legislation giving force and effect to a treaty would constitute a breach of international law on the part of Great Britain for which it would be liable internationally.¹⁰⁷

C. THE SOVIET UNION

Ratification is defined by the Soviets as the solemn approval of an international treaty by the supreme organs of the state, followed by the exchange of ratification documents between the contracting states.¹⁰⁸ Under Soviet law ratification is a constitutive, and not a declaratory act. Hence, a treaty has no legal force until it has been ratified in the manner specified by Soviet domestic legislation, or completion of the exchange or deposit of the instruments of ratification, respectively, depending upon the treaty provisions concerning ratification procedures.¹⁰⁹ Refusal by the Soviet Government to ratify a treaty, or to exchange and deposit its instruments of ratification, if the treaty provides for an exchange and deposit of instruments of ratification, is a perfectly legal act under international law, as both the Soviets and the West view it.¹¹⁰

The Soviets consider that treaties concluded by the Soviet Union which are not incompatible with existing Soviet legislation are binding upon it as a matter of international law, and, being constitutional acts of that Union, constitute a part of the municipal law of the Union merely by and upon publication of their texts. Thus, except for the promulgation of the text of treaties, no special legislation is required to give them the force and effect of domestic legislation.¹¹¹ Treaties which are incompatible with existing Soviet domestic legislation, or which require implementing legisla-

¹⁰⁷ 1 OPPENHEIM 40-41.

¹⁰⁸ TRISKA AND SLUSSER 75.

¹⁰⁹ *Id.* at 77.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 106-07.

tion (to obligate funds from the state budget), require specific legislation to give them domestic force and effect or, if they are already in force but require implementing legislation, to enable their fulfillment.¹¹² Nevertheless, the Soviet Union is not relieved of its international obligations established by treaty if it should fail or refuse to enact the legislation required to give the treaty force and effect. The treaty, under these circumstances, would simply have no binding effect within the Soviet Union.¹¹³

It is to be observed that under the Constitution of the Union of Soviet Socialist Republics of 1936, as amended, and legislation in implementation thereof, not all treaties which are concluded by the USSR require ratification. Only peace treaties, treaties of mutual defense against aggression, and international agreements whose entry into force is expressly made subject to ratification by the parties need to be ratified, and such treaties can be ratified or denounced only by the Supreme Soviet. All other types of treaties may be concluded upon the confirmation of the Council of People's Commissars, by negotiators authorized by that Council; treaties so concluded may be denounced by the Council.

The discussion of ratification procedures under the domestic laws of the United States, the United Kingdom, and the Soviet Union explains the signature and ratification procedures followed in concluding the recent Nuclear Test Ban Treaty: all three parties had expressly made the effectiveness of the treaty subject to ratification. The Soviet Constitution and legislation does not require that a treaty of this nature be ratified. In the United States it was considered to be of such import that the approval of the Senate should be sought in the manner which the Constitution requires for "treaties." Ratification would not have been required under British law to make it effective upon its signature as a legal international obligation of the United Kingdom. Its subsequent effectiveness within the United Kingdom, however, would have been based upon the enactment of appropriate enabling legislation by Parliament.

XII. THE LEGAL EFFECT OF TREATIES

Treaties which have as their purpose legal objects under international law are binding upon the signatory states because customary international law gives them such effect.¹¹⁴ Under customary

¹¹² *Id.* at 108.

¹¹³ *Id.* at 111.

¹¹⁴ 1 OPPENHEIM 881.

international law and, on certain matters, conventional international law (*e.g.*, the UN Charter) as well, certain rights and obligations are precluded from becoming the object of treaties, and treaties on illegal objects are automatically null and void.¹¹⁵ A treaty, other than a universal one of a law-making character, enacted for the general good of the international community, which purports to impose an obligation upon a third party without its consent, would to that extent be null and void, for treaty obligations do not have a binding effect upon nonsignatories.¹¹⁶

XIII. ENSURING COMPLIANCE WITH TREATIES

It has been observed that treaties are permanently obeyed only when they reflect the continued wishes of, and provide continuing benefits to, the contracting parties.¹¹⁷ Treaty signatories, therefore, can never rest assured that the others will permanently comply with the obligations they have assumed under the treaty, unless the situation is such, or the treaty is so cast, that the other signatories will enjoy throughout the life of the treaty benefits which they cherish and would not enjoy in the absence of the treaty. Absent this situation, signatories will eventually shed, either by denunciation or other means, those treaty obligations which have become onerous to them. Even in the absence of denunciation or termination of a treaty by a disgruntled signatory, it is obvious that such a state could render the treaty ineffective and in effect relieve itself of its obligations thereunder through purely procedural tactics and devices.

There are few effective means, if any, of ensuring the continuation of a treaty which no longer serves the interests of one or more of the contracting parties. Yet in spite of the fact that no plethora of means exist to ensure the continuation of treaties, the vast majority of them are conscientiously observed, even under unfavorable conditions and at considerable inconvenience to the signatories. States comply with the treaties they conclude for a variety of reasons: to preserve their international reputation and good name both at home and abroad, to ensure the continuance of benefits which they enjoy under other treaties concluded by them on other matters with the same signatories; to avoid unfavorable publicity and the censure of world public opinion; to avoid retaliatory action, reprisals and possibly war; to avoid international re-

¹¹⁵ *Id.* at 894.

¹¹⁶ *Id.*

¹¹⁷ W. HALL, INTERNATIONAL LAW 12 (7th ed. 1917) [hereafter cited as HALL].

percussions and collective sanctions; to persuade the other signatories to relieve them of their obligations in whole or in part or to obtain tacit consent to their nonperformance; to motivate the other signatories to conclude agreements with them on other matters which would be of substantial benefit to them as a further *quid pro quo* for their continued compliance with treaties which are burdensome.

In cases of legal or political disputes, the continued validity of a treaty can, as a matter of right, be submitted to an arbitral tribunal, a group of experts, or the International Court of Justice for amicable and peaceful settlement, if the parties are bound by the treaty to do so, or if the parties are subject to the compulsory jurisdiction of the court or obliged by mutual agreement. These and other reasons may support the continued observance of unfavorable treaty provisions.

XIV. INTERPRETATION OF TREATIES

The Soviet Union considers, as do the Western Nations, that the interpretation of a treaty is "the clarification of the content, conditions, and aims of the treaty, or of its individual articles," so that the treaty may be applied in consonance with the intent of the parties.¹¹⁸

Soviet doctrine, however, holds it essential that treaties be interpreted in conformity with "the basic principles of international law"—that is, "principles of universal peace and security of nations," "state sovereignty, equality, and mutual advantage," "*pacta sunt servanda*" (treaties are binding), and "*pacta tertiis nec nocent nec prosunt*" (third states have no rights or duties under treaties to which they are not parties).¹¹⁹ Treaties, in the Soviet view, must also be interpreted (a) with reference to the parties' goals and good faith; (b) without considering the law-making characteristics of the treaty; (c) in accordance with both its letter and meaning; (d) by giving precedence to a prohibitive over a mandatory rule of interpretation and by giving precedence to a mandatory over a permissive rule of interpretation; (e) by giving preference to special over general provisions; and (f) by resolving all doubtful issues in favor of the obligated party.¹²⁰

The Soviets also stress the importance of the following methods of interpretation which are generally neither amenable nor com-

¹¹⁸ TRISKA AND SLUSSER 115.

¹¹⁹ *Id.*

¹²⁰ *Id.*

patible with those of the Nations of the West: (a) when treaties contain terms which, although known to all parties, are understood differently by them (*e.g.*, "nationalization," "cooperative co-existence," "freedom," "democracy," "self-determination"), each state is considered as accepting these terms as it understands them under the terms of its own legal system; (b) treaties may be clarified by comparison and reference to other similar treaties.¹²¹

Soviet doctrine specifies the following organs as competent to interpret treaties: (a) The contracting states, which (1) may agree on the interpretation by which they are then bound or (2) may interpret the treaty separately, through their governmental agencies or municipal courts. If one party refuses to accept the domestic interpretation of the other, then only the party that interpreted the agreement is bound by that interpretation and the full responsibility therefor. (b) The International Court of Justice under Article 36 of the Statute of the court. Should the parties agree to make the jurisdiction of the court compulsory for all their disputes involving questions of interpretation, or should the parties agree to accept the jurisdiction of the court only in particular cases (acceptance of the optional jurisdiction of the court), the decision of the court in such cases would be binding upon the parties. (c) The Security Council and General Assembly in the interpretation of the charter of the United Nations. (d) Arbitration courts when the parties so agree. Their decisions under these circumstances are binding on the parties. (e) Conciliation commissions, but their interpretations have no binding effect upon the parties. (f) The diplomatic missions of the parties concerned.¹²²

Under customary international law, treaties which are inconsistent with the obligations assumed by the signatories under former treaties are illegal. This principle extends to multilateral treaties of an almost universal character, such as the Charter of the United Nations which gives to them the character of legislative enactments affecting all members of the international community, and to such multilateral enactments which have been concluded in the general interest. Treaties which impose an obligation to perform a physical impossibility are null and void, as are treaties which impose immoral or illegal obligations, such as those setting up alliances for the purpose of attacking another state without provocation, or which condone the commission of piratical acts on the open sea by a nation or group of nations.¹²³

¹²¹ *Id.* at 117.

¹²² *Id.* at 144-45.

¹²³ I OPPENHEIM 894-97, 936-37. See COBBETT 326-27.

XV. TERMINATION OF TREATIES

A treaty may terminate in four ways: it may expire, be dissolved, become void, or be canceled.¹²⁴ Treaties which provide for their own termination, for example, those which are made for a specific purpose or a specified period of time, or are expressly made terminable by notice, terminate automatically upon the fulfillment of their conditions. When the time has expired, the purpose has been accomplished, or the notice has been given, the treaty goes out of existence.¹²⁵

A treaty concluded for a period of time which has not yet expired, or a treaty made in perpetuity, may be dissolved by mutual consent of the signatories. Mutual consent is evidenced in three ways: by the express declaration of the signatories that the treaty is rescinded; by the conclusion of a new treaty by the parties which is incompatible with a former treaty on the same objects (rescission by tacit mutual consent or substitution); or by the renunciation of rights by a signatory state which alone benefits from treaty provisions.¹²⁶ Treaties which do not expressly provide for the possibility of withdrawal may, nevertheless, be dissolved after notice by one of the signatories. Withdrawal after notice is proper only for treaties which are not intended by the parties to set up an everlasting condition as, for example, commercial treaties. As a general rule treaties concluded for a specified period of time are not terminable by notice. They may, however, be dissolved by mutual consent.¹²⁷

A. VITAL CHANGE OF CIRCUMSTANCES

Vital change of circumstances constitutes an exception to the general rule that treaties concluded for a specified period of time or to set up a permanent condition may not be dissolved by withdrawal. As a practical matter it would appear illogical to maintain that a treaty, even though it may purport to be of indefinite duration, remains binding for all time, notwithstanding any change of conditions, unless discharged or modified by mutual consent. The rapidly changing conditions of national and international life, and the dictates of reason, suggest that there exists in treaties an implied condition, even in those purportedly in perpetuity, that they are to be regarded as terminable because of material and vital change in the fundamental conditions which existed at the time of

¹²⁴ 1 OPPENHEIM 936.

¹²⁵ COBBETT 326.

¹²⁶ 1 OPPENHEIM 937-38.

¹²⁷ *Id.* at 938.

their conclusion.¹²⁸ Many of the older treaties contained the clause *rebus sic stantibus* (in these circumstances), under which the treaty was to be construed as abrogated when the material base and circumstances on which it rested materially changed.¹²⁹

A recent instance of the use of the clause appears in certain post-war economic agreements concluded by the United States. These stipulate that if during the life of the agreement either party should consider that "there has been a fundamental change in the basic assumptions underlying this agreement" a procedure looking toward revision or termination is to be followed.¹³⁰ The maxim *conventio omnis intelligitur rebus sic stantibus* (In every convention it must be understood that material conditions must remain the same) may reasonably be held to be applicable even though the treaty does not contain the *clausula* (the *rebus sic stantibus* clause).¹³¹ In order that the treaty be properly terminable on this basis it would appear that the change upon which the termination is predicated must be one that removes, for all practical purposes, the very basis of the original agreement. Those who deny the legality of recourse to the *clausula* and who renounce it as a dangerous and lax principle, which could negate the sanctity and binding effect of treaties, are reminded that the recognition of the *clausula* rule, as an exception to the general rule *pacta sunt servanda*, may be a matter of practical and inherent necessity.

To espouse the view that treaties are binding for all time, despite such change of conditions and circumstances, could strain the principle of the sanctity of treaties beyond the breaking point, and could imperil not only that principle, but also international peace and security. The principle may be vague, but it is no more so than the rules of municipal law are as to "reasonable cause"; and the international arbitration tribunal or the International Court of Justice would find it no more difficult to apply this principle than would municipal courts in applying the test of reasonableness.¹³² The doctrine *rebus sic stantibus*, kept within proper limits, in fact embodies a general principle of law, which is expressed in the doctrine of frustration and supervening impossibility. In this sense it may be said that every treaty implies a condition that, if by an unforeseen change of circumstances an

¹²⁸ HALL, INTERNATIONAL LAW 360-61.

¹²⁹ GOULD 339-40; COBBETT 326.

¹³⁰ GOULD 339-40.

¹³¹ G. SCHWARZENBERGER, MANUAL OF INTERNATIONAL LAW 158 (4th ed. 1960).

¹³² COBBETT 326.

obligation provided for by the treaty should imperil the existence or vital development of one of the parties, it should have the right to demand its release from the obligation concerned.¹³³

It has been suggested that the doctrine of *rebus sic stantibus* does not give states a unilateral right to declare themselves free from the obligation of a treaty immediately upon the occurrence of a vital change of circumstances, but only entitles them to claim a release from these obligations from the other party or parties to the treaty. Under this view a state that believes the obligations it has assumed by treaty have become unbearable because of a vital change in circumstances should request the other signatory or signatories to agree to the abrogation of the treaty, and should also offer to submit any disputed issues for judicial determination. Should the other signatory or signatories refuse to agree to abrogation, and also refuse to submit the dispute for judicial determination, the requesting state would then be justified in unilaterally declaring the treaty abrogated. The refusal of the others to refer the dispute for adjudication would be *prima facie* evidence that the state or states benefiting from the treaty were determined to take advantage of a treaty which no longer had a legal reason for existing.¹³⁴ It is noted that the United States as recently as 1941 renounced its obligations under the International Load Lines Convention of 1930 on the grounds of "changed conditions" which were alleged as conferring on the United States "an unquestioned right and privilege under approved principles of international law" to declare the treaty inoperative.¹³⁵

Although the practice of states is not conclusive as to the legality of recourse to unilateral denunciation under the doctrine of *clausula rebus sic stantibus*, the doctrine has been applied by states on numerous occasions.¹³⁶ A clear example of the repudiation of treaty obligations on the ground of an essential change of

¹³³ HALL at 360 states that a second implied condition of treaties is that "if originally consistent with the primary right of self preservation, it shall remain so A treaty, therefore, becomes voidable as soon as it is dangerous to the life or incompatible with the independence of a state provided that its injurious effects were not intended by the . . . parties at the time of its conclusion."

¹³⁴ 1 OFFENHEIM 939-42; BRIGGS 914-18.

¹³⁵ T.I.A.S. No. 1819. See G. SCHWARZENBERGER, *supra* note 131 at 158-59.

¹³⁶ Myers, *Treaty Violations and Defective Drafting*, 17 AM. J. INT'L L. 538-65, (1917), states that unilateral denunciation in accordance with the maxim *conventio omnis intelligitur rebus sic stantibus* is an abrupt, though not an illegal method of extinguishing a treaty as is familiar in the American action in abrogating the Treaty of 1832 with Russia. See L. BLOOMFIELD, *THE UNITED NATIONS AND US FOREIGN POLICY* 237 (1960).

circumstances was Russia's action in 1870 in repudiating that portion of the Treaty of Paris of 1856 which neutralized the Black Sea and placed restrictions on Russia with respect to the keeping of armed vessels in that sea. Russia stated that a material change of conditions contemplated by the treaty had occurred by the subsequent union of the Danubian principalities, acquiesced in by the great powers, as well as by the changes in naval warfare occasioned by the use of iron-clad vessels. When the powers met in London at the close of the Franco-Prussian War, Russia was rebuked, but allowed to have her way.¹²⁷

Again in 1886, Russia closed the port of Batoum contrary to the express provision of Article 59 of the Treaty of Berlin of 1878, which provided for the freedom of the port.¹²⁸ All of the signatories except Great Britain appear to have tacitly consented to the denunciation.

Germany in 1936 unilaterally renounced her obligations with respect to the demilitarization of the Rhineland under the Treaty of Versailles and the Locarno Pact, on the ground that these were incompatible with the Franco-Soviet Pact of 1935. The League of Nations, however, declared this illegal.¹²⁹

In the case of *Luzern v. Aargau*, in 1882, the Federal Swiss Tribunal recognized the doctrine of *rebus sic stantibus* in a dispute between two Swiss cantons relative to the extinction of a conventional public law servitude. The court held that it was a principle of law universally recognized that a contract may be denounced by unilateral act as soon as its continued existence is incompatible with the self-preservation of an independent state or when there has been a change in the conditions which formed the tacit condi-

¹²⁷ S. KIATIBIAN, *TRANSFORMATION DES ETATS* 30 (1892). Russia was rebuked by a declaration adopted in a Protocol of 17 January 1871, signed by Austria, France, Germany, Great Britain, Italy, and Turkey, which provided: "It is an essential principle of the law of nations that no Power can liberate itself from the engagement of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting parties, by means of an amicable arrangement." 61 BRITISH AND FOREIGN STATE PAPERS 1198 (1870-1871); J. SCOTT, *CASES ON INTERNATIONAL LAW* 469 (1922).

¹²⁸ I OPPENHEIM 943. See F. MARTENS, *RECUEIL DES PRINCIPAUX TRAITES DES PUISSANCES ET ETATS DE L'EUROPE* (XVIII Nouveau recueil generale, 278 (1873), and XIV Nouveau recueil generale (2 ieme serie), 170 (1889)).

¹²⁹ I OPPENHEIM 943, 948 n. See LEAGUE OF NATIONS OFF. J. 312 (1936). Germany refused to submit the question of the compatibility of these treaties to any tribunal. The League of Nations found that Germany had breached international law by her unilateral repudiation of these obligations. 17 LEAGUE OF NATIONS OFF. J. 340 (1936).

tion of the existence of the treaty.¹⁴⁰ Thus, the practice of states has recognized that treaties are susceptible to unilateral denunciation under the doctrine of *rebus sic stantibus* when, because of unforeseen changes in circumstances, an obligation imperils the existence or the development of the burdened state.¹⁴¹

Payson Wild, Jr., has observed that satisfactory arrangements for treaty relationships involve two important matters: first, provisions for treaty revision and termination, and, second, the creation of some system of legal procedures whereby treaty obligations may be placed in their relative order. These two matters, he states, merge into one and are resolved in national affairs by vesting in government agencies the authority to enact new laws, repeal old ones, and declare certain relationships and rules void. In the international community such action is not now possible, and the obsolete rules which are applied to treaties preclude necessary and timely treaty revision. They work, rather, for the enforcement of treaties which either need revision or establish a *status quo* that is regarded by one party as inequitable.¹⁴² For this reason he believes that the *clausula* has served a useful purpose in focusing attention on the fact that there may be valid grounds for annulling or canceling a treaty obligation; he believes also that treaties which contain no clause for termination or revision may not legally be considered eternal.¹⁴³

The Soviet international law experts consider, as do some experts in the Western Nations, that the *clausula rebus sic stantibus* constitutes a particular exception to the *pacata sunt servanda* principle that is dictated by justice and necessary to economic and political progress. Although the Soviets believe that unilateral repudiation should not take place on the basis of the changed condi-

¹⁴⁰ *Entscheidungen des Schweizer Bundesgerichts*, at 57 (1882), cited in Schindler, *The Administration of Justice in the Swiss Federal Court in Inter-cantonal Disputes*, 15 AM. J. INT'L L. 149, 164 (1921). See 1 OPPENHEIM 940n.

¹⁴¹ See 1 OPPENHEIM 941-42; Crusen, *Les Servitudes Internationales*, 22 RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 60 (1928). The practice of States is inclusive as to the liability for damages of a State which has legitimately renounced an obligation pursuant to the doctrine of *rebus sic stantibus*. Crusen at 61 believes that as the renouncing State has had to resort to a right which is implied in all treaties, there would be no logical reason why it should be held to indemnify the other party. He states that in the annexation of Bosnia and Herzegovina by Austria-Hungary in 1908, Turkey did not obtain damages to which she believed herself entitled. But see E. KAUFMANN, *DAS WESEN DES VOLKERRECHTS UND DIE CLAUSULA REBUS SIC STANTIBUS* 195 (1911), and Crusen at 60.

¹⁴² P. WILD, *SANCTIONS AND TREATY ENFORCEMENT* 406 (1934).

¹⁴³ *Id.* at 12.

tions clause, they consider unilateral repudiation to be permitted by international practice when no agreement for termination or rescission is possible.¹⁴⁴ In this connection it should be noted that the Soviets consider that a government established as a result of profound social, economic, and political revolution is not bound by an international agreement concluded by its predecessors, and that the annulment of such agreements by such a government is a legitimate act.¹⁴⁵

The dissension engendered by the contentious doctrine of *rebus sic stantibus* vividly reflects the controversial nature of the norms of customary international law, many of which are admittedly imprecise, confused, and outmoded; their limited adequacy for the resolution of international disputes; and the role of international law generally, in an unintegrated world order that has undergone unprecedented political, economic, and social changes. The law, essentially, represents stability and the *status quo* for it is the function of law to uphold the existing order of things, not to change or destroy them. Fundamental changes of social, economic, and political processes and the accommodation of incompatible national interests can only be accomplished by legislative action, by the rescission, modification, or alteration of the law. An official international legislative process is at present but a hope, realizable perhaps only in the far distant future. The courts under the present state of affairs, therefore, can at best attempt to conciliate and accommodate minor changes in the world order through the adjudication process and within the narrow limits permitted by a society composed of sovereign states. At the present time the international dispute-solving process functions ineffectively and laboriously under exceptional handicaps.

Some opine that if states were rational their disputes could be resolved satisfactorily by court action on the basis of existing norms. Others believe that legal methods are not only inadequate, but entirely irrelevant to world politics and the settlement of political disputes. Granting some truth to both of these views, a recourse to the doctrine of *rebus sic stantibus* would provide the courts a legal basis on which they could invalidate obsolete and other treaties which jeopardize the peace and security of the international community. Even this opportunity is very limited, as it would extend only to those few instances in which states submit their disputes to judicial settlement.

¹⁴⁴ See TRISKA AND SLUSSER 140-41.

¹⁴⁵ *Id.* at 390.

The world community is not now equipped institutionally either to coordinate, accommodate, or stabilize the international society. It has no legislative body which can rescind bad laws and make new laws that may be urgently required by changed circumstances, and it has no police arm capable of enforcing rights under international legislation. Until such institutions and rules are developed it can be anticipated that states will continue to be reluctant to have their disputes adjudicated.¹⁴⁶

B. UNILATERAL DENUNCIATION AND MUNICIPAL LAW

International law, in addition to its limited recognition of the lawfulness of unilateral denunciation under specified circumstances, also recognizes the possibility that states may take such action in derogation of international law. The power and the capability of states to breach their international obligations is recognized by the provisions of international sanctions. All states recognize an inherent right in themselves to denounce certain treaties.

1. *The Soviet Union.*

The Constitution of the Union of Soviet Socialist Republics expressly provides for the denunciation of treaties.¹⁴⁷ Article 49 (P) of this Constitution specifies that it shall be the Presidium of the Supreme Soviet of the USSR which "ratifies and denounces international treaties of the U.S.S.R." that require ratification. The Soviet law of 20 August 1938, expressly vests in the Council of People's Commissars the right to denounce all other treaties which do not require ratification by the Presidium.¹⁴⁸

This express authorization, properly interpreted, means simply that under Soviet municipal legislation only the Presidium of the Supreme Soviet or the Council of the People's Commissars, depending upon the nature of the agreement, may, for proper cause, denounce a treaty. It does not, for example, give to these bodies a right which the legislative bodies or the executives of the countries of the West may not exercise because their constitutions are silent on the subject or do not expressly vest them with that power. Triska and Slusser have concluded from their examination of So-

¹⁴⁶ See generally L. BLOOMFIELD, *THE UNITED NATIONS AND US FOREIGN POLICY* 236-38 (1960).

¹⁴⁷ Constitution (Fundamental Law) of the Union of the Soviet Socialist Republics, 5 December 1936, as amended. Translated and reproduced in S. A. PEASLEE, *CONSTITUTION OF NATIONS* 490 (2d ed. 1956).

¹⁴⁸ Law of 20 August 1938, *Vedomosti Verkhovnogo Soveta SSSR*, No. II, 1938, *Sbornik Zakonov SSSR, 1938-1961*, at 523 (Moscow, 1961).

viet practice that the USSR considers that the unilateral right to denounce treaties on the basis of changed circumstances is lawful when done by the Soviet Union but unlawful when done by the other party or parties to the treaty.¹⁴⁵

2. *The United States.*

Under the municipal law of the United States, for example, Congress, by subsequent legislation, the provisions of which are incompatible with the provisions of existing treaties, or by failing to enact legislation necessary to implement a treaty, can in fact accomplish a denunciation of a treaty in derogation of United States international obligations. A Supreme Court decision which holds a treaty to be incompatible with the Constitution of the United States or with a subsequent federal statute would also accomplish denunciation. The President can also denounce treaties under powers vested in him by the Constitution. In fact, as far as the United States is concerned, it is more difficult for it to conclude treaties than it is for it to denounce them.¹⁴⁶

B. THE VOIDANCE AND CANCELLATION OF TREATIES

Treaties may become void through the extinction of one of the parties, except for those treaties which are dispositive in nature and as such devolve upon successor states. Treaties are also voided when their execution becomes impossible, for example, a treaty of alliance in cases when war breaks out between some of the parties. Or they are voided when the object of the treaty becomes extinct, for example, treaties regarding a third state which disappears due to its merger with another state.¹⁴⁷

The Soviets maintain that the extinction of a state or government with which the Soviet Government has signed a treaty is just ground for the annulment of the treaty by the Soviet Government, and for its release from all obligations under the treaty.¹⁴⁸

Treaties are canceled when, due to the development of international law, they become inconsistent with international law, as, for example, treaties relating to the treatment of civilian personnel in occupied areas which would be incompatible with the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.¹⁴⁹

¹⁴⁵ TRISKA AND SLUSSER 129.

¹⁴⁶ See *Byrd* 147.

¹⁴⁷ 1 OPPENHEIM 945.

¹⁴⁸ TRISKA AND SLUSSER 290.

¹⁴⁹ 6 U.S.T. 3516; T.I.A.S. No. 3365.

Treaties whose provisions are violated by one of the signatories may be considered void or voidable by the other signatory or signatories unless otherwise specified in the agreement. There are two schools of thought as to whether a treaty is void or merely voidable upon its breach. It is clear that a treaty may properly be considered no longer binding when the breach is a violation of an essential provision of the treaty or its essence. As to breaches of what may be termed non-substantive or nonessential provisions, it is not always possible to distinguish between those that are essential and those that are not; and as the treaty protects both types of provisions, it is for the injured party to determine whether the breach justifies the cancellation of the treaty.¹⁵⁴ Allegations of the violation of a treaty by other signatories have frequently been used by Soviet leaders to justify their denunciation of treaties, and their actions which were incompatible with the provisions of treaties. In 1939 the Russians charged that Finland had "systematically violated" its obligations under the Soviet-Finnish Nonaggression Treaty of 1942, that Finland had by its actions shown that it had "no intention of complying" with the provisions of this treaty, and that on this basis the Soviet Government regarded itself "released from the obligations" of the treaty.¹⁵⁵

A treaty may also become void due to a permanent change in the status of one of the parties to an agreement as, for example, its incorporation within another state. It is clear, however, that changes in the type of government of a state or in its constitution in no way impair the obligations which were assumed by that state under a prior form of government or constitution.¹⁵⁶ The Soviets nevertheless have consistently taken a contrary view: that a state lawfully may unilaterally denounce a treaty which had been concluded by a former type of government on the grounds of vital changes in circumstances.¹⁵⁷

The outbreak of war between the parties, as a general rule, voids or at least suspends treaties of a political nature, except those concluded in anticipation of war or for application in time of war.¹⁵⁸ The Soviet view is at least theoretically the same as that

¹⁵⁴ 1 OPPENHEIM 947. USSR has never deviated from the rule that it is lawful for a signatory to terminate, unilaterally, a treaty which it considers to have been breached by the other party or parties to it. See TRISKA AND SLUSSER 129-31.

¹⁵⁵ TRISKA AND SLUSSER 391.

¹⁵⁶ 1 OPPENHEIM 149.

¹⁵⁷ See TRISKA AND SLUSSER 131-36.

¹⁵⁸ HARVARD RESEARCH (Article 85(a)) 1119-94, 1183-1204; A. MCNAIR, THE LAW OF TREATIES 530-51 (1938); 5. HACKWORTH at 377-90; 2 HYDE 1545-58; HALL 398, 401; COBBETT 344.

of the Western Nations on this point. In practice, however, "the difference is profound" due to the politically oriented view of the Soviets and their hostile and purposeful ideology.¹⁵⁹

XVI. CONCLUSIONS AND SUMMATION

There are significant differences in the views of the Soviets and the States of the West on the principles and rules of international law. These differences are discussed below. They provide information essential to considered decisions on the drafting and the negotiation of treaties with the Soviets and on the degree of reliability which may be placed on Soviet treaty commitments.

A. The Soviets consider treaties as the principal source of international law. They recognize as law only these international customs which they have expressly recognized as being binding upon them. This is significant in that many important eventualities which the West considers as being adequately provided for by customary international law, and as such unnecessary to be provided for expressly in treaties, would not be so provided for under the Soviet view of international law. Thus, many matters which would normally be governed by customary international law in treaties between the States of the West would have to be expressly covered in treaties with the Soviets (*i.e.*, that in case of doubt treaties are to be interpreted by reference to customary international law).

B. The Soviets have asserted as fundamental sources of international law certain "basic laws, norms and concepts" which reflect their peculiar political, ideological, and ethical doctrine. Treaties concluded with the Soviets should affirmatively reflect the inapplicability of such laws, norms and concepts.

C. It is the Soviet view that the binding effect of treaties rests on the legal principles of the equality of the contracting parties, bilateral acceptability, and mutual benefit. This position reduces materially the degree of reliability which the West can place on treaties concluded with the Soviets.

D. It is the Soviet view that no treaty can impose obligations on third States. The Soviet position on this matter extends to so-called law-making or legislative treaties (multilateral treaties which are asserted as having a binding effect on third States, *e.g.*, peace treaties, treaties of international settlement, the UN Charter, and treaties dedicating transit facilities to general use).

¹⁵⁹ TRISKA AND SLUSSER 171-72.

E. The Soviets regard political treaties essentially as weapons for achieving world communism and they have demonstrated ingenuity in justifying and supporting their breaches of political treaties.

If a treaty with the Soviets is to have any chance of success, its provisions must be so clear and precise that differing interpretations are virtually impossible. This type of draftmanship is essential, particularly, in treaties which relate to defense and security matters. The Soviets have used treaty ambiguities to justify action which appears to be clearly in contravention of the over-all intent and purposes of the treaty. The Soviets in drafting treaties resort to language that is capable of manipulation to their advantage even though this potential is not readily apparent. For this reason it would be prudent to maintain a complete record of negotiations leading to treaties with the Soviets and to insure that this record reflects their affirmative approval. This procedure will insure that the intent of the parties on treaty provisions should it be placed in issue at a later date, can be affirmatively determined and interpretations precluded which would be plausible were it not for the record.

F. Terms used in treaties with the Soviets should be defined with precision. Terms such as "democracy," "free elections," "freedom" and "self-determination," which appear to the West as unequivocal and invulnerable to misinterpretation, have an entirely different meaning for the Soviets. These and other general terms must, therefore, be avoided or be defined precisely. In some instances it would be better to explain terms by citing methods by which certain actions are to be accomplished or ends attained.

G. Treaties with the Soviets should contain specific provisions for their modification, revision, and termination. Preferably, the treaties should provide for their unilateral termination subsequent to the receipt by one party of the written notice of the intent of the other party to terminate them. It is impractical to base termination upon mutual consent and illogical to suppose that such a provision would in any way deter the Soviets from breaching treaties that have become burdensome or incompatible with their basic interests. The requirement for mutual consent under these circumstances would serve no useful purpose. It would only intensify existing tensions and conflicts.

In the Soviet Union, Peace treaties, Treaties of Mutual Defense against Aggression, and those whose provisions expressly require or provide for ratification are subject to ratification by the

Supreme Soviet of the USSR and can be denounced only by the Supreme Soviet of the USSR. All other treaties in the USSR are concluded by and may be denounced by the Council of the People's Commissars.

On this basis it is clear that procedurally it is much easier for the United States to abrogate a treaty than it is for the USSR.

H. Traditionally, the Soviets have had recourse to the Doctrine of *Rebus Sic Stantibus* to shed onerous treaties. This doctrine (frustration or intervening impossibility) reflects an implicit condition of treaties that they are terminable because of material and vital changes in the fundamental conditions which existed at the time of the conclusion of the treaty. The Soviets have recently applied this doctrine to treaties concluded by a former type of government. They consider a failure to modify a treaty because of vital changes in circumstances, or to submit the issue for resolution to an impartial body, as adequate grounds for its unilateral termination. It is also the Soviet view that a government established as a result of profound social, economic, and political changes (revolution) is not bound by agreements which were concluded by its predecessor. The annulment of such agreements is a legitimate act in the view of the Soviets.

SOME COMPARISONS BETWEEN COURTS-MARTIALS AND CIVILIAN PRACTICE*

By Robert Emmett Quinn **

I. INTRODUCTION

Before Congress enacted the Uniform Code of Military Justice in 1950,¹ courts-martial were widely regarded in legal and lay circles as the archetype of summary and arbitrary proceedings. Although description of the military system as "drumhead justice" was overdrawn, there were indeed glaring deficiencies in the safeguards accorded an accused and in the attitudes of those administering the military criminal law system. In the supposed interest of furthering the military discipline of the command, a commanding officer did not hesitate to make known to the members of a court-martial, in advance of trial, his personal views either as to the guilt of a particular accused or as to the sentence that should properly be imposed. If he thought of the matter at all, the commanding officer saw no incompatibility between his conduct and the juridical doctrine of impartiality in the administration of criminal justice. Even military lawyers, although trained in civilian law schools, were so permeated with military philosophy that they engaged in the practice themselves to secure results they deemed desirable.²

Apart from not knowing when, or whether, such extrajudicial influence had been brought to bear in his case, an accused did not even know what principles of law the court members actually considered in determining his guilt or innocence. Courts-martial used a service compendium of substantive law and practice as their

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Although this article was written before the new MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, and the MILITARY JUSTICE ACT OF 1968, the comparisons made in this article are even more valid than before, in that most of the judicial decisions referenced herein have been incorporated in the new Manual and Code.

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¹ Act of 5 May 1950, ch. 169, 64 Stat. 108 [hereafter called the Code and cited as UCMJ].

² See, e.g., *United States v. Guest*, 3 U.S.C.M.A. 147, 11 C.M.R. 147 (1953).

source for principles of law. Army and Air Force courts-martial use done compilation; Navy and Marine Corps courts-martial used a different one.³ Each was regarded as the "Bible" of military law by the services in which it was used, and it was taken by the court members into the closed session deliberations to be searched for the proper rules to be applied in the case. The theoretical justification for these, and other, astounding differences between military and civilian practice was perhaps best expressed by Colonel William Winthrop, one of the great students of American military law in effect before the Uniform Code. Analyzing the juridical nature of courts-martial, Colonel Winthrop observed that in *Dynes v. Hoover*⁴ the Supreme Court held that these courts were not federal courts within the meaning of article III of the Constitution. He concluded that this decision meant that "courts-martial must pertain to the executive departments; and they are in fact simply *instrumentalities of the executive power*" to enforce discipline in the armed forces. He further concluded that they were not "embraced in the provisions of the sixth amendment to the Constitution" and were "as much subject to the orders of a competent superior as is any military body or person."⁵ Some contemporary students of military law seem to subscribe to essentially the same views.⁶ However, these views have been rejected,⁷ on both theoretical grounds and in practice, by the United States Court of Military

³ Strictly speaking, the Air Force had its own compilation, the *MANUAL FOR COURTS-MARTIAL, U.S. AIR FORCES* (1949), but this was merely an "adoption" of the Army's *MANUAL FOR COURTS-MARTIAL, U.S. ARMY* (1949). The text statement refers to the latter. The Navy's Compendium was *NAVAL COURTS AND BOARDS* (1937). The Coast Guard also had a Manual, *MANUAL FOR COURTS-MARTIAL, UNITED STATES COAST GUARD* (1949), but it was basically a restatement of the Navy's guide. Upon enactment of the Uniform Code of Military Justice, all these were replaced by the *MANUAL FOR COURTS-MARTIAL UNITED STATES, 1951* [hereafter called the Manual and cited as MCM 1951].

⁴ 61 U.S. (20 How.) 65 (1858).

⁵ W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 49 (2d ed. 1896).

⁶ Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U.L. REV. 861 (1959); Rydstrom, *Self-Incrimination Refined*, 19 JAG J. 1 (1955); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 26 (1958). Apparently, at least one Justice of the Supreme Court shares this view. In his opinion in *Reid v. Covert*, 354 U.S. 1 (1957), Mr. Justice Black described courts-martial as "simply executive tribunals whose personnel are in the executive chain of command." *Id.* at 36.

⁷ *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), is representative of a long line of cases.

Appeals, the supreme court of the military justice system, which was created by the Code.⁸

Persons in the military service are generally entitled to the rights granted all persons by the Constitution, both as defendants in criminal prosecutions and as individuals in a democratic society. The fifth amendment expressly exempts the military from proceeding by presentment or indictment of a grand jury, and other rights, such as trial by a common-law jury, are excluded by necessary implication. Differences of application of constitutional rights must also be recognized. Freedom of speech, for example, is not an absolute. The reasonableness of its exercise depends upon the presence of many variable factors. These factors differ in the military community from the civilian community, and these differences must be taken into account in considering whether a particular restriction upon the freedom to speak is or is not constitutionally valid.⁹

For nearly two decades, the military justice system under the Uniform Code provided procedures and prescribed safeguards for an accused's constitutional rights that were unmatched in the civilian courts. The explosion of constitutional doctrine in recent years, however, has resulted in legislative and judicial adoption by the civilian courts of many procedures already in effect in the military. It can almost be said that the civilian community was catching up with the military in the effective guarantee of constitutional rights. Some procedures in the military system may always be more expansive than those in the civilian courts. For example, in the military the accused in a general court-martial case is entitled

⁸ The United States Court of Military Appeals consists of three judges appointed from civilian life by the President, with the advice and consent of the Senate. With the exception of applications for extraordinary relief, *see, e.g.,* *United States v. Frischolz*, 16 U.S.C.M.A. 150, 86 C.M.R. 306 (1966), and petitions for new trial in cases pending appeal, *see* UCMJ art 73, 10 U.S.C. §873 (1956), the court has only appellate jurisdiction. It must accept for review a case in which the sentence extends to death or in which the accused is a general or other flag officer. All other appellate cases are presented either by certificate from the Judge Advocate General of the accused's armed force or by petition of the accused for grant of review. The petition corresponds to *certiorari* in the Supreme Court of the United States. Not every accused can petition for grant of review because not every court-martial conviction is reviewed by a board of review. A board of review considers only cases in which the sentence extends to a punitive discharge or to confinement to hard labor for one year or more. UCMJ art. 66, 10 U.S.C. § 866 (1956).

⁹ *See, e.g.,* *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967); *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954). *See also* Quinn, *The United States Court of Military Appeals and Individual Rights in the Military Service*, 35 NOTRE DAME L. REV. 491, 497 (1960).

before trial, as a matter of course, to a copy of at least the substance of the expected testimony of every prospective witness against him and to information as to every item of evidence in possession of the prosecution which may be used against him.¹⁰ Even as recently liberalized, the Federal Rules of Criminal Procedure do not approach the openness of prosecution in effect in the military.

Currently, courts-martial procedures and the federal criminal procedures are sufficiently similar to make a civilian practitioner feel comfortable and knowledgeable in a court-martial case. However, just as there are variations in practice between the state and federal courts, there are differences between general practices in the civilian courts and procedures in the military system. Provision for safeguard of constitutional rights can be expected, but military law provides "something more, and something different."¹¹ Some of these differences merit special attention in light of recent Supreme Court decisions concerning an accused's constitutional rights in a criminal proceeding.

II. OBTAINING ORAL AND WRITTEN STATEMENTS FROM A SUSPECT OR ACCUSED

So much has been written and said about the Supreme Court's opinion in *Miranda v. Arizona*¹² that the constitutional consequences of a "custodial interrogation" are probably as familiar to the general public as they are to the legal profession. Military courts responded to *Miranda* as quickly as the civilian courts.¹³ However, the impact of *Miranda* on the military investigative processes was less dramatic and unsettling than its effect on civilian police procedures.

¹⁰ MCM, 1951, ¶34b, c, d, at 45-47. The Manual was promulgated by the President of the United States by virtue of the authority vested by the Code, to prescribe the "procedure, including modes of proof," which as far as practicable "apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts." UCMJ art. 36, 10 U.S.C. § 836 (1956). However, the Manual also contains discussions of substantive principles of law. To the extent the Manual is inconsistent with the Constitution, the Code or substantive law, it is invalid. See B. FELD, A MANUAL OF COURTS-MARTIAL PRACTICE AND APPEAL 164 (1957), for a partial list of provisions of the Manual which have been invalidated, in whole or in part, by decisions of the United States Court of Military Appeals. For a general statement of the position of the Manual in military law see *United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962).

¹¹ Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHNS L. REV. 225, 232 (1961).

¹² 384 U.S. 436 (1966).

¹³ *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

Three requirements of military law simplified the *Miranda* change in the preconditions to admitting into evidence oral or written pretrial statements made by a suspect or accused. First, military law already required that every person suspected or accused of an offense be advised, before questioning, that he had a right to remain silent, and that if he elected to speak what he said could be used against him in a court-martial.¹⁴ Secondly, military law already provided that the suspect or accused could consult the legal adviser to the court-martial authority, a lawyer on his staff, or counsel of his own choice before being subjected to interrogation.¹⁵ Thirdly, military law already maintained a functioning system of appointed counsel and required that a lawyer be appointed for the accused while charges were still in the investigative stage.¹⁶ So far as these aspects of *Miranda* are concerned, the military was not required to adopt significantly new procedures to safeguard the individual's constitutional right to remain silent and his right to the assistance of counsel.

One feature of the standard investigative procedure in the military could not, however, survive *Miranda*. It was common practice for military enforcement officers, as it was with the civilian police, to question a suspect after advising him of his right to remain silent, despite his insistence that he did not wish to say anything. Continued questioning tended to indicate that a statement made in the course of the interrogation might have resulted from an overbearing of the accused's will, but that fact alone did not require exclusion of the statement from evidence.¹⁷ In *Miranda*, the Supreme Court held that "interrogation must cease" if the accused indicates "in any manner, at any time prior to or during questioning" that he wants to remain silent, and any statement taken thereafter "cannot be other than the product of compulsion."¹⁸ Although the logic of turning a single item of evidence into a conclusive presumption of fact may be questioned, the Court of Military Appeals construed the *Miranda* dictate as a constitutional precept. The court reversed a conviction because the record of trial did not "clearly and convincingly" demonstrate that pretrial

¹⁴ UCMJ art. 31, 10 USC § 881 (1956) See *United States v. Wilson*, 2 U.S.C.M.A. 248, 8 C.M.R. 48 (1953).

¹⁵ *United States v. Gunnels*, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957).

¹⁶ UCMJ art. 32, 10 U.S.C. § 832 (1956). See *United States v. Tomaszewski*, 8 U.S.C.M.A. 266, 24 C.M.R. 76 (1957).

¹⁷ *United States v. Traweck*, 16 U.S.C.M.A. 50, 36 C.M.R. 206 (1966); *United States v. Moore*, 4 U.S.C.M.A. 842, 16 C.M.R. 56 (1954).

¹⁸ 384 U.S. 436, 474 (1966).

incriminating statements by the accused were made before he asserted the right to remain silent.¹⁹

A. NON-CUSTODIAL INTERROGATION

Military law does not require a custodial or coercive situation to actuate the *Miranda* system of threshold advice as to the right to remain silent. The obligation to warn exists outside the station house and without regard to whether the suspect has been significantly deprived of freedom of movement. Article 31 of the Uniform Code imposes an obligation upon a police officer to inform the suspect of the nature of the offense of which he is suspected, that "he does not have to make any statement regarding the offense," and that any thing said by him may be used as evidence against him in a trial by court-martial. A statement obtained without such preliminary advice is inadmissible in evidence against the accused over his objection, and an erroneously admitted statement is itself grounds for reversal of an otherwise proper conviction.²⁰

The military reports contain a regrettably large number of cases dealing with alleged violations of article 31. Two will serve to illustrate the broad reach of the article. In *United States v. Wilson*,²¹ a military police sergeant responded to a report of the shooting of a civilian in the bivouac area of United States troops in Korea. On the scene, he was informed by another military policeman that some Koreans had pointed out the accused to him as the persons who had shot their countryman. The accused were around a campfire with several other soldiers. The sergeant approached the group and asked who had done the shooting. The accused answered that they "had shot at the man." At trial, the statement was admitted into evidence against them. On appeal, it was held that the statement was inadmissible because the sergeant suspected the accused, but had not preliminarily advised them of their right to remain silent, as required by article 31, and the con-

¹⁹ *United States v. Bollons*, 17 U.S.C.M.A. 253, 38 C.M.R. 51 (1967). The question remains, however, as to whether *Bollons* is limited to custodial type interrogations or whether it extends to types of questioning not within the scope of *Miranda*. See text accompanying and following notes 34-35 *infra*.

²⁰ *United States v. Wilson*, 2 U.S.C.M.A. 248, 8 C.M.R. 48 (1953). It should be noted that article 31 is concerned only with the right to remain silent; it does not require advice as to the right to counsel. However, the accused may request counsel, and if he does, the interrogation must cease until he can consult with counsel. *United States v. Gunnels*, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1967).

²¹ 2 U.S.C.M.A. 248, 8 C.M.R. 48 (1953).

viction was reversed. In *United States v. Diterlizzi*,²² the accused was tried for voluntary manslaughter by causing the death of three persons in an automobile collision. At the trial, the prosecution offered in evidence testimony to the effect that when an air policeman asked who had been driving the car, the accused admitted that he had been the driver. The evidence indicated that the police officer arrived at the scene after the accident and that his observations led him immediately to conclude he should question the accused "for later court-martial action." The accused's admission that he was the driver was ruled inadmissible because he had not been informed of his right to remain silent.

B. INTERROGATIONS BY "PRIVATE PERSONS"

Article 31 is not limited to interrogations conducted by police officers. By its terms, "no person" subject to the Uniform Code may request a statement from a suspect or accused without first advising him of his right to remain silent. A literal construction of the article would subject every person in the military to its mandate. However, the Court of Military Appeals has rejected such a sweeping construction. Relying upon the legislative purposes of the article and suppositions of situations in which it would be logically absurd to apply it literally, the court has concluded that article 31 is not obligatory upon all in the military service and is not applicable in every instance in which a person suspected of an offense is asked to speak in regard to the offense. Broadly speaking, the court has determined that the article does not cover two classes of persons: (1) those not engaged in gathering evidence for the prosecution of a crime, and (2) those not purporting to exercise disciplinary authority over the accused at the time of questioning. Stated differently, article 31 does not apply to situations in which the questioner and the accused are engaged in a private transaction or one unrelated to military duty.

1. *Private Transactions.*

Considering the military hierarchy of authority and the multiple occasions in which disciplinary authority over another is present without regard to rank, it is not always easy to determine whether a particular situation is purely personal and, therefore, outside the scope of article 31. As the Court of Military Appeals observed in *United States v. Dandaneau*,²³ one "may occupy a position officially superior to that of an accused, without necessarily characterizing all his actions in relation to the accused as

²² 8 U.S.C.M.A. 334, 24 C.M.R. 144 (1957).

²³ 5 U.S.C.M.A. 462, 18 C.M.R. 86 (1955).

official."²⁴ In that case, the court held that an incriminating statement made by the accused to a captain, without previous warning as to the right to remain silent, was not obtained in violation of article 31, despite the fact that before he spoke to the accused the captain knew the accused had returned from an unauthorized absence, which was a violation of the Uniform Code. It appeared that the captain had known the accused from previous assignments, and had approached him on a "personal basis" to ask what had happened to him.

In *United States v. Beck*,²⁵ a close friend of the accused was a military policeman. He was assigned to escort the accused from a civilian jail to a military jail. En route, they engaged in conversation. In the course of the conversation, the policeman asked several questions about the shooting for which the accused had been arrested. The accused's answers were incriminating. At trial, the police officer maintained that he and the accused had talked only as two friends. The accused's statements were admitted into evidence on the ground they were part of an "ordinary" private conversation, which did not come within the purview of article 31.²⁶

*United States v. Johnson*²⁷ held that interrogation of a person suspected of larceny by the victim of the theft is not within the intentment of the article. In that case, the accused stole money from his friend. Initially, the latter considered, but did not pursue, the possibility that the accused was the thief. Later, he learned the accused had given unsatisfactory answers in a lie detector test, and he decided to question the accused again about the theft. As one might expect, he gave no preliminary advice as to the right to remain silent. In the questioning, the accused admitted his guilt. At trial, the accused contended his confession of guilt was obtained in violation of article 31. The contention was rejected. On appeal, the Court of Military Appeals pointed out that, according to the evidence, the victim's interest in the questioning was not "to detect and perfect a case against an offender," but merely to recoup his

²⁴ *Id.* at 465, 18 C.M.R. at 89.

²⁵ 15 U.S.C.M.A. 333, 35 C.M.R. 305 (1965).

²⁶ On appeal, the conviction was reversed, but only on the ground that a question of fact was presented as to the nature of the conversation, whether official or private, which should have been, but was not, submitted to the court members for final determination.

²⁷ 5 U.S.C.M.A. 795, 19 C.M.R. 91 (1955). In *United States v. Josey*, 3 U.S.C.M.A. 767, 14 C.M.R. 185 (1954), a law enforcement agent was present and expressly approved the victim's statement that no charge would be pressed if the accused returned the stolen property. The court held that the agent's presence and comments imparted a sufficient element of officiality to the questioning to bring it within the scope of article 31.

own loss. It concluded that the questioning was personal, not official, and did not fall within the ambit of the article.

2. *Transactions with Persons Having No Apparent Disciplinary Authority.*

Interrogation by persons who are in fact, but not in appearance, connected with law enforcement presents some troublesome situations. The most obvious case is that of the undercover police officer. As a person subject to the code, the literal language of article 31 would require him to inform a suspect of his right to remain silent before he engages him in any conversation concerning a suspected offense. A searching review of the history and legislative background of the article convinced the Court of Military Appeals that the article was intended to overcome the pressures inherent in superior rank or official position, which made the mere asking of a question the equivalent of a command. It concluded, therefore, that the article was inapplicable to situations in which the questioner did not appear to be connected with law enforcement and in which he had no apparent "official" status.²⁸ An undercover police agent thus is not subject to article 31 and need not preliminarily advise a suspect that he has the right to remain silent.

A police informer operates much like an undercover police officer. Consequently, he, too, need not first warn a suspect he has a right to remain silent.²⁹ Other persons who, like informers, may have no official status in military law enforcement, but who, unlike informers, purport to act for the military may be required to inform a suspect of his rights under article 31. Civilian police officers acting on behalf of the military fall into this group.³⁰

C. STATEMENTS NOT AMOUNTING TO A CONFESSION

Prior to *Miranda*, military law had a standard of proof for the admission in evidence of a pretrial confession different from that for the admission of pretrial incriminating statements not amounting to a confession. The Manual, which generally regulates the procedure for courts-martial, requires the Government to show, before a confession can be admitted in evidence, that the statement was voluntary—i.e., that it was not obtained in viola-

²⁸ *United States v. Gibson*, 8 U.S.C.M.A. 746, 14 C.M.R. 164 (1954).

²⁹ *United States v. Hinkson*, 17 U.S.C.M.A. 126, 37 C.M.R. 390 (1967); cf. *United States v. Souder*, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959).

³⁰ *United States v. D'Arco*, 16 U.S.M.C.A. 213, 36 C.M.R. 369 (1966); *United States v. King*, 14 U.S.C.M.A. 227, 34 C.M.R. 7 (1963).

tion of article 31. No similar condition is imposed upon the receipt in evidence of an incriminating statement not amounting to a confession.³¹ The Manual further provides that the defense can consent to dispensing with the required showing of voluntariness, but the failure of defense counsel to object to the admission of the confession is not the equivalent of such consent. As the Court of Military Appeals pointed out, "it is not enough to say he [the military judge] relied upon the absence of defense objection for the Manual itself declares that 'a waiver of an objection does not operate as a consent if consent is required.'" ³² However, since no preliminary proof of compliance with article 31 was required for a statement not amounting to a confession, failure to object to its admission in evidence constituted a waiver of any violation of article 31 incident to procurement of the statement.³³ *Miranda* wiped out these differences, at least as to statements obtained during custodial interrogation.

In *United States v. Lincoln*,³⁴ the Court of Military Appeals focused on *Miranda's* declaration that no "distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense."³⁵ Although the declaration referred to the necessity for threshold advice, not the effect of a failure to object at trial to the admission in evidence of a pretrial statement, the court concluded that it invalidated the Manual's provision distinguishing the conditions of admissibility of a confession from those relating to statements other than confessions. The court held that, from the date of publication of *Miranda*, the Government was required to prove that the accused had been properly advised of his rights before any statement obtained during custodial interrogation could be admitted in evidence. It was further held that, as with a confession, the failure to object to receipt of an inculpatory pretrial statement did not amount to consent to its admission in evidence, and, therefore, the accused could, for the first time on appeal, attack the sufficiency of the evidence as to threshold advice.

The majority opinion in *Lincoln* does not suggest any limitation on the court's holding. However, the court may not have wiped out entirely the Manual's distinction between confessions and lesser

³¹ MCM, 1951, ¶140a, at 248-52.

³² *United States v. Smith*, 15 U.S.C.M.A. 416, 417, 35 C.M.R. 388, 389 (1965).

³³ *United States v. Davis*, 10 U.S.C.M.A. 624, 28 C.M.R. 190 (1959); *United States v. Josey*, 3 U.S.C.M.A. 767, 14 C.M.R. 185 (1954).

³⁴ 17 U.S.C.M.A. 330, 38 C.M.R. 128 (1967).

³⁵ *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

incriminating statements. As noted earlier, article 31 covers more than the custodial type interrogation. To the extent that it applies to a situation outside the scope of *Miranda*, the matter remains exclusively military, and should, therefore, be governed by military law.

D. CORROBORATION

Apart from the broader protection of the right to remain silent accorded by article 31, military trial practice requires greater corroboration of a confession than does the practice in the federal district courts. It is, of course, axiomatic in American law that a confession alone is not sufficient to support a conviction. Until *Opper v. United States*,³⁶ the federal courts were divided as to the amount and the extent of the evidence required to corroborate a confession. Some courts of appeal held that the corroborative evidence need only establish the truthfulness of the confession or material facts embraced in it; others held the corroborative evidence must not only fortify the truthfulness of the statement but also touch upon the *corpus delicti*; and still others followed the stricter rule, as enunciated by the Court of Appeals for the District of Columbia in *Forte v. United States*,³⁷ that the corroborative evidence must establish the probable commission of every element of the offense charged, other than the identity of the wrongdoer. As discussed in the Manual, the corroboration rule was stated in terms of the *Forte* formulation, and this became the military rule.³⁸

In the *Opper* case, the Supreme Court disavowed *Forte's* emphasis upon the *corpus delicti* and held that the independent evidence need only "tend to establish the truthfulness of the statement." The effect of *Opper* was considered by the Court of Military Appeals in *United States v. Villasenor*.³⁹ A majority of the court construed the Manual as a fixed rule of practice, promulgated by the President pursuant to his rule-making power under article 36 of the Code, and, as such, required that it be followed.⁴⁰

³⁶ 348 U.S. 84 (1954).

³⁷ 94 F.2d 286 (D.C. Cir. 1937).

³⁸ MCM, 1951, ¶140a, at 251. See *United States v. Isenberg*, 2 U.S.C.M.A. 349, 8 C.M.R. 149 (1953).

³⁹ 6 U.S.C.M.A. 3, 19 C.M.R. 129 (1955). *Opper* was further considered and reaffirmed in *United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962).

⁴⁰ It has been suggested that the authority to promulgate rules of procedure be conferred upon the United States Court of Military Appeals to conform military practice to federal civilian practice, where the rules are established by the Supreme Court. Feld, *Courts-Martial Practice: Some Phases of Pretrial Procedure*, 28 BROOKLYN L. REV. 25, 26 (1956).

As a result, military practice still requires that evidence aliunde the confession "establish the probable existence of each element of the offense charged."⁴¹

III. THRESHOLD ADVICE AS APPLIED TO CONDUCT

Pointing a finger or nodding the head may be as incriminating as an oral or written statement. For example, if a suspect is asked to point out the car, among those in a crowded parking lot, which he had stolen, and he complies, his act is as incriminating as an oral admission of guilt. Such conduct is usually described as a "testimonial act," and is within the protection of the privilege against self-incrimination.⁴² It is also within the protection of article 31. In *United States v. Nowling*,⁴³ an air policeman from Sheppard Air Force Base was on patrol in the town of Wichita Falls, Texas. He encountered the accused in a night club. Earlier, he had seen the accused in the Air Police Operations Office at the base and had been informed that he had been apprehended at the main gate for violating regulations regarding the wearing of the uniform. The usual practice in such cases, which was known to the air policeman, was that the offender's pass was taken from him and he could not leave the base. As a result, the policeman "suspected" that the accused had left the base without proper authority. He approached the accused and, without advising him of his right to remain silent, asked him for his pass. The accused produced one bearing a name other than his own. He was immediately taken into custody and charged with wrongful possession of an unauthorized pass with intent to deceive, in violation of article 184 of the Code. He was convicted of the charge, but the conviction was reversed by the Court of Military Appeals. The court noted that a "statement" within the meaning of article 31 may consist of a physical act as well as an oral declaration. It held that the article applied to the air policeman's inquiry, and that the pass produced by the accused was inadmissible in evidence because the accused had not been first advised of his right to say or do nothing.

Not every act by a suspect in response to a question by a police officer is, however, tantamount to a testimonial assertion. Thus,

⁴¹ *United States v. Snearley*, 16 U.S.C.M.A. 462, 463, 35 C.M.R. 434, 435 (1965).

⁴² See *United States v. Taylor*, 5 U.S.C.M.A. 178, 17 C.M.R. 178 (1954); 9 J. WIGMORE, EVIDENCE §§ 2236-64, at 378-86 (3d ed. 1940).

⁴³ 9 U.S.C.M.A. 100, 25 C.M.R. 362 (1958).

asking a suspect to roll up the sleeve of his shirt to uncover his arm for examination for a scar is not testimonial in nature. Similarly asking a suspect to turn his head to face a camera to be photographed is not testimonial, nor is the mere act of placing his fingers on an ink pad and paper for fingerprinting a declaration of identity or genuineness. Positioning the arm for extraction of a sample of blood for analysis is not a testimonial utterance, although the analysis may disclose the existence of an incriminating fact. In all such instances, military law, consistent with civilian law, does not require that the accused be first advised of his right to refuse the act as a condition to receipt of evidence that the act was performed and certain information was obtained as a consequence.⁴⁴ However, military law regards certain acts as "statements" within the meaning of article 31, which civilian law does not protect by threshold warning.

A. HANDWRITING EXEMPLARS

In *United States v. Wade*⁴⁵ and *Gilbert v. California*,⁴⁶ the Supreme Court held that no constitutional question of self-incrimination was involved in directing a suspect to provide samples of handwriting. The Court reasoned that a handwriting exemplar is a mere "identifying physical characteristic," which, by reference to *Schmerber v. California*,⁴⁷ it impliedly equated to extraction of a blood sample.⁴⁸ Reasoning like that of the Supreme Court in *Wade* led the draftsmen of the Manual to remark that article 31 is "not violated by requiring a person [including an accused] . . . to make a sample of his handwriting."⁴⁹ In an early case, *United States v. Rosato*,⁵⁰ the Court of Military Appeals reasoned that

⁴⁴ See, e.g., *United States v. Williamson*, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954); cf. *United States v. Musguire*, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958).

⁴⁵ 388 U.S. 218 (1967).

⁴⁶ 388 U.S. 263 (1967).

⁴⁷ 384 U.S. 757 (1966).

⁴⁸ The analogy is questionable. The blood of a suspect exists. Extracting a sample of blood from a vein is like extracting a gun from a pocket. In other words, the situation is more akin to a search than to a statement. Since reasonable force may be used to make a lawful search, reasonable force may be used in the extraction of blood from a vein. A handwriting exemplar, unlike blood or a finger from which a print is desired, is not in existence at the time the accused is asked to furnish it. If force is used to produce an exemplar, can it truthfully be said that it is a sample of the suspect's writing? Is it not more reasonable to assume that when force is used to make the accused's fingers trace a pattern of letters and words, the result is not the physical characteristics of the accused, but rather that of the person who forced the movements.

⁴⁹ MCM, 1951, ¶150b, at 284.

⁵⁰ 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953).

since enforcement officials could not compel an accused to produce self-incriminating evidence then in existence, they could "not lawfully compel an individual to compose and deliver" a handwriting sample. The court concluded that a handwriting sample, obtained from an accused without threshold advice as to his right to say and do nothing under article 31, was inadmissible in evidence against him.

After the Supreme Court's determination that directing a suspect to provide a handwriting exemplar was not a violation of the constitutional right against self-incrimination, the Court of Military Appeals reexamined its *Rosato* decision.⁵¹ Again, the court noted that article 31 was broader in scope than the fifth amendment, and it reaffirmed the *Rosato* holding that composing a handwriting exemplar was an exercise of the intellect and thus constituted a "statement" within the meaning of article 31.

B. VOICE IDENTIFICATIONS

A similar difference exists between military and civilian law in regard to voice utterance for voice identification. Voice utterance frequently takes place at a lineup, at which the suspect and others are directed to utter particular words or phrases for the purpose of determining whether the suspect's voice is like that of the person who committed the offense under investigation. By what may fairly be described as curious reasoning, the Supreme Court has determined that the lineup is so critical a confrontation between the accused and the government as to require that he be informed, before taking part in the lineup, that he has the right to counsel to monitor the proceedings, but that he has no concomitant right to refuse to utter words for voice identification.⁵²

⁵¹ *United States v. White*, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).

⁵² *United States v. Wade*, 388 U.S. 218 (1967). One can ask: "How can the order to speak be enforced, if the accused refuses to speak, or if he utters the words in a tone of pitch so different from that used by the offender as to make identification difficult?" An accused's voice cannot be extracted from him. No instrument can draw particular words or phrases from his vocal chords, as a needle can draw blood from his veins, or a breathalyzer collect exhalations from his mouth. In recent years, various types of machines have been used for voice identification. Some of these utilize a stylus to record a line pattern of the voice sounds which purport to be unique for every individual, regardless of his linguistic background, and to disregard differences, in pitch, resonance, or other variable qualities the human ear apparently depends upon for voice identification. Voice prints from one such machine, described by a witness as yielding 96% success in controlled experiments, have been allowed in evidence for comparison of a voice sample voluntarily given by the accused with a voice print from the recording of an obscene and threatening telephone call by an unknown person. *United States v. Wright*, 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967). Even if voice identification could be

Logical or not, the Supreme Court decisions establish that there is no constitutional right to refuse to speak for voice identification even when the accused is in police custody. In military law, an oral declaration for voice identification is a "statement" within the meaning of article 31. Rejecting a Manual comment that requiring a suspect to utter words for voice identification was not a violation of article 31, the Court of Military Appeals held that a voice utterance constituted a "statement" within the meaning of the article and, therefore, testimony as to identification of the suspect's voice was not admissible in evidence unless he was first warned of his right to remain silent.⁵³ The Court adhered to this position after the *Wade* and *Gilbert* cases were urged upon it as justification for overruling its earlier construction of the article.⁵⁴

IV. SEARCH AND SEIZURE

As a constitutional right, the right to be free from an unreasonable search and seizure is part of military law.⁵⁵ There are, however, important differences between the civilian and military mechanisms for safeguarding this right.

A. ESTABLISHING PROBABLE CAUSE

Probable cause is basic to a reasonable search. Putting aside certain established exceptions, such as a search incident to a lawful arrest, the requisite proof of probable cause is set out in a written application for a warrant, and determination of the sufficiency of the proof is made by an "independent judicial officer."⁵⁶ Rule 41 of the Federal Rules of Criminal Procedure authorizes issuance of a warrant by federal and state judges and by the United States Commissioner within the district where the property sought is located. Obviously the rule is inoperative in a foreign country. By implication, at least, it is also inoperative in areas under the control of an armed force.⁵⁷ As a result, other means have evolved to satisfy the constitutional intentment that an impartial official

made exclusively by such machines, having the accused speak is still not comparable to the noncommunicative act of taking his fingerprints for comparison. The fingers are open and visible, and need only be pressed on an ink pad and on paper to be recorded. Voice utterance must be made; words must be conceived and constructed.

⁵³ *United States v. Greer*, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1958).

⁵⁴ *United States v. Mewborn*, 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968).

⁵⁵ *United States v. Hartsok*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

⁵⁶ *Jones v. United States*, 362 U.S. 257 (1960). See also *Chimel v. California*, 395 U.S. 752 (1969), which drastically limits the scope of warrantless searches incident to lawful arrest.

⁵⁷ See *United States v. Doyle*, 1 U.S.C.M.A. 545, 4 C.M.R. 137 (1952).

be interposed between the police and the individual to insure that probable cause to search is present. The Manual provides that a search of property on a military installation may be "authorized by a commanding officer (including an officer in charge) having jurisdiction over the place where the property is situated."⁵⁵

Unlike rule 41, the Manual is silent as to whether the application for authority to search must be in writing. In view of the omission, it was concluded that an oral application was valid.⁵⁷ Also unlike rule 41, the Manual does not require that the application be upon oath or affirmation. A third dissimilarity is the unique authority reposed in the commanding officer to delegate his power to order a search to other persons in his command.⁶¹ As a result of these differences, a defense challenge to the sufficiency of the showing of probable cause is complicated. While the accused in the civilian community can look to the affidavits submitted to the officer issuing the warrant to determine whether sufficient evidence of probable cause was presented to justify issuance of the warrant, no such convenient reference is available in the military. Instead, defense counsel must consult the officer authorizing the search and the agent applying for the authority to search. In most cases, such inquiry may not present any special difficulty, but there are potential problems. The period of time between the search and the accused's procurement of counsel may be substantial. In that interval witnesses may forget the precise events, or recall them differently. Also, witnesses may become unavailable because of transfer, death or separation from the service.

Recognizing the need for greater certainty than that provided by oral application for authority to search, the Court of Military Appeals has encouraged the services to require written applications for a warrant. It has pointed out that written applications would not only simplify "the task of decision" as to the existence

⁵⁵ MCM, 1951, ¶152, at 288. See *United States v. Carter*, 16 U.S.C.M.A. 277, 36 C.M.R. 433 (1966).

⁵⁶ *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

⁶⁰ MCM, 1951, ¶152, at 289. See *United States v. Gebhart*, 10 U.S.C.M.A. 606, 28 C.M.R. 172 (1959). Although the Supreme Court has often referred to issuance of a warrant by an "independent judicial officer," the Court of Military Appeals held that the Constitution does not literally require that a warrant be issued by a judicial officer. It concluded that authority to issue a warrant was not judicial in the sense that it could not be delegated to another, and it sustained the validity of the Manual's provision for delegability. *United States v. Drew*, 15 U.S.C.M.A. 449, 35 C.M.R. 421 (1965). To safeguard against abuse of the power, it has scrutinized the qualifications of the designee to determine if he can act with a "judicial" attitude. *United States v. Ness*, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1962).

of probable cause, but would obviate the "necessity for extensive testimony, months after the event."⁶¹ Some individual commands have responded to the court's suggestions by adopting a local rule providing for written applications in ordinary circumstances, but no general regulation has been promulgated for all the services.

B. SCOPE OF THE SEARCH

A civilian search warrant is customarily limited to particular places and specified persons. A similar limitation is generally observed in the military, but a broader type of search is also recognized. The latter is known as the "shakedown" search. Its uniqueness lies in the number of persons and places that may be involved. As described in *United States v. Harman*,⁶² it contemplates that "every person assigned to the room or barracks to be searched is directed to place his effects on his bunk and to stand alongside, or to open his locker and stand by it."⁶³

On first exposure to the shakedown search, the civilian practitioner might regard it with suspicion. It may, however, be compared to the search of several apartments in a multiple dwelling when there is probable cause to believe evidence of a crime is present in the building, but the exact apartment is unknown. Suppose, for example, a number of reputable persons report to the police that they saw a man shoot another, and that the murderer had dragged the lifeless body of his victim into a multiple apartment building. Suppose further that when the police arrived on the scene the witnesses reported they had not seen anyone leave the building. Inspection of the public corridors of the building furnishes no clue as to the hiding place of the murderer and his victim. Is there not probable cause to search every apartment in the building? This is the essence of the "shakedown" search.⁶⁴

C. EXCLUSION

Under rule 41 a person aggrieved by a search may immediately move to suppress the results, and, in an appropriate case, obtain return of the seized property. Military law does not directly provide for such relief. In fact, the Manual indicates that military courts have no authority to order illegally-seized property returned to the accused or to impound such property for the purpose of suppressing its possible use as evidence at trial. It provides that

⁶¹ *United States v. Martinez*, 16 U.S.C.M.A. 40, 42, 36 C.M.R. 196, 198 (1966).

⁶² 12 U.S.C.M.A. 180, 187, 30 C.M.R. 180, 187 (1961).

⁶³ *Id.* at 187, 30 C.M.R. at 187.

⁶⁴ *See United States v. Schafer*, 13 U.S.C.M.A. 83, 32 C.M.E. 83 (1962).

"an objection to the use of evidence on the ground that it was illegally obtained . . . is properly made at the time the prosecution attempts to introduce the evidence."⁶⁵

A general court-martial is an entity composed of court members, who largely act as a jury, and a military judge, who acts as a trial judge. Neither can sit independently. Thus, the military judge by himself has no authority to conduct a pretrial hearing on motions for appropriate relief.⁶⁶ However, as an entity, the court-martial may convene to hear only a limited issue, even though the matter is one that can be decided only by the military judge.⁶⁷ It would, therefore, appear to be proper for the court-martial, to which the charges have been referred, to convene in advance of the time set for trial of the merits for the purpose of considering a motion to suppress.

The Manual's remarks are misleading from another point of view. Before the court-martial convenes for trial, all pretrial proceedings in the case can be considered by the convening authority, that is, the officer who referred the charges to the court-martial for trial. The Manual expressly provides that any objection capable of determination without trial of the issue "may be raised before trial by reference to the convening authority."⁶⁸ The sweep of the Manual's language has led one commentator to conclude that all pretrial motions for preliminary relief may properly be brought before the convening authority.⁶⁹

A third means of establishing the invalidity of a search in advance of the trial is in the formal investigation required by article 32 for a general court-martial. At this investigation, the accused is entitled to appointed counsel and to call and examine available witnesses. While the investigating officer is empowered only to make advisory recommendations to the officer who ordered the investigation, if his recommendation as to the illegality of a search is approved it may lead to dismissal of the charge because of the insufficiency of the other evidence to support a conviction.

Except for occasional use of the article 32 investigation to ventilate the issue, search and seizure questions are generally raised for

⁶⁵ MCM, 1951, ¶152, at 288.

⁶⁶ *United States v. Robinson*, 13 U.S.C.M.A. 674, 33 C.M.R. 206 (1963). UCMJ arts. 16(1)(B) and 39a, as amended by the Military Justice Act of 1968, however, authorizes the military judge to conduct such pretrial hearings and even to preside over actual trials without a court under certain circumstances.

⁶⁷ *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

⁶⁸ MCM, 1951, ¶67b, at 96.

⁶⁹ *Cf. United States v. Mullican*, 7 U.S.C.M.A. 209, 21 C.M.R. 334 (1956); see generally Feld, *supra* note 40.

the first time at trial. The standard procedure is for defense counsel to object when government counsel offers evidence obtained as a result of the search, and to request an out-of-court hearing. In a general court-martial, the hearing is before the military judge, who rules finally on the issue. In a special court-martial, the issue is considered in open court because the president rules subject to objection by any court member and, on objection, the matter is determined by a majority vote of all the members.⁷⁰

Miranda has raised certain questions as to search and seizure that have not yet been fully explored in the civilian courts. The first question is whether a search is so critical a confrontation between the individual and the government as to require that he be first advised he has a right to the presence of counsel. In a number of cases subsequent to *Miranda*, the Supreme Court redefined the right against unreasonable search in the broader terms of a right to privacy.⁷¹ In none of these cases, however, did the Court give any indication that threshold advice as to the right to counsel must be given, either at the time of the application for a warrant or at the time of the execution of the warrant. The second question is whether preliminary advice of the *Miranda* type is required when consent of the individual concerned is sought for a search. Again, the search cases decided by the Supreme Court after *Miranda* do not discuss the question. A third question is whether *Miranda*-type advice must be given when consent to a search is sought from a person in a custodial interrogation.

All three questions were considered by the Court of Military Appeals in *United States v. Rushing*.⁷² Each of the three judges of the court wrote separately on the subject. There was no definitive decision as to any of the questions, but, by implication at least two agreed that in a noncustodial situation a police officer need not first advise the individual whose consent is sought that he has a right to refuse his consent and that he has a right to the presence of counsel, his own or appointed, before he gives his consent. The principal opinion held that such separate advice also need not be given when the individual is in custody and is not separately required by article 31 in a noncustodial situation. It observed that a "search is no more than a means of gathering evidence"; it offers no significantly "variable factors" that can be monitored by coun-

⁷⁰ MCM, 1951, ¶57, at 79-80. See *United States v. Baca*, 16 U.S.C.M.A. 811, 36 C.M.R. 467 (1966).

⁷¹ See *v. Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

⁷² 17 U.S.C.M.A. 298, 38 C.M.R. 96 (1967).

sel; and that the consent of the individual to the search "is not itself incriminatory."

V. CONCLUSION

In the military, as in the civilian community, there are those who look backward, wistfully and longingly, to the "old ways" of handling the law breaker, and think how simple and effective life would be if we returned to them. Only last year, the commanding officer of a Naval station issued a Plan of the Day in which he referred, nostalgically and apparently approvingly, to a story in which a thief aboard an old coal-burning ship was thrown by his shipmates into the boiler of the ship as punishment for his offense.⁷⁵ Human nature being what it is, there will probably always be those who regret the present, fear the future, and sanctify the past. Fortunately for society, for most of us the past is only a prologue to the present, and the present is the creative forerunner to a rewarding future.

Courts-martial procedures under the Code have irreversibly moved from the drumhead. To a large degree they correspond to those in the regular federal courts, and, as we have seen, in some areas they accord the military accused broader protections than the civilian accused. The military system is not faultless and unimprovable. Indeed, there are defects, but these are defects of inefficiency and inconvenience, not vices that tend to destroy or diminish the fundamentals of a fair trial. Sentence procedures, for example, are not entirely compatible with current developments in the civilian community. The American Bar Association's Advisory Committee on Sentencing and Review has remarked that "jury sentencing in noncapital cases is an anachronism and . . . should be abolished."⁷⁶ In courts-martial, the court members impose sentence in all cases, capital and noncapital. While that action is only part of the total military sentence procedure, which includes factors not generally present in civilian jurisdictions, such as appellate review of the severity of the sentence,⁷⁷ there is certainly room for a new approach.

Under the Code, the courts-martial system can truly be regarded as an integral part of the federal judiciary. The American people generally, and specifically the legal profession which played so large a role in its development, can be proud of the phenomenal

⁷⁵ *United States v. Cole*, 17 U.S.C.M.A. 296, 38 C.M.R. 94 (1967).

⁷⁶ 2 CRIM. LAW REPR. 3091 (1968).

⁷⁷ UCMJ art. 66, 10 U.S.C. § 866 (1956); *United States v. Jefferson*, 7 U.S.C.M.A. 193, 21 C.M.R. 319 (1956).

turnabout that was effected. The millions of men and women in the armed forces are assured of fair procedures in, and fair administration of, the "Rules for . . . [their] Government and Regulation."²⁶

²⁶ U.S. CONST. art. 1, § 8.

FEDERAL TORT CLAIMS LIABILITY—WHO ARE UNITED STATES EMPLOYEES?*

By Major James L. Livingston **

The basis of respondeat superior liability of the United States for the torts of its employees is the subject of this article. Several theories regarding the status of government employees are discussed, with particular emphasis on the problems created by the interaction of non-governmental employers. In conclusion, the writer asserts that the increasing liberalization of court decisions involving the Federal Tort Claims Act has properly fulfilled legislative intent.

I. INTRODUCTION

The Federal Tort Claims Act¹ is a qualified congressional waiver of the sovereign immunity of the United States from tort liability for negligent and wrongful acts of government employees. Subject to certain provisions listed at 28 U.S.C. § 2680,² the federal district courts were granted exclusive jurisdiction of civil actions on claims against the United States:

[F]or money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, 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.³

Since the passage of the FTCA, numerous federal cases have arisen in which the courts have decided the issue of status as an employee of the United States Government within the meaning of

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¹ Title IV, Legislative Reorganization Act of 1946, Ch. 753, 60 Stat. 842, as amended, 28 U.S.C. §§ 1291, 1346(b), (c), 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1964), as amended, 28 U.S.C. §§ 2401, 2671, 2672, 2675, 2677-79 (Supp. IV, 1969) [hereafter cited as FTCA].

² Thirteen activities are specifically excepted from the sovereign immunity waiver of the FTCA.

³ 28 U.S.C. § 1346(b) (1964), as amended by 80 Stat. 307 (1966).

the FTCA. In every case resulting in liability under the FTCA some person must have acted wrongfully or negligently as an employee of the government.

The purpose of this article is to identify the status of persons who are "United States employees" for purposes of casting liability upon the United States under the "respondeat superior" principles of the FTCA. The scope of this article excludes questions relating to whether government employees were acting within the scope of their employment at the time of an alleged negligent act covered by the FTCA. Also, there will be no direct concern with cases in which the issue involves a plaintiff's possible status as an employee of the government, thereby possibly preventing his taking advantage of the remedies available under the FTCA. Since the status of an agency or organization frequently bears on the federal employment question, the characteristics of federal agencies will be discussed throughout this article.

The FTCA provides the basic statutory standards for the judicial determination of the issue of government employment. The context of the phrase, "employee of the government," expressly includes:

[O]fficers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States whether with or without compensation.⁴

The term "federal agency" is defined in the same title and section of the FTCA to include "the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States,"⁵ but not to include any contractor with the United States.⁶ Judicial interpretation of these statutory definitions has resulted in much clarification of the meaning of employee of the government. The courts faced with the problem of identifying government employees have had to consider numerous factors in addition to the above-mentioned statutory definitions, which in practice amount to broad generalities requiring refinement by application of FTCA decisional law. Since the FTCA definitions of government employee and federal agency are not restatements of common-law concepts, nor sufficiently definitive statutory substitutes for the traditional meaning of employee or

⁴ 28 U.S.C. § 2671, as amended by 80 Stat. 307 (1966).

⁵ *Id.*

⁶ *Id.*

agency, the courts have been confronted with the task of determining whether the FTCA definitions preempt or implement the common-law definitions.⁷ Furthermore, it has been necessary to resolve the related issue of choice of federal or state law where there is a conflict. In most cases, however, there is little significant distinction between state and federal law on these issues.⁸

Where an alleged employee fails to qualify as a government employee under any of the three distinct categories set forth in the definitions section (*i.e.*, officers and employees of any federal agency, members of the military and naval forces, and persons acting on behalf of a federal agency in an official capacity, with or without compensation, temporarily or permanently), the courts have had to go beyond the wording of the Act to determine if such a person was intended to be within the comprehension of the Act. During the course of this article considerable emphasis will be placed on case analysis showing judicial application of non-statutory, as well as statutory, criteria to the resolution of the issue of government employee status.

II. FACTORS BEARING ON THE DETERMINATION OF STATUS AS AN FTCA GOVERNMENT EMPLOYEE

A. PREFATORY STATEMENT OF CONSIDERATIONS TO BE COVERED

In the process of construing the FTCA provisions relating to government employee status, the federal courts have with varying frequency analyzed a number of recurring issues that influence the judicial process in arriving at a conclusion of FTCA employee status. These considerations may be summarized as: Whether state or federal law is controlling in determining FTCA employee status; whether an activity may be characterized as a federal agency (of which its employees qualify as FTCA employees) or whether it possesses the distinguishing characteristics of an independent contractor (of which its employees do not qualify as FTCA employees); whether the "loaned servant" doctrine may be applied to avoid or to establish FTCA employee status; whether the alleged tortfeasor relates to the federal government in a dual capacity, as an independent contractor for some purposes, and as an employee for other purposes; whether sufficient nexus exists to

⁷ *Thomas v. United States*, 204 F. Supp. 896 (D. Vt. 1962), is an example of a court ruling that due to insufficient statutory definition of employee the general principles of agency should be applied.

⁸ L. JAYSON, *HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES*, § 201 (1964) [hereafter cited as *Jayson*].

establish FTCA employee status based on compensation or supervision coming from a federal source; whether an inability to identify a particular individual as an FTCA employee should preclude recovery under the FTCA. Frequently, these factors combine or interact to result in a determination of employee status. Each of these topics will be discussed below.

B. WHETHER STATE OR FEDERAL LAW IS CONTROLLING IN DETERMINING THE FTCA EMPLOYEE QUESTION

An unresolved conflict of opinion exists among the federal courts as to whether state or federal law is to be applied in the judicial determination of status as an employee within the meaning of the FTCA.

Several arguments have been advanced in decisions holding that state law is controlling on the issue of employee status. One plausible argument analogizes the issue of employment status with the issue of whether the tortfeasor was within the scope of employment at the time of a negligent or wrongful occurrence. Since there is no question regarding state law applicability to the issue of scope of employment, it is urged that state law should likewise control the determination of employee status.⁹ Another argument advanced in favor of state law controlling this issue refers to the wording of the FCTA which provides that FTCA liability shall be determined by "the law of the place where the act or omission occurred."¹⁰ It is thought that this statutory direction to apply state law to determine liability incorporated the determination of employee status. It appears that the underlying logic is that there can be no liability under the FTCA without a determination of employee status and since the Act directs state law to be applied

⁹ *Hopson v. United States*, 136 F. Supp. 804 (W. D. Ark. 1956); *Williams v. United States*, 350 U.S. 857 (1955), established the rule that state law is to be applied to determine the scope of employment issue. This is apparently the only clear Supreme Court holding on the choice of law problem pertaining to the three statutory definitions in the FTCA (scope of employment, government employee, and federal agency). In *Maryland ex rel. Levin v. United States*, 381 U.S. 41 (1965), the issue could have been clarified by expressing federal law applicability to a federal employment question; however, the court preferred to discuss the issue in terms of the administrative practices of the Defense Department and the congressional purpose in authorizing, and congressional recognition of, the status of National Guard caretakers. In *Feres v. United States*, 340 U.S. 135 (1950), *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), and *United States v. Gliman*, 347 U.S. 507 (1954), it was stated as dicta, apparently, that federal law should determine the federal employment question, but many lower federal courts have not considered this pronouncement as binding.

¹⁰ 28 U.S.C. § 1346(b) (1964).

in the determination of liability, state law should also be applied in the preliminary determination of employee status.¹¹ FTCA decisional law in the Fourth, Sixth and Eighth Circuits supports the position that state law controls this issue.¹²

A number of courts have held to the contrary on the issue of whether state or federal law must be applied to determine employee status. The major argument advanced in favor of federal law controlling this issue is that the meaning of the phrase, "employee of the government," contained in the FTCA is a matter of statutory construction, and since the FTCA is a federal statute, federal law should be controlling unless state law is expressly designated as controlling the issue. FTCA interpretations in the Second, Fifth, Ninth, and Tenth Circuits support this view.¹³ Although the Supreme Court has discussed this issue and stated in *Feres v. United States*¹⁴ that the question of government employment is clearly federal in character and that it is governed exclusively by federal law, the federal courts of the Fourth, Sixth, and Eighth Circuits apparently considered this position as mere dicta and not binding law in light of the subsequent holding in *Williams v. United States*,¹⁵ that state law governs the scope of employment issue. It would appear that the view holding federal law applicable to the determination of government employment is the more logical and legally defensible. The government creating the act should not be controlled by unrelated laws in deciding who is or is not its employee. The likening of the issue of employment status with the scope issue is not a logical categorization since the issue of employment has significance apart from the imposition of liability under the FTCA. For instance, employee status may be determinative of certain rights to wages, medical or retirement benefits, or it may create a legal status subjecting the employee to criminal process such as military courts-martial. As mentioned above, the United

¹¹ *Fries v. United States*, 170 F.2d 726 (6th Cir. 1948), cert. denied, 336 U.S. 954 (1948); *Smick v. United States*, 181 F. Supp. 149 (D. Nev. 1960).

¹² *Buchanan v. United States*, 305 F.2d 738 (8th Cir. 1962); *Malboof v. United States*, 242 F. Supp. 175 (D. Md. 1965); *Hopson v. United States*, 186 F. Supp. 804 (W.D. Ark. 1956).

¹³ *Maryland v. United States*, 381 U.S. 41 (1965); *Brucker v. United States*, 338 F.2d 427 (9th Cir. 1964), cert. denied, 381 U.S. 937; *Blackwell v. United States*, 321 F.2d 96 (5th Cir. 1963); *United States v. Hainline*, 315 F.2d 153 (10th Cir. 1963); *Pattino v. United States*, 311 F.2d 604 (10th Cir. 1962); *Courtney v. United States*, 230 F.2d 112 (2d Cir. 1956). See generally, Annot., *Who Is An "Employee of the Government" for Whose Conduct the United States May Be Held Liable Under the Federal Tort Claims Act—Federal Cases*, 14 L. Ed. 2d. 892, 897.

¹⁴ 340 U.S. 135 (1950).

¹⁵ 350 U.S. 857 (1955).

States Supreme Court has not ruled precisely on the issue of state or federal law controlling the determination of employee status. It has held, however, that federal practice should be considered in determining the issue of employee status. The court stated in *Maryland ex rel. Levin v. United States*¹⁶ that it viewed congressional purpose, administrative practice of the Defense Department, consistent congressional recognition, and state supervisory practices relative to civilian personnel of the National Guard in combination to arrive at a conclusion of state rather than federal employee status. The effect seems to be that federal law was determinative of the issue, but state law (to the extent that state supervisory practices may be considered state law) is not totally ignored.

Regarding the issue of whether an organization may be characterized as a federal agency for FTCA purposes, it may also be said that there are few precise holdings indicating which law should be applied. Since most federal agencies are established pursuant to federal legislative or executive action, and since there is usually federal regulation of the organization's functions, practices, and purposes in the form of federal statutes or directives, it seems most appropriate that federal law should control the judicial determination of the status of federal agency. In the few cases discussing this precise issue federal law was held to control.¹⁷

If, however, the issue arises regarding possible characterization of a wrongdoer as an independent contractor or his employee, rather than a government employee (the significance of this distinction is to be discussed below) the courts generally refer to local law describing the status as an independent contractor.¹⁸ One authority indicates that perhaps this is due to the fact that there is an absence of federal law in this area.¹⁹

*C. WHETHER AN ACTIVITY OR ORGANIZATION MAY
BE CHARACTERIZED AS A FEDERAL AGENCY OR
WHETHER IT POSSESSES THE DISTINGUISHING
CHARACTERISTICS OF AN INDEPENDENT
CONTRACTOR*

If an individual distinctly has status as an officer or employee of a federal agency, or is an active member of the Armed Forces of the United States, or holds any other status within the express pro-

¹⁶ 381 U.S. 41 (1965).

¹⁷ *Standard Oil Company v. Johnson*, 316 U.S. 481 (1942); *United States v. Holcombe*, 277 F.2d 143 (4th Cir. 1960).

¹⁸ *Anderson v. United States*, 259 F. Supp. 148 (E.D. Pa. 1966); *Buchanan v. United States*, 190 F. Supp. 523 (D. Minn. 1961).

¹⁹ JAYSON § 202.01.

visions of 28 U.S.C. § 2671, there can be no doubt that he is an FTCA government employee. On the other hand, subject to certain exceptions to be mentioned below, it may be stated as a general proposition that the United States Government may not be held liable under the FTCA for the negligence of an independent contractor or his employees. As mentioned in the introduction, the Act expressly states that the term "federal agency" does not include "any contractor" with the United States.²⁰ The immediate significance of the statutory delineation between "federal agencies" and "any contractor" with the United States appears in the further interpretation of the definitions section of the FTCA, in which an employee of the government is defined to include the officers or employees of any federal agency and persons acting on behalf of a federal agency in an official capacity.²¹ Since any contractor with the United States may not be construed as a federal agency, neither an independent contractor nor his employee may, according to the language of the statute, be considered an employee of the United States for the purpose of establishing FTCA liability.

The question next arises as to the meaning of the term "any contractor" and whether traditional standards of definition apply. Often the term "independent contractor" is used interchangeably with the term "contractor" in matters concerning the FTCA. As a matter of legal semantics there appears to be no significant distinction between the term "contractor" and "independent contractor." *Black's Law Dictionary* defines contractor as "one who in pursuit of independent business undertakes to perform a job or piece of work, retaining in himself control of means, method and manner of accomplishing the desired result."²² The same authority defines independent contractor as "one who, exercising an independent employment, contracts to do a piece of work according to his methods and without being subject to the control of his employer except as to the result of the work."²³ The essence of these definitions is that the contractor is freed from superior authority regarding the performance of the particular undertaking, thus the emphasis on independence of the contractor. This characterization of independence establishes that a master-servant relationship does not exist.²⁴ The legal implication of this independence is that the contractor is responsible for his and his employee's negligence, but

²⁰ 28 U.S.C. § 2671 (1964), as amended by 80 Stat. 307 (1966).

²¹ *Id.*

²² BLACK'S LAW DICTIONARY 397 (4th ed. 1951).

²³ *Id.* at 911.

²⁴ See RESTATEMENT (SECOND) OF AGENCY 220(2) (1957), for a statement of the legal characteristics of servants and independent contractors.

that the government engaging his services is not. This is an intended result, as the liability assumed by the federal government under the FTCA is limited by the doctrine of "respondeat superior"; so if there is no master-servant relationship existing between the government and the wrongdoer, there can be no FTCA liability.²⁶

As examples of judicial action distinguishing independent contractors from government employees, the following cases are mentioned. In *Strangi v. United States*,²⁶ after emphasizing that the main distinction between the independent contractor and the master-servant relationship is in the degree of control or right of control retained by the employer over the details of the work as it is being performed, but stating that no absolute distinguishing criteria exists, the court held that a person under contract with the government to clear land for a reservoir was not an employee of the government, but rather an independent contractor. Hence, there was no FTCA liability for his negligent use of fire, since control of such activity did not lie with the United States.

In *Buchanan v. United States*,²⁷ it was held, after emphasizing the lack of authoritative control over the firm's manner and means by which the details of its work were performed, that a firm that operated a government arsenal and manufactured ammunition was an independent contractor rather than an employee of the government. It was mentioned by the court that although the government maintained some measure of general control over the arsenal property, such control was similar to the interest and general control ordinarily exercised by an owner over his property, which through lease or other arrangement is in the immediate possession of another, and that here the government control was exercised in the necessary area of inspection, to insure that the firm's obligations to the government were fulfilled, rather than to take over the firm's obligations.

The total situation approach was similarly employed in *Hopson v. United States*,²⁸ where the firm operating an Army depot was held to be an independent contractor, and its employees not government employees for FTCA purposes, since the only right to control retained or exercised by the government over the depot's operation was limited to the results of the work being performed. It was held that the plant and facilities inspection rights, reserved

²⁶ 28 U.S.C. § 1346(b) (1964); JAYSON §§ 203, 276.

²⁷ 211 F.2d 305 (5th Cir. 1954).

²⁸ 305 F.2d 738 (8th Cir. 1962).

²⁹ 136 F. Supp. 804 (W.D. Ark. 1956).

by the standard government contract for this type of operation, did not destroy the firm's independence of operation.

In a thoroughly reasoned opinion, it was held in *Thomas v. United States*²⁹ that a star route mail carrier was an independent contractor rather than a government employee. The main factor considered in drawing this distinction was that of control over the details of the actual performance of the carrier's duties. Although the government's contract with the carrier contained several provisions indicating the government's right to insure that the mail delivery was properly performed, it was ruled that these provisions did not amount to control of the manner and method of actual delivery of the mail, nor was it control of the conduct of the carrier along the route. Other factors pointed out as bearing on the "control" question were that the control of the means of complying with the contract was entirely with the carrier, the government's only remedy for failure to perform under the contract's terms was by forfeiture or fine, the method of contract formation was that of competitive bidding (the Postmaster General was required to contract with the lowest responsible bidder), so the government had no actual choice in selecting the carrier, the only means of discharging the carrier was under the cancellation provisions of the contract, and the risk of profit was entirely on the carrier, who had to furnish his own equipment to perform his obligations under the contract and hire his own substitutes when he was unable to perform personally. Moreover, the carrier was paid according to his own calculations, his mail handling duties differed from those of regular postal department employees, and none of the customary government employee deductions were taken from his wages.

On the other hand, it was held in *Schetter v. Housing Authority of the City of Erie*³⁰ that a public housing authority was actually an instrumentality of the United States, rather than an independent contractor, even though provisions in the lease between the United States and the authority identified Erie as a lessee and independent contractor, and that all persons employed by the lessee were to be his employees, servants, and agents, and not those of the lessor. It was pointed out that when a lease shrouds the relationship between the government and an agency, courts should pierce the veil in order to avoid an evasion of governmental responsibility. Considering the actualities of the relationship and noting the extent of control retained by the government, the court

²⁹ 204 F. Supp. 896 (D. Vt. 1962).

³⁰ 132 F. Supp. 149 (W.D. Pa. 1955).

held that Erie was in reality a managing agent for the United States, rather than a lessee, and therefore the government was responsible for the negligent repair of a kitchen gas heater, which caused the asphyxiation and death of two young children of tenants in the housing project.

Mention should be made of the considerable potential governmental tort liability in the area of community housing programs, since the federal government's involvement in housing projects is vast and expanding. Case law has effectively applied the ordinary tort liability of a private land owner to the United States, following the FTCA's waiver of the government's traditional immunity. For example, in an FTCA action against the government for wrongful death allegedly resulting from the negligence of the manager of buildings leased to the federal Public Housing Authority, liability was established in *Maryland ex rel. Pumphrey v. Manor Real Estate & Trust Company*.²¹ The particular facts in *Pumphrey* are interesting. It was a widow's action to recover for the death of her husband by endemic typhus, a disease transmitted by the means of the bite of a flea from an infected rat. The manager's alleged negligence consisted of failing to take adequate measures to exterminate the rats. The government's argument that the manager, a real estate dealer, was an independent contractor was rejected on the basis that an employee is defined as a person acting on behalf of a federal agency in an official capacity. In this case the manager was subject to the detailed supervision of the Public Housing Authority, and the management contract bound the manager to regulations contained in an official manager's manual. Subsequently, it was held in *United States v. Dooley*²² that, for purposes of the FTCA, caretakers for a housing project owned by the United States were government employees.

It appears that where housing projects are leased or transferred to state or local management and control that federal tort responsibility may result from residual federal inspection or supervision. One authority states that, regarding the Demonstration Cities and Metropolitan Development Act of 1966,²³ where federal agents or instrumentalities exercise sufficient control over the local project as to constitute a cumulative factual predicate for de facto control, despite the language of contracts and other arrangements stating

²¹ 176 F.2d 414 (4th Cir. 1949).

²² 231 F.2d 423 (9th Cir. 1957).

²³ 42 U.S.C. §§ 8301-74 (1966).

the independent contractor status of the local agency, a major area of potential FTCA liability exists.³⁴

Subject to certain logical exceptions, the courts have consistently ruled that the torts of independent contractors with the government do not result in FTCA liability. The theme central to the exceptions to this rule is that the United States is subject to liability for tort claims in the same manner and to the same extent as a private person under like circumstances, as expressed in 28 U.S.C. § 2674. Several primary exceptions to the independent contractor exemption from FTCA liability were discussed at length in *Benson v. United States*.³⁵ It was recognized that even though the wrongdoer involved was an independent contractor rather than a government employee, the government may be liable for its own negligence in selection of the contractor or in its discharge of functions reserved to government control; or the government may be vicariously liable for the contractor's negligence where the law imposes a non-delegable duty to protect a class or individual from a particular harm; or the government may be liable for its negligence in failing to take reasonable precautionary measures with respect to an inherently dangerous activity, even though the independent contractor may also have been negligent in respect to such activity.³⁶

Another exception to the independent contractor basis of nonliability under the FTCA was discussed in *Anderson v. United States*.³⁷ It was held that when the government contract directs the independent contractor to perform work which of itself necessarily operates to cause damage to a claimant's property, the government may not avoid FTCA liability. In this case a dredging contractor was directed by the contract to use the claimant's land for a mud and silt dump, and the government had failed to acquire the right to use claimant's land. Liability for trespass was based not on the manner in which the work was performed, but rather on the fact that the object of the contract caused the damage.

Somewhat similarly, in the case of *Emelwon, Inc. v. United States*,³⁸ Florida law was interpreted to justify FTCA liability for the negligent spraying of water hyacinth and other noxious vegetation performed by the Florida Game and Fresh Water Fish

³⁴ I. GOTTLIEB & P. GANTT, "UNCLE SAM" AS A LANDLORD UNDER THE FEDERAL TORT CLAIMS ACT 84 (1967).

³⁵ 150 F. Supp. 610 (N.D. Cal. 1957).

³⁶ *Benson v. United States*, 150 F. Supp. 610 (N.D. Cal. 1957), citing W. PROSSER, TORTS § 64 (2d ed. 1955).

³⁷ 259 F. Supp. 148 (E.D. Pa. 1966).

³⁸ 391 F.2d 9 (5th Cir. 1968).

Commission, an independent contractor of the federal government. It was felt by the court that Florida law recognized two theories establishing a duty in the employer (the United States) of the independent contractor. One was that where an employer gains knowledge of a dangerous situation created by an independent contractor, it may incur liability through its failure to halt the operation or otherwise remove the danger. The other theory was based on the nondelegable duty concept. In this regard it was stated that the employer's liability is not absolute, nor is it vicarious for the negligence of the independent contractor, but it is imposed for his own failure to exercise reasonable care in a situation dangerous enough so that the employer himself has a duty to third persons.

It should be emphasized that although FTCA liability may be based on these exceptions, it is not dependent on a finding that the contractor involved was an agency of the United States, but rather it is an implementation of the basic policy declaration of 28 U.S.C. § 2674, that the United States shall be liable in the same manner as a private individual under like circumstances.³⁹

Frequently, in order to establish FTCA liability, it is necessary to prove that a wrongdoing employee's employer is an agency or instrumentality of the government. Judicial treatment of the question of the particular nature of the immediate employer depends on the facts of each case. The definitions section of the FTCA provides limited assistance by expressly designating—as federal agencies—executive departments, military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States. This section has been criticized as being insufficient, since it caused doubt whether the legislative and judicial branches of government were intended to be covered by the FTCA, by reason of the omission of these branches.⁴⁰ The legislative history of the act fails to indicate an express intent that the executive and judicial branches be included in FTCA coverage. Indicative of congressional intent, however, is a Senate Committee Report stating that the definitions section "makes it clear that its provisions cover all Federal agencies . . . and all Federal officers and employees . . ." ⁴¹ Perhaps because of this lack of clarity, an early FTCA case,

³⁹ *Hamman v. United States*, 267 F. Supp. 411 (D. Mont. 1967); *Newman v. United States*, 248 F. Supp. 669 (D. D. C. 1965); *Pierce v United States*, 142 F. Supp. 721 (E.D. Tenn., 1955), *aff'd per curiam*, 235 F.2d 366 (6th Cir 1956); *JAYSON* § 202.01.

⁴⁰ *JAYSON* § 202.01.

⁴¹ S. REP. NO. 1400, 79th Cong., 2d Sess. 31 (1946).

Cromelin v. United States,⁴² held that a federal district judge and a trustee in bankruptcy were not employees of the United States for FTCA purposes. The court so held after weighing the facts that the trustee was an officer of the court, appointed, directed, and paid by the court, and that the judge was appointed by the President, confirmed by the Senate, and paid from the federal treasury. The judge's status as a member of the independent judiciary was viewed as removing him from control of the United States, much in the same manner that a member of Congress is not an employee subject to federal control.⁴³

Considering the particular wording of the definitions clause which expressly "includes" the executive branch as a federal agency but fails to mention the judicial branch, the *Cromelin* result is understandable. Perhaps if the plaintiff's attorney in that case had presented the feelings of the Senate as expressed in the Senate Report,⁴⁴ a contrary holding would have followed. At least a ruling of non-liability based on the discretionary function exclusion of the FTCA would seem more logical.⁴⁵

A subsequent case, *McNamara v. United States*,⁴⁶ involving an injury due to a fall in the Capitol Building, resulted in a ruling that the legislative branch of government is to be considered as a federal agency even though the FTCA's definitions section was silent on this issue. The fact that the judge sitting on the *McNamara* case had assisted as a member of the Justice Department in the preparation of the final version of the FTCA of 1946 lends special significance to the *McNamara* decision. It appears that Judge Holtzoff could not resist the opportunity to clarify the confusion surrounding the federal agency definition. As there was no legislative history indicating an intent to exclude the legislative and judicial branches, and to so limit the act would defeat part of the beneficent purposes of the FTCA, he ruled that the act applies to all three branches of the government.⁴⁷

An organization with special character deserving consideration is the Peace Corps. The Peace Corps resembles the military organizations in that its members are subject to direction and control flowing from a superior authority, having a national purpose as its objective. Members of the Peace Corps also are obligated, al-

⁴² 177 F.2d 275 (5th Cir. 1949), cert. denied, 339 U.S. 944 (1949).

⁴³ *Id.*

⁴⁴ *Supra* note 41.

⁴⁵ 28 U.S.C. § 2680(a) (1964); JAYSON § 202.07.

⁴⁶ 199 F. Supp. 879 (D. D.C. 1961).

⁴⁷ *Id.*; JAYSON § 202.01.

though under more flexible terms, to serve definite periods of duty, somewhat similar to the tour of duty agreed upon in a military enlistment. However, the act establishing the Peace Corps declares that volunteers joining the Corps "shall not be deemed officers or employees or otherwise in the service or employment" of the federal government for any purpose unless the act provides a stated exception.⁴⁸ One of the stated exceptions in the Peace Corps Act makes Peace Corps volunteers employees of the government for FTCA purposes. 22 U.S.C. § 2504(h) (1964) states that "volunteers shall be deemed employees of the United States Government for the purposes of the Federal Tort Claims Act and any other Federal Tort liability statutes. . . ." It should be noted that the express designation of Peace Corps volunteers as FTCA government employees in the organizational statute is a simple and conclusive method of avoiding judicial inconsistency on the question of employment status. The Act is also significant in that it indicates congressional concern about the tortious activities of its newly created organizations. It would be commendable that Congress continue to express its intent regarding employment status in organizations it creates. It could thereby assist the courts in their treatment of FTCA litigation (notwithstanding the difference of opinion among the federal courts as to whether state or federal law controls this question).

In contrast to the Peace Corps is the Civil Air Patrol, a volunteer civilian aviation organization loosely connected with the Air Force. Although the members of the Civil Air Patrol qualify as civilian employees of the federal government for purposes of the Federal Employee's Compensation Act,⁴⁹ as do Peace Corps volunteers,⁵⁰ the Civil Air Patrol is not characterized as a federal agency within the meaning of the FTCA, and its members do not have FTCA employee status.⁵¹

However, where the Civil Air Patrol is engaged in a mission for the Air Force it would seem that the FTCA would probably cover the activities of its members either on the basis of the FTCA definitions of employee as one officially acting on behalf of a federal agency, or on the basis of supervision exercised by the government. One authority has indicated that CAP pilots might conceivably be

⁴⁸ 22 U.S.C. § 2504(a) (1964); JAYSON § 203.02(1)(b).

⁴⁹ 5 U.S.C. § 803 (1964).

⁵⁰ 22 U.S.C. § 2504(d) (1964).

⁵¹ *Pearl v. United States*, 230 F.2d 243 (10th Cir. 1956).

regarded as FTCA employees if they respond to a request from the Air Force to assist in a search for a lost aircraft.⁵² Apparently this precise question has not yet been before the courts. Should the question arise, needless to say the solution of it would be hindered by the lack of congressional direction regarding CAP members' federal employee status.

An example of the significance of characterization as a federal agency within the military organization is the legal distinction drawn between nonappropriated fund activities and private associations. Nonappropriated fund instrumentalities, such as equestrian or flying clubs (which may be either nonappropriated fund activities or private associations depending on the method of organization used), military exchange activities, officers' and non-commissioned officers' clubs (messes), and various welfare instrumentalities, have generally been held to be an integral part of the military organization, and thereby take on the federal agency character of their parent organization. Although there continues to be some judicial uncertainty regarding the nonappropriated fund concept,⁵³ the United States Supreme Court has ruled that nonappropriated fund instrumentalities are "arms of the government deemed by it essential for the performance of governmental functions."⁵⁴ Numerous cases have resulted in decisions applying FTCA employee status to employees (but not members) of nonappropriated fund instrumentalities.

Private association activities have been held not to be an integral part of the military organization, due to the nonessential nature of the functions they perform, and due to the particular characteristics of these organizations which provide for slight governmental supervision (as opposed to the extensive supervision exerted over nonappropriated fund activities).⁵⁵

⁵² JAYSON § 202.08(2).

⁵³ See the concurring opinion of Judge Whitaker in *Pulaski Cab Company v. United States*, 141 Ct. Cl. 160, 167, 157 F. Supp. 955, 959 (1950), and *Scott v. United States*, 236 F. Supp. 864 (M.D. Ga. 1963).

⁵⁴ *Standard Oil Company of California v. Johnson*, 316 U.S. 481, 485 (1942).

⁵⁵ See *United States v. Hainline*, 315 F.2d 153 (10th Cir. 1963); *United States v. Holcombe*, 277 F.2d 143 (4th Cir. 1960); *Roger v. Elrod*, 125 F. Supp. 62 (M.D. Ga. 1954).

⁵⁶ Compare *Army Reg. No. 230-5, ¶2b* (18 Jul. 1956) with ¶6. See also *Scott v. United States*, 226 F. Supp. 864 (M.D. Ga. 1963), *aff'd*, 337 F.2d 471 (5th Cir. 1964), *cert. denied*, 380 U.S. 933 (1965).

D. APPLICATION OF THE LOANED SERVANT
DOCTRINE TO FTCA CASES

An employer who hires a person may loan that person's services to another employer so as to make the person the latter employer's employee. This is the essence of the "loaned servant" doctrine.⁵⁷ In their consideration of FTCA suits courts have occasionally been confronted with the loaned servant doctrine in attempts by the government to establish that at the time of negligent conduct by a person hired by the government, such person had actually become another employer's employee so as to avoid governmental liability. On the other hand, claimants sometimes argue that a person hired by some other employer had, at the time of his negligent conduct, become an employee of the government so as to make the government liable, rather than the original employer. An appropriate parallel argument in this latter situation where a federal agency is involved would be based on that portion of the definitions section which defines government employees to include "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently, whether with or without compensation."⁵⁸ Although this provision was intended to cover public-minded, but negligibly compensated, government volunteer servants during periods of national emergency,⁵⁹ it is not clear how far it should be extended to include other persons who in some way act for the government.⁶⁰ It would seem that when the actualities of an employment situation are such as to justify application of the loaned servant doctrine to establish government employment, it should not be difficult to find that the employee had acted on behalf of a federal agency.

While the determination of government employment status for the purpose of imposing FTCA liability may often depend on a favorable ruling establishing a loaned servant situation, under other circumstances the doctrine's application would be immaterial in relation to FTCA liability. For instance, it may be that the wrongdoing employee was loaned from one federal agency to another, or it may be that the loaned servant fails to qualify as a government employee either before or after the "loan" is effected.⁶¹

⁵⁷ 35 AM. JUR. *Master and Servant* § 541 (Supp. 1968).

⁵⁸ 28 U.S.C. § 2671 (1964).

⁵⁹ Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L. J. 1 (1946); JAYSON 203.04.

⁶⁰ *Id.*

⁶¹ Annot., *supra* note 13 at 902.

The loaned servant doctrine was applied in *Fries v. United States*, to the effect that a chauffeur became a non-federal employee. He had been hired locally by the United States Public Health Service, and was driving a government vehicle in the course of his duties for a venereal disease survey conducted by a city and county, but assisted by the Public Health Service to the extent of loaning equipment and contributing funds, when he negligently caused injury. In this instance the government's assertion of the loaned status of its employee was viewed favorably by the court.

Another instance of a judicial determination that a federal employee become a loaned servant is the early FTCA case of *Cobb v. United States*.⁶² In this action for burns suffered by a member of a junior (high school) ROTC unit, it was held that the Regular Army sergeant, who had allegedly negligently caused the burns, had become a loaned servant, and no recovery under the FTCA was allowed, since the sergeant was no longer an agent of the United States.⁶³ In forming its conclusion of a loaned servant status, the court took into consideration the facts that the ROTC military personnel were serving under the control and at the insistence of the state and the public school board, that the military personnel received additional compensation from the school, that the school board was responsible for the military property loaned to it, and that the school board had agreed to appoint one of its custodial employees to care for the loaned equipment. This court's composite approach to the factual situation presented by *Cobb* is another example of a judicial balancing of legally significant factors, resulting in decisional law defining the ambit of the FTCA. In neither the *Fries* nor the *Cobb* cases was there a written or orally expressed agreement stating that the legal responsibility of the federal employee was to be transferred from the federal agency or military service involved. A working arrangement pragmatically evolved whereby the federal employees were to be used in assisting non-federal authorities in matters of mutual interest, and at a certain point during the rendering of this assistance the federal employee's act became the legal responsibility of the assisted non-federal authorities.

⁶² 170 F.2d 726 (6th Cir. 1948), cert. denied, 336 U.S. 954.

⁶³ 81 F. Supp. 9 (W.D.La. 1948).

⁶⁴ Two subsequent decisions held that military personnel attached to the Reserve Officer Training Corps at the college level continue to be federal employees for purposes of the FTCA. *E.g.*, *La Bombard v. United States*, 122 F. Supp. 294 (D. Vt. 1954); *Bellview v. United States*, 122 F. Supp. 97 (D. Vt. 1954).

The general rule is consistent with these results, in that it is not necessary that the person to whom an employee is loaned be given express or written authority to control the employee. The essential factor is the right to control the employee as his proprietor.⁶⁵

The fact that the tortfeasors in the above cited cases received their primary pay from federal sources did not prevent their being loaned. This result is also consistent with traditional legal concepts.⁶⁶ A major consideration seems to have been given to the right of control over their employment functions and activities.

The importance of authority or right to control also seems pivotal in cases in which the government's arguments claiming its employee had been "loaned" were not accepted. The general rule is that, in order to escape liability, the original employer must have relinquished full control of the servant for the time being; it is not sufficient that the employee was partially under the control of another. If the employer does not surrender full control over the employee, he remains liable for his negligence during the time he acts for the person to whom he is loaned.⁶⁷ There are inherent difficulties in applying this rule to military members, since they are at all times subject to the control of a superior federal authority. Any working arrangement with non-military authorities would necessarily have to recognize the military's ultimate right to control its member, since one's status as member of the armed forces prevents a surrender of full control over that individual.

Subsequent cases involving a loaned servant issue similar to that in *Cobb* were more concerned with the obligatory nature of the tortfeasor's military status. In *Bellview v. United States*,⁶⁸ the court concluded as a matter of law that an Air Force Lieutenant Colonel, as the Professor of Air Science and Tactics at a Vermont college, was an employee of the government when he negligently caused an accident with a car owned by the United States. As factors bearing on the court's decision, the court stated that the tortfeasor was an Air Force officer on active duty, that he was ordered to duty at the college, that he was subject at any moment to be reassigned by the Air Force, and that his main source of livelihood came from his salary as an Air Force officer. This court felt that the inherent control exercised by the Air Force over its member was sufficient to prevent his being loaned to the college. The court was probably in error, however, when it concluded that

⁶⁵ 35 AM. JUR. *Master and Servant* § 541 (Supp. 1968).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 122 F. Supp. 97 (D. Vt. 1954).

payment from the Air Force prevents a loaned servant status, since the general rule regarding compensation is contrary. Shortly thereafter, the same court denied the government's motion to dismiss a negligence complaint on the ground that Army officers assigned to an ROTC unit were no employees of the United States.⁶⁹

It would appear that, while military status does prevent a full surrender of control over him, what is tantamount to full control is relinquished so long as a military member is actually functioning in a loaned status, and so long as the member's superior authorities forebear exercising their power of control. In other words, a military member should be able to be loaned to a non-federal activity if as much control as is possible under the armed forces unique "employment" arrangement is relinquished. This would appear to amount to a forbearance to exercise its right and authority to transfer the loaned member from his present position, and an avoidance of interfering with the borrowing activity's control over the loaned employee.

A leading case involving a situation in which a non-federal employee became a loaned servant to the United States is *Martarano v. United States*.⁷⁰ There it was held that although a state-hired agricultural agent received all his pay and fringe benefits of employment from state agencies, he was, so far as concerned an FTCA suit, an employee of the federal government, because it directly supervised and controlled that employer under a "loan" arrangement with the state. The court based its opinion on the law of vicarious liability, and resorted to state and federal statutes permitting the federal use of state employees. The employee was officially loaned to the federal Fish and Wildlife Service, and he was working under the direct control and supervision of that agency. A necessary responsibility incident to this right of supervision was the federal government's vicarious liability for the tortious conduct of its state-hired and state-paid employee. Greatly influencing the court's decision were the facts that the Federal Bureau of Sport Fisheries and Wildlife supplied the job description to the state agency, it provided the state employee's efficiency ratings, and it approved his pay increases coming from the state.

⁶⁹ *La Bombard v. United States*, 122 F. Supp. 294 (D. Vt. 1954). The Army has taken the position that military personnel assigned ROTC duty are to be considered employees of the United States as concerns administrative claims matters, and that the "loaned servant" doctrine is not to be depended upon arbitrarily as a defense to governmental liability. See U. S. DEPT OF ARMY, PAMPHLET No. 27-162, CLAIMS 50 (1968), citing JAGL 1958/8648, 15 Jul. 1958, as digested in 8 Dig. Ops. 25 (1959).

⁷⁰ 231 F. Supp. 805 (D. Nev. 1964).

It is interesting that this court referred to the language of the FTCA, which includes as government employees those persons acting in behalf of a federal agency in an official capacity, even though temporarily and without compensation, in addition to its reference to the loaned servant doctrine. There seemed to be a reluctance to find employee status solely on the loaned servant doctrine, although there was no statement to that effect. Perhaps the court was attempting to incorporate the loaned servant doctrine into this portion of the statutory employee definition. This would seem appropriate since a loaned servant in relation to the FTCA is acting in behalf of the United States, and frequently he is doing so without federal compensation and on a temporary basis.

The better approach, however, would seem to consider the loaned servant doctrine separate from the statutory definitions, since the government, in its attempt to establish that one of its employees has been loaned, does not base its argument on the FTCA definitions section. In fact, there is tacit admission of employee status by the use of the loaned servant doctrine as a defense. The employee must have been the lending employer's before he could be loaned to a borrowing employer.

It should be mentioned that when a loaned servant status exists, an important issue affecting the responsibility of the loaning employer for the acts of a borrowed employee is whether the borrowed employee was acting within the scope of the borrowing employer's business at the time of his negligent conduct.¹¹ In other words, it is conceivable that an FTCA claimant could still resort to the principles of vicarious liability to find the federal government, as a loaning employer, liable for its loaned servant's tortious conduct outside the scope of the borrowing employer's activity. This, of course, assumes the employee was still acting within the scope of his federal employment.

E. THE EFFECT OF DUAL EMPLOYMENT STATUS OF AN EMPLOYEE

In contrast to the loaned servant doctrine, it is sometimes argued that an employee is that of both the federal government and another employer at the same time. Dual employment status arguments were raised with some initial success in cases involving state National Guardsmen. For instance, in the case of *Layne v. United States*,¹² an Air National Guardsman was held to be in the

¹¹ 85 AM. JUR. *Master and Servant* § 541 (Supp. 1968).

¹² 295 F.2d 483 (7th Cir. 1961), *cert. denied*, 368 U.S. 990 (1962).

dual service of his state and of the United States at the time he was fatally injured in a plane crash resulting from the negligence of federal air field control operators. As a result of this dual capacity holding, the decedent's widow was prevented from recovering under the FTCA. Again, in the case of *United States v. Holly*,⁷³ a state National Guard unit's caretaker was held to be a federal employee when he negligently caused an automobile accident. An important factor in the court's determination of dual status of the state-employed caretaker was the federal statutory provision outlining his duties and providing for payment for specified services to come from federal funds.⁷⁴ Certain regulations defined the duties and responsibilities in detail, and the caretaker was engaged in the performance of such defined duties when the accident occurred. The fact that the caretaker was required by regulations to be a member of the National Guard, take an oath of allegiance to the state, receive compensation from the state, and perform duties for the state was immaterial, since the injuries were caused while the caretaker was in the performance of his described statutory duties for the federal, rather than the state government. Here, as in loaned servant cases, wherein an employee essentially transfers his employer for the purposes of tort liability, the federal government maintained a certain measure of direction and control over the method and means of this employee's service. The major distinction between these cases was that the measure of this control was more limited in the instant case. There was, as the court indicated, a dual employment relationship, rather than a substitution of one employer for another. This situation was essentially viewed as one of dual employment, with the caretaker serving two employers, the federal and the state governments. Where dual status exists, determination of liability turns on the question of the particular employment in which the employee is engaged at the time of his negligent act.

If the caretaker had committed tortious conduct while performing duties flowing from his state, rather than his federal employment, he would have been held to be a state employee, and the United States would not have been liable for such conduct. An example of a dual status case resulting in no FTCA liability was *Pattno v. United States*.⁷⁵ There the United States was not liable for a mid-air collision caused by an Air National Guard caretaker, since the purpose of the flight was to evaluate the flying skill

⁷³ 192 F. 2d 221 (10th Cir. 1951).

⁷⁴ 32 U.S.C. § 709 (1964).

⁷⁵ 811 F.2d 604 (10th Cir. 1982), cert. denied, 373 U.S. 911 (1936).

of another guardsman, a training function for which the state was responsible.

The use of the *Holly* case to illustrate a factual situation in which dual employee status existed was to demonstrate a theoretical approach to the problem. The Supreme Court in *Maryland ex rel. Levin v. United States*⁷⁶ effectively overruled *Holly* when it concluded that civilian caretakers of National Guard units were employees of the state rather than the federal government. This ruling would seem to preempt further application of the dual employment concept to National Guard caretakers, but it should not prevent the future use of the concept in other areas in which the government shares an employee on a relatively equal basis with another employer. It should be mentioned that state National Guard organizations are not federal agencies within the FTCA's definition, except when they are called into federal service. It follows that members of such units are not considered employees of the federal government unless they have been called into federal service.⁷⁷

The issue of dual employment status also arises in certain instances in which the sole employer involved is the United States, where an individual is employed for two separate undertakings. For instance, in the case of *Marcum v. United States*⁷⁸ it was held that a person temporarily employed as a carpenter and foreman by the Geological Survey Division of the Department of Interior to construct several stream water level gauges was acting as an independent contractor when he was driving his truck home to pick up tools and equipment for use on the job the next day, so that FTCA liability could not be established for his negligence while so engaged. It was pointed out that it was clear that a master-servant relationship existed between the employee and the government while he was engaged in the carpentry work from which he was employed, since the government controlled and supervised the manner in which the details of his duties were performed. Nevertheless, it was stated that a person may serve in a dual capacity, and be a servant as to one undertaking for an employer, and an independent contractor as to another undertaking for the same employer.

It would seem that the use of the dual status concept in relation to the FTCA is closely related to the question of whether a gov-

⁷⁶ 381 U.S. 41 (1965).

⁷⁷ *Blackwell v. United States*, 321 F.2d 96 (5th Cir. 1953). The District of Columbia National Guard is an exception to this rule. *O'Boole v. United States*, 206 F.2d 912 (3d Cir. 1953).

⁷⁸ 208 F. Supp. 929 (W.D. Ky. 1962), *aff'd*, 324 F.2d 787 (6th Cir. 1963).

ernment's agent was acting within the scope of his employment at the time of his tortious conduct. In *Marcum* the court framed the issue of scope of employment, and then reasoned that there was no master-servant situation justifying application of the *respondeat superior* theory of liability. The effect was to find that the employee had departed the scope of his employment as a servant, and entered the area of his activities as an independent contractor.

F. SOURCE OF COMPENSATION AND SUPERVISION
OF EMPLOYEE AS INDICIA OF FEDERAL
EMPLOYEE STATUS

The question sometimes arises whether the fact that a person's employment wages are paid from federal government funds establishes federal employer status within the meaning of the FTCA. In the case of *Blackwell v. United States*⁷⁹ the court, after recognizing that a negligent sergeant in the Louisiana National Guard was paid with funds supplied by the United States, held that the sergeant was not an employee of the United States for purposes of the FTCA. The court refused to depart from the well established rule that a member of the National Guard who has not been called into federal service is not an employee of the United States within the meaning of the FTCA. The mere fact of payment from federal funds is not a sufficient connection with the federal government to justify the creation of an employee status.

The cases discussed in relation to the loaned servant doctrine, in which employees hired and paid by the United States were lent to non-federal agencies, are further substantiation that a federal source of compensation is non-conclusive as to employee status.⁸⁰ The cases discussing instances of non-federal employees becoming employees of the United States for FTCA purposes additionally demonstrate that the source of salary is also not a major indicator of FTCA employee status.

The importance of this rule may be seen in relation to the federal government's extensive cooperative efforts with other governments within the federal system. The question often arises as to whether a certain employee is a federal or local government employee. An illustrative case is *Harris v. Boreham*.⁸¹ There it was held that although the superintendent of public works of a municipality in the Virgin Islands was appointed by the United States Secretary of the Interior, and his salary was paid from federal

⁷⁹ 321 F.2d 96 (5th Cir. 1963).

⁸⁰ *Supra* § D.

⁸¹ 233 F.2d 110 (3d Cir. 1956).

funds appropriated by Congress for the government of the Virgin Islands, he was nevertheless an official of the municipality's government, whose duties were performed under the control and supervision of the governor of the territory. The court emphasized that the fact of federal payment of the superintendent's salary did not indicate that officials of the local government were employees of the United States, but merely demonstrated that Congress was willing to subsidize the local government.

The *Harris* case is a good example of the common situation where both the source of compensation and the right of supervision are raised as conflicting indicators of federal employee status. Its result is consistent with the general rule that control and supervision are major indicators of employee status, while the source of compensation is not. The cases analyzed in the discussion of factors distinguishing independent contractors illustrate this rule's application. One court, in *Maloof v. United States*,⁵² even went so far as to state that where the government possesses the right to exercise substantial control, the contractor must be considered a government employee without regard to other indicia.

Perhaps this is an extreme position, but it raises the further question of what is substantial control. There have been efforts to establish that the government's control over a contractor was substantial when it published and enforced safety regulations pertaining to the contractor's work. The United States has generally been able to avoid FTCA liability from this approach, as it did in *United States v. Page*.⁵³ In that case the negligent manufacture of solid fuel propellant resulted in an explosion causing the death of claimant's decedent. The government had reserved the right to inspect for the adherence to contract safety provisions; and an Air Force officer was assigned to the plant, with the responsibility of monitoring the contractor's safety performance. The court ruled, however, that the federal contract right of inspection (and the right to stop the work) did not in itself override the general rule of nonliability for torts of the contractor because no duty was created to employees or third parties.

The effect of this decision is two-fold. It indicates that there will be no FTCA liability for the failure of the government to enforce a safety regulation of this type, and, secondly, it demonstrates that the right to enforce the safety measure does not

⁵² 242 F. Supp. 175 (D. Md. 1965).

⁵³ 350 F.2d 28 (10th Cir. 1965).

amount to control rendering the contractor a government employee.⁵⁴

G. SPECIFICITY IN THE IDENTIFICATION OF FTCA TORTFEASORS

In *Smart v. United States*⁵⁵ it was stated that no action based on the FTCA will lie against the government, unless the government employee causing the injury is himself personally liable. In that case a particular government employee (or group of employees) was identified as causing the tortious injury, and the court was applying to the factual situation the simple FTCA formula that the United States is liable as would be a private person under the circumstances.⁵⁶

This section of the act has developed considerable controversy over what Congress intended when it established as the test of governmental liability the private person analogy. Did Congress intend that there would be liability only if the government was negligent in a way in which a private person could be negligent? Did it intend that only proprietary acts were to be covered? Was it intended that the government employee causing the injury be judicially treated as a private person and if he were liable then the government would also be liable?

Early in the history of the FTCA there was concern that this reference to a private person could be construed as a limitation on the government's liability by its being interpreted as meaning the United States would be liable under the FTCA only for the tortious acts that a private person could commit. In *Cerri v. United States*⁵⁷ it was concluded that the government's sovereign functions were so numerous that Congress could not have intended to limit all FTCA liability to governmental acts capable of performance by a private person. In *Feres v. United States*⁵⁸ the Supreme Court held contrary to the *Cerri* decision by ruling that there was no FTCA liability for injuries or death suffered by members of the armed forces incident to their service. As no private person is

⁵⁴ U. S. DEPT OF ARMY, PAMPHLET No. 27-162, CLAIMS 56 (1968). For a contrary result, see *Mary J. Martin v. United States*, Civil No. 794 (E.D. Tex. 1964), *aff'd per curiam*, No. 22267 (5th Cir. 1966). To the extent that this case premises governmental liability upon a "joint endeavor" in the area of safety regulation, it is regarded by the United States as incorrect.

⁵⁵ 111 F. Supp. 907 (W.D. Okla. 1953).

⁵⁶ 28 U.S.C. § 1346 (b) (1964).

⁵⁷ 80 F. Supp. 831 (N.D. Cal. 1948).

⁵⁸ 340 U.S. 135 (1950).

lawfully authorized to raise an Army, there could be no comparison of governmental and private pursuits. Subsequent Supreme Court decisions⁸⁹ have greatly discredited the *Feres* reasoning, and the present rule is that the private person analogy is not to be used as a limitation to FTCA liability. In *United States v. Hunsucker*⁹⁰ the court reflected the belief that the Supreme Court had rejected any distinction between the government's negligence when it acted in its proprietary capacity and its negligence when it acted in its strictly governmental or sovereign capacity. Currently, the "private person" phraseology is generally recognized as being simply the operative words effecting the FTCA waiver of sovereign immunity, rather than words of limitation.⁹¹

Starting, then, with the basic proposition that FTCA liability may be founded on tortious conduct of the employees of the government either in its proprietary or its strictly governmental capacity, the question next arises whether a claimant must prove the identity of the wrongdoing government employee in order to satisfy the "private person" test of liability. The Act does not state that a claimant must identify the wrongdoing government employee before FTCA liability arises, and decisional law seems to require only that there must be an uncontradicted inference of employee status in order to establish FTCA liability.

In *Lund v. United States*⁹² the claimant was unable to identify a particular government pilot who had allegedly damaged the claimant's automobile by propblasting it with rocks and stones while the car was parked in a designated parking area. The claimant did not see the damage occur but argued that negligent starting operation of an aircraft was the only reasonable explanation for the type of damage resulting to his car. The court held that since there was no evidence to identify the person whose negligent operation caused the damage, the air station was under the control and direction of the Navy, and there was no counterevidence offered to neutralize the inference raised that the guilty person was an employee of the United States, recovery was proper under the FTCA.

In this case, neither the employee, nor the government property inferentially causing the damage, were identified. An earlier case also involving the sufficiency of proof whether or not unidentified persons were government employees was *Watson v. United States*.⁹³

⁸⁹ *E.g.*, *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

⁹⁰ 314 F.2d 98 (9th Cir. 1962).

⁹¹ U. S. DEP'T OF ARMY, PAMPHLET No. 27-162, CLAIMS 35, 36 (1968).

⁹² 104 F. Supp. 756 (D. Mass. 1952).

⁹³ 90 F. Supp. 900 (D. Alas. 1950).

It presented the probably more common situation in which the claimant saw the government employee, and the government property be negligently operated to cause tortious injury, but was unable precisely to identify either. Evidence was presented, however, showing that the claimant, a civilian employee of the government was struck by a bus which in size, shape, color, and every detail of appearance corresponded to an army bus which was at that time being used to shuttle civilians on the post. Evidence was also introduced showing that the bus was being driven by a man wearing an Army uniform. The court held these facts sufficient to raise a strong inference that the bus was being driven by an employee of the government. Since the government failed to present evidence to the contrary, this inference was legally sufficient to establish that the bus was being driven by such an employee.

This case shows that it is sufficient for a claimant to plead and prove facts substantiating that some employee, rather than a particular person, tortiously caused injury to the claimant. This is particularly important in cases involving the negligent maintenance of government property, resulting in an unreasonably dangerous condition. Generally, it has been recognized that it is sufficient for the claimant to establish fault on the part of anonymous and unidentified government employees responsible for maintaining the property in a safe condition.⁸⁴

III. CONCLUSION

While no attempt has been made to identify all persons qualifying as employees of the government for purposes of the FTCA, representative cases have been discussed for the purpose of illustrating the problems arising in, and the principles applying to, cases dealing with the employment question. From the foregoing discussion it should be concluded that courts faced with the issue of FTCA employee status frequently must depend upon non-statutory criteria, as well as the broad definition of "employee of the government" contained in the Act. It also appears that the major non-statutory indicator of employee status is the factor of control or right to control possessed by the government. Where this factor conflicts with other factors of employee status, it generally determines the issue. Differences in factual circumstances have led to differences in judicial treatment of the issue of status, regardless

⁸⁴ *United States v. Trubow*, 214 F.2d 192 (9th Cir. 1954); *Jackson v. United States*, 196 F.2d 725 (8d Cir. 1952); *United States v. Hull*, 195 F.2d 64 (1st Cir. 1952); U.S. DEP'T OF ARMY, PAMPHLET No. 27-162, CLAIMS 50 (1968).

of the general recognition of the non-statutory legal principles pertaining to this issue. Depending on the facts of particular cases, judicial conclusions have varied as to whether an activity or organization should be characterized as a federal agency of which its employees qualify for FTCA purposes, or whether it should be legally distinguished as an independent contractor, the acts of which generally do not support FTCA liability. Results have differed also in the application of the loaned servant doctrine in situations in which persons either enter or depart FTCA employment status, irrespective of formal employer-employee relationships. There has also been an inconsistency, depending on varying factual circumstances, in judicial consideration given to the dual employment concept. Some cases have held that one employee is the legal responsibility of two employers, such liability existing in separate and distinct spheres of activity.

FTCA decisional law has established that merely receiving one's wages or compensation from the federal government does not necessarily qualify a person as a federal employee. The cases have established, however, that the source of an employee's supervision, and the right of control over the details of performance, are primary indicators of employee status. These are logical developments, considering that the purpose of the FTCA was to permit liability under the doctrine of *respondeat superior* for the negligent acts of persons occupying a servant relationship with the United States.

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