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HEADQUARTERS, DEPARTMENT OF THE ARMY JULY 1970

PREFACE

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CONTRACTING-OUT: A CASE FOR REALISTIC CONTRACT VS. IN-HOUSE DECISION-MAKING*

By Major John G. Wildermuth**

Contracting officers frequently have to decide between using military or federal service employees and contracting out to private enterprise for support services. The author discusses the expressed policy in favor of contracting-out, and how it has been eroded by numerous decisions of the Bureau of the Budget, the General Accounting Office, the Department of Defense, and the Army itself. In conclusion, the author suggests that the decision be made easier by redefining the criteria on which it is based, and by elevating the decision-making function to an authority who has the necessary resources to make a sound decision.

I. INTRODUCTION

The Government of the United States currently spends an estimated twenty billion dollars annually for support services.[1] Support services are those operations ancillary to the function of a government agency, which do not involve a product and can be performed either by "in-house" personnel (active duty military and civil service employees) or by civilian personnel furnished by private contractors.[2] Expenditures by all government agencies for support services obtained by contract approach eight and one-quarter billion dollars annually, seven and three-quarters billion of which are accounted for by the Department of Defense.[3] Contracting-out, as the government practice of obtaining goods and services from private industry has often been labeled, is based primarily on a permissive policy declaration by the Presi-

* 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] *Hearings on a Cost Profile for Support Services Before a Subcomm. of the House Comm. on Government Operations*, 90th Cong., 2d Sess. 1 (1968) [hereinafter cited as *1968 Hearings*].

[2] H.R. REP. No. 1850, 90th Cong., 2d Sess. 1 (1968).

[3] *1968 Hearings* 2.

dent that the Government will rely primarily upon the private enterprise system to supply its needs.[4]

Restricting this espoused policy in favor of the private enterprise system in the area of support services, and often in conflict with it, are administrative interpretations of various contracting-out activities by the General Accounting Office and Civil Service Commission. Decision-making organs of these agencies have interpreted existing federal personnel statutes to mean that certain services—"personal services"—may be performed only by government employees and have often struck down contracts for such services as having effectively violated those laws.[5] Intermeshed between the initial policy in favor of contracting-out and decisions by the Comptroller General and the General Counsel of the Civil Service Commission restricting that policy is the current requirement for a cost analysis of in-house vs. contracted-out alternatives.[6]

Frequent conflicts between the policy, administrative decision and cost analysis procedures have created a number of problems, not the least of which is the difficulty operational-level personnel have performing their mission under existing regulations. Faced with time limits, such personnel often decide to follow the procedurally easier path of contracting-out, in obvious disregard of interpretive and regulatory restrictions. Furthermore, such personnel do not always have the resources to make a sound decision between contracting out and developing in-house capabilities.

This article analyzes the apparent conflict between policy and practice in the area of contracting-out in general, with special emphasis on contracting-out for support services, to determine:

(1) Whether there still exists, in fact, a policy in favor of contracting-out to private industry and, if so, what the legal and practical limits of that policy are; and

(2) What corrective action, if any, is necessary, either under existing law or in the form of additional legislation, to resolve the problem of ambiguity and lack of definitive guidance in this area of policy vs. practice, and to permit realistic "contract vs. in-house" decision-making, either at the operational or at a higher level.

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[4] BUREAU OF THE BUDGET, CIRC. NO. A-76, POLICIES FOR ACQUIRING COMMERCIAL OR INDUSTRIAL PRODUCTS AND SERVICES FOR GOVERNMENT USE, para. 2 (Revised 1967) [hereinafter cited as CIRC. A-76 (Revised)].

[5] *See* note 126 *infra* and accompanying text.

[6] CIRC. A-76 (Revised), para. 6.

II. DEVELOPMENT OF THE POLICY

A. *GENERAL*

Since the early 1950's, the Government has initiated and pursued a policy which encourages the use of private enterprise to satisfy government requirements for goods and services. The policy, as first expressed, was grounded primarily on Executive concern about government competition with private enterprise.[7] Congressional support for the policy has been manifested by numerous committee hearings in both houses and various proposals of legislation.[8] Also, the various government agencies, including the important Department of Defense, have expressed their interpretive affirmance of the policy since its inception.[9]

An examination of the development of the policy will show that it exists now in much weaker form, having fallen victim to considerations of cost and those who desire to perpetuate the government's imvolvement in business.[10]

B. *THE BUREAU OF THE BUDGET*

The public first became aware of the Government's pro-private enterprise policy in 1954 when, in his first budget message to Congress after taking office, President Eisenhower stated: "This budget marks the begninning of a movement to shift to . . . pri-

[7] *See* note 11 *infra* and accompanying text.

[8] STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, 88th Cong., 1st Sess., REPORT ON GOVERNMENT COMPETITION WITH PRIVATE ENTERPRISE 14, 19 (Comm. Print 1963) [hereinafter cited as 1963 Comm. Print]. Congressional committees have studied numerous aspects of the problem of government competition with private enterprise in various hearings begun in an extensive study in 1932 by a Special Committee of the House of Representatives, and have not since abated. During the referenced period, investigations were made by the Senate, and House Appropriations Committees, the House Armed Services Committee, the Senate and House Committee on Government Operations, and the Senate Select Committee on Small Businss. *Id.* at 14–24.

[9] Dep't of Defense Directive No. 4100.15, *Commercial or Industrial Activities*, § IV (1969).

[10] Despite the evident weakening of the initial policy, there have been continued protestations that it was not changing. For example, subsequent to a Department of Defense decision in 1965 to convert some 10,500 contract technical service positions to civil service, the Hon. Paul R. Ignatius, Assistant Secretary of Defense (Installations and Logistics) spoke at the Annual Meeting of the National Aerospace Services Association on 2 May 1967, stating: "[I]t seems hardly necessary to emphasize that neither the Defense Department nor the Government as a whole has abandoned the general policy of obtaining the products and services we need from commercial sources to the maximum extent consistent with effective and efficient accomplishment of our programs."

vate enterprise Federal activities which can be more appropriately and more efficiently carried on that way."[11] Several months later, in an appearance before the House Committee on Government Operations, Percival F. Brundage, Deputy Director of the Bureau of the Budget, indicated in his testimony that the program to give preference to private enterprise would be coordinated on a government-wide basis.

Then, in January 1955, the Bureau of the Budget (B.O.B.) published the first in a series of bulletins and circulars dealing with the subject of contracting-out to private industry. It should be noted that the first of these bulletins and those immediately following, both in policy statements and in delineation of implementing procedures, described a very broad, nearly all-inclusive purpose to give up may long-established government-based activities into the hands of civilian contractors.[13] Thus, in this first official publication of the Government concerning the policy, *B.O.B. Bulletin No. 55-4* stated under the heading "Policy":

> It is the general policy of the administration that the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be produced from private enterprise through ordinary business channels. Exceptions to this policy shall be made by the head of an agency only where it is clearly demonstrated in each case that is not in the public interest to procure such product or service from private enterprise.[14]

In order to implement the pronounced policy, each agency head was required to inventory and evaluate all commercial-industrial type activities performed by his agency which fell within the scope of the bulletin. The purpose of the evaluation was to determine whether such activities should be continued by the Government in light of the change in policy. It was to be conducted in several phases, the first to cover manufacturing activities and the second to examine services.[15]

Interestingly, the relative cost of in-house vs. contracted-out activities was de-emphasized in early directives. Cost was only

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[11] 100 CONG. REC. 567 (1954).

[12] 1963 Comm. Print 24.

[13] This, we shall see, furnished the basis for the continuing attack, especially in the last five years, against this policy, and perhaps gave added character and strength to "legal" arguments of dissenters from the theory and practice of the policy.

[14] BUREAU OF THE BUDGET, BULL. NO. 55-4, COMMERCIAL-INDUSTRIAL ACTIVITIES OF THE GOVERNMENT PROVIDING PRODUCTS OR SERVICES FOR GOVERNMENTAL USE, para. 2 (1955) [hereinafter cited as BULL. NO. 55-4].

[15] *Id.* para. 4.

one factor to be considered in the using agency's evaluation and not the primary concern with regard to the final decision. *B.O.B. Bulletin No. 55-4* provided, in its explanation of the required agency evaluation:

> The relative costs of Government operation compared to purchase from private sources will be a factor in the determination in those cases where the agency head concludes that the product or services cannot be purchased on a competitive basis and cannot be obtained at reasonable prices from private industry. In those cases it will be necessary to develop detailed data on such costs.[16]

In emphasizing that decisions should not rest on cost alone, the first bulletin stated:

> Since *cost should not usually be the deciding factor* in determining whether to continue the operation as a direct Government operation, this statement should show both the results of the comparative cost analysis and the elements which have been used in determining the Government cost, both as a direct operation and if the product is secured from private industry.[17]

Guidance as to the specific methods of cost analysis was lacking. Each agency head was told simply that:

> [T]he costs of Government operation should be fairly computed and complete, covering both direct and indirect costs, including elements not usually chargeable to current appropriations such as depreciation, interest on the Government's investment, the cost of self-insurance (even though it is unfunded); there shall also be added an allowance for Federal State and local taxes to the extent necessary to put the costs on a comparable basis. Care must also be exercised to see that costs of procuring material [later directives included services] from private sources are fairly computed and complete, being truly representative of the lowest price the Government would

[16] *Id.* para. 6.

[17] *Id., Attachment B*, para. 26. In a memorandum to the President in October 1956, the Bureau of the Budget discussed the progress of the administration's program concerning the elimination of Government from competition with private enterprise, and stated that the reasons for adopting the policy that "cost should not usually be the deciding factor" were:

"1. The cost of Government operations are not comparable with corresponding business costs. The Government, for example, pays no income taxes and operates its own tax-free facilities, thereby keeping costs down.

"2. Government accounts are not kept in the same manner as business accounts, so that a comparison of the operating costs of Government versus business, for example, is not only difficult but often misleading.

"3. *Above all, the decision whether to continue or discontinue a Government activity solely on an apparent cost basis runs counter to our concept that the Government has ordinarily no right to compete in a private enterprise economy.*" 1963 Comm. Print 28 (emphasis added).

pay for the quantity and quality needed, and taking account of any applicable indirect costs of the Government for such procurement.[18]

As if to emphasize the strength and backing of this new policy, the bulletin required each evaluation to include review of legal authorization for each government commercial and industrial activity to determine whether new legislation was necessary to permit the agency to continue the activity. If new legislation were necessary, the agency was required to draft it and submit it promptly. Absent the need for additional legislation, the agency was required to discontinue the activity within a reasonable time.[19]

Initial successes under the first B.O.B. Bulletin were measured in terms of numbers of government activities terminated or converted to civilian contract; support services were scarcely mentioned. In a press release accompanying the 15 May 1956 publication by the Bureau of the Budget, entitled *Inventory of Certain Commercial-Industrial Activities of the Government*, the initial inventory evaluation required by *B.O.B. Bulletin No. 55–4*, it was stated that the inventory report:

> Is another step in the administration's long-term program to eliminate unnecessary Government competition with our free enterprise system . . .; that since its inauguration the program has prevented the starting of additional commercial-industrial activities.[20]

Listed among the "accomplishments" of the program was the termination of 32 types of commercial-industrial activities within the Department of Defense at 246 installations.[21] A subsequent memorandum from the Bureau of the Budget to the President in October 1956 listed the discontinuance or curtailment of 492 federal commercial-type activities which could be handled competitively by private business.[22]

B.O.B. Bulletin No. 57–7 was published in February 1957, giving further instructions on the evaluation of commercial activities classified as services, the termination of commercial activities, and the starting of new commercial activities. This second bulletin expressed a policy identical to that of its predecessor. Evidence of the future struggle over relative costs may be detected, however, by the absence of the previous bulletin's provision that "cost should not usually be the deciding factor in determining

[18] BULL. NO. 55–4, para. 6

[19] *Id.*

[20] 1963 Comm. Print 26.

[21] *Id.*

[22] *Id.* 2.

whether to continue the operation as a direct Government operation . . . ."[23] An important addition to the previous policy statement was the delineation of those instances in which agency heads could make exceptions to the policy in favor of private enterprise-based commercial activity. Previous instructions were that such a decision might be based on a clear demonstration that contracting-out was "not in the public interest," but no criteria were specified to assist in determining what "not in the public interest" meant.[24] *B.O.B. Bulletin No. 57-7* stated that the phrase included those specific situations in which the product or service was either:

(1) Not available on a competitive basis or at a reasonable price (cited in the previous bulletin but not specified as public interest criteria); or,

(2) Should not be procured due to overriding considerations of law, national security, or national policy.[25]

Government's experience with the initial contracting-out policy indicated that more emphasis could be placed on the accurate comparison of government and industry costs. In testimony before the Senate Select Committe on Small Business in 1960, the Deputy Director of the Bureau of the Budget, Elmer B. Staats, stated with regard to this cost comparison issue:

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[23] BULL. No. 55-4, *Attachment B*, para. 26.

[24] *Id.*

[25] BUREAU OF THE BUDGET, BULL, NO. 57-7, COMMERCIAL-INDUSTRIAL ACTIVITIES OF THE GOVERNMENT PROVIDING PRODUCTS OR SERVICES FOR GOVERNMENTAL USE, para. 10 (1957) [hereinafter cited as BULL. No. 57-7]. Para. 10 states, in referring to those actions which must be taken before establishing new activities:

"No new commercial activity shall be started until, as a minimum, the head of the agency has:

"a. Ascertained that the product or service is necessary to the conduct of a governmental function.

"b. Provided a reasonable opportunity for private enterprise to indicate its ability to furnish the product or service.

"c. Determined, on the basis of the response from private enterprise, that the product or service cannot be supplied on a competitive basis or at a reasonable price through ordinary business channels.

"d. Determined that it is not in the public interest to procure the product or service from private enterprise, either because it is not available on a competitive basis or at a reasonable price (as found under step (c) above), or because of overriding considerations of law, national security, or national policy.

"Steps 'b' and 'c' may be omitted in those cases where overriding considerations of law, national security, or national policy require that the activity be conducted as a Government operation, but in such cases the head of the agency shall make an appropriate record of his findings and conclusions to that effect."

> We found [in reviewing agency reports and discussing the program with agency officials] that the costs of Government operation and private procurement could be compared, provided they were both fairly computed and complete. Costs assigned to Government operation, in order to be comparable, would have to cover all direct and indirect outlays as well as elements not usually chargeable to current appropriations. Costs attributed to procurement from private sources would also have to be computed on an equally fair and complete basis. We realized that some cost items could only be estimated; therefore, the principle was developed that procurement should be from commercial sources unless the difference in comparable cost was relatively large and disproportionate.[26]

This evaluation of previous experience with the contracting-out program was articulated in *B.O.B. Bulletin No. 60-2*, published in September 1959, in which it was specified: "Continuation of Government operation on the ground that procurement through commercial sources would involve higher costs may be justified *only if* the costs are analyzed on a comparable basis and differences are found to be substantial and disproportionately large." [27]

Under *B.O.B. Bulletin No. 60-2*, the policy expression of earlier publications was changed in form. The document stated clearly: "It is the general policy of the administration that the Federal Government will not start or carry on any commercial-industrial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels." [28] In explaining that the policy, which established a presumption in favor of contracted-out activities, benefited the free enterprise system as well as permitted each government agency to concentrate on its primary objective, the bulletin went on to state three exceptions to this policy in which in-house operation became necessary. Those three exceptions, termed "compelling reasons" by the bulletin, were:

(1) National security (this exception included those instances in which an activity could not be turned over to private industry for security reasons, including those functions which must be performed by government personnel in order to provide them with vital training and experience for maintaining combat units in readiness);

(2) Relatively large and disproportionately higher costs; [29]

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[26] 1963 Comm. Print 30.

[27] BUREAU OF THE BUDGET, BULL. NO. 60-2, COMMERCIAL-INDUSTRIAL ACTIVITIES OF THE GOVERNMENT PROVIDING PRODUCTS OR SERVICES FOR GOVERNMENTAL USE, subpara. 3B (1959) [hereinafter cited as BULL NO. 60-2] (emphasis added).

[28] *Id.* para. 2.

[29] No definition of this term was provided.

(3) Clear unfeasibility; *e.g.*, the product or service was

(a) "An integral function of the basic mission of the agency, or

(b) "Not available in the particular instance, nor likely to become available commercially in the foreseeable future because of the Government's unique or highly specialized requirements or geographic isolation of the installation, or

(c) "administratively impractical to contract for commercially." [30]

Although comparative cost analysis of in-house vs. contracted-out activities attained some prominence in *B.O.B. Bulletin No. 60–2*, it remained relatively insignificant for several reasons. First, there was still no mistaking the over-all tenor of the document as to what was expected of each agency: Contract-out if at all possible! Even the relative cost provision was de-emphasized by subsequent explanation: "The admissibility of relatively large and disproportionately higher costs as a possible compelling reason for continued Government operation does not alter the general policy which establishes a presumption in favor of Government procurement from commercial sources and does not prohibit procurement from more costly commercial sources." [31] Secondly, this reference to "relatively large and disproportionately higher" was not in any way defined, leaving a great deal of room for loose interpretation, if not operational rejection, of the provision.[32] Finally, formal agency findings, based on one of the three cited "compelling reasons," were required to be made only where "new starts" of commercial activities or the continuation of existing activities were desired.[33] No such finding was required before decision to contract-out for goods or services could be made.

[30] BULL. No. 60–2, para. 3.

[31] *Id.* subpara. 3B.

[32] Indeed, later Bureau of the Budget publications which have attempted to define and limit this or similar guidelines to percentage-of-cost terms have been equally ambiguous. One congressional committee report recently observed, in referring to testimony dealing with a similar provision in a later Bureau of the Budget publication, CIRCULAR No. A–76 (1966): "There seems to have been confusion in the minds of different witnesses about the real meaning of 'substantial savings' referred to in paragraph 7 b (3) of Circular A–76 and particularly with respect to the 10 percent differential set forth in that paragraph." H.R. Rep. No. 1850, *supra*, note 2, at 3.

[33] The Bulletin states: "Proposed starts should be subjected to the same review outlined in this Bulletin for the evaluation of existing activities." BULL. No. 60–2, para. 6. The Bulletin indicates that the establishment of new activities includes "the establishment, acquisition, or reactivation of any commercial-industrial activity, regardless of the annual estimated cost or value of the product or service." *Id.* n. 4.

To date, the Bureau of the Budget has spoken twice more on the Government's contracting-out policy.[34] The time period between *B.O.B. Bulletin No. 60-2* and its successor, *B.O.B. Circular No. A-76*,[35] produced landmark decisions by the General Counsel of the Civil Service Commission and the Comptroller General,[36] and a large-scale conversion from Department of Defense contracted technical services to in-house operation.[37] Voices could be heard during this period speaking both for and against the policy.[38] Thus, in 1963, the Deputy Director of the Bureau of the Budget, Elmer B. Staats, in testimony before the Joint Economic Committee, revealed that the earlier strong position of President Eisenhower's policy was weakening in favor of strict cost analysis. In that testimony, Mr. Staats stated:

> [W]e have placed increased emphasis on using Government installations and staffs rather than commercial or contractual arrangements when commercial operations are *clearly* more costly. Most of the goods and services needed by the Government will continue to be obtained from commercial or other private sources, but when it is clear that a direct operation by the Government will save money when all pertinent factors are considered, we believe an operation by the Government is warranted.[39]

Similarly, in hearings conducted during 1964 by the Subcommittee on Manpower of the Committee on Post Office and Civil Service of the House of Representatives,[40] and in the subsequent Committee Report,[41] committee members expressed their concern with administration policy in those situations where contracting-out for services was more costly than having the same services

[34] BUREAU OF THE BUDGET, CIRC. NO. A-76, POLICIES FOR ACQUIRING COMMERCIAL OR INDUSTRIAL PRODUCTS AND SERVICES FOR GOVERNMENT USE (1966) [hereinafter cited as CIRC. NO. A-76], and CIRC. A-76 (Revised).

[35] 1959 to 1966.

[36] *See* note 123 *infra* and accompanying text.

[37] In June 1966, the Department of the Army terminated a contract with the RCA Company which had been awarded two years earlier for 5,372 man-months of services at White Sands Missile Range, and converted the operation to in-house (civil service), primarily based on "legal" considerations. SENATE COMM. ON GOVERNMENT OPERATIONS, 90th Cong., 1st Sess. Staff Memo 90-1-8 (1967).

[38] One group of private service companies, the National Council of Technical Service Industries, formed in 1965, has been quite active in representing the interests of member companies which contract with the Government through publication of numerous pamphlets dealing with the Bureau of the Budget publications, testimony before congressional committees, etc

[39] 1963 Comm. Print 9 (emphasis added).

[40] *Hearings on Control of Labor Cost in the Department of Defense Before the Subcomm. on Manpower Utilization of the House Comm. on Post Office and Civil Service*, 88th Cong., 2d Sess. (1964).

[41] *H.R.* REP. No. 129, 89th Cong., 1st Sess. (1965).

performed by governmental employees. In determining that the Secretary of Defense should obtain more complete labor data, including information on the procurement, year after year, of more expensive personnel from contractors to work alongside government employees, the report concludes: "The subcommittee does not believe that the true cost comparison is being carried on today as it could or should be." [42] Correspondingly, the subcommittee recommended:

> (1) The Bureau of the Budget revise its policies relating to the procurement of services and products especially as presently found in Bureau of the Budget Bulletin 60-2 to reflect the current administration's program of increased efficiency and economy in the Federal Government.
>
> (2) The Secretary of Defense establish procedures to insure the flow of information into the major commands and the Pentagon on the total labor force throughout the Defense Establishment. Such information should reveal the extent and cost of each type of labor currently used to support military forces, the impact of personnel ceilings, and the effects of personnel changes on the labor force and on the community.
>
> (3) The Secretary of Defense develop definitive comparative cost data relating to contractual operations and to in-house performance.[43]

B.O.B. Circular No. A-76 represents a major change in the previous policy pronouncements concerning contracting-out and signifies the nearly complete eradication of that policy as initially expressed in the 1950's. In stating that its purpose is to "replace the statement of policy which was set forth in Bureau of Budget Bulletin No. 60-2," [44] it provides that: "The guidelines in this Circular are in furtherance of the Government's general policy of relying on the private enterprise system to supply its needs." [45] In promising, however, that it "*restates* the guidelines and procedures to be applied . . . in determining whether commercial and

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[42] *Id.* XIII. Note that although the House Committee of Post Office and Civil Service expresses concern over relative costs, a recurring theme in its hearings and reports, and in opinions of the General Counsel of the Civil Service Commission, to be discussed *infra*, is protection of the security of the civil service worker "because he has traditionally done this job with success and is doing so now." For example, in the letter of submittal attached to House Report 129, from subcomm. chairman Henderson to Comm. Chairman Murray, the Honorable Mr. Henderson states: "[I]t is not good business for the Federal Government to contract with private interests to furnish the Govenment 'people' to perform work that currently is and historically has been successfully handled by Government personnel." *Id.* V.

[43] *Id.* XIV.

[44] CIRC. No. A-75, para. 1.

[45] *Id.* para. 2.

industrial products and services used by the Government are to be provided by private suppliers or by the Government itself . . .,"[46] the circular makes an unfortunate choice of words: "Restate" is a misnomer, for not only are the new guidelines and procedures different from previous pronouncements, but also their promulgation signifies a basic change in the policy itself. Thus, in specifying those instances in which the Government may perform a commercial or industrial activity,[47] emphasis is placed on *effectiveness and efficiency* of agency programs rather than on reliance on private enterprise. The mood of *Circular No. A–76* is that each agency must perform its mission efficiently and effectively; if it can do so in concert with the basic "presumption" in favor of private enterprise, so much the better; if not, it must be done in-house.

B.O.B. Circular No. A–76 lists the following instances in which the Government would be justified in providing products or services for its own use:

> 1. Procurement of a product or service from a commercial source would disrupt or materially delay an agency's program.
> 2. It is necessary for the Government to conduct a commercial or industrial activity for purposes of combat support or for individual and unit retraining of military personnel or to maintain or strengthen mobilization readiness.
> 3. A satisfactory commercial source is not available and cannot be developed in time to provide a product or service when it is needed.
> 4. The product or service is available from another Federal agency.
> 5. Procurement of the product or service from a commercial source will result in higher cost to the Government.[48]

It is interesting to note that while *B.O.B. Bulletin No. 60–2* specified that in-house operation was permissible only where the "compelling reasons" of national security, relatively large and disproportionately higher costs, and clear unfeasibility could be proved by the using agency,[49] those criteria are not mentioned in *Circular No. A–76.*

The bulk of *Circular No. A–76* pertains to methods of making a comparative cost analysis between in-house and contract operations. Hence, in explaining the policy exception for costs, the circular states that in-house operation is permissible when compara-

[46] *Id.* para. 1 (emphasis added).

[47] The circular defines the phrase "commercial or industrial activity" to be one which "is operated and managed by an executive agency and which provides for the Government's own use a product or service that is obtainable from a private source." *Id.* para. 3.

[48] *Id.* para. 5.

[49] BULL. No. 60–2, para. 3.

tive cost analysis shows that the Government can do the job at lower cost than private enterprise.[50] The circular acknowledges, however, that in such situations the disadvantage of starting or continuing in-house operations should be considered.[51]

Although basic considerations in *Circular No. A–76* concerning cost analysis are generally the same as in the predecessor publication, a major difference in *A–76* is the exclusion from the cost of government operations of an allowance for state and local taxes. *Bulletin No. 55–4,*[52] *Bulletin No. 57–7,*[53] *and Bulletin No. 60–2*[54] each provided that, in determining the relative costs of government operations compared to purchases from private sources, there should be added an allowance for federal, state and local taxes, "to the extent necessary to put the costs on a comparable basis." The absence of this latter provision in *Circular No. A–76* is disturbing to industry, which asserts that such tax expenditures (state and local) constitute a significant cost factor and that their exclusion seriously impairs the opportunity for equitable cost comparison.[55] Losses of federal tax revenue to the federal government due to withdrawal of property from the tax rolls when the Government owns and/or operates the facility are suggested by *Circular No. A–76* for consideration as a disadvantage when determining the propriety of in-house operation.[56] Arguably, the comparable loss to state and local governments of corresponding taxes should be considered when the federal government elects to perform the task itself, instead of utilizing private industry.

Another major area of change in *Circular No. A–76* is the expansion of those products and services *not* covered by the pro-private industry policy. The circular states that it:

> 1. Will not be used as authority to enter into contracts if such authority does not otherwise exist nor will it be used to justify departure from any law or regulation, including regulations of the Civil Service Commission or other appropriate authority, nor will it be used for the purpose of avoiding established salary or personnel limitation.

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[50] CIR. NO. A–76, subpara. 5e.

[51] *Id.*

[52] BULL. NO. 55–4, para. 6.

[53] BULL. NO. 57–7, para. 4.

[54] BULL. NO. 60–2, subpara. 3B.

[55] NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES, THE IMPACT OF OMISSION OF ANY CONSIDERATION OF STATE TAX REVENUES FROM COST COMPARISON REQUIRED BY BUREAU OF THE BUDGET CIRCULAR A–76 at 1 (1966).

[56] CIRC. NO. A–76, subpara. 5e.

> 2. Does not alter the existing requirement that executive agencies will perform for themselves those basic functions of management which they must perform in order to retain essential control over the conduct of their programs. These functions include selection and direction of Government employees, assignment of organizational responsibilities, planning of programs, establishment of performance goals, and priorities, and evaluation of performance.[57]

This expansion of the products and services not covered by the policy reflected the 1965 decision of the General Counsel of the Civil Service Commission, which ruled illegal forms of personnel procurement in derogation of the Civil Service laws.[58] Earlier exclusions from the policy had ben cursory. For example, *Bulletin No. 60-2* stated, in defining commercial-industrial activity in a footnote, "Also excluded are functions which are a part of the normal management responsibilities of a Government agency or a private firm of comparable size (such as accounting personnel work or the like")[59]

B.O.B. Circular No. A-76 was revised in August 1967.[60] In the letter of transmittal of the revised circular addressed to the heads of executive departments and establishments, Acting Bureau of the Budget Director Phillip S. Hughes recited the verse heard many times before concerning government policy, although it seemed this time to ring hollow in light of the erosion of the policy's initial character. He stated: "There is no change in the Government's general policy of relying upon the private enterprise system to supply its needs, except where it is in the national interest for the Government to provide directly the products and services it uses."[61] Accordingly, the policy statement in the revised circular recites the identical statement contained in the original *Circular No. A-76*.[62] Yet certain changes enunciated in the revision move the "in-house vs. contract-out" decision closer to one based primarily on cost analysis. These changes have to do with modification of earlier requirements on the percentage cost

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[57] *Id.* para. 4.

[58] See note 120 *infra* and accompanying text.

[59] BULL. No. 60-2, n. 1.

[60] CIRC. A-76 (Revised).

[61] Transmittal Memorandum No. 1 from Phillip S. Hughes, Acting Director, Bureau of the Budget, to the heads of executive departments and establishments. 30 Aug. 1967.

[62] CIRC. A-76 (Revised), para. 2.

differential for "new starts,"[63] and initiation of a requirement for cost analysis in still another situation.

Although the requirement for cost analysis has become a matter of greater importance with the publication of each successive Bureau of the Budget publication, the publications themselves have offered inadequate guidance as to how much savings is "enough" to justify the utilization or development of in-house facilities. Thus, *Bulletin No. 55–4* stated: "The relative costs of Government operations compared to purchase from private sources will be a factor in the determination [as to whether or not existing manufacturing activities should be continued] in those cases where the agency head concludes that the product or services . . . cannot be obtained at *reasonable prices* from private industry."[64] Although the policy statement in that first bulletin claimed that the administration's new policy in favor of private industry precluded both the *starting and continuing* of commercial activities when not in the public interest,[65] the cost analysis guidelines specified in the bulletin dealt only with continuation or termination of existing operations, but made no mention of new starts. *Bulletin No. 57–7* did envision that its provisions concerning cost analysis should cover both new start and continuation of in-house situations, but was not more specific than the previous bulletin in defining what cost differential would support a decision favoring in-house operation. Thus, *Bulletin No. 57–7* stated:

> The relative costs of Government operation compared to purchase from private sources will be a factor in determining whether to *start or carry on* a commercial activity in those cases where the agency head concludes that the product or service . . . cannot be obtained at reasonable prices from private industry.
>
> Prices may be considered reasonable when the price to the Government is not greater than the lowest price obtained by other purchasers, taking into consideration volume of purchases and quality of the products or services.[66]

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[63] The new circular defines a "new start" as:

"A newly established Government commercial or industrial activity involving additional capital investment of $25,000 or more or additional annual costs of production of $50,000 or more. A reactivation, expansion, modernization, or replacement of an activity involving additional capital investment of $50,000 or more or additional annual costs of production of $100,000 or more are, for purposes of this circular, also regarded as 'new starts.' Consolidation of two or more activities without increasing the overall total amount of products or services provided is not a 'new start.'" *Id.* para. 3.

[64] BULL. No. 55–4, para. 6 (emphasis added).

[65] *Id.* para. 2.

[66] BULL. No. 57–7, para. 4 (emphasis added).

This latter provision would seem to indicate that if the price is reasonable (not more than that charged to other purchasers), the Government will continue to obtain the service by contract, even though it might be less expensive to perform the service in-house. *Bulletin No. 60-2* shed some light on the amount of cost savings which would justify an in-house operation when it stated: "Continuation of Government operation on the ground that procurement through commercial sources would involve higher costs may be justified only if the costs are analyzed on a comparable basis and the differences are found to be *substantial and disproportionately large*" [67] This reference to "substantial and disproportionately large" speaks rather clearly in favor of contracts for private enterprise.

As noted earlier,[68] the overall tone of *Bulletin No. 60-2* was still pro-contractor, despite the rumblings in the distance of requirements for consideration of cost. *Circular No. A-76* was the result of that distant rumbling. It cited a specific cost savings differential in terms of percentage of cost of obtaining the product or service from commercial sources in an attempt to eliminate the guesswork produced by previous documents. Referring to in-house operation in general, including both "new starts" and continuation of existing operations, the circular stated: "A Government commercial activity may be authorized if a comparative cost analysis prepared as provided in this Circular indicates that the Government can provide or is providing a product or service at a cost lower than if the product or service were obtained from commercial sources." [69] The circular then defined cost criteria for use in such an analysis, but for some unstated reason discriminated between "new starts" and continuation of existing operations, specifying percentage guidelines in the former but not in the latter case.[70] Thus, the circular stated, with regard to "new starts":

> A "new start" should not be proposed for reasons involving comparative costs unless savings are sufficient to outweigh uncertainties and risks of unanticipated losses involved in Government activities.
> The amount of savings required as justification for a "new start" will vary depending on individual circumstances. Substantial savings should be required as justification if a large new or additional capital investment is involved. . . . justification may be based on small anticipated savings if little or no capital investment is in-

[67] BULL. NO. 60-2, subpara. 3B.
[68] See note 31 *supra* and accompanying text.
[69] CIRC. No. A-76, para. 5e.
[70] *Id.* subpara. 7b(3).
[71] *Id* (emphasis added).

> volved, if chances for obsolescence are minimal, and if reliable information is available concerning production costs, commercial prices and Government requirements. While no precise standard is prescribed in view of these varying circumstances, a *"new start" ordinarily should not be approved unless costs of a Government activity will be at least 10 percent less than costs of obtaining the product or service from commercial sources.*[71]

Yet the provision governing existing government activities stated:

> An activity should be *continued* for reasons of comparative costs only if a comparative cost analysis indicates that savings resulting from continuation of the activity are at least sufficient to outweigh the disadvantages of Government commercial and industrial activities. *No Specific standard or guideline is prescribed* for deciding whether savings are sufficient to justify continuation of an existing Government commercial activity and each activity should be evaluated on the basis of the applicable circumstances.[72]

Circular A–76, as revised, attempts to clarify the ten per cent cost differential in "new starts" authorization by indicating that such a percentage should be used only as a guide, and may be more or less, depending on the circumstances.[73] Such an "explanation" serves only to compound the ambiguity of previous instructions, and leaves the operational level decision-maker ample room in which to choose the "path of least resistance," even when confronted with a cost analysis situation.

Edging closer toward primary cost-analysis-based decisions, the revised *Circular No. A–76* requires that a cost analysis be conducted not only prior to starting or continuing a government activity, but also when it is otherwise deemed advisable. Hence, this discretionary provision states: "Cost comparison studies should also be made in other cases if there is reason to believe that savings can be realized by the Government providing for its own needs." [74]

Each of the Bureau of the Budget publications has suffered a common malady. Although purporting to deal with administration policy concerning procurement of both products and services, each bulletin or circular has been concerned almost exclusively

[72] *Id.* subpara. 7*c*(3) (emphasis added).

[73] CIRC. A–76 (Revised), subpara 7*b*(3), adds the sentence that: "It is emphasized that 10 percent is not intended to be a fixed figure."

[74] *Id.* para. 6.

with products.[76] As a result, application of the specified criteria to evaluation and cost analysis of in-house vs. contracted-out support services is difficult.[76] For example, in defining "new starts," the revised *Circular No. A-76* uses such terms as "reactivation, expansion, modernization or replacement of a commercial or industrial activity," "capital investment," and "annual costs of production." Also, in its explanation of the relative cost advantage of in-house operation vis-a-vis contracting-out, the later circular refers mainly to facilities, not services. Thus, the circular speaks of "removal or withholding of *property* from the tax rolls,"[77] obsolescence of *plant* and *equipment*,"[78] and required cost analysis when the Government stands to finance more than $50,000 "for costs of *facilities* and *equipment*."[79]

The current status of the policy in favor of contracting-out to private enterprise will be discussed more fully below. Yet it is important to visualize at this point how far from the initial expression of the policy we have come, at least within the Bureau of the Budget. Passing from the initial pronouncement, which indicated that it would be the unusual situation where cost was the deciding factor in determining whether to utilize in-house or contract-

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[75] Although the Bureau of the Budget admits to difficulty in arriving at a valid definition of "support services," it maintains that CIRC. NO. A-76 applies across the board to all forms of procurement. Thus, in recent testimony before a congressional subcommittee, Deputy Director of the Bureau of the Budget Phillip S. Hughes stated: "[W]e have encountered a practical difficulty in defining the term 'service contract' so that it will be uniformly understood and interpreted by all the Government agencies. As A-76 is now written, its provisions apply, across the board, to all types of procurement and there is no necessity for determining whether a particular procurement fits within a prescribed segment of the procurement spectrum. It is the responsibility of the agencies to apply the provisions of Circular A-76 to all types of procurement, taking into consideration the facts and circumstances that prevail in each individual case, irrespective of whether the procurement may be regarded by them as falling within a service-contract category, or some other category which they may establish for purposes of implementing the provisions of the circular." *1968 Hearings* 34.

[76] During testimony before a subcommittee of the House Committee on Government Operations in April 1968, the subcommittee chairman, the Honorable Porter Hardy, Jr., observed: "Well, I have tried my best to see how you are going to fit Circular A-76 into all kinds of procurement. Maybe it is just because I look at the thing from a different standpoint [from the witness, Deputy Director of the Bureau of the Budget, Phillip S. Hughes], but I have a hard time finding out how to apply a good many of the provisions in it to a service contract. It seems to me that A-76 . . . is designed primarily for the procurement ofthings, of commercial-type items, and not of service particularly." *1968 Hearings* 37.

[77] CIRC. NO. A-76, subpara. 5e.

[78] *Id.*

[79] *Id.* para. 6.

ed-out activities,[80] we have reached a temporary plateau on which each agency within the Government is required to justify "in-house" alternatives by cost-analysis, but may, as a discretionary matter, use cost analysis in other instances when deemed advisable.[81] As will be seen in subsequent discussion, other government agencies, specifically the Department of Defense and the General Accounting Office, have advocated cost analysis as the primary basis for making all in-house vs. contracting-out decisions.

C. THE DEPARTMENT OF DEFENSE

The Department of Defense has directed its attention to the problem of in-house vs. contracted-out operations since 1952. In that year, *Department of Defense Directive No. 4000.8* indicated that Department of Defense policy opposed continued operation and retention of in-house facilities. Hence, continued in-house operation required justification, and "new starts" were restricted.[82]

In testifying before the Senate Select Committee on Small Business in 1953, Mr. Charles Thomas, Assistant Secretary of Defense for Supply and Logistics, stated:

> It will be the Department of Defense policy to get out of commercial and industrial type activities to the maximum practicable extent, and this policy with respect to commercial and industrial-type activities is stated in a Department of Defense directive dated November 17, 1952, which provides in part, as follows:
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> "Such [commercial and industrial] facilities will not be continued in operation where the required needs can be effectively and economically served by existing facilities of any department or where private commercial facilities are available, except to the extent that such private commercial facilities are not reasonably available or their use will be demonstrably more expensive or except where the operation of such facilities is essential for training purposes. No facilities, not in operation, shall be retained unless necessary for mobilization reserve. Cost accounting methods will be employed to assist in formulation of decisions concerning cross-servicing, establishment or continuance of such activities in or under the Department of Defense."[83]

Numerous other directives and instructions were published in 1953 and 1954, which provided more specific guidance to the various military departments for the conduct of systematic review of existing commercial and industrial-type activities.[84]

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[80] BULL. No. 55-4, *Attachment B*, para. 26.
[81] CIRC. A-76 (Revised), para. 6.
[82] 1963 Committee Print 33.
[83] *Id.* 34.
[84] *Id.*

The Department of Defense's program favoring private enterprise preceded that of the Bureau of the Budget (the B.O.B. program was not established until the publication of *B.O.B. Bull. No. 55-4* in 1955).[55] But in 1955, after announcement of the Bureau of the Budget policy, there was evidence that the Department of Defense and Bureau of the Budget programs would be merged. Commenting to that effect before a hearing conducted by the Senate Select Committee on Small Business in April 1955, a Department of Defense representative, Mr. O. H. Dersheimer, testified: "[T]he Defense Department has been pushing forward a program to take the Department of Defense out of competition with private business so far as this objective can possibly be accomplished without weakening our defense position."[56] Noting *Bureau of the Budget Bulletin No. 55-4*, he stated: "[W]e are merging our program with that of the Bureau of Budget."[57]

Initial progress under the Department of Defense policy favoring private enterprise was measured in terms of the number of government operations discontinued or curtailed. Thus, Mr. Perkins McGuire, Assistant Secretary of Defense, Supply and Logistics, testified before the Senate Select Committee on Small Business in April 1957, that as of 1 April 1957, 548 government commercial or industrial-type operations had been scheduled for discontinuance or curtailment.[58] The review of government operations was continuous. Thus, Department of Defense representative Mr. Russell A. Crist testified before the same committee in May 1960:

> The Department of Defense in implementing [*B.O.B. Bull. No. 60-2*] . . . has endeavored to insure that all commercial and industrial activities are inventoried and reviewed. Special emphasis has been placed upon major items, such as arsenals, shipyards, aircraft, ship and vehicle maintenance and repair; transportation on a worldwide basis; communication, and warehousing and storage.[59]

In response to studies, hearings and recommendations of the Subcommittee on Manpower of the Committee on Post Office and Civil Service,[60] a special project was established in 1964 by Secretary of Defense McNamara to examine the use of contract support services within that agency. In a memorandum dated 11 September 1964, he indicated to the three service secretaries:

[55] BULL. No. 55-4 was published on 15 January 1955.
[56] 1963 Comm. Print 34.
[57] *Id.*
[58] *Id.* 36.
[59] *Id.*
[60] H.R. REP. No. 129, 89th Cong., 1st Sess. (1965).

> Studies by congressional committees, the General Accounting Office and the Department of Defense have raised questions concerning our policies and practices in deciding when to accomplish the performance of support-type activities by military personnel, direct-hire civilian personnel, or by contract. These studies indicated that there are varying practices among the Department which, in some cases, may result in uneconomic practices or be inconsistent with Civil Service laws and regulations. . . . It is our objective to assure that the Defense Department is equipped and staffed to perform efficiently and effectively all of those functions which are essential to military readiness. After having made this determination, it is our objective in regard to other activities to select that arrangement consistent with Civil Service laws and regulations, which will produce the lowest overall cost. . . .[91]

The study group was directed to concern itself specifically with situations in which greater use of contract support services would be more economical and situations in which contract support service should be terminated for excessive costs.[92] In a memorandum dated 8 January 1965, the Assistant Secretary of Defense, Paul Ignatius, announced an interim report which recommended the conversion to direct-hire civilian or military positions or replacement of contract technical personnel.[93] When the final report and recommendations of the special project group, headed by Mr. Robert C. Moot, Deputy Assistant Secretary of Defense (Logistics Services), were approved by Secretary McNamara in 1965, it be-

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[91] SENATE COMM. ON GOVERNMENT OPERATIONS, 90th Cong., 1st Sess., STAFF MEMO 90-1-8, Appendix B (1967).

[92] *Id.*

[93] *Id.* The Armed Services Procurement Reg. § 22-301 (1 Jan. 1969), defines contract technical personnel:

"DEFINITION OF CONTRACTOR ENGINEERING AND TECHNICAL SERVICES. *Contractor engineering and technical services* consist of the furnishing of advice, instruction, and training to Department of Defense personnel, by commercial or industrial companies, in the installation, operation, and maintenance of Department of Defense weapons, equipment, and systems. This includes transmitting the knowledge necessary to develop among those Department of Defense personnel the technical skill required for installing, maintaining, and operating such equipment in a high state of military readiness. These services may be subdivided into the following categories.

"(a) *Contract plant services* (CPS) are those engineering and technical services provided by the trained and qualified engineers and technicians of a manufacturer of military equipment or components, in the manufacturer's own plants and facilities.

"(b) *Contract field services* (CFS) are those engineering and technical services provided on site at defense locations by the trained and qualified engineers and technicians of commercial or industrial companies.

"(c) *Field service representatives* are those employees of a manufacturer of military equipment or components who provide a liaison or advisory service between their company and the military users of their company's equipment or components."

came clear that the Department of Defense had again antedated the Bureau of the Budget (in *Circular A-76*) in effecting an administration policy change. Primary emphasis in the new policy was placed on military readiness and efficiency, as opposed to the earlier Department of Defense policy that "the Department of Defense get out of commercial and industrial type activities to the maximum practicable extent. . . ."[94] The final report recommended elimination of numerous contract technical positions where inconsistent with the civil service laws and regulations. In keeping with the new emphasis on military readiness and efficiency, the report also stated: "Conversion of technical . . . services will be . . . considered desirable when it is technically feasible, improves military readiness and is economical."[95]

Reflecting the change in Department of Defense policy with regard to contracting-out,[96] three new directives were published in 1965 and 1966, and are currently in effect:

(1) *Department of Defense Directive No. 1130.2*, 2 October 1965, "Engineering and Technical Services-Management and Control";

(2) *Department of Defense Directive No. 4100.15*, 17 April 1969, "Commercial or Industrial Activities"; and

(3) *Department of Defense Instruction No. 4100.33*, 22 July 1966, "Commercial or Industrial Activities-Operation of."

Indicative of the new Department of Defense policy which places strong emphasis on efficient and effective performance of military readiness functions and in-house self-sufficiency is *Department of Defense Directive No. 1130.2*, which states, under the heading "policy": "D.O.D. components will achieve in-house self-

[94] 1963 Comm. Print 34 and text accompanying note 83 *supra*.

[95] SENATE COMM. ON GOVERNMENT OPERATIONS, 90th Cong., 1st Sess., STAFF MEMO 90-1-8, Appendix B (1967).

[96] It has been suggested by one Congressman that the change in Department of Defense policy resulted from the following factors:

"(1) a series of studies and hearings by the Subcommittee on Manpower Utilization of the House Committee on Post Office and Civil Service, beginning in November 1963 and embodied in the Henderson Report; (2) a report by the Comptroller General, dated March 19, 1964, relative to excessive costs incurred by the Department of the Air Force installation in Japan; (3) a decision by the General Counsel of the Civil Service Commission, dated February 12, 1965, concurred in, generally, by the Comptroller General; and (4) a report and recommendation by a Project Staff, appointed by the Secretary of Defense and headed by Robert C. Moot, now Deputy Assistant Secretary of Defense (Logistics Services) begun in September 1964 and completed in March 1965 (referred to as the 'Moot Report')." SENATE COMM. ON GOVERNMENT OPERATIONS, 90th Cong., 1st Sess., STAFF MEMO 90-1-8 (1967) (remarks of Sen. McClellan).

sufficiency as early as possible in the installation, operation and maintenance of their weapons, equipment and systems." [97] The directive cautions: "Contract Field Services (CFS) will be utilized only where necessary for accomplishment of a military mission, and where satisfactory provision of services by D.O.D. personnel is not practicable." [98]

Department of Defense Directive No. 4100.15 implements *Bureau of the Budget Circular No. A–76*. In conformity with the principle espoused in the circular of relying on private enterprise for products or services "to the maximum extent consistent with effective and efficient accomplishment" [99] of its programs, and that only where it is in the national interest for the Government itself to provide those services will it begin or continue an existing operation, the directive states: "[T]he Department of Defense depends upon both Private and Government commercial or industrial sources for the provision of products and services, with the objective of meeting its military readiness requirements with maximum cost effectiveness." [100] The directive then specifies under the title, "Policy," that in-house commercial or industrial activities may be continued or initiated as "new starts" only when one or more of certain criteria exist (citing the five criteria specified in paragraph 5, *B.O.B. Circular No. A–76*).[101] The directive proscribes contracting-out for those basic functions of management necessary to retain control over conduct of agency programs. It lists, as examples of basic functions of management: "selection, training and direction of Government personnel, assignment of organizational responsibilities, planning of programs, establishment of performance goals and priorities, and evaluation of performance," [102] as did the Bureau of the Budget publication; but then qualifies this limitation by permitting contracting-out for

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[97] Dep't of Defense Directive No. 1130.2, § V(A)1 (2 Oct. 1965).

[98] *Id.* § V(B). This provision is apparently based on 36 COMP. GEN. 338, 339 (1956), where the Comptroller General stated: "[W]hen the services required would ordinarily fall within the scope of work generally performed by officers and employees of the agency or of other Government agencies, the determination to invoke such contracting authority should be based on cogent considerations of the *necessity*, efficiency, and economy of the contract procurement." (Emphasis added.) The provision in the D.O.D. Directive does not recognize subsequent rulings by the General Counsel of the Civil Service Commission and the Comptroller General which prohibit contracts for personal services (other than those permitted by statute) as a matter of law. See note 126 *infra* and accompanying text.

[99] Dep't of Defense Directive No. 4100.15, § IV (17 Apr. 1969).

[100] *Id.*

[101] *Id.* § V(B). See note 48 supra and accompanying text.

[102] *Id.*

"managerial, advisory and other support services related to these internal functions, provided that the Government's fundamental responsibility for controlling and managing its program is not compromised or weakened." [103]

In explaining the requirements for implementation of *Department of Defense Directive No. 4100.15 and B.O.B. Circular No. A-76, Department of Defense Instruction No. 4100.33* generally adheres to the specific requirements of those publications with regard to determination of when to contract-out and when to start or continue in-house. In one important regard, however, the implementing instruction goes further than the Bureau of the Budget publication by requiring a comparative cost analysis to be made not only prior to "new start" or continuation circumstances, but also before contracting-out for the performance of the agency's operational need. Hence, the Secretary of each military department is responsible for "making a comparative cost analysis before procuring products or services from private commercial sources when the procurement will cause the Government to finance directly or indirectly more than $50,000 for costs of facilities and equipment to be constructed to Government specifications." [104] The Instruction provides that cost analysis is also required:

> 1. When the decision to rely upon a government in-house activity to provide the products or services is determined on the basis of relative cost. . . .
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> . . . .
>
> 3. When there is a probability that products or services being procured from private enterprise could be obtained from Government sources at a lower overall total cost to the Government.[105]

It should be observed that, while the Bureau of the Budget has not adopted the requirement specified in the implementing Department of Defense Directives for additional cost analysis prior to a decision to contract-out, such a position is advocated by various other elements in our Government. Thus, in a report to the

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[103] *Id.*

[104] Dep't of Defense Instruction No. 4100.33, § VI(F) (22 Jul. 1966). Note that this is addressed primarily to products, not services, when it speaks of "cost of facilities and equipment." But it would appear to include some service contracts. For example, a contract which required the contractor to furnish a particular type of garbage truck to pick up metal garbage containers would apparently be subject to this requirement for comparative cost analysis. Contracts for services or for products and services where the government finances less than $50,000 for cost of facilities and equipment are clearly not covered by this provision.

[105] *Id.*, Incl. 3, § III(A).

Congress dated 6 September 1967, concerning the relative cost of converting approximately 10,500 contract technical service personnel from contract to civil service positions, the Comptroller General of the United States stated:

> On the basis of our rather extensive reviews performed at the National Aeronautics and Space Administration and the Department of Defense, we believe that an executive agency should make a determination on a case-by-case basis as to whether technical services could be more effectively performed by civil service personnel or by contractor-furnished personnel. If it is determined that effective performance could be achieved by either means, we believe that the agency should then make a detailed cost comparison of contractor versus in-house performance of such work. The agency's decision could then be made in full awareness of economic considerations.[106]

In addition, the Senate Committee on Government Operations, after conducting numerous hearings on the subject of "Government Policy and Practice With Respect to Contracts for Technical Services," concluded in its report: "It is apparent that due consideration of the element of cost requires that some form of comparative cost studies must be made by executive branch agencies prior to determining whether to perform a task in-house or by private contract." [107] And finally, in its August 1968 report entitled "Criteria for Support Service Cost Comparisons," the House Committee on Government Operations recommended that:

> 1. The Bureau of the Budget should issue a circular or sufficiently revise Circular A–76, to provide specific criteria governing cost comparisons of support services. Only in this manner can a determination be made as to whether such services can be obtained on a more economical basis by contract or by in-house performance.
> 2. Except in special situations, A–76, or a new circular, should . . . require the making of a cost comparison for support services, before a "new start" *or a contract is made.*[108]

Aside from the practical problems attaching to an across-the-board cost analysis requirement in contract-out vs. in-house determinations,[109] certain fundamental questions of concept present

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[106] STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, 90th Cong., 2d Sess., REPORT ON GOVERNMENT POLICY AND PRACTICE WITH RESPECT TO CONTRACTS FOR TECHNICAL SERVICES 22 (Comm. Print 1968) [hereinafter cited as 1968 Comm. Print].

[107] *Id.* 11.

[108] H. R. REP. No. 1850, *supra* note 2, at 4 (emphasis added).

[109] The Department of Defense's implementing directive of BUREAU OF THE BUDGET CIRCULAR A–76, which requires cost studies of contractual arrangements for support services as well as in-house, "has created a very heavy burden of studies ranging over a wide field of contractual arrangements." 1968 Comm. Print 41.

themselves. Granted that sound business practice requires serious consideration of the relative costs of various alternatives, can that requirement for cost analysis be superimposed upon a policy favoring one of those alternatives: contracting-out for goods and services? The purpose of contracting-out, as initially conceived, was to reduce or terminate, whenever compatible with the national interest, government competition with private enterprise. Although it has never been clear just what meaning attached to the phrase "in the national interest," it is readily apparent at this time that it means efficiency and economy; *i.e.*, if the Government can do the job more cheaply than the private section, then Government can and must compete with private enterprise, for it is "in the national interest" to do so. Of course, this is not the whole picture, as we shall see in studying the various opinions of administrative decision-makers regarding the "legality" of contracting-out for support services. But enough of the picture is complete to explain part of the difficulty with current contracting-out practice. Although emphasis is still placed on contracting with private industry for goods and services, agencies are with increasing frequency being pushed toward cost-based decision-making as the ultimate criterion in the in-house vs. contract-out question. Under the true cost analysis determination, after eliminating all the excluded criteria in the Bureau of the Budget and Department of Defense publications, the ultimate criterion is not: "Will this help private industry?", but: "Will this cost less?" Then, the new policy muses almost as an afterthought: "If it does cost less and at the same time also happens to benefit private industry, how nice it will be!"

But, as noted earlier, the picture is not yet complete.[110] In addi-

[110] The subject of cost accounting is beyond the scope of this article. Its complexity has been the frequent subject of discussion and debate in Congress and industry. As an example of the difficulties involved, note the discussion as to whether total costs to Government, to include "overhead," should be included in cost analysis. The Government Accounting Office believes that overhead should not be included in Government cost analysis unless it can be shown in an individual case that such costs would be increased. 1968 Comm. Print 41. Industry argues, however, that such costing unfairly weights advantage toward in-house operation. *Id.* 42. This is currently an important issue, and one concerning which industry has already taken the opportunity to notify the new Secretary of Commerce, Mr. Maurice Stans. In a letter dated 17 Dec. 1968, Mr. John G. Reutter, President of the Consulting Engineers Council, stated to the Secretary-designate his concern about the award to the Federal Aviation Administration of a $799,651 contract to Coast and Geodetic Survey for engineering and surveying services at 150 United States airports thusly:

"We are unable to understand . . . how anyone familiar with the

tion to the in-house vs. contract-out dilemma caused by the cost analysis requirement, certain important "legal" limitations which have been placed on the practice of contracting-out by the Comptroller General of the United States and the General Counsel of the Civil Service Commission add to the difficulty of determining how, when, and by whom the decision to contract-out should be made.

D. THE GENERAL ACCOUNTING OFFICE AND THE CIVIL SERVICE COMMISSION

The General Accounting Office was established in 1921 by passage of the Budget and Acounting Act of 1921.[111] This office has exerted a strong influence on the development of the policy dealing with contracting-out for services. Empowered by the act to exercise the sole authority to "settle and adjust all claims by and against the Government and all accounts in which the Government is concerned," [112] the Comptroller General has, among his many decisions since 1921, refused to permit payment for services rendered,[113] withheld approval of a service contract,[114] and required the earliest possible termination of a service contract,[115] based on a rule he has concomitantly developed which prohibits the acquisition by a government agency of "personal services" by contract from private enterprise.[116] Basically, the rule is designed to preclude the establishment of an employer-employee relationship outside the existing federal statutory system. [117] The current Comptroller General recently stated the rule thusly:

> The general rule . . . is that Government agencies may contract for the performance of required services including services which tradi-

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daily conduct of an office or business could suggest that it can do this work with no 'overhead.' We realize that the Government has inserted some elements of 'overhead' in other portions of its cost breakdown but where are such items as: rent, legal services, accounting, photogrammetric equipment, depreciation, insurance, social security, and workmen's compensation (to name a few)? If U.S.C. & G.S., together with GAO has devised a means of avoiding such expenses, they owe it to the business community of the nation to point out how." 254 BNA FED. CONT. REP. E-1 (1968).

[111] 42 Stat. 24 (1921), *as amended*, 31 U.S.C. § 71 (1964).

[112] *Id.*

[113] 31 COMP. GEN. 510 (1952).

[114] 15 COMP. GEN. 951 (1936).

[115] Ms. Comp. Gen. B-113739, 2 Apr. 1953.

[116] 17 Comp. Gen. 300 (1937).

[117] Ms. Comp. Gen. B-146824, 4 Mar. 1965 [hereinafter cited as Fuchu (1965)], *contained in* HR REP. No. 188, 89th Cong., 1st Sess., DECISION OF THE COMPTROLLER GENERAL OF THE UNITED STATES REGARDING CONTRACTOR TECHNICAL SERVICE: 1 (1965).

> tionally have been performed by Government employees if contracting out is determined to be justified on the basis of considerations of necessity, efficiency, and economy. However, contracts which are entered into in reliance on that rule must be made on an independent contract or non-personal service basis; that is, they must require the performance of a complete job or task by the contractor and not merely the furnishing of personnel who will work under the supervision and control of Government employees.[118]

Although the rule apparently finds little support in statutory law,[119] it is now firmly entrenched in the administrative and regulatory system controlling government agency operations[120] and is thus an important consideration for the "contract-out vs. in-house" decision-maker.

During the development of the rule prohibiting personal service contracting, the Comptroller General has vacillated between law and policy as the basis for the rule. Thus, in 1943, he stated that the rule was one of law.[121] In 1945,[122] however, and from then until 1965,[123] he maintained the position that the prohibition was a policy matter under which the services, although "personal" in nature, could nonetheless be approved by the Comptroller General if certain criteria were met. Thus, in 1963, in approving a

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[118] *Hearings on Government Policy and Practice with Respect to Contracts for Technical Services Before the Senate Comm. on Government Operations*, 90th Cong., 1st Sess. (1967) [hereinafter cited as *1967 Hearings*].

[119] Fairbanks, *Personal Service Contracts*, 6 MIL. L. REV. 1 (1959). The author states: "It thus seems clear that the [personal services] rule in its breadth as enunciated by the Comptroller General finds little support in the law." *Id. See also* Bisson, *Statutory Limitations on Contracts for Services of Government Agencies*, 34 BROOKLYN L. REV. 197, 222 (1968), where the author concludes: "It is submitted that the decision whether to engage a Federal employee to perform Federal services or to contract such work out to bona fide independent contractors involves the exercise of discretion . . . [which] should not be limited by such *non-stautory restrictions* as the Comptroller's policy against personal service." (Emphasis added.)

[120] *E.g.*, Armed Services Procurement Reg. § 22-102.1(a) (1 Jan. 1969), states, under the heading *Policy*: "The Civil Service laws and regulations and the Classification Act lay down requirements which must be met by the Government in hiring its employees, and establish the incidents of employment. In addition, personal ceilings have been established for the Department of Defense. Except as otherwise authorized by express statutory authority (*e.g.*, 5 U.S.C. 3109b, as implemented by the annual Department of Defense Appropriation Act—expert and consultant services . . .), these laws and regulations shall not be circumvented through the medium of 'personal services' contracting, which is the procuring of services by contract in such a manner that the contractor or his employees are in effect employees of the Government."

[121] 22 COMP. GEN. 700 (1943).

[122] 24 COMP. GEN. 924 (1945).

[123] Fuchu (1965), *supra* note 117.

proposal by the Internal Revenue Service to contract for the receipt, storage and issue of Federal Income Tax forms to points within the Los Angeles District of the Internal Revenue Service for a four and one-half month period, a proposal which he deemed a "purely personal service contract . . .," he stated:

> The general rule is that purely personal services for the Government are required to be performed by Federal personnel under governmental supervision. . . . However, *the requirement of this rule is one of policy rather than positive law* and when it is administratively determined that it would be substantially more economical, feasible, or necessary by reason of unusual circumstances to have the work performed by non-government parties, and that is clearly demonstrable, we would not object to the procurement of such work through proper contractual arrangements.[124]

Apparently having no particular predilection toward the stare decisis concept, however, the Comptroller General again decided in 1965 to treat the rule prohibiting contracting-out for personal services as a matter of law.[125] In 1964, in response to an earlier request from the General Accounting Office, the Civil Service Commission examined certain contracts for contractor-furnished personnel at the Pacific Region Ground Electronics Engineering Agency. Of specific importance were contracts for 104 contract technicians at Fuchu Air Force Base, Japan, as well as other contracts with industry for employment of technicians by the Department of Defense.[126] In a strongly worded opinion subsequently concurred in by the Comptroller General,[127] the General Counsel of the Civil Service Commission ruled that under circumstances where no real distinction can be drawn between positions filled by contract personnel and those filled by federal employees, the posi-

[124] 43 COMP. GEN. 390, 392 (1963) (emphasis added).

[125] Fuchu (1965), *supra* note 117.

[126] As to the authority of the Civil Service Commission to make such an investigation, Mr. John W. Macy, Jr., Chairman, Civil Service Commission, in testimony before the Senate Comm. on Government Operations in 1967, stated: "As the central staff agency for personnel, the Commission must be constantly alert that the provisions of the civil service laws are fully observed. . . ." *1967 Hearings* 247. In the legal memorandum attached to the Opinion of the General Counsel of the Civil Service Commission, Ms. B-146824, 12 Feb. 1965, as contained in H.R. REP. NO. 188, 89th Cong., 1st Sess. 2 (1965) [hereinafter cited as Opn. (1965)], dealing with the Fuchu Air Force Base contracts, it is stated: "[T]he Commission (not the agency) has the authority to determine whether or not the agency has established an employer-employee relationship when it has contracted out with a private organization to furnish personal services . . . ." *citing* the Classification Act of 1949, *as amended*, 5 U.S.C. § 1071 et seq. (1964).

[127] Fuchu (1965), *supra* note 117, at 1.

tions should be federal positions and the employees federal employees, paid under appropriate personnel statutes. Further, personnel procured by contract to fill such positions are illegally obtained in violation and evasion of the Civil Service Act, the Veterans' Preference Act, the Classification Act, and other personnel statutes.[128] What is proscribed, noted the General Counsel, is an employer-employee relationship which is established by means other than the applicable federal personnel laws.[129]

How to determine this employer-employee relationship? In the *Fuchu* decision, three criteria were listed: whether a person is (1) engaged in the performance of a federal function under authority of an act of Congress or an Executive order; (2) performing duties subject to the supervision of a federal officer or employee; and (3) appointed in the civil service by a federal officer or employee.[130]

In a more recent opinion, the General Accounting Office referred six contracts at the Goddard Space Flight Center for on-site technical services to the Civil Service Commission for determination of legality with respect to their terms and operations.[131] Using the same three criteria as he had in the *Fuchu* opinion, the General Counsel determined that the support technicians had been placed in a relationship with the Government, "tantamount to an employer-employee relationship,"[132] and that the contract effectively violated the requirements and policies of the personnel laws by their procurement of personnel in that manner.[133] Consequently, he ruled that "the contracts under review and *all like them* are proscribed unless an agency possesses a specific exception from the personnel laws to procure personal services by contract."[134]

Clearly, the General Counsel of the Civil Service Commission treats contracts for "personal services," other than those con-

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[128] Opn. (1965), *supra* note 126, at 4.

[129] *Id.* 3.

[130] *Id.*

[131] Ms. Opn. Gen. Counsel of C.S.C. 3, 18 Oct. 1967 [hereinafter cited as Opn. (1967)].

[132] *Id.* 37.

[133] *Id.*

[134] *Id.* 40. The following standards were set down by the opinion: "[C]ontracts which, when realistically viewed, contain all the following elements, each to any substantial degree, either in the terms of the contract or in its performance, constitute the procurement of personal services proscribed by the personnel laws.

"Performance on-site.

"Principal tools and equipment furnished by the Government.

"Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

tracts permitted by statute, as illegal without exception.[135] The Comptroller General published his concurrence with this second Civil Service Commission opinion in November 1967. Although the concurrence is in general terms, it is obvious that the Comptroller General also treats the matter of the "personal service" prohibition as a legal, not a policy question.[136] Thus, in another 1965 decision, the Comptroller General ruled that the General Services Administration (GSA) could not enter into contracts for

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are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

"Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

"The need for the type of service provided can reasonably be expected to last beyond one year.

"The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order:

"To adequately protect the Government's interest or

"To retain control of the function involved, or

"To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee." *Id.*

[135] During the hearings before the Senate Committee on Government Operations in 1967, the following colloquy occurred between the Acting Committee Chairman, Senator Joseph M. Montoya, and Mr. John W. Macy, Chairman of the Civil Service Commission:

Senator Montoya: "Let me assume the factual situation of the *Fuchu* case in another case, Mr. Macy. But in addition there is a cost consideration which reflects that the contractor cost would be more economical than the in-house operation. What would be the attitude of the Civil Service Commission?"

Mr. Macy: "Well, if the facts were the same as in the *Fuchu* case, *the Commission's judgment would be that the contract was still illegal.*"

. . . .

Senator Montoya: "All right. Let's assume the same facts as in the *Fuchu* case with the additional consideration that the particular function being handled by the contractor will better promote military readiness and at the same time be done at less cost than the in-house operation. What would the attitude of the Civil Service Commission be under those circumstances?"

Mr. Macy: "There is no congressional exception in cases where a higher degree of military readiness is called for and consequently I would answer the same way as I did in the previous question." *1967 Hearings* 254.

[136] Ms. Comp. Gen. B-133394, 1 Nov. 1967. Although concurring in the opinion of the General Counsel of the Civil Service Commission, the Comptroller General opinion construes it rather strictly. The opinion states: "We *think it is clear from the [CSC Opinion] . . . that no single provision of* a contract, such as the task assignment or technical direction requirement, may constitute the basis for a determination that the contract is or is not proscribed by the personnel laws. Rather, the Opinion requires, before an adverse determination, (1) a realistic consideration of the provisions of the entire contract and the overall substance of the operations thereunder, and (2) a conclusion that each of the stated elements is involved therein to a substantial degree." *Id.* 1.

the procurement of services of clerks, typists, telephone operators and teletype operators on a temporary basis during peakload and emergency periods.[137] In so ruling, the Comptroller General utilized the three criteria cited by the General Counsel of the Civil Service Commission in the *Fuchu* opinion for identifying an employer-employee relationship,[138] and observed that the GSA "does not have inherent power to disregard the enactments of Congress with regard to the Classification Act and the civil service laws and 'employ' individuals through personal service contracts. . . ."[139] And in testimony before the Senate Government Operations Committee in 1967, Comptroller General Elmer B. Staats stated with regard to the *Fuchu* concurrence by his predecessor-in-office, Comptroller General Joseph Campbell: "[I]t was the intent of that statement to support the position taken by the General Counsel of the Civil Service Commission. In other words, we concurred with the *legal* position taken by counsel for the Civil Service Commission."[140]

A curious question has arisen concerning the connotation of the words "illegal" and "legal" as used by the General Counsel of the Civil Service Commission and the Comptroller General. When these two individuals testified in Senate hearings in 1967 concerning contracting-out for services, they seemed to agree that although personal service contracts are "illegal . . . they . . . [can be] permitted for a period of time necessary for conversion transition, as accepted practice and in the interests of good management and the continuation of necessary functions."[141] Also, *Department of Defense Directive No. 1130.2* and the *Armed Services Procurement Regulations* appear to sanction the use of personal service contracts "in the event unusual requirements involving essential mission accomplishment necessitate the procurement of contract field services . . . ," if authorized by the Assistant Secretary of Defense for Manpower,[142] in consultation with the Civil Service Commission.[143] This may well indicate that the question of the "personal services" prohibition is closer to one of policy than either the Comptroller General or the General Counsel of the Civil Service Commission care to admit. The answer seems to lie somewhere in the gray area *between* policy and law.

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[137] 44 COMP. GEN. 761 (1965).
[138] See text accompanying note 130 *supra*.
[139] 44 COMP. GEN. 761, 764 (1965).
[140] *1967 Hearings* 264 (emphasis added).
[141] 1968 Comm. Print 16.
[142] Armed Services Procurement Reg. § 22-302.2 (1 Jan. 1969).
[143] Dep't of Defense Directive No. 1130.2 § V(C) (2 Oct. 1965).

III. THE PRACTICAL LIMITS OF THE POLICY

Prior to determining what *order* can be made of the *disorder* that is the "policy-cost-legality" question, it is appropriate to examine the decision-making process under existing directives and regulations to expose those practical operational problems which have resulted from their interpretation.

The man on the "hot seat" in the majority of cases is the contracting officer. Assume for a moment that a commander is given a mission which includes a support-service requirement that might be performed with equal efficiency either in-house or by contract. In determining which alternative is the more appropriate, the commander's contracting officer utilizes a two-step method. He must initially ask the question: Is this a "personal service" and thus precluded from being procured by contract by current regulations which implement the decisions of the Comptroller General and the General Counsel of the Civil Service Commission?[144] This initial determination is relatively easy, as a practical matter, for guidelines exist which are sufficiently definitive to permit him to decide the question in his own office without going elsewhere for assistance. Thus, he considers:

(1) The nature of the work (his consideration must include an examination of whether the services represent the discharge of a governmental function calling for the exercise of judgment or discretion by the Government);[145]

(2) Those contractual provisions which concern the contractor's employees (such as whether the Government specifies the qualifications of, or reserves the right to approve each contractor's employees);[146]

(3) Other provisions of the contract (such as whether the services can properly be defined as an end product, and whether payment will be for results accomplished or based only on the amount of time worked);[147] and

(4) How the contract will be administered. This provision recognizes that, although by the terms of a contract no "personal services" are provided for, the actual performance of the contract may prove the converse.[148]

Of course, there are those situations in which the "personal ser-

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[144] Armed Services Procurement Reg. § 22-102.1(a) (1 Jan. 1969) [hereinafter referred to and cited as ASPR].

[145] *Id.* § 22-102.2(i).

[146] *Id.* § 22-102.2(ii).

[147] *Id.* § 22-102.2(iii).

[148] *Id.* § 22-102.2(iv).

vice vs. non-personal service" portion of the decision will not be a clear case. Such situations are provided for in ASPR § 22-102.1, which requires that the contracting officer obtain a legal opinion in doubtful cases.[129] This regulatory provision also requires a legal opinion to be obtained in those cases where a "personal service" permitted by statutory exception, such as for expert or consultant services under 5 U.S.C. § 3109(b), is sought to be procured by contract.[130] Normally, the contracting officer is able to make this initial decision within his own resources. Clearly, at this point, if the services are "personal" in nature (and not permitted by statutory exception), the contracting officer is compelled to initiate action for a "new start," that is, to establish the service activity within the Department of the Army, using military or civil service resources.[131] On the other hand, if the services are determined by the contracting officer to be "non-personal," he is free to proceed to the second step in the problem-solving process: Should the services be performed by contractor or in-house personnel?

In this second portion of the decision-making process, various factors come into play. Theoretically, under *Army Regulation 235-5* and *Department of Defense Directive No. 4100.33*, this second step in the determination is a weighing process in which, on one side of the scale, the oft-expressed presumption in favor of private enterprise reposes, waiting to test on the other side of the scale his arch enemies, the "compelling reasons," one by one.[132] Should any of these "compelling reasons" exist, it is sufficient to sustain the contracting officer's decision to initiate a "new start." In practice, the Army Regulation (which, along with *Department of Defense Directive No. 4000.33* goes further in implementing

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[129] *Id.* § 22-102.1.

[130] *Id.* Procurement of such services must be authorized by an appropriation or other statute. 5 U.S.C. § 3109(b) (1964).

[131] Although this effectively is a "compelling reason" which requires in-house operation, it is interesting to note that it is not listed as such in Army Reg. No. 235-5 (28 Nov. 1966) [hereinafter referred to and cited as AR 235-5], which implements the commercial and industrial facilities program in the Department of the Army. That regulation's only reference to the objectionable "personal services" contract is contained in subparagraph 1*d*(2)(e), in which it is stated: "[T]his regulation requires that applicable commanders and heads of Army agencies . . . assure that . . . the procurement of contract support services conforms to applicable laws and regulations, including regulation [sic] of the Civil Service Commission or other appropriate authority, and is not used as the basis for contract personnel procurement not authorized by law, or as a means of avoiding Government personnel or salary limitations."

[132] AR 235-5, para. 5*b*, which states: "The policy . . . establishes a presumption in favor of Department of the Army Procurement of services and

Bureau of the Budget Circular A-76 than the circular itself demands) effectively requires cost analysis in nearly all cases.[153] Thus a cost analysis is required prior to initiating a "new start," [154] prior to continuing an existing in-house activity or converting to contract from in-house operation,[155] and prior to contracting-out for a new service activity.[156] This requirement for cost analysis poses a major problem for the contracting officer, if he is aware of it.[157] Faced with limited staff and information-collection resources, he is asked to make or have made a detailed, complicated and sophisticated analysis with inadequate and

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products from commercial sources." The regulation lists the following "compelling reasons" for exception to the general policy in favor of contracting-out:

"1. Procurement of a product or service from a commercial source would disrupt or materially delay an agency's program.

"2. It is necessay for the Government to conduct a commercial or industrial activity for the purpose of combat support for individual and unit retraining of military personnel or to maintain or strengthen mobilization readiness.

"3. A satisfactory commercial source is not available and cannot be developed in time to provide a product or service when it is needed.

"4. The product or service is not available from another Federal agency nor from commercial sources.

"5. Procurement of the product or service from a commercial source will result in higher cost to the Government." *Id.* para. 6.

[153] The regulation caution, however, that the last of the five compelling reasons, comparative cost advantage to the Government should be used as justification either for initiating a new start or continuing an existing operation only when none of the other four compelling reasons apply, "because of the difficulty in comparing Government and commercial costs." *Id.* para 6*e*(3).

[154] *Id.* para. 9*c*.

[155] Although para. 13*a*(1) of the regulation states that a cost comparison is required only when the decision to continue in-house activities rests on the basis of relative cost, para. 8 of the same regulation, which requires periodic review of all Army commercial-industrial-type activities to determine whether an existing activity should be continued, curtailed or discontinued, states, in subpara. *f*(2)(a): "Before a final decision is reached to convert to a contractor performance, a comparison of cost will be made in accordance with section IV and will be audited by the U.S. Army Audit Agency."

[156] *Id.* subparas. 13*a*(2), (3).

[157] Armed Services Procurement Reg. § 22-102.1 places responsibility upon the contracting officer for assuring implementation of the Government's *policy* that government employees must be hired within the prescriptions of the Civil Service laws and regulations and Classification Act requirements, that Department of Defense personnel ceilings must be observed (except where statute provides an exception), and that "these laws and regulations . . . [are] not circumvented through the medium of 'personal service' contracting. . . ." However, the author is able to find no directive, regulation or instruction which specifies who is to make the comparative cost analysis upon which so much importance has been placed by Bureau of the Budget

indefinite guidance.[158] The evaluation of such complicated costs as overhead, federal taxes, depreciation, and military and civilian personnel salaries, requires substantially more definitive guidance than the generalities now offered.[159]

In addition to the problem of a required cost analysis which in all probability goes beyond the local ability to perform with accuracy, the contracting officer is faced with the subtle influences of the "real" world in which he makes his decisions. When the commanding officer receives a mission, that mission must be performed in "real time." Hence, when that mission includes a requirement for a new services activity not previously performed by the unit or installation, the commander exerts strong pressure on the contracting officer to acquire the capability within the time allotted. Whether an activity might more appropriately be done in-house or not, the contracting officer is most likely to take the path of least resistance and hence the least time-consuming: contracting-out.[160] The current cost analysis procedure provided for in

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and Department of Defense publications. AR 235-5, which implements Dep't of Defense Directive No. 4100.15 and Dep't of Defense Instruction No. 4100.33 (and, thus, B.O.B. CIRC. NO. A-76), places all responsibility for decisions regarding the establishment, continuation or curtailment of commercial and industrial activities on the "applicable commanders and heads of Army agencies" (AR 235-5, para. 1d, 28 Nov. 1966). The regulation makes no further delineation, however, if in-house vs. contracting-out decision-making responsibility, nor do procurement regulations require that such determinations be made prior to contracting for the supply or service.

[158] Note that in specifying those situations in which cost comparisons are required (subpara. 13*a*) and those situations in which cost comparisons are not required (subpara. 13*b*), AR 235-5 fails to cover all possibilities, resulting in ambiguity and ease of skirting the requirement for cost comparison.

[159] Thus, under the heading "Overhead Costs," the contracting officer is advised, in determining overhead cost in Department of Defense commercial or industrial activities, to include "additional overhead costs that are incurred or will be incurred at the installation level if commercial procurement is not utilized. An equitable share of general overhead such as finance and accounting, personnel, legal, local procurement, medical services, receipt, storage and issues of supplies, police, fire and other services should be allocated to the function under study. In addition, overhead costs at the installation level for management, direction, and administration above the organization performing the function which are specifically related to the function, should be included as part of the Government operation costs. Include also any contract termination, lease cancellation, or other costs which may become due because commercial procurement is discontinued in favor of in-house performance." *Id.* subpara. 15*b*(10).

[160] As to one often-cited reason for contracting-out—to avoid personnel ceilings—the following observations were made by Mr. Louis I. Freed, Staff Administrator of the Special Studies Subcommittee of the House Committee on Government Operations, during questioning of the Deputy Director, Bureau of the Budget, Mr. Phillip S. Hughes, in the hearings before that

Army Regulation 235–5 is, by necessity, time consuming and cumbersome. If the agency required to perform the cost analysis is not properly staffed for that function, or is not able to acquire (in the case of civilian personnel) sufficient personnel spaces to fulfill the requirement based on an in-house decision, in-house starts can easily be the victim of long delays.

This discussion brings up an important question: Even when the decision is made that it is either a matter of military necessity or of relatively less cost to go in-house to perform the mission, is the existing personnel system geared to handle the change? The Civil Service Commission asserts that the Civil Service system can handle this personnel flux. In his 1967 opinion on the NASA technical services contracts, the General Counsel of the Civil Service Commission stated: "Generally, we either have or could readily provide examination coverage for the kinds of positions we have been able to identify as occupied by contractor employees." And, he went on, "[W]e see no reason why the Civil Service examining system cannot supply Goddard with the kind of people now working there under contract." [161] Further, in testifying before the House Subcommittee on Government Operations in 1967, Mr. John W. Macy, Chairman of the Civil Service Commission, stated: "I have a pride and a confidence in the civil service system, and I believe that it can perform effectively to meet needs, whether they are emergency or urgent or are routine, and I feel there needs to be a very careful consideration of all of the management factors before a decision is made to contract out for a particular function." [162] Notwithstanding the asserted responsiveness of the Civil Service recruiting program, consideration should be given to the agency's problem of obtaining personnel spaces. A decision to pursue an in-house course of action and the hiring of additional Civil Service personnel does not mean that sufficient personnel spaces can be obtained to permit those personnel to work at the job for which they were hired. Employment ceilings, determined annually by the President, are intended to be absolute limits. Hence, although agencies may request ad-

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subcommittee in 1967 concerning support service contracts: "Aren't your personnel ceilings really sort of a deception, a paper deception? If we had personnel ceilings, on the one hand, and no ceilings via the personal service contract route, why should agencies feel if they have their programs, and they have got to get on with them, that they have to pay attention to ceilings? They can go via the contract route, and literally thumb their noises at you anyway." *1967 Hearings 55.*

[161] Opn. (1967) 39.

[162] *1967 Hearings* 29.

justment in their particular employment ceiling, no such adjustment may be obtained merely to provide for additional employment in a particular bureau or unit. Each agency is first expected to absorb an increase through an internal adjustment in the agency's ceiling distribution.[163]

And what of short-term service requirements? Even though it may well be cheaper to go in-house under a short-term requirement for support services, this may have serious adverse effects on the in-house personnel system, such as the need to move newly acquired civil servants to another location when the short-term requirement is complete, to discharge them, or even to "bump" other Civil Service workers at the same installation who have less seniority. Conversely, it may well be less expensive to contract-out for a short-term service requirement; yet it is not permitted because of the rule precluding contracting-out for personal services absent statutory exception. Clearly, the manpower management aspects of this decision-making process need to be considered if a responsive answer to an in-house vs. contracting-out question is to be made.

One might certainly ask the question: Why do we contract-out even in those situations in which existing guidelines technically preclude our doing so? It has been suggested that as a practical matter, contract services have been utilized in such circumstances as (1) lack of in-house capability, (2) handling peak loads, (3) inability to recruit talent, (4) contract personnel believed less expensive than in-house personnel, (5) lack of adequate personnel because of manpower ceiling authorizations; and (6) more expedient to use contract personnel.[164] It is suggested that all too often, the real reason the contracting officer obtains support services by contract is that it is procedurally easier to do so than to initiate a "new start." Controlling regulations requiring cost analysis before contracting-out in most instances are sufficiently ambiguous to permit sidestepping their purported requirements, and the contracting officer does not want to face the problem of having to obtain personnel spaces to support an in-house decision.

IV. ISSUES AND ALTERNATIVES

The ulitmate issue in the frequent conflict between policy, ad-

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[163] BUREAU OF THE BUDGET, CIRC. No. A-64 (Revised), POSITION MANAGEMENT SYSTEMS AND EMPLOYMENT CEILINGS, subpara. *4d* (1965).

[164] Letter from Senator John L. McClellan, Chairman of the Senate Committee on Government Operations, to four members of Congress from New Mexico, 7 Dec. 1966, *1967 Hearings* 9.

ministrative decision on "legality," and cost analysis is, of course, the one which initiated the entire controversy: To what extent should the Government compete with private enterprise? Strangely, the Congress has failed to speak definitively on this major policy issue, although some consideration to proposed legislation has been given by various congressional committees in the past.[165] Thus, the Senate Committee on Government Operations has considered numerous bills on the subject in every Congress since the 83d. That Committee has always deferred final action thereon, however, mainly because of repeated assurances from the Bureau of the Budget that legislation was not necessary, since the policy contained in proposed legislation already existed in Bureau of the Budget pronouncements. Serious efforts were being made to prevent government competition with private enterprise already, many of which had allegedly been successful.[166] Thus, this primary issue has effectively been answered, by policy directives outside the lawmaking sphere. The spirit of the initial policy remains: Private industry should provide goods and services to the Government, absent some conflict with the national interest. The evolvement of the requirement for cost analysis reflects the practical realization that it is normally in the nation's interest to obtain those goods and services at the lowest price.

A second important issue is: Who can most effectively make the required comparative cost analysis, and under what criteria should it be made? The contracting officer now has the responsibility for deciding whether services are personal or non-personal. Arguably, he should also be permitted to make the initial contracting-out vs. in-house decision. Cost analysis questions could be handled by him on a summary basis, using *more definitive guidelines*. The need for adequate guidelines is strong if the contracting officer is to make such a decision, since his ability to make an in-depth cost analysis is normally limited by virtue of his sparse-

[165] For example, H.R. 9835, 83d Cong., 2d Sess. would have provided, as amended, "for the termination, to the maximum extent compatible with national security and the public interest, of all commercial activities engaged in by the Federal Government in the United States which compete with private enterprise." The proposed statute "declared it to be the policy of the Congress to encourage private competiitve enterprise to the maximum extent compatible with the national security and the public interest; and that the Federal Government should not engage in business-type operations that are in competition with private enterprise, except where it is necessary in furtherance of national programs and objectives legally established." 1963 Comm. Print 19.

[166] SENATE COMM. ON GOVERNMENT OPERATIONS, 90th Cong., 1st Sess., STAFF MEMO 90-1-8, APPENDIX A (1967).

ly-staffed office. Under this concept, analysis which clearly shows cost benefit in favor of either in-house operation or contracting-out could permit the contracting officer to make the decision, subject to subsequent review at a higher level within his agency. Close cases, on the other hand, would be immediately forwarded to a higher level within the agency staff to make a thorough comparative cost analysis. An important part of this plan would be a guarantee to the contracting officer that, should he make an in-house decision, sufficient personnel spaces would be available and allocated to support that decision. Forcing the contracting officer to consider the availability of personnel spaces might very well influence his ultimate decision. Personnel space guarantees could be effected at the same agency level which makes complicated cost analyses for the contracting officer and reviews his summary cost determinations. Such a system would permit relatively quick decision-making in all but the most complicated cost analysis cases. And ASPR, already being received by each contracting officer, is a ready vehicle for distribution of information to the decision-maker.

There is an alternative answer to the issue of who should make the decision. Arguably, it is a policy decision, and one which should be made at the agency's policy level, at least in cases of substantial dollar value. It is a question which calls for a critical weighing of values, many of which the contracting officer does not have sufficient resources to interpret or to comprehend. To cause the local contracting officer to make what is effectively a high-level policy decision may be unrealistic as well as unfair. Severe pressure from time-mission requirements will often cause him to compromise his position by choosing contracting-out as the only acceptable solution under the circumstances. These factors seem to suggest, as a viable alternative, a higher-level in-agency decision-maker to determine the question. Such an individual or body would not suffer the disability of subtle influences faced by the contracting officer, would have within its own level those resources sufficient to accomplish cost analysis requirements in the least amount of time and with the most accuracy, and could directly allocate personnel spaces to support an in-house decision.

A logical choice for this decision-maker is the "requirements" element of the procurement hierarchy; *i.e.*, the individual or organization which determines what procurement actions are necessary and forwards them to the contracting officer in the form of a work directive. A practical approach would provide for inclusion

in each work directive instructions to obtain in-house or contracted-out performance of thhe requirement. If an in-house determination had been made by requirements personnel, an allocation of those additional personnel spaces needed to perform the requirement would be included in each work directive. The contracting officer would not be required to make policy decisions in this case, but would merely follow the instructions received from the requirier. The complicated analysis required by existing regulations and directives to be utilized in making the contracting-out decision thus would be properly performed by a group possessing the technical ability and facilities to do so.

This is not to say that the contracting officer could not serve a useful purpose under such a relationship, for he would surely act as the primary gatherer of facts at his level to assist the decision-maker in arriving at the decision. In addition to the higher-level in-house decision-maker, and to assure the responsiveness of the government personnel system in those situations in which an in-house decision is appropriate, an inter-agency committee might be established to review immediately agency decisions on *urgent* requirements, those concerning a large number of personnel or involving substantial sums of money, or other special situations which might arise. Such a group might properly include a member each from the Bureau of the Budget, which establishes personnel ceilings; the Civil Service Commission, which has concern for the well-being of the system itself and the protection of the personnel laws; the General Accounting Office, which keeps surveillance on the system lest cost or legality be abused; and the Department of Defense or other agency making the personnel request. Such an inter-agency committee would hopefully be able to examine the problem quickly and arrive at a timely solution, which would be definitive to the extent that mission requirements could be completed just as quickly, efficiently and easily with in-house capabilities as with contracted-out personnel.[187] The key to the problem seems to be "ease of mission accomplishment," at least in the absence of strict and specific requirements to the contrary.

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[187] Industry has advocated independent review of *all* decisions to adopt in-house alternatives as opposed to contracting-out, but the Bureau of the Budget, the Government Accounting Office and the Department of Defense oppose this suggestion on the ground that "it is not feasible, from an operating standpoint, to subject numerous day-to-day transactions to a central review by agencies not acquainted with the circumstances." 1968 Comm. Print 40. The suggested inter-agency committee, however, would have neither disability claimed. Not only would it have members on the

Regardless of who makes the decision, it is obvious that at least the Department of Defense decision-maker needs, under circumstances of necessity and short-time requirements, a statutory exception to the rule which prohibits contracting-out for personal services. A recent Congressional Committee Report notes:

> [I]t would appear that such agencies as DOD and NASA, often faced with manpower ceilings, difficulty or inability to recruit shortage-type technical personnel, and strict time schedules for the accomplishments of various phases of their respective missions, would require a measure of latitude and flexibility in personnel procurement.[168]

Current Department of Defense directives also recognize the need for this provision.[169] Such an exception could be included as an amendment to 5 U.S.C. § 3109(b), which now permits contracting-out for expert or consultant services.

V. CONCLUSION

Clearly, the initial policy expressed by President Eisenhower in 1954, proclaiming government's preference for private industry and asserting government's desire to avoid economic confrontation with private enterprise, has been weakened by evolving procedures requiring cost analysis prior to making a decision to initiate or continue in-house operation and by rulings of the General Counsel of the Civil Service Commission and the Comptroller General that certain services can be performed only by government employees. During this evolution no designation of the in-house vs. contracting-out decision-maker has been made, nor have clear criteria upon which to base the decision-making process been specified.

Hence, several alternative solutions to this dilemma have been offered, in the hope that some constructive progress might be made toward realistic contracting-out vs. in-house decision making:

(1) The decision-maker should be affirmatively designated and given adequate definitive criteria upon which to base this decision.

(a) The decision-maker could well be the contracting officer, authorized to make summary cost analyses in all but com-

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committee from all agencies acquainted with the circumstances plus those with authority to correct deficiencies, but also it would not review all decisions, but only those with special circumstances.

[168] 1968 Comm. Print 11.

[169] *See* notes 142 and 143 *supra* and accompanying text.

plicated cases, and backed up by personnel space guarantees by higher authority to support an in-house decision; or, in the alternative,

(b) The decision-maker could be a higher-level in-agency body, such as the originator of the procurement requirement, equipped to handle both in-depth comparative cost analysis and agency-personnel space allocation, with the contracting officer serving primarily as a gatherer of facts for the decision-maker.

(2) Congress should assist the decision-maker by providing a statutory exception to the prohibition against contracting-out for personal services in situations of necessity and short-time requirements.

STATUS OF FORCES AGREEMENTS AS A BASIS FOR UNITED STATES CUSTODY OF AN ACCUSED*

By Major R. Heath, Jr.**

Under the various Status of Forces agreements, the United States is allowed to retain custody of a serviceman accused of committing a crime abroad until he is either charged or ready to begin his sentence. The military has taken the position that such custody must be based on the Uniform Code of Military Justice and the Manual for Courts-Martial. The author argues that this view is unsound. Examining the texts of the agreements, he concludes that they are self-executing and form a sufficient basis by themselves for custody.

I. INTRODUCTION

The custody problems associated with the United States Status of Forces agreements throughout the world are largely of the military's own making. These problems arise from the military's position that custody of an individual, over whom a foreign court has exercised its primary right to jurisdiction, can be based only on the Uniform Code of Military Justice[1] and the *Manual for Courts-Martial, United States, 1969* (Revised edition), and not the custody provisions of the various agreements. The purpose of this study is to inquire into the validity of this position. The inquiry will deal only with pretrial custody and not post trial custody.

The pretrial custody provisions are of two types, those patterned after the NATO SOFA formula[2] and those that follow

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[1] 10 U.S.C. §§ 801-940 (1964), *as amended*, (Supp. IV, 1969) [hereinafter cited as UCMJ].

[2] Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, 19 Jun. 1951, [1953] 2 U.S.T. 1792, T.I.A.S. No. 2846 (effective 23 Aug. 1953) [hereinafter cited as NATO SOFA].

the Supplemental formula.[3] The NATO SOFA formula provides that "[t]he custody of an accused member of a force or civilian component over whom the receving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State." [4] The Supplemental formula, in contrast, states:

> Where custody rests with the authorities of a sending State . . ., it shall remain with these authorities until release or acquittal by the German authorities or until commencement of the sentence. The authorities of the sending State shall make the arrested person available to the German authorities for investigation and criminal proceedings . . . and shall take all appropriate measures to that end and to prevent any prejudice to the course of justice. . . . They shall take full account of any special request regarding custody made by the competent German authorities.[5]

Countries with agreements containing the NATO SOFA type provisions are Iceland,[6] Japan,[7] Australia[8] and the Philippines.[9] In addition to Germany, the supplementary formula is contained in the agreements with Greece,[10] China,[11] and Korea.[12]

A cursory review of these two provisions reveals the multitude

[3] Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, 3 Aug. 1959, [1963] 1 U.S.T. 531, T.I.A.S. No. 5351 (effective 1 Jul. 1963) [hereinafter cited as Supplementary Agreement].

[4] NATO SOFA art. 7, para. 5(c).

[5] Supplementary Agreement, art. 22, para. 3.

[6] Annex on the Status of United States Personnel and Property, 8 May 1951, [1951] 2 U.S.T. 1533, T.I.A.S. No. 2295, art 2, para 6(c).

[7] Agreement under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, 19 Jan. 1960, art. XVII, para. 5(c), [1960] 2 U.S.T. 1652, T.I.A.S. No. 4510.

[8] Agreement Concerning the Status of United States Forces in Australia, 9 May 1963, art. 8, para. 5(c), [1963] 1 U.S.T. 506, T.I.A.S. No. 5349.

[9] Military Bases in the Philippines: Criminal Jurisdiction Arrangements, 10 Aug. 1965, art. XIII, para. 5(c), [1965] 2 U.S.T. 1090, T.I.A.S. No. 5851.

[10] Agreement with the Kingdom of Greece Concerning the Status of United States Forces in Greece, 7 Sep. 1956, art. III, para. 1, [1956] 3 U.S.T. 2555, T.I.A.S. No. 3649.

[11] Agreement with the Republic of China on the Status of United States Armed Forces in the Republic of China, 31 Aug. 1965, art. XIV, para. 5(c), [1966] 1 U.S.T. 373, T.I.A S. No. 5986.

[12] Agreement under Article IV of the Mutual Defense Treaty with the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, 9 Jul. 1966, art. XXII, para. 5(c), [1966] 2 U.S.T. 1677, T.I.A.S. No. 6127 [hereinafter cited as Korea SOFA].

of problems presented by the Supplemental formula, if one takes the view that the only basis for confinement in a United States facility is pursuant to the Uniform Code of Military Justice.[13] These problems become particularly acute when the authorities of the receiving State prevent military authorities from interviewing material witnesses who are nationals of the receiving State; the receiving State delays bringing the case to trial for an apparently unjustified period of time; or the accused remains in confinement while his case is pending appeal.

Applying the NATO SOFA formula strictly with the corresponding release of the accused to the control of the receiving State at the time he is charged, the problems surrounding pretrial custody are reduced but by no means eliminated. It is a practice, however, even in some countries where the NATO SOFA formula is in effect, to allow the United States to exercise custody until the case is final. The fact that this practice was being used in Japan was brought out in the Senate Committee hearings [14] on the case of William S. Girard.[15]

This article will deal specifically with the following questions: "Is there any basis other than article 10, Uniform Code of Military Justice, for confining a member of the forces in a United States facility or in keeping him in any other lesser form of custody, while he is awaiting trial in a foreign court?" and "Can the United States military place in United States custody a civilian member of the forces while he is awaiting trial in a foreign court?" The answer to the second question will evolve from the first and hence will be taken up last.

It is initially important to examine the jurisdictional status of visiting forces where no status of forces or similar agreement exists. This is required because it becomes readily apparent that the sending State's exercise of jurisdiction is dependent upon an international agreement, and without such an agreement it has no jurisdiction. Having determined this the Constitutional law concerning treaties and executive agreements must be reviewed. Of immediate interest is the requirement that a treaty or executive agreement conform to the Constitution. Does placing an individ-

[13] UCMJ art. 10 provides that when "any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

[14] *Hearings Before a Subcommittee of the Committee on Armed Services, United States Senate in the Case of William S. Girard*, 85th Cong., 1st Sess., at 28 (1957).

[15] Wilson v. Girard, 354 U.S. 524 (1957).

ual in custody based on the custody provision of a status of forces agreement constitute a violation of due process? If it does not, can it be said that the treaty or executive agreement, of which the custody provision is a part, is self-executing and thus constitutes the supreme law of the land? If it is self-executing, then can it overrule a prior inconsistent statute? These are the areas which must be explored before the ultimate questions can be answered. Sections II and III, *infra*, contain a broad discussion of the problem areas and point out the fundamental principles involved. In the remaining sections these principles will be applied to the specific custody provisions.

II. HISTORICAL STATUS OF "VISITING" FORCES UNDER INTERNATIONAL LAW

The early criticisms of the NATO Status of Forces Agreement stemmed from the provisions of Article VII that "in case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction." [16] The *Girard* case,[17] which dealt with a similar provision in the Japanese Protocol,[18] was the major factor in causing the controversy over this provision of the agreement to come to a head. The incident threatened the very existence of the American-Japanese alliance. As a result, a relatively minor occurrence, normally handled without great public stir, developed into a serious international controversy.[19] The issue was simply whether Army Specialist Willliam S. Girard should be tried in a Japanese criminal court for causing the death of a Japanese woman at a time when he was alleged to be on guard duty.

The Girard debate was really only an extension of the discussion held at the time of the original Senate debate on the NATO Status of Forces Agreement. The question was whether, in the absence of such a treaty provision, a receiving State would have jurisdiction to try American soldiers. Feeling that the receiving State would not have jurisdiction without the treaty provision, Senator Bricker proposed the following reservation to the Agreement:

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[16] NATO SOFA, art. VII.

[17] Wilson v. Girard, 354 U.S. 524 (1957).

[18] Protocol to Amend Article XVII of the Administrative Agreement under article III of the Security Treaty with Japan, 29 Oct. 1953, [1953] 2 U.S.T. 1846, T.I.A.S. No 2848.

[19] Baldwin, *Foreign Jurisdiction and the American Soldier, The Adventures of Girard*. 1958 WIS. L. REV. 52.

> The military authorities of the United States as a sending State shall have exclusive jurisdiction over the members of its force or civilian component and their dependents with respect to all offenses commited within the territory of the receiving state and the United States as a receiving state shall, at the request of a sending state, waive any jurisdiction which it might possess over the members of a force or civilian component of a sending state and their dependents with respect to all offenses committed within the territory of the United States.[20]

The obvious effect of the Bricker Reservation, if it had been adopted, would have been to deprive the receiving State of all criminal jurisdiction, over all offenses, regardless of their nature, commmitted within its territory. This reservation, together with all of the criminal jurisdiction provisions of the Agreement, were throughly considered by the Senate [21] and after full debate the proposed reservation was rejected by a vote of 53–27.[22] As has been alluded to earlier, the principal reason for the Bricker Reservation was the feeling of Senator Bricker and many others that, according to customary international law, troops of a friendly nation stationed within the territory of another are not subject to the local laws of the other country, but are subject only to their own country's laws and regulations for the government of the armed services.[23]

Any discussion of the applicable principles of international law on this question naturally must commence with Chief Justice Marshall's decision in the celebrated case of *Schooner Exchange v. M'Faddon*.[24]

The case originated as a libel in admiralty filed in the United States District Court for the District of Pennsylvania against the Exchange, after the ship had entered the port of Philadelphia due to bad weather. The libellants alleged that the vessel had been seized on the high seas by certain persons acting under the orders and decrees of Napoleon, Emperor of France, and subsequently commissioned as a man-of-war by France. The District Court dismissed the libel and held: "that a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordering judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel." [25]

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[20] 99 CONG. REC. 4659 (1953).
[21] 99 CONG. REC. 8724–782 (1953).
[22] *Id.* at 8782.
[23] 99 CONG. REC. 4659 (1953).
[24] 11 U.S. (7 Cranch) 116 (1812).
[25] *Id.* at 120.

The Supreme Court affirmed on basically the same ground. Chief Justice Marshall indicated that the case involved "the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States."[26] In his opinion he expresses the meaning and consequences of territorial sovereignty in the following language:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.[27]

Marshall then sets out three classes of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction. He bases the need for these exceptions on the perfect equality and independence of sovereigns, and their corresponding common interest compelling them to material intercourse, and an interchange of good offices with each other.[28] The third class of cases is the only one pertinent to this discussion and it deals with the case of foreign troops who have been granted a right of passage. Of them he says:

> A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominion.
>
> In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from the national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and dipsosition of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.[29]

It is clear that Chief Justice Marshall's comments dealing with immunity of troops were dicta. This language, however, has been

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[26] *Id.* at 135.
[27] *Id.* at 136.
[28] *Id.* at 137.
[29] *Id.* at 139-40.

picked up and used as the foundation for the argument that troops "stationed" as well as "passing through" another country are exempt from the civil and criminal jurisdiction of the place. In an article on this subject,[30] Colonel King wrote: "The essence of the decision is not that an armed public vessel, but any public armed force, whether on land or sea, which enters the territory of another nation with the latter's permission enjoys an extraterritorial status."[31] This analysis is based on an expansion of the Court's decision dealing with "free passage."

In three later cases, the Supreme Court had the occasion to examine the questioned language of the *Schooner Exchange* case. The first of these was in the case of *Coleman v. Tennessee*[32] where the opinion of the court contained the following language: "It is well settled that a foreign army permitted to march through friendly country, or *to be stationed in it,* by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place."[33]

The following year the above language in *Coleman* was cited by the Court in *Dow v. Johnson*[34] and reflects the progression of the cycle that originated with Chief Justice Marshall's decision in *Schooner Exchange:* "As was observed in the recent case of *Coleman v. Tennessee,* it is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, is exempt from its civil and criminal jurisdiction."[35]

The last of this trilogy of decisions, *Tucker v. Alexandroff,*[36] amounts to, in the opinion of Colonel King,[37] "a reaffirmation, at least by way of dictum, of the doctrine laid down in the case of *The Exchange* that the armed forces of one friendly nation within the territory of another by its consent enjoy an extraterritorial status."[38] In the *Tucker* case the Court discussed *The Exchange* at length and said of it:

> This case, however, only holds that the public armed vessels of a foreign nation may, upon principles of comity, enter our harbors with the presumed license of the government, and while there are exempt

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[30] King, *Jurisdiction Over Friendly Foreign Armed Forces*, 36 AM. J. INT'L L. 539 (1942).

[31] *Id.* at 541.

[32] 97 U.S. 509 (1878).

[33] *Id.* at 515 (emphasis added).

[34] 100 U.S. 158 (1879).

[35] *Id.* at 165.

[36] 183 U.S. 424 (1902).

[37] King, *supra* note 30.

[38] *Id.* at 542.

> from the jurisdiction of the local courts; and by parity of reasoning, that, if foreign troops are permitted to enter or cross our territory, they are still subject to the control of their officers and exempt from local jurisdiction."[39]

In analyzing these cases Barton said that "none of these three cases can be independent authority for the validity of the statements which have been quoted from them, because the question of immunity from criminal proceedings was not in issue in any of them.[40] Colonel King,[41] likewise, recognized that the Supreme Court's remarks in each of these three cases concerning the immunity of visiting forces were dicta, but he argued that "dicta of the Supreme Court are entitled to great weight, especially when they concern a matter which only becomes the subject of actual litigation once in a generation, if so often." [42] In a subsequent article Colonel King pointed out that he felt that "the real reason for the immunity is that it is necessary for military efficiency." [43]

To bolster his argument Colonel King looked to decisions in other courts and specifically accorded great weight to the case of *Chung Chi Cheung v. The King*.[44] Chung Chi Cheung was a British subject serving on board an armed public vessel belonging to China. While the ship was in the territorial waters of Hong Kong he shot and killed its captain and then wounded the acting chief officer and himself. Chung Chi Cheung was then detained on shore in the custody of the Hong Kong police. The Chinese government initiated extradition proceedings, but they subsequently failed since the accused was a British national. He was then tried and convicted of murder by a Hong Kong court and sentenced to death. On appeal the jurisdiction of the local British court was challenged. On the basis of the opinion in *Schooner Exchange*, Lord Atkin conceded that the members of the crew of the foreign vessel were immune from local jurisdiction for offenses committed on board the ship. But he also recognized that whatever degree of immunity had been granted to China, it was, "conditional and can in any case be waived by the nation to which the public ship belongs." [45] Lord Atkin was careful to emphasize, however, that, "Questions have arisen as to the exercise of jurisdiction over

[39] Tucker v. Alexandroff, 183 U.S. 424, 433 (1902).

[40] Barton, *Foreign Armed Forces: Immunity from Criminal Jurisdiction*, 27 BRIT. Y.B. INT'L L. 186, 218 (1950).

[41] King, *supra* note 30.

[42] *Id.* at 542.

[43] King, *Further Developments Concerning Jurisdiction Over Friendly Foreign Armed Forces*, 40 AM. J. INT'L L. 257, 278 (1946).

[44] [1939] A.C. 160 (Hong Kong).

[45] *Id.* at 167.

members of a foreign crew who commit offenses on land. It is not necessary for their Lordships to consider these."[46]

It is obvious that none of the cases which discuss Chief Justice Marshall's decision in the *Schooner Exchange* dealt specifically with the problem of immunity of troops. As a result, Barton expressed the opinion that Chief Justice Marshall had limited his remarks to troops in passage and to them only.[47] Barton went on to say that there can "be no justification for an interpretation which declares that he (Marshall) spoke of troops which had been given permission to be stationed in the local territory, as was suggested in *Coleman v. Tennessee,* and *Dow v. Johnson,* or simply to enter the local territory, as was stated in *Tucker v. Alexandroff.*"[48] Re, in commenting on the same cases, stated that "none of the cases envisioned circumstances such as surrounding the stationing of troops abroad under the North Atlantic Treaty."[49]

As a result of the above discussion it was the feeling of most legal writers that Senator Bricker was incorrect in his belief that international law recognized that troops of a friendly nation stationed within the territory of another are not subject to the local laws of the other country. Schwartz[50] expressed the feelings of this group of writers when he concluded:

> It has been claimed that under international law friendly foreign forces are immune from the criminal jurisdiction of the receiving state for crimes committed therein. This contention is without substantial foundation. Even absent an agreement among nations concerned, claims of immunity have been generally rejected except in a few cases where the offenses occurred in the line of duty. As the NATO Agreement makes provision for each offense, as well as for others, it is clear that under this Agreement the sending state acquires more jurisdiction than it would have without an Agreement.[51]

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[46] *Id.* at 176.

[47] Barton, *supra* note 40.

[48] *Id.* at 218.

[49] Re, *The NATO Status of Forces Agreement and International Law,* 50 Nw. U. L. Rev. 349, 369 (1955).

[50] Schwartz, *International Law and the NATO Status of Forces Agreement,* 53 Colum. L. Rev. 1091 (1953).

[51] *Id.* at 1111. In this regard during the Senate discussion of the NATO Status of Forces Agreement, the views of the Department of Justice were requested concerning the immunity of visiting friendly forces from criminal prosecution by the receiving state. In response to this inquiry, on 24 June 1953, Attorney General Herbert Brownell, Jr., testified before the Senate Foreign Relations Committee substantially along the lines of a Memorandum which had been prepared under his direction and supervision. *See Supple-*

Subsequent to the cases discussed above and their analysis by legal scholars the courts have had occasion to consider the status of foreign troops who are stationed in a foreign country. The first such case was *Kinsella v. Krueger*[52] where the Supreme Court, in dicta, stated that "under the principles of international law each nation has jurisdiction of the offenses committed within its own territory,"[53] citing as authority for this proposition Chief Justice Marshall's opinion in *The Exchange.*

In *Cozart v. Wilson*[54] the court in discussing this issue cited the above quoted language from *Kinsella v. Krueger* and then went on to say: "Dicta in the Schooner Exchange case and other early cases suggested that these principles do not apply to members of our armed forces abroad, but these dicta are now entitled to no weight because they cannot be reconciled with the Court's opinion in the Krueger case."[55] In keeping with this proposition the Supreme Court, without qualification, declared in *Wilson v. Girard:*[56] "A sovereign nation has exclusive jurisdiction to punish offenses against its laws committted within its borders, unless it expressly or impliedly consents to surrender its jurisdiction. *The Schooner Exchange v. M'Faddon,* 7 Cranch 116, 136."[57]

This opinion appeared to be sufficient to settle the question of whether, in the absence of any international agreement with the visiting sovereign, a host nation retains the absolute and exclusive right to try foreign servicemen for offenses against the local criminal code. However, this question was again revived in the recent case of *Smallwood v. Clifford.*[58] In discussing the issue, the United States District Court for the District of Columbia stated the rule using the following language: "It should be stated at the outset that under the applicable principles of international law, Korea should have exclusive jurisdiction to punish offenses committed within its territory, unless it expressly or impliedly consents to surrender its jurisdiction."[59]

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mentary Hearing before the Senate Foreign Relations Committee on the Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty, 83d Cong., 1st Sess., at 38–56, 66–76, 89 (1953). Schwartz's article is derived from that Memorandum, which was also inserted in the Congressional Record during the debate on the Agreement. For the portion quoted in the text, see 99 CONG. REC. 8769 (1953).

[52] 351 U.S. 470 (1956), *rev'd on other grounds,* 354 U.S. 1 (1957).

[53] *Id.* at 479.

[54] 236 F.2d 732 (D.C. Cir.), *vacated as moot,* 352 U.S. 884 (1956).

[55] *Id.* at 733.

[56] 354 U.S. 524 (1957).

[57] *Id.* at 529.

[58] 286 F. Supp. 97 (D.D.C. 1968), *appeal docketed,* No. 22053, D.C. Cir.

[59] *Id.* at 100. It must be pointed out, however, that on 28 May 1968 the

International law, as reflected in the cases and in working arrangements, does not appear to support the view that, in the absence of an agreement, the United States would be able to exercise exclusive criminal jurisdiction over its overseas forces.[60] Therefore, Senator Bricker's fears that the United States was giving up jurisdiction over our servicemen stationed in foreign countries if it ratified Article VII of NATO SOFA do not seem justified. The United States in fact gained jurisdiction where it would not have had it but for the treaty provision.

In recognition of this fact, the *Manual for Courts-Martial, United States, 1969* (Revised edition), contains the language of the court expressed in the case of *Wilson v. Girard:* "Under international law, a friendly foreign nation has jurisdiction to punish offenses committed within its borders by members of a visiting force, unless it expressly or impliedly consents to surrender its jurisdiction to the visiting sovereign."[61] This language is contrasted to that found in the *Manual for Courts-Martial, United States, 1951,* which is taken from *Schooner Exchange v. M'Faddon:*

> Under international law, jurisdiction over members of the armed forces of the United States or other sovereign who commit offenses in the territory of a friendly foreign state in which the visiting armed force is by consent quartered or in passage remains in the visiting sovereign.[62]

III. INTERNATIONAL AGREEMENTS

A. REQUIREMENT FOR CONSTITUTIONALITY

Having concluded that the sending State's exercise of jurisdiction is dependent upon an international agreement, it is incum-

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United States Court of Appeals for the District of Columbia issued an order precluding the transfer of the petitioner to the custody of the authorities of the Republic of Korea pending ultimate disposition of Habeas Corpus Case No. 113–68 (No. 21,981). On 3 July 1968, the court continued in effect until further notice the order entered in case No. 21,981 (No. 21,053). This order has not yet been rescinded. It could be argued from this that the question of jurisdiction over visiting armed forces is still not settled; however, the merits of such an argument are doubtful in view of all of the authority to the contrary.

[60] *See* Note, *Criminal Jurisdiction Over Forces Abroad,* 70 HARV. L. REV. 1043. 1047 (1957).

[61] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Revised edition), para. 12, quoting 354 U.S. 524, 529 (1957).

[62] *Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951,* para. 12, at 14.

bent upon us to examine these agreements in relation to their legal force and effect under United States laws.

With respect to the power to make agreements, there are specific provisions of the Constitution which relate to: (a) location of the treaty power within the federal system, (b) international agreements other than treaties, (c) the position of treaties in the internal law of the United States, and (d) separation of powers and checks and balances in the making of treaties. These provisions are as follows:

a. Art. I, § 10, Cl. 1: No State shall enter into any Treaty Alliance, or Confederation. . . .
b. Art. I, § 10, Cl. 3: No State shall, without the consent of Congress, . . . enter into any Agreement or Compact, with another State, or with a Foreign Power. . . .
c. Art. II, § 2, Cl. 2: He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur. . . .
d. Art. VI, Cl. 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

It can be seen from the above that a treaty, which is an international agreement that was submitted to the Senate for its advice and consent, is under the Supremacy clause of the Constitution,[63] a part of the supreme law of the land.[64] The question of whether an executive agreement occupies a similar status will be discussed later in this section.

The question, therefore, of the extent and scope of the treaty-making power resolves itself into one of Constitutional construction and interpretation. Before entering into a discussion of this question, however, "It is essential that the purpose for which the power to make treaties is granted be defined, as this purpose is a condition surrounding its origin and existence and more than a mere limitation imposed upon its exercise." [65]

The purpose is two-fold. Initially the treaty-making power, in common with all the other powers granted to the federal government, partakes of the general purposes for which the Constitution was adopted, one of which is, as recited in the preamble of the

[63] U. S. CONST. art. VI, cl. 2.

[64] Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 906 (1959).

[65] Anderson, *The Extent and Limitations of the Treaty-Making Power under the Constitution*, 1907 AM. J. INT'L L. 636, 639.

Constitution, "to promote the general welfare." Secondly, it has as a purpose the enabling of the federal government to make treaties for the United States.[66]

These two conditions are therefore inherent in the nature of the treaty-making power and must be regarded as defining generally its sphere of operations. They underlie the whole subject and must be borne in mind in considering the question of limitations imposed upon its exercise within such a sphere. With regards to these limitations, Justice Field, in delivering the opinion of the Court in the case of *Geofroy v. Riggs* [67] upholding the validity of a treaty provision under which a French citizen might take land in the United States, said:

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. . . . The treaty power, as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be intended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or cession of any portion of the territory of the latter, without its consent.[68]

This requirement for Constitutionality exists, as it does for statutes, because the Constitution was ordained by the people as a fundamental law to which all governmental enactments were to be subordinated.[69]

The Supreme Court considered this question of Constitutionality in the famous case of *Holland v. Missouri*,[70] which involved restricting the hunting of migratory birds passing between the

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[66] *Id.* at 639.

[67] 133 U.S. 258 (1890).

[68] *Id.* at 266–67. *See also* Asakura v. Seattle, 265 U.S. 332, 341 (1924) ("The treaty making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiations between our government and other nations"); Amaya v. Stanolind Oil and Gas Co., 158 F.2d 554, 556 (1946) ("But while there is no express limitation in the Federal Constitution upon the treaty making power, nevertheless it is not unlimited. It is subject to prohibitions within that Constitution against the state, or federal government. The treaty making power does not extend 'So far as to authorize what the Constitution forbids'." (Dictum)).

[69] McLaughlin, *The Scope of the Treaty Power in the United States*, 42 MINN. L. REV. 709 (1958), 43 MINN. L. REV. 651, 652 (1959).

[70] 252 U.S. 416 (1920).

United States and Canada. Although the principle involved was not novel, the issue was posed sharply because an earlier effort at regulation by national statute had failed when the statute was held to be an invasion of reserved powers, and, therefore, unconstitutional.[71] In discussing the questions involved, the Court used some often quoted language which is of sufficient importance to set out at length:

> It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do . . . . We do not mean to imply that there are no qualifications to the treaty making power, but they must be ascertained in a different way . . . . The treaty in question does not contravene any prohibiting words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment . . . . Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power . . . . We are of the opinion that the treaty and statutes must be upheld.[72]

The Court was careful to note, before upholding its validity, that the treaty involved was not inconsistent with any provision of the Constitution.

In 1957 the Court again had occasion to discuss this question of constitutionality as regards agreements and, in this light, the case of *Reid v. Covert* [73] is of interest. This case was of particular importance to the military as it involved an executive agreement between the United States and Great Britain which permitted United States military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents.[74] The government argued that the Uniform Code of Military Justice,[75] insofar as it provides for the military trial of dependents accompanying the armed forces, can be sustained as legislation which is necessary and proper to carry out the United States obligations under the international agreement made with Great Britain. In failing to concur in this argument, the Court commented on most of the principles which are funda-

[71] United States v. McCullagh, 221 F. 288 (D. Kan. 1915); United States v. Shauver, 214 F. 154 (E.D. Ark. 1914).

[72] Holland v. Missouri, 252 U.S. 416, 432-35 (1920).

[73] 354 U.S. 1 (1957).

[74] Executive Agreement of 27 Jul. 1942, 57 Stat. 1193 (1943), E.A.S. No. 355.

[75] UCMJ art. 2(11).

mental to this area of law. First, they categorically rejected the approach of the Court in *In re Ross*[76] that the Constitution has no applicability abroad. In this regard they said:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.[77]

After disposing of this issue the Court went on to the now familiar principle as laid down in *Geofroy v. Riggs*.[78] In applying that principle to the case at hand the Court commented:

> [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution . . . .
>
> [The Court here quotes the Supremacy Clause.] There is nothing in this language which intimates that treaties and laws enacted purusant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result.[79]

After discussing the constitutionality question the Court concerned itself with the problem presented by an inconsistent treaty and statute. This question also was in issue in the case of *Whitney v. Robertson*.[80] In that case the Court decided that a treaty and a statute relating to the same subject should be construed by the courts "so as to give effect to both, if that can be done without violating the language of either; but if the two are mutually inconsistent, the one last in date will control the other. . . ."[81] Based on these principles the Court in *Reid* concluded that "[i]t would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument."[82]

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[76] 140 U.S. 453 (1891).
[77] Reid v. Covert, 354 U.S. 1, 5–6 (1957).
[78] 133 U.S. 258 (1890).
[79] Reid v. Covert, 354 U.S. 1, 16 (1957).
[80] 124 U.S. 190 (1888).
[81] *Id.* at 194. *See also* Moser v. United States, 341 U.S. 41 (1951); Chae Chan Ping v. United States, 130 U.S. 581 (1889); Botiller v. Dominguez, 130 U.S. 238 (1889); Head Money Cases, 112 U.S. 580 (1884).
[82] Reid v. Covert, 354 U.S. 1, 18 (1957).

The requirement for constitutionality was again raised in the recent case of *Burdell v. Canadian Pacific Airlines*.[53] At issue was the constitutionality of the venue and damage limitation provisions of the Warsaw Convention Treaty.[54] The defendant took the position that a treaty is not subject to constitutional restrictions, a proposition that was rejected by the court. The court then examined the provisions themselves and concluded that they violated the due process and equal protection clauses of the United States Constitution. The court found the provisions to be arbitrary, irresponsible, capricious and indefensible, in that such provisions would attempt to impose a damage limitation less than the undisposed pecuniary losses and damages involved in the case. The court concluded that such preferential treatment of airlines is unconstitutional. This case then reaffirms the rule that a treaty is subject to the Constitution of the United States, and any provision of any treaty which purports to take away a right of a citizen, provided for by the Constitution, is invalid as to that citizen.

B. THE SELF-EXECUTING TREATY

It is apparent from the preceding discussion that a treaty, in order to be valid, must be in agreement with the Constitution. Merely because it is constitutional, however, does not make it effective as a rule of municipal law for the guidance of municipal courts. Ordinarily, treaties are simply agreements or contracts between two or more sovereignties, obligating them to carry out the mutual promises contained therein. But under our law a treaty is of greater moment. It may operate as a law, just like an act of Congress.[55] However, the constitutional provision is not mandatory.

Whether a treaty of its own force makes law, *i.e.*, is self-executing, depends on the intent of the treaty makers. The problem then becomes one of discovering intent.[56] In general, three avenues of discovery are available. The most obvious method is consideration of the language used. The others are the subject matter

[53] Circuit Court of Cook County, Illinois (7 Nov. 1968). The full text of the decision is reproduced in 3 INT'L LAWYER, No. 2 (Jan. 1969).

[54] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 12 Oct. 1929, 49 Stat. 3000 (1935–36), T.S. No. 876 (effective 29 Oct. 1934).

[55] U.S. CONST. art. VI, cl. 2.

[56] Jones v. Meehan, 175 U.S. 1 (1889). *See also* Hidalgo County Water Control Imp. Dist. v. Hedrick, 226 F. 2d 1, 7 (5th Cir. 1955).

of the treaty and the circumstances surrounding the making of the treaty.[57]

Just as Chief Justice Marshall's comments in the case of *Schooner Exchange v. M'Faddon*[58] were the basis for most decisions dealing with jurisdiction over visting forces, his statements in *Foster v. Neilson*[59] are the starting point in any discussion of the question of whether a treaty is self-executing. In that decision he wrote:

> 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 the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation impart 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.[60]

The statements in *Foster v. Neilson* indicate that when a treaty calls for implementing legislation, or an affirmative act by the contracting Sovereign which can only be performed through a legislative act, it is not self-executing. This then makes the problem of determination basically a domestic question of construction for the court. Unfortunately, it is very difficult to extract any clear principle for judicial guidance from the cases discussing this subject. A careful study of the decisions, however, indicates certain recurring factors which appear controlling in the final decision of the courts.

One case, *Amaya v. Stanolind Oil and Gas Co.*, stands alone in suggesing that, as a general rule, a treaty is self-executing.[61] This language has not been repeated in subsequent cases but it does seem to reflect the tendency of courts to make such a finding unless the obvious intent is to the contrary. The relatively recent

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[57] Henry, *When Is A Treaty Self-Executing*, 27 MICH. L. REV. 776, 777 (1929).

[58] 11 U.S. (7 Cranch) 116 (1812).

[59] 27 U.S. (2 Pet.) 253 (1829).

[60] *Id.* at 314.

[61] 158 F.2d 554, 556 (5th Cir. 1947).

case of *Aerovias Interamericanas De Panama v. Board of County Commissioners*[92] also gives some guidance concerning the problem. Here the court said that some insight could be gained by inquiring as to whether the State Department, at the time the treaty was sent to the Senate for ratification, requested the passage of implementing legislation. The reasoning basically given was that it would be absurd for the President to conclude the treaty, not intending to abide by the solemn undertakings contained therein.[93] The court went on to state that where the treaties are full and complete, *i.e.*, do not call for express implementing legislation, do not call for the performance of a particular act by the signatory powers, and do not require the expenditure of funds, they are self-executing. The court also noted that treaties containing the so-called "most favored nation clause" are uniformly held to be self-executing.[94]

An example of a treaty held not to be self-executing due to the language of the treaty itself, is the case of *Vanity Fair Mills, Inc. v. The T. Eaton Co.*[95] The treaty involved, the Convention for the Protection of Industrial Property, provides that the execution of the engagements contained in the Convention shall be subordinated "insofar as necessary, to the observance of the formalities and rules established by the constitutional laws of those of the countries of the Union which are bound to enforce the same, which they undertake to do with as little delay as possible."[96] As a result of this provision, the court said that the convention was not self-executing. It went on to say that when the terms of the treaty impart a contract wherein 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'."[97]

There are two other time-honored rules of construction for examining the language of treaties. First, if a treaty admits of two interpretations, and one is limited and the other liberal, the more liberal should be adopted.[98] Also, a treaty should be liberally construed to carry out the apparent intention of the parties.[99]

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[92] 197 F. Supp. 230 (S.D. Fla. 1961).

[93] *Id.* at 248.

[94] *Id.* at 245–47.

[95] 133 F. Supp. 522 (S.D.N.Y. 1955).

[96] *Id.* at 526.

[97] *Id.*, quoting from Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) (see text accompanying note 90 *supra*).

[98] Shanks v. DuPont, 28 U.S. (3 Pet.) 242, 249 (1830) (Story J.). *See also* Hauenstein v. Lynham, 100 U.S. 483 (1879).

[99] Geofroy v. Riggs, 133 U.S. 258 (1890). *See also* Bacardi Corp. of

It is very difficult to draw any general conclusions with reference to the manner in which the subject matter affects the self-execution of treaties.[100] There is no guiding rule which can be applied to a new type of treaty from reviewing treaties dealing with other subject matter. Subject matter is of very subsidiary importance. However, it must be recognized that courts have been influenced by previous decisions dealing with like treaties and have tended to decide on that basis without "considering" closely the language of the treaty.[101] Treaties dealing with the following subjects have been generally held to be self-executing; treaties giving aliens the right to dispose of property after death, and to inherit lands and the right to equal business privileges;[102] Indian treaties;[103] and extradition treaties.[104] On the other hand, patent treaties have been generally held to be non-self-executing.[105]

The circumstances surrounding the making of the treaty should also be considered. In interpreting statutes, information bearing on the intent of the statute can be gleaned from the legislative history of a given act. In a similar manner, much can be learned concerning the intentions of treaty makers by looking at the negotiations leading to the treaty and in the general situation which called forth the negotiations. In cases involving Indian treaties the courts have considered the general expertise of the government negotiators as compared with the relative inexperience of those representing the Indian position.[106] In other cases the courts have referred to the minutes of the negotiators.[107]

The tests for determining whether a treaty is self-executing are obviously only guidelines for analyzing the problem. Whether a court will pay more attention to one facet than another will vary from case to case and from court to court. It can be safely said, however, that, as a general rule, the conclusion will depend on "a careful correlation of all three lines of investigation":[108]

America v. Domench, 311 U.S. 150 (1940); Board of County Comm'rs v. Aereolineas Peruanasa, S.A., 307 F.2d 802 (5th Cir. 1962).

[100] Note, *Self-Execution of Treaties under the United States Constitution*, 26 COLUM. L. REV. 859, 866 (1926).

[101] Henry, *supra* note 87, at 782.

[102] Asakura v. City of Seattle, 265 U.S. 332 (1924); Chinese Exclusion Case, 130 U.S. 581 (1889); and Hauenstein v. Lynham, 100 U.S. 483 (1879).

[103] Jones v. Meehan, 175 U.S. 1 (1899).

[104] Charlton v. Kelly, 229 U.S. 447 (1913).

[105] Robertson v. General Electric Co., 32 F.2d 495 (4th Cir. 1929).

[106] Jones v. Meehan, 175 U.S. 1, 11 (1899). *See also* Bowman v. Udall, 243 F. Supp. 672, 683 (D.D.C. 1965); Peoria Tribe of Indians of Oklahoma v. United States, 369 F.2d 1001, 1006 (Ct. Cl. 1966) (dissent).

[107] Hennebique Const. Co. v. Myers, 172 F. 869, 880 (3d Cir. 1909) (concurring opinion).

[108] Henry, *supra* note 87, at 785.

the language of the treaty, the subject matter and the circumstances surrounding the making of the treaty. It can be definitely concluded, however, that where a treaty calls for implementing legislation, or an affirmative act by the contracting Sovereign, it cannot be self-executing regardless of the other tests that may be applied.

C. EXECUTIVE AGREEMENTS

It is important, before going further in analyzing the problem, to examine executive agreements and compare their legal effect with treaties. This comparison is required because the only status of forces agreement in existence which qualifies as a treaty is the basic NATO agreement. All of the others are executive agreements. This point will be discussed in greater depth in section IV.

In the United States Constitution the term "treaty" is applied to any international agreement, however denominated, which becomes binding upon the United States through ratification by the President with the advice and consent of the Senate, two-thirds of the Senators present concurring therein. The term "executive agreement" is used to describe all international agreements which become binding on the United States in other ways—through the action of the President alone or through the action of the President together with Congress acting through a majority vote in each House. Executive agreements may take the form of an exchange of notes, or of more formal signed documents.[139]

A review of the constitutional provisions set out earlier in this article reveals that the only reference to executive agreements is contained in clause 3 [140] of that document. We know, however, that from the beginning of the Government the President has entered into various forms of agreements with foreign countries. The conduct of the foreign relations of this country is in its nature essentially an executive function. The President could not successfully deal with other nations if every agreement made by him on any and every subject of discussion between the United States and foreign governments required the approval of the Senate before becoming effective.[141]

The Supreme Court has recognized the obligations of the President in very precise language when they pointed out that, "The

[139] W. BISHOP, INTERNATIONAL LAW CASES AND MATERIALS, 86–87 (2d ed. 1962).

[140] U.S. CONST. art. I, § 10, cl. 3.

[141] 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 397 (1943).

President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." [112] The Court went on to say:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[113]

Although the question of the domestic legal effect of executive agreements is quite controversial, there are basically two generalizations which can be made about them which will be virtually unanimously accepted. The first is that, like treaties, they cannot be used to impair constitutional rights. Language to this effect is contained in the above quoted portion of the decision in the *Curtiss-Wright* case, but it is even more succinctly stated in the case of *Seery v. United States*.[114] There the court pointedly remarked:

> Whatever may be the true doctrine as to formally ratified treaties which conflict with the Constitution, we think that there can be no doubt that an executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair Constitutional rights.[115]

The second basic concept which is universally accepted is the fact that from the point of view of international law, treaties and executive agreements are alike in that both constitute equally binding obligations upon the nation.[116] This principle has been up-

[112] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). *See also* Johnson v. Eisentrager, 339 U.S. 763, 789 (1950); Chicago & S. Air Lines Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948).

[113] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936).

[114] 127 F. Supp. 601 (Ct. Cl. 1955).

[115] *Id.* at 606.

[116] Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751, 755 (1939); McLaughlin, *supra* note 69, at 711.

held in all cases even where the congressional authorization for the President to enter into an agreement has been challenged.[117] The Supreme Court has favored a greater latitude of congressional delegation in the field of external relations than in domestic matters. Perhaps this is viewed as, in Justice Sutherland's words, "an authority which was cognite to the conduct by him of the foreign relations of the Government." [118]

Both the courts and the legal writers in the field have recognized that in order for our system of government to function and operate smoothly the President must have the authority to enter into binding executive agreements as regards our relationships with foreign governments. This, however, is where the accord ends. The disagreement grows out of the question concerning the position an executive agreement holds in domestic law. As was discussed in the preceding sections, a treaty is the supreme law of the land and takes precedence over any prior statutory enactment. Does an executive agreement also occupy such a position? The problem evolves from the wording of the Constitution itself wherein it states that "Treaties . . . shall be the supreme Law of the Land. . . ." [119] The word "agreement" is not listed in this clause, but is included elsewhere in the document.[120]

What can be concluded from this difference in language? One authority in the field [121] commented that treaties may be negotiated which depart widely from our existing laws or policies, and the Senate in approving their ratification is subject to no restraint or consideration within the general limits of the treaty-making power under our form of government other than that which is best for our nation. Sayre indicated, however, that the President in making executive agreements has no such free hand. He must act scrupulously within the laws and conform to the policies already established by Congress.

This difference between a treaty and an executive agreement was also stated in a Department of State publication:

> [I]t may be desirable to point out here the well recognized distinction between an executive agreement and a treaty. In brief it is that the former cannot alter the existing law and must conform to all statutory enactments, whereas a treaty, if ratified by and with the advice and consent of two-thirds of the Senate, as required by the

[117] *Cf.* B. Altman & Co. v. United States, 224 U.S. 583 (1912).
[118] Panama Receiving Co. v. Ryan, 293 U.S. 388, 422 (1935).
[119] U.S. CONST. art. VI, cl. 2.
[120] U.S. CONST. art. I, § 10, cl. 3.
[121] Sayre, *supra* note 116, at 755.

Constitution, itself becomes the supreme law of the land and takes precedence over any prior statutory enactments.[122]

It would appear from the reading of these two sources that the position of executive agreements in our domestic law is clear; however, this is far from the case. Nowhere can the split be more vividly seen than in the articles of McDougal and Lans [123] on one hand, and Borchard [124] on the other, contained in the same volume of the *Yale Law Journal.*

McDougal and Lans state that an executive agreement is entirely on a par with a treaty in every respect.[125] They do concede, though, that a direct presidential agreement will not ordinarily be valid if contrary to previously enacted legislation. However, they clarify this by saying that if the subject of the agreement is a matter within the President's special constitutional competence —related, for example, to the recognition of a foreign government or to an exercise of his authority as Commander in Chief—a realistic application of the separation of powers doctrine might in some situations appropriately permit the President to disregard the statute as an unconstitutional invasion of his own power.[126] Borchard replies: "Who could take any stock in such a proposition?" [127] He then makes the all encompassing statement that, "A treaty by the Constitution is the 'supreme law of the land'; an executive agreement with minor exceptions is not." [128]

Up to this point the discussion of this area has dealt, for the greatest part, with comments of scholars in the field. In addition, no attempt has been made to distinguish the various types of agreements. A Department of State circular, laying down guidelines for the use of executive agreements, suggests:

Executive agreements shall not be used when the subject matter should be covered by treaty. The executive agreement form shall be used only for agreements which fall into one or more of the following categories:

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[122] Current Information Series No. 1, 3 Jul. 1934, MS Department of State, file 611. 0031/815, quoted in 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 425–26 (1943).

[123] McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements; Interchange Instruments of National Policy*, 54 YALE L.J. 181, 534 (1945).

[124] Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616 (1945).

[125] McDougal & Lans, *supra* note 123 at 286.

[126] *Id.* at 317.

[127] Borchard, *supra* note 124 at 644.

[128] *Id.* at 644. For authority for this proposition Borchard cites C. BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 370 (1902).

a. Agreements which are made pursuant to or in accordance with existing legislation or a treaty;

b. Agreements which are made subject to Congressional approval or implementation; or

c. Agreements which are made under and in accordance with the President's Constitutional power.[129]

As can be imagined, the domestic significance of the particular type of agreement can differ substantially. With agreements made in pursuance of existing legislation or a treaty there is a very good argument that, as it derives from one of the elements of the supreme law, it takes on its characteristics and can, therefore, supersede prior inconsistent statutes.[130]

The same basic considerations are involved in agreements made subject to congressional approval or implementation. These are generally referred to as "Congressional-Executive" agreements.[131] As Congress jointly by majority vote passes a statute effecting the agreement, it has the same political basis as that of a statute.[132] Wallace McClure wrote that the President can do by executive agreement anything that he can do by treaty, provided Congress by law cooperates.[133] This also was the basic theme of McDougal and Lans' article.[134] Thus, as in agreements in implementation of existing legislation or treaties, there certainly is a sound argument to permit such an agreement to supersede a prior existing statute. Those who disagree with this concept of interchangeability argue that if treaties and congressional-executive agreements are wholly interchangeable, there no longer remains a constitutional distribution of powers. The argument then continues that if the doctrine of inherent powers [135] in the field of international relations prevails, then there no longer remains constitutional government.[136] Thus the debate continues.

In the case of purely executive agreements, such as those falling within the President's power as Commander in Chief, or his power to conduct foreign relations, there is a problem of even greater substance. Clearly, this sort of agreement is not the su-

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[129] U.S. DEP'T OF STATE, CIRCULAR NO. 175 (1955), reprinted in 50 AM. J. INT'L L. 784, 785 (1956).

[130] McLaughlin, *supra* note 69, at 768. *See also* Wilson v. Girard, 354 U.S. 524 (1957).

[131] E. BYRD, JR., TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES 149 (1960).

[132] McLaughlin, *supra* note 69, at 768.

[133] W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 363 (1941).

[134] McDougal & Lans, *supra* note 123.

[135] *Id.* at 255.

[136] E. BYRD, *supra* note 131, at 154.

preme law of the land by reason of any language in the supremacy law of the land by reason of any language in the supremacy clause,[137] nor does it satisfy the legislative requirements which would justify assimilating it to any of the elements mentioned in that clause.[138] There are, however, cases which lend weight to the argument that this type of agreement is, in effect, equal to a treaty.

In the first of these cases, *United States v. Belmont*,[139] Justice Sutherland wrestled with the question whether foreign policy stated in an executive agreement would displace a contrary policy of the State of New York. He stated his position in the following manner:

> Plainly the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. . . . And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. . . . Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.[140]

And in *United States v. Pink* [141] Mr. Justice Douglas asserted:

> "All constitutional acts of powers, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature . . . ." The Federalist, No. 64. A treaty is a "Law of the Land" under the supremacy clause (Art. VI Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity.[142]

It can be easily seen how those who desire to can use these cases to underscore their position that an agreement is on a par with a treaty. Those who would differ, however, argue that the court has never held or asserted that agreements other than for-

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[137] U.S. CONST. art. VI, cl. 2.
[138] McLaughlin, *supra note* 69, at 768.
[139] 301 U.S. 324 (1937).
[140] *Id.* at 331–32.
[141] 315 U.S. 203 (1942).
[142] *Id.* at 230.

mal treaties, are as extensive in scope as treaties. They point to the language *Pink* which says agreements have similar dignity as treaties, but they argue this does not indicate they are entirely interchangeable.[143]

This latter point of view is reinforced by the case of the *United States v. Guy W. Capps, Inc.*[144] In this case the Capps Company sought to evade penalties to which it was liable under an executive agreement concluded with Canada on 23 November 1948,[145] for having violated a contract by diverting to table use potatoes imported for seed purposes. Capps argued this provision of the agreement was void as it was inconsistent with the Agricultural Act of 3 July 1948. This argument was based on the premise that an agreement is not the supreme law of the land, and, therefore, it cannot supersede a prior existing statute. Chief Judge Parker in the court of appeals agreed, holding that the executive agreement

> was as void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related and that the contract relied on, which was based on the executive agreement, was uneforceable in the courts of the United States for like reasons. . . .
>
> We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress.[146]

Individuals basing their argument on the *Capps* case would be in a much better position if the Supreme Court, when it considered the case, would have commented on the constitutional basis for the decision. Instead it affirmed on the grounds that there was no clear showing of bad faith, neglect or carelessness on the part of the defendant, since the grocery store also sold seed for seed purposes. As a result, the Court specifically declined to discuss the constitutional questions raised by the court of appeals.[147]

In summarizing this area, Byrd[148] states that definite conclu-

[143] E. BYRD, *supra* note 131, at 122.

[144] 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

[145] Agreement with Canada Respecting Control of Exports of Potatoes from Canada to the United States, 20 Nov. 1948, 62 Stat. 3717, T.I.A.S. 1896.

[146] United States v. Guy W. Capps, Inc., 204 F.2d 655, 658–60 (4th Cir. 1953).

[147] *Id.* at 305.

[148] E. BYRD, *supra* note 131, at 195.

sions on power in foreign affairs cannot be drawn from the words of the Constitution alone due to their ambiguity. Conversely, any definite rule must be measured against the Constitution to determine whether it conflicts with any part thereof, and whether, if carried to its logical end, the rule would tend to destroy or make innocuous any provision to the Constitution. Byrd concludes:

> Further, even if a rule may by analytical methods appear to lend itself to a reconciliation with all parts of the Constitution, this reconciliation is specious if it violates the "spirit" of the Constitution, which spirit includes the understanding of the Founding Fathers, the traditional and most universally accepted theories of our form of government, and the contemporary sense of justice.[149]

In summarizing the discussion concerning executive agreements, it can be seen from the various articles and cases cited that there is far from a unanimity of opinion on most of the major issues in this area. It can be safely said, however, that the President does have the power and authority to enter into executive agreements. These agreements must conform to the Constitution, and when they do so they are equally as binding on the nation in international law as are treaties.

In the sphere of domestic law, executive agreements made in pursuance of existing legislation or a treaty, as well as those made subject to congressional approval or implementation, are considered by many to be the supreme law of the land, just like a treaty, with the same effect domestically as a treaty. However, it is a highly contested issue whether or not purely executive agreements occupy a similar position as the supreme law of the land, even if they appear to be self-executing.

IV. AN EXAMINATION OF THE CUSTODY PROVISIONS

A. BACKGROUND

The previous sections have dealt with treaties and executive agreements in general terms, as well as with the question of jurisdiction over troops stationed in a foreign country where no treaty or executive agreement pertaining to their jurisdiction exists. This discussion and the principles developed in it will now be applied to both the NATO SOFA and Supplementary types of custody provisions, with a view toward answering the ultimate question whether the United States can confine an individual on the basis of these treaty provisions alone.

[149] *Id.*

In analyzing this question, an examination will be made of their constitutionality. The self-executing nature of the provisions will then be discussed, distinguishing between the provisions contained in the executive agreement and the provision contained in NATO SOFA, the only agreement based on a formal treaty. After determining the applicability and effect of these provisions on military personnel, the discussion will consider whether they supply equally to civilian members of the forces.

B. CONSTITUTIONALITY OF THE CUSTORY PROVISIONS

The Supreme Court in *Reid v. Covert* [150] emphatically stated that the Constitution and Bill of Rights apply to United States citizens abroad. Thus, the requirement that a treaty or agreement must comply with the Constitution in order to be valid [151] has specifically been held applicable to status of forces agreements.

As was discussed in section II, in the absence of a treaty or an agreement, a receiving State has exclusive jurisdiction over offenses committed against its laws within its territory by members of the forces of the sending State.[152] In view of this conclusion, it would appear that any constitutional objection to the criminal provisions of these agreements, including custody, should be limited to questions involving violations of substantive due process.[153]

With this in mind, it is necessary to examine briefly the applicability of the constitutional guarantee of due process to persons in the United States Armed Forces. Perhaps the most succinct discussion of this issue is contained in *United States v. Hiatt.*[154] The court said:

> We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. An individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the nation's armed forces and has taken the oath to support that Constitution with his life, if need be. The guarantee of the fifth amendment that "no person shall . . . be deprived of life, liberty or property, without due process of law," makes no exception in the case of persons who are in the armed forces.[155]

In regard to the question of the unlawful confinement of a per-

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[150] 354 U.S. 1 (1957).
[151] Geofroy v. Riggs, 133 U.S. 258 (1890).
[152] Wilson v. Girard, 354 U.S. 524 (1957).
[153] Note, *supra* note 60 at 1054.
[154] 141 F. 2d 664 (3d Cir. 1944).
[155] *Id.* at 666.

son by United Staates military authorities, the United States Supreme Court has held that such unlawful confinement constitutes a denial of due process which is reviewable by federal courts on habeas corpus.[156] Additionally, it must be pointed out that for purposes of habeas corpus, a deprivation of liberty which is less than confinement would also be reviewable. In the district court opinion in *Girard v. Wilson*,[157] the court stated: "The petition is for a writ of Habeas Corpus which appears to be authorized . . . since the petitioner is administratively restricted to the limits of Camp Whittington and, therefore, he is sufficiently restrained for the purposes of habeas corpus." [158] The above discussion reveals that where a person is in United States custody pending completion of judicial proceedings in a foreign court, restriction may be regarded as the equivalent of arrest or confinement.

The constitutional problem then becomes as follows: Are the United States military authorities depriving an individual of his liberty without due process of law when he is placed in confinement, or some lesser form of restraint, based solely on the status of forces agreement?

A similar issue was before the court in the case of *Ex parte Toscano*.[159] In that case the district court was faced with the interpretation of a provision of the Hague Treaty of 18 October 1907. The pertinent provision which is contained in chapter two, article 11, stated:

> A neutral power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theater of war.
>
> It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.
>
> It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.[160]

Based on the above, the United States interned Mexican troops who had crossed into the United States and sought asylum during the Mexican Civil War. They had violated no United States law. As could be expected, the petitioners filed a writ of habeas corpus for their release alleging that they had been deprived of their liberty without due process of law. The court concerned itself with

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[156] *Accord*, Burns v. Wilson, 346 U.S. 137, 139 (1953); Day v. Wilson, 247 F.2d 60 (D.C. Cir. 1957).

[157] 152 F. Supp. 21 (D.D.C. 1957).

[158] *Id.* at 27.

[159] 208 F. 938 (S.D. Cal. 1913).

[160] 36 Stat. 2199, 2324 (1909-11), T.S. No. 536.

the meaning of "internment." It said that "internment is not a punishment for crime, but simply an appropriate means agreed upon for the temporary care of alien forces who seek asylum in neutral territory. . . ."[161] The court likened internment to the exclusion or deportation of aliens, both being means respectively employed for the execution of law—a treaty in the one case, and an act of Congress in the other. It found the due process clause no bar to continued incarceration of the belligerent troops.

Several federal cases have discussed the distinction between such temporary confinement and imprisonment as a punitive measure. In *Wong Wing v. United States*[162] the Court said:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but is not imprisonment in a legal sense.[163]

The Court in *Turner v. Williams*[164] used similar language when it commented that the deportation of an alien who is found to be in the United States in violation of law is not a deprivation of liberty without due process of law. They want to indicate that detention or temporary confinement as part of the means necessary to give effect to the exclusion was valid, but imprisonment at hard labor was unconstitutional.

Clearly the custody provision in the Hague Treaty is similar to the language contained in the custody provisions of both the NATO SOFA and Supplementary type clauses. Just as in the internment called for in the Hague Treaty and the confinement in the alien deportation cases, the custody envisioned in both types of provisions in not a criminal sanction. Neither clause provides for imprisonment at hard labor, hence they do not run afoul of the language quoted in the *Turner* case. As a result, the provisions for custody do not violate the due process clause of the Constitution.

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[161] *Ex parte* Toscano, 208 F. 938, 941 (1913).
[162] 163 U.S. 228 (1896).
[163] *Id.* at 235.
[164] 194 U.S. 279 (1904).

C. SELF-EXECUTING NATURE OF CUSTODY PROVISIONS

As has been set out in section II, the constitutionality of a provision in a treaty or an agreement which, for purposes of this discussion occupies a status equal to that of a treaty, does not in and of itself make it effective as a rule of domestic law for the guidance of domestic courts. In order for such a provision to become effective as domestic law, it must be self-executing. This depends on the intent of the treaty makers. The intent is determined by considering the language used, the subject matter of the treaty, and the circumstances surrounding the making of the treaty.[165]

All provisions pertaining to custody state that custody shall remain or rest with the sending State, or in the alternative, that the sending State shall take custody of the accused. The only other difference is that the provisions either provide for this custody to remain with the sending State until he is charged by the receiving State, as in the case of NATO SOFA,[166] or until acquitted or commencement of the sentence as in the German Supplementary Agreement.[167] In order to get some insight into the intent of the treaty makers the language of these provisions must be examined.

A provision is self-executing if it is full and complete, and no legislation is necessary for its enforcement.[168] Language in the Hague Treaty which is similar to that contained in the provisions in questions was discussed in *Ex parte Toscano*.[169] This language reads:

> A neutral power which receives on its territory troops belonging to the belligerent armies shall intern them. . . .
>
> It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.
>
> It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.[170]

The court, after considering the language and its constitutional effect, concluded that it was self-executing as it was full and complete, and no legislation was necessary for its enforcement.[171]

A comparison of the terms of the Hague Treaty with the provi-

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[165] Henry, *supra* note 87, at 777.

[166] NATO SOFA, art. 7, para. 5(c).

[167] Supplementary Agreement, art. 22, para. 3.

[168] Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

[169] 208 F. 938, 940 (S.D. Cal. 1913).

[170] Convention of the Hague Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 Oct. 1907, ch. 2, art. 11, 36 Stat. 2310, 2324, T.S. No. 540.

[171] *Ex parte* Toscano, 208 F. 938, 942 (1913).

sions in question reveals their striking similarity. In the Hague Treaty it is said that the neutral power *shall intern the foreign forces,* while the status of forces agreements say that *custody shall remain* with the authorties of the sending State. The Hague Treaty allows a great deal of latitude in regard to the form the internment will take, ranging from confinement to liberty. Similarly, none of the status of forces custory provisions attempt to define "custody." *Black's Law Dictionary*[172] indicates that the term is very elastic and may mean actual imprisonment or physical detention, or mere power, legal or physical.

The Assistant Judge Advocate General for Military Law,[173] Department of the Army, has expressed the opinion that the language of Article 22, German Supplementary Agreement (giving the United States custody of United States personnel where jurisdiction is to be exercised by German authorities) is permissive. He expressed this same opinion in regard to paragraph 5(c) of Article VII of NATO SOFA.

It is difficult to see the permissive qualities in the words "shall remain." But, in any event, if the language of these two instruments is permissive, the language of the Hague Treaty would also have to be so construed. Under the terms of the two provisions, the receiving State has discretion as to the type of custody to be administered; however, under the terms of the Hague Treaty, the American authorities in *Toscano* had had discretion as to the form of internment, and the Court paid no attention to this wording of the treaty. A search of all the other cases and authorities bearing on the problem of self-execution fails to reveal any occasion where the permissiveness of the language has been determinative in the analysis. To the contrary, the *Toscano* case, by its silence, stands for the proposition that this question is of no import.

The second test for intent is the subject matter of the treaty, which is merely an historical approach to the problem. Again the *Toscano* case is in point as it is the only case which has dealt with the question of whether a treaty provision dealing with custody was self-executing. This, however, is of little consequence in bearing on the overall question. Rouse and Baldwin, in their article dealing with NATO SOFA, did express the opinion that possibly the jurisdictional provisions of the treaty could be supported on

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[172] At 460 (rev. 4th ed. 1968).
[173] JAGW 1962/1329, 26 Oct. 1962.

the basis of the self-executing nature of the treaty.[174] In this same article, however, they commented that "where custody is released to the United States [by a receiving State], an accused may not be further confined unless proper charges have been brought under the Uniform Code of Military Justice."[175] The possibility of the custody provision of the treaty being self-executing was not even mentioned. From the above, it can be seen that the subject test is of little help in this instance, other than for the fact that the one custody provision that was considered by a court was held to be self-executing.

The third test is that of the circumstances surrounding the making of the treaty. At the time the NATO treaty was drawn, and the subsequent status of forces agreements as well, it was well recognized that the receiving State had exclusive jurisdiction over criminal offenses committed within its territory by members of the forces of the sending State.[176] It would therefore follow that the State with exclusive jurisdiction could retain custody of an individual if it so desired.[177] As a result of this jurisdictional situation, any jurisdiction or right to custody that the United States received would be a relinquishment of jurisdiction by the receiving State. The United States was then faced with the problem of attempting to gain the greatest possible control over the members of the force without the having the compromise its position seriously in any other area. The concern of the Senate over the whole problem of criminal jurisdiction became apparent at the time it ratified NATO SOFA.[178] In its Resolution of Ratification the Senate required the commanding officer of an accused, who was to be tried by the authorities of a receiving State, to determine if the accused would receive a fair trial. This concern was reflected when the Supplementary Agreement with Germany was negotiated.

The negotiations concerning the Supplementary Agreement with Germany pertaining to the custody provision are a good example of the United States position with regard to custody under all of these agreements. In these negotiations the position was

[174] Rouse & Baldwin, *The Exercise of Criminal Jurisdiction under the NATO Status of Forces Agreement*, 51 AM. J. INT'L L. 29, 51 (1957).

[175] *Id.* at 54.

[176] Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812).

[177] Stanger, *Criminal Jurisdiction Over Visiting Armed Forces*, 52 U.S. NAVAL WAR COLLEGE, INT'L L. STUDIES, 1957–1958 (1965).

[178] Resolution of Ratification, with Reservation, as Agreed to by the Senate on 15 July 1953, 99 CONG. REC. 8835, 8837, 83d Cong., 1st Sess. (1953).

taken by both parties that the Unitied States could not be asked to exercise custody in an unauthorized manner. It was emphasized that Germany would not require the United States to carry out her detention laws; rather, custody would be determined by the domestic laws of the United States.[179] It is apparent from the negotiating history that the parties intended to honor the German arrest warrant, but felt that it would violate United States domestic law if U.S. forces were compelled to place an accused in confinement if the German authorities so requested. The feeling then was that custody could be maintained under the treaty provision but the United States could not guarantee the type of custody. This latitude in the type of custody is the same as found in the Hague Treaty. It appears from the above that the parties intended that an accussed be placed in custody by the United States based on the agreement, but that the particular type of custody be determined by the United States.

Additionally, the intent of the United States is reflected in an Army regulation dealing with status of forces policies, procedures and information, which states: "[E]ffort will be made in all cases, unless the circumstances of a particular case dictate otherwise, to secure the release of an accused to the custody of U.S. authorities pending completion of all judicial proceedings including appeals."[180] The intent of this regulation, as expressed in its body, is to implement the Senate Resolution accompanying the Senate's consent to the ratification of the NATO Status of Forces Agreement. Additionally, the regulation indicates it is to apply in all overseas areas where United States forces are regularly stationed.[181] These provisions, when read together, provide the regulatory authority for the United States to exercise custody over an accused who is to be tried by a receiving State, regardless of the status of court-martial charges against the accused, if any in fact do exist.

The logic in this reasoning is more apparent when one considers that the regulation envisions custody remaining in the United States until the appellate proceedings have been con-

[179] On 18-19 March 1957, the phrase now present in the Supplementary Agreement, art. 22, para. 1(b), "custody shall rest," was substituted for the phrase, "custody shall be carried out." The Legal Committee also adopted the following provision: "[T]he sending State will retain the right to keep the person arrested in custody either in a detention institution of their own or with the force. . . ." *Negotiating History of the Supplemental Agreement*, SC/SR/61, V12(f) (Bonn, Germany 1957).

[180] Army Reg. No. 27-50, para. 4*a* (28 Jun. 1967).

[181] *Id.* para. 1.

cluded. Even if court-martial charges were originally preferred against the individual, what possible validity would they have after an accused was tried by the receiving State and subsequent hearings were held on his or the prosecutor's appeal? This is particularly true when one considers the length of time an accused could spend in "pretrial confinement." [182]

Consideration of all the tests for intent bearing on the question of whether the custody provisions are self-executing leads to the conclusion that they in fact are self-executing. This is particularly true when one considers the holding in the *Toscano* case where custody was upheld based on the treaty provision even though the individuals had committed no offense against United States law.

It is concluded, therefore, that if the custody provisions are deemed self-executing, they authorize all proper types of restraint desired by the United States regardless of whether the individual has also been charged by the United States. This authorization, however, in custody provisions using the language of the NATO SOFA formula would only exist until the time the individual is charged [183] by the receiving State as that is all the language will allow. In agreements using the Supplementary formual authorization would exist until release or acquittal by the receiving State or until commencement of the sentence.

D. EXECUTIVE AGREEMENTS

In the previous discussion dealing with the self-executing nature of the custody provision it was assumed that both treaties and executive agreements occupied the same status, that of being the supreme law of the land. As has been indicated, however, there is a great deal of controversy over this point. This issue becomes particularly acute when there exists a prior inconsistent statute. In the case of the custody provisions it could be argued that articles 9, 10, 13 and 33 of the Uniform Code of Military

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[182] Consider the case of PFC Earl Small who killed his German girl friend on 28 April 1964. After being tried by the Schwurgericht (Jury Court) at Bad Kreuznach, Germany, on 25 November 1965 his case was appealed to the Federal Supreme Court of Germany where it was heard on 12 July 1966, approximately 27 months after the offense was committed. To say that he was being held on court-martial charges throughout this period of time would be but a subterfuge.

[183] NATO SOFA, art. VII, para. 5(c). As to the possible meanings of the word "charged" under the law of several NATO members, see J. SNEE AND L. PYE, STATUS OF FORCES AGREEMENTS: CRIMINAL JURISDICTION 92–93 (1957).

Justice [154] are inconsistent with custody based solely on an agreement. It was pointed out in section III, *supra*, that a treaty, such as NATO SOFA, takes precedence over a prior inconsistent Justice [155] and the question for exploration then becomes, do executive agreements also have this power.

As was noted earlier, executive agreements are not all similar. There is a more plausible argument that agreements made in pursuance of a prior existing treaty are the supreme law of the land as compared to purely executive agreements.[156] The history of the Japanese agreement was brought out in the case of *Wilson v. Girard* [157] and is a case in point. There the Court traced the history of the Japanese agreement in effect at the time [158] back to a treaty that had been ratified by the Senate and proclaimed by the President.[159] After having found this, the Court stated that the only issue remaining was whether "the Consitution or legislation subsequent to the Security Treaty prohibited the carrying out of this provision authorized by the Treaty for waiver of the qualified jurisdiction granted by Japan." [160] Having found no such constitutional or statutory barrier, it indicated that the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches.

A similar fact situation was presented in the recent case of *Smallwood v. Clifford*.[161] This case involved the Korean Status of Forces Agreement [162] and again the court traced the history of the agreement and found it grew out of the Korean Mutual Defense Treaty of 1953.[163] As in *Girard*, the petition for a writ of habeas corpus, which, if granted, would have prevented the United States from turning Smallwood over to the Korean authorities for trial, was dismissed.[164]

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[154] These articles are entitled, respectively, "Imposition of restraint," "Restraint of persons charged with offenses," "Punishment prohibited before trial," and "Forwarding of charges."

[155] *See* notes 80 and 81 *supra*.

[156] McLaughlin, *supra* note 69.

[157] 354 U.S. 524 (1957).

[158] Administrative Agreement under Article III of Security Treaty between the United States of America and Japan, 28 Feb. 1952, [1952] 3 U.S.T. 3341, T.I.A.S. No. 2492 (effective 28 Apr. 1952).

[159] Security Treaty with Japan, 8 Sep. 1951, [1952] 3 U.S.T. 3329, T.I.A.S. No. 2491 (effective 28 Apr. 1952).

[160] Wilson v. Girard, 354 U.S. 524, 530 (1957).

[161] 286 F. Supp. 97 (D.D.C. 1968).

[162] Korea SOFA, *supra* note 12.

[163] Mutual Defense Treaty with the Republic of Korea, 1 Oct. 1953, [1954] 3 U.S.T. 2368, T.I.A.S. No. 3097.

[164] *But see* note 59.

Both of these cases show the tendency of the courts to view executive agreements that are in implementation of treaties differently than those which are purely presidential agreements. After having found in the *Girard* case that the agreement was based on a treaty, the Court limited its examination to constitutional questions and an inquiry whether subsequent legislation had been passed which would have altered the terms of the agreement. This would indicate that the Court in fact recognized that the agreement assumed the same position as the treaty, that of being the supreme law of the land. It appears, therefore, that agreements made in pursuance of existing treaties assume the characteristics of the treaty and thereby can supersede existing statutes.

Having examined the problem in relation to agreements made in implementation of a treaty, it is now pertinent to examine purely executive agreements. As has been pointed out in the preceding section, executive agreements have somewhat less support than agreements made in pursuance of a treaty with respect to being the supreme law of the land. There is, however, some support for the position that purely presidential agreements also the the supreme law of the land.

In the case of *United States v. Curtiss Wright Export Corp.*,[195] the Supreme Court recognized that under the separation of powers doctrine, as established by the Constitution, the complete and exclusive conduct of foreign affairs is in the hands of the Executive Branch of the Government. Additionally it was said that, "The President is the sole organ of the nation in its external relations and its sole representative with foreign nations."[196] As a result of this Presidential responsibility, the courts have recognized, although it is not spelled out in the Constitution, the power of the President to make such international agreements as do not constitute treaties in the international sense.[197] Additionally, the Court, realizing the difficulties involved in international negotiations, accorded the President a greater degree of discretion and freedom from statutory restrictions than if only domestic affairs alone were involved.[198] In recognition of these principles, the Court has stated that a treaty is the law of the land and international executive agreements have a similar dignity.[199]

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[195] 299 U.S. 304 (1936).

[196] *Id.* at 319. *See also* Worthy v. Herter, 270 F.2d 905, 911–12 (D.C. Cir. 1959), *cert. denied,* 361 U.S. 918 (1959).

[197] United States v. Curtiss-Wright Corp., 299 U.S. 304, 318 (1936).

[198] *Id.* at 321.

[199] United States v. Pink, 315 U.S. 203, 222–23, 229–30 (1942); United States v. Belmont, 301 U.S. 324, 330–31 (1937).

With specific reference to status of forces agreements, it is apparent that the assignment of servicemen to duty in a foreign country is a matter falling within the purview of the conduct of foreign policy or the use and dispostion of military power.[200] As the court in *Worthy v. Herter* remarked, "The essence of the conduct of foreign affairs is the maintenance ofpeace, the prevention of war. The Constitution places that task of prevention in the hands of the Executive."[201] It follows, therefore, that measures designed to facilitate and implement the stationing of troops aboard are clearly proper subjects for executive negotiation and international agreement, given the division and separation of authority established by the Constitution. Accordingly, there is a very strong argument that the President's acts in the area, as set out in the various status of forces agreements, do have the same status as a treaty and are, therefore, the supreme law of the land.

There are those who would argue, however, as did the majority in the case of the *United States v Guy Capps, Inc.*,[202] that an executive agreement cannot supersede a prior existing statute. Of course, if one takes the position that the status of forces agreements based on purely executive agreements are the supreme law of the land, then this would not follow; the agreement would supersede a prior existing statute.[203] However, even if the conclusion of the *Capps* case is adhered to, it is not necessarily determinative of the issue presented here.

In *Capps* the court said the agreement "was void because it was not authorized by Congress and contravened provisions of a statute dealing wwith the very matter to which it related. . . ."[204] Although an agreement may not be authorized by Congress, it has been shown that it is the President's function to handle matters dealing with foreign affairs, and agreements dealing with such matters are not constitutionally required to be submitted to the Senate for approval. For the argument concerning the contravention of a statute, the district court in *Smallwood v. Clifford*[205] remarked:

> Petitioner states that both the Constitution and the Uniform Code

[200] Luftig v. McNamara, 373 F.2d 664, 666 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967).

[201] 270 F.2d 905, 910 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 918 (1959).

[202] 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

[203] *Cf.* Whitney v. Robertson, 124 U.S. 190 (1888).

[204] United States v. Guy W. Capps, Inc., 204 F.2d 655, 658 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 291 (1955).

[205] 286 F. Supp. 97 (D.D.C. 1968).

> of Military Justice provide the method of trying servicemen abroad and that this method cannot be altered by an Executive Agreement. This contention has merit only in instances in which there has been no violation of the criminal code of a foreign state. However, when the offense is against the laws of another nation, and only when it expressly or impliedly waives its jurisdiction will the provisions of the Uniform Code of Military Justice apply. The *Girard* case holds that the primary right of jurisdiction belongs to the nation in which territory the serviceman commits the crime.[206]

If this language is followed literally, it cannot be argued that the provision of the agreement regarding custody violates the Uniform Code of Military Justice,[207] since the Code is not applicable as long as jurisdiction has not been waived by the receiving State.

There is yet another basis for maintaining that custody based on the pertinent provisions of the various agreements is proper. In the case of *Cozart v. Wilson* [208] the court stated:

> Since Japan has not, either at the time of the offenses with which the present petitioners are charged or at any later time, ceded to the United States jurisdiction of these offenses, Japan has jurisdiction to try petitioners and might hold them in jail pending trial. They do not and cannot complain because they are not so strictly confined.[209]

The *Cozart* case involved three men who were being kept in the Marine Corps and in Japan after their enlistments had expired. Two had been convicted of rape by a Japanese court and were being re-tried because the prosecutor was dissatisfied with the suspended sentences that were previously imposed. The third was awaiting trial for negligent homicide. Although technically his enlistment had not expired, he was nevertheless beyond his normal rotation date to the United States.

In the *Cozart* case, as in *Girard* and *Smallwood*, an excellent opportunity was presented for discussion of the validity of the United States custody. By their silence, the courts tacitly agreed that this custody was proper. Although the courts in *Girard* and *Smallwood* spoke in terms of agreements made in pursuance of a treaty, the court in *Cozart* did not base its decision on this ground. Hence, in summary, it can be argued that these cases uphold the validity of United States custody under purely executive status of forces agreements, as well as agreements made in pursuance of a treaty.

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[206] *Id.* at 101.
[207] UCMJ arts. 9, 10.
[208] 236 F.2d 732 (D.C. Cir. 1956), *vacated*, 352 U.S. 884 (1956).
[209] *Id.* at 733.

V. APPLICABILITY OF THE CUSTODY PROVISIONS TO CIVILIAN MEMBERS OF THE FORCES

The custody provisions of NATO SOFA and the Supplementary Agreement also in terms apply to civilian members of the force and dependents of members of the force. Discussion of the effect of this application has been purposely postponed until the end of this article, since it would seem that all of the arguments pertaining to the self-executing nature of the custody provisions with respect to military accused would also be applicable to civilians. There is, however, a great deal of disagreement concerning this question.

Most of the difference of opinion stems from the Supreme Court cases of *Kinsella v. Singleton*,[210] *Wilson v. Bohlender*,[211] *McElroy v. Guagliardo*,[212] and *Grisham v. Hagan*.[213] The holding of these cases was basically that article 2(11) of the Uniform Code of Military Justice, providing for the trial by court-martial of "all persons [civilians] serving with, employed, or accompanying the armed forces" of the United States in foreign countries, cannot constitutionally be applied in peacetime to the trial of a civilian employee of the armed forces in a foreign country who is charged with having comitted a *non*capital offense there. The holdings of these cases extended the doctrine of *Reid v. Covert*,[214] which had held that this article of the Uniform Code could not be used to punish civilians abroad for capital crimes either.

As a result of these opinions, The Judge Advocate General of the Army adopted the opinion that United States military authorities could no longer retain custody over civilian members of the force. This opinion was expressed on one occasion in response to an inquiry from the Staff Judge Advocate, United States Army, Japan, concerning the authority of United States military authorities over United States civilians in Japan. There it was said:

> Authority to apprehend and detain mentioned categories of persons is, in general, the same as with respect to persons such as tourists who have no connection with U.S. military establishment and who must be turned over to local authorities immediately. Extent of such authority is established: (1) by local (foreign) law justifying action similar to citizens arrest; or (2) within base areas and U.S. facili-

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[210] 361 U.S. 234 (1960).
[211] 361 U.S. 281 (1960).
[212] *Id.*
[213] 361 U.S. 278 (1960).
[214] 354 U.S. 1 (1956).

ties, by reasonable necessity to protect U.S. property or the personnel or security of the command.[215]

The basis for the above opinion can be gleaned from a memorandum prepared for the Army Judge Advocate General, General Charles H. Decker, on the subject, "United States Military Authority Over Civilians Overseas." [216] This memorandum concluded that under United States law, the provisions of the status of forces agreements, and the decision in the *Singleton* and companion cases, the United States military authorities had no authority to confine civilian members of the forces as well as dependents of members of the forces. The memorandum went on to state that involuntary detention of such persons would be a violation of the due process clause of the Constitution. Additionally, it was argued that this holding could not cause the United States to breach its treaty obligations, as the provisions were permissive in nature and were granted on the assumption that the civilians in question would continue to be subject to court-martial jurisdiction.

It can be seen that the reasons set forth in the memorandum involve precisely the same points as have been discussed in the previous two sections of this article. The conclusions of these sections were that such a custody provision does not violate the due process clause of the Constitution, and that the language of the treaty which is deemed to be permissive does not prevent the provisions from being self-executing. Thus, there is only on- question remaining in the memorandum which needs further elaboration. That is the argument that the custody provision pertaining to civilians was based on the assumption that the civilians in question would continue to be subject to court-martial jurisdiction.

Is it really material if they are not subject to court-martial jurisdiction? In *Ex parte Toscano*,[217] the court held that the petitioners could be confined based on the provisions of the Hague Treaty even though they had committed to offense against United States criminal law. In the *Toscano* case, applying the usual test for jurisdiction, it could be said that the United States had no jurisdiction over the offense because it was not a violation of United States law. Despite this, the court held the confinement of the petitioners to be valid.

[215] JAGJ 1960/8346, 6 May 1960.

[216] JAGW 1960/1134, 16 Jun. 1960.

[217] 208 F. 938 (S.D. Cal. 1913) (discussed in text accompanying note 169 *supra*).

It also appears that the military authorities have interpreted the *Singleton* case and its companion cases too broadly. These cases held that it was unlawful to *try* civilians under atricle 2(11) of the Uniform Code of Military Justice. The cases did not hold that the military authorities could not exercise custody over civilians, but merely that civilians could not be tried by the military. It is recognized that in the Court of Claims case of *Taylor v. United States*,[218] the court said that the holding in the *Singleton* cases and others did not merely indicate that civilian employees are free of court-martial trials, but that the Uniform Code of Military Justice and the Manual for Courts-Martial also do not apply to them.

The solution to this last problem is that where a civilian overseas is in the custody of the United States military authorities by virtue of his having committed a crime against the law of the receiving State, and having been relinquished to the custody of the United States by the receiving State, he is not placed under such custody (either confinement or some lesser form of custody) under the authority of the Uniform Code of Military Justice or the Manual for Courts-Martial. Instead he is placed in custody on the authority of the custody provision itself, which has been determined to be self-executing, meaning that it has the force and effect of law in the domestic courts of the United States. There is nothing contained in the cited cases which would prohibit the custody provisions in the various agreements from having this effect. It is also interesting to note that, only recently, the Korean Agreement was concluded and it contained the following familiar language:

> The custody of an accused member of the United States armed forces or civilian component or of a dependent, over whom the Republic of Korea is to exercise jurisdiction shall, if he is in the hands of the military authorities of the United States, remain with the military authorities of the United States pending the conclusion of all judicial proceedings and until custody is requested by the authorities of the Republic of Korea.[219]

Clearly, the drafters of this provision must have felt civilian members of the forces and dependents were subject to being placed in custody by United States military authorities. This is particularly true when one notes that in the Agreed Minutes to the Agreement under the section dealing with jurisdiction[220] it

[218] 374 F.2d 694 (Ct. Cl. 1967).

[219] Korea SOFA, art. XXII, para. 5(c). This agreement was signed 9 July 1966. *See also* note 12 *supra* and accompanying text.

[220] Korea SOFA, art. XXII, para. 1(a).

was recognized that the United States does not have criminal jurisdiction over members of the civilian component or dependents, but no such comment was made in the Minutes concerning the question of custody. Considering all of the above, it is respectfully submitted that the United States has authority to place members of the civilian component or dependents in custody as a result of their having committed a crime against the laws of the receiving State based on the self-executing nature of the custody provisions contained in the various status of forces agreements.

VI. CONCLUSION

It is apparent the primary interest of the various political and military leaders who have concerned themselves with status of forces agreements is to assure the proper treatment of members of the forces who commit offenses against the laws of a receiving State. It is in this vein that the custody provisions were included in the various agreements. The provisions were created to allow the United States to maintain custody over an accused for as long a period in the judicial process as possible. The very purpose for which they were designed is defeated by adopting the position that custody cannot be maintained on the basis of the custody provisions.

In investigating the advisability of this it was determined that, in the absence of an agreement, exclusive jurisdiction lies with the receiving State. As a result, a detailed examination of the custody provisions was undertaken, and it revealed that the provisions were self-executing and occupied a status of being part of the supreme law of the land. It was also concluded that the provisions did not violate any constitutional rights of an accused, particularly the right not to be deprived of individual liberty without due process of law.

The above analysis inevitably results in the conclusion that the United States military authorities can place an individual in custody based solely on the custody provisions. The length of custody would vary with the type of provision, the NATO SOFA form limiting the period to when the charges are preferred, whereas the Supplementary formula would allow custody to remain with United States authorities until commencement of the sentence. This conclusion also applies to custody over civilian members of the forces and dependents of members of the forces.

It is readily apparent that maintaining custody based on the agreement is far more realistic than keeping an individual in confinement based on charges that will never come to trial, and in some cases, are over two years old. It also allows for the custody

of an individual where, through one reason or another, the United States military authorities have not been able to substantiate charges against the accused. In short, there is no requirement that military charges be outstanding aginst an individual before the United States military authorities exercise custody over him where the accused has violated a criminal provision of the receiving State and that State has elected to exercise jurisdiction over him.

These conclusions appear to form a justiciable and practical basis on which to deal with the problem of custody. They also prevent the perversion of the very goal that the United States is attempting to achieve by these provisions, that of maintaining custody of an accused for as long a period as possible before releasing him to the custody of the receiving State. It is therefore recommended that the current policy of not allowing custody to be maintained on the basis of a custody provision be terminated and the reverse of that position be adopted. Additionally, it is recommended that in the negotiation of future agreements, an effort be made to provide for United States custody of an accused until the conclusion of all judicial proceedings rather than only to the time of the preferring of charges.

MARTIAL LAW TODAY*

By Frederick Bernays Wiener

The imposition of military controls in the civilian sector is the subject of this article. The author reviews the lurid history of mistakes involving martial law over the past several decades and expresses the hope that the lessons gleaned therefrom will be learned and remembered for the future.

I. INTRODUCTION

In August 1794, 176 years ago, President Washington issued his first dispersal order in the Whiskey Rebellion. Since then, there have been thirty-one similar proclamations, the most recent being issued to suppress the riots in the nation's capital two years ago. It is vital that those who occupy executive office today understand the lessons taught by these precedents so that the prevailing trend of permissiveness and leniency may be halted before our society is destroyed.

Any effort to delineate the scope of today's martial law is beset by numerous difficulties. By definition—"the carrying on of government in domestic territory by military agencies, *in whole or in part*, with the consequent supersession of some or all civil agencies" [1]—martial law includes every form of military aid to the civil power.

Martial law becomes relevant only when a particular situation can no longer be controlled by the agencies of civil government without military aid. At that point high-pitched emotions are aroused on both sides, and reasonableness is in short supply, doctrinally and otherwise.

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[1] WIENER, A PRACTICAL MANUAL OF MARTIAL LAW § 14 at 10 (1940) [hereafter cited as PRACTICAL MANUAL]. The passage set forth in the text was quoted with approval in *Ex parte* Duncan, 146 F.2d 576, 580 note 7 (9th Cir. 1944), *rev'd on other grounds sub nom.* Duncan *v.* Kahanamoku, 327 U.S. 304 (1946), and in Ochikubo *v.* Bonesteel, 60 F. Supp. 916, 928 (S.D. Cal. 1945).

Another difficulty is that today legal doctrines are in a very fluid state indeed. To the extent that "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts," [2] it involves prediction; and accurate prediction is not easy in the face of thirty square overrulings of prior decisions by the Supreme Court in the last nine years.[3]

The emphasis of the litigated martial law cases has been completely reversed within the last generation. In the 1930's and early 1940's the problem was the curbing of unjustified action taken under proclamations of martial law—in other words, relief against excesses. But today the more pressing task is to ensure the proper application of force lest civil authority perish. In the words of a most distinguished judge, uttered just a decade ago, "lawlessness if not checked is the precursor of anarchy. . . . Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society." [4]

Finally, any attempt at this time to set forth "the law" encounters "the criminal law revolution," [5] with its emphasis on the rights of the individual at the expense of society, in decision after decision that, in the words of another distinguished judge, "further impairs the ability of society to protect itself against those who have made it impossible to live today in safety." [6]

The result is that, in the prevailing climate of opinion, the very notion of taking steps that look in the direction of law enforcement is now being denigrated in advance by being labeled "repression," much as "law and order" seems to have been successfully howled down over the past few years by being called "racism."

II. MARTIAL LAW JUST BEFORE WORLD WAR II

In Mr. Justice Holmes's famous phrase, "[H]istoric continuity with the past is not a duty, it is only a necessity." [7] Accordingly,

[2] American Banana Company *v.* United Fruit Company, 213 U.S. 347, 356 (1909) (by Mr. Justice Holmes).

[3] In my BRIEFING AND ARGUING FEDERAL APPEALS 473–74 (1967 ed.), I listed fifteen square overrulings from 1961 to 1967. Since 1967, I count fifteen more, to enumerate which would unduly extend this footnote.

[4] Cooper *v.* Aaron, 358 U.S. 1, 22 (1958) (concurrence by Mr. Justice Frankfurter).

[5] *See* BNA, THE CRIMINAL LAW REVOLUTION 1960–1968 (1968).

[6] Ross *v.* McMann, 409 F.2d 1016, 1040 (2d Cir. 1969) (dissent by Friendly, J.).

[7] Holmes, *Learning and Science*, COLLECTED LEGAL PAPERS 138, 139 (1921).

in order to understand both the problems implicit in the lawful control of future violence and the limitations heretofore placed thereon, it is necessary, not as antiquarianism or anecdotage, but simply as essential lawyer-like research, to examine the earlier martial law precedents.

Up to 7 December 1941, the last Presidential proclamations preceding the employment of federal troops in aid of the civil power dated from 1914 in respect of enforcing federal law, in Arkansas,[8] and from 1921 in connection with assistance to state authority, in West Virginia.[9] The latter instance was a consequence of the unavailability of the National Guard, as in that state it had not yet been reconstituted following World War I service.[10] The last use of federal troops in a sudden local emergency had come in 1928, on the occasion of a disturbance at the immigration station in San Francisco Bay.[11]

All three situations were covered by time-tested instructions resting on the plain mandate of the Constitution and the implementing statues. The only federal problem area involved the disregard, during President Wilson's peace conference preoccupations and later illness, of the requirements for Presidential determination as a condition precedent to the employment of federal troops in the usual domestic situation; during 1919–1920, such troops had been called out by local commanders under unauthorized War Department delegation,[12] in obvious violation of the provisions of the Posse Comitatus Act.[13]

In the state area, the overriding martial law problem arose out of the arbitrary action of numerous state governors who undertook to switch from civil to military control, from the restraints of civil law to the excesses of unlimited military power, by means of proclamations of martial law issued when there was absolutely no violence, no obstruction whatever to law enforcement and no paralyzing natural disaster.

The use of troops in all of those situations rested on an unfor-

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[8] FEDERAL AID IN DOMESTIC DISTURBANCES, S. DOC. NO. 263, 67th Cong., 2d Sess. 317, 321 [hereafter cited as FEDERAL AID].

[9] FEDERAL AID 315–16, 319–21.

[10] *Ex parte* Lavinder, 88 W. Va. 713, 108 S.E. 428 (1921); PRACTICAL MANUAL § 115; RICH, THE PRESIDENTS AND CIVIL DISORDER 158–67 (1941) [hereafter cited as RICH].

[11] DIG. OPS. JAG (1912–30) § 13; *id.* (1912–40) § 480; PRACTICAL MANUAL § 61. This is a matter governed by Army Reg. No. 500–50, para. 6 (11 Jun. 1969).

[12] PRACTICAL MANUAL § 55; RICH 152–58.

[13] 18 U.S.C. § 1385 (1964).

tunate Supreme Court dictum in *Moyer v. Peabody*[14] (*per* Holmes, J., refighting the battles of 1861–1865, when "our hearts were touched with fire")[15] that attributed conclusiveness to gubernatorial proclamations of martial law. So there arose what in 1940 I called the bogus martial law situations,[16] but that today, the word "phony" having attained legitimacy in the interim,[17] would for the laity be perhaps more intelligibly characterized as instances of phony martial law.

It took the decision in *Sterling v. Constantin*,[18] handed down in 1932, to put an end to such outrages. There Chief Justice Hughes, speaking for the Court, limited *Moyer v. Peabody* to situations where there was actual violence and declared in ringing tones, in the forceful language that he used so effectively, that "[w]hat are the allowable limits of military discretion, and whether or not they have been over-stepped in a particular case, are judicial questions."[19] The Court accordingly invalidated military orders that had curtailed the drilling of oil and gas wells after similar administrative orders had been judicially enjoined[20] and exploded the myth that declarations of martial law were conclusive and unreviewable.[21]

In retrospect the strangest aspect of *Sterling v. Constantin* was neither its result nor its reasoning. It was the fact that, as though the case had never been decided, state governors continued to invoke martial law in absolutely peaceful circumstances to attain ends impermissible under civil law.

Thus, in Oklahoma, subsequent to *Sterling v. Constantin*, Governor Alfalfa Bill Murray undertook to curtail oil and gas prod-

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[14] 212 U.S. 78, 83 (1909): "It is admitted, as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of that fact."

[15] "Through our great good fortune, in our youth our hearts were touched with fire." Holmes, *Memorial Day, 1884*, in HOWE, THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 4, 15 (1962).

[16] PRACTICAL MANUAL §§ 105, 148.

[17] *See* Lutwak v. United States, 344 U.S. 604, 609 (1953).

[18] 287 U.S. 378 (1932).

[19] 287 U.S. at 400–01.

[20] MacMillan v. Railroad Commission, 51 F.2d 400 (W.D. Tex. 1931).

[21] Fairman, *Martial Rule in the Light of Sterling* v. *Constantin*, 19 CORNELL L. Q. 20, 23 (1933); PRACTICAL MANUAL 116: "[T]he United States Supreme Court has knocked out the prop on which these cases [establishing the conclusiveness of executive determinations of insurrections] rested, for conclusiveness is the basis and foundation for all of them . . ." (quoted with approval in Duncan v. Kahanamoku, 327 U.S. 304, 321 note 18 (1946)).

uction by military order—which was promptly enjoined [22]—and likewise to ram a patently unconstitutional zoning ordinance down a reluctant city council's collective throats. He was once more enjoined.[23] One of his successors in office resorted to the same means to stop the building of a dam in which the United States had every property right save bare legal title and similarly came a cropper.[24]

In South Carolina and again in Georgia, willful governors undertook to remove highway commissioners under color of martial law after other means proved unavailing; [25] the chief executive of Tennessee called out the Guard to influence a primary election; [26] the Governor of Iowa did the same to stop a hearing being conducted by the National Labor Relations Board; [27] the Governor of Arizona anticipated his opposite number in Oklahoma by invoking military force to halt the building of a dam wholly owned by the Federal Government; [28] while the Governor, Captain-General, and Commander-in-Chief of the State of Rhode Island and Providence Plantations called out the troops to stop horse racing, in this instance also after his earlier efforts to the same end had been thwarted by the courts.[29] In this last situation, the target of gubernatorial disesteem did not even seek judicial relief.

All of these enumerated instances, amazingly enough, date from the years 1935 to 1941; all took place just as if *Sterling v.*

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[22] Russell Petroleum Company v. Walker, 162 Okla. 216, 19 P.2d 582 (1933); PRACTICAL MANUAL § 94.

[23] Allen *v.* Oklahoma City, 175 Okla. 421, 52 P.2d 1054 (1935); PRACTICAL MANUAL § 95.

[24] United States *v.* Phillips, 33 F. Supp. 261 (N.D. Okla. 1940). This was reversed because tried by a district court of three judges, rather than one. Phillips *v.* United States, 312 U.S. 246 (1941). An identical decree was thereafter entered by the single judge.

[25] Hearon *v.* Calus, 178 S.C. 381, 183 S.E. 13 (1935); PRACTICAL MANUAL § 102; Miller *v.* Rivers, 31 F. Supp. 540 (M.D. Ga. 1940), *rev'd because moot*, 112 F.2d 439 (5th Cir. 1940); Patten *v.* Miller, 190 Ga. 108, 8 S.E.2d 757 (1940), and related cases.

[26] Joyner *v.* Browning, 30 F. Supp. 512 (W.D. Tenn. 1939); PRACTICAL MANUAL § 102a.

[27] PRACTICAL MANUAL § 149.

[28] PRACTICAL MANUAL § 149; *see* United States *v.* Arizona, 295 U.S. 174 (1935).

[29] CHAFEE, STATE HOUSE VERSUS PENT HOUSE (1937); PRACTICAL MANUAL § 101. The earlier cases were Narragansett Racing Association *v.* Kiernan, 59 R.I. 79, 194 Atl. 49 (1937), and Narragansett Racing Association *v.* Kiernan, 59 R.I. 90, 194 Atl. 692 (1937). The Governor's title as given in the text appears on all commissions and is drawn from R. I. CONST. (1842), art. VII, §§ 1, 3; the chief executive in question was the Hon. Robert E. Quinn, now and since 1951 Chief Judge of the United States Court of Military Appeals.

Constantin had never been decided in 1932; and in some of them state governors used the federally equipped National Guard to halt operations of the Federal Government.[30] As will be noted below, some of the same vicious nonsense spilled over into a number of the anti-integration flareups of 1957 and thereafter.

In each of the examples just mentioned, the methods and means of martial law were employed, not to support the law when civil agencies were unable to do so, but rather to flout the law. In each of these instances, the harsh and ugly fact was that the community experienced, without the slightest justification, military dictatorship for a limited purpose. In each of these instances, however, the illegal action was enjoined once judicial assistance was invoked, on the inescapable view that "[y]ou cannot amend the statute book with the bayonet." [31]

III. MARTIAL LAW DURING WORLD WAR II

The attack at Pearl Harbor and the consequent declarations of war ended for some time to come any and all state martial law excesses. The single instance of federal military aid to the state civil power came in June 1943, when the Michigan authorities were unable to deal with a racial riot in Detroit. State Guard [32] assistance being inadequate, federal troops were sent at the request of the governor.[33]

But Pearl Harbor triggered martial law in Hawaii, and for virtually the first time the United States Government became involved in the consequences of a proclamation of martial law.[34]

[30] Interfering with an NLRB hearing in Iowa, *supra* note 27, and interfering with the construction of federal dams in Arizona, *supra* note 28, and in Oklahoma, *supra* note 24. In the situation last mentioned, the trial court found as a fact (Finding 47, 33 F. Supp. at 267) that the troops sent to the dam site were "fully armed with rifles, machine guns and pistols, all of which had been supplied to it by the United States" (under the provisions of 32 U.S.C. §§ 33, 35 (1926–1940 eds.)).

[31] Conclusion of oral argument (by the author of this paper) in support of motion for preliminary injunction in *United States* v. *Phillips*, 33 F. Supp. 261 (N.D. Okla. 1940).

[32] First authorized pursuant to the act of 21 Oct. 1940, c. 904, 54 Stat. 1206, in order to replace the National Guard, which was then in process of being ordered to active federal duty. This basic provision was thereafter several times amended and is now codified in 32 U.S.C. § 109 (1964), where such supplemental units are called "defense forces."

[33] PROC. No. 2588, 21 Jun. 1943, 57 Stat. 742.

[34] There were two such proclamations during the Civil War. PRACTICAL MANUAL § 63; FEDERAL AID 205, 238; 2 WINTHROP, MILITARY LAW AND PRECEDENTS 1283–84, 1293–94 (2d ed. 1896) [hereafter cited as WINTHROP]. During the Colorado disturbances in 1914, Secretary of War Garrison advised one federal military commander that no proclamation of mar-

Looking at the matter with the benefit of twenty-eight years of hindsight, it is obvious, indeed all too painfully obvious, that the wartime martial law situation in Hawaii will long stand as an object lesson in two respects, first of how not to do it, and second of how not to litigate it afterwards.[35]

The first basic mistake, one which influenced every action thereafter taken, was that under the terms of Governor Poindexter's proclamation of martial law he called on the military authorities, not "to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory," as Section 67 of the Hawaiian Organic Act expressly provided,[36] but instead called on them to supersede him.[37] Thus he obtained, not the military aid to the civil power contemplated by the statute, but rather military supersession of the civil power, himself included.

Moreover, in view of the supersession rather than the support of civil authority, Hawaiian martial law was administered by a military governor *eo nomine*.[38] But military government is justified only in connection with the occupation of enemy territory (or of rebellious domestic territory,[39] as when the Union Army advanced into the Confederacy [40] or when, much earlier, the British

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tial law was necessary (FEDERAL AID 315): "I do not know of anything that you cannot do under existing circumstances that you could do any better if there was a written proclamation of martial law posted within your district."

[35] Some of the text that follows rests on personal observations while on active duty with the Army, March 1941 to December 1945, during tours of duty in Washington and in Hawaii, and while Special Assistant to the Attorney General of United States, on trips to Hawaii in 1946 and 1947 to defend litigation growing out of martial law. ANTHONY, HAWAII UNDER ARMY RULE (1954) [hereafter cited as ARMY RULE], written by the lawyer who ultimately won his long legal battle against martial law, has excellent documentation and is accurate on most details.

[36] 48 U.S.C. § 532 (1926–1958 eds.); see text in Duncan *v.* Kahanamoku, 327 U.S. 304, 307 note 1 (1946).

[37] See ARMY RULE 127–28; *Ex parte* White, 66 F. Supp. 982, at 990 (D. Haw. 1944).

[38] For the texts of the Military Governor's Proclamations and General Orders, see ARMY RULE 127–28, 131–33, 137–83. Not until 21 July 1944 was the name of the "Office of the Military Governor" changed to "Office of Internal Security." *Id.* 183.

[39] For the classic discussion of military law, military government and martial law, see *Ex parte* Milligan, 4 Wall. 2, 141–42 (1866) (by Mr. Chief Justice Chase). Since then, the decisions have recognized a fourth head of military jurisdiction, *viz.*, the laws of war. E.g., *Ex parte* Quirin, 317 U.S. 1 (1942); *In re* Yamashita, 327 U.S. 1 (1946); Hirota *v.* MacArthur, 338 U.S. 197 (1948); Johnson *v.* Eisentrager, 339 U.S. 763 (1950).

[40] *E.g.*, The Grapeshot, 9 Wall. 129 (1870); Pennywit *v.* Eaton, 15 Wall. 380 (1872); Burke *v.* Miltenberger, 19 Wall. 519 (1873); New Orleans *v.* Steamship Company, 20 Wall. 387 (1874); Coleman *v.* Tennessee, 97 U.S. 509 (1878); Dow *v.* Johnson, 100 U.S. 158 (1880).

occupied six American cities during the Revolution).[41] Since the Hawaiians were loyal, and since the only enemy was the Japanese invader, Hawaii after 7 December 1941 presented not a military government but a martial law situation.[42]

The second basic mistake was that the military authorities used the wrong yardstick. Overlooking the basic principle that martial law is the public law of necessity, with the consequence that only necessity calls forth martial law, justifies its exercise and measures the extent and degree to which it may be employed,[43] the officers directing the Hawaiian situation operated on the principle of convenience. If "we can do it better than they can downtown," then they determined that it would be done through military agencies rather than left to the civil authorities. And perhaps the most glaring instance of the disregard of the necessity principle was the maintenance of the 10 p.m. curfew long after it served any military purpose whatever.[44]

The third basic mistake was the widespread resort to military trials. Here again, there was an inversion of approach: The military tried people not because the threat of invasion had closed the courts, but instead ordered them closed and then proceeded to try all concerned. There were excesses, long to be remembered, all of which gave the Army a very black eye.[45] (The Navy, which was in over-all command in the Pacific, was perfectly happy to let the Army handle the nasty chore of martial law, the continuance of which the Navy insisted on in order to keep the labor situation quiescent.)

The second and third of these basic mistakes coalesced in the two military trials that later were litigated in the Supreme Court. One of these concerned a stockbroker named White, who had succumbed to the occupational disease of embezzling his customers' funds; he was tried by a provost court in August 1942, and was

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[41] Wiener, *Six Occupied Cities*, CIVILIANS UNDER MILITARY JUSTICE 92–159 (1967).

[42] See quotation from *Ex parte* Milligan, *supra* note 39.

[43] PRACTICAL MANUAL § 19, quoted with approval in Earl Warren, WAR-TIME MARTIAL RULE IN CALIFORNIA, 17 CALIF. STATE BAR J. 185, 188 (1942).

[44] The curfew was still in effect when General MacArthur made good his pledge to return to the Philippines, when Iwo Jima was assaulted and taken, and during all of the Okinawa campaign. By March 1945, after the Hawaiian echelon of the Okinawa invasion task force had departed from the Islands, the military governor recognized that the curfew was no longer necessary for security. But it was not lifted until July. See ARMY RULE 103–05; *cf. id.* 58–59.

[45] ARMY RULE 38–39, 48–58, 195–96; McColloch, *Judge Metzger and the Military*, 35 A.B.A.J. 365 (1949).

sentenced to five years' imprisonment. It would be difficult either as an original proposition or otherwise to explain the bearing of his offense on the ability of the military and naval commanders in Hawaii to protect the Islands against attack. The other involved one Duncan, tried in March 1944, for scuffling with a marine guard at the entrance to the Pearl Harbor base. Since at this time American troops had successfully landed in the Marshall and Admiralty Islands, or half way between Tokyo and Honolulu,[46] it is not easy to see how trying Duncan in a civilian police court would have deflected in the slightest the prosecution of the war. Nonetheless, he was tried by a military provost court and sentenced to six months in jail.

The two United States district judges in Hawaii, both obviously restive under the prevailing regime, separately released Duncan and White on habeas corpus,[47] while similar proceedings in related cases resulted in collateral incidents that had all the earmarks of a Marx Brothers farce.

After one of those judges issued writs of habeas corpus on behalf of two other individuals tried and imprisoned by the military, named Seiffert and Glockner, the Commanding General in Hawaii countered with the notorious General Order 31, which prohibited Judge Metzger by name from entertaining any habeas corpus proceedings, under pain of trial by military commission and punishment up to imprisonment for life.[48]

The judge thereupon cited the general for contempt—shades of Andrew Jackson at New Orleans in 1815![49]—the general played hide-and-seek with the marshal who sought to serve him; the

[46] By 2 March 1944, the date of Duncan's trial by a provost court, U.S. forces had taken Eniwetok and Kwajelein in the Marshall Islands and had landed on Los Negros Islands in the Admiralty Group. U.S. ARMY IN WORLD WAR II, CHRONOLOGY 1941–1945, 167–77 (1960).

[47] The facts of the two cases appear in district court opinions published after the end of the war. *Ex parte* Duncan, 66 F. Supp. 976 (D. Haw. 1944); *Ex parte* White, 66 F. Supp. 982 (D. Haw. 1944); and ARMY RULE 77–79.

[48] See *Ex parte* White, 66 F. Supp. at 994–97; and ARMY RULE 178–79.

[49] When Judge Hall in New Orleans at the itme of the British threat against the city held General Jackson's declaration of martial law illegal, Old Hickory retaliated by clapping the judge into jail. For this he was fined for contempt. *See* Johnson *v.* Duncan, 3 Mart. 520, 557–58 (La. 1815); 2 WINTHROP 1281–82; JAMES, ANDREW JACKSON: THE BORDER CAPTAIN 275–86 (1932). *Quaere,* Did the Act of Congress refunding the fine plus interest thirty years later amount to a legislative overruling of the decision? Act of 16 February 1844, ch. 2, 5 Stat. 651. One significant difference between the two situations is that Jackson was an unschooled man, operating in an unchartered area, while Lt. Gen. Robert C. Richardson, Jr., was an educated and cultivated gentleman with a host of legal advisers at his disposal.

judge tried and punished the general for contempt; and, in the end, the latter required and received a Presidential pardon to save him from the consequences of his militant precipitancy.[50]

Thereafter the *White* and *Duncan* cases led to the fourth and ultimately most serious basic mistake, namely, shortsighted litigation strategy.

The judgments releasing both petitioners were reversed by the Ninth Circuit later in 1944, in opinions full of language helpful to the military in the future.[51] Petitions for certiorari were granted, but were not argued until December 1945.[52]

By that time the war was over, the Armed Forces were being rapidly demobilized, and men's thoughts and energies once more turned to peaceful pursuits. Accordingly, it would have been the better part of wisdom then to have released petitioners by remitting the unexecuted portions of their sentences. White had served nearly two years when released on habeas corpus and Duncan two months; and release would have rendered their cases moot while fully preserving the precedential value of the Ninth Circuit's ruling. Indeed, a number of others tried by military tribunals or simply detained by the military in Hawaii had been so released during the war.[53]

But in the fall of 1945 all such suggestions encountered the Pentagon's war-time thinking of "[w]e've got to back up the theater commander." Well, they backed him up—right into the buzz saw—the decision in *Duncan v. Kahanamoku*.[54] There the Supreme Court held, not only that there was no necessity for military trials at the time in question, the ground that Chief Justice Stone took in his concurrence,[55] but, flatly and unequivocally, that even under martial law duly and properly proclaimed in a perilous situation, military trials of non-military persons would never be lawful.[56]

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[50] ARMY RULE 64–77; Armstrong, *Martial Law in Hawaii*, 29 A.B.A.J. 698 (1943).

[51] *Ex parte* Duncan, 146 F.2d 576 (9th Cir. 1944).

[52] 324 U.S. 833 (1945). Ironically enough, both cases were argued on the anniversary of the attack on Pearl Harbor. J. SUP. CT., October Term, 1945, at 86 (7 Dec. 1945).

[53] *See Ex parte* Spurlock, 66 F. Supp. 997 (D. Haw. 1944) (releasing petitioner), *rev'd*, 146 F.2d 652 (9th Cir. 1944), *cert. denied* (because moot), 324 U.S. 868 (1945); Zimmerman *v.* Walker, 132 F.2d 442 (9th Cir. 1942), *cert. denied* (because moot), 319 U.S. 744 (1943); and the Glockner and Seifert cases, ARMY RULE 64–77.

[54] 327 U.S. 304 (1946), together with the companion case of White *v.* Steer.

[55] 327 U.S. 335–37.

[56] *Id.* at 319–24, part III.

On the basis of earlier precedents, notably a native Hawaiian case construing a provision in the antecedent Constitution of the Republic of Hawaii identical with section 67 of the Organic Act,[57] Stone, C.J., probably had the better of the argument. But hard cases have always made bad law, and this was no exception.[58] Thereafter, once the Ninth Circuit was reversed, the only member of that court who had been recorded as not participating in its decision published his dissent, written after the case had been submitted but not then disclosed.[59] For sheer nonfortitude, his performance can have few if any equals.

Even so, it is doubtful whether the broad sweep of *Duncan v. Kahanamoku* has been fully appreciated. There are still current Department of the Army publications that envisage military trials in martial law situations.[60] Unless after a future nuclear holocaust *Duncan v. Kahanamoku* perishes along with most of the country, those manuals surely set forth doubtful doctrine as the law now stands.[61]

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[57] *In re* Kalanianaole, 10 Haw. 29 (1895), *construing* art. 31, HAW. CONST. 1894 (see 9 Haw. at 742 for the text). Interestingly enough, Frear, J., of the Supreme Court of Hawaii, who wrote the decision in question, was thereafter a member of the commission that drafted the Hawaiian Organic Act.

[58] See Duncan *v.* Kahanamoku, 327 U.S. at 357 (dissent of Mr. Justices Burton and Frankfurter).

[59] *Ex parte* Duncan, 153 F.2d 943 (1 Mar. 1946, "Nunc pro Tunc as of 1 Nov. 1944").

[60] U.S. DEP'T OF ARMY FIELD MANUAL NO. 19-15, CIVIL DISTURBANCES AND DISORDERS, 25 Mar. 1968, app. G, § IV, *Martial Law Tribunals;* U.S. DEP'T OF ARMY PAM. NO. 27-11, MILITARY ASSISTANCE TO CIVIL AUTHORITIES, para. 11, 1 Dec. 1966.

[61] One serious question remaining completely unresolved is whether, when Congress pursuant to article I, section 9, clause 2, of the Constitution authorizes suspension of the privilege of the writ of habeas corpus, suspension action thereunder is subject to judicial review. The district judges in the Duncan, White and Spurlock cases (*supra* notes 47 and 53) held that it was; the Ninth Circuit (*supra* note 51) split three ways on the matter; and by the time the first two cases reached the Supreme Court, the privilege of the writ had been restored. 327 U.S. at 312, note 5.

On the one hand are the cases holding certain military actions of the executive unreviewable, *e.g.,* Martin *v.* Mott, 12 Wheat. 10 (1827) (calling out militia); on the other is Sterling *v.* Constantin, 287 U.S. 378 (1932) (holding other executive military action reviewable). *Compare Ex parte* Quirin, 317 U.S. 1, 24-25 (1942).

All that can be ventured here is that a United States court would undoubtedly treat Presidential action more tenderly than that of a state governor and that it should be loath to try out in open court *flagrante belli* information concerning enemy dispositions known only to the President and his military advisers. After all, the full extent of the damage done to the United States Navy at Pearl Harbor was not revealed until a year later. But the force that those factors add to a decision against reviewability

IV. MILITARY AID IN DESEGREGATION SITUATIONS

There followed a period of calm for a decade, until, in consequence of local decisions implementing the school desegregation doctrines of *Brown v. Board of Education*,[62] the country witnessed a series of extremely realistic Civil War re-enactments.

The first of these, in Arkansas in 1957, involved the efforts of Governor Faubus through the use of military force—specifically, through the use of the Arkansas National Guard, uniformed, armed and equipped by the United States [63]—to frustrate the decrees of the United States district court desegregating Little Rock's Central High School. When a conference with President Eisenhower failed to persuade the Governor to discontinue the National Guard's interference, federal troops were sent to effectuate the decrees and the Guard was brought into federal service for the same purpose. Subsequent litigation sustained the President's action.[64]

A more serious disturbance erupted at Oxford, Mississippi, in September 1962, when Governor Barnett prevented the enforcement of a federal decree ordering the University of Mississippi to admit a Negro student. Once again, federal troops were ordered in to enforce federal law, this time by President Kennedy, and once again the state National Guard was called into federal service.[65] In the end, Governor Barnett escaped punishment for his obvious contempt.[66]

Next year the same story was played over again, on two separate occasions, when Governor George Wallace "stood in the school door" to resist integration decrees.[67] Emulating King Can-

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would be neutralized and perhaps outweighed if, as happened in the later Hawaiian martial law cases, the question were litigated in a climate of opinion increasingly free of national peril.

[62] 347 U.S. 483 (1954); 349 U.S. 294 (1955).

[63] 32 U.S.C. § 702 (1964).

[64] PROC. NO. 3204, 23 Sep. 1957, 22 Fed. Reg. 7628; EXEC. ORDER NO. 10,730, 24 Sep. 1957, 22 Fed. Reg. 7628. Here and in the notes that follow, the dates are those of the signature of the document cited.

The details of the controversy are set forth in 41 OP. ATTY. GEN. 313, published after the event. The President's use of troops was sustained in Faubus *v.* United States, 254 F.2d 797 (8th Cir. 1958), *cert. denied*, 358 U.S. 829 (1958). The basic desegregation decree was upheld in Cooper *v.* Aaron, 358 U.S. 1 (1958), while a state statute cutting off funds from integrated schools was struck down in Aaron *v.* McKinley, 173 F. Supp. 944 (E.D. Ark. 1959), *aff'd sub nom.* Faubus *v.* Aaron, 361 U.S. 197 (1959).

[65] PROC. NO. 3497, 30 Sep. 1962, 27 Fed. Reg. 9681; EXEC. ORDER NO. 11,053, 30 Sep. 1962, 27 Fed. Reg. 9693.

[66] United States *v.* Barnett, 376 U.S. 681 (1964); *cf.* Tefft, *United States* v. *Barnett: "'Twas a Famous Victory,"* 1964 SUP. CT. REV. 123.

[67] PROC. NO. 3542, 1 Jun. 1963, 28 Fed. Reg. 5707; PROC. NO. 3554, 10

ute, Governor Wallace sought to stem the tide and failed utterly; Alabama's motion to bring an original action in the Supreme Court of the United States to halt the preparatory moves of the Secretary of Defense was denied because of prematurity.[68] Consequently the action failed to obtain either objective that it sought, a declaration that 10 U.S.C. § 333 was unconstitutional, or another that the fourteenth amendment was null and void.

Finally, in 1965, when Governor Wallace declared his inability, in connection with the projected freedom march from Selma to Montgomery, to protect the marchers, President Johnson called out federal troops and mobilized the Alabama National Guard to ensure their safety.[69]

In these five situations there were, by comparison with the earlier use of federal troops in domestic disturbances, three elements of novelty.

The first was the initial use of a provision dating from the anti-Ku Klux Klan Act of 1871, known to military lawyers over many generations as R.S. § 5299, which is now 10 U.S.C. § 333. When originally enacted, some pretty solid laywers considered that provision unconstitutional.[70] But there can be little doubt that it is aptly designed to enforce the fourteenth amendment, and of course military aid is by express language of the Constitution available to "execute the Laws of the Union" whenever necessary, regardless of the wishes of the state governor involved.

For, as the Supreme Court had said, "We hold it to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." [71] Governors Faubus, Barnett and Wallace were thus simply relearning from Presidents Eisenhower, Kennedy and Johnson the lesson earlier taught Governor Altgeld of Illinois by President Cleveland.[72] Indeed, this was the precise lesson later taught Eugene V. Debs by the Supreme Court: "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitu-

Sep. 1963, 28 Fed. Reg. 9861; EXEC. ORDER NO. 11,111, 11 Jun. 1963, 28 Fed. Reg. 5709; EXEC. ORDER NO. 11,118, 10 Sep. 1963, 28 Fed. Reg. 9863.

[68] Alabama *v.* United States, 373 U.S. 545 (1963).

[69] PROC. No. 3645, 23 Mar. 1965, 30 Fed. Reg. 3739; EXEC. ORDER NO. 11,207, 23 Mar. 1965, 30 Fed. Reg. 3743.

[70] HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1870–1882, 34–42 (1965).

[71] *Ex parte* Siebold, 100 U.S. 371,395 (1879).

[72] FEDERAL AID 195–204.

tion to its care." [73] There could be no more apt illustration of Santayana's famous phrase: "Those who ignore history are condemned to repeat it."

The second novelty was the use made of the state National Guard after federal troops had appeared. At the time of the Colorado disturbances in 1914, the National Guard was simply sent home, on the view that since they had failed in their task, they had better not stay around to clutter up the premises.[74] But in Arkansas and Mississippi and Alabama, the Guard was called into federal service and remained to effectuate rather than to frustrate law enforcement. They complied willingly, and there was no conflict; it simply never occurred to any of them not to obey the Presidential mandate.[75]

(They were "called" into federal service because employed as provided in the Constitution "to execute the Laws of the Union." [76] The "order," which dates from 1933, is the means used to employ the National Guard overseas, under the Army clause rather than the militia clause. This is a matter with a long and somewhat complex history, too long to repeat here.[77] But it may be mentioned that an "order" was erroneously issued in 1957,[78] under the aegis of the same General Counsel of the Department of Defense who had earlier invented the plainly unlawful administrative dishonorable discharge.) [79]

The third novelty was the widespread use of federal marshals to enforce the law concurrently with the troops. The employment of civilians in that connection undoubtedly reflected the endemic libertarian conviction that any use of military force is essentially obscene, the kind of thinking earlier responsible for the refusal to

[73] *In re* Debs, 158 U.S. 564, 582 (1895).

[74] FEDERAL AID 312–15.

[75] EXEC. ORDER NOS. 11,053, 11,111, 11,118, 11,207, supra notes 65, 67, and 69; *cf.* EXEC. ORDER NO. 10,730, *supra* note 64.

[76] Art. I, § 8, cl. 15.

[77] Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, especially at 207–09 (1940), set forth (without credit) H.R. REP. NO. 1066, 82d Cong., 1st Sess. (1949).

[78] EXEC. ORDER NO. 10, 730, *supra* note 64.

[79] *See* Pasley, *Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court-Martial?*, 41 CORNELL L. Q. 545 (1956); *cf.* Bell *v.* United States, 366 U.S. 393, 395 note 1 (1961). It will doubtless be of interest to those who habitually impugn "the military mind" that, while the administrative dishonorable discharge was invented by a simon-pure civilian, it had been held illegal in an opinion by The Judge Advocate General of the Army, the late Maj. Gen. Eugene M. Caffey, who was a West Point graduate with combat service in North Africa, Sicily and Normandy, and who had, in addition to an LL.B. from the University of Virginia, a Distinguished Service Cross for bravery on Utah Beach on D-Day.

support the Bay of Pigs project with obviously essential air cover. In any event, the principal contribution made by the use of United States marshals at Oxford, Mississippi, was a good deal of collateral litigation.[50]

V. THE 1967 and 1968 URBAN RIOTS

This brings us to consider the tragic urban riots of 1967 and 1968.

The first of these where federal assistance became necessary occurred in Detroit in July 1967. Since this was federal military aid to the state civil power, without any federal law to be enforced, the President could not act on his own but had to await a request.[51] Unhappily there was much boggling over the need and the form of the request. Governor and President engaged in unseemly one-upmanship while Detroit burned; and then, although federal troops were duly sent to assist the Michigan National Guard, their actual use was committed to a delegate who delayed their entry on the scene.[52] It was not a creditable performance, and immediately thereafter, when order was finally restored, the President made two appointments: He appointed a day of prayer,[53] and he appointed a commission.[54]

The riot commission in due course issued a voluminous report,[55] in the course of which it recommended, as it had originally proposed before the ashes of Detriot had even cooled, that more Negroes be enlisted in the National Guard.[56] The rationale underlying that recommendation was the observation that the Regular Army, with about 20 per cent Negro soldiers in its ranks, had done a more effective and responsible job than had the Guard,

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[50] *See In re* McShane's Petition, 235 F. Supp. 262 (N.D. Miss. 1964); Norton v. McShane, 33 F.R.D. 131 (N.D. Miss. 1963), *aff'd*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965); United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965).

[51] U.S. CONST. art. IV, § 4; 10 U.S.C. § 331 (1964).

[52] PROC. NO. 3795, 24 Jul. 1967, 32 Fed. Reg. 10,905; EXEC. ORDER NO. 11,364, 24 Jul. 1967, 32 Fed. Reg. 10,907; *and see* New York Times, 24 Jul. through 1 Aug. 1967, for the sequence of events.

[53] PROC. NO. 3796, *National Day of Prayer for Reconciliation*, 27 Jul. 1967, 32 Fed. Reg. 11,071.

[54] EXEC. ORDER NO. 11,365, *Establishing a National Advisory Commission on Civil Disorders*, 29 Jul. 1967, 32 Fed. Reg. 11,111.

[55] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 1 Mar. 1968.

[56] *Id.* 318 (letter to the President, 10 Aug. 1967); New York Times, 11 Aug. 1967, at 1.

where the percentage of Negroes was five per cent or less.[87] It seems never to have occurred to any member of the commission that this divergence in performance reflected, not racial composition, but simply more intensive training. After all, peace-time Regulars are full-time professionals, which peace-time Guardsmen, whatever their ultimate military potential, are not.

The Riot Commission also attributed the principal cause of the 1967 riots to white racism.[88] But within a month after the publication of its report, there came the widespread and indeed nation-wide rioting of April 1968 that followed the murder of Dr. Martin Luther King, Jr. This was rioting that all too clearly reflected black racism.

On this last occasion federal troops were dispatched to three areas where the local National Guard was unable to quell the disturbances, to Illinois,[89] to Maryland,[90] and to the District of Columbia.[91] Unlike the two past instances when federal troops *eo nomine* had been employed in District of Columbia civil disorders —in 1919 at the time of an ugly race riot, and 1932 when the bonus army was evicted[92]—on this occasion the troops were preceded by a proclamation calling on the rioters to disperse, issued pursuant to 10 U.S.C. § 334, the former R.S. § 5300.

A short digression is in order here. Such a proclamation, which in the United States has no time limit prescribed by statute, dates from 1792[93] and was modeled on the proclamation first provided for in the English Riot Act of 1714. Under the English measure, a civil magistrate read the statutory proclamation calling on the disorderly crowd to disperse within an hour, after which those

[87] *Id.* 276.

[88] *Id.* 5: "White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II."

[89] PROC. No. 3841, 7 Apr. 1968, 33 Fed. Reg. 5497; EXEC. ORDER No. 11,404, 7 Apr. 1968, 33 Fed. Reg. 5503.

[90] PROC. No. 3842, 7 Apr 1968, 33 Fed. Reg. 5573; EXEC. ORDER No. 11, 405, 7 Apr. 1968, 33 Fed. Reg. 5505.

[91] PROC. No. 3840, 5 Apr. 1968, 33 Fed. Reg. 5945; EXEC. ORDER No. 11,403, 5 Apr. 1968, 33 Fed. Reg. 5501. It should perhaps be noted that, since the District of Columbia National Guard is a purely federal force without any state status, its members, unlike other Guardsmen, fall within the *Federal Tort Claims Act even when not in federal service. Compare* O'Toole v. United States, 206 F.2d 912 (3d Cir. 1953), *with* Maryland v. United States, 381 U.S. 41 (1965).

[92] RICH 153-54 (1919 race riot); 167-76 (1932 Bonus Army).

[93] Act of 2 May 1792, ch. 28, § 3, 1 Stat. 264, and then re-enacted as Act of 28 Feb. 1795, ch. 36, § 3, 1 Stat. 424, and again as Act of 29 Jul. 1861, ch. 26, § 2, 12 Stat. 281, 282.

remaining would be deemed guilty of felony.[94] This provision, which result in grave misunderstandings in England, particularly at the time of the Lord George Gordon riots in 1780,[95] underlies the popular expression about reading someone the riot act.

To return to April 1968: Here again, the troops came too slowly, notably in the District of Columbia. Here again, permissiveness characterized the handling of the mob. There were documented instances of looters taking articles from stores, placing them in their cars and then driving off—but stopping religiously for red lights. Such conduct, assuredly, did not indicate that a traffic ticket was more to be feared than an indictment for housebreaking or larceny. But it did reflect the rioters' understanding that, while they could loot with considerable impunity, they would risk collision and injury if they disregarded a traffic signal.

It was not until the near-riot that Washington escaped in June 1968, after the evacuation of Resurrection City—called by some citizens, wryly though not wholly inaccurately, Insurrection City—that the course of the earlier disorders appeared to have left their imprint. For in June the police and the National Guard appeared in such force that all potential rioting was smothered before it started.

Whatever may be said of President Johnson's actions in August 1967, and in April 1968, the prompt response in June 1968 showed that the earlier lessons had been learned and inwardly digested. Moreover, his perception of what was really at stake kept him from ever indorsing his Riot Commission's recommendations. One can only conclude that it was a great pity not to have investigated more intensively the ideological background of that commission's staff. Therein may well be found the real bases for its recommendations.

VI. MARTIAL LAW TODAY—AND TOMORROW

The United States as a nation has now had 176 years of experience with the problem of extending military aid to restrain civil disorder. Actually, August and September of last year marked the 175th anniversary of President George Washington's first dispersal proclamations, those addressed to the participants in the Whiskey Rebellion of 1794.[96]

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[94] 1 Geo. I, ch. 5, § 2.

[95] 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 202–06 (1883); 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 328–31 (1926); 10 *id.* 63–64, 705–09 (1938).

[96] FEDERAL AID 27–30 (proclamations dated 7 Aug. and 25 Sep. 1794).

The records show thirty-two such proclamations in all, twenty-two of them issued before World War II, including the basic proclamation issued after the firing on Fort Sumter in 1861. Nine of these involved assistance to federal authorities, ten assistance to state authorities, and three assistance to territorial authorities.[97] Since World War II there have been ten more, five involving federal support, four state support, and the last the 1968 District of Columbia situation.[98]

The existing machinery is ample, the techniques for calling it into play are—or at least should be—well known. The thin volume of illustrative history demonstrates that in this area executive power cannot—repeat, *cannot*—be delegated. Serious civil disorder anywhere in the nation requires full and personal Presidential attention. When the President is otherwise engaged, or ill, or entrusts his power to another, faulty judgment is inevitable. Examples are the use of federal troops as strike-breakers in Idaho in 1899, when President McKinley was devoting most of his energies to the problems that followed the close of the Spanish War;[99] the injection of federal troops into local situations by subordinate military commanders in 1919–1920, while President Wilson was incapacitated;[100] and the delayed entry of the troops into Detroit in 1967, when President Johnson transferred actual power of decision to a delegate.[101]

More decisive action is also needed in state capitals, where a good starting point would be the jettisoning of sweet-scented proclamations of emergency in favor of the more traumatic effect of the classical proclamations of martial law. State executives, too, must learn to smother incipient disorder at the outset, as was done in Washington in June 1968, and not to delay calling out the Guard, delay that assuredly made control of the Watts riot area of Los Angeles more difficult in 1965. State governors must likewise learn that here is critical action that cannot be delegated to attorneys general or to mayors. They must make the decision, the hard decisions, by themselves—and if they are away when the trouble starts, they should be at pains to return instantly.

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[97] FEDERAL AID *passim*, where each of these proclamations is set forth in full.

[98] Federal support: (1) Arkansas, 1957, *supra* note 64; (2) Mississippi, 1962, *supra* note 65; (3), (4), Alabama, 1963, *supra* note 67; (5) Alabama, 1965, *supra* note 69. State support: (1) Michigan, 1943, *supra* note 33; (2) Michigan, 1967, *supra* note 82; (3) Illinois, 1968, *supra* note 89; (4) Maryland, 1968, *supra* note 90. District of Columbia, 1968, *supra* note 91.

[99] RICH 113–20.

[100] RICH 152, 154–58.

[101] *Supra* note 82.

Above all, it is essential to recognize that a good many of the participants in recent disorders aim at deliberate anarchy and that their talk about the "restructuring of society" is simply polysyllabic jargon for rebellion and revolution. Therefore, it is vital that those in executive office reverse the prevailing trend of permissiveness and leniency, now so widespread that it threatens to rend the very fabric of society.

The Constitution of the United States, it should never be forgotten, does not guarantee either its dissolution or its own destruction. Clause 15 of Article I, Section 10, empowers Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Section 3 of Article II admonishes the President to "take Care that the Laws be faithfully executed." And Section 4 of Article IV directs that the United States "guarantee to every State in this Union a Republican Form of Government, and shall protect each of them . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." Provisions similar to the first quoted exist in all state constitutions.

The machinery to keep the peace is clearly set forth in the Constitution and in the laws. Let us pray that, if we encounter future large scale violence, those in authority will have not only the wit to penetrate the anarchy fomenting semanticism of the word "repression," but, preeminently, that they will have the wisdom, the fortitude and the moral resolution to attain that so vital objective of our Constitution, "to . . . insure domestic Tranquillity."

THE STAFF JUDGE ADVOCATE AS LEGAL ADVISER TO THE POST SURGEON: MALPRACTICE, HOSPITAL NEGLIGENCE AND RELATED MATTERS*

By Major Richard E. Cumming**

Malpractice cases against the United States under the Federal Tort Claims Act often fail by reason of service-incidence, statute of limitations, or other exceptions to that Act. The writer notes that although the Government has "deeper pockets" than even the most heavily-insured physician, surgeon, or psychiatrist, a plaintiff, fearing dismissal of his complaint against the United States, may be inclined to name the doctor as a party defendant. How the staff judge advocate can advise the post surgeon in this connection is the subject of this article, particularly in the area of malpractice insurance.

A doctor and a lawyer are seated next to each other in a train. Both are enjoying the scenery and the doctor exclaims: "Look at those sheep out there—they've been shorn." The lawyer replies: "They appear to have been —at least on one side."

I. INTRODUCTION

In 1967 the Federal Government operated 416 hospitals in the United States. These hospitals contained 175,065 beds and reported 1,699,928 admissions with an average daily patient census of 148,839 (85 percent occupancy). Excluding residents, interns and students, 214,494 personnel were required to make these institutions function. Births, at the 211 hospitals reporting, totalled 121,768.[1] In addition, 51 hospitals are operated by the United

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[1] 42 J. AM. HOSP. ASSN. 454 (1968).

States Government in foreign countries.[2] Many of these hospitals in the United States and abroad are maintained by the military.

The Judge Advocate General of the Army has assigned Army lawyers to many Army hospitals throughout the United States. Army lawyers teach at the Medical Field Service School, Brooke Army Medical Center, Fort Sam Houston, Texas, where Army doctors receive their first introduction to military life. Army lawyers work in the U.S. Army Medical Research and Development Command and take courses in the Armed Forces Institute of Pathology. The Surgeon General's Office has its own judge advocate.[3] Most Army doctors, however, must seek legal advice not from a specialist assigned to their hospital, but from the office of the staff judge advocate.

In an attempt to ascertain the types of legal problems faced by the Army doctor, the writer contacted judge advocates who are assigned to positions involving daily contact with medical personnel. Of course, doctors have many legal problems which are unrelated to their profession, for example, they need wills, tax advice, and help in interpreting regulations dealing with the release of information as applied to medical records. An examination of the duties of the staff judge advocate and the surgeon in *Staff Organization and Procedure*[4] does not reveal any special relationship between these two officers. Nor is an examination of the *Staff Judge Advocate Handbook* helpful.[5] One writer in describing the relationship of the judge advocate with the special staff points out that as a matter of routine he deals with areas under the cognizance of the provost marshal and the adjutant.[6] Though the chaplain merited special comment, the surgeon is not mentioned. The judge advocate receives some hints in his training, however, that the surgeon may have unique legal problems. The text, *Military Reservations*,[7] deals with inquests and autopsies[8] in

[2] *Id.* at 242. Specifically in the Azores, Belgium, Canada, Cuba, Eritrea (Ethiopia), W. Germany, Guam, Iceland, Iran, Italy, Japan, Korea, Libya, Okinawa, Philippines, Puerto Rico, Republic of China, Spain, Turkey, United Kingdom, and Vietnam. Cases involving these hospitals are beyond the scope of this paper, although they may be mentioned incidentally.

[3] Office of The Judge Adv. Gen., U.S. Dep't of Army, JAGC, Personnel & Activity Directory 15 (Jul. 1969).

[4] U.S. DEP'T OF ARMY, FIELD MANUAL NO. 101-5, STAFF OFFICERS FIELD MANUAL—STAFF ORGANIZATION AND PROCEDURE paras. 4-50, 51 (1968).

[5] U.S. DEP'T OF ARMY, PAMPHLET NO. 27-5, STAFF JUDGE ADVOCATE HANDBOOK para. 28 (1963).

[6] H. Scherr, *The Role of the Staff Legal Officer* 142-46, 1958 (unpublished thesis in The Judge Advocate General's School).

[7] U.S. DEP'T OF ARMY, PAMPHLET NO. 27-164, MILITARY RESERVATIONS

paragraph 12.5, and paragraph 12.6 in discussing consent to treatment of nonmilitary personnel in Army hospital states in part:

> If there is a question whether consent of a parent or guardian is required in view of the age, mental condition, or emancipated status of the patient, or because of non-availability of the parents or similar factors, the advice of the local staff judge advocate or other legal officer should be obtained.
>
> . . . .
>
> Regulations provide that the validity of a court order directing involuntary confinement or treatment of a patient in any Army medical treatment facility is a matter for review, in each instance, by the appropriate judge advocate or legal adviser.

The surgeon even has special problems in the military justice area as the following excerpt from a letter indicates:

> Patients come into contact with doctors, nurses, and other patient care personnel; little contact, if any, is had with personnel from the Medical Holding Company Commander or his staff. As a result, marginal soldiers who are inclined to deviate from expected norms without close supervision often become involved in disciplinary scrapes. Most frequently these are disorderly conduct episodes on treatment wards where the patients are healthy enough to be up and around (eg. Pulmonary Disease). These patients lie around a good deal of the day and even if they do participate in the many Red Cross activities and/or occupational therapy programs they eventually become bored. Consequently, it is often quite difficult to go to bed at 2200 when the nurse tells them to.
>
> Another problem we face here, which constitutes our main disciplinary problem is our tremendous number of AWOLs. Most of these are of a very short duration, usually ranging from a few days to two weeks. Most of them come at the end of an authorized absence —weekend pass, ordinary leave or convalescent leave. The hospital is cognizant of the fact that patients do not like to be here and so when their medical condition permits, patients are sent home for convalescent leave. This is particularly true for orthopedic patients from Vietnam. However, when it comes time to return, some patients often figure they can come back a few days later and no one will really suffer for it—they know they have no duty to perform.[9]

95-96 (1965).

[8] See also J. Stoker, *Post Mortem Examinations in the Armed Forces*, 1961 (unpublished thesis in The Judge Advocate General's School), and O'Hearn, *Authorization for Autopsies*, in THE BEST OF LAW AND MEDICINE '66-'68 at 9 (J.A.M.A. ed. 1968) [hereinafter cited as LAW AND MEDICINE].

[9] Letter from Captain Steven A. Holm, Judge Advocate, Valley Forge General Hospital, to the writer, 21 Nov. 1968. Because of inability to schedule trials which would interfere with medical treatment procedures and inability to confine patients in a stockade due to their medical condition the vast majority of cases are processed under article 15, Uniform Code of Military Justice.

The judge advocate may anticipate this sort of problem and indeed is trained to give at least tentative answers to recurring questions from the military physician such as: "Is an Article 31(b) warning required prior to the extraction of bodily fluid if I have been asked by the Military Police to run a blood alcohol test on a patient?"[10] Most judge advocates sense that many military psychiatrists and social workers feel there is a basic conflict between their function of healing and their duty to warn pursuant to article 31(b).[11] Some of the problems faced by the surgeon, however, are considerably more esoteric. Consider the following examples:

(1) The surgeon requests legal advice regarding the treatment of a dependent adult who refuses standard medical treatment such as blood transfusions.[12]

(2) The surgeon requests legal advice regarding the treatment of a dependent child with venereal disease who needs treatment but is unwilling to obtain consent from the parents.[13]

(3) The surgeon requests legal advice regarding the prescription of a contraceptive pill requested by a minor dependent daughter suffering from nymphomania. The girl is entitled to treatment by law and regulation and refuses to inform her parents of her malady. Specifically the doctor wishes to know what his liability is if he prescribes the pill without parental consent and the parents learns of it? Suppose pregnancy results or the pill is injurious to the girl's health?

(4) The surgeon requests legal advice regarding the effect of local laws on therapeutic abortions performed in his Army hospital.

(5) The surgeon requests legal advice regarding a soldier who desires to donate a kidney to another member of his family.

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[10] See discussion in Rudland, *Fifth Amendment and Article 31 Admissibility of Bodily Fluid Test Results in Courts-Martial*, 10 AF JAG L. REV., Sep.-Oct. 1968, at 45.

[11] See Bergen, *Keeping Patients' Secrets* and Morse, *Physician's Liability for Improper Disclosure* in LAW AND MEDICINE 67, 69.

[12] See Holman, *Jehovah's Witnesses and Blood Transfusions* in LAW AND MEDICINE 113.

[13] This problem is solved at Letterman General Hospital, Presidio of San Francisco, by referring the young patient to a California public health clinic where he receives free treatment with no questions asked and no consent needed. Letter from Captain Thomas A. Knapp, Armed Forces Institute of Pathology, Legal Medicine Section, to the author, 3 Dec. 1968.

[14] The child was eventually treated by a psychiatrist. Interview with Major Allen D. Adams, Judge Advocate, U.S. Army Medical Research and Development Command, in Washington, D.C., 21 Jan. 1969. See O'Hearn, *Liability for Unsuccessful Birth Control* in LAW AND MEDICINE 31.

Does he have the right to do so? What is the line-of-duty determination if such an operation renders the soldier unfit for further military duty? Does state legislation regarding tissue and organ transplants apply in the military hospital?

(6) The surgeon requests legal advice regarding the procedures to be followed in the release of illegitimate newborn infants to third parties.

(7) The surgeon requests legal advice regarding a soldier who was injured off duty by the negligence of a civilian and who desires to secure civilian medical care instead of using military physicians. Does the soldier have a right to do this? Can the United States or the military doctors personally incur liability by denying leave for such a purpose and treating the soldier without his consent?

Even though the foregoing specific questions may never be presented to the judge advocate he should be aware that his fellow staff officer, the surgeon, has a specific legal danger, with which no other branch of the Army is much concerned. That danger is suggested in the questions above and is not peculiar to the military physician, but is of concern to civilian doctors also—claims and litigation based on alleged professional negligence—the malpractice suit.

II. THE BASIC CONCERN: TARGET DEFENDANTS

A glance at the *Index to Legal Periodicals* reveals that hundreds of articles have been written on the various aspects of malpractice. There is no dearth of material in the physician's professional literature, either.[15] Some of these articles deal specifically with the practice of medicine in the military and many point out that the law has had a special concern with physicians since the Code of Hammurabi (c. 2250 BC).[16] The subject is not only intellectually interesting as science advances and the law changes, but is a social problem, not only in number of cases, but also in the amounts of money involved in the cases and the seriousness of the results. As will be seen in an analysis of cases arising from fed-

[15] *See, e.g.*, Curran, *Hospital Law*, 42 J. AM. HOSP. ASSN. 79 (1968).

[16] *E.g.*, D. Marchus, *Medical Malpractice, Hospital Negligence and the Armed Services*, 1957 (unpublished thesis in The Judge Advocate General's School) traces the concept from this earliest of recorded laws through Persia in 550 B.C., Rome in 25 B.C., the Visogothic Code around 650 A.D., the 10th Century Welsh Venedotian Code, the Penal Code of China around 1600 A.D., and the development of the Common Law from 1422 in England. *Id.* at 8–16. Marchus notes that the extreme criminal sanctions of the early law have been, in effect, superseded by civil liability in tort. *Id.* at 16.

eral hospitals, the doctor does not always bury his mistakes—like the lawyer's mistakes they may live on to plague him.

Though the physician has always been concerned personally with malpractice actions in one form or another, the United States did not grant permission for any plaintiff to sue the Government for malpractice by a federally employed doctor until the passage of the Federal Tort Claims Act on 2 August 1946.[17]

> FTCA was the culmination of a long effort to mitigate unjust consequences of the Government's immunity from suit. Even though Congress had been reluctant to infringe on the doctrine of sovereign immunity, it had for years recognized the existence of a moral obligation to pay the claims of those injured by wrongful acts of Government employees through the vehicle of private relief legislation.[18]

On 18 July 1966, Congress revised the FTCA as to claims accruing on or after 18 January 1967 and provided that a prospective plaintiff, no matter what the size of the claim, must file administratively with the appropriate federal agency for consideration before filing suit.[19] Prior to this amendment the United States district courts had exclusive jurisdiction over all claims under the FTCA exceeding $2,500. The amendment, as implemented,[20] means that the judge advocate will be increasingly in the business of receiving, investigating and attempting to settle claims against the United States which allege negligence on the part of military physicians.

It is interesting to note that when Congress considered removing the bar of sovereign immunity from plaintiff's actions against the Federal Government sounding in tort, actions based on alleged malpractice were expressly excluded in bills introduced in the 72d, 73d, and 74th Congress. The 68th through the 74th Congress considered 16 bills and 5 of them contained express exceptions as to malpractice suits. Such exceptions were not mentioned in bills considered by the 76th through the 79th Congress, and the FTCA as enacted contains no such exception.[21]

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[17] 60 Stat. 842 (1946), *as amended,* 28 U.S.C. §§ 2671–80 (1964), *as amended* (Supp. IV, 1969) [hereinafter cited as FTCA].

[18] U.S. DEP'T OF ARMY, PAMPHLET NO. 27–162, CLAIMS 31 (1968) (footnote omitted).

[19] 28 U.S.C. § 2675 (Supp. IV, 1969), *amending* 28 U.S.C. § 2675 (1964).

[20] Army Reg. No. 27–22 (18 Jan. 1967). This regulation contains the Attorney General's Regulation (28 C.F.R. § 14.1–.11 (1969)), and applies to claims arising on and after 18 Jan. 1967. Administrative processing of claims which accrued prior to 18 Jan. 1967 is governed by Army Reg. No. 27–22 (20 May 1966).

[21] Gottlieb & Young, *Medical Malpractice and Limitations Under the Federal Tort Claims Act,* 13 DEFENSE L. J. 257, 258 (1964).

"Malpractice" is defined in *Black's Law Dictionary* as:

> As applied to physicians and surgeons, this term means, generally, professional misconduct towards a patient which is considered reprehensible either because immoral in itself or because contrary to law or expressly forbidden by law.
>
> In a more specific sense, it means bad, wrong, or injudicious treatment of a patient, professionally and in respect to the particular disease or injury, resulting in injury, unnecessary suffering, or death to the patient, and proceeding from ignorance, carelessness, want of proper professional skill, disregard of established rules or principles, neglect, or a malicious or criminal intent.[22]

Put more simply, the question in a malpractice case is always: "Did the physician have a legal duty toward the patient; did he act as a reasonably prudent medical practitioner in the same or a similar locality would have acted under the circumstances; did he use his best judgment; and if not, was his negligence the proximate cause of the patient's injury or death?" Some specific examples will be furnished later, but it is most important for the judge advocate to realize that the surgeon stands in a unique position among staff officers. As he deals "with the very life of human beings and because, in effect, that life depends on the training, judgment and ability of the practitioner, the law has become more and more impatient with carelessness and indifference."[23] The military physician, like his civilian counterpart, is generally a "target defendant" in the United States because of his profession and financial posture. More than any other staff officer he is in a position to subject the United States to suit under the FTCA and it is strongly assumed by many that he may be personally liable for his negligent acts. Unlike his civilian counterpart, the military physician cannot choose his patients.

> The private physician is under no legal obligation to accept as patients all who apply to him for treatment. It is generally recognized that the physician-patient relationship is a consensual one, in the nature of a negotiated agreement between two parties having an interest in the same subject matter. The patient seeking medical treatment technically "offers" to engage the services of the physician, and the latter technically "accepts" the engagement, creating the consensual arrangement (or contract) mentioned above.[24]

The military physician must often practice in overcrowded condi-

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[22] BLACK'S LAW DICTIONARY 1111 (rev. 4th ed. 1968) (citations omitted).

[23] Marchus, *supra* note 16, at 137.

[24] E. BERNZWEIG, LEGAL ASPECTS OF PHS MEDICAL CARE 19 (Public Health Service Pub. No. 1468, 1966, (footnote omitted). *Accord*, Marchus, *supra* note 16, at 43–44, and authorities cited.

tions and, often overworked, he must treat all who qualify under law or regulation to receive his services.[25] Furthermore, the surgeon is called upon at times to treat certain patients who not only have not consented to treatment, but who may be actually hostile toward it and him.[26] Under these conditions malpractice suits against the United States under the FTCA based on the doctrine of *respondeat superior* and against military physicians in their personal capacity would seem inevitable. It is for this reason that hospital judge advocates agree, almost unanimously, that the main legal concern of the surgeon is malpractice.

The first malpractice suit arose in the United States in 1794, but the legal actions in the area were insignificant until 1930–1940.[27] In 1955 it was reported that some 5,000 cases were being tried per year and thousands of others settled out of court.[28] In 1960 it was reported that 6,000 doctors had been sued in the past year, that jury awards in malpractice suits had nearly trebled since 1950 and that lawyers' fees, court costs, damages and out-of-court settlements in 1959 totaled an estimated $50,000,000. It was also reported that one in every seven physicians in the United States had been sued for malpractice and that almost 95 per cent carried professional liability insurance.[29]

The impact of malpractice litigation has been felt by the United States Government. On 30 June 1958, there were 71 cases pending against the Federal Government alleging medical negligence with a total of $13,824,811.77 claimed. Five years later there were 147 cases pending with a total of $46,556,689.00 claimed.[30] The Navy alone reported 49 suits under the FTCA between 1959 and 1965 in which the plaintiff alleged malpractice by naval medical personnel or in naval facilities.[31]

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[25] Section 107 of the Dependents Medical and Dental Care Act of 1956, 10 U.S.C. § 1076(a) (1964), provides: "A dependent of a member of a uniformed service who is on active duty for a period of more than 30 days, or of such a member who died while on that duty, *is entitled*, upon request, *to* the *medical and dental care* prescribed by section 1077 of this title *in facilities of the uniformed services*, subject to the availability of space and facilities and the capabilities of the medical and dental staff." (Emphasis added.) *Cf.* Army Reg. No. 40-3, para. 3 (Mar. 1962).

[26] *See, e.g.,* Army Reg. No. 600-20, para. 48c(2) (Change No. 4, 30 Jun. 1969), which re-affirms the Army's 50-year-old policy of mandatory immunization for soldiers.

[27] Maloney, *The Military Physician and Medical Malpractice: Some Modern Trends*, 9 AF JAG L REV., Nov.-Dec. 1967, at 20.

[28] NEWSWEEK, 11 Jul. 1955, at 72.

[29] TIME, 28 Nov. 1960, at 69.

[30] Gottleib & Young, *supra* note 21, at 259.

[31] O'Neill, *Some Comments on Medical Negligence*, 19 JAG J., Mar.-Apr. 1965, at 103, 107.

At the time of this writing the Justice Department is defending 36 cases in which the plaintiff is alleging malpractice in federal hospitals.[32] In one of these cases the doctor is named personally as defendant.[33] These figures, however, may be misleading as the full effect of the amendment to the FTCA regarding claims accruing on or after 18 January 1967 is not known at this time.[34]

> The judge advocate in the office of the Surgeon General, Department of the Army, is involved on the average in the defense of one malpractice case per month. Many of these cases are settled out of court, but of those where the Government feels it really has a defensible case we have been able to get dismissals in better than 85% of the cases and in the remaining 15% the judgments are often considerably lower than the plaintiff had hoped to get on settlement.[35]

No court case brought against an Army physician in his personal capacity has ever been won by the plaintiff, but several cases have been settled against individual physicians who had malpractice insurance. Though it may have been possible to win the cases in court, the insurance companies preferred to settle and the United States could not insist on trial without forfeiture of the military doctor's insurability.[36]

The types of medical negligence for which liabil[illegible] has been imposed are:

1. Failure to utilize X-ray studies, blood tests, biopsy or other indicated tests in making a diagnosis;
2. Failure to use an indicated prophylactic measure, such as tetanus antitoxin;
3. Failure to match blood properly;
4. Failure to give proper instructions when prescribing drugs;

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[32] Interview with Thomas L. Young, Head, Medical Malpractice Litigation Unit, Torts Section, Civil Division, United States Dep't of Justice, Washington, D.C., 24 Jan. 1969. For a table comparing the results of malpractice claims against the federal government, 1964–1969, see appendix A.

[33] See 28 U.S.C. § 1442a (1964), regarding removal of actions from state to United States district courts when the defendant is "a member of the armed forces of the United States" and the incident for which he is being sued was "an act done under color of his office or status, or in respect to which he claims any right, title or authority under a law of the United States respecting the armed forces thereof, or under the law of war. . . ." See also Army Reg. No. 27-40, para. 9 (25 May 1967), regarding defense by the Department of Justice of suits brought against military personnel and Department of the Army civilian employees as a result of the performance of their official duties.

[34] See appendix B.

[35] Letter from LTC William C. Vinet, Jr., Judge Advocate, Office of The Surgeon General, U.S. Dep't of Army, to the author, 30 Oct. 1968, Incl. 1.

[36] *Id.*

5. Failure to sterilize surgical instruments;
6. Failure to test for hypersensitivity to a drug;
7. Failure to keep medical equipment in working order;
8. Failure to have cardiac-arrest resuscitative equipment available during major surgery;
9. Failure to remove foreign objects from the patient's body during surgery;
10. Failure to give continued care (*i.e.*, abandonment of the patient);
11. Failure to warn the patient of the risks of hazardous therapy or surgical procedures, or to obtain his informed consent thereto;
12. Failure to keep complete and accurate medical records;
13. Failure to supervise mental patients properly;
14. Failure to record negative findings (*e.g.*, normal pulse, respiration and blood pressure);
15. Failure to take a complete medical history.[57]

Though not founded on negligence, actions in tort may also be brought against medical personnel by disgruntled patients for assault and battery (*e.g.*, surgery without informed consent), false imprisonment (*e.g.*, detention of a patient with a suspected psychiatric disorder without a court order or consent of the individual or a person authorized to act for him) and libel or slander (*e.g.*, improper release of information to unauthorized persons that the patient has venereal disease).

It is emphasized that a mere failure to cure or bring about the desired result of treatment will not bring about liability on the part of the military physician or the United States. The law is cognizant of the fact that medicine is not an exact science notwithstanding rising expectations in recent years. Nor will negligence be presumed even in the fact of injury or some untoward result; it must be proved by a preponderance of the evidence,[58] and the plaintiff carries the burden of proof (though he may shift the burden of going forward with the evidence to the de-

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[57] Bernzweig, *supra* note 24, at 26.

[58] Maloney, *supra* note 27, at 21, points out that some of the early cases almost required the plaintiff to prove his case "beyond a reasonable doubt" and cites a 1934 Florida decision which seemed to equate malpractice with "gross carelessness or criminal neglect," requiring "moral certainty as to cause" rather than a "preponderance of the evidence." Some writers still cite "clear and convincing evidence" as the standard (*e.g.*, Bernzweig, *supra* note 24, at 27 n. 87), but "preponderance" is the standard in most jurisdictions.

fendant in some cases by use of the doctrines of *res ipsa loquitur* or "common knowledge").[39]

It must also be noted that there are factors at work in the Army hospital which make suits for malpractice more likely than in a civilian hospital. Most individuals do not care for hospitals. The patient is ill and the institution seems impersonal and unsympathetic. Furthermore, his dignity and sense of pride are affected; in many cases the patient is completely dependent upon complete strangers for the care of his most basic needs. Not only must nurses assuage his pain with syringes, not only must he be fed, bathed and assisted in the eliminative processes by orderlies and strange devices, but he is not being treated by his family doctor: He has been referred to a busy specialist or a team of specialists.

> It may be stated almost axiomatically that *the less personal the relationship between the patient and his physician, the more likely the patient is to think in terms of suing for damages when he is dissatisfied with the results of treatment.*[40]

Furthermore, many patients in Army hospitals are in no way happy with the Army and may be belligerent toward Army officers.

III. LEGAL ADVICE: A DIVISION OF OPINION

When the Army lawyer becomes aware of the rise in malpractice litigation and is cognizant of the Army doctor's particular problems, what sort of legal advice should be forthcoming? Is "(1) practice better medicine and (2) carry liability insurance" [41] adequate? Should we admit that we attorneys do not know the technicalities of how to avoid malpractice and can only offer meaningful advice after an allegation of negligence is made? Do we fulfill our professional responsibility by telling the surgeon that if he suspects something is amiss he should first "render . . . immediate medical treatment . . . to alleviate the damages, and secondly, [conduct a] prompt and straightforward investigation of the injuries. . . .? [42]

[39] See Levin, *Malpractice and the Federal Tort Claims Act*, 1963 INS. L.J. 469 n. 88, for a discussion of the difference between the doctrines as applied in malpractice cases.

[40] Bernzweig, *supra* note 24, at 36 (footnote omitted).

[41] J. Pemberton, Malpractice in Federal Government Medical Facilities—Problems Under the Federal Tort Claims Act 22, 1966 (unpublished lecture in Walter Reed Army Medical Center).

[42] O'Neill, *supra* note 31, at 109.

This information is not necessarily bad, but it should be noted immediately that there is a sharp division of legal opinion on the necessity or desirability of medical professional liability insurance for physicians employed by the United States. One author states that if a judgment in a malpractice suit is "rendered against the individual, there is no appropriation available for its payment, and the individual will be held personally responsible." [43] Another states that the military physician is in "a position of financial danger to himself.[44] Still another states:

> The liability of an agent for his own negligence has long been embedded in the law, and this principle applies even to certain acts of public officers. In consequence of this rule, it has been held that employees of the Federal Government . . . may be held personally liable for their own torts to third persons even though committed in the course of their Government employment. In this regard, acts of medical negligence are no exception to the rule, and the fact that the physician or dentist is authorized to practice medicine for the government, either with or without compliance with State medical licensure requirements, affords no cloak of immunity.[45]

On the other hand one judge advocate in the Office of the Surgeon General, Department of the Army, has stated:

> It is the view of the writer, not generally accepted, that a military physician or dentist, acting pursuant to applicable statutes, regulations or directives, who treats a patient legally authorized to receive medical or dental care, may not be held individually liable by the patient for damages arising out of alleged malpractice.[46]

Perhaps it is a minority viewpoint but the Dean of the Law School at the University of Florida, in the most recent and comprehensive article dealing with the subject, concurred and concluded that the military physician "has little to fear from malpractice litigation, other than the possible inconvenience of being required to testify and perhaps defend his conduct before his colleagues. He occupies a very favored position. . . ." [47]

Considering this divergence of views, the staff judge advocate may be pardoned for his cautiousness in reply to the surgeon's inquiry regarding medical liability insurance. To begin with, many judge advocates may be mistaken if they assume that most military physicians are insured. One hospital judge advocate ex-

[43] Marchus, *supra* note 16, at 130.
[44] F. Dorsey, *The Serviceman and the Federal Tort Claims Act—The "Incident to Service" Rule* 100, 1963 (unpublished thesis in The Judge Advocate General's School).
[45] Bernzweig, *supra* note 24, at 10 (footnotes omitted).
[46] Levin, *supra* note 39, at 454 n. 1.
[47] Maloney, *supra* note 27, at 39.

pressed in the opinion recently that "[m]ost military doctors, like their civilian counterparts, carry malpractice insurance with high limits." [48] If this is so, it represents a trend away from the past. An informal survey of 192 medical officers at Walter Reed General Hospital in 1961 indicated that only 44 carried insurance.[49] A more formal survey conducted by the Office of the Surgeon General, Department of the Army, completed in 1961, received responses from 1,017 medical and dental officers: 172 carried malpractice insurance, 66 formerly carried but did not then carry insurance and 779 officers did not then carry and had never carried insurance.[50] Those who did not carry insurance cited the following reasons: (a) premiums were financially burdensome, and they were gambling that they would not need insurance; (b) they were involved in duties which did not involve patient care; (c) they were in residency training; or (d) as a practical matter, the Government would reimburse them in proper case.[51] The amounts of insurance coverage were listed from $2,500.00 to $200,000.00/$600,000.00, and at that time premiums varied from $15.00 to $170.00 per year. The amount of the premium was said to vary with the amount of coverage, the state in which the doctor practiced, and whether the insurance was issued as part of group insurance sponsored by a medical association or was an individual policy issued directly by a commercial insurance company. Over ten years ago it was noted by one writer that:

> There are relatively few insurance companies that will write malpractice or medical professional liability insurance and the rate is substantially higher for a doctor who desires surgical, X-ray, or shock treatment coverage than for the general practitioner. These distinctions apply equally to military doctors, but rates are generally lower for them than for civilian doctors. Presumably the main

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[48] Letter from Colonel E. M. Schmidt, Judge Advocate, Fitzsimons General Hospital, to the author, 1968.

[49] Legal Tips for Newly Assigned Personnel, Graduate Education Office, Walter Reed General Hospital (1961). The same document indicates that records of the Surgeon General's Office dating back to 1947 reflected only one suit against an Army physician, who settled out of court against the advice of U.S. attorneys.

[50] Disposition Form, Comment No. 2, to The Judge Advocate General (Army), from The Surgeon General (Army), 7 Feb. 1961, subject: Draft Bill to Amend Title 28 of U.S.C. to provide for defense of suits against Federal Employees, etc.

[51] It is supposed that the doctors had private relief legislation in mind. If that is so, the proper case has never arisen. The author was informed in an interview with LTC Marshall E. Bailey, Chief, Legislative Relief Division, Office of The Judge Advocate General, Dep't of Army, in Washington, D.C., 21 Jan. 1969, that no relief bill has been passed by Congress for an Army doctor who had a judgment rendered against him personally for malpractice.

> reason for this is the knowledge that Government lawyers will defend suits brought under the Federal Tort Claims Act.[52]

In 1967, premium rates for medical malpractice insurance reached such heights in Alaska that the Governor launched an official inquiry into the matter, citing one instance where the annual rate rose from $977.00 to $6,800.00 with a reduced limitation on coverage.[53] The increase in already-high medical fees, and the danger that doctors might be deterred from practicing in the State, was seen by the Governor as contrary to the public interest. He intimated that Alaska might setup a state-directed plan to enable physicians to keep professional liability insurance at a reasonable level.

In December 1968 and January 1969 the Office of the Surgeon General, Department of the Army, received several requests for advice from military physicians in the field whose insurance carriers refused to extend malpractice policies. This apparently had nothing to do with their status as officers in the United States Army. One company which issued policies for the American College of Surgeons stated that due to the frequency of suits and the amounts of verdicts being rendered by juries nowadays the underwriter no longer found it good business to insure doctors against professional liability. This company indicated that by underwriting with Lloyds of London it would be possible to extend some policies, but that even Lloyds refused to underwrite for physicians practicing in the State of California.[54]

In connection with the quotation above (*supra* note 52) it should be noted that government lawyers will defend suits for malpractice brought not only under the FTCA, but those suits brought against the military physician himself, if he was acting within the scope of his employment when the alleged tort took place. Nevertheless, "Representation may . . . be declined where the military personnel or civilian employee is adequately pro-

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[52] Coward, *Malpractice and the Service Doctor*, 9 U.S. ARMED FORCES MED. J. 232–40 (Feb. 1958), reprinted 45 U.S. NAVY MED. NEWS LETTER, 26 Feb. 1965, at 1.

[53] Schering Corp., 9 LEGAL BRIEF 1, Mar. 1967.

[54] Interviews with LTC William C. Vinet, Jr., Judge Advocate, Office of The Surgeon General, U.S. Dep't of Army, and Major Allen D. Adams, Judge Advocate, U.S. Army Medical Research and Development Command, U.S. Dep't of Army, in Washington, D.C., 21 Jan. 1969. In California adequate insurance coverage may cost over $3,000.00 per year. Interview with Dr. Jerry W. Bains, Assistant Professor, Surgery Dep't, University of Virginia Medical Center, in Charlottesville, Virginia, 10 Mar. 1969.

tected by his own liability insurance and potential liability of the United States not to be involved."[55]

It is extremely difficult to determine exactly how many Army medical practitioners are involved in individual malpractice litigation. Of the 1017 officers who participated in the 1961 survey, 13 were involved in suits in which they were named defendant, and two feared involvement in suits naming "John Does." Two suits were settled out of court by insurance companies, three did not go to trial, one was dismissed, malpractice could not be established as to four defendants, three cases were not specified and the cases involving "John Does" were pending when the survey was completed. These figures may be misleading. Physicians, civilian or military, are extremely reticent on the subject of malpractice. They are aware that the mass communications media have made the general public not only quite knowledgeable in the field of medicine but most informed in the field of medical mistakes also.

> There is little doubt that physicians have an overwhelming fear of malpractice suits, not so much from the potential pecuniary loss which may result, but from the injury to community reputation resulting from a mere allegation of negligence. Fearing the adverse publicity of a lawsuit, many physicians have urged their insurance carriers to settle otherwise unjustifiable claims, and when word of such settlements has spread, other potential litigants have been encouraged to press similar claims.[56]

The military physician's reputation gained from one instance of malpractice may live for years and follow him around the world. It may well be permanently recorded on his "efficiency report." Not knowing how a malpractice case may affect his career in the way of assignment and promotion opportunities, the officer-doctor who is insured may request his carrier to settle out of court, and if that is impossible he may not request removal from state to federal court or assistance from the Office of the Surgeon General or the Department of Justice. If the case is litigated the fact that he is an employee of the United States may never appear. This may be an explanation as to why it is difficult to find cases which have been reported where the military physician is named personally as the defendant. Another reason, of course, is that most potential claimants know that the United States, as employer, has deeper pockets than the doctor no matter what the limits on his insurance policy.

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[55] Army Reg. No. 27-40, para. 9*b* (25 May 1967).

[56] Bernzweig, *supra* note 24, at 87 (footnote omitted).

> Although the Federal Tort Claims Act provides for the liability of the Government for the negligence of its employees acting within the scope of their employment, the injured party has retained his right of action against the employee. In addition, active members of the armed forces are barred from recovery from the Government under this act. Hence the need for malpractice insurance for medical officers while in service is not obviated.[57]

Would this be good advice if passed to the surgeon from the staff judge advocate today? The following discussion of cases which have been litigated and reported would seem to indicate that it is much too simple. With few exceptions these cases all involve government medical personnel and should give the judge advocate who is unfamiliar with the area some idea of the types of claims which are litigated as well as the standards which the courts apply.

IV. THE INJURED SERVICEMAN

A. THE UNITED STATES AS DEFENDANT

Most judge advocates, when considering the sericeman as a plaintiff under the FTCA, are well aware of the famous "incident-to-service" rule first hinted at by the Supreme Court scarcely three years after the Act was made law. In *Brooks* v. *United States*, it was held that the Brooks brothers, members of the United States Armed Forces, could recover for injuries sustained when their automobile was struck at a highway intersection by an Army truck.[58] It was observed that any amount payable under servicemen's benefit laws in consequence of personal injury or death should be deducted or taken into consideration in fixing recovery, but the Court noted that "[t]he statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen'." [59] The Court further stated:

> The Government envisages dire consequences. . . . A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their

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[57] Medico Legal Guide, Ireland Army Hospital, Fort Knox, Kentucky, prepared by the Staff Judge Advocate, U.S. Army Armor Center, circa 1962, *quoted in* letter from Major Frederick E. Moss, Legal Counsel, Armed Forces Institute of Pathology, to the writer, 28 Jan. 1969.

[58] 337 U.S. 49 (1949).

[59] *Id.* at 51.

> service except in the sense that all human events depend on what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it. . . .[60]

The next year the Supreme Court did express an opinion in the landmark case of *Feres v. United States*.[61] It was this decision that has led some to state that the Court has added a specific exception to the FTCA.[62] The decision dealt with three cases and resolved a conflict which had arisen between the circuit courts.[63] Two of the cases alleged malpractice on the part of Army physicians. *Griggs v. United States* involved the allegedly wrongful death of an Army officer on active duty from medical malpractice in a military hospital. *Jefferson v. United States* was a classic example of what is known as a "sponge case," but did not involve a sponge. A soldier had been operated on by an Army doctor at Fort Belvoir, Virginia. Eight months later (after his discharge from the Army) during another operation, a towel 30 inches long and 18 inches wide, marked "Medical Department, U.S. Army," was removed from his stomch.

The Supreme Court announced in deciding these cases that the FTCA did not extend a remedy to members of the United States armed forces who sustained, "incident to their service," what otherwise would be an actionable wrong. The primary purpose of the FTCA was seen to be an extension of a remedy to those who had

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[60] *Id.* at 52.

[61] 340 U.S. 135 (1950).

[62] Note, *Military Personnel and Military Medical Negligence*, 49 MARQ. L. REV. 610 (1966). The author states the rule of the case as: the FTCA provides for jurisdiction over any claim founded on negligence brought against the United States "other than that of a serviceman who is acting 'in-line-of-duty.'" *Id.* at 611. Judge advocates would do well to keep the distinctions between "in-line-of-duty," "acting within the scope of employment," and "incident-to-service" in mind when examining cases in this area. The Brooks brothers were on authorized leave "in-line-of-duty" when injured and were entitled to certain administrative remedies which the court recognized. The *Brooks* case was not overruled by the *Feres* decision. "Scope-of-employment" is a standard which is applied to the alleged tortfeasor in order to ascertain the liability of the United States under the master-servant standards of the FTCA. While the "incident-to-service" standard is applied to the injured serviceman in order to ascertain whether he is a proper party claimant under the FTCA, it most certainly is not the same as the "line-of-duty" standard which is applied to the injured serviceman to determine whether he is a proper claimant for administrative benefits such as treatment in a Veterans' Administration (hereafter referred to as VA) hospital.

[63] *See* Feres v. United States, 117 F.2d 535 (2d Cir. 1949) (recovery denied); Griggs v. United States, 178 F.2d 1 (10th Cir. 1949) (recovery allowed); Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949) (recovery denied).

been without in the past and if the Act incidentally benefited those who had a remedy already this was thought to be unintentional. The FTCA was to be construed insofar as language would permit to fit into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole. The Court pointed out that "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authoirity." [64] They noted further:

> One obvious shortcoming in these claims is that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence against either his superior officers or the government he is serving.[65]

There have been, needless to say, numerous decisions since the *Feres* case which have attempted to define the phrase "incident-to-service." In the field of malpractice it would seem that once a serviceman is admitted to a military hospital it is impossible to conceive of medical treatment which could be anything other than "incident-to-service." [66] It has been argued by at least one writer, however, that the Supreme Court narrowed the "incident-to-service" rule in a subsequent case to "in the course of military duty," and that a serviceman should not be precluded from suing for malpractice under the FTCA because at the time he receives medical treatment he is not performing a military duty and his claim does not arise from or in the course of military duty.[67]

In the case of *Buer v. United States* [68] a serviceman placed a claim against the United States based on alleged malpractice by an Army surgeon who had operated in an Army post hospital after an injury was sustained in an automobile accident while the plaintiff was on leave. *The court held the tort was not actionable* under the FTCA, as the serviceman was injured incident to his service, and noted that an Army regulation provided that the sta-

[64] Feres v. United States, 340 U.S. 135, 143 (1950).

[65] *Id.* at 141.

[66] Rakestraw, *Malpractice and the Military Doctor*, AF JAG BULL., Nov.-Dec. 1961, p. 3.

[67] Dorsey, *supra* note 44, at 100. The case referred to is United States v. Brown, 348 U.S. 110 (1954), discussed in text accompanying note 115, *infra*.

tus of the plaintiff changed from "leave" to "sick in hospital" when he was admitted.[69]

Plaintiff alleged negligence in diagnosis and that the United States had employed incompetent physicians (*i.e.*, failed to make a proper inspection of their qualifications) in *Norris* v. *United States*.[70] The Court refused to allow recovery under the FTCA. It held that the serviceman had lost his life "incident-to-service" when he complained of illness to his commanding officer but was believed to be malingering and was refused admission to the station hospital. The symptoms had persisted and he had utimately been admitted, but he died.

In *Kilduff v. United States*,[71] an ex-serviceman who had been discharged in 1946 commenced a suit in December 1958 alleging injury because the Government had failed to disclose the results of his physical examinations. The Court held the action was barred by the FTCA's two-year statute of limitations and pointed out that the claim accrued for purposes of the statute of limitations from the tort itself, *i.e.*, from wrongful conduct plus injury, and not from the time damage was suffered.

The Court went on to say that in actions under the FTCA the law of the state where the injury was alleged to have taken place governs the determination with respect to the time the tort claim came into existence for statute of limitations purposes.[72] Even if fraud were involved, which would normally operate to suspend the running of the statute of limitations, the Act specifically says the United States is immune from suits for deceit.

Finally, even if the plaintiff could overcome these hurdles, he would be barred by the "incident-to-service" rule. The last examination was given immediately before the discharge. The Government was not accused of causing or re-activating the tuberculosis, but of not telling the serviceman that he had a lung infection.

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[68] 241 F.2d 3 (7th Cir.), *cert. denied*, 353 U.S. 974 (1956).

[69] *Accord*, United States v. Tumenas, S.D. Fla. (1962), as digested in O'Neill *supra* note 31, at 105. In that case a sailor became ill on leave and reported to a Navy hospital. He was given medication and placed in bed but died a few days later of pulmonary embolus. The widow was barred from recovery because the sailor's leave stopped when he was admitted to the hospital and the treatment was seen as incident to his service.

[70] 137 F. Supp. 11 (E.D. N.Y. 1955), *aff'd*, 229 F.2d 439 (2d Cir. 1956). *Compare* Van Sickel v. United States, 179 F. Supp. 791 (S.D. Cal. 1959), *aff'd*, 285 F.2d 87 (9th Cir. 1960), *with* Hirons v. Director. 351 F.2d 613 (4th Cir. 1965), *and* Ellis v. Parker, 257 F. Supp. 207 (M.D. Pa. 1966).

[71] 248 F. Supp. 310 (E.D. Va. 1960).

[72] *Cf.* Quinton v. United States, 203 F. Supp. 332 (N.D. Tex. 1961), *rev'd*, 304 F.2d 234 (5th Cir. 1962), discussed in text at note 100, *infra*.

This may have permitted a revival of the disease, but as suppression of the report was the only alleged tort, and as the duty to disclose was seen as arising during a reasonable interval after the examination (no repetitive or uninterrupted wrong could be seen), the plaintiff was not so far removed from the service as to give him the right to sue as an ex-serviceman, notwithstanding the fact that the nonfeasance on the part of the defendant did not occur until after the discharge.

If the *Kilduff* case demonstrates how the incident-to-service rule may be applied when the alleged tort takes place after discharge, *Healy v. United States*[73] is a striking example of how it may be invoked when the alleged tort is committed prior to active duty. The complaint asserted that Air Force physicians had negligently certified the plaintiff as physically fit for duty, when in fact he had a disqualifying heart condition which was aggravated during his basic training.

The court dismissed the cause of action for failure to state a claim on which relief could be granted. It held that the FTCA did not cover wrongs which, although not sustained in the course of active military duty, are incident to such duty, particularly those arising from life on a military installation. The plaintiff pointed out that one of the main reasons for the rule in the *Feres* case was the availability of administrative remedies, whereas he was not entitled to these remedies because his condition existed prior to the time he entered the service. The court thought, however, that the main reason for the incident-to-service rule was the government-soldier relationship and suggested that the plaintiff attempt to obtain special legislative relief. This, of course, was one thing Congress was trying to avoid when they passed the FTCA.

In *Weiserbs v. United States*,[74] the court held that a complaint accusing the United States Navy, in which the plaintiff had served four and one-half years, of negligent failure to diagnose a serious heart ailment and to give the plaintiff proper treatment, was demurrable under the FTCA. The court further stated that it had no jurisdiction if the claim was brought under the Tucker Act[75] for medical expenses incurred by the plaintiff, who alleged that he had a contract with the Navy under which they had agreed to furnish him medical care. The *Feres* rule, rather than the holding in the *Brooks* case, was seen as binding even though the plaintiff underwent an operation while in a leave status.

[73] 192 F. Supp. 325 (S.D. N.Y.), *aff'd*, 295 F.2d 958 (2d Cir. 1961).
[74] Weiserbs v. United States, 199 F. Supp. 329 (E.D. N.Y. 1961).
[75] 28 U.S.C. § 1491 (1964).

A flying officer alleged that his commanding officer and medical personnel in the base hospital undertook to examine, treat and confine him in the hospital for the purpose of bringing about his retirement for medical disability and that he had sustained injury at their hands.[76] The court held the complaint fatally defective for two reasons. The plaintiff was barred by the "incident-to-service" rule; furthermore, the case sounded in defamation, assault, battery, false imprisonment, misrepresentation, deceit and interference with contract, all of which are exceptions to the right to bring an action under the provisions of the FTCA.

In a 1963 case, a Naval reservist was put on active duty status for the purpose of a physical examination.[77] This status was apparently expected to last less than 24 hours. During the examination, a corpsman punctured the reservist's eardrum. The court held that recovery was barred by the "incident-to-service" rule; that administrative benefits were available; and that the relationship between a serviceman and his superiors is special and different from civilian life. There was no discussion of the relative grade and rank of the corpsman or the plaintiff. Though the plaintiff argued that his active duty was of the "most ephemeral type possible," the court stated that "the decision in the *Feres* case is not predicated upon the length of time an individual has been or will be on active duty, but rather upon his military status at the time of his injury." [78]

The natural reaction of one reading these cases is to ask, "If the injured serviceman cannot sue the United States because malpractice is always incident to service, why does he not sue the doctor?" Until 1962, no case directly on point could be found to supply the answer.[79]

B. *THE DOCTOR AS DEFENDANT*

The flying officer mentioned above apparently had enough foresight to suspect that his action against the United States would be barred by the *Feres* doctrine. He sued the Air Force medical officer and a contract psychiatrist personally in the state courts. The action was removed to the United States district court, which found that the defendants acted under the provisions of Air Force regulations and within the course and scope of their authorities

[76] Gamage v. United States, 217 F. Supp. 381 (N.D. Cal. 1962).
[77] Knoch v. United States, 316 F.2d 532 (9th Cir. 1963).
[78] *Id.* at 534.
[79] *Cf.* Rakestraw, *supra* note 66, at 9; Marchus, *supra* note 16, at 124.

and duties, and accordingly held the removal proper.[50] The court stated that scope of employment was a question to be decided by federal standards, and that if "scope" were found, it would make no difference whether the defendants were guilty of mistaken, erroneous or even tortious conduct—they would be held immune from actions for damages. In sweeping language the court went on to say that wrongs committed by negligent or dishonest officials of the United States were more properly the subject of government sanction and not personal redress by an injured private party. The contract psychiatrist was viewed as having the same function as the military doctor. As he was bound by Air Force regulations, he was entitled to immunity, and this could not be destroyed by proof of malice or ulterior motives. The immunity was seen as not limited to cabinet members, department heads or judges but as extending to lesser officials such as the defendants:

> That medical officers in the Armed Forces and those doctors who contract with the military should be covered by the immunity rule would appear quite apparent if the rule as presently applied by the United States Circuit Courts and the United States Supreme Court is to have a consistent application.[51]

"To allow the fear or risk of personal liability for their official acts to inhibit military doctors from performing their duty . . . would be contrary to the national interest." [52]

It is difficult to ascertain how much of *Gamage v. Peal* is dicta, but one thing is clear: the decision is not based on the status of the plaintiff at the time of the alleged tort, but upon the status of the alleged tortfeasors. If it is good law, its theory of official immunity could be extended, perhaps, to other cases in which the plaintiff is not an injured serviceman but is, for example, a dependent, suing the doctor and not naming the United States as defendant. It is an open question whether the defense would hold in, say, the "sponge case," *i.e.*, would the defense be good in a case which did not sound in libel, false imprisonment or malicious defamation? This has not been decided by the Supreme Court. The Justice Department used the defense successfully in one unreported case at trial level; but as the plaintiff intended to appeal, the physician settled out of court for $3,000.00.[53]

[50] Gamage v. Peal, 217 F. Supp. 384 (N.D. Cal. 1962).
[51] *Id.* at 390.
[52] *Id.* at 389.
[53] Interview with Thomas L. Young, Head, Medical Malpractice Litigation Unit, Torts Section, Civil Division, Dep't of Justice, in Washington, D.C., 24 Jan. 1969.

A more recent case is that of *Bailey* v. *Van Buskirk*.[54] An enlisted man sued an Army surgeon personally, alleging that the negligent leaving of sutures in the area of the kidney during an operation performed in an Army hospital necessitated a second operation and the removal of that organ. The appellate court affirmed dismissal of the action by the lower court:

> [W]hile the army medical corps performs mostly a function of service it nevertheless has a command function over all officers and enlisted men who are admitted to its facilities during the period of their admission. The operations were performed by the medical officers in line of duty. It is not yet within the American legal concept that one soldier may sue another for negligent acts performed in the line of duty. The idea is that an undisciplined army is a mob and he who is in it would weaken discipline if he can civilly litigate with others in the army over the performance of another man's army duty.[55]

The Court referred to the *Jefferson* and *Griggs* cases and noted that plaintiff was not without compensation from Congress.

In *Bailey v. De Quevedo* [56] the plaintiff attempted unsuccessfully to hold and Army physician liable under the same factual situation. It was argued that though the decision to operate might involve discretion on the part of the doctor, the operation must be performed with due care. Several cases were cited to support this proposition, but the court noted that the plaintiffs in these cases were civilians.

It is true that the court in *Bailey* v. *Van Buskirk* mentions "command function," and the realization that most Army physicians do not exercise this function has led one writer to assert that "the *Bailey* rule is specifically limited to those situations in which a command relationship may be said to exist. . . ." [57] It is submitted that this is not the case and that the reference to the "American legal concept" and to the *Griggs* case is more important to the holding than the plaintiff's status as an enlisted man and the defendant's status as an officer at the time the tort took place. It is the opinion of this writer that the *Bailey* rule would prohibit an officer from suing an enlisted man for his tortious conduct, if the negligence complained of took place within the tort-

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[54] 345 F.2d 298 (9th Cir. 1965), *cert. denied*, 383 U.S. 948 (1966).

[55] *Id.* at 298. *Accord*, Curnutt v. Holk, 230 Cal. App. 2d 580, 41 Cal. Rptr. 174 (1964) (one Air Force officer negligently shot and injured another; recovery denied).

[56] 241 F. Supp. 335 (E.D. Pa. 1965), *aff'd*, 375 F.2d 72 (3d Cir. 1967).

[57] Bernzweig, *supra* note 24, at 16. This command function is established by 10 U.S.C. §§ 3579, 5945, 8579 (1964), *as amended* (Supp. IV, 1969).

feasor's scope of employment. Be that as it may, the *Bailey* cases do not rest entirely upon the status of the defendants at the time of the alleged tort, as did *Gamage v. Peal,* but consider the status of the plaintiff equally important.

V. THE INJURED DEPENDENT—THE UNITED STATES AS DEFENDANT

We have just seen that under the current state of the law it is virtually impossible for the injured serviceman to recover in a malpractice action whether he names the United States or the doctor as defendant. What of the serviceman's dependents? Though no reported cases have been found in which an injured dependent sued a military doctor personally, there are several cases involving actions by or on behalf of dependents against the United States.

Less than two years after the passage of the FTCA, a court allowed a chief warrant officer of the Navy to recover $11,460.00 for the death of his minor child caused by the negligence of a Navy corpsman in filling a prescription for eyedrops.[58] No question was raised as to the plaintiff's right to recover for loss of earning capacity during minority, funeral expenses or loss of association.

In *Denny v. United States* [59] it was held that the failure to send an ambulance promptly to pick up an officer's wife at the time she was beginning labor, which resulted in a stillborn child, involved a discretionary function or duty, and as such was not actionable under the provisions of the FTCA. A concurring opinion stated that the duty of medical officers to attend to families of officers and enlisted men was not discretionary, but only conditioned on practicability. This may well be a distinction without a difference. However, the court's ultimate decision was based on the insufficiency of the complaint, which did not allege any injury other than the death of a child at birth, a cause not actionable under Texas law.

A master sergeant maintained an action under the FTCA for injuries (permanent paralysis from the waist down) to his wife who had been admitted to the maternity section of an Army hospital. The court held in *Costley v. United States* [60] that employees

[58] Wilscam v. United States, 76 F. Supp. 581 (D. Haw. 1948). It is interesting to note that the court took judicial notice of the decreased purchasing power of the dollar over twenty years ago.

[59] 171 F.2d 365 (5th Cir. 1948), *cert. denied,* 337 U.S. 919 (1949).

[60] 181 F.2d 723 (5th Cir. 1950). *See also* Gore v. United States, 229 F. Supp. 547 (E.D. Mich. 1964).

of the United States had been negligent in administering, as incident to the delivery of a child, a harmful substance instead of the prescribed spinal anesthetic. The Army regulations regarding admission were examined, and the court decided that the discretion on the part of the defendant was in the decision to admit and not in the treatment thereafter; once admitted, the patient was entitled to treatment with due and reasonable care, skill, diligence and ability.

A decision rendered less than a year after the *Costley* case involved much the same factual situation; but instead of defending on a discretion theory, the Government attempted to invoke the "incident-to-service" rule.[91] The court denied the motion to dismiss and stated that the *Feres* case did not govern. The sergeant was allowed to recover for expenses to care for and treat his wife as well as for deprivation of assistance and companionship. The injuries for which the plaintiff sought recovery were seen as not incident to the service the was rendering, notwithstanding the fact that his wife was entitled to care in the Army hospital by virtue of his status.

An award of $94,650.00 was obtained by a master sergeant who sued the United States as next friend of his infant daughter.[92] She was permanently disabled as a result of the negligent act of a physician in an Army hospital in injecting a concentrated solution into the child's back. The court noted that though the treatment was given in execution of a statute or regulation, the doctor had a duty to exercise due care. It rejected the Government's contention that the treatment of dependents was incident to the plaintiff's service. The Government's relationship to the serviceman's dependents was seen as not distinctively federal in character as the dependent is not serving the Government, or on duty, and can choose his or her own habitat.[93] The *Brooks* case was cited; and it was stated that if a member of the armed services who was off duty at the time the tort took place could recover, the dependents of such a member could recover. The Government attempted unsuccessfully to invoke a Kansas law to the effect that a charitable hospital could not be held liable for the negligence of

[91] Messer v. United States, 95 F. Supp. 512 (N.D. Fla. 1951).

[92] Grigalauskas v. United States, 103 F. Supp. 543 (D. Mass. 1951), *aff'd*, 195 F.2d 494 (1st Cir. 1952). *See also* Larrabee v. United States, 254 F. Supp. 613 (S.D. Cal. 1966), and Kapuschinsky v. United States, 248 F. Supp. 732, and 259 F. Supp. 1 (D. S.C. 1966).

[93] This has been criticized by Hendricks, *supra* note 62, who points out that in actuality this is not so, as the family usually lives with the serviceman in military housing.

its physicians, unless it could be shown that the management had not exercised reasonable care in their employment. The court felt that the Army hospital could not fit into the Kansas definition, as it neither derived funds from charity nor held funds in trust. The United States was seen as deriving a benefit from the operation of the hospital, in that it helped build and maintain health and morale and was a factor considered in enlistment.

In *Herring* v. *United States*,[94] plaintiff was the wife of an Army sergeant but was also a former member of the Women's Army Corps. When she alleged negligent treatment in an Army hospital the court refused to dismiss the complaint and held her to be a civilian, stating that the determining factor set up in *Feres* was the status of the plaintiff, not the source, and circumstances of the injury. Referring to the *Brooks* case, the court said:

> If an injury which a soldier received during war time, while he was home on furlough (subject to military regulations and call at any time), does not arise out of and is not incidental to military service, then certainly the same thing can be said for an injury to a civilian which occurred several years after the war was over.[95]

Although under Colorado law a municipal corporation could not be held liable for negligence in the public health area, this argument was thought to be irrelevant because the United States is liable under the provisions of the FTCA in the same way a private person would be.

Another Army sergeant's wife sued the United States for $100,000.00 in 1955, alleging paralysis following a spinal anesthetic negligently administered while she was a maternity patient in a naval hospital.[96] The trial judge concluded that the anesthetic was not contaminated by the solution in which the ampule was stored. Failure to color the solution artifically so it could be easily determined whether the anesthetic was contaminated was not the cause of the injury: the patient was hypersensitive. The paralysis had been caused by the drug, but its use was proper; and as the United States' agents complied with legal standards, the United States was not liable. It was a matter of common knowledge that mothers suffer intense pain during childbirth and the use of an anesthetic in some form is standard procedure and

[94] 98 F. Supp. 69 (D. Colo. 1951).

[95] *Id.* at 70.

[96] Hall v. United States, 136 F. Supp. 187 (W.D. La. 1955), *aff'd*, 234 F.2d 811 (5th Cir. 1956). For a different result under similar circumstances, see Rahn v. United States, 222 F. Supp. 775 (S.D. Ga. 1963).

expected by the mother. Consent was implied, notwithstanding the failure to warn plaintiff of possible after effect.

The doctor was bound to look only to natural and probable effects, and was not answerable for results arising from the patient's peculiar condition or temperament, of which the doctor had no knowledge. He could not be held responsible for circumstances beyond his knowledge and ability to anticipate and prevent and was required by law only to possess and use reasonable knowledge and ability, and the same skill his colleagues would have used. The evidence showed that the physician who administered the drug had sufficient skill and training. It was pointed out that the burden was on the patient to prove by affirmative evidence that the physician was unskilled and negligent; the doctrine of *res ipsa loquitur* was inapplicable, because the plaintiff failed to prove her injury would not have occurred in the ordinary course of events without negligence.

In *Kolesar* v. *United States*,[97] the 35-year-old wife of a 38-year-old sailor alleged that her life expectancy had been shortened to 10 years and that her condition was generally comparable to that of a paraplegic because Navy physicians negligently failed to diagnose cardiac arrest and restore circulation of blood and oxygen to her brain while she was undergoing an operation. The court noted that the paintiff would require 24-hour nursing care and medication to be administered by a doctor or registered nurse and awarded $48,503.78 for medical care. In addition the wife was awarded $5,000.00 for pain, suffering and embarrassment, and $15,000.00 for loss of mental and physical health and ability to live a normal life as a result of the injury. The serviceman was awarded $2,000.00 for loss of consortium prior to trial and $8,000.00 for future loss. The court in discussing the standard of care required of a physician noted a decision of the Supreme Court of Florida [98] concerning the "same locality rule." The Florida court stated in dicta that this rule—that a doctor must practice medicine only as good as his colleagues in the same community or locality—was originally formulated when communications were slow or non-existent and has lost much of its significance today with the increasing number and excellence of medical schools, the free interchange of scientific information and the consequent tendency to harmonize medical standards throughout the country. The district court went on to say that the decay of the same locality rule

[97] 198 F. Supp. 517 (S.D. Fla. 1961).
[98] Montgomery v. State, 84 So.2d 34 (Fla. 1955).

has particular significance in reference to a Federal hospital and a military community administered on a national basis, wherein Navy Medical officers from many medical schools, and many states, practice without being subject to local board examinations otherwise required of personnel practicing medicine in the state wherein the hospital is located. Such an institution is a community apart and cannot be said to have contributed nothing to the standards of its geographical location or unto itself."[99]

Quinton v. United States[100] seems to have become a landmark case in the determination of the question, "When did the claim accrue?" under the FTCA, despite the fact that it has been vigorously criticized.[101] It was alleged that the wrong blood type had been given to an Air Force dependent, who gave birth to a stillborn child some three years later. The trial court had dismissed the complaint, noting that state law started the running of the statute of limitations on the date of the transfusion. In reversing, the appellate court said that federal law applied as to this question and that the statute of limitations did not begin to run until the plaintiff discovered the injury, or in the exercise of reasonable diligence should have discovered it. This view is now written into the Army regulations.[102]

Another case which has come under withering attack is *Lane v. United States*,[103] a dependent's action under the provisions of the FTCA for injuries sustained in a government hospital, when a physician operated on her right knee rather than her left. The court noted that ordinarily an operation without consent is assault and battery, and the action could not be sustained if based thereon. Nonetheless it awarded plaintiff $3,500.00, and the case was not appealed. The court specifically refused to follow *Moos v. United States*[104] and stated that the legislative history of the "intentional tort" exclusions in the FTCA

suggests the belief that Congress wished to avoid exposure to claims grounded upon the impulsive and "hot headed" actions of employees, even though acting within the apparant scope of their employment, whenever such actions would ordinarily be considered "private acts."[105]

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[99] 198 F. Supp. 517, 521 (S.D. Fla. 1961).

[100] 304 F.2d 234 (5th Cir. 1962). *See also* Brown v. United States, 353 F.2d 578 (9th Cir. 1965).

[101] Gottleib and Young, *supra* note 21, 265-89.

[102] Army Reg. No. 27-22, para. 2*c* (18 Jan. 1967).

[103] 225 F. Supp. 850 (E.D. Va. 1964).

[104] 118 F. Supp. 275 (D. Minn. 1954), *aff'd*, 225 F.2d 705 (8th Cir. 1955), discussed in text at note 114 *infra*.

[105] 225 F. Supp. at 851.

The court did not believe that the exclusion applied to a "technical" assault and battery, but only to an intentionally wrongful act. The instant case was seen as an example of sheer negligence, similar to a government driver's cutting a corner at an intersection and striking a pedestrian. The Government conceded that if the operation had been on the knee which was the proper subject of the operation, and ligaments or muscles were negligently cut with resulting damage, the plaintiff would not be barred in a malpractice action under the FTCA by an assault and battery argument.[106]

In *Hicks* v. *United States*,[107] the decedent was the dependent wife of a Navy enlisted man who had visited the Naval dispensary at 4:00 a.m. with intense abdominal pain and continual vomiting. The corpsmen obtained her records, a brief history of her illness, her blood pressure, pulse, temperature and respiration. The physician questioned her on her symptoms, felt her abdomen and lis-

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[106] As the conflict between the *Lane* and the *Moos* cases remains unresolved it is thought wise to consider in some detail the argument advanced against the former by Hall, *Surgical Assault and Battery*, LAW AND MEDICINE 8:

"The *Lane* decision creates a spurious distinction between assault and battery and *technical* assault and battery, with the latter, unlike the former divorced from intention. Assault and battery is a concept which is monolithic in structure and predicated upon intention. To cleave the concept in order to eliminate the requirement of intention for a particular factual type of assault and battery is to abandon legal principle in order to create liability. *Technical* assault and battery is an amorphism.

"The court in *Lane* closed one eye when it looked on intention as an essential element of assault and battery. A surgical procedure is a battery, regardless of its results, and as the United States Court of Appeals for the District of Columbia in 1941 in *Bonner v. Moran* (126 F.2d 121, 122), pointed out, 'is excusable only when there is express or *implied* consent by the patient; or stated somewhat differently, the surgeon is liable in damages if the operation is unauthorized.' The court in the *Lane* case equated intent as a component of assault and battery with express intent. Intent need not be express in every instance of assault and battery. Where express intent is lacking, intent will be implied by operation of law. The implication is based on two presumptions of law: (1) the act (here the unauthorized surgical act) manifests the intent, and (2) a man (here a surgeon) intends the consequences of his voluntary acts.

"The court in the *Lane* case confused its tortious creation of *technical* assault and battery with the tort of malpractice. Malpractice presupposes informed consent on the part of the patient to the surgical procedure but consists of the negligent performance of that procedure. The gravamen of assault and battery, of course, is the absence of consent. Malpractice, grounded in negligence, is one of the nonintentional torts whereas intent is a cardinal component of assault and battery." *Lane* is also criticized by Maloney, *supra* note 27, at 31.

[107] 368 F.2d 626 (4th Cir. 1966). Cases involving similar circumstances are Steeves v. United States, 294 F. Supp. 446 (D. S.C. 1968), and Varga v. United States, Civil 1159-NN (E.D. Va., filed Mar. 1969), *as digested in* 69-9 JALS 14 (1969).

tened to her bowel sounds with a stethescope. He then informed her that she had a "bug," gave her a pain killer and told her to return in eight hours. His examination took ten minutes. The patient died at 12:48 p.m. The court examined the Virginia law and stated that whereas doctors hold themselves out as possessing the knowledge and ability necessary to practice medicine effectively, they are not insurers and are not held to the highest standard of care known in their profession, but must exhibit only that degree of skill and diligence employed by the ordinary prudent practitioner in the community. A physician using ordinary care in reaching his diagnosis and acting on it would not be liable, continued the court, even though the diagnosis proved to be a mistake in judgment. Nevetheless, if symptoms are consistent with either of two possible conditions, one lethal if not treated promptly, due care demands a doctor to make more than a cursory examination and release of the patient. That intestinal obstruction was a rare occurrence, and that gastroenteritis, a condition having similar symptoms, was more likely, did not excuse the doctor's failure to make inquiries and perform additional tests that might serve to distinguish the two conditions. The physician in this case did not make an inquiry as to diarrhea and did not make a rectal examination. Thus, he did not follow the accepted standard; if he had, he would have been alerted to the fact that the patient required close observation with a view to immediate surgical intervention if a diagnosis of intestinal obstruction, rather than gastroenteritis, was confirmed. His failure to inquire before releasing the patient was seen as negligence. Only in cases where the patient has been adequately examined is there no liability for the physician's erroneous diagnosis.

The evidence in the instant case showed that if the patient had been operated on promptly she would have survived, and thus established that the negligent diagnosis was the proximate cause of the death. The court added that the physician whose negligent action or inaction had effectively terminated the patient's chance for survival would not be permitted to raise an issue as to the measure of chance for survival which he has put beyond realization; if there were any substantial chance of survival and the physician destroyed it, he would be deemed answerable.[108]

[108] The unreported case of Clark v. United States, No. 11727 (4th Cir. 16 Oct. 1968), *aff'g* E.D. Va., *as digested* in 69-1 JALS 31 (1969), noted that *Hicks* laid down no new rule of law with respect to either negligence or proximate cause. In *Clark*, negligence was alleged in failure to make timely use of a diagnostic procedure. In holding that the delay in diagnosis was the proximate cause of the loss of a kidney, the court stated: "If a

We may conclude that if the injured dependent can prove malpractice, there is no obstacle to recovery under the FTCA. As we shall see, the injured veteran has had a more difficult task, but an examination of the cases indicates that at the present time his status as plaintiff is substantially the same as that of the dependent of a soldier on active duty.

VI. THE INJURED VETERAN

A. THE UNITED STATES AS DEFENDANT

Shortly after the passage of the FTCA, a veteran sued the Government for injuries he received while undergoing an examination for the purpose of obtaining information to be used in considering his appeal from a reduced rate of disability for a service connected injury.[109] A physician had applied lighted matches to plaintiff's leg to test his reflexes. The defendant's motion to dismiss was granted by the court which noted that the claim could not have arisen except for an injury sustanied in combat and therefore the injury was connected with the military service of the plaintiff.

Less than a year later a court allowed the heirs of an honorably discharged serviceman to maintain an action under the FTCA for his death.[110] The veteran had allegedly expired due to the negligence of employees of the VA hospital in which he received treatment.

In *Bandy v. United States*[111] a veteran alleged that while he received treatment in a VA hospital for chorea, a nervous disorder, contracted while he was in the service but not in combat, he had been placed in a box-like cabinet and sustained severe burns over his entire body from contact with hot electric lamps inside the cabinet. The attendants refused to release the patient from the cabinet, despite his pleas, until he became unconscious. The court held them to be negligent, applying the doctrine of *res ipsa loquitur* since the injury-causing instrumentality was under the

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physician, as an aid to diagnosis, *i.e.*, his judgment, does not avail himself of the scientific means and facilities open to him for the collection of the *best* factual data upon which to arrive at his diagnosis, the result is not an error of judgment but negligence in failing to secure an adequate factual basis upon which to support his diagnosis or judgment."

[109] Peruchki v. United States, 80 F. Supp. 959 (M.D. Pa. 1948). For a recovery for wrongful death from an accident suffered while a veteran was convalescing from an illness, see Kopa v. United States, 236 F. Supp. 189 (D. Haw. 1964).

[110] Santana v. United States, 175 F.2d 320 (1st Cir. 1949).

[111] 92 F. Supp. 360 (D. Nev. 1950).

defendant's exclusive control and the injury was caused by some act incidental to that control. The court stated that this was not a service connected injury and that a request for and acceptance of VA benefits did not preclude the veteran's action under the FTCA, but that the benefits should be deducted from the $15,000.00 award. It was felt that the process of judicial lawmaking should not be invoked to create an exception which Congress had refused to make by legislation.

Over two years later a court denied recovery under the FTCA to a nurse who alleged injuries sustained as a result of medical treatment in a VA hospital.[112] Notwithstanding plaintiff's discharge six years before, the court found the injury was service connected, so that the plaintiff was eligible for VA benefits; but Congress' failure to provide any administrative remedies for such tort claims was evidence that it did not intend to confer the right to sue under the FTCA on persons eligible for VA benefits.

O'Neil v. United States[113] involved a World War I veteran, who had been admitted to a VA hospital in 1949 for treatment of a skin allergy, which was not service connected, and who was given an overdose of epinephrine, which caused a disabling cardiac condition. The plaintiff was 100 per cent disabled, but was denied recovery under the provisions of the FTCA. The court cited the *Feres* case, which was thought to stand for the exclusive character of the federal administrative plans of compensation and stated that as the veteran's service had led him to the government hospital where the treatment caused the disability, his injury was incident to service. The claim of the wife was denied because Maryland, where the tort took place, did not recognize claims for loss of consortium.

In *Moos v. United States*,[114] the facts were similar to those in the *Lane* case; but the plaintiff was a veteran, rather than a dependent. Though the wrong leg and hip had been operated on, the complaint under the FTCA was dismissed on the expected ground —that assault and battery was not actionable under the Minnesota law. Though the plaintiff might have had a cause of action based on negligence, it is superseded by the cause of action for assult and battery. The Court held that any negligence which might have occurred prior to the operation was irrelevant (the veteran claimed that the operation he wanted had been delayed) and

[112] Pettis v. United States, 108 F. Supp. 500 (N.D. Cal. 1952).
[113] 202 F.2d 366 (D.C. Cir. 1953).
[114] 118 F. Supp. 275 (D. Minn. 1954), *aff'd*, 225 F.2d 705 (8th Cir. 1955).

stated that plaintiff could obtain administrative benefits from the VA.

In 1954 the Supreme Court put an end to the Government's "incident-to-service" defense in cases where the plaintiff was a veteran.[115] An ex-serviceman, who had been injured on active duty prior to the time he was discharged, sustained serious, permanent injury several years later, when an allegedly defective tourniquet was used in the course of an operation on the same injury at a VA hospital. The majority opinion noted that "[t]he *Feres* decision did not disapprove of the *Brooks* case. It merely distinguished it. . . ."[116] Recovery was allowed. *Brooks* was seen as controlling: the plaintiff was not on active duty and subject to military discipline, in fact he was a civilian. A dissent written by Justice Black (in which he was joined by Justice Reed and Justice Minton) found the injury inseparably related to military duty. It was pointed out that allowing a veteran to recover and denying recovery to the serviceman on active duty was unjustifiable discrimination not required by the FTCA.

An early case dealing with the statute of limitations problem for veterans is *Tessier v. United States*.[117] An appendectomy was performed on a veteran in a VA hospital on 7 June 1947. The veteran experienced pain and was hospitalized by the Air Force in 1951, twice in 1952, and twice in 1953. He returned to the VA hospital in February 1954, and in March 1954 needle fragments were found in his body. Subsequently, a major gastrointestinal exploratory operation, 14 series of X-rays, and one fluoroscopy were made. Pleurisy, bleeding ulcers, abscesses, and physical manifestations of emotional problems centered around hostility were diagnosed.

For failure of the various doctors to discover these disorders sooner, suit was filed on 30 November 1955. Though noting that this was "unquestionably a sad case," and that the Government was "using the statute of limitations to defeat a meritorious claim," the court nonetheless decided to bar the claim under the applicable local law, the Maine Statute of Limitations, allowing a cause of action only for the negligent failure to discover the fragments in 1954.

The results reported from all the tests had been negative, but eight series of X-rays (the only ones covering the area in question) showed at least one metal fragment; and the fluoroscopy

[115] United States v. Brown, 348 U.S. 110 (1954).
[116] *Id.* at 112.
[117] 269 F.2d 305 (1st Cir. 1959).

and one series of X-rays showed elevation of the right side of the diaphragm. The complaint alleged no theory of continuing negligence or fraudulent concealment. The court distinguished *United States v. Reid* [118] on its unusual circumstances, which prevented accurate determination of when the harm actually happened, even in retrospect. It added that the Fifth Circuit in *Reid* recognized that the cause of action did not accrue when the plaintiff first knew of the injury, but when harm had in fact occurred. The result in *Tessier* was a $650.00 judgment affirmed for plaintiff, with $100.00 in VA benefits deducted.

In *Hungerford v. United States*,[119] a court dealt with the claim of a veteran whose initial injury resulted from combat in Korea in 1950. The plaintiff had suffered blackouts at that time and had been placed in a military hospital, where the diagnosis was that he was suffering from psychosomatic disorders, with no physical, organic injury. In 1953, plaintiff had absented himself without leave, for which he received a dishonorable discharge. In 1956 and 1957, plaintiff was hospitalized in a civilian and a VA hospital respectively; both reached the same diagnosis as had been reached before. Subsequently the plaintiff was arrested for forgery and prior to trial was treated in two civilian hospitals. After his conviction he was placed in still another civilian hospital, which discovered brain damage. After treatment plaintiff was paroled and filed suit on 11 July 1960.

The complaint was dismissed on two grounds. First, the court held the suit barred by the statute of limitations as it believed that state law governed as to the time when a claim against the United States accrued and when the statute of limitations under the FTCA began to run. It expressed the opinion that the principal purpose of the statute of limitations was to protect the defendant against stale and unjust claims, and that in order to do this it must run from the time of the event, and not from the time of the discovery of the negligence. Second, the court held that the claim against the United States for unnecessary continuation and aggravation of the veteran's brain injury, as a result of the negligent failure of VA hospital doctors to discover the injury, arose out of negligent misrepresentation, defined by the court as a statement, made in the honest belief that it is true, but based on negligent investigation or failure to investigate. Such a claim was

[118] 251 F.2d 691 (5th Cir. 1958), discussed in text at note 132, *infra*. *Cf.* Quinton v. United States, 304 F.2d 234 (5th Cir. 1962), discussed in text accompanying note 100 *supra*.
[119] 192 F. Supp. 581 (N.D. Cal. 1961).

thus within the statutory exception from the coverage of the FTCA, which could not be avoided by alleging the negligence on which the misrepresentation was based.

On 1 January 1969 the *Army Times* reported that Victor M. Hungerford, cited for herosim in combat, had been restored to his rank as a retired major and awarded $50,000.00 back pay and benefits in 1964. More surprising was the reported fact that on 26 November 1968, U.S. District Court Judge Thomas J. MacBride approved a $40,000.00 out-of-court settlement in the plaintiff's $500,000.00 malpractice suit. Further details are unknown at the time of this writing.

A 1964 decision rendered a $725,000.00 judgment against the United States in a malpractice action brought under the FTCA.[120] The Government had injected a radioactive contrast dye into a serviceman's sinus while he was on active duty. It was held liable for a failure, after his discharge, to determine the nature of the substance and remove it after repeated complaints of serious symptoms and repeated X-rays showed the retained opaque substance. As a 43-year-old attorney, plaintiff developed cancer and was required to have radical surgency including the removal of an eye and much of the bony structure, nervous system and tissue on the left side of his face. He underwent great pain and suffering; required special equipment in his home, office and automobile; and could not conduct a full scale law practice. In a sweeping decision the court stated that the VA clinic not only fell short of accepted medical practice in assuming umbrathor was a non-radioactive iodized oil, but the Government had knowledge of this dangerous drug and a duty to follow up the case, even if the plaintiff had never returned to the Government's physicians. The United States was seen as negligent in not affirmatively seeking out those endangered by the drug and in not warning them of its effects.[121] As the FTCA made the Government liable in the same manner and to the same extent as a private individual, it was not a defense for the defendant to argue that it was not bound by the knowledge of some doctors because they did not communicate with other doctors. The court pointed out that the Government

[120] Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964). For another recovery for eye injury, see Owen v. United States, 251 F. Supp. 38 (D. Cal. 1966).

[121] It is understood that records are at the time of this writing being screened to determine the existence and whereabouts of other possible plaintiffs. Interview with Major Allen D. Adams, Judge Advocate, U.S. Army Medical Research and Development Command, U.S. Dep't of Army, in Washington, D.C., 21 Jan. 1969.

could not have a lower standard for its physicians than that of physicians in private practice in the area, and that failure to obtain the complete medical records of the plaintiff (which were in fact in the same building as the physician in charge of treatment) was not proper medical practice in that area.

In a more recent case the plaintiff alleged negligence in diagnosis when he was treated at a VA hospital in 1962 for headaches.[122] After nine complete workups, the diagnosis was tension, and the plaintiff failed to keep his follow up appointments. In 1965 the plaintiff's condition was diagnosed as a tumor. It was held that the tumor existed in 1962, but that there was not negligence at that time, hindsight failing as a test for diagnostic analysis. The court concluded that the law provided no remedy where there is an abandonment of treatment by the patient.

B. THE DOCTOR AS DEFENDANT

A case decided in 1964 involved a government physician as well as the United States as a defendant.[123] The plaintiff had submitted herself to a VA hospital for "out patient emergency treatment for an emotional upset," but was transferred to Bellevue instead of being hospitalized by the VA. She was prevented from leaving the VA hospital until Bellevue employees took her into custody, and she alleged that she received "beatings and indignities" at the latter hospital. At a later date the plaintiff entered another VA hospital for treatment of a fever but, it was alleged, she received psychiatric care against her will.

The court affirmed dismissal of the complaint for four reasons. First, they noted that the claim was really for false imprisonment, notwithstanding the alleged wanton and willful negligence, and therefore there could be no liability under the provisions of the FTCA. Second, as there was no allegation that the government physician knew or should have known that the plaintiff would be injured by the Bellevue employees, it was insufficient to state a claim for liability for acts of third persons. Third, the medical decision of the second VA hospital to give psychiatric examinations was a discretionary function, precluding liability of the United States. Last, the government doctor was immune from a suit for false imprisonment, as her decision to transfer the patient to Bellevue was made pursuant to official duties and in what reasonably appeared to her to be an emergency situation.

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[122] Osborn v. United States, Civil No. 67-145 (D. Okla., filed 15 Oct. 1968), *as digested in* 69-1 JALS 32 (1969).

[123] Blitz v. Boog, 328 F.2d 596 (2d Cir. 1964).

Thus, little more than a year after *Gamage v. Peal*,[124] the doctrine of official immunity was used with success once again in the defense of a government physician who was sued personally. Psychiatrists were involved in both of these cases, as were factual situations constituting specific exceptions to the FTCA. The significance of this remains to be seen.[125]

VII. CIVILIAN EMPLOYEES AND OTHERS INJURED

A. THE UNITED STATES AS DEFENDANT

On 29 December 1968 it was reported in the *Washington Star* that attorneys sought $400,000 damages from the United States, alleging that their client's daughter was slain by an emotionally unstable Marine Corps veteran, whose premature release from a Navy hospital was due to negligent acts and omissions of those in charge. The attorneys noted that there had been very few cases similar to this one. Yet in 1949, in *Kendrick v. United States*,[126] the same facts had been alleged. The court had held that the performance by executive officers of their discretionary governmental duties, which were entrusted to them by statute, was not subject to judicial review. The court stated that the Government could not be liable on the grounds that the manager of the VA facility, and the psychiatrists who constituted the conference which recommended discharge, acted in strict accordance with regulations, and therefore could not be held personally liable for the death of one who was subsequently killed by the veteran. This case was decided less than four years after the FTCA became law, and more than 13 years before the *Gamage* decision, but the elements mentioned above are present: psychiatrists were involvd, as well as an exception to the FTCA.

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[124] *Supra* note 80 and accompanying text.

[125] In Burks v. Ross, Civil No. 25684 (E.D. Mich., filed 22 Nov. 1968), plaintiff filed suit against the director of a VA hospital, a psychiatrist, nurses and nurses' attendants alleging that their negligence allowed the plaintiff's husband the opportunity to commit suicide. The Government moved for a summary judgment on the basis of Barr v. Mateo, 360 U.S. 564 (1959), and the motion was granted after some discussion of the official immunity doctrine as applied to the facts of the case. For other cases involving immunity, see Baker v. United States, 226 F. Supp. 129 (S.D. Iowa 1964), *aff'd* 343 F.2d 222 (8th Cir. 1965); White v. United States, 317 F.2d 13 (4th Cir. 1963); Smart v. United States, 207 F.2d 841 (10th Cir. 1953); Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966).

[126] 82 F. Supp. 430 (N.D. Ala. 1949). Similar facts are involved in Fair v. United States, 234 F.2d 288 (5th Cir. 1956), and Underwood v. United States, 356 F.2d 92 (5th Cir. 1966); Eanes v. United States, 280 F. Supp. 143 (E.D. Va. 1968), *aff'd*, No. 12440 (4th Cir., filed 7 Mar. 1969).

Civilians treated for physical maladies seem to have fared better. In *Dishman v. United States*,[127] it was alleged that a VA physician mistakenly poured carbolic acid into an employee's ear in attempting to alleviate an earache. The hospital regulations barred treatment of chronic illnesses of employees, and the Government argued that this should bar recovery under the FTCA for the doctor's alleged negligence. The court would not accept this position. The ear trouble was minor and likely to yield to temporary treatment. Although the hospital had exercised its discretion in granting the treatment, the United States could not use that as a defense. The Government further argued that the Federal Employees Compensation Act [128] should be the plaintiff's only remedy, but the court determined that the ear condition before the treatment was unrelated to the plaintiff's employment.

Four years after the *Dishman* case the Ninth Circuit rendered a decision in a similar case.[129] The plaintiff was a civilian employee of an Army hospital, who suffered from varicose vein trouble allegedly intensified by her work. She had been admitted to the hospital by the Commanding Officer, who was desirous of retaining her services. When malpractice in post operative care was alleged (failure to use antibiotics, causing years of pain and suffering and probable permanent disablement), the Commanding Officer testified that he felt he had made a mistaken admission. The Government argued that the evidence did not show he had acted within the scope of his employment.

The court held that plaintiff had been suffering from an "occupational disease," as that term was defined under the Army regulations. "In our view her injuries were in war service and she was an much entitled to the operation by the hospital surgeons as if she had been shot in the leg in battle." [130] Unlike the soldier, however, the civilian employee was not bound by an "incident-to-service" rule. The court held that the FECA was not applicable because the negligence complained of did not take place until after hospitalization. In discussing the standard of care required by physicians and surgeons, the court stated that they were expected to possess and exercise that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of their

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[127] 93 F. Supp. 567 (D. Md. 1950).

[128] 5 U.S.C. § 8102 (Supp. IV, 1969) [hereinafter cited as the FECA]. For cases illustrating the exclusiveness of the remedy, see Balancio v. United States, 267 F.2d 135 (2d Cir. 1959), Frieouf v. United States, 183 F. Supp. 439 (N.D. Cal. 1960), and Leahy v. United States, 160 F. Supp. 519 (E.D. N.Y. 1958).

[129] United States v. Canon, 217 F.2d 70 (9th Cir. 1954).

profession under similar circumstances. Similarity of condition was seen as an essential factor and the locality rule was only one factor to be considered. The court seemed to hold the Army physician to a higher standard of care than a physician practicing in the same locality. Noting that the doctor in this case had traveled to different places for pre-medical and medical education, had served internship in two places and residence in two other places, the court commented: "Such an experience gives a far wider range of medical knowledge than one could obtain from a private practice of many more years."[131]

In the *Reid* case,[132] a civilian employee of the Army alleged negligence on the part of a physician who failed to advise him that he probably had incipient tuberculosis. The medical examination and X-rays to which the plaintiff referred took place in March 1949, and the Government raised the statute of limitations as a defense. The court held that state law, used to determine when the claim came into being, indicated that the claim did not accrue until an advanced condition of tuberculosis manifested itself. The negligent act itself would not begin the running of the statute unless some damage took place at that time, and thus the complaint was not time-barred.

A subsequent Second Circuit case [133] contradicts *Reid*. Plaintiff, a merchant seaman, alleged serious rectal injury after the administration of a post-operative enema, containing a grossly excessive dose of potassium iodide. This took place in a Public Health Service hospital some 12 years before the action was filed. The court held that accrual of the claim under the FTCA was governed by federal, not state law. The claim for malpractice accrued when the plaintiff knew or should have known of the facts constituting malpractice, and though the statute of limitations would not run while he was receiving continuous treatment from the physician or hospital involved in the negligence, the running of the statute would not be postponed indefinitely during occasional treatment to eliminate the results of the injury (plaintiff had been required to undergo much additional surgery). Nor did the court see the statute of limitations postponed during plaintiff's visits to the

[130] *Id.* at 72.

[131] *Id.* at 73.

[132] United States v. Reid, 251 F.2d 691 (5th Cir. 1958), *supra* note 118. For other cases involving the failure of government doctors to discover conditions, see Berry v. United States, 157 F. Supp. 317 (D. Ore. 1957); Somma v. United States, 283 F.2d 149 (3d Cir. 1960); and Booth v. United States, 155 F. Supp. 235 (Ct. Cl. 1957).

[133] Kossick v. United States, 330 F.2d 933 (2d Cir. 1964). *Compare* the result in Beech v. United States, 345 F.2d 872 (5th Cir. 1965).

hospital where the injury occurred for treatment of ailments unconnected with the wrong, or by a visit after a long interval solely for an examination.

These cases imply that the injured civilian employee may have a more difficult time in recovering from the United States under the FTCA than his fellow civilians, the dependent and the veteran. Though he is not restricted by the incident-to-service rule, it is possible that his remedy under the FECA may be exclusive. For this reason the injured civilian employee may choose to sue the doctor.

B. THE DOCTOR AS DEFENDANT

In the case of *Taylor v. Glotfelty*,[154] it was alleged that a psychiatrist employed by a medical center for federal prisoners caused untrue statements relating to an inmate's condition to be published and uttered. The court held that an officer acting within the scope of the duties entrusted to him is not liable for damages in a civil action because of a mistake of fact made by him in the exercise of his judgment or discretion, or even if he acts from ulterior motives. He could not be liable for damages even if the statements concerning the inmates were malicious, if the statements were made by him in the discharge of his official duties and in relation to matters duly committed to him for his determination.[155]

Though the *Taylor* case was decided almost ten years prior to *Gamage* it should be noted that it involves a psychiatrist as defendant and that the FTCA has specific exceptions for libel, slander, misrepresentation and deceit.

Allman v. Hanley [156] is the only case which can be found to support the proposition that a military doctor can be personally liable for malpractice. The defendants in this case were an Air Force physician and a civilian physician employed by the Air Force. The decision revolves around the exclusiveness of the remedy provided by the FECA, as the plaintiff was a civilian employee of the United States. Though the court stated that acts done by an officer in performance of his duty did not lose their official character merely because they were done in a negligent

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[154] 201 F.2d 51 (6th Cir. 1952).

[155] In Brown v. Rudolph, 25 F.2d 540 (D.C. Cir. 1928), it was held that the commissioners of the District of Columbia could not be held liable for damages even if they made a mistake in a preliminary proceeding of the formal commitment of an insane person. As officers they exercised a discretion vested in them by statute and were immune from suit.

[156] 302 F.2d 559 (5th Cir. 1962).

manner, and noted that an officer is acting under the color of his office so long as he does not depart so far from his course of duty that his actions can be looked on as personal, this discussion took place in regard to the question of whether removal to the federal court was proper. It is not apparent that the official immunity doctrine was considered. Further, the court admitted that it had been cited no cases on the duty of government physicians. Removal from the state court was held proper, notwithstanding the allegation that the defendants were not authorized to perform operations in a negligent manner. The removal by one of the defendants terminated the power of the state court to issue process, because the entire case was removed as to all parties whether joined or not in the petition for removal. It is on this point that the *Allman* case is most often cited.

The court went on to hold that the FECA did not abrogate the plaintiff's common law right to sue the defendants personally: "In any examination of statutory provisions for remedies certain basic inquiries should be kept in mind. Against whom is the remedy exclusive? The employer? A third party? A fellow employee?[137] The FECA was seen as a limitation of the remedy of the employee against the Government as employer; it contained no specific statutory command abrogating the employee's right to sue a fellow employee and in fact recognized the right of the employee to recover from "some person other than the United States" (in the section concerning the subrogation of the Government to the employee's right of action). The court noted that state workmen's compensation cases are in conflict on the point, but that most state courts which hold the common law right to sue abrogated do so on the basis of a particular statute. In the absence of a specific prohibition, only two states barred a co-employee from recovery against a negligent fellow employee. Discussing a decision rendered by the Supreme Court of Florida in 1955, the Circuit Court said that the decision "pointed out that at common law servants mutually owed to each other the duty of exercising ordinary care in the performance of services and that they were liable for failure in that respect resulting in injury to a fellow employee."[138] Finally, the court refused to consider the defendants as instrumentalities of the United States for the question of exclusiveness of remedy under the FTCA and stated that the fact that the Longshoreman's and Harbor Worker's Compen-

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[137] *Id.* at 562.

[138] *Id.* at 563. The reference is to Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955).

sation Act (which was also silent on the point) had been interpreted differently was not controlling.[139]

VIII. CONCLUSIONS

If the cases discussed above are compared with malpractice cases in general, one will conclude that the most salient difference between the cases where the alleged tortfeasor is an employee of the Federal Government and the cases where the defendant is a physician in private practice is the emphasis the courts have placed on the status of the injured party. Claims brought under the FTCA, though governed generally by law of the state where the tort allegedly took place, are not necessarily settled in the same manner as they would have been settled in a state court, given the same facts. Even if the government physician is sued in his personal capacity, he may be protected by the status of the injured party at the time of the alleged tort or if not, perhaps by his own status as a federal officer. The cases themselves illustrate the reasons why the staff judge advocate would have difficulty in advising the post surgeon on his personal professional liability. A lecture to a hospital staff on the "what and why" of malpractice, to include "how" it occurs as well as advice on preventive measures, might be relatively easy as compared to a lecture on the problem of "who is liable to whom under what circumstances."

It is unlikely that the United States will ever authorize the purchase of malpractice policies for government doctors out of

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[139] The *Allman* case has been discussed at some length in order that the reader may compare it to the *Gamage* decision (see text at notes 76, 80, *supra*), rendered by a district court some four months later. While *Gamage* has not been cited as authority in subsequent decisions it has not been specificially criticized. In Simpson v. McVey, 217 F. Supp. 575 (S.D. Ohio 1963), a deputy U.S. marshal was held to be acting within the scope of his employment when he attemped to serve process and had the papers knocked from his hands by the plaintiff's knife, and could not be held liable for plaintiff's subsequent arrest and imprisonment by the FBI. In Marion v. United States, 214 F. Supp. 320 (D. Md. 1963), the court allowed an Air Force civilian employee to maintain an action against an Air policeman who struck the plaintiff's privately owned light delivery truck with a motorcycle. Though both employees were acting within the scope of their employment when the incident occurred, it was held that the FECA was an exclusive remedy only against the United States. But in Gilliam v. United States, 407 F.2d 818 (1969), *reversing* 264 F. Supp. 7 (E.D. Ky. 1967), a deputy federal marshal, assigned to accompany a second federal marshal on a trip escorting prisoners, had no right to sue the estate of the second marshal for injury sustained in an automobile accident. *Accord*, Polishuk v. Beavin (Pa. Sup. Ct., filed 26 Feb. 1969), *as digested in* 69-9 JALS 13.

appropriated funds. A similar proposal was discussed in 1956 in regard to H.R. 10577, 84th Congress, 2d Session, a bill [t]o provide for the procurement by the Government of insurance against risk to civilian personnel of liability for personal injury or death, or for property damage, arising from the operation of motor vehicles in the performance of official government duties, and for other purposes." It was pointed out at the time that government procurement of commercial insurance would be unusual, as the settled policy of the federal government was to assume its own risk.[140]

What is more likely is that legislation similar to the Government Drivers' Act [141] or the more recent legislation which indemnifies VA physicians against malpractice suits [142] will eventually be enacted to relieve apprehension on the part of all government physicians. The reasons advanced for such legislation are persuasive:

> The military motor vehicle operator . . . does not normally enter the military service to serve as a driver. He is assigned to this duty and directed to perform it, notwithstanding the fact that driving a vehicle is surrounded with risks of accidents and consequent personal liability. Clearly, such operator should not be required to pay for insurance in order to save himself the cost of judgments which might be levied against him. The cost of such insurance would be a reduction in pay required because of his assignment by higher authority. Without such insurance, the motor vehicle operator is in constant financial jeopardy, for it is obvious that even the most careful driver might be guilty of negligence at times.
>
> At the other end of the spectrum there is a large group of Government medical personnel, both civilian and military, who, in their daily work, are exposed to the threat of suits for malpractice despite the fact that they have little or no choice either in the patients they are required to treat or in the medical procedures they are required to perform. Although the incidence of malpractice suits against individual Government medical personnel has been low, the threat remains. The threat has an adverse effect on the efficiency and morale of Government medical employees, and is not assuaged by the possibility that, in appropriate cases, reimbursement of damages paid in a law suit would be effected by a private relief bill, if not otherwise covered by insurance.[143]

Such legislation was proposed long ago,[144] but thus far has met with little interest and no success. A constitutional argument has

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[140] Coward, *supra* note 52, citing 35 COMP. GEN. 391, 392 (1956).
[141] 28 U.S.C. § 2679 (1964), *as amended* (Supp. IV, 1969).
[142] 38 U.S.C. § 4116 (Supp. IV, 1969).
[143] The Surgeon General (Army), *supra* note 50.
[144] *E.g.*, Dep't of Defense Legislative Proposals 87-126, 88-52.

been advanced against it (the common law right to sue whom one wants), but if the success of plaintiff's arguments along that line under the Government Drivers' Act is any indication of its validity, the argument will not stand.[145] Apparently, it was thought that this sort of legislation might lead to a lowering of professional standards and provide a license for malpractice. Unless it can be shown, however, that accidents have increased as a result of the passage of the Government Drivers' Act or that malpractice cases have increased as a result of the legislation passed for VA physicians (which seems to have passed unnoticed by the AMA), this argument is of dubious validity. It can hardly be said that the doctrine of official immunity is a license for judges to render poor decisions.

It may well be that "[t]he scope of immunity of federal officers and employees for their torts has expanded rapidly since *Barr v. Matteo*. . . ."[147] The mere presence of the *Allman* case, however, should give the judge advocate pause as he advises his fellow professional, the surgeon.

It is for good reason that the policy followed by the Surgeon General as to whether an Army physician should carry malpractice insurance is that each one should decide this matter individually.[148] The staff judge advocate must, however, be prepared to provide guidelines to the post surgeon as he attempts to make his decision. A step in the right direction was taken on 23 September 1968, with the publication of *Claims Administration Letter No. 12/68* by the U.S. Army Claims Service, which suggests certain questions to be put to an Army employee who seeks legal advice on commercial insurance protection: "The Army physician is particularly vulnerable . . . [to lawsuits] because the element of a grudge against the allegedly negligent physician frequently triggers a malpractice claim."

The surgeon should be advised, in the writer's opinion, that it is extremely unlikely that the military physician, who acts pur-

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[145] The Justice Department indicates success by the plaintiff in only one case which is being appealed. Conversation with Thomas L. Young, Head, Medical Malpractice Litigation Unit, Torts Section, Civil Division, 24 Jan. 1969. *But cf.* Henning v. Ebersole, 8 Misc. 2d 768, 166 N.Y.S.2d 167 (Sup. Ct. 1957).

[146] Interview with LTC William C. Vinet, Jr., Judge Advocate, Office of The Surgeon General, U.S. Dep't of Army, in Washington, D.C., 21 Jan. 1969.

[147] U.S. DEP'T OF ARMY, PAMPHLET NO. 27-162, CLAIMS 79 n. 452 (1968).

[148] Coward, *supra* note 52; Letter from Captain James C. Carr, JAGC, U.S. Army Medical Field Service School, Brooke Army Medical Center, to the author, 2 Dec. 1968.

suant to applicable statutes, regulations or directives in treating a patient who is authorized to receive medical care, will ever be sued in his personal capacity for malpractice, by reason of the FTCA. If he is sued he will be defended in all likelihood by the Department of Justice, and it is quite possible that he will be held not liable under the rationale of the *Bailey* or *Gamage* cases. If he is unwilling to "gamble" on this basis, however, he should ask himself:

(a) Whether it is likely he will be involved directly in patient care: It seems reasonable to assert that the more patients he comes in contact with every day, the more his risk increases; on the other hand, if he is involved primarily in administration, his risk decreases.

(b) If he is involved directly in patient care, what is the status of the bulk of his patients? A physician working in a dispensary which is authorized only to treat servicemen runs a much smaller risk than the physician who is called upon to treat dependents or civilian employees as part of his daily routine.

(c) Does he specialize? It would seem, even among the specialties, that the psychiatrist stands in a much more protected position than the surgeon. The general practitioner would seem to stand between the two.

Furthermore, the military physician should be cautioned as to his "off duty" activities. Under certain circumstances the military doctor is permitted to "moonlight," for example, he may conduct physical examinations for insurance companies or be engaged as a consultant for a civilian doctor. If malpractice is alleged under such circumstances, it is extremely unlikely that he can expect any assistance from the Government.[149]

Finally, the military physician should be advised as to exactly what protection he can expect to receive from the "Good Samaritan" statute of the state in which he is stationed. These laws are designed to protect the doctor who renders emergency aid to an injured person from tort liability and therefore encourage humane treatment. The 36 states, and the District of Columbia, which have enacted such legislation, however, have not done so on a uniform basis. Some grant immunity only to physicians licensed by the state; others deny immunity if a fee is received or expected for the treatment.[150] Thus, a careful reading of the particular statute involved is indispensable.

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[149] Maloney, *supra* note 27, at 34, does give one example where the Air Force retained counsel to defend an Air Force doctor charged with malpractice outside the scope of his employment.

[150] Bernzweig, *supra* note 24, appendix B.

January 29, 1969
U.S. Department of Justice

APPENDIX A

CIVIL DIVISION TORT SECTION

MEDICAL MALPRACTICE CASES

FOR PERIOD JULY 1, 1963, THROUGH DECEMBER 31, 1968

Fiscal year	Cases received		Cases closed in compromise			Cases closed by judgment		
	Number	Amount claimed	Number	Amount claimed	Amount awarded	Number	Amount claimed	Amount awarded
1964	94	$ 29,598,360.00	35	$ 5,347,351.00	$ 368,375.00	7	$ 535,000.00	$ 143,263.00
1965	85	33,445,179.00	33	14,867,969.00	923,920.00	8	3,987,000.00	1,237,005.00
1966	123	47,901,928.00	43	5,456,200.00	710,879.00	5	725,267.00	273.208.00
1967	139	40,390,728.00	31	6,059,347.00	484,900.00	12	3,580,000.00	640,435.00
1968	102	33,430,528.00	66	13,424,638.00	1,541,003.00	9	1,933,000.00	477,277.00
1969*								
7/1/68-12/31/68*	32	9,151,265.00	17	4,696,522.00	518,500.00	4	825,000.00	153,833.00
Total	575**	$193,917,988.00	225	$49,852,027.00	$4,547,577.00	45	$11,585,267.00	$2,925,021.00

**Includes 13 reopened cases.

APPENDIX B

RESUME OF MALPRACTICE CLAIMS SUBMITTED DURING CALENDAR YEAR 1968

U.S. Army
Claims Service
6 Feb 69

	Alleged	*Amount Claimed*	*Amount Paid*
1	Loss of fingers, scarring of entire forearm and thigh from extravasation of drug injected in Army hospital.	$ 200,000.00	$80,000.00
2	Death of wife from improper use of anesthetic machine during operation.	185,000.00	37,301.41
3	Failure to diagnose ectopic pregnancy	65,000.00	2,500.00
4	during number of visits to service hospital.	35,000.00	
5	Operation on wrong eye through inadvertance.	40,000.00	3,500.00
6	Child fell out of bed in hospital and died.	50,000.00	Settlement offer $3,000.00
7	Jaw broken and drill bit left in gum during removal of impacted wisdom tooth.	2,500.00	2,000.00
8	Over-administration of salt due to mathematical error resulting in death of child.	70,000.00	Being settled
9	Failure to transfuse newborn resulting in death.	25,000.00	Being settled
10	Caudal anesthetic resulting in paraplegia.	50,000.00	Over juris—Litigation (old FTCA)
11	Child born dead.	25,000.00	Disapproved
12	Child born dead.	100,000.00	Disapproved
13	Failure to diagnose broken toe.	10,000.00	Disapproved
14	Contraction of infectious hepatitis from service member being released from an Army hospital.	80,000.00	Disapproved
15	18-inch sponge left in abdominal cavity during operation.	50,000.00	Being settled
16	Failure to properly set leg following fall.	150,000.00	Disapproved

	Alleged	*Amount Claimed*	*Amount Paid*
17	Failure to diagnose peritonitis resulting in death.	35,000.00	Being settled
18	Operation on wrong toe.	100,000.00	Being settled
19	Hydrocephalus resulting from improper delivery.	1,750,000.00	Over juris—(old FTCA)
20	Failure to diagnose internal infection resulting in loss of fetus.	75,000.00	In litigation
21	Failure to diagnose measles during pregnancy resulting in miscarriage.	2,500.00	Disapproved
22	Suicide resulting from premature release from closed ward.	1,500,000.00	Disapproved—incident to service
23	Staph infection contracted in Army hospital.	250,000.00	Disapproved—incident to service
24	Failure to diagnose fractured skull following fall.	150,000.00	Disapproved—in litigation
25	Failure to diagnose poor physical condition which caused service member to die during parachute jump.	200,000.00	Disapproved—incident to service
26	Failure to diagnose brain tumor.	250,000.00	Disapproved—incident to service
27	Suicide resulting from failure to give proper psychiatric treatment.	150,000.00	Disapproved—incident to service
28	Death of infant due to failure to diagnose and treat.	350,000.00	Disapproved
29	Malpractice in plastic surgery on protruding ear of son.	60,000.00	Disapproved

COMMENT
DEFENSE IN OUTER SPACE *

I. INTRODUCTION

Within the framework of the United Nations the "Treaty on Principles Governing The Activities of States In The Exploration And Use Of Outer Space, Including The Moon And Other Celestial Bodies" was developed and finalized.[1]

As of 22 April 1969, eighty-nine nations became signatories, of which forty-eight, including the U.S. and the Soviet Union, have become parties to the treaty.

This treaty is the latest effort to avoid conflict in outer space and to establish rules and procedures for the exploration of celestial bodies. Article IV is perhaps the most significant and also the most controversial provision of the treaty.[2] This article, embodying the ideals of a previous United Nations Resolution,[3] sets forth the obligation of signatories to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kind of weapons of mass destruction or stationing such weapons in outer space in any other manner. In addition, it provides that the Moon and other celestial bodies shall be used exclusively for peaceful purposes and contains a prohibition against the establishment of military bases, installations, and fortifications or the testing of any type of weapon or the conducting of military maeuvers.

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*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of the Department of Defense, the United States Air Force, Air University, The Judge Advocate General's School or any other governmental agency.

[1] STAFF OF SENATE COMM ON AERONAUTICAL AND SPACE SCIENCE, 90TH CONG. 1ST SESS., REPORT ON TREATY ON PRINCIPLES GOVERNING THE ACTIVITIES OF STATES IN THE EXPLORATION AND USE OF OUTER SPACE, INCLUDING THE MOON AND OTHER CELESTIAL BODIES 37 (Comm. Print 1967).

[2] Article IV provides that Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner. It further states that the moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for sicentific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

II. INSURING COMPLIANCE WITH THE TREATY

Perhaps this section of the treaty is a major step toward insuring peace and some type of arms control. Its main goal, apparently, is to achieve a demilitarization of outer space which is feasible from both the military and political viewpoints. However, the prohibition with regard to space weapons systems is no bar to earth-based weaponry, nor does it prohibit the development of space weaponry.

Although the treaty does not provide for an inspection or enforcement system, the provisions of Articles I, II and XII, which provide for free access to all areas of celestial bodies, prohibit national appropriation of outer space or of celestial bodies and declare that all stations, installations, or other activities on the Moon and other celestial bodies shall be open to representatives of other states, parties to the treaty, on a basis of reciprocity, may provide sufficient controls to insure compliance with the terms of the treaty. However, there are terrestrial states with potential space exploration capability which have not become a party to the treaty. Unfortunately, without provision for enforcement, there is no uniform basis for mutual or singular action to protect against unlawful activities in outer space. Thus there is a continuing need for the development of surveillance, early warning or detection type devices by all signatories.

General Earle G. Wheeler, United States Army, Chairman of the Joint Chiefs of Staff, testifying in favor of the treaty, discussed this subject before the Committee on Foreign Relations of the United States Senate, stating:

> The Joint Chiefs of Staff remain concerned about the assured verification capability with regard to "weapons in orbit." The development of prohibited orbital vehicles could have serious implications, especially if it enabled an enemy to achieve effective surprise attack against our command and control facilities and military forces. . . . This threat can be answered only through intensified U.S. efforts to develop capabilities to detect and verify the orbiting of nuclear weapons or those threatening mass destruction. We must develop the capability of dealing with that threat should it materialize, with or without a treaty.[4]

Thus this nation must not be misled into believing that the possibility and reality of future security threats from outer space can be ignored. The United States military space efforts cannot be abandoned. Present detection, tracking, and identification capabil-

[3] G.A. Res. 1884, 18 U.N. GAOR, 124th Plenary Meeting, at 1, U.N. Doc. A/5571, 17 October 1963.

[4] *Hearings on the Treaty on Outer Space Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess., at 84 (1967).

ities require constant improvement; and if weapon systems are needed, this nation is obligated to build those systems to insure national security.

III. COURSE OF ACTION FOR TREATY VIOLATION

It has been noted that the treaty does not provide for a police force in outer space nor any other enforcement measures. What then is this or any other nation's course of action when a signatory or non-signatory nation violates Article IV? With due regard to the provisions of Articles IX and XII concerning interference with lawful activities and access and inspection of stations, installations, equipment and space vehicles on the Moon and other celestial bodies as well as the fact that there is no provision for other than visual inspection of orbiting satellites, Mr. Leonard C. Meeker, Legal Advisor, U.S. Department of State, provided the Senate Committee on Foreign Relations the following observation:

> Thus, in regard to verification of compliance, the Treaty leaves the parties essentially with the rights they have under international law apart from the Treaty. A State having real reason to suspect violation would be entitled to challenge the suspected State and, if its reasonable doubts were not removed, to take appropriate steps to protect itself against the effects of a Treaty violation. The extent of these rights would, of necessity, depend upon the facts of the particular situation.[5]

Article 51 of the United Nations Charter acknowledges the inherent right of self-defense as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations. . . .[6]

Article III of the treaty provides that international law, including the Charter of the United Nations, will be applicable to activities in the exploration and use of outer space. This article reaffirms the provisions of Article I concerning the applicability of international law to outer space and gives a new status to the U.N. Charter in the extraterrestrial sphere. The inherent right of self-defense as applied to outer space through this treaty, international law, and the U.N. Charter must now be considered.

The United Nations Charter, in the view of some authorities, limits the exercise of the right of self-defense to situations in-

[5] *Id.* at 100

[6] U.N. CHARTER, art. 51.

volving "armed attacks."[7] But what of potential threats to national security by other means? Can one nation threaten the security of another by orbiting space stations or destruction weapons in violation of the treaty without armed attack? If so, can the threatened nation repel this threat under the provisions of Article 51 of the U.N. Charter, international law, or the treaty? Is a nation justified in taking preventive measures to thwart a potential attack? The United Nations Charter does use the limiting term "armed attack"; however, if the last two questions are answered in the negative, what protective measures can be taken? As one writer states:

> Clearly there is a . . . principle which must be added to the rule of law in outer space, namely, the basic right of national self-preservation, as embodied in Article 51 of the Charter of the United Nations. In brief, a nation is justified in protecting itself from attack no matter where the staging area of the attack may be, including on the high seas or in outer space, and a nation may carry its defensive forces to such areas. The great unresolved problem, so far as defensive measures in space are concerned, is to translate the general recognition of this right of self-defense into some workable criteria for distinguishing between the defensive and offensive uses of space.[8]

IV. NATIONAL DEFENSE POLICY

Notwithstanding the language of Article 51 of the United Nations Charter concerning the requirement of an armed attack and the uncertainty created as to its meaning, these words do not detract from the inherent right of self-defense as recognized in international law.[9] Accepting the inherent right of self-defense as a basic law of national self-preservation, what policy of national defense should the United States adopt concerning the vast area of outer space?

In order to answer this question, certain limitations must be established. First a distinction must be drawn between land-based as opposed to space-based weapon systems, excluding the former from consideration. Land-based weapons with an earth-intersection trajectory, even though launched through space, are not prohibited by the treaty. It is with apparent acts of aggression or po-

[7] Kunz, *Individual and Collective Self Defense in Article 51 of the United Nations*, 41 AM J. INT'L L. 371 (1957); *contra*, Cooper, *Self Defense in Outer Space . . . and the United Nations*, AIR FORCE AND SPACE DIGEST 51 (Feb. 1962).

[8] HALEY, SPACE LAW AND GOVERNMENT 157 (1963). *Contra*, Kittrie, *Aggressive Use of Space Vehicles—The Remedies in International Law*, 4TH COLLOQ, UNIVERSITY OF OKLAHOMA RESEARCH INSTITUTE 198 (1963).

[9] DeSaussure and Reed, *Self Defense—A Right in Outer Space*, 7 AF JAG L. REV. (No. 5) 40 (Sept–Oct. 1965).

tential aggression *from* outer space, not *through* outer space, with which we are concerned. Consideration must also be given to whether space vehicles are aggressive or nonaggressive.

Once the mission of the vehicle is determined, consideration must be given to the next element—is defensive action justified? The mere fact that a space vehicle has destructive or aggressive capability is not sufficient. There must be a danger of such an immediate and overwhelming nature that there is no choice but to act in self-defense.[10] And this conduct must be purely in defense, not a reprisal or belligerent act.

On 3 November 1967, former Secretary of Defense Robert S. McNamara announced that the Soviet Union had developed a Fractional Orbital Bombardment System (FOBS).[11] This weapon is fired into a very low orbit approximately 100 miles above the earth's surface and at a given point prior to completion of the first orbit the weapon drops out of orbit and follows a re-entry path similar to a ballistic missile. This announcement placed in issue the question of the Soviet Union violating the Treaty on Peaceful Use of Outer Space. Mr. McNamara rejected the argument of a Soviet Union treaty violation on the theory that the FOBS would not complete a full circuit of the earth before re-entry, hence did not constitute placing a destructive weapon in orbit.[12]

Although this conclusion may be subject to criticism, the development of a FOBS by the Soviet Union does indicate that the United States must remain informed and alert concerning possible treaty violation and the likelihood of attack. Assuming that the Soviet Union has not violated the treaty by developing a FOBS, such systems are examples of why this nation cannot relax its aerospace defense activities.[13] The quest for international cooperation in the peaceful use of outer space must not jeopardize national defense responsibilities.

Therefore, as this nation is committed to the policy that outer space is to be dedicated to peaceful purposes and the provisions of the United Nations Charter, what conditions must be present in order to exercise the inherent right of self-defense recognized in international law against a space vehicle? First, the hostile vehicle must have a capability to threaten a state's national interest

[10] *Id.* at 43; Cooper, *supra* note 7, at 56.

[11] AIR FORCE AND SPACE DIGEST 18 (Dec. 1967).

[12] Leavitt, *FOBS: It Shouldn't Be Any Surprise,* AIR FORCE AND SPACE DIGEST 71, (Dec. 1967).

[13] Huglin, *Our Space Venture and Our Role in the World,* AIR UNIVERSITY REVIEW 13, (May–Jun 1968).

and be on a mission which all logical conclusions indicate has such a purpose. Further, the vehicle must constitute a clear and present danger to the threatened state to such a degree that the suppression thereof is the only alternative available.

Assuming the conditions as related in the preceding paragraph, can there by any doubt as to the policy of the United States? This nation has the unalterable purpose "to develop and maintain those capabilities in that medium [space] necessary for the protection of our national security." [14] In order to effect this policy the United States must create the capability to determine the existence of a threat constituting a clear and present danger and to paralyze such a threat. This capability can result only from the maintenance of an efficient space age military posture.

V. CONCLUSION

Although war should be abolished because its utter destructiveness precludes it from determining a satisfactory solution for the participant nations, it is still considered an essential element of the national policy of some countries. This nation must be prepared to insure that outer space is used exclusively for peaceful purposes and to protect itself against the effects of a violation of the Treaty on Outer Space. Perhaps this treaty is the beginning of another major step in the development of international understanding and cooperation. The nations of the world cannot permit outer space or some planetary galaxy to become a battleground for national or international conquest. Now is the time for the dedication of outer space to peaceful purposes. If mankind fails in this great endeavor to govern his activities in outer space, Armageddon will be upon us.

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[14] Forman, *Why a Military Space Program?*, PROCEEDINGS OF THE CONFERENCE ON SPACE SCIENCE AND SPACE LAW 68, 71 (U. of Okl. 1963).

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