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Through a discussion of the provisions of the recent trade legislation, the author analyses in detail those areas in which the new act has wrought significant changes and those in which it has merely reframed the previous law. Concluding, Professor Metzger points out that while the 1962 trade act equips the President with a potentially effective tool to break down artificial trade barriers, whether its full potential will be realized is a still-unanswered question and will depend upon whether the authority given the President by the act is exercised with the same vigor that marked its passage.

Introduction

On January 25, 1962, President Kennedy sent to the Congress his message “Relative to the Reciprocal Trade Agreements Program.”1 In it he recalled that the reciprocal trade agreements program which had been initiated in 1934 was a “landmark measure” which has “brought growth and order to the free world trading system,” but stated that in order to “meet the challenges and opportunities of a rapidly changing world economy” it was necessary to replace it by “a wholly new instrument.”2

He identified these challenges as “five fundamentally new and sweeping developments [which] have made obsolete our traditional trade policy”: (1) The growth of the European Common Market, (2) The growing pressures on our balance-of-payments position, (3) The need to accelerate our own economic growth, (4) The Communist aid and trade offensive, (5) The need for new markets for Japan and the developing nations. More specifically, he asked for extensive new tariff-cutting authority, indicated that ample safeguards against injury to American industry and agriculture would be retained, and proposed a new program of trade ad-

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justment assistance to firms and workers who might be injured in consequence of increased imports as a result of lowered tariffs.  

On October 11, 1962, there was enacted into law the "Trade Expansion Act of 1962," representing the legislative embodiment of the President's program following its negotiation through the Congressional shoals.

It is not the purpose of this article to develop the case for increased international trade. The President's message, identifying in broad terms the benefits to the United States of increased trade, represents another in a long series of such arguments whose lineage stretches back over several centuries, and expresses the broad views of many who have been in favor of the trade agreements program of the past twenty-nine years. Rather, it is the purpose of this article to attempt to identify and assess the significance of the salient elements of the 1962 act, both those which are "new" and those which have a familiar ring. In order to do this with some perspective, it is necessary to set forth the background of the 1962 act.

I

BACKGROUND OF THE TRADE AGREEMENTS ACT OF 1934, AS AMENDED AND EXTENDED UNTIL 1962

In the 19th century, when the United States was pursuing a foreign policy of isolationism, when it was seeking to develop a new continent free from economic or political interference from abroad, it was understandable that a policy of self-sufficiency was thought possible and even desirable despite its economic costs. But by the turn of the century, and especially by the time World War I approached, this policy of economic autarchy—importing only products we did not produce, and exporting only surpluses—was outdated from every point of view.

Our domestic economy was no longer a group of infant industries which could not stand competition. On the contrary, the Sherman Act, enacted in 1890, had established a general national policy against monopolies and in favor of competition free from artificial restraints such as price-fixing and division of markets. This policy was adopted because, economically, we had decided in favor of an expanding economy producing better goods at lower prices, which meant rising standards of living for our people, and against monopolies and restraints which meant lower living standards. The policy of competition had another domestic purpose, a political pur-

3 House Hearings, pt. 1, at 2, 8.
4 This and the following five paragraphs are taken from Metzger, International Law, Trade and Finance 78-80 (1962).
pose in the highest sense of the term. Recognizing that there was a close relationship between economic power and political power, and determined to preserve and improve our democratic political system, the people of the United States set their face against monopoly because a monopoly of economic power could directly and indirectly undermine our democratic system.

Economic isolationism was also outdated in terms of our foreign trade itself. Our agricultural and manufacturing production had grown so great that we needed export markets. Our domestic standards of life had improved to such an extent that we needed more, and a greater variety of, imports. Since we could not export to countries which could not earn enough from our imports to pay for them, and we ourselves needed to export in order to earn enough to pay for our imports, it was in the mutual interest of the United States and its trading partners to accept more imports from one another and to export more of the goods each could produce more economically. The natural outcome of this mutuality of interest was a policy which favored lower tariffs, fewer quotas and other import restrictions, and nondiscrimination in the treatment of imports from the group of countries comprising the world trading system.

This was the logical system, but it was extremely difficult to bring about. It was in 1916 that Congressman Cordell Hull introduced a bill having for its purpose the mutual reduction of excessive tariffs and other import restrictions by the United States and its trading partners, but it was not until 1934 that the Roosevelt administration succeeded in securing the enactment of the Trade Agreements Act.\textsuperscript{5}

In the meantime, United States tariffs had been pushed to the highest levels in history, in the Fordney-McCumber Act of 1922\textsuperscript{6} and the Smoot-Hawley Act of 1930.\textsuperscript{7} This Smoot-Hawley act resulted in protests from thirty-four countries. "By offending nearly every important country in the world, it played its part in destroying whatever little amity and good will among nations there was left," according to the historian Carl Becker.\textsuperscript{8} A thousand American economists, led by Paul H. Douglas, now the distinguished Senator from Illinois, had also protested the measure, but President Hoover signed it, even though he could not plead ignorance of the probable consequences.

Nor were the warnings of the economists or the thirty-four protests

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from as many countries academic in character. As Cordell Hull stated in his memoirs, these countries, "goaded by what they regarded as almost an embargo keeping out their exports to the United States . . . retaliated in kind."9 In one year, for example, Switzerland's exports to the United States fell off 30.5 per cent as compared to a general decline of her exports of 11 per cent; her imports from the United States decreased 29.6 per cent compared with a decrease of 5.4 per cent in her imports from all countries. The British enacted a high tariff act in 1931 and followed up by establishing in the Ottawa Agreements of 1932 a tariff preference wall around the Commonwealth. The share of the United States in the world's foreign trade fell by almost thirty per cent from 1929 to 1933.

In 1933, a new administration and a new Congress came into power, and national tariff policy was reversed in 1934. Instead of raising tariffs to combat the depression, Congress sought to improve domestic economic conditions by expanding foreign trade through reciprocal tariff reductions in agreements with foreign countries. The principal stated purpose of the Trade Agreements Act of 1934, the first section of which is an amendment (section 350) to the Smoot-Hawley Tariff Act of 1930, was to expand exports.

The Trade Agreements Act authorized the President to negotiate with other countries for a reciprocal lowering of tariffs and other trade barriers whenever he found that existing import restrictions of the United States or of any foreign country were unduly burdening our foreign trade. Specific congressional approval of reductions was not required. The act limited reductions, however, to fifty per cent of their 1934 levels and provided that commodities could not be transferred between the dutiable and free lists.10

The delegation of tariff-cutting authority to the President was from the beginning, and continues to be, on a temporary basis. The authorization of the Executive to enter into trade agreements has been extended eleven times, until 1962. Each time the renewal of authority to enter into trade agreements has been for limited periods (from one to four years), which has given Congress frequent opportunity to review the administration of the statute.

In the Trade Agreements Extension Act of 1945, Congress authorized further reductions in tariffs by permitting the Executive to reduce duties

10 48 Stat. 943 (1934). For further details upon the 1934 act and subsequent amendments until 1962, see Catudal, Trade Agreements Legislation: A Section by Section Analysis, 39 Dept. of State Bull. 1013 (1958).
by fifty per cent of the rates in effect on January 1, 1945, which meant that a duty which had been reduced by fifty per cent could be further reduced by another fifty per cent in a trade agreement. That year marked the legislative highpoint of the trade liberalization program until 1962. From 1945 to 1962 extensions of the tariff-cutting power were modest (fifteen per cent authority was granted in the 1955 act and twenty per cent in the 1958 act), and restrictive amendments, including the "escape clause" and "peril points," were added and intensified. The principal extension acts were those of 1951, 1955 and 1958. The 1958 act extended until June 30, 1962, the period during which the President was authorized to enter into trade agreements with foreign countries.

II

The Trade Expansion Act of 1962

The twelfth extension of the Trade Agreements program—the Trade Expansion Act of 1962, enacted October 11, 1962—made three significant changes in the program: 1) it expanded substantially the authority of the President to negotiate tariff reductions in trade agreements, with Common Market countries and with others; 2) it changed materially the "safeguards against injury" provisions of the program; and 3) it added an "adjustment assistance" program to firms and employees harmed by imports, to be used in place of or in combination with tariff relief.

Tariff-Cutting Authority

Four types of tariff-cutting authority are given to the President in the new act; they may be used in trade agreements entered into before July 1, 1967. This temporal limitation on entering into trade agreements is the longest yet legislated (as noted, four years was the longest hitherto).

a) Fifty per cent reductions. The first, and clearly the most important, is the authority to decrease any rate of duty to a rate fifty per cent below the rate existing on July 1, 1962. This authority extends to trade agreements with any country except a "country or area dominated or controlled by Communism." Such countries include the Soviet Union and the

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Warsaw Pact countries, Yugoslavia, and Communist China and the Far Eastern countries within its orbit of influence.

The fifty per cent reduction authority represents the widest latitude granted by Congress since 1945 and indicates clearly the markedly freer-trade orientation of the new statute. The exclusion of Communist-dominated countries from the benefits of the program represents a continuation and expansion of the denial of most-favored-nation treatment first provided for in Section 5 of the 1951 Extension Act. The expansion results from the inclusion, for political reasons (the economic effect being relatively small), of Poland and Yugoslavia in the ban. Both had been receiving most-favored-nation treatment, Yugoslavia for decades, and Poland since a 1960 agreement involving Polish compensation for nationalized American property. The administration opposed this extension of old section 5 to these countries, and may, political weather permitting, attempt to secure an appropriate amendment.

b) Low-rate articles. A much less important authorization is the grant of authority, in a trade agreement with any country except Communist-dominated countries, to reduce rates of duty down to zero where the rate existing on July 1, 1962, is not more than five per cent ad valorem or its equivalent. This authority permits elimination of low, "nuisance" duties, which have not really inhibited imports because of the rate but have constituted an administrative burden on importers. In the 1958 Extension Act, authority had been granted to reduce any duty by two per cent provided that this did not result in making the article duty-free.

c) Special authority for Common Market trade agreements. The second most important tariff-cutting authority granted was envisaged to be the authority, in a trade agreement with the European Economic Community (EEC), to reduce to zero the duty on articles in any category where the United States and the EEC together account for eighty per cent or more

17 H.R. 10368, 85th Cong., 2d Sess. (1958) contained a provision which would have permitted elimination of duties of three per cent ad valorem or less, Hearings on Trade Extension Act Before House Ways and Means Committee, 85th Cong., 2d Sess. pt. 1, at 2 (1958). It was changed in the bill as reported by the committee.
of the aggregated world export value of all the articles in such category, based on a representative period within the immediately preceding five years from the beginning of the negotiating process, and comprising at least two one-year periods. The Tariff Commission is given the task of determining the articles falling within a category after the President selects a system of category classification. The President is given the task of determining the “aggregated world export value” on the basis of the recent historical period; in so doing, however, he must exclude exports from any EEC country to another, and exports to or from the United States or any EEC country, and Communist-dominated countries, during that period. He must receive the advice of the Tariff Commission before making his determination in this respect.

The ultimate significance of this special authority was always extremely difficult to have predicted with confidence. If Great Britain and some of the other European Free Trade Area (EFTA) countries had joined the Common Market, it is possible that it might have had substantial significance, though it is doubtful that there would have been a great deal of tariff-cutting below the fifty per cent cuts available under the general authority and it is highly unlikely that there would have been more than a minimum of cutting down to zero. After all, France could not have been expected to be anxious to accord to the United States the advantages of a free-trade area which she had refused to accord to the United Kingdom, in 1958, for both economic and political reasons.

Now that the United Kingdom has been refused entry into the Common Market this special authority will have no practical significance, since without the United Kingdom share of world trade included, there are very few categories of articles where the United States and the EEC account for as much as eighty per cent of world trade, as defined in the act.

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18 Trade Expansion Act § 211 (1962).
19 Trade Expansion Act § 211(d) (1962).
20 Sweden, Norway, Denmark, Switzerland, Austria and Portugal are the other members of the European Free Trade Area. See Benoit, Europe at Sixes and Sevens 79-85 (1961). The difference between a “free trade area” and a “customs union” (which is what the European Common Market purports to be) is as follows. Countries which become members of a free trade area agree not to assess or collect duties or impose other restrictions on goods of one another entering their respective customs territories, but each continues to maintain its individual tariff wall against goods of non-member countries. Countries which become members of a customs union agree to permit entry duty-free and without restriction to goods of one another, and, in addition, agree that a single common tariff wall will replace their individual tariff walls hitherto maintained.
21 Benoit, op. cit. supra note 20, at 71-76.
22 Trade Expansion Act § 211 (1962); Senate Hearings, pt. 4, at 2260-62.
Nor will various forms of partial membership for the United Kingdom and perhaps other EFTA countries, which have been talked of recently, revive the special authority, in view of the fact that the EEC is defined, for purposes of the act as countries which "are agreed to achieve a common external tariff through the European Economic Community."

The Douglas Amendment

This virtual gutting of the special authority to reduce duties down to zero, caused by the non-entry of the United Kingdom into the Common Market, might have been avoided if the administration had supported instead of opposed the Douglas Amendment. Senator Douglas proposed an amendment, based upon a proposal by Congressman Henry Reuss, which would have authorized the President to negotiate duties down to zero in categories in which the United States and the EEC, plus any other country or countries belonging to the EFTA regardless of whether they were considering entrance into the Common Market, comprised eighty per cent of world trade.

At the time he proposed the amendment, Senator Douglas did so because of the possibility which he believed then existed (August 1962), that the United Kingdom would not enter the EEC, both because of its own doubts and the fact that, "President de Gaulle is suspected of not wishing to have British entrance because he wants to maintain continental superiority and does not wish to have too much British influence."

While acknowledging that the Douglas Amendment put him in a "curious" position of refusing a wider grant of authority, Undersecretary of State Ball nevertheless did so refuse, primarily because its adoption would mean that, "opponents [within Britain] of the entry of Britain into the Common Market could say that there is an alternative presented to Britain which had not been available before." While Mr. Ball objected to his "formulation," it is difficult to quarrel with Senator Douglas' concluding comment, "What you mean is [that the amendment would] reduce the pressure on Great Britain to go into the Common Market."

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23 Trade Expansion Act § 256(2) (1962).
25 Senate Hearings, pt. 4, at 2260.
26 Senate Hearings, pt. 4, at 2261-62.
It would be unwise and unfair to think that Mr. Ball was unaware of the possibility that what has happened would happen. It is reasonable to surmise, therefore, that, believing that British doubts about entry were a greater risk than French objections to Britain, he wished to make it perfectly plain to Britain that she must make maximum efforts to get into the EEC, and having accomplished that, then be in a position to exert pressure on France to accept the United Kingdom. It is fair to say, therefore, that the administration read the probabilities with a much warmer head than Senator Douglas, and further, in all likelihood exaggerated the effects which the Douglas Amendment would have had upon British efforts to seek entrance, since these were based upon political as well as economic factors.

Second thoughts such as these must, in fact, have occurred somewhere in the administration, perhaps to Mr. Ball, because when the Douglas Amendment was adopted in the Senate Finance Committee, and the committee bill was voted on by the Senate, no special efforts were made by the administration to eliminate it. Moreover, when the House and Senate bills were in Conference Committee, the administration position on the Douglas Amendment was one of “no objection.” However, this was a far cry from support, and thus, in view of the public position of opposition theretofore taken, this neutral attitude in fact lent strength to the opposition voiced by the House conferees. Accordingly, the Douglas Amendment was eliminated by the Conference Committee from the bill which became the act.27

As indicated, however, even with the Douglas Amendment the special authority’s principal function was always, in the view of many, more optical in terms of the political presentation of a “new program” than real in terms of being used to bring discrimination down to the point where it would be of minor significance as a deterrent to American exports.

d) Agricultural and tropical agricultural and forestry products. In trade agreements with the EEC, two additional special authorities are granted, neither of which is of substantial trade significance so far as United States trade with the EEC is concerned.

The first permits tariff-cutting down to zero of specified agricultural commodities if the President determines that this will “tend to assure the maintenance or expansion of United States exports of the like article.”28 Since the most important and effective barriers to imports of agricul-

tural commodities are the fee and quota restrictions imposed under Section 22 of the Agricultural Adjustment Act, which are not touched by this act, it is not likely that this authority will purchase much by way of concessions from the EEC.

The second special authority in this group permits tariff cuts down to zero on tropical agricultural or forestry commodities, provided a) that such article is “not produced in significant quantities in the United States,” and b) that the EEC has made a commitment “with respect to duties or other import restrictions which is likely to assure access for such article to the markets of” the EEC which is comparable to the access accorded by the United States, and c) that such access will be “afforded substantially without differential treatment as among free world countries of origin.”

The purpose of this authority is to influence the EEC to ease imports of such articles primarily from Latin America to the EEC, that is, to reduce the discrimination against Latin America which inheres in the arrangements of association between the EEC and those African territories which produce such commodities, arrangements which provide for their duty-free entrance to the EEC. The bargaining leverage afforded by this provision to secure this objective, however, is more apparent than real. For the United States already accords duty-free treatment to the most important of the major commodities identified—coffee and bananas—and since sugar is substantially produced in the United States, the President is not authorized to utilize this special authority so far as it is concerned. The Europeans may thus be expected to point out that the United States is asking them to change their African trading arrangements in order to accommodate outsiders, in exchange for which the United States would continue, without change, to provide duty-free treatment for the great bulk of such articles, which the United States has no thought of changing anyway.

30 Trade Expansion Act § 213 (1962). A “tropical agricultural or forestry commodity” is one which is determined by the President, on advice of the Tariff Commission, to be produced to the extent of more than half (in terms of world production) in the area lying between 20° north latitude and 20° south latitude. Trade Expansion Act § 213(b) (1962). The Tariff Commission must also advise the President as to whether such an article is substantially produced in the United States.
31 Art. 133, Treaty Establishing the European Economic Community (1957); see Benoit, op. cit. supra note 20, at 8-9, 202-04.
Staging of Duty Reductions

The new act,33 like the 1955 and 1958 extensions, provides for the reduction of duties lowered in trade agreements over a period of time, in order that the competing domestic industry may adjust to harder competition gradually rather than be faced suddenly with imports benefited by a deep slash in duties. Thus, the 1958 act, which authorized, principally, reductions up to twenty per cent of the July 1, 1958 rate, required that, "such decrease shall become initially effective in not more than four annual stages, and no amount of decrease becoming initially effective at one time shall exceed 10 per centum of the rate of duty existing on July 1, 1958."34

The "staging" requirement of the new act is similar, though more complicated. Applying to all the reductions authorized by the act except that relating to tropical agricultural and forestry commodities, it requires that not more than one-fifth of the total reduction of duty on an article take effect on the date the total reduction is proclaimed, and that the remaining four-fifths take place in four equal installments at one-year intervals after the proclamation date.35

IMPORT RESTRICTIONS TO OFFSET UNREASONABLE, UNJUSTIFIABLE OR DISCRIMINATORY ACTS OF FOREIGN COUNTRIES

From the outset of the Trade Agreements program in 1934, the act has contained two interlocking provisions, one governing the extension of the benefits of trade agreements to "third countries" (countries other than the one with whom an agreement is being made) and the other relating to the suspension of concessions if any country discriminated against American commerce. Section 350(a)(5) of the Tariff Act of 1930, as amended, thus provided that 1) "duties and other import restrictions proclaimed pursuant to [the Trade Agreements Act] shall apply to articles, the growth, produce, or manufacture of all foreign countries, whether imported directly or indirectly," except for (since 1951) goods from Soviet or Chinese Communist-dominated countries, and 2) that this legal re-

33 Trade Expansion Act § 253 (1962).
requirement, as well as the continued application of a trade agreement rate to goods of a country with whom it was negotiated, was subject to a proviso that "the President shall, as soon as practicable, suspend the application [of the trade agreement rate] to articles, the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts (including the operations of international cartels) or policies which in his opinion tend to defeat the purpose of this [act]."\(^{36}\)

In fact, the authority granted in the proviso has been used very infrequently; it was utilized beginning in 1935 against Germany and thereafter applied to goods from German-occupied territory, and for a few months in 1937 it was applied to Australia.\(^{37}\) Not that "discriminatory" restrictions against United States commerce were never maintained; they were and are. But the overwhelmingly major restriction against American exports has been and is the balance-of-payments quantitative restriction caused by the shortage of foreign exchange reserves on the part of the restriction-imposing country. Since such restrictions, for balance of payments reasons, are specifically recognized as "legal" in Article XIV of the General Agreement on Tariffs and Trade (GATT),\(^{38}\) the United States has maintained that such restrictions, as well as all others permitted by the GATT articles, were neither "discriminatory treatment of American commerce" nor "policies which . . . defeat the purpose of this [act]" within the meaning of the proviso.

The new act retains the mandatory most-favored-nation treatment provision of the prior legislation, but makes a number of changes in the second of these interlocking provisions, by expanding the scope and application of the proviso and, perhaps more importantly, making clear the desire on the part of Congress that the President make greater use of this retaliatory tool than in past years in order to end discrimination or "unreasonable" or "unjustifiable" treatment of American exports.

Since a paraphrase of the section would almost by necessity repeat the whole provision, it is set out here in full:

Section 252. Foreign Import Restrictions.
(a) Whenever unjustifiable foreign import restrictions impair the value of tariff commitments made to the United States, oppress the commerce of the United States, or prevent the expansion of trade on a mutually advantageous basis, the President shall—


(1) take all appropriate and feasible steps within his power to eliminate such restrictions,

(2) refrain from negotiating the reduction or elimination of any United States import restriction under section 201 (a) of this title in order to obtain the reduction or elimination of any such restrictions, and

(3) notwithstanding any provision of any trade agreement under this Act and to the extent he deems necessary and appropriate, impose duties or other import restrictions on the products of any foreign country or instrumentality establishing or maintaining such foreign import restrictions against United States agricultural products, when he deems such duties and other import restrictions necessary and appropriate to prevent the establishment or obtain the removal of such foreign import restrictions and to provide access for United States agricultural products to the markets of such country or instrumentality on an equitable basis.

(b) Whenever a foreign country or instrumentality the products of which receive benefits of trade agreement concessions made by the United States—

(1) maintains nontariff trade restrictions, including variable import fees, which substantially burden United States commerce in a manner inconsistent with provisions of trade agreements, or

(2) engages in discriminatory or other acts (including tolerance of international cartels) or policies unjustifiably restricting United States commerce,

the President shall, to the extent that such action is consistent with the purposes of section 102—

(A) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or

(B) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality.

(c) Whenever a foreign country or instrumentality, the products of which receive benefits of trade agreement concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President may, to the extent that such action is consistent with the purposes of section 102, and having due regard for the international obligations of the United States—

(1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or

(2) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality.

Two things are clear, so far as the changes wrought by this new section are concerned. The first is that the scope of the old proviso has been enlarged substantially. Under the old proviso, the President was required (before 1955 he was only authorized39) only to suspend the application of the lower trade agreement rates to countries which discriminated

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against American exports. Under the new act, he is a) to refrain from negotiating the reduction or elimination of United States import restrictions in order to secure the elimination of such restrictions, b) in some circumstances to refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with a country imposing such restrictions, c) in certain situations to "impose duties or other import restrictions," and, d) generally, to "take all appropriate and feasible steps" to eliminate such restrictions. Second, the Congress has spoken vigorously in favor of carrying and using the big stick in order to end discrimination, and particularly to forestall what appear to be impending Common Market agricultural restrictions which may affect seriously continuing American agricultural exports.\(^{40}\)

It is difficult, however, to identify other changes with confidence. Thus, the Senate Report, in commenting upon sections 252(a) and 252(b) (except for 252(a)(3)), states that they do not "authorize action against foreign import restrictions which, though they may be legally justifiable, impose a substantial burden upon United States commerce,"\(^{41}\) thereby indicating, correctly, that these provisions do not work a significant change in prior law. On the other hand, sections 252(a)(3) and 252(c) are aimed at burdensome restrictions, despite the fact that they are permissible under international agreements, \textit{i.e.,} even though they are not in legal contemplation "discriminatory." Section 252(a)(3) so states directly ("notwithstanding any provision of any trade agreement under this Act"), and 252(c) does so indirectly ("having due regard for the international obligations of the United States"); and as to 252(c), the Senate Report states that it "would not authorize any \textit{indiscriminate} breach of international obligations, such as our most-favored-nation treaties with regard to the products of other countries." (Emphasis added.)

The significance of these changes lies in the fact that the Common Market's agricultural policies are a part of the external tariff system of a customs union which is specifically permitted under Article XXIV of the GATT\(^{42}\) if it meets the conditions specified therein, and the United States, unlike some other countries, has never taken the position in GATT that the Common Market fails to meet such conditions. The Senate was

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therefore attempting to say that the President should retaliate against such restrictions even though in so doing he might run a bit afoul of international agreements to which the United States is a party. However, section 252(a)(3), which requires imposition of import restrictions to forestall or remove "unjustifiable" foreign restrictions, does so only "when [the President] deems such . . . restrictions necessary and appropriate," and section 252(c) authorizes action "to the extent that such action is consistent with" the purposes of the act, "having due regard" to international obligations. Hence, the Senate, having marched half way up the hill, reconsidered and then slid back at least half that distance.

It thus appears that the changes, extensive though they are by verbiage count, really amount to an expression of serious concern, more serious than ever before expressed, concerning the impact of the Common Market on American agricultural exports, and a strong desire that the President do everything that he can do reasonably to secure relief. This basically hortatory result should not be minimized, however, despite the fact that it will probably not result in withdrawal of concessions already granted. For it indicates to the President that he will have political as well as economic trouble at home unless in future negotiations he can secure commitments which will enable American agricultural exports to Europe to continue at close to historic levels.

SAFEGUARDS AGAINST INJURY

Under the law existing prior to the enactment of the 1962 act, there were four principal safeguards against injury to domestic producers caused by increased imports. Two of these, "peril points" and "the escape clause proceeding," related to injury caused by an increase in imports as a consequence of concessions made in trade agreements, while the other two, the "National Security amendment"43 and the "section 22 proceeding,"44 related to injury caused by increased imports regardless of whether trade agreement concessions affecting the product had been made. The 1962 act makes material changes in the first two, and effects no material change in the latter two safeguards.

Peril Points

Under the law prior to the 1962 act,45 before commencement of negotiations with foreign countries for tariff reductions, a list was made up of
articles considered for possible "modifications of duties and other import restrictions," and published. The Tariff Commission then investigated, holding appropriate hearings, and made a report within six months to the President on each such article as to the limit to which modification may be made "without causing or threatening serious injury to the domestic industry producing like or competitive articles." In subsequent negotiations, the President might breach these "peril points," but if he did he had to report why he had done so to the Congress.

Under the procedures of the 1962 act, a list of articles or categories of articles proposed to be the subject of trade agreements negotiations must be furnished to the Tariff Commission; as under prior law, the Tariff Commission must investigate, holding appropriate hearings, and reporting to the President within six months of the receipt of the list. But instead of reporting as to the specific limits to which tariffs may be reduced without causing or threatening serious injury to the domestic industry—the "peril points," the Tariff Commission is to advise the President "as to the economic effect of reductions or eliminations in duties or other import restrictions on United States firms and workers in industries producing like or directly competitive articles." In giving this advice the Tariff Commission must take into account "the probability of the occurrence on a widespread basis in the industry of significant idling of productive facilities of firms, or prolonged and persistent inability of firms to operate at a profit, and of unemployment or underemployment of workers."

Apart from the more pointed definition of injury represented by this language, the principal difference in the peril point procedures envisaged in the new program is that there will be no identification of precise peril points. Instead of providing the President with its educated guess concerning the lowest possible non-injurious rate on hundreds or thousands of articles, the Tariff Commission will render a judgment as to the economic effect upon domestic industry of the total reduction permitted under the authority granted to the President. This, too, it would appear, will have to be an educated guess, because it has never been possible to forecast with accuracy the effect upon domestic industry of duty reductions; too many imponderables are present. In addition, if, as may well be the case, the Tariff Commission will be unaware of the extent to which the authority will be utilized in respect to any article or category at the time it reports, it may be asked: Of how much value to the President will the

46 Trade Expansion Act § 301(b)(2) (1962).
47 House Hearings, pt. 1, at 86.
report be if its purpose is to indicate with some precision the areas in which reductions will be perilous? The prior peril point procedure had the enormous drawback of seeming to identify peril with delusive accuracy. The new procedure avoids that defect, but in the process may result in failing to identify peril in a meaningful manner.

On the other hand, the Tariff Commission report may be of some assistance, in expediting subsequent action toward adjustment assistance to affected firms and workers in the event concessions are made despite its view of the probable impact upon domestic industry. And, more important, the elimination of "peril points," which in recent years have had a decidedly inhibiting influence upon United States tariff bargaining, will better enable the United States to make substantial offers to the Common Market and to others in an effort to secure compensatory reductions.

Reservation of Articles from Negotiations

A certain price was paid, however, for the marked relaxation of peril points secured in the new act. Section 225 requires the President to "reserve from negotiations" for tariff reductions any article if there is in effect regarding such article an action taken under the National Security amendment (this means oil and oil products at present), or under the prior or the new escape clause (such as watches, bicycles, lead and zinc), or under the "orderly marketing" section of the new act.

Prior legislation imposed no such requirement, although it was in fact highly unlikely that an article which had been specially protected by restrictions so imposed would be listed for possible duty reductions.

In addition, until October 12, 1967, (which is beyond the period during which the President can enter into trade agreements under the act), the President must also reserve from negotiations any article produced by a domestic industry which a majority of the Tariff Commission had found, in an escape clause proceeding, to have been caused or threatened with serious injury from increased imports, where the President had refused to grant

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49 House Hearings, pt. 1, at 86-87.
51 U.S. Tariff Comm'n, Investigations Under the "Escape Clause" of Trade Agreements 5 (1962) (watches, No. 7-26; lead and zinc, No. 7-65; bicycles, No. 7-37).
53 If an article had been granted escape-clause relief which still was outstanding, this meant that it was deemed to require higher protection than the lower trade agreement rate would provide. It would clearly have made no sense to negotiate an even lower rate than the trade agreement rate, which had been found to be too low to prevent injury.
escape clause relief, if the article is listed under section 221 and the industry requests and the Commission informs the President that conditions have not substantially improved since it made the original finding.54 This provision, by reaching back and immunizing from further tariff cuts articles which were never the beneficiaries of escape clause relief, in the great majority of cases because the President had disagreed with the majority of the Commission’s findings on injury (i.e., tobacco pipes),55 creates a novel and disturbing restriction on presidential discretion which is hardly consistent with the conception which has underlain escape clause proceedings from the outset—namely, that the Tariff Commission’s findings on injury as well as its recommendations as to relief are not binding upon the President.56

Finally, the President is authorized to reserve from negotiations any other article, in the light of the advice and information furnished to him.57

The Escape Clause Proceeding

Under prior law,58 if a domestic industry believed that it had been injured or that injury was threatened as a consequence of an increase in imports of articles which had been the subject of trade agreement concessions, it could appeal to the Tariff Commission. The Tariff Commission, within six months, had to report to the President its findings, after appropriate investigation, as to whether increased imports had caused or

54 Trade Expansion Act § 225 (1962).
56 House Comm. on Ways and Means, Trade Agreement Extension Act of 1955, H.R. Rep. No. 50, 84th Cong., 1st Sess. 4-5 (1955). The Ways and Means Committee was quite emphatic:

Findings on the question whether injury is caused or threatened by imports resulting from tariff concessions are based on factual material. However, proper weight must be given to such facts, reasonable inferences drawn therefrom, and, finally, there must be an exercise of judgment. Different weight can be given to the same facts, different inferences can be drawn from the same fact, and differing judgments can result. Otherwise all administrative or judicial judgments would be unanimous and be affirmed on appeal. In practically every field where administrative or judicial findings are involved, the Congress has provided for some review of those findings, either by courts or by the President. In the committee’s opinion it would be undesirable to depart from this practice in the case of the escape clause. Your committee believes that the President should not be compelled as a matter of law to accept findings of the Tariff Commission where it is his opinion that they are not soundly based, although in the committee’s opinion he should give full consideration and proper weight to such findings.

57 Trade Expansion Act § 225(c) (1962).
threatened serious injury to the domestic industry producing like or directly competitive articles, and submit its recommendation, if it found that such injury had been caused or threatened, as to the tariff or quota relief necessary to remedy the injury—tariff relief being limited to a rate fifty per cent above the rate existing on July 1, 1934.\textsuperscript{59} The President could accept or reject the findings and recommendations of the Tariff Commission, in whole or in part; if he failed to agree with the Commission, he had to report to the Congress the reasons why. The Congress, by a concurrent resolution adopted by a two-thirds majority of both houses, which was procedurally "privileged," might overturn his negative action, thereby causing the Tariff Commission's recommendation to be put into effect.\textsuperscript{60} However, this latter event never occurred. The President could, of course, utilize whatever authority there might be to assist the industry and its workers, and not accept the Tariff Commission's report and recommendations, and in fact, had done so in some cases.\textsuperscript{61} But the thrust of the prior escape clause procedure was tariff and quota relief, with no special relief tools of other kinds to alleviate injury having been made available to the President.

The changes wrought in this procedure by the 1962 act are extensive and important. They are of two kinds: changes in the escape clause procedure itself, and the addition of "adjustment assistance" to affected firms and workers, both designed to change the emphasis in alleviating injury from tariff relief to "domestic" relief measures.

First, there were a number of major changes in the escape clause procedure itself:

a) Under prior law, there was no necessity to show a causal connection between a trade agreement concession and the increase in imports which was alleged to have caused injury. The Tariff Commission had long conclusively presumed such a connection from the mere existence of the two elements\textsuperscript{62} because of its unwillingness to speculate that a concession had absolutely nothing to do with a subsequent increase in imports, and this action of the Commission had received congressional blessing in the report of the House Ways and Means Committee on the bill which became


\textsuperscript{60} Section 6, 72 Stat. 676 (1958).


\textsuperscript{62} Ch. 14, § 4, 65 Stat. 73 (1951) (the earlier law had required that the concession "in whole or in part" cause increased imports).
the 1958 act.\textsuperscript{63} This was changed by the 1962 act, which requires, before escape relief can lie, that increased imports must result "in major part" from trade agreement concessions.\textsuperscript{64} Thus, the mere fact that there was a concession in 1947 and increased imports in 1963 will no longer suffice to make this part of the case for relief; a significant causal relationship must now be found.

b) Under prior law, an increase in imports occurred, for purposes of escape clause relief, if the increase was "actual or relative."\textsuperscript{65} Thus, if imports remained steady but domestic production of the like article declined, a "relative" increase in imports had occurred, and escape relief was "jurisdictionally" available on this score. Because the 1962 act omits the phrase "actual or relative,"\textsuperscript{66} it is clear that relative increases will no longer suffice for escape action to lie.

c) Under prior law, the Tariff Commission was enjoined to consider that serious injury had resulted from increased imports when it found that such increased imports "have contributed substantially towards causing or threatening serious injury."\textsuperscript{67} Under the 1962 act, however, the Commission must find, before escape relief will lie, that "increased imports have been the major factor in causing, or threatening to cause such injury."\textsuperscript{68} While neither "contributed substantially" nor "the major factor" will ever rank high on anyone's list of verbal precision-instruments, it is clear that the 1962 act tightens the necessary causal connection which must be found before escape relief can be recommended.

d) Neither prior law nor the 1962 act define "serious injury." However, the 1962 act simplifies to some extent the factors to be considered by the Tariff Commission in its determination of whether such injury has occurred, and eliminates some. Under prior law, the Commission was enjoined to consider, without excluding other factors, the following: "[A] downward trend of production, employment, prices, profits, or wages in the domestic industry concerned, or a decline in sales, an increase in imports, either actual or relative to domestic production, a higher or growing inventory, or a decline in the proportion of the domestic market supplied by domestic producers."\textsuperscript{69} The new act requires the Tariff Commission

\textsuperscript{64} Trade Expansion Act § 301(b)(1) (1962).
\textsuperscript{66} Trade Expansion Act § 301(b)(1) (1962).
\textsuperscript{68} Trade Expansion Act § 301(b)(3) (1962).
to "take into account all economic factors which it considers relevant, including idling of productive facilities, inability to operate at a level of reasonable profit, and unemployment or underemployment."\(^{70}\)

The elimination of the last three factors specified in prior law (increase in imports, higher inventory, decline in domestic industry's share of the domestic market) is a clear gain, since some were relevant only to causation of injury, and all were equivocal so far as the existence of injury was concerned. For the rest, the new enumeration represents a generalization, and a pretty good one, of the older enumeration. The importance of the change, however, is far from earth-shaking.

e) Under prior law, the Tariff Commission was required to "segment" the domestic industry for the purpose of determining whether the "industry" was seriously injured by imports. Section 7(e) (added in the 1955 act)\(^{71}\) defined "domestic industry producing like or directly competitive articles" to mean "that portion or subdivision of the producing organizations manufacturing, assembling, processing, extracting, growing, or otherwise producing like or directly competitive products or articles in commercial quantities." And the Commission was required, insofar as practicable, to "distinguish or separate the operations of the producing organizations involving the like or directly competitive products or articles . . . from the operations of such organizations involving other products or articles."\(^{72}\)

The 1962 act omits this "segmentation" provision. However, the House Ways and Means Committee, in its report\(^{73}\) on the bill which became the act, stated as follows:

It is your committee's intention, for purposes of this bill, that in general, the industry, in the case of any industry investigation, will include those operations of those establishments in which the domestic article in question (i.e., the article which is "like," or "directly competitive with," the imported article, as the case may be) is produced. If the domestic article in question is produced in an establishment along with several other articles, the overall operations of the establishment would be included in the domestic industry. Where a corporate entity has several establishments (e.g., divisions or plants) in only one of which the domestic article in question is produced, the establishments in which the domestic article is not produced would, as a general rule, not be included in the industry. This would be particularly apt to be the case where the allied establishments produce articles which are wholly unrelated to the articles produced in the establishment in which the domestic article in question is produced, unless the equipment and skills de-

\(^{70}\) Trade Expansion Act § 301(b)(2) (1962).


\(^{72}\) Ibid.

voted to production of the domestic article in question are freely interchangeable among establishments of the firm.

It should be recognized, however, that the determination of the extent to which establishments producing articles different from the domestic article in question may be separated from the establishments under the same corporate roof that produce the domestic article in question will necessarily be affected by the accounting procedures that prevail in a given case. That is, the establishments not producing the domestic article in question would not be excluded from the domestic industry if it is impracticable to distinguish or separate their operations from the operations of their allied establishments in which the domestic article in question is produced.

In consequence, the principle of "segmentation" is maintained, with somewhat more specific guidelines furnished to the Tariff Commission than had been supplied before.

f) Under prior law, the Tariff Commission had refused escape relief to the domestic industry producing sheep and lamb on the hoof which had alleged that injury was caused it by imports of mutton and lamb products processed from animals, on the ground that these were not "like or directly competitive" products. In its opinion, the Commission had relied upon the defeat, during legislative consideration of the 1958 act, of the Morse Amendment, which would have stated that glacé cherries were "like or directly competitive" with raw cherries.

Under the 1962 act, this result, which never made sense to economists, is reversed. Section 405(4) provides that, "An imported article is 'directly competitive with' a domestic article at an earlier or later stage of processing, and a domestic article is 'directly competitive with' an imported article at an earlier or later stage of processing, if the importation of the imported article has an economic effect on producers of the domestic article comparable to the effect of importation of articles in the same stage of processing as the domestic article. For purposes of this paragraph, the unprocessed article is at an earlier stage of processing." The House Report, in commenting upon this new language, stated:

The term "earlier or later stage of processing" contemplates that the article remains substantially the same during such stages of processing, and is not wholly transformed into a different article. Thus, for example, zinc oxide would be zinc ore in a later stage of processing, since it can be processed directly from zinc ore.

75 Ibid.
76 Id. at 61. In fact Section 22 of the Agriculture Adjustment Act, 64 Stat. 261 (1950), as amended, 7 U.S.C. § 624 (1958), has long provided for relief in this situation.
For the same reason, a raw cherry would be a glace cherry in an earlier stage of processing, and the same is true of a live lamb and dressed lamb meat.

g) Under prior law, Congress could cause the Tariff Commission's recommended relief to be put into effect, despite disapproval in whole or in part by the President, by a concurrent resolution, which was procedurally "privileged," adopted by a two-thirds vote of both houses.78 As earlier stated, no action has been taken under this provision. Under the new act, the voting requirement is reduced to simple majorities, and the statute is silent concerning the procedural privilege of the concurrent resolution.79 However, it is highly unlikely that these changes will have any practical consequences since it will still be very difficult for an affected industry to muster such wide congressional support in the face of presidential opposition.

h) Under prior law, escape relief continued indefinitely unless changed or terminated by the President upon advice of the Tariff Commission, which reviewed the industry situation annually after an initial two year period of operation under the escape relief granted.80 Under the 1962 act increased import restrictions proclaimed under the escape clause provision will terminate not later than four years after the effective date of the initial proclamation or the date of enactment of the law, whichever is later, unless, following petition by the industry, the President determines, after receiving the advice of the Tariff Commission and after seeking the advice of the Secretaries of Commerce and Labor, that extension of the restriction in whole or in part is in the national interest. The period of extension may not exceed four years at any one time.81 This difference—affirmative action needed to terminate under prior law, affirmative action needed to avoid termination under the new act—may well result in a shorter period in which escape relief will continue from now on. In the past, it was a rarity for escape relief to be modified at any time once it had been granted.

In summation, the changes in the escape clause proceeding are substantial. The result is to make escape clause tariff relief more difficult to secure in consequence of the general tightening of requirements for such relief—not only tighter causation between the trade agreement concession and the increase in imports, and between such increased imports and

79 Trade Expansion Act § 351(2) (b) (1962).
81 Trade Expansion Act § 351(c) (2) (1962).
serious injury, but also concerning the time during which escape action will continue, and in the other respects enumerated.

ADJUSTMENT ASSISTANCE

These changes in the escape clause, as well as the other major features in the 1962 act which are in the direction of liberalizing international trade, would have been more difficult to achieve without the adoption of the additional safeguard of “adjustment assistance” to firms and workers.

Among the principal drawbacks of the escape clause concept, two loomed large in past years. First, if a domestic industry was seriously injured in consequence of concession-engendered import competition, the only effective means available to alleviate the injury was to “take it out on imports” by imposing import restrictions, thus penalizing the more efficient foreign producer and his country, which would lose dollar earnings, as well as the American consumer and the American fabricator of imported goods. Second, if the domestic industry as a whole was not being seriously injured by such import competition, individual firms and workers who nevertheless might be so injured had no special means afforded to enable them to adjust to new lines of work; escape relief itself would not lie, and their adjustment problems were not differentiated from problems of adjustment caused by ordinary technological change, government contract policy changes, etc.

While logically it was difficult to justify differential treatment of adjustment problems on the basis of varying impersonal causes, since firms and workers have no more of a “right” to the maintenance of a tariff rate82 than Douglas Aircraft has to the continuation of a particular missile system in the nation’s arsenal, there were three non-logical factors which made special treatment of import-impacted firms and workers appealing. First, the vestiges of mercantilist feelings on the part of a substantial part of the population cannot be shrugged off completely as a manifestation of irrationality, if only because the number of persons thereby indicted would be too large. The average man accepts more readily the capture of a local market by another American than he does when the culprit is a foreigner. It is “natural” for him, as for the mercantilists of a few centuries back, to consider that he “owns” the local

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82 The courts have upheld the constitutionality of changes in tariff rates effectuated by the President following trade agreements negotiated under policies and standards established by Congress. J. W. Hampton & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892); Star-Kist Foods, Inc. v. United States, 41 Cust. Ct. 200, 169 F. Supp. 268 (1958), aff’d, 275 F.2d 472 (1959).
market, and only gives up a piece of it, if he does, for his own advantage. This feeling is by no means unique in America.

Second, and more importantly, the available general means for adjustment (workmen's compensation and retraining benefits, which vary widely) particularly but not exclusively for workers, is too meager; special adjustment assistance, while creating a differential in favor of import-displaced workers, is thus equitable in itself, and, moreover, may serve the purpose in time of raising the levels of adjustment assistance available generally, through higher benefits in state unemployment compensation systems, and in federal programs such as those under the Manpower Development and Training Act\(^83\) and the Area Redevelopment Act,\(^84\) perhaps just in order to eliminate the favoritism evidenced by such special assistance!

Finally, while what we do may perhaps not be utterly persuasive of what we should do, it is clear that we have in fact differentiated among workers' unemployment benefits depending on the line of work in which they are or have been involved: there has been a Railroad Unemployment Insurance Law\(^85\) for approximately twenty years which affords unemployed railroad workers different treatment than that afforded by existing state unemployment insurance laws; the Servicemen’s Readjustment Act of 1944\(^88\) and the Veterans’ Readjustment Assistance Act of 1952\(^87\) both treated workers released from the armed forces differently from the way the state unemployment insurance laws treated other workers, including those laid off by defense plants; and, under the same state unemployment insurance law, some workers are “covered” and others are not, and even as to two who are both covered and worked the same number of weeks and were laid off the same day, one may receive higher benefits depending upon when the weeks were worked during the base period.\(^88\)

The first formal proposal for adjustment assistance was put forward by David J. McDonald, President of the United Steelworkers of America, as a member of the President’s Commission on Foreign Economic Policy (Randall Commission)\(^89\) in 1954. During that year, a number of bills

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\(^88\) See, U.S. Dep’t of Labor, Comparison of State Unemployment Insurance Laws, as of Jan. 1, 1962 (B.E.S. No. U-141).
\(^89\) Comm’n on Foreign Economic Policy, Report to the President and Congress, January 1954, at 54-58.
were introduced in Congress setting forth this proposal in formal terms, among them one introduced in the Senate (the first there introduced) by then — Senator Kennedy.90 Over the years, until 1962, such bills were a usual feature of the congressional landscape, but none ever got as far as hearings until the administration adopted the idea and made it part of its presentation in the 1962 bill.

The Procedure of Adjustment Assistance

Adjustment assistance procedures, for firms and workers, begin with a petition for a "determination of eligibility to apply for adjustment assistance" filed with the Tariff Commission by a firm, or by a group of workers or their certified or recognized union or other duly authorized representative.91 Such a petition may be filed independently, or together with a petition for "tariff adjustment" (escape clause relief). As the House Report makes clear,92 "An industry investigation will be conducted whether the petition seeks tariff adjustment or other adjustment assistance or both."

a) If the Tariff Commission finds that the industry has been injured, under the criteria for escape relief discussed above, the President may act thereupon by either providing tariff relief, or by providing, respecting such industry, that firms may request the Secretary of Commerce for certification of eligibility to apply for adjustment assistance, or that workers may request such certifications of the Secretary of Labor, or take any combination of such actions.93

If the President takes such action, then the Secretary of Commerce or Labor, respectively, must certify as eligible to apply for adjustment assistance any firm or group of workers in such an industry upon a showing to his satisfaction that the increased imports which the Tariff Commission has determined to result from concessions granted under trade agreements have caused serious injury or threat thereof to such firm or group of workers.94

b) If the Tariff Commission fails to find that the industry has been injured, where petitions for both tariff adjustment and adjustment assistance have been filed, or if only a petition for adjustment assistance has been filed, the President may still certify such firm or group of workers to

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91 Trade Expansion Act § 301(a)(2) (1962).
93 Trade Expansion Act § 302(a) (1962).
94 Trade Expansion Act § 302(b)(1), (2) (1962).
be eligible to apply for adjustment assistance if the Commission has found that "as a result in major part of concessions granted under trade agreements, an article like or directly competitive with" an article produced by the firm (or "such worker's firm") "is being imported into the United States in such increased quantities as to cause or threaten to cause, serious injury" to such firm, or unemployment or under-employment of a significant number or proportion of the workers of such firm or subdivision. The standards to be applied in making this judgment are the same as those to be applied in making findings for "tariff adjustment." However, while the Tariff Commission has six months within which to make its determination and report on "tariff adjustment," as it has had under prior law to make escape clause reports, the Commission must report its determination of eligibility to apply for adjustment assistance "not later than 60 days after the date on which the petition is filed.

This interrelated and complex procedure was caused in large part by two mutually conflicting desires: 1) A desire to require a showing of a real causal connection between concession-engendered imports and injury to firms or workers where their industries were not injured as a whole, or where the industry as a whole was injured but not each firm within it, and 2) a desire to get adjustment assistance to firms and workers within a relatively short period of time, because otherwise, in Lord Keynes' famous phrase, "in the long run, we'll all be dead." The result was a compromise which seems to be weighted, despite the written requirements of fairly tight causation, toward satisfaction of the second desire. There are two reasons for this conclusion, both also interrelated. In the first place, while it is difficult enough, with complete import statistics available, to determine the impact of total imports upon an entire domestic industry, it is much more difficult, with no reliable, ready-at-hand figures showing the flow of imports to the Minneapolis-St. Paul market area, for example, to determine to what extent a firm marketing in that area has been hurt by imports. Further, other reasons for injury, such as a change in public taste, are much more difficult to judge in the case of a single firm than in the case of an entire industry. Secondly, the Tariff Commission has always made a successful case for at least a six-month period within which to investigate and reach conclusions in industry investigations, where basic relevant import data are at hand. But the Commission is given only

95 Trade Expansion Act §§ 301(c) (1), (2), 302(c) (1962).
96 Trade Expansion Act § 301(f) (2) (1962).
98 Trade Expansion Act § 301(f) (3) (1962).
sixty days within which to make determinations of eligibility to apply for adjustment assistance, where it is supposed to make the same basic causation findings on what will be a lesser quality of evidence. Thus, despite the House Committee’s cautionary admonition\(^\text{99}\) that “it is important that adjustment assistance in all instances be given only where it has been concluded that the conditions requiring assistance were caused by increased imports from tariff concessions made under trade agreements,” it is difficult to conclude that there was not, at the least, a bit of tongue in the cheek of the Ways and Means Committee when it caused that sentence to be written.

**The Substance of Adjustment Assistance**

(A) **Adjustment Assistance to Workers**

Workers deemed eligible to apply for adjustment assistance, under the above-described procedures, may receive several forms of assistance: 1) readjustment allowances—a weekly cash allowance intended to supplement regular unemployment compensation and to be generally available for fifty-two weeks of unemployment, including weeks of training; 2) training for vocational readjustment—failure without good cause to take training to which the worker is referred will terminate his readjustment allowances; and 3) relocation allowances, for workers unable to obtain suitable local employment, to cover the cost of moving the family to an area where a job is available.\(^\text{100}\)

*Trade readjustment allowances.*—The cash allowances under the act are paid only for weeks of unemployment beginning not earlier than thirty-one days after enactment of the act and after the date determined as the beginning of the import-caused unemployment problem. The separation itself must occur after the beginning date but within two years of a certification that workers of the firm or subdivision are eligible for worker assistance. (This two-year period can be shortened by a presidential determination that unemployment is no longer attributable to imports).

A week of unemployment is a week in which the worker earns less than seventy-five per cent of his average weekly wage and either works in the adversely affected employment for less than eighty per cent of his


\(^100\) Sections 321-38 of the Trade Expansion Act define the forms and terms of assistance to workers. The description which follows is taken from the summary contained in H.R. Rep. No. 1818, 87th Cong., 2d Sess. 29-33 (1962).
average hours, or, if he has been totally separated from the adversely affected employment and is working at some other job, is not working on a full-time basis.

To be eligible for trade readjustment allowances, the worker must have been separated due to lack of work in an adversely affected employment, that is, in a firm or subdivision with respect to which there has been a certification of worker eligibility. This test of separation due to lack of work is stricter than under state law. A worker who leaves his job voluntarily may be eligible for state unemployment insurance if he had good cause but he would not be eligible for trade readjustment allowances under this act if he left voluntarily, no matter how good the cause.

To be entitled to trade readjustment allowances, a worker must have had substantial employment over the three years immediately preceding his separation from adversely affected employment. The worker must have earned wages of fifteen dollars or more in at least half the weeks of the three years; and, in the fifty-two weeks preceding his separation he must have had twenty-six weeks of employment, at wages of at least fifteen dollars, in a firm or firms the workers of which have been found adversely affected by imports.

These employment requirements relating to entitlement to allowances are substantially stricter than those under the Manpower Development and Training Act of 1962\(^\text{101}\) or under state unemployment insurance law. The Manpower Act requires only three years of gainful employment at any time in the worker’s past. Of the thirty-seven states where the unemployment insurance qualifying requirements are, or can be, expressed in terms of weeks of employment, only two have a requirement of more than twenty weeks in a fifty-two-week base period; twenty require less than twenty weeks, and fifteen require twenty weeks.

**Weekly amount of trade readjustment allowances.**—The trade readjustment allowance for a week is sixty-five per cent of the individual’s average weekly wage but it cannot exceed sixty-five per cent of the average weekly manufacturing wage.\(^\text{102}\) The individual’s average weekly wage is determined on the basis of the so-called high-quarter formula typical of most state unemployment compensation laws.

The maximum amount that can be paid to any worker for a week is sixty-five per cent of the annual average weekly wage paid to production workers in manufacturing for the latest calendar year for which the figure has been published by the Bureau of Labor Statistics of the De-


\(^{102}\) Trade Expansion Act § 322 (1962).
partment of Labor. At the time the act was enacted the most recent published figure, for the year 1960, was $89.72. The official average for 1961 was expected to be about $92.34, which would give a maximum weekly trade readjustment payment based thereon of $61. This is substantially in excess of the benefits which workers secure under state unemployment compensation laws. However, the worker’s weekly allowance will be reduced by one-half of any remuneration that he receives for services performed during the week of unemployment. This formula gives him an incentive to find work.

The amount of the trade readjustment allowance is further limited by the requirement that the total amount that a worker receives as trade readjustment allowance, remuneration for services performed during the week, and unemployment insurance and training allowance under the Manpower Development and Training Act,103 or Area Redevelopment Act,104 cannot exceed seventy-five per cent of his average weekly wage.

An adversely affected worker may receive his weekly trade readjustment allowance for weeks while he is attending training. The trade readjustment allowance would be in lieu of any training allowance he might receive under any other federal law for worker training. If, under another federal law for the training of workers, an adversely affected worker who is taking training could receive a higher weekly payment, his trade readjustment allowance for a week of training will be increased to such higher amount.

The act provides that trade readjustment allowances will not duplicate benefits already available to the worker, but will merely supplement them, as necessary, to provide the designated level of weekly payments for a potential duration of fifty-two weeks in most cases. A worker’s trade readjustment allowance for a week is thus reduced by any unemployment insurance to which he is entitled for such week, whether or not he has filed a claim for the unemployment insurance. If, for any week in which the worker is not taking training, he is found ineligible for state unemployment insurance solely on account of his claim for a trade readjustment allowance, his trade readjustment allowance will be reduced as if he had received state benefits.

With respect to a worker who is taking training, however, unemployment insurance for a week would be deducted from his trade readjustment allowance for that week only if the worker received the unemployment insurance. The act provides that if an adversely affected worker is paid

unemployment insurance under state law for a week during which he is taking approved training, the state may be reimbursed from trade reallocation allowance funds for the unemployment insurance, to the extent of the trade reallocation allowance to which the worker would have been entitled. It is intended that reimbursed unemployment insurance payments not be charged to employers' accounts and that trainees not have their eligibility for unemployment insurance reduced on account of such payments. This treatment of the relationship between payments to workers in training, reimbursement, and state unemployment insurance does not differ from that provided in the Manpower Development and Training Act.\textsuperscript{105}

The act prevents a worker from obtaining duplicate benefits by first exhausting his entitlement to benefits under unemployment insurance or a federal training law and then applying for trade readjustment allowances. The potential duration of trade readjustment allowances is reduced by the number of weeks for which the worker received such other benefits when he later files for a trade readjustment allowance. He is paid at that time the amount by which his trade readjustment allowance would have exceeded these other benefits for the prior weeks. This provision for payment would come into operation, for example, where unemployed workers have been receiving unemployment or training benefits and there is a section 302 certification of trade impact with a beginning date preceding the date of their layoff.\textsuperscript{106}

\textit{Time Limit on Trade Readjustment Allowances}.—Under the act, a worker may receive trade readjustment allowances for not more than fifty-two weeks, with two exceptions. A worker who is taking training may receive up to twenty-six additional weeks of allowances to assist him in completing his training. In view of the difficulty that older workers would have in finding jobs, a worker who was at least sixty years old when he was separated is entitled to thirteen additional weeks if he remains unemployed, is available for work, and otherwise meets the requirements of the act. However, no worker can receive both the additional twenty-six weeks and the additional thirteen weeks.

The extra twenty-six weeks' duration for workers taking training will not encourage workers to put off training, since a worker's referral to training is not within his control. If a worker refuses, without good cause, to accept training to which he may be referred early in the fifty-two week period, his allowance would be suspended.

\textsuperscript{105} 76 Stat. 23, 42 U.S.C.A. \textsection 2571 (1962).

\textsuperscript{106} Trade Expansion Act \textsection 323 (1962).
Finally, the normal fifty-two week duration may be paid to a worker only for weeks of unemployment beginning within two years after the beginning of the appropriate week. The additional twenty-six or thirteen weeks may be paid within three years. For a worker totally separated, the appropriate week is the week of his most recent total separation. For a worker partially separated, the appropriate week is the first week for which he received a trade readjustment allowance following his most recent partial separation.\textsuperscript{107}

\textit{Application of State Law.}—Except where inconsistent with the purposes of this act, the availability and disqualification provisions of the applicable state unemployment insurance law will apply to claims for trade readjustment allowance. The particular state law that would apply is, generally, that of the state in which the individual would be entitled to unemployment insurance.\textsuperscript{108}

\textit{Training.}—The act provides that every effort shall be made to return adversely affected workers to full employment through whatever testing, counseling, training, and placement services are available under any federal law. If the training provided is not within commuting distance of the worker’s residence, his transportation may be paid, at not more than ten cents a mile, and while at the facility, he may be paid subsistence expenses not to exceed five dollars a day. These limitations are the same as those provided in the Manpower Development and Training Act. An individual who goes away for training and for any reason does not complete the course will receive transportation home. In determining “commuting distance” account will be taken of the established labor market area, patterns of place of work and place of residence, and usual community practice.

Insofar as practicable, preference is to be given to training arrangements which coordinate the training program for workers with the readjustment program of the employers. Such arrangements would afford the worker an opportunity to preserve his seniority and other rights, and would afford the employer an opportunity to rehire or retain his work force. The training offered to any worker should take his desires into account.

Training is of such importance under the program enacted by this act that trade readjustment allowances will be denied to a worker who, without good cause, refuses to accept suitable training to which he is referred, or fails to continue the course or to make satisfactory progress in it. The

\textsuperscript{107} Trade Expansion Act § 324 (1962).

\textsuperscript{108} Trade Expansion Act § 325 (1962).
denial of allowances will continue until he accepts or resumes approved training.\textsuperscript{109}

Relocation Allowances.—A relocation allowance is provided by the act for a totally separated worker who is the head of a family to make it possible for him to take a job in another location if he has no reasonable prospects for suitable reemployment locally. A worker is a "head of a family" if he has dependents who would make the move with him.

A relocation allowance may be paid to a worker only if, for the week in which he applies for a relocation allowance, he is entitled to a trade readjustment allowance (or he would have been so entitled, except for certain circumstances, such as the fact that he has the new job, etc.).

A relocation allowance consists of both the reasonable and necessary expenses incurred in transporting the worker, his family, and their household effects from their present location to that of the new job, and a lump-sum payment equivalent to two and one-half times the national average manufacturing wage.\textsuperscript{110}

Agreements with States.—The act provides that the Secretary of Labor may enter into agreements with states under which the state agency will carry out many of the specific functions associated with payment of allowances and the handling of training. The procedure for these state agreements follows the pattern established under prior laws.\textsuperscript{111}

Review.—The act provides (as does the Manpower Training Act) that determinations as to the entitlement of individuals to assistance are final and conclusive, and not subject to review, except as the Secretary of Labor may by regulation provide. There would be no review of the certification that the unemployment in the worker’s firm was caused by imports. The act also directs the Secretary to provide for review of state agency determinations in the same manner and to the same extent as determinations under the state law, unless such state review procedure is impracticable or is inconsistent with the purpose of the act. Determinations by state agencies which will be subject to the same review as unemployment insurance determinations include determinations on issues similar to those involved in unemployment insurance claims.

(B) Adjustment Assistance to Firms

Sections 311 to 320 of the act define the forms and terms of assistance to firms.\textsuperscript{112} The act provides that firms determined to be eligible to apply

\textsuperscript{110} Trade Expansion Act §§ 328-30 (1962).
\textsuperscript{111} Trade Expansion Act § 331 (1962).
\textsuperscript{112} The description which follows is taken from the summary contained in H.R. Rep. No. 1818, 87th Cong., 2d Sess. 26-28 (1962).
The three forms with which poses sentiment to such acts, reasonable be may be efficient manner.

Borrowing and adjustment for concessions are to be preferred. Exceptions to the coverage of the commercial enterprise. Assistance will be provided to self-help devices.

It is expected that many applicants will be firms whose capital reserves and borrowing ability have been depleted. Therefore, pursuant to the act, such firms could receive direct federal loans or assistance through federal participation in, or guarantee of, private loans to assist in adjustment to import competition.

Firms may also be provided with technical assistance in order to devise the most effective adjustment proposal and to carry it out in the most efficient manner.

Also firms with current losses due predominantly to import competition may be given the opportunity to carry back the loss for income tax purposes for five years, instead of the normal three.113

Adjustment Proposals.—The act provides that a firm certified as eligible to apply for trade adjustment assistance may file its application with the Secretary of Commerce, indicating its need for assistance. Within a reasonable time, it must submit a proposal for its economic adjustment. This adjustment proposal will describe in some detail the nature and cost of the proposed adjustment effort, and the resources to be devoted to it from federal and other sources. The firm may be furnished technical assistance in order to prepare an adequate adjustment proposal.

Adjustment proposals from firms applying for adjustment assistance are to be certified by the Secretary of Commerce as (1) giving reasonable assurance of contributing to successful adjustment; (2) giving adequate consideration to the interest of workers involved; and (3) assuring a maximum self-help effort by the firm. No financial or tax assistance and no further technical assistance may be given until the adjustment proposal has been certified.

It is recognized that there may be some firms for which adjustment assistance is inappropriate and which could not adjust to their difficulties in this way. Even though such firms may have been certified as eligible to apply for adjustment assistance, the Secretary of Commerce may not authorize assistance unless he is satisfied that it will be of practical benefit to the applicant. Adjustment assistance will be treated not as indemnification of past loss, but as constructive aid for the rehabilitation of a commercial enterprise. Adjustment plans that will permit the rehiring of workers laid off due to increased imports resulting from trade agreement concessions are to be preferred.114

114 Ibid.
Use of Other Agencies.—The Secretary of Commerce will be required to submit each firm’s certified adjustment proposal to whatever federal agency or agencies he determines to be appropriate to furnish the financial and technical assistance necessary to carry out such proposal. Such agencies may include the Small Business Administration, the Departments of Agriculture and Interior and the Area Redevelopment Administration. Each such agency will determine whether any part of the assistance called for by the proposal comes within the legal authority, regulations, and policies of the agency, and whether it is prepared to furnish such assistance out of its own appropriations. If the agency, for any reason, is not prepared to furnish any or all the necessary assistance, it will promptly notify the Secretary of Commerce, who may then furnish such assistance as remains necessary to carry out the adjustment proposal. The Secretary will, to the maximum extent practicable, provide such financial and technical assistance through existing agencies having the necessary expertise by making available to them funds appropriated under the act.115

Financial Assistance.—Financial assistance may be furnished for plant and equipment, including modernization and conversion and, in exceptional circumstances, for working capital.

Loans made or deferred participations taken up are to bear interest at a rate no lower than four per cent. Loans made, guaranteed, or covered by deferred participation agreements may have maturities of no more than twenty-five years (with a possibility of a ten-year extension for orderly liquidation). Private loans may be guaranteed or covered by participation agreements only if they are made at a reasonable rate of interest. An interest ceiling is provided on the portion of any such loan guaranteed or covered. Guarantees and deferred participation agreements are to be limited to ninety per cent of whatever portion of a loan is made for adjustment purposes.

No financial assistance is to be provided unless the Secretary of Commerce determines that there is reasonable assurance of repayment (although it is not necessary that collateral be required). Financial assistance is not to be furnished if it is otherwise available to the firm on reasonable terms from non-federal sources.116

115 Trade Expansion Act § 312 (1962). The terms and conditions under which the Secretary of Commerce may furnish technical and financial assistance not furnished under the programs of other agencies are comparable to those presently applicable to other federal assistance programs.
Technical Assistance.—Technical assistance may include such aids as managerial advice, market analyses, research in and development of new or existing techniques and products, and any other technical service that would help promote adjustment to import competition. Subject to the requirement to make use of existing government agencies to the maximum extent practicable or appropriate in extending technical assistance, the act authorizes provision of technical assistance through non-federal sources, on a contract basis or otherwise. Certain types of technical assistance, such as management studies, might better be handled outside of the government. A firm may be required to share the cost of technical assistance as appropriate.\textsuperscript{117}

Tax Assistance.—The act authorizes the Secretary of Commerce to certify eligibility for tax assistance when he determines that such assistance will materially help the firm to adjust and that the firm has sustained a loss which arose predominantly from a business seriously injured, in the loss year, due to increased imports resulting from a trade agreement concession. The existence and amount of such loss are to be determined under the Internal Revenue Code. This will permit a firm to carry back the loss for tax purposes two years beyond the three years normally allowed. A firm without sufficient profits for the three taxable years preceding the loss year to take full advantage of the present carryback provisions, may receive a refund out of taxes for the two additional preceding years. Under prior law, it would only have been able to get a tax advantage from the loss as against possible future income.\textsuperscript{118}

* * * *

While the benefits of adjustment assistance to workers, particularly, but also to firms, are greater than those which they would receive if they were required to adjust to new conditions for reasons other than import competition, it would probably be a mistake to think that the cost of these benefits will be large. The record of the past twenty-nine years of the trade agreements program offers scant ground for concern that the new act will result in substantial import-caused unemployment or other injury. A tiny fraction of American employment was affected in the industries found by the Tariff Commission to have qualified for escape clause relief in past years. While studies of the impact of imports or exports on employment are only in the beginning stages, those which have appeared do not indicate that the trade agreements program possible

\textsuperscript{117} Trade Expansion Act § 313 (1962).

\textsuperscript{118} Trade Expansion Act § 317 (1962).
under the new act will, in fact, have major domestic economic effects, relative to other much more significant domestic policies or to other phenomena such as automation. It would probably be wiser, then, to judge that the adjustment assistance program promises to be a relatively small and marginal matter, both as to its cost and its impact upon the domestic economy.

ORDERLY MARKETING AGREEMENTS

Section 352 of the act, relating to "orderly marketing arrangements," grants new authority to the President for the purpose of avoiding injury to domestic industry caused by concession-engendered imports, in addition to tariff relief and adjustment assistance. After receiving an affirmative finding from the Tariff Commission that concessions under trade agreements have resulted in increased imports which have caused or threatened serious injury to domestic industry, the President may "negotiate international agreements with foreign countries limiting the export from such countries and the import into the United States of the article causing or threatening to cause serious injury to such industry" whenever he determines that such action would be more appropriate than tariff relief.

Section 204 of the Agriculture Act of 1956, as amended,¹¹⁹ had authorized the President to take such action with respect to certain agricultural commodities and products processed therefrom, and to restrict imports of such products from countries not parties to such agreements, as well as those of parties.

This new section will enable the President to take such action regarding any product after, but only after, receiving a Tariff Commission finding that the domestic industry producing the product has been injured or threatened with injury from concession-engendered increased imports.

While the new section thus opens the way to a proliferation of import restrictions similar to those imposed under the cotton textile agreement,¹²⁰ negotiated under Section 204 of the Agriculture Act—restrictions which can be fully as effective in curtailing more economic imports as tariff relief under the escape clause—the section makes it clear that the authority, and therefore the pressure to utilize it, is only available after a domestic industry has made out a case of injury from imports before the Tariff Commission. By making this a prerequisite, the Congress may

have in fact rendered a service because, following on the heels of the first of the cotton textiles "arrangements" with Japan in 1956 and thereafter, successive administrations have been plagued by pressures from other industries to make import quota protective arrangements for them without their having first made out a case under the escape clause. The new section 352 should therefore enable the administration to inform future supplicants, not in the agricultural commodity field, that they must first make out a case to the Tariff Commission before the administration can consider the question whether it would be appropriate to negotiate an import quota international agreement.

NATIONAL SECURITY AMENDMENT

Section 232 of the new act makes no material change in the "national security" provisions of prior law. Section 232(a) provides that no action shall be taken to "decrease or eliminate" the duty or other import restriction on any article if the President determines that such reduction or elimination would "threaten to impair the national security."

Subsection (b) of this section provides that on request of any United States department or agency, on application by any interested party, or on his own motion, the Director of the Office of Emergency Planning shall immediately make an investigation to determine the effects on the national security of imports of the article in question. In such investigation the Director is to seek information and advice from appropriate departments and agencies. If the Director, as a result of the investigation, is of the opinion that the article is being imported into the United States in such quantities and under such circumstances as to threaten impairment of the national security, he shall promptly advise the President. Unless the President determines that the article is not being so imported, "he shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security."

Subsection (c) specifies certain matters to which the Director of the Office of Emergency Planning and the President are to give attention in determining whether the decrease in the duty on a particular article will impair the national security. They are to consider the domestic production needed for projected national defense and the capacity of domestic in-

dustry to meet such requirements. They are also to consider the require-
ments of growth of such domestic industry and how it will be affected by
importation of foreign goods. The President and the Director are also
admonished to recognize the close connections between the economic wel-
fare of the nation and national security and to take into consideration the
impact of foreign competition on the economic welfare of particular
industries.

The fact the administration did not propose at least modification (as by
eliminating the “economic welfare” consideration) of the National Securi-
ties Amendment should not be taken to reflect a considered judgment that
it is perfect legislation. Rather, it represented a political judgment that it
would be foolish to try to seek modification because the effort would fail
and, in the process, perhaps jeopardize the achievement of the other
major changes in the legislation which were being sought.

SECTION 22 OF THE AGRICULTURAL ADJUSTMENT ACT

Under Section 22 of the Agricultural Adjustment Act, the President
is authorized to restrict the importation of agricultural commodities when-
ever it is found that such importation is interfering with government-
sponsored agricultural programs. The proceeding is initiated by the Secre-
tary of Agriculture whenever he has reason to believe that any importation
will result in such interference. He so advises the President. If the Presi-
dent agrees with the recommendation of the Secretary, he has the Tariff
Commission conduct an investigation to ascertain the facts. If, on the basis
of this investigation and report by the Commission, the President finds
the existence of such facts, he must proclaim up to a fifty per cent ad
valorem tax or quantitative restrictions up to fifty per cent of the quan-
tities which entered during a past representative period.

This provision of law is not affected by the new act. In fact, as above
noted, domestic commodities which benefit from section 22 restrictions can-
not be the subject of tariff bargaining under the trade agreement procedures
of the act.

ADMINISTRATION OF THE PROGRAM

Under prior law and executive order, a network of committees was
established over the years to assist the President to carry out his respon-
sibilities. These committees were (1) the Interdepartmental Committee

on Trade Agreements, or Trade Agreements Committee (TAC),\(^{125}\) (2) the Committee for Reciprocity Information (CRI),\(^{126}\) and (3) the cabinet-level Trade Policy Committee (TPC).\(^{127}\)

The Trade Agreements Committee (TAC) was responsible for developing detailed information and recommendations concerning the initiation and carrying out of negotiations, as well as for the administration of the trade agreements program generally. The Committee, which set up interdepartmental subcommittees of experts for each country or group of countries with which negotiations were contemplated, was made up of representatives of the following agencies: Agriculture, Commerce, Defense, Interior, International Cooperation Administration, Labor, State, Tariff Commission and Treasury. The representative of the Department of State served as chairman.

The Committee for Reciprocity Information (CRI) had the same membership as the Trade Agreements Committee, but the Tariff Commission member served as its chairman. This Committee invited interested persons and organizations, as well as the general public, to submit views in writing and at public hearings regarding possible tariff concessions to be made by the United States in trade agreement negotiations, as well as suggestions for concessions which might be sought from other countries.

The Trade Policy Committee (TPC) was established in 1957 at the cabinet level to advise and assist the President in the administration of the Trade Agreements program. In addition to the Secretary of Commerce as its chairman, the Committee consisted of the Secretaries of Agriculture, Defense, Interior, Labor, State, and Treasury, or high-ranking alternates designated by them. The Trade Policy Committee reviewed the recommendations of the Trade Agreements Committee at all stages of trade agreement negotiations and transmitted these recommendations to the President with any comments of its own resulting from the review.

This administrative structure was subjected to increasing criticism over the years, among other reasons because there was no one high-level person who was responsible, under the President, for the conduct of trade agreement negotiations and for rendering advice to him in escape clause proceedings and related matters. The Secretary of State, who was nominally in charge of negotiations, in fact had to delegate the negotiating function to the assistant secretary level, and this actually meant that tariff negotiations were carried on at the “official,” or office-director, level.


The Secretary of Commerce was head of the TPC, which made recommendations to the President on the action he should take in escape clause proceedings following Tariff Commission findings and recommendations for relief.

Sections 241 and 242 of the new act, establishing a new administrative organization, reflect this dissatisfaction and attempt to overcome it. A Special Representative for Trade Negotiations, with the rank of Ambassador, is created. He is given two main functions by statute: (1) he is to be the “chief representative of the United States for each” trade agreement negotiation, as well as for such others as the President assigns to him; (2) he is to be the chairman of an “interagency organization” which the President is to establish to assist the President to carry out his trade agreement, tariff adjustment and orderly marketing agreement functions under the act.

The interagency organization, of which the Special Representative is chairman, is to be composed of the “heads of such departments and of such other officers as the President designates.” This organization’s task is “to make recommendations to the President on basic policy issues arising in the administration of the trade agreements program,” recommend appropriate action on tariff adjustment (escape clause) reports by the Tariff Commission, advise the President concerning the results of hearings on burdensome foreign import restrictions, and “perform such other functions with respect to the trade agreements program” as the President, from time to time, designates.

On January 15, 1963, the President issued an Executive Order on the administration of the program.128 In this order, the President (1) placed the Special Representative (former Secretary of State Christian Herter has been named) in the Executive Office of the President, “directly responsible to the President”; (2) assigned to him the task of generally assisting the President in the administration of the act and of furnishing timely and appropriate recommendations in connection with the “administration and execution” of the act; (3) delegated to the Special Representative the function of furnishing to the President the lists of articles to be the subject of trade agreement negotiations, and of providing for hearings on these listed articles; (4) established a new Trade Expansion Act Advisory Committee (called “the Committee,” not the TAC), chaired by the Special Representative, and composed of the Secretaries of State, Treasury, Defense, Interior, Agriculture, Commerce, and Labor, each of

whom can designate an official of no lower rank than Assistant Secretary
to serve for him; (5) authorized the Special Representative to constitute
from time to time "appropriate committees or task forces" made up in
whole or in part of representatives or employees of interested agencies;
(6) abolished the TAC, CRI, and TPC; and (7) made various other tech-
nical dispositions consistent with the act and this new structure.

It can be seen from the foregoing recital that the new "Committee" will
perform the functions formerly performed by the three committees it re-
places, all under the leadership and responsibility of the Special Repre-
sentative. Of course, he will make use of his authority to "constitute ap-
propriate committees or task forces," and therefore, in fact, the "Com-
mittee" will be very much like the old TPC, and these unnamed "commit-
tees" and "task forces" will be very much like the old TAC and its country
committees, and the old CRI. The importance of the change, therefore,
does not lie in any "saving" in committees, but rather in the fact that there
is one full-time man of rank, with "appropriate" staff (now small but,
inevitably, expandable), responsible to the President and, therefore, to
the Congress, for the administration and execution of the program. This
represents a clear gain over the former split State-Commerce responsi-
bilities for TAC and TPC.

This, of course, does not mean that interagency differences, caused by
differing interests, will vanish. It may not even mean that the Special
Representative will in fact have decisive influence—that depends upon his
relationship with the President, his performance and, as an interaction
therefrom, his effective authority. But, at the least, the new structure
provides a better opportunity for consistency, as well as continuing con-
cern with the operation of the trade agreements program, a program
which may be of even greater importance to the United States in the
future than it has been in the past.

**Conclusion**

The Trade Expansion Act of 1962 represents a strong step in the direc-
tion of expansion of international trade, a continuation and strengthening
of the trade agreement program, whose purpose is to reduce artificial
barriers to increased trade among nations. It provides the President with
tools which are more numerous and, in some cases, sharper and heavier
than any President has had since 1934. By expanding his tariff-cutting
authority, and both contracting the peril-point and escape clause safe-
guards and containing their use through adjustment assistance, he is en-
abled to bargain in order to free trade from artificial barriers to a greater
extent than has been possible for many years. This is true despite the fact that the most dramatic element of the 1962 act—the special authority to reduce duties down to zero in trade agreements with the Common Market, has been rendered ineffective by the rejection of Britain's efforts to become a member of the EEC.

To have secured a good set of tools and to use them to fulfill the purpose for which they were procured are, however, different things. It takes skill and resolution to secure good legislation; it takes skill of a different sort and perhaps even more resolution to use that legislative authority in a way which may cause discomfort to groups in a society who were not immediately affected by the mere procurement of the enabling legislation. Whether the new act will be utilized to free trade is a question which is not answered by the mere enactment of the legislation, important though that is.

The resolution necessary to secure the legislation was in ample supply. Thus, the President stated, with vigor and clarity, in his message to the Congress on January 25, 1962, seeking the legislation: 129

Once given a fair and equal opportunity to compete in oversea markets, and once subject to healthy competition from oversea manufacturers for our own markets, American management and labor will have additional reason to maintain competitive costs and prices, modernize their plants, and increase their productivity. The discipline of the world marketplace is an excellent measure of efficiency and a force to stability. To try to shield American industry from the discipline of foreign competition would isolate our domestic price level from world prices, encourage domestic inflation, reduce our exports still further, and invite less desirable governmental solutions.

In addition, he pointed out, "a more liberal trade policy will in general benefit our most efficient and expanding industries," assist in expanding our economic growth, and thereby enable us better to "undertake the many enterprises which the security of free peoples demands."

A little over a year later, on February 21, 1963, just four months after securing the legislation, however, both the language and the mood were distinctly different. At his press conference on that day, the President was asked whether he had decided to impose restrictions on wool imports, as requested by New England and Western Senators. He replied as follows: 130

Well, we have discussed the problem of wool imports increasing from about 17 per cent to 21 or 22 per cent, and then the danger of going to 25 per cent. This is a matter of concern.

129 House Hearings, pt. 1, at 3.
On the other hand, the countries which are exporting to the United States are very anxious to maintain this market. I get periodic meetings from chicken growers who are anxious for us to provide a free flow of chickens into Western Europe, and from other members of Congress who are anxious for us to prevent a free flow of textiles into the United States, and others who wish us not to limit the importation of oil, and others who wish us to encourage the exports of various other things into the market.

It is quite difficult to get a balance, but that is what we are attempting to do. Governor (Christian A.) Herter (Chief trade negotiator) is working on it. We are attempting in this rather varied economy, with interests, some of which wish to encourage exports, some of which wish to diminish imports, we are attempting to get a fair balance. Quite obviously we cannot have it all our way, just exports without accepting some imports. Woolens, however, are a particularly sensitive problem. This Administration had conversations last year about woolens which have made us anxious to see if we can limit. We are in touch with the various governments. It is rather a difficult time now, however, because of the British not getting into the Common Market, which has made them more sensitive about their export markets.

In addition, we have some difficulties with the Japanese over cotton textiles. So that so far we have not been successful, but it is a matter which Governor Herter is talking about a good deal.

In 1962 “healthy competition” from overseas manufacturers was good for American management and labor, by helping to “maintain competitive costs and prices,” to “modernize plants,” and to “increase productivity,” as well as being good for the American consumer. In 1963, however, an increase in wool imports of from four to possibly eight per cent is a “matter of concern.” In 1962 expanded exports and expanded imports were both desirable, while in 1963 our efforts are to maintain a “fair balance,” and to do this we must accept “some imports.” In fact our efforts to diminish the imports of Japanese textiles from their 1962 levels are meeting with “difficulties”!

The domestic difficulties of which the President spoke are real, the pressures are often intense, and the necessity of trying to seek a “balance” is perennial. But the trade agreements program and the 1962 act which now enables it to be carried forward are dedicated to the proposition that this “balance” must continually be struck at higher levels of imports and of exports. The striking of balances at existing or lower levels of exports and imports, whatever else it might be called, cannot be said to be a characteristic of a continuing, much less a stronger, trade agreements program.

The President’s voice in 1962 was affirmative in seeking the means to create higher and higher balanced levels of international trade. Unfortunately, his February 1963 press conference bespoke a defensive, if not
a retreating posture, which was quite out of keeping with the direction of the legislation which he had secured with such skillful leadership.\textsuperscript{131}

There can be no doubt that the difficulties of accomplishing continual increases in international trade are both substantial and by no means solely of our own making, as recent events in Europe have made clear. Nevertheless, the United States, as the most powerful economic and military unit in the world today and for some time to come, perforce will have a good deal to say about whether these difficulties in the path of expanding trade will be overcome. If the voice with which we spoke in 1962 is regained, the 1962 Trade Expansion Act has a chance of living up to its promise.

\textsuperscript{131} In commenting upon the recent “wafer-thin” increase in the quota on residual oil imports, the Washington Post (March 16, 1963, p. A12, col. 2) editorialized that “this Administration has a way of using glowing rhetoric about free trade and then retreating in concrete instances into the foxholes of protectionism.” This Administration, however, is probably not very different from others in this respect, except that its 1962 rhetoric may have been a bit more glowing. As Richard Rovere has recently pointed out in The New Yorker (March 16, 1963, p. 202), “the run of politicians, from middle left to middle right, are very partial to liberal, internationalist rhetoric. Somehow or other, they find it better stuff for the making of speeches than conservative rhetoric. Possibly this is because it has a more hopeful sound and holds ambiguity better.”

More importantly, the Washington Post apparently has missed the significance, from the viewpoint of “rhetoric,” of the February 21, 1963 press conference, which was marked by such a singular retreat from high-flying language. The point is that if this or any Administration can retreat in concrete instances from such rhetoric, as it most assuredly can, how much easier it is for it to fall back from a less advanced position! Advocates of freer trade would therefore be happier if the rhetoric, at least, remained incandescent, well knowing that to ask for surcease from hypocrisy in this world is equivalent to waiting for the pot of gold plus rainbow to fall in one’s lap.
THE INVALIDITY OF STATE STATUTES GOVERNING THE SHARE OF NONRESIDENT ALIENS IN DECEDENTS' ESTATES

Willard L. Boyd*

In the light of the applicable international and constitutional law, the author examines the validity of the two major types of state statutes governing the succession and distribution rights of nonresident aliens. Professor Boyd concludes that such statutes are of dubious validity not only as a denial of due process and equal protection under the fourteenth amendment and as an unconstitutional infringement upon the federal government's plenary power over foreign relations, but also on the grounds that they are in general conflict with the overriding federal policy in this area.

On October 22, 1962, the United States Supreme Court in a per curiam decision dismissed for want of a substantial federal question an appeal involving the constitutionality of the New York “Iron Curtain” statute. Mr. Justice Douglas, with Mr. Justice Black concurring, dissented.

The case before the Supreme Court was Ioannou v. New York.1 In issue was the estate share of a beneficiary residing in Czechoslovakia which had been deposited for her benefit with the New York State Treasurer by order of the Surrogate's Court administering the estate. This order was predicated on the authority granted by section 269-a(1) of the New York Surrogate's Court Act which provides in part as follows:

Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be pair [sic] into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction.2

* Professor, College of Law, University of Iowa.

Section 269-a(2) provides:

In any such proceeding, where it is uncertain that an alien legatee, distributee or beneficiary of a trust, not residing within the United States or its territories, would have the benefit or use or control of the money or other property due him, the burden of providing that such alien legatee, distributee or beneficiary of a trust will receive the benefit or use or control of the money or other property due him shall be upon him or on the person or persons claiming from, through or under him.

See also Berman, Soviet Heirs in American Courts, 62 Colum. L. Rev. 257, 263-64 (1962); Fulda, Legatees Behind the Iron Curtain, 16 Ohio St. L.J. 496, 499 (1955).
The decree ordering the deposit was based on the finding that it was improbable that the beneficiary would have the use and enjoyment of the funds in Czechoslovakia. The decree of deposit was subject to the further order of the Surrogate’s Court.

Subsequent to the deposit, the Czechoslovakian beneficiary executed an assignment of her share to her niece who resided in the United Kingdom. The assignee then made application to the Surrogate Court for leave to withdraw the deposited funds. In her application the petitioner stated that the assignment was executed voluntarily and without duress in the United States Embassy in Prague and that the funds would not come into the possession of the Czechoslovakian or any other foreign government. The petition was dismissed by the Surrogate’s Court because of the absence of proof that conditions had changed in Czechoslovakia. This order was affirmed by the Appellate Division of the Supreme Court and the Court of Appeals without opinions.

On appeal to the United States Supreme Court, the petitioner contended that the refusal to recognize the assignment of the estate share deprived the petitioner and her assignor of due process and equal protection. As indicated the Supreme Court dismissed the appeal for want of a substantial federal question. In a dissent, however, Mr. Justice Douglas took the position that two substantial federal questions were presented by the appeal. First, he raised the question of whether the New York statute was invalid because it conflicted with the federal power over foreign affairs, and secondly, he stated that a due process question was created by the refusal to recognize the assignment.

The disposition of this case coupled with the provocative dissent makes it appropriate to reexamine the right of nonresident aliens to share in decedents’ estates. In the United States every state has modified the common law rules of alien succession either by statute or constitution. Through the years varying succession rights have been granted to differing classes of aliens. More recently two types of statutes dealing with

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3 371 U.S. at 30.
nonresident aliens have become increasingly significant. Section 269-a of the New York Surrogate's Court Act has been the model for one of these statutory types. 7 Such statutes are frequently referred to as either "Iron


An interesting variation of this type of statute exists in Massachusetts. Mass. Ann. Laws ch. 206, § 27A (1955) provides:

Whenever payment of a legacy or distributive share cannot be made to the person entitled thereto, or such person may not receive or have the opportunity to obtain said legacy or distributive share, the court, on petition of an interested party or in its discretion may order that the money be deposited in a savings bank or other like institution, or invested in the manner provided in section twenty-eight. When a claimant to such funds resides outside of the United States or its territories, the court may, upon petition of the claimant, disburse the money in the manner provided in section twenty-eight. When a claimant to such funds resides in the United States or its territories, the court may, upon petition of the claimant, disburse the money in the manner provided in section twenty-eight.

An interesting variation of this type of statute exists in Massachusetts. Mass. Ann. Laws ch. 206, § 27A (1955) provides:

Whenever payment of a legacy or distributive share is to be made to a person who is domiciled in a country or state outside of the United States or its territories, in which the court, in its discretion, finds that there is not a reasonable assurance that such legacy or distributive share will actually be paid, the court may order that such funds be deposited in a savings bank or other like institution, or invested in the manner provided in section twenty-eight. When a claimant to such funds resides outside of the United States or its territories, the court may, upon petition of the claimant, disburse the money in the manner provided in section twenty-eight. When a claimant to such funds resides in the United States or its territories, the court may, upon petition of the claimant, disburse the money in the manner provided in section twenty-eight.


Whenever it shall appear to the court that if distribution were made a beneficiary would not have the actual benefit, use, enjoyment or control of the money or other property distributed to him by a fiduciary, the court shall have the power and authority to direct the fiduciary (a) to make payment of the share of such beneficiary at such times and in such manner and amounts as the court may deem proper, or (b) to withhold distribution of the share of such beneficiary, convert it to cash, and pay it through the Department of Revenue into the State Treasury without escheat.


As to the effect of federal regulations on these statutes, see In re Matter of Brailer, 305 N.Y. 148, 111 N.E.2d 424, appeal dismissed, 346 U.S. 802 (1953); Comment, supra note 6 25 So. Cal. L. Rev., at 334-35.

Without the aid of one of these statutes some courts have reached an identical result as a matter of common law. See Arenson, International Procedural Problems in the Administration of Estates and Trusts, A.B.A. Section of International and Comparative Law, 1959 Proceedings 60, 63; Chaitkin, The Rights of Residents of Russia and Its Satellites to Share
Curtain” statutes or “eastern” statutes; the latter designation is attributable to the fact that these statutes have been usually adopted by eastern states. By way of contrast, some states, primarily western, have adopted reciprocal succession statutes which bar a nonresident alien from succeeding to property in an estate within their jurisdiction unless an American citizen would be entitled to succeed to estate property located in the alien’s country on the same terms as citizens of that country.


In contrast Ore. Rev. Stat. § 111.070 (1957) accords succession rights to a nonresident alien (a) if United States citizens are granted succession rights on the same basis as citizens of the alien’s country, (b) if United States citizens are permitted to receive payment in the United States of money derived from estates in such country, and (c) upon proof that such alien will receive the benefit, use or control of his estate share without confiscation. If these reciprocal rights do not exist, the property escheats to the state.

For a discussion of this type of statute see Lee, Consular Law and Practice 152-53 (1961); Arenson, supra note 7 at 62-65; Berman, supra note 2; Chaitkin, supra note 7; Fulda, supra note 2; Heyman, supra note 7 at 226-40; Scheller & Mayda, supra note 7; Snyder & Stander, supra note 7 (1954); Beneficiaries Behind the Iron Curtain, 7 W. Res. L. Rev. 179 (1956).

Section 259 of the Cal. Prob. Code provides:
The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents.

To ascertain the validity of American statutes dealing with succession rights of nonresident aliens, consideration must be given to both international and domestic constitutional principles, and the application of these principles to the above-mentioned types of statutes.

I

INTERNATIONAL LAW

Although customary international law has never accorded aliens the right to succeed to real property, it is currently unclear as to whether the succession to personalty by aliens is the concern of international or domestic law. In feudal times, continental European nations established the droit d'aubaine which prohibited aliens from taking personal and real property by either will or intestate succession. Eventually in the eighteenth century this tenurial limitation was supplanted by the droit de detraction, which was a tax on the removal by an alien of his estate share from the nation in which the property was located. National legislation and treaties have eliminated these two continental impediments to alien succession.

Unlike the continent, England only restricted alien succession to realty and permitted aliens to share in the decedent's personalty. The realty restrictions varied according to whether the decedent died testate or intestate. In the event of intestacy the alien was not entitled to take realty. However, if the decedent died testate the alien devisee took title good against everyone save the crown. The crown could divest the alien's title by "inquest of office found." If the crown failed to so act during the

(Supp. 1961) (nonresident aliens not eligible for United States citizenship entitled to take realty if country of nationality allows United States citizens to so take realty).

As to these statutes see Berman, supra note 7, at 268-72; Chaitkin, supra note 7, at 301-13, 316-17; Heyman, supra note 7, at 229-32; Scheller & Mayda, supra note 7, at 18-19; Note, Property Rights of Aliens Under Iowa and Federal Law, 47 Iowa L. Rev. 105, 108-12 (1961); Comment, supra note 7, at 332-37.

As to the burden of proof under reciprocal succession statutes, see Berman, supra note 7, at 268-72; Chaitkin, supra note 7, at 307-10; Note, Property Rights of Aliens Under Iowa and Federal Law, supra.


11 2 Oppenheim, International Law § 322 (Lauterpacht ed. 1952); Chitty, op. cit. supra note 9, §§ 112-13; Wheaton, Elements of International Law § 82 (Wilson ed. 1936); Boyd, supra note 6, at 1002.
alien's life, the title to the realty passed to the crown upon the devisee's death.\(^{12}\)

These common law rules as to realty and personalty became the common law of the United States and govern in the absence of legislation to the contrary.\(^{13}\) In the United States alien succession to both personalty and realty has been regarded as the proper subject of domestic legislation\(^ {14}\) and some American and state legislation has restricted succession to personalty as well as realty.\(^ {15}\)

While international law has consistently regarded the succession to real property as a domestic question, it is difficult to state the rule as to personalty with any certainty. Although authorities have recognized the right of aliens to succeed to personalty,\(^ {16}\) some have acknowledged that national interests may exist which warrant limitations on this right.\(^ {17}\) Such vague qualifications make it unlikely that any positive rule of international law assures rights of succession in personalty to aliens.\(^ {18}\)

Even though international law fails to accord an alien the right to succeed to property, once this right is granted by domestic law the alien's interest in the property is presumably entitled to protection under international law.\(^ {19}\) Little attention has been directed to the application to suc-

\(^{12}\) Gibson, Aliens and the Law 34-35, 45-46 (1940); 2 McNair, International Law Opinions 101-04 (1956); Boyd, supra note 6, at 1002-03.

\(^{13}\) 3 Hackworth, Digest of International Law § 289 (1942); Konvitz, The Alien and the Asiatic in American Law 148-53 (1946); Boyd, supra note 11, at 1004; Note, supra note 9.


\(^{15}\) See notes 6-9 supra and accompanying text.


\(^{17}\) 1 Hyde, op. cit. supra note 10, § 203; Cutler, The Treatment of Foreigners, 27 Am. J. Int'l L. 225, 239 (1933).

\(^{18}\) Roth, op. cit. supra note 16.


For a criticism of the term "vested rights" when referring to protected property rights, see Katz & Brewster, International Transactions and Relations 120-21 (1960); Wilson, op. cit. supra, at 101-02.
cession rights of international legal concepts generally designed to protect alien property rights. It is reasonable to assume, however, that the doctrines of national treatment and a minimum standard of treatment apply to the administration and distribution of estates in which aliens have a domestically created interest. These propositions find their roots in both customary and treaty law.

Logically, the administration and distribution of estates fall within two areas of alien rights. The protection of alien property rights and the assurance to aliens of judicial remedies in national courts are relevant regardless of whether the asserted basis of protection is national treatment or a minimum standard. As to property rights the problems of expropriation have been the primary concern while judicial problems have primarily centered around the right of an alien to invoke the jurisdiction of a national court. Where the basis of protection is national treatment, the alien is afforded the same protection accorded nationals. Should the national treatment of property be inadequate, the minimum standard concept requires that the alien's property rights be protected nevertheless.

To a considerable extent recent American commercial treaties, like those of other nations, have incorporated the concept of national treatment. Two classes of provisions in these treaties bear on rights in decedents' estates. First, access to judicial and administrative tribunals is expressly made the subject of national treatment. Arguably


21 Bishop, op. cit. supra note 20; Gibson, op. cit. supra note 12, at 1-4, 27-28; Roth, op. cit. supra note 16, at 81-88; Wilson, op. cit. supra note 19, at 100. Accord, Borchard, supra note 19, at 56-60.

22 Gibson, op. cit. supra note 12, at 1-2; Wilson, op. cit. supra note 19, at 98-99.

23 Gibson, op. cit. supra note 12, at 1-2; Wilson, op. cit. supra note 19, at 209-14.

24 Roth, op. cit. supra note 16, at 165-77; see Wilson, op. cit. supra note 19, at 95-96.

25 Wilson, op. cit. supra note 19, at 209.

26 Borchard, op. cit. supra note 16, at 85; Williams, op. cit. supra note 19; Wilson, op. cit. supra note 19, at 7; Walker, supra note 20, at 811.

27 Gibson, op. cit. supra note 12, at 1-2, 9, 12-13; Williams, op. cit. supra note 19, at 98-100.

28 Bishop, op. cit. supra note 20, at 931. See Restatement, op. cit. supra note 14, Reporter's Note § 184 at 649.

29 Wilson, op. cit. supra note 19, at 9; Walker, supra note 20.

this clause extends the benefits of the due process-notice requirements to aliens interested in American based estates. Secondly, to assure a minimum standard some of these treaties state that the property of nationals of either of the contracting parties within the territory of the other shall not be taken without due process of law and just compensation. Unlike the prior provision, this guarantee is absolute and is not predicated on the law of the particular country in which the property is located as it would be had the right been framed in terms of national treatment. As a consequence the meaning of “due process” in this treaty clause is determined by international rather than American jurisprudence even though the property is located in the United States. Other treaties include provisions for both the application of a minimum standard and national treatment where property is taken. Clearly, refusal to distribute estate shares granted aliens by local law would constitute a taking of property within the scope of the treaty. Thus, by treaty provision guaranteeing national treatment, foreign nationals gain the protection of American constitutional due process with respect to their succession rights in the United States.

Citation of this type of treaty provision see Gibson, op. cit. supra note 12, at 32, 33; Wilson, op. cit. supra note 19, at 224-43.


32 Wilson, op. cit. supra note 19, at 114-15; Walker, supra note 20, at 811-12, 823.


34 See generally, Wilson, op. cit. supra note 19, at 121. In the draft “Convention on the International Responsibility of States for Injuries to Aliens” the following definitions appear in article 10 which deals with the taking and deprivation of use or enjoyment of property:

3. (a) A ‘taking of property’ includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

(b) A ‘taking of the use of property’ includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time.”

Where a minimum standard rather than national treatment is the applicable doctrine, safeguards guaranteed by the domestic law of the United States cannot be invoked. In the absence of a treaty requiring national treatment, the Restatement of the Foreign Relations Law of the United States takes the position that the minimum standard governs and that an alien cannot claim national treatment in the United States. The Restatement asserts that state conduct which discriminates against aliens of particular nationalities represents a departure from the international standard of justice. In commenting on this statement, the draftsmen recognized the right of the receiving state to restrict alien ownership of property but they contend that, once property rights have been granted by the receiving state, "hardship on the alien must be taken into account in determining the reasonableness of new restrictions." This contention is extremely significant when considering statutes authorizing courts to defer distribution of estate shares. Laudably the draftsmen have emphasized the interests of the individual.

A departure from the international standard also occurs where there is a denial of procedural justice in a civil proceeding determining any right of an alien. Since the proceeding must be fair, the Restatement enumerates certain criteria deemed relevant to a determination of fairness. From the standpoint of determining the fairness of probate proceedings, it is important to ascertain whether the alien beneficiary had adequate information concerning the nature of the proceeding and also had reasonable opportunity to prepare for the proceedings, consult counsel, communicate with a representative of his government, obtain witnesses and evidence in his own behalf, and to contest evidence against him. Such criteria clearly make reasonable notice to alien beneficiaries essential to a probate proceeding valid under international law.

Some question exists as to whether these international rules cover non-resident as well as resident aliens. Often treaties which incorporate na-

35 Bishop, op. cit. supra note 20, at 629-30; Restatement, op. cit. supra note 14, § 171, comment b.
36 Restatement, op. cit. supra note 14, § 169, comment a; § 171, comments a and b.
37 Id. § 170.
38 Id. § 170, comment a.
39 Id. §§ 182, 184(1).
40 Id. § 185. See similarly Borchard, op. cit. supra note 16, § 129; Gibson, op. cit. supra note 12, at 1-2, 15; Roth, op. cit. supra note 16, at 178, 185; Sohn & Baxter, op. cit. supra note 34, at 86-99 (arts. 6-8); Borchard, supra note 19, at 449, 454-56, 460.
tional treatment or minimum standard protection either exclude the non-resident alien or else are unclear on this point.\textsuperscript{41} Certainly, the protection of property rights ought not be contingent on the presence of the property owner.\textsuperscript{42}

Since the distribution and administration of estates is a matter of state law in the United States, it is essential to ascertain if a rule of international law supersedes contrary state law. Where the rule is embodied in a treaty, the state law must yield. However, the effect of a rule based on custom is not as clear even though customary international law is regarded by both federal and state courts as a part of the law of the land.\textsuperscript{43} Generally these courts apply such law only if there is no conflict with domestic law. Moreover, the courts interpret the content of customary international law and in construing a domestic statute will ordinarily take the position that it does not violate international law.\textsuperscript{44} As a result no state court is likely to hold that customary international law conflicts with a state statute governing administration and distribution of decedents' estates.

Nevertheless, whenever a state court applies international law the foreign relations of the United States are involved.\textsuperscript{45} In particular, where a case involves the rights of an alien, the country of his nationality might institute diplomatic negotiations with the United States government concerning his claim. If these negotiations are unsuccessful, the two nations may refer the dispute to an international tribunal for determination.\textsuperscript{46} Therefore, as a general proposition and with specific reference to decedents' estates, the application of international law by a state court should be regarded as a federal question, thus requiring an opportunity for fed-

\textsuperscript{41} Wilson, op. cit. supra note 19, at 211, 214, 230, 238.
\textsuperscript{44} Peters v. McKay, supra note 43, at 424-28, 238 P.2d at 230-32 (dictum); Bishop, op. cit. supra note 20, at 73-74; 1 Hackworth, Digest of International Law 26-28, § 7 (1940); 1 Hyde, op. cit. supra note 10, § 5.
\textsuperscript{46} 1 Hyde, op. cit. supra note 10.
eral review of the state court's action. Clearly, the national interest requires uniform interpretation of international law in American courts.

II

UNITED STATES LAW

In the United States succession rights and probate procedure are generally the subject of state rather than federal action. Upon the decedent's death the estate interests of the beneficiaries are regarded as vested property rights entitled to protection. Nevertheless, it is well accepted that a change in the state laws of succession can defeat a beneficiary's expectancy. This power of a state legislature to determine succession rights is not without limitation, however. Unfortunately, some confusion exists concerning the extent of this legislative prerogative because of dictum by the United State Supreme Court in Irving Trust Co. v. Day. There the Court stated that nothing in the Federal Constitution "forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." Taken literally this statement means that state succession laws are not subject to the equal protection and due process clauses of the fourteenth amendment or the foreign relations power of the federal government. However, this dictum cannot be relied upon as an accurate statement of the law since there do exist federal constitutional limitations on the power of a

47 Jessup, supra note 43, at 742. In Bergman v. De Sieyes, 170 F.2d 360, 361 (2d Cir. 1948) an action in deceit was brought in a New York state court against the French ambassador to Bolivia who was served in New York while en route to his post. The case was removed by defendant for diversity of citizenship to the federal court. With reference to the question of service, Judge Learned Hand stated that:

since the defendant was served while the cause was in the state court, the law of New York determines its validity, and, although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow so far as they have declared themselves. Whether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension, would present a federal question we need not consider, for neither is present here.

The court then proceeded to interpret the New York law as granting immunity from service of process to diplomats in transit. Regarding federal common law generally, see Hinderlider v. La Plata Co., 304 U.S. 92 (1937).


50 314 U.S. 556 (1941).

51 Id. at 562.
state to grant succession rights and provide for estate administration where aliens are involved.52

APPLICATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES TO ALIENS

Although it has been generally stated that the due process clauses of the fifth and fourteenth amendments are applicable to aliens,53 the cases in which due process protection has been extended to aliens have usually involved aliens who are within the jurisdiction of the United States.54 The due process clauses of the fourteenth and fifth amendments, however, are not restricted specifically to persons within the jurisdiction of the United States. Constitutional terminology, therefore, permits the application of the due process clauses to nonresident as well as resident aliens.

While it is true that aliens seeking admission to the United States have not successfully claimed the protection of the due process clause of the fifth amendment, the courts in these cases have emphasized the exclusive and unreviewable nature of Congress' power over immigration.55 However, in contrast to that situation, the United States Supreme Court has held that the just compensation provision of the fifth amendment applies to the taking of property of a nonresident alien friend.56 Moreover, the

53 Bishop, International Law 465 (1953); 3 Hackworth, Digest of International Law, § 288 (1942); Kauper, Constitutional Law, 751 (2d ed. 1960).
55 See, e.g., United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) and cases discussed in Kauper, op. cit. supra note 53, at 686-87; Comment, Extent of Constitutional Protection Afforded Resident Aliens, supra note 54; Comment, The Alien and the Constitution, supra note 54.
56 Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931). In that case a Russian corporation was the assignee for value of certain contracts for the construction in the United States of two vessels by a New York shipbuilding corporation. In August, 1917, the United States Shipping Board Emergency Fleet Corporation requisitioned these contracts and the vessels being constructed for the use of the United States. In holding the Russian corporation entitled to just compensation the Court said:

There was no legislation which prevented it from acquiring and holding the property in question. The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution... Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation... And this obligation was to pay to the
Supreme Court in *Home Ins. Co. v. Dick*\(^{57}\) stated generally by dictum that the due process clause of the fourteenth amendment "extends to aliens," and taken in context the Court clearly had in mind nonresident aliens since the only alien defendant was a nonresident Mexican corporation.\(^{58}\) The due process protection of the fifth and fourteenth amendments, however, does not extend to nonresident aliens when making claims against property located in the United States where the claims arose abroad and were unrelated to business conducted in the United States.\(^{59}\)

In the event of war or national emergency, the United States govern-

petitioner the equivalent of the full value of the property contemporaneously with the taking . . . .

The Fifth Amendment gives to each owner of property his individual right. The constitutional right of owner A to compensation when his property is taken is irrespective of what may be done somewhere else with the property of owner B. As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments. The Act of Congress should be interpreted in the light of its manifest purpose to give effect to the constitutional guarantee. Id. at 491-92.

See also Note, Friendly Alien's Right to Sue for Return of Property Seized by Alien Property Custodian, 56 Yale L.J. 1068, 1073 (1947).

In Salamandra Life Ins. Co. v. New York Life Ins. & Trust Co., 254 Fed. 852 (S.D.N.Y. 1918) the court assumed the applicability of the fifth amendment due process clause to nonresident alien friends.

\(^{57}\) 281 U.S. 397 (1930).

\(^{58}\) Id. at 411 (dictum).

\(^{59}\) United States v. Pink, 315 U.S. 203 (1942). In this case the court said:

"[T]he contest here is between the United States and creditors of the Russian corporation who, we assume, are not citizens of this country and whose claims did not arise out of transactions with the New York branch. The United States is seeking to protect not only claims which it holds but also claims of its nationals . . . . Such claims did not arise out of transactions with this Russian corporation; they are, however, claims against Russia or its nationals . . . ."

If the President had the power to determine the policy which was to govern the question of recognition, then the Fifth Amendment does not stand in the way of giving full force and effect to the Litvinov Assignment. To be sure, aliens as well as citizens are entitled to the protection of the Fifth Amendment . . . . A State is not precluded, however, by the Fourteenth Amendment from according priority to local creditors as against creditors who are nationals of foreign countries and whose claims arose abroad . . . . By the same token, the Federal government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors. And it matters not that the procedure adopted by the Federal Government is globular and involves a regrouping of assets. There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts. There is no reason why it may not, through such devices as the Litvinov Assignment, make itself and its nationals whole from assets here before it permits such assets to go abroad in satisfaction of claims of aliens made elsewhere and not incurred in connection with business conducted in this country . . . . Id. at 227-28.

See also Disconto Gesellschaft v. Umbreit, 208 U.S. 570 (1908).
ment can confiscate without compensation the property in this country of enemy aliens pursuant to the federal war power. The United States Supreme Court has taken the position that the war power also permits the seizure of property of alien friends. However, if the property of alien friends is requisitioned, they are entitled to just compensation as provided for by the fifth amendment even though they are nonresident aliens. In short, by virtue of constitutional phraseology and the foregoing decisions, it seems clear that nonresident alien friends are usually entitled to federal due process protection.

A state case is also of significance in this regard. The Montana Supreme Court has invoked its state due process clause to protect the rights of nonresident aliens in an estate. In that situation intestate succession was predicated solely on relationship without regard to citizenship or residence at the time of decedent’s death. Prior to distribution of the estate, however, the intestacy statute was changed to allow a non-


As to the authority of the Alien Property Custodian with respect to interests of enemy aliens in decedents’ estates see Bishop, Judicial Construction of the Trading with the Enemy Act, 62 Harv. L. Rev. 721, 736-39 (1949). For criticism of confiscation of enemy alien property see Borchard, The Treatment of Enemy Property, 34 Georgetown L.J. 389 (1946); Littauer, supra; Note, supra.

61 Silesian-American Corp. v. Clark, supra note 60. In that case nonresident alien Swiss banks were pledgees of stock of Delaware corporation owned by a German corporation. Note also the Court’s reference in that case to the power of the United States to seize alien property under the general welfare clause of the Federal Constitution. See id. at 476 n.4. See also Littauer, supra note 6 at 760-61, 768-70.

62 Mont. Const. art. 3, § 27 provides: “No person shall be deprived of life, liberty, or property without due process of law.”

63 In re Nossen’s Estate, 118 Mont. 40, 162 P.2d 216 (1945). The court affirmed a decree of final distribution which distributed a portion of the estate to the Alien Property Custodian who had assumed control over the interests of the German heirs. See also In the Matter of the Estate of Gaspar, 128 Mont. 383, 275 P.2d 656 (1954); Bunkley v. Scottish-American Mortgage Co., 185 Fed. 783 (5th Cir. 1911). In the latter case a Mississippi statute prohibited ownership of realty by nonresident aliens except that they were permitted to take a lien on realty to secure a debt and at a sale to enforce payment of the debt they could purchase the realty and hold it for not more than twenty years with power of sale. The court held a nonresident alien so holding was entitled to all the protection and defenses available to other owners of realty in Mississippi. But cf. State v. Natsuhara, 136 Wash. 437, 240 Pac. 557 (1925); Alexander, Rights of Aliens Under the Federal Constitution 101-02 (1931). See generally as to due process protection of vested interests of estate beneficiaries, Tilley, The Mullane Case: New Notice Requirements, 30 Mich. S.B.J. 12, 16-17 (1951).
resident alien to receive Montana estate assets only if the country of his residence would permit the transfer of estate assets located in the foreign country to an heir residing in the United States. The court held that the rights of the nonresident alien heirs had vested under the prior statute at the time of decedent’s death and that the application of the new statute to the pending estate would therefore violate the Montana due process clause.

A more difficult question arises concerning the applicability of the equal protection clause to nonresident aliens. In the fourteenth amendment a distinction is made between the equal protection and due process clauses. Unlike the due process clause which contains no jurisdictional limitation, the equal protection clause expressly prohibits any state from denying "to any person within its jurisdiction the equal protection of the laws." Since the fourteenth amendment specifically guarantees equal protection of the laws only to persons within the state’s jurisdiction, it remains to be determined whether a nonresident alien will be deemed to be within the state's jurisdiction as required.

Although the United States Supreme Court has construed the term "person" as including aliens, it has done so only in cases involving resident aliens. The Court has indicated that the equal protection clause applies only to persons physically present within the territorial jurisdiction of a state. Recent commentators, however, have contended that this territorial construction is too narrow. Specifically as to nonresident aliens, it has been urged that such aliens are within the state’s jurisdiction if they acquire property located within the state or would be entitled to acquire property there in the absence of discriminatory state statutes. Moreover, it has been further suggested that "jurisdiction" should be interpreted as meaning legislative jurisdiction so that in the case of a

64 U.S. Const. amend. XIV, § 1. (Emphasis added.)
65 E.g., Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).
66 Terrace v. Thompson, 263 U.S. 197, 216 (1923) (dictum); Blake v. McClung, 172 U.S. 239, 260-61 (1898) (dictum); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (dictum); see also State v. Travelers Ins. Co., 70 Conn. 590, 600, 40 Atl. 465, 467 (1898) (dictum); Maryland Cas. Co. v. Chamos, 203 Ky. 820, 823-24, 263 S.W. 370, 371-72 (1924) (dictum). But see Hillsborough v. Cromwell, 326 U.S. 620 (1946) where the plaintiff who was a nonresident brought an action in a federal court based on diversity to invalidate a discriminatory state property assessment. In sustaining federal jurisdiction, the Supreme Court referred to the equal protection clause without any accompanying discussion of the plaintiff’s nonresidence.
Invalidity of State Statutes

nonresident alien there might be adequate minimum contacts to satisfy this jurisdictional requirement.\textsuperscript{68}\textsuperscript{68} Even though no cases to date have adopted these theories, they merit serious judicial consideration as a rational solution to the question of jurisdiction where the succession rights of nonresident aliens are involved.

\textbf{EFFECT OF EQUAL PROTECTION AND DUE PROCESS CLAUSES ON STATE STATUTES AFFECTING THE ESTATE SHARES OF ALIENS}

The preceding analysis indicates that nonresident aliens should be entitled to some protection under the equal protection and due process clauses of the fourteenth amendment. It is, therefore, appropriate to consider whether state statutes of descent and distribution affecting nonresident aliens violate these constitutional safeguards. Attention will first be focused on the western type succession statute followed by an examination of the eastern type statute.

\textit{Succession Statutes}

Assuming the applicability of the equal protection clause to nonresident aliens, it becomes necessary to determine whether the classification adopted by the reciprocal succession statutes is reasonable. To be considered reasonable, there must be a rational relation between the classification and the legitimate purposes of the legislation.\textsuperscript{69}\textsuperscript{69} Proponents of the western type statutes might contend that these statutes seek to accomplish one or both of two proper goals. First, the state may conclude that the ownership of property by nonresident aliens is undesirable because of the state's lack of control over nonresident aliens,\textsuperscript{70}\textsuperscript{70} the undesirability of absentee ownership,\textsuperscript{71}\textsuperscript{71} or the fear of foreign economic penetration.\textsuperscript{72}\textsuperscript{72} How-

\textsuperscript{68} Note, supra note 67.

\textsuperscript{69} Terrace v. Thompson, 263 U.S. 197 (1923) (Washington statute which prohibited ownership of realty by aliens who had not in good faith declared their intention to become U.S. citizens); Porterfield v. Webb, 263 U.S. 225 (1923) (California statute which prohibited ownership of realty by aliens ineligible for citizenship); Webb v. O'Brien, 263 U.S. 313 (1923) (California statute); Frick v. Webb, 263 U.S. 326 (1923) (California statutes).


\textsuperscript{72} Sullivan, supra note 71, at 35-40; Boyd, supra note 52, at 1004, 1020.
ever, the classification contained in the western statutes in no manner ef-
fectuates these particular goals since it does not prohibit ownership by all 
nonresident aliens but rather only by those whose countries of nationality 
fail to permit succession by American nationals. There is no rational basis 
for assuming that citizens of such nations constitute a greater threat as 
nonresident property owners than the citizens of those countries which 
afford American citizens succession rights. This classification cannot, 
therefore, be sustained as reasonable where the purpose is the restriction 
of property ownership by nonresident aliens.

Secondly, the western statutes might be an attempt to further the 
fundamental principle of American law that the intent of the decedent 
should be carried out as far as possible. Clearly, this is a legitimate end, 
and in this context it would be proper for the legislature to recognize the 
decedent’s desire that his beneficiaries have the use and enjoyment of their 
estate shares. Nevertheless, the classification contained in the statute does 
not accomplish that end. Instead of making succession contingent on the 
right of a nonresident alien to take and enjoy his estate share in the coun-
try of his residence, the right of succession is granted only if that country 
accords American citizens national treatment in succession matters. Thus, 
this type of statute may impede the testator’s intention and produce a 
contrary result.

Clearly, neither of the foregoing objectives is the real purpose of the 
western statutes because the means adopted are in no way calculated to 
attain these ends. The statutory classification demonstrates that the real 
goal of this legislation involves the foreign relations of the United States. 
The purpose of these state statutes is to promote the right of American 
citizens to succeed to property abroad by predicating the succession rights 
of aliens within a state on reciprocity. Indeed, the California statute was 
avowedly enacted in 1941 as a measure to protect the United States from 
its potential enemies. The statute was directed against those nations 
which impounded or confiscated estate shares belonging to citizens of 
California for war purposes. The statute also sought to prevent estate 
assets of persons dying in California from being transmitted to aliens 
residing in hostile foreign nations where the assets might be confiscated 
and used for war. Since the foreign countries which engaged in these acts 
were hostile to the United States, it was considered essential that assets in 
this country should not be sent abroad where they could be utilized in a 
war against the United States.73

App. 1953); In re Bevilacqua’s Estate, 161 P.2d 589, 593-94 (Cal. Dist. Ct. App. 1945);
With respect to the actual goal of the western statutes, the issue is not the reasonableness of the classification but instead the legitimacy of the object itself. The power of a state to enact succession legislation affecting the foreign relations of the United States will be discussed subsequently. If a state is without such power, the purpose of these western statutes is improper.

Given an improper legislative purpose, a question of substantive due process exists. An examination of the means utilized in this legislation indicates that the purpose of the statute is to affect foreign affairs. If the state lacks authority to deny succession rights to nonresident aliens because the power over foreign affairs is not reserved to the states, then as to these aliens the western type statute violates the substantive due process protection guaranteed them by the fourteenth amendment. The due process clause bars the enforcement of any state legislation which is beyond the power of the state.\footnote{\textit{See} Nebbia v. New York, 291 U.S. 502, 537 (1934).}

\textit{Distribution Statutes}

The so-called eastern statutes authorize the court administering an estate to withhold the distributive share of a beneficiary where it appears that such beneficiary will not have the benefit or control of the property. Accordingly, a probate court is allowed to refrain from distributing estate shares to persons residing in countries where they are unlikely to realize fully the benefits of their shares in either a testate or intestate estate in the United States. This legislation is designed to preserve rather than confiscate the distributees' shares. Unlike the western statutes, most of these statutes are not limited by their terms to cases involving nonresident aliens.\footnote{\textit{See} \textit{notes} 2, 7, 8 supra and accompanying text. As to the possibility of applying such statutes to estate shares of residents see 53 Mich. L. Rev. 142, 144 (1954).}

The classification set forth in this statute is reasonable and does not constitute a violation of the equal protection clause to the extent that the statute seeks to effectuate the decedent's intent that his beneficiaries should have the benefit of their estate shares.\footnote{\textit{See} \textit{In the Matter} of Braier, 305 N.Y. 148, 154, 111 N.E.2d 424, 426 (1953); \textit{In the...}}
However, this is not the sole purpose of these statutes. The announced aim of this eastern type statute, just as in the case of the western statute, involves the foreign relations of the United States. The reason advanced for enacting the first of these statutes in New York was the possibility that the distributive shares paid to nonresident aliens might be confiscated by the countries of their residence.77 The New York statute was enacted in 1939 under the cloud of World War II, but the impetus for most other states to adopt similar legislation has come in the post-war period as a result of the confiscatory policies of the communist governments of Eastern Europe. It is significant that today these statutes are commonly referred to as the "Iron Curtain" statutes. In denying distribution, some courts have been motivated by the possibility that these funds might eventually be used against the United States.78

Whether the eastern statutes constitute an improper invasion of the federal government's power over foreign affairs will be examined later. However, if these statutes exceed state authority their purpose is improper, and as a result, they violate the due process clause of the fourteenth amendment.79

A specific application of the New York statute was attacked in the previously mentioned case of Ioannou v. New York as being repugnant to the fourteenth amendment.80 There the Surrogate's Court declined to give effect to the assignment of her estate share by the Czechoslovakian beneficiary for want of proof that conditions in Czechoslovakia would permit


This amendment is proposed by the Executive Committee of the Surrogates' Association of the State of New York. The purpose of the amendment is to authorize the deposit of monies or property in the Surrogate's Court in cases where transmission or payment to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by confiscation in whole or in part. The amendment authorizes the impounding of the fund by the Surrogate to await the time when payment can be made to the beneficiary for his own benefit, use and control.


79 See note 74 and accompanying text.

the beneficiary to enjoy her share. The petitioner-assignee, a resident of the United Kingdom, contended that the assignment was voluntary and that the funds would not reach Czechoslovakia. On appeal to the United States Supreme Court it was alleged that failure to recognize this assignment violated the equal protection and due process clauses.

The petitioner contended that the constitutional issue presented was whether the New York courts, without a hearing, could deprive the beneficiary of the right to assign her interest voluntarily. The petitioner asserted that the Surrogate's Court hearing was in fact no hearing since the court refused to allow the assignment without making any finding as to the voluntariness of that act. As a consequence the court's action prohibits the beneficiary from making a voluntary assignment so long as Czechoslovakia limits the enjoyment by its nationals of their shares in American estates. Appellant contended that such a construction of the New York statute constituted a denial of due process as to both the assignor and the assignee.

The equal protection argument proceeded on the grounds that the assignor and assignee were not accorded the same treatment as estate beneficiaries located in other countries who are permitted by the court to assign their shares voluntarily even though such beneficiaries have no greater freedom of disposition than persons residing in Czechoslovakia. Under that construction of the statute the beneficiary's right of assignment is not predicated on his unhampered ability to assign free from government control but rather on his right to enjoy his estate share. The

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81 See In Matter of Geiger, 7 N.Y.2d 109, 195 N.Y.S.2d 831, 164 N.E.2d 99 (1959), wherein the court held that the beneficiaries could not assign funds deposited by the Surrogate's Court pursuant to section 269. The estate shares were to be withheld until such time as payment could be made to the Hungarian beneficiaries for their own benefit, use and control. The funds had been assigned to a lawyer residing in the United States in part for the benefit of the beneficiaries and in part to pay his legal fees incurred on their behalf. The assignee proposed to purchase "Tkka" packages which were an approved means of sending food and clothing to persons residing in Hungary. In contrast see Mass. Ann. Law ch. 206, § 27B.

Courts have held these statutes are applicable where a distributee has executed a power of attorney in favor of the consul of any nation not likely to permit its nationals to enjoy fully their shares in decedents' estates. See Boyd, Consular Functions in Connection with Decedents' Estates, 47 Iowa L. Rev. 823, 914 (1962).

83 Id. at 4-5, 15-20. In reply the appellee stated that since the purpose of § 269-a was to protect rather than impair the rights of nonresident alien beneficiaries, there was no violation of due process. Appellee's Motion to Dismiss or Affirm, p. 5, Ioannou v. New York, 371 U.S. 30 (1962).
appellant-petitioner argued that equal protection was denied because the statute does not treat equally all nonresident aliens having the power to assign.\textsuperscript{84}

As previously indicated the Supreme Court in a per curiam decision dismissed the appeal for want of a substantial federal question. In his dissent Mr. Justice Douglas dealt with the substantive due process issue.\textsuperscript{86} He stated that if the purpose of the New York statute was to prevent unfriendly foreign governments from seizing funds that might be used against the United States, the court's rejection of the assignment might be reasonable. In that event the purpose would be subject to attack as an attempt to regulate foreign affairs. If, however, the statutory purpose was to effectuate the testator's intent, the refusal to recognize the assignment would not seem to be a reasonable means of achieving that objective. In the absence of evidence that the funds would ever reach Czechoslovakia, Mr. Justice Douglas concluded that an "irrebuttable presumption that the testator would not have wanted his beneficiary to make a voluntary assignment of his interest under these circumstances flies in the face of reason and common sense."\textsuperscript{886} Similarly, although the dissent did not discuss the equal protection argument, it seems unreasonable to discriminate against a beneficiary living in a country which denied him the enjoyment of his estate share but granted him the right to assign it simply because there was no rational relation between the classification and the statutory purpose of carrying out the testator's intent.

A procedural due process question involving the New York statute was also raised in the case of \textit{In the Matter of Braier}.\textsuperscript{87} There the consular section of the Hungarian legation appearing pursuant to treaty as attorney in fact for a Hungarian legatee appealed from an ex parte surrogate's order directing the deposit of a bequest with the New York City treasurer for the account of the legatee. On appeal to the court of appeals the consular section sought to attack the surrogate's order in part on the grounds that it violated the requirements of due process. The court of appeals held that the failure of the surrogate to grant a hearing before ordering the deposit

\textsuperscript{84} Appellant's Jurisdictional Statement, p. 4-5, 16-20. The appellee countered that there was no equal protection violation because all nonresident alien beneficiaries who would not have the use of their shares were treated alike. Further it was proper for New York to protect such beneficiaries from any impulsive assignment of their shares. Appellee's Motion to Dismiss or Affirm, p. 7.

\textsuperscript{86} 371 U.S. at 33.

\textsuperscript{886} Id. at 34.

did not constitute a denial of due process. The court justified this conclusion on two grounds. First, the court reasoned that a hearing was not necessary in this case because the legatee had not been deprived of title to the bequest, as the bequest had merely been set aside for her benefit until such time as assurance could be given that she would receive it. The court stressed that the statutory aim is to protect rather than impair the beneficiary’s interest. Similar court constructions along with the language of the eastern type statutes indicate that the impounded funds are not to escheat. Also, the surrogate in Ioannou had stated that should the beneficiary die, the funds would be held for the benefit of his heirs or distributees.

As its second reason the court of appeals stated that since the surrogate’s order of deposit was not a final order, there was no denial of due process for want of a hearing upon proper notice. Under the surrogate’s decree application could be made at any time for an order distributing the funds if it were shown that the legatee would actually receive the bequest. The court felt that due process was satisfied by the assurance of a future hearing. As to the matter of notice it seems clear that if the due process concept is to be a meaningful guardian of the individual’s property rights, his interest in an estate cannot be finally adjudicated until he has “had reasonable notice and an opportunity to be heard.” Though the Supreme Court has not expressly applied the doctrine of Mullane v. Central Hanover Bank & Trust Co. to probate, its subsequent reliance on the doctrine in analogous situations has raised the possibility that it will do so when confronted with a probate case. Furthermore, under the Mullane doctrine failure to give adequate notice constitutes a jurisdictional defect rendering the proceeding void, and a statute of limitations will not afford any protection. As a minimum precaution, therefore, each state ought to

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88 305 N.Y. at 158, 111 N.E.2d at 428.
89 See notes 7, 8 supra and accompanying text.
91 305 N.Y. at 159, 111 N.E.2d at 429.
94 Recently the United States Supreme Court applied the Mullane doctrine in Schroeder v. City of New York, 371 U.S. 30 (1962). Involved in this case was the validity of published and posted notice provided for in a New York statute establishing the procedure to be followed in condemning property rights required for a water supply. The statute provided that claims for damages by riparian owners were barred after three years. This action
provide by statute for at least one mailed notice during the period of administration to the heirs, devisees, and legatees whose names and addresses can be ascertained with due diligence.95 Similarly nonresident and resident alien friends are entitled to this same constitutional protection if they acquire property rights as beneficiaries in decedents' estates under state laws or treaties.96

It is well to emphasize in concluding this discussion of constitutional safeguards that their application to alien friends is in no way contingent upon reciprocal treatment of American citizens by foreign governments. The United States Supreme Court has taken the position that since the fifth amendment applies to alien friends their property in the United States cannot be confiscated even though the property of American citizens might be confiscated in the country of the aliens' nationality.97

THE FOREIGN RELATIONS POWER

In his Ioannou dissent, Mr. Justice Douglas also challenged the constitutionality of the New York statute on the grounds that "if New York has, in effect, regulated an area of our international relations that should be regulated only by the Federal Government, or if the New York statute conflicts with existing federal policy, then that statute cannot be given effect."98 He further stated that this federal question was not foreclosed by the Supreme Court's decision in Clark v. Allen.99

Although the statutes before the court differed in the two cases, the subsequent dissenting opinion raises two questions concerning the foreign relations power applicable to both types of statutes. First, if the federal power over foreign relations is exclusive, these statutes are subject to challenge as improper encroachments on this federal prerogative. Second, even assuming that this federal power is not exclusive, the state statutes to restrain continued diversion of water was brought by a riparian owner after the expiration of three years on the basis of inadequate notice of condemnation proceedings. The Supreme Court held that published notices posted off the owner's land were not adequate notice of the condemnation proceedings where the owner's name and address were readily ascertainable from both tax rolls and deed records.

96 See id. at 30-39, 52-65 for a treatment of United States treaties and statutes dealing with notice to consuls and aliens, and 88-102 for the effect of due process and the Mullane case on probate notice to aliens and consuls.
99 331 U.S. 503 (1946). Interestingly, Mr. Justice Douglas wrote the Court's opinion in that case sustaining the constitutionality of the California reciprocal succession statute.
are still open to attack if there is a conflicting federal policy as to alien succession.

Exclusive Federal Power

In *Clark v. Allen*, the constitutionality of the California reciprocal succession statute was challenged on the grounds that the statute infringed upon the exclusive power of the federal government over foreign affairs. As described by the Court, the attack proceeded on the basis that the purpose of the California statute is to promote the right of American citizens to succeed to property abroad by offering aliens reciprocal rights in California. Given this purpose it was asserted that such reciprocal arrangements are properly the subject for federal determination on the national level. The Supreme Court rejected the foreign affairs challenge as "farfetched."100

In sustaining the constitutionality of the California statute, Mr. Justice Douglas, speaking for the Court, stated that devolution rights are determined by state law in the absence of a contrary federal policy. As to rights in personalty there was no conflicting treaty requiring the state law to yield in this case. Moreover, the Court maintained that the statute did not violate the proscriptions against a state negotiating or making a compact with a foreign nation. By way of conclusion the Court stated that: "What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line."101

The rationale employed in *Clark* is open to objection on two counts. Not only did the Supreme Court grossly underestimate the effect of the California statute on foreign relations, but the Court also failed to examine in detail its prior decisions recognizing the authority of a state to legislate on succession matters.

Admittedly, the statement has often been made that, in the absence of a treaty, a state has the power to deny to aliens succession and ownership rights in property.102 Although numerous decisions of the United States Supreme Court are cited for this proposition, the cases do not in fact bear

100 Id. at 516-17.
101 Id. at 517. See Kelly, Effect of Probate Code Upon the Claims of Alien Nonresidents to Share in California Estates, 1 Hastings L.J. 128, 129-30 (1950).
out this broad assertion. Many of the cases did not involve aliens so that they merely support the general principle that devolution of property is controlled by the states. A number of other cases which are relied upon related to aliens, but they are insufficient authority because the Court did not consider the conflict between state law and the foreign relations power in reaching a decision. In most instances the Court either affirmed a state application of the common law rule of succession or sustained the extension of alien succession rights by treaties which conflicted with state laws.

Three of the alien cases frequently cited deserve particular attention. None of these cases, however, involved the validity of a state statute denying succession rights to aliens. In Mager v. Grima the Supreme Court upheld a Louisiana statute imposing a tax on legacies passing to legatees who were neither citizens of the United States nor domiciled in Louisiana. In rejecting a general allegation that the statute violated the federal constitution, the Court emphasized that every nation or state has the unquestioned right to prohibit alien succession to property. The Court thus appeared to be relying primarily on a rule of international law although it also added that the Louisiana tax did not interfere with commerce nor constitute a tax on exports. Similarly, in Hauenstein v. Lyne.


104 E.g., Sullivan v. Burnett, 105 U.S. 334 (1881) (involved construction but not constitutionality of state statute relating to succession rights of nonresident aliens); Phillips v. Moore, 100 U.S. 208 (1879) (involved construction of Mexican law as to succession rights of nonresident aliens).


As to the application of the common law in the United States see Boyd, Treaties Governing the Succession to Real Property by Aliens, 51 Mich. L. Rev. 1001, 1004 (1953).


107 Id. at 493-94.

108 Id. at 494. Relying on Mager it has been held that a western type reciprocal statute is not foreign commerce so that it does not conflict with the federal power over foreign commerce. In re Bevilacqua's Estate, 161 P.2d 589, 595 (Cal. Dist. Ct. App. 1945), rev'd on other grounds, 31 Cal. 2d 580, 191 P.2d 752 (1948).
where a treaty was accorded precedence over state law, the Court stated by way of dictum that "the law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. . . . In our country, this authority is primarily in the States where the property is situated."110

The third significant alien case, Blythe v. Hinckley,111 was discussed and relied upon by the Court in Clark v. Allen.112 In Blythe an action was brought to determine whether a British subject was entitled to inherit California realty from an intestate. The appellant contended that in the absence of a treaty a California statute permitting this alien to inherit violated article 1, section 10, of the United States Constitution prohibiting the states from entering into treaties. According to this argument the California statute was an invasion of the national treaty making power. The Court sustained the constitutionality of the statute stating that no case had been cited which cast any doubt on the power of a state to grant succession rights to an alien.113

Adherence to the Blythe case did not compel the result in Clark. The two California statutes before the Court differed materially. While the sole purpose of the California reciprocal statute is to affect American foreign relations,114 the purpose of the statute in the Blythe case was the effectuation of the decedent’s intention. Nevertheless, even if a statute were properly designed to carry out that intent, the fact remains that state statutes granting succession rights to aliens are not as likely to be the source of international friction as those denying such rights.

Subsequent to Clark, the Supreme Court decided Oyama v. California115 and Takahashi v. Fish & Game Comm’n116 which cases have been interpreted as reflecting a shift in the Court’s attitude toward the scope of the states' power to enact legislation affecting aliens.

Prior to the Oyama and Takahashi decisions, the United States Supreme Court in 1923 had sustained the California and Washington alien land laws which prohibited aliens ineligible for citizenship from owning

109 100 U.S. 483 (1879).
110 Id. at 484.
111 180 U.S. 333 (1901).
112 331 U.S. 503, 517 (1946).
113 180 U.S. at 341-42.
114 See notes 69-74 supra and accompanying text.
land.117 As a practical matter this classification was based on race because the Japanese and Chinese then represented the only significant group of aliens ineligible for citizenship.

In 1948 the Court was confronted with another aspect of the California alien land law in Oyama v. California.118 That statute stipulated that land should escheat if acquired by ineligible aliens and also if a transfer were made for the purpose of avoiding escheat. Moreover, the statute provided that the intent to avoid escheat was to be presumed, prima facie, if an ineligible alien paid the consideration for a transfer to an eligible alien or citizen. At the time this case arose, the Japanese constituted the only major group of aliens ineligible for citizenship. The Supreme Court held that to apply the presumption where the transferee was a minor son of the ineligible alien and also a United States citizen was unconstitutional since a distinction between citizens based on ancestry in these circumstances is an unreasonable classification.119 The same year in Takahashi v. Fish & Game Comm'n120 the Supreme Court held unconstitutional a California statute which prohibited the issuance of commercial fishing licenses to any person ineligible for citizenship. In reaching this result the Court took the position that the equal protection clause extended to resident aliens and constituted a limitation on a state's power to prevent resident aliens, especially particular racial groups within this class, from pursuing a vocation open to other residents of the state.121

Although the equal protection clause was invoked in both cases, the Court in the Takahashi case also reaffirmed its prior decisions holding that state statutes which place discriminatory burdens on the residence of aliens in the United States are invalid because they conflict with the exclusive authority of the federal government over immigration.122 The Court had stated earlier by dictum in Terrace v. Thompson123 that even

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117 Terrace v. Thompson, 263 U.S. 197 (1923) (Washington statute which prohibited ownership of realty by aliens who had not in good faith declared their intention to become United States citizens); Porterfield v. Webb, 263 U.S. 225 (1923) (California statute which prohibited ownership of realty by aliens ineligible for citizenship); see Webb v. O'Brien, 263 U.S. 313 (1923) (California statute); Frick v. Webb, 263 U.S. 326 (1923) (California statute).
118 332 U.S. 633 (1948).
119 Id. at 640.
120 334 U.S. 410 (1948).
121 Id. at 420.
122 Id. at 410, 415-16, 418-20; see Truax v. Raich, 239 U.S. 33, 42 (1915); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875). See also Comment, The Alien and the Constitution, 20 U. Chi. L. Rev. 547, 569 (1953).
123 263 U.S. 197 (1923).
though Congress had exclusive jurisdiction over immigration and naturalization the states were not precluded from denying to aliens the right to own land.\textsuperscript{124}

In both \textit{Oyama} and \textit{Takahashi}, the Court refrained from reconsidering the constitutionality of the alien land laws and preferred merely to assume their continued validity.\textsuperscript{125} Nevertheless, the Oregon Supreme Court relied on these two cases as authority for striking down the Oregon alien land law.\textsuperscript{126} The Oregon court felt that the United States Supreme Court in \textit{Oyama} and \textit{Takahashi} assigned greater value than it had in the 1923 alien land cases to

(1) the right of all aliens within our borders, wherever they may be, to engage in ordinary occupation; (2) the freedom of all rights from impairment by legislation which is based upon the individual's color, race or creed; and (3) the desirability in general of having the Federal government alone enact special laws concerning the status of aliens, if any need to be enacted.\textsuperscript{127}

Accordingly, the Oregon decision was predicated not only on the unreasonableness of the statutory classification but also on the grounds that the statute invaded the exclusive federal power over immigration.\textsuperscript{128} Later, the Supreme Court of California, in declaring the alien land law of that state unconstitutional, acknowledged the conflict between the state statute and the federal power over immigration.\textsuperscript{129} Increasing federal and state judicial concern about state encroachments on the exclusive federal control over immigration raises serious doubts about the validity of state legislation which denies resident aliens the right to succeed to property.\textsuperscript{130}

This judicial attitude toward state statutes encroaching on the federal immigration power is relevant to the legitimacy of state statutes affecting the succession rights of nonresident aliens. This relevancy is due to the national nature of both the immigration and foreign relations powers as

\textsuperscript{124} Id. at 217 (dictum). See Webb v. O'Brien, 263 U.S. 313, 321-22 (1923) (dictum), where the Court asserted that in the absence of a treaty to the contrary a state could deny to aliens the right to own land.

\textsuperscript{125} Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 422 (1948); Oyama v. California, 332 U.S. 633, 646-47 (1948).

\textsuperscript{126} Kenji v. McCourt, 185 Ore. 579, 204 P.2d 569 (1949).

\textsuperscript{127} Id. at 604-05, 204 P.2d at 579-80.

\textsuperscript{128} Id. at 603-14, 204 P.2d at 579-83.


\textsuperscript{130} See Comment, Validity of State Restraints on Alien Ownership of Land, 51 Mich. L. Rev. 1053, 1062-67 (1953); Comment, supra note 122, at 567-69. See also Sullivan, supra note 102.
well as to the foreign relations aspect of the immigration power.\textsuperscript{131} As in the case of immigration, the authority of the national government over foreign relations should foreclose any state legislation either if its sole purpose is to affect foreign relations or if it has more than an incidental effect on foreign relations.

The western type statute falls within the rubric of both of these proscriptions. The sole purpose of the western statute is the regulation of foreign relations.\textsuperscript{132} Moreover, notwithstanding Mr. Justice Douglas' rejection of the argument as "farfetched" in \textit{Clark v. Allen},\textsuperscript{133} the western reciprocal statutes do invade the province of the foreign relations power and have more than an "incidental or indirect effect" on this power. Even though the granting or denying to nonresident aliens of ownership and succession rights to property is not controlled by international law,\textsuperscript{134} state denials of such rights have often produced tensions between the federal government and the country of the alien's nationality.\textsuperscript{135} As American investments abroad increase, restrictions on alien ownership rights will have an even greater impact on foreign relations because they will serve as an obstacle to securing more extensive property rights for Americans overseas.\textsuperscript{136} Accordingly, federal control over nonresident alien succession rights should be regarded an exclusive because of the need for uniformity in foreign affairs. Even in the absence of a federal policy on

\textsuperscript{131} See Chy Lung v. Freeman, 92 U.S. 275, 279-80 (1875); Henderson v. Mayor of New York, 92 U.S. 259, 272-73 (1875).

\textsuperscript{132} See notes 69-74 supra and accompanying text.

\textsuperscript{133} 331 U.S. 503 (1946).

\textsuperscript{134} See notes 16-18 supra and accompanying text.


A California court of appeals has stated that a western type reciprocal succession statute does not cause the United States embarrassment because no "nation could within reason expect more for its nationals than its law gives to ours." In re Bevilaqua's Estate, 161 P.2d 589, 596 (Cal. Dist. Ct. App. 1945). This completely ignores the difficult and tension-producing problems that have often been involved in proving reciprocal succession rights under foreign law in American courts. See Berman, Soviet Heirs in American Courts, 62 Colum. L. Rev. 257, 268-74 (1962); Scheller & Mayda, Payment of Estate Shares Behind the Iron Curtain, 28 Wis. B. Bull. 17-19 (June 1955); Sullivan, supra note 102, at 42.

\textsuperscript{136} In Geofroy v. Riggs, 133 U.S. 258 (1890), the Court said: "As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations." Id. at 266.
this issue, the exclusive nature of the foreign relations power should preclude the states from legislating in this area.\textsuperscript{137}

When confronted with the constitutionality of the New York "Iron Curtain" statute in \textit{Ioannou v. New York},\textsuperscript{138} Mr. Justice Douglas took the position that \textit{Clark} did not foreclose an inquiry into the question of whether the statute represented an invasion of the federal power over foreign relations. In his dissent he stated:

Admittedly the several States have traditionally regulated the descent and distribution of estates within their boundaries. This does not mean, however, that their regulations must be sustained if they impair the effective exercise of the Nation's foreign policy.\textsuperscript{139}

He further concluded that the practice of state courts in withholding remittances from beneficiaries residing in communist countries and in prohibiting assignments of their shares of estates affects "international relations in a persistent and subtle way."\textsuperscript{140}

The foregoing language indicates that Mr. Justice Douglas now views the effect of alien descent and distribution on foreign relations as being more substantial than he did in \textit{Clark v. Allen}.\textsuperscript{141} This interpretation is fortified by the fact that the sole purpose of the western statutes is to affect foreign relations,\textsuperscript{142} while the Iron Curtain statutes combine this improper purpose with the proper goal of effectuating the decedent's intention.\textsuperscript{143} Even in the absence of a conflicting federal policy, he is now willing to strike down a state statute having a proper purpose if the statute has more than an incidental effect on foreign relations. The effect of the Iron Curtain statutes on foreign affairs cannot be minimized. Unlike the western statutes, these eastern statutes fall within the domain of international law. Although a nation is not compelled by international law to extend succession rights to aliens, it is required to protect property rights which have


\textsuperscript{138} 371 U.S. 30, 31 (1962).

\textsuperscript{139} Id. at 31.

\textsuperscript{140} Ibid. The New York Court of Appeals held that Section 269-a of the Surrogate's Court Act did not encroach on federal power to regulate foreign commerce where there was no conflicting national policy. In the Matter of Braier, 305 N.Y. 148, 111 N.E.2d 424 (1953), appeal dismissed sub nom. Kalmanc v. Green, 346 U.S. 802 (1953). In support of constitutionality see Zupko Estate, 15 Pa. D.&C.2d 442 (Orphans' Ct. 1958); Scheller & Mayda, supra note 135; Snyder & Stander, Distributive Rights of Foreign Beneficiaries as Affected by State Action—Recent Pennsylvania Developments, 63 Dick. L. Rev. 297, 305-07 (1954).

\textsuperscript{141} See notes 100, 101 supra and accompanying text.

\textsuperscript{142} See notes 69-74 supra and accompanying text.

\textsuperscript{143} See notes 75-81 supra and accompanying text.
vested in aliens pursuant to domestic law. Where a state statute denies or restricts vested property rights of an alien as in the case of the Iron Curtain statutes, a question of international law is raised. Any claim that a state statute violates international law will be directed by the country of the alien's nationality against the federal rather than the state government. The international legal problems surrounding the Iron Curtain statutes clearly have serious foreign implications for the United States, and further consideration should be given to their determined constitutionality.

CONFICTING FEDERAL POLICY

Mr. Justice Douglas also stated in his Ioannou dissent that the New York statute would be invalid if it conflicted with existing federal policy. Even if state succession legislation does not constitute an improper invasion of the exclusive power of the federal government over foreign affairs, such legislation is superseded by a conflicting federal policy. Federal policy may be either formally or informally expressed through international agreements, congressional enactments, or statements by officials of the executive branch.

International Agreements

It is well established that alien succession rights are a proper subject of the treaty-making power and that conflicting state statutes must yield to the treaty. Even though the treaty device has been the traditional form utilized for federal control of alien succession, arguably the same result can be achieved by executive agreement made with or without congressional approval. The Restatement of the Foreign Relations Law of the

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144 See also notes 22-38 supra and accompanying text.
147 370 U.S. at 31.
151 See United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); Restatement, op. cit. supra note 148, §§ 123, 146; Cardozo, The Authority in
United States, however, indicates that in the absence of congressional approval the President cannot enter into an executive agreement providing that foreign nationals will not be denied succession rights in the United States.\[^{152}\]

The succession rights of aliens have been the subject of bilateral treaty negotiations by this nation from its inception.\[^{153}\] Generally, the succession rights granted aliens by United States treaties have been less extensive than the rights accorded them by state statutes. In some instances, however, these bilateral treaty rights are broader than those afforded by state legislation.\[^{154}\] With respect to realty, these treaties have ordinarily granted aliens only a qualified right of succession. In the event alienage is a bar to succession under state law, the standard American treaty formula in use guarantees nonresident and resident aliens the right to sell their shares in any decedent's real property located in the United States within a specified period of time.\[^{155}\] By contrast a number of treaties have stipulated that if an alien dies owning personality, regardless of their nationality, are entitled to succeed to the personality without any limitations.\[^{156}\] Under present treaty practice non-

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\[^{152}\] This conclusion is derived by analogy from § 124, comment b, illustration 3, Restatement, op. cit. supra note 148, which reads as follows:

3. The President makes an agreement with state A that nationals of either state may not be denied permission to practice accounting in the other state by reason of alienage. The agreement is not within the scope of the President's power as chief executive and is unconstitutional.

Comment b states that in the past, executive agreements without Congressional approval have been based on the President's power as commander-in-chief and his power to receive foreign ambassadors and recognize foreign governments. The draftsmen thus limit the rationale of the Pink and Belmont cases, to the facts of those cases. See also Id., § 147.


\[^{154}\] See Gibson, Aliens and the Law 48 (1940).

\[^{155}\] See Boyd, supra note 153, at 1009-1019.

\[^{156}\] See Meekison, Treaty Provisions for the Inheritance of Personal Property, 44 Am. J. Int'l L. 313 (1950). However, in Clark v. Allen, 331 U.S. 503, 514-16 (1946), the United States Supreme Court held that this provision did not apply to personality left in California by an American citizen even though he was survived by beneficiaries who were aliens.
resident and resident aliens are granted the same right of sale both as to realty and personalty in the United States regardless of the decedent's nationality. A five-year period is usually allowed in which to make the sale.\(^{157}\)

The United States Supreme Court has held that conflicting treaty provisions take precedence over western reciprocal succession statutes. In \textit{Clark v. Allen}, the Supreme Court took the position that nonresident German nationals were entitled to a qualified interest granted by treaty in California realty regardless of the nationality of the decedent,\(^{158}\) and it was, therefore, unnecessary to prove reciprocity under the California statute. Moreover, the Supreme Court held in \textit{Kolovrat v. Oregon}\(^{159}\) that the Oregon reciprocal statute did not control because an 1881 treaty with Yugoslavia contains a most-favored-nation clause making an 1853 treaty with Argentina applicable. By the terms of the Argentinian treaty nonresident and resident aliens are accorded the same rights of succession as native citizens.\(^{160}\) Accordingly, nonresident Yugoslavians were permitted

\(^{157}\) The standard clause, or its variations, now usually incorporated in United States treaties provides:

\begin{quote}
National and companies of either Party shall be permitted freely to dispose of property within the territories of the other Party with respect to the acquisition of which through testate or intestate succession their alienage has prevented them from receiving national treatment, and they shall be permitted a term of at least five years in which to effect such disposition.
\end{quote}


\(^{158}\) 331 U.S. 503, 507-508 (1946) (Alien Property Custodian vested in himself all right, title and interest of the German nationals in the real estate).


\(^{160}\) Art. 9 of the Treaty of Friendship, Commerce and Navigation With the Argentine Confederation, July 27, 1853, 10 Stat. 1005, 1009, T.S. No. 4 provides in part as follows: "In whatever relates to . . . acquiring and disposing of property of every sort and denomination, either by sale, donation, exchange, testament, or in any other manner whatsoever, . . . the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties and rights, as native citizens . . . ."
by the Court to inherit the personalty of two intestates who resided in Oregon.

An additional problem existed in the Kolovrat case which was absent in Clark. Unlike the California statute, the Oregon statute not only requires that United States citizens have the right to succeed to property in the country of the alien beneficiary's nationality on the same terms as citizens of that country but also that American citizens have the right to receive, by payment to them within the United States, money originating from the estates of persons dying within that foreign country. The Oregon Supreme Court held that American citizens did not have an enforceable right to receive funds from a Yugoslavian estate in the United States because the Yugoslav foreign exchange laws were broad enough to permit the issuance of regulations impairing the payment of estate shares abroad.\(^\text{161}\) On appeal, the United States Supreme Court rejected this position on the grounds that the International Monetary Fund Agreement to which both countries are parties prohibits the signatory powers from exercising controls over international capital movements in a manner which will either restrict payments for current transactions or unduly delay transfer of funds in settlement of commitments. Moreover, a 1948 agreement between Yugoslavia and the United States was cited as obligating Yugoslavia to continue to grant most-favored-nation treatment to United States citizens in the acquisition and ownership of assets in that country and to authorize persons in Yugoslavia to pay debts to United States nationals.\(^\text{162}\) The United States Supreme Court stated that these international agreements established a national policy on foreign exchange and that:

After the proper governmental agencies have selected the policy of foreign exchange for the country as a whole, Oregon of course cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities. Our National Government's assent to these international agreements, coupled with its continuing adherence to the 1881 Treaty, precludes any State from deciding that Yugoslavian laws meeting the standards of those agreements can be the basis for defeating rights conferred by the 1881 Treaty.\(^\text{163}\)

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163 Id. at 198.
American treaty clauses granting succession rights to aliens do not cover the distribution of estate shares to nonresident aliens.164 Traditionally, the problem of distribution has been embraced in treaty provisions defining consular rights in decedents' estates.165 This matter has been dealt with in a consular context because historically one of the principal functions of a consular officer has been to serve as a remission agent for estate shares accruing to his nonresident countrymen.166

Notwithstanding the generality of the eastern statutes, they are in part designed as a basis for judicial refusal to distribute estate shares to the consular officer of any nation not likely to permit its nationals to enjoy fully their shares in decedents' estates. In denying this consular prerogative, it is immaterial whether the consul justifies his right of receipt on a treaty or a power of attorney executed by the interested distributees.167

With respect to treaty rights, the courts have held that these Iron Curtain statutes do not conflict with the provision inserted in United States treaties from 1923 to 1947 stipulating that:

A consular officer . . . may in behalf of his non-resident countrymen receipt for their distributive shares . . . provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.168

To justify the application of the statutes, the courts reason that the treaty clause is inapplicable because conditions make it impossible for the

164 In Petition of Mazurowski, 331 Mass. 33, 116 N.E.2d 854 (1953), the court held that a treaty provision granting aliens national treatment in the succession to personality did not preclude the application of an eastern type statute. The court emphasized the fact that the state statute was not limited by its terms to aliens.


166 Id. at 823.

167 See Berman, supra note 135, at 257-58; Heyman, supra note 146, at 237-39; Scheller & Mayda, supra note 135, at 54-56.

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consul to "remit" the distributive share to the distributee as required by the treaty.¹⁶⁹

Without the aid of one of these statutes, some courts have reached an identical result as a matter of common law.¹⁷⁰ Where it appeared that the distributees would not have the benefit of their shares, a Pennsylvania court, before the enactment of a statute in 1953, declined to distribute

¹⁶⁹ For an instance where a federal freezing order precluded consul from transmitting share to distributee, see In the Matter of Braier, 305 N.Y. 148, 155-56, 111 N.E.2d 424, 427, appeal dismissed, 346 U.S. 802 (1953); In the Matter of Estate of Miller, 181 Misc. 88, 45 N.Y.S.2d 485 (Surr. Ct. 1943) (no reference to treaty); In the Matter of Estate of Plemich, 176 Misc. 560, 28 N.Y.S.2d 86 (Surr. Ct. 1941); In the Matter of Estate of Ramberg, 174 Misc. 306, 20 N.Y.S.2d 619 (Surr. Ct. 1940). The following dicta appeared in two of the cases: "Since federal blocking regulations depend on considerations of national defense, the freezing order might conceivably be lifted, without assurance that the legatee would receive the funds. Section 269 is the means, in such a case, of assuring transmission of the bequest to its proper owner." In the Matter of Braier, 305 N.Y. 148, 157, 111 N.E.2d 424, 428 (1953). "They in any event are unable at the present time to enjoy the benefit of such property and so the terms of section 269 . . . are directly applicable to the funds." In the Matter of Estate of Miller, 45 N.Y.S.2d 485, 487, 181 Misc. 88, 90 (1943).

For an instance where a consul was denied share of national residing in sending state because his government did not exercise control over sending state territory, see In the Matter of Estate of Niggol, 202 Misc. 290, 115 N.Y.S.2d 557 (Surr. Ct. 1952); In the Matter of Estate of Yee Yoke Ban, 200 Misc. 499, 107 N.Y.S.2d 221 (Surr. Ct. 1951); In the Matter of Estate of Wong Hoen, 199 Misc. 1119, 107 N.Y.S.2d 407 (Surr. Ct. 1951); In the Matter of Estate of Steiner, 172 Misc. 950, 16 N.Y.S.2d 613 (Surr. Ct. 1939). The following dicta appeared in two of the cases: "Moreover, proof that the distributees will not have the benefit of the property is sufficient to warrant the court in withholding payment to the non-resident distributees despite the existence of a treaty authorizing payment to the foreign consul . . . ." In the Matter of Estate of Yee Yoke Ban, supra at 500, 107 N.Y.S.2d at 222-23.

For a case where German consul was denied share of infant distributee living in the British protectorate of Palestine during World War II, see In the Matter of Estate of Weidberg, 172 Misc. 524, 15 N.Y.S.2d 252 (Surr. Ct. 1939).

For a different rationalization of the absence of conflict between these statutes and the treaty provisions, see In re Simon's Estate, 20 N.J. Super. 375, 377, 90 A.2d 70, 71 (Super. Ct. 1952) (dictum), where the court said:

[While the treaties provide that a consular officer of either contracting party may in behalf of his non-resident countrymen appear and advocate their rights, and may receipt for their distribution shares derived from decedents' estates and other sources, yet our attention has not been invited to any treaty provision which obliges the courts of either country to direct the payment of such distributive shares.

In refusing to distribute to the consul, the court discussed the treaty only generally in Estate of Wozniak, 44 Luz. L. Reg. Rep. 227, 230-31 (Pa. Orphans' Ct. 1954).

See generally Heyman, supra note 146, at 239; Scheller & Mayda, supra note 135, at 54.

¹⁷⁰ See note 7 supra.
Recent United States treaty provisions eliminate any question of conflict between the consular right of receipt and a state policy deferring distribution where conditions warrant. Both the 1948 treaty with Costa Rica172 and the estate article approved by the State Department and the American Bar Association for incorporation in future treaties173 expressly

171 Zielinski Estate, 73 Pa. D. & C. 81 (Orphans' Ct. 1950). See also Gebert's Estate, 29 North. Co. 142 (Pa. Orphans' Ct. 1943), where court distributed shares to Polish consul during World War II with the provision that consul not transmit the funds to the Polish beneficiaries until the end of the war and restoration of Polish independence.

Contrast with these cases In Matter of White, 100 Misc. 393, 166 N.Y. Supp. 712 (Surr. Ct. 1917), where court ordered payment of distributive share to Swedish consul who had taken charge of Austro-Hungarian interests as a result of severance of diplomatic relations between the United States and Austria-Hungary. Notwithstanding this severance, the court concluded that the treaties between the two countries were still in force and that:

[The consul general of Austria-Hungary would have a right to receive any and all funds to which subjects of those countries might be entitled, were such an official here, and it appearing that the Swedish consul general has taken charge of Austro-Hungarian interests in this country, pursuant to an agreement with the Austro-Hungarian government, and with the consent and approval of the United States Government. Id. at 394, 166 N.Y. Supp. at 713.

172 Article 9(3) of the Consular Convention with Costa Rica, Jan. 12, 1948, 1 U.S.T. & O.I.A. 247, 270, T.I.A.S. No. 2045 provides:

A consular officer of the sending state may, on behalf of a national of the sending state who is not a resident of the receiving state, receive for transmission to such a person, through channels prescribed by the sending state, any money or property to which such person is entitled as a consequence of the death of any person. Such money or property may include, but is not limited to, shares in an estate, payments made pursuant to Workmen's Compensation Laws, or any similar laws, and the proceeds of life insurance policies. The court, agency or person making the distribution shall not, however, be required to make such distribution through a consular officer. If a court, agency or person does make distribution through a consular officer it may require him to furnish reasonable evidence of the receipt of the money or property by the person or persons entitled thereto. The authority vested in a consular officer by this section shall be in addition to and not in limitation of the authority vested in him by previous paragraphs of this article.

173 Section 3 provides:

Unless prohibited by law, a consular officer may, within the discretion of the court, agency, or person making distribution, receive for transmission to a national of the sending state who is not a resident of the receiving state, any money or property to which such national is entitled as a consequence of the death of another person, including shares in an estate, payments made pursuant to workmen's compensation laws or similar laws, and proceeds of life insurance policies. The court, agency, or person making distribution may require that a consular officer comply with conditions laid down with regard to (a) presenting a power of attorney or other authorization from such non-resident national, (b) furnishing reasonable evidence of the receipt of such money or property by such national, and (c) returning the money or property in the event he is unable to furnish such evidence.

provide that it shall be within the discretion of the court as to whether or not distribution of an estate share will be made through a consul.

In addition to distribution, notice of estate proceedings has been the subject of American consular treaty provisions. Beginning in 1868 and continuing to the present, the standard clause has provided that where an alien dies in the United States without having in this country any known heirs or testamentary executors appointed by the decedent, notice of the "circumstance" must be given by the competent local authorities to the consul of the decedent's nationality. Notice of "circumstance" requires at least notice of death and perhaps, at most, all necessary information relating to the estate. Later treaties provide explicitly that the notice is to be of the fact of death. In order to comply with the requirements of the standard provision the consul should be notified at once. The notice provision itself states that the purpose of the notice is to provide for the transmission of information to the interested parties through the medium of the consul. Thus, the treaty is designed to apprise nonresident heirs and executors through the medium of notifying the nearest consul of their government.

Moreover, as previously discussed, nonresident and resident alien friends are entitled to the protection of the Mullane doctrine with respect to their interests as estate beneficiaries. To fulfill the due process requirement, the Mullane doctrine would seem to necessitate at least one mailed notice in the case of alien beneficiaries, whose names and addresses can be ascertained with due diligence. Although the Mullane case eliminated any distinction between the notice given residents and nonresidents, the Court did stress that:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.


175 The notice provision included in the estates article approved by the State Department and the American Bar Association reads as follows:

(1) In the case of the death of a national of the sending state in the territory of the receiving state, without having in the territory of his decease any known heir or testamentary executor, the appropriate local authorities of the receiving state shall promptly inform a consular officer of the sending state.


177 A.B.A. 1041-42 (1961); A.B.A. Section of International and Comparative Law, 1961 Proceedings 81. This provision represents a regression from the standard American notice clause which by its terms was designed as a vehicle for notifying the interested parties.
Thus, the particular circumstances may require a change in the method of notice in order to achieve the ultimate end of informing the interested persons whose property rights are in issue.\textsuperscript{177}

The nonresidency of an alien interested in an estate is a circumstance to be considered in determining adequacy of the notice to which he may be entitled by the due process clause. Since notification of the nonresident alien is clearly required, the only question is whether a notice mailed to the nonresident alien directly is more "reasonably calculated" to give him notice than where the notice is mailed to the consul of his nationality. It is arguable that notice must be given directly to a nonresident alien rather than to his consul, notwithstanding any treaty provision to the contrary.\textsuperscript{178} The subordination of a United States treaty provision to the requirements of federal due process assumes that the treaty-making power is not superior to the Constitution in this area.\textsuperscript{179}

To comply with federal due process requirements United States treaties and statutes must contain specific and detailed provision for adequate notice as actual notice is not a substitute for prescribed notice.\textsuperscript{180} Preferably the treaties and statutes should provide that the interested parties whose names and addresses are known should be notified directly by the probate court or estate representative. Should the estate be small, notice through the consul may be justified as a means of saving expense.\textsuperscript{181} As a general policy, however, a direct mailing is more likely to result in actual notice with a minimum of delay than notice given to the consul for transmission either directly or indirectly to the interested parties. The long-standing failure of American probate authorities to notify consuls as prescribed by treaty and statute can be attributed in large part to the unfamiliarity of these authorities with consuls and their location, some-

\textsuperscript{177} See Boyd, supra note 174, at 88-89.

\textsuperscript{178} See Boyd, id. at 88-90.


\textsuperscript{180} See Boyd, supra note 174, at 87-88.

\textsuperscript{181} Id. at 61, 90.
times far from the probate situs. Also when names and addresses are known there seems to be no justification to deviate from the Supreme Court's refusal to distinguish between residents and nonresidents.

**Statutes**

Congress has generally refrained from enacting legislation regulating alien succession. In time of war or approaching war it has passed and amended a Trading with the Enemy Act which has been justified as a proper exercise of the federal war power. Pursuant to this act, the Alien Property Custodian by freezing or vesting in himself the succession interests of certain nonresident aliens has prevented distribution of their estate shares to these aliens.

Some doubt has been expressed as to whether Congress in the absence of wartime conditions has the authority to adopt legislation controlling alien succession. This issue now appears resolved in favor of such power by *United States v. Oregon*.

In that case the decedent, an Oregon resident, died intestate in a United State Veterans' Hospital. He was survived by no heirs, but he left a small estate comprised of personalty. An Oregon statute provided that his property should escheat to the State; however, a federal statute stipulated that where a veteran dies without will or heirs in a Veterans' Hospital his personal property should vest in the United States. The State of Oregon asserted that the federal statute was invalid because the states had reserved the power to control the devolution of property. The United States Supreme Court sustained the validity of the federal statute on the ground that the powers to raise armies and navies and conduct wars permitted Congress to legislate as to veterans.

The fact that this law pertains to the devolution of property does not render it invalid. Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power.

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182 Id. at 64-65.
183 See Boyd, supra note 153, at 1005; Orfield, Alien Land Rights in Nebraska, 17 Neb. L. Bul. 3, 14-15 (1938); Diplomatic Instruction from Secretary of State Marcy to Mr. Fay, June 19, 1854, M.S. Inst. Switz. I, 17 cited in 4 Moore, Digest of International Law 37 (1906).
185 Id. at 649. Mr. Justice Douglas, joined by Mr. Justice Whittaker, dissented. The dissent stressed the fact that historically succession had been a state matter and also argued that this federal succession statute was not a necessary and proper means of exercising Con-
The power of Congress to raise armies and navies and conduct wars is one aspect of the foreign relations power.\textsuperscript{186} The Constitution also expressly authorizes Congress to exercise certain other powers relating to foreign affairs including the power to regulate foreign commerce.\textsuperscript{187} These specifically enumerated powers, however, are not the sole source of Congress' authority over foreign relations. As the federal legislature, Congress has the general power to enact legislation regulating foreign affairs even though the Constitution does not so provide.\textsuperscript{188}

Because of the derivation and nature of the foreign relations power, the federal government is accorded greater liberality in adopting means and ends in foreign affairs than it is in the case of internal affairs. The treaty-making power, therefore, cannot be deemed the exclusive vehicle for expressing federal policy regarding alien succession. In peacetime, federal legislation concerning nonresident alien succession can be justified not only under Congress' power to regulate foreign commerce\textsuperscript{189} but also on its general power over foreign relations. Clearly the enactment of such legislation is reasonably related to the regulation of foreign affairs.\textsuperscript{190}

Congressional legislation in this area should not amount to a mere federalization of either the western reciprocal succession statutes or the eastern distribution statutes or a combination of both. A federal version of these statutes would retain the difficult problem of proof and the diversity resulting from multiple judicial interpretations.\textsuperscript{191} To minimize international friction and to secure uniformity, a federal statute should remove alienage as a disability and grant to all nonresident aliens the right to succeed to property in the United States. To permit flexibility in the conduct of foreign affairs, the executive branch of the federal govern-


\textsuperscript{188} See Perez v. Brownell, 356 U.S. 44, 57-62 (1958) where the Court sustained as a proper exercise of Congress' power over foreign relations a statute which deprived United States nationals of their citizenship if they voted in a foreign election.

\textsuperscript{189} See Boyd, supra note 153, at 1005-06.
ment should be authorized to block the transmission of estate assets abroad when it is in the national interest to do so. In order to comply with constitutional requirements detained assets should be held for future distribution to the alien beneficiaries. However, such a uniform approach will remain impossible as long as the states are allowed to continue to enforce their present alien succession and distribution statutes.

Policy Statements

To the President and executive branch belong the principal responsibility for formulating and executing American foreign policy. In enunciating foreign policy the President is not limited to joint action with the Congress or the Senate. He has the authority to enter into international agreements without the consent of Congress. Moreover, American policy may be expressed through statements by the President and his representatives in the executive branch. Indeed, silence on the part of the executive may indicate policy.

By virtue of the increasing complexities and momentum of world events, executive statements of policy are being resorted to more frequently in the conduct of American foreign affairs. This practice raises the question of whether conflicting state laws must yield to a policy statement as well as to an international agreement or federal statute. As in Clark v. Allen, the United States Supreme Court has stressed that it is the federal policy which must be given precedence. The Court has not concerned itself with the form in which this policy is expressed. Since the Supreme Court is more concerned with substance than form, Professor Arthur S. Miller argues that executive policy statements should prevail over conflicting state policy. To facilitate the determination of the existence of such a conflict, he contends that such a federal policy statement should be a written and clear statement by a major executive official.

As to executive policy relating to succession by nonresident aliens, the

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195 331 U.S. 503, 517 (1946). But see note 101 supra and accompanying text.
196 Miller, supra note 149, at 1544-46, 1548-49.
197 Id. at 1546-48.
Al\brief\, Alien Property Custodian, represented by the Justice Department, instituted the action in Clark v. Allen.\textsuperscript{198} The Custodian there contended that the California reciprocal statute was not a proper objective of state legislation because it invaded the exclusive federal power over foreign affairs.\textsuperscript{199} By contesting the validity of the state statute the Alien Property Custodian manifested a federal policy in conflict with that of California. The action of the United States Supreme Court in sustaining the California statute in Clark conflicted with the rationale of its decision in United States v. Pink where the Court said "the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts."\textsuperscript{200}

On occasion, state courts inquire of the State Department if there is a federal policy as to the distribution of estate assets to nonresident aliens. The State Department generally replies that the distribution of estate shares is a matter of state law because there are no federal restrictions on such transfers. However, the Department goes on to inform the inquiring court of the existence of a Treasury Department regulation prohibiting the delivery of government checks to nonresident alien payees in certain countries because there is no reasonable assurance that the payees will receive the checks or be able to negotiate them for full value.\textsuperscript{201} The response also indicates that state courts have withheld distribution on the basis of this regulation. This ambiguous response leaves most courts with the understanding that the State Department policy precludes distribution to those aliens covered by the Treasury regulation.\textsuperscript{202}

\textsuperscript{198} 331 U.S. 503 (1946).

\textsuperscript{199} See appellant's argument in Clark v. Allen, 170 A.L.R. 953, 956 (1947). The same argument was made in the lower court, see Allen v. Markham, 156 F.2d 653, 655 (9th Cir. 1946).

\textsuperscript{200} 315 U.S. 203, 233-34 (1942).

\textsuperscript{201} 31 C.F.R. 211.3(a) (Supp. 1962).

\textsuperscript{202} See Berman, Soviet Heirs in American Courts, 62 Colum. L. Rev. 257, 272-73 (1962); Heyman, supra note 192, at 233, 237; Comment, State Regulation of Nonresident Alien Inheritance—An Anomaly in Foreign Policy, 18 U. Chi. L. Rev. 329, 334-35 (1951). The following cases are significant in this regard: Petition of Mazurowski, 331 Mass. 33, 116 N.E.2d 854 (1954), where the court relied in part on the Treasury regulation in denying distribution on the ground that the nonresident alien would not receive the full value of his estate share. In this case the State and Justice Departments responded to inquiries concerning Polish foreign exchange regulations; In re Estate of Markewitsh, 62 N.J. Super. 407, 163 A.2d 232 (Passaic County Ct. 1960) (letter from State Department as described in above text); In the Matter of Braier, 305 N.Y. 148, 111 N.E.2d 424, appeal dismissed sub nom. Kalamane v. Green, 346 U.S. 802 (1953) where the court relied on the Treasury regulations in denying
partment’s reluctance to express an unequivocal federal policy is probably due in part to the belief that such a statement is without legal significance by virtue of Clark v. Allen and in part to an unwillingness to precipitate a states’ rights controversy over alien succession.

The Treasury regulation should not be relied on as a statement of federal policy with respect to the distribution of shares in decedents’ estates.\(^{203}\) The standard State Department response is so ambiguous that it does not reveal a federal policy. In one New York case the surrogate had before him two Treasury Department letters from the Assistant General Counsel and the Assistant Chief, Investments Branch, Division of Deposits and Investments which stated that the Treasury regulation has no direct bearing on the transfer of private funds abroad and does not restrict the sending of estate shares to foreign countries.\(^ {204}\)

Failure to articulate an alien succession policy cannot be construed as federal approval of either the western or eastern type of statute. Sub-

distribution. The court held that this denial did not conflict with the Trading with the Enemy Act partly on the grounds that the Alien Property Custodian in a letter to the executor indicated that there was no conflict in the application of the federal and the New York statute. The court said:

Since a state provision “will be stricken only if—in terms or in practical administration— it conflicts with the Federal law or infringes on its policy,” it necessarily follows that Section 269 may stand along with subdivision (b) of section 5 of the Trading with the Enemy act . . .

Id. at 155, 111 N.E.2d at 426.

Probate courts relying on the Treasury regulation have been motivated not only by presumed State Department policy but also by the belief that checks drawn on private funds are no more likely to reach nonresident aliens than those drawn on government funds. These courts have felt that the federal government is in a better position than the state courts to determine conditions abroad. See Arenson, International Procedural Problems in the Administration of Estates and Trusts, A.B.A. Section of International and Comparative Law, 1959 Proceedings 60, 64-65; Feldman and De Young, The American Dollars and the Iron Curtain Countries, 24 Det. Lawyer 15 (1956); Fulda, Legatees Behind the Iron Curtain, 16 Ohio St. L.J. 496, 498-500 (1955); Snyder & Stander, Distributive Rights of Foreign Beneficiaries as Affected by State Action, 63 Dick. L. Rev. 297, 302-03, 316-17 (1954).

\(^{203}\) See In re Miller's Estate, 35 Ill. App. 2d 349, 353, 182 N.E.2d 913, 915 (1962) where the court stated:

This regulation does not govern private funds in inheritance matters and does not provide a sufficient basis, by some sweeping analogy or characterization of political conditions, for prohibiting distribution of the assets under the valid assignment presented here. The court in this case in ordering distribution to the nonresident alien beneficiary relied in part on a letter from the Office of Alien Property, Department of Justice, stating that the distribution of these assets to Czechoslovakia was not subject to a blocking order.

\(^{204}\) In the Matter of Kuznic, 23 Misc. 2d 604, 206 N.Y.S.2d 297 (Surr. Ct. 1960) (surrogate refused to order an impounded estate share distributed to Soviet national because he doubted if the beneficiary would have the use of the share).
stantial variations exist from state to state in the statutory and judicial treatment of the succession rights of nonresident aliens.\textsuperscript{205} Such variations create chaos when uniformity is essential to the conduct of foreign relations.\textsuperscript{206} Moreover, the denial or reciprocal grant of succession rights to nonresident aliens impedes the federal policy of stimulating private investments abroad.

A direct relationship exists between nonresident alien succession rights in the United States and private investments by American citizens overseas. To encourage such investments, basic property rights must be accorded our nationals in foreign countries. The right of succession is one of these fundamental rights, and the most effective way of inducing the grant of this right by a foreign government is to make an affirmative grant of the same right to its nationals having property interests in the United States.\textsuperscript{207} The negative approach of the western reciprocal succession statute makes it a less effective catalyst for the creation of property rights abroad.

Although international law is not concerned with the granting of succession rights to aliens, it does afford protection for such rights once they are granted. Therefore, since the eastern statutes restrict distribution of estate shares granted aliens, they must be judged not only against a domestic constitutional standard but also against an international legal standard. Where the Federal Government is silent on the issue, it is presumed to have adopted the general principles of international law. This is further substantiated by the broad treaty policy of the United States which seeks to protect property rights granted aliens.

**Conclusion**

The course of our national economy and foreign policy since *Clark v. Allen* has created for this country many problems of capital emigration. In this new era, the national interest in foreign investment must take precedence over the states' diminishing problems of alien ownership. No longer is the problem primarily one of aliens gaining property rights in the United States, for now American citizens are seeking property rights as resident and nonresident aliens in foreign countries. The Supreme Court's underestimation of the effect of state succession statutes on American foreign relations in 1946, combined with the legal and economic

\textsuperscript{205} See notes 6-9 supra and accompanying text.

\textsuperscript{206} See notes 134-37 supra and accompanying text.

developments since that time, make it desirable for the Court to review its decision in *Clark v. Allen*. Such a re-examination would be consistent with the Court's traditional willingness to interpret the Constitution in the light of changing circumstances\(^{208}\) and could lead to a more definite and acceptable policy respecting nonresident aliens.

IMPLIED DUTIES OF COOPERATION AND THE
DEFENSE OF SOVEREIGN ACTS IN
GOVERNMENT CONTRACTS

RICHARD E. SPEIDEL*

Analyzing current risk distribution in fixed-price contracts with the United States, the author discusses the extent to which the defense of "sovereign acts" has prevented recovery by a contractor for damages incurred by the government's interference with his performance. While the courts have offered some protection to contractors by allowing recovery for breach of an "implied duty of cooperation" on the part of the United States in certain instances, Professor Speidel concludes that further safeguards, both judicial and administrative, are needed.

INTRODUCTION

The United States obtains most of its needed supplies, services and construction by contract from private enterprise. Inherent in the complex purchasing process necessary to effectuate and administer these contracts is a basic conflict between the private contractor's profit incentive and the public responsibilities of the United States and its contracting officials. As an illustration, suppose a private contractor's performance under a firm fixed-price contract is prevented or hindered by government officials in a manner neither foreseeable to the contractor nor due to his negligence nor within his control. Assume further that the acts or omissions are the result of a public interest which will be prejudiced unless prompt and effective action is taken by government officials. Who bears the risk of this conduct, the private contractor or the public treasury? May the contractor recover damages for "breach" of contract? Obviously, a difficult risk distribution problem is presented.

In an enlightened public purchasing process, both the public and private interests should be identified, evaluated and given protection commensurate with the actual needs of that process. On the Government's side, one such basic need is for a broad base of capable contractors who are willing and able to satisfy the Government's purchasing requirements; another is for efficient and economical operation. The inherent difficulty, however, is that if, in the name of the public interest in economy, a broad imposition of risk is made on private contractors, the public interest in a broad base of capable producers may be impaired. Without reasonable

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assurance of a fair profit the capable, responsible contractor may divert his productive energy to private commercial undertakings. A question of continuing importance, therefore, is whether a sensible risk adjustment has been accomplished by standard government contract clauses and the federal courts, particularly where the contractor’s damage claim is caused by acts or omissions of government officials.1

One fairly safe assumption is that the general scheme of risk distribution currently found in the standard government contract clauses has neither unduly discouraged competent contractors from competing for contracts nor prevented them from earning a fair profit. But can the same be said when the contract is silent and the conflict between private and public interest is given to the federal courts for decision? In dealing with claims against the United States, the courts have consistently asserted that when the United States “comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.”2 Thus, resorting to the established principle of private contracts that each party has an implied or “constructive” duty not unjustifiably to prevent or hinder performance by the other,3 the Supreme Court has held that if between individuals certain conduct “would be considered an improper interference, and damages would be awarded to the extent of the loss . . . the United States must answer to the same rule.”4

At the same time, however, the courts have long asserted that the “United States as a contractor cannot be held liable directly or indirectly

1 Demonstrating the significance of this inquiry is the increasing concentration of prime contracts in the hands of a relatively small number of contractors. During fiscal year 1962, for example, the leading 100 defense prime contractors received 72.3% in dollar value of all prime contracts awarded by the Department of Defense. A total of $18.5 billion was involved. Ten leading prime contractors received over 30% of the total dollar value. These figures show slightly less concentration than previous years. Also, about 50% of the work was subcontracted thus achieving broader distribution. See 4 Government Contractor ¶ 593 (1962).


for the public acts of the United States as a sovereign." The apparent result of this doctrine of "dual capacity" is that the United States as a contractor has an implied duty of cooperation, but the United States as a "sovereign" does not. Thus, only part of the United States "comes down from its position of sovereignty, and enters the domain of commerce" and that part will be liable only for "improper" acts of prevention or hindrance. Obviously, from the contractor's point of view, these distinctions and characterizations are of great importance, since they form the bases of judicial risk distribution when the contractor's performance is prevented or hindered by the United States. In this article, we will examine whether a sensible risk adjustment has been accomplished by these judicial decisions and the standard government contract clauses.

I

UNITED STATES AS A CONTRACTOR: IMPLIED DUTIES OF COOPERATION AUTHORITY OF THE CONTRACTING OFFICER

In most cases, federal executive agencies derive power to contract by implication from congressional enactments which vest in them the responsibility for implementing legislative programs. Further, as Mr. Justice Marshall once observed, the implied power of the United States to contract is "coextensive with the duties and powers of government." While this is still accurate today as a general concept, the critical question is the extent to which the "implied" power to contract has been defined, directed and limited by statute and regulation. One significant condition is that

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6 The power of the United States to contract is an incident of its general right of sovereignty, but must be exercised within the sphere of constitutional power through the department in which that power is confided. United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831); United States v. Salon, 182 F.2d 110 (7th Cir. 1950). See United States v. Maurice, 26 Fed. Cas. 1211 (No. 15,747) (C.C. D. Va. 1823); cf. United States v. Speed, 75 U.S. (8 Wall.) 77 (1869). Compare 10 U.S.C. § 5031 (1958) (creates position of Secretary of Navy with broad powers) with 10 U.S.C. § 4531 (1958) (gives Secretary of Army specific power to procure materials and facilities necessary to maintain and support Army).

7 United States v. Maurice, supra note 6 at 1217. Marshall also stated: "It follows . . . that the duty, and of course the right, to make contracts may flow from an act of congress, which does not in terms prescribe the duty; the proposition then is true, that there is power to contract in every case where it is necessary to the execution of a public duty." Ibid.

the contracting power must be exercised within a particular executive department or agency by a properly appointed contracting officer. As a rule, the contracting officer is delegated the primary responsibility for contract administration and is vested with broad discretionary power in making decisions. As stated in the Armed Services Procurement Regulation:

Each contracting officer is responsible for performing or having performed all administrative actions necessary for effective contracting. The contracting officer shall exercise reasonable care, skill and judgment and shall avail himself of all of the organization tools (such as the advice of specialists in the fields of contracting, finance, law, contract audit, mobilization planning, engineering, traffic management and cost analysis) necessary to accomplish the purpose as, in his discretion, will best serve the interest of the Government.

Within the scope of his actual authority, therefore, a contracting officer's decisions and conduct in the administration of a particular contract are, right or wrong, acts of the United States in its contractual capacity. Consequently, if an aggrieved contractor's claim is based upon

contracts. More specific restrictions are found in permanent appropriations legislation, 12 Stat. 220, 41 U.S.C. § 11, as amended, 15 Stat. 111, 41 U.S.C. § 12 (1958), and the annual Department of Defense Appropriations Acts. For executive regulation and control, see Federal Procurement Regulations, 41 C.F.R. §§ 1-1.000 through 1.1101 (1963). The doctrine of United States v. Tingley, 30 U.S. (5 Pet.) 115 (1831), has been described as a general principle only, which does not purport "to enumerate the limitations and exceptions, which may arise from the distribution of power in our government, and from the operation of other provisions in our constitution and laws." United States v. Bradley, 35 U.S. (10 Pet.) 343, 359 (1836).

9 The Armed Services Procurement Regulation (ASPR), 32 C.F.R. § 1.201.3 (1962), defines contracting officer as:
any person who, in accordance with Departmental procedures, is currently designated a contracting officer with the authority to enter into and administer contracts and make determinations and findings with respect thereto. . . . The term also includes the authorized representative of the contracting officer acting within the limits of his authority.

10 32 C.F.R. § 3.801.2(a) (1961). In military procurement, the contracting officer is appointed by the head of a procuring activity, e.g., Ordnance in the Department of the Army, and exercises his delegated authority subject to all applicable requirements of law, regulation and departmental procedures. 32 C.F.R. §§ 1.401-404 (1961). It is the contracting officer's duty to make, in good faith, the final decision on disputed questions of fact arising in the administration of a particular contract. See John A. Johnson Contracting Corp. v. United States, 132 Ct. Cl. 645, 132 F. Supp. 698 (1955); Climatic Rainwear Co. v. United States, 115 Ct. Cl. 520, 88 F. Supp. 415 (1950); cf. McShain v. United States, 106 Ct. Cl. 280, 65 F. Supp. 589 (1946).

11 A contracting officer does not necessarily exceed his actual authority, when in the exercise of discretion, he makes a mistake or an error in judgment to the detriment of the United
a contract, express or implied, he may seek relief in the federal courts under the Tucker Act\textsuperscript{12} or, if required by the contract, from an administrative board of contract appeals.\textsuperscript{13}

**IMPLIED DUTIES—CONTRACTUAL RISK DISTRIBUTION**

It is clear that in addition to the duty to fulfill express promises made in its contracts, the United States also has an “implied” duty to cooperate with the contractor in the completion of his promised performance. In recognition of this “implied” duty, it has been held that a contracting officer may not unjustifiably prevent or hinder the contractor’s performance,\textsuperscript{14} and may in some cases have an implied duty to render affirmative assistance.\textsuperscript{15} Further, absent a contrary contract clause or clear risk assumption, a “breach” of this duty by the United States both discharges the contractor and gives him a claim for compensatory damages.\textsuperscript{16} Thus


\textsuperscript{13} If the contracting officer decides a “dispute concerning a question of fact arising under the contract,” that decision is final and conclusive unless appealed by contractor to the appropriate administrative board of contract appeals. See the standard “Disputes” clause, 41 C.F.R. § 1-16.901-32(12) (1962). The board of contract appeals is created and its jurisdiction and powers defined by the secretary of the department or agency whose officials awarded the particular contract involved. See, e.g., Charter, Armed Services Board of Contract Appeals, 27 Fed. Reg. 3170 (1962), 3 Gov’t Cont. Rep. ¶ 33,738 (1962). Subject to the provisions of the “Disputes Act,” 68 Stat. 81, 41 U.S.C. § 321-22 (1958), the decisions of the boards of contract appeals may be appealed to and reviewed by the federal courts. See statutes cited note 12 supra.

\textsuperscript{14} See, e.g., William A. Smith Contracting Co. v. United States, 292 F.2d 847 (Ct. Cl. 1961).


\textsuperscript{16} United States v. Behan, 110 U.S. 338 (1884); Houston Constr. Co. v. United States, 38
it can be seen that this "implied" duty to cooperate effectuates the agreed exchange and provides protection for the contractor's profit margin.

Consider some common illustrations of the "implied" duty of cooperation. Assume that Federal Agency X awards a firm fixed-price contract to a contractor for the supply of a specified quantity and quality of end items; deliveries are due in installments over a six-month period. Assume further that no standard government contract clauses are included in this contract. If, after award, the contracting officer unjustifiably terminates the contractor's performance, the termination violates an implied duty of cooperation by preventing the contractor from performing the agreed exchange and acts as a breach of contract by the United States. The contractor is thereby entitled to seek compensatory damages, including loss of profit.

The same result follows if the contracting officer unjustifiably orders a change in the terms of performance or temporarily suspends work.

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18 Profits lost because of the breach were recovered in Klein v. United States, supra note 17, and Miller v. United States, supra note 17. Lost profits were denied in United States v. Penn Foundry Mfg. Co., supra note 17 (contractor unable to show affirmatively that it was ready and able to perform undertaking on time) and United States v. Behan, 110 U.S. 338 (1884) (contractor unable to prove what profit would be made if work completed). Cf. United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875) (contractor and contracting officer settled damage claim resulting from unauthorized termination); Locke v. United States, 283 F.2d 521 (Ct. Cl. 1960).

19 Kayfield Constr. Corp. v. United States, 278 F.2d 217 (2d Cir. 1960) (contracting officer required work in excess of contract requirements); American Trading Prosds. Corp. v. United States, 172 F. Supp. 165 (D. Md. 1959) (government dispatcher negligently directed charter party to wrong port); Beuttas v. United States, 111 Ct. Cl. 532, 77 F. Supp. 933 (1948) (contracting officer improperly ordered 48-hour week); A. J. Paretta Contracting Co. v. United States, 109 Ct. Cl. 324 (1947) (contracting officer forced contractor to increase minimum wage rate by wrongful threat of termination for default). In each case, the contracting officer had no contractual authority to order the change; however, the contractor elected to perform the change and recovered the resulting extra costs.

20 United States v. Mueller, 113 U.S. 153 (1885); United States v. Smith, 94 U.S. 214
without offering to grant a time extension or to adjust the contract price. In addition to having a claim for damages, if the contractor elected to complete performance he would be excused from the consequences of any delay caused by the change or suspension.\(^{(2)}\) This is, of course, "hornbook" law.

But what of the possible defenses of the United States in our illustration? Can these deliberate acts done with full knowledge of their immediate impact on the contractor’s performance be justified on any ground? In private contracts, temporary or permanent objective impossibility may justify a promisor’s failure to perform an express promise on time.\(^{(22)}\) The same theory has been used to excuse alleged "breaches" of contract by the United States.\(^{(23)}\) In our illustration, however, Agency X has not expressly promised that it will not terminate, order changes or temporarily suspend work. Clearly, then, the defense of "impossibility" does not apply. But suppose the Government’s acts are motivated or required by public necessity, \(i.e\). it is no longer economically or administratively convenient to continue the contractual relationship in its initial form. The few decisions on point seem to reject public convenience or necessity as a defense, particularly where an act of the contracting officer directly alters the terms of the contract.\(^{(24)}\) Here, then, the conflict between private and public


\(^{(21)}\) See authorities cited note 16 supra.

\(^{(22)}\) See Annot., 84 A.L.R. 2d 12 (1962).


\(^{(24)}\) In the following cases acts of prevention or hindrance which directly obstructed the contractor’s performance were breaches of contract despite some apparent public justification. (1) Termination or repudiation of contract: Perry v. United States, 294 U.S. 330 (1935); Lynch v. United States, 292 U.S. 571 (1934) (congressional action to remedy economic conditions caused by depression); United States v. Behan, 110 U.S. 338 (1884) (proposed construction project unfeasible); United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875) (United States no longer needed supplies); United States v. American Trading Co., 138 F. Supp. 536 (N.D. Cal. 1956) (outbreak of war induced contracting agency to terminate charter contract). (2) Change orders: Beuttas v. United States, 111 Ct. Cl. 532, 77 F. Supp. 933 (1948) (government breached contract by ordering 48-hour week where contractor priced on basis of 40-hour week and contract not subject to subsequent war time Executive Order requiring a 48-hour week). (3) Stop work orders: In Houston Constr. Co. v. United States, 38 Ct. Cl. 724, 736 (1903), the Court had this to say about a government stop-work order allegedly required by the war with Spain:

Nor should the United States be held exempt from liability in this case by reason of
interest has been resolved wisely in favor of the contractor. Further, the disadvantages of attempting to protect the public treasury by express contract clauses drafted and imposed upon contractors by the United States are readily apparent. With such a serious threat to his profit margin, the fixed-price contractor would either refuse to deal with the United States or his price would be exorbitantly padded for contingencies. Hence it is obvious that without a sensible risk adjustment, the interests of neither the contractor nor the United States would be served.

In attempting to accommodate the competing private and public interests, such an adjustment has been made by standard form contract clauses. In general, these clauses protect both the freedom of the contracting officer to act in the public interest and the contractor's profit expectation. Compromises, however, are made. In defense contracts, while the contracting officer may terminate the contract in the best interest of the Government, the United States agrees to pay the contractor's actual costs incurred and profit on work done. The contractor, however, may not claim anticipated profits prevented by the termination. Under the standard "Changes"

the existence of war ... at the time work was suspended, though that was assigned as the cause, for the reason that while from patriotic motives every citizen, for the mutual good of all others, should be held to such reasonable sacrifice of personal interests as may be necessary for the public welfare, the rule should not be held to impose unjust or unequal burdens, nor do the facts and circumstances of the case require it. . . .

 Cf. Schuler & McDonald, Inc. v. United States, 85 Ct. Cl. 631 (1937) (suspension of work improper even though contracting agency had overdrawn appropriation account).

25 In Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), Mr. Justice Black observed, "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." 310 U.S. at 127. See, e.g., In re American Boiler Works, 220 F.2d 319, 321 (3d Cir. 1955); Wood v. United States, 258 U.S. 120 (1922) (exculpation from liability for delay caused by work suspension); Wells Bros. Co. v. United States, 254 U.S. 83 (1920) (contract limits liability of United States for delay caused by change order). See also authorities cited note 29 infra. But see Ozark Dam Constructors v. United States, 130 Ct. Cl. 354, 127 F. Supp. 187 (1955), petition dismissed, 288 F.2d 913 (Ct. Cl. 1961).

26 An extreme example is found in Ozark Dam Constructors v. United States, supra note 25, wherein the government promised to furnish cement to contractor for a construction project but expressly exculpated itself from liability for any delay in delivery. The government, for reasons that the court characterized as amounting to almost willful negligence, failed to obtain the cement on time and the contractor suffered damages. The Court of Claims refused to apply the exculpation clause and rejected the government's argument that the contractor should have provided for the delay contingency in its fixed-price: "If the plaintiffs really included in their bid an amount to cover the contingency of such inconsiderate conduct on the part of the government's representatives, the government was buying and the public was paying for things that were worth less than nothing." Id. at 360.

clause, the contracting officer may order limited changes in the work to be done but must, in appropriate cases, extend the time set for performance, adjust the contract price, or both.28 The contractor, however, may not recover costs incurred in performing unchanged work even though caused by the change order.29 Under optional clauses for both supply and construction contracts, the contracting officer may temporarily suspend work for the convenience of the Government but must extend the time set by the contract for performance.30 In these instances the contractor is entitled to a price adjustment only if the delay is unreasonable.31

While these examples do not exhaust the list of important risk adjustment clauses, they do illustrate that the standard form government contract clauses have expressly sanctioned much of the unilateral conduct that would otherwise breach the United States' implied duty of cooperation. The clauses distribute the financial risks involved, provide a method to liquidate claims for damage, and convert the entire controversy into a factual dispute which must be settled administratively. As a procedural matter, the contractor must continue to work and may take advantage of administrative remedies provided by the contract.32 In a normal situation, for standard "Changes" clauses, see 41 C.F.R. §§ 1-16.901-23A(3),(4) (1962) (construction contract) and 41 C.F.R. § 1-16.901-32(2) (1962) (supply contract).


29 See 32 C.F.R. § 7.604.3 (1962) (construction); 32 C.F.R. § 7.105.8 (1962) (negotiated fixed-price supply). As an implied incident to the contract right to make changes, the contracting officer may suspend work for a reasonable time without liability to consider the scope of the proposed change or whether to issue a change order at all. Mount Vernon Contracting Corp. v. United States, 139 Ct. Cl. 688, 153 F. Supp. 469 (1957); J. A. Ross & Co. v. United States, 126 Ct. Cl. 323, 115 F. Supp. 187 (1953).


31 41 C.F.R. § 1-16.901-32(12)(a) (1962) (pending final decision of a dispute contractor shall proceed diligently with the performance of the contract and in accordance with the contracting officer's decision). See generally Spector, Anatomy of a Dispute, 20 Fed. B.J. 398 (1960); Birnbaum, Questions of Law and Fact and the Jurisdiction of the Armed Services Board of Contract Appeals, 19 Fed. B.J. 120 (1959); Shedd, Administrative Authority to
Government Contracts

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the federal courts have no original jurisdiction over these disputes unless the contractor has no adequate administrative remedy or the contracting officer has made a decision outside the scope of the disputes' procedure.

IIPLIED DUTIES—JUDICIAL RISK DISTRIBUTION

Cooperation Expressly Promised

In order to satisfy the need for a broad base of reliable, competitive producers in areas of complex, specialized business risks, the United States is compelled to furnish financial and property assistance in specified cases where the unique risks tend to reduce the number of concerns willing and able to compete for government contracts. This is voluntary cooperation on the part of the Government, and absent contractual provisions indicating otherwise, the Court of Claims has presumed the contractor's business acumen in making the contract, and has imposed the burden of the risk upon the contractor. Further, the courts will not imply a duty to furnish assistance where the contractor's need has not been caused by the United States. However, when a government agency expressly promises


If the contracting officer makes a decision in proper form within the scope of the disputes procedure, i.e., a dispute concerning a question of fact arising under the contract, that decision is final and conclusive unless the contractor makes a timely appeal to the appropriate secretary or his duly authorized representative. 41 C.F.R. § 1-16.901-32(12)(a) (1962). Unless the contractor has "exhausted" this administrative remedy the federal courts may not review the contracting officer's decision on the merits. See, e.g., United States v. Holpuch Co., 328 U.S. 234 (1946); United States v. Callahan Walker Constr. Co., 317 U.S. 56 (1942); Happel v. United States, 279 F.2d 88 (8th Cir. 1960). But see Reinking v. United States, 283 F.2d 527 (Cl. Ct. 1960); Oliver-Finnie Co. v. United States, 279 F.2d 498 (Cl. Ct. 1960); United States v. Heaton, 195 F. Supp. 742 (D. Neb. 1961); United States v. Blake, 161 F. Supp. 76 (E.D.N.C. 1958) (administrative remedy inadequate or unavailable).

If the contracting officer exceeds the power reserved to him by the contract, the decision is no longer subject to the disputes procedure, and the conduct may breach the implied duty of cooperation. See, e.g., Saddler v. United States, 287 F.2d 411 (Cl. Ct. 1961) (contracting officer exceeded scope of Changes clause); F. H. McGraw & Co. v. United States, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955) (unreasonable delay after suspension of work); Klein v. United States, 285 F.2d 778 (Cl. Ct. 1961) (contracting officer exceeded scope of Termination-for-Default clause); cf. Librach v. United States, 147 Ct. Cl. 605 (1959) (contractor argued unsuccessfully that termination for convenience not in good faith). See also North American Phillips Co. v. United States, 292 F.2d 861 (Cl. Ct. 1961) (contracting officer exceeded scope of contract settlement provisions).


In Rolin v. United States, 142 Ct. Cl. 73, 160 F. Supp. 264 (1958), the court stated:
to assist the contractor in performance, the circumstances may give rise to a concurrent implied duty of cooperation. As an example, if the express promise is to furnish financial or property assistance, the implied duty is to furnish it in time to be used "in the ordinary and economical course of the performance of the contract."  

Suppose, in our illustration above, that Agency X had promised to furnish specified components to assist the contractor in performance and that it had failed to deliver the promised components in time for the contractor to complete performance within the six-month period. Clearly, the contractor's delay is in no way attributable to himself, and any increased costs were caused by the United States in its contractual capacity. Is the United States liable for breach of contract? The answer is yes if the failure of Agency X officials to furnish the components on time is characterized as "negligent," for it has been held that the United States has an implied duty not to interfere negligently with the contractor's performance in this manner. But what is "negligence" or "fault" in this con-

Therefore, the Government's financial obligation to anyone who has furnished materials or services to the Government under a contract is to be found "within the four walls of the contract" (Steel Products Engineering Co. v. United States, 1933, 78 Ct. Cl. 410, 419), unless the Government has caused its contractor to incur unforeseen expenses in performing the contract.


37 Walsh v. United States, 121 Ct. Cl. 546, 554-55, 102 F. Supp. 589, 591 (1952). See Kehm Corp. v. United States, 119 Ct. Cl. 454, 469, 93 F. Supp. 620, 623 (1950), where it was stated:

Logic would seem to require that a contract binding one party to fabricate goods for another by a certain time out of material to be furnished by the other must perforce be held also to bind the other party to supply the material sufficiently early for the work to be done as promised and not be dilatory in accepting the completed goods. The law considers a promise such as plaintiff's to be subject to a "constructive condition of cooperation."

38 See Challender v. United States, 127 Ct. Cl. 557, 563, 119 F. Supp. 186, 190 (1954) where, in holding the United States liable for failing promptly to deliver promised materials, the court stated:

There is present in a contract such as this one, an implied obligation on the defendant that it will not do that which will hinder the contractor in the performance of the contract. When the contractor is delayed by a negligent act chargeable to the Government, it is a breach of this clearly implied obligation, and the Government is liable for damages sustained by the contractor because of the delay.

text? Stated affirmatively, the officials of Agency X must exert every reasonable effort to make the promised deliveries on time.  

As formulated, the test requires a case-by-case examination of facts to determine whether the high standards of administrative responsibility have been met. Hence, in some cases the United States' delay is justified upon proof that every reasonable effort was made even though it was not "objectively" impossible to render timely performance, while in other

39 Where the United States expressly promised to furnish materials to the contractor but did not promise to deliver them at any specific time, the Court of Claims has held: "The promisor's undertaking normally gives rise to an implied complementary obligation on the part of the promisee: he must not only not hinder his promisor's performance, he must do whatever is necessary to enable him to perform." Kehm Corp. v. United States, 119 Ct. Cl. 454, 469, 93 F. Supp. 620, 623 (1950). (Emphasis added.) Thus, if the United States has, with due diligence, made every reasonable effort to furnish the promised assistance on time, it has satisfied the implied duty of cooperation. See M. F. Comer Bridge & Foundation Co. v. United States, 147 Ct. Cl. 504, 178 F. Supp. 808 (1959); Barling v. United States, 126 Ct. Cl. 34, 111 F. Supp. 878 (1953); Daum v. United States, 120 Ct. Cl. 192 (1951); Otis Williams & Co. v. United States, 120 Ct. Cl. 249 (1951); cf. Garod Radio Corp. v. United States, 307 F.2d 945 (Ct. Cl. 1962). See also United States v. Foley, 329 U.S. 64 (1946) (delay by United States in furnishing work site justified by unusual diligence of contracting officials to overcome an unexpected subsoil condition).


41 In private contracts, a promisor's failure to perform on time may be temporarily excused by the doctrine of "objective" impossibility. See Peerless Cas. Co. v. Weymouth Gardens, Inc., 215 F.2d 362 (1st Cir. 1954); Restatement, Contracts §§ 455, 457, 462 (1932); Patterson, Temporary Impossibility of Performance of Contract, 7 Va. L. Rev. 798 (1961). This concept should be distinguished from cases where the promisor's performance is made more difficult or expensive than anticipated but not impossible to perform. Restatement, Contracts § 467 (1932). But see Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 Pac. 458 (1916) (doctrine of practical impossibility). In Otis Williams & Co. v. United States, 120 Ct. Cl. 249 (1951), the contractor was delayed over 300 days when the United States failed to make prompt delivery of promised steel. In justification, the United States proved that it had issued five unsuccessful invitations for steel over an eight-month period, had
instances the "reasonable effort" test is coupled with a finding that the contractor should have known about a probable delay and therefore assumed the risk.42 As a rule, however, a failure by contracting officers to exercise every reasonable effort to secure prompt delivery of promised components is equated to a negligent interference with the contractor's performance and is a breach of contract. The Court of Claims has stated that any other result is justifiable "only upon the assumption that the government may, with impunity, do whatever is good for its own interest regardless of harm" to the contractor.43

The result of these decisions is that the contractor, although faultless, bears the risk of delay when the United States is not "negligent" in making an untimely delivery of promised assistance. Further, it appears easier for the United States to justify the delay than it would be for a private contractor under similar circumstances.44 In view of the damage to the contractor's profit margin, is the "reasonable efforts" test a sensible

maintained a special system of source inquiry; had kept in constant contact with 39 suppliers and had given contractor freedom to find an adequate source. The evidence revealed that contractor had found an adequate source but the United States refused to purchase it since the prices were in excess of the O.P.A. ceiling. The court excused the delay:

Defendant exerted every effort to secure the necessary steel. It was more than ordinarily diligent in undertaking to do so. Its inability . . . was not attributable to any fault on its part. . . . It was not plaintiff's fault that the work was delayed, but we do not think it was defendant's fault either, since it did everything it could under the circumstances.

Id. at 273-74. See also Peter Kiewit Sons' Co. v. United States, supra note 40 (United States not negligent in failing to vary usual purchasing practice which would insure prompt delivery under normal circumstances).

42 United States v. Foley, 329 U.S. 64 (1946); Daum v. United States, 120 Ct. Cl. 192 (1951); Ross Eng'r Co. v. United States, 103 Ct. Cl. 185, cert. denied, 326 U.S. 735 (1945).

44 In George A. Fuller Co. v. United States, 108 Ct. Cl. 70, 101, 69 F. Supp. 409, 415 (1947), the court stated the traditional rule applied to private contracts: "But not only is the Government liable for willful delay, it is liable for any delay except one caused by the exercise of a reserved right or one brought about by an act of God, of the law, or the other party." But see cases cited notes 39, 41, supra.
risk adjustment under the circumstances? An affirmative response seems legitimate since the United States voluntarily agreed to furnish the assistance but did not expressly promise to provide it by a specific time; the "implied" duty should not be tested by standards of objective impossibility. Moreover, if the United States' contracting officials have exerted "every reasonable effort," it is doubtful that any private contractor could have delivered the components on time.

A better result, however, has been achieved by the Department of Defense "Government-Furnished Property Clause" for fixed-price contracts. This clause provides, in part, that if the promised assistance is not given "in sufficient time to enable the contractor to meet . . . delivery or performance dates," the contracting officer shall, upon request by the contractor,

make a determination of the delay occasioned the Contractor thereby, and shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by such delay, in accordance with the procedures provided for in the clause of this contract entitled "Changes." 46

Under this clause, the contractor is apparently protected from delays regardless of "reasonable efforts" or objective impossibility; thus, from the contractor's standpoint it is an admirable example of governmental concern for the problems of realistic pricing and fair profit in the fixed-price contract. Further, as a contracting technique, the clause obviates the tedious case-by-case evaluation of administrative conduct.

Cooperation Duties Imposed by the Courts

The cases considered thus far decide that the United States as a contractor breaches its implied duty of cooperation when contracting officials unjustifiably terminate performance, issue change or suspension of work orders, or fail without "every reasonable effort" promptly to furnish assistance which has been expressly promised. Because of their importance and recurring nature, most of these "breaches" are now regulated by standard government contract clauses. There are additional problems, however, involving the general standards of responsibility to be imposed upon contracting officials which test the outer limits of the implied duty of cooperation. 47

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46 Ibid.
47 In construction contracts the United States has an implied duty to furnish the contractor with a work site. Fritz-Rumer-Cooke Co. v. United States, 279 F.2d 200 (6th Cir.
During the performance of a government contract the contracting officer may make countless administrative decisions which directly or indirectly affect that performance. While some of these decisions give rise to con-

1960); Schmoll v. United States, 91 Ct. Cl. 1 (1940); cf. Fred R. Comb Co. v. United States, 103 Ct. Cl. 174 (1945). But see Hales v. United States, 113 F. Supp. 505 (W.D. Okla. 1953). Further, where the United States has expressly promised to furnish the site by a particular time, any delay will be a breach of contract, Albert Elec. Corp. v. United States, 142 Ct. Cl. 609, 162 F. Supp. 772 (1958), and the defense of reasonable diligence will not excuse the delay. See Schulman Elec. Co. v. United States, 145 Ct. Cl. 399 (1950); Gerhardt F. Meyne Co. v. United States, 110 Ct. Cl. 527, 76 F. Supp. 811 (1948); James Stewart Corp. v. United States, 108 Ct. Cl. 596, 71 F. Supp. 235 (1947). Without an express promise, however, a delay by the United States may be justified by proof of due diligence in trying to make the site available in time to complete performance on schedule. United States v. Foley, 329 U.S. 64 (1946). If the work site is not furnished in time for the contractor to finish his undertaking on time, the contractor, to recover damages for breach of contract, must show either that the government was at fault or that an express promise was made to furnish the work site by a specific time. Ben C. Gerwick, Inc. v. United States, 285 F.2d 432 (Ct. Cl. 1961).

The United States also has an implied duty, in construction contracts, to furnish the contractor with specifications which are adequate to meet the government's actual needs. See, e.g., United States v. Spearin, 248 U.S. 132 (1918); Bostwick-Batterson Co. v. United States, 283 F.2d 956 (Ct. Cl. 1960); Anthony P. Miller, Inc. v. United States, 111 Ct. Cl. 252, 77 F. Supp. 209 (1948). Three common breaches of this duty occur: (1) where the contractor is required by the contracting officer to perform more work than a reasonable interpretation of the specifications requires, Kayfield Constr. Corp. v. United States, 278 F.2d 217 (2d Cir. 1960); (2) where the specifications misrepresent subsoil or other conditions, United States v. Atlantic Dredging Co., 253 U.S. 1 (1919); Christie v. United States, 237 U.S. 234 (1915); Hollerbach v. United States, 233 U.S. 165 (1914); Potashnick v. United States, 123 Ct. Cl. 197, 105 F. Supp. 837 (1952); Warren Bros. Roads Co. v. United States, 123 Ct. Cl. 48, 105 F. Supp. 826 (1952); and (3) where contracting officials fail to disclose known conditions affecting the cost of performance which the contractor had no independent duty to discover by inspection. Ragonese v. United States, 128 Ct. Cl. 156, 120 F. Supp. 768 (1954); cf. United States v. Atlantic Dredging Co., supra; Potashnick v. United States, supra.

Of course, where adequate specifications are furnished and all known subsoil conditions affecting the cost of performance are disclosed, the implied duty of cooperation has been met. See Carnegie Steel Co. v. United States, 240 U.S. 156 (1916); United States v. Normile, 239 U.S. 344 (1915); Rolin v. United States, 142 Ct. Cl. 73, 160 F. Supp. 264 (1958). Further, if a contractor knows of the conditions or the contract expressly places the risk upon him no recovery is permitted. MacArthur Bros. Co. v. United States, 258 U.S. 6 (1922); Maryland Dredging & Contracting Co. v. United States, 241 U.S. 184 (1916). On the other hand, the risk of damages resultant from unforeseen subsoil conditions, normally placed upon the contractor, has been modified by the standard "Changed Conditions" clause, 41 C.F.R. § 1-16.901-23A(4) (1962). Under the clause the contractor may claim either a time extension or an equitable adjustment in price for subsurface or latent physical conditions at the work site "differing materially from those indicated" in the contract or "unknown" conditions "of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for" in the contract. See
troversies which are processed under the disputes procedure, others which may equally interfere with the contractor’s performance may not involve questions of fact arising under the contract. In formulating a standard by which to determine when administrative conduct has breached the implied duty of cooperation, the Court of Claims has stated that “a high degree of good faith should be required on the part of the government and its agents” and that there is an implied duty to give “fair consideration” to the interests of the contractor in contract administration. Breaches of these implied duties occur where there are unreasonable delays in administering a particular contract clause, or in a variety of situations where prompt inspection or approval was delayed without justification. Other breaches have been found where the contracting officer altered the sequence of performance specified in the contract, unreasonably ob-


48 See cases cited notes 13, 32, 34 supra.
50 In Ripley v. United States, 223 U.S. 695 (1911), the government engineer, in the exercise of discretion conferred upon him by the contract, refused contractor permission to take needed action on a construction project. In finding that the engineer’s decision was grossly mistaken, the Court stated: “But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent’s judgment should be exercised—not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties.” Id. at 701-02. Accord, William A. Smith Contracting Co. v. United States, 292 F.2d 847 (Ct. Cl. 1961); Volentine & Littleton v. United States, 144 Ct. Cl. 723, 169 F. Supp. 263 (1959); James Stewart Corp. v. United States, 108 Ct. Cl. 596, 71 F. Supp. 235 (1947).

structed the contractor's progress,\textsuperscript{54} and wrongfully induced the contractor to perform extra work by a threat to terminate for default.\textsuperscript{55}

Common to these cases and others is a court's conclusion that the contracting officer's acts or omissions were unreasonable or negligent under the circumstances or that the contractor's damage was directly caused by administrative conduct difficult to justify on any reasonable basis. A more difficult problem, however, is presented where the administrative conduct does have a reasonable basis, yet the contractor's performance is still obstructed. As previously noted, the exercise of every reasonable effort to furnish promised assistance will justify a delay which causes damage to a contractor;\textsuperscript{56} further, if no assistance is expressly promised there is no implied duty to cooperate no matter how compelling is the contractor's need.\textsuperscript{57} But what of the situation where affirmative action by the contracting officer interferes with the contractor's performance, yet has some public justification? Will the United States be liable for breach of contract?

In \textit{United States v. Beuttas},\textsuperscript{58} the contractor agreed to perform construction work for Agency X at a fixed price and to pay certain employees a specified minimum wage. Through no fault of Agency X, the contractor delayed in starting work. Subsequently, before the contractor completed its portion of the work, Agency X awarded another contract on the same work site, specifying minimum wages higher than the contractor was required to pay. As a result, a dispute arose between the contractor and union workers which was settled when the contractor agreed to match the minimum wages paid in the second contract. The contractor completed the work and sued the United States for breach of contract. In reversing the Court of Claims' judgment for the contractor, the Supreme Court held that the United States had not breached an implied duty not to render performance more costly to the contractor.\textsuperscript{59} In examining the facts, the

\textsuperscript{54} United States v. Barlow, 184 U.S. 123 (1902) (unwarranted superintendence); Clark v. United States, 73 U.S. (6 Wall.) 543 (1867) (engineer wrongfully obstructed contractor's performance); William A. Smith Contracting Co. v. United States, 292 F.2d 847 (Ct. Cl. 1961) (contracting officials stripped balast pit of usable materials upon which contractor relied and refused contractor access to a substitute supply).


\textsuperscript{56} See cases cited note 39 supra.

\textsuperscript{57} See cases cited note 36 supra.

\textsuperscript{58} 324 U.S. 768 (1945).

\textsuperscript{59} The Court of Claims had found a breach of the implied duty of cooperation, con-
Court noted that Agency $X$ had planned for the contractor to complete his portion of the work before the second contract was awarded. Further, Agency $X$ had neither caused the contractor’s delay in starting nor had reason to suspect that the award of a second contract at a higher minimum wage would cause a labor dispute which the contractor could settle only by paying higher wages. Hence, the Court concluded that Agency $X$, although awarding the second contract through the same officials administering the contractor’s contract, did not “cause” the wage increase: “It follows that there is no basis for holding that the Government knowingly hindered respondents in the performance of the contract or culpably increased their costs.”

Several features of the *Beuttas* case should be noted. First, the contractor was somewhat at fault in failing to start work promptly. Second, Agency $X$, in good faith, awarded a separate contract to complete the public project and there was no evidence that its action was unreasonable under the circumstances. Finally, while the affirmative act of Agency $X$ was a cause of the contractor’s increased cost, it was an indirect cause at best, since it was not an incident of the direct administration of the contractor’s undertaking and had but indirect effect upon the supply and cost of labor on the project. Under these facts, therefore, the contractor bore the risk of changes in the contemplated cost and availability of labor even though that change was traceable to conduct of the contracting agency. Presumably the same result would follow if the contractor’s performance was made more difficult by the agency’s using a source of supply upon which the contractor relied but which was not the sole source of supply contemplated by the contract; a similar situation would occur where, by increased solicitation from competing suppliers the Agency affects the

cluding that the contractor’s damage was the necessary consequence of the government’s action. *Beuttas* v. United States, 101 Ct. Cl. 748, 60 F. Supp. 771 (1944), rev’d, 324 U.S. 768 (1945).

60 324 U.S. at 773; cf. United States v. Blair, 321 U.S. 730 (1944) (contracting officials have no duty to prevent contractor #1 from interfering with contractor #2 when contractor #2 not actually delayed in performance).

61 Minimum wage determinations by the Secretary of Labor do not constitute an actionable representation that they are the prevailing wages in a particular area or that the contractor can, if he pays just the minimum, obtain an adequate labor force. United States v. Binghamton Constr. Co., 347 U.S. 171 (1954).

market price of an item the contractor agreed to supply at a fixed price.\(^6^3\) While there is little authority on the point, in light of the foregoing, a generalization is possible: The United States does not breach an implied duty of cooperation owed to a particular contractor simply because the contracting agency, while performing other legitimate activities, indirectly affects the cost or supply of labor and materials needed by that contractor. As stated, the proposition emphasizes that while the contractor may be affected by the agency act, the public interest prevails in the adjustment of risk distribution.

To be emphasized equally, however, are certain of the contractor's legitimate interests to which the officials of Agency X must give fair consideration when performing other public responsibilities. Thus, if the contracting officer has actual knowledge of facts or future governmental activity which, if revealed, would cause a fixed-price contractor to revise cost estimates, a failure to disclose this information prior to contract award may breach the implied duty of cooperation.\(^6^4\) Rightly, this affirmative duty to disclose protects a contractor who does not or should not reasonably know of facts material to pricing.\(^6^5\) In addition, if the con-

\(^6^3\) Commodity Credit Corp. v. Rosenberg Bros. & Co., 243 F.2d 504 (9th Cir.), cert. denied, 355 U.S. 837 (1957) (contractor agreed to supply grain at fixed price on assumption that market price would drop and an adequate supply would be available).


In Helene Curtis Indus., Inc. v. United States, No. 251-56, Ct. Cl., Feb. 6, 1963, digested in 5 Gov't Contractor ¶ 70 (1963), the implied duty of cooperation was breached when the government failed to disclose vital information regarding the mass production of a needed chemical to prospective bidders. The information, if disclosed, would materially affect the cost of performance. Further, the government knew that the contractor could not reasonably discover the facts and, according to the court, could not let him flounder on his own. The decision is weakened, however, by an alternative holding that the specifications misled the contractor. See supra note 45.

\(^6^5\) Contractor was awarded damages for breach of contract in Snyder-Lynch Motors, Inc. v. United States, supra note 64, and Ragonese v. United States, supra note 64.
tract contains an express provision affording the contractor protection from the increased cost of labor or supplies, e.g., a price escalation clause, the contracting officer has an implied duty to use that clause in appropriate cases, particularly where the United States “caused” a price increase by conduct which would not otherwise breach the contract. If the use of the clause is within the contracting officer’s discretion, a rigid standard of good faith is imposed upon the exercise of that discretion. Of relevance is Volentine & Littleton v. United States, where the contractor entered a fixed-price agreement to clear a large tract of land behind a dam which another contractor was building for the United States. Agency X, the contracting agency, was administering both contracts. To facilitate construction of the dam but without adequate warning to the contractor, Agency X raised the water level behind the dam, delaying the contractor by obstructing the clearing operation. In granting the contractor damages for breach of contract, the Court of Claims characterized the government’s conduct as “completely inconsiderate of the interests of the plaintiff.” In commenting on the government’s actions, the court observed, Its [the government’s] explanation lies, no doubt, in the fact that the dam contract involved infinitely larger sums and interests than did the plaintiff’s contract. But if the flooding of plaintiff’s work was necessary in order to avoid delaying the dam contractor’s more expensive work, with possible liability of the Government for the delay, the plaintiff ought not to have to suffer the cost of this advantage to the Government.

II

UNITED STATES AS A SOVEREIGN: DEFENSE OF SOVEREIGN ACTS

If the United States prevents or hinders a contractor’s performance by acts done in its “sovereign” capacity a resulting claim for breach of con-
tract damages will be denied by the federal courts. In the well-worn words of the Court of Claims:

The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. . . . In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.\textsuperscript{72}

But just what is a "sovereign" act? What justifications support this apparent exception to the United States' implied duty of cooperation? Is there any relationship between the defense of "sovereign" acts and the implied duty of cooperation? While none of these questions admit of easy answers, two hypothetical examples present the problem in its simplest form.

First, suppose that Agency X agrees to sell surplus property to the contractor and promises delivery within ten days. The contractor informs Agency X officials that prompt delivery is essential to a profitable resale contract with a third party. Five days later Agency Y unexpectedly imposes an embargo upon the shipment of certain classes of goods, including the property sold to the contractor, thus preventing Agency X from shipping the goods. When the embargo is lifted ten days later, the contractor has lost his profitable resale. Second, suppose the contractor agrees to perform a fixed-price supply contract for Agency X in facilities that the contractor has leased from a third party. After performance starts, Agency Y unexpectedly begins proceedings to condemn a large tract of land, including the premises where the contract is being performed. In order to complete the contract with Agency X, the contractor moves to another location and incurs additional costs of $130,000.

The primary question in both examples is the same: Is the United States, contracting through Agency X, liable in damages for the acts of prevention and hinderance by Agency Y? In both cases the answer is no,\textsuperscript{73} although a contractor's default, if any, will be excused under

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\item \textsuperscript{72} Jones v. United States, 1 Ct. Cl. 383, 384-85 (1865). That this quotation still has vitality is demonstrated by Bateson-Stolte, Inc. v. United States, 305 F.2d 386, 390 (Ct. Cl. 1962).
\item \textsuperscript{73} Illustration \#1 is based upon Horowitz v. United States, 267 U.S. 458 (1925) (embargo
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standard contract clauses. If done in the proper performance of public duties, the acts of Agency Y are classified as "sovereign" by the courts; they are of general application and have merely indirect effects upon the contractor's performance. Further, in our examples Agency X itself performed no act of prevention or hindrance, and, absent an express contractual provision, had no implied affirmative duty, either to give the contractor financial assistance or to stop Agency Y from acting. Thus, in the absence of contract provisions to the contrary, the risk of "sovereign" acts falls on the private contractor, regardless of whether he be deprived of an expected profit or compelled to perform an otherwise profitable contract at a loss.

The "sovereign" acts theory most clearly reflects the inherent conflict between public and private interests in government contracts. Underlying this theory is a recognition of the vital need for the United States to be free to perform all necessary acts of government, through whichever agency or department is empowered to act. As Professor Mitchell has put it, governmental effectiveness must not be restricted by contracts with private business concerns. However, when one considers that the cor-

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76 Mitchell, The Contracts of Public Authorities: A Comparative Study (1954). In essence, Professor Mitchell argues that since a government will "exercise a power of self-preservation and . . . will denounce obligations incurred which . . . jeopardize its existence" and further, since a government and its agencies "exist to govern and to do so within the
relative of this freedom to act is an absolute immunity from suit for possible damages resulting from these protected acts,\textsuperscript{77} the risks confronting a private contractor become obvious.

Three basic justifications for this absolute immunity suggest themselves: (1) The United States has consented to be sued upon claims arising from contracts, express or implied in fact. In instances where the contractor deals with Agency X alone, the promises of Agency X made through properly appointed contracting officers create expectations in the contractor and induce him to rely. Hence, the duty of cooperation is implied from the contractor's particularized relationship with Agency X. Agency Y, on the other hand, owes no contractual duty to the contractor. Thus, it is theoretically impossible to impose contractual liability upon

limits imposed by either the constitutional document or the theory of the community for which they exist," there is, in fact, a theory of governmental effectiveness embodied in the law. "In the sphere of contract this would mean that no contract would be enforced in any case where some essential governmental activity would be thereby rendered impossible or seriously impeded." All other public contracts are enforceable according to their terms. Id. at 6-7.

This theory seems to reconcile the apparently conflicting and often confusing notions of "contractual" and "sovereign" capacities with the realities of governmental operation. As a matter of practical necessity, the "sovereign" fetters its discretion by contract; it must obtain needed supplies and services from private enterprise, subject to other public interests. But while the theory of "governmental effectiveness" permits termination or interference with contracts in certain cases, it does not necessarily deny compensation to the contractor. While this theory "might well mean some restriction of administrative freedom . . . . [it] should only operate where the obstruction offered by a contract to the performance of public duties is substantial, and not where the existence of the contract is only an inconvenience to the administration." Id. at 241. However, as Professor Pasley has observed, the theory "does not answer such important questions as: What is an essential governmental activity? How may it be recognized? Is a contract which turns out to be impeding such an activity void ab initio? Or is it merely terminable? If the latter, is compensation payable? If so, on what basis?" Pasley, Book Review, 41 Cornell L.Q. 342, 345 (1955). See also Mewett, The Theory of Government Contracts, 5 McGill L.J. 222 (1959); Mitchell, The Treatment of Public Contracts in the United States, 9 U. Toronto L.J. 194 (1952); Mitchell, A General Theory of Public Contracts, 63 Jurid. Rev. 60 (1951).

\textsuperscript{77} Derecktor v. United States, 129 Ct. Cl. 103, 128 F. Supp. 136 (1954), cert. granted, 348 U.S. 926, case dismissed per stipulation, 350 U.S. 802 (1955). See cases cited notes 71, 73 supra. This follows even though it is doubtful that any contracting officer has the power to bind either Agency X or Agency Y to perform future acts of effective government. Bateson-Stolte, Inc. v. United States, 305 F.2d 386, 389 (Ct. Cl. 1962); Gerhardt F. Meyne Co. v. United States, 110 Ct. Cl. 527, 550, 76 F. Supp. 811, 815 (1948) (United States has no power to enter into a binding agreement that it will not exercise a sovereign power but it can say, if it does, that it will pay contractor's damage). Accord, Rederiaktiebolaget Amphitrite v. The King, [1921] 3 K.B. 500 (not competent for government by contract to fetter future executive action).
the United States for acts of Agency Y which interfere with the contractor’s performance unless Agency X has also breached its implied duty of cooperation.\textsuperscript{78} (2) Any court-established rule imposing a blanket liability upon the United States for non-contractual acts of effective government would place an intolerable burden on the public treasury. As a practical matter, freedom to govern effectively and immunity from the consequences of that action go hand in hand.\textsuperscript{79} Even if the contractor were to be protected from “sovereign” acts in specified cases, Agency X might have difficulty planning for and funding the liability. The costs of a change order or a termination for convenience are much easier to calculate for budget purposes than the uncertainty of “sovereign” acts and their impact upon a particular contractor’s performance. (3) The most often repeated policy justification for absolute immunity is that a contractor who deals with the United States in its contractual capacity should occupy no better risk position than if he were dealing with a private party.\textsuperscript{80} Accordingly, the Court of Claims, in distinguishing “sovereign” and contractual acts, has determined that if a private party substituted for Agency X, the contracting agency, would be liable for damages flowing from the act of prevention or hindrance by Agency Y, the United States will also be liable. By the same token, however, if objective impossibility or commercial frustration would excuse the substituted party, then the United States will also be excused.\textsuperscript{81} This test was first formulated in 1865\textsuperscript{82} and still persists as an articulated factor in the court decisions.

**LIMITATIONS UPON THE DEFENSE OF SOVEREIGN ACTS**

Where an act or omission of Agency Y prevents or hinders performance of a contract administered by Agency X, the commonly expressed condi-

\textsuperscript{78} See, e.g., Shedd-Bartush Foods v. Commodity Credit Corp., 135 F. Supp. 78, 89 (N.D. Ill. 1955), aff’d, 231 F.2d 555 (7th Cir. 1956).

\textsuperscript{79} The cases clearly support this conclusion. See cases cited notes 73, 75, 77 supra. Professor Mitchell, however, has asserted that the actual payment of compensation for the consequences of so-called “sovereign” acts rarely offends the sovereign. Even if the freedom to govern effectively is preserved, compensation for the consequences of its exercise should be denied only where payment offends the principle of effectiveness. Mitchell, A General Theory of Public Contracts, 63 Jurid. Rev. 60, 86-87 (1951). This is a sound distinction which the American decisions rarely make. Unless the contracting agency has expressly promised to compensate contractor, no recovery is permitted. See cases cited note 77 supra.

\textsuperscript{80} See cases cited notes 72, 73, 75 supra.


\textsuperscript{82} Jones v. United States, 1 Ct. Cl. 383, 385 (1865). For recent affirmations of this policy, see Bateson-Stolte, Inc. v. United States, 305 F.2d 386 (Ct. Cl. 1962); Wah Chang Corp. v. United States, 282 F.2d 728 (Ct. Cl. 1960).
tions to the availability of the sovereign acts defense are (1) the act of Agency $Y$ must have been "public and general," and (2) the damage to the contractor must have been caused indirectly.\textsuperscript{83} In our two illustrations, the acts of embargo and condemnation would satisfy these requirements. But suppose Agency $Y$ acts as a direct result of problems created by a particular contract or group of contracts administered by Agency $X$. Would the defense of "sovereign" acts be denied? Admittedly, the "guidelines . . . are not susceptible to mechanical application."\textsuperscript{84} It seems clear, however, that if the acts of Agency $Y$ are public and general, the defense will not be rejected simply because one contractor is adversely affected.\textsuperscript{85} Further, in Derecktor \textit{v. United States},\textsuperscript{86} the Court of Claims decided that the defense may apply even though the act of Agency $Y$ was motivated by and directed at a particular contract. Of increasing importance, then, are the questions of Agency $Y$'s authority to act, and whether the exercise of discretion in so acting was justified under the circumstances. Following these standards, it would seem that a legitimate public interest, such as the protection of United States' foreign relations, coupled with "probable cause" that continued performance of a particular contract will prejudice that interest, would justify a deliberate act of prevention or hindrance by Agency $Y$, subject of course to judicial review.\textsuperscript{87}

\textsuperscript{83} See cases cited notes 73, 75 supra.
\textsuperscript{84} Wah Chang Corp. \textit{v. United States}, 282 F.2d 728, 735 ( Ct. Cl. 1960).
\textsuperscript{85} Ibid. Agency $Y$, by an act characterized as "public and general" condemned a large tract of land thus indirectly obstructing the performance of one government contract administered by Agency $X$. The defense of "sovereign" acts was applied. In Derecktor \textit{v. United States}, 129 Ct. Cl. 103, 128 F. Supp. 136 (1954), cert. granted, 348 U.S. 926, case dismissed per stipulation, 350 U.S. 802 (1955), the court suggested that while the act of Agency $Y$ was applied to a particular contract, it would undoubtedly apply also to any other contract which presented the same problem.
\textsuperscript{86} Supra note 85.
\textsuperscript{87} But see Miller \textit{v. United States}, 135 Ct. Cl. 1, 140 F. Supp. 789 (1956), where the court held that Agency $Y$ did not have probable cause to believe that surplus property sold by Agency $X$ (both agencies were part of the same department) to the contractor would be used to prejudice United States foreign relations. Thus, a termination by Agency $X$ of the contract of sale was a breach of contract, and the contractor was able to recover compensatory damages, including profits prevented. The facts showed that the contractor had offered to permit Agency $Y$ to approve any resale contracts proposed after the surplus property had been delivered by Agency $X$. Agency $Y$ refused the proposal even though it would give Agency $Y$ power to prevent the threat to United States' foreign relations without repudiating the contract, and subsequently Agency $Y$ refused to perform. The court stated that under these facts the termination was "a privilege no sovereign enjoys except in a despotic society. It is abhorrent to the conscience of free men. It cannot be tolerated under the laws or according to the morals of the American people." Id. at 11, 140 F. Supp. at 795. In dissent-
It may be said, therefore, that the government’s immunity depends upon both authority and justification for the acts of prevention or hindrance.

An additional limitation of the sovereign acts defense is demonstrated negatively by the denial of its use where a “discrimination was purposely practiced against the contractor” or where the act was “so arbitrary and unreasonable as to render it illegal.” The Court of Claims has expressed this limitation quite well:

We think that when agents of the Government, without justification in statute, executive order, administrative discretion or otherwise, engage in conduct which is in violation of an express or implied provision of a Government contract, the mantle of sovereignty does not give the Government immunity from suit. It needs no such immunity in order to be able to go on governing wisely and as circumstances require without being hampered by its outstanding contracts. We think that to treat every act of a Government agent, done in the name of the Government, as an act of sovereignty within the meaning of the doctrine here under discussion would be a retreat, without reason, from the purpose of the statute permitting citizens to sue the United States for breach of contract.

In part, Chief Judge Jones found “probable cause” on the record and argued that the termination was fully justified in the national interest:

The immunity of a sovereign act, as used in a free country, is not a method conjured up to escape contractual liability to individuals. That could not have been easily handled by defendant’s refusing permission to be sued. It is to be invoked when the national interest is at stake.

Here was a practical condition where there was danger of world conflagration. . . . Is the nation to remain helpless in the presence of another such threat? What are responsible officials to do when face to face with such a condition? Must they remain helpless or does it call for the action of the times?

In United States v. American Trading Co., 138 F. Supp. 536, 539-40 (N.D. Cal. 1956), a termination by officials of the contracting agency was deemed a breach of contract even though the outbreak of World War II was a justifying cause. The court held that the termination was not “public and general.” Officials of Agency Y, it should be noted, were not involved. But see Sunswick Corp. v. United States, 109 Ct. Cl. 772, 796, 75 F. Supp. 221, 227, cert. denied, 334 U.S. 827 (1948) (while acts of Agency Y were directed at a particular contractor, contract with Agency X delegated power to act to Agency Y and provided for price escalation).


89 Ottinger v. United States, 123 Ct. Cl. 23, 48, 106 F. Supp. 198, 204 (1952). In an earlier opinion, the court held that a claim upon which relief could be based was stated when contractor alleged that Agency Y had, without investigation, arbitrarily and capriciously refused to certify workmen on a construction project until a non-existent labor dispute had been settled. Ottinger v. United States, 116 Ct. Cl. 282, 88 F. Supp. 881 (1950). In the later case, supra, however, the evidence failed to support the contractor’s allegation and the defense of sovereign acts was applied.

The conclusion seems clear, that if the acts of prevention or hindrance by Agency Y cannot be justified, the United States, when sued upon a contract, express or implied, may not invoke the defense of "sovereign" acts. Also while the contracting officers of Agency X cannot guarantee that the United States will not perform future acts of effective government, they can agree to compensate the contractor for damages resulting from justifiable acts of the United States in its "sovereign capacity." Further, if a contract contains a clause which protects the contractor from the consequences of a "sovereign" act, the contracting officer may have an implied duty to invoke that clause. The importance of these powers cannot be overestimated, for their existence provides a legal basis whereby contracting agencies may alleviate a blanket risk imposition on private contractors, prejudicial to the public interest in maintaining a broad base of capable contractors.

SOME DIFFICULT CASES

The least complicated instances of "sovereign" acts are those presented by our two illustrations. The act of Agency Y is "public and general" and the contractor is indirectly damaged. Further, the contract with Agency X does not expressly cover the problem and the contracting officer has not participated in the decision to act. As a result, theoretical and policy justifications for the defense make the most sense despite the obvious damage to the contractor's expected profit. Yet the intermeshed operations of government do not always permit different agencies to function in such splendid isolation; at times there must be coordination between agencies, and often the contracting officials of Agency X will be directly or indirectly involved in the acts of Agency Y. These more realistic situations present the most difficult "sovereign" acts problems. Three recent cases illustrate the difficulties involved.

Case #1. Agency X awarded a fixed-price construction contract to the contractor which required the payment of specified minimum wages.

91 See note 77 supra.
93 See cases cited note 66 supra.
The contractor priced his bid on the justified assumption that there was an adequate labor supply in the area and that the minimum wage was high enough to attract it. After award to the contractor, Agency \( Y \) announced that it would award contracts for a billion dollar project in the same area. These latter contracts stipulated the payment of higher minimum wages and required the importation of labor from other states by virtue of the size of the project. The contractor, to complete his contract, was thereby forced to meet the higher minimum wages of Agency \( Y \)'s contracts and to hire labor from outside the immediate area. His additional costs exceeded the fixed-price by $190,000. In these circumstances, can the contractor, who neither knew nor should have known about Agency \( Y \)'s proposed action, recover damages for breach of contract against the United States? If Agency \( X \) actually knew that Agency \( Y \) intended to award the contracts and was aware of their probable effect on the contractor's performance, a failure to disclose this information prior to the award to the contractor would breach the implied duty of cooperation.\(^94\) If, however, Agency \( X \) had no actual knowledge of the project and could not, by reasonable action, prevent its start, the defense of "sovereign" acts would apply.

Without question the award of a billion dollars worth of contract by Agency \( Y \) is a "public and general" act of effective government. However, attendant circumstances can preclude a simple combination of this with a showing of indirect damage in order to dispose of the case on the basis of "sovereign" acts. Assume that Agency \( X \) assisted Agency \( Y \) in selecting a site for the billion dollar project; at the time of award to the contractor, the possible sites had been narrowed to five or six. Further, after award, Agency \( Y \) accepted the recommendation of Agency \( X \) for an exact location. In view of this participation by Agency \( X \), was there a breach of the implied duty of cooperation in failing to disclose the possible risk to the contractor at the time of award, or in failing later to adjust the contractor's price? The Court of Claims held that there was no breach, since the evidence disclosed that officials of Agency \( X \) did not know at the time of award to the contractor exactly where the site would be, the magnitude of the project or its probable impact on the contractor's performance.\(^95\) Stated otherwise, Agency \( X \) did not knowingly hinder the

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94 See cases cited note 64 supra.
95 Bateson-Stolte, Inc. v. United States, 305 F.2d 386, 388-89 (Ct. Cl. 1962). In holding that the United States did not breach the implied duty of cooperation to disclose known facts of a material nature, the court found that Agency \( X \) promised neither that subsequent contracts would not be awarded nor that the United States would make compensation for any
contractor or culpably increase his costs. In light of the probable risk involved, however, did Agency X make every reasonable effort to consider the contractor's legitimate interests? If the contractor had known about this potential risk, would he have been willing to undertake the project without some protection against the contingency? It seems doubtful. While the factual conclusions of the Court of Claims overcome any inference of negligence on the part of Agency X officials, the resolution of the risk distribution in this case is questionable. At the very least, it would seem that contracting officials should include in the contract a price escalation clause designed to protect both the contractor and the United States from the particular risk illustrated by this case.

Case #2. Agency X agreed to sell the contractor surplus property and promised delivery by a specific date. The contract did not contain a "Termination for Convenience" clause. The contractor in turn made a profitable resale contract with a third party, conditioned upon prompt delivery of the property by Agency X. Before the agreed delivery date, Agency Y had "probable cause" to believe that the property, if delivered to and resold by the contractor, would be used in a way to prejudice legitimate public interests of the United States. What are the possible alternatives of the United States to protect these interests? If Agency X delivered the property to the contractor and Agency Y with proper authority imposed either an embargo or conditions upon its resale, it seems clear that the defense of "sovereign" acts would apply. On the other hand, if Agency X refused to deliver the property on time, the United States would be directly interfering with the contractor's expectations by an act in its contractual capacity, and consequently, would be liable for breach of contract, regardless of public justification. Suppose, however, that Agency Y prevailed upon Agency X to terminate the contract, or at least to delay delivery of the property. Would the defense of "sovereign" acts apply where the breach by Agency X is the result of urgings by Agency Y? Can there be any justification for a contractual act which directly affects the contractor's rights? Does the real question turn simply upon who acts and why, when there is a need for some act of ef-

96 See cases cited note 73 supra.
fective government? Or is the question decided by whether the contracting officer was compelled to act or had some discretion in the matter?

In *Derecktor v. United States*, an analogous situation, the Court of Claims held that the conduct of Agency Y was "in effect an embargo," and since Agency Y had a duty to object to prompt delivery, Agency X had a parallel duty not to perform its promise. The decision is reconcilable with the implied duty of cooperation cases only if the contracting officer had no discretion and is considered as a mere conduit through which Agency Y accomplished directly what could have been done indirectly by embargo. In this limited context alone can an act by a contracting officer which directly affects the contractor's rights be classified "sovereign." Regardless of these subtle distinctions, however, the contractor's damage is precisely the same, and the question of reasonable risk distribution remains. As a possible solution, it has been suggested that the contractor should recover out-of-pocket expenditures made in reliance on Agency X's promise, but not the profits prevented by the so-called "sovereign" act. This, of course, resembles the compromise made by the "Termination for Convenience" clause found in defense department supply contracts. To be remembered, however, is that the *Derecktor* case involved a sale of surplus property rather than a supply contract; hence, any profit prevented comes from a contemplated resale by the contractor, not normally foreseeable by the contracting agency. Further, the public interest in a broad base of capable purchasers of government property is arguably less than the concern for the base of suppliers to the United States. Nonetheless, it would seem that the payment of "reliance" damages to the contractor in this situation would accomplish a sensible adjustment of the competing private and public interests. As a matter of procedure this result could best be accomplished by an appropriate contract clause voluntarily drafted by the contracting agency.

**Case #3.** The contractor entered into a fixed-price contract with Agency X to repair runways at an air base under the command of Agency Y. The contract contained a "Suspension of Work" clause which authorized the contracting officer to suspend work "when determined by him to be necessary or desirable for the convenience" of the government. While

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the contractor was promised a time extension if work was suspended, he would receive an equitable adjustment in contract price only if the delay was unreasonable.\textsuperscript{101} After performance was begun the President placed the air base and its personnel on an alert status. The base commander, in the proper exercise of his discretion, decided to stop all work on the runways until the alert was lifted, and ordered the contracting officer to suspend work. It seems clear that the contracting officer had little choice, and did not independently determine that the suspension was necessary for the convenience of the government. Rather, he was a mere conduit through which the base commander accomplished indirectly a result that could have been accomplished directly by excluding the contractor's employees from the air base. It should be noted that had the base commander excluded all the contractor's employees, the conduct would clearly be classified a "sovereign" act.\textsuperscript{102} The contractor's recovery would then depend upon the general terms of the contract with Agency X. However, in issuing the suspension of work order, the contracting officer relied upon the "Suspension of Work" clause in the contract.

In a lengthy and rather tortured opinion, the Armed Services Board of Contract Appeals ruled that despite the obvious "sovereign" act problem, the contractor was entitled to the protection of the "Suspension of Work" clause.\textsuperscript{103} The decision effects a sensible result which should follow regardless of how the base commander accomplished his purpose or whether the contracting officer expressly relied upon the clause. While


\textsuperscript{102} See cases cited note 75 supra.

\textsuperscript{103} Empire Gas Eng'r Co., ASBCA No. 7190, 1962 BCA ¶ 3323. In reaching this result, the Armed Services Board of Contract Appeals concluded that Derecktor v. United States, 129 Ct. Cl. 103, 128 F. Supp. 136 (1954), cert. granted, 348 U.S. 926, dismissed per stipulation, 350 U.S. 802 (1955), was virtually overruled by Miller v. United States, 135 Ct. Cl. 1, 140 F. Supp. 789 (1956). The ASBCA then stated that in no case had an order issued by a contracting officer directly to a contractor been held to be a sovereign act. Thus, regardless of the possibility of indirect exclusion, the act of suspension by the contracting officer was a contractual act even though he had no discretion in the matter. Since that act would breach the implied duty of cooperation if there were no suspension of work clause, the act with a suspension of work clause must be considered to cause an unreasonable delay. Consequently, the contractor was entitled to both a time extension and an equitable adjustment in price under the contract for the entire suspension period. For a contrary view, see Lane Constr. Corp., Eng. BCA No. 1977 (Sept. 1961) (contractor denied recovery for extra costs caused by a one day stop-work order issued by officials of Agency X under a contract containing "suspension of work" clause when Agency Y, at the request of the State Department, decided to close air base for the security of visiting Premier Khrushchev).
the contracting officer appears to have some discretion in the use of the clause, the decision to invoke it or not must be made in good faith and after fair consideration of the contractor's legitimate interests. In this instance, the clause was broad enough to cover the risk involved. Consequently, the contracting officer had an implied duty to use the clause regardless of how the base commander accomplished his desire to stop work.

III

EVALUATION AND CONCLUSION

In his book, *Law in a Changing Society*, Professor Friedman has observed that the private contract has increasingly been used as an "instrument of economic State policy, through the extension of government functions and the socialization of industries." As a result, the contract is becoming "largely the legal expression of economic and social policies," thus weakening "the degree to which contract can any longer fulfill the function of security against calculated economic risks." He concludes:

This is further emphasized by the development of the doctrine of frustration, which allows for the statutory or judicial consideration of circumstances beyond the control of the parties. To that extent, contract becomes the foundation for a broad adjustment of risks in which private agreement and public policy are mingled.104

In contrast to this general contract concept, most government contracts are completely devoid of "private agreement," and their terms are entirely an expression of public policy. As a result, the allocation of risks is likewise based upon a public policy primarily determined by Congress and the executive agencies rather than by the courts—an institutionalized process in which the typical contractor has little or no bargaining power.105

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105 *T*he government contract is an admirable example of that type of agreement known as the "contract of adhesion." Its boiler-maker provisions are the result of long bureaucratic experience in the making, administration and termination of contracts. Standard government contract clauses appear to go through a never-ending process of evolution, reflecting changes in laws, newly recognized interests of the Government, new determinations affecting law or policy by cognizant administrative bodies, changing circumstances of industry and other factors.

Thus, as a condition to doing business with the government the contractor must accept a variety of standard contract clauses.

How, then, can a capable contractor bid for a government contract and protect himself against a serious risk which he recognizes could affect performance? Typically, if the standard clauses do not provide some specific protection, he will either refuse to bid or price for the contingency. Where a firm fixed-price contract is involved the latter alternative may impose burdens on both parties concerned. On the contractor's part there may be extreme difficulty in deciding what amount will provide adequate protection, yet still enable him to submit the lowest competitive bid. On the other hand, if all bidders are pricing for a contingency that does not occur, the government may pay unrealistic prices for its goods and services. Even the imperceptive contractor who is not deterred and does not price for the contingency creates serious administrative problems, for while his bid may be low, marginal performance and a frantic search for unavailable administrative relief often follows the occurrence of an unforeseen contingency. Ideally, then, the solution should include a consideration and protection of both interests involved. As a practical matter, it seems clear that when the problem becomes sufficiently acute, contracting agencies will resolve it by special contract clauses permitting either price escalation or equitable adjustments in the fixed contract price.\footnote{See Gaskins, Delays, Suspensions and Available Remedies Under Government Contracts, 44 Minn. L. Rev. 75, 88-89 (1959) (describes evolution of "Changed Conditions" clause); cf. Braucher, Fixed Prices and Price Redetermination in Defense Contracts, 53 Colum. L. Rev. 936, 943 (1953): Close pricing means pricing at levels which will not cover costs in all contingencies. If the objective of providing an incentive for efficient performance is to be achieved, the risk of loss from inefficient performance must be borne by the contractor. Ordinarily he should also be responsible for the efficiency of subcontractors. Other risks, such as fire, may be insurable and the Government may properly agree to a price sufficient to cover insurance premiums. But if a risk threatens an uninsurable loss large in relation to the contractor's net assets, an amount sufficient to protect the contractor in the event of loss will, of course, be too large if no loss occurs. The Government may then find it cheaper to assume the risk.}

Fortunately, while the primary justification advanced for such a solution is the "best interest" of the government (in such things as economy, efficient and timely performance and maintenance of a broad base of capable contractors), the seeming coincidence of private contractors' "best interests" provides the latter a degree of protection as well.

But what protection has a private contractor where a "sovereign" acts risk is involved? Essentially, the risk involves the possibility that government officials may, in the legitimate exercise of their public responsibilities, indirectly prevent or hinder the contractor's performance, perhaps de-
laying completion, or making it more difficult or costly for the contractor to obtain labor and supplies. An additional possibility is that contracting officials may directly interfere with performance by terminations or stop-work orders. In any event, the risk is beyond the contractor's control and not due to his fault or negligence. Further, while the general risk of some "sovereign" act may be foreseeable, the precise character of such an act and its impact upon performance are not, for the varieties of and justifications for these acts are as varied as the responsibilities of government itself. Against this background, therefore, three fundamental questions present themselves: Is it essential that some adjustment of the present "sovereign" acts risk be made? If so, should this adjustment be made by the executive agencies or left to the courts? Finally, as a practical matter, how broad can this adjustment be without seriously impairing the freedom to take effective executive action?

(1) Is it essential that some adjustment of the present "sovereign" acts risk be made? The first consideration in answering this question is the amount of protection the contractor now receives from the courts and the standard contract clauses. In a series of decisions from 1865 to date, the federal courts have applied the defense of "sovereign" acts where the "public and general" acts of an agency not the contracting agency cause damage to the contractor. Thus, when sued as a contractor the United States may escape liability for the consequences of specified conduct by agencies which have no contractual duties to particular private persons. Some protection is given the contractor, however, inasmuch as the federal courts will review the conduct of Agency Y for authorization and justification. Further, the Court of Claims has expanded Agency X's implied duty of cooperation to include (a) the disclosure of known future "sovereign" acts of Agency Y which clearly will affect performance and (b) the use of clauses contained in the contract which protect the contractor from the consequences of "sovereign" acts. The protection ends here, however. The Court of Claims cannot compel the contracting agencies to include appropriate clauses and will not imply a promise to compensate the contractor where none has been made expressly.

Where the acts of prevention and hindrance are done by officials of the contracting agency, however, the contractor is granted extensive judicial protection. In contrast to situations involving acts of a second agency, the implied duty of cooperation is vigorously applied to the contracting officer's direct administration of a particular contract. Thus, unless the power is reserved by contract, the most compelling public necessity will not justify terminations or work suspensions ordered by the contracting
officer. Further, contracting officials must exercise every reasonable effort to furnish promised assistance in time for the contractor to meet his performance schedule, even though a specific time for delivery was not mentioned in the contract. Finally, in the general administration of any contract these officials have an affirmative duty to act in good faith and after fair consideration of the contractor’s legitimate interests. While these implied duties are imprecise in content, their application by the Court of Claims has produced a sensible risk adjustment.

There are other questions, however, which have not been definitively answered, and which present areas of doubtful protection for the contractor. For example, when should the United States be liable for conduct of Agency X which interferes with the performance of a particular contract, but which is not directly connected with the administration of that contract? Clearly, the implied duty of cooperation does not prohibit Agency X from performing other procurement responsibilities. In attempting to answer the question, the court in United States v. Beuttas formulated a test indicating negligence as the key, finding liability where contracting officials “knowingly hindered respondents in the performance of the contract or culpably increased their costs.” But is it negligence to award a necessary contract with knowledge that it will or probably will have some impact on the contractor’s performance? Perhaps this problem can be resolved simply by deciding that the contractor assumes the risk and should price for it. Certainly it would be no greater burden than if he were performing a private contract in the same area. Further, the damage to the contractor is indirect, resulting from the impact of the agency’s conduct on market conditions. In Volentine & Littleton v. United States, however, the Court of Claims held that the contractor is

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107 See cases cited note 97 supra.
108 324 U.S. 768 (1945).
109 Id. at 773. See Speck, Delays-Damages on Government Contracts: Constructive Conditions and Administrative Remedies, 26 Geo. Wash. L. Rev. 505, 542 (1958), where the author argues that the emphasis upon negligence or fault by the Supreme Court and the Court of Claims is a “legal soecism”:

[T]he United States becomes libel (sic) for breach of contract for negligently failing to do what, apart from the negligence, it would have no contract obligation to do at all. Even in the law of torts, a duty is a prerequisite to negligence before liability, but here negligence establishes the duty.

The fact is, however, that the Court of Claims has imposed an “implied” duty of cooperation on every contractual relationship and uses the concept of negligence to describe when that duty has not been met. Mr. Speck’s excellent and exhaustive review of the cases is found in id. at 512-35.
entitled to "fair consideration" from officials of Agency X who are administering another contract on the same work site. The result in this decision suggests that the administration of the contractor's contract must be coordinated with the other procurement activities of Agency X. Hence, if because of proximity or other circumstances, an apparently unrelated act of Agency X clearly will interfere with the contractor's performance, contracting officials have an implied duty to fairly consider the contractor's legitimate interests. At the very least there is an implied duty to minimize the inconvenience that the proposed action will cause.111

An even more basic problem involves the distinction between "contractual" and "sovereign" acts, and the effect of this determination on a contractor's ability to recover damages from the United States. Traditionally, the determination of whether an act directly affecting a contractor is "contractual" or "sovereign" has depended upon which agency acted, Agency X (the contracting agency) or Agency Y.112 However, where particular acts of both agencies have indirectly affected a contractor's performance, there is a similarity in the judicial treatment of the acts. For example, assume a contractor is dealing with Agency X on a fixed-price basis. Assume further that both Agency X and Agency Y subsequently award defense contracts in the immediate area which, because of differences in terms, indirectly increase the contractor's performance costs. Concededly, both Agency X and Agency Y are serving the public interest in the award of defense contracts; the acts of both agencies are identical. Agency X, however, has an implied duty to cooperate with the contractor, while Agency Y does not. As a result, the acts of Agency Y are classified "sovereign" and cloaked with an immunity from liability for damages to the contractor. To be noted is the fact that, if Agency X satisfies its implied duty of cooperation, the United States is similarly immune from liability.113 Thus, if Agency X has not breached the implied contractual duty of cooperation, both its conduct and that of Agency Y may be lumped together in the "sovereign" acts category, i.e., govern-

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111 Would the United States be liable if Agency Y rather than Agency X had raised the water level without giving adequate notice to the contractor? Does Agency Y have any duty to consider the contractor's legitimate interests? Would such action be "arbitrary and capricious" under the test of Ottinger v. United States, 123 Ct. Cl. 23, 106 F. Supp. 198 (1952)?

112 Although this distinction was seemingly ignored in Derecktor v. United States, 129 Ct. Cl. 103, 128 F. Supp. 136 (1954), cert. granted, 348 U.S. 925, case dismissed per stipulation, 350 U.S. 802 (1955), it still provided a focal point for analysis.

ment acts of prevention and hinderance for which contractor has no remedy in damages.

The problem then is to draw the line between compensable and non-compensable acts of prevention and hinderance, and the judicial line between the compensable and non-compensable governmental act seems to depend upon the scope of the implied duty of cooperation. If that duty has been met, the contractor assumes the risk of governmental acts of prevention and hinderance whether labeled "sovereign" or "contractual." This result is recognized in and tempered somewhat by the standard contract clauses. Thus, a contractor will be excused from the consequences of a default caused by an act of the United States in either its "contractual" or "sovereign" capacity. However, a contractor is not entitled to affirmative relief for increased costs traceable to the "sovereign" act; this form of relief is limited to specified "contractual" acts such as change orders, terminations and work suspensions, and even in such instances a compromise is made in the amount of recovery. Is the contractor adequately protected by the terms of the "excuse" provision or the opportunity to price for the "sovereign" act contingency? Clearly not. As noted earlier, the vagaries of the "sovereign" acts risk make it extremely difficult to discount in pricing. Further, it is doubtful that a time extension alone is adequate compensation for the extra costs of a delay caused by the United States. Finally, it should be noted that if a "sovereign" act makes performance more costly rather than impossible the contractor must continue work and absorb the loss. There is no middle ground;
the contractor either bears all of the risk or none of it. Clearly there is a need for a sensible risk allocation.

(2) *Has the problem become so acute that the executive agencies should resolve it by new contractual provisions for administrative relief?* Persuasive arguments against such action can be made inasmuch as there is no concrete evidence that the current judicial or contractual risk adjustment has either deterred capable contractors or produced unrealistic prices. At the same time, “sovereign” act problems are sporadic and normally arise in wartime when the risk is absorbed by the cost-plus-fixed-fee contract. Finally, a contractor may gain more protection from dealing with the government than he would obtain in a private undertaking. Since the typical “sovereign” act does not produce direct interference with private contract performance, the United States as a “contractor” might be subject to a greater liability than a private party in the same position. In sum, without specific evidence that capable contractors are being deterred from participating in the contract process or that contract prices are too high, it can be argued the public interests in economy and convenience justify the current risk distribution and its occasional damage to particular contractors. At the very least, the “sovereign” acts risk cannot be singled out as a primary cause of the increased concentration of defense prime contracts in the hands of relatively few private business concerns.

The countervailing arguments, however, must be based upon the realities of federal procurement in 1963, rather than the rubrics of 1865. The government contractor today performs quasi-public functions of vital importance to national defense. Paradoxically, the contractor is a profit-making “instrumentality” of the United States who furnishes both needed supplies and services and implements government economic and social policies which often have little relationship to efficient purchasing. Since World War II a continuing relationship of mutual dependence has

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119 For excellent discussions of this unique function, see Miller, Government Contracts and Social Control: A Preliminary Inquiry, 41 Va. L. Rev. 27 (1955); Van Cleve, Use of Federal Procurement to Achieve National Policy Goals, 1961 Wis. L. Rev. 566; Whelan & Pearson, supra note 105, at 303-14; Miller, Administration by Contract: A New Concern for the Administrative Lawyer, 36 N.Y.U.L. Rev. 957 (1961).
been established between the United States and the community of government contractors. Consequently, potentially disruptive problems in this relationship should be promptly recognized, evaluated and removed through joint efforts or voluntary, unilateral action by the executive departments.

The "sovereign" acts risk is just such a problem, and as such is deserving of serious scrutiny. Government procurement is now accomplished in a declared state of national emergency. The risk that a contractor's performance will be obstructed by emergency executive action is increasing, as is amply demonstrated by the continuing crises in Southeast Asia, Cuba and Berlin. Yet Congress has recently increased the mandatory use of formal advertising and is continually pressuring for more small business participation. The result is that more small contractors will be performing firm fixed-price contracts at a time when a risk consciously imposed upon them is increasing. Finally, it is no longer realistic for the courts and contracting officials to mouth bromides about equating the liability of the United States as a "contractor" to that of other private persons in similar circumstances. The unique economic risks of dealing with the United States are greater and more varied than those encountered in typical private undertakings. Further, as illustrated by the temporary exclusion of construction contractors from Air Force installations during "alerts" or other emergencies, the risk of "sovereign" acts may fall only on those who contract with the United States. If the current realities of federal procurement continue, the pricing problem presented by this particular contingency will, if it has not already, become acute. Accordingly, the contracting agencies should, in the public interest, give careful consideration to further administrative relief.

(3) As a practical matter, how broad can an adjustment be without seriously impairing administrative freedom to take effective governmental action? The nature of administrative relief for the contractor will depend upon the type of "sovereign" act involved and the threat posed to a contractor's fixed-price bargain. A basic rule of thumb should be that a contractor's administrative recovery will be no greater than that available under standard or optional contract clauses measuring the United States' liability for the "contractual" act of Agency X. Thus, if the contracting officer of Agency X terminates, changes or suspends work for the "convenience" of the government, the United States will be liable even though


121 See cases cited note 103 supra.
the action was compelled by Agency Y in the proper performance of public duties. The contractor's administrative recovery, however, shall be limited to that provided for in the contract—actual costs, a reasonable profit on work done and the extra costs caused by "unreasonable" delays. This approach will require that standard "Termination for Convenience" and "Suspension of Work" clauses be included in every government contract, including those affecting the sale of surplus property. If, as a practical matter, Agency Y accomplishes a temporary or permanent work stoppage by direct action against the contractor, the contracting officials of Agency X will have an implied duty to cooperate by invoking the appropriate contract clause. For maximum protection, this implied duty as imposed by the Court of Claims should be expressed in the contract.

More difficult problems are presented when the "sovereign" acts have primary impact upon general market conditions and, as an indirect result, either delay or increase the cost of a contractor's performance. If the contractor is delayed because the procurement activities of Agency Y have made needed labor and supplies more costly or more difficult to obtain, should the United States pay the resulting "standby" costs? Is this any different from the case where Agency Y condemns land and forces the contractor to relocate at considerable extra cost? While administrative relief for the cost of delay under these circumstances would be unprecedented,\(^\text{122}\) carefully drafted forms of price escalation would not.\(^\text{123}\) Con-

\(^{122}\) Without contractual adjustment the "standby" cost of delay caused by a "sovereign" act is absorbed by the contractor. See cases cited note 75 supra. While under the supply contract "Changes" clause the cost increase in performing both changed and unchanged work is compensable, this clearly does not cover the problem under discussion. See United States v. Rice, 317 U.S. 61 (1942). Under the "Suspension of Work" clause or when a stop-work order is issued incident to the making of a change, unreasonable delays are compensable. See cases cited note 101 supra. Other cases where delay-damages are compensated are those where the United States as a "contractor" has breached the implied duty of cooperation. See Ben C. Gerwick, Inc. v. United States, 285 F.2d 432 (Ct. Cl. 1961); Peter Kiewit Sons' Co. v. United States, 138 Ct. Cl. 668, 151 F. Supp. 726 (1957); Thompson v. United States, 130 Ct. Cl. 1, 124 F. Supp. 645 (1945); Challender v. United States, 127 Ct. Cl. 557, 119 F. Supp. 186 (1954); Anthony P. Miller, Inc. v. United States, 111 Ct. Cl. 252, 77 F. Supp. 209 (1948); George A. Fuller Co. v. United States, 108 Ct. Cl. 70, 67 F. Supp. 409 (1947). None of these situations are precedents here. It has been argued that the executive departments have no authority to settle and pay unliquidated claims against the United States for breach of contract damages. See Speck, supra note 109, at 546-64. These objections, however, do not seem to apply when the contracting agency consciously assumes liability for such damages by contract and provides an administrative method for their liquidation, \textit{i.e.,} an "equitable" adjustment in price. See Shedd, Administrative Authority to Settle Claims for Breach of Government Contract, 27 Geo. Wash. L. Rev. 481 (1959). For recent illustrative administrative decisions, see Model Eng'r & Mfg. Corp., ASBCA No. 7490, 1962 BCA ¶ 3363; Allied Contractors, Inc., ICBA No. 265, 1962 BCA ¶ 3501; L. R. Sommer, ASBCA No. 5065, 58-2 BCA ¶ 2043 (1958).

\(^{123}\) Where negotiation is authorized, the head of an agency may, subject to express limita-
sequently, a compromise which places the risk of delay on the contractor but inserts flexibility into the fixed-price arrangement might be feasible at this time. Another solution might be an amendment of the "Default" clause to excuse the contractor from further performance under the contract if his costs were substantially increased by a "sovereign" act. The test would be whether the fixed-price bargain had, in practical effect, been nullified rather than whether continued performance is impossible. Further, if the contractor is given a legitimate election here, his choice to continue performance would be a "valuable" consideration which might be given in exchange for a promise by the contracting officer to increase the contract price.


125 If the contract does not contain a price escalation clause at the time of award and a contractor's costs are increased by acts of the United States in its "sovereign" capacity, the contracting officer may not "waive" that defense and grant escalation without receiving valuable consideration from the contractor. These officials are "without the authority to waive or surrender gratuitously any vested right or interest acquired by the United States under contract, or otherwise." 35 Comp. Gen. 230, 232 (1955). Accord: 35 Comp. Gen. 56 (1955); 18 Comp. Gen. 114 (1938). See Salem Prods. Corp. v. United States, 298 F.2d 808 (2d Cir. 1962); Bausch & Lomb Optical Co. v. United States, 78 Ct. Cl. 584, cert. denied, 292 U.S. 645 (1934); J. J. Preis & Co. v. United States, 58 Ct. Cl. 81 (1923). Cf. 22 Comp. Gen. 260 (1942) ("sovereign" acts case). But see Blake Constr. Co. v. United States, 296 F.2d 393 (D.C. Cir. 1961). The possibility of extraordinary relief should be thoroughly explored. See 72 Stat. 972, 50 U.S.C. § 1431 (1958) (President may authorize any department exercising national defense functions to enter into contracts or into amendments or modifications without regard to other provisions or law when he deems that such
The foregoing suggestions are prompted by a conviction that under existing circumstances the current allocation of the "sovereign" acts risk is not sensible. Admittedly, a contractor cannot and should not be immunized from every risk of doing business with the United States. He can, however, receive calculated administrative protection from those risks over which he has no control and against which realistic pricing is difficult. This protection clearly is in the public interest, since the desired independence and responsibility of the private contractor would be impaired; rather, he would be encouraged and assisted in his effort to earn a fair profit while simultaneously serving the needs of national defense. Of considerable importance also, the small businessman will be afforded a greater margin of safety. But whether the "sovereign" acts risk is reallocated or not, its presence forces private contractors and government officials alike to reflect upon the actual needs and goals of the government contracting process. A realistic and continual evaluation of what is being done, and why, is essential to the achievement of what Professor Whelan has called "optimum relationships among the Government, business organizations and the labor community."

126 Whelan & Pearson, supra note 105, at 344.
COMMENTS
GOOD FAITH BARGAINING OVER SUBCONTRACTING

GUY FARMER*

Examining the recent National Labor Relations Board's decisions holding that the question of subcontracting is subject to mandatory bargaining under section 8(a)(5) of the National Labor Relations Act, the author contends that the Board's present position lacks the flexibility required by the facts of industrial life. Mr. Farmer suggests that whether a decision to subcontract should be subjected to mandatory bargaining and, if so to what extent, should be made to depend upon a variety of factors such as the absence or existence of a collective bargaining agreement and an applicable arbitration provision. He concludes that the public's interest in both a healthy collective bargaining process and in a sound and flexible economy can be served only by such an approach which reflects an awareness of both these factors and the many other economic realities of the business world.

INTRODUCTION

In a recent series of cases the NLRB has undertaken to define an employer's duty to bargain over the question of subcontracting. From the welter of opinions and dissents over the legal requirements imposed by section 8(a)(5),1 as amplified in section 8(d)2 of the National Labor Relations Act, it appears that the present dialogue on the point has revolved around the sterile question of whether subcontracting by an employer is a part of the "wages, hours, and other terms and conditions of employment" concerning which the act directs the employer to bargain in good faith, or whether subcontracting falls within the nebulous phrase (not found in the act) of "management prerogatives."

The statutory definitions are, of course, relevant. Discussion of the question solely on this plane, however, lacks the dimension which can be provided only by placing the problem within the context of the everyday realities of industrial life. These include factors such as the existence of a

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collective agreement, the utilization of the grievance and arbitration process and the proper accommodation of the employer’s interest in running his business as efficiently as possible.

Any workable solution to this problem of whether there is an employer duty to bargain before subcontracting must begin with the recognition that the question of managerial responsibility versus employee rights and the application of the bargaining obligation arise in a wide range of situations. The error of the Board majority in recent cases lies in the apparent view that there is a single, unalterable mechanistic principle equally applicable in all circumstances. That principle seems to emerge as the inescapable obligation to bargain an issue out to agreement or impasse prior to taking definitive action. Thus, regardless of the existence of a collective bargaining agreement, economic necessity, or considerations of efficiency or economy, it is apparently the view of the majority of the Board that an employer cannot subcontract out all or part of an operation without first bargaining the matter out to agreement or impasse with the union. This view, however, fails to take into account some of the significant factors and different shadings of factual patterns which should have a bearing upon the employer’s duty to bargain in good faith with respect to subcontracting. These differing factors tend to emerge from a review of recent Board decisions on the question.

THE RECENT BOARD DECISIONS

In the first of these decisions, Town & Country Mfg. Co., the Board indicated that even though an employer subcontracted work for purely economic and nondiscriminatory motives, he was under a legal obligation imposed by section 8 (a) (5) to bargain with the union over his decision to subcontract. The employer in that case manufactured mobile home trailers and maintained a hauling operation to deliver its trailers to its customers. About a month after a union of drivers had achieved certification from the Board, the employer subcontracted the entire hauling operation and terminated the drivers’ employment. After the union had achieved certification and before the subcontracting decision was made, the union and employer had engaged in bargaining over what would have been an initial contract. After the decision to subcontract was announced, the union protested, but to no avail.

4 It is of some concern to note that the Board’s holding in this case was dicta since it found that the employer’s decision to subcontract was based on discriminatory motives, thus rendering it a violation of section 8(a) (3).
In upholding the union's contention that the employer's conduct was in violation of section 8(a)(5) of the act, the Board held that the subject of subcontracting was a bargainable matter within the statutory phrase "other terms and conditions of employment," and ordered the employer to reinstate the drivers with back pay, to reinstate the hauling operation and to bargain with the union. Seeking to ease the fears of employers, the Board added:

This obligation to bargain in no wise restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment.\(^4\)

To Member Rodgers, who dissented, the majority opinion represented an intrusion into an area of management prerogatives which are "exercisable without negotiation."

A majority of the Board stated that it was content to rely upon the Supreme Court's opinion in Order of R.R. Telegraphers v. Chicago & N.W. R.R.\(^5\) for its rationale in positing the requirement of good faith bargaining over subcontracting for purely economic motives. The Telegraphers case, however, concerned the question of whether the Norris-LaGuardia Act\(^6\) prohibited the issuance of an injunction against the union for striking over a demand that jobs in existence on a certain date would not be abolished without the agreement of the union and the carrier. One argument of the carrier to support its position on the inapplicability of the Norris-LaGuardia Act was that the union demand was an unlawful attempt to usurp managerial prerogatives and that a strike for such a demand should not, therefore, receive the protection of the Norris-LaGuardia Act. The Court disagreed, finding that the union violated no "specific legal command" by its proposal.\(^7\) For this reason, among others, the Court held that the Norris-LaGuardia Act was applicable and prescribed an injunction against the union's strike. The case, therefore, does not seek to define the carrier's obligation to bargain with the union over the union's proposal, but merely characterizes the union's proposal as not contrary to law. The holding of the Telegraphers case thus is, at best, tangential to the issues in the Town & Country case.

Crucial to the Board's ruling in the Town & Country case was the following passage:

\(^4\) 136 N.L.R.B. at 1027.
\(^7\) 362 U.S. at 339.
The drivers had designated the union as their exclusive bargaining representative in a Board election. This having been done, the statute imposed on Respondent the mandatory duty to bargain with that representative concerning the drivers' rates of pay, wages, hours of employment, and other terms and conditions of employment. Early in the administration of the Act, the Supreme Court made it abundantly clear that an employer does not fulfill this obligation where he takes unilateral action affecting these topics of bargaining.8

The law with respect to "unilateral changes," however, is simply not as broad as this quotation implies. In NLRB v. Katz,9 the Supreme Court stated the current rule with respect to unilateral changes in the following holding:

We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.10

In the Katz case the employer had unilaterally changed the Company's sick leave plan, increased wages and given merit increases while those three subjects were under negotiation with the union. In each case the Company's action had the intended effect of foreclosing discussion of the issue with the union prior to the employer's reaching an impasse with the union over the issues.

Under the holding of the Katz case unilateral action by the employer thus comes under suspicion only where that action takes place at a time when the subject of the action has been under negotiation and the employer's unilateral action had the effect of removing the subject from bargaining. That, of course, involves a very limited number of subjects and periods of time in relation to the host of managerial decisions required each day which affect in varying degrees an employee's wages, hours or working conditions. The Board's inference in the above-quoted portion of the Town & Country case leaves the impression that the Supreme Court has, since 1938, held that an employer commits an unfair labor practice each and every time that he makes a decision affecting employee's wages, hours and working conditions without first bargaining in good faith with

8 136 N.L.R.B. at 1026. For the proposition stated in the last sentence of this quotation, the Board cited NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333, 348 (1938). The MacKay case, however, is not even remotely in point, and the specific page cited deals with the propriety of a Board order under section 8(a)(3) reinstating with back pay employees who had been discriminated against because of their union activity.


10 Id. at 743. (Emphasis added.)
the union with respect to such decision. In fact, the Supreme Court has never so held.

In the Town & Country case, the Board also took note of the apparently contrary decision in Fibreboard Paper Prods. Corp. In Fibreboard the employer had, since 1937, recognized, bargained and entered into collective bargaining agreements with the Steelworkers for a unit of approximately fifty maintenance employees. Near the end of the term of this contract, the employer informed the union that it would serve no purpose to negotiate a new agreement since it had decided to subcontract out the maintenance operation. The record showed that savings of $225,000 per year could be effected by this move and that there was no anti-union animus. The collective bargaining agreement in effect at the time of the decision to subcontract provided certain termination rights and benefits as well as a general non-exclusionary arbitration clause.

In its original opinion, the Board dismissed the union's complaint on the theory that the decision to subcontract "does not relate to a condition of employment, but to a precondition necessary to the establishment and continuance of the relationship from which conditions of employment arise." The Board purported to distinguish apparently contrary decisions on the theory that in those cases some employees would remain in the unit and therefore be affected, whereas in the instant case "no employees remained in the unit to be represented by the union, and thus there necessarily could be no impact on the employment conditions of employees remaining in the unit."

In Town & Country, therefore, the Board overruled the original Fibreboard decision. But Fibreboard was due for a more formal burial. Subsequent to the Town & Country decision the Board granted a motion to rehear the Fibreboard case and thereafter issued a supplemental decision reversing the reasoning and result of its first opinion. In this supplemental opinion the Board, Member Rodgers dissenting, held that

12 Order of R.R. Telegraphers v. Chicago & N.W. R.R., 362 U.S. 330 (1960) (discussed in text at 560); Shamrock Dairy, Inc., 124 N.L.R.B. 494 (1959) (a majority of the Board found an employer violated § 8(a)(5) while a collective bargaining agreement was still in existence by entering into individual contracts with some of his driver-salesmen as independent contractors without first bargaining with the union over adoption of this arrangement); Timken Roller Bearing Co., 70 N.L.R.B. 500 (1946) (employer violated § 8(a)(5) while a collective bargaining agreement was in existence by refusing to negotiate with the union before issuing a manual for employees containing plant rules and penalties enforcing them and by making other unilateral changes in working conditions).
the employer’s “failure to negotiate with the charging unions concerning its decision to subcontract its maintenance work constituted a violation of section 8(a)(5).” It was apparent that the Board felt the *Fibreboard* situation was covered by its dicta in *Town & Country*.

It is only by means of a footnote in the dissenting opinion in *Fibreboard* that one is informed that there was an existing contract covering the employees affected by the decision to subcontract. Yet, this fact should be of significant importance in analyzing the legality of the conduct under section 8(a)(5) in that it is not quite accurate for the Board to state in *Fibreboard* that the employer had failed to negotiate with the union over the issue of subcontracting. Here, as contrasted with the situation in *Town & Country*, the employer’s negotiations with the union were crystallized in a collective bargaining agreement which provided for the contingency which occurred during the term of the contract and—of equal importance—contained an arbitration clause which did not exclude subcontracting from its scope.

Indeed, Member Rodgers’ view, concurring in the original *Fibreboard* decision and dissenting in the supplemental opinion—that subcontracting is not a mandatory subject of bargaining—is, as the majority in the supplemental decision was forced to agree, supported by impressive judicial authority.\(^\text{14}\)

The Board advanced its holdings in the *Town & Country* and *Fibreboard* cases another significant step in *Hawaii Meat Packing Co.*\(^\text{15}\) There, the company and union had reached an impasse in bargaining over economic matters (not related to subcontracting), and the union struck. On the first day of the strike the company entered into a subcontract for the delivery portion of its operations. On the same day the company notified its employees that it intended to re-open the plant and to hire replacements for employees who did not return. The same letter advised employees that the delivery work had been contracted out and that positions as drivers and helpers were no longer necessary. This was the first notice to the employees or union that the company was considering the subcontracting operation.

The Board held that the employer’s failure to bargain over subcontract-

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14 See NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961); Jays Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961); NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960); NLRB v. R. C. Mahon Co., 269 F.2d 44 (6th Cir. 1959); NLRB v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955); NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954); NLRB v. Houston Chronicle Pub. Co., 211 F.2d 848 (5th Cir. 1954).

15 139 N.L.R.B. No. 75 (1962).
ing during an economic strike was a refusal to bargain and turned the strike into an unfair labor practice strike. The Board observed that the permanent replacement of economic strikers by an employer without prior good faith bargaining was distinguishable from the displacement caused by subcontracting, in that the latter, by eliminating jobs within the bargaining unit, resulted in an erosion of the bargaining representative's status.

In so holding the Board apparently left unanswered the large question concerning the transfer of work during an economic strike from the plant on strike to a different plant in order to keep the business operational for the duration of the strike. The Board's rationale about the elimination of unit jobs would appear to apply only to a permanent subcontracting or to a transfer of the work beyond the duration of the strike. If, on the contrary, the rule applies to stop-gap transfers of work for the duration of an economic strike, unions have been given a powerful weapon indeed. It would mean that in the early critical days of an economic strike, where it might be difficult or impossible to obtain replacements at the site of the dispute, the company's entire productive output would be crippled for the period of time which it took to bargain in good faith about the temporary transfer of the work to a different plant or company. Apart from the legalities, it is also somewhat unrealistic to speak of bargaining in good faith about the transfer of work to another plant after an economic strike is in progress. At this point in time it is an exercise in fantasy to imagine the union and employer coming to agreeable terms on either the permanent subcontracting out of work or the temporary transfer of it during the course of the strike.

A CRITIQUE OF THE PRESENT BOARD POSITION

As the above decisions indicate, both the majority and dissent in Town & Country and Fibreboard appear to view the bargainability of subcontracting as an all or nothing proposition, one side taking the view that subcontracting is at all times a bargainable matter and the other the view that subcontracting, at least where it involves discontinuing an entire department or operation, is an exclusive management province. Both views suffer from the vice of over-simplification.

It may be conceded that the question of whether work shall be contracted out at all, as well as the terms and conditions under which work is contracted out, are bargainable issues and appropriate subjects for agreement. But the acceptance of this principle is merely the beginning, not
the end of the analysis. The real question is how sensibly and reasonably to accommodate the obligation to bargain with the practical exigencies of a business operation. Granting the existence of a bargaining obligation, there still remains the question which is presented in constantly changing patterns as to how in each situation this obligation should be fulfilled without imposing restrictions which unduly hamper and stultify management in the exercise of the freedom of decision essential to orderly and efficient operation.

On the one hand, without falling back on the concept of "management prerogative"—a term which implies unlimited power of unilateral action—it is nonetheless correct to say that in the management and operation of a business enterprise there are certain well-defined areas of decision which must be regarded as primarily the responsibility of management. These include decisions as to price, products, processes, work methods and techniques and the whole area of efficiency and economy of operation. It also necessarily includes the ultimate question of whether to continue all or any part of an operation. The question of subcontracting merely presents one segment of the whole bundle of operational managerial problems which must in the nature of things be entrusted, at least initially, to the business judgment of the managers of the enterprise. On the other hand, this is not to say that there is not a direct and legitimate employee interest which under the bargaining relationship should be given due weight and recognition. The problem is thus one of appropriate accommodation of management responsibility and employee rights.

While this accommodation is difficult, it is not impossible. It cannot be found either in the older cliché of management prerogatives or the more recent dogma that all decisions affecting employees' jobs or working conditions impose at all times and in all circumstances a mandatory duty to bargain as a prerequisite to managerial decision and action. The adoption of either of these two extremes precludes any rational accommodation of the legitimate interests of employer and employee in these vital areas of industrial life. Rather, it appears to this writer that the Board's legal analysis in cases involving good faith bargaining over subcontracting should begin with a fundamental factual distinction, which has to this date been ignored in Board decisions. That distinction concerns the presence or absence in a particular case of an existing collective bargaining agreement containing provisions with respect to subcontracting and/or a general arbitration clause. Each situation presents different problems and deserves separate treatment.
1. Where there is no contract, in effect, but there is a union with bargaining status.

This situation may come about as a result of an initial certification or upon the expiration of a fixed term agreement and when negotiations are pending or are in progress. What is the obligation of the employer? The question may arise in several ways. The simplest one is that in which a union proposes an agreement relating to and prohibiting or restricting subcontracting. This is obviously and clearly a bargaining item on which the employer must negotiate and bargain in good faith. This is not to say that he must make a concession. He has the equal right to insist upon retaining the right of full freedom to subcontract when and where he pleases.

But the problem does not end with this simple confrontation at the bargaining table. Those who are experienced in the collective bargaining process know that it frequently requires weeks and even months to negotiate to a conclusion on all of the issues normally raised in the negotiation of an agreement. Under this hypothesis, where there is no agreement in effect and negotiations are in progress, what is the obligation of an employer with respect to subcontracting during the interim while negotiations are in progress? He has no agreement to govern subcontracting; his only obligation at this stage is the legal obligation of good faith bargaining. While he is negotiating, the business compulsion of continuing to operate his business in accordance with sound business judgment cannot be suspended. A machine breaks down requiring an emergency repair, or he hears from his engineering department that parts which he has been producing himself can be purchased more economically from a small parts jobber. The possibilities are infinite. He may have been producing his own packages and he finds that he can purchase packaging at a savings. As in Town & Country, he may discover that he can contract out his hauling at a substantial economy. As still another variation, the employer may find that the advent of the negotiation coincides with a business disaster which requires him to sell or liquidate his business. This may be a rare occurrence, but it can and has happened.\(^\text{16}\)

When any of these or other similar contingencies arise, it presents a question of the employer’s bargaining obligation and its accommodation to his business interest. It is well to remember that here the employer has no contractual obligation to his employees. His only duty is the statutory

one that he conduct negotiations with the employee’s representative in good faith. The bargaining process is an obligatory one but it is explicitly provided that good faith does not require the making of concessions. Emphatically, the process does not vest the union with the veto power over management decisions; nor does it require an employer to maintain the status quo or guarantee the continuity in detail, or in general, of his producing enterprise unless and until he can obtain the agreement of the union to modify or suspend operations.

Yet, the prior submission of the issue by the employer to the bargaining process will in every case require him to defer the action which his business judgment tells him is necessary or at least prudent and will in some types of situations completely negate his power of business decision. This is so because business necessity cannot in many cases await the outcome of protracted bargaining sessions. Once an issue is thrown into negotiations it cannot easily be extricated for the exercise of business judgment and action. It must, under traditional concepts, be bargained out to a conclusion, which means that it must not only be resolved on its own merits but also must await the eventual agreement on all other pending bargaining issues. Or, absent eventual agreement, it must be bargained out to an impasse, another slippery concept involving the employer in great hazard if he miscalculates the precise moment in time when an impasse is reached and he is at last free to take definitive action.

The beguiling language of the Board in the Town & Country case, quoted earlier in this article, stating that its decision in no way restrained an employer from effectuating an economic decision to terminate or compelled an employer to bow to union demands, should not mislead an employer. Behind these words lies a complex and time-consuming procedure constructed from various NLRB precedents. For instance, an employer may still be guilty of a refusal to bargain after agreeing to bargain with the union merely by “unduly” delaying or postponing bargaining sessions; by taking an “adamant” position refusing the union’s demands; by submitting no counterproposals; or counterproposals which are “sham gestures”; or counterproposals which have no reasonable possibility of acceptance because they reduce present employee benefits; by taking inconsistent positions in negotiations, withdrawing offers or con-

cessions or raising new issues tending to frustrate agreement;\textsuperscript{22} by insisting on "non-mandatory" subjects to the point of impasse;\textsuperscript{23} by cutting off negotiations before reaching a "genuine" impasse;\textsuperscript{24} or by refusing to negotiate again after an impasse has been broken.\textsuperscript{25} The list and citations could go on far longer. No criticism is necessarily implied of the result of the cited cases. They do, however, illustrate that the "prior discussion" referred to in the \textit{Town \& Country} case could be more complex and time-consuming than might appear from the language used.

A recent and notable example of economic stagnation caused by the obligation to bargain prior to effectuation of a management decision affecting wages, hours and working conditions is recorded in \textit{Brotherhood of Locomotive Eng'rs v. Baltimore \& O.R.R.}\textsuperscript{26} In that case, which arose under the Railway Labor Act, a large number of carriers served notice on November 2, 1959, of intended changes in work rules. It was only on November 28, 1962, that the carriers received circuit court approval to put such changed rules into effect without the unions' agreement. Yet, the court noted that for the year 1961 alone, the work rules currently enforced cost the carriers $592,062,000.\textsuperscript{27}

This example serves to highlight some of the practical consequences of the Board's error in relying on the \textit{Telegraphers} case for its rationale in \textit{Town \& Country}. Section 6 of the Railway Labor Act with its requirements of notice of intended contractual changes and prohibition on the carrier against altering rates of pay, rules or working conditions until the dispute has been finally acted upon under section 5 of the Railway Labor Act, has no counterpart under the National Labor Relations Act. The tendency of the Board to equate an employer's bargaining obligations under these two different statutes is wholly unwarranted, and can lead only to an extension of the decision-making paralysis so graphically described in the \textit{Locomotive Eng'rs} case.

Moreover, the interests of the employer in preserving freedom of decision and action in the operation of an enterprise is not his concern alone. It is also the concern of the public. It is a matter of public concern that our whole complex of business endeavors be provided the necessary freedom and flexibility to maintain and improve efficiency and economy. This

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\item \textsuperscript{22} Bergen Point Iron Works, 79 N.L.R.B. 1133 (1948).
\item \textsuperscript{24} Lang \& Son, Inc., 102 N.L.R.B. 1667 (1953).
\item \textsuperscript{25} Sharon Hats, Inc., 127 N.L.R.B. No. 199 (1960).
\item \textsuperscript{26} 310 F.2d 503 (7th Cir. 1962), aff'd 31 U.S.L. Week 4240 (March 5, 1963).
\item \textsuperscript{27} Id. at 507.
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is essential to our national welfare and the preservation of a competitive position in the world.

This interest is so great that it might suggest that the essential rights of management to resolve these business problems should not be compromised by the collective bargaining process. Our national policy, however, as expressed in the labor laws, is also dedicated to fostering collective bargaining, and there can be no doubt that these matters are within that orbit. These are questions which do affect the conditions of employment of employees, and therefore a certain conflict of policy is latent in the situation which calls for a compromise or accommodation of rights and interests.

As mentioned previously, such an accommodation is difficult but not unattainable. It may be at least approximated by the application of a rule of reason in the context in which the question arises. In the situation where an emergency repair is required and other situations calling for subcontracting which arise during a negotiation period, it would appear that we need only determine what is required of the employer to manifest his good faith. It would appear reasonable to suggest that an employer be left free during this period to conduct his business in accordance with his business judgment and without the necessity for bargaining out the issue so long as he is motivated solely by business considerations and so long as he does not take action of a permanent character which has the effect of removing the subject matter from the bargaining table. Conversely stated, the employer should be left free to operate his business during the pre-agreement stage, but he should be required to accept the subject matter as a bargaining issue and make no arrangements, contractual or otherwise, which would foreclose negotiation of an agreement on the matter in question subsequent to the business decision which has been made.

To illustrate, in the simple case of machine repair, the employer should be allowed to contract out the work during negotiations without prior bargaining on each occasion. However, if subcontracting of machine repairs is made an issue in the bargaining, he should be required to bargain in good faith and should make no subcontracting commitments of a permanent nature that would interfere with his making an agreement of a different kind on the subject.

Such a rule, and such a modus operandi, would cover most subcontracting situations, and would impose no undue hardship on either employer or employees. It would, of course, be understood that any subcontracting arrangements or practices entered into while negotiations are pending
would have to yield to and be readjusted to conform to the terms of the agreement after it became effective.

This approach, however, would not solve a question such as presented in *Town & Country* where business necessity might require the elimination by subcontracting or, indeed, by liquidation of the entire bargaining unit or any substantial part of it. In this context, the effect on employees is permanent and not merely temporary and cannot be rectified by the subsequent agreement. On the other hand, the economic necessity for the employer to move quickly may be even more pressing.

In such a case, it seems reasonable to require the employer to demonstrate his good faith by notifying the union of his plans and by presenting to the union the economic considerations which influenced his decision. He should also be required to negotiate in good faith as to terminal pay or other terminal benefits for the employees whose jobs will be affected. Setting aside any issue as to discriminatory motivation which is remediable under section 8(a)(3) of the act, however, an employer who acts solely for economic considerations should still be free in the exercise of his business judgment to eliminate or subcontract all or any part of his operation. Otherwise, a union certification becomes something it was never intended to be—a guarantee of employment for the members of the bargaining unit.²⁸ Nor should the employer be required, by virtue of submitting the subject to the bargaining process, indefinitely and interminably to postpone action in order to satisfy a theoretical requirement of good faith bargaining. Realistically, it is too much to expect that the union would or could ever agree to the elimination of jobs for its members, and therefore the union would customarily follow the strategy of delaying as long as possible the reaching of a conclusion to the bargaining.

The Board language in *Town & Country*, stating that "prior discussion" of the issue is all that the act requires might be construed to mean that an employer need only notify the union of his decision and grant the union an opportunity to be heard, after which the employer would be free to implement his decision. The language referred to might suggest that the Board does not contemplate long, drawn-out discussions. If this is the inference, and if the Board will apply a realistic rule as to the employer's obligation in this context, this would be a significant step forward in alleviating employer fears that the imposition of the bargaining requirement will effectively deprive them of the practical power of decision. Specifically, the suggestion here is that the employer should be held to

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have discharged his bargaining obligation on the basic decision by notification to the union and by presenting to the union the economic considerations governing his decision. No protracted discussion or so-called bargaining to an impasse should be required, nor should the complex panoply of Board rules applicable to bargaining for a collective bargaining agreement be applied so to deprive the employer of his initial decision-making responsibility. With respect to the subject of terminal benefits, however, there is no reason why the employer should not take whatever reasonable time as is necessary to explore fully and negotiate this issue to a conclusion.

These conclusions are supported to some extent by the decision of the Second Circuit in *NLRB v. Rapid Bindery, Inc.* In that case the employer failed to notify the union he was bargaining with for an initial contract about his plans to transfer the operation. The court held:

The decision to move was not a required subject of collective bargaining as it was clearly within the realm of managerial discretion. However, once that decision was made, § 8(a)(5) requires that notice of it be given to the union so that the negotiators could then consider the treatment due to those employees whose conditions of employment would be radically changed by the move.

2. *Where there is a contract in effect.*

Where there is a labor agreement in effect, the problems of subcontracting as well as other relationships between employer and employee are reduced to more manageable dimensions. In the normal case, all issues should be resolved within the context of the agreement, and there should be no occasion for intervention by the National Labor Relations Board.

The particular agreement may treat the problem of subcontracting in a wide variety of ways, ranging from no specific mention of it to explicit and detailed treatment of the entire problem. The agreement may permit subcontracting on certain terms, it may prohibit it entirely, or it may commit the matter wholly to the discretion of the employer. Whatever may be the treatment of subcontracting agreed upon, this constitutes the bargain for the period of the agreement, and the terms of the agreement should govern.

*Town & Country* and more particularly *Fibreboard* would appear to suggest that, regardless of the existence of a collective bargaining agreement, there remains a more general obligation under the NLRA to bargain out any subcontracting problems that may arise. It is to be hoped that

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29 293 F.2d 170 (2d Cir. 1961).
30 Id. at 176.
the Board intended no such inference. Where an agreement exists, any employer who subcontracts work must be prepared to validate his action by reference to the agreement and any violation of his contract obligation can be rectified by the reference to arbitration or the courts.

In contracts containing a general arbitration clause, such as existed in the Fibreboard case, the Board’s bargaining order could conflict with the arbitration process. In United Steelworkers of America v. Warrior & Gulf Nav. Co., the Supreme Court held that a management decision to subcontract and its consequences were subject to the general arbitration provisions of a collective bargaining agreement, which contain no provisions on subcontracting, even where the arbitration clause reserved strictly management functions from arbitration. It can, therefore, be well argued on the basis of the Supreme Court’s Warrior & Gulf case, that even where subcontracting is not expressly and specifically covered in a collective bargaining agreement with a general arbitration clause, the employer’s duty to bargain in good faith about its decision to subcontract and its effects should be limited to processing a grievance through the arbitration process.

In the Warrior & Gulf case, Mr. Justice Douglas specifically provided that “the present federal policy is to promote industrial stabilization through the collective bargaining agreement.” Following this statement, a footnote was appended which stated:

In § 8(d) of the National Labor Relations Act . . . Congress indeed provided that where there was a collective bargaining agreement for a fixed term the duty to bargain did not require either party to discuss or agree to any modification of the terms and conditions contained in the contract.

Thus, a bargaining order by the Board in a case where a collective agreement contains an arbitration clause not excepting subcontracting from its scope would interfere with and oust the arbitrator’s jurisdiction. Such a result is plainly out of harmony with the Supreme Court’s opinion in the Warrior & Gulf case.

This is not to say that the Supreme Court’s apparent view of a collective agreement as an all-encompassing document under which all the disputes are resolvable does not itself pose serious problems. Employers had heretofore thought that matters not specifically bargained away remained in the employer’s exclusive province. The Court, however, adopting a

31 363 U.S. 574 (1960).
32 Id. at 578.
33 Id. at 578 n.3.
broad rule of construction of arbitration clauses, has brought within the ambit of arbitration all issues not specifically excluded. This does, however, have the merit, in terms of stability, of bringing all issues within the scope of the agreement and thus avoiding the instability that might arise from disputes for which there exists no contractual method of resolution.

Whatever qualms employers may have about the license given arbitrators by the Supreme Court's decision, the salutary thrust of the Court decisions in terms of their impact on the bargaining process clearly emerges. The lesson which the NLRB should draw is that the agreement and the procedures for settling disputes which are established by the agreement determine the full scope of the bargaining obligation during the term of the agreement. The generalized obligation to bargain collectively is thus translated into specific terms which themselves fix the extent of the obligation and the conditions of its fulfillment. This principle applies to subcontracting with as much force as it does to all other aspects of the relationship. The Board should indeed welcome the opportunity to leave this issue to the established contract procedures.34

The discussion in Warrior & Gulf of an employer's duty to bargain in good faith during the term of a contract about subjects on which the contract is silent necessarily brings into focus the doctrine of NLRB v. Jacobs Mfg. Co.35 There the court was called upon to construe that rarely interpreted portion of section 8(d) of the act, commented on in the Warrior & Gulf case, which provides:

[T]he duties [to bargain in good faith with respect to wages, hours and working conditions] so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period if such modification is to become effective before such terms can be reopened under the provisions of the contract.36

In the Jacobs case the employer and union had negotiated a two-year contract which contained a reopening clause after one year which was limited to discussion of wage rates. The agreement contained no provision on a group insurance program, nor was there any evidence of discussion

34 It is, perhaps, appropriate to note at this point that the General Counsel has commented on the increase in the NLRB case load resulting from refusal to bargain charges against employers resulting from economic decisions made by employers to terminate a part or all of a particular operation. Office of the General Counsel, National Labor Relations Board, Summary of Operations, Calendar Year 1962, at 124.
35 196 F.2d 680 (2d Cir. 1952).
of such a program in the negotiations. After a year had passed the union proposed a group insurance program which the company declined to discuss on the ground that it was not within the terms of the reopening clause. The employer contended that the above-quoted portion of section 8(d), except for subjects expressly reserved for further negotiations, created a static period in the entire industrial relationship between the parties for the term of the contract, even as to aspects of the relationship not expressly covered in the contract or negotiations leading up to the contract.

The court ruled that the language of section 8(d) should be given a more limited construction. The court spoke of the conflicting objectives of the act in encouraging employers to bargain about employee demands whenever made on the one hand, and in encouraging stability of contracts governing industrial relations on the other. Turning to the language of section 8(d) the court ruled:

Since the language chosen to describe this exception [to the requirement of bargaining] is precise and explicit, "terms and conditions contained in a contract, for a fixed period," we do not think it relieves an employer of the duty to bargain as to subjects which were neither discussed nor embodied in any of the terms or conditions of the contract. . . . In so deciding, however, as we have already indicated in commenting on the Board's ruling concerning the group insurance issue, we do not intend to pass upon the effect, if any, on the duty to bargain of mere previous discussion of a subject without putting any terms and conditions as to it into the contract.87

The Board has interpreted the quoted portion of section 8(d) to mean that an employer need not bargain with a union during the term of the contract over a subject which has been covered specifically in the agreement. Even if the subject is not covered specifically in the agreement, the employer need not bargain during the term of the agreement about a subject on which the parties bargained, if it can be shown from an evaluation of the prior negotiations that the matter was fully discussed or consciously explored and the union consciously yielded or clearly and unmistakably waived its interest in the subject.88

The Warrior & Gulf case appears to throw considerable doubt on the continuing validity of the Jacobs case. Since the Supreme Court has accorded such preeminence to the role of arbitration, even where the arbitration clause does not expressly cover the subject under discussion, a rule more consistent with the Supreme Court's philosophy and the language of

87 196 F.2d at 684.
section 8(d) would hold that a contract for a term containing a general arbitration clause “covers the whole employment relationship,” and thus does create a static period between the employer and his employees for the term of the contract, insofar as new negotiations for contract terms is concerned, even with respect to subjects not covered expressly in the contract or discussed in negotiations. The arbitration clause has now assumed the status of the exclusive method or procedure by which matters unsettled in the contract language and not excepted from the scope of the arbitration clause, are to be settled between the parties during the term of an agreement without recourse to the courts.

The Jacobs doctrine, it is submitted, was never valid. Despite its promulgation several years ago, employers have never accepted it, and unions have not made any real effort to exploit it. A common-sense respect for the rules of the game rejects it as both unfair and unstabilizing. The more practical and realistic view of the collective bargaining process is that the agreement which emerges from the entire complex of proposals and counter-proposals constitutes the whole agreement between the parties, and the unspoken premise is that matters not raised or discussed are just as effectively disposed of as matters specifically excluded or included in the agreement. Both employer and union bargain for a certain economic package for a certain term, and both parties understand the agreement to be a complete package. Any other view makes an agreement for a fixed term wholly illusory from both a union and a management point of view.

This does not mean that the obligation to bargain is suspended during the term of agreement. It simply means that bargaining moves into a more orderly and controlled phase in which issues are not to be resolved by negotiation in the initial sense, but by recourse to the machinery and procedures spelled out in the collective agreement. Agreements are enforceable through grievance and arbitration procedures and through the courts with the result that there is no necessity for the superimposition by the NLRB of a more generalized bargaining obligation.

Thus, the Board order in the Fibreboard case to bargain collectively with the union over the question of subcontracting is in reality an order to re-negotiate a matter which had been settled by the parties under their collective bargaining agreement, either through the contract’s termination of employment provisions or through the arbitration clause. Although it is true that the agreement in Fibreboard was about to expire when the decision to subcontract was made, the Board’s opinion appears to render

irrelevant the contractual status of the parties. It is not, however, too
difficult to imagine the situation in which one year after the parties have
agreed to a three-year contract containing an arbitration clause and/or a
clause covering subcontracting, an employer decides to subcontract busi-
ness contemplated in the agreement. Where is the appropriate forum for
the union to protest? In this situation an order by the NLRB for the
employer to negotiate the question of subcontracting is plainly subversive
of the stability of the existing agreement. It provides the union with an
opportunity to gain at the time of the decision to subcontract what it
could not obtain under the contract at the time it was negotiated. Espe-
cially if the parties have so indicated in their agreement, the terms of the
agreement should not have to be renegotiated every time management
makes a decision affecting wages, hours or working conditions pursuant
to, or even in contravention of, the agreement. Under the circumstances
posed above, the union's demand for bargaining when the decision to sub-
contract is made is simply unseasonable. At this point in time the issue,
if there be any, should be in the hands of the arbitrator, not on the
bargaining table.

Presumably the Board would agree, although this is by no means clear
at this writing,\(^1\) that if there were a contract in effect categorically and
explicitly stating the terms under which work could be contracted out, the
employer could safely act in accordance with the terms of the agreement.\(^2\)
But in the situation where there is a contract in effect which is silent on the
subject, the Board would presumably say that the employer could not
subcontract work without first notifying the union of his intention to do
so, and then, upon request, engaging in good faith bargaining as a pre-
requisite to any implementation of his decision.

It is primarily this view of the trend of Board decisions which has
caused consternation in management circles. Heretofore, management had
thought that if the agreement did not restrict subcontracting, the ques-
tion had been left to management discretion. While some trepidation was
caused by the earlier Supreme Court decisions which held that, unless ex-

\(^1\) The termination of employment provision in the Fibreboard contract appears to have
been expressed solely in terms of the computation of vacation pay in the event of termination.

\(^2\) If this premise is valid, the Town & Country and Fibreboard cases will result in
placing added pressures upon contract negotiators to obtain explicit subcontracting clauses,
though the decision to subcontract may not be imminent, and although the parties heretofore
relied upon an unspoken agreement on the subject which either or both parties, for various
reasons, did not wish to spell out expressly in the agreement. An agreement setting out the
right to subcontract, the conditions of subcontracting, and the effects thereof may now be
the parties' only real defense against the vicissitudes of piecemeal bargaining or arbitration.
pressly excluded, subcontracting was still an arbitrable matter under a standard arbitration clause, this ruling at least left the initial decision-making to management, subject to later rectification through the grievance and arbitration procedures. The imposition by the Board, however, of a broader obligation to bargain on the issue prior to taking action has the practical effect of taking away the power to make decisions in an area of essential management responsibility affecting the very life blood of a business enterprise.

CONCLUSION

Recent Board decisions relating to subcontracting, and related issues such as partial or total discontinuance of business operations, bring into critical focus the potentially conflicting rights of managers to manage a business and the rights of employees to organize and bargain collectively on issues affecting their jobs and welfare. The national interest lies, or at least is presumed to lie, in the preservation of the freedom of management to make and implement business decisions which in their honest and informed judgment are necessary to the health of the enterprise and of the right of employees to have a collective voice in the determination of the wages and conditions under which they work.

The problem which these potentially conflicting national policies present is the age-old one of a practical and wise accommodation of interests. This problem is made more difficult because of the dynamic and highly competitive nature of a free enterprise industrial society. Intra and intermural, as well as world-wide competition between firms, products, and even nations has in recent years become more intense and will become even more so with the development of the Japanese, West German, and Russian economies and with the advent of the European Common Market. These interlacing competitive factors coincide and bear down on a particular employer in a particular business and impose upon him the hard necessities of business survival. Employers must of necessity, therefore, become more cost-conscious and must have the means and the freedom to expand and contract their operations, to eliminate one operation or add another, to install new processes and discard old ones, to eliminate jobs or change their content, and indeed, to give up the ghost entirely if competitive factors dictate the economic necessity.

One inevitable result of the interaction of these economic forces in a dynamic society is the temporary dislocation of employment and the decreased job security of particular employees in particular jobs for particular employers. Despite these dislocations, a healthy and rising
economy should, as our economy has in the past, continue in the aggregate to supply more and more jobs for more and more people. The character of these jobs and the places where they develop will, of course, follow a changing pattern, and industrial workers displaced from a job may face serious problems in adapting to a changing work force.

It would appear, however, that to a large extent this problem of dislocation and relocation is a national one calling for the combined efforts of the whole of the nation, and is, by and large, not one which can be left to the traditional processes of collective bargaining between each employer and his employees for solution. Almost by definition, the employer faced with such dire economic necessity as to require him to reduce his work force, to contract out part of his work, or to go out of business entirely is the least equipped to contribute to the alleviation or solution of the employee dislocation and hardship which is an inevitable concomitant of his business distress.

The trend of NLRB doctrine is toward imposing an absolute obligation upon the employer to withhold until they have been submitted to the process of collective bargaining the making of business decisions which affect employee welfare. Yet in the main, the submission of business judgment to the process of negotiation will prove not only time-consuming but in the end fruitless. Where business necessity for it exists, it is unlikely that an employer could be persuaded to alter his decision, and it is equally unlikely by the very nature of their responsibility that unions will agree to the elimination of jobs for their members. The end result of the application of Board doctrine to the whole complex of business decisions in this area will only be to create time lags of substantial and sometimes interminable duration between necessity and action, and thus impose severe obstacles to our over-all industrial efficiency and economic growth. The extension and refinements which the Board seems about to emboss on the bargaining obligation can only represent a Pyrrhic victory for the union. The consequences can only be frustration and stalemate on all sides.

Collective bargaining is not an end in itself, nor is it a magic formula for the disposition of all the industrial and social problems of our times. It was originally designed as a mechanism for giving employees a collective voice in advancing their own cause in the area of wages, hours and condition of work. In the accomplishment of this salutary objective it has and will continue to serve a worthwhile social purpose, wholly consonant with American ideals. The danger now is that it will by the process of a mechanistic extension into an area uniquely and by nature
reserved for management decision and action become an instrument for stalemating business decisions and impeding economic growth.

As has been suggested in this article, this result can be avoided without real sacrifice to the gains which employees have made and can continue to make in the protection of their own rights through the collective bargaining process. This will require a careful and discriminating case-by-case approach by the NLRB and the courts to the rights and obligations of employers in this sensitive area. It will also require a keener appraisal of all the relevant interests and a greater appreciation of some of the fairly obvious facts of industrial life.
McDONALD v. UNITED STATES: THE DURHAM RULE REDEFINED

DAVID C. ACHESON*

Briefly examining the inequities which have arisen under the Durham rule of criminal responsibility, as developed in the District of Columbia, the author suggests that many of these imbalances have been eliminated by the recently decided McDonald v. United States. Mr. Acheson points out that not only have the problems presented the prosecution by the elusive product question been reduced, but also that under McDonald the defendant is much less likely to get a directed verdict of not guilty by reason of insanity merely because "some evidence" of insanity has been introduced and gone unrebuted. He concludes by stating that although McDonald can be expected to have little effect upon psychiatric testimony in criminal trials, it is nevertheless a significant step toward the achievement of a test of mental responsibility which is fair to defense and prosecution alike.

INTRODUCTION

A few weeks ago the Temporary Commission on Revision of the Penal Law of New York asked me to submit to the New York state legislature a statement of our experience in the District of Columbia with the Durham rule of criminal responsibility.¹ In response, I put down my own views of the Durham rule, and the successor rules laid down in McDonald v. United States,² together with some thoughts on their relative merit or demerit versus the New York proposal, and what follows is substantially the text of the statement that I submitted. These observations will serve, I hope, as a useful review of local developments in criminal responsibility, of at least as much interest to the legal profession in the District of Columbia as to the New York legislature.

While this is not the place for theorizing, I would like to fix a starting point for what I have to say. It is important to be certain precisely for what purpose a rule of law is to be used. To me a rule of criminal responsibility ought to answer two purposes. First, it must be a test of responsibility. This means that we accept the axiom that some moral choice must be made between the guilty and the innocent, between those who are morally culpable and are to be punished and those who are not. If a moral choice is not to be made, it is nonsense to talk of criminal respon-

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¹ The New York legislature is presently considering a proposal to adopt the American Law Institute's formulation in lieu of the rather strict version of the M'Naghten rule now obtaining there. This proposal is cast as an amendment of section 1120 of the Penal Law.

sibility. And if responsibility is the blossom that we are trying to pick from the thorns, the test of responsibility must measure the degree of choice open to the defendant. A test of responsibility should not be shaped to irrelevant uses—such as determining merely whether the defendant needs mental treatment, or whether his mental condition made it more or less likely that he would commit the criminal act. Nor should we be diverted by the skepticism of psychiatrists toward the validity of the concept of moral culpability. We have passed beyond that crossroad, if we are at the point that we are looking for a rule of responsibility.

Second, the rule must be one that is not incomprehensible to juries. It must recognize the fact that the issue of responsibility is decided by the unscientific process of litigation, and the rule must define the issue in a way that permits jury determination in more or less familiar terms without throwing the ultimate issue open to hopeless speculation.

At the risk of slight over-simplification, I should like to emphasize that the Durham rule, as it is commonly known, is no longer the law in the District of Columbia. It was modified in basic part by McDonald v. United States,\(^3\) decided by the United States Court of Appeals for the District of Columbia Circuit sitting en banc, on October 8, 1962. My discussion will take up Durham before McDonald, then the new rules laid down in McDonald, then the practical application of both standards by psychiatrists in the District of Columbia.

The Durham Rule

Durham is best understood as a shorthand expression for the basic rule of responsibility laid down in Durham v. United States,\(^4\) as the court of appeals applied and interpreted it in eighty-odd cases over a period of eight and a half years, plus a number of subsidiary rules laid down in court decisions in which criminal responsibility was an issue. Space only permits a highlight examination of the sedimentary deposit subsequently added to Durham up to the time of McDonald.

Durham was decided in 1954. The rule of the case was, and is, that a person is not responsible for a criminal act if he suffered at the time from a mental disease or defect and if the act was a "product" of the disease or defect. On its face it would appear a reasonable rule calling for inquiry into mental affliction and its causal connection with the criminal act. But very serious problems have arisen in applying the rule over the years, to the point that it was not well focused as an inquiry into responsibility, it

\(^3\) Ibid.

was confusing to juries, judges, and medical witnesses alike, and it set a series of traps in the path of the prosecution which, in my judgment, did not serve the interests of justice.

1. One major criticism of Durham has always been that "product" was too vague a term. "Product" in what sense? How should the trial judge explain "product" to the jury in his instruction? What causal mechanisms should the medical witness describe to the jury and the jury search for in the evidence? As practice developed, the juries could expect precious little guidance from the medical witness or the judge. Psychiatrists, of course, do not define the legal term "product." Many believe that it is impossible to say whether a particular act is the product of a mental disease and those psychiatrists customarily express no opinion on that issue. One effort was made by the court of appeals to explain "product" in terms of a variety of causal synonyms:

When we say the defense of insanity requires that the act be a "product of" a disease, we mean that the facts on the record are such that the trier of the facts is enabled to draw a reasonable inference that the accused would not have committed the act he did commit if he had not been diseased as he was. There must be a relationship between the disease and the act, and that relationship, whatever it may be in degree, must be, as we have already said, critical in its effect in respect to the act. By "critical" we mean decisive, determinative, causal; we mean to convey the idea inherent in the phrases "because of," "except for," "without which," "but for," "effect of," "result of," "causative factor"; the disease made the effective or decisive difference between doing and not doing the act. The short phrases "product of" and "causal connection" are not intended to be precise, as though they were chemical formulae.

This decision turned jury instructions toward circular definitions for a brief period, but these definitions were not widely followed by trial judges. Some trial judges attempted to explain the "product" concept in terms of particular causal mechanisms of which there was evidence in the particular case. For example, in Campbell v. United States the issue of "product" was tried by both sides on the question of the defendant's ability to exercise good judgment and his ability to control his conduct. The trial judge's instruction to the jury explained "product" in those terms—the terms chosen for litigation by the parties themselves. But a divided panel of the United States Court of Appeals for the District of Columbia (2-1) reversed the conviction, holding that the capacity-for-control test was only one type of the causal relationships that were possible under Durham,

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5 The effect of such a disclaimer is treated p. 583, infra.
and that the instruction had erroneously narrowed the jury's understanding of "product" by excluding other possible causal standards. The majority did not attempt to point out what other type of causal connection was possible. Rehearing of the case en banc was sought, but was denied by a margin of one vote.

A related difficulty with the "product" concept is the attitude toward it that has evolved among medical witnesses. Their prevailing view is that, while occasionally one can say that an act was a product of mental disease, one can rarely if ever say that an act was not a product. To analogize, one can sometimes find a needle in the haystack, but one cannot find that there is not a needle in the haystack. The consequence of this view is that when the psychiatrist can come to a firm opinion on the issue of "product," it is almost invariably in favor of the defendant. No dice could be more loaded than this. It is not the fault of the psychiatrist. When the test of causal connection is as limitless and vague as the "product" concept, certainty can only exist on the affirmative finding, never on the negative.

Part of the problem is that medical witnesses are permitted under Durham to testify to an ultimate issue in the case, the "product" question. This practice carries both a legal and a practical evil. Legally, a witness is supposed to limit his testimony to fact or to expert opinion. "Product" is neither. It is a legal-factual ultimate conclusion, analogous to the issue of negligence, on which surely no witness would be permitted to speak. Practically, "product" is quite outside of the normal, expert frame of reference of the witness. It is a judgment that most psychiatrists do not make professionally in diagnosis or treatment.

2. A second major difficulty with the "product" rule has been a virtually automatic presumption, once mental disease is shown, that the act was a product of the disease. This presumption arises immediately upon a bare showing of mental disease, without any evidence of a causal connection. If the defendant can show "some evidence" of mental disease, and if the medical witnesses say they don't know whether or not the act was a product, the government loses on directed verdict for failure to carry its burden of proof beyond a reasonable doubt. The rule that the defendant is required to raise the issue by showing "some evidence" of mental disease does not apply to the second prong of the responsibility test. Under the rule of Frigillana v. United States "some evidence" of causal connection or "product" is not necessary.\(^8\)\(^9\)

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\(^8\) The phrase comes from Davis v. United States, 160 U.S. 469, 486 (1895).

Of course, there is a presumption of sanity in the District of Columbia, as elsewhere, but under the case law of which Frigillana was the most recent expression, that presumption is overcome by a showing of "some evidence" of mental disease. Thereafter, the government must prove beyond a reasonable doubt the absence of mental disease or that the act was not a product of the disease. The latter element cannot be proved in the typical case in which the psychiatrist will not or cannot express an opinion on the question. And so, as a practical matter, every case must be fought by the prosecution on the absence of mental disease, or not fought at all. "Product" is thus read out of the Durham rule in practice, by the automatic, trap-like operation of the presumption of a causal connection. The irony of this is particularly biting when one recalls that one of the chief arguments advanced for the Durham standard was that it took account of "psychic realities and scientific knowledge."\(^{10}\)

Naturally, the presumption of causal connection has produced many situations in which either a verdict is directed against the government, or it is forced to go to trial before a judge, on a waiver of jury trial, and take an uncontested judgment of acquittal by reason of insanity. An interesting example of a directed verdict situation is the state of the record on the "product" question in Wright v. United States.\(^{11}\) Eleven psychiatrists testified, all called by the defendant. No opinion was elicited by defendant from five. The opinions the others expressed on the "product" issue were in various shades of doubt. Two witnesses stated they had "insufficient data to support an opinion"; one said that it was "likely" there was a causal connection; another said there "could very well be" a causal connection and another that it was "surely possible"; one of the eleven answered "Yes" to a hypothetical question. The court of appeals, on this state of the record, held that the government failed to sustain its burden as a matter of law, and reversed the conviction. Such a state of the record is not unusual in the degree of its ambiguity on the issue of "product."

3. As a final criticism, the state of the law under Durham requires of the defendant too slender a quantum of evidence of mental disease, to overcome the presumption of sanity. "Some evidence" is the historic rule.\(^{12}\) As interpreted in our circuit, this has been something akin to a "scintilla." As an illustration of how insignificant "some evidence" could be, one defendant took the witness stand and speculated that he "must

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have been insane." On cross examination he testified that he was not insane, but would like to be because he preferred Saint Elizabeths Hospital to jail. The court of appeals held that the presumption of sanity was overcome so as to raise the insanity issue, solely by virtue of this testimony.\textsuperscript{13} Such a standard has often brought the issue of responsibility into the case when there was not enough evidence to litigate the issue intelligibly to a jury, and naturally has encouraged surprise tactics by defense counsel. Trials have frequently been chaotic and preparation has lost much of its power to forearm.

Believing that \textit{Durham} and its subsidiary rules had become so capricious and burdensome as to be tolerable no longer, the United State's Attorney's office prepared and urged in 1962 a brief legislative act based upon a proposed section of the American Law Institute Model Penal Code.\textsuperscript{14} Subsequently the court of appeals handed down, \textit{en banc}, a unanimous (for this purpose) opinion in \textit{McDonald v. United States}.\textsuperscript{15} In this decision, I believe, the law has taken a significant new direction, and much for the better.

\section*{The New Rules}

In \textit{McDonald v. United States} the court of appeals reversed a conviction of manslaughter for a faulty jury instruction. Important new rules were laid down, which, since they were provided as guidance for a new trial, have stature far greater than mere dicta. A panel of the court heard argument, and rehearing \textit{en banc} was ordered \textit{sua sponte}. So far as the points under discussion here are concerned, the new rules were unanimously supported by the full court.

1. The court pointed out in \textit{McDonald} that, contrary to the government's contention, sufficient evidence of mental disease was present to require a jury instruction on criminal responsibility. The issue is raised by "some evidence" which must be "more than a scintilla, yet, of course, the amount need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal."\textsuperscript{16} After \textit{Clark v. United States},\textsuperscript{17} this statement would appear to tighten the standard of "some evidence" considerably.

2. Possibly the most significant portion of the court's opinion in \textit{McDonald} dealt with the standards for directed verdict. The court firmly

\begin{itemize}
\item \textsuperscript{13} Clark v. United States, 104 U.S. App. D.C. 27, 259 F.2d 184 (1958).
\item \textsuperscript{14} Model Penal Code § 4.01 (Proposed Draft, 1962).
\item \textsuperscript{15} No. 16,304, D.C. Cir., Oct. 8, 1962.
\item \textsuperscript{16} Id. at 3-4.
\item \textsuperscript{17} 104 U.S. App. D.C. 27, 259 F.2d 184 (1958).
\end{itemize}
knocked on the head the notion that affirmative government evidence of responsibility is necessary to avoid a directed verdict. The court said:

It does not follow, however, that whenever, there is any testimony which may be said to constitute “some evidence” of mental disorder, the Government must present affirmative rebuttal evidence or suffer a directed verdict. A directed verdict requires not merely “some evidence,” but proof sufficient to compel a reasonable juror to entertain a reasonable doubt concerning the accused’s responsibility. . . . Whether uncontradicted evidence, including expert opinion evidence, which is sufficient to raise a jury question on the mental issue is also sufficient to require a directed verdict depends upon its weight and credibility. . . . Davis v. United States, 160 U.S. 469, clearly supports this position. There the Supreme Court said that the jury, in considering an insanity plea, must weigh all the evidence, including the presumption of sanity. Id. at 488. Whether uncontradicted expert testimony overcomes the presumption depends upon its weight and credibility, and weight and credibility ordinarily are for the jury.18

As a practical matter this amounts to saying that every issue of criminal responsibility must go to the jury, a very great improvement in the law from a prosecutor’s point of view and a rule that does neither side an injustice. Subsequent to McDonald, decisions of the court of appeals have made it clear that the court will not revert to an evidence-weighing process in passing upon appellants’ claims that a verdict should have been directed. They have adhered to the approach expressed in McDonald.19

3. Perhaps, the most significant part of the McDonald opinion is the court’s handling of the causal connection problem. The court changed the standard of responsibility, in effect, from a two-step finding of (1) mental disease and (2) causal connection to a one-step analysis. This was done by a definition of “mental disease” in the following terms:

[A] mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. Thus the jury would consider testimony concerning the development, adaptation and functioning of these processes and controls.20

By this standard a mental condition must have behavioral consequences to qualify as “mental disease” for legal purposes. Thus, the psychiatrists’ terminology does not control the question of “mental disease,” but rather the consequences of the mental condition control it. “What psychiatrists may consider a ‘mental disease or defect’ for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or

defect for the jury's purpose in determining criminal responsibility."\(^{21}\)
The recognition of this dichotomy of the medical and legal standard is long overdue and the candid handling of it in *McDonald* should bring much clarity to the confusion wrought by medical witnesses' testimony. It may be, though the court has not yet so ruled, that it will be improper to put the question to a medical witness: "Doctor, on the basis of your examination of the defendant and his medical record, was he, on January 2, 1963, in your opinion, suffering from a mental disease?" Under the old *Durham* rules, this question was a common one, and an affirmative answer could wrap up the ball game.

While *McDonald* does not formally abolish the "product" element, it does reduce its significance. It is apparent that a finding of "mental disease," with the consequences required under *McDonald*, much reduces the significance of a second-step finding that the crime was the "product" of the disease. Once the jury finds that the effects of the mental disease are present which *McDonald* requires, the issue of "product" relation with the crime will in many cases be virtually decided. If the jury finds the defendant suffering from a mental condition which impairs his control over his behavior, which is the *McDonald* standard, then it is an easy jump to the finding that the mental condition caused the particular behavior involved in the criminal case. The government's burden of proof is substantially redistributed—not reduced, but redistributed.

Under *McDonald* the government has the burden of proof beyond a reasonable doubt to show that the defendant was not suffering from a mental disease which impairs control of behavior, or that the crime was not a product of that disease. Where a defendant did in fact not suffer from *that kind* of mental disease, it will probably be less difficult for the government to carry its burden than it was under *Durham* to prove that the defendant did not suffer from a mental disease of *any kind*. But if the jury finds against the government on that issue—that is, finds that the defendant suffered from a mental disease which impaired his control of behavior—it will be more difficult under *McDonald* than it was under *Durham* to prove that the criminal behavior was not caused by the mental disease. If control over behavior in general is found to be impaired by the mental disease, it will be virtually impossible for the government to sort out the particular criminal act and show that it alone of the defendant's total conduct was not the result of that impairment. This is not to say that the *McDonald* standard makes the government's case harder, but

\(^{21}\) Ibid.
only that the case will swing more completely on the issue of mental disease. As prosecutors, we are, on the whole, better off.

In this respect the McDonald rule is not dissimilar to the standard of responsibility proposed in section 4.01 of the American Law Institute Model Penal Code and proposed for New York. Under the ALI rule, there is no question of causal connection between mental condition and the particular crime, but only on examination of mental condition and its behavioral consequences. Under McDonald, the causal connection between mental condition and the particular act is still involved, but it is the caboose on the train. Its direction is determined by the finding of behavioral consequences of the mental condition.

**Medical Practice under Durham and McDonald**

So much for legal experience under Durham and for the legal changes wrought by McDonald. It remains to examine the application of the two by the psychiatrists, chiefly those at Saint Elizabeths Hospital, where most of the defendants are examined.

After pre-trial mental examination under D.C. Code §24-301, the practice of both Saint Elizabeths and D.C. General hospitals has been to report to the court on mental condition and causal connection with the crime. The report identifies a mental disease, if any, and states an opinion one way or the other, or demurs, on the question whether the act was a "product." There is reason to believe that the more experienced doctors are reluctant to make a finding of mental disease without some evidence of its effect on conduct. They tend to look for behavioral consequences, as one element of mental disease, in rather the fashion suggested in McDonald. This was medical practice under Durham even before McDonald. The practice appears to have resulted partly from the native skepticism of doctors and partly from an awareness on their part that the "mental disease" finding was to be used for a criminal responsibility test and therefore should have a built-in relevance to responsibility for behavior and to the defendant's power of choice.

Such an approach to the finding of mental disease is not, in many cases, used by the more junior staff psychiatrists. On the contrary, many of the junior medical staff appear to approach the question from the opposite angle, and seem disposed to infer mental disease from the starting point of criminal conduct. The result of this approach, of course, is to resolve both the mental disease question and the "product" question against a finding of responsibility.

It is more owing, perhaps, to the liberal trend in medical analysis, than
to the legal standards of *Durham*, that there has been a steady and rapid increase in acquittals by reason of insanity in the District of Columbia. The statistical experience is as follows:22

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Defendants tried</th>
<th>Defendants acquitted by reason of insanity</th>
<th>Percentage insanity acquittals of defendants tried</th>
</tr>
</thead>
<tbody>
<tr>
<td>1953</td>
<td>1017</td>
<td>3</td>
<td>.29%</td>
</tr>
<tr>
<td>1954</td>
<td>600</td>
<td>9</td>
<td>1.5</td>
</tr>
<tr>
<td>1955</td>
<td>485</td>
<td>12</td>
<td>2.5</td>
</tr>
<tr>
<td>1956</td>
<td>503</td>
<td>21</td>
<td>4.2</td>
</tr>
<tr>
<td>1957</td>
<td>485</td>
<td>12</td>
<td>2.5</td>
</tr>
<tr>
<td>1958</td>
<td>570</td>
<td>21</td>
<td>3.7</td>
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<tr>
<td>1959</td>
<td>525</td>
<td>35</td>
<td>6.7</td>
</tr>
<tr>
<td>1960</td>
<td>438</td>
<td>36</td>
<td>8.2</td>
</tr>
<tr>
<td>1961</td>
<td>521</td>
<td>66</td>
<td>12.7</td>
</tr>
<tr>
<td>1962</td>
<td>516</td>
<td>67</td>
<td>13.0</td>
</tr>
</tbody>
</table>

One cannot say that the present rate of insanity acquittals is too high or too low, without a fixed standard of comparison and without knowing whether that standard is sound or unsound. Perhaps before *Durham* too few were acquitted, and perhaps now too many. Certainly even a prosecutor cannot proceed from the premise that the insanity defense should never succeed. However, it is likely that such acquittals, as a percentage of total defendants tried, is higher in the District of Columbia than in any jurisdiction in the United States.

A very significant fact that the statistics cited above do not reveal is that between two-thirds and three-fourths of our insanity acquittals are uncontested acquittals by the court sitting without a jury, upon waiver by both sides. Cases are handled in that fashion when the examining staff panel at the hospital is unanimous that the defendant had mental disease and that the crime was a product. When the Government lacks any contrary evidence and believes that the medical staff judgment is well supported, it simply submits its case-in-chief and offers, and indeed possesses, no rebuttal on responsibility. In cases of this kind, it would probably make little difference whether the District of Columbia had *Durham*, the American Law Institute proposal, or *McDonald*. Doctors who will not make a finding of mental disease without being satisfied that there is a substantial deprivation of behavior control would probably find the same way under all three tests. Apparently they were satisfied of this in these

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22 These figures relate to the United States District Court only; Municipal Court figures are not included.
uncontested cases where the panel was unanimous. And in such cases, of course, one would expect the same result from the liberal medical school which tends to infer mental disease from criminal conduct.

In more difficult cases, however, amounting to one-fourth to one-third of the cases where the issue is raised, it may be that the more skeptical school of medical thought will find fewer cases of mental disease under McDonald than under Durham. It is too early in McDonald's career to know. I have my doubts. I think the same medical approach will be used as formerly. The behavioral consequence of mental disease is now part of the legal definition, but that fact will not much alter the analysis of a doctor who always used it, anyway. The real point is that the skeptical school of medicine appears to be dying out among the government staff physicians. This fact is far more important than the legal difference between Durham and McDonald. My own guess is that insanity acquittals will continue on the rise. It may very well be that the relevant question is not so much whether Durham or the Model Code is the preferable legal test of responsibility, as what kind of psychiatrists will administer either standard. I do not believe that the adoption of the Model Code provision in the District of Columbia would make nearly as much difference in the analysis of psychiatrists or in the acquittal rate as would a less liberal attitude on the part of the medical profession. But I should think that even the most liberal psychiatrist is closely harnessed by the M'Naghten standard, and that a change in jurisdictions which follow that standard to the ALI standard would greatly increase the acquittal rate. As I have said, this is not necessarily something to be avoided.

One final word on the subject of medical application of the Durham and McDonald rules. The matter of psychopaths is a difficult problem in the District of Columbia, and one on which doctors divide. Mere repeated anti-social conduct is normally not categorized as mental disease, but the difficulty arises when that phenomenon accompanies a "personality disorder," such as a diagnosis of "inadequate personality." Some doctors call it mental disease; others do not. Perhaps the matter can safely be left to the evidence in each case. But it should be noted that the exception in the ALI proposal for "repeated criminal or otherwise anti-social conduct" would not necessarily except a personality disorder diagnosed from psychological tests. Many doctors would call that disorder "mental disease" for medical purposes.

CONCLUSION

In summary, our experience in the District of Columbia under the Durham rule has been an unhappy one. From my point of view the legal
changes in the standard of responsibility and in subsidiary rules, resulting from the *McDonald* decision, are highly desirable. The legal standards now obtaining in the District of Columbia under *McDonald* should result in a state of affairs satisfactory from a prosecutor's point of view. However, at the same time they will provide a standard that will be fair to defense and prosecution alike, and will permit the advantageous use of medical learning without permitting psychiatrists to run riot.
THE

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NOTE
ECONOMIC REGULATION OF FOREIGN AIR CARRIERS BY
THE CAB: ITS LEGALITY AND REVIEWABILITY

INTRODUCTION

International air transportation is more than a mere economic venture
the success or failure of which depends on profits and dividends. Rather,
in most countries an international airline is considered another appendage
of its government, either in the form of a governmentally controlled and
subsidized monopoly, a government corporation or an official arm of the
government itself. Indeed, in recent years, a foreign airline has become
a prestige symbol, a bargaining unit in diplomatic negotiations, a valuable
source of intelligence, and a ready military air reserve in terms of trained
manpower and equipment.

With this in mind, it is not surprising that during the last two decades
evvery country that can afford sufficient air carrier equipment to provide
international service has done so. As a result, competition in the foreign air
traffic market has been steadily increasing, and with this increased com-
petition the United States air carriers’ share of the international air
transportation market has been gradually decreasing. For example, their
share of the North Atlantic market alone has declined from 68.1 per cent
to 39.8 percent during the last twelve years.

Needless to say, this decline has been the subject of much concern. To
prevent further deterioration in the competitive position of United
States carriers, several remedies have been suggested. As might be ex-
pected, one of the most oft-repeated suggestions is for more extensive
economic regulation of the foreign carriers flying into and out of the

definitions and context of the specific terms used.

2 Cooper, Air Transport and World Organization, 55 Yale L.J. 1191 (1946); McDonald, supra note 1, at 85-86; Fifth Column Important Reason for Maintaining Losing Airlines in Latin America, The New York Times, p. 6, col. 6, Aug. 10, 1940.
4 See, e.g., International Air Agreements, S. Rep. No. 1875, 84th Cong., 2d Sess. (1956); McDonald, supra note 1, at 85; Lissitzyn, supra note 1.
United States, in order to limit the share of these carriers in what is still the largest source of international air passenger traffic.\(^5\)

With increased economic regulation as the probable objective, the Civil Aeronautics Board in 1961 instituted a proceeding which was to be the first step toward allowing the Board to impose economic restrictions upon all foreign air carriers serving the United States.\(^6\) The CAB’s proposed regulation has created myriad problems in both administrative and constitutional law. This note will seek to examine some of these problems, and in so doing, attempt to determine the validity of the CAB’s contemplated actions.

I

THE PRESENT SCOPE OF REGULATION OF FOREIGN AIR CARRIERS AND PROPOSED PART 213

It is undisputed that the United States has sovereign powers over its own airspace.\(^7\) In the exercise of this power, Congress has created and designated the CAB, an independent regulatory agency, as the government’s instrument for the regulation of international and domestic air transportation.\(^8\) By means of the Civil Aeronautics Act of 1938\(^9\) and the Federal Aviation Act of 1958,\(^10\) the Congress gave to the CAB the power to determine rates and routes, and to otherwise regulate competition “to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States.”\(^11\) However, while the CAB

\(^5\) This was the purpose of S. 958, 87th Cong., 2d Sess. (Feb. 12, 1962), which was a proposed amendment to S. 958, 87th Cong., 1st Sess. (Feb. 16, 1961). It was introduced by Senator Magnuson at the request of the CAB. It died in committee. International Air Agreements, supra note 4, at 12-20; CAB Divided on Foreign Carriers, Aviation Week, Sept. 17, 1962, p. 39; Doty, World Unrest Slows U.S. Air Policy Aim, Aviation Week, July 16, 1962, p. 42.


\(^9\) 52 Stat. 973 (1938).

\(^10\) 72 Stat. 731, 49 U.S.C. § 1301-1542 (1958), [hereinafter cited as FAA]. Although this act repealed and superseded the Civil Aeronautics Act of 1938, all relevant provisions of the 1938 act pertaining to the economic regulation of foreign air carriers were continued unchanged.

was given complete economic regulatory power over internal air transportation, it was vested with only limited power in the foreign field.

The extent of the CAB’s power over foreign air carriers can best be seen by a brief review of the pertinent provisions of the Federal Aviation Act. Section 402(a) of the act requires that foreign air carriers wishing to operate either within or over the United States must first obtain a permit from the CAB. 12 Similarly, section 402(f) empowers the Board to revoke, amend or modify a foreign air carrier’s permit whenever it is deemed to be in the public interest. 13 The power given the Board by these sections, however, is immediately and severely limited by section 801 of the act, which states unconditionally that any Board action affecting foreign air carriers must be approved by the President and that no Board order on these matters shall be published until it has first received such approval. 14 In short, the act provides that any CAB action with respect to foreign air carrier permits shall have the effect only of a recommendation to the President which he can accept, reject or modify as he wishes.

Congress has thus placed the President in the regulatory system to make the final determination in matters of foreign air transportation. The role given the President reflects the involvement of the delicate matter of foreign relations 15 in the making of these determinations, and complements the inherent powers the President has in this area, independent of any congressional delegation of power. 16 Clearly, the President is the sole organ for the nation in the conduct of foreign relations; he alone is responsible for this nation’s foreign policy. 17 As was pointed out earlier,

16 See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936), where the Court stated:

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 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.

See also, Corwin, The President, Office and Powers 1787-1957, 184 (1957) where the author states: “(T)here is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation’s intermediary in its dealing with other nations.”

since most, if not all, of the foreign airlines operating in the United States are either government monopolies, corporations, or agencies, any decision affecting a foreign airline could have ramifications in other areas of foreign policy with which that particular nation is involved. It is for this reason that the President was designated and recognized as the ultimate arbiter, and the CAB relegated to the role of an adviser whose principal duty is to apprise the executive of the domestic effect of any action affecting foreign air carriers.  

A second limitation upon the CAB's power of economic regulation over foreign air carriers is contained in section 1102 of the act, which provides that the CAB, while carrying out its statutory duty, must act consistent with any treaty, convention, or other international obligation currently binding on the United States. In this respect the President, in the exercise of his foreign relations power, has executed a series of bilateral executive agreements which grant reciprocal operating rights to a foreign nation and its designated air carrier. These executive agreements, popularly called the Bermuda Agreements, although not ratified by the Senate as a formal treaty, are similar to a treaty in that they create an international obligation which binds the United States, and with it the CAB. The typical Bermuda Agreement grants to each contracting country the privilege of "commercial entry and departure for international traffic in passengers, cargo, and mail." In elaborate detail, it provides for specific international air routes and airports to be used in a nation's territory, and restricts all flight privileges to the routes and points named. A further

\[\text{References:}\]

22 Bermuda Agreement, Introduction.
23 Bermuda Agreement, Annex, Sec. III.
restriction provides that Fifth Freedom traffic, involving the right of
Country A to pick up passengers in Country B and carry them to Country
C,24 shall remain proportionate to the traffic requirements between the
carrier's home country and the countries of ultimate destination.25 Aside
from these two restrictions, however, each nation is free to determine its
own carrier, its capacity and how frequently it will be operated on a
certain route.26 Finally, the Bermuda Agreement contains provisions for
arbitration machinery to be used if one of the contracting countries con-
siders itself injured because of an alleged violation of the agreement by
the other country.27

As intimated previously, in spite of the detailed and carefully worded
provisions in the Bermuda agreements, this bilateral approach to the
regulation of international air transportation, and the corresponding lack
of domestic regulation has been the subject of increasing criticism in
recent years from both government and non-government spokesmen.28
The feeling has grown that the United States, faced with the continuing
decline of its share of the world market, must exercise its initiative and
take some action to halt this descent.29 As a result, notwithstanding the

24 The First Freedom is the privilege to fly across the territory of a country without
landing. The Second Freedom is the privilege to land for nontraffic purposes. The Third
Freedom is the right, between two contracting countries, to carry traffic originating in its
own country to the other signatory country. In other words, Country A carries traffic
originating in Country A to Country B. The Fourth Freedom is Country A's right to carry
traffic from Country B to Country A. Fifth Freedom traffic is that traffic which Country
A picks up in Country B and carries to Country C. See generally, Thomas, supra note 20, at
182-84; Recommended Decision of Hearing Examiner, Foreign Air Carrier Permit Terms
Investigation, CAB Docket No. 12063, June 21, 1962, at 41.
25 Bermuda Agreement, par. (6). This clause is vague, and no concrete standards have
been established to determine when capacity is being violated.
26 Recommended Decision of Hearing Examiner, Foreign Air Carrier Permit Terms
Investigation, CAB Docket No. 12063, June 21, 1962 at 8-9. See Bermuda Agreement
Annex I; Bermuda Agreement, Appendix, art. 12(b).
27 Bermuda Agreement, Appendix, art. 9.
28 Hearings Before the Aviation Sub-Committee of the Senate Committee on Commerce,
87 Cong., 1st Sess., (1961); Doty, World Unrest Slows U.S. Aviation Policy Aim, Aviation
Week, July 16, 1962, p. 42, 50; Harding, Merger Might Save the Airlines, The Atlantic,
Sept. 1962, p. 47; Hector, Problems of the CAB and the Independent Regulatory Commission,
69 Yale L.J. 931, 935 (1960).
29 This feeling has grown stronger following the failure of negotiations with certain
countries, notably the Scandinavian countries and Venezuela, which the United States charged
with violating the Bermuda Agreement's capacity and frequency provisions relating to
Fifth Freedom traffic. Recommended Decision of Hearing Examiner, Foreign Air Carrier
Permit Terms Investigation, CAB Docket No. 12063, June 21, 1962, at 60-61. See also,
McDonald, Pan Am: Peril and Opportunity, supra note 1, at 84.
above-mentioned limitations on its sphere of action, the CAB in 1961 instituted a proceeding to:

determine whether all foreign air carrier permits should be amended by the imposition of a new condition pursuant to which foreign air carriers could be required to furnish traffic data to the Board and submit their schedules for approval by the Board. . . . 30

Specifically, the Board instituted an investigation and hearing to determine whether it should amend all foreign air carrier permits by referentially incorporating into those permits a proposed new economic regulation, proposed Part 213. 31 This regulation, if adopted and approved by the President, would eventually empower the Board with sufficient authority to unilaterally regulate the flights of foreign air carriers within United States' territory as it now does those of domestic carriers. The machinery for regulation would require a foreign carrier, on CAB request, to submit traffic capacity and schedule data to the CAB. 32 The CAB could then approve or disapprove an existing schedule or an application for a new route, thereby limiting the number of flights and/or the number of passengers per flight which a particular foreign carrier proposes to fly into or out of this country. 33 This approval or disapproval would not be a mere recommendation to the President but, rather, would be effective immediately without further executive review or action. 34

Although the CAB itself has not yet decided that the adoption of proposed Part 213 would be in the public interest such that it should be submitted to the President for his approval, 35 the challenges to the valid-

31 Ibid.
32 Proposed Part 213.5.
33 Proposed Part 213.6(b).
34 Terms, Conditions, and Limitations of Foreign Air Carrier Permits, CAB Order No. E-17235, July 27, 1961, aff'd on rehearing, CAB Order No. E-17537, Oct. 14, 1961. By these proceedings, the Board dismissed challenges by the foreign carriers that it did not have the power or the jurisdiction over such carriers, to adopt proposed Part 213. The Board there said: "[T]he Board and not the President would perform the actual functions of requiring submission of traffic data and schedules and the approving and disapproving of such schedules." Id. at 4.
35 The Board's proposal was found not to be in the public interest by the Hearing Examiner, who recommended that the CAB discontinue its hearings. Recommended Decision of Hearing Examiner, Foreign Air Carrier Permit Terms Investigation, CAB Docket No. 12063, June 21, 1962, at 88. Two court tests followed in which the legality of the CAB's action was challenged. However, the courts refused to review the Board's action at that time. As of this writing, the CAB has either not sent its recommended decision to the
ity, and indeed the wisdom, of the CAB’s action are so many and so varied that an analysis of these questions seems worthwhile. The first problem concerning the validity of proposed Part 213 is whether the CAB, bound by statute not to act contrary to international agreements, would be acting inconsistently with the provisions of the Bermuda agreements and thus violate section 1102 by the adoption of proposed Part 213. A second question is whether the procedure for revocation or disapproval of foreign schedules contained in proposed Part 213 would be illegal, in that it is not subject to presidential approval, and that the CAB is thereby seeking power which was expressly denied it by the Congress as recently as 1962.36 While there is no doubt that the United States has the right to unilaterally limit the capacity and schedules of foreign air carriers flying into this country, whether the CAB is properly empowered to make a final determination in that respect is open to inquiry. A third probable objection to the CAB’s proposed action is that it makes no provision for a mandatory hearing prior to the disapproval of an existing or proposed schedule, in spite of the fact that the act makes an opportunity for a hearing a prerequisite to the revocation, modification or amendment of any carrier’s permit.

The legality of the Board’s action will depend upon the answers to these objections. Accordingly, an inquiry into each of these questions is warranted. However, such an examination cannot be made without keeping in mind the possibility that any judicial review of allegedly illegal Board action will be precluded by the terms of section 1106 of the act, which excludes all Board orders affecting foreign air carriers from the scrutiny of the courts. Our inquiry therefore must be on two levels: 1) Is there a wrong or an illegality? 2) Is it judicially cognizable?

II

THE LEGALITY OF PROPOSED PART 213

The first ground upon which the validity of the Board’s proposed action might be challenged relates to the requirements of section 1102 and a seeming conflict between what the Board proposes to do and the terms of the Bermuda agreements.

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36 See note 5, supra. See also, Parris, S. 1423: Pending Legislation Restricting the President’s Power to Overrule CAB Certification in Foreign Air Transportation Cases, 26 Geo. Wash. L. Rev. 315 (1958).
Working from the assumption that the ultimate objective of the CAB’s proposed regulation is to impose schedule and capacity limitations upon the foreign air carriers serving the United States, there would appear to be certain provisions contained in each of the Bilateral Agreements which the CAB would be violating by the adoption of this particular order. Of these provisions the most difficult to reconcile with the Board’s proposed action is that providing for mandatory negotiation and arbitration between the contracting countries to resolve any dispute which might arise under the agreement. In this regard, article IV(b) of the Bermuda Agreement Annex provides that one country “shall so inform” the other contracting country of any route changes or controversies. Consultation between the two contracting parties would then begin, and if agreement cannot be reached, article 9 of the agreement is to be invoked, which provides that any dispute which cannot be settled through consultation is to be referred to an international air transportation organization for an advisory report.

37 The Board’s ultimate objective in seeking the adoption of proposed Part 213 was stated quite succinctly by one of its own witnesses testifying before the Hearing Examiner:

I think I stated that the first objective of this regulation was to get information . . . . That is not, however, the sole objective. It is merely the means to an end. The end is the relation [regulation] of air transport in the public interest. (Emphasis added.)

Recommended Decision of Hearing Examiner, Foreign Air Carrier Permit Terms Investigation, CAB Docket No. 12063, June 21, 1962, at 23. Thus the Board’s final goal appears to be far more than the mere gathering of informational statistics as it claims. Rather, the ultimate objective seems to be the unilateral economic regulation of the flights of foreign air carriers to and from the United States.

38 Bermuda Agreement, Appendix, art. 9; Bermuda Agreement, Annex, § IV(b).

39 Bermuda Agreement, Annex, § IV(b), provides in pertinent part:

If [a] Contracting Party finds that, having regard to the principles set forth in paragraph (6) of the Final Act of the Conference referred to in Section 1 of this Annex, the interests of its air carrier or carriers are prejudiced by the carriage by the air carrier or carriers of the first Contracting Party of traffic between the territory of the second Contracting Party and the new point in the territory of a third country, it shall so inform the first Contracting Party. If agreement cannot be reached by consultation between the Contracting Parties, it shall be open to the Contracting Party whose air carrier or carriers is or are affected to invoke the provisions of Article 9 of this Agreement.

40 Bermuda Agreement, Appendix, art. 9, provides in pertinent part:

Any dispute between the Contracting parties relating to the interpretation or application of this Agreement or its Annex which cannot be settled through consultation shall be referred for an advisory report to [the International Air Transport Association]. (Emphasis added.)

Article 9—which relates to disputes—must be distinguished from article 8, which relates to modification of the terms of the Bermuda Agreement and provides that the Parties “may request consultation between the aeronautical authorities” of their respective governments if they desire to modify the terms of the agreement. If agreed upon such a modification
These articles provide, in effect, that whenever any country claims that the other party is violating the Bilateral Agreement, this contention is to be resolved exclusively within the procedural framework set out in the agreement, regardless of the merit of the contention. In short, the parties have agreed to forego all unilateral action to enforce the agreement as they think it should be enforced. So interpreted, these provisions would seem to be reconcilable with the CAB's proposed action only if it is assumed that the Board would never exercise its proposed power to limit the capacity and the number of flights which a foreign carrier wishes to provide—an assumption which appears somewhat unrealistic on its face.\footnote{41}

The second of the typical Bilateral provisions which would be in seeming conflict with the Board's action relates to the very matter of the capacity and frequency limitations which are impliedly set forth in the Bermuda agreements. When the first bilateral was worked out between the United Kingdom and the United States, a compromise was reached between two competing contentions. The United States sought freedom of

would take effect after confirmation by an exchange of notes through normal diplomatic channels.

It is apparent that the Board's action does not involve an attempt to modify the Bermuda Agreement, but relates to "interpretation or application" of the Bermuda Agreement, which comes within the mandatory consultation provisions of article 9. The British government has already filed a note of protest with the State Department that the CAB's action violates the bilaterals. Moreover, the Board itself has recognized that bilateral inter-governmental consultations and not unilateral determinations are the appropriate methods for resolving controversies which arise under the Agreement. See, e.g., BOAC, CAB Docket No. 9975, Order No. E-14332, May 18, 1959:

Should the applicant [BOAC] . . . provide the excess Tokyo-United States Fifth Freedom traffic capacity which Northwest predicts, the [Bermuda] Agreement calls for consultation between the two governments, and, if agreement cannot be reached by consultation, reference of the problem to the [ICAO].

See, Recommended Decision of Hearing Examiner, Foreign Air Carrier Permit Terms Investigation, CAB Docket No. 12063, June 21, 1962, at 52-64, and authorities cited therein.

The Hearing Officer noted at 54:

Until the institution of the present proceeding [Proposed Part 213], the Board had not varied from its earlier position that where a bilateral air transport agreement was in force, its capacity clauses and the machinery for their implementation provided the procedures to be followed when problems of frequency and capacity had arisen . . . . [Emphasis added.]

The foreign carriers made this argument to the Board in opposition to proposed Part 213, but the Board countered that the consultations and negotiation provisions are discretionary. See Brief for Respondent, p. 33, British Overseas Airways Corp. v. CAB, 113 U.S. App. D.C. 76, 304 F.2d 952 (1962). However, the Bermuda Agreement's use of the word "shall" in article 9 strongly militates against the Board's interpretation.

\footnote{41 See note 37, supra.}
operation in the development of potential air traffic and competition.\footnote{I Department of State, Proceedings of the International Civil Aviation Conference 55-63 (1948).} The British, on the other hand, were fearful of the overwhelming competition from the already powerful United States carriers and sought "rigid mathematical formulas" to govern capacity and frequency.\footnote{Id. at 63-74.} The resulting compromise was the previously mentioned general principle that in all Fifth Freedom traffic capacity was to be proportionate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination.\footnote{As to Fifth Freedom traffic, par. (6) of the Bermuda Agreement provides the following standards: [T]he general principle that capacity shall be related: (a) to traffic requirements between the country of origin and the countries of destination; (b) to the requirements of through airline operation; and (c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.} However, there was to be no control over frequency or capacity. United States Delegate L. Welch Pogue, later testifying before a Senate Committee, spelled out the result of these provisions:

Senator McClellan: Mr. Pogue, I would like to get something cleared up in my mind. Under this agreement we grant each country the right to establish such frequencies as it desires. . . . Now, is there any control . . . of capacity . . . ?

Mr. Pogue: No, Senator, we were very careful to avoid that, like the plague, so to speak . . . .

Senator McClellan: There is no agreement here whereby the United Kingdom could in any way control or veto any capacity arrangements that our lines might desire to provide?

Mr. Pogue: That is absolutely correct, Senator.

Senator McClellan: And likewise we would have no power to control theirs?

Mr. Pogue: That is correct . . . .\footnote{Hearings on S. 1814 Before Senate Committee on Commerce, 79th Cong., 2d Sess., at 54-55 (1946).}

In short, like the consultation and arbitration provisions, the frequency and capacity limitation in the Bilaterals contemplates no unilateral action of enforcement on the part of either contracting party.

In apparent recognition of this conflict between their proposed regulation and the provisions of the Bermuda agreements, the CAB has sought to justify its action not within the framework of the Bilaterals but within
the framework of the Federal Aviation Act. Thus, it has directed an attack against any strict reading of section 1102 that might limit the power given to the Board by section 402 which states broadly that "any permit issued . . . [to a foreign air carrier] may after notice and hearing, be altered, modified, amended, suspended, cancelled or revoked by the Board whenever it finds such action to be in the public interest." The Board argues that the force of this section would be nullified, in opposition to the intent of Congress, if it were to be considered limited by the provisions of section 1102.

In answer to the Board's argument, however, it may be pointed out that to read section 1102 as being limited by the grant of power contained in section 402 would have the effect of nullifying the former provision, a result which Congress could hardly have intended in view of the effect that such a construction could have upon the delicate matter of foreign relations. Moreover, the contention that section 402 would be rendered a nullity if limited by section 1102 is not quite accurate, for the limitations of this latter section apply only to the regular public flights of a nation with whom the United States has a Bermuda-type agreement. They have no application to charter flights by any foreign carrier; nor do they apply to the regular public flights of carriers of nations with whom we have no such agreement. Thus, while reading section 1102 as limited by section 402 would render one of the two a nullity, the converse would not be true. Examined from this perspective, it is difficult to avoid concluding that any exercise by the Board of the power which it seeks through the adoption of Proposed Part 213 would conflict with the above-mentioned bilateral provisions, thereby violating the mandate of section 1102.


[T]here is no express provision in section 1102 that the Board shall disregard any other express authority or prohibition of the Act, or that the Board shall fail to exercise any of its powers and duties to be performed under any of the other provisions of the Act. . . . [I]t seems clear that the provisions of section 1102 regarding adherence to international obligations constitute no bar to our authority under section 402 . . . . Id. at 2-3.


49 In fact, the Board in 1958, with presidential approval, adopted proposed Part 212 which in effect did to charter flights what proposed Part 213 proposes to do to the regular flights, in that advance permission from the Board is required before any particular flight can be conducted. 14 C.F.R. 212 (1962). See also, Goldklang, Transatlantic Charter Policy —A Study in Airline Regulation, 28 J. Air L. & Com. 99 (1962).
Perhaps the weakness of the Board's argument on this point is best illustrated by its recourse to the familiar argument that, since other countries have violated the apparent meaning of the agreement by imposing restrictions similar to those which the Board proposes, why shouldn't the United States be allowed to do the same? Although the emotional appeal of such an argument is great, its logic leaves something to be desired. The unpleasant fact remains that what the Board proposes to do through proposed Part 213 seems clearly inconsistent with the provisions of the Bermuda agreements and as such, is illegal under the act. This alone, however, does not mean that the Board's regulation, if adopted and approved by the President, will be held invalid by the courts, for, as previously mentioned, a possible bar to judicial review remains. Only when this possibility is eliminated will any argument based on the bilaterals and section 1102 be of more than academic value.

The second and third grounds upon which the legality of the CAB's proposed action might be attacked are based upon the requirement of section 801 that any Board action affecting foreign air carrier permits must be approved by the President before it can become final and effective; and the requirement of section 402 that no foreign carrier's permit shall be revoked, amended or modified without first providing notice and an opportunity for a hearing. The conflict between these provisions and the CAB's proposed regulation lies in the recommendation's inversion of the order of decision which Congress has set forth in the statute and at the same time its elimination of the mandatory hearing requirements so basic to the federal administrative process. For, under proposed Part 213 the Board, acting independently under a prior blanket grant of authority by the President, would have the power to enter a final order rejecting the proposed

50 The Supreme Court, in Charlton v. Kelly, 229 U.S. 447, 473 (1913), held: If the [alleged violation of a treaty by] . . . Italy was, as contended, a violation of the obligation of the treaty, which in international law would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable not void; and if the United States should prefer, it might waive any breach which in its judgement had occurred and conform to its own obligation as if there had been no such breach. To the same effect, see Restatement, Foreign Relations 143 (Tent. Draft No. 3, 1959). The Bermuda Agreement contains specific provisions for termination, and until these provisions are exercised by the executive department, the United States will be deemed to have "elected to waive any right to free itself from the obligation . . . ." 229 U.S. at 476. See also S. Hackworth, Digest of International Law 342-46 (1943); Bishop, International Law 195-97 (2d ed. 1962).


flight and capacity schedules of any individual foreign air carrier thereby making the Board the final arbiter on matters concerning the day-to-day operation of individual foreign air carriers. Moreover, the Board could do this without providing a hearing unless it so desired.

In defense of its proposed action it could be argued that the only amendment of the foreign carrier permits which the Board seeks to effect is the incorporation therein of proposed Part 213 and that this amendment would have been preceded by a hearing and would have received presidential approval. It could thus be contended that any exercise on an individual carrier basis of the power which the Board seeks under the proposed order would be merely the ministerial implementation of the original amendment, and as such would require neither a hearing nor the approval of the President.

Such an argument, however, seems to be one of form over substance.


54 Proposed Part 213.8(c); Recommended Decision of Hearing Examiner, supra note 53, at 19.


56 Id. at 34-35. The CAB, at 35 states: "[T]he implementation would be merely the enforcing, in accordance with its terms, of the amendment inserted in the permits in this proceeding in full compliance with Sections 402 and 801."

57 The Supreme Court has consistently held that in interpreting agency action, substance is always determinative over mere form. Thus, the Court in Powell v. United States, 300 U.S. 276, 285 (1937) stated: "[O]veremphasis upon the mere form of the order may not be permitted to obscure its purpose and effect . . . Interpreted according to purpose, the order is in substance and effect an affirmative one . . . ." Subsequently, in Columbia Broadcasting System v. United States, 316 U.S. 407 (1942), Mr. Chief Justice Stone said at 416: "The particular label placed [on an order] . . . by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." This principle of substance over form was also applied by the Supreme Court in CAB v. Delta Air Lines, 367 U.S. 316 (1961). In that case the CAB purported to grant a certificate reserving the right to amend its terms after further deliberation without providing either notice or an opportunity for a hearing. This action, said the Court, was in substance merely an attempt to alter a certificate of public convenience and necessity after its issuance without meeting the statutory procedural requirements. 367 U.S. at 316. The Court found the Board action invalid, and said simply at 328: "[T]he power the Board asks for in this case seems nothing more or less than the power to do indirectly what it cannot do directly." The Court in another comment on the Board's action, said at 325:

[To the extent that] there are uncertainties over the Board's power to alter effective certificates, there is an identifiable congressional intent that these uncertainties be resolved in favor of the certified carrier and that the specific instructions set out in the statute
proposed Part 213 is solely an enabling order of the most general sort and since it places no limitations upon the Board's use of the authority which it grants, any Board action under it would appear to be far more than a purely ministerial implementation of a presidential directive. Rather, the application of this power to an individual carrier would be left entirely to the discretion of the Board, subject only to the vague standards set forth in the act itself. Thus, whether a foreign carrier's existing or proposed capacity and flight schedule should be rejected would depend upon the Board's finding under the particular circumstances of the case that such action would be in the public interest. Only at this point will the carrier's operating rights be actually curtailed. Accordingly, it would seem that it is not the mere incorporation of proposed Part 213 into the carriers' permits, but rather the implementation of that regulation on an individual carrier basis that would constitute the crucial amendment and as such require a hearing and presidential approval before it could become effective.

should not be modified by resort to such generalities as 'administrative flexibility' and 'implied powers.'


58 See Recommended Decision of Hearing Examiner, Foreign Air Carrier Permit Terms Investigation, CAB Docket No. 12063, June 21, 1962, at 16, where it is stated:

It is clear that if adopted by the Board and made effective by the President, the proposed new Part 213 of the Economic Regulations would only be an enabling regulation and would not be self-executory. The imposition of the requirements on foreign air carriers provided for by the proposed Part 213 would be made only through discretionary and specific Board action with respect to each foreign air carrier holding or receiving a permit under section 402 of the Act. Presumably, therefore, the Board would then decide with respect to each foreign air carrier whether its exercise of the authority provided for in the proposed regulation was consistent with existing or prospective intergovernmental agreements to which the United States is now or hereafter shall become a party.


61 The standards used to determine the effect of an order were set forth by Mr. Justice Brandeis in United States v. Los Angeles & Salt Lake R.R. Co., 273 U.S. 299, 309-10 (1926):

The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation.

Mr. Justice Brandeis found the "order" involved in that particular instance to be merely an investigative conclusion, and not an order reviewable by the judiciary. In the controversy
Assuming the above to be true, the possible objection to such a result is two-fold. First, it may be argued that any presidential approval of the Board's recommendation would be invalid since it would conflict with the statutorily expressed will of Congress. Secondly, even if the presidential approval is held valid, it may be contended that any exercise of this delegated power by the Board would be invalid since the Board, as a creature of Congress, cannot assume power to make a final determination in an area where Congress has refused it.62

As to the first of these possible objections, the question of the validity of the President's action could be decided on either one of the two levels—first, as a matter of statutory construction, i.e., would the President's action be valid under the terms of the Federal Aviation Act, or secondly, as a matter of constitutional law, i.e., assuming that the President's action is inconsistent with the intent of Congress as manifested in the statute, could it be upheld as a valid exercise of his inherent powers under the Constitution over matters dealing with foreign relations. Notwithstanding the importance of this second question, it would seem that the ultimate answer to our problem will depend upon the courts' construction of the statute. That the fate of the Board's proposal, if adopted, will probably be decided on this plane is indicated not only by the fact that any action taken by either the Board or the President with regard to proposed Part 213 will probably purport to be taken in pursuance and within the framework of the statute,63 but also by the fact that, if at all possible, the courts have traditionally refused to resolve on constitutional grounds any apparent conflict between presidential and congressional action in an area where they both seem to have constitutional competency to act.64 How-
ever, an analysis of this more academic constitutional question cannot be avoided, nor should its importance be underestimated, for not only might a court's view of this constitutional matter influence its construction of the statute, especially in a case such as ours where the legislative history of the enactment of section 801 is relatively slight, but also because there might be some attempt to justify any adoption and approval of proposed Part 213 as a valid exercise of the President's inherent power over foreign relations without regard to the terms of the statute.

As to the construction of the act itself, it would immediately seem that the result sought by the CAB is contrary to the congressional intent, for the statute specifically provides that the President shall exercise the final dispositive power in these matters.65 As Mr. Justice Jackson stated in Chicago & So. Air Lines v. Waterman S.S. Corp.:66

When a foreign carrier seeks to engage in public carriage over the territory or waters of this country . . . Congress has completely inverted the usual administrative process. Instead of acting independently of executive control, the agency is subordinated to it.

As Mr. Justice Jackson further pointed out, the role which Congress gave the President was not merely a negative one.67 Rather, it was a positive and detailed control, unparalleled in the history of American administrative bodies.68 Had Congress felt that the CAB could adequately carry out the responsibilities which the act gives the President, it could readily have granted the CAB the appropriate plenary powers. It is apparent from the statute itself, however, that Congress did not feel that the Board was the appropriate seat of this power. This is most clearly emphasized by the fact that as recently as last year Congress expressly refused to give the Board this plenary power although a request in this vein was made.69 Consequently, if the President, after having been granted the power from Congress, in turn delegates it to an agency in which Congress did not see fit to vest the authority initially, the least that can be said is that such action would be in spite of rather than in pursuance of the express language of the act.

As suggested above, however, the possibility remains that in construing section 801 of the Federal Aviation Act, the courts will be influenced more by what the President can constitutionally do pursuant to his own powers,

67 Ibid.
68 Ibid.
69 See note 5, supra and accompanying text.
than by what Congress intended for him to do when it enacted that section. In other words, the ultimate question might become one of whether the President can give such authority to the CAB, notwithstanding the fact that this would be inconsistent with the congressionally established procedures. In the final analysis, the determination of this question will depend largely upon the very source of this power to regulate foreign air carriers—whether it is wholly executive, wholly legislative or a combination of the two.

If the power to regulate foreign carriers is derived from the President's plenary power over foreign relations, the answer to the delegation question would seem to be relatively simple. The President can delegate his inherent powers to any agency or individual he chooses, so long as control over such agency or individual is retained. It has been under this basic principle that the executive branch of the government has grown in both war and peacetime to include many special agencies and departments, designed to assist in an enlightened exercise of the executive power. The President is substantially free from legislative supervision in this area, for Congress cannot interfere with the inner operations of the executive branch of the government.


71 E.g., Corwin, The President, Office and Powers 1787-1957, 93-100, 294-305 (1957); See also, Longaker, The President as International Leader, 21 Law & Contemp. Prob. 735, 745-47 (1956).

72 See, e.g., Myers v. United States, 272 U.S. 52 (1926); Corwin, supra note 71, at 110-18, 182-83 and authorities cited therein. It might be argued, however, that the President is constitutionally responsible for the exercise of his inherent power, and in the event of delegation of this power, such delegation must be to an officer or agency accountable to the executive for its use or misuse. Accordingly it might be contended that a grant of inherent executive power to an agency or individual not subject to executive control would be clearly improper. In the situation now under discussion, the CAB is a statutory creature created by, and subject to, the Congress, a so-called independent regulatory agency, and theoretically free of presidential pressures, and affirmative control. Thus it might be contended that if the President were to grant, or subdelegate the powers herein involved to the CAB, he would not only be making an irresponsible delegation of power to an agency over which he exercises no control, but also he would be abdicating his constitutional duty to properly exercise that power. Realistically however, it seems quite unlikely that any court would reach such a conclusion. For all practical purposes, therefore, if the President's control over foreign air carriers is found to be an inherent power of the executive office, any delegation of it would be upheld as valid presidential action regardless of the intent of Congress.
On the other hand, if the power over foreign air lines is solely a derivative of the power over foreign commerce, Congress would be the supreme and ultimate source of that power under the Constitution.73 In that case, the power which the President exercises as final arbiter over foreign air carriers would be solely legislative authority delegated to him by Congress.74 Viewed in this manner, the President would no longer be free to delegate it when, how, or to whom he chooses, for the Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer75 made clear that when the President acts in an area in which the power of Congress is supreme, his act is invalid if it clearly conflicts with the expressed will of Congress.76 Therefore, if the power over foreign air carriers is considered solely legislative, the President must follow the statutory procedures established in the exercise of that power; he would no longer unconditionally be able to delegate as he so chooses.

The statutory structure of the Federal Aviation Act of 1958, however, does not lend itself to such simple determinations, i.e., whether the source of power is solely executive or solely legislative. Rather, the act recognizes that the control over foreign airlines involves both congressional and presidential prerogatives, pooling or commingling these powers for the purpose of fostering a coordinated policy which takes all of the many factors involved into consideration.77 While Congress, through the CAB, could competently regulate the economic operations of foreign carriers within the boundaries of this country, it cannot be presumed to deal with the foreign relations problems involved.78 Conversely, the President

75 343 U.S. 579 (1952).
76 Id. at 588-89.
77 See Chicago & So. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948). The Court there said:

Congress may of course delegate very large grants of its power over foreign commerce to the President. . . . The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs. . . . For present purposes, the order draws vitality from either or both sources. Legislative and Executive powers are pooled obviously to the end that commercial, strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies.

Id. at 109-10.
78 E.g., Corwin, supra note 71, at 84: "[T]here is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in its dealing with other nations." See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), in which the Court said:

'The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has
does not have the expertise of the CAB in regard to the economic impact of foreign air transportation. Thus, by the act, both powers were merged, reserving to the President the ultimate responsibility for determining which consideration—foreign affairs or economic impact—is the most important in each particular case. As analyzed by Mr. Justice Jackson in *Waterman*: "Legislative and Executive powers are pooled obviously to the end that commercial, strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies."

Against this background, we come to the ultimate question: does the President have inherent power under the Constitution to delegate his authority over foreign air carriers to the CAB in the face of a contrary congressional intent? In circumstances such as ours, where the power involved is a combined one, the question of the presidential ability to delegate powers in this area is correspondingly complicated. Certainly where there is a mixture of executive and legislative powers, the President has greater latitude than when he is exercising delegated congressional power, and lesser latitude than when he is exercising his own inherent power. The problem, however, is to determine the exact extent of his discretionary abilities in this gray area; unfortunately, as yet there has been no determinative formula established by which to measure the limitations on his discretion.

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His confidential sources of information. He has his agents in the form of diplomatic, consular and other officials.

Id. at 320.


80 333 U.S. at 110.

81 See Mr. Justice Jackson's analysis of this point in his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-640 (1952). See also Corwin, The Steel Seizure Case: A Judicial Brick Without Straw, 53 Colum. L. Rev. 53 (1953).

82 See generally Corwin, supra note 81, at 57. The author states that the historical record of presidential action in the recognized field of Congressional power includes many instances in which presidential action has been upheld until Congress adopted superceding legislation.

83 Mr. Justice Jackson, concurring in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), said:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be devined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. . . . And
There is some help in the language of the Supreme Court in *United States v. Curtiss-Wright Export Corp.* which declared that when the President is acting pursuant to a combination of his own inherent powers and the delegated powers of Congress, he is to be given great discretion in selecting the means which he wishes to use to achieve the dual objective. Thus, the Court in that case stated:

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 which would not be admissible were domestic affairs alone involved.

The above language, however, is not dispositive of our problem, for, when analyzed within the context of the issue confronting the *Curtiss-Wright* Court, it does no more than state that when Congress delegates authority to the President in an area in which he has inherent authority of his own, the Congressional delegation can be broader in its terms and less specific in its standards. Since in *Curtiss-Wright* the Court was not concerned with presidential action conflicting with any congressional design, it offers no precedent for what the CAB suggests in its proposed regulation.

Greater guidance, perhaps, can be found in Mr. Justice Jackson's remarks in *Youngstown Sheet & Tube Co. v. Sawyer,* wherein he analysed the extent of presidential power in areas where his authority and that of Congress overlap and the President acts contrary to, or takes measures incompatible with, the expressed or implied will of Congress. In this area, he notes, the presidential power is at "its lowest ebb, for then he can

court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

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Id. at 634-35.

84 299 U.S. 304 (1936).

85 Id. at 319-20.

86 343 U.S. 579 (1952) (opinion of Jackson, J.).

87 Id. at 637-38.
rly only upon his own powers minus any constitutional powers of Congress over the matter. Thus,

Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

However, it must be pointed out that the force of the above statement is weakened when it is read within the context of the Court’s ultimate decision, for the Court in that instance avoided resolving any clash of congressional and presidential power in an area of concurrent competency simply by deciding that in the area in which the President had acted in that case Congress alone had authority and any presidential action inconsistent with the expressed will of Congress was accordingly invalid.

Thus, the precedent value of Mr. Justice Jackson’s statement is only that of dicta in a separate opinion. Nevertheless, Mr. Justice Jackson’s words still represent the only pronouncement on a Supreme Court level that directly faces the clash of powers problem. As such they would, at least, seem to indicate that if the CAB seeks to justify its action under the inherent powers of the President or seeks to utilize this line of argument as a tool of statutory interpretation to have the statute construed to uphold the validity of its proposed action, it would still be hard put to offset the apparent meaning of the clear language of the statute.

There is, however, one factor relating to the President’s authority to validly delegate his duties under the act to the CAB which has hitherto been ignored, namely, the Delegation of Functions Act. Prior to 1950, the President’s ability to sub-delegate congressional power conferred upon him was a matter not “clearly established or defined by judicial decision.” The combination of this uncertainty and President Truman’s complaint that it took “3 hours every night” to look over and sign papers stacked on his desk, prompted Congress to pass the Delegation of Functions Act in 1951. By the terms of the act, the President is enabled to direct the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by

88 Id. at 637 (dictum).
89 Id. at 637-38 (dictum).
90 343 U.S. at 582 (opinion of Black, J.).
93 Id. at 2931.
The President (1) any function which is vested in the President by law or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President.94

The act thus confers authority to delegate not only presidential functions but also functions which a statute directs be performed by a designated officer subject to approval or other action of the President.95

It would seem, therefore, that in the area of presidential sub-delegation of congressional power, the Congress itself has swept away many of the obstacles earlier imagined. However, the legislative history of the act indicates that the extent of delegation under it is limited in that there are certain functions which cannot be delegated since they are "inappropriate [for delegation] due to their character."96 Unfortunately, neither the act itself nor its legislative history explains which functions Congress had in mind that were, due to their character, "inappropriate."

It does seem clear, however, that when Congress enacted the Federal Aviation Act in 1958, had it been so inclined, it could have given the final power over matters concerning foreign airlines to the CAB rather than to the President. From this it would follow that since Congress specifically granted this power to the President rather than to the CAB, it considered its exercise as being appropriate for the President himself and no one else. Moreover, the exercise of a power involving the delicate matter of foreign relations would seem especially inappropriate for any one other than the President.97 Finally, the Delegation of Functions Act specifically states that delegation may extend only to "the head of any department or agency in the Executive branch of the government, or any official thereof."98 Since the CAB is an independent regulatory agency, not a part of the executive branch, it would seem that even those functions which are appropriate for delegation could not be delegated to the Board under that act.99 Thus, the

95 Ibid.
97 See note 78, supra.
99 See 1962-63 U.S. Government Organization Manual, in which the Executive Departments (Department of State, Department of Interior, etc.) are listed beginning at 63. Independent agencies are listed beginning at 356. The Manual, at 362, states: "The Federal Aviation Act of 1958 . . . provided for the continuation of the Board as an independent agency. . . . The Civil Aeronautics Board is an independent Federal agency. . . ." See also the Organization Charts in the Manual, at 574, in which the CAB is again listed as an independent office and establishment. The delegations which the President has made under the Delegation of Functions Act have all been delegations to the departments within the executive branch as contrasted with the independent regulatory agencies.
Delegation of Functions Act, though endowing the President with sweeping authority to delegate the duties and functions which Congress has given him, does not seem to give him the power to delegate to the CAB his responsibility over matters affecting foreign air carriers.

From the above analysis, it should be apparent not only that Congress did not intend for the CAB to have the power which it seeks under proposed Part 213, but also that, no matter how clear this might be, the courts will avoid finding invalid any presidential action approving this recommendation if they can possibly do so. Accordingly, even should a court accept the above analysis so as to find any Board action under the regulation invalid, it is more likely to do so on the grounds that the Board lacks the power to exercise the delegated authority than on the controversial grounds that the presidential delegation is itself null and void. This, then, raises the second facet of the second and third possible objections to the Board's proposed action, namely, whether the Board has the statutory power to exercise the authority which it seeks.

Basically, the CAB is a statutory creature created by Congress as an independent regulatory agency, whose responsibility is to regulate domestic air carriers, and to assist in the regulation of foreign air carriers. Ultimately, whether the CAB may assume the powers which would be delegated by the President through the approval of proposed Part 213 depends entirely on whether Congress, in the Federal Aviation Act, granted it the power to make a final determination as to foreign air carriers. As we have seen, this is clearly not the case. Congress unambiguously inserted the President into the statutory procedure in order that he would make the final determination which the CAB itself now seeks to make. The Supreme Court expressly recognized the CAB's lack of jurisdiction to make a final determination on matters affecting foreign air carriers when it described the effect of a CAB order relating to an application under section 402 as follows: "Instead of its order serving as a final disposition of the application, its force is exhausted when it serves as a recommendation to the President." That such was the intent of Congress is emphasized by the previously mentioned fact that the Board's 1962 request to Congress for full power to regulate foreign airlines met with no success.

100 See note 64 supra and accompanying text.
101 Mr. Justice Jackson, in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952), noted this tendency of the courts: "Court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way."
103 See note 5 supra and accompanying text.
The CAB, then, if it adopts proposed Part 213, is seeking to extend its jurisdiction beyond the limits which Congress set forth in the Federal Aviation Act. Certainly, it cannot do this on its own;\textsuperscript{104} nor can the President give to the CAB, an independent regulatory agency, what its creator, Congress, refused to give. On this ground alone it would seem that what the Board seeks with its proposed regulation is beyond the scope of its statutory authority and therefore without validity.

III

THE REVIEWABILITY OF ACTION BY THE BOARD OR THE PRESIDENT
WITH RESPECT TO PROPOSED PART 213

GENERAL STANDARD OF REVIEW

As mentioned at the outset, the mere fact that the Board’s proposed regulation appears to be in violation of section 1102 or even that it appears to be beyond the scope of the CAB’s statutory authority will alone offer little solace to the foreign air carriers affected, for unless judicial review can be obtained on these points the carriers might well be the victim of a wrong without a remedy. Since proposed Part 213 falls within the ambit of section 801 requiring presidential approval,\textsuperscript{105} and since section 1006(a) excludes from judicial review “any order in respect of any foreign air carrier subject to the approval of the President,”\textsuperscript{106} the possibility of review on these points is, at best, problematical.

This was most clearly demonstrated by the decision of the Court of Appeals for the District of Columbia Circuit in\textit{British Overseas Airways Corp.} v.\textit{CAB}\textsuperscript{107} where it refused to review the petition of the foreign air carriers to have the Board ordered to cease all proceedings directed towards the adoption of proposed Part 213. In a one paragraph opinion, the court, citing the Supreme Court’s opinion in \textit{Chicago & So. Air Lines v. Waterman S.S. Corp.},\textsuperscript{108} stated simply that since the regulation was subject to presidential approval, any review of it or the proceedings leading towards its adoption was precluded by the clear language of the statute. In\textit{Waterman} the Supreme Court had previously stated that:

\textsuperscript{104} See\textit{CAB v. Delta Air Lines, Inc.}, 367 U.S. 316, 322 (1961), in which the Court said, “The Board is entirely a creature of Congress. The determinative question is not what the Board thinks it should do, but what Congress has said it can do.”


\textsuperscript{108} 333 U.S. 103 (1948).
Orders of the Board as to certificates for overseas or foreign air transportation are not mature and are therefore not susceptible of judicial review at any time before they are finalized by Presidential approval. After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate.109

Earlier in its opinion that Court had also noted:

[T]o revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control.110

From this it seems apparent that there can be no normal review of Board action, at least, prior to presidential approval.111 However, the question

109 Id. at 114.
110 Id. at 113.
111 Two extrinsic factors, however, create certain doubts as to just what force should presently be attributed to the Waterman holding. First, although the Waterman Court was unanimous in holding the President's action non-reviewable, the Justices split five to four on the question whether there could be review of the Board's action. Nevertheless, though two of the dissenters remain on the bench, while but one of the majority is still sitting, this practical consideration is of no moment in a case such as ours, for the dissenters in Waterman disagreed with the majority only because of the fact that the CAB order in that case dealt with the overseas routes of a citizen carrier and the statute, by its terms, only barred judicial review of Board orders relating to foreign carriers subject to Presidential approval. In a case such as ours where the Board's order would be expressly excluded from judicial review by section 1006(a), it is highly unlikely that even the Waterman dissenters would ignore the statute and grant review since this would entail a finding that the congressional denial of review is unconstitutional. The second doubt as to the present force of Waterman arises from the recent case of Pan American World Airways, Inc. v. Boyd, 207 F. Supp. 152 (D.D.C. 1962), appeal docketed, No. 17473, D.C. Cir., (Dec. 13,1962), which suggests that inroads upon Waterman might still be made. In that case, the Board, having tentatively concluded to terminate a certificate of convenience and necessity which authorized Pan Am, a citizen carrier, to operate a particular foreign route, ordered Pan Am to show cause why its certificate should not be terminated. When Pan Am petitioned for an injunction in the district court, prior to the hearing on the show cause order, alleging that the Board's action was not within its statutory power, the court, realizing that under Waterman Pan Am's failure to show cause would initiate non-reviewable Board and Presidential action declared that since the show cause order itself was not subject to Presidential approval, it constituted a reviewable final order. In denying the Board's assertion that Pan Am's suit was premature, the court noted that the requirement of exhaustion of administrative remedies was not a prerequisite to judicial review when it is claimed that the administrative agency is transcending its legal authority. The court concluded that since the Board had actually made a tentative decision, had announced its intention to effectuate it, and had taken steps to do so, a justiciable case or controversy was presented. However, it is doubtful that the avenue of review thus opened in Pan American would be
remains whether there may be judicial review at some juncture subsequent to the approval of the President, if it is obtained.

A limited review was obtained, in substance, in Trans World Airlines, Inc. v. CAB. In that case the petitioner sought review of a Board order approved by the President granting permission for the acquisition by one carrier of the assets of another subject to certain modifications of their overseas routes. Although the court pointed out that the normal review was precluded by the Waterman doctrine, it concluded that "the President and the Board acted within their legal powers in making the order. . . . If so, the court is without jurisdiction to review that order. . . ." Thus, while denying power to review the Board's order approved by the President, the court examined both the Board's and the President's conduct to determine whether it was within the ambit of their constitutional and statutory power.

A similar analysis was undertaken by the Supreme Court in the leading case of Youngstown Sheet & Tube Co. v. Sawyer, where an Executive Order, unauthorized by the Constitution or laws of the United States, and implemented by executive action contrary to congressionally authorized statutory proceedings, was declared invalid. Although the Supreme Court in United States v. Guy W. Capps, Inc. indicated a certain reluctance to base its review on these grounds, Youngstown indicates that when no other grounds of review are available and there is legitimate doubt as to the validity of the President's action, such an inquiry can and will be made. This was recognized by the CAB and by the Court in

available to a court faced with a British Overseas Airways Corp. situation. For in the latter case the Board instituted only an investigatory proceeding to determine whether the public interest required that certain amendments be made in foreign air carrier permits, and the challenged Board order merely denied a threshold motion to dismiss this investigation—an order obviously lacking the potential adversity of the show cause order confronting the court in Pan American. In short, since judicial review of administrative proceedings is inappropriate unless and until the agency takes some legally cognizable adverse action against the party to its proceedings, review could have been denied in a British Overseas Airways Corp. situation, without any resort to Waterman, simply on the grounds that the order appealed from lacked sufficient adversity to constitute a justiciable case or controversy. See United States v. Los Angeles & Salt Lake R.R. Co., 273 U.S. 299 (1927).

112 184 F.2d 66 (2d Cir. 1950).
113 Id. at 71.
114 343 U.S. 579 (1952).
115 348 U.S. 296 (1955), affirming, 204 F.2d 655 (4th Cir. 1953).
British Overseas Airways Corp. Indeed, when the latter denied the carriers' petition for review at that time, it went out of its way to state: "This is not to say that there may not be a judicial remedy against administrative, or even presidential, action beyond the scope of lawful authority, as defined by the Aviation Act." It thus dismissed the petitions "without prejudice to independent proceedings in the District Court challenging the validity of the proposed regulation if and when promulgated." Reading the above in the light of Youngstown we may thus conclude that, at least, the Board's order if approved by the President would be reviewable to determine whether it conflicts with the congressional mandate.

APPLICATION OF THE STANDARDS OF REVIEW TO THE FOREIGN AIR CARRIERS CASE

As we have seen, any Board action amending foreign air carrier permits pursuant to Part 213 might be challenged on any one of the following grounds: (1) that any unilateral determination of frequency and capacity limitations would be contrary to the outstanding bilateral agreements to which this country is a party; (2) that any presidential order authorizing the Board to make such a determination without a hearing, or to put it into effect without presidential approval would be invalid for failure to comply with the statutory procedures established by Congress; or, (3) that any exercise by the Board of this power would be invalid on the grounds that the Board lacks the statutory authorization to make a final determination amending a foreign air carrier's permit.

In view of the inability to obtain review of any Board action before it is submitted for presidential approval, it must be remembered that each of the indicated challenges would be directed at the President's action in approving the incorporation of Part 213 into all foreign air carrier permits, or at any Board action implementing Part 213 on an individual-carrier basis. With this in mind, let us consider the merits of each of these challenges in the light of judicial review limitations.

118 Ibid.
119 Ibid.
120 See Seery v. United States, 130 Ct. Cl. 481, 127 F. Supp. 601 (1955), where the Court of Claims reviewed executive action, invalidating an executive agreement which effectively nullified an Act of Congress consenting to suit on Constitutional claims. Moreover, in Alaska Airlines, Inc. v. CAB, 109 U.S. App. D.C. 230, 285 F.2d 672 (1960), review of a final order affecting a citizen carrier but requiring Presidential approval under the act was provided where the claim of illegality was confined to assertions of Board action beyond the scope of the statute. However, the jurisdictional question apparently was not raised in that case, the Board preferring to defend on the merits.
As to the first of these attacks, it would seem that, insofar as domestic law is concerned, the President would be free to interpret any Executive Agreement within constitutional limits, in any manner which is deemed to be in the interests of the United States in the international political sphere.\textsuperscript{121} Thus, any presidential acts construing the provisions of a Bilateral, so long as they are not clearly inconsistent with the terms of the agreement, would be looked upon by the courts with an almost irrebuttable presumption of correctness and be deemed by them to be binding executive interpretations of a political nature.\textsuperscript{122}

Moreover, even where the presidential action appears to be irreconcilable with the agreement’s provisions, since section 1102 states only that the Board shall act consistently with the terms of any binding international agreement,\textsuperscript{123} it might be cogently argued that this section limits only the Board’s powers and that no statutory limitations are thereby placed upon the President’s action, no matter how inconsistent with the Bilaterals it might be. When this line of reasoning is linked with the fact that under \textit{Waterman} any Board error prior to presidential approval is immunized from judicial scrutiny, the Bilateral objection seems to be moot, at best.

Against this, however, it might be contended that to free the President from the force of section 1102, while protecting Board errors prior to presidential approval from court correction would be to emasculate that section since every possible violation of it would be subject to presidential approval. In effect, this would give that section no greater force than that of a recommendation to the Board, a result which might be difficult to reconcile with congressional intent. Moreover, it might also be argued, as it was by the dissenter in \textit{Waterman}, that no Board order which is invalid under the statute can be rendered valid by the approval of the President. Notwithstanding these arguments, however, it would still seem that if the President approved Board action which was seemingly inconsistent with the terms of the Bermuda agreements, the courts would nevertheless refuse to view the President’s action as a violation of section 1102 and, absent a deviation from the language in \textit{Waterman}, would thus refuse to find the Board’s order invalid on the sole grounds that it violates that


section. It follows, therefore, that to attack presidential or Board action as inconsistent with outstanding Bilateral agreements would in all likelihood be futile.

As to the possible objection to the validity of the President's action in signing the Board's order, review would seem available under the rule of Youngstown. If, as has been suggested, the courts find that the President's order has the effect of authorizing the Board to modify a foreign air carrier's permit without a hearing, then it would seem that this Presidential action is subject to review just as the President's action in Youngstown was reviewable to determine if it conflicted with a superseding congressional design. Thus, if the Board were to refuse to approve a particular foreign carrier's schedule without a hearing, the Board order might be attacked on the grounds that the presidential order authorizing such a procedure was invalid since it conflicted with the procedure laid down by Congress in the exercise of its power to regulate foreign commerce, and that any Board order pursuant to this authority was equally invalid. A similar argument could, of course, be made as to the objection that the President acted invalidly by delegating to the Board the power to render a final decision affecting the permits of foreign air carriers.

As to the third possible objection, i.e., even if the President can validly delegate this power, the Board lacks the statutory power to exercise it, this simply involves an analysis of the Board's jurisdiction over foreign air carriers—an analysis which has not as yet been undertaken by the courts. That such an analysis is not abhorrent to the courts was indicated by the Second Circuit Court of Appeals in Trans World Airlines, Inc. v. CAB,124 where the court, in denying judicial review to a Board order approved by the President, predicated its decision on its finding that the Board had acted validly in submitting an order affecting overseas routes of citizen carriers to the President for his approval. Moreover, such an analysis would not be precluded by the Supreme Court's policy considerations announced in Waterman. A determination by the courts that a given Board action was ultra vires under the statute would neither require the executive to disclose secret information vital to national security nor relegate the court's decision to the role of merely an advisory opinion since any Board order implementing Part 213 on an individual basis would present sufficient adversity and finality to constitute a reviewable order. Such a determination would merely consist of a finding by the court that the Board lacked jurisdiction in an area where the Board alleged the contrary.

124 184 F.2d 66 (2d Cir. 1950).
Following this argument to its logical conclusion, however, let us assume (1) that the President's delegation is valid, and (2) that the Board can validly assume the role of delegatee. Under these conditions, could review of a final Board order refusing to approve the proposed schedule of a particular air carrier without providing an opportunity for a hearing be obtained on the grounds that the affected carrier has been denied his procedural rights under the act? If the Board's implementation of Part 213 on an individual carrier basis is deemed to be an amendment of a permit within the meaning of section 402 of the act, the answer to this question would seem to be yes. The order actually applying Part 213 is not itself subject to presidential approval and thus is not expressly excluded from judicial review by the terms of section 1006(a). Moreover, if the President's approval of Part 213 is construed as a broad grant of discretionary authority to the Board, to be exercised independently of executive supervision, it is arguable that the political considerations which led the Waterman Court to decline to review action constituting the exercise of presidential discretion would be inapplicable. Certainly the advisory opinion objection would be no bar to review in such an instance.

From the above analysis, it is apparent that, for all intents and purposes, the political considerations announced in Waterman and the express statutory exception of section 1006(a) categorically preclude any normal review of CAB action and preclude essentially all review of either presidential or Board action which might otherwise be attacked as violative of existing bilateral agreements. Nevertheless, it was shown in Youngstown that the courts will review presidential action for any alleged conflict with the statutorily expressed will of Congress. Moreover, it was noted that, although the President's delegation might well be deemed valid, a plausible and reviewable challenge to the Board's jurisdiction, i.e., its power to act pursuant to the delegated presidential authorization, could be made. However, on this point, it is likely that review might be deferred until the Board has taken action against an individual carrier, for until such action is taken, a court might experience difficulty in determining that the mere incorporation of Part 213 into foreign air carrier permits constituted such an immediate threat to the carriers' rights as to meet the Article III case or controversy prerequisite.

**Conclusion**

Several considerations come to mind after a review of the questions concerning the CAB's jurisdiction to economically regulate foreign air

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125 See notes 57, 58 supra and accompanying text.
carriers, in general, and the problems presented by proposed Part 213, in particular. The initial conclusion is that what the Board proposes to do is inconsistent with the provisions of sections 1102, 402 and 801 of the Federal Aviation Act and thus any act of the President approving the adoption of Part 213 would conflict with this statutory design. As such, it would be invalid unless it could be supported as an exercise of his inherent power over foreign relations which the above analysis shows to be unlikely. Also, apart from the validity of presidential action, it appears that any exercise by the Board of the power which it seeks would be in excess of its statutory authority and thus of no effect. Finally, while it is unlikely that judicial review could be obtained on the question of a violation of the Bilateral agreements and section 1102, review would seem to be available as to the other objections pursuant to the filing of a petition for an injunction to restrain any exercise by the Board of the powers which it would claim under the proposed regulation.

However, over and above these purely legal questions is an even greater question concerning the wisdom of the Board's proposed action. This question must first be answered by the Board itself in deciding whether to recommend the adoption of Part 213 and then by the President in deciding whether to approve such a recommendation, if and when made. Hopefully, the answer to this question will be against such recommendation or approval, at least so long as Congress does not see fit to amend the provisions of the Federal Aviation Act so as to authorize an expansion of the CAB's role in the regulation of foreign air carriers. Absent such a change in congressional intent, one must assume that the procedure laid down by Congress is the one which best serves the interests of the nation and that any deviation therefrom should be diligently avoided.

James V. Dolan
Harry Huge
RECENT DECISIONS

CORPORATIONS—ANNUAL FEE FOR INVESTMENT ADVICE PAID BY OPEN-END INVESTMENT COMPANY BASED ON RATE OF ONE-HALF OF ONE PER CENT OF ITS AVERAGE DAILY NET ASSETS IS NOT LEGALLY EXCESSIVE WHERE HIGHEST FEE AMOUNTED TO APPROXIMATELY $2,789,000. Saxe v. Brady, 184 A.2d 602 (Del. Ch. 1962).

For approximately twenty-one years prior to 1960, Fundamental Investors, Inc., a Delaware corporation and an open-end investment company registered under the Investment Company Act of 1940,1 had maintained a contractual relationship with Investors Management Company, Inc.,2 whereby the latter furnished investment advice to Fundamental for an annual fee equivalent to one-half of one per cent of Fundamental’s average daily net assets.3 Investors Management was a wholly-owned subsidiary of Hugh W. Long and Company, Incorporated, the principal underwriter of shares of stock of Fundamental. Of the ten directors who served on Fundamental’s board during 1959 and 1960, four were affiliated persons4 of Long, Inc., three of whom had a substantial stock interest therein. In March of 1954 Fundamental’s shareholders approved the investment advisory contract for a two-year period, and thereafter up to and including 1960, the contract was continued in effect annually by a vote of a majority of Fundamental’s directors who were not affiliated with Long, Inc. or with

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1 54 Stat. 789, as amended, 15 U.S.C. § 80a (1958). The act defines an open-end company as one “which is offering for sale or has outstanding any redeemable securities of which it is the issuer.” 54 Stat. 800 (1940), 15 U.S.C. § 80a-5(a)(1) (1958). These companies are commonly known as “mutual funds.”


[W]ho pursuant to contract with such company regularly furnishes advice to such company with respect to the desirability of investing in, purchasing or selling securities or other property, or is empowered to determine what securities or property shall be purchased or sold by such company . . . .


3 For an extensive discussion of the extent and type of services performed by investment advisers of open-end companies, see Securities Research Unit, Wharton School of Finance and Commerce of the Univ. of Pa., A Study of Mutual Funds, H.R. Rep. No. 2274, 87th Cong., 2d Sess. 476-79 (1962) [hereinafter cited as Mutual Fund Study].


(A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof . . . .
Investors Management. During the period from 1954 through 1959, Fundamental’s net assets increased from $256,000,000 to approximately $600,000,000 and the fee paid to Investors Management increased from $1,019,000 in 1954 to $2,789,000 in 1959.5

In February, 1960, the plaintiffs instituted a derivative action on behalf of Fundamental against its directors, Investors Management, and Long, Inc., alleging, *inter alia*, that the fees paid to Investors Management during the years 1955-1960 were excessive and constituted a waste of Fundamental’s assets, and charging that such payment and the annual renewal of the advisory contract by the non-affiliated directors resulted in breaches of fiduciary duty by the directors of Fundamental. In April, 1960, the management of Fundamental submitted the advisory contract to the shareholders for their ratification and approval of its continuance for an additional year. The proxy statement apprised the shareholders of the pending derivative action. A majority of the shares were voted in favor of ratification and approval of the continuance of the contract. The Court of Chancery of Delaware dismissed the complaint on the merits. *Held*, annual fee for investment advice paid by open-end investment company based on rate of one-half of one per cent of its average daily net assets is not legally excessive where highest fee amounted to approximately $2,789,000.6

The decision in the instant case, in upholding for the first time since the enactment of the Investment Company Act of 19407 the reasonableness of an investment advisory fee, represents a landmark in an area which until recently has received scant judicial attention.8 In 1961 the same court was faced with a similar problem in *Meiselman v. Eberstadt*.9 However, that case involved a derivative suit in which the plaintiffs alleged only that a portion of the fees paid to the advisory company which were then paid as salaries from the advisory company to certain directors of the mutual fund who were also in control of and executives of the advisory company constituted indirect compensation from the mutual fund to those directors in excess of their reasonable salary from the fund. Since at no time in that case was the reasonableness of the actual fee to the investment adviser attacked, that case was not dispositive of the issue presented in *Saxe*. Since the rate involved in *Saxe* is typical of the majority of the existing investment advisory contracts,10 that decision was thus enthusiastically greeted11 as the first authoritative vindication of such compensation arrangements.

At first glance this assumption appears correct. The decision on the central issue of waste turned on the pivot that the value of compensation payments for

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9 170 A.2d 720 (Del. Ch. 1961).
10 184 A.2d at 611.
services "is obviously a matter of judgment on the part of the person who must pay them" and that where judgment is involved, courts often wisely defer to the decisions of directors or stockholders. And although it recognized that such payments can grow so large as to be unconscionable, the court noted the fact that there was no "shocking disparity" between the arrangement under consideration and the advisory contracts of investment companies of similar stature.

In reality, however, the decision portends no judicial absolution of the traditional, annual renewal of investment advisory contracts by directors who typically refrain from attempting to negotiate a fee other than at the generally prevailing annual rate. On the contrary, the Chancellor in Saxe was careful to point out in an admonitory fashion that directors should obviously take into consideration relevant economic factors before approving an advisory contract. These factors include not only a consideration of such matters as the rate of the investment advisor's compensation as compared with the rates paid by other mutual funds of similar size and amount of the company's profits as compared with the profits of other advisory firms, but also a consideration of the actual dollar amount paid under the contract. In view of the strong statement that the profit figures under consideration "are certainly approaching the point where they are outstripping any reasonable relationship to expenses and effort even in a legal sense . . . even after making due allowance for benefit presumably conferred," directors of the larger funds are left with little support for *ad infinitum* compensation arrangements based on a percentage of the assets at the prevailing rate. Moreover, it should be noted that the plaintiff's claim was based solely upon equitable principles rather than upon the statutory provisions of the Investment Company Act of 1940, which may ultimately provide the necessary standards and respon-

12 184 A.2d at 610.
13 Id. at 611-13.
15 See 184 A.2d. at 616-17.
16 Id. at 611-12.
17 Id. at 615.
18 Id. at 612-13. Other factors mentioned were: (1) the ratio of expenses incurred to the profits earned by the management company as compared with the ratios of other such companies, id. at 615; (2) the fact of shareholder ratification, id. at 611-12; and (3) the composition of the organization performing the advisory function, id. at 616.
19 Id. at 616.
sibilities for mutual fund directors when challenges are made to their approval of advisory contracts which provide for the payment of allegedly excessive fees.

However, while the Chancellor's decision on the issue of the reasonableness of the compensation combined a warning that directors must be alert to their duties with a statement of the "yardsticks" by which their performance will be measured, his allocation of the burden of proof does nothing to resolve a basic procedural problem which this type of litigation presents. Under existing law, unless it can be shown that the transaction in question was entered into by an interested board,22 the burden of proving waste is upon the plaintiff who must show that "what the corporation has received [for the contested payments] is so inadequate in value that no person of ordinary sound business judgment would deem it worth what the corporation has paid."23 This law, however, was developed within the framework of traditional corporate activities, and, as a consequence, leaves something to be desired when applied to the unique corporate structure of the mutual fund industry.

Unfortunately, there is nothing in Saxe which suggests an abandonment of this conventional approach. On the contrary, the Chancellor avoided the question of who must initially carry the burden of proof by a gratuitous assumption that the "action of the nonaffiliated directors in approving the management contract must be considered as the action of an interested board."24 Working from this assumption he then held that the stockholder ratification was effective and that this ratification returned the burden of proof to the plaintiffs.

In view of the fact that the industry is currently embroiled with litigation challenging compensation agreements,25 it is inevitable that courts must soon squarely face this problem of who should bear the initial burden of proof in cases such as the instant one. When they do it is difficult to see how the admonition given by the Chancellor in Saxe on the substantive issue can be of more than limited effectiveness unless the traditional procedures are abandoned in favor of a more realistic approach.

It is submitted that the answer to how a court should allocate the burden of proof in such a situation should be found in the nature of the institution con-

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22 E.g., Gropper v. North Central Texas Oil Co., 35 Del. Ch. 198, 202, 114 A.2d 231, 233 (Ch. 1955); Kaufman v. Shoenberg, 33 Del. Ch. 211, 220, 91 A.2d 768, 791 (Ch. 1952); Keenan v. Eshleman, 23 Del. Ch. 234, 243, 2 A.2d 904, 908 (Sup. Ct. 1938). This rule is not confined to a situation where all the directors of the two corporations are common, see Kennedy v. Emerald Coal & Coke Co., 28 Del. Ch. 405, 415, 42 A.2d 398, 402 (Sup. Ct. 1944). The transaction may be tainted if only one interested director votes, where such vote is required for a quorum, Kaufman v. Shoenberg, supra. This Delaware rule is less extensive than the majority rule, which imposes the burden of proof on the directors, regardless of the lack of participation by the interested directors. Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921); 3 Fletcher, Cyclopedia of Corporations (perm. ed. rev. vol. 1947) § 931.
24 184 A.2d at 605.
cerned rather than in a consideration of general principles applicable to transactions of corporations engaged in the more ordinary types of activity. Reliance upon tests applicable to the garden variety of isolated transactions belies common understanding of the typical organization and operation of open-end investment companies. As in the instant case, virtually the entire active management of these companies is the subject of the contract. Thus, the transaction permeates the entire structure of the company by initiating and promoting the day-to-day management by others. The management or advisory contract is not a simple, isolated transaction—it is part and parcel of the corporate fabric itself.

Such a scheme of corporate management demands firm judicial control. This is especially true since the contract is not subject to federal approval as are other transactions under the Investment Company Act of 1940, and the SEC has not exercised the other powers reposed in it under the act to challenge fee structures.

In view of the unique nature of the institution, it is submitted that the burden of proof on the issue of waste or excessiveness of payments pursuant to an advisory contract entered into between corporations having a posture to one another similar to those in Saxe should be carried by those who would uphold it. This appears to be a needed measure of protection in a day when mutual funds are becoming more and more affected with a deep public interest. If the directors of investment companies view this suggestion as imposing an onerous burden on them if their conduct is challenged, the instant case provides a simple solution—the contract can be submitted to the shareholders annually.

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26 See generally Mutual Fund Study, 37-74.
27 See ibid., at 476-79. The investment adviser’s function is not limited to rendering investment advice. For example, in the instant case Investors Management contracted to carry out the active management of every phase of Fundamental’s business except underwriting. 184 A.2d at 614-15.
28 See Mutual Fund Study at 67 wherein it is suggested that the “pervasive interpenetration of executive personnel, taken in conjunction with the fact that open-end companies are almost invariably organized by a management group associated with the adviser, and the present limitations on the role of the independent directors, suggests that open-end investment companies are typically legal shells without genuine autonomy, controlled by external management interests.”
29 For a criticism of characterizing suits such as the one brought in the instant case as simply questioning the size of fees, see Eisenberg & Phillips, supra, note 8, at 82-83.
32 Such a solution is, however, deceptive in its simplicity, for it has been urged that
In areas where, as in the instant case, the range of directorial discretion is wide, rules of substantive law are, of necessity, somewhat imprecise. And because each case must be viewed within a framework of its own intricate business context, even strong admonitory language, since it must be couched in generalities, is at best a dubious deterrent to future abuses. On the other hand, since procedural rules are by nature specific and are not so fettered by the necessity of judicial deference in matters involving business judgment, it is often from them that a court can most realistically fashion a needed device to aid future litigants in this area.

GEORGE J. FORSYTH*

CRIMINAL LAW—A DEFENDANT’S ATTORNEY IN A JOINT FEDERAL CRIMINAL ACTION MAY COMMENT UPON A CO-DEFENDANT’S FAILURE TO TESTIFY ONLY WHEN THE ATTORNEY’S DUTY TO HIS OWN CLIENT SO REQUIRES, AND IF SO, SEPARATE TRIALS MUST BE ORDERED TO PROTECT THE SILENT CO-DEFENDANT’S RIGHTS UNDER THE FIFTH AMENDMENT. De Luna v. United States, 308 F.2d 140 (5th Cir. 1962).

Appellant, de Luna, and one Alfredo Gomez were indicted jointly for alleged violations of the Narcotic Drug Import and Export Act. Each retained his own counsel and, after Gomez’s pre-trial motion for a severance was denied, each conducted his own defense without regard to the interest of his co-defendant. At trial, Gomez took the stand, putting all blame for the alleged violations on de Luna, who did not testify. In his argument to the jury, Gomez’s attorney repeatedly contrasted his client’s willingness to testify with de Luna’s silence, saying at one point that “at least one man was honest enough . . . to take the stand. . . . You haven’t heard a word from this man [de Luna].” Appellant’s objections to such remarks were overruled, but the court specifically stated that the jury cannot “consider or refer to the fact that [de Luna] did not testify in passing on the question of his guilt or innocence.” This point was substantially


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2 De Luna v. United States, 308 F.2d 140, 143 (5th Cir. 1962).
3 Id. at 143 n.2.
repeated in the court’s instructions to the jury, which nonetheless acquitted Gomez but found de Luna guilty. On appeal, the United States Court of Appeals for the Fifth Circuit reversed, one judge concurring separately. Held, A defendant’s attorney in a joint federal criminal action may comment upon a co-defendant’s failure to testify only when the attorney’s duty to his own client so requires, and if so, separate trials must be ordered to protect the silent co-defendant’s rights under the fifth amendment.4

The Supreme Court has stated that the purpose of the fifth amendment is to “insure that a person should not be compelled . . . to give testimony which might tend to show that he himself has committed a crime.”5 The amendment has received a liberal construction in favor of this right.6 Thus, it is well-settled that this right to remain silent prohibits all modes of compelling a defendant to testify, either directly7 or indirectly.8 Further, such a defendant’s failure to testify may not be the subject of comment by either court9 or prosecution,10 nor is any presumption against the defendant permitted from his silence.11

On the other hand, it is equally settled that such a defendant has a right to testify if he chooses. And it has been held that this embraces the right of a defendant to testify against his co-defendant,12 or in his own behalf though the two are being tried together and the co-defendant does not testify.13 As stated in Rowan v. United States,14 “the competency of one defendant as a witness [is not] dependent upon the consent of . . . [the second defendant].”15 Clearly, then, in some cases a conflict may arise between a defendant’s admitted right to testify, and his co-defendant’s right to remain silent, free from comment.

Traditionally, a defendant’s right to freedom from comment on his failure to testify has been viewed from the aspect of the effect of such comment upon the jury.16 In 1893, the Supreme Court laid down the rule that comment upon a

4 De Luna v. United States, 308 F.2d 140 (5th Cir. 1962).
5 Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).
7 United States v. Housing Foundation of America, supra note 6, at 666.
8 McKnight v. United States, 115 Fed. 972, 981, 982 (6th Cir. 1902).
11 McKnight v. United States, 115 Fed. 972, 982 (6th Cir. 1902).
12 Rowan v. United States, 281 Fed. 137 (5th Cir. 1922).
13 Rickey v. United States, 242 F.2d 583 (5th Cir. 1957).
14 281 Fed. 137 (5th Cir. 1922).
15 Id. at 139.
defendant’s silence by the prosecution is not prejudicial if the court can, by appropriate instructions, correct the error.\textsuperscript{17} And in \textit{Raffel v. United States},\textsuperscript{18} the Court ruled that a defendant’s failure to take the stand in a former trial could be the subject of comment at a later trial when he did testify. The Court thereby implied that comment may be proper so long as the jury was instructed that such failure to testify could only be considered as going to credibility and not as bearing upon the question of guilt or innocence.

However, in two recent cases the Supreme Court has declared that in some situations a defendant’s failure to testify at a prior proceeding could not be made the subject of comment even when he subsequently testified at a later trial. In \textit{Stewart v. United States},\textsuperscript{19} the Court found that the Government’s question on cross-examination as to whether the defendant had taken the stand in previous trials relating to the alleged crime might create such inferences as to constitute prejudicial error. Similarly, in \textit{Grunewald v. United States},\textsuperscript{20} the Court refused to sanction the use of such comment even where the trial judge admonished the jury that the question was allowable only to impugn the defendant’s credibility.

Thus, it has been increasingly realized that this right of silence can in some instances be adequately safeguarded only if all comment is absolutely forbidden. The \textit{de Luna} court ruled in effect that the circumstances of the instant case were such as to bring it within this rule.

The \textit{de Luna} court found that the trial court’s “inaction” in not preventing comment had prejudiced the appellant, despite the cautionary instructions. In the eyes of both the majority and concurring opinions, by imposing upon \textit{de Luna} the burden of either suffering from such comment or, alternatively, testifying to protect himself, the trial court had deprived him of a fair trial. But while the majority held that the lower court’s “participation” in the abridgment of \textit{de Luna}’s fifth amendment rights had produced this result, the concurring opinion based its rationale on the sixth amendment right to a fair trial, arguing that the trial court had failed to balance the rights represented.

All the judges agreed that merely because one defendant had the right to testify contrary to the interest of the other, he did not thereby acquire the right to comment upon the second defendant’s silence. However, the concurring opinion asserted that he never could have such a right; whereas the majority ruled, without citing authority, that he could do so when necessary for his own defense, reasoning that it would be “unfair” and a violation of due process to bar him from commenting in such a situation.

From one point of view, a co-defendant testifying at a joint trial is simply another witness so far as the second defendant is concerned, and no more than any other should he be allowed to comment on that other defendant’s silence. For, as

\textsuperscript{17} Wilson v. United States, supra note 16, at 67-68.
\textsuperscript{18} 271 U.S. 494 (1926).
\textsuperscript{19} 366 U.S. 1 (1961).
\textsuperscript{20} 353 U.S. 391 (1957).
regards the result of such comment, the prejudice created would not differ from that produced by comment of the prosecution. Both, therefore, should be equally impermissible. Further, this should be true whether the co-defendant was in fact commenting as a witness or whether his counsel was doing so in his defense. The abridgment is equally damaging and therefore equally impermissible. Certainly, it may be argued, to include this comment within the prohibition of the fifth amendment is consonant with the broad, liberal construction given the right of silence by the Supreme Court.

However, whether a defendant's right to stand silent requires that his co-defendant be always barred from commenting on such silence is another question. When a defendant is on trial alone and his co-defendant refuses to testify, thereby damaging the first defendant's defense, a cogent argument can be made for allowing the first defendant to comment on such silence. Since the extent of the fifth amendment's protection to a silent defendant is measured by the prejudice which he might suffer as a result of any adverse comment, it would seem that where there is no danger of prejudice the protection need not apply. By inference, in such a situation there should be no bar to a defendant's comment on his co-defendant's silence. However, as both the majority and concurring opinions point out, if the first defendant has this right to comment on the silence of the second, he must be given a separate opportunity to exercise it. He cannot do so at a joint trial.

In this light, the concurring opinion's absolute rejection of the right of a co-defendant to comment is too sweeping. This opinion was certainly affected in part by the procedural problem involved in recognizing such a right, which would supposedly "eliminate joint trials, or vest in the defendant the right to a mistrial during final arguments, or in the alternative create built-in reversible error, all in the discretion of the defendants." But while exercise of this right certainly poses a procedural problem, it is hardly this drastic. Presumably, it would rest within the court's discretion to determine at the outset of the trial whether a defendant's defense "required" him to be permitted to comment on a co-defendant's silence such that a severance would be necessary. Once the court has made this determination, if it is adverse to the defendant's assertion of necessity, counsel could be appropriately instructed to avoid all comment on the other defendant's silence. Counsel should be no more inclined to violate these instructions to obtain a mistrial than they are through breaches of other rules of court. The court would be no less in control of the trial in this situation than in any other. Severance is always a potential question anyway; and the decision of the court at the outset not to permit comment, thereby denying severance, could be changed if, as the trial unfolded, the court determined a severance was necessary. The procedural problem involved adds a new dimension to the trial, but one that should be within the court's control.

As the majority suggests, the more fundamental question is the basic fairness

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21 308 F.2d at 151-52.
of balancing all rights in a single trial, thereby denying one defendant the right to comment on the silence of the other in making his defense. On this question more authority is required. Certainly it is a fifth and sixth amendment problem of significance in every joint trial. The instant case does no more than identify the right; other cases will be needed to define it.

DENNIS BRENNAN


The Textile Workers Union of America, AFL-CIO, initiated an organizational campaign among the employees of Darlington Manufacturing Company, a subsidiary of the co-respondent, Deering-Milliken Company, engaged in the manufacture of textiles in Darlington, South Carolina. During this period, Darlington was engaged in an extensive plant improvement and modernization program. Throughout the campaign, Darlington’s supervisors interrogated employees as to their union feelings and activities, making threatening statements regarding these activities. An election was held under the supervision of the National Labor Relations Board, resulting in a union victory. Shortly thereafter Roger Milliken, Darlington’s president, called a meeting of the board of directors, who thereupon voted to close the plant.

The union filed a complaint with the NLRB alleging that Darlington had violated the Labor-Management Relations Act, specifically section 8(a)(1), which forbids employer’s interference with employee’s rights of self-organization, section 8(a)(3), which forbids discharge of employees because of their union activity, and section 8(a)(5), which forbids an employer from illegally refusing to bargain with a certified union.

The Board found Darlington in violation of all three sections and ordered that (1) in the event that Darlington resumed operations they would have to re-employ the discharged employees, and (2) that Darlington cease and desist from the unfair labor practices committed. The Board further ordered, under section 10(c), that Darlington pay back salary from the time of the discriminatory discharge until the employees are able to obtain substantially equivalent employment. Held, the permanent closing of his business by an employer motivated by an anti-union bias constitutes an unfair labor practice.2

The statutory proscription of section 8(a)(3) of the Labor-Management Rela-

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tions Act presents the Board with the problem of determining when unilateral action of an employer constitutes "discrimination" so as to fall within the prohibition of the section. When an employer unilaterally terminates or reduces operations, the Board, in looking for discrimination, must necessarily make inquiry into motivation. Thus, in determining whether there has been an employee discharged in violation of section 8(a)(3), the Board's policy is to ascertain whether the employer's decision was based on other than discriminatory factors, or, more affirmatively, whether the decision to discharge was economically motivated.

There are several factors which the Board should, or may, consider in this regard. Among these are the presence or absence of a prior history of opposition or hostility to unions, financial distress, the dates on which the decision to go out of business was made and on which the employer in fact closed down, and the increased costs reasonably anticipated from the unionization of employees. The Board will not accept the employer's word alone that he was economically motivated, but must inquire further. However, doubts are to be resolved in favor of legal motivation, since the record as a whole in an unfair labor practice case must present a substantial basis of believable evidence probative of an unlawful motive, or such motivation will not be inferred. In borderline cases, reviewing courts tend to conclude that economic factors are responsible for the termination of operations, as, in the final analysis, the issue is not whether the business reasons advanced in defense are good or bad business judgments, but whether there was in fact a good faith business motive for the change. Where such motives are present, even though there may simultaneously have been animosity between the employer and the union, termination will be considered legal. Thus, in NLRB v. Lassing the employer anticipated the possible necessity of terminating its transportation of its own product and employing an independent contractor for this purpose, and had determined that any

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3 See, e.g., Bon Hennings Logging Co., 132 N.L.R.B. 97 (1961), enforced, 308 F.2d 548 (9th Cir. 1962).
6 Ibid.
7 District 25, Retail, Wholesale, and Dept. Store Union v. NLRB, 294 F.2d 364 (3d Cir. 1961).
8 Jay Foods, Inc., v. NLRB, 292 F.2d 317 (7th Cir. 1961).
10 NLRB v. Dan River Mills, Inc., 274 F.2d 381 (5th Cir. 1960).
11 NLRB v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962); Mount Hope Finishing Co. v. NLRB, 211 F.2d 365 (4th Cir. 1954).
13 NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 175 (2d Cir. 1961).
further increase in costs would demand such a move. When the union demanded recognition of three Lassing employees, the company deemed such an increase in costs imminent and suspended operations. This discontinuance was found not to constitute an unfair labor practice.

In the instant case the employer countered the charges of unfair labor practices with the assertion that economic motivation justified the closing of its plant. The Board rejected this argument, seizing upon the fact that Darlington's plant improvement and modernization program had proceeded undisturbed until the arrival of the union on the scene. Darlington further claimed, however, that even if the reason for closing the plant had been anti-union feeling, the closing cannot be in violation of the act because a company has the absolute right to go out of business at any time and for whatever reason. In rejecting this second and more significant contention, the Board conceded that "there is no decided case directly dispositive of Darlington's claim. . . ." In support of its "absolute right" argument, respondent relied upon New Madrid v. NLRB. In that case the plant was shut down and all the equipment sold to third parties. The court affirmed the Board's finding that New Madrid committed unfair labor practices in relation to incidents occurring during the operation of the plant and in relation to the shutdown of the plant, but held the company responsible for the unfair labor practices only up to the time that it went out of business. The court there stated:

None of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business, or to actually dispose of his business to another, for whatever reason he may choose, whether union animosity or anything else, and without his being thereby left subject to a remedial liability under the Labor-Management Relations Act for such unfair labor practices as he may have committed in the enterprise, except up to the time that such actual and permanent closing or true and bona fide change in ownership occurred.

The Board pointed out in Darlington that the "absolute right" statement in New Madrid refers only to the extent of the period of liability, since the Eighth Circuit had sustained the Board's findings of unfair labor practices, and that the above quoted paragraph is obiter dictum, contrary to the court's legal conclusions. In so stating, however, the Board seems to have overlooked the fact that the unfair labor practices found in New Madrid were acts which occurred prior to the shutdown, and that it was not New Madrid's going out of business which was the unfair labor practice.

The Board thus saw no distinction between two overlapping but seemingly different occurrences in the discharge of the employees and the going out of

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15 139 N.L.R.B. No. 23 at 7.
16 Id. at 13.
17 215 F.2d 908 (8th Cir. 1954).
18 Id. at 914.
business, and refused to limit the charge of an unfair labor practice only to the discharging of the employees. Rather, the discharge of the employees and the going out of business were treated as one occurrence, and therefore, as one unfair labor practice, for the apparent reason that the discharge of the Darlington employees was solely the result of the company's decision to go out of business. Thus, it would seem paradoxical to hold that an employer who discriminates by terminating part of his business, thereby affecting only some of his employees, does not discriminate when he terminates his entire business and thereby affects all of his employees.

Perhaps of equal significance with its holding that an employer has no absolute right to go out of business is the Board's prescription of a remedy for the unfair labor practices committed by Darlington. The Board held Darlington liable for the salaries of all its employees until such unlawfully discharged employees secured substantially similar employment. In so declaring Darlington liable beyond the date of actual closing until some undeterminable future date, the Board clearly declined to follow prior authority. For example, in the Barbers Iron Foundry19 case, the Board found an unfair labor practice where an employer discharged all of his employees and concluded his business because of union animus. But the award of back pay accompanying this finding held the discriminating employer liable only for wages accruing up to the time of the actual closing, the Board expressly declining to extend liability beyond the date of closing. Judicial authority supports this earlier Board holding.20

The principle that an employer should not be liable for back pay beyond the date of abandonment of his business with respect to those whose jobs are abolished by the abandonment has also been applied in the case where an employer merely terminates one phase of his business.21 Generally, however, where the employer's action amounts to less than going out of business, liability beyond the curtailment date has been found on the grounds that termination of a portion of one's business or change in mode of operation resorted to primarily because of enmity toward a union is only different in degree from a discriminatory discharge of an employee for union activity. Thus, in NLRB v. Missouri Transit Co.22 the court rejected the contention of the Transit Co. that regardless of motive, the sale of their shuttle-bus-line equipment and definite termination of that part of their business, resulting in elimination of jobs, precluded any right the employees may have had to back pay. Similar back-pay awards have been allowed by the Board and the courts.23

19 126 N.L.R.B. 30 (1960).
21 NLRB v. Cleveland-Cliffs Iron Co., 133 F.2d 295 (6th Cir. 1943).
22 250 F.2d 261 (8th Cir. 1957).
To apply this rationale to the situation of the employer who goes completely out of business and liquidates his assets admittedly seems unwarranted at first glance. When an employer winds up his business and permanently terminates the employer-employee relationship, the reasons upon which he should be held liable for back pay, beyond the date of his closing, should be more substantial. Extensions of liability beyond the date of closing would appear warranted only if necessary to insure that the goals of the National Labor Relations Act are not subverted and that the rights of the workers to organize are protected. However, since it cannot be denied that if no such extension were provided, employers might, where circumstances dictated, do as Darlington did in order to avoid collective bargaining, the remedy appears appropriate.

It is axiomatic that there should be no wrong cognizable at law without some remedy. Therefore, any holding that going out of business in order to avoid the legal obligation to deal with a union is an unfair labor practice must be accompanied by an award of back pay beyond the date of actual closing. Otherwise, the holding on the principle issue would become sterile and nugatory. If an employer has no right to avoid bargaining with a union by permanently terminating his business, then his obligation to his employees should not end at the closing but should continue until such time as they can obtain similar employment or until the employer could have legally terminated his business. The extension of the back pay liability beyond the date of actual closing is a necessary concomitant to the Board’s legitimate discretion to select a remedy which will effectuate the policies of the act and fit the particular situation of each case.24

Finally, however extreme one may consider the remedy prescribed in the instant case, one must place it in the context of the Board’s additional finding that for purposes of the act the Darlington Manufacturing Company and its parent, Deering-Milliken Company, are one corporation and thus are jointly liable for the back pay.25 The refusal of the Board to follow the Barbers Iron26 case loses some of its impact when considered in the light of its finding that Darlington and Deering-Milliken constituted a single employer and that only a part of the employer’s total business was abandoned when the operations of the Darlington Company were terminated. This finding of joint liability lessens the thrust of the remedy and creates a question as to whether the Board would have taken the same stand had there been no going business in the background.

The fact of Darlington’s scantily disguised discriminatory motives provides a firm legal basis for the Board’s decision; the fact that the parent corporation is still in operative existence, thus providing a source for the remedy assessed,

24 See Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
25 139 N.L.R.B. No. 23 at 23.
26 126 N.L.R.B. 30 (1960).
gives cogency to the remedy; but in the final analysis, though the decision and its attendant remedy may be logically sound, they nevertheless ring somewhat false in the ear of the realist.

LAURENCE E. HARRIS
PAUL E. O’DONNELL, JR.

MARITIME LAW—APPOINTMENT OF GOVERNMENT-MORTGAGEE AS RECEIVER FOR SHIP DEEMED TO BE MADE PURSUANT TO CHAPTER XIV OF THE BANKRUPTCY ACT WHEREIN THE GOVERNMENT BEARS THE LOSS OF CONTINUED OPERATION. Northwest Marine Works v. United States, 307 F.2d 537 (9th Cir. 1962).

The United States sold the Audrey II to Universal Oil Carriers in 1951 taking as security a promissory note and preferred ship mortgage. Appellants obtained valid maritime liens for services and supplies rendered the vessel in 1953 and 1954. Universal was unable to meet its mortgage payments and in August 1954 the United States filed a libel to foreclose the mortgage. The district court, although the libel did not request it, issued a consent order permitting continued operation of the ship by the government as receiver pursuant to Section 952 of the Ship Mortgage Act.\(^1\) Shortly after publication of the libel, default of persons (appellants did not intervene until June 1955) was entered. The vessel continued operations and by November 1954 had incurred debts such that a court order permitting the government to advance money to the ship was entered. The mortgage was eventually foreclosed in June 1955 and the ship sold. The preferred ship mortgage was paid as a preferred lien, but the remaining proceeds were insufficient to satisfy both the advances of the government and the liens claimed by appellants. The district court held that the advances by the government were valid maritime liens entitled to priority over the earlier lien claims. The court of appeals on its own motion considered the applicability of Chapter XIV of the Bankruptcy Act\(^2\) and reversed. Held, the appointment of the government-mortgagee as receiver for a ship must be deemed to have been made pursuant to Chapter XIV of the Bankruptcy Act wherein the government must bear the losses of continued operation.\(^3\)

A maritime lien on a vessel may arise from such transactions as tort and collision claims,\(^4\) seamen’s wages,\(^5\) and services and supplies furnished the vessel.\(^6\)

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4. The John G. Stevens, 170 U.S. 113 (1898).
5. The John G. Stevens, supra note 4, at 119; Hebert, The Origin and Nature of Maritime Liens, 4 Tul. L. Rev. 381, 393-95 (1930).
Not depending on the lienor's possession,7 a maritime lien must be enforced by a libel in rem in an admiralty court8 which has the power to sell the vessel free of all liens wherever the vessel may be found.9 In distributing what may be insufficient proceeds the court first ranks the maritime liens by type10 (e.g., seamen's wages over supplies); within a given rank those claims occurring later in time are given priority.11 The Ship Mortgage Act12 creates for the vessel's mortgagee a preferred lien with priority over almost all other liens accruing after the mortgage is recorded,13 and provides a forum and procedure for foreclosure of the mortgage on default.14

When one, relying on the credit of the vessel, advances money to the owner to enable the latter to pay off valid maritime liens, the advancer is entitled by subrogation to the benefit of those liens, including their priority over earlier liens of the same type.15 When the vessel is in custodia legis, maritime liens may not thereafter be incurred,16 but this exception has been held inapplicable to certain types of liens attaching when the vessel is operated under court order.17

It is thus seen that the advances by the government to the Audrey II for supplies and services rendered the vessel should have had priority over the earlier liens of appellants which were of the same type, if classic doctrines of admiralty law were to be followed. Indeed, this was the theory of the district court.18

In rejecting this solution the court of appeals relied primarily on section 701 and 702 of Chapter XIV of the Bankruptcy Act of 1938.19 Generally for these sections to apply there must be: (1) a proceeding in a bankruptcy, equity, or admiralty court of the United States in which a receiver may be appointed for any

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7 The Rock Island Bridge, 73 U.S. (6 Wall.) 213 (1867).
10 The William Leishear, 21 F.2d 862 (D. Md. 1927).
15 The City of Camden, 147 Fed. 847 (S.D. Ala. 1906). However, owners and general agents, who do not rely on the credit of the ship, cannot obtain a maritime lien by their advances. The Washington, 296 Fed. 158, 166 (E.D.N.Y. 1924); The Nissequogue, 280 Fed. 174, 189 (E.D.N.C. 1922); The Estaban de Antunano, 31 Fed. 920 (C.C.E.D. La. 1887).
17 E.g., The Resolute, 168 U.S. 437 (1897) (seamen's wages); The Washington, 296 Fed. 158 (E.D.N.Y. 1924) (seamen's wages); The Willamette Valley, 66 Fed. 565 (9th Cir. 1895) (coal supplies).
The finding that corporation whose vessels are mortgaged to the United States; (2) a finding that continued operation of the vessel inures to the benefit of the estate, furthers the purposes of the Merchant Marine Act and is essential to the foreign commerce of the United States; and, (3) the express consent of the Maritime Commission to the appointment of itself or another as receiver. Given these major elements, a court may permit the Maritime Commission to continue operation if it undertakes to bear all losses from such an operation. The court adopted the end result of Chapter XIV—the government bearing the losses, finding sufficient satisfaction of the essential elements to justify this result notwithstanding the fact that neither the district court nor the parties before it considered the statute operative.

The court relied first on the proposition which it calls "the normal rule as to receivers": a receiver may not ordinarily be authorized by a court to speculatively carry on a debtor's business to the detriment of the estate. The cases cited in support of this proposition, however, seem inapposite and unconvincing authority for the court's conclusion. All the cases cited are concerned with land operations and stand firmly for the proposition that a receiver of a private corporation needs the consent of lien holders before superior receiver's certificates may be issued. These cases, however, should be distinguished from those involving corporations such as shipping concerns, since in the latter situations greater problems of public convenience and security may be involved. To require unanimous consent of prior lien holders in all cases of a receivership when such a corporation is involved seems impractical as well as burdensome to the public interest. In the light of the Merchant Marine Act it would be difficult indeed to consider modern shipping anything but a public concern, since that act specifically states: "It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of . . . a merchant marine."

20 The court considers that there is no difference in appointing a receiver for a corporation, as the act requires, and appointing a receiver for the assets of a corporation, which it does here. 307 F.2d at 544. It is arguable that the act contemplates a technically bankrupt corporation, unable to meet all its operating expenses, not merely mortgage payments, in which case the act would not be operative at all. See W. & J. Tiebout, Inc. v. Milton, 143 F.2d 585 (2d Cir. 1944).


22 307 F.2d at 542.

23 Coursey v. International Harvester Co., 109 F.2d 774 (10th Cir. 1940) (gathering carcasses of dead animals); Nicholson v. Western Loan & Bldg. Co., 60 F.2d 516 (9th Cir.), cert. denied, 288 U.S. 605 (1932) (construction of apartment buildings); Smith v. Shenandoah Valley Nat'l Bank, 246 Fed. 379 (4th Cir. 1917) (sale of automobiles); International Trust Co. v. Decker Bros., 152 Fed. 78 (9th Cir. 1907) (mining properties); Hanna v. State Trust Co., 70 Fed. 2 (8th Cir. 1895) (irrigation of arid lands).


The main thrust of the court's decision, however, is based on its view of the Bankruptcy Act as a whole. Against a background of abuses in railroad receiverships a number of provisions were incorporated to protect secured creditors against continued operation of the business and to control and limit the effect of receiver's certificates. The court noted that the purpose of Chapter XIV— permitting continued operation of vessels while protecting creditors—was consonant with the act as a whole. Chapter XIV differs from the remainder of the act, however, in not being within the exclusive jurisdiction of the bankruptcy courts, so that the admiralty courts, as the district court was here, could apply its provisions.

Since this is the first judicial application of Chapter XIV, it would perhaps be helpful to note the legislative history of this statute, for it was not a part of the original bill drawn up by the Senate for a revision of the Bankruptcy Act of 1898. In fact Chapter XIV seems to have been designed specifically to cope with a major problem in 1938; i.e., the possible grounding of the Munson and Dollar steamship lines in reorganization and foreclosure proceedings. Most significantly, Chapter XIV was drawn up in concert with the Maritime Commission, the very party opposed to its application in the instant case. Its purpose is lucidly explained in the very words of the chief counsel of the Maritime Commission in 1938:

The essential thing we are trying to do here is suggest the adoption of legislation which will permit the continuance of these lines, even though the Maritime Commission has to pay the expenses of their operation, where their operation is essential, . . . pending foreclosure or pending . . . reorganization matters.

It is seen, therefore, that a literal reading of Chapter XIV taken in conjunction with its legislative purpose substantiates its application in the instant case, for to permit the government to be subrogated to maritime liens with priority over the appellant's liens would effectively frustrate the congressional mandate. It can be concluded, then, that the court was on solid ground in its application of Chapter XIV to the instant case.

Moreover, there are two prior cases which the court could have relied upon to

26 For a background of this area, see Lowenthal, The Railroad Reorganization Act, 47 Harv. L. Rev. 188 (1933) and Thacher, Some Tendencies of Modern Receiverships, 4 Calif. L. Rev. 32 (1915).
27 In 1 Collier, Bankruptcy § 2.10 (14th ed. 1940) it is stated that the framers of Chapter XIV refused to give bankruptcy courts admiralty jurisdiction. A discussion of some of the problems of concurrent jurisdiction may be found in Gilmore & Black, The Law of Admiralty 654-62 (1957).
30 Id. at 8 (statement of Sen. O'Mahoney).
31 Id. at 7 (statement of Mr. Geaslin).
further substantiate its holding. In the first of these cases, Tietjen & Lang Dry Dock Co. v. The Deepwater, the mortgagees sought to continue operation of the vessels during the summer to obtain some of the business of the New York World’s Fair. The court noted the possibility that losses would result from the continued operation of the vessels by a receiver and refused to permit such operation unless the mortgagees took out insurance against losses. In the second case, The Southern Cross, there was a certainty of loss in continued operations but since the Maritime Commission (also the mortgagee) stated its willingness to pay whatever losses would arise, the court reluctantly appointed a receiver and allowed such operation. A further source of authority for the instant court is described by Benedict who points out that when Congress elaborated the provisions of reorganizations under the Bankruptcy Act of 1938, the admiralty bar and the judiciary worked out rules for the bankruptcy court which permitted continued ship operation, provided the receiver took out insurance.

The basis found for Chapter XIV, then, is not a history of abuses as in the railroad receiverships, but rather a recognition of good practice of allowing the district court, in its discretion, to permit continued ship operation while at the same time protecting creditors of the vessel. In effect, the instant court holds that it was an abuse of discretion for the district court not to appoint the Maritime Commission as a loss-bearing receiver, and as stated before, it appears that the court has reached a proper legal result.

Yet, as much as the court is to be commended for its knowledge and application of a statute that had been in a virtual limbo for twenty-five years, its decision may have created some serious problems which are yet to be answered. For, over and above the district court’s failure to apply Chapter XIV the present court seemed pointedly disturbed with the lower court’s handling of the whole receivership operation and generally stated that it was “grossly unfair to permit the government, . . . to put the ship on the high seas . . . as a sort of floating credit card payable to bearer. . . .”

To fully evaluate the thrust of this last statement it must be recognized that banks and other agencies can be mortgagees of vessels as well as the government. If a private mortgagee elects to continue operation of a defaulting company in accord with the purposes of the Merchant Marine Act, rather than foreclosing or allowing the mortgagor to reorganize in bankruptcy, under the broad language of the instant case he may now bear the risk of loss even though under classic admiralty law his advances would gain a priority through subrogation. Admittedly Chapter XIV would not be applicable, since this would not be a ship upon which the United States holds mortgages, but a combination of the reasoning in

35 Id. at 238-39.
36 307 F.2d at 541 (Emphasis added.)
The Deepwater and The Southern Cross cases with the general language of Northwest Marine Works could sway an appellate court into holding that the district court's only equitable solution to continued operation would be to charge the mortgagee with the entire risk of loss. If this be a valid hypothesis, the effect may well be to discourage any mortgagee from even chancing continued operation of a ship whose owners are in arrears in their payments. In an industry which tends to be cyclic, marginal operators may never be allowed to proceed past a low point. Further, the national danger of many commercial ships being tied up in foreclosure or bankruptcy proceedings could become a startling reality.

The effect of Northwest Marine Works must be to remove from the district courts much of the discretion they had previously exercised when vessels were being operated through receiverships. It is submitted again, however, that there is a legal basis to justify this decision limited to its particular facts. It must remain for the future to see whether Northwest Marine Works will serve as the foundation for a further restriction of the district courts' discretion in maritime receiverships or whether Congress will attempt to clarify the questions raised by subsequent legislation.

EUGENE A. YOURCH

37 The Maritime Commission argued that vessels had been operated similar to the Audrey II in thirty-nine cases in various district courts. The court answered: "It is an old saw that two wrongs do not make a right. Neither do thirty-nine." 307 F.2d at 541.
BOOK REVIEW


This is a book that definitely should be read by all those interested in the administration of criminal justice. For the police interrogator the book offers an easily understood "how to do it" approach. For the citizen interested in obtaining insight into the mind and manner of law enforcement, the book is invaluable. This is particularly significant in view of the authorship. One co-author, Fred Inbau, is a distinguished professor of law at Northwestern University. The other, John Reid, was an associate of Professor Inbau when both were connected with the Chicago Police Scientific Crime Detection Laboratory. The book's suggestions must be weighed in light of the authors' awareness of the fundamental concepts of human dignity embodied in the Constitution. Because this is no desk manual prepared by unethical or unaware authors, it takes on added importance.

The material is presented in three basic parts: (1) the substance of successful interrogation, (2) the law governing a confession's admissibility, and (3) the practical need for such interrogation. Each shall be discussed in order.

THE INTERROGATION

In essence this is a handbook for police interrogators. It suggests how one may successfully elicit confessions from those suspected of guilt who are not ready to spontaneously blurt out the desired incrimination. Its end is to secure a confession that will stand up in court. Its method is to skirt the limits of permissible conduct, for the authors believe that interrogations must be conducted under conditions of privacy and for a reasonable period of time, and that they frequently require the use of psychological tactics and techniques that could well be classified as "unethical," if we were to evaluate them in terms of ordinary, everyday social behavior. In other words, the "morals of the market place" are too high for successful criminal interrogation. Accordingly, this book tells how to frighten without overt threats; how to wheedle without express promises; and how to compel without physical force.

As a tool for securing confessions the book has great utility to all professional interrogators. In the reviewer's judgment its danger lies in the possibility that the methods urged will elicit confessions from both the innocent and the guilty. The repeated avowals of protection for the
innocent are not convincing because no showing of that protection is made. The book demonstrates how deceit, trickery, fear, and psychological pressures may be used to make a recalcitrant criminal confess. Its authors agree that physical brutality, threats and promises of leniency will cause confessions regardless of guilt. No explanation is given why the psychological threats and promises suggested, which are just one step removed from legally prohibited action, will induce the confession of resisting guilty persons but will afford protection to the resisting innocent person. The factors encouraging confessions are the same for both classes of suspect—fear, confusion, and hope for relief from the psychological stress of the interrogation.

Anxiety is created and sustained by a variety of methods. The interrogation room is to be devoid of windows, telephone, or other distracting and reassuring symbols. Pencils and other small objects are removed so that tension may not be relieved by handling them. "Tension relieving activities of this sort detract from the effectiveness of the interrogation, especially during the critical phase when a guilty subject is trying desperately to suppress an urge to confess." If the subject gulps, licks his lips, jiggles his leg, or taps fingers or foot, he is told that this indicates his falsehood and guilt. The interrogator uses factual analysis to show that the subject's guilt is already established and that he might as well confess. The interrogator's confidence in the suspect's guilt must be consistently manifested and he must remain in psychological control of the interrogation. "Consequently every discreet effort should be made to prevent the subject from uttering denials of guilt. . . . As part of this procedure for discouraging denials of guilt, the interrogator should direct his comments toward the reasons why the subject committed the act; in this way the interrogator avoids the issue of whether the subject did it." Discouragement of such denials prevents reinforcement of the suspect's resistance. The interrogator's chair at the beginning should be two or three feet away from the suspect; later the suspect's knees should be just about in between the interrogator's as they sit face to face. If the suspect is a responsible man in the community, the proper psychological atmosphere may be created by calling him by his first name rather than Mister.

1 Inbau & Reid, Criminal Interrogation and Confessions (1962) [hereinafter cited as Inbau & Reid].
2 Id. at 24–25.
3 Interrogators during the Stalinist purges, on the pretext of removing suicidal implements, had suspects who were used to exercising authority wear ill-fitting prison clothes without suspenders or belt so that trousers had to be held up by hand. The suspect was required to refer to the interrogator by his formal title.
The futility of resistance should be emphasized. The interrogator should show an incriminating fact and then cut off the attempted explanation. A large file of papers may be useful to demonstrate the supposed magnitude of incriminating evidence against the suspect, especially if he is a business man used to making decisions from such documents. Every effort should be made to keep the suspect on the defensive and the interrogator in confident mastery of the psychological situation.

Almost all of the examples of successful interrogation utilize the leading question. The interrogator is encouraged to thoroughly investigate the suspect and the crime, and to form opinions as to the suspect’s guilt, his motive and method of committing the crime. After achieving the proper psychological mood, the investigator relates his facts and theories to the suspect. He then concludes, “Isn’t that the way it happened, Joe?” If the confession is not completely consistent with the facts known to the interrogator, he proceeds in guiding the suspect to a confession completely corroborated by the facts. The interrogator may feign disgust and anger for a moment. Later the suspect is given another chance by the suggestion that he still doesn’t have the look of a man completely relieved and if he will only tell the whole truth, relief will follow. Suggestions again follow as to what happened and the concluding question, “That’s the way it happened, isn’t it Joe?” Leniency is not expressly promised, but the suspect is told that his conduct is understandable and not unusual, that some other specified person is really to blame, and that anyone would have done the same thing in his circumstances. No threats of physical abuse are made; no promises of leniency issue; but the suspect is shown that his refusal to go along with the interrogator’s wishes will result in psychological punishment and that his compliance will meet with psychological reward. Only after he has completely submitted to the interrogator’s will is he given the opportunity to dictate his story to a stenographer. At this time the authors advise against the use of leading questions as the appearance of a narrative in the suspect’s own words is given more weight in court.

The danger of methods such as just described is illustrated most aptly in the famous English case of Timothy Evans. At his trial in 1950 for the murder of his wife and daughter, Evans repudiated his several detailed confessions. He testified that he had been told of the deaths of his wife and daughter, the details which the police knew, and that he was considered responsible. He testified that he replied “yes, sir” to all of this because he was upset and didn’t care what happened to him; and that he was afraid that his refusal to confess would result in a police beating.
Three years later the bodies of six women were found in the same house as Evan’s wife and daughter. A co-tenant, Christie (who had been a star witness at Evan’s trial), was convicted of the six murders and hanged as Evans had been. A White Paper on the subject indicates that Christie was willing to confess to the murder of Mrs. Evans as well as the six other women. In all, the voluminous literature regarding the two trials demonstrates how a suggestible, excited person can be made to confess crimes that he did not commit through the methods advocated in the book under review. The authors seem unaware of this danger.

THE LAW GOVERNING CONFESSIONS

The book’s excellent discussion of legal considerations regarding the admissibility of confessions has much to commend it. A careful selection of cases is presented with scrupulous regard for the facts. The discussion is marred by what appears to be an effort to demonstrate the Supreme Court’s inconsistency rather than an attempt to find a rationale behind the decisions. Perhaps it is impossible to synthesize the apparently conflicting decisions, but the authors’ obvious and strong disapproval of the Supreme Court’s “crusade to police the police” may furnish a more acceptable explanation. As the Supreme Court decision in McNabb v. United States held interrogation conditions apparently similar to those advocated by the authors “uncivilized” and unacceptable in the Federal Courts, it is not surprising to find the authors critical of the decision.

After a chronological analysis of the most important state court confession cases decided by the United States Supreme Court since 1943, the year when the court embarked upon its “crusade to police the police,” the authors conclude:

The sharp differences of viewpoint that prevail among the members of the United States Supreme Court and the uncertainty that exists in the various opinions of the Court itself leave the inquiring criminal interrogator in a quandary as to what is or is not permissible. In an effort to offer some guidance, about all we can suggest—until such time as the Supreme Court settles upon a clear-cut test of its own—is this, and we put it in the form of a question which the interrogator may ask of himself:

"Is what I am about to do, or say, apt to make an innocent person confess?"

If the answer to the above question is "No", the interrogator should go ahead

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4 Altrincham and Gilmour, The Case of Timothy Evans (1956); Eddowes, The Man on Your Conscience (1955); Henderson, Report of Inquiry into Conviction of Timothy Evans; A Supplementary Report (1953); Jesse, Trials of Evans & Christie (1957).
5 318 U.S. 332 (1943).
6 Inbau & Reid at 149.
and do or say whatever was contemplated; on the other hand, if the answer is "Yes", the interrogator should refrain from doing or saying what he had in mind.

In our judgment this is the only understandable test of confession admissibility. It is also the only one of any practical value and utility.7

Neither here, nor elsewhere in the book, is any full explanation of what may cause an innocent person to confess ever given. In the absence of any explicit statement, the matter is left to the individual discretion of each interrogator operating in "privacy and for a reasonable period of time."

However, a detailed analysis of the cases regarding threats, promises, right to legal counsel, and other matters is presented. This discussion will give the prosecutor and interrogator an excellent idea of those practices which have been approved and those which have been disapproved.

The authors' conclude their discussion on the suspect's right to counsel:

Sometime in the near future the legislatures will have to come to grips with the problem of right to counsel during the investigative stage of a criminal case. Consideration will have to be given to the matter of specifically authorizing a reasonable period of police detention for the purpose of private interrogation of suspected or accused persons who are not unwilling to talk. Consideration will also have to be given by the legal profession to the possibility of establishing a different ethical standard for criminal defense lawyers and to replace that which now exists whereby counsel is privileged to advise all suspected or accused clients to "keep their mouths shut" and to tell the investigators nothing. Perhaps a canon of ethics should be formulated in such a way that the public welfare, as well as that of the client, is taken into account.8

PRACTICAL NEED

The last section of the book is a short plea for freedom in the interrogation of suspects. The authors say that in many cases the interrogation is essential to solution of the crime; that trickery and deceit are permissible and necessary; but that force, threats, or promises of leniency are not permissible because they might well induce an innocent person to confess. The authors advocate legislation permitting private police interrogation for a reasonable period of time. They indicate that:

The only real, practically attainable protection we can set up for ourselves against police interrogation abuses (just as with respect to arrest and detention abuses) is to see to it that our police are selected and promoted on a merit basis, that they are properly trained and adequately compensated, and that they are permitted to remain substantially free from politically inspired interference.9

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7 Id. at 157.
8 Id. at 173.
9 Id. at 208.
CONCLUSION

With the diminished reliance upon magic and trial by ordeal in medieval times, confessions became the most persuasive evidence of guilt. The crude tortures of the sixteenth century used to persuade old women to confess their witchcraft have been replaced by more sophisticated forms of mental torture. Civilization has rejected the confession extracted by threats, beatings, and promises. Society still accepts confessions secured by methods short of these. This book demonstrates how chillingly close one can come to prohibited methods and still obtain a legal confession. If one’s criteria of social utility is limited to securing convictions, this book should be a boon to the community.

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**BOOKS RECEIVED**


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