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IN THIS ISSUE—

Daniel V. DeSimone and James B. Gambrell have considered the impact of oaths on persons doing business with the Federal Government. In a well-documented article, the authors consider the problem primarily in the fields of patents, trade-marks, and taxes.

The Patent Office proposed a declaration-in-lieu-of-oath bill which was introduced in both Houses of the 87th Congress, with the Committee on the Judiciary of the Senate reporting the bill out favorably. Action by the 88th Congress is expected on this matter.

Recent articles,[1] legal conferences, and symposia have evidenced an increased interest in the subject of equitable adjustments under Government contracts. Clay Duncan in his article considers such adjustments under fixed-price contracts. Such situations are considered as where a contractor obtains supplies or services considerably below the market price, or where a contractor discovers belatedly that he bid too low due to a substantial error. The author considers what he terms the "subjective," the "objective," and the "leave them where you find them" approaches to the equtiable adjustments problem.

Major John R. Donnelly treats the subject of the nonprofit or "not for profit" corporation, created by a Government agency, a relatively recent phenomenon on the industrial scene. His article describes the formation and background of one of these corporations, the Aerospace Corporation, created by the United States Air Force in 1960 in order to provide scientific and technical management of its research and development contractors. Major Donnelly's article also considers the question of whether such a corporation is a Government instrumentality.

Irving A. Appleman states at the outset in his article that many problems have been occasioned by the fraud provision of the Immigration and Nationality Act of 1952 and then goes on to prove it. Since the cases indicate that a fact may be material or not depending on the surrounding circumstances, Mr. Appleman opines that if the new criteria adopted by the Attorney General do not help solve the problem, legislation may be required to establish materiality in immigration cases.

The subject of the Government's acquisition and use of technical data of contractors is one which has provoked many a controversy. While Norman J. Latker's point of departure in his article is the regulations applicable in the Air Force Systems Command, the article describes the issues involved in the acquiring and using of engineering data by the Government.

P.G.D.

MISREPRESENTATION IN IMMIGRATION LAW: MATERIALITY

Irving A. Appleman *

INTRODUCTION

In the notably complex field of immigration law, few problems have given more trouble than the varied interpretations of the fraud provision of the Immigration and Nationality Act of 1952.

The Act directs the exclusion of "Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact." [1]

An alien who has effected a fraudulent entry within the above is deportable.[2] The clause operates as a perpetual bar [3] unless the alien can bring himself within one of the recently-enacted waiver provisions.[4] The very harshness of the provision has undoubtedly been a contributing factor to its diverse interpretations.[5] Yet this harshness was apparently intentional and reflects the concern of the Congress over attempts to evade the immigration laws through misrepresentations to consuls and immigration officials.[6]

CONFLICTING RULES

Although Section 212(a)(19) is new in the Immigration and Nationality Act of 1952,[7] the problem it deals with is an old one. Frequently it arose as the result of a challenge to the validity of the alien's visa,[8] or on a charge he entered by means of false statements.[9]

Where the false statements led to issuance of a non-quota visa which

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[1] 8 USC 1182 (a)(19); 66 Stat. 163. Inherent in this language are three areas of difficulty: (a) What is documentation?, (b) Was the misrepresentation wilful?, (c) Was it of a material fact?. While the (a) and (b) are worthy exploratory fields in themselves, this discussion concerns only (c). It must be assumed in the cases discussed in this article that (a) and (b) are either resolved or are not in issue. Also we are not concerned in this discussion with the problem of fraudulent marriages under 8 USC 1251 (c), or the prospective force only to be given the words "seeks to enter" as ruled upon in matter of M-, 6 I & N Dec. 149 (Atty. Gen. 1954).

[2] 8 USC 1251 (a)(1); 66 Stat. 163.

[3] Matter of G- M-, 7 I & N Dec., 40, 41 (Atty. Gen. 1956).

[4] 8 USC 1182 (i); 8 USC 1251; 75 Stat. 650.

[5] Note 3, *supra*, at p. 43.

[6] H. Rept. No. 2096, 82d Cong., 2d Sess. (1952), at p. 128: "It is also the opinion of the conferees that the sections of the bill which provide for the exclusion of aliens who obtained travel documents by fraud or by wilfully misrepresenting a material fact, should not serve to exclude or to deport certain bona fide refugees who in fear of being forcibly repatriated to their former homelands misrepresented their place of birth when applying for a visa and such misrepresentation did not have as its basis the desire to evade quota provisions of the law or an investigation in the place of their former residence. The conferees wish to emphasize that in applying fair humanitarian standards in the administrative adjudication of such cases, every effort is to be made to prevent the evasion of law by fraud and to protect the interest of the

In *United States ex rel. Fink v. Reimer,*[18] Fink represented himself as Apfelroth, who could get a preference visa, Fink could not. ". . . while it is true that the statute does not expressly exclude those who get their papers by fraud, fraud thwarts their very purpose. They are the means of identifying the bearer by name and otherwise, so that the propriety of his admission may be scrutinized . . . if they describe him as someone else, he makes that scrutiny impossible." [19] The Sixth Circuit concurred.[20]

The First Circuit has sharply rejected the rule that a misrepresentation as to identity is material only if the alien thereby gained some advantage he would not otherwise have had. Elsa Clarke falsely represented herself as single, gave her maiden name, falsely gave her last residence as Costa Rica, where she had been born but had not resided for several years, and failed to disclose her four minor children and British spouse (a fact which could have revealed her lack of eligibility for a Costa Rican passport):

> We believe that a misrepresentation concerning identity by an incoming alien which results in entry into this country without the proper statutory investigation by immigration authorities is material, justifying deportation, *no matter what the outcome of the investigation would have been if it had been made.* The importance of such an investigation has been recognized. . . . This employment of fraud precluded ten years of appellee's life, 1943 to 1953, from investigation as required . . . , thus thwarting any inspection as to her possible inadmissibility to the United States as a member of the excludable classes of aliens. . . . (Emphasis supplied.)[21]

The Fifth Circuit concurs with the First. In *Duran-Garcia v. Neelly,*[22] the alien applied for a border-crossing card in her own name. She concealed a grant of the privilege of voluntary departure for a violation of visitor status on a previous visit under another name. Her stated reason for entering was "to shop and visit." Shortly after entry she took employment as a domestic.

After commenting that misrepresentation as to a visitor's purpose in entering which, if known, would have caused her to be treated as an immigrant, or rejected, was material, and that knowledge of the previous quasi deportation proceedings would have suggested further inquiry into the alien's actual motives, the court stated:

> . . . Though perhaps a complete inquiry would have resulted in a discovery of no other material facts than the previous involuntary departure, it has been held that any concealment of information that tends to frustrate the proper official investigations is ground for excludability under the statute, particularly if the deception is directed primarily against the United States.[23]

There the matter rests as of now, as to misrepresentation of identity, with the courts going either direction depending whether they start with *Leibowitz,* or with *Fink v. Reimer.* Significantly, despite the assertion that mere curtailment of investigation is the essence of the fraud, in each of the cited cases there appears to have existed an actual probable ground of inadmissibility concealed by the misrepresentation of identity.

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[18] 96 F. 2d 217 (CA 2 1938).

The hinge of the present rule, at least in the Second Circuit, is whether the further investigation which has been cut off *might* have prompted a final refusal. As the court said in *Ganduxe y Marino,* "Materiality is a question of degree.",[34] pointing to *In Re Field's Petition.*[35] There the alien had failed to disclose prior residence in Russia because she feared that there would be an investigation as to communist affiliation:

> Disclosure of residence in Russia for a year and a half is not nearly so likely to result in a refusal of a visa on the ground of membership in the Communist Party as pleading guilty to loitering to solicit homosexual acts is to result in refusal of a visa on the ground that the alien is afflicted with psychopathic personality. . . .[36]

The Court of Appeals for the District of Columbia has also backed away from *Iorio* and *Leibowitz.* In *Ablett v. Brownell,* [37] the alien was charged with conviction of a crime involving moral turpitude prior to entry, as well as entry with an invalid visa in that it had been procured by fraud or misrepresentation. The crime concealed was that of " 'wilfully being a party (as landlord) to the continued use' of the leased premises as a brothel." This charge was not sustained by the court, which pointed out that there was doubt as to whether the crime involved moral turpitude. However, as to the second charge, the court noted that had the alien revealed the conviction ". . . the consul would have been justified in refraining from an immediate grant of the visa which was applied for and granted on July 17, 1951, and on which the appellant entered the United States. . . ." [38] Disclosure of the conviction would have required the consul to determine if the crime involved moral turpitude. This question could not have been investigated and a final determination reached immediately. An investigation, if it had not been thwarted by the false answer, would have included questioning as to other possible convictions and might have disclosed an additional conviction for petty theft. Beyond any of these considerations was the fact that the concealment of the conviction resulted in the acquisition of a visa on July 17, 1951, which he could not have acquired at that time, or perhaps ever, if the truth had been told. "The fact that he perhaps might have obtained a visa at some later date is irrelevant here; the visa at issue is the one obtained on July 17, 1951." [39]

The Ninth Circuit has said flatly that it is not convinced that *Leibowitz* and *In Re Field's Petition,* represent the law today ". . . for the majority rule seems to be the fact that the alien might have obtained a visa on the true facts does not vitiate the fraud or misrepresentation." [40]

The First Circuit, in *Langhammer v. Hamilton,*[41] has ruled that concealment of communist party membership, even if involuntary, foreclosed inquiry which would ". . . have unearthed facts *warranting* his exclusion regardless of the ultimate determination of this question when all the evidence was in." [42]

That the test of materiality lies in the possibility or probability of adverse action resulting from the fact concealed or misstated, rather than the inevitability of such a result, is supported by

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[34] *Id.* at p. 568.
[35] 159 F. Supp. 144 (U.S.D.C., S.D., N.Y. 1958).
[36] Note 30, *supra,* at p. 568.
[37] 240 F. 2d 625 (C.A. D.C. 1957).

courts. For a long time it was held that *every* misrepresentation of identity was necessarily material, in that the effect was to foreclose proper investigation of qualifications for admission, and thus invalidated the visa.[48] Cases of concealment of name and identity were distinguished from misrepresentation of other facts; as to the latter the view was that the false statement would not invalidate the document if it appeared that the person would have been equally entitled to what he obtained had he told the truth.[49] This position was enlarged upon by the Board of Immigration Appeals in *Matter of C-T-P-*,[50] which stated the rule applicable to misrepresentations other than identity, as follows:

> . . . (3) If the misrepresentation is concerning an objective matter which is a ground of inadmissibility, such as conviction for crime involving moral turpitude, then the objective fact must exist. The conviction must be present and it must involve moral turpitude.
>
> (4) If the misrepresentation is concerning a ground which requires a weighing and balancing of intangible factors giving the consul measure of discretion, as for example, whether an applicant is a believer in a subversive doctrine, or a psychopathic personality, or one likely to become a public charge, then it is not necessary that the record establish that the ground actually did exist. It is sufficient if the record establishes that the ground of inadmissibility probably existed.[51]

Recently the Attorney General, "because the numerous decisions on the question by the Board, the Attorney General and the courts have not been wholly clear or consistent," in *Matter of S-*, and *Matter of B-C-*,[52] undertook a reexamination of the principles involved.

S- was a Hungarian who obtained a nonimmigrant visa from a United States consul at Toronto, Canada, without revealing that he had been a member of the Communist Party in Hungary from 1947 to 1956. A special inquiry officer found the membership involuntary and hence not a ground of exclusion. The Board of Immigration Appeals affirmed this ruling, and, applying the rule in *Matter of G-M-*,[53] held the misrepresentation not material because the alien would not have been denied a visa or excluded had he told the truth.

B-C-, on the other hand, was a Mexican who had lived in this country as a permanent resident from 1927 to 1930; had entered on agricultural laborer's cards issued in the name of his nephew in 1952 and in 1954; and was again admitted as a permanent resident in 1956. In connection with his 1956 application he failed to disclose prior residences and failed to disclose his use of an alias. The Board of Immigration Appeals applied the general rule that a misrepresentation as to identity is always material under *Matter of B- and P-*,[54] although pointing out that there was nothing to reveal that the respondent could not have qualified for a laborer's permit in his own name.

The Attorney General reversed the Board in both instances. In so doing he enunciated the following tests: (1) Was the alien excludable on the true facts? If so, the misrepresentation was material; (2) Did the misrepresentation

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[48] Matter of B- and P-, 2 I & N Dec. 638 (Atty. Gen. 1947).
[49] Note 3, *supra*.

dren has been held not material under the rule in *Matter of S- and B-C-*.[56] Even though the misrepresentations were concerning relevant matters, on the facts as they existed when the consul considered the application the respondent was coming to employment in which she was qualified and for which she was assured a reasonable salary with room and board and hence was not likely to become a public charge. Since the facts failed to suggest the existence of a substantial question as to eligibility to enter, the misrepresentations were not material. A similar result was reached in *Matter of J-D-D-*.[57]

However, in *Matter of L-D-L-R-*,[58] *Matter of S- and B-C-* was applied with different effect. There the alien failed to reveal an arrest in Mexico on two occasions in connection with theft of money from a bus company. Following the arrest no judgment was entered and the charge was withdrawn upon his payment of 3,000 pesos to the company. The respondent denied any guilt and it was contended that since the criminal charges were dismissed and the applicant did not admit commission of crime, the concealment of the arrest was immaterial. The opposing contention was that had the true facts been in the consul's possession, evidence might have been procured from the police or persons charged with the crime which would have enabled the consul to confront the applicant, with a reasonable possibility he might have admitted the offense [59] or that he might have failed to satisfy the consul that he was admissible. On the facts of the case, including the indication that a police report reflected that he had confessed the crime, notwithstanding his present disclaimer, and the absence of a conviction, the Board found that the applicant had not borne the burden of establishing that his misrepresentation did not cut off a line of inquiry which might have resulted in the denial of a visa.[60]

CONCLUSION

It is hoped that Interim Decision 1168 will throw light on the murky recesses of false affidavits of support, questionable offers of employment,[61] concealment of spouses [62] and children,[63] misrepresentation of financial assets,[64] concealment of prior residence,[65] concealment of voluntary [66] and involuntary [67] Communist party membership, and the myriad factual variations fraud cases can entail. Should it fail to do so, the Congress ultimately may have to furnish its own definition of materiality for immigration purposes.

Extended speculation as to such a definition would not be profitable. Two obvious possibilities suggest themselves —1) a misrepresentation of any infor-

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[56] Matter of M-I-, I & N Int. Dec. 1203 (1962).
[57] I & N Int. Dec. 1210 (1962).
[58] I & N Int. Dec. 1207 (1962).
[59] An alien who admits commission of a crime or admits committing acts which constitute the essential elements of a crime involving moral turpitude with exceptions not applicable in the case, is inadmissible under 8 USC 1182 (a)(9).
[60] Cf. Corrado v. U.S., note 47, *supra.* LLL
[61] Matter of R-D-, 6 I & N Dec. 581 (1955).
[62] Matter of R- J-, 7 I & N Dec. 182 (1956); cf. Matter of G-, 6 I & N Dec. 9 (1952).
[63] Matter of D-, 6 I & N Dec. (1954); cf. Landon v. Clarke, note 2, *supra;* note 57, *supra.*
[64] Matter of S-C-, 7 I & N Dec. 76 (Atty. Gen. 1956); Matter of G-L-, 7 I & N Dec. 464

THE IMPACT OF OATHS AND WRITTEN DECLARATIONS ON PERSONS TRANSACTING BUSINESS WITH THE GOVERNMENT

Daniel V. De Simone and James B. Gambrell***

INTRODUCTION

Up until the late thirties the courts and various agencies of the Government uniformly required important documents to be executed under oath [1] and, in most cases, witnessed by a notary or other person legally empowered to administer oaths.[2] However, this uniformity has fallen victim to the times. Over the past 25 years the courts have streamlined their procedures,[3] and many Government agencies have successfully asked to be relieved of the administrative burdens that arise from the formalistic oath-making process.[4]

These burdens have grown as the role of the Government has increased in our complex society. The processing of formally executed documents [5] — once little more than a mild inconvenience—

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[1] "Oath. An outward pledge given by the person taking it that his attestation . . . is made under an immediate sense of his responsibility to God." Bouvier's *Law Dictionary* (rev. ed. 1914). An affirmation is normally permitted as an alternative where religious scruples are involved. For example, Fed. R. Civ. P. 43 (d): "Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof." See also 1 USC 1 (1951). See generally, as to oaths, affirmations, affidavits, etc., John's *American Notaries*, ch. 2 (De Funiak ed. 1942).

[2] See, for example, 35 USC 115 (1952), 15 USC 1061 (1946). While many are probably willing to depend on the oath itself to operate on an individual's conscience, it is generally the rule that a person legally empowered must also witness the oath—and this, despite handwriting experts, the science of questioned documents, and, most important, the unlikelihood that one, intent on falsehood or forgery, would be deterred by the presence of a notary.

[3] The federal rules of civil and criminal procedure are exemplary. See, e.g., Fed. R. Civ. P. 11 (signing of pleadings). "[V]erification is the exception and not the rule. Truthfulness and honesty are made largely dependent upon subscription of the pleadings, and not verification." 2 Moore, Federal Practice ¶ 11.03 at 2105 (2d ed. 1961). The exceptions are few. See *ibid.*

In contrast, the procedural laws of the states commonly require the verification of certain pleadings. E.g., see N.Y. Civil Practice Act §§ 248-252, Cal. Civil Code ¶ 446,447. Note that state statutes requiring verified pleadings are not applicable in the federal courts. Employers Mut. Liab. Ins. Co. of Wisc. v. Blunt, 227 F.2d. 312 (5th Cir. 1955), *cert. den.*, 350 U. S. 994 (1956).

[4] Congress, in the instances where it has eliminated the requirement of an oath as the sole means of verification, has permitted a simple written declaration instead. Thus, one now simply signs his name to an income tax return, a customs declaration form, or an inquiry to prospective jurors. Compare section 3809 of the Internal Revenue Code of 1939 with its successor, section 6065 of the Internal Revenue Code of 1954. Also, see the text at notes 53 and 59 *infra*.

still remain, although the administrative difficulties engendered by defective executions would be avoided.

There was a time when, by present standards, the workload of the Patent Office was light. Consequently, the search for informal executions and the procedures taken to correct those that were found were not noticeably onerous.[12] Today, however, over 85,000 patent applications, 23,000 trademark applications and thousands of other documents requiring formal execution are submitted to the Patent Office each year, so that the search for informal executions and the procedural steps necessary to rectify them have become wasteful extravagancies if other techniques of verification are available.[13]

The individual applicant-affiant, of course, has always been inconvenienced, irrespective of the work input of the Patent Office. This is especially true of foreign applicants, for whom special verification requirements are imposed both by statute and by rule.[14] These requirements may not be unduly burdensome to a foreign applicant who has convenient access to a diplomatic or consular officer of the United States, but when he does not, they are onerous indeed.[15] Moreover, the statutory burden is compounded by rule 66 of the Rules of Practice in Patent Cases which re-

[12] For example, in 1875 there were only 21,638 applications filed and 14,837 patents issued.

[13] And other techniques there are. The obvious alternative is to use a simple written declaration, which, if fraudulent, would subject the declarant to punishment under 18 USC 1001 (1948), reprinted in the text at note 43, *infra*.

[14] 35 USC 115 (1952), 15 USC 1061 (1946), and rule 66 (in patent cases), 37 CFR 1.66 (1960). The major western European countries allow an application to be filed by an interested party—the inventor, his assignee or attorney—and many of these countires do not even require the inventor to be named. Many practitioners in these countries regard the ascertainment of the identity of individual inventors as an unwarranted burden, although the Federal Republic of Germany, whose residents file more U. S. applications than do those of any other foreign country, has a "division of rights" law that requires German firms to ascertain who the inventors are anyway. Law of July 25, 1957, [1957] Bundesgesetzblatt 756 (Ger.). As to the German law, see, e.g., Brennan, *The Developing Law of German Employee Inventions*, 6 P.T.C.J. Res. and Ed. 41 (1962).

In light of the European sentiment on the U. S. requirement that the inventor himself must file (a requirement applied to U. S. applicants as well), it is not surprising that many foreigners have taken umbrage to the more complicated verification procedures imposed upon them. See generally, Scher, *What Foreign Patent Attorneys Think of American Patent Practice*, 44 J. Pat. Off. Soc'y. 544, 545 (1962). For a searching and basic appraisal of American patent law and its administration, see Walleser, *A Foreign Lawyer's Look at Some Basic Concepts of American Patent Law*, 44 J. Pat. Off. Soc'y. 409 (1962). European patent laws and practices come in for their share of criticism by U. S. applicants. See, e.g., Kemman, *Foreign Patent Relations*, 40 J. Pat. Off. Soc'y. 527, 543 (1958).

[15] Suppose, for example, that the applicant is a resident of Roccacasale, a small town nestled in the Apennines of Italy, and that he is able to make the requisite oath before the local postmaster. This starts a "chain of authentication" that laboriously cascades its way to the United States embassy in Rome. The Mayor of Sulmona (the nearest sizeable town to Roccacasale) may verify the postmaster's office and his authority to administer oaths. Next, in Aquila, capital of the province of Abruzzi, in which both Roccacasale and Sulmona are situated, the Governor may authenticate the office of the Mayor of Sulmona. Eventually, in Rome, the Ministry of Foreign Affairs may authenticate the Governor's office. And, finally, the United States embassy may authenticate the office of the Foreign Minister.

This method of authentication is a practical expedient and has been upheld as sufficient proof of the oath-administering authority of the first link in the "chain" (in our example,

History Of The Oath In Patent Cases

The first patent act [22] did not require an applicant for patent to make an oath relating to inventorship. The inventor was required merely to state the facts of inventorship in a simple petition.[23] The sworn statement of inventorship was instituted by the Patent Act of 1793.[24] Even so, this statement could be submitted any time before a patent issued.[25]

In 1800, foreign nationals were permitted to apply for United States patents.[26] But, in contradistinction to U.S. applicants, they could apply for patents only if they had been resident in the United States for two years.[27] And

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7 (1937); Alabama, Harrison v. Simons, 55 Ala. 510 (1876). Thus, the Patent Office quite often receives oaths that do not need a seal to be valid where they are executed. This conflict of laws aggravates the burden of checking formally executed documents for informalities.

[22] Act of April 10, 1790, ch. 7, 1 Stat. 109.

[23] ". . . upon the petition of any person . . . setting forth that he . . . hath invented any useful art, manufacture, engine, machine, or device . . . not before known or used . . . and describing the . . . invention . . . clearly, truly and fully. . . ." Act of April 10, 1790, ch. 7, §1, 1 Stat. 109.

[24] ". . . every inventor, before he can receive a patent, shall swear or affirm, that he does verily believe, that he is the true inventor . . . which oath or affirmation may be made before any person authorized to administer oaths. . . ." Act of Feb. 21, 1793, ch. 11, §3, 1 Stat. 318.

[25] The taking of the oath was considered a mere "prerequisite to the granting of a patent, and in no degree essential to its validity." Mr. Justice Story (on circuit) in Whittemore v. Cutter, 29 Fed. Cas. 1120, 1121 (No. 17,600) (C.C.D. Mass. 1813). See also, Crompton v. Belknap Mills, 30 Fed. Cas. 1060, 1062 (No. 18,285) (C.C.D. N.H. 1869). But the law in this respect gradually changed: "I suppose it is now too late to hold with Mr. Justice Story in Whittemore v. Cutter *{supra}* . . . that the oath is of no consequence as regards the validity of a patent, once it is granted." Judge Learned Hand in Van Heusen Products v. Earl & Wilson, 300 Fed. 923, 935 (S.D. N.Y. 1924) (*dictum*). A patent is now deemed void if it is not supported by the statutory oath. See, for example, Hartford Empire Co. v. Ober Nester Glass Co., 51 F.2d 85, 97 (E.D. Mo. 1931), *aff'd*, 71 F.2d 539 (8th Cir. 1934), *cert. den.*, 293 U.S. 625 (1935).

[26] Act of April 17, 1800, ch. 25, § 1, 2 Stat. 37. The Act of 1793 had extended the privilege of application to U.S. citizens only. Act of Feb. 21, 1793, ch. 11, § 1, 1 Stat. 318.

[27] ". . . the rights and privileges given . . . to citizens of the United States [by the act of 1793, note 25, *supra*] . . . hereby are extended . . . to all aliens who at the time of petitioning . . . shall have resided for two years within the United States . . . *Provided always,* that every person petitioning for a patent for any invention . . . shall make oath or affirmation before some person duly authorized to administer oaths . . . that such invention . . . hath not, to the best of his or her knowledge or belief, been known or used either in this or any foreign country [prior to his application for patent]." Act of April 17, 1800, ch. 25, § 1, 2 Stat. 37.

Note that use in a foreign country was then a statutory bar to foreigners, which it is not for anyone under the present statute. 35 USC 102 (1952).

Further extensions to aliens of the privilege to apply for U.S. patents were made in 1832, Act of July 13, 1832, ch. 203, 4 Stat. 577 (no two year residence requirement, but at time of petitioning had to be resident and declare intent to become U.S. citizen, and if citizenship not timely secured patent "ceased and determined"); in 1836, Act of July 4, 1836, ch. 357, § 9, 5 Stat. 117 (either had to be resident at time of petitioning and make oath of intent to become U.S. citizen, or had to pay $500 if British subject, $300 if other alien); and in 1842, Act of August 29, 1842, ch. 263, § 3, 5 Stat. 543 (could apply for *design* patent if had been resident in U.S. one year and had made oath of intent to become U.S. citizen).

Aliens were put on an equal footing with U.S. citizens in applying for U.S. patents in 1861, Act of March 2, 1861, ch. 88, §§ 10, 17, 12 Stat. 246, with the exception of applicants for design patents (§ 11), as to whom equality was achieved in the Act of July 8, 1870, ch.

ernment. Broadly speaking, these sanctions are found in two types of statutes in the United States Code:

(1) fraud statutes [36] that apply to fraudulent representations [37] made in dealings with government agencies, whether or not they are made under oath, and

(2) perjury statutes [38] that apply to false oaths.[39]

The federal perjury statutes are numerous and overlap to the point of distraction.[40] Not only are they to be found in the Criminal Code, they are also "built into" various other titles of the United States Code, so that, for example, the verification section of the Internal Revenue Code [41] has a companion enforcement section.[42] Yet all of the perjury provisions of the United States Code deal with matters that also fall within the purview of the general fraud section, 18 U.S.C. § 1001. This section provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.[43]

Though one who makes a false oath in any matter before the Patent Office may be indicted and convicted under the general perjury section, 18 U.S.C. § 1621, it is more difficult to obtain a

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[36] For example, 18 USC 1001 (1948).

[37] For ease of narration, "fraudulent statement" is here meant to refer to any statement in which a material fact has been willfully falsified or concealed so that it would fall within the purview of 18 USC 1001, quoted in the text at note 43, *supra*.

[38] For example, Crimes and Criminal Procedure: 18 USC 1621 (1948); Internal Revenue Code of 1954, § 7206; Executive Departments and Government Officers and Employees: 5 USC 789 (1916); Customs Duties: 19 USC 1510 (1930).

[39] Perjury is defined commonly as the willful violation of an oath, by falsely stating or concealing information so that the statement sworn to is knowingly untrue.

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both." 18 USC 1621 (1948).

[40] Judicial comment is exemplified by Wechsler v. United States, 158 Fed. 579 (2d Cir. 1907). Moreover, the maximum punishments called for by the various perjury and fraud sections of the United States Code vary considerably. E.g., 16 USC 371 (1936) (false oath to obtain free bathing in Hot Springs National Park): $300, 60 days; 48 USC 199 (1943) (false oath of applicant for Alaska game license): $500, 6 months; 15 USC 78 ff (1938) (false statement by securities broker): $10,000, 2 years—but no imprisonment if broker had no knowledge of rule or regulation he violated; 5 USC 789 (1916) (false claim for disability pension): $2000, 1 year; Int. Rev. Code of 1954, § 7206 (false tax statement): $5000, 3 years; 18 USC 1621 (1948) (perjury generally): $2000, 5 years; 18 USC 1001 (1948) (false statements or entries generally): $10,000, 5 years. The limitation of actions varies too. E.g., 15 USC 78 r (1936) (false statement under S.E.C. Act): 3 years, but no later than 1 year after discovery of facts; 18 USC 3282 (1954) (offenses not capital): 5 years; 31 USC 235 (1863) (false claim against Government): 6 years.

Some of the consequences of the variation in the limitation of actions are illustrated in U.S. v. Beacon Brass Co., 106 F. Supp. 510 (D.C. Mass. 1952), *reversed*, 344 U.S. 43 (1952).

plicable,[51] should have more far-reaching consequences in encouraging full and truthful disclosures in the affairs of the government and, if need be, in bringing violators to justice.[52]

Legislative Reform

The first major breach in the uniform requirement of the Congress that important documents be executed under oath and properly witnessed was probably prompted, in part, by the broadening of the federal income tax base. The increasing number of income tax returns that were being filed each year no doubt suggested a relaxation of the oath requirement.[53] Accordingly, in 1939 the Internal Revenue Code was amended [54] to permit a written declaration instead of an oath in certain cases.[55] And in 1945, Congress, perhaps still reeling from the enormous amount of paper work that attended wartime controls, considered a bill [56] that would have permitted a written declaration to be used for verification in all non-judicial proceedings of the Government.[57]

Since that time, legislative activity has been directed to eliminating the oath in specific instances where various departments and agencies began to find the oath an unduly burdensome device.

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[51] U.S. v. Gilliland, 312 U.S. 86 (1941); Knowles v. U.S., 224 F.2d. 168 (10th Cir. 1955); Stevens v. U.S., 206 F.2d. 64 (6th Cir. 1953); Todorow et al. v. U.S., 173 F.2d. 439 (9th Cir. 1949), *cert. den.*, 337 U.S. 925 (1940); U.S. v. Favala, 139 F.2d. 830 (2d Cir. 1944); U.S. v. Giarraputo, 140 F. Supp. 831 (E.D.N.Y. 1956); U.S. v. Meyers, 131 F. Supp. 525 (N.D. Cal. 1955); U.S. v. Ganz, 48 F. Supp. 323 (D.C. Mass. 1942). *Cf.* U.S. v. Moore, 185 F.2d. 92 (5th Cir. 1950). That the question of relevancy is not open to one who knowingly makes false statements with intent to mislead Government officials, see U.S. v. Eisler, 75 F. Supp. 634, 638 (D.D.C. 1947).

[52] See note 44 *supra* for the comment of the Attorney General of the United States on the efficacy of § 1001. This leads one to wonder why it is necessary to scatter sections for the punishment of perjury throughout the United States Code. (See note 40, *supra* and the accompanying text.) Section 1001 of the Criminal Code would seem to be sufficient, for it applies whether or not the fraudulent representation is made under oath. It is not surprising, therefore, to find that the trend in other agencies and departments of the Government has been to permit simple declarations in lieu of oaths. See text beginning at note 55, *infra*.

As is apparent, *in personam* jurisdiction is necessary to try an individual who has violated, say, 18 USC 1621 (perjury type) or 18 USC 1001 (general fraud type), so that in this respect, it makes no difference whether a foreign applicant for a U.S. patent or trademark has made a false oath or, simply, a false declaration. Absent such jurisdiction, the only certain recourse is to cancel the patent or trademark.

[53] "We think the Congressional intent in enacting section 3809 [Int. Rev. Code of 1939] was . . . to simplify the task of both taxpayer and the Bureau of Internal Revenue by permitting a verified return to be substituted for a notarized return in certain situations." Cohen v. U.S., 201 F.2d. 386, 393 (9th Cir. 1953).

[54] Int. Rev. Code of 1939, § 3809, ch. 517, § 4 (a), 63 Stat. 667 (1949); now Int. Rev. Code of 1954, § 6065, 68A Stat. 749.

[55] Commenting on section 3809, Int. Rev. Code of 1939, the Senate Committee on Finance said in its report: "The present law eliminates the oath in the case of individual income tax returns and employment tax returns. These changes will not only relieve the taxpayers of the burden of notarizing their returns but will expedite the processing by the Bureau of returns which might otherwise have to be sent back for compliance with the oath requirement." Sen. Rept. No. 685, 81st Cong., 1st Sess., Part II, § 4 (1949).

[56] "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That except in a judicial proceeding or in a proceeding in a court of justice, no written statement required by law shall be required to be verified by oath or affirmation before a magistrate or person authorized by law to administer oaths if it contains or is verified by a written declaration that it is made under the penalties of perjury. Whoever signs and issues such a written statement containing or verified by such a written

ecution of a document submitted to the Patent Office.[66]

Unfortunately, although the revised bill passed the Senate, Congress adjourned before the House had time to consider it.

CONCLUSION

Whether in patent or other matters, the underlying purpose of the formally executed oath is a meritorious one. Consequently, the oath should not be discarded merely to enhance administrative efficiency or to relieve the burdens of growing commitments. However, as we have attempted to show, comparable solemnity can be achieved by means of a simple written declaration accompanied by a warning of the consequences of falsehood.

While the making of the oath has perhaps been the principal motivation for some affiants to be candid—most are honest, oath or not—the Federal Criminal Code makes it clear that we have never been content to rely on moral restraint alone. Such restraint can hardly be expected to influence the inveterate scoundrel. Since we have had to brandish section 1621 of the Criminal Code for him anyway, it would seem far better to invoke the broader, more easily administered, and more liberally interpreted language of section 1001.

Many agencies of the Government have already been permitted to accept simple written declarations where oaths were formerly required, thus benefiting not only themselves but also the persons who deal with them. There does not appear to be any reason why other government agencies and the parties transacting business with them should not also be given the benefit of this more reasonable procedure.

disclose their trade secrets and product designs to their competitors through the Government. They argue that their research and development capabilities are intended to create products for them to sell, not to come up with products for others to copy. The conflict between the differing purposes of the Government and its contractors is most acute in the research and development situation where privately developed items are incorporated in an end product whose overall development is paid for by the Government. The Government is unwilling to permit the development contractor to become a sole source for the end product, by not acquiring sufficient data to enable reprocurement from others, and the contractor is unwilling to give up what it regards as proprietary rights in the items it has developed at its own expense. The problem is intensified when the Government's requirement for data is passed on by prime contractors to subcontractors. The first attempt to state general policy in this whole troublesome area came in 1957 when the Armed Services Procurement Regulation (ASPR) was amended to include a new section specifically relating to the acquisition of data.

In the years since 1957, the Government and industry have been unable to resolve their differences as to the Government policy of acquiring and using engineering data. There are those who contend that the differences can never be resolved, but nevertheless, Government and industry have continued to discuss and modify some of their positions.

In the Air Force Systems Command (AFSC) as in all other Government procuring activities, technical data is obtained for later use in competitive procurement in two ways:

(a) Pursuant to contract requirements, and

(b) Outside of contract.

Data obtained outside of contract may be of two types—solicited and unsolicited.

Solicited Data

Solicited data is data that is obtained through a "Request for Proposal" (RFP) or a request to a contractor by a government employee.

(a) Data provided by a prospective contractor to the Air Force in response to a "Request for Proposal" may include information which the offeror does not want disclosed to the public or used by the Air Force for any purpose other than evaluation of the proposals. If the contractor wishes to restrict such data from open dissemination, he must mark the data with the restrictive legend set forth in Armed Services Procurement Regulation (ASPR) 3-109.[3]

Failure of the contractor to use this legend on the data provided relieves the Government of any restrictions on its use and its use for competitive procurement purposes would not be actionable under law. This merely follows the common law rule which states that the use of an idea by someone other than the originator will not result in the recovery of damages by the originator if he cannot prove among other things that he protected such information from unrestricted use by others.

(b) Data provided by a contractor to the Government in response to a re-

[3] The language of the restrictive legend of ASPR 3-109 is as follows: "This data furnished in response to RFP No._____, shall not be disclosed outside the Government or be duplicated, used or disclosed in whole or in part for any purpose other than to evaluate the pro-

restricted drawing by measurement and analysis of the hardware depicted by the restricted drawing.[7] This procedure is commonly known as reverse engineering. To prepare such a drawing is proper, even if the drawing so prepared is bound to have considerable similarity in views, sections and dimensioning with the restricted drawing.

Obtaining Data Under Contract

The amount of data the Air Force obtains outside of contract is small in comparison to that acquired through Research and Development and Supply contracts. The new policy of obtaining data sufficient for competitive procurement is thus most important in the contractual area and is reflected in the 9 April 1957 revision of Section IX, Part 2 of ASPR.

The type and quantity of data to be procured is governed not only by ASPR but also by two other distinct kinds of contractual provisions. The first is a separate document in the form of a specification which describes how to prepare the data to be delivered. There are a number of such specifications, the most basic of which is Military Specification MIL-D-70327, "Engineering Drawing and Associated Lists."

The second provision indicates what data is to be delivered under the contract. In the Air Force, this document is usually MCP 71-77, Issue II, August 1960, "Engineering Data Requirements for Material and Services."

The series of contract clauses set out in ASPR Section IX, Part 2, "Data and Copyrights" sections 9-203.1, .2, .3, and .4 merely establish the Government's rights to use data delivered under the contract and do not require what data is to be delivered. What data is to be delivered is set forth, as indicated above, by MCP 71-77. The clauses are therefore appropriately referred to as "Rights in Data" clauses.

These "rights in data" clauses are not operative unless data is specified for delivery in the contract. This distinction is very basic, but not always understood, particularly by subcontractors who occasionally believe they must deliver data because ASPR data clauses appear in their purchase orders. Not only do the ASPR data clauses not require that data be delivered, but certain provisions of the clauses actually eliminate the necessity of furnishing a special class of data by automatically amending the data requirements, as will be discussed hereafter.

There are three different "Rights in Data" clauses in use, each composed of from two or more of the clauses of ASPR 9-203.1, .2, .3, or .4. Which composite of ASPR 9-203.1, .2, .3, or .4 is used to make up the "Rights in Data" clause depends on the type of contract involved and whether the Government requires limited or unlimited rights to the data to be delivered.

1. All contracts whether Research and Development or Supply that require delivery of data contain the "Basic Data" clause of ASPR 9-203.1 in the "Rights in Data" clause.

The most important purpose of the "Basic Data" clause is to secure a grant to the Government to use in any manner

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ber 12, 1961, as "(a) A clear need for reprocurement of such supplies is established; (b) There are no suitable supplies of alternative design; (c) The existing source is inadequate for defense need, or is demanding an excessive price; (d) The item can be manufactured by others from the technical data which is procurable; (e) The existing source will not license or train additional competing sources; (f) The savings through competition would be likely to exceed

out restriction on their use, and therefore, may use them for competitive reprocurement.

By excluding proprietary data under "Fail-Safe" clause, the contractor creates what is generally known as "swiss cheese" drawings. Although it appears to have been the Government's original concept that such drawings would be adequate to permit manufacturing by other competent firms who were assumed to have the capability of furnishing the missing "proprietary data" from their own inventory of trade secrets, it is doubtful that such drawings would generally be adequate for manufacturing purposes. Whether a drawing can be used for manufacture depends on how much information has been removed. What rightfully can be removed as being "proprietary data" as defined by the "Fail-Safe" clause is an area in which industry and Government are still far apart.

3. ASPR 9-203.3 sets out a clause which may be added to the "Basic Data" clause and the "Fail-Safe" clause in supply contracts when the procuring activity is able to negotiate delivery of proprietary data subject to limitations on its use.

The clause states that the data identified by the schedule as being subject to limitations will not be released outside the Government if the contractor stamps the data with the specified restrictive legend.[12]

Use of the ASPR 9-203.3 permits the Government to obtain a full complement of data for internal Government purposes such as overhaul of the device depicted by the data. Without the right to accept proprietary data on a limited rights basis, the Government would not be able to obtain a full set of data for the device purchased as the contractor has the right under the "Fail-Safe" clause to withhold proprietary data.

In summary, the "Basic Data" clause and the "Fail-Safe" clause are mandatory as comprising the "Rights in Data" clause in all supply contracts where data is specified to be delivered. Use of the 9-203.3 clause along with the "Basic Data" and "Fail-Safe" clause in making up the "Rights in Data" clause is discretionary and dependent upon whether the procuring activity desires a full complement of data for internal use and whether the procuring activity can negotiate for the delivery of excludable proprietary data.

4. For Research and Development contracts, ASPR 9-203.4 sets out a clause which is to be added to the "Basic Data" clause of ASPR 9-203.1 in every contract that has as one of its principal purposes experimental, developmental, or research work. It states that data need not be furnished for standard commercial items as defined by ASPR. It further provides that proprietary data as defined in the clause need not be furnished for other items which were developed at private expense and previously sold or offered for sale.

ASPR requires that when data is obtained under an R&D contract it shall be obtained without limitation on its use.[13] Thus, if a contractor can exclude

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[12] The legend of ASPR 9-203.3 is as follows: "Furnished under United States Government Contract No. _____ and only those portions hereof which are marked (for example, by circling, underscoring, or otherwise) and indicated as being subject to this legend shall not be released outside the Government (except to foreign governments subject to these same limitations) nor be disclosed, used or duplicated for procurement or manufacturing purposes, except as otherwise authorized by contract, without the permission of _____. This legend shall be marked on any reproduction hereof in whole or in part."

X	REPARABLE ITEMS	X	NONREPARABLE ITEMS
	Complete Set		Main Assembly
	Main Assembly Drawing		Control Drawing (Spec-Source)
	Control Drawing (Spec-Source)		
	Item Specification (MIL–D–26036)		
	Detailed Assembly Drawing		

FIGURE III

NOTE: When a control drawing is specified, it shall be prepared and submitted by the prime contractor and shall be a part of the set of data furnished with the prime contractor's set of data.

X	BASIC OR INITIAL SHIPMENT	REVISIONS
	30 days prior to delivery of first production article	After delivery of the initial shipment of data, subsequent revisions and new drawings shall be shipped every: ☐ 30 Days ☐ 60 Days ☐ 90 Days ☐ Days Revision and new data affecting flight and safety shall be delivered immediately when facts become known.
	..... days prior to delivery of first production article	
	..... days after delivery of first production article	
	Concurrent with delivery of the ..... production article	

FIGURE IV

The Committee also pointed up the problems:

"The strict standards and the legal safeguards attending Government conduct are considerably weakened. Moreover, there is a question as to whether the conflict-of-interest statutes apply to the STL personnel who have responsibilities similar to those normally exercised by Government personnel. STL personnel became part of the Air Force organization but without the inhibitions that apply to Government personnel. With no restraints on salary, STL employees can and in some cases do, receive much more than the Government personnel who work along with them. The Government has used STL as a ready manpower pool to overcome Government restrictions on employment, not only of high-caliber professional personnel but of secretaries, chauffeurs, switchboard operators, custodians, and the like. The Air Force avers that this has been an economical and convenient arrangement but it tends to scramble Government and private activities in defiance of commonly accepted values in public service. The convention adopted by the Air Force of referring to Ramo-Wooldridge as its "prime" contractor or as a "line" contractor on a par with other missile contractors does not obviate the fact that this contractor alone sits in the very seat of Government, three or four thousand strong, and wields an enormous influence on the course and conduct of multi-million dollar missile programs. This influence—there is nothing invidious about the term as used here—is the more powerful because it is exercised in the name of the Air Force. And while much emphasis is given to the fact that STL hews closely to the line of "technical" decisions and keeps out of business and contracting decisions, the other fact is that the technical decisions are crucial to and shape the course of the business decisions. In the missile programs, technique is master; business is the housekeeper." [4]

"The Air Force states that it, too, has built up a respectable "inhouse" capability in ballistic missile management, but this new resource probably consists of armies of missile buyers, contract administrators and inspectors rather than the scientists, engineers and technicians necessary to give, as Ramo-Wooldridge (STL) now does, "technical direction" to all the big missile programs. General Bernard Schriever [then Commander, Air Force Ballistic Missile Division, (ARDC), now, Commander, Air Force Systems Command] admitted to the subcommittee that the inhouse capability, after 5 years of missile management effort, resides in STL, not in the Air Force." [5]

The Committee stated its solution to the problem:

"The subcommittee believes that if STL is to have any future with the Air Force it must be converted into a nonprofit institution akin to the Rand Corporation and other private and university-sponsored organizations which serve the military departments and other agencies of the Federal Government on a stable and continuing basis. Government relationships with non-profit organizations also pose problems, but they are less important than the benefits received, and certainly less crucial than those posed by the STL tie with the Air Force. Thompson - Ramo - Wooldridge would have to recover its capital investment and the subcommittee believes that the Air Force should be enabled to acquire the facilities of STL. This would insure

State of California. The articles provide: "The purposes of the Corporation are exclusively scientific as herein set forth: To engage in, assist and contribute to the support of scientific activities and projects for, and to perform and engage in research, development and advisory services to or for, the United States Government."

They further provide that there will be no distribution of profit, nor should it inure to the benefit of any member "except that this provision shall not be construed so as to prevent the payment to trustees, officers or employees of reasonable compensation for services actually rendered to the Corporation."

Upon dissolution any remaining assets shall be turned over to the United States as the Secretary of the Air Force may direct.

In addition to these declarations in its articles of incorporation, the Aerospace management has insisted that its formal contracts with the Air Force restate its "unique mission", which derives from a letter sent from the Secretary of the Air Force to the organizing committee and which is used as a basis for recruitment of personnel. It provides in part: ". . . the mission of The Aerospace Corporation is to aid the United States Air Force in applying the full resources of modern science and technology to the problem of achieving those continuing advances in ballistic missile and military space systems which are basic to national security; The Aerospace Corporation is responsible for providing the Air Force missile and space efforts with an organization which is objective, possessing high technical competence and characterized by permanence and stability; The Aerospace Corporation will provide a vital link between the Air Force and the scientific and industrial organizations through its unique role, will help to insure that the full technical resources of the nation are properly applied and that the potential advances in the missile and space field are realized in the shortest possible time; . . ."

The Corporate Device as Insulation from the Government

Considering these express declarations and this particular background of national policy, it seems clear that the Aerospace Corporation is a government instrumentality. However, obviously, an attempt has been made to insulate this organization from the Government by incorporating it as a non-profit corporation created under state law, and by having the Government deal with it formally and, in particular, fund it, by means of a research and development contract. This corporate insulation is sought as protection from industry objections on the one hand and government red-tape on the other. The non-profit aspect removed the objection which existed in regards to STL's "aggressive profit-making drive." It is also removed from a competitive position with the rest of the aerospace industry, at least for the present, by virtue of its "charter" restrictions and close Air Force control of its funding. Of course a normal public corporation could accomplish these ends in a much simpler fashion. It is therefore primarily a device to permit the recruitment of the needed scientific talent, which could not be obtained with the present civil service salary structure. In addition it provides a certain amount of freedom from Government administrative regulations in the scientific and technical areas. It also permits a much more rapid expansion of facilities and

allowable costs under its Government contract, if so-called independent research.

In the aforementioned cases, the Government liability existed, despite the contractual insulation, because of duties placed by state laws on an owner, employer or furnisher of property or equipment. In other words, the negligence is that of the Government, as opposed to, or in addition to, that of the contractor. The Government may also be liable for the contractor's sole negligence if the organization with which it is contracting is found to be a Government instrumentality despite the existence of a separate corporation and a contract. The case of *Toth vs United States*[18] was a wrongful death claim involving a housing project owned by the Public Housing Administration of the United States but "leased" to the Youngstown Metropolitan Housing Authority. The Government moved for summary judgment on grounds that 28 USCA 2671 provides that "federal agency" includes "corporations primarily acting as instrumentalities or agencies of the United States," but does not include "any contractor with the United States," and that the United States only relationship to the Youngstown Metropolitan Housing Authority was as a contractor under a lease arrangement. The court denied the motion stating that the mere styling of the agreement as a lease did not in fact make it so, but that it was in fact an agency agreement, and presumably that the Authority was acting primarily for the Government. It considered the following points:

"Thus, under the contractual arrangement, all profits are reserved to the Government. Section 3.

"There is detailed supervision of the operation and management of the project by the Government through a program of management and an approved operating budget—Section 5. While it is true that the so-called "lessee" is to engage personnel and provide equipment, it must do so in accordance with the operating budget and management program and the Government determines the wage scale—Section 5.

"The use of the property is restricted —Section 5.

"The "lessee" is to arrange for commercial facilities on instructions from the Government—Section 30.

"There is control by the Government of all fiscal affairs—Sections 6 and 7, and the deposit and use of funds is carefully circumscribed—Section 8.

"The agreement contemplates that the Government may supply non-expendable personal property and fixtures—Section 30. The "lessee" must release personal property determined by the Government not to be necessary for the operation of the property, Section 10. Upon termination of the contractual arrangement, title to all personal property vests in the Government—Section 17 . . . The purpose of the present agreement, as disclosed in Section 5, is to effectuate federal housing policies, and the local housing authority is acting as an instrumentality of the United States to achieve this purpose.

"I do not believe that under such circumstances the federal Government should be permitted to escape liability for the negligent acts of the officials of the local authority, and I think that the Federal Tort Claims Act contemplates that it respond."[19]

The application of the same criteria used by the Court in *Toth* to find the local housing authority in fact a federal Government instrumentality would lead to the same conclusion in the case of

under its charter is not a corporation "primarily acting as an instrumentality of the United States," nor is it part of an executive department, nor is it an "independent establishment of the United States", and it is not a federal agency within the Federal Torts Claims Act.

The *Alexander* case, in which the Supreme Court denied *certiorari,* involved injuries received by the plaintiff, a professional golfer, while flying as a passenger in a United States Air Force aircraft flown by an Air Force pilot but while on a mission for the Civil Air Patrol. The Court of Appeals held that the Civil Air Patrol was not a federal agency within the meaning of the Federal Tort Claims Act, relying on the *Pearl* Case; and that the pilot, although an officer of the United States Air Force, was acting outside the scope of his authority.

The *Pearl* case involved the death of a passenger on an official indoctrinating flight of the Civil Air Patrol in a Civil Air Patrol aircraft which was on loan from the Air Force and was piloted by a member of the Civil Air Patrol. The Court pointed out that the Civil Air Patrol was incorporated under the act of July 1, 1946 [25] but, that an examination of its objects and purposes clearly indicate, "if they do not compel the conclusion", that the Civil Air Patrol was an independent non-governmental agency, and the mere fact of its being incorporated under a federal statute did not make it a governmental instrumentality. The incorporating act states that it is "solely of a benevolent character" and the control of congress is limited to receiving a report such as it receives from other such patriotic societies as the American Red Cross. Since the District Court in *Alexander* had held the United States liable, the Court of Appeals distinguished that decision on the ground. that the plane involved was owned, operated, maintained and exclusively controlled by the United States Air Force.

It may also be pointed out that no provision was ever made for funding the activities of the Civil Air Patrol by the Congress or any executive department of the Government. But subsequent legislation existing at the time of the crash,[26] after describing the Civil Air Patrol in its first paragraph as a "voluntary civilian auxiliary of the Air Force", authorized the Secretary of the Air Force to furnish surplus aircraft, other equipment, fuel, use of Air Force facilities; to assign civilian and military personnel of the Air Force for training and liaison purposes; and to allow payment of travel expenses and allowances while on Air Force missions. The Court in *Pearl* looked to the Report of the Senate Committee on Armed Services for the history of the bill and found no specific governmental purpose, other than that of a "voluntary civilian auxiliary of the Air Force", of course. It emphasized that in fact no Air Force personnel were involved nor was it an Air Force mission.

The Appellate Court in *Alexander* in reversing the District Court considered in great detail the Air Force Regulations issued pursuant to 5 U.S.C.A. 626(1). These regulations indicate assumption by the Air Force of a great deal of detailed supervision of the Civil Air Patrol. However, although the Court cited *Pearl* (which had specifically distinguished the District Court decision on *Alexander*) as authority for finding that the Civil Air Patrol was not a federal agency, it avoided further discussion of that case by finding that the Air Force pilot, and

EQUITABLE ADJUSTMENTS UNDER FIXED-PRICE CONTRACTS

*Clay H. Duncan**

INTRODUCTION

"Equitable adjustment" as used in fixed price Government contracts is an expression which at first glance appears to be easily defined, but which loses that simplicity of definition when one reviews the appellate decisions which have attempted to apply the phrase. Recent articles have explored the question of whether the adjustment should be made on a value (or objective) basis of whether it should be on an actual cost to the contractor (or subjective) basis.[1] This article presents a discussion of the application of the various principles pronounced by the appellate boards and courts to the special situations which not uncommonly occur; e.g., where a contractor has found himself involved in a situation where he has made a belated discovery of a substantial error in his bid resulting in a too low bid for the item being changed; where supplies or services are donated to a contractor or are obtained at a price substantially below market price due to a special relationship or circumstance, etc. The ensuing discussion is intended to offer still a third possible approach which would embrace both objective and subjective considerations. Although set out in prior cases such as *S. N. Neilsen Company*[2] this third approach is best expressed in the appeal of *Montag-Halvorson-Cascade-Austin*[3] holding that the true object of an equitable adjustment:

> "is to leave the parties in the same position costwise and profitwise as they would have occupied had there been no change, preserving to each as nearly as possible the advantages and disadvantages of their bargain."

This suggested third approach may be referred to as "leave them where you find them." This would in same cases result in an adjustment on an objective basis and in other cases on a subjective basis. A review of pertinent decisions with "leave them where you find them" in mind may best serve to illustrate the point.

EQUITABLE ADJUSTMENT AND CHANGES IN WORK

The *Neilsen* case is probably the most familiar one to people with more than a passing interest in the subject because it seems to have been a lead off case for a number of decisions on the subject. The case involved a change to outside utilities made prior to commencement of

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[1] Ginsburg. *The Measure of Equitable Adjustments for Change Orders Under Fixed-Price Contracts,* Mil. L. Rev., October 1961 (DA Pam 27-100-14, 1 Oct 61); Spector, *Confusion in the Concept of the Equitable Adjustment in Government Contracts,* 22 Fed. Bar J. 5 (1962).

[2] Eng C&A 408 (Nov. 12, 1953); ASBCA 1990 (Oct. 1, 1954); 141 Ct. Cl. 793 (Mar. 5, 1958). While the *Neilsen* case is the case most cited by proponents of the "objective" approach, it will be noted that it has also been cited with approval in cases where allowances was made on

had not been issued" and "the change order did not increase plaintiff's losses."

It will be noted that the *ratio decidendi* of both Boards and the Court of Claims appears to have been founded on the theory of "leave them where you find them."

Some eleven months after the ASBCA decision in *Neilsen, supra,* allowing adjustment on a value approach, the ASBCA decided *Franklin Metal Products Company*[5] and held that adjustment on a cost approach would be proper (except for failure of proof); however, in this case as in *Neilsen,* the contractor would be left in the same position costwise and profitwise as he was prior to the change. The Government changed the f.o.b. delivery point for posts and deducted from the contract price the difference in freight rates. Appellant contended that freight rates were inapplicable since he intended to haul the posts with his own trucks. ASBCA had this to say relative to appellant's theory of recovery:

> "We see no reason why a contractor should not have the benefits of the advantages he may possess for bid-making purposes. Any justifiable reductions by reason of the 'changes' provision of the contract should be measured upon the basis of his bid, not upon general freighting principles that he did not seek to apply in such a case."

These decisions were followed by ASBCA's decision in *Keco Industries, Inc.*[6] Appellant had contracted to furnish both gasoline driven and electric driven refrigeration units. By change order the gasoline units were changed to electric and the issue was as to the proper computation of an equitable adjustment. Appellant had admittedly bid too low on both items in his original bid. The Board, in a split decision, endorsed the "leave them where you find them" approach by saying, "In our opinion appellant should not be left in a worse position as a result of the issuance of the change order."[7]

Several Engineer Board decisions were next in order. In *Westover and Hope,*[8] the contractor had erroneously based its bid on a subcontractor quotation for doors which did not meet the specifications. The specified doors were later changed by change order to require a cheaper door, and the Government requested a credit for the change. Appellant requested an increase in price based on the difference in cost between the door on which he had erroneously bid and the door required by the change order. In denying appellant's claim, the Board specifically endorsed the objective approach (reasonable cost to a typical contractor) as the proper basis for effecting equitable adjustments;[9] however, the result was consistent with "leave them where you find them" in that the contractor was left in the same position as he was prior to the change, i.e., with an underbid for the doors.

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[5] ASBCA 2496 (Aug. 23, 1955). A cost approach was also utilized by ASBCA in a case which preceded *Neilsen* by some six months involving a change order for extra work. Dibs Production & Engineering Co., ASBCA 1438 (Mar. 26, 1954).

[6] ASBCA 2476 (Mar. 30, 1956).

[7] However, the actual results achieved by this decision would appear to have corrected an error in bid and have left the contractor in a somewhat improved position.

[8] Eng C&A 1057 (Dec. 14, 1956).

block was higher than the standard block and applied the "objective" theory to request adjustment on the basis of the market price. The Engineer Board adopted appellant's reasoning and allowed adjustment on the basis of the current market price, even though it found that the relationship between appellant and supplier was typically businesslike and at arms length.[12] This of course placed appellant in an improved position costwise and profitwise. ASBCA, however, in its decision on August 30, 1960 overruled the Engineer Board and disallowed appellant's claim on the basis of failure to prove a higher market value at the time the contract was made with the supplier, in an arms length business transaction. It also states as follows relative to "value" of materials:

> "It is recognized that there are situations where it is proper to compensate a contractor for the 'value' of materials used in the performance of a contract, notwithstanding the fact that such materials are not reflected as 'costs incurred' in the contractor's accounting records. If, due to fortuitous circumstances, a contractor obtains materials as a gift or at a price demonstrably less than the prevailing fair market value for such materials, and the contractor uses such materials in the performance of a change order, it would seem to be 'equitable' that the price adjustment for such change order should reflect the prevailing fair market value of such materials."

ASBCA again had occasion to consider the question of equitable adjustments in *The Ensign-Bickford Company*.[13] A contract was accelerated by a two part change order and appellant in good faith entered into a firm arrangement with his subcontractor for the acceleration work and made payment to him prior to negotiating a settlement with the Government. The Government, which also had accelerated another identical contract with another contractor, determined in negotiating with the other prime contractor after the fact that the amount allowed the subcontractor was excessive. ASBCA, on the basis that the amount negotiated by appellant was reasonable at the time negotiated, and that the increased price which appellant had already paid its subcontractor was increased cost to the appellant, made allowances to appellant on the basis of the excessive subcontract payment. This left appellant in the same position as prior to the change.

Equitable Adjustment and Extra Work

The cases discussed to this point have all pertained to changes in the work as opposed to added work. The same reasoning of fairness to both parties however appears applicable and has been applied in cases involving extra or added work and changed conditions. In *Dibs Production & Engineering Company*,[14] decided by ASBCA just six months prior to its decision in the *Neilsen* case, a change order was issued to require painting of items being manufactured. Appellant was not experienced in painting work. ASBCA based its decision on the fact that the Government had selected an inexperienced contractor to do the painting and held that, under such circumstances, "the issue is what the appel-

[12] It might be significant to point out that this case was written by the same panel member who had written the *Malan* and *Westover* and *Hope* decisions which also specifically endorsed

BOOK REVIEWS

GOVERNMENT GUARANTEES TO FOREIGN INVESTORS. By A. A. Fatouros. New York: Columbia University Press. 1962. Pp. 411. $12.00.

Professor Fatouros of the University of Western Ontario Law School has done a signal service to students of international law, practitioners in the field of international investment, and, indeed, to non-lawyers interested in international relations, by producing this book. For he has done nothing less than examine dispassionately, fairly, and with a wealth of data, all the existing techniques, and proposals, for securing greater security for private foreign investments from adverse Governmental action; assess their advantages and limitations; and draw conclusions designed to put the problem in proper perspective.

The book is in three parts. The first summarizes somewhat familiar material concerning the relationship between the economic development of underdeveloped countries and private foreign investment: the predominance since World War II of public investment, the expectation that this form of investment will continue to predominate, the fact that, even so, underdeveloped countries receive less private foreign capital than they need, and the obstacles to such increased investment.

The second part of the book analyzes the kinds of "state promises", existing and proposed, which have been thought of to overcome some of these obstacles: guarantees by capital-exporting countries to their own investors; bilateral treaties;

Part three discusses very ably the legal effects of these various kinds of state promises, the state of the law concerning state breaches of contract, the law concerning compensation if there is a taking of property, and related matters.

Nor does Professor Fatouros shrink from drawing conclusions: As to proposed multilateral investment codes, "no satisfactory international code seems possible," primarily because capital-importing countries will not accept the limitations upon their freedom to experiment in order to achieve development which such codes would impose upon them. To the reviewer, this assessment has long appeared to be right.

Investment guarantees by capital-exporting countries are of "greater usefulness", though they are subject to two limitations—they relate only to future investments and they provide "insurance only" With this judgment there can be some dispute. Only the understandable reluctance of capital-exporting countries to shoulder the risk prevents them from expanding guarantees to covering all existing investment, and recent developments indicate a willingness to guarantee expansion of existing investments through reinvested earnings in local currencies which would be guaranteed in dollars; in time this could easily result in effective guarantees of "existing" investments. As to the fact that all that the investor is assured of is insurance, rather than a guarantee that he can carry on his business relatively unhindered for future ages, in what other areas of this life does one receive such assur-

PUBLIC MONEY SOURCES FOR OVERSEAS TRADE AND INVESTMENT. By John E. Loomis. Washington, D. C.: The Bureau of National Affairs, Inc. 1963. Pp. 300. Index. $16.50.

Since the Second World War, for a variety of reasons, the number of United States and International lending institutions has grown rapidly.

The Export-Import Bank of Washington is the oldest of the public lending agencies doing international business, having been chartered in 1934, ironically to finance trade with the Soviet Union. It has expanded its activities in recent years, instituting a new program of foreign export credit insurance in February, 1962.

The International Bank for Reconstruction and Development, the so-called "World Bank", perhaps because it has, in many respects, outgrown its original purpose—which was to help rebuild Europe—has a new sister institution, the International Development Association, established in 1960 and directed more clearly to the needs of the under-developed countries. As a result of a change in top management and the additional power to acquire stock directly, the International Finance Corporation has gotten a new breath of life although, because of its limited funds, it is still somewhat restricted in its activities. After a slow beginning, the Inter-American Development Bank is now active in Latin-American investments, although so far its activities have been primarily in the public sector.

The United States AID program has gone into its *n*th reorganization, encompassing the Cooley loan program previously administered by the Export-Import Bank. Its investment guaranty tion and Development Loan Fund with some additional fillips for the unwary. It has a somewhat changed lending program, although the major effect of the reorganization has not been so much a change in lending policy as the imposition of the unwieldy bureaucratic structure and programming techniques of the International Cooperation Administration on the Development Loan Fund. All of these programs, to a more or less degree, have as a result of the reorganization and a new administration, taken on a new slant and policy and, in some cases, a different legislative background.

To the connoisseur, as much as to the novitiate, this changing international scene has been difficult to follow: and, because many of the agencies have different purposes and were organized for different reasons, many of their activities overlap with only slight ramifications which are difficult to analyze without engaging in a long, arduous, and sometimes futile, process.

Ariadne's cord to this labyrinth of international lending agencies has now been published in an operations manual by John E. Loomis, formerly the general counsel for the Development Loan Fund. There have been prior to this comparisons of these agencies, but all of these have either been too brief to do more than indicate the beginning of the problem to the untutored and be worthless to the expert, or been dated in large measure before their publication. This book is unique in this field: it is the only book which is both complete and, at the time of its publication, up-to-date.

The book is complete, the preface tells us, up to the fall of 1962, and it appears that at least for the next couple of years it will continue to be a current analysis of the international and U.S. lending in-

"bargaining" for good projects or for the foreign exchange costs of a project in order to keep its own skirts clean. Yet such bargaining consumes an inordinate amount of not only the staff's, but top management's time. The close coordination between the various lending institutions most active in the Alliance For Progress (The Export-Import Bank, the Inter-American Development Bank & AID) is useful to prevent two agencies from working on the same project. However, much of this "coordination" is actually a "bargaining" over the distribution of the wealth (the "good projects") and deciding who must pick up the poorer projects (retroactive financing, non-project aid without a clear plan, operations in a country with little self-help, etc. There are exceptions to this; most notably in housing, where the coordination between AID and the Inter-American Development Bank has led to the decision that very low-cost housing would be financed by the IADB and somewhat more expensive homes for the emerging middle class would be financed by AID. This type of coordination is unfortunately rarely found elsewhere in examining lending institutions in Mr. Loomis' book.

Hopefully, Mr. Loomis' book will cause the decision makers to see this situation more clearly.

In any event, lawyers and executives who have to play the game with the rules as they are, will find a valuable addition to their libraries. Congratulations are in order for a valuable manual which should be placed at the right hand of all who have the need for or think they have the need for public funds to go overseas.

*—Reviewed by Arnold H. Leibowitz**

TRAFFIC COURT PROCEDURE AND ADMINISTRATION. By James P. Economos. Chicago: American Bar Association. 1961. Pp. 141. $5.00.

Undoubtedly this book is the most definitive study of the Traffic Court Program with emphasis on the appropriate administration of justice in this area since the publication of *Traffic Court* by George Warren in 1944. The author, James P. Economos, with B.S. and LL.B. degrees from the University of Illinois and a distinguished career in the field of judicial administration, a former Chairman of the American Bar Association Junior Bar Conference and Director of the Traffic Court Program of the American Bar Association since 1943, contributes the benefit of his eighteen years of first-hand experience in the field to this work.

The book points up the important position of the traffic court judge in the American society of today and his immeasurable opportunity through the proper administration of justice to perform a tremendous educational function.

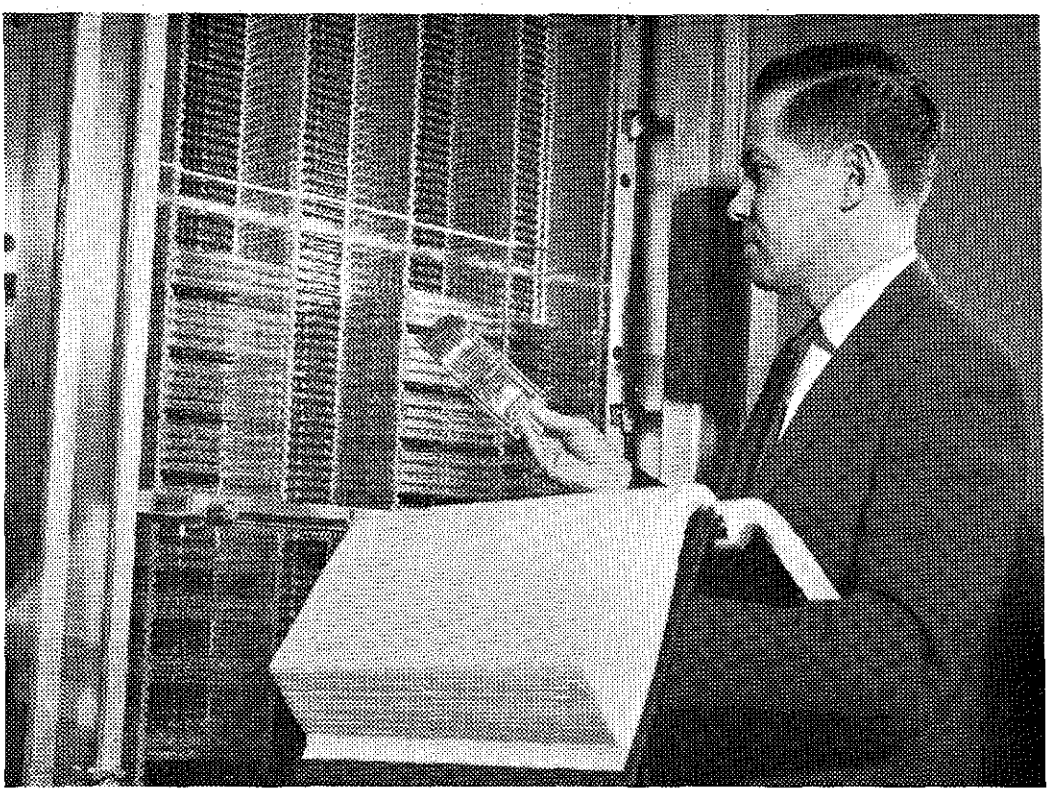
Mr. Economos has carefully defined the function of the traffic court judge and the function of the traffic court itself, directing attention to the necessity of a well organized system of judicial administration in this area with its ultimate effect upon the public. The author has detailed in excellent fashion the appropriate and necessary procedures according to the highest recommended national standards from the issuance of the traffic court complaint through pre-court proceedings, courtroom procedures including opening ceremonies and the opportunities for educational aspects of hearings in open court, to the ultimate disposition of the case. Moreover, the book details the necessary clerical procedures

Considerable attention is given the very practical problems of courtroom facilities and related office requirements to the duties and functions of personnel necessary to the proper conduct of the court's business. Included is a thorough analysis of the court administrator's function, the necessity for appropriate statistical reports and analyses.

The book closes with a succinct and hard-hitting discussion of the judicial responsibility of the traffic court judge, directing attention to the necessity in the proper administration of justice, for competent, qualified men and women in this field.

The excellent appendices to this book include the National Standards for Improving the Administration of Justice in Traffic Courts; the Resolutions of the National Conference of Chief Justices Relating to Traffic Courts; the Immediate and Long Range Needs for Traffic Court Improvement Promulgated by the Public Officials Traffic Safety Conference held under the sponsorship of the President's Committee for Traffic Safety in 1957 and subsequently ratified and approved by the American Bar Association and the Conference of Chief Justices; the 1961 Action Program of the President's Committee for Traffic Safety; Model Rules Governing Procedure in Traffic Cases; and in addition, forms for a standard uniform traffic ticket, complaint, summons, report of conviction and police records are included.

This book is not only informative and educational to members of the legal profession interested in the improvement of the administration of justice in the traffic court field, but it should prove to be invaluable to traffic court judges and administrators everywhere and particularly to those authorities charged with the responsibility for traffic safety, education



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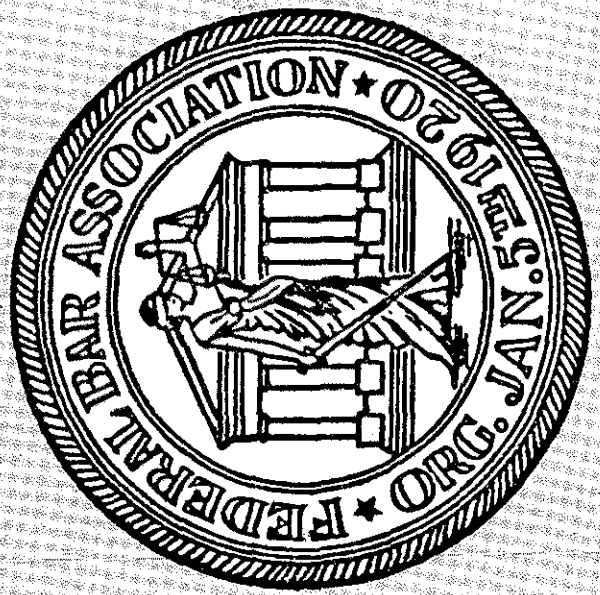
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The issues of the Federal Bar Journal listed above may be purchased for $1.75 per copy from the National Office of The Federal Bar Association,

HOWELL'S COPYRIGHT LAW, Rev. Ed. By Alan Latman. Washington, D.C.: Bureau of National Affairs, Inc., 1962. Pp. 358. $9.25.

Many areas of legal endeavor develop one or two favorite texts to which almost everyone refers at one time or another. The *Copyright Law* by Herbert Howell has long enjoyed such a distinctive status.

Undoubtedly one of the outstanding qualities of Mr. Howell's earlier book was its readability, and this quality has been admirably preserved by Alan Latman in his revision.

Since the last revision of *The Copyright Law,* in 1952, significant developments in the law of copyright have occurred. Among these might be numbered adherence by the United States to the Universal Copyright Convention, and such far-reaching judicial pronouncements as the decision in *Mazer v. Stein* [1]. In addition to developments on the administrative and legal side of the ledger, recent technical and scientific disoveries and improvements have had an effect on legal thinking in the copyright field which is likely as profound as in any other legal area. Television and improved audio and visual recording devices are now within the reach of many individual citizens. The presence of a photocopying machine in many libraries has become almost commonplace. The legal effect of these and other technical innovations are some of the matters touched upon by Mr. Latman in his revised edition.

While, in general, following the same arrangement of material, Mr. Latman has extensively rewritten certain portions of the book in the light of recent trends.

For those unfamiliar with the predecessor work, the general organization of material in *Howell's Copyright Law* may be gleaned from the chapter titles:

Subject Matter of Copyright; Classification of Copyrightable Subject Matter; Non-Copyrightable Material; Ownership of Statutory Copyright; Statutory Requisites for Copyright: Publication; Statutory Requisites for Copyright: Notice; Deposit of Copies and Registration of Works First Published; Manufacturing Requirements and Ad Interim Copyright; Statutory Requisites for Copyright in Unpublished Works; Renewal of Copyright; Rights Secured by Copyright and Infringement Thereof; Remedies for Infringement; International Copyright Relations; Taxation of Copyrights; and State Copyright Legislation.

In the Appendixes are included essential reference documents such as the Copyright Law itself, the regulations of the Copyright Office, the U.S. Supreme Court Rules, the Customs Regulations, the Universal Copyright Convention and Berne Convention.

Here is a book that presents in a concise, summary fashion an entree into most copyright problems. Its simplicity and readability should commend it, particularly to the general practitioner, who encounters an occasional or incidental copyright problem in his regular practice.

—Reviewed by R. J. Keegan *

will be dated at all as a result of this session of Congress.

As an example of its thoroughness, it includes for each agency the applicable legislation, a list of the transactions already entered into (complete until the fall of 1962), and a very valuable section called "Applicable Procedures." This details, as well as one can, how to go about approaching one of these institutions, and what data is required.

As Mr. Loomis indicates in his preface, the issue is whether to set up a book like this by function or by agency. This is a matter of choice and perhaps a matter of flipping a coin. Once having decided to organize by agency, as Mr. Loomis has, then the crucial thing is to be able to move from agency to agency rapidly to follow a given problem. The value of this book is that Mr. Loomis has arranged his Table of Contents and his subject matter subdivisions on each agency, so that they parallel each other quite closely and one can move from application procedures in IFC to application procedures in AID or from procurement under AID loans to procurement under IDA loans, or from guarantees made by the Export-Import to guarantees made by AID and find out rather quickly where one's client or firm fits in.

Of course, this organization reflects a high degree of expertise and awareness by the author of the problems asked by the agencies and by borrowers or suppliers. Thus Mr. Loomis highlights differences between foreign exchange and local currency funding, project and non-project financing, administrative preferences of agencies for certain types of projects, debt-equity ratios, procurement, and competitive and negotiated bidding in the selection of consulting engineering and contractor services.

The book is not flashy. It is stylistiplies, a manual, descriptive rather than normative. And it does the job, smoothly and effectively.

When one looks at these agencies, especially after having read Mr. Loomis' book, one is impressed by the duplication among the public international agencies. Thus, if one desires to invest in a soft-drink or textile plant, I can think of no agency (perhaps Cooley funds would be available) that would be interested. On the other hand, if one were seeking funds for a fertilizer plant, a dam, or a truck factory in an underdeveloped country, there is not one of these agencies which could not be found with the check all but filled in. (O happy man with projects such as these!) Although there is talk of "the bank of last resort" so that one goes in a sort of descending order from the World Bank to the Export-Import to the Inter-American Bank, if it is in Latin America, to IDA and then to AID, in actual fact the legislative and administrative policy at each agency overlap to such degree that one can eliminate in many cases, all of the institutions at once, and, on the other hand, one can include them all at once. The emphasis on maximum economic development for each dollar expended and the cross-fertilization of agency staffs has meant a sameness of approach which has in great measure cancelled out the value of having the additional agency. One can ask with some seriousness "are not the economic development projects in the private section so few that it would be profitable to have one of the existing agencies not emphasize this in its private project lending"? It could look at the management and the structure of the project, gauge its likelihood of process, and if all were well, process the project leaving questions of priority in economic development aside.

Bilateral treaties and *ad hoc* guarantees by the host country are "probably most effective", in Professor Fatouros' view, though the latter are not widespread and will in all likelihood be limited in the future, as in the past, to very large projects, and not even most of those, while the former must necessarily state commitments in general language. In the reviewer's opinion, while both these techniques are useful, more for their indication of long-term intention on the part of the host country than for other reasons, neither give recovery in convertible currency, or quickly, which is the result of investment guarantees by the capital-exporting country.

With Professor Fatouros' more general conclusions, there should be no serious caveat: "no guarantee today can provide complete security, even for non-business risks only. The lack of security of investment in foreign, and especially underdeveloped, countries is due to, and is a manifestation of, the general lack of stability in today's economic and political situation. It is not possible to provide complete security for investment where the underlying economic and political conditions are unstable. Legal means can be useful, since they provide some degree of relative security, but there are definite limits to their effectiveness." Moreover, since private foreign investment does not have "the central or the most important role" in economic development of the more backward countries, they are not exactly anxious "to grant such guarantees or extend existing ones", and the "world political situation is such that they generally cannot be coerced into doing so against their will." In short, private foreign investment is in the same boat with the rest of us, one which is attempting to negotiate a passage through very rough waters which stretch out endlessly, with nobody deserving to be, and no one getting, guaranteed safe.

—*Reviewed by Stanley D. Metzger* *

lant's costs were rather than what it would have cost a more experienced firm."

The full Corps of Engineers Claims and Appeals Board rendered a split decision in *Montgomery Construction Co.*[15], a case where appellant had been directed by change order to perform certain extra earth work. Appellant had negotiated an agreement with his neighbor to perform the work at about one-fourth of what was a fair and reasonable price. The Board held that appellant was entitled to the bargain he had negotiated and that he was entitled to a fair and reasonable price for the work. This case allowed the contractor the advantage of a special bargain obtained by him in connection with the change itself, but still left the parties in the same position they were prior to the change insofar as the work covered by the basic contract was concerned. It is evident that this decision was based upon the fact this was not an arms length transaction but was a special price given by a neighbor because of friendship and is distinguishable from the *Bruce* decision, *supra,* on that basis. Certainly, as stated in the *Bruce* decision, if work or materials were donated to a contractor in connection with a change, the Government could not expect or require him to donate them to the Government.

As in the decisions on changed work, these decisions on added work have accomplished adjustments on both objective and subjective bases but have in each case left the contractor in the same position costwise and profitwise on the original work as he was prior to the change. As to the added work, they left the contractor with a special bargain obtained through friendship (*Montgomery* case) and allowed extra costs incurred, not through any fault on his part but because the Government had required him to perform work in which he was not experienced (*Dibs* case).[16]

Conclusion

Thus, from this brief review of more recent expressions on the subject of equitable adjustments, we may reasonably conclude that neither "objective" nor "subjective" are ultimate avenues to a proper determination but are best placed in their proper position of being merely approaches to the correct conclusion of leaving the parties in the same position costwise and profitwise as they would have occupied had there been no change.

In the *Montag-Halvorson-Cascade-Austin* case, *supra,* cited in the first paragraph of this article as best expressing the theory of leaving the contractor in the same position you find him, the contract provided payment for galvanized steel pipe on a unit price per pound installed basis. A change substituted lighter pipe for heavy pipe. Since costs of installing the lighter pipe remained approximately the same as for the heavy pipe, even though the weight on which payment was based decreased, cost per pound installed increased. The Board decided this case expressly on "leave them where you find them" without referring to the previous Board cases on equitable adjustments, or to the objective approach previously endorsed by the Board.

On October 10, 1958, seven months after the Court of Claims decision in *Neilsen,* the ASBCA again had occasion to consider the question of what constitutes an equitable adjustment and decided *Lofstrand Company*[10] in a split decision of the full Board. Appellant had bid on the basis of a 30-day firm price quotation from a supplier of $12.80 for a thermometer which, but for an error by a supplier, should have cost $34.69. The Government changed to a cheaper thermometer worth $8.53 and attempted to deduct the difference between $8.53 and $34.69. The Board stated that:

> "The issue before us involves a basic question as to whether a contractor shall be denied the privilege of protecting itself against market vicissitudes by obtaining firm quotations from responsible suppliers of component items."

The Board, finding that appellant made no mistake in utilizing a firm quotation in submitting its bid, held that the firm quotation froze appellant's costs and held that the proper deduction was the difference between $8.53 and $12.80. This left appellant in the same position as he was prior to the change. It will be noted that this case stands squarely on the fact that the contractor had a 30-day firm quotation for the specified item and differs from the *Westover and Hope* case in that no firm quotation for the specified items had been obtained in that case. In fact, the error in the *Westover and Hope* case was that the supplier had quoted on a non-specification item. The *Lofstrand* case differs from the *Neilsen* case in that the error in bid was by a supplier who had quoted on a particular item and had no obligation under his firm quotation to furnish other than the item on which he had quoted. Therefore, due to the change ordered by the Government, the prime contractor lost the advantage of the low firm quotation. On the other hand, there was no showing in *Neilsen* that the subcontractor's refusal to perform was due to or in any way connected with the change ordered. In that case there was a subcontract for electrical construction, which specifically provided that the terms and provisions of the prime contract between the Government and *Neilsen* were made a part of the subcontract agreement. The subcontract was therefore subject to the Changes article of the prime contract which permitted changes to be made at the direction of the contracting officer.

On June 30, 1959 the Engineer Board decided the *Bruce Construction Corporation* appeal.[11] The specifications under appellant's contract changed a requirement for standard concrete block to sand block. The supplier furnished the sand block to appellant at the same price as the standard block. Appellant showed that the current market price of sand

work, substituting overhead electric lines for underground utilities originally required. The contractor's electrical subcontractor had based its bid and executed a subcontract with *Neilsen* on the basis of a quotation from an electrical sub-subcontractor. The sub-subcontractor apparently withdrew immediately its bid when it found that it had made an error in its quotation. *Neilsen* did not attempt to hold the electrical subcontractor responsible upon its original subcontract; however, there is nothing in the decisions which indicates that the subcontractor's nonperformance was due to the change, or that the executed subcontract was not binding on the subcontractor. *Neilsen* then requested adjustment from the Government for the change on the basis of the difference between his bid price for the original work and the agreed estimated cost for the work as changed. The Government refused adjustment on this basis and unilaterally effected the adjustment on the basis of the decrease in the reasonable cost of performance of the work. The Corps of Engineers Claims and Appeals Board (Eng C&A)[4] on November 12, 1953, after recognizing that individual circumstances control in determining what is an equitable adjustment where particular circumstances are present, set out general rules for determining an equitable adjustment. It pointed out that the adjustment is generally restricted to the immediate change but that:

> "Where the work is changed, but the changed work retains some principal items provided for in the original work, and the changes are so interrelated as to be incapable of accurate segregation, the measure of the adjustment would be the difference between what it would have cost to perform the original work (plus overhead and profit) and the reasonable cost to that contractor of performing the work as changed (plus overhead and profit). The difference represents the value of the increase or decrease in work. *The above would leave the parties with respect to the remaining original work in the same position they were prior to the change.*" (emphasis supplied)

A dissenting opinion disagreed as to what would leave the parties in the same position but agreed that the basis of adjustment should be one:

> ". . . which will leave the parties in relatively the same monetary position, as near as may be, as they occupied before the change was made. Neither the Government nor the contractor should be enriched or impoverished by reason of the change in the work."

The Armed Services Board of Contract Appeals (ASBCA) on October 1, 1954, upheld the Engineer Board stating that the method adopted by the contracting officer for effectuating the equitable adjustment "is basically sound and we find no fault with it or its application in the instant case." It also pointed out that:

> "The term 'Equitable Adjustment' in itself precludes the idea of there being any one cut and dried method of arriving at the end desired. Proper methods to be followed, therefore, are not necessarily limited in number. . . . The contract provisions quoted above provide for equitable adjustment to be made if any change causes an increase or decrease in the *amount due under this contract*. This must be the determining factor in effecting equitable adjustment."

The case then went to the Court of Claims which followed the reasoning of the Boards' stating that "its losses would have been the same if the change order

the Civil Air Patrol officers who made the arrangements for the flight, had violated the provisions of the Air Force Regulations "which have been worked out with great care and precision by the highest governmental authority under the terms of the statute" and were therefore acting out of scope of employment. Under the state law at the time, this finding made the conclusion that the Civil Air Patrol was not a federal agency mere *obiter dictum.*

It is suggested that in a proper case the Civil Air Patrol may yet be held liable as a Governmental agency, primarily because of the subsequent legislation and implementing Air Force Regulations. Nevertheless, the distinction between the objectives of a corporation which has a "unique mission", "basic to national security", and which is funded solely by Congressional line item Research and Development appropriations, and a "voluntary civilian auxiliary of the Air Force," with only loaned or surplus aircraft or facilities, is obvious.

Conclusion

Although the non-profit corporation like Aerospace may be effectively insulated against Governmental administrative regulations the courts are likely to pierce this insulation with regards to liability to the public. This is in accord with the growing tendency of the courts to break down the concept of sovereign immunity. Although the sovereign, the federal government, invades the business world more and more, and by new and strange devices, such as the non-profit corporation, the courts are certainly not going to allow it to insulate itself from the concurrent responsibilities. In a like manner, the status of the employees and the directors of these quasi-public corporations is equally uncertain but worthy of analysis. If the conclusion is sound that the Government non-profit corporation is a Government instrumentality in the tort area, should it not be equally so for purposes of applications of the conflicts-of-interest statutes treatment of inventions and proprietary data, and other similar fields of government regulations?

Aerospace. Of course, since the instrument used by the Government in relation to Aerospace is styled plainly contract and has been recognized by the Courts in many other cases as a contract, it is hard to say that it is really an agency arrangement and not a contract. If it is in fact a contract, then it would seem that Aerospace is a contractor and therefore excluded from the application of the provisions of the Federal Tort Claims Act. However, by examining the preamble of the contract which states Aerospace's unique relationship to the Government, and by examining its articles of incorporation and the history of its organization, the Court concerned with the realities can easily determine that Aerospace is more than just a contractor, it is in fact a Government instrumentality. The Supreme Court has in fact used this technique when faced with the argument that certain organizations were not Government instrumentalities because they were formed as private corporations.

While there are a dearth of cases so far on whether state incorporated nonprofit corporations are Government instrumentalities under the Federal Tort Claims Act [20] there are decisions under other acts which should be persuasive. The Supreme Court has stated that it will look to the realities, and the main realities which it has looked to are: Where does the money come from and where do the profits and losses go? The Court observed in *Inland Waterways vs Young:* [21] "The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations when realities become decisive . . . The funds of these corporations are for all practical purposes, Government funds; the losses, if losses there be, are the Governments' losses."

In *Emergency Fleet Corporation vs Western Union Telegraph Company* [22] Mr. Justice Brandeis said: "These services of the Fleet Corporation were obviously of a public nature. It has never done any business or conducted any operation except on behalf of the United States."

"First it is argued that the government (telegraph) rate should be denied because the Fleet Corporation is a private corporation. In form it is such. But all of its $50,000,000 capital stock was subscribed and paid for by the Shipping Board on behalf of the United States. All has been so held by it ever since. The United States alone had had a financial interest in its capital stock . . ."

In *Southern Pacific Company vs Reconstruction Finance Corporation* [23] the Court referred to the preamble of the charter to find: "Ownership by Supplies (Defense Supplies Corporation) was tantamount to ownership by the United States. The very first paragraph of the charter by which the appellee created Supplies, stamps upon the latter an indelible governmental brand: "In order to aid the Government of the United States in its national defense program, Reconstruction Finance Corporation hereby declares: . . ."

One line of cases arising under the Federal Tort Claims Act in which the facts are similar to the Aerospace Corporation situation are those relating to the Civil Air Patrol.[24] In these cases the courts held that the Civil Air Patrol

[20] A related line of cases are those dealing with the Civil Air Patrol, although it was incorporated under an Act of Congress. See *infra.*

[21] 309 U.S. 517, 524; 60 S.Ct. 646,650.

California and in various projected localities.

All of these aspects and the problems to which they give rise have been recognized in a study conducted by a committee headed by the Honorable David E. Bell, then Director of the Bureau of the Budget, (now, Administrator, Agency for International Development) at the request of President Kennedy. In his report, released to the public April 30, 1962, he states: "Finally the developments of recent years have inevitably blurred the traditional dividing lines between the public and private sectors of our Nation. A number of profound questions affecting the structure of our society are raised by our inability to apply the classical distinctions between what is public and what is private. For example, should a corporation created to provide services to Government and receiving 100% of its financial support from Government be considered a "public" or a "private" agency? In what sense is a business corporation doing nearly 100% of its business with the Government engaged in "free enterprise."?

Inevitably, the Courts will be called upon to provide the answers. As to the first question, court decisions can be anticipated in at least one area, that of tort liability. The specific question to be treated in this area is: What is the effectiveness of the insulation against government liability normally provided by the corporate device?

Tort Liability Under the Federal Tort Claims Act

Colonel Daniel E. Henderson, Jr. in a recent article has pointed out the rapid development of principles of Government liability [12] despite the insulation of the corporate device, particularly where state safety statutes are applicable.[13]

The liability may be based on Government ownership of the premises [14] or by breaking down the independent contractor relationship by the Government assuming too much control,[15] or by the Government furnishing defective equipment.[16] He indicates further possibilities: "States statutes could be determinative in a variety of other circumstances. For example, in some of today's involved contractual situations, pertaining to complicated weapons systems and technical research and development contracts, multiple prime contractors are often utilized in a single project together with numerous subcontractors. Parts furnished by one such contractor may become an integral part of the whole and the government's duty of inspection and acceptance under one contract could play a part in determining whether the government was liable under the safety provisions of another contract considered in light of state statutes." [17]

If these liabilities exist in normal Government-contractor relationships the liability is all the more likely where the contractor, like Aerospace, occupies only premises owned by the Government, and the Air Force through its Systems Program Offices, is continually directing and redirecting the contractor, and is co-located with him. Likewise all the administrative functions of the contractor are either directed by the Aerospace Contract Management Office, if in support of the Air Force, or approved by the Administrative Contracting Officer as

[12] Under the Federal Tort Claims Act, enacted in 1946, 28 USC 1346(b).

[13] *Government Contracts—Safety Regulations and Potential Tort Litigation*, Vol. IV, No. 4 USAF JAG Bull., 3 (Jul-Aug 1962).

their continuing availability to the Government.

The methods of effecting this nonprofit status are complex and would have to be the subject of careful negotiations. The legal problems are manifold and the solution will admittedly not be found quickly . . ." [6]

The Committee also stated that times were changing:

"The subcommittee appreciates very much, of course, the fact that in 1953-54 the intense concern and the hurried efforts to achieve ballistic missile capability allowed little time to think and plan for the future. The overwhelming demands of the moment in those tense times surpassed any concern about what would happen 5 years hence. The time now has come to take stock for the days ahead." [7]

The Formation of The Aerospace Corporation

By letter dated December 4, 1959, Secretary of the Air Force James H. Douglas wrote to Chairman Chet Holifield of the Military Operations Subcommittee, Committee on Government Operations, House of Representatives, commenting on the findings and recommendations of HR 1121 and advising that a committee for the purpose of examining and evaluating the Air Force ballistic missile management organizations, to be headed by Dr. Clark B. Millikan of the California Institute of Technology, had been appointed by him.[8]

This committee presented a report to Secretary Douglas on January 29, 1960, which provided for a civilian contractor organization which, "must be basically non-competitive."

"The Air Force seized upon the Millikan Committee recommendations to side-step the difficult problem of converting STL into a nonprofit organization. Rather than grapple with that formidable task, the Air Force created a new nonprofit corporation to coexist with, and even supervise, STL." [9]

The hearings before the Military Operations Subcommittee developed the organization of the Aerospace Corporation: ". . . In February 1960 General Schreiver brought together as an informal group an organizing committee for the new corporation. In addition to Dr. Jerome Wiesner* and General James McCormack, who had served on the Millikan committee, the organizing committee had William C. Foster, Vice President, senior advisor and director of Olin Mathieson Chemical Corp.; Dr. William O. Baker, vice president for research of Bell Telephone Laboratories, Inc.; and T. F. Walkowicz (who later withdrew)." [10]

"The organizing committee was asked by the Secretary of the Air Force to submit a list of possible members for the board of trustees. The committee also was authorized to draw up the charter of the new organization. The slate of trustees and the terms of the charter were reviewed and approved by the Secretary of the Air Force." [11]

The articles of incorporation of The Aerospace Corporation filed in Los Angeles, California on June 3, 1960 show that it was incorporated under the General Non-Profit Corporation Law of the

[6] *Id.*, p. 99.
[7] *Id.*, p. 100.
[8] *Organization and Management of Missile Programs*, H. Rept. No. 324, 87th Cong., 1st Sess. (1961).
[9] *Ibid.*, p. 14.

THE AEROSPACE CORPORATION: FISH OR FOWL OR GOVERNMENT INSTRUMENTALITY

*John R. Donnelly**

INTRODUCTION

October 4, 1957 the American public became aware of the startling news that a Russian "Sputnik" was orbiting in the space above them. They were not yet familiar with the term "Aerospace" but they heralded this event as the start of the space age. However, this event led, by way of the Air Force Intercontinental Ballistic Missile Program, to the formation of a quasi-public, non-profit corporation known as "The Aerospace Corporation." [1]

It was created by the Air Force to escape the dilemma which had arisen by the Air Force hiring of a profit-seeking corporation to act as technical manager of its ballistic missile programs. The Air Force originally contracted with the firm of Ramo-Wooldridge, which subsequently, by merger, became Thompson-Ramo-Wooldridge, and later spun off as its subsidiary, Space Technology Laboratories, which was to act as systems engineers and technical directors for the Ballistic Missile Division of the Air Force. Under the terms of its contract with the Air Force, this contractor was not to develop or produce "hardware" for the programs. Its subsequent desire to do so, and thus compete with other Government contractors despite its privileged position with the Air Force plus the Air Force need to rely on "out house" (or "contracted out," as the contractors prefer the terminology) scientific and technical support created the dilemma.

THE BALLISTIC MISSILE PROGRAM BACKGROUND

The Committee on Government Operations of the House of Representatives has made an excellent study and report on the background of the missile programs and in particular, the problem leading to the formation of the Aerospace Corporation.[2]

"From the performance standpoint Ramo-Wooldridge (STL) along with Ballistic Missiles Division can point to the fact that they 'beat the clock' and surprised many experts in getting operable Atlases and Thors from factory to field in so short a period of time. There will be many—in industry, among participating contractors, in Government, among rival services—who discount the contribution of Ramo-Wooldridge (and STL), but, this organization can take pride in its own right for what it has done for the United States." [3]

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[1] Dr. Ivan Getting, President of the Aerospace Corporation, has stated publicly that he prefers the term "public interest" corporation due to the bitter arguments over the use of

MIL–STD–7 MIL–D–70327 Data Reqmts	Req X	MIL–STD–30 MIL–D–70327 Data Reqmts	Req X	SPECIAL REQUIREMENTS	Req X	CONTROL DOCUMENTS
Assemblies		List of Material		Complete Set		MIL–D–70327
Details		Data List		Material Specs		
Detail Assembly				Process Specs		
Installation				Revision Notices		
Wiring				Item Specification		
				Tube Bend Data		
				Undimensioned Data		MIL–D–8510

FIGURE I

NOTE: When Figure I above cites a requirement for a complete set of data to be delivered, the requirement shall be interpreted to mean only those data of the contractor's complete set to perform the mission cited in Figure II.

Prime	Vendor Rep	Vendor Non-Rep	MISSION TO SUPPORT	Prime	Vendor Rep	Vendor Non-Rep	MISSION TO SUPPORT
			Manufacture (Competitive Reprocurement)				Shipping Requirements
			Design Modification				Storage Requirements
			Manufacture (Government)				Identification of Stock
			Service Testing				Ordering of Replacement Parts
			Item of Design Evaluation				Inspection of Items at Overhaul
			Production Inspection				General Maintenance
			Receiving Inspection				Construction
			Overhaul				
			Installation of Equipment				
			Mfg of Items Source Coded "M"				

FIGURE II

and for any purpose whatsoever all data specified to be delivered under the contract subject to any limitations contained in any other provisions of the "Rights in Data" clause.[8]

The "Basic Data" clause further gives the Government the right at any time to remove or ignore any restrictive marking on any piece of "subject data" that is not authorized by the terms of the contract, notwithstanding the fact that the Government has inspected and accepted the restricted data as complying with the contract.[9]

2. In every supply contract in which data is specified to be delivered, the clause of ASPR 9-203.2[10] must be added to the "Basic Data" clause of 9-203.1 to make up the "Rights in Data" clause. It provides that the contractor need not deliver "Proprietary Data" unless it is identified in the schedule of the contract as being required. Since the 9-203.2 clause ordinarily eliminates the obligation to furnish proprietary data it has been referred to with endearment by contractors as the "Fail-Safe" clause or the "Loophole Clause."

The "Fail-Safe" clause contains the ASPR definition of "proprietary data" to which the contractor's data must comply if he is to be permitted to withhold it. From the standpoint of the prime contractor and the subcontractor, the "Fail-Safe" clause is most important as it provides the only means of withholding data in supply contracts. Since the drawing requirements of contracts are normally established by reference to a specification such as MIL-D-70327, which usually requires that engineering drawings be prepared in sufficient detail to permit manufacturing, the information required to be placed on the drawing normally includes proprietary information of the design manufacturer. Without the withholding clause of ASPR 9-203.2, contractors and subcontractors would be automatically required to furnish proprietary data without consideration. This would be contrary to ASPR policy which provides that, when proprietary data is obtained under supply contracts, there shall be a specific negotiation for such data and the contractual requirement shall be listed as a separate contract item.

It is important to note the exact nature of the prime contractor's position under the "Fail-Safe" provision. It does not automatically protect the contractor. It only gives the contractor the right to protect himself. That is, it calls for affirmative action on the part of the contractor to remove from his drawings or other data those elements which he considers to be proprietary. If he does not, the Government obtains the right under "Basic Data" clause[11] and common law to use the drawings and other data with-

[8] Paragraph (f) of ASPR 9-203.1: "Unless otherwise limited below, the Government may duplicate, use, and disclose in any manner and for any purpose whatsoever, and have others so do, all "Subject Data" delivered under this contract."

[9] Paragraph (h) of ASPR 9-203.1: "Notwithstanding any provisions of this contract concerning inspection and acceptance, the Government shall have the right at any time to modify, remove, obliterate, or ignore any marking not authorized by the terms of this contract on any piece of subject data furnished under this contract."

[10] The clause of ASPR 9-203.2 provides: "(1) Notwithstanding any Tables or Specifications included or incorporated in the contract by reference, "proprietary data" need not be furnished unless suitably identified in the Schedule of the Contract as being required. For the purpose of this clause, 'proprietary data' means data providing information concerning the details of the contractor's secrets of manufacture, such as may be contained in but not limited

quest by a Government employee may be protected by the contractor by furnishing it with a restrictive legend similar to the legend of ASPR 3-109 or by specifying in letter accompanying the data that the contractor does not want the data disclosed to the public. If the Government accepts the data on this basis there is a binding confidential relationship.

As in the case of the "Request for Proposal" failure of the contractor to use a restrictive legend on the data provided relieves the Government or any of its employees of any liability resulting from its use.

Unsolicited Data

The procedures governing the use of data accompanying unsolicited proposals are set forth in Air Force Systems Command Regulation (AFSCR) 80-8 and are intended to promote the free-flow of information to the Air Force for evaluation as to possible Air Force use.

A solicited proposal is defined as a proposal obtained by the Government through direct request to the submitter. Thus, a proposal will be considered to be "unsolicited" in those cases where the only act of solicitation is a Government document published for the purpose of showing information or inventions needed by the Air Force. No request is made directly to the submitter. Thus, a proposal in answer to a document such as an AFSC "Technical Objective Document Release" or the "National Inventors' Council's 'Inventions Wanted by the Armed Forces' " is considered to be an unsolicited proposal.

AFSCR 80-8 specifies that any proposal identified as an unsolicited proposal will be handled on a confidential basis and will not be disclosed publicly.[4] This procedure is followed even though the submitter has not placed either a restrictive legend on the proposal or asked in an accompanying letter that the proposal be handled confidentially.[5]

It is important to point out that a validly imposed restriction on *any* data obtained by the Government does not limit the Government's right to use the information contained in such data if the information is obtained from another source without restriction. Thus, it is quite proper after certain conditions[6] have been met for a Government engineer to prepare, without copying or tracing of the restricted drawing, a new un-

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[4] Paragraph 4a of AFSCR 80-8; "Unsolicited proposals whether or not received for evaluation on a 'company confidential' or 'proprietary' basis, will be accepted for evaluation by the AFSC division/center responsible office or designated control office. Each unsolicited proposal will have AFSC Form 15 "Unsolicited Article or Disclosure (Cover Sheet), affixed (Attachment 1). . ."

Form 15 states in large print that the disclosure covered is "FOR OFFICIAL USE ONLY" as it "MAY CONTAIN PROPRIETARY INFORMATION."

[5] The full ramification of AFSCR 80-8 is illustrated in Comp. Gen. Dec. B-143711, December 22, 1960. The facts of this case disclosed that on September 3, 1959, Gayston Corp. submitted an unsolicited proposal covering its static discharger to the Air Force. The proposal was submitted for the purpose of having the Air Force consider whether the static discharger was a product improvement to replace the existing static discharger covered by specification MIL-S-9129A. AFSC Form 91 issued pursuant to AFSCR 80-8 was executed by Gayston, thus binding Gayston and the Air Force to the procedures set forth in AFSCR 80-8.

Subsequently, the Air Force proceeded to use the Gayston data in a proposed procurement of nylon static discharges under invitations for bids (IFR) No. 33-604-61-101, issued on July 20, 1960.

The Comptroller General in handling the Gayston protest stated, "On the record before us, the Air Force was obligated, under established procedures (AFSCR 80-8) to maintain the confidential character of the data or trade secrets submitted by Gayston for evaluation."

TECHNICAL DATA IN THE AIR FORCE SYSTEMS COMMAND

*Norman J. Latker**

INTRODUCTION

There is no phase of Government procurement more controversial at the present time than that of the Government's acquisition and use of technical data in the form of engineering drawings for formal advertising.

The controversy stems from the idea espoused by section 2304 of Title 10 of the United States Code, which states that whenever practicable, property purchased by the Government shall be obtained through formal advertising rather than negotiation. This directive is based on the theory that the Government is able to obtain goods at lower prices through formal advertising than through negotiation in most instances.

Even though formal advertising may cut Government procurement costs, all Government procurement cannot be done in this manner as Section 2305 of Title 10 of the United States Code requires that specifications to be used in an "Invitation for Bid" must be sufficient to permit full and free competition.[1]

Thus, if a Government procuring activity's specification would not permit all competent manufacturers to make the item depicted therein, no specification useable for formal advertising purposes is available and procurement must be made through negotiation. The lack of adequate specifications is usually due to Government inability to provide engineering drawings sufficient for manufacturing purposes.

This inability may arise from several causes, of course. However, it is least excusable when it arises from failure to use data the Government already has, failure to obtain date by enforcing contract provisions for acquiring it, or failure to contract for data for items developed at government expense. Instances of such failures have aroused much justifiable criticism.

Nevertheless, as procuring activities exert greater efforts to acquire sufficient data to provide for competitive reprocurement,[2] they encounter resistance from contractors who feel reluctant to

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[1] Paragraph (b) of 10 USC 2305: "The specifications in invitations for bids must contain the necessary language and attachments to permit full and free competition. If the specifications in an invitation for bid do not carry the necessary descriptive language and attachments, or if those attachments are not accessible to all competent and reliable bidders, the invitation is invalid and no award is made."

[2] The Government's determination to obtain its goods through formal advertising whenever feasible is clearly reflected by the Comp. Gen. Dec. B-136916, Oct. 6, 1958. This decision involved the procurement by formal advertising of a patented article. The Comptroller General stated that in such a situation the procuring activity is required to make its awards to the lowest bidder meeting the specifications notwithstanding a threat of patent infringement.

It follows from this decision that if a Government procuring activity has in its possession

For example, the Customs Service obtained relief in 1953,[58] and the Internal Revenue Code of 1954 decreed that income tax returns thenceforth were to be verified simply by a declaration.[59] More recently, Congress enacted a similar reform for the Federal Communications Commission.[60]

In keeping with this trend, the Patent Office, through the Department of Commerce, proposed a declaration-in-lieu-of-oath bill to the 87th Congress.[61] This bill, H.R. 9315, was the outgrowth of a cooperative effort by members of the patent bar, the Commissioner of Patents, and the Patent Office's Committee on Practice and Procedure. The bill would have permitted written declarations to be accepted in lieu of the oaths required in applications for patents and trademark registrations.[62]

But since there are a number of other provisions in the United States Code which require an oath in matters pertaining to patents and trademarks,[63] H.R. 9315 was revised and presented anew to Congress. The revised bill was introduced in the House as H.R. 12773[64] during the second session of the 87th Congress, and its Senate counterpart was reported out by the Senate Committee on the Judiciary before the end of that session.[65]

This version gave the Commissioner of Patents authority to accept, on a written declaration, any document filed in the Patent Office which is required by law, rule or other regulation to be executed under oath. It also provided that in all cases where a written declaration is permitted in lieu of an oath, the document must carry a notice to the effect that "willful false statements or the like are punishable by fine or imprisonment, or both, under section 1001, title 18, United States Code." This was to emphasize to a declarant that grave consequences attend the fraudulent ex-

[58] Customs Simplification Act, ch. 397, § 17, 67 Stat. 517 (1953), 19 USC 1486 (d), which allows the Secretary of the Treasury to prescribe by regulation that any document required to be under oath by any law administered by the Customs Service may be verified instead by a written declaration.

[59] Int. Rev. Code of 1954, § 6065. The Secretary may require an oath in special cases, but this discretionary authority does not apply to tax returns and declarations filed by individuals. *Id.* at subsection (b).

[60] Public Law No. 87-444, 87th Cong., 2d. Sess. (April 27, 1962), which permits a written declaration to be used in lieu of an oath on certain forms required to be filed with the Federal Communications Commission.

[61] H.R. 9315, 87th Cong., 1st Sess. (1961). Its companion in the Senate was S. 2639.

[62] Section 2 of the bill gave the Commissioner of Patents discretionary authority to accept defectively executed applications provisionally. This section was intended to avoid statutory bars in appropriate cases. See the text at note 17, *supra.*

[63] See statutes cited in note 10, *supra.*

[64] "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that Title 35, United States Code, is amended by adding the following new sections after section 24:

"Sec. 25. Declaration in lieu of oath.

"(a) The Commissioner may by rule prescribe that any document to be filed in the Patent Office and which is required by any law, rule or other regulation to be under oath may be subscribed to by a written declaration in such form as the Commissioner may prescribe, such declaration to be in lieu of the oath otherwise required.

"(b) Whenever such written declaration is used, the document must warn the declarant that willful false statements and the like are punishable by fine or imprisonment, or both (18 USC 1001).

"Sec. 26. Effect of defective execution.

conviction under section 1621 than under section 1001.[44] This is principally because section 1621 depends upon the presence of a false oath, which is more difficult to prove than are other types of falsehood.[45]

A leading case, in which the conviction of an applicant for patent was sought because he had made a false oath, is *Patterson v. United States*.[46] Patterson was convicted because he had sworn that he was the original, first and *sole* inventor of the device in question, when, in fact, he was at best a joint inventor. On appeal, the appellate court reversed the conviction, reasoning that, although the patent statute required the applicant to swear under oath that he "does verily believe himself to be the original and first inventor," [47] it did not also require him to swear, as did the Rules of Practice,[48] that he was a sole or a joint inventor. The court held that an administrative rule could not enlarge the scope of criminal liability under the perjury statute.[49]

Whereas 18 U.S.C. §1621 and other perjury statutes are limited to false oaths authorized to be administered by any *law* of the United States, 18 U.S.C. §1001 applies to *any* willful false statement or concealment of a material fact in *any* matter within the jurisdiction of any department or agency of the United States.[50] Of these two sections, it is evident that section 1001, because of its much broader scope and the more liberal rules of evidence that are ap-

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[44] This fact was emphasized by the then Attorney General, Tom C. Clark, in supporting H.R. 2858, 79th Cong., 1st Sess. (1945), which is reproduced at note 56 *infra*. "While the penalties contained in section 35 (A) [now 18 USC 1001] are more severe than those pertaining to perjury [punishable under § 1621], because of the rules of evidence in perjury cases, the crime of perjury is more difficult to prove."

See also, U.S. v. Gilliland, 312 U.S. 86 (1941); Todorow et al v. U.S., 173 F.2d. 439 (9th Cir. 1949), *cert. den.*, 337 U.S. 925 (1940); U.S. v. Dumas, 288 Fed. 247 (E.D. N.Y. 1923).

[45] An oath taken before an officer who has no legal authority to administer oaths cannot serve as a basis for conviction of perjury. U.S. v. Doshen, 133 F.2d. 757 (3rd Cir. 1943). But since 18 USC 1001 does not require the fraudulent representations to have been made under oath, the defectiveness of an oath is no defense to a prosecution under this section.

The so-called perjury rule is that the uncorroborated testimony of one witness is insufficient to prove perjury. See, for example, Hammer v. U.S., 271 U.S. 620,626 (1926). But the perjury rule does not apply to a prosecution under 18 U.S.C. § 1001. Todorow et al. v. U.S., 173 F.2d. 439 (9th Cir. 1949), *cert. den.*, 337 U.S. 925 (1940).

While it was early argued that 18 USC 1001 could not be invoked when the fraudulent statement was oral and voluntary, this view has been judicially laid to rest. Knowles v. U.S., 224 F.2d. 168 (10th Cir. 1955). And Cohen v. U.S., 201 F.2d. 386 (9th Cir. 1953), further illustrates the broad scope of section 1001.

[46] 181 Fed. 970 (9th Cir. 1910), *reversing* U.S. v. Patterson, 172 Fed. 241 (D.C. Ore. 1909).

[47] The Patent Act of 1870, ch. 230, § 30, 16 Stat. 202; as amended, ch. 1019, § 2, 32 Stat. 1225 (1903); further amended, ch. 312, § 3, 46 Stat. 376 (1930), 35 USC 35 (1946); presently 35 USC 115, ch. 950, § 1, 66 Stat. 799 (1952).

[48] See old rule 46 of the Rules of Practice in the United States Patent Office, as revised, February 28, 1905. The corresponding rule presently in force, rule 65, 37 CFR 1.65 (1961), calls for the same averment as to joint or sole inventorship.

[49] Patterson v. U.S., 181 Fed. 970, 973 (9th Cir. 1910). The court admitted that Congress could statutorily require an applicant to state whether "he is a sole or joint inventor of the invention claimed in his application," but then added,

it by no means follows that the department [of the Interior] can by any rule or regula-

in 1832, to avoid forfeiture of their patents, aliens had to begin working them within one year of their issuance.[28]

The Patent Act of 1836 again modified the content of the oath in applications for patents. It required that:

> The applicant shall also make oath or affirmation that he does verily believe that he is the original and first inventor or discoverer of the art, machine, composition, or improvement, for which he solicits a patent, and that he does not know or believe that the same was ever before known or used; and also of what country he is a citizen; which oath or affirmation may be made before any person authorized by law to administer oaths.[29]

In the event a request for reconsideration was made, a renewed oath of inventorship was required.[30]

It will be noted that the Patent Act of 1836 introduced the requirement that the applicant state his citizenship, possibly because foreign nationals were required to pay filing fees at least ten times greater than those paid by United States nationals[31] and had to work their patents to keep them in force.[32] But these discriminations against foreign applicants eventually abated. In 1861, Congress made the fees for foreign and U.S. applicants the same[33] and dropped the requirement that foreign-owned patents had to be worked.[34]

Changes in the oath provision subsided after 1836 so that the oath section of the Patent Act of 1952 is little different from its counterpart of 1836.[35]

Sanctions

Beyond the moral influence that compels most persons to be truthful, the United States Code contains legal sanctions to encourage complete and honest disclosures in dealings with the various agencies and departments of the Gov-

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[28] Forfeiture also occurred if working ceased for any period of 6 months after introduction to public use. Act of July 13, 1832, ch. 203, 4 Stat. 577.

[29] Act of July 4, 1836, ch. 357, § 6, 5 Stat. 117. Also of interest was section 18 of the act, which required that the statement of hardship justifying a seven year extension of the patent had to be sworn to under oath.

[30] "But if the applicant [whose application has been rejected] shall persist in his claim for a patent, with or without any alteration of his specification, he shall be required to make oath or affirmation anew, in manner as aforesaid." Act of July 4, 1836, ch. 357, § 7, 5 Stat. 117. The Act of March 2, 1861, ch. 88, § 3, 12 Stat. 246 retained substantially the same language. This statutory requirement was repealed by the Act of July 8, 1870, ch. 230, § 41, 111, 16 Stat. 198.

[31] Act of July 4, 1836, ch. 203, § 9, 4 Stat. 577. See Edwards, *Patent Office Fees—A Legislative History*, Study of the Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, United States Senate, Study No. 13, 85th Cong., 2d Sess., 1 (1958). The filing fee for U.S. nationals, two-thirds of which was returned if the application was withdrawn (§ 7), was $30, for British subjects, $500, and for all other foreigners, $300. Probably because of this striking fee differential, patents were held to be invalid if the patentee's oath incorrectly stated his citizenship, whether the error was intentional or inadvertent. Child v. Adams, 5 Fed. Cas. 613 (No. 2,673) (C.C.E.D. Pa. 1854). This holding was outdated and, therefore, abandoned when aliens were put on an equal footing with U.S. nationals (see note 27 *supra*). Tonduer v. Chambers, 37 Fed. 333 (C.C.W.D. Pa. 1889).

[32] See note 28, *supra*, and the accompanying text.

[33] Act of March 2, 1861, ch. 88, § 10, 12 Stat. 246.

[34] Repealed by implication. Act of March 2, 1861, ch. 88, §§ 16, 17, 12 Stat. 246.

[35] Compare the text at note 29 *supra*, with 35 USC 115 (1952). The Act of 1870 provided that an applicant residing in a foreign country could have his oath witnessed either

quires application papers to be ribboned and sealed at the time of execution if it takes place in a foreign country.[16]

Over the years the Patent Office has developed a set of canons to determine whether a document defectively verified under oath is so informal that it cannot be corrected without filing a duplicate of the document in a *de novo* sense. If the document is an application for patent or trademark registration and it must be resubmitted *de novo* for whatever reason, the consequences can be serious, since a statutory bar may arise before the applicant files the corrected document.[17] Because of this drastic possibility, the Patent Office permits correction without resubmission if it can do so under the statutes. Thus, whenever possible, the Office accepts an application for examination provisionally, informs the applicant of the defect, and requires him to correct it before a patent can issue. Intermediate the kind of informality so severe as to require *de novo* resubmission [18] and the type which is of no material consequence [19] is a third class of informalities.[20] For this latter class, the Patent Office withholds the original filing date of the document until a properly executed one is submitted, whereupon the corrected document is effective *nunc pro tunc*.

In all events, no matter how insignificant the defect, it is necessary for the Patent Office either initially to write the applicant a letter pointing out the informality and indicating how it may be corrected or, after the prosecution of the application has begun, to notify him that the defect must be corrected before any patent can be issued.[21]

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[16] Rule 66 (b), 37 CFR 1.66 (1960), reads as follows:
"When the oath is taken before an officer in a country foreign to the United States, all the application papers, except the drawings, must be attached together and a ribbon passed one or more times through all the sheets of the application, except the drawings, and the ends of said ribbon brought together under the seal before the latter is affixed and impressed, or each sheet must be impressed with the official seal of the officer before whom the oath is taken. If the papers as filed are not properly ribboned or each sheet impressed with the seal, the case will be accepted for examination, but before it is allowed, duplicate papers, prepared in compliance with the foregoing sentence, must be filed."
It has been argued that to permit the use of the written declaration by foreign applicants for U. S. patent would encourage the execution of applications in blank. The sealed ribbon or the individual sealing of pages is supposed to protect against executions in blank. Note, however, that even if this sealing procedure is not followed, the Patent Office gives the applicant his filing date nevertheless. He need only file a duplicate application correcting the defect before the application can be passed to issue.

[17] See 35 USC 102 (1952). For examples of situations where intervening statutory bars arose, see Hunt Co. v. Mallinckrodt Chem. Works, 177 F.2d 583 (2d Cir. 1949) (inoperative disclosure; Lavin v. Pierotti, 29 C.C.P.A. (Patents) 1235, 129 F.2d 883 (1942) (inadequate disclosure); Hemphill Co. v. Coe, 121 F.2d 897 (D. C. Cir. 1941) (inoperative disclosure). In the face of an imminent statutory bar, it can be appreciated that time is even more of the essence for a foreign applicant than it is for his U. S. counterpart.

[18] For example, where the would-be applicant has not signed his name. In this class of informalities there is no semblance of an oath, and the initial filing date will not be given.

[19] For example, where the oath of a foreign applicant is not ribboned to the rest of his application papers. There is no delay of prosecution for this type of informality, but before a patent can issue the defect must either be corrected or waived via a successful petition to the Commissioner of Patents.

[20] For example, where the authority of the witness to administer the oath has not been established.

[21] By the latter alternative, the defect is called to the examiner's attention by a pink slip

has become an ofttimes vexatious task, with no clear corresponding benefit.[6]

To appreciate the problems posed by the mounting pressures[7] of Government paperwork and the solutions available, an appraisal of the recent experience of the United States Patent Office will be profitable. As its work input has increased[8] so, too, have its administrative problems. Consequently, every avenue of improvement is carefully explored, no matter how small its impact may be on the overall operation of the Patent Office. And so, it has increasingly been asked whether it is necessary to require documents to be formally executed in patent and trademark cases.[9]

The patent and trademark laws require that certain documents[10]—most notably, applications for patents and trademark registrations — be executed under oath and be witnessed by a legally empowered person. And the rules of practice of the Patent Office extend the oath requirement to still other documents.[11]

If all of these documents complied with the verification requirements of the statutes and the rules of practice, they would still have to be scrutinized to determine that fact. Therefore, even under such ideal, but unlikely circumstances, the administrative burden of checking documents for proper verification would

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[6] See note 4, *supra*. Surely, if the propensity for falsehood is of major concern to any Government agency, that agency would be the Internal Revenue Service. Yet, each year millions of Americans simply sign their names to tax statements that transfer billions of dollars of their personal income to the Treasury of the United States.

[7] *See Records Management in the United States Government—A Report with Recommendations* (1949), prepared for the Commission on Organization of the Executive Branch of the Government (1st Hoover Commission). In 1930 the total Government inventory of records was estimated to be between 3 and 4 million cubic feet. In 1948 the estimate was 19 million cubic feet. *Id.* at p. 3.

The present total inventory of government records is estimated at 24 million cubic feet—six to eight times what it was thirty years ago and enough paper to fill 16 million ordinary file drawers. A hopeful note: although records are now being created at the rate of 3 million cubic feet per year, and this rate is increasing, they seem to be "dying" just as fast, in the wake of an intensive government campaign to retire outdated records.

[8] For example, the number of applications for patents increased from 48,075 in 1901 to 81,171 in fiscal year 1961, and the trend for the past 20 years indicates that the Patent Office may expect an increase of approximately 1400 applications each year.

[9] See, for example, S. Rept. No. 2168, 87th Cong., 2d Sess. 2 (1962); Final Report of the 1961-1962 Management Survey of the U. S. Patent Office (Recommendation No. 103 at p. 101); Boyle, *A New Oath for Patent Applications*, 41 J. Pat. Off. Soc'y 840 (1959). The Commissioner of Patents, in his 1961 Annual Report (at p. 5), touched generally upon the need for improving Patent Office operations:

> Whatever the Patent Office can do to simplify, even streamline its operations, within its present procedures, will be done. It will ask itself: Are these procedures simple enough; are they reasonable demands; are these steps absolutely necessary for the proper examination and adjudication of patent and trademark requests? Whenever the answer is "no" the procedure will be simplified or abolished.

[10] For example, application for patent, 35 USC 115 (1952), application for patent on joint invention, 35 USC 116 (1952), application for trademark registration, 15 USC 1051 (1946), affidavit of use of trademark, 15 USC 1058 (1946), renewal of trademark registration 15 USC 1059 (1946).

[11] For example, affidavits to overcome cited patent or publication, rule 131, 37 CFR 1.131 (1960); to traverse grounds of rejection, rule 132, 37 CFR 1.132 (1960); in support of application for reissue, rule 175, 37 CFR 1.175 (1960); to antedate application filing date of other party in an interference contest, rule 202, 37 CFR 1.202 (1960); to show prima facie entitlement of priority award when in interference contest with a patent, rule 204, 37 CFR 1.204 (1960); and, in the form of preliminary statements, to allege the dates of in-

mation which the statute requires in the application for a visa,[68] shall be regarded as material, or 2) the materiality shall be the same as for the crime of perjury under 18 U.S.C. 1621, i.e.—"capable of influencing" the tribunal in the issue before it; [69] a ". . . natural effect or tendency to influence, impede or dissuade . . ." the course of an investigation.[70] (The same test applies to 18 U.S.C. 1001 in those jurisdictions where materiality is an essential element, namely —"a natural tendency to influence or is capable of influencing the decision of the tribunal in making a determination required to be made.") [71]

One thing is certain. Not all misrepresentations should operate as a permanent bar. At the same time, a United States consul or immigration officer is entitled to honest answers to questions necessary to the performance of his job. The channel lies somewhere between these two markers. As of now, it is possible for the same fact to be material or not, depending on the surrounding circumstances. In this posture, precedent becomes either worthless or all-important, depending on the number of distinctions the opposing sides can muster or eliminate as the case may be. This is not always satisfactory. While consistency can be the "hobgoblin of little minds," at the same time it is essential to orderly administration of the law. It is to be hoped the new criteria of the Attorney General will put an end to the erratic gyrations so confusing in previous rulings.

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[68] 8 USC 1202 (a)(c).

[69] Fraser v. U.S., 145 F. 2d 145 (CA 6 1944): *cert. den.*, 324 U.S. 842.

[70] U.S. v. Hirsch, 136 F. 2d 976 (CA 2 1943); *cert. den.*, 320 U.S. 759; U.S. v. Parker, 244 F. 2d 943 (CA 7 1957); *cert. den.*, 355 U.S. 836.

[71] U.S. v. Sorkin, 275 F. 2d 330 (CA 2 1960); *cert. den.*, 362 U.S. 989. For the relation-

tend to shut off a line of inquiry *relevant* to eligibility? Under *Chaunt* the connection between a misrepresentation and a line of inquiry which is relevant cannot be "remote, tenuous or fanciful", (3) If a relevant line of inquiry has been cut off, *might* that inquiry have resulted in a proper determination that the alien be excluded? "The alien bears the burden of persuasion and proof . . . and the risk that any uncertainties resulting from his own obstruction of the inquiry may be resolved against him. . . . Where the opportunity for adequate investigation has been lessened because of the alien's misconduct in making a deliberate misrepresentation, either because of the passage of time or for other reasons, the alien's evidence of his eligibility may be unpersuasive. . . ." Mere impairment of an opportunity for investigation, in itself, should not be a sufficient basis for denying a valuable right to the alien. But if the facts "indicate the existence of a substantial question as to the alien's eligibility to enter" then the possibility of impairment of investigative opportunity might warrant a holding that the misrepresentation was material. The Government should not have to speculate as to what the results of an investigation would have been where the alien has prevented that investigation.

The application of these principles to the case of *S-* resulted in a finding that disclosing communist party membership would have raised a serious question as to admissibility and would have led to further investigation on the question of whether his membership was voluntary or involuntary. That investigation at the time, might have led to a denial of a visa. (Significantly, an earlier application to a consul in Vienna, in which *S-* disclosed communist party membership, did result in a denial of the visa.) Accordingly, the misrepresentation was material.

In the *B-C-* case the alien's use of his nephew's name in obtaining agricultural worker's cards in 1952 and 1954 shut off investigation. However, there was nothing to indicate that if he had used his true name the resultant investigation would have shown a ground of exclusion. Accordingly, the misrepresentation was held not material. Thus, at long last the administrative view that every misrepresentation of identity is necessarily material, has been abandoned. Such a misrepresentation now stands on exactly the same footing as any other misrepresentation.

The Attorney General's ruling in *Matter of S-* and *B-C-*, has not yet come under the scrutiny of the courts, and the administrative interpretations have been limited in number.

Matter of N-, decided by the Board of Immigration Appeals on October 27, 1961,[55] concerned an alien who was arrested in England on July 15, 1958, on a charge of embezzlement. On July 18, 1958, three days later, he indicated to a consul, in connection with his application for a visa, that he had never been arrested. As of the date that he entered the United States on August 22, 1958, and as of the date of the decision, a charge of embezzlement was still pending against him. The Board found that the consular officer would not have issued the visa and would have postponed action on the application until there had been a final disposition of the criminal proceeding. The misrepresentation was therefore material within Interim Decision 1168.

On the other hand, concealment from the consul of a prior marriage and the existence of three minor dependent chil-

the Supreme Court decisions, in the analogous area of misrepresentation in obtaining citizenship, in *Costello v. United States* [43] and *Chaunt v. United States*.[44]

Chaunt was a cancellation of citizenship case, with a commensurately high burden of proof. [45] In connection with his petition for naturalization, Chaunt concealed arrests which occurred more than five years prior to the petition, namely: 1929, distributing handbills in violation of an ordinance; 1929, violating park regulations by making an oration or public demonstration; and 1930, general breach of the peace. As to the first offense he pleaded not guilty and was discharged, as to the second, judgment was suspended, and the third was nol prossed. In themselves the arrests were of minor consequence, not involving moral turpitude. The contention was, however, that had the arrests been disclosed it would have led to investigation revealing communist party membership.

The Court ruled that in the circumstances of the case the Government failed to show by clear, unequivocal, and convincing evidence "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." [46] The inference is that had the facts been of such nature that their disclosure would have been useful in an investigation *possibly* leading to ultimate denial, the Court would regard them as material.

What the Court's position would be on a similar set of facts in a fraud case not arising from revocation of citizenship, with its high burden of proof, is necessarily speculative, but certainly the possibility must be recognized that a similar misrepresentation to a *consul* in connection with an application for a *visa,* could be held material. In any event, the Court had no difficulty in reaching the conclusion, even in a denaturalization proceeding, that a concealment of extensive bootlegging activities in connection with a petition for naturalization, was a suppression of facts which ". . . if known, might in and of themselves justify denial of citizenship" within *Chaunt*.[47]

Hence the recent cases appear to establish that the misrepresentation would be material if it might have led to withholding the issuance of the immediate immigration document, even though ultimately no ground of inadmissibility was found to have existed, as against the earlier test that the misrepresentation or concealment was material *only* if it would have led to ultimate denial of the visa.

The Administrative View

The administrative decisions have reflected some of the diversity in the

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[43] 365 U.S. 265 (1961).

[44] 364 U.S. 350 (1960).

[45] ". . . in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must indeed be clear, unequivocal, and convincing, and not leave 'the issue . . . in doubt'." *Id.* at p. 353.

[46] *Id.* at p. 355.

[47] Note 43, *supra,* at p. 271; see also Annotation 5 L. ed. 2d 914; *Accord,* Corrado v. U.S., 227 F. 2d 780 (CA 6 1955); *cert. den.,* 351 U.S. 925 (arrests, without convictions, for murder, armed robbery, and felonious assault); U.S. v. Saracino, 43 F. 2d 76 (CA 3 1930);

Recent Court Decisions

With the notable exception of the Seventh Circuit, which, in *Cavillo v. Robinson,* [24] again asserts that to be material a misstatement must refer to such facts as would have justified a consul in refusing a visa had they been disclosed and mere faliure to reveal prior residence in the United States was not material, later court decisions in areas other than identity, also tend to limit the application of *Leibowitz* and *Iorio.*[25] The Second Circuit itself has vitiated *Iorio.*

In *United States ex rel. Jankowski v. Shaughnessy,*[26] the alien concealed from the consul the fact that he had been imprisoned or interned in England from 1940 to December 1942. "The misrepresentation and concealment were material. Had he disclosed those facts, they would have been enough to justify the refusal of a visa. For surely they would have led to a temporary refusal, pending a further inquiry, the results of which *might* well have prompted a final refusal." [27] (Emphasis added.)

Again, in *United States v. Flores-Rodrigues,*[28] the alien concealed from the United States consul, in his application for a visa, the fact of an arrest for disorderly conduct arising from homosexual activity. ". . . we think that defendant's false statement was material if a truthful answer might have induced the vice-consul to institute an investigation which might have resulted in a proper refusal of the visa." [29] The court pointed out that the defendant's lie prevented investigation of the possible applicability to him of those exclusion provisions of the statute pertaining to mental deficiency and constitutional psychopathic inferiority, and those certified as being mentally or physically defective. The decision was based, not on the fact that investigation would have necessarily disclosed the ground of inadmissibility, but that it *might* have.

The facts in *Ganduxe y Marino v. Murff,*[30] are identical with *United States v. Flores-Rodrigues*: [31]

> If plaintiff had disclosed his arrest for loitering to solicit homosexual acts an attempt would almost certainly have been made to exclude him under subdivision (4)[32] which excludes 'aliens afflicted with psychopathic personality.' . . .
>
> It might well be that any attempt to prove the plaintiff to be a homosexual would have been unsuccessful. He now presents a certificate from a physician that he is not a homosexual. Nevertheless, by the false statement that he had never been convicted of a crime, plaintiff succeeded in escaping an investigation by the Vice-Consul as to whether or not he was a homosexual. A decision that an alien may make a false statement in his application for a visa in order to avoid the raising of a substantial question as to his eligibility and then, if he is caught in the false statement after having successfully choked off investigation, may try out his eligibility just as if nothing had happened would, it seems to me, be an invitation to false swearing.[33]

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[24] 271 F. 2d 249 (CA 7 1959).
[25] Notes 15 and 8, *supra.*
[26] 186 F. 2d 580 (CA 2 1951).
[27] *Id.* at p. 582.
[28] 237 F. 2d 405 (CA 2 1956).
[29] *Id.* at p. 408.
[30] 183 F. Supp. 565 (U.S.D.C., S.D., N.Y. 1959)

could not have been otherwise obtained, it was early settled that the alien was liable to deportation.[10]

However, a more sophisticated problem was presented where the matter concealed would not necessarily have resulted in refusal of a visa, had it been known.

In *United States ex rel. Iorio v. Day,*[11] the alien had sworn to the consul that he had never been imprisoned when, in fact, there had been arrests and an imprisonment in New Mexico for possessing whisky:

> The statute does not make it a ground for deportation that the alien has made a false oath upon his application for a visa or used it to get in . . . if what he suppressed was irrelevant to his admission, the mere suppression would not debar him . . . the question comes down at most to whether the facts, had he disclosed them, would have been enough to justify the refusal of a visa or exclusion upon entry.[12]

Since the crimes did not involve moral turpitude, no ground of inadmissibility was concealed and the visa was not invalid.

Four years later a different result was reached in *United States ex rel. Volpe v. Smith.*[13] There the alien, a returning resident alien, misrepresented himself as a citizen to an immigrant inspector. "The falsification went to the vitals of any inspection. . . . Applicant's deception . . . was of a nature which resulted in the avoidance of an inspection. . . . Considering the purposes of an inspection, we conclude that anything which defeats it—fraud, deceit, or duress—negatives it, avoids it. . . . *What the officer would have discovered, or might have discovered, had the inspection not been thwarted is beside the question.*" (Emphasis added.)[14]

Identity

With enunciation of the principles in *Iorio v. Day* and *Volpe v. Smith,* the lines were drawn and the battle joined. An early conflict, and one which has continued up to recent date, concerned misrepresentation or concealment of *identity.*

United States ex rel. Leibowitz v. Schlotfeldt,[15] concerned an alien who represented himself as his dead brother when he applied for his visa. This was done, not to obtain the visa, but because he had originally assumed his brother's identity years before to escape an army draft, and had been known by that name and identity since. Since he would have been entitled to the visa under his own name, the misrepresentation was held not material and the alien not deportable as one entering without a valid visa.[16] Earlier, without discussion, the Third Circuit reached the opposite conclusion as to a woman who assumed the identity of her sister to obtain quota status.[17]

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[10] Popa v. Zurbrick, 45 F. 2d 583 (CA6 1930); U.S. ex rel. Thomas v. Day, 29 F. 2d 485 (CA 2 1928); Hirose v. Berkshire, 73 F. 2d 86 (CA 9 1934). Cf. U.S. v. Rossi, 299 F. 2d 650 (CA 9 1962), a denaturalization case, with correspondingly high burden of proof, where Rossi, an Italian, used the identity and nationality of his brother, a national of Chile to obtain a nonquota visa, but where the Government failed to establish that the Italian quota was oversubscribed at the time. In view of the failure of proof that but for the misrepresentation Rossi could not have entered, cancellation of citizenship was denied.

[11] Note 8, *supra.*

[12] *Id.* at p. 921.

[13] Note 9, *supra.*

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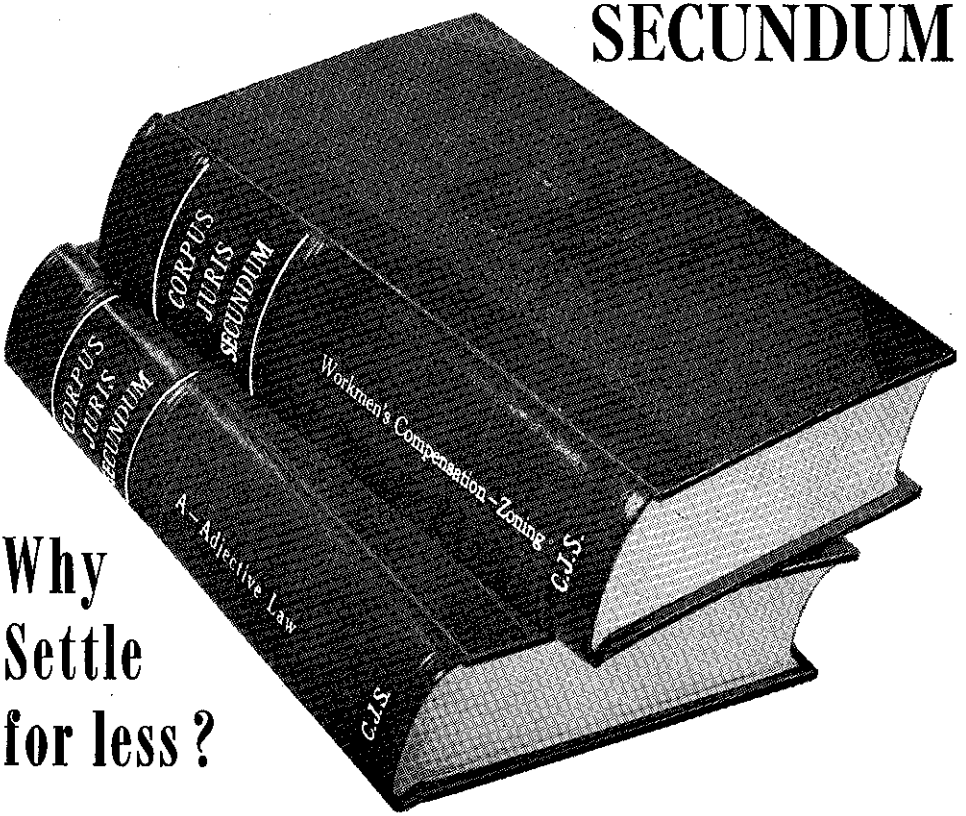
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